

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  
Opinion No. 2016-UP-177

**RECEIVED**  
JUN 29 2016  
SC SUPREME COURT

Mike Russell, .....Petitioner,

v.

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

Of Which Pennsylvania Life Insurance Company,.....Respondent.

**PETITION FOR CERTIORARI**

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## **INTRODUCTION**

Pursuant to Rule 242, SCACR, Petitioner Mike Russell (“Petitioner”) petitions this Court to issue a Writ of Certiorari to the Court of Appeals to review the Court’s rulings in *Mike Russell v. Randolph Gill and Pennsylvania Life Insurance Company*, Appellate Case No. 2014-000671, Opinion No. 2016-UP-177, filed on April 13, 2016, and withdrawn, substituted and refiled on June 1, 2016. Petitioner asserts that this matter involves novel questions of law and that the Court of Appeal’s decision is in conflict with South Carolina Statutory Law as well as with prior decisions of this Court. The grounds for this Petition are discussed below.

### **RULE 242 (D)(1), SCACR CERTIFICATION**

Counsel for Petitioner certifies that a Petition for Rehearing was made to the Court of Appeals on April 28, 2016, and denied by the Court on June 1, 2016.

### **QUESTIONS PRESENTED FOR REVIEW**

- I. Did the Court of Appeals err in reversing Judge Griffith’s Order that Penn Life could not enforce the intoxication exclusion contained in the Policy purchased by the Petitioner?

### **CONCISE STATEMENT OF THE CASE**

This is an appeal from the Order of the Honorable Eugene Griffith entered on or about June 7, 2013, after a four day bench trial in the Lexington County Court of Common Pleas. (Order of the Honorable Eugene Griffith, dated June 7, 2013; R. pp. 1-10; 88, 178, 399). After consideration of the testimony presented before him and after reviewing the exhibits introduced at trial, Judge Griffith found and ruled that Respondent Penn Life Insurance Company (“Penn Life”) offered no proof that it provided Petitioner Mike Russell with a copy of the disability policy sold to him and was therefore not entitled to enforce

the intoxication exclusion contained in the policy in order to defeat coverage. (R. p. 10).

Petitioner initiated this action against Respondent Penn Life and Randolph Gill on or about February 10, 2010, in the Charleston County Court of Common Pleas. (R. p. 29). (Mr. Gill was dismissed from this lawsuit prior to trial). Petitioner's Complaint alleged causes of action against Appellant including bad faith refusal to pay benefits; breach of contract to procure insurance; and breach of insurance contract. (R. pp. 29-34). Respondent removed this case to Federal Court and subsequently answered Mike Russell's Complaint. (R. pp. 36, 53). Pennsylvania Life Insurance Company also asserted a counterclaim against Respondent for declaratory judgment, seeking to enforce an intoxication exclusion allegedly contained in the insurance policy. (R. pp. 10, 63-70; 77-87). On or about October 1, 2010, the case was remanded to State Court on the grounds that the then Defendant Gill was a South Carolina native. (R. pp. 15-25).

Venue in the case was ultimately transferred to Lexington County (R. pp. 1-2). The matter was tried before Judge Griffith on December 13-14 and 20-21, 2012. On June 7, 2013, Judge Griffith issued his Order. (R. pp. 1-10). Pennsylvania Life Insurance Company timely filed a Motion for Reconsideration which was argued before Judge Griffith on October 15, 2013. (R. pp. 2414-2416). On or about March 5, 2014, Judge Griffith issued his Order denying the Motion for Reconsideration. (R. p. 13). This appeal followed.

On April 13, 2016, the Court of Appeals filed its Opinion reversing the Trial Court's Order. The Petitioner timely filed a Petition for Rehearing. On June 1, 2016, the Court of Appeals issued its Order denying the Petition for Rehearing, but withdrawing the original Opinion and substituting an opinion dated June 1, 2016. This Petition follows.

## STATEMENT OF THE FACTS

The question before the Court in this case is very simple. Can an insurance company deny coverage based on an exclusion in a policy which the carrier has never bothered to deliver or give to its insured? The Trial Court heard the evidence presented before him and considered the documentary evidence as well as the applicable South Carolina Law and held that as a matter of law it could not. (R. pp. 1-10). Judge Griffith's ruling was correct and should have been affirmed by the Court of Appeals.

Petitioner purchased an accident disability insurance policy from Penn Life in November of 1999. (R. pp. 2, 677). Several years later, on or about June 27, 2002, Petitioner met with Randolph Gill, another insurance agent, and completed an application requesting an additional monthly benefit of \$500.00 for his accident disability policy. (R. pp. 2, 688). This increased his monthly benefit to \$2500.00 a month. (R. pp. 2, 100, 419).

Although both South Carolina Law and company policy specifically required that the Petitioner be furnished with a copy of the policy and his application, the evidence presented in this case by both Petitioner and Respondent conclusively establishes that the Petitioner was never provided a copy of his policy in 1999 or 2002. No evidence was presented that Respondent or its agents ever provided Petitioner with a copy of his policy. (R. pp. 2-3, 99, 103, 112, 113, 137, 140, 141, 149, 152, 417-418).

Respondent provided testimony that it was their company "policy" to deliver a copy of the policy to the agent, who then delivered it to their insureds. However, Respondent was unable to produce a single shred of evidence that this "policy" was followed in this case. (R. pp. 137, 138, 143-144). The only policy that Respondent was able to produce during discovery and at trial was a computer generated specimen of the policy generated

after the commencement of this litigation and not the actual policy itself. (R. pp. 136, 274-275).

On June 18, 2008, the Petitioner was seriously injured in a motorcycle accident. (R. p. 7). Petitioner admitted to consuming several alcoholic drinks prior to the accident. (R. p. 6). The Respondent asserted as a defense to the Petitioner's claim, the argument that the Petitioner's action was barred by the intoxication exclusion contained in the policy that he never received and spent the bulk of its case at trial (as well as the bulk of its Brief before this Court of Appeals) litigating and presenting argument as to the cause of the accident and whether or not the Petitioner was intoxicated at the time his accident occurred. (Petitioner has vehemently denied being intoxicated at the time of the accident and has vehemently denied that the accident was caused or contributed to by any intoxication on his part. (R. p. 428). Judge Griffith made no finding or ruling in his Order as to the issue of whether or not the Petitioner was intoxicated at the time of the accident and whether or not such alleged impairment contributed to the motorcycle accident and his injuries. (R. p. 10).

Petitioner submitted to Respondent a claim form dated August 27, 2008, requesting disability benefits under the policy. (R. pp. 279-280, 624). Petitioner executed all forms and provided all information required by Respondent. (R. pp. 280-281). He executed a Release for Medical Records. The Respondent conceded at trial that Petitioner did not lie to the company, or provide them with false or misleading information. (R. pp. 279, 283, 337).

By check dated September 22, 2008, Respondent paid to Petitioner \$8,125.00. This payment included two months of disability benefits, a surgical benefit, an ambulance

benefit, and benefits related to emergency first aid and x-rays. (R. pp. 7, 711). Petitioner submitted to Respondent a second claim form dated October 2, 2008, and in response the Respondent issued a check to Petitioner on October 9, 2008, for \$2,500.00 of total disability benefits. (R. p. 717). Respondent presented evidence at trial that they made monthly disability payments to Petitioner from 2008 up to trial. (R. pp. 7, 979-981).

The Petitioner is now 42 years old. (R. p. 424). Prior to the motorcycle accident he owned his own construction company, making approximately \$40,000.00 - \$60,000.00 a year. (R. p. 416). It is undisputed that the Petitioner is presently disabled under the Respondent's policy. (R. pp. 277, 278, 279). His injuries in the accident included a broken pelvis, broken hip, fractured fibula and open fracture to his tibia. He suffered damage to one of his knees. (R. pp. 202, 203). He suffers from chronic, nearly constant migraines, and ringing in his ears. He has difficulty concentrating. (R. p. 348). In addition, he can only walk short distances with the assistance of a cane. He cannot bend or stoop. He has pain and numbness in his legs as the result of nerve damage. (R. pp. 347, 420, 421-424). He is under continuous care of a physician for chronic and constant pain. He has not been cleared to return to work. (R. p. 430). Evidence was presented at trial that the present dollar value of the policy is approximately \$540,000.00 if the Petitioner is disabled until age sixty five (65). (R. p. 405).

## ARGUMENT

### **I. THE TRIAL COURT CORRECTLY APPLIED SOUTH CAROLINA CODE SECTION 38-71-30 TO THIS CASE AND HELD THAT THE APPELLANT IS NOT ENTITLED TO ENFORCE THE "INTOXICATION EXCLUSION" AND THE COURT OF APPEALS ERRED IN ITS OPINION REVSEESING THE TRIAL COURT'S ORDER**

Judge Griffith correctly determined that the Respondent never delivered a copy of the application of insurance. Judge Griffith correctly held that Respondent never delivered the actual policy of insurance to the Petitioner. Judge Griffith correctly applied South Carolina Code Section 38-71-30 to this case in order to hold that the Respondent was precluded as a matter of law from relying on or enforcing any intoxication exclusion contained in the policy of insurance it never delivered to Petitioner. The Court of Appeals should have affirmed Judge Griffith's Order prohibiting Respondent from relying on the intoxication exclusion to defeat coverage in this case.

It is undisputed in this case that the Petitioner never received a copy of the policy of insurance. Petitioner and his wife both testified at trial that they never received a copy of the policy. (R. pp. 353, 417, 418). He testified that he was provided with a packet of information that he believed to be the policy (but which he learned after commencing this action was not). (R. p. 354). This packet contained no information regarding any alleged "intoxication exclusion." (R. p. 354). He testified that he was not aware of any exclusions that the policy might or might not have contained at the time he bought it and that he would not have purchased the policy had he known it contained such an exclusion. (R. p. 418).

Respondent presented no testimony or evidence that the policy was ever delivered to Petitioner. Randolph Gill, the agent who sold Petitioner the additional increased coverage, presented no evidence of delivery of the application or policy. (R. pp. 99, 103,

107, 108, 112, 113). John Mackin, an authorized representative of Respondent Penn Life with authority to speak for them, also testified at trial. (R. pp. 126, 128, 129). Mr. Mackin acknowledged that an insurance company is required to send a copy of the policy to its insured. (R. pp. 144, 148). He further testified that while it was his company's policy to deliver the policy to the agent who sold it for delivery to the insured, there was no evidence the company policy was followed or that there was any delivery to the Petitioner in this case. (R. pp. 137, 138, 139, 140, 141, 146, 149, 152). Finally, Respondent presented no letters of transmittal, or receipts indicating that the policy of insurance was ever given to Petitioner. (R. pp. 137, 149, 152, 154).

The parties both agree that South Carolina Code Section 38-71-30 is applicable to the insurance policy at issue in this case. It reads in pertinent part:

“(E)very 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.”

Respondent's own witnesses acknowledged that an insurance company has an obligation to provide the policy of insurance to the customer or insured. (R. p. 144). As set forth above, the Trial Court correctly held and ruled that while Respondent issued a policy in response to the Petitioner's application, Respondent offered no proof that a copy of the policy was ever delivered to the Petitioner. The Trial Court correctly found and ruled that as a result of Respondent's clear (and admitted) violation of South Carolina Code Section 38-71-30, it was not entitled to enforce any intoxication exclusion contained in the policy.

Statutory application and interpretation is a question of law for the Court. *Vaughn v. McLeod Regional Medical Center*, 372 S.C. 505, 642 S.E.2d 744 (2007); *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693 (2012); *Colleton County Taxpayers Ass'n v. School District of Colleton County*, 371 S.C. 224, 638 S.E.2d 685 (2006); *State v. Jacobs*, 393 S.C. 584, 713 S.E.2d 621 (2011). Under South Carolina Law, the Court's function is to enforce an ambiguous statute according to its terms.

Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.

*Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The Court has held that it is its duty to apply the Statute according to its own terms. *Shelly Construction Company v. Sea Garden Homes, Inc.*, 287 S.C. 24, 336 S.E.2d. 488 (S.C. App. 1985).

Judge Griffith correctly applied the plain and clear meaning of South Carolina Code Section 38-71-30 to the facts of this case. South Carolina law clearly and unequivocally requires that the insurer deliver a copy of both the application and policy to the insured in order that the "whole contract appears in the application and policy of insurance." Clearly, under this statute, an insurer is required to deliver both the application and the actual policy of insurance to its insured. Respondent presented no evidence at trial that it ever delivered a copy of the policy to Petitioner. Therefore, under South Carolina law, it cannot rely on any intoxication exclusion allegedly contained in its policy (which it never delivered to Petitioner) to defeat coverage in this case.

Even if the language contained in this statute is ambiguous, which the Petitioner asserts it is not, Judge Griffith interpreted this Statute correctly. The primary purpose in construing a statute is to determine the legislative intent. The language contained in the

statute is the best evidence of what the legislature intended. *See, Hodges v. Rainy*, 341 S.C.79, 533 S.E.2d 578 (2001); *McClanahan v. Richland Cnty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03, at 94 (5th ed.1992)). "The Court is not at liberty, under the guise of construction, to alter the plain language of [a] statute by adding words which the Legislature saw fit not to include." *Shelly Construction Company v. Sea Garden Homes, Inc.*, 287 S.C. 24, 336 S.E.2d 488 (S.C. App. 1985); *see, Enos v. Doe*, 380 S.C. 295, 669 S.E.2d 619 (2008).

In the case before the Court, the statute in question clearly evidences a legislative intent for the insured to be provided with all relevant documents which form the contract of insurance. Failure to provide an insured with all the necessary documents precludes an insurer from enforcing a policy provision contained in the undelivered policy against its insured. It would be a ridiculous construction to interpret this statute in such a way that an insurer has to provide a copy of the application, but may withhold from its insured a copy of the actual policy. The Respondent's argument for a contrary construction of this statute lacks merit and should have been rejected by the Court of Appeals.

### CONCLUSION

South Carolina law clearly and unequivocally provides that an insurance company must deliver to its insured both a copy of the application and a copy of the actual policy. The Respondent violated this provision by failing to provide Petitioner with a copy of his policy. The Trial Judge correctly ruled that the Respondent was therefore not entitled to

rely on any intoxication exclusion contained in the policy. The Order and Judgment of the Trial Court should have been affirmed. Petitioner therefore respectfully requests that this Court grant this Petition and issue a Writ of Certiorari to review the Court of Appeals decision in this case. Ultimately, this Court should reverse the Court of Appeals and reinstate the Trial Court's Judgment.

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By:



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June 24, 2016

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Of Which Pennsylvania Life Insurance Company,.....Respondent.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that a petition of rehearing or reinstatement was made  
and finally ruled on by the Court of Appeals.

By: \_\_\_\_\_

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Of Which Pennsylvania Life Insurance  
Company is Appellant.

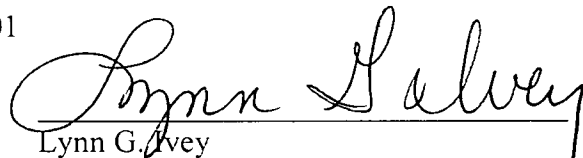
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**PROOF OF SERVICE**

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I certify that I have served the Petitioner's Petition for Certioari on counsel of record by depositing a copy of same in the United States Mail, postage prepaid, on June 29 2016, addressed to the attorneys of record as follows:

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June 29, 2016