THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2014-000150

Canal Insurance Company,.. Appellant,

v.

National House Movers, L.L.C.;
Kevin E. Jones; David Black;
Ron Hewes; and Brent Jones .... Respondents.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of Facts 1

i. Background 1
ii. Canal's Insurance Policy 2

Statement of the Case 3

i. Procedural History 3
ii. Trial Court Opinion 3

Argument 4

I. STANDARD OF REVIEW 4

II. THE TRIAL COURT CORRECTLY HELD THAT KEVIN JONES WAS A TEMPORARY WORKER AS DEFINED IN THE INSURANCE POLICY ... 5

III. THE TRIAL COURT DID NOT ERR IN HOLDING THAT KEVIN JONES WAS FURNISHED TO NHM 6

A. THE DEFINITION OF TEMPORARY WORKER CONTAINS NO EXPRESS OR IMPLIED REQUIREMENT THAT THE WORKER BE FURNISHED BY AN EMPLOYMENT AGENCY 6

B. THE TRIALCOURT DID NOT ERR IN REFUSING TO ADOPT THE MINORITY VIEW THAT "FURNISHED TO YOU" MEANS THE EMPLOYMENT MUST BE FURNISHED BY AN EMPLOYMENT AGENCY 7

C. KEVIN JONES WAS NOT DIRECTLY INVOLVED IN AN ACTION THAT DIRECTLY AFFECTED VEHICLE SAFETY THAT WOULD CAUSE HIM TO BE CONSIDERED AN "EMPLOYEE" UNDER THE POLICY 13

IV. AN AMBIGUOUS CONTRACT IS STRICTLY CONSTRUED AGAINST THE INSURER 14

V. APPELLANT'S REQUEST FOR REMAND AND REFERRAL TO THE WORKERS COMPENSATION COMMISSION WAS NOT PRESERVED FOR APPEAL 16

Conclusion 17

Certificate of Counsel 19

TABLE OF AUTHORITIES

Cases

Allstate Ins. Co. v. Federated Mut. Implement & Hardware Ins. Co., 251 S.C. 203, 161 S.E.2d 240 (1968) 4

AMCO Ins. Co. v. Dorpinghaus, 2007 WL 313280 (US D Ct. Minn.) 7, 8

Auto-Owners Ins. Co. v. Madison at Park W. Prop. Owners Ass'n, Inc., 834 F.Supp.2d 437 (D.S.C. 2011) 15, 16

Ayers v. C&D General Contractors, 237 F.Supp.2d 764 (W.D. Ky. 2002) 5, 11, 15

Bituminous Cas v. Ross, 413 F.Supp.2d 740 (N.D.W.Va. 2006) 11

Boggs v. Aetna Cas. and Sur. Co., 272 S.C. 460, 252 S.E.2d 565 (1979) 14

Borntreger v. Smith, 811 N.W.2d 447 (Wis. Ct. App. 2012) 9, 10

Brown v. Indiana Ins. Co., 184 S.W.3d 528 (Ky. 2005) 7, 9

Buddin v. Nationwide Mut. Ins. Co., 250 S.C. 332, 157 S.E.2d 633 (1967) 15

Burlington Ins. Co. v. De Vesta, 511 F.Supp.2d 231 (Conn. D.Ct. 2007) 7, 10

Carl's Italian Restaurant v. Truck Ins. Exchange, 183 P.3d 636 (Colo.App. 2007) 11

Felts v. Richland County, 303 S.C. 354, 400 S.E.2d 781 (1991) 4

Gavan v. Bituminous Casualty Corp., 242 S.W.3d 718 (Mo. 2008) 10

General Agents Ins. Co. of America, Inc. v. Mandrill Corp, Inc., 243 Fed.Appx. 961 (6th Cir.Tenn. 2007) 11

Hutchinson v. Liberty Life Ins. Co., 404 S.C. 20, 743 S.E.2d 827 (2013) 5

Lafayette Insurance Co. v. Roberts, 2013 WL 3961173 (Tenn.Ct.App. 2013) 10

Legette v. Dan Duly, d/b/a Double D Docks, Op. No. 2014-UP-165 (Ct. App. 2014) 16

Mendenhall v. Property & Cas Ins Co of Hartford, 375 S.W.3d 90 (M0. 2012) .. 10, 11, 12

Monticello Ins. Co. v. Dion, 836 N.E.2d 1112 (Mass.App.Ct. 2005) 11

National Indemnity v. Landscape Mgt., 963 So.2d 361 (Fla.App. 4 Dist. 2007) 11

Nationwide Mut. Ins. Co. v. Allen, 850 A.2d 1047 (Conn.Ct. App. 2004) 10

Nautilus Ins. Co. v. Gardner, 2005 WL 664358 (E.D.Pa. 2005) 11

Nick's Brick Oven Pizza v. Excelsior Ins., 853 N.Y.S.2d 870 (Sup. Ct. 2008) 11

Northland Casualty Company v. Meeks, 540 F.3d 869 (8th Cir. 2008) 8, 11

Owners Ins. Co. v Clayton, 364 S.C. 555; 614 S.E.2d 611 (2005) 14

Parra v. Markel Intern. Ins. Co. Ltd., 300 Fed.Appx. 317 (5th Cir.Tx. 2008) 11

Preservation Capital Consultants, LLC v. First Am. Title Ins. Co., 406 S.C. 309, 751 S.E.2d 256 (2013) 6

Rhiner v.Red Shield Ins., 208 P.3d 1043 (Or.Ct.App. 2009) 10

S. Carolina Farm Bureau Mut. Ins. Co. v. Wilson, 344 S.C. 525, 544 S.E.2d 848 (Ct. App. 2001) 4, 6, 13, 14

State Farm Mut. Auto. Ins. Co. v. James, 337 S.C. 86, 522 S.E.2d 345 (Ct. App. 1999) ... 4

Torrington Co. v. Aetna Cas. and Sur. Co., 264 S.C. 636, 216 S.E.2d 547 (1975) 14

Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976) 4, 5

Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 732 S.E.2d 626 (2012) 6, 14

Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731 (1998) 17

Statutes

Kentucky Revised Statutes, KRS 342.615 9

Kentucky Revised Statutes, KRS 342.630 9

South Carolina Code Ann. §42-1-360 (Supp. 2013) 16

Appellate Court Rules

Rule 268(d)(2), SCACR 16

Other Authorities

Black's Law Dictionary, 96th ed. (1990) 12

Webster's Third New International Dictionary of the American Language (2002) 12

STATEMENT OF ISSUES

The issues are whether or not Kevin Jones was a "temporary worker," as defined by the insurance policy, and whether he was furnished to National House Movers, LLC.

STATEMENT OF FACTS

i. Background

National House Movers, LLC, ("NHM") is a small house-moving company. Joint Stipulated Facts ("JSF"); R. p. 7, ¶1. Brent Jones ("Brent Jones"), David Black ("Mr. Black"), and Ron Hewes ("Mr. Hewes") are members of NHM. Id. Mr. Hewes is the only permanent employee of NHM and conducts all of the operations to elevate or move houses. Id. Because NHM had only one full-time employee, it did not qualify for workers compensation insurance. JSF; R. p. 8, ¶12. Mr. Hewes occasionally obtains temporary help when manual labor is needed for individual jobs. JSF; R. p. 7, ¶1. Mr. Hewes personally oversees and directs the work of these temporary laborers. Id. NHM only used Kevin E. Jones ("Kevin Jones") when Mr. Hewes required manual labor help. JSF; R. p. 7, ¶1. NHM was insured by a Commercial General Liability insurance policy issued by Appellant, Canal Insurance Company ("Canal Insurance"). JSF; R. p. 8, ¶12.

Kevin Jones initially did temporary work with NHM in June, 2011, for work on a house in Cowpens, South Carolina. JSF; R. p. 7, ¶2. David Johnson, who had worked as temporary help with NHM, brought Kevin Jones to NHM. Id. On February 2, 2012, Kevin Jones was used as temporary help to move a house in Gaffney, South Carolina. JPS; R. p. 8, ¶11. The house involved in this case was transported on dollies hooked to a commercial vehicle. Id. ¶9.

During the moving process, Kevin Jones was stationed on the roof of the house. Id; R. p. 8, ¶11. Kevin Jones's job was to guide cable and telephone wires over the roof of the house. Id. He was instructed to sit on the roof at the lower corner of the house, and, if he saw a non-electrical wire that might get caught on the roof, he was to use a piece of PVC to guide the wire across the roof. Id. Mr. Hewes told Kevin Jones to stay in his position at the lower corner of the house unless he was moving non-electrical wires, and also instructed him not to touch electrical lines, which were identified to him by Mr. Hewes. JSF; R. p. 7, ¶5. However, Kevin Jones was somehow seriously injured by contact with an overhead power line. Mr. Hewes was walking in front of the truck and, therefore, did not witness incident directly. JSF; R. p. 8, ¶11. There were no other witnesses to the incident. Id.

Kevin Jones sued NHM and its principals on June 26, 2012. Canal Insurance provided the defense of the lawsuit under a reservation of rights.

ii. Canal's Insurance Policy

Canal's Business Auto Coverage Form provides liability coverage for "all sums an insured legally must pay because of 'bodily injury' . . . to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a 'covered auto '". Policy, Section II, A. - Liability Coverage (Form IA 02 CW 0810, Page 2 of 11); R. p. 62. The policy contains an exclusion for bodily injury to "[a]n '*employee*' of the 'insured' arising out of and in the course of (1) Employment by the 'insured'; or (2) Performing the duties related to the conduct of the 'insured's' business." Policy, Section II, B. 4. (Form IA 02 CW 0810, Page 3 of 11); R. p. 63. (emphasis added).

Section V of the contract provides the definitions of terms contained in the policy, and specifically qualifies that the meaning of an employee "does not include a *'temporary*

worker"". Policy, Section V, F. (Form IA 02 CW 0810, Page 10 of 11); R. p. 70. (emphasis added).

Section V.O. specifically defines a 'temporary worker' as follows:

"'Temporary worker' means a person who is furnished to you to substitute for a permanent 'employee' on leave or to meet ***seasonal or short-term workload conditions.*** 'Temporary Worker' does not include a driver of a motor vehicle in your business." Policy (Form IA 02 CW 0810, Page 11 of 11); R. p. 71. (emphasis added)

STATEMENT OF THE CASE

i. Procedural History

On September 26, 2012, Canal Insurance filed the underlying Declaratory Judgment action, contending that the insurance policy excludes coverage for this injury. On August 16, 2013, Canal Insurance filed its Motion for Summary Judgment on the ground that there is no disputed issue of material fact on the issue of whether Canal Insurance's policy excludes coverage for the injuries incurred by Kevin Jones inasmuch as Jones "was not a temporary employee". On September16, 2013, Defendants filed a Counter Motion for Summary Judgment, asserting that coverage was provided by the Canal policy in as much as Kevin Jones was a "temporary worker" as defined by the insurance contract and, therefore, not an "employee" excluded from liability coverage under the terms of the policy. Both motions for summary judgment were denied. The declaratory action was later tried in a bench trial before the Honorable Edward W. Miller on November 21, 2013.

ii. Trial Court Opinion

On December 30, 2013, the Trial Court passed its Order holding that Jones was a "temporary employee," thereby granting coverage to NHM. R. p.1. The Court held that the Canal policy definition of a temporary worker was not ambiguous. R. p. 5.

The Court further found that the policy does not restrict the furnisher of a temporary worker to an employment agency or entity. Id. Therefore, the Court held that Kevin Jones was furnished by a third party to NHM for short-term workload conditions and Kevin Jones was a "temporary worker" within the meaning of the policy. R. p. 6. Further, the Court held that NHM is entitled to the indemnity coverage provided in the Canal policy for the claim filed by Kevin Jones against NHM. Id.

On June 27, 2014, Canal Insurance filed this appeal against that Order.

ARGUMENT

I. STANDARD OF REVIEW

Generally, "'[a] suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue.'" State Farm Mut. Auto. Ins. Co. v. James, 337 S.C. 86, 93, 522 S.E.2d 345, 348 (Ct. App. 1999) (quoting Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "A suit to determine coverage under an automobile liability policy is an action at law." Id. (citing Allstate Ins. Co. v. Federated Mut. Implement & Hardware Ins. Co., 251 S.C. 203, 205, 161 S.E.2d 240, 241 (1968). "As a result, under [the Court of Appeals] standard of review, [the Court's] jurisdiction is limited to correcting errors of law and factual findings will not be disturbed unless unsupported by any evidence." Id. at 348-49 (citing Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)).

Therefore, "[i]n an action at law tried without a jury, the trial court's findings will not be disturbed on appeal unless the findings are found to be without evidence reasonably supporting them." S. Carolina Farm Bureau Mut. Ins. Co. v. Wilson, 344 S.C. 525, 529, 544 S.E.2d 848, 849 (Ct. App. 2001) (citing Townes Assocs., Ltd. v. City of Greenville, *supra*.)

II. THE TRIAL COURT CORRECTLY HELD THAT KEVIN JONES WAS A TEMPORARY WORKER AS DEFINED IN THE INSURANCE POLICY

"Words in insurance contracts are to be given their plain, ordinary and popular meaning." Hutchinson v. Liberty Life Ins. Co., 404 S.C. 20, 23, 743 S.E.2d 827, 829 (2013). Per the policy form, "'Temporary worker' means a person who is furnished to you to substitute for a permanent 'employee' on leave or to meet seasonal or short-term workload conditions. 'Temporary Worker' does not include a driver of a motor vehicle in your business." (Form IA 02 CW 0810, Page 11 of 11); R. p. 71, ¶O.

In Ayers v. C&D General Contractors, 237 F. Supp. 2d 764 (W.D. Ky. 2002), the court found that the overall definition was clear in that "[i]f an employee is hired to fill-in for a permanent employee on leave *or to meet a short-term need*, the CGL policy classifies that employee as a "temporary worker" and thus exempt from the coverage's exclusion for bodily injuries to an "employee." *Id.* p.769 (emphasis added).

In the instant case, Kevin Jones testified that he worked on his first job with NHM in June of 2011, "throwing blocks under houses." R. p. 117, lines 20-25. His testimony confirms that at some of these jobs he would only work a week, whereas others might last 3-4 weeks. R. p. 119, lines 14-23. Most significantly, Kevin Jones admitted that if there was no house relocation work available then "I didn't work." R. p. 119, lines 19-23. In Kevin Jones's own words: "I wasn't no full-time employee - so I just helped them when they needed it." R. p. 121, lines 19-22. Kevin Jones admitted he only worked for NHM when they needed an "extra hand;" he would be called before a job and "asked if he wanted to work on that day" and, if NHM did not need him, they did not call him. R. p. 125, lines 15-25; R. p. 126, lines1-3.

Thus, it is evident that Kevin Jones worked with NHM to meet short-term workload conditions and was a temporary worker.

III. THE TRIAL COURT DID NOT ERR IN HOLDING THAT KEVIN JONES WAS FURNISHED TO NHM

A. THE DEFINITION OF TEMPORARY WORKER CONTAINS NO EXPRESS OR IMPLIED REQUIREMENT THAT THE WORKER BE FURNISHED BY AN EMPLOYMENT AGENCY

Usually, "[i]nsurance policies are subject to general rules of contract construction." S. Carolina Farm Bureau Mut. Ins. Co.v. Wilson, 344 S.C. 525, 530, 544 S.E.2d 848 (Ct. App. 2001). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary, and popular meaning." Pres. Capital Consultants, LLC v. First Am. Title Ins. Co., 406 S.C. 309, 316, 751 S.E.2d 256, 259 (2013) (quoting Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012). "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." Id.

Here, Canal's policy defines "temporary worker" as "a person who is furnished to you to substitute for a permanent 'employee' on leave or to meet seasonal or short-term workload conditions." Policy Form IA 02 CW 0810; R. p. 71, ¶O. However, nowhere does it define the phrase "furnished to". There is no express or implied requirement in the clause that the worker be furnished by an employment agency as claimed by the Canal Insurance.

B. THE TRIAL COURT DID NOT ERR IN REFUSING TO ADOPT THE MINORITY VIEW THAT "FURNISHED TO YOU" MEANS THE EMPLOYMENT MUST BE FURNISHED BY AN EMPLOYMENT AGENCY

The trial court noted that "this phrase ['furnished to'] has not been construed in the context of an insurance policy in our state." Order; R. p. 4. However, the Court noted that there had been "significant judicial review in other jurisdictions." Id.; R. p. 4. Citing to various decisions, the court observed that "[t]he vast majority of jurisdictions have concluded that the phrase 'furnished to you' is not ambiguous and necessarily means that a third party is involved in 'furnishing' the temporary worker to the employer." Id.; R. p. 4. Further, some jurisdictions which have found ambiguity in the temporary worker definition conclude that virtually anyone can "furnish" the temporary worker to the employer including the worker and the employer themselves. Id.; R. p. 4. Only a few courts have construed the definition of "furnished to" require involvement of a temporary service or entity. (citing Brown v. Indiana Ins. Co., 184 S.W.3d 528 (Ky. 2005); Burlington Ins. Co. v. De Vesta, 511 F.Supp.2d 231 (Conn. D.Ct.2007); AMCO Ins. Co. v. Dorpinghaus,2007 WL 313280 (US D Ct. Minn.).

Based on the above observations, the Court rightfully adopted "the majority rule that any third person or entity is sufficient to furnish the temporary worker" reasoning that "the policy is silent as to who must furnish a temporary employee." Order; R. p. 5. Further, the Court noted that "it simply does not say 'temporary worker' means a person who is furnished to you by an employment-type agency . . . .'" Id. Moreover, the trial court observed that "it is unreasonable to assume that any person would glean this restriction from the words provided in the policy." Id.

Canal concedes that the vast majority of jurisdictions have concluded that "furnished to you" requires third party involvement as found by the Trial Court.

Appellant's Brief, p.8. Canal contends, however, that the Trial Court erred in its finding that requiring the third party to an employment agency was the minority view. *Id.* Canal discusses only three decisions supporting its argument that the Trial Court "evidently misunderstood the majority position" on the issue that "furnished to you" requires the involvement of a temporary service. *Id.*

They are as follows:

1. Northland Casualty Company v. Meeks, 540 F.3d 869 (8th Cir. 2008), was an appeal of the entry of summary judgment for the carrier by the District Court which found as a matter of fact that the employee was not a "'temporary worker' *because he was not 'furnished to' Harrell by another entity.*" *Id.* at 872 (*emphasis added*). The Court of Appeals stated: "We first consider whether a third party must furnish the worker to the insured in order to qualify as a temporary worker, *or whether, as Meeks and Harrell claim, Floyd could qualify as a temporary worker by furnishing himself to Harrell.*" *Id.* at 875 (*emphasis added*). Because there was no evidence of any third party involvement in the hiring, the trial court was affirmed. There is nothing in this decision that supports the position that "furnished to you" requires the involvement of a temporary service.

2. AMCO Ins. Co. v. Dorpinghaus, 2007 WL 313280 (D. Minn. 2007), was also a decision decided at the summary judgment stage before the federal District Court. However, the injured workers in this litigation were the employer's son and his two friends. They contended they could furnish themselves to the employer and alternatively that they were furnished by the employer's son or their own respective companies. This trial court decision is factually distinguishable from the instant appeal and the conclusion that there was no third party involvement as a factual finding actually renders any opinion regarding the requisite nature of third party involvement pure dicta.

3. Borntreger v. Smith, 811 N.W.2d 447(Wis. Ct. App. 2012). Canal's discussion of this case consists of four sentences, none of which mentions or even suggests that "furnished to you" requires the involvement of a temporary service. That is because this issue was deemed forfeited under the court's issue preservation rules and was therefore not addressed in the appeal.

Despite the fact that the authorities presented by the Appellant appear to be inapposite to the instant appeal, Respondents concede that there is a minority view advocating Canal's position:

In Brown v. Indiana Ins. Co., 184 S.W.3rd 528 (Ky. 2005), the Kentucky Supreme Court did hold that a temporary worker must be furnished by an "employment agency, manpower service provider or any similar service..." *Id.* p.540. However, it is the first sentence of the opinion that distinguishes Kentucky and South Carolina jurisprudence on this issue: "The issue presented by this appeal is whether a commercial general automobile liability insurance policy affords coverage for damages sought in a tort action brought against the insured employer for the wrongful death of its employee, *where the action would have been bared by the Kentucky Workers' Compensation Act but for the fact that the employer failed to procure a policy of workers' compensation insurance.*" *Id.* at 531. (emphasis added). Kentucky statutes require mandatory workers compensation coverage for any employer with one (1) or more employees. KRS 342.630. Kentucky also statutorily defines both "temporary worker" and "temporary help service" in its Workers' Compensation Act. KRS 342.615. Brown was therefore decided under an Exclusive Remedy Doctrine which is inapplicable to the instant appeal where it is stipulated that the employer did not qualify for workers compensation coverage under South Carolina statutes. JSF; R. p. 8, ¶12.

In Nationwide Mut. Ins. Co. v. Allen, 850 A.2d 1047 (Conn. Ct. App. 2004), the Appellate Court of Connecticut did hold that the worker did not go to an employment agency, manpower service provider or similar service to employ or utilize Shaw's services. "Shaw was not employed by anyone who lent or furnished him to Allen as an employee. Thus, the [trial] court reasonably concluded that Shaw was not furnished to Allen within the definition of 'temporary worker' and could not be a temporary worker under the insurance policy." *Id.* at 1057. Unfortunately there is no citing precedent in the opinion on this point and no further discussion. However, the Court may have been influenced by the uncontested facts that Shaw had a workers compensation claim pending against his employer (*Id.* at 1051) and that "Shaw worked for Allen during the spring, summer and fall from early May, 1997, until May 25, 1999 [the day of his accident]" (*Id.* at 1044).

In Burlington Ins. Co. v. De Vesta, 511 F. Supp.2d 231 (D. Conn. 2007), the District Court cited Nationwide Mut. Ins. Co. v. Allen's definition of temporary worker to grant summary judgment. The opinion references no other authorities on this issue.

In summary, only three reported opinions can be argued to support a minority position that "furnished to you" requires involvement of some type of employment agency. However, as the Trial Court determined, there are many more decisions that clearly conclude otherwise. All of the following decisions found that the term "furnished to you" only requires some third party involvement other than the employer : Lafayette Insurance Co. v. Roberts, 2013 WL 3961173 (Tenn.Ct.App. 2013); Mendenhall v. Property & Cas Ins Co of Hartford, 375 S.W.3d 90 (Mo. 2012); Borntreger v. Smith, 811 N.W.2d 447 (Wis.Ct.App. 2012); Rhiner v.Red Shield Ins., 208 P.3d 1043 (Or.Ct.App. 2009); Gavan v. Bituminous Casualty Corp., 242 S.W.3d 718 (Mo. 2008); Parra v.

Markel Intern. Ins. Co. Ltd., 300 Fed.Appx. 317 (5th Cir.Tx. 2008); Northland Cas. Co. v. Meeks, 530 F.2d 869 (8th Cir.Ark. 2008); Carl's Italian Restaurant v. Truck Ins. Exchange, 183 P.3d 636 (Colo.App. 2007); General Agents Ins. Co. of America, Inc. v. Mandrill Corp, Inc., 243 Fed.Appx. 961 (6th Cir.Tenn. 2007); Monticello Ins. Co. v. Dion, 836 N.E.2d 1112 (Mass.App.Ct. 2005); Nautilus Ins. Co. v. Gardner, 2005 WL 664358 (E.D.Pa. 2005).

Additionally, the following courts have held that the term "furnished to you" is ambiguous and must be strictly construed against the carrier resulting in *anyone* qualifying as the furnisher of the temporary employer: Nick's Brick Oven Pizza v. Excelsior Ins, 853 N.Y.S.2d 870 (Sup. Ct. 2008); Bituminous Cas v. Ross, 413 F.Supp2d 740 (N.D.W.Va. 2006); Ayers v. C&D Contractors, 237 F.Supp.2d 764 (W.D.Ky. 2002); National Indemnity v. Landscape Mgt., 963 So.2d 361 (Fla.App 4 Dist. 2007).

Irrespective of the mainstream categorization on this issue, the more compelling consideration is the jurisprudence that has influenced other courts. One of the more recent appellate courts to address the temporary worker phrase was the Supreme Court of Missouri, En Banc, in Mendenhall v. Property & Cas Ins Co of Hartford, 375 S.W.3d 90 (Mo. 2012). The Mendenhall facts and issues also parallel the instant case: the parties agreed the worker met the seasonal or short-term workload conditions; there was no dispute that the "furnished to" phrase required involvement of a third party; and, the dispositive issue was whether or not an employment agency was required to "furnish" the worker. *Id.* p.92.

> "The term 'furnished to' is not defined in the policy. When interpreting insurance policy language, courts give a term its ordinary meaning unless it plainly appears that a technical meaning was intended...It does not appear that the term 'furnished to' has a precise technical meaning. Therefore, the standard English dictionary definition governs..
>
> The standard definition of the word 'furnish' is 'to provide or supply with what is needed, useful or desirable.' WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 923 (2002). Similarly, BLACK'S LAW DICTIONARY defines 'furnish' as 'supply, provide or equip, for accomplishment of a particular purpose.' BLACK'S LAW DICTIONARY 675 96th ed. (1990).
>
> In the context of this case, neither the word 'furnish' nor its synonyms 'provide' and 'supply' necessarily require the [third party] and [the worker] to have an employment or agency relationship to support a finding that the [third party] furnished [the worker] to work for [the employer]." *Id.* p.93.

The Mendenhall Court also considered the contrasting definitions of "leased worker' and "temporary worker" which is mirrored in the Canal policy at issue. Canal's "leased worker" policy definition specifies a particular type of third party involvement: "'Leased worker' means a person leased by you by a labor leasing firm under an agreement between you and the labor leasing firm to perform duties related to the conduct of your business." Policy, Form IA 02 CW 0810; R. p. 70, ¶I. The policy definition of "temporary worker" is not qualified by the existence of any agency or employment relationship. This contrast in the policy definitions led the Mendenhall Court to conclude that "the difference in the level of specificity between the two definitions is a relevant consideration...the 'leased worker' provision requires that the worker be furnished by a particular type of third party, while the 'temporary worker' provision requires involvement of any type of third party." Mendenhall p.93.

The evidence in this case established that Kevin Jones was only used by NHM for short-term work. Therefore, he is a temporary worker under the policy. Further, it is uncontroverted that David Johnson brought Kevin Jones to NHM. The parties stipulated that David Johnson was neither a permanent employee nor a member of NHM.

Stipulation of Facts; R. p. 7, ¶ 1. Thus, Canal Insurance's allegation that David Johnson was an agent of NHM and he could not furnish Kevin Jones to NHM is meritless. The trial Court found that "there is no evidence that David Johnson was an agent of NHM and such a conclusion is inconsistent with his manual labor temporary position." R. p. 5.

There is no reason for this court to vacate the trial court's findings because "trial court's findings [should] not be disturbed on appeal unless the findings are found to be without evidence reasonably supporting them." S. C. Farm Bureau Mut. Ins. Co.v. Wilson, 344 S.C. at 529, 544 S.E.2d 848 (Ct. App. 2001).

C. KEVIN JONES WAS NOT INVOLVED IN AN ACTION THAT DIRECTLY AFFECTED VEHICULAR SAFETY THAT WOULD CAUSE HIM TO BE CONSIDERED AN "EMPLOYEE" UNDER THE POLICY LANGUAGE

Section V,F. of the Policy specifically defines "employee" as follows:

> 'Employee' includes a 'leased worker'. Employee also includes any individual, other than an employer, who is employed by an employer and who in the course of his employment directly affects commercial motor vehicle safety. ***'Employee' does not include a 'temporary worker'.*** " Form IA02 CW 0810, Page10 of 11; R. p. 70. (emphasis added).

In the instant case, Kevin Jones's work did not directly affect vehicle safety. The house involved was transported on dollies hooked to a commercial vehicle. JSF; R. p. 8, ¶9. During the moving process, Kevin Jones was stationed on the roof of the house, where his job was to guide cable and telephone wires over the roof of the house. Id; R. p. 8, ¶9. He was instructed to sit on the roof and follow Mr. Hewes's directions regarding which wires to guide and which not to. Id.; R. p. 7, ¶5. He was not driving the truck, and he did not make safety decisions

regarding wires. His job was simply to follow Mr. Hewes's directions. Therefore, his job did not involve any action that ***directly*** affected vehicle safety.

Moreover, Canal's construction of this policy provision completely ignores the last sentence of the definitions paragraph: **"Employee" does not include a "temporary worker".** (emphasis added) R. p. 70, ¶F. Even if Kevin Jones' work affected commercial motor vehicle safety, the policy excludes his classification as an employee due to his temporary worker status.

Accordingly, Appellant's claim that Kevin Jones was not a "temporary worker" but an employee because he "directly affected commercial motor vehicle safety" is meritless and should be rejected.

IV. AN AMBIGUOUS CONTRACT IS STRICTLY CONSTRUED AGAINST THE INSURER

"'[A]mbiguous or conflicting terms [] must be construed liberally in favor of the insured and strictly against the insurer.'" Preservation Capital Consultants v. First American Title Ins. Co., 406 S.C. 309, 751 S.E.2d 256, 261 (S.C. 2013) (quoting Whitlock, 399 S.C.at 615). "'It is a question of law for the court whether the language of a contract is ambiguous.'" Id. (quoting Whitlock, 399 S.C.at 615). Further, "a policy clause extending coverage has to be liberally construed in favor of coverage." S. Carolina Farm Bureau Mut. Ins. Co.v. Wilson, 344 S.C. 525, 530, 522 S.E.2d 345 (Ct. App. 1999) (citing Torrington Co. v. Aetna Cas. and Sur. Co., 264 S.C. 636, 216 S.E.2d 547 (1975)). Therefore, "insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." Owners Ins. Co. v Clayton, 364 S.C. 555, 560; 614 S.E.2d 611, 614 (2005) (citing Boggs v. Aetna Cas. and Sur. Co., 272 S.C. 460, 252 S.E.2d 565 (1979)).

Additionally, "'if doubt exists as to the extent or fact of coverage,' South Carolina courts have long held that 'where the clause is one of inclusion it should be broadly construed for the benefit of the insured while in exclusion cases the same clause is given a more restricted interpretation[ ].'" Auto-Owners Ins. Co. v. Madison at Park W. Prop. Owners Ass'n, Inc., 834 F. Supp. 2d 437, 443 (D.S.C. 2011) (quoting Buddin v. Nationwide Mut. Ins. Co., 250 S.C. 332, 157 S.E.2d 633, 635 (1967)).Therefore, it has been found that the term 'furnished to you' to be "too ambiguous to be given [the] literal interpretation," meaning supplied by a temporary agency. Ayers v. C&D Gen. Contrs., 237 F. Supp. 2d 764, 769 (W.D. Ky. 2002).

The court in Ayers reasoned that such a reading would result in short-term employees responding to newspaper advertisements being excluded from coverage, whereas short-term employees supplied by a temporary agency would be covered. The court found that "such a literal interpretation . . . changes the basic meaning of the contract by including some temporary employees and excluding others" based on a distinction that the court found inexplicable and illogical. Id. at p. 769.

In the instant case, Canal's policy defines 'temporary worker' as "a person who is furnished to you to substitute for a permanent 'employee' on leave or to meet seasonal or short-term workload conditions." Form IA 02 CW 0810; R. p. 71, ¶O. However, nowhere does it define the phrase "furnished to." There is no express or implied requirement in the clause that the worker be furnished by an employment agency, as claimed by the Canal Insurance.

Although the trial court noted that there was no controlling authority on the meaning of "furnished to you," it properly cited to various jurisdictions' decisions before adopting the majority view that "any third-person or entity is sufficient to furnish the

temporary worker." Order; R. pp. 4-5. Further, the court found that there was no ambiguity in the meaning of the terms. Therefore, the Court properly held that there was no express or implied requirement in the clause that the worker be furnished by an *employment agency*. (emphasis added).

Even if this Court finds that there is an ambiguity in the meaning of the terms, it must still strictly construe the contract in favor of NHM. Therefore, Kevin Jones is a temporary worker under the policy because if doubt exists as to the extent or fact of coverage, "where the clause is one of inclusion it should be broadly construed for the benefit of the insured while in exclusion cases the same clause is given a more restricted interpretation[ ]." Auto-Owners Ins. Co. supra at 443.

V. APPELLANT'S REQUEST FOR REMAND AND REFERRAL TO THE WORKERS COMPENSATION COMMISSION WAS NOT PRESERVED FOR APPEAL

Appellant argued in the last paragraph of its Brief, that this Court should remand the case "for referral to the Workers' Compensation Commission to determine the jurisdictional question of whether NHM had the requisite number of employees for Jones' claim to be adjudicated by that body." Appellant's Brief at p.19. The Appellant's only cited authority for this request is Legette v. Dan Duly, d/b/a Double D Docks, Op. No. 2014-UP-165 (Ct. App. 2014) (an unpublished opinion which has "no precedential value and should not be cited except in proceedings in which they are directly involved.") Rule 268(d)(2), SCACR. Despite the appropriateness of citing an unpublished opinion as precedential authority, Appellant has not provided any authority requiring a circuit court to "refer" a civil proceeding to the Workers Compensation Commission. Furthermore, South Carolina Code Ann. §42-1-360 (Supp. 2013)

statutorily exempts casual employees and regular employments of less than four employees in the same business within the State which would deprive the Commission of any jurisdiction in this matter. Appellant *stipulated* in the trial court hearing the following facts:

> Mr. Hewes is the only permanent employee of NHM. Joint Stipulated Facts; R. p. 7, ¶1. Mr. Hewes obtained casual help only as needed for individual jobs. Id. Kevin Jones was one of the casual employees who worked only when short term working conditions involving moving or raising a house required extra help. Id. "Inasmuch as NHM had only one full-time employee, it did not qualify for workers compensation insurance. Id; R. p. 8, ¶12.

Finally, this issue was not raised in the trial court proceeding and is not preserved for appellate review. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

CONCLUSION

Canal's insurance contract specifically exempted temporary workers from the policy exclusion regarding liability coverage, meaning it provided coverage for temporary workers. The testimony conclusively establishes that Kevin Jones was always a temporary, short-term worker who was used only when the workload required extra help on a specific job. The Court rightly found that because Kevin Jones was furnished by a third party to NHM for short-term workload conditions, Jones was a "temporary worker" within the meaning of the policy. Thus, by the specific terms of this insurance policy, Canal has a contractual obligation to afford National House Movers liability coverage for the claim presented by Kevin Jones. The Trial court decision should be affirmed.

Respectfully Submitted,

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October 1, 2014

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Edward W. Miller, Circuit Court Judge

Case No. 12-CP-23-6195

Court of Appeals Tracking No.: 2014-000150

Canal Insurance Company. ....Appellant,

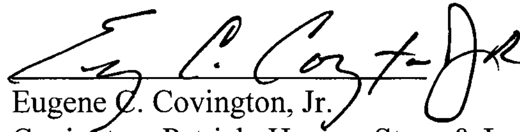
v.

National House Movers, LLC,
Kevin E. Jones; David Black;
Ron Hewes; and Brent Jones.....................Respondents

CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Respondents complies with Rule 211(b), SCACR.

October 1, 2014



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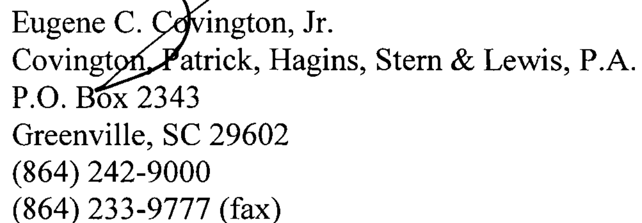
PROOF OF SERVICE

I certify that I have served the Brief of Respondents on Canal Insurance Company, by depositing a copy of it in the United States Mail, postage prepaid, on October 1, 2014, addressed to its attorneys of record, Mark S. Barrow and William R. Calhoun, Jr., Sweeny Wingate & Barrow, P.A., P.O. Box 12129, Columbia, SC, 29211.



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