

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Paul M. Burch, Circuit Court Judge

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Appellate Case No. 2015-000806

APR 21 2016

SC Court of Appeals

Ard Trucking Company Respondent,

v.

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

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. ARD TRUCKING AGREED TO BE BOUND BY THE WCIP AND THE WCIP REQUIRES THAT THE LSRP IS APPLICABLE TO ITS ASSIGNED RISK POLICY AS A MATTER OF LAW.

- II. PER THE WCIP, THE PRODUCER IS THE AGENT OF THE ASSIGNED RISK INSURED AND THE PRODUCER ADMITTED HE HAD ACTUAL KNOWLEDGE THAT THE LSRP APPLIED TO ARD TRUCKING'S ASSIGNED RISK POLICY BEFORE ARD TRUCKING ISSUED AN IRREVOCABLE LETTER OF CREDIT (ILOC) TO THE SERVICING CARRIER; THEREFORE, ARD TRUCKING, THROUGH ITS PRODUCER, HAD ACTUAL KNOWLEDGE THAT THE LSRP APPLIED TO ITS POLICY.

- III. THE JUDGE'S PRE-JUDGMENT INTEREST AWARD IS IN ERROR PURSUANT TO S.C. CODE 34-31-20.

STATEMENT OF THE CASE

On October 20, 2005, Respondent Ard Trucking Company (hereinafter “Ard”) brought an action alleging Breach of Contract and Conversion against Appellant Travelers Property Casualty Company of America d/b/a The Travelers Indemnity Company of Illinois (hereinafter “Travelers”). Travelers answered and counterclaimed alleging that it was owed additional premium. After the parties had conducted discovery, the parties filed cross-Motions for Summary Judgment. Travelers filed its Motion for Summary Judgment on September 15, 2014, and Ard filed its Motion for Summary Judgment on November 20, 2014. The parties submitted respective Memoranda, Affidavits and accompanying exhibits and the matter was heard before Judge Burch on December 18, 2014. After both parties submitted competing Orders to Judge Burch, Judge Burch adopted Ard’s Order on February 13, 2015.

Travelers subsequently timely filed a Motion for Reconsideration on March 5, 2015 and Judge Burch subsequently denied Travelers’ motion on March 24, 2015. On April 20, 2015 Travelers timely served its Notice of Appeal.

STATEMENT OF THE FACTS

Ard Trucking submitted an Assigned Risk application for an Assigned Risk policy of workers’ compensation insurance pursuant to the WCIP through its producer, Michael P. Hair & Associates, Inc. on 11/6/03. (R. pp. 197-200). Pursuant to the application, Ard Trucking agreed to be bound by the WCIP. (R. p. 200). In its Application, Ard Trucking also acknowledged the LSRP was explained to Ard Trucking and that an explanatory notice or Brochure had been provided to Ard Trucking and that Ard Trucking would be bound by the LSRP if Ard Trucking’s estimated annual premium or preliminary physical audit premium met or exceeded

the premium eligibility requirements. (R. p. 200). On 11/20/03, SCDOI/NCCI assigned Travelers to be the servicing carrier based on Ard Trucking's application and Travelers issued a binder for an Assigned Risk workers' compensation policy to Ard Trucking for the policy period effective 11/7/2003. (R. pp. 272-273).¹

Pursuant to the WCIP, Travelers was assigned to be the servicing carrier based on Ard Trucking's Assigned Risk application and issued an Assigned Risk Workers' Compensation Policy number 6JUB-0188B92-3-03 to Ard Trucking for the policy period of 11/07/03 to 11/07/04. (R. pp. 201-222; 431-434; 594-615). The Assigned Risk policy issued to Ard Trucking contained the SCDOI/NCCI required Assigned Risk policy standard SCWCIP LSRP Endorsement ("Assigned Risk Loss Sensitive Rating Plan Notification Endorsement") adopted by SCDOI/NCCI. (R. p. 215; 608). Subsequently, pursuant to the WCIP rules, Travelers performed a preliminary audit survey of Ard Trucking's payroll in February, 2004, which in turn triggered the WCIP LSRP provisions.

Pursuant to the WCIP, on or about March 1, 2004, Travelers issued a rewritten Assigned Risk policy, which included the NCCI required "Mandatory Assigned Risk Loss Sensitive Rating Plan Endorsement" adopted by NCCI. (R. pp. 223-252; 236-238; 616-645; 629-631). On or about March 1, 2004, Travelers also sent Ard Trucking and its producer a letter advising that Ard Trucking Assigned Risk policy had been issued as part of the mandatory LSRP and also provided Ard Trucking and its producer with an SCDOI/NCCI required and copyrighted explanatory

¹ Admittedly, Allen Ard testified that he did not review his application before he signed it, did not read his entire policy, and did not review the WCIP or LSRP provisions he agreed to be bound by. In South Carolina, "[a] person who signs a contract or other written document cannot avoid the effect of the document by claiming that he did not read it." Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) (citing Sims v. Tyler, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981); Evans v. State Farm Mut. Auto. Ins. Co., 269 S.C. 584, 587, 239 S.E.2d 76, 77 (1977)). Instead, when a person signs a document, he is responsible for exercising reasonable care to protect himself by reading the document and making sure of its contents. Id. At 663-664, 582 S.E.2d at 440. "The law does not impose a duty on the [defendant] to explain to an individual what he could learn from simply reading the document." Id. At 664, 582 S.E.2d at 440 (Citing Citizens & S. Nat'l Bank of S.C. v. Landord, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994)). (R. pp. 275-286).

Brochure/pamphlet entitled “The Loss Sensitive Rating Plan (LSRP): An Employer’s Guide To The Mandatory Assigned Risk Retrospective Rating Program.” (R. pp. 254-262). Pursuant to the WCIP and SCDOI plan documents, once Travelers forwarded the SCDOI/NCCI required Notice Endorsement, Mandatory Endorsement and Brochure, Ard Trucking had notice that the LSRP applied to its Assigned Risk policy as set forth by the SCDOI approved plan and WCIP – the SCDOI approved plan/WCIP requires no other notice to be sent to Ard Trucking or any other Assigned Risk insured. (R. pp. 157-196; 185; 548-586; 587).

Ard Trucking representatives initially testified that they did not know if they received the rewritten Assigned Risk policy, with the Mandatory Endorsement, or the Brochure on or about March of 2004.² However, in the Affidavit of Harry Brown,³ at the time Safety Director of Ard Trucking and now Ard Trucking’s vice-president, submitted to the Court prior to the summary judgment hearing, Ard Trucking admitted that Travelers sent the re-written Assigned Risk policy (which also contained the “Mandatory Assigned Risk Loss Sensitive Rating Plan Endorsement”), as well as the SCDOI/NCCI Brochure/pamphlet entitled “Loss Sensitive Rating Plan,” to Ard Trucking on or about March of 2004.

Afterwards, pursuant to the WCIP and Assigned Risk rules and LSRP, Travelers requested and Ard Trucking provided an acceptable, clean, unconditional, Irrevocable Letter of Credit (ILOC) for \$52,116. (R. p. 125-126). Ard Trucking’s producer testified that when Ard Trucking’s initial Assigned Risk policy was issued

² Ard Trucking and his representatives initially testified that they did not know if they received the rewritten Assigned Risk policy or the booklet in or about March of 2004. (R. pp. 290-314). Ard Trucking’s producer testified, however, that he did receive the re-written Assigned Risk policy and he was aware that Ard Trucking Company Assigned Risk Policy was subject to the LSRP requirements before Ard Trucking Company issued its ILOC to Travelers. (R. pp. 316-329).

³ Per the Affidavit of Harry Brown, Ard Trucking now admits it received the re-written Assigned Risk policy on or about March of 2004, where Par. 5 states: “Travelers ... issued a replacement policy dated March 1, 2004, which I also reviewed and filed;” and Par. 7 which states “Travelers mailed Ard Trucking Company a Brochure entitled “Loss Sensitive Rating Plan.” I cannot recall receiving and reviewing this document, however, I have no reason to doubt that Travelers sent it to Ard Trucking Company.” (R. p. 545-546).

to Ard Trucking, he did not know the details of the LSRP. However, after the producer received the mandatory Endorsement and Brochure, and after Travelers requested an ILOC, Ard Trucking's producer became familiar with the LSRP and its applicability to Ard Trucking's Assigned Risk policy and the producer further advised Ard Trucking that the LSRP was applicable to Ard Trucking's Assigned Risk policy, and he told Ard Trucking it was required to issue an ILOC to Travelers in accordance to LSRP requirements if Ard Trucking wished to continue having an Assigned Risk policy pursuant to the WCIP. It was only after Ard Trucking's producer became aware of the LSRP and its applicability to Ard Trucking's Assigned Risk policy (and, per the producer's testimony, he advised Ard Trucking of the same) that Ard Trucking issued an ILOC to Travelers. (R. pp. 316-329).

On or about December 24, 2004, at the end of the policy period, pursuant to the WCIP, Travelers audited Ard Trucking with an Annual Physical Audit and issued a final bill to Ard Trucking. In addition, pursuant to the WCIP's LSRP, Travelers subsequently calculated and issued an LSRP bill for Ard Trucking for \$175,064 based upon the actual losses incurred at several intervals after the termination of the Assigned Risk policy.⁴ (R. p. 153). Ard Trucking refused and has continued to refuse to pay Travelers' bill for additional premium of \$175,064 owed per the LSRP. Subsequently, per the LSRP provisions, Travelers drew upon the \$52,116 ILOC and Ard Trucking still owes Travelers \$122,948 for premium owed. (R. p. 153). Further, Ard Trucking did not contest Travelers' LSRP determination by filing a written

⁴ The WCIP and the Assigned Risk policy allow an applicant to obtain an Assigned Risk policy via an estimate based on the representations of Ard Trucking and its producer. Based on Ard Trucking's application, Ard Trucking was issued a South Carolina Assigned Risk policy. After the preliminary audit survey, per the WCIP and policy terms, Travelers determined Ard Trucking's premium triggered South Carolina's LSRP which is applicable to Assigned Risk policies. Based on the WCIP and applicable audit standards, Travelers is entitled to an additional premium of \$175,064 based on the LSRP. Travelers issued a bill to Ard Trucking for the additional \$175,064 in premium owed. Ard Trucking refused to pay the additional premium owed. Subsequently, per the LSRP, Travelers drew upon the \$52,116 ILOC and Ard Trucking still owes Travelers \$122,948 for premium owed.

appeal of Travelers' LSRP determination or any other issue to the SCDOI/NCCI as required pursuant to WCIP Rule 4.⁵ (R. p. 153).

Pursuant to South Carolina statutory law, case law, the SCDOI approved Plan/WCIP and the Assigned Risk policy terms (including the SCDOI/NCCI required Notice Endorsement, Mandatory Endorsement, and Brochure), a servicing carrier is required to charge premium pursuant to the LSRP. Therefore, Travelers, the servicing carrier, is entitled to the premium it seeks.

ARGUMENT

This appeal involves a challenge to the South Carolina Assigned Risk Workers' Compensation Insurance Plan (WCIP) as promulgated by the South Carolina Department of Insurance. Respectfully, the judge improperly applied the law, the WCIP, and the admitted facts of the case where the judge misconstrued the SCDOI required initial Notice Endorsement, the Mandatory Endorsement, and the LSRP Brochure (all required by the SCDOI) by relying solely upon the required initial Notice Endorsement,⁶ in isolation, while excluding notice provided by the required Mandatory Endorsement and Brochure, to come to a result which is contrary to the law and the WCIP.

Initially, there are two dispositive issues in favor of the servicing carrier which the judge regrettably ignored. First, as a matter of law, Ard Trucking agreed to be bound by the WCIP and, per the South Carolina Department of Insurance, the WCIP mandates the LSRP applied to Ard's Assigned Risk policy. This threshold issue is dispositive on its face, without reference to any additional notice to an assigned risk insured.

⁵ Indeed, Ard Trucking did not appeal any issue to the SCDOI/NCCI as is required by WCIP Rule 4. (R. pp. 348-350).

⁶ In addition, Ard Trucking representatives testified that they did not even review or rely upon the initial Endorsement. (R. pp. 310-313).

Second, the South Carolina Department of Insurance approved plan for giving additional notice to assigned risk insureds of the LSRP applicability to Assigned Risk policies “worked” in this case as (1) the Assigned Risk insured and his producer received the required initial Notice Endorsement, the Mandatory Endorsement, and the Brochure, (2) the insured’s producer knew the LSRP applied to his Assigned Risk insured’s policy, and (3) the insured’s producer notified the Assigned Risk insured that LSRP was applicable to his Assigned Risk policy before the Assigned Risk insured issued an Irrevocable Letter of Credit to the servicing carrier (as required by the WCIP). In other words, as a practical matter, this appeal does not involve a theoretical legal inquiry into the effectiveness of the Endorsements required by the South Carolina Department of Insurance because the insured’s producer admits that he received the Endorsements and the Brochure, understood such documents to explain to him (and the insured) that the LSRP applied to the insured’s Assigned Risk policy, and the producer told his Assigned Risk insured the LSRP applied to his Assigned Risk policy before the insured issued an ILOC to the servicing carrier.⁷ As such, as the Assigned Risk insured had actual and imputed knowledge that the LSRP applied to the Assigned Risk policy before the Assigned Risk insured issued an ILOC to the servicing carrier (as required by the Plan), the Assigned Risk insured cannot credibly claim that the servicing carrier should be estopped from charging it for the LSRP premium owed. Accordingly, based on the law and on the admitted facts, respectfully, the servicing carrier is entitled to a reversal of the judge’s Order.

Finally, Travelers respectfully submits that the judge erred in his application of the law and based his decision on theoretical supposition as opposed to any

⁷ Indeed, Ard Trucking did not have to continue with the Assigned Risk policy and could have chosen to refuse to submit an ILOC pursuant to the LSRP, which would have led to its cancellation of its Assigned Risk policy. The LSRP is the only mechanism a servicing carrier has to request an ILOC. By choosing to submit the ILOC to the servicing carrier, Ard Trucking certainly accepted the LSRP program at such time.

evidence in the Record when the judge negated the LSRP program in South Carolina by misconstruing the first Notice Endorsement in isolation and without reference to the Mandatory Endorsement and Brochure. Moreover, the judge erred by his ruling that a servicing carrier can somehow alter the Notice Endorsement which was required by the South Carolina Department of Insurance. Such ruling is unsupported by any evidence in the Record.

Accordingly, this appeal involves an attack on the authority of the South Carolina Department of Insurance to require specific Endorsements, which the South Carolina Department of Insurance deemed appropriate to provide notice to assigned risk insureds. In this case in particular, based on the facts in the Record, the notice requirements (Notice Endorsement, Mandatory Endorsement and Brochure) actually “worked” and provided the insured and his producer with actual knowledge that LSRP applied to the Assigned Risk policy issued to the Assigned Risk insured and the Assigned Risk insured should not be allowed to sidestep its obligations required under the WCIP in such circumstances.

I. ARD TRUCKING AGREED TO BE BOUND BY THE WCIP AND THE WCIP REQUIRES THAT THE LSRP IS APPLICABLE TO ITS ASSIGNED RISK POLICY AS A MATTER OF LAW.

A. BACKGROUND

South Carolina law provides for a workers’ compensation market for workers’ compensation policies of last resort, generally referred to as Assigned Risk workers’ compensation policies. Assigned Risk policies are for high risk employers who are unable to obtain workers’ compensation coverage in the voluntary market. Assigned Risk policies are highly regulated by the SCDOI and issued pursuant to the WCIP and are administrated through the SCDOI/NCCI.⁸ The

⁸ For those entities that cannot obtain workers’ compensation coverage in the voluntary market, the State has an established “Assigned Risk” or “residual market.” Rates for such a program are established by the State, and rules

SCDOI/NCCI require servicing carriers to provide for standard forms, policies, and Endorsements via forms adopted by the SCDOI/NCCI in South Carolina. Servicing carriers, such as Travelers, are required to follow the WCIP provisions and utilize forms as required by the SCDOI/NCCI in South Carolina. Finally, and most importantly, the South Carolina Department of Insurance verified that, in South Carolina, the LSRP is applicable to Assigned Risk policies issued after November 1, 2003.⁹ (R. p. 547). Accordingly, the WCIP mandates that LSRP is applicable to Ard Trucking Company's Assigned Risk policy, which was issued on November 7, 2013, as a matter of law.

This matter involves a premium dispute wherein Ard Trucking alleges Travelers improperly charged Ard Trucking premium pursuant to the WCIP's Loss Sensitive Rating Plan (LSRP). In South Carolina, pursuant to the law, the SCDOI, the WCIP, and the Assigned Risk policy terms, Travelers is entitled to charge premium pursuant to the LSRP which is applicable to Assigned Risk policies.¹⁰ The LSRP is a plan that adjusts the premium for an Assigned Risk policy, following the policy term, based upon the actual occurrence of claims, i.e., the plan provides for a retroactive premium based on actual losses incurred at numerous intervals after the termination of the Assigned Risk policy. Pursuant to the WCIP, based on Ard

and procedures have been promulgated by the State as they relate to the Assigned Risk market – the South Carolina Workers' Compensation Assigned Risk Plan (WCIP), operating rules and procedures. The Plan administrator for the residual market is the National Council on Compensation Program, Inc. (NCCI).

⁹ The LSRP is a plan that adjusts the premium for an Assigned Risk policy following the policy term, based upon the actual occurrence of claims, i.e., the plan provides for a retroactive premium based on actual losses incurred at numerous intervals after the termination of the Assigned Risk policy. A retrospective rating plan for those employers who have an Assigned Risk workers' compensation insurance premium of \$200,000 or more. Initially, the LSRP was implemented as part of the WC Insurance Plan and was administered by the National Council on Compensation Insurance (NCCI) from March 1, 1994 until May 1, 2000 for policies effective September 1, 1994 and later. Between May 1, 2000 and May 1, 2003, NCCI again administered the WC Insurance Plan and the LSRP in South Carolina as of May 1, 2003 for policies effective on November 1, 2003 and after. The Loss Sensitive Rating Program details are further set forth in the NCCI approved Plan documents and NCCI Brochure entitled "*The Loss Sensitive Rating Plan (LSRP); An Employer's Guide to the Mandatory Assigned Risk Retrospective Rating Program.*" (R. pp. 547-587).

¹⁰ Per South Carolina law and the WCIP, the LSRP is applicable to Assigned Risk policies issued after November 1, 2003. Accordingly, LSRP is applicable to Ard Trucking Company's Assigned Risk policy as a matter of law.

Trucking's payroll, Ard Trucking's Assigned Risk policy triggered the LSRP under the WCIP. Accordingly, pursuant to South Carolina law and the WCIP, Travelers, as the servicing carrier, is entitled to the additional premium it seeks pursuant to the LSRP.

Here, pursuant to the WCIP and SCDOI approved plan, Travelers was required to issue and in fact did issue the SCDOI/NCCI required Notice Endorsement (R. p. 215), Mandatory Endorsement (R. pp. 236-238), and Brochure (R. pp. 254-262) to Ard Trucking. Ard Trucking received these SCDOI/NCCI mandated forms, which SCDOI/NCCI has mandated provides notice to Ard Trucking (and to all Assigned Risk insureds in South Carolina) (R. p. 587) that the LSRP applies to its Assigned Risk policy. The judge, however, erred in holding that the Notice Endorsement, in isolation, excludes the application of the LSRP to Ard Trucking's policy, despite the fact that the Mandatory Endorsement and Brochure modify and supplant the Notice Endorsement as mandated by the WCIP. The judge also erred by holding that Travelers could somehow modify or alter the required SCDOI/NCCI forms mandated by the WCIP and SCDOI/NCCI. Finally, the judge erred by ignoring the dispositive testimony of Ard Trucking's producer that it, and therefore Ard Trucking, received the Mandatory Endorsement and Brochure and the producer not only had actual knowledge, but also understood and explained to Ard Trucking that the LSRP applied to Ard Trucking's Assigned Risk policy before Ard Trucking issued Travelers an ILOC. (R. pp. 316-329) In South Carolina, pursuant to the law, the WCIP, and the Assigned Risk policy terms (including the SCDOI/NCCI mandated Notice And Mandatory Endorsements and Brochure), Ard Trucking had sufficient notice that the LSRP applied to its

Assigned Risk policy and the servicing carrier Travelers is entitled to charge premium pursuant to the LSRP which is applicable to Assigned Risk policies.¹¹

B. DISPOSITIVE LEGAL ISSUE

No dispute exists between the parties concerning the amount of payroll/remuneration Ard Trucking paid to its workers during the relevant policy period (or the LSRP calculations based on such payroll). The only dispute between the parties is whether or not the LSRP applies to Ard Trucking's South Carolina Assigned Risk policy. (R. pp. 352-353). Stated differently, the dispositive legal issue involved in this case is solely a legal issue – whether or not the LSRP applies to Ard Trucking's South Carolina Assigned Risk policy. Through his producer, Ard Trucking submitted an Assigned Risk application and Ard Trucking was issued an Assigned Risk policy of workers' compensation insurance pursuant to the WCIP. In his application, Ard Trucking agreed to be bound by the terms of the WCIP.¹² The SCDOI has verified that the LSRP applied to South Carolina Assigned Risk policies when the Assigned Risk policy was issued to Ard Trucking pursuant to WCIP. Accordingly, as LSRP applies to Ard Trucking's Assigned Risk policy, Travelers, the servicing carrier, is entitled to the premium it now seeks as a matter of law.

1. WCIP HAS THE “FORCE OF LAW.”

In South Carolina, the WCIP has the force of law. According to the applicable provisions of the South Carolina Assigned Risk plan, the WCIP, as administered by SCDOI/NCCI, is the only “mechanism” in the state for implementing the Assigned Risk pool and has been approved by the Director of the Department of Insurance for

¹¹ Per South Carolina law and the WCIP, the LSRP is applicable to Assigned Risk policies issued after November 1, 2003. Accordingly, LSRP is applicable to Ard Trucking's Assigned Risk policy as a matter of law. Further, per the SCDOI/NCCI required Notice Endorsement, Mandatory Endorsement & Brochure, as expressly required by the WCIP, Ard Trucking had sufficient notice that the LSRP applied to its Assigned Risk policy. (R. p. 587).

¹² This case revolves around the Loss Sensitive Rating Plan (LSRP) which is mandated by the WCIP. Ard Trucking alleges (1) that he is not bound by the LSRP, and (2) that the carrier is estopped from seeking the additional premium it is owed pursuant to the LSRP.

use in South Carolina. Avant v. Willowglen Academy, 367 S.C. 315, S.E.2d 797 (S.C. 2006) affirming 356 S.C. 181, 588 S.E.2d 125 (Ct. App. 2003). While the Court of Appeals in the Avant case noted that the General Assembly had not specifically enacted the WCIP, it determined that the Director of the Department of Insurance followed the broad mandate of the General Assembly and properly acted upon its intent in section 38-73-540 to create an Assigned Risk plan by approving the WCIP for its use in the Assigned Risk practice in this State. Id. The WCIP provides the framework for the Assigned Risk pool and includes numerous provisions governing Assigned Risk practice. Id. Without the WCIP, there would be nothing guiding Assigned Risk practice and its procedure, such as an employer's application process for Assigned Risk coverage or the assignment of an insurer to a risk. Id. The only way an employer can obtain an Assigned Risk policy is by applying through SCDOI/NCCI and the WCIP and certifying that the employer is unable to obtain voluntary coverage. Id. SCDOI/NCCI is designated in the WCIP as the "plan administrator." Id. The Supreme Court affirmed that WCIP rules have the "force of law" concerning Assigned Risk policies. More recently, in Burris v. Propst Lumber & Logging, Inc., 396 S.C. 85, 719 S.E.2d 695 (Ct. App. 2011), the Court of Appeals confirmed that the Assigned Risk Basic Manual and Supplement "is controlling law with respect to the issues it addresses."

2. SOUTH CAROLINA ASSIGNED RISK POLICIES APPLY THE LSRP FOR ASSIGNED RISK POLICIES ISSUED AFTER NOVEMBER 1, 2003.

In South Carolina, Assigned Risk policies are governed by the WCIP. Pursuant to S.C. Department of Insurance, the LSRP applies to South Carolina Assigned Risk policies issued on or after November 1, 2003. The South Carolina Department of Insurance has verified:

“Initially the LSRP was implemented as part of the WC Insurance Plan and was administered by the National Council on Compensation Insurance (NCCI) from March 1, 1994 until May 1, 2000 for policies effective September 1, 1994 and later. Between May 1, 2000 and May 1, 2003, SCDOI/NCCI did not administer the Assigned Risk mechanism and it is unclear if the LSRP was mandated during that period. The SCDOI/NCCI again administered the WC Insurance Plan and the LSRP in South Carolina as of May 1, 2003 for policies effective on November 1, 2003 and after. The Loss Sensitive Rating Program is set forth in the attached SCDOI/NCCI Brochure and the attached approved item filing (including plan documents) provided by the SCDOI/NCCI.” (R. pp. 547-587).

In South Carolina, the WCIP has the force of law. The South Carolina Department of Insurance has verified that the LSRP applies to Assigned Risk policies on or after November 1, 2003. Accordingly, as a matter of law, as Ard Trucking’s Assigned Risk policy was applied for on 11/6/03 and was issued on 11/7/03, the LSRP applies to the Assigned Risk policy issued to Ard Trucking.

Respectfully, the judge’s Order misapplies this fundamental point. Ard Trucking agreed to be bound by the WCIP. The WCIP mandates the LSRP applies to Ard Trucking’s Assigned Risk policy. The WCIP mandates the notice to be provided to Ard Trucking: the SCDOI/NCCI required Notice Endorsement, Mandatory Endorsement and Brochure. (R. p. 587). Although the Notice Endorsement does not list South Carolina specifically, when this specific Assigned Risk policy was issued, the SCDOI had mandated that South Carolina not be listed in the Notice Endorsement. SCDOI had determined that the Mandatory Endorsement and Brochure (which Travelers sent and Ard Trucking received) sufficiently amended and supplanted the Notice Endorsement and provided sufficient notice to Ard Trucking that the LSRP applied to its Assigned Risk policy. (R. pp. 547-587). Accordingly, the SCDOI required Notice & Mandatory Endorsements (and the Brochure) [including the mandated Application, Policy & Binder], all of which Ard

Trucking received in accordance with the WCIP, provides sufficient notice of the LSRP application to Ard Trucking's Assigned Risk policy as a matter of law.¹³ (R. pp. 547-587).

3. ASSIGNED RISK APPLICATION

The Assigned Risk application advises Ard Trucking of the LSRP's applicability. In his application, Ard Trucking signed an applicant statement agreeing to be bound by the WCIP and agreeing that his policy may be subject to the LSRP. Specifically, the Assigned Risk application states:

"The undersigned applicant understands further that since he/she has been unable to secure workers compensation coverage through any other insurance provider, this coverage is being afforded through a Workers Compensation Insurance Plan, and that the rates charged may be higher than those in the voluntary market.

The following statement is only applicable in jurisdictions where the SCDOI/NCCI, Inc. Loss Sensitive Rating Plan has been approved for use:

"By signing below I acknowledge that the SCDOI/NCCI, Inc. Loss Sensitive Rating Plan has been explained to me or that an explanatory notice or Brochure has been provided to me and I agree that I shall be bound by the terms of such plan. If my estimated annual premium or preliminary physical audit premium meets or exceeds the premium eligibility requirement." (R. p. 200).

Here, Ard Trucking signed and submitted an Assigned Risk application to SCDOI/NCCI, and Ard Trucking is bound by such Applicant's Statement. Ard Trucking acknowledged that it is bound by the LSRP if South Carolina had approved the LSRP in South Carolina. Based on the SCDOI approval of LSRP in

¹³ In other words, the judge's interpretation of the Notice Endorsement, to the exclusion of these other NCCI required Endorsements and Forms, erroneously negates the SCDOI/WCIP requirement that LSRP applies to Ard Trucking's policy and constitutes an error of law.

South Carolina for Assigned Risk policies after 11/1/2003, Ard Trucking Company is bound by the LSRP as a matter of law.

Here, Ard Trucking signed and submitted such application to SCDOI/NCCI, and Ard Trucking is bound by such Applicant's Statement. Ard Trucking acknowledged that it is bound by the LSRP if South Carolina has approved the LSRP in South Carolina. Admittedly, Allen Ard testified that he did not review Ard Trucking's application before he signed it, did not read the entire policy, and did not review the WCIP or LSRP provisions he agreed to be bound by. (R. pp. 275-286). In South Carolina, "[a] person who signs a contract or other written document cannot avoid the effect of the document by claiming that he did not read it." Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) (citing Sims v. Tyler, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981); Evans v. State Farm Mut. Auto. Ins. Co., 269 S.C. 584, 587, 239 S.E.2d 76, 77 (1977)). Instead, when a person signs a document, he is responsible for exercising reasonable care to protect himself by reading the document and making sure of its contents. Id. at 663-64, 582 S.E.2d at 440. "The law does not impose a duty on the [defendant] to explain to an individual what he could learn from simply reading the document." Id. at 664 582 S.E.2d at 440 (citing Citizens & S. Nat'l Bank of S.C. v. Lanford, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994)). Based on the SCDOI approval of LSRP in South Carolina for Assigned Risk policies after 11/1/2003, Ard Trucking is bound by the LSRP as a matter of law.

4. ASSIGNED RISK POLICY

Identical with WCIP, the Assigned Risk policy itself allows Travelers to charge premiums in accordance with the WCIP. Specifically, the Assigned Risk policy states:

"A. OUR MANUALS

All premium for this policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance. (R. p. 213).

Moreover, the Assigned Risk policy and binder set forth:

“COVERAGE FOR THIS EMPLOYER HAS BEEN PLACED THROUGH THE ASSIGNED RISK PLAN. AS THE PLAN IS THE MARKET OF LAST RESORT, COVERAGE SHOULD CONTINUE TO BE SOUGHT THROUGH THE STANDARD/VOLUNTARY MARKET. PLEASE NOTE THAT PREMIUMS IN THE ASSIGNED RISK PLAN MAY BE HIGHER THAN THE STANDARD/VOLUNTARY MARKET.

If a policy issued by an insurance carrier, pursuant to an assignment under the Workers Compensation Insurance Plan, is canceled due to the employer’s failure to comply with the terms or conditions of the policy, such employer may be ineligible for further coverage under the Plan.”

...
“Coverage is being bound subject to your signed statement acknowledging and agreeing to the terms of the Loss Sensitive Rating Plan in the event that your estimated annual premium or preliminary physical audit premium meets or exceeds the premium eligibility requirement.” (R. pp. 272-273).

Accordingly, per the Assigned Risk policy terms itself, the WCIP’s LSRP applies to Ard Trucking’s Assigned Risk policy as a matter of law.

5. THE NOTICE ENDORSEMENT, THE MANDATORY ENDORSEMENT & THE LSRP BROCHURE.

Respectfully, the judge erroneously held that the Notice Endorsement, in isolation, negated or excluded the application of the LSRP to Assigned Risk policies in South Carolina. However, the judge’s decision failed to consider the WCIP/SCDOI approved plan and rules concerning how the Notice Endorsement, the Mandatory Endorsement, and the brochure work in tandem provide sufficient notice

to an Assigned Risk applicant/insured of the applicability of the LSRP to Assigned Risk policies. (R. pp. 547-587).

The SCDOI/WCIP requires a servicing carrier to issue a Notice Endorsement upon the submission of an Assigned Risk application and the issuance of an initial Assigned Risk policy – Travelers issued the required Notice Endorsement. (R. p. 215). After the issuance of an initial Assigned Risk policy with a Notice Endorsement, the SCDOI/WCIP allows a servicing carrier to perform an initial audit survey to determine whether the premium triggers the LSRP – Travelers performed such a survey, which triggered the LSRP. (R. pp. 152-153; 264; 269; 547-587). After the LSRP is triggered, the SCDOI/WCIP requires a servicing carrier to issue a rewritten policy with a required Mandatory Endorsement and a Brochure—Travelers issued the required Mandatory Endorsement (R. pp. 236-238) and Brochure. (R. pp. 254-262). These three documents (the required Notice Endorsement, Mandatory Endorsement & Brochure) are the only documents that the servicing carrier is required to forward to the Assigned Risk insured and Travelers forwarded such documentation to Ard Trucking.¹⁴ Accordingly, as SCDOI/NCCI (and therefore the Legislature) has determined that these three documents are the only documentation required to provide Ard Trucking with sufficient notice of the LSRP applicability to Ard Trucking’s Assigned Risk policy, no other act is required by the servicing carrier

¹⁴ The judge’s adoptive Order further erred by holding “However, instead of using the required Notification Endorsement to notify Ard Trucking that LSRP would be applied to the South Carolina policy issued to Ard Trucking by Defendant, the language Defendant used in the required Endorsement not only failed to include South Carolina as a state wherein LSRP applied, it effectively excluded Ard Trucking’s South Carolina policy from being subject to LSRP application.” Importantly, as set forth in the Affidavit of the Travelers underwriter, auditor and LSRP experts (R. pp. 152-153; 264; 269), the Notice Endorsement Travelers sent (which did not list South Carolina) was the SCDOI/NCCI required Endorsement. There is absolutely no evidence in the Record that Travelers was supposed to send any other Notice Endorsement and the judge’s finding of fact to the contrary is erroneous. Further, no evidence in the Record exists to support any finding that Travelers could alter the SCDOI/NCCI required Endorsements and such finding of fact is also erroneous. Finally, the proposition that the law (i.e., the WCIP) is extraneous and not incorporated into an Assigned Risk policy is a clear error of law based on South Carolina law. Finally, in contrast to the judge’s public policy pronouncements, respectfully, stripping the WCIP from applying to Assigned Risk policies would cause “chaos to reign within the business world and within the courts,” specifically in the Assigned Risk markets.

to apply the LSRP to Ard Trucking's Assigned Risk policy. (R. pp. 152-153; 264; 269; 547-587).

The above is especially true where Ard Trucking and its producer admitted that they knew that the LSRP applied to its Assigned Risk policy before Ard Trucking issued its ILOC to the servicing carrier. (R. pp. 316-329). Not only did Travelers comply with the WCIP requirements to provide Ard Trucking with notice as required by the WCIP, Ard Trucking and its producer have admitted that they knew the LSRP applied to its Assigned Risk policy before Ard Trucking issued its ILOC to Travelers; yet, Ard Trucking argues and the judge's Order embraces the notion that, despite complying with the SCDOI/WCIP requirements which provides notice to an insured and despite the fact that Ard Trucking and its producer admit that they knew the LSRP applied to its policy, the Notice Endorsement, which fails to list South Carolina, in isolation, dictates that the Assigned Risk policy does not allow, negates, or somehow excludes the LSRP to Ard Trucking's Assigned Risk policy...irrespective of the fact that the Mandatory Endorsement and Brochure amended the initial Notice Endorsement and were sent to and received by Ard Trucking before it issued its ILOC to Travelers. Respectfully, such result is absurd on its face, ignores the SCDOI approved plan/WCIP, evades the province of the SCDOI/NCCI and the Legislature, and risks the entire Assigned Risk program in South Carolina to inure to the benefit of Ard Trucking, which voluntarily applied for and received an Assigned Risk policy (by design, a more expensive policy of last resort) and where it voluntarily agreed to be bound by the WCIP.

Accordingly, respectfully, this appeal should be resolved upon application of the law (the WCIP) as set forth in the Basic Manual, Supplemental Manual, and the SCDOI Plan documentation in its entirety (R. pp. 547-487), and interpreting the initial Notice Endorsement, in isolation, as set forth in the judge's adopted Order violates the law and constitutes an error of law.

Respectfully, a fatal error in the judge's adoptive Order is that it ignores the SCDOI approved plan/WCIP, i.e., the law. (R. pp. 547-587). In South Carolina, the WCIP, as adopted by the SCDOI and NCCI, mandates the LSRP applies to Ard Trucking's Assigned Risk policy as a matter of law. Respectfully, the judge erred by adopting Ard Trucking's argument that the Notice Endorsement excludes or negates the LSRP in South Carolina because it does not list South Carolina as a state to which the Notice Endorsement applies. Although the Notice Endorsement does not list South Carolina, the Mandatory Endorsement does apply to South Carolina and, most importantly, the SCDOI/NCCI/SCDOI has determined that the Mandatory Endorsement (along with the Brochure) amend/supplant the Notice Endorsement to provide sufficient notice to Ard Trucking that the LSRP applies to its South Carolina Assigned Risk policy. (R. pp. 547-587). The WCIP requires Travelers to issue the SCDOI/NCCI required Notice Endorsement it issued to Ard Trucking. After the initial audit survey, once the payroll triggers the LSRP (as in this present case), the WCIP requires Travelers to issue a SCDOI/NCCI required Mandatory Endorsement and Brochure. Pursuant to the WCIP, the Mandatory Endorsement (and Brochure) revises and amends the Notice Endorsement and the WCIP mandates that the Mandatory Endorsement (and Brochure) provides sufficient notice that the LSRP applies to Ard Trucking's Assigned Risk policy. (R. pp. 547-587).

In addition to the Mandatory Endorsement, the WCIP also requires that Travelers send the SCDOI/NCCI required Brochure which clearly explains the LSRP applicability in South Carolina, its purpose, and how the LSRP works. It is uncontroverted that Travelers sent and Ard Trucking received these SCDOI/NCCI required Forms and Brochure. As such, according to the law, Ard Trucking had sufficient notice and Ard Trucking is deemed to have notice of the LSRP applicability to its Assigned Risk policy as a matter of law. To solely interpret the initial Notice Endorsement in isolation as excluding the LSRP applicability ignores

the entire regulatory scheme as set forth in SCDOI 0001 – 00040 (R. pp. 547-587), which mandates how a servicing carrier notifies an insured of the LSRP’s applicability. Respectfully, regretfully, the judge ignored entire portions of the WCIP (i.e., the law) to render the LSRP program to be irrelevant. Further, the judge erred by finding the Mandatory Endorsement (and Brochure) did not provide sufficient notice that the LSRP applies in South Carolina. The Mandatory Endorsement (and Brochure) clearly advises that LSRP applies to an Assigned Risk policy in states that have approved the LSRP. In South Carolina, as the LSRP applies to all Assigned Risk policies after November 1, 2003, the Mandatory Endorsement incorporates the LSRP into Ard Trucking’s Assigned Risk policy. The Mandatory Endorsement clearly states “This Endorsement applies where the LSRP has been approved.” (R. p. 236). Thus, although the initial Notice Endorsement did not specifically list South Carolina, the Mandatory Endorsement clearly applies in South Carolina. Further, interpreting the Mandatory Endorsement to mean nothing and to render it a nullity based on the initial Notice Endorsement violates the SCDOI approved plan/WCIP and renders the entire LSRP obsolete in South Carolina and constitutes an error of fact and law.

6. ARD TRUCKING HAS FAILED TO PROVIDE ANY EXPERT TESTIMONY THAT TRAVELERS BREACHED ANY STANDARD OF CARE.

Ard Trucking has failed to list any expert to opine that Travelers breached any standard of care. Indeed, the South Carolina Department of Insurance has verified that LSRP applies to Assigned Risk policies issued after November 1, 2003 date and, therefore, specifically applies to Ard Trucking’s Assigned Risk policy. Ard Trucking has not listed any expert to opine that Travelers has improperly determined that the LSRP applies to Ard Trucking’s Assigned Risk policy or breached any standard of care in regard to its audits. Indeed, no expert testimony

exists that Travelers took any act that violated any standard of care or caused any damages to Ard Trucking. In South Carolina, a party is required to provide expert testimony to establish the standard of care and deviation from such standard in order to proceed with a professional negligence case. See City of York v. Turner – Murphy Company, Inc., 317 S.C. 194, 452 S.E.2d 615 (1995) (stating “In a professional negligence cause of action, Ard Trucking must prove the professional failed to conform to generally recognized and accepted practices in the profession. If Ard Trucking cannot meet this burden, then the professional cannot be found liable as a matter of law.... Where professional negligence is alleged, expert testimony is usually necessary to establish both the standard of care and the professional’s deviation from that standard, unless the subject matter is within the area of common knowledge and experience of the layman so that no special learning is needed to evaluate the professional’s conduct”).

Although Ard Trucking argues that Travelers provided Ard Trucking with an Assigned Risk policy that was “better” than a typical South Carolina Assigned Risk policy (due to the Notification Endorsement’s failure to specifically list South Carolina), Ard Trucking has provided no evidence that the Endorsements (the Notification and Mandatory Endorsements) issued by Travelers to Ard Trucking were not standard Endorsements drafted, copyrighted and mandated by SCDOI/NCCI. Ard Trucking has provided no evidence that a servicing carrier, such as Travelers, has any discretion to vary the Endorsements mandated by the SCDOI/NCCI. Here, Ard Trucking has failed to provide any testimony, expert or otherwise, that Travelers, its underwriters, or its auditor breached any standard of care or to provide any evidence that the Endorsements used by Travelers were not mandated by SCDOI/NCCI. Accordingly, Ard Trucking’s lack of any expert testimony to support its claims against Travelers is also fatal to Ard Trucking’s claims.

Nowhere is the above more evident than the judge's Order which simply finds that Travelers could have simply added in South Carolina to the initial Notice Endorsement or that Travelers somehow selected to provide Ard Trucking with defective Endorsements. No evidence (zero, zilch, nada) exists to support any finding that Travelers did not issue the SCDOI/NCCI required and copyrighted Endorsements or Forms.¹⁵ Also, no evidence exists that Travelers had any authority to alter or amend any of the SCDOI/NCCI required and copyrighted Endorsements or Forms. In contrast, it is uncontroverted that Travelers issued the SCDOI/NCCI required and copyrighted Endorsements or Forms and fully complied with all of its obligations as set forth in the WCIP. (R. pp. 152-153; 264; 269).

7. ARD TRUCKING FAILED TO APPEAL TRAVELERS' LSRP/PREMIUM DETERMINATION PURSUANT TO WCIP RULE 4.

Ard Trucking asserts that Travelers is estopped from seeking the premium it is owed. However, Ard Trucking failed to make such arguments via the appeal mechanism to SCDOI/NCCI set forth in WCIP Rule 4. (R. pp. 588-590; Supplemental Record 1-9). The WCIP appellate process requires Ard Trucking to appeal such dispute to SCDOI/NCCI and, if unsatisfied, the appeal process requires an appeal to the Workers' Compensation Commission, the appellate courts, and ultimately to the State Supreme Court.

The SCDOI/NCCI/WCIP unappealed LSRP determination binds Ard Trucking per the WCIP requirements. The WCIP Rule 4 provides Ard Trucking with

¹⁵ Indeed, the adoptive Order errs where it finds "simply because SCDOI allowed insurers to include LSRP provisions in South Carolina Assigned Risk policies beginning in November 1, 2003, LSRP provisions were not automatically incorporated into every South Carolina Assigned Risk policy." In South Carolina, pursuant to the WCIP, the proposition that Ard Trucking is bound by the law (the WCIP) is not a red herring argument as Ard Trucking asserts; to the contrary, pursuant to the WCIP and the policy terms itself, Ard Trucking is bound by the law and the law requires LSRP's applicability when Ard Trucking signed its Application wherein it agreed to be bound by the WCIP. The judge's Order which speculates a servicing carrier can alter "the law" or choose not to follow "the law" or that the servicing carrier can alter/amend/change the SCDOI/NCCI required Endorsements is an error of law, further, per the WCIP, the LSRP is automatically applicable to Ard Trucking's policy based on the SCDOI/approved plan/verification, the application, the binder and policy, and the required Endorsements and Brochure which Ard Trucking received.

an appeal mechanism/process to appeal to SCDOI/NCCI, an administrative body, concerning any LSRP dispute between the parties. Specifically, the Assigned Risk Supplement and SCDOI/NCCI Basic Manual Rule 4 set forth the following mechanism:

“Any Assigned Risk policyholders affected by the actions of their assigned carrier or SCDOI/NCCI are provided with a process in which grievances can be reviewed, resolved, or heard by the mechanism that has been established and approved in the state for such grievances. For further information on this process, refer to Basic Manual Rule 4-A-10.

The state’s approved workers compensation appeal mechanism is the forum for hearing the dispute. This process is administered by SCDOI/NCCI in its capacity as rating organization and/or Plan Administrator. The Plan Administrator’s intervention in disputes is generally limited to matters involving experience rating modification factors, application of rules contained in SCDOI/NCCI manuals, eligibility and assignment under the WCIP, classification assignment, and Assigned Risk pricing programs.”

“Any party affected by the decision of the Plan Administrator may seek binding arbitration for such purpose; or in the alternative, the party may seek a de novo review by the regulatory authority, by requesting such binding arbitration or de novo review in writing and at its own expense, within thirty (30) days after the date of such decision.”

“The conditions outlined in Rule 4-A-2-g must be met in order for the employer to have a bona fide premium dispute. The Plan Administrator’s intervention in disputes is generally limited to matters involving:

- Experience rating modification factors
- Application of rules contained in SCDOI/NCCI manuals
- Eligibility and assignment under the Workers Compensation Insurance Plan (WCIP)
- Classification assignment
- Assigned Risk pricing programs” (R. pp. 588-590; Supplemental Record 1-9).

Here, as required by the WCIP, Ard Trucking did not file any appeal of Travelers' LSRP decision to the SCDOI/NCCI. Rather, Ard Trucking abandoned its appeal of the dispute and, pursuant to WCIP, the insured is bound by Travelers' decision. In South Carolina, failure to exhaust administrative remedies requires the administrative ruling, right or wrong, to be affirmed. See Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 714 S.E.2d 869 (S.C. 2011) (citing Richland County v. Palmetto Cablevision, 261 S.C. 222, 199 S.E.2d 168 (1973) (stating "an unchallenged ruling, right or wrong, becomes law of the case."); Bennett v. S.C. Dep't of Corrections, 305 S.C. 310, 408 S.E.2d 230 (1991) (stating "the decision of administrative tribunal precludes the re-litigation of the issues addressed by that tribunal in a collateral action").

Further, Ard Trucking's argument asserted at the hearing that Rule 4 of the WCIP does not apply to it because Ard Trucking's president did not subjectively believe the rule applied to him is incredible. Ard Trucking's counsel argued: "So, again, Your Honor, it's our position that the policy speaks for itself, and of course, if it's not covered by the LSRP, Mr. Ard had no duty to do anything with respect to the LSRP including any type time of appeal [sic]. They didn't – he didn't think it ever applied. He still doesn't because they [presumably his producer] told him it did not." (R. p. 56). Such argument is unbelievable. Ard Trucking agreed to be bound by the WCIP, which contains and requires an appeal via an administrative appeal mechanism of any disputes between the insured and servicing carrier concerning "application of rules contained in NCCI manuals" and "Assigned Risk pricing programs"; however, Ard Trucking asserts it is not bound by the WCIP appeal mechanism because he, the president, did not believe he was bound by it. The law, however, does not work in such a manner and how Ard Trucking "feels" about the appeal mechanism (which he agreed to be bound by) does not dictate whether or not

Ard Trucking is bound by such appeal mechanism. With little doubt, Ard Trucking is bound by the WCIP, including its appeal mechanism, when he agreed to be bound by the WCIP in his Assigned Risk application.

Accordingly, Ard Trucking is prohibited from asserting its current defenses or seeking its present claims against the servicing carrier in this present litigation, and Ard Trucking is bound by the prior unappealed Travelers/NCCI determination pursuant to the WCIP. As no genuine issue of fact exists for a jury to determine any factual issue as the servicing carrier's entitlement to premiums has been established pursuant to the WCIP provisions and Ard Trucking's abandoned appeal via SCDOI/NCCI pursuant to the WCIP provisions, Travelers is entitled to the premium it seeks on such grounds as well. Accordingly, as Ard Trucking failed to timely appeal Travelers' decision to the SCDOI/NCCI, the administrative body charged with administering the WCIP, Ard Trucking cannot collaterally attack Travelers unappealed decision via this present collateral lawsuit. If Ard Trucking wished to assert estoppel arguments, it was required to raise those arguments before the SCDOI/NCCI previously.

II. PER THE WCIP, THE PRODUCER IS THE AGENT OF THE ASSIGNED RISK INSURED AND THE PRODUCER ADMITTED HE HAD ACTUAL KNOWLEDGE THAT THE LSRP APPLIED TO ARD TRUCKING'S ASSIGNED RISK POLICY BEFORE ARD TRUCKING ISSUED AN IRREVOCABLE LETTER OF CREDIT (ILOC) TO THE SERVICING CARRIER; THEREFORE, ARD TRUCKING, THROUGH ITS PRODUCER, HAD ACTUAL KNOWLEDGE THAT THE LSRP APPLIED TO ITS POLICY.

A. ARD TRUCKING'S PRODUCER IS AN AGENT OF ARD TRUCKING, NOT TRAVELERS.

In South Carolina, the WCIP mandates that the producer is an agent of the insured, not the servicing carrier Travelers. Pursuant to the WCIP and South Carolina law, the producer who submitted the Assigned Risk application on behalf of Ard Trucking is the agent of Ard Trucking, not Travelers. As such, any failure of Ard Trucking's producer to explain to his own client the WCIP, the LSRP, the Assigned Risk policy or its implications rests solely with Ard Trucking's own agent, not with Travelers. See S.C.W.C.I.P. Section I. "Duties and Responsibilities Under the Plan: The Producer's and Agency's Duties and Responsibilities" ... [a producer] "is not a contract agent or agent of the servicing carrier. [Producers] have no authority from the servicing carrier to bind or cancel coverage nor to otherwise act within such an agency relationship." (R. pp. 591-593). Moreover, both Ard Trucking and its producer admitted that the producer is the agent of Ard Trucking, not the servicing carrier.¹⁶ (R. pp. 355-363).

¹⁶ The judge's adoptive Order erroneously ruled, in passing, that Michael P. Hair & Associates was a mere "broker" in North Carolina. The Order fails to find that Michael P. Hair & Associates was Ard Trucking's producer and that the producer's knowledge is imputed to Ard Trucking as a matter of fact and law. In its Motion for Reconsideration, Travelers respectfully requested the judge to issue specific findings of fact that the producer was an agent of Ard Trucking and that the knowledge of the producer was imputed to Ard Trucking, which had actual knowledge that the LSRP was applicable to its Assigned Risk policy; however, the judge denied such Motion for Reconsideration. (R. pp. 113-135; 15)

Here, Ard Trucking's producer admitted he was aware that the LSRP applied to Ard Trucking's Assigned Risk policy before Ard Trucking provided the irrevocable LOC to the servicing carrier:

“Q. Okay. Now, after the binder was issued, did the producer become aware that due to the amount of premium for the case, the premium and the payroll of the insured, that the LSRP was triggered?”

A. Not right away. I think it was sometime after an audit was performed and it was determined that the payroll was higher than what we – you know – what was submitted in the application so...

Q. Right. And that was the preliminary audit that's in line with the WCIP provisions?

A. I believe so, yes.”

Gary T. Usher deposition transcript, (R. p. 319, l. 9-19).

“Q. Okay. At some point before the letter of credit was requested, was the producer Michael P. Hair informed of the LSRP program and the details set forth in Defendant's Exhibit No. 4? [March 1, 2004 letter from Travelers and LSRP booklet attached as Exhibit 10 to this Memorandum.]

A. Yes. We were when we received this.”

Gary T. Usher deposition transcript, (R. p. 321, l. 11-15).

“Q. Okay. And did you have any conversations with the safety manager at Ard Trucking about the LSRP?”

A. I'm sure I did.”

Gary T. Usher deposition transcript, (R. pp. 321, l. 25 – 322, l. 1-3).

“A. Harry Brown was the safety manager and he was my contact person there. He was who I talked to about whatever issues we needed to talk about.

Q. Okay. And did you advise Mr. Brown about the LSRP?”

A. I'm sure once this – it became aware to both of us I'm sure we had probably more than one discussion on it and just – you know – just discovering what it was and what was necessary and what had to be done going forward.”

Gary T. Usher deposition transcript, (R. p. 322, l. 5-14).

Here, Ard Trucking's producer admitted he was aware that the LSRP applied to Ard Trucking's Assigned Risk policy before Ard Trucking provided the ILOC to

the servicing carrier. Also, Ard Trucking's producer admitted he became aware of and had conversations with Ard Trucking about the LSRP on or about March of 2004, before Ard Trucking issued its ILOC to Travelers. As such, the producer had knowledge that Ard Trucking's Assigned Risk policy had triggered the LSRP and that Ard Trucking's Assigned Risk policy was subject to the LSRP prior to Ard Trucking issuing an ILOC to Travelers. Moreover, the admitted knowledge of the producer is imputed to Ard Trucking as a matter of law. It is well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority. Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp., 273 S.C. 306 (S.C. 1979); see 3 Am.Jur.2d, Agency, § 273, et seq.; 3 C.J.S. Agency § 432, et seq.; American Freehold Land Mortgage Co. v. Felder, 44 S.C. 478, 22 S.E.2d 598 (1985); Hill v. Carolina Power & Light Co., 204 S.C. 83, 28 S.C. 83, 28 S.E.2d 545 (1943). Citizens' Bank v. Heyward, 135 S.C. 190, 190, 133, S.E. 709, 709 (1925) (recognizing general rule that notice to an agent is notice to principal, particularly in cases of corporations); 18B Am.Jur.2d Corporations § 1442 (2004) ("A corporation's knowledge is entirely imputed to it from the knowledge possessed by its officers and agents. In accordance with general agency principles, a corporation generally is charged with knowledge of facts that its agents learn within the scope of their employment").

As Ard Trucking's producer admitted that he knew that the LSRP applied to the Assigned Risk workers' compensation policy prior to Ard Trucking issuing a letter of credit pursuant to the LSRP as required by the WCIP, the knowledge of the producer is imputed to Ard Trucking, and Ard Trucking had imputed knowledge that the LSRP applied to its Assigned Risk policy prior to Ard Trucking issuing an ILOC to Travelers. Further, the producer testified that he notified Ard Trucking of the LSRP applicability to its Assigned Risk policy, establishing actual knowledge of the same on behalf of Ard Trucking.

B. ARD TRUCKING'S COUNTER-ARGUMENTS AS ADOPTED BY THE JUDGE'S ORDER ARE WITHOUT MERIT.¹⁷

Ard Trucking's counter-arguments are based on estoppel. In South Carolina, in order to prevail on a claim of estoppel, Ard Trucking must demonstrate: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reasonable reliance on the other party's conduct; and (3) a prejudicial change in position. Stringer v. State Farm Mutual Automobile Ins. Co., 386 S.C. 188 (Ct. App. 2011). Admittedly, Ard Trucking had the means of knowledge and implied, if not actual, knowledge of the LSRP. Also, per the WCIP, the Mandatory Endorsement & Brochure, as well as the entire WCIP's availability to Ard Trucking, provides notice, knowledge, and the means of knowledge of the LSRP's applicability. Further, admittedly, Ard Trucking did not "reasonably rely" on any representation by Travelers. (R. pp. 275-286; 310-313).

Ard Trucking's first counter-argument, which the judge adopted in his Order, is that the LSRP does not apply to Ard Trucking's South Carolina Assigned Risk policy because of the LSRP "Notice" Endorsement contained in the Assigned Risk policy. Ard Trucking argues that the LSRP "Notice" Endorsement excluded the LSRP applicability (as the Endorsement does not specifically list South Carolina) and therefore the servicing carrier is estopped from seeking additional LSRP funds.¹⁸ However, Ard Trucking's argument is flawed because the Mandatory Endorsement (and Brochure) supplants/amends and revises the Notice

¹⁷ Indeed, the judge's Order holds that a strained interpretation of the Notice Endorsement did not advise Ard Trucking of what it already knew, where: 1) Ard Trucking is presumed to know the law (the WCIP) as a matter of law; 2) the Mandatory Endorsement and Brochure provided notice to Ard Trucking as a matter of law; 3) the producer admitted it knew the LSRP was applicable to Ard Trucking's policy; and 4) the producer told Ard Trucking that LSRP applied to its Assigned Risk policy.

¹⁸ Ard Trucking ignores the Mandatory Endorsement completely in asserting its arguments. As the SCDOI/NCCI has determined that the "Notification" and "Mandatory" Endorsements (along with the Brochure) provide the requisite notice to an Assigned Risk policy insured, such Endorsements provide adequate notice to Ard Trucking of the LSRP applicability to Assigned Risk policies in South Carolina. (R. pp. 547-587).

Endorsement (to the extent it may be interpreted to exclude the LSRP in South Carolina¹⁹).

Further, Ard Trucking's argument has already been soundly rejected by South Carolina courts. Specifically, the reasoning and holding of the Georgetown Steel Company vs. Capital City Insurance Company, 318 B.R. 313 (U.S.B.C. (D.S.C.) 2004) decision is particularly instructive. In Georgetown, the South Carolina bankruptcy court held that the servicing carrier's use of standard forms and policies (such as the Assigned Risk LSRP Notification Endorsement at the time) is not ambiguous to a reasonable person in South Carolina as a matter of law. The Court held that the Assigned Risk application, the WCIP, and Assigned Risk policy terms put the insured on notice of the LSRP and its details as a matter of law because "an insured could examine the South Carolina plan to determine the specific factors applicable to all policies written under the Assigned Risk plan." Moreover, "the standard LSRP Endorsements drafted and copyrighted by SCDOI/NCCI" ... "specifically and unambiguously notifies the policy holder that the LSRP has been adopted in South Carolina and states that the plan will be adjusted based upon the losses incurred." Similarly, Ard Trucking "could have examined the South Carolina plan to determine the specific factors applicable to all policies written under the Assigned Risk plan." Ard Trucking failed to do so, at its own peril.²⁰ Further, the Application, the Policy, the Binder, the Mandatory

¹⁹ Indeed, a literal application of the Notice Endorsement merely sets forth that the Notice Endorsement itself does not apply to Ard Trucking's Assigned Risk policy, a far cry from "excluding" or "negating" the LSRP in South Carolina; rather, it merely notifies an insured of specific states which have LSRP programs pursuant to such specific Endorsement. Failure to list South Carolina as a specific state does not exclude or negate the LSRP from applying in South Carolina; rather, it merely prevents the application of the Notice Endorsement itself. Moreover, once the payroll triggers the LSRP during an interim audit survey, the WCIP provides specific notice that the LSRP applies to an Assigned Risk policy via the Mandatory Endorsement and Brochure, which amend/supplant the Notice Endorsement. (R. pp. 547-587).

²⁰ Bizarrely, Ard Trucking's interpretation, as adopted by the judge's Order, negates the key holding of the Georgetown Steel decision. The fact that the Endorsements required by the WCIP/NCCI at the time of Georgetown decision differed than the Endorsements the WCIP/NCCI required at the time Ard Trucking policy was issued does not mean that the Endorsements SCDOI/NCCI required to be sent to Ard Trucking are somehow defective. Rather, the crux of the Georgetown decision centers around a servicing carrier's use of SCDOI/NCCI approved and required

Endorsement (which supplements/revises the Notice Endorsement) and the Brochure, all drafted, copyrighted, approved and required by SCDOI/NCCI, “specifically and unambiguously notifies the policy holder that the LSRP has been adopted in South Carolina.” (R. pp. 547-587).

The Assigned Risk policy Endorsements’ language is mandated by the SCDOI/NCCI and South Carolina’s Department of Insurance. The Assigned Risk policy/Binder itself mandates that “Coverage is being bound subject to your signed statement acknowledging and agreeing to the terms of the Loss Sensitive Rating Plan in the event that your estimated annual premium or preliminary physical audit premium meets or exceeds the premium eligibility requirement.” (R. p. 273). As Ard Trucking agreed to be bound by the WCIP and applied for and received an Assigned Risk policy, Ard Trucking had the means of knowledge to obtain and review a copy of the SCDOI approved plan/WCIP, or contact its producer, or the South Carolina Department of Insurance to inquire further concerning the LSRP applicability. Ignorance of the law is no excuse: “It is fundamental principle of law that everyone is charged with or deemed to have knowledge of the law. The legal axiom that ignorance of the law is no excuse has long been the law of this nation and state. 31A C.J.S. Evidence Section 132(1) (1980); Benn v. Camel City Coach Co., 162 S.C. 44, 160 S.E. 135 (1931); Gregory v. Gregory, 292 S.C. 587 (Ct. App. 1987). In South Carolina, the WCIP’s LSRP is the law. Moreover, as Ard Trucking’s producer admitted he knew the LSRP applied to Ard Trucking’s Assigned Risk policy before he asked Ard Trucking to issue the irrevocable LOC to the servicing carrier, such knowledge is imputed to Ard Trucking. (R. pp. 316-329). Finally, as Ard Trucking’s producer testified he advised Ard Trucking of the

Endorsements as providing notice to an Assigned Risk insured and, more importantly, an insured’s own responsibility to review the WCIP to determine the applicability of the LSRP. Ard Trucking and its producer had the same access to the WCIP that the Georgetown insured had and, accordingly, the Georgetown decision supports Travelers position in this case. Further, under Georgetown’s reasoning, the Mandatory Endorsement and Brochure amend the initial Notice Endorsement and provide sufficient notice of the LSRP to Ard Trucking in South Carolina.

LSRP before Ard Trucking issued its ILOC to Travelers, Ard Trucking had the means of knowledge, imputed knowledge, and actual knowledge of the LSRP applicability to its Assigned Risk policy.

Accordingly, Ard Trucking not only had the means of knowledge, but also had knowledge that the LSRP applied to the Assigned Risk policy before Ard Trucking issued an irrevocable LOC to the servicing carrier. Further, in key parts of their depositions, Allen Ard and Harry Brown both testified that they did not rely on the Assigned Risk “Notice” Endorsement, negating any reasonable reliance on the part of Ard Trucking. (R. pp. 284-286; 310-314; 377-385). For these reasons, Ard Trucking’s first counter-argument fails.

For a second defense/counter-argument, Ard Trucking argues, and the judge’s Order implies, that the servicing carrier should be estopped due to the servicing carrier having issued a “final” bill which Ard Trucking paid and that the amount that Ard Trucking owed pursuant to the LSRP was somehow “extraordinary.”²¹ This argument is also flawed because, by its nature, LSRP mandates retrospective billings, beyond the final premium bill, and is intended to be a mechanism to ensure that large employers, such as Ard Trucking, pay their fair share based on the number of losses such employers have during the policy period.²² Indeed, the LSRP specifically provides for three evaluation periods after

²¹ Indeed, respectfully, the judge’s adoptive Order reflects a bias against the LSRP, referring to the additional LSRP premium owed by Ard Trucking as “extraordinary additional premium charges for losses after the coverage year ended” and “extraordinary LSRP premiums” on eight separate occasions. Respectfully, it should be beyond the purview of the Court to question the wisdom or folly of the Legislature/SCDOI/NCCI in regard to the LSRP; rather, the Court should be limited to applying the law, not re-writing the law. The Legislature/SCDOI/NCCI have determined that the LSRP is necessary/required to ensure the viability of the entire Assigned Risk program in South Carolina, to benefit all employers and South Carolina workers, and ad hoc judicial opinions negating the LSRP in South Carolina (via a strained interpretation of the Notice Endorsement) risk the entire Assigned Risk system and circumvent the intent of the Legislature.

²² The judge’s Order’s footnote 1 is also erroneous based on the WCIP. Travelers’ July 2004 (Letter of Credit for \$52,116) documentation (R. p. 647) is not evidence Ard Trucking was owed a “return premium,” but it is merely a confirmation/receipt that the ILOC was received by Travelers on July 27, 2004. Indeed, the Travelers documentation was issued months before the first valuation of LSRP was triggered, well before the expiration of the policy, and merely reflects what premium would be returned is the LSRP valuation were zero in the future. As the LSRP valuations are not determined until after the policy periods end, the judge’s finding that the July 27th Travelers

the final premium billing to capture such additional premium owed. Section A of the Premium section clearly sets forth that: “All premium for this policy will be determined by our manuals, rates, rating plans and classifications.” (R. p. 213). Moreover, the LSRP program itself exists and was adopted by the SCDOI to ensure large employers pay their fair share to ensure the stability and continued financial viability of the Assigned Risk program in South Carolina. In other words, excusing Ard Trucking from the LSRP program based on a strained reading of the Notice Endorsement in isolation (while ignoring the Mandatory Endorsement/Brochure which amends the initial Notice Endorsement) – because the judge viewed the LSRP premium as being “extraordinary” – will necessarily increase workers compensation costs on all other employers in South Carolina (based on how the Assigned Risk program is funded and maintained). Such result is contrary to the WCIP itself and the public policy reasons underpinning the LSRP as expressed by the Legislature and the SCDOI.

III. THE JUDGE’S PRE-JUDGMENT INTEREST AWARD IS IN ERROR PURSUANT TO S.C. CODE 34-31-20.

S.C. Code Ann. § 34-31-20, entitled “Legal Rate of Interest,” sets forth that the correct pre-judgment interest award for Ard Trucking would be at the rate of 8 ¾ percent per annum. As Ard Trucking’s ILOC was not drafted until September 8, 2005, the correct interest determination would be \$52,116 at 8 ¾ percent per annum from September 8, 2005 until February 13, 2015 (the date of the judge’s Order). Applying an 8 ¾ percent simple interest calculation, the correct pre-judgment interest award is \$42,941.40, not \$51,728.74, as set forth in the judge’s Order.

document promises a return of the ILOC as a “return premium,” before any LSRP valuation was completed, is erroneous and is not supported by any evidence in the Record.

CONCLUSION

No dispute exists between the parties concerning the amount of payroll/remuneration Ard Trucking paid to its workers during the relevant policy period (or the LSRP calculations based on such payroll). The only dispute between the parties is whether or not the LSRP applies to Ard Trucking's South Carolina Assigned Risk policy. Stated differently, the dispositive legal issue involved in this case is solely a legal issue – whether or not the LSRP applies to Ard Trucking's South Carolina Assigned Risk policy.²³ Through his producer, Ard Trucking submitted an Assigned Risk application and Ard Trucking was issued an Assigned Risk policy of workers' compensation insurance pursuant to the WCIP. In his application, Ard Trucking agreed to be bound by the terms of the WCIP. The Assigned Risk Binder and Policy were issued in accordance with the WCIP. The SCDOI has verified that the LSRP applied to South Carolina Assigned Risk policies when the Assigned Risk policy was issued to Ard Trucking pursuant to WCIP. Ard Trucking received the SCDOI/NCCI mandated Notice Endorsement, the Mandatory Endorsement, and Brochure establishing Ard Trucking had notice of the LSRP as a matter of law. Accordingly, the LSRP applies to Ard Trucking's Assigned Risk policy, and Travelers, the servicing carrier, is entitled to the premium it now seeks as a matter of law.

In conclusion, Travelers respectfully requests this Honorable Court reverse the prior judge's Order and further issue an Order/judgment in favor of Travelers for the additional premium of \$122,948 (a liquidated amount) and interest from 6/29/05 to the date of the judge's prior Order for an additional amount of \$103,993.52 for a total of \$264,901.72.

²³ No reasonable jury could find for Ard based on the uncontroverted facts such that the Court is presented with an issue of law. At a minimum, however, triable issues of fact exist to prevent the issuance of an Order in favor of Ard's Motion for Summary Judgment as to Travelers.

Respectfully submitted,

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April 15, 2016
Charleston, South Carolina

CERTIFICATE OF COMPLIANCE

This Brief of Appellant has been prepared using:

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EXCLUSIVE of the Table of Contents, Table of Authorities, the Certificate of Filing and Service, and this Certificate of Compliance, this Brief contains 11,604 words.

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Phillip S. Ferderigos

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Paul M. Burch, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2015-000806

Ard Trucking Company Respondent,

v.

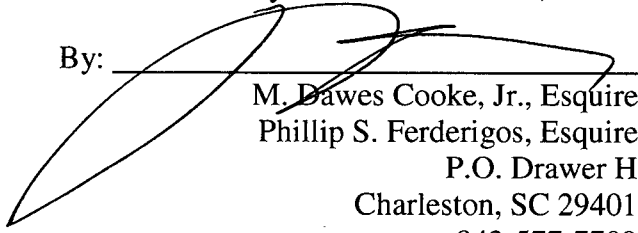
Travelers Property Casualty Company
of America d/b/a The Travelers Indemnity
Company of Illinois Appellant.

CERTIFICATE OF COMPLIANCE

I hereby certify that the Final Reply Brief of Appellant and the Final Brief of Appellant
comply with Rule 211(b).

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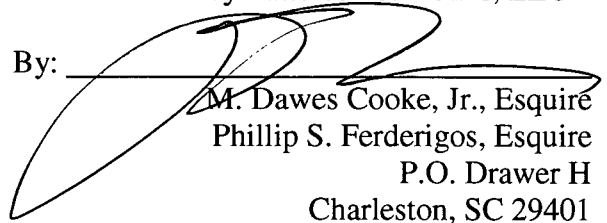
CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 14 day of April, 2016, I filed with the Clerk's Office of the South Carolina Court of Appeals, via U.S. Mail, the required number of copies of the Final Brief of Appellant and the Final Reply Brief of Appellant, and I further certify that I served the required number of copies on counsel for the Respondent with sufficient postage, properly addressed as follows:

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April 18, 2016

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
P.O. Box 11629
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RE: Ard Trucking Company, Respondent
v.
Travelers Property Casualty Company of America d/b/a The Travelers Indemnity Company of Illinois, Appellant
Appellate Court Case No. 2015-000806

Dear Ms. Kitchings:

Please find enclosed the original and 16 copies each of the Final Brief of Appellant and the Final Reply Brief of Appellant. Please file the original and 15 copies and return one clocked copy of each Brief to me in the envelope provided herein.

In addition, please find the original and one copy of the Certificate of Compliance and the Certificate of Filing and Service.

By copy of this letter and pursuant to the Certificate of Service, I am simultaneously serving counsel for the Respondent with copies of both documents.

Thank you for your assistance.

With kind regards,

Phillip S. Ferderigos

Enc.

Cc w/enc.: Martin S. Driggers, Sr., Esq.

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