THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

RECEIVED
JAN 26 2018
SC Court of Appeals

APPELLATE CASE NO. 2015-000806

Ard Trucking Company .... Respondent.

vs.

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

RESPONDENT'S PETITION FOR REHEARING AND SUGGESTION FOR *EN BANC* HEARING

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PETITION FOR REHEARING

Pursuant to Appellate Practice Rule 221 (a), Respondent respectfully petitions the South Carolina Court of Appeals for a rehearing of the above captioned case and to alter and/or reverse the January 10, 2018 decision of the Court of Appeals, wherein the Court of Appeals reversed the trial court's grant of summary judgment in favor of Respondent.

The points of error asserted by Respondent are overlooking and/or misinterpreting the applicable law as applied to the facts involved.

REQUEST FOR *EN BANC* REHEARING

Pursuant to Appellate Practice Rule 219 (b), Respondent respectfully suggests that the rehearing by the Court of Appeals' of its said January 10, 2018 decision be heard *En Banc* by the Court of Appeals due to the significance and gravity errors in the said January 10, 2018 decision; the importance and necessity of securing uniformity of the Court of Appeals' decisions; and correct conflicts between the said January 10, 2018 decision and applicable and controlling law.

POINTS OF ERROR COMMITTED BY COURT OF APPEALS

Respondent respectfully asserts the following are points of error that were overlooked and/or misinterpreted by the Court of Appeals:

I. The Court of Appeals' failed to properly apply South Carolina law to the two identical "LSRP Notification Endorsements" Appellant incorporated into each of the two policies (an initial policy and a replacement policy) Appellant issued to Respondent, which resulted in the Court of Appeals' failure to acknowledge and enforce a the *clear and unambiguous exclusion* of the disputed "Loss Sensitive Rate Plan" surcharge premium from the policies issued by Appellant.

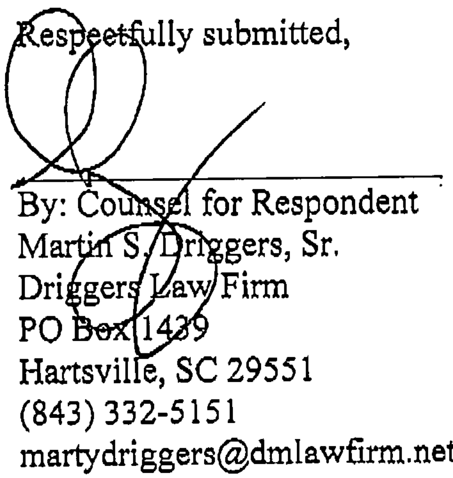
II. The Court of Appeals' improperly rewrote Appellant's policy in favor of Appellant's interest by resorting to a rule of law which only arises whenever an ambiguity exists, after the Court of Appeals had agreed with both parties that there was no ambiguity in Appellant's policy.

III. The Court of Appeals' erred by factually concluding that Respondent knew Appellant intended to and would apply the LSRP surcharge premium to the policies issued to Respondent, which conclusion resulted from the Court of Appeals disregarding, ignoring and rewritint the *clear and unambiguous exclusion* "Loss Sensitive Rate Plan" surcharge premium from the policies issued by Appellant.

Pursuant to Appellate Practice Rule 240 (c), Respondent attaches a Memorandum of Authorities in Support of Respondent's Petition for Rehearing

January 25, 2018

Respectfully submitted,



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Ard Trucking Company .... Respondent.

vs.

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

RESPONDENT'S MEMORANDUM AND TABLE OF AUTHORITIES IN SUPPORT OF RESPONDENT'S PETITION FOR REHEARING AND SUGGESTION FOR *EN BANC* HEARING

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STATEMENT OF FACTS

Respondent is a family owned trucking company in the Pee Dee area of South Carolina which operated since 1945. Respondent employs over 70 truck drivers and 40 office administrators supplying national transportation for Respondent's customers. (R. 00503.)

This case concerns the interpretation and enforcement of an insurance policy *exclusion* contained in two assigned risk insurance policies issued to Respondent by Appellant. The initial policy was issued on December 1, 2003 (R. pp 00594-00615) and a replacement policy was issued on March 1, 2004 (R. pp. 00616-00647). Both policies contain the identical one page endorsement entitled, "LSRP Notification Endorsement." (The "LSRP Notification Endorsement" in the initial policy is at R. p. 00608 and in the replacement policy at R. p. 00628.) The endorsement *excludes* the application of a LSRP surcharge premium from South Carolina policies, such as the policies issued to Respondent.

On November 1, 2003, just six (6) days prior the effective date the Respondent's initial policy, the South Carolina Department of Insurance (SCDOI) *conditionally* authorized South Carolina assigned risk insurers, including Appellant, to charge an extraordinary Loss Sensitive Rate Plan surcharge premium to certain policy holders in South Carolina. (R. 547.) SCDOI's condition for

permitting the LSRP surcharge premium, required participating insurers to provide prospective insured parties with a "notification" the LSRP surcharge premium could apply to their policies.

Specifically, SCDOI's BASIC MANUAL of LSRP rules (R. pp. 00566-00590) required insurers who intended to apply the LSRP surcharge premium to incorporate into each policy an "LSRP Notification Endorsement" that would "ensure" that any South Carolina insured affected by the LSRP surcharge premium would be notified about the LSRP surcharge premium:

> D. Notice to Assigned Risk Policyholders.
> All assigned risk policies shall be endorsed with policy endorsement WC 00 04 17 - Assigned Risk Loss Sensitive Rating Plan (LSRP) Notification ("LSRP Notification Endorsement") in order to ensure that all possible qualifying risks are notified of the intent and details of the Plan. All assigned carriers shall be required to attach this endorsement to all assigned risk policies.
>
> (Emphasis supplied.) (R. p. 00575.)

Pursuant to the SCDOI notification requirement, both of the policies issued to Respondent contained Appellant's "LSRP Notification Endorsement" based on a model endorsement provided by SCDOI. (R. p. 00582,) Appellant incorporated the endorsemtn into Respondent's initial policy at R. p. 00608 and into Respondent's replacement policy at R. p. 00628.

The first sentence of Appellant's "LSRP Notification Endorsement" stated:

> This endorsement is issued because you may qualify to have the cost of your insurance subject to the assigned risk mandatory Loss Sensitive Rating Plan (LSRP).
>
> (R. p. 00608 and R. p. 00628.)

After listing the seven (7) qualifications for LSRP "eligibility, " the endorsement ended with the following sentence:

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

SCHEDULE

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

Appellant's own plain, clear and unambiguous language in the "LSRP Notification Endorsement," *excluded* the application of the LSRP surcharge premium from South Carolina insurance policies, such as the policies issue to Respondent.

Not withstanding the *exclusion* of LSRP surchage premium from the policies Appellant issued to Respondent, Appellant asserted a claim against Respondent for the LSRP surcharge premium after the policy year concluded. As a result, Respondent filed this lawsuit to recover from Appellant a $52,114 Letter of Credit pledged by Respondent to cover any additional workers compensation premium found due. After extensive discovery, both parties file motions summary judgement in the lower court.

The lower court applied South Carolina law regarding interpretation of insurance policies to the *exclusion* in Appellant's "LSRP Notification Endorsement" and ordered Appellant to refund the Letter of Credit to Respondent. (R. 001 - 14) Appellant appealed the lower court's order.

On January 10, 2018, the Court of Appeals reversed the lower court's order by holding that the exclusion of the LSRP premium surcharge did not apply to Respondent's policy "as a matter of law." The Court of Appeals justified its refusal to enforce the *exclusion* under Appellant's "LSRP Notification Endorsement" by making a factual determination that both Respondent and Appellant intended for the LSRP surcharge premium to apply to Respondent's insurance coverage.

Respondent respectfully requests the Court of Appeals to reconsider the manner in which it applied the controlling law in this case and to reconsider its

factual conclusion that Respondent had agreed for Appellant to apply the LSRP surcharge premium to apply to the policies Appellant issued to Respondent, since Appellant never informed Respondent that the LSRP surcharge would apply to the policies issued to Respondent and the *exclusion* in question specifically stated that the LSRP surcharge *would not apply* to the policies issued to Respondent.

DISCUSSION OF POINTS OF ERROR

I. The Court of Appeals' failed to properly apply South Carolina law to the two identical "LSRP Notification Endorsements" Appellant incorporated into each of the two policies (an initial policy and a replacement policy) Appellant issued to Respondent, which resulted in the Court of Appeals' failure to acknowledge and enforce a the *clear and unambiguous exclusion* of the disputed "Loss Sensitive Rate Plan" surcharge premium from the policies issued by Appellant.

After properly stating South Carolina rules of insurance policy intrepretation, the Court of Appeals failed to properly apply these rules to the exclusionary language contained in Appellant's "LSRP Notification Endorsement."

Appellant's "LSRP Notification Endorsement" clearly and unambiguously listed the states wherein Appellant intendeld to apply the LSRP premium surcharge. Clearly, South Carolina was not on the list. This omission of South Carolina constituted an *exclusion* of Respondent's South Carolina policies from the LSRP premium surcharge.

Under Appellant's basic insurance policy, Appellant sets out the principles controlling "changes" to the policy:

GENERAL SECTION

> **A. The Policy**
> This policy includes at its effective date the Information Page and all endorsements and schedules listed there. It is a contract of insurance between you (the employer named in Item 1 of the Information Page) and us (the insurer named on the Information Page). The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy.
>
> (Emphasis supplied.)(R. p. 00603.)

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

In this appeal, Appellant sought to avoid the consequences of its own the clear and unequivocal terms used in its "LSRP Notification Endorsement" and urged the Court of Appeals to rewrite the policy for Appellant's benefit. The Court of Appeals order agreeing with Appellant violates controlling rules of insurance contract law and also violates and breaches Appellant's own insurance contract which prohibits unilateral policy changes. *See*, *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) (Courts must enforce,

not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning.)

Appellant persuaded the Court of Appeals to accept a false proposition that simply because SCDOI *conditionally* allowed insurers to apply the LSRP surcharge premium to South Carolina policies, the LSRP surcharge premium was automatically included in all policies "as a matter of law." However, SCDOI required Appellant to give insured parties notice that it intended to apply the LSRP surcharge premium to their policies.

Appellant's "LSRP Notification Endorsement" utterly failed to notify Respondent that LSRP would apply to Respondent's policies. Instead, Appellant's clear and unequivocal language it used in its endorsement *excluded* LSRP from applying to the South Carolina policies issued to Respondent.

Instead of enforcing Appellant's clear and unambiguos *exclusion*, the Court of Appeals has embrased Appellant's false proposition that SCDOI's allowance of the LSRP surcharge premium, "as a matter of law," "amended/supplanted" (Appellant's Final Brief at Page 23, Line 6) and/or "revised and amended" (Appellant's Final Brief at Page 23, Line 12) Appellant's own plain, ordinary, clear and unambiguous *exclusion* of LSRP from South Carolina policies.

Appellant's false proposition is contrary ignores and disregards time-honored South Carolina rules of law that bind contracting parities to their clear and unambiguous contractual terms. The actions of the Court of Appeals in this case, if unabated and uncorrected, will result in unambiguous terms used in insurance contracts to no longer be enforceable and will, in spite of plain, clear and unbiguous language, permit insurers to contest clear and unambiguous terms in order to suit their own ends.

The Court of Appeals should not be taken in by Appellant's false and erroneous proposition and should not assist Appellant rewrite its *exclusion* which drastically changes and alters the plain, ordinary and unambiguous meaning of Appellant's insurance policies. The Court of Appeals should not bend the law to point of breaking the law in an effort to releave Appellant from of its self-created delima. The only fair, reasonable and proper interpretation of Appellants' "LSRP Notification Endorsement" is to determine, as the lower court did, that the LSRP premium surcharge was clearly and unambiguously *excluded* from the South Carolina policies Appellant issued to Respondent.

Auto-Owners Insurance Company v. Benjamin, 415 S.C. 137, 781 S.E. 2d 137 (Ct. Ap. 2015) (Shearouse Adv. Sh. No. 48 at 36) is an example of legions of cases which have applied long standing rules of law in order to bind contracting

parties to the plain, specific, unequivocal language contained in insurance contracts:

> Insurance policies are subject to the general rules of contract construction. Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012) (quoting M & M Corp. of S.C. v. Auto-Owners Ins. Co., 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010)). The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Id. (quoting McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning. Id. (quoting USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008)).
>
> Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. Whitlock, 399 S.C. at 615, 732 S.E.2d at 628 (quoting McGill, 381 S.C. at 185, 672 S.E.2d at 574).

II. The Court of Appeals' improperly rewrote Appellant's policy in favor of Appellant's interest by resorting to a rule of law which only arises whenever an ambiguity exists, after the Court of Appeals had agreed with both parties that there was no ambiguity in Appellant's policy.

In interpreting the clear and unambiguous *exclusion* contained in Appellant's "LSRP Notification Endorsement," the Court of Appeals erroneously decided to "consider the policy as a whole" in order to second guess the intention of the parties. However, there was no reason for the Court of Appeals to look any further

than the clear and unequivocal *exclusion* in Appellant's the "LSRP Notification Endorsement."

Under South Carolina law, parties are bound by the plain, specific, unequivocal language in their insurance contracts. In cased, Courts are required to enforce the policy and cannot second guess what either party may have intended. However, in case of an ambiguity, Courts are permitted to look beyond the ambigous terms in order to ascertain the contractiing parties' intentions.

The foregoing rules are enunciated in *Auto-Owners Insurance Company v. Benjamin*, supra. First of all, *Auto-Owners Insurance Company* states that the "cardinal rule" of construction requires courts to ascertain and give legal effect to the insurance contract language:

> Insurance policies are subject to the general rules of contract construction. (Citations omitted.) The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. (Citations omitted.) "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." (Citations omitted.) Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." (Citations omitted.)

Secondly, if the Court determines that the insurance contract language is ambiguous, the Court can then look beyond the ambiguous language and consider

the "whole document" in order to assist the Court determine the intention of the parties:

> Whether the language of a contract is ambiguous is a question of law for the court. An insurance contract is read as a whole document so that 'one may not, by pointing out a single sentence or clause, create an ambiguity.'" (Citations omitted.) However, this court must construe "[a]mbiguous or conflicting terms in an insurance policy . . . liberally in favor of the insured and strictly against the insurer." (Citations omitted.) Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." (Citations omitted.)

Since the *exclusion* in Appellant's "LSRP Notification Endorsement" was not ambiguous, the Court of Appeals should have enforced it as written, just as the lower court did, without going beyond the *exclusion* in to interpret the *exclusion's* clear and unabiguous language.

III. The Court of Appeals' erred by factually concluding that Respondent knew Appellant intended to and would apply the LSRP surcharge premium to the policies issued to Respondent, which conclusion resulted from the Court of Appeals disregarding, ignoring and rewritint the *clear and unambiguous exclusion* "Loss Sensitive Rate Plan" surcharge premium from the policies issued by Appellant.

A. The intention of the parties to a clear and unambiguous insurance contract should be deduced from the plain, ordinary and unambiguous language within the policy itself.

The Court of Appeals failed to enforce the plain language contained in Appellant's "LSRP Notification Endorsement," which clearly and ambiguously *excluded* the LSRP surcharge premium from the policies Appellant issued to Respondent. Instead, the Court of Appeals went out of its way to second guess what the parties intended. In this process, the Court conclude that Respondent knew that Appellant intended to apply the LSRP surcharge to Respondent's insurance coverage.

However, this factual conclusion is contradicted by Appellant's own plain and unambiguous language it used in its "LSRP Notification Endorsement," which clearly and specifically *excluded* the LSRP surcharge from applying to the two South Carolina policies Appellant issued to Respondent.

How could Respondent have ever known that Appellant would attempt to apply the LSRP surcharge premium to Respondent's policies when Appellant's own "LSRP Notification Endorsement" clearly, plainly and unambigously stated that LSRP was *excluded* from Respondent's South Carolina policies? The intention of parties to an insurance contract is best derived from the language the parties use the insurance contract itself.

Whenever insurance contract language is clear and unambiguous, Courts should not attempt rewrite a contract, second guess what the parties intended, or

otherwise torture the plain, unabguous language in the contract, in an effort to arrive at some different interpretation, meaning or conclusion that favors one party and harms the other.

B. Appellant *specifically informed* Respondent by using plain, ordinary and unambiguous language in its "LSRP Notification Endorsement" that the LSRP surcharge premium did not apply to the South Carolina policies issued to Respondent.

The Court of Appeals should have looked no further than the language Appellant itself used in the "LSRP Notification Endorsement" to ascertain what Appellant intended. A reading of the Appellant's plain, ordinary and unabiguous language contained it Appellant's "LSRP Notification Endorsement," it is impossible to conclude that Appellant intended for the LSRP surcharge premium to the policies issued to Respondent.

Likewise, it is impossible to conclude that Respondent could have possibly known that the plain, ordinary and unabiguous language Appellant used to *exclude* Respondent's South Carolina policies from the LSRP surcharge premium did not mean what it said and that the Court of Appeals could or would discard and ignore the *exclusion* in an effort to reach a diametrically opposite conclusion.

C. Neither (1) the application Respondent signed on November 6, 2003 or (2) the LSRP brochure Appellant provided to Respondent negated Appellant's clear and unambiguous *exclusion* contained in the policies

> that Appellant subsequently issued to Respondent, both of which stated that the LSRP surcharge premium did not apply to the South Carolina polices issued to Respondent.

In an effort to support its decision to ignore the clear and unambiguous *exclusion* of the LSRP surcharge premium contained in the policies Appellant issued to Respondent, the Court of Appeals factually concluded that Respondent knew that Appellant intended to apply the LSRP surcharge premium to Respondent's policies.

To support this factual conlusion, the Court of Appeals relied on language contained in Respondent's November 6, 2003 application for insurance and on Respondent's receipt of an "LSRP brochure" Appellant provided to Respondent. However, neither of these informed Respondent that LSRP would apply to the policies Appellant issued to Respondent. Moreover, Appellant's subsequently issued policies both contained the clear and unambiguous *exclusion* which negated anything to the contrary.

1. The November 6, 2003 Insurance Application signed by Respondent contained an important "disclaimer"

The "FACTS" recited by Court of Appeals in its January 10, 2018 decision stated, in part:

> Allen Ard, owner of Ard Trucking, submitted an application for an assigned risk insurance policy with

> Travelers. The application contained the following clause above Ard's signature:
>
>> By signing below I acknowledge that the [LSRP] 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.

Unfortunately, the Court of Appeals omitted an important "disclaimer" also contained on the application immediately above the foregoing, which stated:

> The following statement is only applicable in jurisdictions where the NCCI, Inc. Loss Sensitive Rating Plan has been approved for use:
>
> (R. 00200)

When the application was executed on November 6, 2003, Respondent had never heard of LSRP, no one explained LSRP to Respondent at the time the application was signed, and no one ever informed Respondent that LSRP had been *conditionally* approved on November 1, 2003 in South Carolina by the South Carolina Insurance Commission. (R. 00503.)

Importantly, both policies Appellant issued to Respondent *excluded* LSRP from Respondent's policies, thereby overriding anything to the contrary.

2. The "LSRP brochure" provided to Respondent by Appellant stated that Respondent would be informed if and when LSRP applied to the policies Appellant issued to Respondent.

The acknowledgment in the November 6, 2003 application Respondent signed indicated that several methods would be used by Appellant to notify the applicant regarding LSRP:

> By signing below I acknowledge that the [LSRP] has been explained to me, (assumedly by the agent, which was not done)
>
> or
>
> . . . an explanatory notice or brochure has been provided to me . . . (assumedly by mail from Appellant as the insurer)
>
> (R. 00200. Emphasis supplied.)

Affidavits provided by Respondent's officers (President Allen Ard at R. 00503 and Safety Director Harry Brown at R. 00545) stated that no one explained LSRP to Respondent. According to Respondent's Safety Director, a brochure explaining the LSRP surcharge premium would not had any relevance to Respondent because the policies Appellant issued to Respondent both *excluded* the LSRP surcharge premium from applying to Respondent's South Carolina policies.

It is noted that Appellant's "LSRP brochure" mailed to Respondent states on page 3 the following prominently displayed language:

> **Implementation**
>
> We have proposed that in your state, the LSRP be implemented six months from the effective date of regulatory approval. This six months' advance notice is intended to give you time to seek coverage in the voluntary market. (*Note: The implementation date may vary by state.*) Upon approval, all LSRP-eligible accounts currently in the residual market, their producers or brokers and current assigned carriers will be advised of the approval and implementation dates, as well as the LSRP parameters. (R. 549.)

Therefore, Appellant's LSRP brochure itself states that the LSRP was not yet implemented in South Carolina, and that Respondent would be informed when the implementation occurred. Respondent was never so notified.

Again both policies issued by Appellant to Respondent *excluded* LSRP from application in Respondent's policies, thereby overriding anything to the contrary. The *exclusion* plainly and unambiguously stated that the LSRP surcharge premium did not apply to Respondent's South Carolina policies.

D. Although the Court of Appeals found that the $52,116 Letter of Credit (LOC) Respondent gave Appellant evinced the intention of both parties from the LSRP to apply to Respondent's policies, this finding is contradicted by Appellant's own July 27, 2004 "change document" which made no mention of LSRP.

The lower court found there was "scant" use by Appellant of the term "LSRP" under the policies issued to Respondent:

> However, such scant and unexplained use of LSRP terminology ("Loss Sensitive Ratting Plans" is used on one page and "LSRP" is used on another page) falls far short of overcoming (Appellant's) own clear and unambiguous exclusion of LSRP from having any application to the South Carolina replacement policy issued to Plaintiff, which exclusion is contained in Defendant's own LSRP Notification Endorsement. (R. 008)

However, the Court of Appeals' January 10, 2018 decision found that Appellant's use of the term "LSRP" in a March 1, 2004 single page contained the replacement policy and which related to a $52,116 Letter of Credit Respondent gave Appellant demonstrated that Respondent knew Appellant intended for the two policies issued to Respondent to include the LSRP surcharge premium. (R. 00620.) Subsequently, on July 27, 2004, Appellant attached a "Change Document" to the March 1, 2004 replacement policy which identified the $52,116 Letter of Credit as a "RETURN PREMIUM" without any reference whatsoever to "LSRP." (R. 00543)

Respondent's affidavit states Respondent understood that the $52,116 Letter of Credit "would be rescinded by (Appellant) as soon as the final audit was completed and the Final Premium paid by (Respondent.) (R. 00507.) As stated above, the scant use of the term "LSRP" by Appellant did not change the clear,

unambiguous *exclusion* Appellant included in both policies issued to Respondent which *excluded* the application of LSRP from the South Carolina policies issued Respondent.

CONCLUSION

The January 10, 2018 decision of the Court of Appeals constitutes a catastrophic financial turn of events for Respondent which should be reviewed and reversed, or altered. The plain, ordinary and unambiguous language used by Appellant in its "LSRP Notification Endorsement" states that the LSRP surcharge premium *did not apply* to Respondent's policies. Instead, the LSRP surcharge premium was unilaterally, specifically, clearly and unambiguously *excluded* by Appellant under the "LSRP Notification Exclusion" incorporated into Respondent's two South Carolina policies.

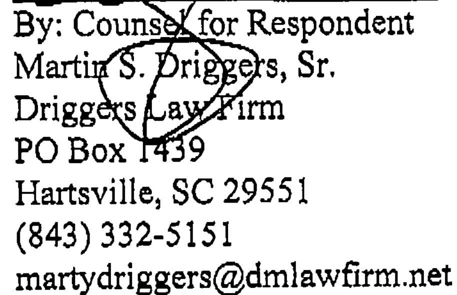
Appellant's clear and unambiguous language it used to *exclude* the LSRP surcharge premium from the South Carolina policies Appellant issued to Respondent created a dispositive contractual obligation upon Appellant which the Court of Appeals was bound to recognize and enforce, just as the lower court did. *Assuming arguendo* that Appellant made a mistake by *excluding* the LSRP surcharge premium from Appellant's South Carolina policies - a fact Appellant has

never admitted - Appellant is nonetheless bound by its own insurance contract terms.

To the extent that the Court of Appeals again concludes there are actual issues in this case regarding what the parties intended to be included in the subject policies and/or factual issues regarding the meaning of the policy language Appellant used in the insurance contract, this case should be remanded to the lower court so that such factual issues can be fully and appropriately adjudicated.

January 25, 2018

Respectfully submitted,



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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ard Trucking Company, Respondent,

v.

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

Appellate Case No. 2015-000806

Appeal From Darlington County
Paul M. Burch, Circuit Court Judge

Unpublished Opinion No. 2018-UP-010
Heard September 19, 2017 – Filed January 10, 2018

REVERSED

M. Dawes Cooke, Jr., and Phillip S. Ferderigos, both of Barnwell Whaley Patterson & Helms, LLC, of Charleston, for Appellant.

Martin S. Driggers, Sr., of Driggers & Moyd, of Hartsville, for Respondent.

PER CURIAM: In this civil action, Travelers Property Casualty Company of America (Travelers) appeals the circuit court's grant of summary judgment in favor of Ard Trucking Company. Travelers asserts the circuit court erred in finding a

Loss Sensitive Rate Plan (LSRP)[1] did not apply to the insurance policy it issued to Ard Trucking because (1) Ard Trucking agreed to be bound by a Workers' Compensation Insurance Plan (the Plan), which required the LSRP to apply to Ard Trucking's assigned risk policy as a matter of law; and (2) Ard Trucking had knowledge the LSRP applied to its policy. Travelers also argues (3) the circuit court's prejudgment interest award was in error. We reverse.

FACTS

South Carolina provides a workers' compensation insurance market for 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. The South Carolina Department of Insurance (SCDOI) approved the LSRP as part of the South Carolina Workers' Compensation Assigned Risk Plan, naming the National Council on Compensation Insurance (the Council) as Plan Administrator. The Council dictated the LSRP would be mandatory for all assigned risk insureds with a standard premium equal to or exceeding $200,000. Additionally, the Council instructed insurers "[a]ll assigned risk policies shall be endorsed with policy endorsement WC 00 04 17 - Assigned Risk [LSRP] Notification."

Allen Ard, owner of Ard Trucking, submitted an application for an assigned risk insurance policy with Travelers. The application contained the following clause above Ard's signature:

> By signing below I acknowledge that the [LSRP] 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.

Travelers issued the policy to Ard Trucking to cover a one-year period, with an estimated annual premium of $168,000. The policy stated the premium was subject to verification and change by audit. The policy included eleven separate endorsements, including the Assigned Risk LSRP Notification. The Assigned Risk LSRP Notification endorsement explained to the insured it was "issued because you may qualify to have the cost of your insurance subjected to the assigned risk

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[1] LSRP refers to a plan that adjusts the premium on a policy, following the policy term, based upon the actual occurrence of claims.

mandatory [LSRP]." The endorsement provided that it applied in twelve states and the District of Columbia and listed the premium eligibility for each associated state; however, South Carolina was not one of the states listed.

Ard Trucking's estimated annual premiums exceeded $200,000. As a result, Travelers issued a replacement policy to Ard Trucking for the same coverage year, with an estimated annual premium of $262,000. The replacement policy indicated the rating mode was LSRP and the LSRP Contingent Deposit was $52,116. The replacement policy contained an additional endorsement, the Mandatory Assigned Risk LSRP Endorsement, which was added "to explain the rating plan and how the Assigned Risk [LSRP] premium will be determined." The replacement policy contained the Assigned Risk LSRP Notification endorsement, identical to the one provided in the initial policy, which did not include South Carolina on the list of applicable states. After receiving the replacement policy, Ard Trucking obtained an irrevocable letter of credit from Carolina Bank in the amount of $52,116 and permitted Travelers to draw on the letter of credit with a draft.

After the policy year ended, Travelers conducted an audit of Ard Trucking's operations to determine the final premium due to Travelers. Travelers notified Ard Trucking it owed a final premium of $29,245, which Ard Trucking promptly paid. Thereafter, Travelers notified Ard Trucking that it still owed $175,064 under the LSRP and warned that Travelers would draw the entire letter of credit if Ard Trucking did not pay that amount. Ard Trucking claimed the LSRP Notification Endorsement specifically excluded South Carolina from the LSRP and refused to make the additional payment. Consequently, Travelers drafted the letter of credit.

Ard Trucking filed a claim in the circuit court against Travelers for breach of contract and conversion. The parties filed cross motions for summary judgment, and the circuit court held a hearing. Afterward, the circuit court granted summary judgment to Ard Trucking. The court found the LSRP did not apply to the policy and awarded Ard Trucking $103,844.74. Travelers filed a Rule 59(e) motion to alter or amend the order, which the circuit court denied. This appeal followed.

STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the [circuit] court," which "may grant a motion for summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 234–35, 692 S.E.2d 499,

505 (2010) (quoting Rule 56(c), SCRCP). We are also required to view "the evidence and all inferences which can reasonably be drawn therefrom . . . in the light most favorable to the nonmoving party." *Id.* at 235, 692 S.E.2d at 505 (quoting *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006)).

LAW/ANALYSIS

Travelers argues the LSRP applied to Ard Trucking's assigned risk insurance policy. Both parties conceded during oral argument that the policy was unambiguous, and therefore, we need only examine the policy. *See Beaufort Cty. Sch. Dist. v. United Nat'l. Ins. Co.*, 392 S.C. 506, 526, 709 S.E.2d 85, 95–96 (Ct. App. 2011) (stating the interpretation of an unambiguous insurance policy is for the court); *Williams v. Gov't Emps. Ins. Co.*, 409 S.C. 586, 594, 762 S.E.2d 705, 709 (2014) (providing that when an insurance policy's language is unambiguous, the language alone determines the policy's force and effect); *Way v. Way*, 398 S.C. 1, 7 n.7, 726 S.E.2d 215, 219 n.7 (Ct. App. 2012) (per curiam) (finding matters conceded at oral argument unnecessary for discussion of issue on appeal).

"Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary[,] and popular meaning." *Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977). When construing the provisions of an insurance policy, the court must examine the policy as a whole and adopt a construction that gives effect to the entire instrument and each of its various parts and provisions. *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 349 (1976). "[T]he meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole and considering the context and subject matter of the insurance contract." *Id.* at 593, 225 S.E.2d at 349; *see also MGC Mgmt. of Charleston, Inc. v. Kinghorn Ins. Agency*, 336 S.C. 542, 548, 520 S.E.2d 820, 823 (Ct. App. 1999) ("[T]he law is clear that, in construing an insurance contract, all of its provisions must be considered together.").

Considering the policy as a whole and the subject matter of the insurance contract, we find the LSRP applied to Ard Trucking's assigned risk insurance policy. The replacement policy listed the LSRP as its rating mode and listed $52,116 as the LSRP Contingent Deposit. Although the Assigned Risk LSRP Notification endorsement stated the insured *may* qualify to have the cost of its insurance subjected to the LSRP, the Mandatory Assigned Risk LSRP Endorsement—included in the replacement policy—stated it was added to the policy "to explain the rating plan and how the Assigned Risk [LSRP] premium *will* be determined." (emphasis added). In accordance with clearly established contract law, this court

may not read the provision in the Assigned Risk LSRP Notification Endorsement in isolation to defeat application of the LSRP. *See MGC Mgmt.*, 336 S.C. at 549, 520 S.E.2d at 823 ("[I]f the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend or defeat coverage that was never intended by the parties."). Therefore, we reverse the circuit court's grant of summary judgment.[2]

REVERSED.

WILLIAMS, THOMAS, and MCDONALD, JJ., concur.

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[2] Because our resolution of the prior issue is dispositive, we decline to address the remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive).

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CERTIFICATE OF COMPLIANCE

This Request for Rehearing by Respondent has been prepared using:

WordPerfect X8 (2014)

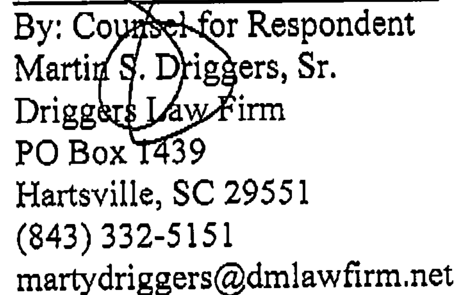
Times New Roman

14 Point Type

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

January 25, 2018

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 25 day of January, 2018 I filed with the Clerk's Office of the South Carolina Court of Appeals, via U.S. Mail, the required number of copies of this Respondent's Petition for Rehearing and Respondent's Suggestion of an En Banc Hearing, and I further certify that I served the required number of copies of Respondent's Petition for Rehearing and Respondent's Suggestion of an En Banc Hearing on other counsel of record via U. S. Mail with sufficient postage, properly addressed as follows:

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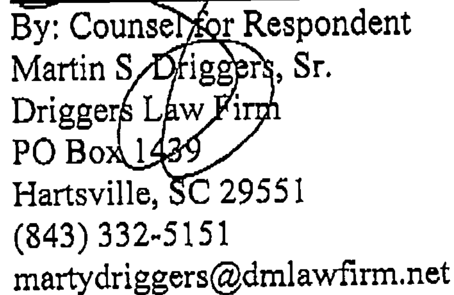
Counsel for Appellant

January 25, 2018

Respectfully submitted,



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January 25, 2018

The Honorable Jenny Abbott Kitchings
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Via Email: jkitchings@sccourts.org
Via Facsimile

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

Dear Ms. Kitchings:

Pursuant to our conversation of January 24, 2018, I am today faxing and emailing to you the following:

1. Respondent Ard Trucking Company's Request for Rehearing and Suggestion of an En Banc Haring before the Court of Appeals (With Certificate of Service on Opposing Counsel by Mail)

2. A copy of the Court of Appeals decision involved, which is Appellate Court Case: 2015-000806.

3. Check for $25 for the Filing Fee is being mailed herewith

By mail today, I am also sending you the originals of the above listed documents and an additional copy. Please file the originals and return a clocked copy to me in the envelope provided herein.

Per our conversation, I am only sending the original, signed and paper-clipped documents listed above. You instructed me not to send any additional copies as they would only be discarded by your office.

Thank you for your assistance in this matter.

Sincerely,

Martin S. Driggers, Sr.
MSD/dy

cc: Phillip Federigos, Esq.
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