

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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JUN 21 2018

S.C. SUPREME COURT

Appellate Case No. 2018-000923

Ard Trucking Company..... Petitioner,

v.

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

RETURN OF RESPONDENT TO PETITIONER'S
PETITION FOR WRIT OF CERTIORARI

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WCIP RULE 424

STATEMENT OF THE ISSUES

- I. ARE ARD'S ARGUMENTS CONTRARY TO THE LAW?
- II. ARE ARD'S ARGUMENTS CONTRARY TO THE FACTS IN THE RECORD?
- III. DOES ARD'S FAILURE TO APPEAL TRAVELERS' PREMIUM DECISION TO NCCI AS REQUIRED BY WCIP RULE 4 BAR ITS CLAIM AGAINST TRAVELERS?
- IV. DOES ARD'S FAILURE TO ADDRESS ITS PRODUCER'S ADMISSIONS BAR ITS CLAIM AGAINST TRAVELERS?

COUNTER-STATEMENT OF FACTS

RESPONDENT HEREBY INCORPORATES THE STATEMENT OF FACTS SET FORTH IN APP. pp. 663-667 AS IF SET FORTH HEREIN.¹

ARGUMENTS

Pursuant to South Carolina Appellate Court Rule 242, this Petition does not involve (1) a novel question of law, (2) or dissent in the decision of the Court of Appeals, (3) or any decision of the Court of Appeals in conflict with a prior decision of the Supreme Court, or (4) any substantial constitutional issues, or (5) any federal question. Indeed, the Court of Appeals was unanimous in applying the well-settled Supreme Court's Avant decision and its progeny recognizing that, as to assigned risk policies of insurance, the Workers' Compensation Insurance Plan has the effect of law. This Petition is merely Ard Trucking Company's (Ard) last attempt to

¹ Ard's purported "Statement of the Facts" fails to advise the Court of key evidence in the Record and misconstrues several important facts and the law. However, it is instructive for the Court based on the manner in which Ard attempts to present "facts" and, even more importantly, for the facts that Ard purposely omits. In a nutshell, Ard attempts to focus the Court on what it calls "the interpretation of contractual terms contained in two assigned workers' compensation insurance policies" as the basis of this petition; however, Ard fails to mention that the assigned risk policies are governed by the WCIP and the approved SCDOI plan for LSRP. Ard further fails to indicate that it agreed to be bound by the WCIP even before the assigned risk policy was issued to Ard. Ard argues that Travelers asked the lower court to "rewrite" the insurance policies by "disregarding time-honored insurance contract rules"; however, it is Ard that is asking the Court to ignore the law (WCIP) and to misinterpret the assigned risk insurance contracts by narrowly interpreting one Endorsement, in isolation and to the exclusion of the entire plan, the Mandatory Endorsement, and the policy terms themselves, Ard's purposely misconstruing of one part of the policy (the Notice Endorsement) in isolation does not negate the law or the policy terms themselves..

skirt the law in South Carolina, an effort which the Court of Appeals unanimously rejected. Travelers Property Casualty Company of America d/b/a The Travelers Indemnity Company of Illinois (hereinafter "Travelers") hereby respectfully files its Return to Petitioner's Petition for Writ of Certiorari. Petitioner Ard's Petition lacks any merit based on the following uncontroverted grounds:

1. The Workers' Compensation Insurance Plan ("WCIP") applies to all assigned risk policies in South Carolina and the WCIP has the "force" of law.
2. Petitioner Ard agreed to be bound by the WCIP.
3. The WCIP requires the LSRP to apply to Ard's assigned risk policy.
4. Pursuant to the WCIP, the LSRP Notice Documents (the Application, the Binder, the Policy, the Notice Endorsement, the Mandatory Endorsement, and the LSRP Brochure) provided notice to Ard that the LSRP applied to its assigned risk policy.
5. Pursuant to the WCIP, Ard's producer is Ard's agent and Ard's producer/agent admitted he had actual knowledge and knew that the LSRP applied to Ard's assigned risk policy before Ard issued its Irrevocable Letter of Credit to Travelers, and said knowledge is imputed to Ard as a matter of law.

A simple review of the evidence in the Record and the applicable law reveals that Ard's argument that the Notice Endorsement constituted an "exclusion" of the LSRP from the assigned risk policy is contrary to the policy itself, the Mandatory Endorsement (which specifically states the LSRP applies to the policy i.e., "to explain the rating plan and how the assigned risk [LSRP] premium will be determined"), the WCIP and South Carolina law. The Legislature, by the South Carolina Department of Insurance ("SCDOI"), has adopted the entire LSRP plan (App. pp. 547-587) and the WCIP has the "force of law" in South Carolina. Ard's attempt to "gut" the entire

Loss Sensitive Rating Plan (“LSRP”) plan by focusing on a small part of the entire process (where the SCDOI requires a five-step Endorsement/LSRP Brochure process (App. p. 587)) to the exclusion of the other parts of the notification process (the Application Notice, the Coverage Binder Notice, the Mandatory Endorsement, and the LSRP Brochure) attempts to create an ambiguity where no ambiguity exists.

At first blush, Ard’s arguments appear plausible if, and only if, this Court ignores the law and the facts in the Record. After reviewing the SCDOI approved plan and the evidence in the Record, however, it is clear that Ard quintessentially places “the cart before the horse” and ignores both the law and the uncontroverted facts in the Record in order to support its arguments. Although the Notice Endorsement is a part of the Workers’ Compensation Insurance Plan (WCIP) and statutory scheme adopted by the SCDOI to provide an assigned risk insured of notice of the LSRP, it is only a minor part of providing such notice. It does not, however, affirmatively exclude the LSRP from the assigned risk policy as Ard asserts.² Rather, the Application Notice (App. pp. 197-200), the Coverage Binder Notice (App. pp. 272-273), the Notice Endorsement (App. p. 215), the Mandatory Endorsement (App. pp. 236-238) and the LSRP Letter and LSRP Brochure (App. p. 254-262) (hereinafter collectively referred to as the “SCDOI LSRP Notice Documents”) provide specific notice to an assigned risk insured that the LSRP applies to assigned risk policies in South Carolina where, in addition to the specific notice provided by these documents, the Mandatory Endorsement unequivocally sets forth: “this Endorsement applies where LSRP has been approved.” (App. p. 236). As the LSRP had previously been approved in South Carolina before the assigned risk policy was issued to Ard,

² By its own express terms, the Notice Endorsement is self-limiting and the Endorsement itself does not apply to the assigned risk policy. In contrast, by its express terms, the Mandatory Endorsement applies to Ard’s policy. Per the SCDOI approved plan, the Mandatory Endorsement provides specific notice of the LSRP once the assigned risk premium exceeds the LSRP premium threshold.

the SCDOI LSRP Notice Documents provide sufficient notice to Ard that the LSRP applied to its assigned risk policy. Such notification scheme is specifically set forth in the SCDOI approved plan document [SCDOI 00029]. (App. p. 587).

Specifically, on or about March 1, 2004, Ard also received the Mandatory Endorsement (App. pp. 236-238), Travelers' explanatory LSRP letter (App. p. 254), and the LSRP Brochure (App. pp. 255-262) explaining the LSRP to Ard in laymen's terms. See Travelers March 1, 2004 letter to Ard stating:

Dear Insured:

The above referenced policy has been issued as part of the mandatory Loss Sensitive Rating Plan (LSRP). The purpose of the LSRP is to provide a retrospective rating plan for employers with assigned risk workers' compensation premium over a certain threshold. Retrospective rating programs determine the final premium for a policy after the policy period has ended and is based on actual losses incurred during the policy period.

Enclosed please find the explanatory booklet *The Loss Sensitive Rating Plan (LSRP): An employer's guide to the mandatory assigned risk retrospective rating program*. Please review the booklet carefully and discuss it with your producer. (App. p. 254).

Ard cannot cherry-pick one part of the entire scheme and ignore the entire WCIP/SCDOI approved plan as a whole. Ard cannot point to the Notice Endorsement, in isolation, and ignore the entire remaining statutory scheme in place, including this letter, the LSRP Brochure, and the Mandatory Endorsement. The Notice Endorsement plays but a small part, a first step, in the approved plan by the SCDOI as set forth in SCDOI 0001 to 0040. (App. pp. 547-587). The Notice Endorsement is just one step in the process, not the entire process itself, and it is not the entire solution to the issues presented in this case.

Ard agreed to be bound by the WCIP. The SCDOI adopted the LSRP statutory scheme as part of the WCIP and SCDOI determined that sufficient notice is provided to an assigned risk insured if the insured is provided with the SCDOI LSRP Notice Documents that Ard received. Here, based on the WCIP, the assigned risk insured Ard, a large dollar employer, and its producer (Ard's agent pursuant to the WCIP) received the SCDOI LSRP Notice Documents

which, as a matter of law, provide notice to Ard of the LSRP. Moreover, the uncontroverted evidence in the Record proves that the SCDOI's LSRP Notice Documents "worked" – it is uncontroverted that Ard's producer knew of the LSRP program and told its insured that the LSRP applied to its assigned risk policy before Ard provided its LSRP deposit³ to Travelers. (App. pp. 316-329).

I. ARD'S ARGUMENTS ARE CONTRARY TO THE LAW.

A. BACKGROUND

South Carolina law provides for a workers' compensation market for workers' compensation policies of last resort, generally referred to as Assigned Risk workers' compensation policies. Assigned Risk policies are for high risk employers who are unable to obtain workers' compensation coverage in the voluntary market. Assigned Risk policies are highly regulated by the SCDOI and issued pursuant to the WCIP and are administrated through the SCDOI/NCCI.⁴ The SCDOI/NCCI require servicing carriers to provide for standard forms, policies, and Endorsements via forms adopted by the SCDOI/NCCI in South Carolina. Servicing carriers, such as Travelers, are required to follow the WCIP provisions and utilize forms as required by the SCDOI/NCCI in South Carolina. Finally, and most importantly, the South Carolina Department of Insurance verified that, in South Carolina, the LSRP is applicable to Assigned Risk policies issued after November 1, 2003.⁵ (App. p. 547). Accordingly, the WCIP

³ Indeed, the only mechanism for a servicing carrier to require an additional deposit from an assigned risk insured is the LSRP plan. If there was no LSRP plan that was adopted by the SCDOI, Travelers would be unable to request an ILOC in accordance with the LSRP plan documents SCDOI 4, 6, 16, 23, 27 (App. pp. 550, 552, 562, 569 & 573).

⁴ For those entities that cannot obtain workers' compensation coverage in the voluntary market, the State has an established "Assigned Risk" or "residual market." Rates for such a program are established by the State, and rules and procedures have been promulgated by the State as they relate to the Assigned Risk market – the South Carolina Workers' Compensation Assigned Risk Plan (WCIP), operating rules and procedures. The Plan administrator for the residual market is the National Council on Compensation Program, Inc. (NCCI).

⁵ The LSRP is a plan that adjusts the premium for an Assigned Risk policy following the policy term, based upon the actual occurrence of claims, i.e., the plan provides for a retroactive premium based on actual losses incurred at numerous intervals after the termination of the Assigned Risk policy. A retrospective rating plan for those employers who have an Assigned Risk workers' compensation insurance premium of \$200,000 or more. Initially, the LSRP was implemented as part of the WC Insurance Plan and was administered by the National Council on Compensation Insurance (NCCI) from March 1, 1994 until May 1, 2000 for policies effective September 1, 1994 and later. Between May 1, 2000 and May 1, 2003, NCCI again administered the WC Insurance Plan and the LSRP in South Carolina as of May 1, 2003 for policies effective on November 1, 2003 and after. The Loss Sensitive Rating Program details are further set forth in the NCCI approved Plan documents and NCCI Brochure entitled "*The Loss Sensitive Rating Plan (LSRP); An Employer's Guide to the Mandatory Assigned Risk Retrospective Rating Program.*" (App. pp. 547-587).

mandates that LSRP is applicable to Ard's Assigned Risk policy, which was issued on November 7, 2013, as a matter of law.

1. WCIP HAS THE "FORCE OF LAW."

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

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

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

"Initially the LSRP was implemented as part of the WC Insurance Plan and was administered by the National Council on Compensation Insurance (NCCI) from March 1, 1994 until May 1, 2000 for policies effective September 1, 1994 and later. Between May 1, 2000 and May 1, 2003, SCDOI/NCCI did not administer the

Assigned Risk mechanism and it is unclear if the LSRP was mandated during that period. The SCDOI/NCCI again administered the WC Insurance Plan and the LSRP in South Carolina as of May 1, 2003 for policies effective on November 1, 2003 and after. The Loss Sensitive Rating Program is set forth in the attached SCDOI/NCCI Brochure and the attached approved item filing (including plan documents) provided by the SCDOI/NCCI.” (App. pp. 547-587).

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

3. ASSIGNED RISK APPLICATION

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

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

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

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

Here, Ard signed and submitted an Assigned Risk application to SCDOI/NCCI, and Ard is bound by such Applicant’s Statement. Ard acknowledged that it is bound by the LSRP if South Carolina had approved the LSRP in South Carolina. Based on the SCDOI approval of LSRP in South Carolina for Assigned Risk policies after 11/1/2003, Ard is bound by the LSRP as a matter of law.

Here, Ard signed and submitted such application to SCDOI/NCCI, and Ard is bound by such Applicant’s Statement. Ard acknowledged that it is bound by the LSRP if South Carolina has approved the LSRP in South Carolina. Admittedly, Allen Ard testified that he did not review Ard’s application before he signed it, did not read the entire policy, and did not review the WCIP

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

4. ASSIGNED RISK POLICY

Identical with WCIP, the Assigned Risk policy itself allows Travelers to charge premiums in accordance with the WCIP. Specifically, the Assigned Risk policy **Part 5** states:

“A. OUR MANUALS

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

Moreover, the Assigned Risk policy and binder set forth:

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

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

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

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

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

The Notice Endorsement, the Mandatory Endorsement, and the brochure work in tandem provide sufficient notice to an Assigned Risk applicant/insured of the applicability of the LSRP to Assigned Risk policies. (App. pp. 547-587). Said documents are self-explanatory. See App. pp. 677-681 for additional discussion. Ard's attempt to focus exclusively on the Notice Endorsement, to the exclusion of the rest of SCDOI approved plan and the SCDOI LSRP Notice Documents, should fall on deaf ears.⁶ Here, based on the uncontroverted evidence in the Record, the LSRP notice provisions were satisfied where it is uncontroverted that Travelers sent and Ard received the SCDOI LSRP Notice Documents; further, and importantly, in this specific case, the SCDOI plan "worked" because these documents provided actual notice and knowledge to Ard and its producer, where Ard was fully aware and knew that the LSRP plan applied to its assigned risk policy before it issued an irrevocable letter of credit (ILOC) according to the SCDOI approved plan.⁷ (App. pp. 316-329).

Ard's arguments appear deceptively simple – because the Notice Endorsement does not affirmatively list South Carolina, it must necessarily follow that it specifically excludes the

⁶ Ard's argument that the policy terms specifically stated that the LSRP did not apply to the assigned risk policy ignores the terms of the policy and the applicable law. Ard makes its arguments by simply cherry-picking a minute part of the SCDOI plan and ignoring the rest of the plan designed to give sufficient notice of the LSRP. Ard purposely attempts to misconstrue the first Endorsement, to the exclusion of the Mandatory Endorsement and LSRP Brochure which, combined together, provide sufficient notice to Ard as is required by the SCDOI. Ard's argument is especially ironic where, here, the SCDOI approved plan actually "worked" to provide notice to Ard before it issued an ILOC.

⁷ As such, this appeal does not involve an "innocent" employer who, out of nowhere, was charged an "extraordinary" premium where the employer had relied on the Notice Endorsement. Indeed, Ard admitted in its representative depositions that it did not review or rely on the Notice Endorsement (App. pp. 275-286; 310-314; 377-385). To the contrary, this appeal involves a large dollar, sophisticated employer who received the required Notices and Endorsements pursuant to the SCDOI requirements, and who agreed to be bound by the WCIP terms (including the LSRP). Furthermore, this large dollar employer (and his producer/agent) had actual knowledge that the LSRP applied to his assigned risk policy before said employer issued an ILOC. (App. pp. 316-329).

LSRP in South Carolina; therefore, Ard “wins.” Ard asserts every other document/notice is either irrelevant or insufficient to put it on notice that the LSRP applies to its assigned risk policy. With no evidence in the Record, Ard further asserts that the servicing carrier could have somehow altered the Notice Endorsement (i.e., by adding South Carolina in the Notice Endorsement listing), but failed to do so or the SCDOI “conditionally authorized” the servicing carrier to charge LSRP premium if it wanted to. However, there is no evidence in the Record that the servicing carrier had or has the authority to alter the Notice Endorsement required by the SCDOI/NCCI or that the servicing carrier had discretion as to whether or not to charge LSRP premium (App. pp. 152-153; 264; 269). The sole evidence in the Record is that the subject Endorsements and forms were required by NCCI. See Affidavits of Ghayal, Moyen, and Evangelista (App. pp. 152-153; 264; 269). Finally, Ard also asserts that the Mandatory Endorsement is meaningless as it only explained how the LSRP would be calculated if it applied to the assigned risk policy and the LSRP Brochure (which explains the LSRP in detail) is not an Endorsement and, therefore, cannot alter the policy. In making such arguments, Ard ignores the fact that the SCDOI approved the LSRP for all assigned risk policies issued after November 1, 2003, ignores the law (the WCIP and the entire LSRP plan set up by the SCDOI) and the uncontroverted facts in the Record in this case. Ard’s “sleight of hand,” red herring arguments are quickly exposed when the Court reviews SCDOI 0001-0040 (App. pp. 547-587), which is the approved plan by the SCDOI concerning the LSRP.

B. THE SCDOI APPROVED PLAN

In reviewing the SCDOI adopted plan, the SCDOI provides for sufficient notice to an assigned risk insured where a servicing carrier provides the SCDOI LSRP Notice Documents [the Application, the Coverage Binder, the Notice Endorsement, the Mandatory Endorsement and the LSRP Brochure], which Travelers provided and which Ard received in this case.

According to the SCDOI approved plan, SCDOI 00029 (App. p. 587) sets forth the notice to be provided to an assigned risk insured:

D. Notice to Assigned Risk Policyholders

All assigned risk policies shall be endorsed with policy Endorsement WC00 04 17 – Assigned Risk Loss Sensitive Rating Plan (LSRP) Notification 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. **[First requirement: Notice Endorsement]**

Assigned risk policies meeting the eligibility threshold to qualify for LSRP, shall be endorsed with policy Endorsement WC 00 04 18. **[Second requirement: Mandatory Endorsement]**

Assigned risk carriers shall be required to indicate on all renewal quotations to risks with premium of \$150,000 or more that payment of the renewal deposit constitutes knowledge and acceptance of the possible applicability of the LSRP to the policy. The assigned risk carrier shall provide the employer with the full details of the LSRP. **[Third requirement: LSRP Brochure]**

The ACORD application for the assigned risk market will include the following language immediately above the signature of the employer:

By signing below I acknowledge that the Loss Sensitive Rating Plan has been explained to me or that an explanatory notice or brochure has been provided to me and I agree that I shall be bound by the terms of such plan if my estimated annual premium or preliminary physical audit premium meets or exceeds the premium eligibility requirement. [Fourth requirement: Application]

When the policy is bound, a notice shall be included which reads:

Coverage is being bound subject to your signed statement acknowledging and agreeing to the terms of the Loss Sensitive Rating Plan in the event that your estimated annual premium or preliminary physical audit premium meets or exceeds the premium eligibility requirement. [Fifth requirement: Binder]

Once Travelers issued the SCDOI LSRP Notice Documents set forth above, pursuant to the law (the WCIP and the SCDOI approved plan), Travelers is required to charge the LSRP premium as the SCDOI has determined that Ard was provided with sufficient notice with such documents.⁸

⁸ Here, the SCDOI LSRP Notice Documents were uncontrovertibly sent to and received by Ard and its producer.

C. ARD'S PETITION ARGUMENTS

Ard's initially argues that the policy terms "cannot be unilaterally changed, amended or re-written." Ard fails to point out to the Court, however, that, by its very nature, the assigned risk policy explicitly sets forth that the premium will be governed by the WCIP manual of rules, rates, rating plans, which include the LSRP, and all of which are applicable to the policy from its inception. In relevant part, Ard's assigned risk policy sets forth:

PART FIVE -- PREMIUM

A. Our Manuals

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

Accordingly, Ard's argument that Travelers' policy terms "cannot be unilaterally changed, amended or rewritten" ignores the very language of the assigned risk policy itself which requires Travelers to charge premiums in accordance with the WCIP. Indeed, the LSRP is applicable to Ard's policy because the LSRP was adopted and became effective prior to the date the assigned risk insured policy was issued to it. It is not a matter "unilaterally changing, amending or rewriting" the policy terms as Ard would have the Court believe; rather, it is a matter of applying the policy terms in accordance with what the policy terms actually are; i.e., that the servicing carrier will charge premiums in accordance with the plan manual. Pursuant to Ard's application and policy terms themselves, Ard agreed to be bound by the WCIP and it agreed to pay for the premium charges, which include the LSRP in South Carolina.

Ard's related, but more specific, argument is that the policy may not be "changed or waived except by Endorsement issued by Appellant as part of this policy." Ard then focuses on a small part of a five-step process of providing an assigned risk insured notice and asserts that the Notice Endorsement itself must affirmatively exclude the LSRP so that the servicing carrier can no longer charge premium for LSRP unless the servicing carrier specifically

lists South Carolina as an LSRP state in another Endorsement itself. Unfortunately for Ard, such is not the law in South Carolina or in this case. Again, Ard misrepresents the policy terms and the law to attempt to come to a forced conclusion.⁹ The WCIP and the SCDOI approved plan set forth the applicable law in this instance. Ard's argument that the Notice Endorsement itself must list South Carolina or a servicing carrier can never be allowed to charge LSRP premium is directly refuted and rejected by the SCDOI approved LSRP plan itself.¹⁰

Ard further asserts that the Notice Endorsement is a "clear and unambiguous exclusion" of the LSRP and/or the Court of Appeals "disregarded, ignored or rewrote" such "exclusion" out of the assigned risk policy. As set forth previously, such argument is directly refuted and contrary to the SCDOI approved plan which has the effect of law. Nowhere does the Notice Endorsement exclude the LSRP applicability to the assigned risk policy. In conjunction with its erroneous argument, Ard argues that the LSRP Mandatory Endorsement and the LSRP Brochure do not amend, change or rewrite the LSRP Notification Endorsement; however, again, Ard misses the point of the Mandatory Endorsement and the LSRP Brochure. Contrary to Ard's argument, the Mandatory Endorsement and the LSRP Brochure [along with the other SCDOI LSRP Notice documents] provide specific notice of the LSRP's application in South Carolina to any reasonable person. Even more importantly, however, the SCDOI, pursuant to the SCDOI approved plan and the WCIP, have deemed the LSRP Mandatory Endorsement and the LSRP Brochure (and the other SCDOI LSRP Notice Documents) as the appropriate mechanisms for a servicing carrier to provide sufficient notice to an assigned risk insured. Pursuant to the SCDOI

⁹ The assigned risk policy is governed by laws that are different than a voluntary insurance policy. The Supreme Court has been very clear that the WCIP governs assigned risk policies and takes precedence over more general insurance common law. Ard ignores the entire SCDOI statutory scheme that sets up the LSRP and the SCDOI's decision that the SCDOI LSRP Notice Documents provide sufficient notice to an assigned risk insured that the LSRP applies to the assigned risk policy.

¹⁰ The Notice Endorsement itself merely sets forth that it does not apply to the policy; it in no way limits the Mandatory Endorsement which clearly applies to the assigned risk policy pursuant to its own express terms.

approved plan, a servicing carrier is not only allowed, but is required, to charge premium for LSRP once those documents are sent to the insured. Here, it is uncontroverted that Ard received the SCDOI LSRP Notice Documents including the Notice Endorsement, the Mandatory Endorsement, and the LSRP Brochure. Ard's producer received such documentation and understood that the LSRP applied to Ard's assigned risk policy. Pursuant to the SCDOI approved plan and the LSRP, the servicing carrier was not required to take any further action in order to properly charge premium for LSRP in accordance with the SCDOI approved plan.¹¹

D. ARD'S ADDITIONAL FACT AND ARGUMENT ERRORS

1. Ard's false "extraordinary" premium charge argument

Ard consistently refers to the LSRP premium as "an extraordinary premium surcharge requirement"; however, such characterization is refuted directly by the SCDOI approved plan.¹² As the SCDOI Plan states, the LSRP is a program which seeks to have large dollar employers pay their fair share of premiums in order to allow the entire assigned risk market to be viable. (App. pp. 547-587). Ad hoc judicial decisions which prevent servicing carriers from charging premium based on the exposure of these large dollar employers will only serve to weaken the entire assigned risk market and dramatically increase premium costs for all employers in the

¹¹ Ard's strained argument that the Mandatory Endorsement or the LSRP Brochure do not provide notice that the LSRP applies in South Carolina lacks merit. Any reasonable person who would read the Mandatory Endorsement, as well as the LSRP Brochure, would certainly understand, or at least be on notice, that the LSRP applies to the assigned risk policy in South Carolina. As set forth in the Georgetown Steel Co. vs. Capital City Ins. Co., 318 B.R. 313 (U.S.B.C.(D.S.C.) 2004), it is the assigned risk insured's responsibility to obtain a copy of and review the SCDOI approved plan if it is confused about what the LSRP is when it receives the SCDOI LSRP Notice Documents. Further, Ard's argument that the Mandatory Endorsement and the LSRP Brochure did not provide sufficient notice to Ard is largely irrelevant where (1) Ard agreed to be bound by the WCIP and (2) the SCDOI approved plan requires that an assigned risk insured be charged LSRP if the servicing carrier issues the SCDOI LSRP Notice documents to the assigned risk insured. As it is uncontroverted that Travelers, the servicing carrier, provided the SCDOI LSRP Notice Documents to Ard (and its producer admits that he received them and understood that the LSRP applied to Ard), the sufficiency of the notice provided by these documents *in the abstract* is simply irrelevant. Ard agreed to be bound by the WCIP and the WCIP requires LSRP to be charged if the assigned risk insured received the SCDOI LSRP Notice Documents. As Ard received such documents, LSRP is appropriate in this case.

¹² Ard also either forgets or ignores the fact that an assigned risk policy, by design, is more expensive than a workers' compensation policy in the voluntary market.

assigned risk policy market and the voluntary market as well.¹³ The LSRP is not an “extraordinary premium surcharge” as Ard asserts; rather, it is a necessary component of the assigned risk market required by the SCDOI to ensure the assigned risk market’s survival as an alternate workers’ compensation system for high risk employers such as Ard. High risk, large dollar employers, such as Ard, should bear the cost of their extraordinary exposure and should pay their fair share. Further, assigned risk insureds, such as Ard, agree to be bound by the WCIP on the “front end,” before an assigned risk policy is issued to it. Ard was free to obtain a cheaper policy in the voluntary market if it desired to do so/was able to do so; however, having voluntarily applied for an assigned risk policy, Ard cannot seriously complain that it is bound by the WCIP/SCDOI plan, where it expressly agreed to be bound by such plan before obtaining the benefits of its assigned risk policy.¹⁴

2. Ard’s false “conditional” authority and servicing carrier discretion arguments

In its prior arguments and current Petition, Ard states that SCDOI “conditionally authorized appellant, and other similar insurers to add an LSRP premium surcharge to assigned risk insurance policies issued in South Carolina.” Further, Ard asserts that the servicing carrier was to “specifically include” within their policies an LSRP Notice Endorsement that would “ensure” that all South Carolina insureds would have notice LSRP could be applied. By such arguments, Ard misrepresents the LSRP plan as set forth in SCDOI numbers 0001 - 0040. (App. pp. 547-587). First, there is absolutely no evidence in the Record that the SCDOI conditionally authorized the servicing carrier to add LSRP; rather, the evidence in the Record is uncontroverted that the SCDOI requires LSRP to be applicable to

¹³ Slanted judicial decisions in favor of big local employers risk the entire workers’ compensation market in South Carolina which will inevitably lead to premiums skyrocketing, businesses closing, and the state economy suffering. If South Carolina courts allow state court judges to let local, multi-million dollar employers skirt their responsibility to pay LSRP premium, South Carolina will likely face such a fate.

¹⁴ This is especially the case with Ard where Travelers paid hundreds of thousands of dollars in benefits to injured employees during the exact same policy period.

assigned risk policies after November 1, 2003. (App. p. 547). This is a significant fact. Similarly, there is no evidence that a servicing carrier can vary the LSRP Endorsements that the SCDOI required in this case as Ard suggests. It is uncontroverted that Travelers provided the SCDOI required Endorsements to Ard. (App. pp. 152-153; 264; 269).

Of particular importance to exposing Ard's false arguments, the SCDOI approved plan's statement that the servicing carrier should "ensure" that South Carolina insureds be provided with notice of the LSRP is not a broad statement of law that is left up to the discretion of each individual servicing carrier; in stark contrast to Ard's claim, the LSRP and SCDOI approved plan documents specifically set forth that notice to the insured is "ensured" by the servicing carrier sending the required SCDOI LSRP Notice Documents, including the exact WC000417 Notice Endorsement the servicing carrier uncontrovertedly sent in this case. The SCDOI approved plan is very specific in stating that the LSRP Notice Documents ensure notice of the LSRP to an assigned risk insured.¹⁵ (App. p. 587). The SCDOI plan specifically sets forth what Travelers was required to do, and Travelers did exactly what the SCDOI requires in this case. The uncontroverted evidence in the Record is that the Notice Endorsement, along with the Mandatory Endorsement and LSRP Brochure, which Travelers sent to Ard and its producer, were required by the SCDOI and "ensured" notice to Ard in accordance with the SCDOI's plan. (App. pp. 152-153; 264; 269). As a matter of law, the SCDOI LSRP Notice Documents provide

¹⁵ The plan specifically requires the Notice Endorsement Travelers sent and Ard received in this case. As a matter of law, the SCDOI approved plan/Basic Manual that Ard refers to is a part of the overall SCDOI plan itself which specifically sets forth that notice is provided to an assigned risk insured by a servicing carrier providing the specific SCDOI LSRP Notice Documents Travelers provided to Ard in this case. There is absolutely no evidence in the Record that Travelers was required to provide any other notice (or, on the flip side, was allowed to provide any other notice) to Ard concerning the LSRP plan; Ard's suggestion otherwise is contrary to the approved plan.

the insured with sufficient notice and knowledge of the LSRP applying to its assigned risk policy.¹⁶

Finally, as Ard asserts, the Basic Manual states “D. Notice to Assigned Risk Policy Holders... all assigned risk policies shall be endorsed with Policy Endorsement WC000417 - Assigned Risk Loss Sensitive Rating Plan (LSRP) notification in order to ensure that ‘all possible qualifying risks are notified of the intent and details of the plan’”; however, again, Ard fails to advise the court that the WC000417 Assigned Risk Loss Sensitive Rating Plan (LSRP) Notification Endorsement [SCDOI 00029 & 00036 (App. pp. 575; 582)] is very specific and is the exact same Notification Endorsement that Ard now complains did not provide it sufficient notice. By providing the SCDOI/NCCI required Notice Endorsement, along with the other SCDOI LSRP Notice Documents, Travelers provided the required “notice to assigned risk policy holders” which, as a matter of law, “ensured” Ard was notified of the intent and details of the LSRP.¹⁷

3. Ard’s false “affirmative exclusion” argument

Based on Ard’s purposeful misconstruing of the LSRP plan, Ard further asserts that Travelers’ assigned risk policy

“failed to include Respondent South Carolina insurance policy as being subject to LSRP application. Conversely stated, the clear and unequivocal language in the policy Appellant issued to Respondent affirmatively excluded LSRP from being applicable to the South Carolina insurance policy...”

Again, this bold assertion is a clear error of law in light of the law and the facts in this case. The

¹⁶ Even more than an academic exercise, however, the uncontroverted evidence in this case is that Ard knew that the LSRP applied to its policy before it issued the ILOC; however, after having this knowledge and issuing an ILOC in accordance with the LSRP plan, Ard then flips and now attempts to argue Travelers is estopped by the singular Notice Endorsement in isolation – by itself – without reference to the entire WCIP and SCDOI approved plan. The SCDOI’s approved plan which Ard references, in and of itself, provides specific notice to Ard that the LSRP applies in South Carolina. “Ignorance of the law is no excuse,” and, just as the appellant in Georgetown Steel Co., supra, Ard had knowledge of the Basic Manual, the WCIP, and the SCDOI approved plan requiring LSRP in South Carolina.

¹⁷ As set forth in the SCDOI approved plan, after a preliminary audit’s premium threshold indicated that Ard was a large dollar employer which was subject to the LSRP, Travelers issued a Mandatory Endorsement and LSRP Brochure explaining the LSRP to Ard pursuant to the SCDOI approved plan.

Notice Endorsement does not “affirmatively exclude” the LSRP as Ard asserts. Travelers was required to provide the exact Notice Endorsement that it provided as set forth in the SCDOI document 00036 (App. p. 582), which is only one step in a multi-step process of providing Ard notice of the LSRP application with the SCDOI LSRP Notice Documents. Whereas the Notice Endorsement required by the SCDOI approved plan/NCCI does not list South Carolina, the SCDOI has determined that the Application Notice, Coverage Binder Notice, the Mandatory Endorsement, and the LSRP Brochure do provide notice of the LSRP. The SCDOI has determined that together these SCDOI LSRP Notice Documents provide sufficient notice to Ard, and any objective reading of these documents support SCDOI’s decision to provide notice in such a manner.¹⁸ Therefore, focusing on the Notice Endorsement in isolation would be an error of law, especially where Ard’s logic is premised upon/assumes that the Notice Endorsement *affirmatively excludes* LSRP in South Carolina, where the Notice Endorsement verbiage itself and the SCDOI plan sets forth otherwise.¹⁹

Ard continues to ignore that (1) South Carolina law is incorporated into the policy as a matter of law,²⁰ and (2) the policy terms themselves require the servicing carrier to charge for premiums in accordance with the manual and plans, which include the LSRP. Thus, Ard’s argument that the policy terms themselves exclude the LSRP is refuted in light of **Part 5** of the policy which specifically requires the servicing carrier to charge premium in accordance with the

¹⁸ Indeed, SCDOI’s plan is validated where Ard’s producer admits he understood the LSRP applied to Ard’s assigned risk policy after he received the SCDOI LSRP Notice Documents. (App. pp. 316-329).

¹⁹ In other words, by focusing only on the Notice Endorsement itself and ignoring the entire plan, Ard would have this Court ignore the law and the plan in its entirety and hold that the Notice Endorsement, in and of itself, excludes the possibility of a servicing carrier charging LSRP premium. Such absurd result, however, would be contrary to the law, the express policy terms, and the public policy of having large dollar employers pay their fair share to support the assigned risk market that they benefit from.

²⁰ Throughout its Brief to the Court of Appeals and the Petition, Ard artfully dances around and ignores the obvious ... the SCDOI approved plan binds Ard and Travelers is entitled to the premium it seeks. In South Carolina, an assigned risk policy of insurance, like all policies of insurance, incorporates South Carolina law. The assigned risk policy incorporates the WCIP. The specific provisions of the WCIP/the assigned risk plan and the SCDOI approved plan govern the assigned risk policy. Accordingly, Ard attempts to avoid the law by purposely misconstruing parts of the insurance policy terms, to the exclusion of others, is unavailing.

WCIP Plan which includes the LSRP. As **Part 5** incorporates the LSRP into the policy, Travelers is not requesting any “change” to the terms of the policy as the LSRP was incorporated into the assigned risk policy from the inception of Ard’s assigned risk policy.²¹

4. Ard’s false Mandatory Endorsement argument

Ard further argued that the Mandatory Endorsement did not amend, change or rewrite the LSRP Notification Endorsement. In making its argument, Ard again ignores the SCDOI approved plan pages 00017, 18, 23, 29, 33, 36 and 37 (App. pp. 563, 564, 569, 575, 579, 582 & 583), which set forth that the Notice Endorsement, Mandatory Endorsement and the LSRP Brochure provide sufficient notice to Ard. Specifically, SCDOI 00029 (App. p. 587) sets forth the required “notice to assigned risk policyholders,” (i.e., the SCDOI LSRP Notice Documents) which is the exact notice Ard received.²²

Ard also argues that the Mandatory Endorsement only applies if the Notice Endorsement specifically lists South Carolina, and it does not indicate that the LSRP is applicable in South Carolina.²³ Again, such argument is contrived because the LSRP is applicable to the assigned risk policy in South Carolina as of November 1, 2003 as a matter of law pursuant to the WCIP and

²¹ In addition, although the law itself is sufficient notice to Ard that the LSRP applies, the SCDOI approved plan sets forth that sufficient notice is provided to the insured as a matter of law if the servicing carrier sends the SCDOI LSRP Notice Documents in accordance with the SCDOI plan. (App. p. 587). Because Travelers sent those documents, which is uncontroverted, Ard had sufficient notice as a matter of law and there is no defense to Travelers seeking the premium that it now seeks pursuant to the LSRP in this case.

²² Ard continues to argue that the LSRP Notice Endorsement “expressly negated” the application of LSRP to the policies; however, Ard’s argument is contrary to the WCIP/SCDOI approved plan. Further, the Notice Endorsement is self-limiting and does not apply to the policy – it does not and cannot affirmatively exclude the LSRP. In short, just because the Notice Endorsement does not specifically list South Carolina, it does not automatically mean that the entire SCDOI plan is rendered irrelevant, especially where the Plan itself [SCDOI 0017, 18 & 29] (App. pp. 563, 564, & 575) sets forth that the Notice Endorsement, along with the Mandatory Endorsement and the LSRP Brochure, provide sufficient notice to Ard pursuant to the Plan. Therefore, cherry-picking the Notice Endorsement in isolation and ignoring the rest of the SCDOI plan is not supportive of Ard’s arguments.

²³ Indeed, Ard’s argument makes little sense. If South Carolina was listed in the Notice Endorsement, then there would be no need for the Mandatory Endorsement or the LSRP Brochure to begin with. The SCDOI chose a statutory scheme which provides notice to an insured by the Mandatory Endorsement and LSRP Brochure supplementing the Notice Endorsement when a premium threshold is met. Reasonable people may differ about whether or not the SCDOI approved plan method of notice is the “best” method of providing notice, but it is axiomatic that the SCDOI has the discretion and the right to adopt the plan in accordance with what it believes is appropriate. See *Avant v. Willowglen Academy*, 367 S.C. 315 (S.C. 2006).

SCDOI approved plan.²⁴ (App. p. 547). The SCDOI approved plan only requires that Travelers provide the insured with the Mandatory Endorsement [and the other SCDOI LSRP Notice Documents] which Ard admits it received. (App. p. 587). Initially, Ard admits the Mandatory LSRP Endorsement states “this Endorsement applies where the LSRP has been approved,” but Ard then asserts “nowhere in the Endorsement does it specifically state LSRP was ever approved in the State of South Carolina.” Again, Ard places “the cart before the horse.” What Ard fails to acknowledge is that the servicing carrier is not required to specifically list South Carolina in any Endorsement in order to advise Ard that the LSRP was approved in the state of South Carolina because **THAT IS THE LAW IN SOUTH CAROLINA**. As the LSRP applies in South Carolina, by its express terms, the Mandatory Endorsement applies to Ard’s policy. Further, it is axiomatic that the WCIP is the law and ignorance of the law is no excuse. Similar to the appellant in Georgetown Steel,²⁵ supra, Ard could have requested clarification from its producer or obtained and reviewed the actual SCDOI approved plan which is set forth in the Record in SCDOI 0001 - 00040.²⁶ (App. pp. 547-587).

It is simply incredible that Ard attempts to argue that the Mandatory Endorsement, along

²⁴ By its own terms, the Notice Endorsement is self-limiting and does not apply to the policy. The Notice Endorsement does not and cannot affirmatively exclude anything. Per the plan, once Ard’s estimated premium exceeded the LSRP threshold, the policy was re-written to be an LSRP policy issued with the Mandatory Endorsement which supplants the Notice Endorsement and, along with the LSRP Brochure and accompanying Letter, specifically advises an insured of the LSRP applicability where it specifically states “this Endorsement applies where the LSRP has been approved.” As the LSRP had been approved in South Carolina prior to when the assigned risk policy was issued, the Mandatory Endorsement provides specific notice of the LSRP to Ard.

²⁵ As Georgetown Steel states “[A]n insured could examine the South Carolina plan to determine the specific factors applicable to all policies written under the Assigned Risk plan.” Similar to this case, Georgetown Steel also holds that “The standard LSRP Endorsements drafted and copyrighted by SCDOI/NCCI ... specifically and unambiguously notifies the policy holder that the LSRP has been adopted in South Carolina.” Here, similarly, the SCDOI/NCCI required SCDOI LSRP Notice Documents unquestionably provided specific notice to Ard and put Ard on notice that the LSRP applies to its assigned risk policy in South Carolina. Ard cannot escape Georgetown Steel’s holding, which is equally applicable to Ard, if not more so, where Ard’s producer admitted he knew that the Endorsements and LSRP Brochure (of which Ard now complains) notified him and, therefore, Ard of the LSRP’s applicability in South Carolina. (App. pp. 316-329).

²⁶ Ard, like any reasonable person/entity, could have determined that the LSRP applies in South Carolina if it was confused by the Mandatory Endorsement provision or the LSRP Brochure.

with the March 2004 letter and the LSRP Brochure, are somehow confusing. No reasonable person would be confused by such Endorsement, LSRP Brochure, or letter. What is uncontroverted, however, is that Ard's producer was not confused by the Mandatory Endorsement and the LSRP Brochure as the producer himself, the agent of Ard, knew that the LSRP applied to the assigned risk policy before the ILOC was issued by Ard to Travelers. This notice is imputed to Ard as a matter of law.²⁷ Accordingly, the argument *in the abstract* that the Mandatory Endorsement does not provide notice that the LSRP applies in South Carolina is contrary to the facts in this case where Ard's producer testified under oath to the exact opposite.²⁸

5. Ard's false subjective beliefs and LSRP arguments

In Ard's Brief to the Court of Appeals and in its present petition, Ard essentially asserts that Ard is not bound by the LSRP because "Respondent did not believe LSRP applied to the policies." However, Ard's statement that it did not *subjectively* believe the LSRP applied to its policies is (1) irrelevant, and (2) is directly refuted by its producer's admission that Ard and its producer had actual knowledge of the LSRP's applicability to the assigned risk policy before Ard issued the ILOC to Travelers. Ard further argues that the LSRP Brochure did not specifically advise it of the LSRP's applicability in South Carolina; again, Ard's argument is meritless as any objective reading of the LSRP Brochure would put any reasonable person on notice that LSRP applies in South Carolina; moreover, to the extent that the LSRP Brochure does not do so, Ard is presumed to know the law which is incorporated into the assigned risk policy.

Further, Ard's safety director Brown's generic Affidavit setting forth his *subjective* belief

²⁷ Indeed, Ard does not even discuss this dispositive fact in its Petition. Ard argues that Travelers did not sufficiently advise it of what, as a matter of law, it already knew! Ard's argument collapses under the weight of its own absurdity.

²⁸ As such, the Mandatory Endorsement, which specifically sets forth that "the Endorsement applies where the LSRP has been approved," is notice to Ard that the LSRP has been approved in South Carolina. Because the LSRP was approved in South Carolina on November 1, 2003 prior to the issuance of Ard's assigned risk policy, pursuant to the Mandatory Endorsement itself, the Mandatory Endorsement provides sufficient notice to Ard that the LSRP applies to its assigned risk policy by any objective and reasonable reading.

that the LSRP did not apply to Ard's assigned risk policy is simply irrelevant. Mr. Brown's "belief" after "carefully" reviewing the policy during the course of this litigation is irrelevant and does not refute Ard's sworn admissions that it did not rely on the Notice Endorsement or that its producer explained the LSRP to Ard prior to its issuing the ILOC to Travelers. (App. pp. 275-286; 310-314; 316-329; 377-385). Once again, Ard employs "sleight of hand" arguments, submitting an Affidavit which purports to create the impression that Ard relied on the Notice Endorsement, or was unaware of the LSRP applicability to the assigned risk policy based on the Notice Endorsement or LSRP Brochure, when such innuendo is directly refuted by Mr. Ard (Ard President), Mr. Brown (Ard Safety Director), and its own producer's sworn testimony.²⁹

6. Ard's request to ignore the law

Ard appears to argue that the Court should not apply the law when interpreting insurance contracts. Ard, by sticking its head in the sand and ignoring the law and **Part 5** of the policy, continues to assert that Travelers is "boldly" attempting to avoid its own insurance policy provisions or to have the Court "re-write" the assigned risk policy at hand. In contrast, Travelers merely seeks to apply the law and the contract pursuant to its express terms. As set forth previously, the assigned risk policy provisions themselves require Travelers to charge premium in accordance with the LSRP (i.e., **Part 5** of the policy) and, moreover, the WCIP/SCDOI approved Plan requires the same.³⁰ This Court should deny Ard's request to invite chaos in South Carolina workers' compensation markets and, instead, require Ard to comply with (1) the

²⁹ Ard safety director Brown's Affidavit indicates that his current beliefs are based on having "carefully" reviewed the policies and appear to assert what Ard's legal position is in this case. His Affidavit, however, is in stark contrast to the Ard President's, his own, and their producer's testimony where Ard readily admitted under oath that they had not reviewed or relied upon the Notice Endorsement (App. pp. 275-286; 310-314; 316-329; 377-385); thus, Ard's key factual assertion which underpins its entire argument is refuted by Ard's own sworn testimony.

³⁰ In so doing, Ard advocates that the SCDOI plan be torn asunder and for premiums rightly owed by large dollar employers to go uncollected and that their large exposure risk should be borne by the entire voluntary and assigned risk workers' compensation market throughout South Carolina. If such is the case, premiums across the board in both assigned risk markets and voluntary markets in South Carolina will continue to spiral and sky-rocket, affecting every other employer throughout this State.

established and controlling rules of insurance contract law,³¹ (2) the law (i.e., the WCIP and SCDOI approved plan), and (3) to keep its promise to be bound by the WCIP.

Protecting a local, large dollar employer seems to be a motivating factor in the underlying opinion of the trial judge below. However, the Court of Appeals corrected the trial judge's attempt to "gut" the WCIP in South Carolina which sought to protect this local, large dollar employer from paying the premium it should pay in accordance with the law and the assigned risk policy terms themselves. The underlying trial judge decision was a knife at the "heart and soul" of the LSRP program of the WCIP, which is the law in South Carolina. The Court of Appeals corrected such clear error. The South Carolina courts have repeatedly held that the WCIP is the law in prior decisions (from the Supreme Court's 2006 Avant decision to the more recent Court of Appeals' Burris decision) and the trial judge skirted such binding precedents in order to help a local, large dollar employer. The law should not bend or be broken for such parochial concerns.

II. ARD'S ARGUMENTS ARE CONTRARY TO THE FACTS IN THE RECORD.

This case does not represent the factual scenario which Ard is trying to present. Ard representatives admitted that they did not rely on the Notice Endorsement. Ard's producer admitted that he knew the LSRP plan applied to Ard's assigned risk policy and he told Ard representatives (the safety director) that the LSRP applied before Ard issued its ILOC to Travelers. (App. pp. 275-286; 310-314; 316-329; 377-385). Ard did not rely on the Notice Endorsement and was later shocked to find out that LSRP applied to its assigned risk policy. The

³¹ Interestingly, in citing "legions of cases" applying "long standing rules of law" for insurance contracts in its Petition, Ard correctly cites the law dispositive in this appeal: "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." Ard violates this principle by pointing to a single part of the insurance contract and a single part of the WCIP to falsely attempt to create a forced ambiguity where no ambiguity exists (where the assigned risk policy **Part 5** and the SCDOI approved plan should be read and implemented in their entirety according to the SCDOI plan).

facts in the Record, which are uncontroverted, set forth a much more calculating argument by Ard where it received the required SCDOI LSRP Notice Documents advising it of the LSRP, it voluntarily moved forward by issuing an ILOC after its producer explained to Ard representatives that the LSRP applied and, only after the LSRP bill was due (based on the actual losses of Ard during the policy period), did Ard begin with its present argument that it should not pay what it had agreed to pay pursuant to the WCIP.

This Petition does not involve an esoteric philosophical debate about whether or not the SCDOI LSRP Notice Documents provide sufficient notice to Ard *in the abstract*; rather, here, the SCDOI approved plan to provide sufficient notice of the LSRP to Ard actually “worked.” Here, Ard’s producer/agent received these documents, understood the LSRP to apply to Ard’s assigned risk policy before Ard issued an ILOC, and then explained to Ard representatives that the LSRP applied to its assigned risk policy before Ard issued an ILOC pursuant to the LSRP. Any failure of Ard to understand the specifics of the LSRP program, if such failure actually existed, would lie with Ard’s own producer’s negligence in failing to explain to Ard the full parameters of the LSRP, not with the servicing carrier. Ard’s producer admits that he knew the LSRP applied and advised Ard that the LSRP applied before an ILOC was issued to Travelers by Ard. Pursuant to WCIP, W.C.I.P. Section I, as a matter of law, Ard’s producer is the agent of the insured, Ard. (See App. pp. 366-367; 687). As such, Ard had actual and imputed knowledge that the LSRP applied to its assigned risk policy before it issued the ILOC. Accordingly, Ard’s arguments rest on its hope that this Court will ignore the law, as well as these uncontroverted facts in the Record.

III. ARD FAILS TO ADDRESS ITS FAILURE TO APPEAL TRAVELERS’ PREMIUM DECISION TO NCCI AND THE SCDOI AS REQUIRED BY WCIP RULE 4.

Travelers incorporates its prior arguments set forth in its Appellant brief. (App. pp. 683-686). Ard's failure to administratively appeal these issues prohibit it from asserting its current arguments to the Court. (App. pp. 588-590, 683-686; Supplemental Record 1-9; App. pp. 113-135; 15). Ard cannot sidestep the entire administrative mechanism in place which was the appropriate forum to address Ard's objections to the LSRP.

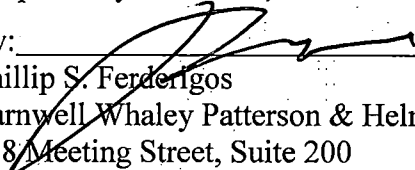
IV. ARD FAILS TO ADDRESS ITS PRODUCER'S ADMISSIONS NEGATING ITS PRESENT ARGUMENTS TO THE COURT.

Travelers incorporates its prior arguments set forth in its Appellant brief. (App. pp. 113-135; 687-690).

V. CONCLUSION

As set forth previously, this Petition does not involve (1) a novel question of law, (2) or dissent in the decision of the Court of Appeals, (3) or any decision of the Court of Appeals in conflict with a prior decision of the Supreme Court, or (4) any substantial constitutional issues, or (5) any federal question. This Petition is just Ard's attempt to skirt the law as set forth in Avant, supra, which the Court of Appeals rejected. Accordingly, Travelers respectfully requests that the Supreme Court deny Ard's present petition.

Respectfully submitted,

By: 
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Dated: June 18, 2018

Counsel for the Respondent

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM DARLINGTON COUNTY

Paul M. Burch, Circuit Court Judge

RECEIVED

JUN 21 2018

S.C. SUPREME COURT

Appellate Case No. 2018-000923

Ard Trucking Company Petitioner,

v.

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

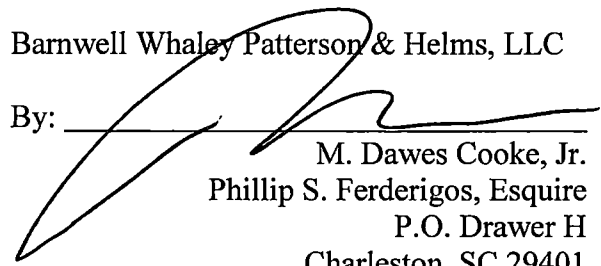
PROOF OF FILING AND SERVICE

I hereby certify that on this 18 day of June, 2018, I filed with the Clerk's Office of the South Carolina Supreme Court, via U.S. Mail, the required number of copies of the RETURN OF RESPONENT TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI, and I further certify that I served the required number of copies on counsel for the Petitioner with sufficient postage, properly addressed as follows:

Martin S. Driggers, Sr., Esquire
323 West Home Avenue
P.O. Box 1439
Hartsville, SC 29551

Barnwell Whaley Patterson & Helms, LLC

By: _____



M. Dawes Cooke, Jr.
Phillip S. Ferderigos, Esquire
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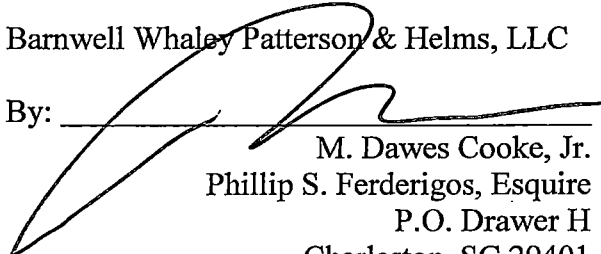
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