

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr.

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

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Mike Russell,..... Respondent,

v.

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

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

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**FINAL BRIEF OF APPELLANT**

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## STATEMENT OF ISSUES ON APPEAL

- I. The trial court erred by ruling that Section 38-71-30 renders unenforceable an intoxication exclusion in an accident disability insurance policy when there is insufficient evidence of delivery.
  
- II. Based on the fully developed record presented to the trial court, this Court should grant judgment in favor of Penn Life, without remanding to the trial court, because Russell's intoxication was a contributing cause of the accident.

## STATEMENT OF THE CASE

This appeal addresses whether the intoxication exclusion contained in an accident disability insurance policy barred Respondent Mike Russell (“Russell”) from recovering benefits under that policy when Russell injured himself in a wreck while operating his motorcycle with a blood alcohol level of 0.232, nearly three times the legal limit in South Carolina. The trial court incorrectly ruled that Appellant Pennsylvania Life Insurance Company (“Penn Life”) could not enforce the intoxication exclusion. This Court should reverse.

Russell instituted this action by filing a complaint against Penn Life and insurance agent Randolph Gill on February 10, 2010. {Complaint; R. 29}. Russell alleged the following causes of action against both Defendants: (1) bad faith refusal to pay benefits; (2) breach of contract to procure insurance; and (3) breach of the insurance contract. {Complaint; R. 29-35}. Penn Life answered, pointing out that all benefits due had been paid and asserting that the intoxication exclusion contained in Russell’s policy barred Russell from receiving additional benefits. {Am. Answer & Counterclaim; R. 77-87}.

On April 1, 2010, Penn Life filed a notice of removal of the action to federal court. {Notice of Removal; R. 36}. Both Penn Life and Gill filed answers, denying the allegations in the complaint and asserting affirmative defenses. {Penn Life Answer, R. 63; Gill Answer, R. 71}. Penn Life subsequently filed an amended answer and a counterclaim for declaratory judgment, alleging that the intoxication exclusion contained in Russell’s policy barred Russell from continuing to receive monthly benefit payments under the policy. {Am. Answer & Counterclaim; R. 77-87}. The United

States District Court for the District of South Carolina issued an order remanding the case on October 1, 2010.<sup>1</sup> {Remand Order; R. 15}.

The parties presented their case by bench trial before Judge Griffith in the Lexington County Court of Common Pleas on December 13–14 and 20–21, 2012. {Tr. Trans. Vol. 1, p. 1, Vol. 2 p. 2, Vol. 3 p. 1; R. 88, 179, 399}. As to Russell’s claims against Penn Life, the trial court ruled in favor of Penn Life on all claims. {Trial Court Order at 9-10; R. 9-10}. Specifically, the trial court dismissed Russell’s claim for breach of the insurance contract, finding that Russell received all insurance payments. {Id. at 9; R. 9}. The trial court also denied Russell’s claim for bad faith refusal to pay insurance benefits because Penn Life made all payments due under the policy. {Id. at 9-10; R. 9-10}. Finally, the trial court dismissed Russell’s claim for failure to procure insurance, finding that Russell did not offer any evidence that he did not receive the coverage he requested or that he suffered any damages from an alleged failure to procure insurance. {Id. at 10; R. 10}. Russell did not file a motion to reconsider or appeal any of these rulings. In fact, Russell did not appeal any ruling or finding of the trial court.<sup>2</sup>

As to Penn Life’s declaratory judgment claim seeking to enforce the intoxication exclusion, the trial court ruled in favor of Russell. The trial court concluded that Penn

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<sup>1</sup> The case was remanded because Defendant Randolph Gill was a South Carolina resident. Russell voluntarily dismissed Gill shortly before trial.

<sup>2</sup> Thus, all the trial court’s adverse findings against Russell are law of the case for this appeal. See, e.g., Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (holding that “an unappealed ruling, right or wrong, is the law of the case”); In re Morrison, 321 S.C. 370, 372 n. 2, 468 S.E.2d 651, 652 n. 2 (1996) (recognizing the settled rule that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal). As a result, Penn Life will cite to the factual findings of the order (as related to Russell, the policy, the wreck, and the use of alcohol on the night of the wreck) throughout this brief because those facts are law of the case for this appeal.

Life's proof of delivery of the policy was insufficient, and, under Section 38-71-30, Penn Life was therefore not entitled to enforce the intoxication exclusion. {Order at 10; R. 10}. The trial court declined to reach the issue of whether Russell was intoxicated and whether intoxication contributed to the accident because of its ruling that the exclusion did not apply. Penn Life filed a motion to alter or amend the trial court's ruling. {Motion to Alter or Amend; R. 2409}. Following a hearing, {Motion Trans.; R. 2414}, the trial court denied Penn Life's motion. {Order denying Motion to Alter or Amend; R. 13}. Penn Life timely filed a notice of appeal.

#### STATEMENT OF THE FACTS

Russell purchased an accident disability insurance policy from Penn Life in 1999. {1999 Application, Penn Life Tr. Ex. 9; R. 677}. He met with an agent on November 19, 1999, and completed a Penn Life application for an accident disability policy that provided a monthly disability benefit of \$2,000. {Application, Penn Life Tr. Ex. 9; R. 677}. Penn Life issued the policy to Russell. {Order ¶ 16 p. 6; R. 6}. Russell made monthly premium payments on the policy. {Tr. Trans. Vol. 3 p. 21; R. 419}.

Jack Mackin, a former Penn Life employee who was knowledgeable about the Penn Life's policy administrative systems, testified that once the policy was issued, systems were in place which would ensure delivery of the policy to Russell. {Tr. Trans. Vol. 1 p. 51, 53, 62-63, 71; R. 138, 140, 149-50, 158}. Russell, on the other hand, testified that he did not recall ever receiving the policy back in 1999. Nevertheless, Russell paid the premiums for the 9 year period preceding the wreck

which led to these legal proceedings, knowing that an insurance policy existed. {Tr. Trans. Vol. 1 p. 76, Vol. 3 p. 21; R. 163, 419}.

In June 2002, Russell sought to increase the monthly disability benefit. {2002 Application, Penn Life Tr. Ex. 11; R. 688}. Russell met with Defendant Randolph Gill, an insurance agent, and completed an application seeking an additional monthly benefit of \$500 for his accident disability policy. {2002 Application, Penn Life Tr. Ex. 11; R. 688}. Penn Life accepted Russell's application and increased his total monthly benefit to \$2,500. {Policy Declaration Page; R. 604-05; 2002 Application, Penn Life Tr. Ex. 11; R. 688}. Neither party made any other changes to the terms or exclusions to the initial policy purchased in 1999. {Tr. Trans. Vol. 3 p. 60; R. 458}. At that time, Gill presented Russell with a receipt in conjunction with the increase in the monthly benefit. {Tr. Trans. Vol. 2 p. 73, Vol. 3 p. 38, 61; Insurance Receipt, Penn Life Tr. Ex. 12; R. 250, 436, 459; 699}. Russell admitted at trial that he received the receipt from Gill at that time. {Tr. Trans. Vol. 3 p. 56-57; R. 454-55}. Russell also acknowledged receiving the receipt in an affidavit. {Affidavit of Oct. 31, 2012, Penn Life Tr. Ex. 4; R. 629}. Russell admitted in that affidavit that Gill provided the receipt, and Russell attached that receipt as an exhibit to his affidavit. {Exhibit 2 to Affidavit of Oct. 31, 2012; R. 660; Penn Life Tr. Ex. 4; R. 629}. Moreover, the trial court found that "[Russell] acknowledged that he received the receipt from Mr. Gill." {Order ¶ 3 p. 2; R. 2}.

The receipt issued to Russell clearly and unambiguously gave notice of the exclusions contained in the policy. The top of the receipt form was titled: "Definitions, Exceptions and Limitations." {Insurance Receipt, Penn Life Tr. Ex. 12; R. 699}. The

receipt also contained a paragraph with the heading, in all capital typeface—“EXCEPTIONS AND LIMITATIONS.” {Insurance Receipt, Penn Life Tr. Ex. 12; R. 699}. That paragraph listed the exclusions contained in the policy and unequivocally advised Russell that “Your coverage does not cover loss . . . that results from any of the following: . . . being intoxicated.” {Insurance Receipt, Penn Life Tr. Ex. 12; R. 699}. Russell continued to pay his monthly premiums for the policy after receiving the receipt. {Tr. Trans. Vol. 3 p. 37; R. 435}.

On June 18, 2008, Russell crashed his motorcycle into the back of a parked car and sustained injuries to his left leg and hip. {Order ¶ 21 p. 7; R. 7}. Russell had left work early that day and headed home. {Order ¶ 17 p. 6; R. 6}. Russell then left his house to ride on his motorcycle. {Order ¶ 17 p. 6; R. 6}. After riding for a while, Russell decided to go to the Carolina Wings & Ribhouse restaurant located in West Columbia, South Carolina, where he consumed several alcoholic beverages. {Order ¶ 17 p. 6; R. 6}.

At trial, Russell admitted that he had several alcoholic drinks while at the restaurant. Russell recalled consuming between two and three Crown Royal drinks. Russell’s restaurant receipt indicated Russell purchased seven alcoholic beverages, including a beer, three Crown Royal drinks, a Southern Comfort, and two Yager<sup>3</sup> drinks. {Tr. Trans. p. Vol. 3 p. 76-77; R. 474-75}. The trial court acknowledged in its order that the evidence showed that “[Russell’s] blood alcohol level was more than double the statutory level to be charged with Driving Under the Influence.” {Order ¶

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<sup>3</sup> “Yager” is short for Jagermeister, a potent German liquor. See Jagermeister, Urban Dictionary, <http://www.urbandictionary.com/define.php?term=Jagermeister> (last visited Sept. 23, 2014).

23 p. 7; R. 7}. Specifically, evidence of test results presented at trial established that Russell's blood alcohol level was as high as 0.232. {Tr. Trans. Vol. 2 p. 12, Vol. 3 p. 196; R. 189, 594}.

After consuming the beverages, Russell departed the restaurant on his motorcycle to head home. {Order ¶ 18 p. 6; R. 6}. Russell chose to return home via Exit 15 on Interstate 26 eastbound towards Charleston because that was the closest exit to his home. {Order ¶ 18 p. 6; R. 6}. Russell was very familiar with Exit 15 because he had traveled it almost every day for many years to return home. {Tr. Trans. Vol. 3 p. 81; R. 479}. Russell further testified that there was nothing wrong with his motorcycle and that he was a very experienced motorcycle rider. {Tr. Trans. Vol. 3 p. 76-77; R. 474-75}.

Prior to Russell exiting on Exit 15, another motorist, Connie Collins, had stopped her vehicle in the grass along the left side of the exit ramp. The vehicle was 99% out of the roadway on Exit 15, and her car lights were still on. {Tr. Trans. Vol. 3 p. 103; R. 501; Order ¶ 20 p. 6; R. 6}. It was necessary for Ms. Collins to stop her vehicle so that she could retrieve a cell phone that had fallen near her brake and accelerator pedals. {Tr. Trans. Vol. 3 p. 170; R. 568}. As Russell drove down the ramp for Exit 15, he collided with Ms. Collins' vehicle. {Order ¶ 21 p. 7; R. 7}. Russell was thrown from his motorcycle and sustained injuries to his left leg and hip. {Order ¶ 21 p. 7; R. 7}. Russell was hospitalized for treatment. {Order ¶ 21 p. 7; R. 7}.

The South Carolina Highway Patrol investigated the wreck. The investigating officer observed at the scene that Ms. Collins' vehicle was parked almost entirely off

the exit ramp. {Tr. Trans. Vol. 3 p. 102-03; R. 500-01}. The officer testified that only a few inches of the right rear of Ms. Collins' vehicle were over the white line that delineates the left shoulder of the exit ramp and the main part of the roadway. {Tr. Trans. Vol. 3 p. 112-13; R. 510-11}. The officer concluded that Ms. Collins' vehicle was 99% out of the roadway. {Tr. Trans. Vol. 3 p. 103; R. 501}.

Notably, the officer testified that the position of Ms. Collins' vehicle would not have impeded any traffic traveling down the middle of the exit ramp and that there was ample room for a vehicle to pass safely, especially a motorcycle, which needs even less width of roadway. {Tr. Trans. Vol. 3 p. 104, 115; R. 502, 513}. The officer further stated that the collision occurred on the straight part of the exit ramp before it began to curve. {Tr. Trans. Vol. 3 p. 104; R. 502}. According to the investigating officer, Russell was at fault for the wreck because there was no reason that he could not have avoided Ms. Collins' vehicle as he proceeded down the exit ramp. {Tr. Trans. Vol. 3 p. 114, 118, 130; R. 512, 516, 528}.

The investigation of this wreck established that (1) Ms. Collins' vehicle lights were on at the time of the accident, (2) Ms. Collins' brake lights would have been on as well because she had not taken her foot off the brake when she stopped her vehicle, (3) there was no evidence that Russell had tried braking prior to the colliding with Ms. Collins' vehicle, (4) the investigating officer found no skid marks belonging to the motorcycle at the scene, (5) a short skid mark next to the back right tire of Ms. Collins' vehicle showed that it was fully stopped at the moment of impact, and (6) the force of impact evidenced by the damage to Ms. Collins' vehicle, and the fact that it was pushed forward by the impact, established that Russell made no significant effort to decelerate

prior to the collision. {Tr. Trans. Vol. 3 p. 102-04, 110-15, 170, 171, 178, 195; R. 500-02, 508-13, 568, 569, 576, 593}.

The investigating officer also observed Russell at the hospital. The officer noted that Russell had a strong odor of alcohol on him at the emergency room. {Tr. Trans. Vol. 3 p. 105; R. 503}. As a result of the investigation, the officer concluded that Russell had been driving under the influence at the time of the wreck. {Tr. Trans. Vol. 3 p. 105-06; R. 503-04}. Russell was issued a traffic ticket charging him with the violation. {Penn Life Tr. Ex. 7; R. 675}. The investigating officer concluded that Russell's driving under the influence was the primary contributing factor of the wreck. {Tr. Trans. Vol. 3 p. 118; R. 516}.

Two blood samples drawn from Russell following the motorcycle wreck established an elevated blood alcohol level. The hospital collected the first blood sample from Russell around 10:00 p.m. the night of the wreck as part of standard hospital procedure for the purpose of providing medical treatment. {Tr. Trans. Vol. 2 p. 11; R. 188}. The results of the laboratory testing of this sample showed that the Plaintiff's blood alcohol level was 0.232. {Penn Life Tr. Ex. Exh. 21 p. 114; R. 1022}. The Highway Patrol directed the collection of the second blood sample, which was collected from Russell at 12:05 a.m. on the night of the wreck (about two hours after the first sample was taken). {Id.; R. 1022}. The South Carolina Law Enforcement Division ("SLED") test results showed that Russell's blood alcohol level was 0.199. {Penn Life Tr. Ex. 23 p. 415; R. 1128}. At trial, Russell stipulated to the chain of custody for the blood sample collected by law enforcement and tested by SLED. {Tr. Trans. Vol. 3 p. 142; R. 540}.

Dr. William Richardson, a board certified toxicologist, and Dr. Wendy Bell, Lieutenant and chief toxicologist of the SLED drug analysis department, testified that the records reflect that the blood samples were correctly collected, processed, stored, and tested. {Tr. Trans. Vol. 3 p. 142-44; R. 540-42}. Each also testified that the methods and equipment used to test the samples are reliable and complied with all applicable scientific standards: {Tr. Trans. Vol. 2 p. 15, 19, Vol. 3 p. 144; R. 192, 196, 542}. Moreover, testimony showed that there was no evidence that Russell received any medical treatment or intervention that would have impacted his blood alcohol results or which would have caused those results to show an elevated level. {Tr. Trans. Vol. 3 p. 149; R. 547}. Dr. Bell confirmed that the only way that ethyl alcohol could have entered Russell's body on the night of the accident was through Russell's consumption of alcoholic beverages at the restaurant. {Tr. Trans. Vol. 3 p. 144, 149; R. 542, 547}.

Expert testimony further established that a person of Russell's physical characteristics (such as height, weight, and age) would have had to consume a minimum of seven to ten alcoholic beverages prior to the wreck to reach the blood alcohol levels reflected in the results of the testing conducted by the hospital and SLED. {Tr. Trans. Vol. 2 p. 14, Vol. 3 p. 144-45, 146; R. 191, 542-43, 544}. According to Dr. Richardson and Dr. Bell, the standard elimination or metabolization rate for a person consuming alcohol is approximately 20 milligrams/deciliter/hour. {Tr. Trans. Vol. 2 p. 17, Vol. 3 p. 147-48; R. 194, 545-46}. Both testified that it is not scientifically or medically possible for Russell to have achieved a blood alcohol level of

0.232 or 0.199 by consuming only three Crown Royal drinks over a period of hours, as he claimed.<sup>4</sup> {Tr. Trans. Vol. 2 p. 45, Vol. 3 p. 147-48; R. 222, 545-46}.

Relevant to the wreck, both Dr. Richardson and Dr. Bell testified to a reasonable degree of scientific and medical certainty that an individual with Russell's physical characteristics and blood alcohol level would have experienced significant cognitive impairment that would have negatively affected his ability to operate a motor vehicle. {Tr. Trans. Vol. 2 p. 23-24, Vol. 3 p. 151-52, 153-54; R. 200-01, 549-50, 551-52}. The cognitive impairment would come in several forms, some of which would include slowed reaction time, impaired judgment, and lack of ability to multitask. {Tr. Trans. Vol. 2 p. 24; R. 201}.

About two months after the wreck, Russell submitted a claim form to Penn Life requesting disability benefits under the policy. {Claim Form dated August 27, 2008, Penn Life Tr. Ex. 2; R. 624}. Penn Life relied on the representations of Russell and began payment of benefits to Russell. {Tr. Trans. Vol. 2 p. 99-100; R. 276-77}. In November 2009, Penn Life first learned about Russell's alcohol consumption on the day of the wreck while reviewing a medical record obtained through a follow up request to the treating hospital. {Tr. Trans. p. Vol. 2 p. 138, 159; R. 315, 336}. Russell had previously concealed the fact that alcohol was involved by providing to Penn Life an insurance form about the wreck that made no mention of the DUI charge

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<sup>4</sup> This standard elimination or metabolization rate further explains the difference in the blood alcohol levels measured by the Lexington Medical Center and SLED. {Tr. Trans. Vol. 2 p. 17, Vol. 3 p. 147-48; R. 194, 545-46}. Dr. Richardson and Dr. Bell testified that the different levels resulted from the fact that the blood samples were drawn at different times, and Russell's body eliminated or metabolized some of the alcohol in Russell's system between the times each sample was collected. {Id.; R. 194, 545-46}.

instead of providing the Highway Patrol incident report, which attributed the wreck to Russell's intoxication. {Tr. Trans. Vol. 2 p. 142, 157-58; R. 319, 334-35}.

After learning alcohol was involved, Penn Life issued a reservation of rights letter to Russell and informed him that it had commenced an investigation. {Reservation of Rights Letter, Penn Life Tr. Ex. 19; R. 983}. Russell initiated this action in response to that letter. {Complaint; R. 29}. Penn Life answered and asserted a counterclaim seeking to enforce the intoxication exclusion in Russell's policy. {Am. Answer & Counterclaim; R. 77}.

The matter proceeded to a bench trial before Judge Griffith. After ruling in favor of Penn Life on all of Russell's claims<sup>5</sup>, the trial court addressed the applicability of the intoxication exclusion. Russell claimed that the exclusion did not apply because there was insufficient evidence that Penn Life delivered the policy to him, and therefore, Penn Life could not enforce the exclusion pursuant to Section 38-71-30 of the South Carolina Code. {Tr. Trans. Vol. 1 p. 46-47; R. 133-34}. Thus, Russell was asking the trial court to enforce the policy by ordering that benefit payments continue while simultaneously arguing the exclusion did not apply because he did not receive the policy. {Id.; R. 133-34}.

Penn Life argued that the statute could not be used to render the exclusion unenforceable because (1) Section 38-71-30 does not address delivery of an insurance policy, but only addresses what should happen to the application, and (2) nothing in that

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<sup>5</sup> As to Russell's claims against Penn Life, the trial court ruled in favor of Penn Life as to all claims. {Order p. 9-10; R. at 9-10}. Russell did not appeal those rulings.

section provided for invalidating an exclusion due to failure to deliver the insurance policy. {Tr. Trans. Vol. 1 p. 47; R. 134; Motion to Alter or Amend; R. 2409}.

The trial court found that Penn Life issued the policy to Russell and that the policy contained an intoxication exclusion.<sup>6</sup> {Order ¶ 16 p. 6; R. 6}. Moreover, the trial court found that policy and exclusion were in place at the time of the wreck. {Id.; R. 6}. The trial court found:

[T]hat the records of the Defendant reflect that a policy was issued in response to the applications submitted by the Plaintiff and that such policy would have included an intoxication exclusion. The Court further finds that the specimen policy introduced as Defendant's Exhibit 1 accurately reflects the terms of the policy as they existed in the records of the Defendant at the time of the Plaintiff's wreck.

{Id.; R. 6}. Despite this finding, the trial court ruled that pursuant to Section 38-71-30, Penn Life could not enforce the intoxication exclusion because there was insufficient evidence to show Penn Life delivered the policy to Russell. {Order ¶ 39 p. 10; R. 10}. Penn Life filed a motion to alter or amend arguing that (1) Section 38-71-30 was irrelevant to this action because that section only addresses delivery of the application and not delivery of the policy, (2) that Section 38-71-30 does not provide any basis to allow a finding that failure to deliver a policy renders an exclusion unenforceable, (3) that Russell had notice of the exclusion via delivery of the policy receipt, and (4) that such a finding violates the public policy of South Carolina.

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<sup>6</sup> Trial testimony established that Penn Life would not issue a policy that did not include an intoxication exclusion. {Tr. Trans. Vol. 2 p. 84; R. 171}. Moreover, Russell could not have obtained a policy without an intoxication exclusion, even if he had wanted one. {Id.}. Penn Life simply would have not issued the policy to Russell in such a case. {Id.}.

{Motion to Alter or Amend; R. 2409}. The trial court denied the motion. {Order denying Penn Life's Motion to Alter or Amend; R. 13}. This appeal followed.

### ARGUMENT

**I. The trial court erred in ruling that Section 38-71-30 bars the enforceability of the intoxication exclusion.**

The trial court found that Penn Life could not enforce the intoxication exclusion in the policy because there was insufficient evidence that the policy had been delivered to the Russell.<sup>7</sup> {Order ¶ 39 p. 10; R. 10}. In making this ruling, the trial court relied exclusively on Section 38-71-30 of the South Carolina Code. This was error. The plain and unambiguous language of Section 38-71-30 obligates the Court to bar any defenses to the policy on account of anything contained in or omitted from the application, but it does not authorize the courts to re-write insurance policies or nullify exclusions. This Court should reverse the trial court's order because the perceived lack of evidence of delivery of the policy to Russell did not entitle the Court to render the intoxication exclusion unenforceable under the plain and unambiguous language of Section 38-71-30. Nothing in Section 38-71-30 allows an insured to selectively enforce the beneficial terms of an insurance policy while avoiding any unfavorable terms that might defeat coverage.

South Carolina law recognizes that intoxication exclusions are appropriate for inclusion in accident and health insurance policies. Section 38-71-370 allows insurers

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<sup>7</sup> Testimony from Jack Mackin established that Penn Life had procedures in place to ensure the delivery of policies issued by the company: Tr. Trans. Vol. 1 p. 51, 53, 62-63, 71; R. 138, 140, 149-50, 158}. Nevertheless, the trial court found there was insufficient evidence that delivery had occurred. This placed a difficult burden on Penn Life since the delivery of the original policy would have occurred in 1999, over 12 years prior to the trial.

to include intoxication exclusions in accident disability policies by using the statutory language or substantially similar language:

**INTOXICANTS AND NARCOTICS:** The company is not liable for any loss resulting from the insured being drunk or under the influence of any narcotic unless taken on the advice of a physician.

S.C. Code Ann. § 38-71-370. As the trial court correctly found, Russell's policy contained an intoxication exclusion in compliance with this statute.

Despite this finding, the trial court utilized Section 38-71-30 to find that Penn Life could not enforce the intoxication exclusion because, as Russell contended, Penn Life never delivered the policy to him. This was error. The 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.**

S.C. Code Ann. § 38-71-30 (emphasis added). This plain and unambiguous language establishes that the Legislature intended for this section 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. The section does not create penalties for the insurer's failure to deliver the policy itself. Moreover, Section 38-71-30 is silent as to the exclusions contained in the policy. No part of Section 38-71-30 suggests that nullifying key policy language is a potential consequence of non-delivery.

The cardinal rule of statutory interpretation is to determine the intent of the legislature above all else. Gordon v. Phillips Utils., Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005). “All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used . . . .” McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002); Ray Bell Constr. Co. v. School Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998). Moreover, “if a statute’s language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (internal quotes and citation omitted). Words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute’s operation. Id. Courts will reject an interpretation leading to an absurd result clearly unintended by the legislature. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). Further, it is beyond a court’s “power to effect a change in the statutes enacted by the Legislature.” State v. Corey D., 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000).

In finding that Section 38-71-30 required delivery of the policy to the insured, the trial court improperly ignored the plain language of the statute. In order to support the trial court’s interpretation of Section 38-71-30, this Court would have to focus exclusively on the “deliver with each policy of insurance” language and ignore the other language of the statute that qualifies that language. The Legislature limited the

scope of the statute by the language that follows the “deliver with each policy of insurance” language.

The statute limits its application to delivery of “a copy of the application” so that the application can be incorporated as part of the insurance policy. S.C. Code Ann. § 38-71-30 (defining its purpose “so that the whole contract appears in the application and policy of insurance”). Thus, the purpose of Section 38-71-30 is for the insurer to deliver the **application** to the insured. The following sentence bolsters that inescapable conclusion. . . . The Legislature imposed a penalty solely “on account of anything contained in or omitted **from the application.**” S.C. Code Ann. § 38-71-30. The courts of this State cannot ignore the inclusion of this unambiguous language in the statute.

Regardless of the scope of the statute, it is indisputable that the Legislature did not impose a penalty that would have any impact on the terms of the policy or the policy exclusions. Section 38-71-30 is silent as to exclusions contained in the policy. Thus, the plain and unambiguous language of Section 38-71-30 establishes one conclusion—the Legislature did not intend for that section to apply to delivery of the policy or to render policy exclusions unenforceable.

By focusing solely on the “deliver with each policy of insurance” language, the trial court effectively eliminated the remaining language drafted by the Legislature. Such a construction contravenes our well-settled rules of statutory construction. This Court should reverse that error.

Courts should seek a construction of a statute that gives meaning to every word of a statute rather than one that renders a portion meaningless. Hinton v. S. Carolina

Dep't of Prob., Parole & Pardon Servs., 357 S.C. 327, 342, 592 S.E.2d 335, 343 (Ct. App. 2004); 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”). “Every word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction.” Breeden v. TCW, Inc./Tennessee Exp., 355 S.C. 112, 120, 584 S.E.2d 379, 383 (2003). “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.” Davenport v. City of Rock Hill, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993). “A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.” CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011); Matter of Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citations omitted).

The placing of the “a copy of the application” language and penalty language for items “omitted from the application” immediately after the delivery language signifies the Legislature’s intent to modify, qualify, or limit the delivery language relied upon by the trial court. 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 the Legislature’s intent to limit the scope of Section 38-71-30 to delivery of the application.

When Section 38-71-30 is read as a whole, the conclusion is inescapable—the purpose of the statute is to incorporate the contents of the application into the contract

between the insurer and insured. The statute specifies the penalty for failure to comply, prohibiting an insurer from asserting a defense to the policy based on anything included or omitted from the application. Nowhere in the statute does it provide that an insurer loses the ability to rely on an exclusion contained in the policy if it is unable to provide sufficient evidence to demonstrate that it delivered the policy. The Legislature did not intend for that section to apply to delivery of the policy or to render policy exclusions unenforceable.<sup>8</sup> Thus, the trial court erred in using Section 38-71-30 to bar enforcement of the intoxication exclusion by Penn Life. This Court should reverse.

Other statutory construction maxims also support this conclusion. The doctrine of “expressio unius est exclusio alterius” or “inclusio est exclusio alterius” applies to this analysis and establishes that Section 38-71-30 does not require delivery of the policy to the insured. See, e.g., German Evangelical Lutheran Church of Charleston v. City of Charleston, 352 S.C. 600, 576 S.E.2d 150 (2003) (holding that the doctrine means that “to express or include one thing implies the exclusion of another”); Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) (same). Under that well-settled doctrine, the decision of the legislature to specifically **include** delivery of the **application** (and penalties for failure to do so) in the statute establishes that the

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<sup>8</sup> There is no statute or case law in South Carolina which allows a trial court to invalidate a policy exclusion based on a finding that delivery did not occur. 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.”). Here, the trial court found in Paragraph 16 of the Order that the policy issued in response to Russell’s application and reflected in the records of Penn Life contained an intoxication exclusion. South Carolina law required the trial court to enforce that exclusion. There is no law in South Carolina that would allow for the selective enforcement of policy provisions requiring benefit payments while at the same time allowing the Court to disregard exclusions or limitations. This is especially true where, as here, the exclusion is one specifically permitted by statute. See S.C. Code Ann. § 38-71-370(9) (Law. Co-op. 2002) (expressly authorizing inclusion of intoxication exclusion in accident disability policies).

Legislature intended to exclude delivery of the policy itself (and penalties for failure to do so) in Section 38-71-30 because such language was not specifically mentioned in the section. The trial court's reliance on Section 38-71-30 to bar enforcement of the intoxication exclusion was misplaced.

In conclusion, 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. This Court should reverse and hold that the intoxication exclusion contained in the policy is enforceable.

Even if Section 38-71-30 did address delivery of the policy, the trial court still erred in using that section to bar enforcement of the intoxication exclusion. 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. The Legislature did not provide any penalty for failure to deliver the policy. Moreover, even if delivery of the policy was required, the penalty would remain the same—Penn Life could not use Russell's application as a defense to his claim. As a result, the trial court's decision to bar Penn Life from enforcing the intoxication exclusion exceeded the scope of Section 38-71-30. This Court should reverse.

The trial court further erred in holding the intoxication exclusion unenforceable because Russell admitted receiving notice of the exclusion in 2002, some 6 years before the wreck. In June 2002, Russell sought to increase the monthly disability policy benefit. {2002 Application, Penn Life Tr. Ex. 11; R. 688}. Russell met with Defendant Randolph Gill, an insurance agent, and completed the application to request an additional monthly benefit of \$500 for his accident disability policy. {2002

Application, Penn Life Tr. Ex. 11; R. 688}. As a result, Russell's total monthly benefit increased to \$2,500. {2002 Application, Penn Life Tr. Ex. 11; R. 688}.

At that time, Gill presented Russell with a receipt in conjunction with the increase in the monthly benefit. {Tr. Trans. Vol. 2 p. 73, Vol. 3, p. 38, 61; Insurance Receipt, Penn Life Tr. Ex. 12; R. 250, 436, 459; 699}. Russell admitted that he received the receipt from Gill at that time. {Tr. Trans. Vol. 3 p. 61; R. 459}. Russell also acknowledged receiving the receipt in an affidavit. {Affidavit of Oct. 31, 2012, Penn Life Tr. Ex. 4; R. 629}. Russell admitted in that affidavit that Gill provided the receipt, and Russell attached that receipt as an exhibit to his affidavit. {Exhibit 2 to Affidavit of Oct. 31, 2012; R. 660; Penn Life Tr. Ex. 4; R. 629}. Moreover, the trial court found that "[Russell] acknowledged that he received the receipt from Mr. Gill." {Order ¶ 3 p. 2; R. 2}.

The receipt issued to Russell reiterated the exclusions contained in the policy. The top of the receipt form was titled: "Definitions, Exceptions and Limitations." {Insurance Receipt, Penn Life Tr. Ex. 12; R. 699}. The receipt also contained a paragraph with the heading, in all capital typeface—"EXCEPTIONS AND LIMITATIONS." {Insurance Receipt, Penn Life Tr. Ex. 12; R. 699}. That paragraph reiterated the exclusions contained in the policy and advised Russell that "Your coverage does not cover loss . . . that results from any of the following: . . . being intoxicated." {Insurance Receipt, Penn Life Tr. Ex. 12; R. 699}. Russell continued to pay his monthly premiums for the policy after receiving the receipt. {Tr. Trans. Vol. 3 p. 37; R. 435}.

Therefore, Penn Life delivered Russell notice of the intoxication exclusion in 2002. Russell admitted that he had received the receipt at that time. As a result, even if it were true that Penn Life failed to deliver the policy in 1999 and incredibly again failed to deliver the amended policy in 2002, Russell 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 situations like this 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.<sup>9</sup>

**II. This Court should hold that Russell was intoxicated at the time of the accident based on the fully developed record presented to the trial court by the parties.**

As a result of its erroneous ruling on the enforceability of the intoxication exclusion, the trial court declined to rule on the issue of Russell’s intoxication at the time of the wreck. This Court has the authority to rule on this issue. Judicial economy supports making this ruling on appeal.

The record developed at trial is sufficient to allow this Court to analyze and rule on the issue of Russell’s intoxication and the fact that it was a contributing cause of the wreck. Each party addressed this issue, presented evidence, and developed the record on this issue before the trial court. It would be judicially inefficient and unnecessary to remand this action to the trial court to enter judgment in favor of Penn Life. See, e.g., Riley v. Ford Motor Co., 408 S.C. 1, \_\_\_, 757 S.E.2d 422, 429 (Ct. App. 2014) (“Because we find the record is sufficient to allow this court to engage in the required analysis, we decide the question without remand”) (citing Church v. McGee, 391 S.C. 334, 342, 705 S.E.2d 481, 485 (Ct. App. 2011)); see also 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

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<sup>9</sup> Russell cannot claim any prejudice from the purported absence of delivery of the policy because he was on notice of the existence of the intoxication exclusion as disclosed in the receipt provided by the insurance agent. Moreover, there can be no prejudice because the excluded activity is illegal when combined with operating a motor vehicle, as was done by Russell. Thus, regardless of Russell’s knowledge of the exclusion, he should not have been driving after a significant consumption of alcohol. Without a showing of prejudice, Penn Life cannot be estopped from relying on the intoxication exclusion. Stringer v. State Farm Mut. Auto. Ins. Co., 386 S.C. 188, 687 S.E.2d 58 (Ct. App. 2009) (refusing to find estoppel against insurer where insured could not show prejudicial change of position).

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"); 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.").

As set forth fully in the Statement of Facts, the evidence introduced at trial established that Russell was intoxicated at the time of the wreck. Russell's restaurant receipt indicated Russell purchased seven alcoholic beverages, including a beer, three Crown Royal drinks, a Southern Comfort, and two Yager drinks. {Tr. Trans. Vol. 2

p. 15; R. 192}. His blood alcohol level of 0.232 was nearly three times the legal limit. {Penn Life Tr. Ex. 21 p. 114; R. 1022; Penn Life Tr. Ex. 23 p. 415; R. 1128}. Based on the testimony presented; the trial court recognized that “[Russell’s] blood alcohol level was more than double the statutory level to be charged with Driving Under the Influence.” {Order ¶ 23 p. 7; R. 7}. Therefore, this Court should hold that Russell was intoxicated at the time of the wreck.

Additionally; the only reasonable conclusion supported by the evidence is that Russell’s intoxicated condition was a contributing cause of the wreck, thereby implicating the intoxication exclusion. The investigating officer observed at the scene that Ms. Collins’ vehicle was parked almost entirely off the exit ramp. {Tr. Trans. Vol. 3 p. 102-03; R. 500-01}. Only a few inches of the right rear of Ms. Collins’ vehicle were over the white line that delineates the left shoulder of the exit ramp and the main part of the roadway. {Tr. Trans. Vol. 3 p. 112-13; R. 510-11}. The officer concluded that Ms. Collins’ vehicle was 99% out of the roadway. {Tr. Trans. Vol. 3 p. 103; R. 501}. Notably, the position of Ms. Collins’ vehicle would not have impeded any traffic traveling down the middle of the exit ramp, and there was ample room for a vehicle to pass safely, especially a motorcycle, which needs even less width of roadway. {Tr. Trans. Vol. 3 p. 104, 115; R. 502, 513}. As a result, the investigating officer concluded Russell was at fault for the wreck because there was no reason that he could not have avoided Ms. Collins’ vehicle as he proceeded down the exit ramp. {Tr. Trans. Vol. 3 p. 114, 118, 130; R. 512, 516, 528}. The investigating officer also concluded that Russell’s driving under the influence was the primary contributing factor of the wreck. {Tr. Trans. Vol. 3 p. 118; R. 516}. Therefore, the only reasonable

conclusion supported by the evidence is that Russell's intoxicated condition was a contributing cause of the wreck. Accordingly, this Court should enter judgment in favor of Penn Life.

**III. This Court should reverse the trial court because allowing Russell to recover disability insurance benefits for injuries that he received while driving drunk violates public policy.**

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 Court has recognized that “[o]ur statutory and case law reflect the compelling public policy that those who voluntarily become intoxicated must be held responsible for the consequences of their behavior.” Tobias v. Sports Club, Inc., 323 S.C. 345, 355, 474 S.E.2d 450, 456 (Ct. App. 1996). The Court further noted that:

In our view, a rule which allows an intoxicated individual to hold a tavern owner liable without regard to his own actions in continuing to consume alcohol promotes irresponsibility and rewards drunk driving. Given a choice between a rule that fosters individual responsibility and one that forsakes personal accountability, we opt for personal agency over dependency and embrace individual autonomy over paternalism.

Id. at 356, 474 S.E.2d at 456 (quoting Estate of Kelly v. Falin, 127 Wash.2d 31, 896 P.2d 1245, 1250 (1995) (en banc)); see also id. at 350 n.9, 474 S.E.2d at 452 n.9 (citing numerous jurisdictions that have “either judicially or legislatively denied relief to the intoxicated person himself”).

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.

### CONCLUSION

For these reasons, this Court should reverse the trial court's judgment and enter judgment in favor of Penn Life, finding that the intoxication exclusion applies in this case and that the evidence establishes that the wreck was a result of Russell's intoxication.

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January 20, 2015

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr.

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

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Mike Russell, ..... Respondent,

v.

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

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


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**CERTIFICATE OF COUNSEL**

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

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January ~~29~~, 2015

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

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

Mike Russell, ..... Respondent,  
v.  
Randolph Gill and Pennsylvania Life Insurance  
Company, ..... Defendants  
Of Which Pennsylvania Life Insurance Company is, ..... Appellant.

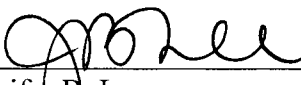
PROOF OF SERVICE

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):

Pleadings: **Appellant's Final Brief**

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January 20, 2015