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

Mike Russell, ...Petitioner,

v.

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

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

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mike Russell, Respondent,

v.

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Of Which Pennsylvania Life Insurance Company is the Appellant.

Appellate Case No. 2014-000671

Appeal From Lexington County
Eugene C. Griffith, Jr., Circuit Court Judge

Unpublished Opinion No. 2016-UP-177
Submitted December 1, 2015 – Filed April 13, 2016
Withdrawn, Substituted and Refiled June 1, 2016

REVERSED AND REMANDED

D. Lawrence Kristinik, III, Michael J. Anzelmo, and Kristen E. Horne, all of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Appellant.

Ralph Nichols Riley, Jr., of Smith and Thomas, P.A., of West Columbia; S. Jahue Moore and John Calvin

Bradley, Jr., both of Moore Taylor Law Firm, P.A., of West Columbia, for Respondent.

PER CURIAM: Respondent Mike Russell filed this action against Appellant Pennsylvania Life Insurance Company (Penn Life) and insurance agent Randolph Gill, alleging bad faith refusal to pay benefits pursuant to a disability insurance policy, breach of contract to procure insurance, and breach of contract. Penn Life asserted, among other defenses, that an intoxication exclusion clause in the policy at issue barred Russell from receiving additional benefits. Penn Life also counterclaimed for a declaratory judgment that the intoxication exclusion barred Russell from continuing to receive monthly benefit payments. At issue in this appeal is the trial court's ruling on Penn Life's declaratory judgment claim that Penn Life could not enforce the intoxication exclusion because it failed to provide sufficient proof of delivery of the accident disability policy on which Russell's claim for benefits was based. We reverse and remand.[1]

Russell first applied for the policy in 1999. According to a specimen policy presented during trial, Penn Life would "not be liable for any loss which result[ed] from [the insured] being: (1) intoxicated; or (2) under the influence of any narcotic unless taken on the advice of a Physician." In 2002, when Russell increased his monthly disability benefits, Gill gave Russell a receipt with similar language. Russell did not dispute that his policy with Penn Life included the intoxication exclusion.

On the evening of June 18, 2008, Russell was thrown from his motorcycle when, while preparing to exit onto Interstate 26 toward Charleston, he crashed into the back of a car that was stopped along the left side of the exit ramp. Prior to the crash, the car's driver was retrieving a cell phone that had fallen near her brake and accelerator pedals. The car lights were on, and the right-rear corner of the car was over the white line by "not more than two feet." There was no evidence of any attempt by Russell to stop his motorcycle before the collision. Russell, unconscious after the impact, was hospitalized for serious injuries to his left leg and hip. Tests administered at the hospital showed his blood alcohol level was over the legal limit for intoxication. According to the accident report, the primary contributing factor to the collision was Russell's driving under the influence;

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

however, the report also showed the other driver contributed to the accident because she stopped her vehicle without removing it completely from the roadway. Russell and the other driver were issued tickets, but the citations in both cases were dismissed.

In August 2008, Russell submitted a claim form to Penn Life for disability benefits under the policy. Initially, Penn Life paid benefits to Russell; however, in November 2009, it learned that alcohol may have been involved in Russell's accident. Based on this information, Penn Life commenced an investigation and issued a reservation of rights letter to Russell. On February 10, 2010, Russell filed this action against Penn Life, alleging causes of action for bad faith refusal to pay first-party benefits, breach of contract to procure insurance, and breach of contract.[2] In June 2010, Penn Life filed an amended answer that included a counterclaim for a declaratory judgment that Russell's loss was not covered under the policy because of the intoxication exclusion.

The trial court heard the matter without a jury in December 2012. By order dated June 7, 2013, the court found Penn Life was barred by statute from enforcing the intoxication exclusion because its proof of the delivery of the policy was insufficient. The court specifically declined to reach the issues of whether Russell was intoxicated at the time of the accident and, if he was intoxicated, whether his intoxication contributed to his accident. Penn Life moved to alter or amend this ruling. Following a hearing, the trial court issued a Form 4 order denying Penn Life's motion. Penn Life appeals.

1. The trial court based its finding that Penn Life could not enforce the intoxication exclusion on section 38-71-30 of the South Carolina Code (2015). Penn Life argues the trial court interpreted section 38-71-30 incorrectly. We agree.

Section 38-71-30 provides as follows:

> 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*

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[2] Gill was also named as a defendant in this action, but was later dismissed.

> *account of anything contained in or omitted from the application.* If the insurance policy is issued upon an oral application, no defense is allowed to the policy on account of anything contained in or omitted from the oral application.[3]

(emphasis added). The question of whether section 38-71-30 prohibited Penn Life from enforcing the intoxication exclusion can be resolved without resorting to rules of statutory interpretation. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("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."). Under section 38-71-30, the penalty to an insurer for violating this section is limited to a prohibition against the insurer's use of any defense "on account of anything contained in or omitted from the application." The statute does not include any language barring an insurer from asserting any defenses contained within the policy itself.[4] Because the intoxication exclusion is within the policy itself, rather than within the application, we hold section 38-71-30 does not prohibit Penn Life form enforcing it.

2. Penn Life argues that even though the trial court did not determine whether Russell was intoxicated at the time of the accident or whether his alleged intoxication was a contributing factor to his accident, this court has authority to rule on the issue and should do so in the interest of judicial economy. We disagree.

---

[3] This version of the statute was in effect when Russell purchased the policy in 1999 and has remained unchanged since that time.

[4] In its brief, Penn Life argues other reasons to reverse the trial court's decision to prohibit its use of the intoxication exclusion, namely that (1) Russell admitted receiving notice of the exclusion when he increased his benefits in 2002, and (2) public policy is not served by allowing a voluntarily intoxicated adult to recover from injuries resulting from his own illegal conduct. Because our decision to reverse the trial court's ruling is based solely on the plain and unambiguous language of section 38-71-30, we decline to address these arguments. *See Futch v. McAllister Towing Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive of the appeal).

The record includes conflicting evidence on the questions of whether Russell was intoxicated and, if so, whether his injuries resulted at least in part because of his intoxication. Although Russell admitted he bought several drinks at a restaurant shortly before his accident, he claimed some of them were consumed by other people. He also testified he was not "buzzed" when he left the restaurant on his motorcycle and disputed the accuracy of the blood alcohol readings that indicated his blood alcohol level to be over the legal limit for intoxication. Furthermore, contrary to Penn Life's assertion that the other vehicle was almost completely off the roadway, there was evidence that it may have protruded into the lane of traffic by as much as two feet. Given these conflicts in the evidence, some of which involve credibility assessments, we cannot decide based on the record presented in this appeal whether Penn Life, as the party seeking declaratory relief, met its burden by the greater weight or preponderance of the evidence.[5] *See Vt. Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 10, 446 S.E.2d 417, 421 (1994) ("Where an action is filed for declaratory judgment seeking affirmative relief, the movant must prove his material allegations by a preponderance of the evidence."); *S. Realty & Constr. Co. v. Bryan*, 290 S.C. 302, 313-14, 350 S.E.2d 194, 200 (Ct. App. 1996) ("An appellate court will not ordinarily become involved in judging the credibility of witnesses. Such is a function of the trier of fact."). We therefore remand this case to the trial court to make its own findings, based on the prior proceedings before it, as to whether Penn Life can enforce the intoxication exclusion.

REVERSED AND REMANDED.

HUFF, A.C.J, and WILLIAMS and THOMAS, JJ., concur.

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[5] In this court's prior opinion, we noted certain pages were not included in the record on appeal. Although these pages were missing from the bound copies of the record on appeal the appellant provided to the court, counsel for the appellant has correctly advised the court that the unbound original record on appeal filed with the Clerk's Office was not missing any pages. We have reviewed the pages that did not appear in the bound copies and conclude they do not contain any information that would change our holding on any issue presented in this appeal.

THE STATE OF SOUTH CAROLINA
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Of Which Pennsylvania Life Insurance Company is the Appellant.

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PER CURIAM: Respondent Mike Russell filed this action against Appellant Pennsylvania Life Insurance Company (Penn Life) and insurance agent Randolph Gill, alleging bad faith refusal to pay benefits pursuant to a disability insurance policy, breach of contract to procure insurance, and breach of contract. Penn Life asserted, among other defenses, that an intoxication exclusion clause in the policy at issue barred Russell from receiving additional benefits. Penn Life also counterclaimed for a declaratory judgment that the intoxication exclusion barred Russell from continuing to receive monthly benefit payments. At issue in this appeal is the trial court's ruling on Penn Life's declaratory judgment claim that Penn Life could not enforce the intoxication exclusion because it failed to provide sufficient proof of delivery of the accident disability policy on which Russell's claim for benefits was based. We reverse and remand.[1]

Russell first applied for the policy in 1999. According to a specimen policy presented during trial, Penn Life would "not be liable for any loss which result[ed] from [the insured] being: (1) intoxicated; or (2) under the influence of any narcotic unless taken on the advice of a Physician." In 2002, when Russell increased his monthly disability benefits, Gill gave Russell a receipt with similar language. Russell did not dispute that his policy with Penn Life included the intoxication exclusion.

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Russell and the other driver were issued tickets, but the citations in both cases were dismissed.

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The trial court heard the matter without a jury in December 2012. By order dated June 7, 2013, the court found Penn Life was barred by statute from enforcing the intoxication exclusion because its proof of the delivery of the policy was insufficient. The court specifically declined to reach the issues of whether Russell was intoxicated at the time of the accident and, if he was intoxicated, whether his intoxication contributed to his accident. Penn Life moved to alter or amend this ruling. Following a hearing, the trial court issued a Form 4 order denying Penn Life's motion. Penn Life appeals.

1. The trial court based its finding that Penn Life could not enforce the intoxication exclusion on section 38-71-30 of the South Carolina Code (2015). Penn Life argues the trial court interpreted section 38-71-30 incorrectly. We agree.

Section 38-71-30 provides as follows:

> 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*. If the insurance policy is issued upon an

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> oral application, no defense is allowed to the policy on account of anything contained in or omitted from the oral application.[3]

(emphasis added). The question of whether section 38-71-30 prohibited Penn Life from enforcing the intoxication exclusion can be resolved without resorting to rules of statutory interpretation. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("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."). Under section 38-71-30, the penalty to an insurer for violating this section is limited to a prohibition against the insurer's use of any defense "on account of anything contained in or omitted from the application." The statute does not include any language barring an insurer from asserting any defenses contained within the policy itself.[4] Because the intoxication exclusion is within the policy itself, rather than within the application, we hold section 38-71-30 does not prohibit Penn Life form enforcing it.

2. Penn Life argues that even though the trial court did not determine whether Russell was intoxicated at the time of the accident or whether his alleged intoxication was a contributing factor to his accident, this court has authority to rule on the issue and should do so in the interest of judicial economy. We disagree.

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[3] This version of the statute was in effect when Russell purchased the policy in 1999 and has remained unchanged since that time.

[4] In its brief, Penn Life argues other reasons to reverse the trial court's decision to prohibit its use of the intoxication exclusion, namely that (1) Russell admitted receiving notice of the exclusion when he increased his benefits in 2002, and (2) public policy is not served by allowing a voluntarily intoxicated adult to recover from injuries resulting from his own illegal conduct. Because our decision to reverse the trial court's ruling is based solely on the plain and unambiguous language of section 38-71-30, we decline to address these arguments. *See Futch v. McAllister Towing Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive of the appeal).

The record includes conflicting evidence on the questions of whether Russell was intoxicated and, if so, whether his injuries resulted at least in part because of his intoxication. Although Russell admitted he bought several drinks at a restaurant shortly before his accident, he claimed some of them were consumed by other people. He also testified he was not "buzzed" when he left the restaurant on his motorcycle and disputed the accuracy of the blood alcohol readings that indicated his blood alcohol level to be over the legal limit for intoxication. Furthermore, contrary to Penn Life's assertion that the other vehicle was almost completely off the roadway, there was evidence that it may have protruded into the lane of traffic by as much as two feet. Given these conflicts in the evidence, some of which involve credibility assessments, we cannot decide based on the record presented in this appeal whether Penn Life, as the party seeking declaratory relief, met its burden by the greater weight or preponderance of the evidence.[5] *See Vt. Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 10, 446 S.E.2d 417, 421 (1994) ("Where an action is filed for declaratory judgment seeking affirmative relief, the movant must prove his material allegations by a preponderance of the evidence."); *S. Realty & Constr. Co. v. Bryan*, 290 S.C. 302, 313-14, 350 S.E.2d 194, 200 (Ct. App. 1996) ("An appellate court will not ordinarily become involved in judging the credibility of witnesses. Such is a function of the trier of fact."). We therefore remand this case to the trial court to make its own findings, based on the prior proceedings before it, as to whether Penn Life can enforce the intoxication exclusion.

REVERSED AND REMANDED.

HUFF, A.C.J., and WILLIAMS and THOMAS, JJ., concur.

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[5] We also note that, contrary to Penn Life's Designation of Matter that the entire trial transcript was to be included in the record, more than one hundred pages appear to have been omitted from the Record on Appeal. According to the Table of Contents, the missing pages contain part of the testimony of Russell's wife, all of Russell's trial testimony, and part of the testimony from one of the officers who appeared at the scene of the accident. As the appealing party, Penn Life had the burden of providing a sufficient record for review. *See Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 339, 611 S.E.2d 485, 488-89 (2005).

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
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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.

PETITION FOR REHEARING

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Pursuant to Rule 221 and Rule 240, SCACR, Respondent Mike Russell files this Petition for Rehearing with respect to this Court's decision in *Mike Russell v. Randolph Gill and Pennsylvania Life Insurance Company,* 2016-UP-177 (S.C. Ct. App., filed April 13, 2016). Respondent suggests that the Court overlooked and misapprehended the following points in reversing the decision of the Trial Court.

1. The Court's decision misapprehended, overlooked and ignored the fact that the Appellant presented no evidence of delivery of the application or policy to Respondent. (R. p. 99, ll. 14-23; p. 103, ll. 21-23; p. 107, l. 18 – p. 108, l. 1; p. 112, l. 20 – p. 133, l. 1).
2. The Court's decision misapprehended, overlooked and/or ignored the fact that the Respondent never received a copy of the policy of insurance because Appellant never delivered one to Respondent. (R. p. 137, ll. 11-16; p. 138, ll. 9-21; p. 139, ll. 6-10; p. 140, ll. 7-11; p. 141, ll. 14-17; p. 146, ll. 2-21; p. 149, l. 3; p. 152, ll.10-17; p. 154, ll. 18-21; p. 353, ll. 15-18; p. 354, ll. 6-25; p. 417; ll. 8-9; p. 418, ll. 5-8).
3. The Court's decision misapprehended and overlooked evidence that neither Respondent nor his wife had any knowledge of the existence of the exclusion relied upon by Appellant. (R. p. 418, ll. 9-11; 20-25).
4. The Court's decision misapprehended, overlooked and/or ignored the fact that Respondent was never provided with any information regarding any alleged "intoxication exclusion." (R. p. 354, ll. 15-18).
5. The Court's decision misapprehended, overlooked and/or ignored the fact that Appellant presented no testimony or evidence that the policy was ever delivered

to Respondent. (R. p. 99, ll. 14-23; p. 103, ll. 21-23; p. 107, l. 18 – p. 108, l. 1; p. 112, l. 20 – p. 113, l. 1; p. 137, ll. 11-16; p. 138, ll. 9-21; p. 139, ll. 6-10; p. 140, ll. 7-11; p. 141, ll. 14-17; p. 146, ll. 2-21; p. 149, l. 3; p. 152, ll. 10-17; p. 154, ll. 18-21).

6. The Court's Opinion misconstrues and misapplies South Carolina Code Section 38-71-30 to the facts of this case. The Trial Court correctly interpreted Section 38-71-30 and found and ruled that as a result of Appellant'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. The Trial Court's Order was correct and should have been affirmed by this Court.

7. 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. Appellant presented no evidence at trial that it ever delivered a copy of the policy to Respondent. Therefore, under South Carolina law, it cannot rely on any intoxication exclusion allegedly contained in its policy (which it never delivered to Respondent) to defeat coverage in this case. This Court's opinion misapprehended, misconstrued and misapplied this Statute to the facts of this case in ruling otherwise and in reversing the Trial Court's opinion.

8. The Court's decision reversing the Trial Court misapprehends and violates clear 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.

For reasons stated above, this Court should grant this Petition, withdraw its prior Opinion, and issue a new opinion affirming the Trial Court's decision and Order.

Respectfully submitted,

By: _____

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April 28, 2016

The South Carolina Court of Appeals

Mike Russell, Respondent,

v.

Randolph Gill and Pennsylvania Life Insurance Company, Defendants,

Of Which Pennsylvania Life Insurance Company is the Appellant.

Appellate Case No. 2014-000671

ORDER

After careful consideration of the petition for rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

In response to Appellant's request for clarification, the court withdraws its previous opinion and orders that the attached opinion be substituted.

Thomas E. Huff A.C.J.

J.

J.

Columbia, South Carolina

FILED

June 1, 2016

cc:
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D. Lawrence Kristinik, III, Esquire
Michael J. Anzelmo, Esquire
Kristen E. Horne, Esquire
John Calvin Bradley, Jr., Esquire
Ralph Nichols Riley, Jr., Esquire
The Honorable Eugene C. Griffith, Jr.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
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Mike Russell,..... Respondent,

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

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.[1] {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.[2]

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

[1] The case was remanded because Defendant Randolph Gill was a South Carolina resident. Russell voluntarily dismissed Gill shortly before trial.

[2] 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[3] 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 ¶

[3] "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.[4] {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

[4] 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[5], 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

[5] 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.[6] {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.

[6] 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.[7] {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

[7] 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 it 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.[8] 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

[8] 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.[9]

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

[9] 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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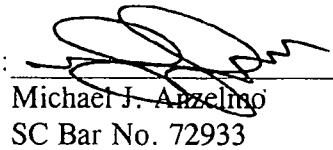
By: 

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January 20, 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

Appellate Case No. 2014-000671

Mike Russell, ... Respondent,

v.

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

Of Which Pennsylvania Life Insurance Company is the. ..... Appellant.

BRIEF OF RESPONDENT

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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. (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 correctly found and ruled that Appellant Pennsylvania Life Insurance Company ("Penn Life") offered no proof that it provided Respondent 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) Judge Griffith's Order is correct and should be affirmed by this Court.

Respondent initiated this action against Appellant 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). Respondent'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). Appellant removed this case to Federal Court and subsequently answered Respondent's Complaint. (R. pp. 36, 63). Appellant 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). Appellant timely filed a motion for reconsideration which was argued before Judge Griffith on October 15, 2013. (R. pp. 2414-2436). On or about March 5, 2014, Judge Griffith issued his Order denying the Appellant's motion for reconsideration. (R. p. 13). This appeal followed.

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). Appellant takes issue with this ruling and has appealed. However, Judge Griffith's ruling is correct and should be affirmed by this Court.

Respondent 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, Respondent 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 $2,500.00 a month. (R. p. 2; p. 100, lines 2-6; p. 419, lines 6-8).

Although both South Carolina law and company policy specifically required that the Respondent be furnished with a copy of the policy and his application, the evidence presented in this case by both Appellant and Respondent conclusively establishes that the Respondent was never provided a copy of his policy in 1999 or 2002. No evidence was presented that Appellant or its agents ever provided Respondent with a copy of his

policy. (R. pp. 2-3; p. 99, lines 14-23; p. 103, lines 21-23; p. 112, lines 20-25; p. 113, line 1; p. 137, lines 11-16; p. 140, lines 7-11, 18-20; p. 141, lines 14-17; p. 149, line 3; p. 152, lines 10-17; p. 417, lines 8-9; p. 418, lines 5-8).

Appellant 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, Appellant was unable to produce a single shred of evidence that this "policy" was followed in this case. (R. p. 137, line 10 - p. 138, line 17; p. 143, line 23 – p. 144, line 1). The only policy that Appellant 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. p. 136, line 2; p. 274, line 20 – p. 275, line 19).

On June 18, 2008, the Respondent was seriously injured in a motorcycle accident. (R. p. 7). Respondent admitted to consuming several alcoholic drinks prior to the accident. (R. p. 6). The Appellant asserted as a defense to the Respondent's claim the argument that the Respondent'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) litigating and presenting argument as to the cause of the accident and whether or not the Respondent was intoxicated at the time his accident occurred. (Respondent 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, lines 21-23). Judge Griffith made no finding or ruling in his Order as to the issue of whether or not the Respondent 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).

Respondent submitted to Appellants a claim form dated August 27, 2008, requesting disability benefits under the policy. (R. p. 279, line 21 - p. 280, line 5; p. 624). Respondent executed all forms and provided all information required by Appellant. (R. p. 280, lines 1-25; p. 281, lines 1-6). He executed a release for medical records. (R. p. 284, lines 15-19). The Appellant conceded at trial that Respondent did not lie to the company or provide them with false or misleading information. (R. p. 279, lines 17-20; p. 283, lines 20-23; p. 337, line 20 – p. 338, line 2).

By check dated September 22, 2008, Appellant paid to Respondent $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). Respondent submitted to Appellant a second claim form dated October 2, 2008, and in response the Appellant issued a check to Respondent on October 9, 2008, for $2,500.00 of total disability benefits. (R. p. 717). Appellant presented evidence at trial that they made monthly disability payments to Respondent from 2008 up to trial. (R. pp. 7, 979-981).

The Respondent is now 42 years old. (R. p. 424, lines 23-24). Prior to the motorcycle accident he owned his own construction company, making approximately $40,000.00 - $60,000.00 a year. (R. p. 416, lines 16-19). It is undisputed that the Respondent is presently disabled under the Appellant's policy. (R. p. 277, lines 1-12; p. 278, lines 15-22; p. 279, lines 4-7, 21-25). 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. p. 202, line 17 – p. 203, line 14). He suffers from chronic, nearly constant migraines, and ringing in his ears. He has difficulty concentrating. (R. p. 348,

line 14 – p. 349, line 6). 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. p. 347, line 12 - p. 348, line 4; p. 420, lines 12-25; pp. 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. 360, line 11 - p. 361, line 11). Respondent presented testimony at trial that the present dollar value of the policy is approximately $540,000.00 if the Respondent is disabled until age 65. (R. p. 405, lines 3-4).

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."

The Appellant argues that Respondent's claim is barred by the "intoxication exclusion" allegedly contained in the insurance policy that he was never provided with or that he never received from Appellant. Judge Griffith correctly applied South Carolina Code Section 38-71-30 to this case in order to hold that the Appellant 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 Respondent. His Order should be affirmed by this Court.

It is undisputed in this case that the Respondent never received a copy of the policy of insurance. Respondent and his wife both testified at trial that they never received a copy of the policy. (R. p. 353, lines 15-18; p. 417; lines 8-9; p. 418, lines 5-8). 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, lines 6-25; Plaintiff's Trial Exhibit 21). This packet contained no information regarding any

alleged "intoxication exclusion." (R. p. 354, lines 15-18). Respondent testified that he was not aware of any exclusions that the policy might or might not contain 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, lines 9-11, 20-25).

Appellant presented no testimony or evidence that the policy was ever delivered to Respondent. Randolph Gill, the agent who sold Respondent the additional increased coverage, presented no evidence of delivery of the application or policy. (R. p. 99, lines 14-23; p. 103, lines 21-23; p. 107, line 18 – p. 108, line 1; p. 112, line 20 - p. 113, line 1). John Mackin, an authorized representative of Appellant Penn Life with authority to speak for them, also testified at trial. (R. p. 126, lines 3-6; p. 128, line 24 – p. 129, line 2). Mr. Mackin acknowledged that an insurance company is required to send a copy of the policy to its insured. (R. p. 144, lines 19-23; p. 148, lines 1-5). 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 Respondent in this case. (R. p. 137, lines 11-16; p. 138, lines 9-21; p. 139, lines 6-10; p. 140, lines 7-11; p. 141, lines 14-17; p. 146, lines 2-21; p. 149, line 3; p. 152, lines 10-17). Finally, Appellant presented no letters of transmittal or receipts indicating that the policy of insurance was ever given to Respondent. (R. p. 137, lines 13-16; p. 149, line 3; p. 152, lines 10-17; p. 154, lines 18-21).

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: "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." Appellant'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, lines 19-23). As set forth above, the Trial Court correctly held and ruled that while Appellant issued a policy in response to the Respondent's application, Appellant offered no proof that a copy of the policy was ever delivered to the Respondent. The Trial Court correctly found and ruled that as a result of Appellant'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. (R. pp. 1-10).

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. Appellant presented no evidence at trial that it ever delivered a copy of the policy to Respondent. Therefore, under South Carolina law, it cannot rely on any intoxication exclusion allegedly contained in its policy (which it never delivered to Respondent) to defeat coverage in this case.

Even if the language contained in this statute is ambiguous, which the Respondent 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 Appellant's argument for a contrary construction of this statute lacks merit and should be rejected by this Court.

II. THE RECEIPT DOES NOT EXCUSE APPELLANT'S FAILURE TO DELIVER A COPY OF THE POLICY TO RESPONDENT.

The Appellant argues that the receipt it introduced into evidence at Exhibit 12 somehow excuses their failure to deliver a copy of the policy to Respondent. However, Respondent cannot rely on Exhibit 12 to excuse it's failure to deliver a copy of the application and policy to the Respondent.

As the Appellant acknowledges in its brief, Exhibit 12 consists of a document entitled "Definitions, Exceptions and Limitations." (R. p. 113, lines 2-5). Appellant's agent, Mr. Gill identified this document as a receipt which he "assumes" that he gave to Respondent in July 2002 (three years after purchase of the original policy) when Respondent increased his monthly benefit. (R. p. 113, lines 6-21). Because this document contains language it construes as providing that the policy does not cover loss from "intoxication," the Appellant argues to this Court that it is excused from its admitted failure to deliver a copy of the policy to Respondent. (R. p. 112, line 22 – p. 114, line 15).

This argument lacks merit. The Appellant's own witnesses and representatives acknowledged that they had a duty to deliver a copy of the actual policy itself to their insured. They acknowledged that the document marked and introduced as Exhibit 12 was not a copy of the policy. (R. p. 121, line 19 - p. 122, line 21). The document on its face clearly states that it is not a copy of the contract of insurance. (R. p. 122, lines 13-21). Mr. Mackin, the Respondent's representative, brought to trial to testify on its behalf, described it as a brochure and not a contract of insurance. (R. p. 135, lines 18-23). Mr. Gill, who sold the monthly benefit increase to Respondent in 2002, described this document as a summary or "brief description" of the policy. (R. p. 122, lines 13-15). However, he acknowledged at trial that to determine the actual language of the contract one would have to look at the actual contract itself (which was never provided to Respondent). (R. p. 122, lines 13-21). The delivery of the receipt does not excuse the Appellant for its failure to deliver a copy of its policy to Respondent or to exempt the Appellant from the operation of South Carolina Code Section 38-71-30.

Further, the document which was identified and introduced as Exhibit 12 did not exist at the time Respondent purchased the original policy in 1999. It was not created and/or delivered to the Respondent until 2002, at the time the monthly benefit was increased. Therefore Exhibit 12 does not relieve or excuse the Appellant from its failure to comply with South Carolina Code Section 38-71-30.

III. THE CAUSE OF RESPONDENT'S ACCIDENT IS IRRELEVANT TO THE ISSUES BEFORE THE COURT.

The Appellant argues that this Court should hold that Respondent was intoxicated at the time of the accident and that this intoxication was a contributing cause of his wreck

"based on the fully developed record presented to the trial court by the parties," and asks this Court to enter judgment in its favor. (Initial Brief of Appellant, p. 22).

As set forth above, the Appellant's failure to deliver a copy of the disability policy to Respondent precludes them from relying on any intoxication exclusion contained in its policy as a matter of law. Therefore, the issue of whether or not the Respondent was "intoxicated" at the time of the accident, and whether this alleged intoxication caused or contributed to the accident and his subsequent injuries, is irrelevant to the issues before the Court as the Trial Court correctly ruled in his Order. (R. p. 10).

Even if this Court were to conclude that the Appellant has a right to rely on the intoxication exclusion, the evidence does not establish that the Respondent was impaired at the time of the accident and that any intoxication or impairment was the proximate cause of the accident which forms the basis of the Respondent's disability. Judge Griffith made no finding as to whether or not Respondent was impaired at the time the accident occurred and whether or not any alleged impairment contributed to the motorcycle accident. (R. p. 10). He correctly ruled that the other issues in the case were dispositive and made any decision on the causation of the accident unnecessary and moot. (R. p. 10). The evidence presented before Judge Griffith as to whether or not the Respondent was impaired or intoxicated at the time of the accident and whether this caused or contributed to the accident which caused his injuries was in dispute. In addition to the evidence cited by Appellant in its brief, the Respondent presented ample evidence that he was not impaired at the time of the accident and that the accident was not caused by any alleged impairment on his part, but was caused by the negligence of the other driver involved in the accident. (R. p. 212, line 10 - p. 213, line 2; p. 215, line 22 - p. 216, line 13; p. 307,

lines 12-14; p. 371, lines 17-23; p. 425, lines 9-18, 19-20; p. 427, lines 2-25; p. 440, lines 7-9; p. 486, line 19 - p. 487, line 3; p. 519, line 21 - p. 521, line 5; p. 525, lines 3-19; pp. 526-527). There is certainly sufficient conflicting testimony in the record as to the question of any alleged intoxication on the part of Respondent and whether or not this caused or contributed to the accident to warrant a remand back to the trial court in the event that this court determines that the Appellant can rely on the alleged intoxication exclusion to defeat coverage in this case.

IV. PUBLIC POLICY DOES NOT REQUIRE REVERSAL OF THE TRIAL COURT'S ORDER AND IT SHOULD BE AFFIRMED.

The Appellant argues that this Court should reverse the Order of the Trial Court because, "allowing Russell (Respondent) to recover disability insurance benefits for injuries received while driving drunk violates public policy." This argument lacks merit and should be ignored by this Court.

As set forth above, the Appellant's failure to deliver a copy of the disability policy to Respondent precludes them from relying on the intoxication exclusion as a matter of law. Therefore, the issue of whether or not the Respondent was "intoxicated" at the time of the accident, and whether this alleged intoxication caused or contributed to the accident and his subsequent injuries, is irrelevant to the issues before the Court.

Further, there has been no finding by any Court that the Respondent was "driving drunk" at the time he was involved in the motorcycle accident resulting in his injuries and disability. The Trial Court expressly made no ruling on this issue at trial. Judge Griffith's Order expressly provides that, "[t]he Court has not reached the issue as to whether the Plaintiff's (Respondent's) level of impairment due to the consumption of alcohol and if such impairment contributed to the collision with Ms. Collins' vehicle."

(R. p. 10). The Court correctly ruled that "[t]he other issues presented in the case proved dispositive and made a decision on the causation of the wreck unnecessary and moot." (R. p. 10).

Therefore whether or not "public policy" precludes recovery in this case is not at issue in the appeal before the Court. Appellant's argument to the contrary is not controlling.

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 Appellant violated this provision by failing to provide Respondent with a copy of his policy. The trial judge correctly ruled that the Appellant was therefore not entitled to rely on any intoxication exclusion contained in the policy. The Order and Judgment of the Trial Court should be affirmed.

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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

The Honorable Eugene C. Griffith, Jr.

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

Mike Russell, ... Respondent,

v.

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

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

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

{Signature Page Follows}

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

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THE 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 2016-UP-177 (filed June 1, 2016)

Mike Russell, ... Petitioner,

v.

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

Of Which Pennsylvania Life Insurance
Company is Appellant.

PROOF OF SERVICE

I certify that I have served the Petitioner's Appendix 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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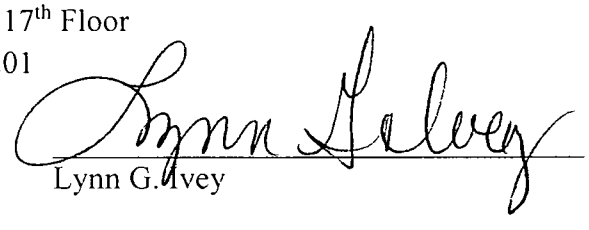

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