STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2008-CP-10-127
Appellate Case No. 2010-180986

AequiCap Insurance Company, ... Appellant,

v.

Eddie Reese Best, Travis Scott d/b/a FISCAL Transportation, LLC, Estate of James Buchanan and Roger Pelotte, ... Defendants,

of whom Estate of James Buchanan and Roger Pelotte are, ... Respondents.

INITIAL BRIEF OF RESPONDENT

John S. Nichols
SC Bar No. 004210
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-8995

Daniel W. Luginbill
SC Bar No. 68525
WILSON, LUGINBILL & KIRKLAND, LLC
Post Office Box 1150
Bamberg, South Carolina 29003
(803) 245-7799

Attorneys for Respondent James Buchanan

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COUNTER-STATEMENT OF THE CASE

On July 8, 2008, AequiCap Insurance Company ("AequiCap") brought a declaratory judgment action seeking a ruling as to its duties and obligations to defend or indemnify its insured, Travis D. Scott ("Scott") d/b/a Fiscal Transport ("Fiscal") and Eddie Reese Best ("Best")(collectively referred to as "Insureds") for claims against the Insureds by Roger Pelote ("Pelote") and the Estate of James Buchanan ("Buchanan") for claims that arose out of a motor vehicle collision on January 7, 2008 in Bamberg, South Carolina. AequiCap sought a declaration that its obligation to indemnify the Insureds was limited to $75,000 statutory minimum coverage. (Complaint, p. 5) Only Pelote and Buchanan answered the complaint, and the court entered default judgments against Scott, Best, and Fiscal.

Following some discovery, AequiCap moved for summary judgment, and the court denied that motion. The parties conducted further discovery and the case proceeded to a non-jury trial. The parties presented a Stipulation of Undisputed Facts which the trial court accepted into evidence. The parties did not call witnesses and the trial court based its decision on the Stipulation, arguments of counsel, and the pleadings and discovery the parties filed with the court. (Tr. p. 2; Order of 9/15/10, p. 1).

The trial court found in favor of Pelote and Buchanan, holding AequiCap obligated to indemnify the Insureds up to the full $1,000,000 of coverage provided for in the policy. (Order p. 9). AequiCap timely moved to alter or amend the judgment and the trial court denied that motion. (Motion; Order of 12/2/10 denying motion). AequiCap then timely filed and served its notice of appeal.

While the appeal was pending AequiCap was placed into receivership by the State of Florida. *In re Receivership of AequiCap Ins. Co.*, Case No. 2011-CA-0494 (Leon County Circuit Ct.). The South Carolina Insurance Guaranty Fund is managing the underlying claim.

FACTS

As noted, the trial court tried the matter on stipulated facts. The horrific collision in this case involved four tractor-trailer trucks traveling on Highway 321 just south of the town of Olar in Bamberg County, South Carolina. The issues in this appeal involve the extent of liability insurance coverage for the vehicle that caused the wreck.

THE WRECK

On January 7, 2008, James Buchanan was driving his tractor-trailer northbound on Highway 321. Eddie Best was driving a tractor-trailer owned by Travis Scott, d/b/a Fiscal Transport and was hauling logs southbound on Highway 301. Willie Pelote was driving a tractor-trailer behind Mr. Best's vehicle. Roger Pelote was driving a tractor-trailer behind the vehicle driven by Willie Pelote. (MAIT report, p. 4).

At about noon the Buchanan vehicle was approaching the Fiscal vehicle when two of the tires separated from the trailer portion of Fiscal Transport's vehicle. (MAIT report p. 14). One tire crossed the center line and struck Mr. Buchanan's southbound truck, causing him to lose control. The other tire struck the northbound truck driven by Willie Pelote on the right side. Willie Pelote then swerved to avoid Mr. Buchanan's truck which had crossed over to his side of the roadway; Willie Pelote was not harmed in the wreck.

(MAIT report p. 13). Mr. Buchanan's vehicle then struck the truck being driven by Roger Pelote head on, and both of those vehicles caught fire. Mr. Buchanan was killed and Roger Pelote suffered severe injuries but survived. (MAIT report pp. 9-10).

STIPULATED FACTS IN THE DECLARATORY JUDGMENT

The vehicle Mr. Best was operating was insured by AequiCap. On July 8, 2008, AequiCap filed a declaratory judgment action seeking a ruling as to its duties and obligations to defend and indemnify its insureds, Travis D. Scott, d/b/a Fiscal Transport and Eddie Reese Best for claims against made by Roger Pelotte and Mr. Buchanan's Estate. In the nonjury trial, the parties stipulated to the following facts.

Travis Scott operated Fiscal Transport, a company in the business of hauling timber. (Stip. No. 1). AequiCap Insurance Company issued an automobile liability policy bearing number TC025758 to Fiscal Transport. (Stip. No. 2). The policy provides liability coverage up to a combined single limit of $1,000,000.00. However, the policy contains an endorsement requiring the named insured to submit potential drivers of covered autos to AequiCap for preapproval. The policy provides that these drivers will only be insureds under the policy after they have been submitted to AequiCap and approved for coverage. The exact language of the endorsement is:

> **NON-PREAPPROVED DRIVERS NOT COVERED**
>
> Further, the insured represents that it has submitted to AEQUICAP INSURANCE COMPANY all drivers of its vehicles as of the policy date, further it represents insured will pre-submit to AEQUICAP INSURANCE COMPANY, all drivers for approval prior to permitting said drivers to

drive an insured vehicle, and will not permit any person submitted and approved to drive the insured vehicle during the policy term.

(Stip. No. 3). The policy also provides as follows:

SECTION II – LIABILITY COVERAGE

PARAGRAPH A. "COVERAGE", ITEM 1, "WHO IS AN INSURED" is replaced as follows:

The following are "insureds":

A. You for an covered "auto" only when the covered "auto" is driven by an approved driver described in paragraph "b" of this section II.A.1.

B. Any driver authorized as a commercial truck driver while operating covered "auto" with your knowledge and consent under your operating authority.* No coverage will apply to any driver newly placed in service after the policy begins until you report that driver to us and we advise you in writing that he/she is acceptable to us and that he/she is covered under the policy. Coverage on any such driver newly placed in service will become effective as of the date and time we advise you he/she is acceptable and that they are covered by the policy and not before. Subject to the reporting methods outlined and agreed to in the notification procedure outline signed by the insured and the agent prior to coverage being effected under the policy.

* Only such drivers listed as of the date this policy begins, on the schedule in the original application signed by you, and not otherwise excluded are covered as of the date this policy begins.

(Stip. No. 4). The policy does not contain an MCS-90 or Form E or Form F filing. (Stip. No. 5). Scott submitted two drivers for approval, both of whom were disapproved due to their driving records. (Stip. No. 6).

Best was employed with Fiscal Transport for approximately one month before the accident. (Stip. No. 11). Best hauled logs for Fiscal Transport from the forests to mills

located in the State of South Carolina (Stip. No. 12) and never delivered logs outside the State of South Carolina. (Stip. No. 13). Best never hauled any product other than logs while employed with Fiscal Transport. (Stip. No. 14).

On January 7, 2008, Best was driving the Fiscal Transport truck on Highway 321 within the course and scope of his employment. (Stip. No. 7). Best was hauling logs from a several hundred acre tract of land located in Lexington County, South Carolina to Collum Mill in Allendale, South Carolina. (Stip. No. 15, 17). Best and Fiscal Transport were hauling the logs under contract with Midlands Timber. (Stip. Nos. 16, 19-26). On that date Best was involved in the wreck on Highway 321. (Stip. No. 7). The wreck resulted in Mr. Buchanan's death and injuries to Roger Pelote. (Stip. No. 8).

Neither Travis Scott nor Fiscal Transport had submitted Best to Aequicap for preapproval prior to the wreck. (Stip. No. 9). If Mr. Best had been submitted to AequiCap for preapproval, AequiCap would have disapproved him for coverage due to his driving record. (Stip. No. 10).

Aequicap acknowledged that the SC Financial Responsibility Act prohibits a complete denial of coverage. Aequicap has tendered liability coverage in the amount of $75,000 to the two claimants, collectively. (Stip. No. 32).

THE TRIAL COURT'S RULINGS

The trial court initially ruled:

(A) The pre-approval exclusion was invalid under Section 38-77-30(7), which defines "insureds" to include "any person who uses with the consent,

expressed or implied, of the named insured" the covered motor vehicle, and Best was admittedly operating the truck with Scott's permission.

(B) The pre-approval exclusion in the endorsement contravenes the more specific statute, Section 38-77-142(B), which requires coverage for permissive use, so that the endorsement was void under Section 38-77-142(C).

(C) The court must read the void exclusion in the endorsement out of the policy.

(D) The AequiCap endorsement is easily severable from the policy.

(E) The legislature could have permitted an insurer to alter the statutory definition of "insured" for coverage over mandatory minimums but did not do so.

(F) Permissive users are covered to the full extent of the coverage listed in the policy declaration page.

(G) Even if the court found the pre-reporting exclusion was valid as to the driver, Best, because he was not pre-approved, the exclusion did not apply regarding coverage for Scott's separate liability for failure to properly maintain the covered vehicle. Scott would remain covered for his negligent maintenance even if the driver, Best, were not covered for negligent operation of the vehicle. Accordingly, the policy provides $1,000,000 coverage for Scott's alleged negligent maintenance of the truck and trailer.

(Order of 9/15/10).

AequiCap filed a motion for reconsideration pursuant to Rule 59(e), SCRCP. The court issued an order denying the motion and finding:

(A) Scott was operating Fiscal as a "motor carrier" for purposes of South Carolina law.

(B) The truck owned by Scott and operated by Best was subject to Regulation 38-414 regarding minimum insurance coverage for trucks carrying non-hazardous freight.

(C) Scott did not qualify for the exemption in Regulation 38-407(4) governing "lumber haulers engaged in transporting lumber and logs from the forest to the shipping points in this State." The "farm to market" exemption did not apply, and any other interpretation would violate the Equal Protection Clause. Hence, the AequiCap policy provides at least minimum limits of $750,000 coverage for Scott.

(D) Even if the court found the pre-reporting exclusion was valid as to the driver, Best, the exclusion did not apply regarding coverage for Scott's failure to properly maintain the covered vehicle.

(Order of 12/2/10).

This appeal follows.

ARGUMENTS

SCOPE OF APPELLATE REVIEW

The standard of review in an action for declaratory judgment depends on the underlying issues, and when the underlying dispute is to determine if coverage exists under an insurance policy, the action is one at law. *Nationwide Mut. Ins. Co. v. Rhoden*, 387 S.C. 194, 691 S.E.2d 487 (Ct. App. 2010); *Goldston v. State Farm Mut. Auto. Ins. Co.*, 358 S.C. 157, 594 S.E.2d 511 (Ct. App.2004). In an action at law, tried without a jury, the appellate court will not disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings. *Nationwide Mut. Ins. Co. v. Rhoden*. However, when an appeal involves stipulated facts, an appellate court is free to review whether the trial court properly applied the law to those facts. *Id. See also J.K. Const., Inc. v. Western Carolina Regional Sewer Authority*, 336 S.C. 162, 519 S.E.2d 561 (1999) (when appeal involves stipulated or undisputed facts, appellate court is free to review whether trial court properly applied the law to those facts). In such cases, the appellate court owes no particular deference to the trial court's legal conclusions. *J.K. Const., Inc.*

I. THE TRIAL COURT CORRECTLY RULED THAT THE AEQUICAP POLICY ENDORSEMENT EXCLUDING COVERAGE FOR THIS LOSS WAS NOT ENFORCEABLE FOR COVERAGE AMOUNTS IN EXCESS OF THE MINIMAL REQUIREMENTS UNDER THE SOUTH CAROLINA FINANCIAL RESPONSIBILITY ACT

AequiCap contends that the exclusionary provision in the "pre-approval" endorsement is a reasonable exclusionary clause that does not conflict with South Carolina's insurance statutes and is therefore enforceable above the statutorily required

minimum limits. (App. Br. pp. 6-10). AequiCap contends there is a dichotomy between mandatory and optional coverage that permits an insurer to include "any valid exclusion" regarding optional coverage. These arguments should not be persuasive.

There is no question that the coverage in this case – liability insurance for a commercial trucking company – is mandatory. 23A S.C. Code Ann. Regs. 38-412 (Supp. 2011) (mandating evidence of insurance in the amounts prescribed by the regulations before a carrier may obtain a certificate or operate in South Carolina). The issue is whether the endorsement in this case that excludes coverage for drivers unless pre-approved by AequiCap is void in its entirety or void merely for minimum limits, but not void for coverage beyond those limits. The trial court held the endorsement was void in its entirety since it conflicted with provisions of the Financial Responsibility Act. This Court should affirm.

An insurer has the right to impose only those conditions that do not conflict with a statutory mandate. *South Carolina Farm Bureau Mut. Ins. Co. v. Courtney*, 349 S.C. 366, 563 S.E.2d 648 (2002). If a clause does so conflict it will be declared invalid. *Id.* If a policy provision conflicts with a statutory mandate, the statute controls. *State Farm Mut. Auto. Ins. Co. v. James*, 337 S.C. 86, 522 S.E.2d 345 (Ct. App. 1999).

As noted above, the policy provides:

SECTION II – LIABILITY COVERAGE

PARAGRAPH A. "COVERAGE", ITEM 1, "WHO IS AN INSURED" is replaced as follows:

The following are "insureds":

A. You for an covered "auto" only when the covered "auto" is driven by an approved driver described in paragraph "b" of this section II.A.1.

B. Any driver authorized as a commercial truck driver while operating covered "auto" with your knowledge and consent under your operating authority.* No coverage will apply to any driver newly placed in service after the policy begins until you report that driver to us and we advise you in writing that he/she is acceptable to us and that he/she is covered under the policy. Coverage on any such driver newly placed in service will become effective as of the date and time we advise you he/she is acceptable and that they are covered by the policy and not before. Subject to the reporting methods outlined and agreed to in the notification procedure outline signed by the insured and the agent prior to coverage being effected under the policy.

* Only such drivers listed as of the date this policy begins, on the schedule in the original application signed by you, and not otherwise excluded are covered as of the date this policy begins.

(Stip. No. 4). The policy endorsement states:

NON-PREAPPROVED DRIVERS NOT COVERED

Further, the insured represents that it has submitted to AEQUICAP INSURANCE COMPANY all drivers of its vehicles as of the policy date, further it represents insured will pre-submit to AEQUICAP INSURANCE COMPANY, all drivers for approval prior to permitting said drivers to drive an insured vehicle, and will not permit any person submitted and approved to drive the insured vehicle during the policy term.

(Stip. No. 3). The validity *vel non* of this endorsement is at the heart of this case.

Under the Financial Responsibility Act, "Insured" means "the named insured and . . . *any person who uses with the consent, expressed or implied, of the named insured* the motor vehicle to which the policy applies . . . or the personal representative of any of the above." S.C. Code Ann. § 38-77-30(7)(1976 & Cum. Supp.). There is no dispute that Best was operating the vehicle with the expressed consent of the named insured,

Fiscal/Scott. The exclusion here, however, attempts to redefine "insured" in a manner not provided for in the Act. Where an exclusion is contrary to the statutory requirements under the Financial Responsibility Act, the exclusion is invalid. *State Farm Mut. Auto. Ins. Co. v. James.*

In *Am. Mutual Fire Ins. Co. of Charleston v. Aetna Cas. and Surety Co.*, 303 S.C. 301, 400 S.E.2d 147 (1991), the Court declared invalid a provision excluding liability coverage for an employee of an automobile dealership "while working in the business of servicing automobiles." The Court held the exemption "contravened S.C. Code Ann. §56-9-820 and -810(2) (1976)," now codified at Sections 38-77-140 and -30(6) (1989), respectively.

The trial court found AequiCap's exclusion similarly contravened Sections 38-77-140 and -30(7) by attempting to improperly avoid liability coverage for the permissive user of a covered vehicle defined by the statute as an insured. Under *American Mutual* such an exclusion is invalid and of no effect.

The trial court added, however, that AequiCap's exclusion also contravened other, more specific, statutes. Section 38-77-142(B) provides:

> No policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle may be issued or delivered in this State to the owner of a vehicle or may be issued or delivered by an insurer licensed in this State upon a motor vehicle principally garaged or used in this State without an endorsement or provision insuring the named insured, *and any other person using or responsible for the use of the motor vehicle with the expressed or implied consent of the named insured*, against liability for death or injury sustained, or loss or damage incurred *within the coverage of the policy or contract* as a result of negligence in the operation or use of the motor vehicle by the named insured or by any other person.

S.C. Code Ann. § 38-77-142(B) (Supp. 2011)(Emphasis added). The court held AequiCap's pre-approval exclusion caused the policy to violate this Section by not providing liability coverage, within the coverage of the policy, to a permissive user. (Order of 9/15/10, p. 4).

Section 38-77-142(C) provides; "Any endorsement, provision, or rider attached to or included in any policy of insurance which purports or seeks to limit or reduce the coverage afforded by the provisions required by this section *is void.*" S.C. Code Ann. § 38-77-142(C) (Supp. 2011) (emphasis added). The circuit court held the statute does not allow for a pre-approval requirement contained in Aequicap's endorsement, thus, the endorsement, not the entire policy, is void under the plain language of subsection (C). The trial court added that "there is no need to read into the policy the requisite statutory language, rather the Court must simply read out the void exclusion." (Order of 9/15/10, p. 5).

The trial court also found this reading consistent with conventional rules of contract interpretation. Courts will attempt to sever an illegal provision in an otherwise valid contract and enforce the remaining terms. *See Glassford v. BrickKicker*, 35 A.3d 1044 (Vt. 2011) (courts generally may sever an illegal or unconscionable provision of a contract as long as the provision does not constitute the essential purpose of the agreement but, rather, is only a part of multiple reciprocal promises in the agreement); *Security Service Federal Credit Union v. Sanders*, 264 S.W.3d 292 (Tex.App.–San Antonio 2008) (a court is generally authorized to sever an illegal or an unenforceable provision from a contract and enforce the remainder of the contract); *Jacob v. Norris,*

McLaughlin & Marcus, 128 N.J. 10, 607 A.2d 142 (1992) (if the illegal portion does not defeat the central purpose of the contract, the court can sever it and enforce the rest of the contract). This principle applies in South Carolina. *See Columbia Architectural Group, Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980) (a severable contract is one in its nature and purpose susceptible of division and apportionment, with an emphasis on discerning the parties' intent); *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App.2002) (whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties).

The trial court held the AequiCap policy was "easily capable of division by simply excising the offending exclusion, and leaving the remaining provisions of the contract of insurance." (Order of 9/15/10, p. 5). The court added:

> The fact the policy is composed of a primary policy and several endorsements indicates the parties intended for the policy to be so divided. Any other interpretation would require the Fiscal vehicle to be entirely uninsured, a finding which would be against public policy. Further, this treatment of the policy and endorsements is consistent with the statutory structure of S.C. Code Ann. § 38-77-142.

(Order of 9/15/10, p. 5). These rulings are correct.

Next, the trial court held Section 38-77-142(C) prevents AequiCap's attempted limitation of the scope of coverage, not just the amount of coverage. (Order of 9/15/10, p. 5). The exclusion purported to limit the scope of coverage by changing the definition of a permissive user. As the plain language of subsection 38-77-142 (B) provides, a permissive user must be covered "within the coverage of the policy," which in the Aequicap policy is $1,000,000. The Court added:

> Had the legislature intended insurance companies to have the ability to alter the statutory definitions of insured for any amount of coverage over mandatory minimums, they could easily have done so within the language of § 38-77-142. The absence of such language is a strong indication that there was no such legislative intent.

(Order of 9/15/10, p. 6). This is the law in South Carolina. See *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.") (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed.1992)); *City of Columbia v. ACLU of S.C., Inc.*, 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996) ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning.").

AequiCap contends the policy language is valid and enforceable for amounts above the statutory minimum limits, citing to *George v. Empire Fire and Marine*, 344 S.C. 582, 545 S.E.2d 500 (2001). (App. Br. p. 7). However, *George* is distinguishable from this case in a meaningful way.

First, the policy at issue in *George* was an excess garage policy, not a primary commercial policy. As the trial court stated, the public policies which are embodied in the statutory insurance scheme differentiate between those limits designed to protect the public from "private passenger automobiles" and commercial motor vehicles. The latter pose a far greater risk of serious bodily injury or death, and thus require greater regulation and greater liability coverage. (Order of 9/15/10, p. 6).

The trial court held the General Assembly recognized this distinction in the plain text of Section 38-77-142. Subsection (A) limits itself to "private passenger automobiles

principally garaged, docked or used in this State. . . ." By contrast, subsection (B) simply applies to "motor vehicles" and imposes coverage for permissive users for damages sustained "within the coverage of the policy . . ." (Order of 9/15/10, p. 6).

The trial court observed that neither *George* nor any of the cases it cited referenced Section 38-77-142. Rather, these cases focused only on the statutory definition of "insured" contained in Section 38-77-30. The trial court held this section draws a clear distinction between the garage policies discussed in *George* and a commercial policy designed to insure a pulpwood truck like that at issue in this case. See S.C. Code Ann. § 38-77-30(13)(a), which specifically distinguishes garage policies as a "small commercial risk" and excludes from that definition "pulpwood trucks and dump trucks." "Small commercial risks" are likewise excluded from the definition of "private passenger automobile." S.C. Code Ann. § 38-77-30(5.5)(d). Thus, reading the sections *in pari materia*, Section 38-77-142(A) discusses "private passenger vehicles" and 38-77-142(B) discusses the broader "motor vehicles." *See Denman v. City of Columbia*, 387 S.C. 131, 691 S.E.2d 465 (2010) (statutes dealing with the same subject matter are in pari materia and must be construed together, if possible, to produce a single, harmonious result). Each subsection accordingly discusses two separate types of insurance, the implication being that the General Assembly recognized the different goals of insuring private versus commercial vehicles.

As Section 38-77-142(B) is the more specific statute, it must control over the language of the more general, definitional statute of Section 38-77-30 to the extent that there is any internal disagreement between the two. *Skinner v. Westinghouse Elec. Corp.*,

394 S.C. 428, 716 S.E.2d 443 (2011) (generally, specific laws prevail over general laws). *See* also *Spectre, LLC v. S.C. Dep't of Health and Envtl. Control*, 386 S.C. 357, 688 S.E.2d 844 (2010) (where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect); *Ramsey v. County of McCormick*, 306 S.C. 393, 397, 412 S.E.2d 408, 410 (1991) (same). Because the Supreme Court in *George* did not discuss the language of Section 38-77-142(B), *George* offers no guidance in the interpretation of that section.

As the plain language of Section 38-77-142(C) provides, an endorsement which purports to limit or reduce coverage mandated by Section 38-77-142 is void. The trial court held that reading AequiCap's policy without the improper exclusion revealed that permissive users are covered to the full amount of coverage listed in the declaration page, or in this case, $1,000,000. The trial court added that "the inescapable conclusion is that Best, who was a permissive user, was afforded coverage in that amount." (Order of 9/15/10, p. 8).

AequiCap cites to *Hansen ex rel. Hansen v. United Services Auto. Ass'n*, 350 S.C. 62, 565 S.E.2d 114 (Ct. App. 2002) in support of its assertion that although the exclusion contained in the endorsement may be void, AequiCap may enforce it as to amounts exceeding the minimal amounts required by the Financial Responsibility Act. (App. Br. P. 7). *Hansen*, however, is meaningfully distinguishable. The policy was issued in Ohio, and therefore was not even subject to the South Carolina Financial Responsibility Act.

See *Newton v. Progressive Northwestern Ins. Co.*, 347 S.C. 271, 554 S.E.2d 437 (Ct. App. 2001) (an "automobile policy" is a policy issued or delivered in this State; the Act did not apply to a policy issued in Georgia). Furthermore, the Court in *Hansen* did not discuss the precise issue here, that is, the effect of declaring void an endorsement that attempted to redefine "permissive user." Therefore any discussion of the Act in *Hansen* is at best *dictum*.

AequiCap also cites to *Pennsylvania Nat'l. Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984) in support of its assertion that it may enforce the endorsement above the minimum coverage. (App. Br. pp. 7-8). *Parker* is also meaningfully distinct from this case.

In *Parker*, this Court held that a business use exclusion which resulted in no coverage for a permissive user of the automobile was void. Importantly, the opinion does not state that it was voiding an exclusion in a policy that exceeded minimum limits only up to those limits. Instead, the Court effectively declared the offending exclusion void in its entirety, and the language AequiCap cites did not control the outcome in that case. Furthermore, *Parker* also did not deal with the precise provisions in this case, that is, the provisions of Section 38-77-142(B) and (C).

AequiCap also cites to Section 56-9-20(5)(d) of the South Carolina Code as supporting its argument. The Court should not be persuaded by this argument.

To begin with, the trial court did not address this argument in either the order of September 15, 2010, or the order of December 2, 2010 denying rehearing.

Further, Section 56-9-20 applies to words and phrases used in Chapter 9 of Title

56. S.C. Code Ann. § 56-9-20 (Supp. 2010). Subpart (5) defines "Motor Vehicle Liability Policy," and sets forth conditions applicable to that definition. The relevant portion is found in subpart (5)(d), which provides:

> (d) Additional coverage permitted. Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and the excess or additional coverage shall not be subject *to the provisions of this chapter*. With respect to a policy which grants this excess or additional coverage, the term "motor vehicle liability policy" shall apply only to that part of the coverage *which is required by this article*.

(Emphasis added). Thus, part 5(d) governs coverage in addition to that which is required by "this chapter," or Chapter 9 of Title 56. The relevant provisions in this case, however, are not found in Chapter 9 of Title 56, but in Chapter 77 of Title 38.

Lastly, the coverage at issue in this case is not "additional coverage" as contemplated by Section 56-9-20(5)(d). Instead, it is coverage mandated for permissive users by Section 38-77-30 and Section 38-77-142(B) and (C) and Regulation 38-414.

This Court should hold that the trial court correctly held the pre-approval endorsement violates the Act and is accordingly void in its entirety such that coverage existed for Best "within the coverage of the policy," that is, the declared single limit of $1,000,000. The Court should affirm the trial court's order.

II. THE TRIAL COURT CORRECTLY RULED THAT AEQUICAP'S INSURED WAS NOT EXEMPT FROM COMMERCIAL MOTOR CARRIER INSURANCE REQUIREMENTS UNDER SECTION 58-23-50(A)(6) OF THE SOUTH CAROLINA CODE AS WELL AS REGULATION 38-407(4) OF THE SOUTH CAROLINA CODE OF REGULATIONS

AequiCap contends that the trial court erred in defining "shipping point" to include the forest where the lumber was loaded onto Scott's truck for purposes of the exemption found in Regulation 38-407(4). 23A S.C. Code Ann Regs. 38-407(4) (Supp. 2010). AequiCap instead argues that the forest is the "point of production" and cannot be the "shipping point" under the Regulation. AequiCap asserts that the regulation is a "farm-to-market" exception to the coverage requirements, and that Scott was transporting "timber" (the raw material) as opposed to "lumber" (the finished product that will be "shipped"). The Court should reject these arguments.

South Carolina law contains both statutes and regulations governing "motor carriers."*Bovain v. Canal Ins.*, 383 S.C. 100, 678 S.E.2d 422 (2009). Regulation 38-414 provides for heightened insurance requirements for certain "motor carriers" for hire as part of a group of Economic Regulations. *Bovain*. Specifically, Regulation 38-414 provides that "[i]nsurance policies and surety bonds for bodily injury and property damage will have limits of liability not less than" $750,000 per incident for trucks weighing 10,0000 or more pounds GVWR that carry non-hazardous freight. 23A S.C. Code Ann. Regs. 38-414 (Supp.2010). The Regulation applies "to any person ... or corporation which is ... engaged as a motor carrier for hire within the State of South Carolina" unless they are otherwise exempted. 23A S.C. Code Ann. Regs. 38-401 (Supp.2010); *Bovain*.

Regulation 38-407 provides for exemptions from the Economic Regulations for certain motor carriers. In particular, Regulation 38-407(4) provides an exemption for qualifying "[l]umber haulers engaged in transporting lumber and logs *from the forest to the shipping points* in this State." 23A S.C. Code Ann. Regs. 38-407(4) (Supp.2008) (emphasis added). The term "shipping points" is not defined in the Regulations.

The burden of proving the entitlement to an exemption is on the party asserting the exemption. *Bovain*. In general, exemptions are an act of legislative grace and, as such, they are to be strictly and reasonably construed. *Id. See also*, *State v. Life Ins. Co.*, 254 S.C. 286, 175 S.E.2d 203 (1970) (noting exemptions are provided as an act of legislative grace and are to be construed strictly; a party must meet the specified conditions to obtain the benefit conferred by the exemption). The words used in legislation "must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand [their] operation." *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 420 S.E.2d 843, 846 (1992); *State v. Hood*, 49 S.C.L. (15 Rich.) 177, 185 (1868) ("Every exemption must be couched in such plain and unambiguous language as to satisfy the Court beyond doubt that the Legislature intended to create the exemption. Such a right can never arise by mere implication, and all laws granting the exemption are to be most strictly construed.").

The issue becomes whether Scott's possession of the lumber and logs from the forest to the mill qualifies as "transporting lumber and logs from the forest to the shipping points" so that Scott was exempt from the minimum limits requirements of Regulation 38-414. The trial court noted that historically, the "shipping point" meant the location

where the common carrier would obtain the material for transport to the mill. That is, the exemption covered anyone who loaded the lumber or logs in the forest and transported it to the point (i.e., the "shipping point") where the common carrier then loaded it for transporting over the roadways to the mill. In this case, Scott, the common carrier, obtained the lumber in the forest itself from Midlands Timber, and the next destination was Collum Mill, the mill for processing.

As the trial court described it, the "shipping point" "marks the point at which the common carrier picks up the goods, as distinct from the point of manufacture. (Order of 12/2/10, p. 4) (citing *McElveen v. Atl. Coast Line R.R. Co.*, 210 S.C. 556, 43 S.E.2d 485 (1947) (when there is no evidence as to the value of the goods at their destination, recovery can be had as to the value at the shipping point instead)). The court held that the mill, as the destination, is not synonymous with "shipping point." (Order of 12/2/10, pp. 4-5) (citing *United Financial Casualty Co. v. Lewis*, CA No. 4:08–4014–TLW (2010 WL 3271740) (D.S.C. 2010)) (District Court concluded that plain and ordinary meaning of a "shipping point" suggested that (i) it is a place of shipment, or (ii) a location where goods are brought to be transported or sent for delivery).

As the trial court held, Regulation 38-407(4) does not intend to exempt trucks hauling lumber on a regular basis from the forest to the mill. AequiCap contends that "shipping point" means "point of origin," and the forest is the "point of production" and cannot be the "shipping point" for purposes of Regulation 38-407(4). (App. Br. p. 11). This argument should not be persuasive.

Initially, there is nothing in the statutes or the applicable regulations that limits the

"shipping point" in such a way as to exclude the forest where the common carrier obtains the goods for transport to the mill. It is the place of shipment in that instance, that is, the shipping point.

It is true, as AequiCap points out, that the Supreme Court stated in *Bovain* that "the plain meaning of 'forest' is that it commonly refers to an area of land covered with trees, usually of considerable extent. The express language of Regulation 38-407(4) exempts those hauling lumber *from a forest as the point of production.*" *Bovain*, 383 S.C. at 112, 678 S.E.2d at 428. (App. Br. p. 11). However, the narrow holding of that case is that the phrase "from the forest" for purposes of the Regulation should be construed narrowly and should not include the facts of that case, where the motor carrier had picked up logs left by a tree cutting operation that was working in an area along Interstate 26. The Court stated:

> A broad interpretation of "forest" as pertaining to any site where trees are cut would eviscerate the language that the exemption applies to those hauling logs "from the forest to the shipping points in this State." We do not believe that is a reasonable and strict construction of all of the pertinent terms of the exemption. The legislature could have easily used broader language and stated that anyone hauling lumber or logs is exempted if that were its intent. *Cf. State v. Alls*, 330 S.C. 528, 531, 500 S.E.2d 781, 782 (1998) (stating legislative provisions must be read as a whole and sections which are part of the same law should be construed together and each given effect, if it can be done by any reasonable construction). In this case, we conclude Canal Insurance did not meet its burden of establishing that the exemption applied here as there was no evidence that Greene was transporting lumber and logs "from the forest to the shipping points in this State."

Bovain, 383 S.C. at 112, 678 S.E.2d at 429. The Court was not addressing the issue in this case, that is, whether Scott was transporting the logs "from the forest to the shipping

points in this State."

Importantly, the Court was also not dealing with the phrase "shipping point," and did not hold that if a forest is considered a "point of production" under one fact scenario, it could not be a "shipping point" in another. Instead, as the District Court observed, the "shipping point" is generally a location where the manufacturer or producer of a product releases physical control of the product to the common carrier. *United Financial Casualty Co. v. Lewis*, CA No. 4:08–4014–TLW (2010 WL 3271740) (D.S.C. 2010). In this case, that location just happened to also be in the forest.

The trial court found that the "shipping point" was the location where a common carrier, like Scott, picks up the goods. (Order of 12/2/10, p. 4). The court cited to *Tiger, Inc. v. Fisher Agro, Inc.* to observe that the Supreme Court noted that a "'growers' agent' is defined as 'any person *operating at shipping point* who sells or distributes produce in commerce for or on behalf of growers or others and whose operations may include the planting, harvesting, grading, packing, and furnishing containers, supplies or other services.'" 301 S.C. 229, 235, 391 S.E.2d 538, 542 (1990) (emphasis added). Furthermore, "shipping point" is used as a place to mark the value of goods destroyed or damaged in transit, and refers to the point where the common carrier receives the goods as opposed to the point of manufacture. *McElveen v. Atlantic Coast Line R. Co.*, 210 S.C. 556, 564, 43 S.E.2d 485, 489 (1947) ("when there is no evidence as to the value of the goods at their destination recovery can be had as to the value at the shipping point instead."). The court's construction of the Regulation is sound and in conformity with the history of the statute.

For instance, in *State v. Hicklin*, the Supreme Court noted:

> * * * One hauling his own products in his own motor vehicle does not come within the purview of the act, and no provision for his exemption is necessary. The act applies only to those who are carriers for compensation, and the exemption can refer only to farmers and dairymen hauling farm and dairy products for compensation. The same may be said with regard to those hauling lumber and logs from the forest to the shipping points.

168 S.C. 440, 453, 167 S.E. 674, 679 (1933). Thus, the exemption is not to apply to the common carriers, who take the product at the shipping point and transport it to the mill.

The court next noted that the "mill" is not the "shipping point," but is the location where products are created from raw materials prior to being sent to market. (Order of 12/2/10, p. 5). The court observed that the District Court had noted a "mill," by definition, is "a building or collection of buildings with machinery for manufacturing," and that the court was not persuaded that a "mill" was synonymous with a "shipping point." (Order of 12/2/10, p. 5) (citing *United Financial Casualty Co. v. Lewis*, CA No. 4:08–4014–TLW (2010 WL 3271740) (D.S.C. 2010)). The trial court found the legal analysis and logical arguments of *United Financial* "compelling," adding that the burden of establishing entitlement to the exemption fell on AequiCap, and that AequiCap failed to meet that burden. (Order of 12/2/10, p. 5). The trial court held:

> In this light, it appears likely that Regulation 38-407(4) does not intend to cover trucks hauling lumber on a regular basis from forest to mill. This is apparent when the history of the so-called "farm-to-market" exemption is closely examined. Initially, the exemption's purpose was the imposition of various vehicle regulations regarding length and weight. In *State Ex Rel Daniel v. John P. Nutt Co., Inc.*, 180 S.C. 19, 185 S.E. 25 (1935), our Supreme Court upheld, as against equal protection violation arguments, an exemption for "trucks engaged in the transportation of lumber, poles, piles and logs from the mill or forest to shipping points, or

from forest or mill to consumer." It can be seen from the plain language of the exemption, as it was written at that time, that "mills" and "shipping points" are two distinct terms. Logically, then, a common carrier hauling logs from the forest to the mill, must be legally distinct from one hauling logs from forest to a shipping point. Currently, there is no longer an exemption for common carriers hauling from the forest to the mill.

(Order of 12/2/10, p. 5). The circuit court added:

The exemption was intended to exempt those that made limited use of the highways, as shown in the rationale contained in *Hicklin v. Coney*, 290 U.S. 169 (1933), a U.S. Supreme Court case interpreting South Carolina law. Noting that the "distinction between property employed in conducting a business which requires constant and unusual use of the highways and property not so employed is plain enough" the Court upheld the exemption against an Equal Protection challenge. In finding that those for whom the exemption was intended were generally hauling their own products, and were doing so only on short hauls, the Court held: "The exemption in favor of those hauling lumber and logs from the forests to the shipping points relates to a limited class of transportation simply to places of shipment and does not appear to be unreasonable." *Id.* (internal citations omitted).

Furthermore, unless there is a rational difference between these types of haulers, and any other type of common carrier, then the exemption fails Equal Protection Analysis. *See*, *Smith v. Cahoon*, 283 U.S. 553 (1931) (invalidating a South Carolina exemption for carriers of certain agricultural products from having to carry insurance). The South Carolina Supreme Court found the following rational basis for the "farm-to-market" exemptions: "[T]he Legislature in making its classification was entitled to consider frequency and character of use [of transportation on State highways]." *State ex rel. Coney, et al. v. Hicklin*, 168 S.C. 440, 167 S.E. 674 (1933). The Court observed that differentiating between motor vehicle carriers found within the "farm-to-market exemptions" made sense, for "as a matter of fact the use of the highways for the transportation of farm products by the owner is casual and infrequent and incidental; farmers use the highways to transport their products to market ordinarily but a few times a year."

The key is that the regulation, at the time, clearly did not apply to common carriers engaged in the daily hauling of freight. "Attention was called to the factual basis for the distinction as it had been pointed out by the District Court, which found a practical difference between the case of

> those "who operate fleets of trucks in the conduct of their business and who use the highways daily in the delivery of their products to their customers' and that of a farmer who hauls his wheat or live stock to town once or twice a year." *Id.*, at 174, citing *Cont'l Baking Co., v. Woodring*, 286 U.S. 352 (1932).

(Order of 12/2/10, pp. 6-7).

The trial court noted that over 200 loads of logs were hauled from the tract which generated the load being hauled by Best at the time of the incident. Furthermore, Fiscal Transportation was neither in the business of short, nor infrequent hauling; Best was hauling from Lexington County to Allendale County. As a common carrier, Fiscal hauled daily and over great distances. The court concluded the "farm-to-market" exemption was inapplicable and unavailable to AequiCap. (Order of 12/2/10, p. 7).

The court held any other interpretation would render the statute in violation of the Equal Protection Clause due to the disparate treatment between commercial carriers hauling freight other than logs. (Order of 12/2/10, p. 7). The court stated it had the duty to uphold the statute so as to avoid constitutional questions about its validity. (Order of 12/2/10, p. 7). *See, e.g., Edwards v. State*, 383 S.C. 82, 678 S.E.2d 412 (2009) (where a statute is susceptible of two constructions, one of which presents grave and doubtful constitutional questions, and the other of which avoids those questions, the Court's duty is to adopt the latter).

In conclusion, the trial court held that haulers such as Fiscal/Scott were never intended to qualify for the "farm to market" exception, and doing so would create a violation of the Equal Protection clause of the Fourteenth Amendment to the Unites States Constitution. The court held this could not have been the General Assembly's

intent. Accordingly, the court found that, at a minimum, Aequicap must provide coverage of $750,000 as required by Regulation 38-414.

The trial court's analysis is correct. The exemption was not meant to apply to regular haulers like Fiscal/Scott but to owners of the freight who were getting their products to a shipping point, where the products would be taken to a processor or a market. The legislature chose to exempt these "mom and pop" organizations who happened to transport their product from the forest to a shipper, like Fiscal/Scott, who then takes the product to a mill.

AeqiCap asserts that "timber" is distinct from "lumber," and that logs are not "shipped" until processed into that product. (App. Br. p. 12). To begin with, this argument was not ruled upon by the trial court either in the first order or the order on reconsideration. Second, AequiCap does not explain how characterizing a mill as a place from which finished lumber products may be shipped precludes the point Fiscal/Scott obtained the timber from being a "shipping point" in its own right. There is no authority that precludes more than one "shipping point" for a product, and the statute does not embrace such a broad concept.

This argument also asks the Court to impose a broad definition of "shipping point," while the Supreme Court has instructed that the exemptions are to be construed narrowly, not broadly. *Bovain*, 383 S.C. at 112, 678 S.E.2d at 428. A narrow construction upholds the trial court's ruling in this case.

AueqiCap next contends that the record establishes that at the time of the wreck, "Best, while driving to his employment by Scott, was 'transporting lumber [and logs]

from the forest to shipping points' in South Carolina – namely, the Collum Mill." (App. Br. p. 12-13). This contention overstates the stipulation. The parties agreed that at the time of the wreck, "Best was hauling logs from a tract of land located in Lexington County, South Carolina to Collum Mill in Allendale, South Carolina. (Stipulation, p. 3 ¶ 15). The parties also agreed that Best was transporting the logs from the MCM tract headed for Collum Lumber Mill in Allendale. (Stipulation, p. 4, ¶ 29). The parties agreed that Best hauled logs for Fiscal Transport from the forests to mills located in the State of South Carolina (Stip. No. 12) and never delivered logs outside the State of South Carolina. (Stip. No. 13). The parties did *not*, however, stipulate that Collum Mill was a "shipping point" for purposes of Regulation 38-407(4). What the record in fact establishes is that Best obtained the lumber and logs at the shipping point, and shipped them to the mill, which was the destination of the trip.

AequiCap contends that because Collum Mill "is the initial shipping point for wood products after they are harvested from the forest and processed, the exception in 38-407(4) is applicable to this haul and Fiscal is not required to maintain commercial motor vehicle limits of $750,000 in liability coverage." (App. Br. p. 13). The Court should not be persuaded by this analysis. The language of the Regulation is not limited to transporting "processed wood products." In fact, the precise language of the regulation states "lumber haulers engaged in transporting lumber *and logs* from the forest to the shipping points in this State." Under AequiCap's argument, the words "and logs" have no meaning since only a place that ships finished wood products, like lumber, may qualify as a "shipping point." However, the Court must give meaning to the statute as whole.

Beaufort County v. South Carolina State Election Com'n, 395 S.C. 366, 718 S.E.2d 432 (2011) (a statute shall not be construed by concentrating on an isolated phrase).

The entire text of Regulation 38-407 indicates the narrowness of its application. The Regulation provides:

> These rules shall not be construed to apply to:
>
> 1. United States mail carriers operating star routes while engaged solely in carrying mail;
>
> 2. Farmers or dairymen hauling dairy or farm products or to any other person engaged in hauling perishable products of a farm, including hay and straw, or dairy products for hire from the farm to the first market when sold in South Carolina;
>
> 3. Persons transporting agricultural livestock and poultry feeds, including ingredients;
>
> 4. Lumber haulers engaged in transporting lumber and logs from the forest to the shipping points in this State;
>
> 5. Haulers engaged in transporting chips or wood residues;
>
> 6. Any vehicle engaged in the business of hauling, towing, or transporting wrecked or damaged vehicles or vehicles used in ride-sharing; or
>
> 7. Single-source lessors of vehicles and drivers who lease the motor vehicles and drivers to uncertificated motor vehicle carriers that conduct transportation of property (other than used household goods) in furtherance of and within the scope of their nontransportation primary enterprises, when the period of the lease is for thirty days or more, the lessee maintains insurance coverage for the protection of the public, a copy of the lease is carried in the motor vehicle during the period of the lease, and there is displayed on both sides of the motor vehicle a placard identifying the lessee.
>
> 8. Used by a county to transport property. Additionally, the Department does not have jurisdiction over any class of for hire operations which has been or hereafter may be specifically exempted in the Code of Laws of South Carolina, or is required by the Public Service Commission to have a

Certificate of Public Convenience and Necessity.

23A S.C. Regs. Ann. 38-407. See also S.C. Code Ann. § 58-23-50 (Supp. 2010) (setting forth similar exemptions for the Chapter of Title 58 governing motor carriers; subpart (6) is identical to Reg. 38-407(4)). What these "haulers" have in common is that they are not general commercial carriers who operate over long distances like Fiscal/Scott. They are mail carriers operating star routes (but only if carrying mail); farmers or dairymen hauling perishable products "to the first market when sold in South Carolina"; persons transporting livestock and poultry feeds (including ingredients); haulers transporting chips or wood residue; vehicles transporting wrecked or damaged vehicles or used in "ride-sharing"; single source lessors of vehicles who comply with the remainder of subsection (7); or vehicles used by a county to transport property. While each of these vehicles might meet the definition of "motor carrier,"the legislature has made the decision not to require these narrow classes of carriers to obtain the higher levels of liability coverage. This narrow class includes "lumber haulers engaged in transporting lumber and logs from the forest to the shipping points in this State," unlike Fiscal/Scott, who obtain the freight at the shipping point and move it on to the mill to be processed.

Accordingly, the Court should affirm the trial court's ruling that AuequiCap failed to meet its burden of establishing that the exemption found in Regulation 38-407(4) applied to Fiscal/Scott, who was not a "lumber hauler engaged in transporting lumber and logs from the forest to the shipping points in this State." Accordingly, the minimum limits of $750,000 applied to this case, not the $75,000 combined single limits of liability coverage that governs haulers who are not commercial shippers.

III. THERE ARE UNAPPEALED RULINGS THAT ARE THE LAW OF THE CASE AND REQUIRE THIS COURT TO AFFIRM

The trial court made two rulings that are not challenged on appeal. This Court should hold these rulings are the law of the case and require the Court to affirm.

An unappealed ruling, right or wrong, is the law of the case. *Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012). *See also Yelsen Land Co., Inc. v. State*, 397 S.C. 15, 723 S.E.2d 592 (2012) (an unchallenged ruling, whether correct or not, is the law of the case); *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance.").

First, the Court held that even if the "unapproved driver" provision applied to limit coverage for the driver, Best, that provision would not limit coverage for Scott's own liability arising out of negligence maintenance of the truck. (Order of 12/2/10, pp. 8-9, Part D; pp. 9-10, ¶ 5). AequiCap has not challenged that ruling in its Brief, and it is now the law of this case. *Atlantic Coast Builders and Contractors, LLC v. Lewis*. Thus, even if AequiCap is correct that the trial court should have enforced the "approved driver" policy enforcement, this alternate ruling that coverage applies to Scott's own separate negligence apart from Best's negligence mandates affirmance.

Second, the Court held that enforcing the Regulatory exemption for lumber haulers would create disparate treatment of all other types of truck operators with a gross vehicle weight of 10,000 pounds or greater and would be violative of the federal Equal Protection clauses. (Order of 12/2/10, pp. 6-8; p. 9, ¶ 4). AequiCap does not challenge

this ruling in its Brief, and it is also the law of this case. *Atlantic Coast Builders and Contractors, LLC v. Lewis*. Thus, even if AequiCap is correct that the trial court improperly construed the Regulatory exemption (which the court did not do), this unchallenged alternate basis for not applying the Regulatory exemption is the law of the case and mandates affirmance.

Further, this Court may affirm for any reason appearing in the record. Rule 220(c), SCACR; *Stinney v. Sumter School Dist. 17*, 391 S.C. 547, 707 S.E.2d 397 (2011). The trial court's unappealed rulings are part of the record in this case, and require affirmance even if this Court agrees with the legal arguments AequiCap makes in its Brief.

Accordingly, this Court should apply this principal of appellate practice to hold that these unchallenged rulings are the law of the case and even if AequiCap is correct as to the issues it states on appeal, the Court must affirm.

CONCLUSION

For the reasons stated this Court should affirm the judgment of the circuit court.

John S. Nichols
SC Bar No. 004210
Bluestein, Nichols, Thompson & Delgado, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-8995

Daniel W. Luginbill
SC Bar No. 68525
Wilson, Luginbill & Kirkland, LLC
Post Office Box 1150
Bamberg, South Carolina 29003
(803) 245-7799

Attorneys for Respondent Buchanan

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