RECEIVED
JAN 08 2016
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DARLINGTON COUNTY
PAUL M. BURCH, CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2015-000806

Ard Trucking Company ..... Respondent.

vs.

Travelers Property Casualty Company of America
d/b/a The Travelers Indemnity Company of Illinois, ...Appellant.

INITIAL BRIEF OF RESPONDENT

Driggers & Moyd
Martin S. Driggers, Sr.
Post Office Box 1439
Hartsville, SC 29551
Attorney for Respondent

Barnwell Whaley Patterson & Helms LLC
Phillip S. Ferderigos, Esquire
PO Drawer H
Charleston, SC 29401
843-577-7700
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. APPELLANT'S POLICY TERMS, WHICH CLEARLY AND UNAMBIGUOUSLY STATED LSRP WAS NOT APPLICABLE TO RESPONDENT'S POLICY, CANNOT BE UNILATERALLY *CHANGED*, *AMENDED* OR *REWRITTEN* .....

II. COURTS CANNOT REWRITE INSURANCE CONTRACTS TO SUIT ONE OF THE PARTIES; INSTEAD, COURTS MUST ENFORCE INSURANCE CONTRACTS ACCORDING TO THE PLAIN, ORDINARY AND POPULAR MEANING OF THEIR TERMS

III. RESPONDENT CONCURS WITH APPELLANT'S OBJECTION TO LOWER COURT'S PREJUDGMENT INTEREST CALCULATION

STATEMENT OF THE CASE

This case involves the interpretation of contractual terms contained in two assigned risk workers compensation insurance policies (an initial policy on 12/1/03 and a replacement policy on 3/1/04) issued by Appellant to Respondent. Appellant asked the Lower Court to rewrite the insurance policies it drafted and issued to Respondent by disregarding time honored insurance contract rules established by South Carolina's Courts which require insurance policies to "say what they mean and to mean what they say."

Appellant's effort to rewrite the two policies was rejected by the Lower Court, which awarded judgment in favor of Respondent in the sum of $52,116 for unearned premiums wrongfully retained by Appellant and prejudgement interest. The Lower Court's Order dated February 5, 2015 should be sustained by the Court of Appeals.

STATEMENT OF FACTS

In this appeal, Appellant seeks to impose upon Respondent an extraordinary premium surcharge requirement, known as the Loss Sensitive Rate Plan or LSRP, which, including interest, totals $264,901.72. (Appellant's Brief at Page 38.) This claim is made in spite of Appellant's own specific, clear and unambiguous

terms included in both of the policies issued to Respondent which state that LSRP did not apply to the policy Appellant issued to Respondent.

On November 1, 2003 and six (6) days prior to the effective date coverage began under the policies Appellant issued to Respondent, the South Carolina Department of Insurance (SCDOI) conditionally authorized Appellant, and other similar insurers, to add an LSRP premium surcharge to assigned risk insurance policies issued in South Carolina. However and importantly, SCDOI simultaneously issued a BASIC MANUAL of LSRP rules which required insurers qualifying to invoke LSRP to specifically include within their policies an LSRP Notification Endorsement that would "ensure" that all that South Carolina insureds to be affected by LSRP would have actual notice LSRP could be applied to their policies.

SCDOI's BASIC MANUAL of rules and mandatory LSRP requirements for insurance carriers authorized to invoke LSRP insurance provisions, stated, in part, as follows:

> D. Notice to Assigned Risk Policyholders.
>
> All assigned risk policies shall be endorsed with policy endorsement WC 00 04 17 - Assigned Risk Loss Sensitive Rating Plan (LSRP) Notification in order to ensure that all possible qualifying risks are notified of the intent and details of

the Plan. All assigned carriers shall be required to attach this endorsement to all assigned risk policies. (Emphasis supplied.)

On December 1, 2003, Appellant issued Respondent's initial insurance policy for one coverage year from November 6, 2003 through November 6, 2004. Included in Appellant's policy was a one page endorsement designated "WC 00 04 17" and captioned, **ASSIGNED RISK LOSS SENSITIVE RATING PLAN NOTIFICATION ENDORSEMENT** (LSRP Notification Endorsement). (See Respondent's Exhibit 1.)

The LSRP Notification Endorsement stated in part, "you may qualify to have the cost of your insurance subject to the assigned risk mandatory Loss Sensitive Rating Plan (LSRP)." Thereafter, the LSRP Notification Endorsement listed seven (7) qualifications for "eligibility" for LSRP to apply. Importantly, the LSRP Notification Endorsement ended with the following plain, clear, and unambiguous language:

This endorsement applies in the states listed in the schedule below:

SCHEDULE

STATE	**PREMIUM ELIGIBILITY**
Alabama	$200,000
Alaska	$200,000
Connecticut	$200,000
District of Columbia	$200,000
Georgia	$200,000
Idaho	$200,000

Illinois	$200,000
Indiana	$100,000
Kansas	$200,000
Nevada	$200,000
New Hampshire	$175,000
North Carolina	$200,000
South Dakota	$200,000

Therefore, the insurance policy Appellant issued to Respondent on December 1, 2003 failed to include Respondent's South Carolina insurance policy as being subject to LSRP application. Conversely stated, the clear and unequivocal language in the policy Appellant issued to Respondent affirmatively excluded LSRP from being applicable to the South Carolina insurance policy issued to Respondent.

Subsequently, Appellant issued and delivered a "replacement" policy to Respondent on March 1, 2004. The replacement policy contained the identical LSRP Notification Endorsement contained in the initial policy. Therefore, both policies issued by Appellant and delivered to Respondent contained the identical LSRP Notification Endorsement and both of them clearly, unequivocally and affirmatively omitted the application LSRP application from the South Carolina insurance policy Appellant issued to Respondent.

After the insurance coverage year ended on November 6, 2004, Respondent paid the "Final Premium Bill" to Appellant based on a Final Audit by Appellant's

CPA. However, Appellant refused to refund and release $52,116 which Respondent had pledged to Appellant under a May 2004 Letter of Credit to secure payment of any additional premiums due.[1]

Respondent sued Appellant to recover the funds pledged under the May 2004 Letter of Credit. Appellant counterclaimed, seeking additional extraordinary premiums from Appellant totaling $175,064 under the LSRP provisions it maintained were incorporated into the policies issued to Respondent "as a matter of law." While Appellant admits the exclusion of LSRP application under the Notification Endorsement Appellant included in Respondent's policies, Appellant nevertheless maintained that other documents that were not included in the polices operated to "amend," "supplant," and "revise" the policies. (See, e.g., Appellant's Brief at Page 23.)

In cross motions for summary judgment, Appellant requested the Lower Court to disregard the clear, specific and unequivocal language used in Appellant's policy's LSRP Notification Endorsement which excluded the application of LSRP from the South Carolina policy Appellant issued to

---

1. Appellant treated the $52,116 pledged by Respondent under the May 2004 letter of credit as a "return premium" debt owed to Plaintiff. This fact is reflected by a policy "change document" issued under Appellant's policy on July27, 2004. It is also noted here that there is no mention in this document regarding the application of the Loss Sensitive Rating Plan or LSRP to the policy issued. See, Appellant's Change Document WC 99 99 98 (00) issued 07-27-04 regarding the $52,116 Letter of Credit.

Respondent and requested the Lower Court to rewrite the policy to impose the application of LSRP upon Respondent's policy.

The Lower Court refused Appellant's request to rewrite the policies issued to Respondent and held, instead, that LSRP did not apply to the insurance contracts issued by Appellant to Respondent due the clear, unambiguous, unequivocal and affirmative language Appellant used in the LSRP Notification Endorsement. The Lower Court granted Respondent's request for the recovery of the unearned premiums held by Appellant under the May 2004 Letter of Credit, plus prejudgment interest. From the Lower Court's Order, Appellant has appealed.

ARGUMENT

I. APPELLANT'S POLICY TERMS, WHICH CLEARLY AND UNAMBIGUOUSLY STATED LSRP WAS NOT APPLICABLE TO RESPONDENT'S POLICY, CANNOT BE UNILATERALLY *CHANGED*, *AMENDED* OR *REWRITTEN* .....

As the Lower Court stated in its February 5, 2015 Order denying Appellant's request that the Lower Court to disregard the LSRP Notification Endorsement, "The die was cast by (Appellant) and this Court cannot rewrite (Appellant's) policy."

Appellant argued to the Lower Court, and continues to argue in this appeal, that Appellant is somehow immune from the consequences of its own policy language (through the LSRP Notification Endorsement incorporated into Appellant's policies) which specifically notified and informed Respondent that LSRP did not apply to Respondent. In spite of the LSRP exclusion Appellant itself issued to Respondent, Appellant arrogantly continues to argue that the LSRP Endorsement was, "as a matter of law," "amended," "supplanted," or "revised" by other documents not included in the two polices issued to Respondent.

Specifically, Appellant argues that (1) the LSRP Mandatory Endorsement included in the March 1, 2004 replacement policy issued to Respondent and (2) a Brochure delivered to Respondent which explained LSRP, somehow individually or combined to rewrite the unambiguous language contained in the LSRP Notification Endorsement incorporated into both policies issued to Respondent. The Lower Court properly rejected Appellant's arguments.

A. TERMS OF APPELLANT'S POLICY MAY NOT BE CHANGED OR WAIVED EXCEPT BY ENDORSEMENT ISSUED BY APPELLANT AS PART OF THIS POLICY

The two insurance policies issued by Appellant to Respondent contain a five-page form entitled WC 00 00 00 (A), which forms the core of Appellant's

assigned risk workers compensation insurance policies. Among other matters, this form explains responsibilities of the insured employer, exclusions from coverage and the way the premium is determined.

Importantly, Form WC 00 00 00 (A) of Appellant's insurance contract issued to Respondent contains "boilerplate" contractual principles, and effectively included the time tested contractual admonition: "The only contractual terms or agreements between the contracting parties are those terms set forth, included, and contained within the four corners of this contract."

The first policy provision of the WC 00 00 00 (A) form plainly states the contractual principles controlling "changes" under Appellant's policy:

> **WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY**
>
> In return for the payment of the premium and subject to all terms of this policy, we agree with you as follows:
>
> **GENERAL SECTION**
>
> **A. The Policy**
>
> This policy includes at its effective date the Information Page and all endorsements and schedules listed there. It is a contract of insurance between you (the employer named in Item 1 of the Information Page) and us (the insurer named on the Information Page). The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or

> waived except by endorsement issued by us to be part of this policy. (Emphasis supplied.)

Accordingly, Appellant's own policy terms state as follows:

1. Appellant's insurance policy is a contract between Appellant and Respondent.

2. The only agreements relating to the insurance contract are stated in the policy.

3. The terms of Appellant's insurance contract may not be "changed" or waived except by endorsement issued by Appellant and made a part of this policy.

Therefore, Appellant's policy language prohibits any "change" to the terms of the policy "except by endorsement issued by (Appellant) to be part of this policy."

The lynchpin proposition relied upon in Appellant's appeal maintains that Appellant's own clear and unequivocal terms contained in the LSRP Notification Endorsement - which excluded LSRP application from Respondent's South Carolina insurance policy - were somehow ("by operation of law") "changed" or, in Appellant's words, "amended/supplanted" (Appellant's Brief at Page 23, Line 6) and/or "revised and amended" (Appellant's Brief at Page 23, Line 12).

Appellant's novel lynchpin proposition is not only (1) contrary to common sense and (2) violates hardened South Carolina rules regarding insurance contracts

which hold contracting parities to their contractual terms, Appellant's proposition is (3) specifically prohibited by Appellant's own insurance contract provisions.

B. NO REMEDY "AS A MATTER OF LAW" WAS AVAILABLE TO CHANGE APPELLANT'S *ADMITTED* EXCLUSION OF LSRP FROM APPLYING TO RESPONDENT'S POLICY

As demonstrated on page 23 of Appellant's Brief, Appellant is forced to admit, because it cannot deny, that Appellant's own clear and unambiguous terms used in the LSRP Notification Endorsement, and which were incorporated into both of policies issued to Respondent, specifically state that LSRP is **not** applicable to Respondent's South Carolina policies.

However, through extraordinary convoluted reasoning, Appellant maintains it is somehow immune from its own clear and unambiguous terms and that the Courts should allow it to rewrite the terms in LSRP Notification Endorsement to completely reverse their meaning:

> Although the Notice Endorsement does not list South Carolina, the Mandatory Endorsement does apply to South Carolina and, most importantly, the SCDOI/NCCI/SCDOI has determined that the Mandatory Endorsement (along with the Brochure) amend/supplant to provide sufficient notice to (Respondent) that the LSRP applies to its South Carolina Assigned Risk policy. The WDIP requires (Appellant) to issue SCDOI/NCCI required Notice Endorsement it issued to (Respondent). After the initial audit survey,

> once the payroll triggers the LSRP (as in this present case), the WCIP requires (Appellant) to issue a SCDOI/NCCI required Mandatory Endorsement and Brochure. Pursuant to the WCIP, the Mandatory Endorsement (and Brochure) revises and amends the Notice Endorsement and the WCIP mandates that the Mandatory Endorsement (and Brochure) provides sufficient notice that the LSRP applies to (Respondent's) Assigned Risk policy. (Emphasis supplied. Appellant's Brief at Page 23, Lines 3 - 14.)

This ham-handed effort to rewrite ("amend," supplant," and/or "revise") Appellant's own clear and unambiguous language used to promulgate contract terms, is just a desperate attempt by Appellant to avoid the consequences of its own terms contained in its own insurance contract.

Appellant's novel proposition would require this Court to rewrite the insurance contract's terms so that they the contract would then have the exact opposite meaning from the existing plain, clear and unambiguous meaning. However, courts cannot rewrite insurance policies to suit the pleasure of one of the contracting parties. *See, USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) (Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning.)

1. APPELLANT'S "LSRP MANDATORY ENDORSEMENT" DID NOT *AMEND*, *CHANGE* OR *REWRITE* THE "LSRP NOTIFICATION ENDORSEMENT"

Appellant's argues that the LSRP Mandatory Endorsement Appellant (included in the policy issued to Respondent March 1, 2004) somehow displaced and overrode (in Appellant's terminology "amended," "supplanted" and/or "revised" or "amended/supplanted") the LSRP Notification Endorsement "as a matter of law." Ironically, the March 1, 2004 replacement policy wherein the LSRP Mandatory Endorsement first appeared, also contains the identical LSRP Notification Endorsement incorporated into the initial (12/1/03) policy issued Appellant to Respondent. Again, the same language appeared in the LSRP Notification Endorsement attached to both policies, which clearly and unequivocally declares that LSRP does not apply to Respondent's policy.

The Lower Court carefully reviewed all of the contractual provisions contained in both insurance policies issued to Respondent, including the LSRP Mandatory Endorsement in the replacement policy which Appellant maintains "revised and amended" or "amended/supplanted" the replacement policy to include the application of LSRP "as a matter of law." Following the Lower Court's analysis, the Lower Court determined that the LSRP Mandatory

Endorsement did not negate the clear and unequivocal language contained in the LSRP Notification Endorsement:

PERTINENT POLICY LANGUAGE EXAMINED

> Insurance policies typically contain declarations and provisions, and include endorsements applicable to specific situations and venues. The (Appellant's) policy initially had 11 endorsements and its replacement policy had 13 endorsements. Several endorsements included under the initial (12/1/03) policy and replacement (3/1/03) policy bear scrutiny in deciding whether the LSRP applied to the South Carolina policy issued to (Respondent).
>
> 1. Assigned Rick Endorsement
>
> Both the initial and replacement policies issued to (Respondent) contain an identical one-page Assigned Risk Adjustment Program endorsement (WC 00 06 15 (00)), informing Plaintiff that Defendant may add a "surcharge" to the premium for South Carolina policies. Without question, this endorsement applies to (Respondent's) South Carolina policy because the endorsement specifically lists South Carolina among the ten (10) states wherein this surcharge may by applied. The first paragraph of the "assigned risk" endorsement may be applied.
>
> The first paragraph of the Assigned Risk Endorsement states,
>
> > . . . The (assigned risk) program adds a surcharge to the premium of insureds who are eligible for an experience rating modification, are assigned risks, and meed

the other requirements of the program.
(Balance omitted.)

It is noted that the Assigned Risk Endorsement does not incorporate, explain, or even mention LSRP in any way. Accordingly, and not to be confused with the extraordinary premiums charged whenever LSRP is applicable, the Assigned Risk Endorsement clearly and unequivocally notifies and informs Plaintiff that (1) a surcharge may be applied to Plaintiff's premium under the Assigned Risk Adjustment Program and, importantly, (2) the assigned risk surcharge addressed in the Assigned Risk Endorsement is applicable to South Carolina insureds, which included (Respondent).

2. A/R Loss Sensitive Rating Plan Notification Endorsement

(Appellant's) in initial and replacement policies both contained an extremely important endorsement entitled the Assigned Risk Loss Sensitive Rating Plan Notification Endorsement (WC 00 06 17 (00)), hereafter LSRP Notification Endorsement. An LSRP Notification Endorsement containing the identical language was attached to the initial and replacement policies South Carolina policies issued to (Respondent). These identical LSRP Notification Endorsements clearly and unequivocally declared that LSRP was applicable to policies issued in South Carolina. Specifically, both endorsements stated as follows:

This endorsement applies in the states listed in the schedule below:

SCHEDULE

STATE	**PREMIUM ELIGIBILITY**
Alabama	$200,000
Alaska	$200,000

Connecticut	$200,000
District of Columbia	$200,000
Georgia	$200,000
Idaho	$200,000
Illinois	$200,000
Indiana	$100,000
Kansas	$200,000
Nevada	$200,000
New Hampshire	$175,000
North Carolina	$200,000
South Dakota	$200,000

Stated differently, the LSRP Notification Endorsement incorporated by (Appellant) into the two South Carolina policies issued to (Respondent) expressly negated the application of LSRP to the policies. (Appellant's) own clear and unambiguous language excluded both of the policies issued in South Carolina from any LSRP application. Therefore, LSRP provisions did not apply to the South Carolina policy issued by (Appellant) to (Respondent).

(Appellant) could easily have clearly and unequivocally applied LSRP provisions to the two South Carolina policies issued to (Respondent), just as (Appellant) clearly and unequivocally applied the Assigned Risk Endorsement to (Respondent's) South Carolina policy. However, (Appellant) failed to include, and therefore clearly excluded, LSRP application from (Respondent's) South Carolina policy.

Instead of notifying and informing (Respondent) that LSRP and extraordinary LSRP premiums applied to (Appellant's) the South Carolina policy, (Appellant) own plain, ordinary, and unequivocal language declared that LSRP provisions did not apply in South Carolina and, therefore, did not apply to (Respondent's) South

Carolina policy. The die was cast by (Appellant) and this Court cannot rewrite (Appellant's) policy.

3. Mandatory Assigned Risk Loss Sensitive Rating Plan Endorsement

Other than the (Appellant's) LSRP Notification Endorsement which excluded LSRP application under the South Carolina initial and replacement policies issued to (Respondent), the only other endorsement related to LSRP contained in the policy was the Mandatory Assigned Risk Loss Sensitive Rating Plan Endorsement (MARLSRP Endorsement) (WC 00 06 18 (00)). It is noted that this endorsement was not included in the initial (12/1/03) policy, but only included in the replacement (3/1/05) policy. The purpose of the MARLSRP Endorsement is to explain how LSRP extraordinary premiums, if and when applicable, were to be computed.

While the MARLSRP Endorsement states, "This endorsement applies where the LSRP has been approved," nowhere in th endorsement does it specifically state LSRP was ever approved in the state of South Carolina. As already noted, the LSRP Notification Endorsement discussed above and which was included in both the initial and replacement policies (Appellant) delivered to (Respondent), clearly and unequivocally declares that LSRP does not apply in South Carolina.

4. Other Policy References to LSRP

Except for (1) the LSRP Notification Endorsement (contained in both policies) which clearly and unequivocally exclude (Respondent's) South Carolina policy from LSRP application, and (2) the MARLSRP

> Endorsement (only contained in the March 1, 2004 policy) which simply explained how LSRP premiums, if applicable, are to be determined, there were no other endorsements or provisions under (Appellant's) initial or replacement policy which address the application of LSRP. All told, there are only two other references to LSRP anywhere else in the replacement policy, both of which appear on the two page "Extension of Info Page Schedule." However, such scant and unexplained use of LSRP terminology ("Loss Sensitive Rating Plans" is used on one page and "LSRP" is used on another page) falls far short of overcoming (Appellant's) own clear and unambiguous exclusion of LSRP from having any application to the South Carolina replacement policy issued to (Respondent), which exclusion is contained in (Appellant's) own LSRP Notification Endorsement.

Following the Lower Court's thorough review and analysis of Appellant's insurance policy provisions, the Lower Court rejected Appellant's proposition that Appellant's LSRP Mandatory Endorsement had altered ("revised and amended" or "amended/supplanted") the clear and unequivocal language Appellant used in the LSRP Notification Endorsement.

2. APPELLANT'S LSRP "BROCHURE" DID NOT *AMEND*, *CHANGE* OR *REWRITE* THE "LSRP NOTIFICATION ENDORSEMENT"

Appellant's proposition that the delivery to Respondent of a Brochure explaining LSRP also somehow rewrote ("revised and amended" or "amended/supplanted") the LSRP Notification Endorsement is without merit. As

stated in affidavits of Respondent's President Allen Ard and Respondent's Safety Director Harry Brown, Respondent did not believe LSRP applied to the policies issued by Appellant to Respondent. Moreover, the language in the Brochure did not inform Respondent that LSRP applied to the insurance policies issued to Respondent by Appellant. Again, the policies themselves stated that LSRP did apply to Respondent's policies.

Respondent's Safety Director Brown's affidavit states, in part, as follows:

> 6. I have carefully reviewed the original (of Appellant's) policy issued on December 1, 2003, as well as (Appellant's) replacement policy issued on March 1, 2004. Neither of these policies includes LSRP provisions which would have applied to (Respondent). In fact, the LSRP coverage endorsement under both of these policies specifically omits South Carolina from the list of states where LSRP provisions were applicable.
>
> 7. During my deposition on April 26, 2014, I was informed that after (Appellant) insured (Respondent) in November of 2003, (Appellant) mailed (Respondent) a brochure entitled "Loss Sensitive Rating Plan." I cannot recall receiving and reviewing this document, however, I have no reason to doubt that (Appellant) sent it (Respondent). This document would have been forwarded to me, (Respondent's) Safety Director to review. In looking over the brochure during my deposition, the brochure appears to have been intended to explain how the LSRP provisions operate whenever a policy includes LSRP requirements. However, since the original and replacement (of Appellant's) insurance policies on file in the (Respondent's) Safety Department

> excluded South Carolina from compliance with LSRP. As a result, the brochure regarding LSRP was not applicable to (Respondent) and I would have discarded it as being inapplicable to (Respondent) and, therefore, unnecessary to review or maintain.

The fact that an LSRP Brochure was delivered to Respondent did not alter and amend the terms of the LSRP Notification Endorsement Appellant incorporated into the two policies issued to Respondent. The LSRP Notification Endorsement, contained in both policies, clearly and unequivocally notified and informed Respondent that LSRP did not apply to the South Carolina policies issued by Appellant to Respondent.

Finally, the Brochure relied upon by Appellant as altering or rewriting the LSRP Notification Endorsement "as a matter of law," states on page 3 that LSRP was not yet implemented in South Carolina:

> **Implementation**
> We have proposed that in your state, the LSRP be implemented six months from the effective date of regulatory approval. This six month's advance notice is intended to give you time to seek coverage in the voluntary market. *(Note: The implementation may vary by state.)* Upon approval, all LSRP-eligible accounts currently in the residual market, their producers or brokers and current assigned carriers will be advised of the approval and implementation dates, as well as the LSRP parameters.

Appellant's Brochure, was not part of either of the two policies Appellant issued to Respondent and could not have altered, "revised," "amended," or "supplanted" Appellant's LSRP Notification Endorsement included in both polices and which clearly and unequivocally excluded Respondent's South Carolina policies from LSRP application.

II. COURTS MUST ENFORCE INSURANCE CONTRACTS ACCORDING TO THE PLAIN, ORDINARY AND POPULAR MEANING OF THEIR TERMS AND CANNOT REWRITE INSURANCE CONTRACTS TO SUIT ONE OF THE PARTIES

Plainly put, Appellant's bold request to rewrite the policies issued to Respondent is the only hope Appellant has to overcome the consequences of its own insurance policy provisions. However, doing this would defile, distort and ignore centuries of contract rules of law, which would create disorder, disruption and chaos.

This Court should deny Appellant's request and, instead, require Appellant to comply with established and controlling rules of insurance contract law. Under South Carolina law, both the insurer and the insured, as parties to the insurance contract, are bound by the clear, specific and unequivocal terms of the insurance policy's unequivocal provisions and terms.

The following is but one of legions of cases citing and applying long

standing rules of law that bind contracting parties to the plain, specific, unequivocal language of insurance contracts, and is taken from the recent case of *Auto-Owners Insurance Company v. Benjamin*, Op. No. 5367 (S.C. Ct. App. filed December 9, 2015) (Shearouse Adv. Sh. No. 48 at 36):

> "Insurance policies are subject to the general rules of contract construction." Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012) (quoting M & M Corp. of S.C. v. Auto-Owners Ins. Co., 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010)). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." Id. (quoting McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." Id. (quoting USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008)).
>
> "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." Whitlock, 399 S.C. at 615, 732 S.E.2d at 628 (quoting McGill, 381 S.C. at 185, 672 S.E.2d at 574). Whether the language of a contract is ambiguous is a question of law for the court. Id. "An insurance contract is read as a whole document so that 'one may not, by pointing out a single sentence or clause, create an ambiguity.'" Beaufort Cty. Sch. Dist. v. United Nat'l Ins. Co., 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011) (quoting Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976)). However, this court must construe "[a]mbiguous or conflicting terms in an insurance policy . . . liberally in favor of the insured and strictly against the insurer."

> Whitlock, 399 S.C. at 615, 732 S.E.2d at 628 (quoting Clegg, 377 S.C. at 655, 661 S.E.2d at 797). "Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." Owners Ins. Co. v. Clayton, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005).

The Lower Court's February 5, 2015 Order applied South Carolina law to the terms of Appellant's policies issued to Respondent. In the :Lower Court's Order, the Lower Court conducted a thorough analysis of the law relied upon in *Georgetown Steel Company v. Capital City Insurance Company,* 318 B.R. 313 (U.S.B.C. (D.S.C.) 2004). (*Georgetown Steel* is also addressed in Appellant's Brief at Page 35.)

Georgetown Steel involved facts quite similar to the facts in this case; however, significant factual differences are noted in the Lower Court's order. In particular, the language contained in the LSRP provisions used by the insurer in *Georgetown Steel* are significantly different from the language Appellant used in the LSRP provisions Appellant incorporated into the two policies issued to Respondent.

As the Lower Court noted, the bankruptcy court in *Georgetown Steel* resolved the issues facing it by applying the South Carolina law of contracts.

The Lower Court's analysis of *Georgetown Steel* follows:

GEORGETOWN STEEL SUPPORTS (APPELLANT'S) CLAIM

(Appellant) urges the Court to accept the proposition that LSRP was *automatically* included in the policy it issued to (Respondent) *as a matter of law*. However, acceptance of (Appellant's) proposition requires the Court to disregard (Appellant's) clear and unambiguous exclusion, under its LSRP Notification Endorsement, of South Carolina from list of states wherein LSRP applies. Moreover, by accepting (Appellant's) proposition, this Court would have to ignore established rules of contract law that should control.

In *Georgetown Steel*, the bankruptcy court held that the parties to a contract are bound by the clear and unambiguous terms in the contract. The facts in *Georgetown Steel* are similar in many respects to the facts before the Court now. Importantly, however, the language used by the insurer in *Georgetown Steel* was radically different from the language used in the policy language adopted for use by the (Appellant) herein.

The debtor in *Georgetown Steel* was insured under an assigned risk workers compensation insurance policy. The debtor sought to negate the application of the LSRP provisions within the insurer's policy issued to the debtor so that the debtor could recover substantial funds the insurer was holding to cover LSRP premiums owed to the insurer by the debtor. The critical question in *Georgetown Steel* was whether LSRP provisions contained under the debtor's assigned risk insurance policies were valid or not. After applying the law of contracts to the facts, the bankruptcy court in *Georgetown Steel* held that LSRP clearly applied to the debtor's insurance policy.

Before undertaking its analysis of the contact provisions, the *Georgetown Steel* bankruptcy court stated the controlling principles of contract law:

> General rules of contract instruction pursuant to South Carolina law apply. The intent of the parties is to be primarily considered, which can be ascertained from the language of the Policies. Schulmeyer v. State Farm Fire and Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003); *Goldston v. State Farm Mut. Auto. Ins. Co.,* 358 S.C. 157, 169–70, 594 S.E.2d 511, 518 (Ct.App.2004). If the language is clear and unambiguous, the language alone is controlling. *Schulmeyer,* 353 .C. at 495, 579 S.E.2d at 134. If capable of two reasonable interpretations, that construction which is most favorable to the insured will be adopted. *Hansen v. USAA,* 350 S.C. 62, 68, 565 S.E.2d 114, 117 (Ct.App.2002) (citation omitted).

After applying the law to the debtor's policy, the bankruptcy court concluded that the insurer "specifically and unambiguously notified the policyholder that LSRP had been adopted in South Carolina and states that "the plan will be adjusted based upon the losses incurred." In reaching this conclusion, the bankruptcy court was compelled by the clear and unequivocal language contained in the insurers' two separate LSRP Notification Endorsements which specifically notified and informed the insured debtor that the LSRP provisions were specifically applicable under the debtor's South Carolina policy:

Perhaps the most telling portion of the Policies with respect to the application of an LSRP is the Endorsements included in the Policies. The Policies contain an Assigned Risk Loss Sensitive Rating Plan Notification Endorsement and an Assigned Risk Loss Sensitive Rating Plan Notification Endorsement (the "Endorsements"). The Endorsements provide as follows:

> This plan will adjust your premium for this insurance based upon the losses incurred during the period covered by this insurance.

The Endorsements further specifically state that:

> Your insurance is written under the South Carolina Workers Compensation Assigned Risk Plan that has adopted the Loss Sensitive Rating Plan (LSRP).

The Endorsements further set forth the LSRP Premium elements, the formula for calculation of the LSRP Premium, and when calculations and payments related to the LSRP Premium must be made. Accordingly, the Policies, including the Endorsements, unambiguously provide that an LSRP applies in South Carolina and should have put Debtor on notice as to the

further adjustment of premium.
(Emphasis supplied.)

In sum, the insurer in *Georgetown Steel* specifically and explicitly notified and informed the debtor under the LSRP Notification Endorsement (WC 00 06 17 (00)), which was incorporated into to the two South Carolina policies issued to the debtor, that LSRP applied to the debtor's South Carolina policy:

> Your insurance is written under the South Carolina Workers Compensation\Assigned Risk Plan that has adopted the Loss Sensitive Rating Plan (LSRP).

However, no such language exists within the two policies that (Appellant) issued to (Respondent) herein. Instead, (Appellant) plainly and unambiguously provided under the LSRP Notification Endorsement it included in both the initial and replacement policies issued to (Respondent) that a specific list of the states wherein LSRP had been adopted and applied. Clearly and unambiguously, South Carolina was excluded from the list. The only reasonable interpretation of (Appellant's) own clear and unambiguous language used in the LSRP Notification Endorsement is that LSRP did not apply to either of the two policies (Appellant) issued to (Respondent).

III. RESPONDENT CONCURS WITH APPELLANT'S OBJECTION TO LOWER COURT'S PREJUDGMENT INTEREST CALCULATION

Appellant Brief indicates the Lower Court erred in computing the prejudgment interest due Respondent. Specifically, Appellant maintains that since

the Letter of Credit funds were not drafted by Appellant until September 8, 2005, the statutory interest of 8.75% on the sum due to Respondent did not begin to run until September 8, 2005, therefore, the accrued interest should have been "$42,941.40, not $51,728.74, as set forth in the judge's Order."

Respondent consents to an appropriate modification of the Lower Court's Order to reflect the proper interest due to Respondent. Moreover, this error was caused by Respondent's counsel, not the Lower Court. At an appropriate time, Respondent will request and or consent to, the amendment of the February 5, 2015 Order.

CONCLUSION

Insurance policies cannot be unilaterally rewritten to suit the pleasure of one of the parties. As an insurer operating in South Carolina, Appellant was bound to follow the mandates of SCDOI. SCDOI specifically required insurers authorized to apply LSRP to their policies to provide specific notification in policies issued to insured parities that the insurer intended to apply LSRP to their policy premiums. This notification mandate had preeminent importance to SCDOI and anything less was insufficient.

However, the LSRP Notification Endorsement Appellant placed in both the initial (12/1/03) policy and replacement (3/1/04) policy issued to Respondent

clearly and unequivocally excluded Respondent's South Carolina two policies from LSRP application. The Lower Court properly concluded:

> (Appellant) could easily have clearly and unequivocally applied LSRP provisions to the two South Carolina policies issued to (Respondent), just as (Appellant) clearly and unequivocally applied the Assigned Risk Endorsement to (Respondent's) South Carolina policy. However, (Appellant) failed to include, and therefore clearly excluded, LSRP application from (Respondent's) South Carolina policy. (Lower Court Order dated February 5, 2015 at page 6.)

And:

> The only reasonable interpretation of (Appellant's) own clear and unambiguous language used in the LSRP Notification Endorsement is that LSRP did not apply to either of the two policies (Appellant) issued to (Respondent)." (Lower Court Order dated February 5, 2015 at page 11.)

Appellant's appeal seeks this Court's permission to rewrite the policies in question. This would be and contrary to established rules of law. If Courts invade this sacred providence and permit Appellant to disregard its own plain and unequivocal language, parties to insurance contracts would not longer be able to rely on plain, specific, clear and unequivocal language. Instead, contracting parties would be required to go far beyond the four corners of the contract in order to fully comprehend their contractual rights. This result would not only be ludicrous and nonsensical, by disruptive and chaotic.

Appellant's Brief points to South Carolina law requiring an insured party to read and be bound by the terms of their insurance policies. (Appellant's Brief at Page 19.) Clearly this principle of law is a sword with two edges. Insurers, who promulgate the terms of their insurance policies likewise have a duty read their own policies and are also bound by their terms.

The Lower Court properly refused Appellant's request to anywise rewrite, amend, supplant, or revise the plain and unambiguous terms Appellant itself used. Respondent respectfully submits that the Lower Court's February 5, 2015 Order should be sustained except as to an appropriate modification of prejudgement interest contained in the Lower Court's judgment and consented to by Respondent.

Respectfully submitted,
Driggers & Moyd, LLC

By: _____
Martin S. Driggers, Sr.
323 West Home Avenue
P.O. Box 1439
Hartsville, SC 29551
843-332-5151
Counsel for Respondent

January 6, 2016
Hartsville, South Carolina

RESPONDENT'S EXHIBIT #1

Travelers

WORKERS COMPENSATION
AND
EMPLOYERS LIABILITY POLICY
ENDORSEMENT WC 00 04 67 (03)

POLICY NUMBER: [illegible]

ASSIGNED RISK LOSS SENSITIVE RATING PLAN NOTIFICATION ENDORSEMENT

This endorsement is issued because you may qualify to have the cost of your insurance subject to the assigned risk standard Loss Sensitive Rating Plan (LSRP).

Eligibility:

1. Your insurance is written under Workers Compensation Insurance Plan (WCIP) in a state which has adopted the Loss Sensitive Rating Plan (LSRP).
2. The LSRP shall apply to an individual assigned risk policy if the total annual estimated Standard Premium as preliminary physical audit premium equals or exceeds the amount listed in the schedule.
3. A decrease in premium during the first 120 days of coverage which results in the premium falling below the LSRP premium eligibility threshold, shall result in the conversion of the policy to a guaranteed cost policy, retroactive to policy inception.
4. An increase in premium during the first 120 days of coverage which qualifies as employer for the LSRP shall result in the retroactive application of the LSRP to policy inception.
5. After the first 120 days of the coverage term, if it is determined that an employer qualifies for LSRP, the policy shall not be changed until renewal.
6. Notwithstanding anything above to the contrary, any attempt to avoid the application of the LSRP arising from a misrepresentation or omission by you, your agent, employees, officers or directors shall result in the retroactive application of LSRP from the date upon which it would have applied had such misrepresentation or omission not been made.
7. The LSRP will apply on an Intrastate basis when the estimated aggregate Total of all states having approved LSRP's annual standard premium meets the premium eligibility requirement for the LSRP state generating the largest premium.

   This plan will adjust your premium for this insurance based upon the losses incurred during the period covered by this insurance.

   This endorsement applies in the states listed in the schedule below.

SCHEDULE

STATE	PREMIUM ELIGIBILITY
Alabama	$250,000
Alaska	$250,000
Connecticut	$350,000
District of Columbia	$250,000
Georgia	$250,000
Idaho	$250,000
Illinois	$250,000
Indiana	$100,000
Kansas	$250,000
Kentucky	$250,000
New Hampshire	$175,000
North Carolina	$250,000
South Dakota	$250,000

DATE OF ISSUE: 12-01-03 SIGNATURE: [illegible] (Rev. 03-00)

CERTIFICATE OF COMPLIANCE

This Brief of Respondent has been prepared using:

WordPerfect X6 (2012)

Times New Roman

14 Point Type

Exclusive of the Table of Contents, Table Authorities, the Certificate of Filing and Service, and this Certificate of Compliance, this Brief contains, 5,885 words.

I understand that a material misrepresentation can result in the Court's striking the Brief and imposing sanctions. If the Court so directs, I will provide and electronic version of the Brief and/or a copy of the word or line print-out.

By: Counsel for Respondent
Martin S. Driggers, Sr.
Driggers and Moyd
PO Box 1439
Hartsville, SC 29551
(843) 332-5151

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 6 day of January, 2016, I filed with the Clerk's Office of the South Carolina Court of Appeals, via U.S. Mail, the required number of copies of this Initial Brief of Respondent and further certify the I served the required number of copies of the Initial Brief of Respondent on other counsel of record via U. S. Mail with sufficient postage, properly addressed as follows:

Phillip Ferderigos
Barnwell Whaley Patterson & Helms LLC
P. O. Drawer H
Charleston, SC 29402

Counsel for Appellant

January 6, 2016 By: _____

Martin S. Driggers, Sr.
Driggers and Moyd
PO Box 1439
Hartsville, SC 29551

Counsel for Respondent

DRIGGERS & MOYD

ATTORNEYS AND COUNSELORS AT LAW

323 WEST HOME AVENUE
POST OFFICE BOX 1439
HARTSVILLE, SOUTH CAROLINA 29551

dmlawfirm@dmlawfirm.net

MARTIN S. DRIGGERS, SR.
DAVID H. MOYD

TELEPHONE
843-332-5151
FACSIMILE
843-383-6150

January 6, 2016

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: Ard Trucking Company, Respondent
vs.
Travelers Property Casualty Company of America d/b/a The Travelers Indemnity Company of Illinois, Appellant
Appellate Court Case: 2015-000806

Dear Ms. Kitchings:

Please find enclosed the original and three (3) copies of the Initial Brief of the Respondent and the Respondent's Designation of Matter to be Included in the Record on Appeal. Please file the originals and two (2) copies of each and return one (1) clocked copy to me in the envelope provided herein.

Thank you for your assistance in this matter.

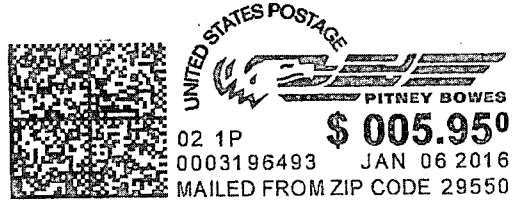
Sincerely,

Martin S. Driggers, Sr.

MSD/dy

cc: Phillip Federigos
Barnwell Whaley Patterson & Helms
PO Drawer H
Charleston, SC 29402

DRIGGERS & MOYD
ATTORNEYS AND COUNSELORS AT LAW
323 WEST HOME AVENUE
P.O. BOX 1439
HARTSVILLE, SOUTH CAROLINA 29551



The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211