THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr.

Case No. 2011-CP-32-04981
Appellate Case No. 2014-000671

Mike Russell,..... Respondent,

v.

Randolph Gill and Pennsylvania Life Insurance Company..... Defendants,

Of Whom Pennsylvania Life Insurance Company is ..... Appellant.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

In his brief, Respondent Mike Russell ("Russell") misconstrues section 38-71-30 in an attempt to create a remedy where none exists. Russell requests that this Court ignore the rules of statutory construction and affirm the trial court's decision to expand section 38-71-30 to nullify the intoxication exclusion contained in an accident disability insurance policy that he purchased from Appellant Pennsylvania Life Insurance Company ("Penn Life"). Such a construction by the trial court constitutes reversible error.

The plain and unambiguous language of section 38-71-30 establishes that our Legislature intended to limit application of the statute to ensure that insureds receive a copy of their application once the process is complete and to establish an appropriate penalty should there be noncompliance with delivery of the application. The section does not create penalties for the insurer's alleged failure to deliver the policy itself. No part of section 38-71-30 suggests that nullifying any specific policy exclusions can be a potential consequence of alleged non-delivery of either the application or the policy. Russell's argument improperly required the trial court to expand the reach of the statute and impose a penalty not authorized by the Legislature. Thus, the trial court erred. This Court should reverse.

I. Section 38-71-30 did not allow the trial court to selectively enforce the terms of policy.

Russell claims that section 38-71-30 controls delivery of an insurance policy, and the failure to do so allows the court to render the policy exclusions unenforceable. {Resp. Br. p. 8-9}. Russell's positions lack merit for two reasons. First, the

Legislature limited the scope of section 38-71-30 to delivery of the insured's application of insurance and the timing for the insured to do so. Second, section 38-71-30 only contains penalties for the insurer's failure to deliver the application at the required time. Section 38-71-30 does not create penalties for the insurer's alleged failure to deliver the policy itself. Thus, this Court should reject Russell's meritless claims and reverse the trial court.

a. Russell improperly focuses on certain words in section 38-71-30 in contravention of our rules of statutory construction in an attempt to construe section 38-71-30 as a delivery of the policy statute, which it is not.

Russell claims that the trial court correctly construed section 38-71-30 so as to require delivery of the insurance policy. {Resp. Br. p. 6}. Specifically, Russell claims that section 38-71-30 precluded Penn Life from enforcing the intoxication exclusion because he claims that Penn Life never delivered the policy to him. {Resp. Br. p. 8-9}. Such a construction improperly requires this Court to focus on only certain words of section 38-71-30 while failing to give any effect to the remaining language of that section.[1]

Section 38-71-30 provides, in relevant part, that:

> Every insurer doing accident or health insurance business in the State shall deliver with each policy of insurance issued by it **a copy of the application made by the insured** so that the whole contract appears in the application and policy of insurance. **If the insurer violates this requirement**, no defense is allowed to the policy on account of anything **contained in or omitted from the application**.

[1] As discussed in section 1.b, *infra*, the penalty for failure to deliver the application at the required time was limited by the Legislature solely "on account of anything contained in or omitted **from the application**." S.C. Code Ann. § 38-71-30 (emphasis added).

S.C. Code Ann. § 38-71-30 (emphasis added). The plain and unambiguous language of the statute establishes that the Legislature's focus was to incorporate the contents of the **application** into the contract between the insurer and the insured and to preclude the insurer from asserting a defense to the policy based on anything included or omitted from the application. That is all.

By focusing solely on the "deliver with each policy of insurance" language, Russell's construction effectively eliminates the remaining language in section 38-71-30. See, e.g., CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous."); Breeden v. TCW, Inc./Tennessee Exp., 355 S.C. 112, 120, 584 S.E.2d 379, 383 (2003) ("Every word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction."); Steinke v. S. Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 396, 520 S.E.2d 142, 154 (1999) (stating that courts should "avoid a construction that would read a provision out of a statute"); Davenport v. City of Rock Hill, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993) ("It is never to be supposed that a single word was inserted in the law of this state without the intention of thereby conveying some meaning."). By placing the "a copy of the application" language and penalty language for items "omitted from the application" immediately after the delivery language, the Legislature signaled its intent to modify, qualify, or limit the delivery language relied upon by Russell. See, e.g., Total Environmental Solutions, Inc. v. S.C. Pub. Servs. Comm'n, 351 S.C. 175, 181-82, 568 S.E.2d 365,

369 (2002) (finding a subsequent phrase in the statute modified a preceding phrase and defined the scope of the statute). Such a grammatical construction demonstrates how Russell's position lacks merit.[2] This Court should reverse.[3]

b. The trial court erred in nullifying the intoxication exclusion because section 38-71-30 does not create penalties for any failure to deliver the policy.

Russell's brief fails to refute (or even mention) the fact that the plain language of section 38-71-30 does not create any penalty for the insurer's failure to deliver the policy itself. Russell seeks to selectively enforce the beneficial terms of an insurance policy while avoiding any unfavorable terms that might defeat coverage. Russell's position lacks support. Nothing in section 38-71-30 or South Carolina law allows for such a construction of an insurance policy, and Russell does not cite any authority for this Court to rule in such a manner in this action.[4]

Section 38-71-30 provides only one penalty and that penalty precludes the insurer from using "anything contained in or omitted from the application" as a defense to a claim by the insured. This is evident from the plain and unambiguous language,

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[2] Russell also fails to refute the fact that the doctrine of "expressio unius est exclusio alterius" or "inclusio est exclusio alterius" establishes that section 38-71-30 does not require delivery of the policy to the insured. The decision of the legislature to specifically include delivery of the application, with related penalties for failure to do so, in the statute establishes that the Legislature intended to **exclude** delivery of the **policy** itself from section 38-71-30 because such language was not specifically mentioned in the section.

[3] Public policy is not served by allowing a voluntarily intoxicated adult to recover insurance benefits under a disability policy, thus compensating him for injuries that resulted from his own illegal conduct. This same rationale should apply equally in the case of a voluntarily intoxicated insured seeking to recover insurance benefits for injuries he received in a wreck caused by his own drunkenness. Public policy precludes a court from rewriting an insurance policy to allow an insured to recover for losses sustained by the insured's voluntary decision to drive while intoxicated.

[4] Indeed, South Carolina law is clear that the courts cannot be used as a vehicle to re-write insurance contracts. Dean v. American Fire & Cas. Co., 249 S.C. 39, 41, 152 S.E.2d 247, 248 (1967) ("[T]he courts have no authority to change the contract . . . and have no power to interpolate into the agreement between the insurer and the insured a condition or stipulation not contemplated by the contract between the parties.").

providing that "[i]f the insurer violates [the application delivery requirement], no defense is allowed to the policy on account of anything **contained in or omitted from the application**." S.C. Code Ann. § 38-71-30 (emphasis added). Notably, the section does not create penalties for the insurer's failure to deliver the policy. The Legislature did not intend for that section to apply to delivery of the policy or to render policy exclusions unenforceable.

Even if section 38-71-30 did address delivery of the policy, Russell's position still lacks merit. Failure to deliver the policy does not alter the penalty chosen by the Legislature. In fact, the penalty would remain the same—Penn Life could not use Russell's **application** as a defense to his claim. No part of Section 38-71-30 suggests that nullifying key policy language is a potential consequence of non-delivery. As a result, the trial court's decision to bar Penn Life from enforcing the intoxication exclusion was not authorized by section 38-71-30. Therefore, the trial court erred in using this section to nullify the intoxication exclusion in the policy.

In sum, regardless of the scope of the statute, the Legislature did not impose a penalty that would allow a court to nullify policy exclusions. The trial court erred in using section 38-71-30 to invalidate the intoxication exclusion in Russell's policy.[5] This Court should reverse.

II. The trial court further erred in holding the intoxication exclusion unenforceable because Russell admitted receiving notice of the exclusion in 2002, some six years before the accident.

In his brief, Russell fails to dispute the fact that he had actual notice of the intoxication exclusion prior to the accident. {Resp. Br. p. 10-11}. This is because he

[5] The trial court found that Penn Life issued the policy to Russell and that the policy contained an intoxication exclusion. {Order ¶ 16 p. 6; R. 6}.

cannot do so. Russell admitted to the trial court that he received the receipt containing "EXCEPTIONS AND LIMITATIONS," including the fact that his policy did not "cover loss . . . that results from any of the following: . . . being intoxicated." {Insurance Receipt, Penn Life Tr. Ex. 12; R. 699; Exhibit 2 to Affidavit of Oct. 31, 2012; R. 660; Penn Life Tr. Ex. 4; R. 629; Order ¶ 3 p. 2; R. 2 {finding by the trial court that "[Russell] acknowledged that he received the receipt from Mr. Gill."}.

Therefore, Penn Life delivered Russell notice of the intoxication exclusion in 2002, which was six years prior to the accident. As a result, even if it were true that Penn Life could not prove that it delivered the policy in 1999 and the amended policy in 2002, Russell still had notice that the policy contained an intoxication exclusion six years prior to the wreck. There is no support in the law for invalidating a term in an insurance policy when the insured had notice of its existence.

Courts addressing this issue hold that the exclusion is still enforceable even when the policy was not delivered. See, e.g., Neely v. Am. Family Mut. Ins. Co., 123 F.3d 1127, 1130 (8th Cir. 1997) ("[We] reject[] the . . . contention that . . . failure to deliver the insurance policy estops [the insurer] from enforcing the exclusionary clause" because the insured had "not shown that . . . the failure to deliver an exclusionary clause results in the per se inability to enforce the clause."); Community Bank v. Progressive Cas. Ins. Co., No. 1:08-cv-1443-WTL-WGH, 2010 U.S. Dist. LEXIS 75608 (S.D. Ind. July 27, 2010) (holding that lack of delivery does not have an effect on the policy's exclusions because"[the insured] has not cited a single case to indicate that . . . the failure to deliver an insurance policy or exclusionary clause results in the per se inability to enforce the clause" and "the court's own research [has not] revealed

any case law dictating this result."); Williams v. Permanent Gen. Assur. Corp., 2002 Ohio 4445, 2002 Ohio App. LEXIS 4589, at *8-9 (Ohio Ct. App. 2002) ("[T]he exclusionary language within the policy was effective despite the failure to deliver the policy."); Jones v. Cincinnati Ins. Co., No. 96 CA 43, 1999 Ohio App. LEXIS 2827, at *10 (Ohio Ct. App. June 21, 1999) (holding lack of delivery irrelevant, stating "such a policy would not have been issued without said exclusion. Therefore . . . the exclusionary language was applicable and the insurer was entitled to a judgment as a matter of law."). Accordingly, this Court should reverse and hold that the intoxication exclusion contained in the subject policy is enforceable.

III. This Court should hold that Russell was intoxicated at the time of the accident because the parties fully developed and presented the issue to the trial court and remand would waste judicial resources.

Russell does not refute the fact that this Court has the authority to rule on the issue of Russell's intoxication at the time of the wreck. {Resp. Br. p. 11-13}. Russell instead claims that this Court should not address the issue because the trial court refused to do so. {Id.}. While the trial court declined to rule on this issue (because of its incorrect ruling under section 38-71-30), such a decision does not alter this Court's authority to rule on this issue. Judicial economy supports making this ruling on appeal.

Each party addressed this issue, presented evidence, and fully developed the record on this issue before the trial court. For the sake of brevity, Penn Life will not rehash the plethora of evidence that established Russell was intoxicated at the time of the wreck. Rather, Penn Life refers the Court to section II of its Appellant's Brief. It would be judicially inefficient and unnecessary to remand this action to the trial court to enter judgment in favor of Penn Life in light of the overwhelming evidence of

intoxication presented to the trial court. Our appellate courts routinely make such rulings in such circumstances. See, e.g., Hollins v. Richland County School Dist. One, 310 S.C. 486, 427 S.E.2d 654 (1993) ("Although trial court did not specifically rule on this issue, remand for a determination of the matter would not serve the interests of judicial economy.").[6] This Court should do the same in this matter.

Conclusion

Based on the foregoing, the Legislature limited the scope of section 38-71-30 to delivery of the application. The trial court exceeded that scope and erred in using section 38-71-30 to bar enforcement of the intoxication exclusion by Penn Life. Therefore, this Court should reverse the trial court's judgment and enter judgment in favor of Penn Life pursuant to section 38-71-30. Moreover, this Court should, as matter of judicial economy, hold that the intoxication exclusion contained in the policy is enforceable, and that the evidence establishes that the wreck was a result of Russell's intoxication.

{Signature Page Follows}

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[6] See also Church v. McGee, 391 S.C. 334, 342, 705 S.E.2d 481, 485 (Ct. App. 2011); Buist v. Huggins, 367 S.C. 268, 275, 625 S.E.2d 636, 639 (2006) (deciding to address the merits of an issue in the interest of judicial economy when the trial court had already heard arguments and addressed the issue, and the record on appeal provided sufficient evidence to make a finding of fact); Southern Bell Tel. and Tel. Co. v. Hamm, 360 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) (electing to address an issue on appeal in the interest of judicial economy after both parties had fully briefed the issue); Furtick v. S.C. Dep't of Prob., Parole & Pardon Servs., 352 S.C. 594, 599, 576 S.E.2d 146, 149 (2003) (addressing the merits of a claim in the interest of judicial economy despite the respondent being entitled to review by the lower court); Wachovia Bank of S.C. v. Player, 341 S.C. 424, 428, 535 S.E.2d 128, 130 (2000) (reversing the decision of the Court of Appeals' holding that master lacked jurisdiction but addressing the merits of petitioner's appeal "in the interest of judicial economy"); see also Woodson v. DLI Props., L.L.C., 406 S.C. 517, 528 n. 10, 753 S.E.2d 428, 434 n. 10 (2014) ("While remand to the court of appeals is appropriate, in the interest of judicial economy, we address the merits of whether summary judgment in favor of Respondents was proper."); State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (finding issue preserved and addressing the merits of the issue "in the interest of judicial economy")

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

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, Pennsylvania Life Insurance Company, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same United States Mail, prepaid, to the following address(es):

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