THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

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

BRIEF OF APPELLANT

Mark S. Barrow
William R. Calhoun, Jr.
Sweeny Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, SC 29211
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ATTORNEYS FOR APPELLANT

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ISSUE ON APPEAL

Did the Court err in holding that Kevin Jones was a "temporary employee" rather than an "employee" of National House Movers and, thus, find coverage where there is none under the facts of the underlying accident?

STATEMENT OF FACTS

I. Employment of Kevin Jones

The genesis of this action is found in the employment of Kevin E. Jones by National House Movers, LLC ("NHM"). Ron Hewes was the member of NHM who did the hiring and directly supervised Jones.. He was the only person at NHM who had authority to hire workers. Dep. of Hewes, pp. 8, line 23 - 11, line 7; R. 85, line 23 – 88, line 7; Dep. of Brent Jones (the Rule 30(b)(6) deponent for NHM), pp. 18, line 2 - 19, line 8; R. 111, line 2 – R. 112, line 8. Employment in NHM was on a project-by-project basis. The simple protocol for being hired at NHM required a potential employee to be interviewed by Hewes. Dep. of Hewes, p. 14, lines 8-15; R. 91, lines 8-15. David Johnson, the person who contacted Kevin Jones on behalf of NHM and himself an employee of NHM, did *not* have authority to hire people. Id., p. 14, lines 8-10; R. 91, lines 8-10..

The accident upon which this action is based occurred on February 2, 2012, in Gaffney, South Carolina. At the time, NHM had five employees, including Hewes, engaged in the moving of a house. Dep. of Hewes, pp. 38, line 15 – 39, line 8; R. 104, line 15 - R. 105, line 8. In connection with the job, Hewes "needed a grunt to haul blocks," id., p. 14, lines 4-5; R. 91, lines 4-5, so he asked a partner in NHM, Fred Najim, to contact David Johnson. Dep. of Hewes, pp. 11, line 8 – 12, line 11; R. 88, line 8 – 89, line 11. Johnson had worked on NHM projects for years. Dep.. of Hewes, p. 12, lines 12-21; R. 89, lines 12-21; Dep. of K. Jones, p. 52, lines 2-18;

R. 124, lines 2-18. Johnson asked Hewes if he needed any more help for the job, and Hewes replied that, "one more probably wouldn't hurt." Dep. of Hewes, p. 13, lines 24-25; R. 90, lines 24-25. Johnson, however, did *not* have authority to hire personnel for NHM. Id., p. 14, lines 8-10; R. 91, lines 8-10. Johnson called Jones and "asked me [Jones] did I want to help." Dep. of K. Jones, p. 8, lines 7- 13; R. 118, lines 7-13. Jones said that he did want to help. Id. So Johnson, a friend whom Jones had known for several years, Dep. of K. Jones, pp. 22, line 22 – 23, line 5; R. 122, line 22 –R. 123, line 5, came and picked him up and took him to the job site. Id., p. 8, lines 9 – 10; R. 118, lines 9-10.

Mr. Hewes testified as follows about NHM's hiring of Kevin Jones:

> Q. ...Mr. Jones didn't come to you through a temporary agency did he?
> A. No, sir.
> Q. He was brought to you for you to determine if you wanted to hire him from... David Johnson. David Johnson, right?
> A. Uh-huh. Yes.

Dep. of Hewes, p. 35, lines 6-12; R. 103, lines 6-12. It is undisputed that Johnson suggested and recommended Jones for employment. However, nothing in the record evidences that Johnson had any authority or control over Jones' employment with NHM.

II. The Underlying Accident

Jones, after being hired by Hewes, was assigned by NHM to assist in moving a house that was being relocated by stationing himself on the roof of the moving house. His mission was to facilitate the sliding of cable wires and telephone wires over the roof as the house moved; after being put in motion, the wire should slide on its own. Jones was thereafter supposed to ensure that the wire did not get snagged on anything on the roof, such as a shingle. Dep. of Hewes, p. 25, lines 3–25; R. 94, lines 3-25; p. 28, line 21- p. 29, line 18; R. 97, line 21 – 98, line 18.. Jones was supposed to sit on the roof at the lower corner of the house and, if he saw a non-electrical wire

about to be snagged, he was to pick up a piece of PVC pipe placed on the roof as a "scoop" to facilitate the wire's moving across the roof, and nudge the wire to get it started moving. Id., p. 31, lines 6-19; R. 100, lines 6-19. If a non-electrical wire did not get snagged, Jones was to stay in his position at the lower corner of the house. Id. He was instructed by Hewes not to touch an electrical power line, id., p. 29, line 3 – 30, line 20; R. 98, line 3- 99, line 20. Hewes, walking in front of the very slow-moving truck, Id., p. 39, lines 1-2, R. 105, lines 1-2, would alert him to electrical power wires. Id., p. 30, lines 21-23; R. 99, lines 21-23.

On the day of the accident, the house, on dollies hooked to a truck, approached a pair of wires, one neutral and one electrical. The electrical wire was above the roof of the house by 2.5 or 3 feet, but the neutral wire had a lot of slack and Jones took the PVC pipe to push that wire. Instead of pushing the neutral wire, Jones started flipping it, unnecessarily, to facilitate its movement. Id., p. 31, line 20 – 32, line 18; R. 100, line 20 – R. 101, line 18. He had been instructed to leave it alone. Id., p. 32, lines 19-22; R. 101, lines 19-22.

Hewes walked to the side of the house and saw the neutral wire come down on the backside. He testified that the electrical wire was "a good [five or six] feet" above the neutral wire, so when the neutral wire cleared the house he believed that the house was clear of both wires. Id., pp. 32, line 25 – 33, line 7; R. 101, line 25 – 102, line 7. He did not see the accident, id., p. 33, lines 9 – 12; R. 102, lines 9-12, and does not understand how it happened. Id. There appear to be no eyewitnesses to Mr. Jones' accident, but it is believed that he must have been near the peak of the house and raised his arm, resulting in his coming in contact with, or into close proximity to, the electrical wire by which he was injured.

III. NHM's Insurance Policy

Canal Insurance Company ("Canal") issued to NHM an insurance policy covering the period 3/18/2011 to 3/18/2012 (the "Policy"). R. 39-83. The Policy consisted of three coverage parts: commercial automobile; commercial general liability ("CGL"); and inland marine. It is undisputed that the commercial automobile policy is the only coverage part that is applicable to this case. No claim has been made under any other part and the CGL policy specifically excludes coverage for " '[b]odily injury'...arising out of the ...use...of any...'auto'."

The pertinent provisions of Canal's commercial auto policy are as follows:

SECTION II – LIABILITY COVERAGE

A. Coverage

We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".... R.62.

B. Exclusions

This insurance does not apply to any of the following:

3. Workers' Compensation
Any obligation for which the "insured" or the "insured's insurer May be held liable under any workers' compensation, disability benefits of unemployment compensation law or similar law.

4. Employee Indemnification and Employer's Liability
"Bodily injury" to:
a. An "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; or...

R.63.

DEFINITIONS

F. "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 or her employment directly affects commercial motor vehicle safety.** Such term includes a driver of a commercial motor vehicle

(including an independent contractor while in the course of operating a commercial motor vehicle), a mechanic, and a freight handler. "**Employee" does not include a "temporary worker"** (emphasis added) R.70.

O. "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 (emphasis added) R. 71.

STATEMENT OF THE CASE

Jones initiated a tort action against NHM on June 26, 2012. Canal defended NHM in that action under a full reservation of rights. On September 26, 2012, Canal initiated the action for declaratory judgment that has resulted in this appeal. The Defendants were NHM, Kevin Jones, David Black, Ron Hewes, Brent Jones and Fred Najim. Canal and the Defendants conducted discovery, including depositions, some of which are cited herein. All the cited depositions were put in evidence at the trial of this matter. Transcript, p. 45; R.38.

On December 12, 2013, Kevin Jones entered into a Covenant Not to Execute with the individual defendants in both the tort and the coverage actions. Thereafter, in this coverage action, Plaintiff and the remaining two defendants, NHM and Jones, moved seasonably for summary judgment as to the issue of whether there was insurance coverage. The Honorable J. Mark Hayes, II, denied both motions for summary judgment. The declaratory action was tried in a bench trial before the Honorable Edward W. Miller on November 21, 2013. Judge Miller filed his Order on December 30, 2013. It held that Jones was a "temporary employee," thereby granting coverage to NHM. Canal's appeal is of that Order. R.6.

ARGUMENT

I. STANDARD OF REVIEW

This appears to be an issue of first impression in South Carolina regarding the construction of the term, "temporary worker," in a CGL or commercial auto insurance policy, which is an issue of law. This Court has held:

> "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County,* 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "An issue essentially one at law, will not be transformed into one in equity simply because declaratory relief is sought." *Id.* In South Carolina, an insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law. *Estate of Revis by Revis v. Revis*, 326 S.C. 470, 476, 484 S.E.2d 112, 115 (Ct.App.1997). "Contract actions are actions at law." *Hofer v. St. Clair,* 298 S.C. 503, 508, 381 S.E.2d 736, 739 (1989).

Cook v. State Farm Auto. Ins. Co., 376 S.C. 426, 429, 656 S.E.2d 784, 786 (Ct. App. 2008).

Our Supreme Court has held that *de novo* review will be accorded all issues of law, with the appellate court "free to decide matters of law with no particular deference to the trial court." Menezes v. WL Ross & Co., LLC, 403 S.C. 522, 530, 744 S.E.2d 178, 182 (2013) (footnote omitted).

II. JONES IS NOT A "TEMPORARY WORKER" BECAUSE THE POLICY INTENDS THAT THE THIRD PARTY FURNISHING THE "TEMPORARY WORKER" MUST BE AN ORGANIZATION IN THE BUSINESS OF PROVIDING SUCH WORKERS.

A major issue before this court, as before the trial court, is whether Jones was "furnished to" NHM. The trial court, which did not find the phrase ambiguous, as advocated by Respondents, held that the term meant that the employee had to be furnished by a third party. However, the trial court erroneously held that Johnson's recommendation of Jones for employment met the Policy's requirement that Jones be "furnished to" NHM.

The Policy, as quoted above, contains definitions of "employee" and "temporary worker." The Policy excludes coverage for NHM's employees. It defines "employee" to include a "leased worker," but states specifically that, "'Employee' does not include a 'temporary worker'." R.70. The Policy definition of "temporary worker" is "a person who is furnished to you to substitute for a permanent 'employee' on leave or to meet seasonal or short-term workload conditions." It is undisputed that Jones was hired by NHM to meet "short-term workload conditions." The disputed issue is whether he was "furnished to" NHM.

The phrase "furnished to you" is standard wording in Insurance Services Office ("ISO") policies covering commercial general and commercial auto liability. The words were added by ISO in 1993. As stated by the Missouri Court of Appeals in construing the same phrase in a CGL policy:

> The CGL policy containing the employee exclusion and policy definition are on a form copyrighted by the Insurance Services Office, Inc. (ISO). Until 1993, the ISO standard form CGL policy did not define "employee." In 1993, the definitions of "employee," "leased employee" and "temporary worker" were added to the ISO standard form CGL policy **to cover the non-traditional employment relationship where a client company is using the services of employees of a staffing company**. Jack P. Gibson, et al., Int'l Risk Mgmt. Inst., Inc., 1 *Commercial Liability Insurance*, Sections V.L. .9–.10, .22, .50 (Jan. 2002). This addition included "leased employees" within the definition of "employee" but excluded "temporary workers."

American Family Mut. Ins. Co. v. Tickle, 99 S.W.3d 25, 30 (Mo. Ct. App. 2003). (emphasis added); *See also*, Central Mut. Ins. Co. v. True Plastics, Inc., 992 N.E.2d 385, 389 (Mass. Ct. App. 2013) (same); General Agents Ins. Co. of America v. Mandrill Corp., 243 Fed. Appx. 961, 967 (6th Cir. 2007) (temporary worker definition added "to address a distinction made by several states' workers compensation statutes...temporary employees...are considered to remain employees of the temporary staffing agency.").

ISO's intention, in using the phrase, "furnished to you," was that it would apply in situations in which companies in the business of providing temporary workers – and who would provide workers' compensation for them – provided such a worker to the insured. In this case, it is conceded that Jones was not furnished by a staffing company. As such, the trial court erred in finding for Respondents.

III. THE TRIAL COURT ERRED IN IGNORING THE MAJORITY POSITION THAT "FURNISHED TO YOU" MEANS THAT THE EMPLOYEE MUST BE FURNISHED BY A THIRD PARTY ENTITY THAT SUPPLIES LABOR.

The Trial Court evidently misunderstood the majority position on this issue. It was correct in joining the "vast majority of the courts" that have "concluded that the phrase 'who is furnished to you' requires third party involvement." Lafayette Ins. Co. v. Roberts, 2013 WL 3961173 (Tenn. Ct. App. 2013). *See,* Order, p. 4; R.4. The Court was incorrect, however, in stating that, "[o]nly a few courts have construed the definition of 'furnished' to require involvement of a temporary service as argued by Canal." Order, p. 5; R.5.

In. Northland Casualty Company v. Meeks, 540 F.3d 869, 876-77(8th Cir. 2008) (citing AMCO Ins. Co. v. Dorpinghaus, 2007 WL 313280 at *4 (D. Minn. 2007)), the Eighth Circuit Court of Appeals held that, "a worker is not furnished to an insured unless a third party – typically a staffing agency – has been involved in providing or supplying the worker to the insured." The Northland Court also cites nine other cases following the quoted citation from AMCO.[1] The Trial Court, therefore, erroneously believed that it was ruling

[1] *See* Northland, 540 F.3d at 876-77 citing *Gavan v. Bituminous Cas. Corp.,* 242 S.W.3d 718, 721 (Mo.2008); *Gen. Agents Ins. Co. of Am., Inc. v. Mandrill Corp.,* 243 Fed. Appx. 961, 967–68 (6th Cir.2007) (unpublished) (opinion of Kennedy, J.); *Carl's Italian Rest. v. Truck Ins. Exch.,* 183 P.3d 636, 639–40 (Colo.Ct.App.2007), *cert. denied,* No. 08SC23, 2008 WL 2008622 (Colo. May 12, 2008) (en banc); *Nautilus Ins. Co. v. Gardner,* 2005 WL 664358, at *6–7; *Brown v. Ind. Ins. Co.,* 184 S.W.3d 528, 537–40 (Ky.2005); *Monticello Ins. Co. v. Dion,* 65 Mass. App. Ct. 46, 836 N.E.2d 1112, 1115 (2005); *Nationwide Mut. Ins. Co. v. Allen,* 83 Conn. App. 526, 850 A.2d 1047, 1057 (2004); *Am. Family Mut.,* 99 S.W.3d at 30–31.

consistently with the majority of courts in holding that Jones' co-worker "furnished" him to NHM.

AMCO Insurance Company. v. Dorpinghaus, *supra.,* is quite similar to the case *sub judice.* In that case, Steven Dorpinghaus, operating as Dorphinghaus Construction, undertook to build a home and hangar garage. He reached an agreement with his son, Tony, to help with the framing. Tony, knowing that he could not frame the buildings by himself, called a close friend, Richie, to assist with the framing. Richie spoke directly with Steven about the terms and payment for the work. A mutual friend of Tony and Richie, Tommy, heard about the project and asked if he could work on it. Steven agreed and informed Tommy how much he would be paid.

Tony, Richie and Tommy were working on the project when the scaffolding on which they were standing collapsed. All three suffered serious injuries. Dorpinghaus Construction was insured by AMCO Insurance Company. The pertinent language in the AMCO policy regarding temporary workers "furnished to" the insured is identical to that in the Canal policy at issue.

AMCO filed an action for declaratory judgment to determine whether its policy provided coverage for the three young men's injuries. At the summary judgment stage, after reviewing the precedent from many jurisdictions, the court granted summary judgment to AMCO on the key issue of whether Tony, Richie and Tommy were "temporary employees." It accepted AMCO's interpretation because it was the only one that gave "meaning to all of the words of the policy." 2007 WL 313280 at *5. Tony argued that he provided himself to his father, but the District Court held that precedent did not support that conclusion.[2] Rather, a third party was required.

[2] One of the cases relied on by Tony and the other Defendants, American Family Mut. Ins. Co. v. As One, Inc., 189 S.W.3d 194, 198 (Mo. Ct. App. 2006) has been overruled by Gavan v. Bituminous Casualty Corp., 242 S.W.3d 718 (Mo. 2008), which held that a person could not furnish himself to work for an insured and that membership in a union, moreover, does not cause the union to "furnish" a worker to an employer.

Moreover, the District Court held that *not just anyone* could be a third-party who *furnished* an employee to an employer. Regarding Richie and Tommy, they court held as follows:

> Anticipating that this Court might agree with the majority of courts that a worker must be furnished to an insured by a third party to qualify as a temporary worker for purposes of the CGL policy, Richie and Tommy argue that *Tony* furnished them to Dorpinghaus Construction. Richie and Tommy are contradicted by their own testimony and by common sense. *Tony was not in the business of supplying workers to others*; he was instead employed by Meats, Meals and More, another of his father's businesses. And neither Richie nor Tommy had ever worked for Tony, making it difficult for Tony to furnish them to anyone. Not surprisingly, then, Richie and Tommy negotiated the terms of their arrangements directly with Steven Dorpinghaus....Neither accepted the job before speaking to Steven Dorpinghaus....*No reasonable jury could find that Tony "furnished" Richie and Tommy to his father.*

AMCO Ins. Co. v. Dorpinghaus, 2007 WL 313280, *7 (D. Minn. 2007) (italics added).

The Wisconsin Court of Appeals has also addressed a case in which a friend asserted that she "furnished" a temporary employee. Borntreger v. Smith, 811 N.W.2d 447 (Wis. Ct. App. 2012). The Smiths, who operated a farm, wanted to hire a temporary worker. A young woman who was employed by the Smiths "introduced" and "recommended" Borntreger, who was the young woman's boyfriend. He drove the young woman back and forth to the Smith's farm. The court held that her actions did not amount to her furnishing Borntreger as a temporary worker. It held that Borntreger was, therefore, an employee and the "'employee' exclusion was applicable." 811 N.W.2d at 451.

Support for the majority position is also found in the Spring/Summer, 2010, issue of Tort Trial & Insurance Practice Law Journal in an article entitled, "The Law of 'Leased Worker' and 'Temporary Worker'," written by Stephen P. Perlmutter, a trial lawyer with over 35 years' experience. R. 129-77 Mr. Perlmutter summarized various legal positions on the phrase, "furnished to you," and gives a chronological discussion of both the majority and minority lines of cases. His summary was is follows:

A. Furnished to: *Does It Require the Injured Worker to be Provided to the Client Company by a Third-Party Employment-Type Business*?

> The majority of cases that have applied the employer's liability exclusion to deny coverage have done so by finding that the worker was not "furnished to" the insured client company, as is required by the CGL policy's definition of *temporary worker*. These cases, therefore, generally do not reach the issue of whether the worker was furnished to "substitute for a permanent employee on leave or to meet seasonal or short-term workload conditions." However, the courts are in disagreement about the meaning of the "furnished to" requirement in the definition of *temporary worker*. **The majority line of cases holds that to be a temporary worker, the worker must be furnished to the client company by an employment-type agency.** The minority line of cases finds no requirement that the temporary worker be furnished to the client company by such a business.

Tort Trial & Insurance Practice Law Journal, Spring/Summer 2010 (45:3-4) p. 766 (emphasis added)R. 134.

Jones, allegedly "furnished" by a friend in this case, is in the same position as Richie and Tommy in AMCO and Borntreger in the Borntreger case. Jones was hired, and given his assignments, by *Hewes* for NHM, rather than by any third party. Johnson in this case is even less likely to be able to "furnish" Jones to NHM than Tony was to furnish Richie and Tommy to Dorpinghaus Construction or the young woman in Borntrager. All Johnson could do is to recommend Jones to Hewes. He could not "furnish" him under the common meaning of the word, which implies as a prerequisite that one "have" or "control" the person/item to be furnished. Until Hewes *hired* Jones, he was not an employee. Calling Jones and driving him to the work site is not "furnishing" Jones to NHM; everything prior to the actual hiring might be a recommendation, but it is not "furnishing" an employee. Accordingly, the trial court erred in holding that Johnson was a third party capable of "furnishing" Jones in the manner contemplated

by the Policy. Judgment for Respondents should be reversed, and judgment for Appellant entered.[3]

IV. THE TRIAL COURT ERRED IN HOLDING THAT AN EMPLOYEE OF NHM COULD FURNISH JONES TO NMH

Even if the trial court was correct in holding that the third-party who can "furnish" a "temporary employee" does not have to be a labor or staffing company, the court erred in holding that an employee of the insured could "furnish" a "temporary employee" to the insured. In holding that Johnson furnished Jones to NHM, the court effectively held that NHM could furnish an employee to itself. Thus, the trial court's holding ignored the third-party requirement it held was necessary to characterize Jones as a "temporary employee." In holding that an employee could serve as a third-party furnisher of a co-employee the trial court relied on a single Florida case, National Indemnity Company v. Landscape Management Company, Inc., 963 So.2d 361 (Fla.App. 4 Dist. 2007). However, in contrast to the trial court in this matter, the court in National Indemnity held the "furnished to you" phrase ambiguous. National Indemnity, 963 So.2d at 364. The National Indemnity Court further rejected that the employee must be

[3] *See also* Nationwide Mut. Ins. Co. v. Allen, 850 A.2d 1047, 1057(Conn. Ct. App. 2004) ("...Allen did not go to an employment agency, manpower service provider or any similar service to employ or to utilize Shaw's services. Shaw was not employed by anyone who lent or furnished him to Allen as an employee.... Shaw was not furnished to Allen within the definition of 'temporary worker' ... under the insurance policy"); Burlington Ins. Co. v. De Vesta, 511 F. Supp.2d 231, 233 (D. Conn. 2007) (cites Allen for proposition that, to be "furnished," worker must come from agency, etc.); Monticello Ins. Co. v. Dion, 836 N.E. 2d 1112, (Mass Ct. App. 2005) (Employer Dion's cousin, working for Dion's tree-cutting service, killed when tree fell wrong way. She was "employee" of tree service, rather than "temporary employee." To consider her to be "furnished to" employer would *de facto* read "furnished to" out of policy); Nautilus Ins. Co. v. Gardner, 2005 WL 664358 at *5 (E.D. Pa., 2005) (claim against owner of haunted house display for sexual abuse by one of his employees against 14-year old girl, who was an "actor" at display. Claimant asserts girl was "temporary employee." Court held that girl was not "furnished to" Gardner, so she was an employee and policy exclusion applied); Empire Fire and Marine Ins. Co. v. Jones, 739 F.Supp.2d 746, 754 (M.D. Pa. 2010) (Drumhiser, working on Jones' garbage truck, was injured when he tried to board the truck. Kalmans, for whom Drumhiser was already working, recommended him to Jones. Drumhiser was not a "temporary worker" because Kalmans did not "furnish" him to Jones as they "had no control over him," though they were his primary employer); Brown v. Indiana Ins. Co., 184 S.W.3d 528, 538 (Ky. 2005) ("...CGL policies except the temporary worker from the definition of "employee." However, for that exception to apply, the worker must have been 'furnished to' the entity by a temporary help service..."); Carl's Italian Restaurant v. Truck Ins. Exchange, 183 P.3d 636, 639 (Colo. Ct. App 2007) ("On appeal, plaintiffs contend that the trial court erred in determining that the term 'furnished' requires that a temporary worker must be supplied by a third party. We disagree.").

furnished by a third party, id., a condition that the trial court in this matter specifically held was required. Thus, for its decision to allow a co-employee to furnish a "temporary worker", the trial court in this case relied upon a case with which it disagreed on two very fundamental points: whether the policy term is ambiguous and whether a third party must furnish the "temporary worker."[4]

Several other courts have rejected the notion that a co-employee can furnish a "temporary worker." The Missouri Court of Appeals has held, "[a]n employer obtains a liability policy 'to cover *its liability to the public* for negligence of its agents, servants and employees under the doctrine of respondeat superior....The primary purpose of an employee exclusion clause is to draw a sharp line between employees and members of the general public." American Family Mut. Ins. Co. v. Tickle, 99 S.W.3d 25, 29 (Mo. Ct. App. 2003) (citations omitted).

To hold, as the trial court did, that a co-worker – with no control of or authority over Mr. Jones – could "furnish" Jones obviates the purpose of the Policy's language, which reflects the intention of the parties. It also inadvertently encourages collusion and fraud. If a co-worker in the situation of David Johnson in this case can assert that he "furnished" a friend to the employer, it provides a mechanism whereby the insured employer can avoid obtaining workers' compensation and impose a burden on the liability insurer that the insurer never intended to insure and for which no premium was paid. A mere suggestion by the employer to the co-worker that the injured party will be able to collect insurance money if the co-worker says that he brought the injured party to the employer will, in many cases, cause the co-worker to follow the insured's suggestion. The decisions of a court should not encourage dishonesty, as the lower court's holding inadvertently could.

[4] The United States Court of Appeals for the Eighth Circuit disagreed with the outcome in National Indemnity. Northland Cas. Co. v. Meeks, 540 F.3d 869 (8th Cir. 2008) (finding the phrase "furnished to" unambiguous).

To hold that a person, already a part of a business as an employee, can "furnish" a third person to the business is also not consistent with the phrase, "furnished to you." This is, *de facto*, for the business to furnish the new employee to itself. Such an employee is not actually a "third person," as he is acting *for* the employer. This is especially true when the original employee has been *specifically authorized* by the employer, as here, to suggest, but not hire, another employee. Dep. of Hewes, pp. 13, line 19 – 14, line 10, R. 90, line 19 – R. 91, line 10. At that point, David Johnson had actual authority as an *agent* of NHM to invite Jones for an interview. Fleming v. Asbill, 326 S.C. 49, 53, 483 S.E.2d 751, 753 (1997) ("Agency implies the existence of a fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf," *citing* Restatement (Second) of Agency §1 (1957)); *See also* the Black's Law Dictionary (5th ed.) definition of agent: "A person authorized by another to act for him." Johnson's communication with Jones could be only an invitation to Jones for an interview and a recommendation to NHM, as only Hewes could hire a worker. Dep. of Hewes, p. 9, lines 12-16; R. 86, lines 12-16; p. 14, lines 11-15; R. 91, lines 11-15.

Inasmuch as Johnson was *de facto* acting as an agent for NHM, it would effectively be that NHM was furnishing Jones to itself. That renders nugatory the phrase "furnished to you." If a business can hire a person directly and have that procedure comply with the quoted words of the policy, that phrase would have no effect. That is *de facto* to remove those words – intended by ISO and the insurer – from the policy. The Roberts Court addressed this specific issue:

> Here, a "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." (emphasis added). This definition suggests the involvement of a third party who provides the temporary worker to the insured. If one could furnish oneself with a temporary worker within the meaning of the policy, there would be no need for including the phrase "who is furnished to you." The definition could then just read, 'a person who substitutes for a permanent employee or who meets seasonal or short-term workload conditions.' Any worker who substituted for a permanent employee on leave

> or who met seasonal demands or short-term workload conditions would satisfy the definition of a temporary worker, and there would effectively be no 'furnished to you' requirement. Contracts must be construed, as far as is reasonable, so as to give effect to every term. *Vantage Technology, LLC v. Cross,* 17 S.W.3d 637, 650 (Tenn. Ct. App. 1999). Insurer's interpretation is the only one that gives meaning to all of the words of the policy definition.

Roberts, *supra., 2013 WL 3961173* at *7 (citation omitted)(italics in original). This holding is fully consistent with South Carolina law as articulated in Preservation Capital Consultants, LLC v. First American Title Ins., 406 S.C. 309, 751 S.E.2d 256 (2013) and Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 225 S.E.2d 344 (1976). *See also,* Parra v. Markel Intern. Ins. Co. Ltd., 2008 WL 4974299 (5th Cir. 2008) ("the clause, 'person who is furnished to you,' required a showing that *a third person rather than an agent or employee of the employer* referred the temporary worker to the employer for employment.") (emphasis added).

If the lower court's holding is allowed to stand, an employer in such a situation can consciously evade its responsibility to obtain workers' compensation or employer's liability insurance to provide for its workers' injuries simply by asking an employee to contact a friend to come to work. Under the appealed ruling, that would pass the responsibility for injuries to the unsuspecting CGL/commercial auto carrier, which had no intention of providing, and did not charge for, such coverage.

V. THERE SHOULD ALSO BE NO COVERAGE UNDER THE POLICY BECAUSE KEVIN JONES WAS DIRECTLY INVOLVED IN AN ACTION THAT AFFECTED VEHICLE SAFETY, WHICH SPECIFICALLY MAKES HIM AN "EMPLOYEE" UNDER THE UNAMBIGUOUS WORDS OF THE POLICY.

As quoted *supra*, p. 4, the Policy defines "employee" to specifically include "any individual ...employed by an employer and who in the course of his or her employment directly affects motor vehicle safety." R.70.

The deposition testimony of Kevin Jones, Brent Jones (the 30(b)(6) designee for NHM) and, most importantly, Ron Hewes confirms the conclusion that Kevin Jones' actions on top of the house affected vehicle safety. Brent Jones testified as follows:

> Q. ...the man on the house is responsible for taking the PVC pipe and raising the wire as you're transporting the house down the roadway, correct?
> A. Right. And then the gable – the gable of the house –
> Q. Sure.
> A. – I think typically the wire would sit on top of that gable and slide down the gable, the peak, as the house is moving.
> Q. And why is that important in transporting a house?
> A. So we don't knock those wires down, break the wire and maybe cause a pole to fall over.
> Q. Right. Pole could fall on the tractor, it could fall on the highway, could fall on the house.
> A. Just like you said.
> Q. Could fall on adjacent property, correct?
> A. Yeah.

Dep. of B. Jones, p. 31, lines 3-20; R. 114, lines 3-20.

Kevin Jones testified as follows:

> Q. What would happen if those wires had hit that roof? Why did they want you to keep those wires off that roof?
> A. They didn't want them to catch any shingles, hang up on the shingles and pull the shingles off the house. That's why they don't want them to get caught on the shingles because they want me to lift them up.
>
> ***
>
> Q. You could pull the poles down; couldn't you?
> A. Yes, sir. Or break a wire, snap the wire.
> Q. If the pole came down, it could be trouble; couldn't it?
> A. Very serious.

Dep. of K. Jones, p. 102, lines 13-20; R. 127, lines 13-20; p. 103, lines 6-10; R.128, lines 6-10.

The man responsible for the operation, Ron Hewes, testified as follows:

Q. And what would happen if those wires would get hung up?
A. They would break. That's why I'm on the ground, to stop the house, to watch it.
Q. What would break?
A. *The wires would break. Or depending on how heavy the wires, it could possibly pull a pole out.*

***

Q. Right. And if that happened, would cause an accident.
A. Right.
Q. And you're trying to - - because you're concerned with safety; are you not?
A. That's right.
Q. You're concerned with the safety of the transporting of the house, *the operation of the vehicles transporting the house.*
A. *Yes.*
Q. And you're concerned with the safety of the wires that are across the road, correct?
A. Yes, sir.
Q. And the reason why you're doing this is to prevent an accident involving one of those wires that might pull a pole down, it might impact your house, your truck, adjoining property or hit somebody else, correct?
A. Yes, sir.

Dep. of Hewes, p. 26, lines 1-7; R. 95, lines 1-7; pp. 26, line 11-27, line 4; R.95, line 11-R. 96, line 4 (emphasis added).

It is, therefore, undisputed that Kevin Jones' actions affected the safety of the vehicle, the utility poles beside the road, the wires themselves, and other property adjacent to the road. All of this potential damage directly flows from the operation of the commercial truck hauling the house from one location to another.

This issue was directly raised to the trial court at trial. Transcript, p. 10; R. 30.

Given the Policy's specific inclusion as an "employee" of anyone whose employment "directly affects commercial vehicle safety," as Kevin Jones' responsibilities clearly did, Jones was an employee of NHM. He is, therefore, subject to the Policy's unambiguous exclusion of injuries to an employee. The specific provision including a person who "directly affects vehicle safety" as an "employee" should take precedence over the general statement that "temporary employees" are not included as "employees." The intention of the policy is clearly to bring

people who are affecting vehicle safety within the policy exclusion for "employees." The policy is not intended to be a substitute for workers' compensation.

CONCLUSION

In this matter of first impression, this Court should reverse the decision of the trial court. The lower court erred in holding that Kevin Jones was furnished to National Home Movers ("NHM") by Jones' friend, David Johnson, who was already an NHM employee. Jones was, therefore, not considered by the court to be an employee of NHM. Consequently, Canal Insurance Company's commercial auto policy, which was not intended to cover injuries to people working for its insured, was held to provide coverage for Jones' workplace accident. There are several reasons to reverse the trial court's order.

The plain meaning of "furnished to you" is that an entity outside the organization, which or who has control or possession of something or someone, has transferred to "you" the right to control that person or possess the material item. Webster's New World Dictionary of the American Language includes, in the definition of "furnish," in distinguishing partial synonyms, a note saying, "furnish...implies the provision of all the things requisite for a particular service." If Johnson did not have control of Jones – as he did not – he could not furnish Jones to NHM. To recommend or propose someone for employment is not to furnish that person to the employer.

The pertinent words in Canal's policy were added by ISO for the specific purpose of not providing double coverage for temporary workers provided by an employment service. That service would provide workers' compensation for the worker – which would remain an employee of the employment service. The majority of courts which have addressed this issue have ruled consistently with ISO's stated intention for the words it chose.

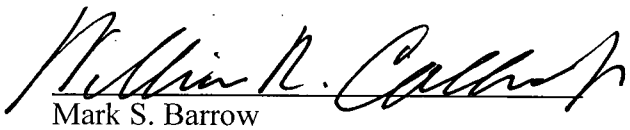
South Carolina law follows the practice of construing contracts in accordance with the intentions of the parties. Canal's intention in using ISO's words is consistent with ISO's intention, that "temporary employee" means a worker provided by an employment service. NHM's intentions are not fully known. It obviously did not provide employee liability insurance for its employees' injuries. If it read its policy with Canal, it could not have expected Canal's policy to provide coverage for its employees' injuries. A reasonable inference is that NHM intended to be self-insured – until Jones' accident occurred.

Finally, if the appealed Order is not reversed, employers and employees will be encouraged to fabricate stories about workers being "furnished" by other workers so as to place the burden of employees' injuries on CGL or commercial auto insurers who have not charged a premium for such coverage. If the trial court's holding is unchanged, the temptation will be to avoid buying workers' compensation coverage, thus depriving workers in the State of the statutory protection the legislature intended for them. The public policy of the State should encourage employers to obtain workers through employment services which insure the workers within the workers' compensation system rather than through litigation of each injury. The trial court's order should be reversed.

Alternatively, the 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. Legette v. Dan Duly d/b/a Double D Docks, Op. No. 2014-UP-165 (S.C. Ct. App., filed April 9, 2014). The Trial Court's Order should be reversed in either case.

Respectfully submitted,

SWEENY,WINGATE & BARROW, P.A.



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September 23, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 12-CP-23-6195
Court of Appeals Tracking No.: 2014-000150

Canal Insurance Company,.....Appellant,

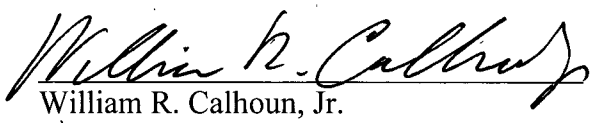
v.

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

CERTIFICATE OF COUNSEL

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

September 23, 2014



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PROOF OF SERVICE

I certify that I have served Appellant's Final Brief and Final Reply Brief on National Home Movers, L.L.C.; David Black; Ron Hewes; and Brent Jones, by depositing a copy of each in the United States Mail, postage prepaid, on the date annotated below, addressed to their attorney of record, Eugene C. Covington, Jr., Post Office Box 2343, Greenville, S.C. 29602 and have served Kevin E. Jones in the same manner and on the same day by depositing a copy of each in the U.S. Mail, postage prepaid, addressed to his attorney of record, George Brandt, III, 360 East Henry Street, Suite 101, Spartanburg, S.C. 29302.

September 24, 2014

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