THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

C.A. No. 2008-CP-5-127
Case Tracking No. 2010181986

Aequicap Insurance Company, Appellant,
v.

Eddie Reese Best, Travis Scott, d/b/a Fiscal Transport; F.I.S.C.A.L. Transportation, LLC; Estate of James Buchanan, and Roger Pelote, Defendants,

Of Whom Estate of James Buchanan and Roger Pelote are Respondents.

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ORIGINAL

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STATEMENT OF ISSUES ON APPEAL

I. Is the AequiCap policy endorsement excluding coverage for this loss enforceable for coverage amounts in excess of Financial Responsibility Act requirements?

II. Is AequiCap's insured exempt from commercial motor carrier insurance requirements under S.C. CODE ANN. § 58-23-50(A)(6) and S.C. CODE ANN. REGS. 38-407(4) because he was transporting timber from the forest to shipping points in South Carolina?

STATEMENT OF THE CASE

Plaintiff/Appellant AequiCap Insurance Company ("AequiCap" or "Appellant") filed a declaratory judgment action seeking a ruling as to its duties and obligations to defend and indemnify its insured Travis D. Scott d/b/a/ Fiscal Transport ("Scott" or "Fiscal") and Eddie Reese Best ("Best") (collectively, for the purposes of convenience herein, "Insureds") for claims against the Insureds by Defendants/Respondents Roger Pelotte ("Pelotte") and the Estate of James Buchanan ("Buchanan") (collectively "Respondents") as a result of a motor vehicle accident occurring on January 7, 2008 in Bamberg County (the "MVA"). (R. p.29, ¶ 18). Specifically and as is set forth in additional detail hereinbelow, AequiCap sought, *inter alia*, a declaration that its obligation to indemnify the Insureds was limited to the $75,000 statutory minimum limit of coverage. (R. p. 30). Although AequiCap named Scott, Best and others as defendants in the action, only Pelotte and Buchanan answered – default judgments being entered against the remaining non-responsive defendants.

Following discovery, AequiCap moved for Summary Judgment. (R. p. 51). AequiCap's motion was subsequently denied. (R. p. 6). The parties then conducted further and additional discovery, and the case proceeded to a non-jury trial.

At trial, the parties presented an agreed-to Stipulation of Undisputed Facts (the "Stipulation"), which the Trial Court accepted into evidence. (R. p. 7; Exhibit 4; R. p. 680). No witnesses were called at trial, but rather the Trial Court reviewed and based its decision on the Stipulation, arguments presented by counsel, and other pleadings and discovery filed with the Trial Court. (R. pp. 7, 202). After reviewing the evidence and hearing arguments from counsel, the Trial Court ruled in favor of Respondents and held that AequiCap was obligated to indemnify the Insureds up to the full $1,000,000 of coverage provided for in the Policy. (R. p. 15). AequiCap timely filed a Motion to Alter or Amend, which the Trial Court denied. (R. p. 169). AequiCap then timely filed its Notice of Appeal.

During the pendency of this appeal, Aequicap was placed into receivership by the Florida Courts, In re Receivership of Aequicap Ins. Co., Case No. 2011-CA-0494 (Leon County Circuit Ct.). The underlying claim is being managed by the South Carolina Insurance Guaranty Fund.

STATEMENT OF THE FACTS

As noted hereinabove, the facts in this case have in large part been stipulated to by the parties. Scott, operating and doing business as "Fiscal Transport," was in the business of hauling cut timber. (Stipulation ¶ 1; R. p. 680). Fiscal Transport obtained a commercial automobile liability insurance policy from AequiCap, policy number TC025758, which provided liability coverage for "Specifically Described Autos" in an amount not to exceed a combined single limit of $1,000,000 (the "Policy"). (Stipulation ¶ 3; R. p. 680) "Section II – Liability Coverage, A. Coverage" provides that AequiCap

> will pay all sums an "insured" legally must pay as to damages because of "bodily injury" or "property damage" to which this

> insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto."

An "insured" is defined by "Section II – Liability Coverage, A. Coverage, 1. Who Is An Insured," subject to the Policy's Amendatory Endorsement, which provides in pertinent part:

> **AMENDATORY ENDORSEMENT**
> **TRUCKERS COVERAGE FORM**
> **CHANGES IN LIABILITY COVERAGE (SECTION II)**
>
> SECTION II – Liability Coverage
> Paragraph A. "COVERAGE", ITEM 1. "WHO IS AN INSURED" is replaced as follows:
>
> The following are "insureds":
>
> A. You for any covered "auto" only when the covered "auto" is driven by an approved driver described in paragraph "B" of this section II.A.1.
> B. Any driver authorized as a commercial truck driver while Operating covered "auto" with your knowledge and consent under your operating authority.* No coverage will apply to any driver newly placed in service after the policy begins until you report that driver to us and we advise you in writing that he/she is acceptable to us and that he/she is covered under the policy. Coverage on any such driver newly placed in service will become effective as of the date and time we advise you he/she is acceptable and that they are covered by the policy and not before. Subject to the reporting methods outlined and agreed to in the notification procedure outline signed by the insured and the agent prior to coverage being effected under the policy.
>
> *Only such drivers listed as of the date this policy begins, on the schedule in the original application signed by you, and not otherwise excluded are covered as of the date this policy begins.

(Stipulation ¶ 4; R. p. 681). By way of and as set forth in the Endorsement, **the clear language of the Policy avoids all coverage for the named insured or drivers operating a covered "auto" unless the driver has been approved by AequiCap.** The

agent who issued the Policy explained the above language to Scott and emphasized the importance of submitting drivers to AequiCap for pre-approval. (R. pp. 381-382). Scott was well aware he was required to submit drivers for pre-approval and had, in fact, submitted several drivers for approval prior to the accident giving rise to this lawsuit – some of whom were approved and some of whom were denied. (R. pp. 381-382; pp. 307-310). In fact, after the accident, Scott belatedly tried to submit Best to AequiCap for approval, and AequiCap disapproved Best as a driver on the Policy. (R. pp. 307-310).

On January 7, 2008, Best was driving a truck for Fiscal Transport, hauling timber from a tract of land in Lexington County, South Carolina to Collum Mill in Allendale, South Carolina. (Stipulation ¶ 7; R. pp. 681-682.) While traveling on US Highway 321 near Olar, South Carolina, Best was involved in an accident which resulted in the death of Buchanan and injuries to Pelotte. (Stipulation ¶ 8; R. pp. 681-682.) It is undisputed that, prior to the accident, Fiscal Transport had not submitted Best to AequiCap for pre-approval as a driver. (Stipulation ¶ 9; R. p. 682.) It is likewise undisputed that had Best been submitted to AequiCap for pre-approval, he would not have been approved due to his driving record. (Stipulation ¶ 10; R. p. 682). As noted above, Best's approval was in fact denied by AequiCap when he was submitted for approval several days after the accident.

After receiving notice of claims from Buchanan and Pelotte, AequiCap issued a reservation of rights letter to Fiscal Transport, indicating that it did not believe coverage existed due to the failure to submit Best for approval. AequiCap then instituted the present declaratory judgment action seeking a declaration that the Endorsement excluding coverage is enforceable above and beyond the minimum limits established by the

Financial Responsibility Act and that coverage does not exist for Best or for Fiscal Transport, at least above the statutory minimum requirement of $75,000 combined single limits. In making this argument, AequiCap acknowledged that the Endorsement, although facially applicable and excluding coverage *in toto*, is unenforceable as to mandatory coverage under the South Carolina Financial Responsibility Act. (R. p. 91). However, AequiCap argued that the Endorsement is enforceable for coverage amounts greater than the mandatory minimums required by statute. (R. pp. 91-92). Additionally, because Best was engaged in hauling timber from the forest to a shipping point at the time of the accident, AequiCap argued that he was exempt from commercial insurance requirements and that the mandatory minimum applicable to him was $75,000. (R. pp. 92-94) Alternatively, AequiCap sought a declaration that coverage was limited to $750,000, the mandatory minimum applicable to commercial motor carriers, rather than the full $1,000,000 otherwise available under the Policy. As noted, the Trial Court ruled against AequiCap on both points and held that $1,000,000 in coverage is available under the Policy. (R. pp. 14-15).

STANDARD OF REVIEW

"A declaratory judgment action is neither legal nor equitable and, therefore, the standard of review is determined by the nature of the underlying issue." Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County, 371 S.C. 224, 231, 638 S.E.2d 685, 688 (2006). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." Id. "In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." Id. However, where the

parties have stipulated to the facts – as in this case – the trial court is presented only with a question of law. See J.K. Contsr., Inc. v. Western Carolina Reg'l Sewer Auth., 336 S.C. 162, 519 S.E.2d 561 (1999)("Stipulated facts leave only a question of law for trial court." (citing Harleysville Mut. Ins. Co. v. R.W. Harp & Sons, Inc., 305 S.C. 492, 409 S.E.2d 418 (Ct. App. 1991))). Where the action presents a question of law – as does this declaratory action – the Court's review "is plenary and without deference to the trial court." J.K. Constr., 336 S.C. at 166, 519 S.E.2d at 563.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE ENDORSEMENT PROPERLY EXCLUDES COVERAGE IN AMOUNTS EXCEEDING THOSE REQUIRED BY SOUTH CAROLINA'S FINANCIAL RESPONSIBILITY ACT, AND IS SO ENFORCEABLE.

The Policy clearly and unambiguously provides that when a driver is not submitted and pre-approved by AequiCap, **neither the driver nor the named insured is covered under the Policy**. South Carolina law provides that "[i]nsurers have the right to limit their liability and to impose whatever conditions they desire upon an insured, provided they are not in contravention of some statutory inhibition or public policy." Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 550-51, 320 S.E.2d 458, 461 (Ct. App. 1984). "Reasonable exclusionary clauses which do not conflict with the legislative expression of the public policy of the State as revealed in the various motor vehicle insurance statutes are permitted." Id. at 551, 320 S.E.2d at 461. Specifically, our Supreme Court in Rhame v. National Grange Mut. Ins. Co., 238 S.C. 539, 545, 121 S.E.2d 94, 97 (1961), noted that "[a]n insurer has the right to restrict liabilities to injuries inflicted while the automobile ...was being driven by certain persons."

Thus, under South Carolina law, the AequiCap Policy language is valid and enforceable for amounts above statutorily required minimum limits. See George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 586, 545 S.E.2d 500, 502 (2001)(holding that **the effect of invalidating an endorsement as contrary to financial responsibility requirements is "reform[ation of] such policies for the mandatory minimum coverage...not the policy limits.**") [emphasis added]; Hansen v. United Servs. Auto. Ass'n, 350 S.C. 62, 72, 565 S.E.2d 114, 118 (Ct. App. 2002) ("Exclusions in liability insurance policies **are valid and enforceable as to amounts exceeding coverage required in financial responsibility laws.**" (citing Powell v. State Farm Mut. Auto. Ins. Co., 86 Md. App. 98, 585 A.2d 286, 294 (1991)) [emphasis added]); Jordan v. Aetna Cas. & Sur. Co., 264 S.C. 294, 297, 214 S.E.2d 818, 820 (1975) ("a policy provision which contravenes an applicable statute *is to that extent invalid.*" [emphasis added]). "Where a statute requires insurance for the benefit of the public, however, the insurer is not permitted to nullify its purposes through engrafting exceptions from liability as to uses which it was the evident purpose of the statute to cover." Parker, 282 S.C. at 551, 320 S.E.2d at 461. However, the majority of compulsory jurisdictions invalidate exclusion clauses only to the extent of the statutorily prescribed mandatory minimum limits of liability coverage. See Hansen, 350 S.C. at 72, 565 S.E.2d at 118 ("Exclusions in liability insurance policies are valid and enforceable as to amounts exceeding coverage required in financial responsibility laws." (citing Powell, 585 A.2d at 294)). South Carolina has expressly adopted this majority view. See Hansen, 350 S.C. at 72, 565 S.E.2d at 119; see also United Servs. Auto. Ass'n v. Markosky, 340 S.C. 223, 226, 530 S.E.2d 660, 662 (Ct. App. 2000) ("Reasonable exclusion clauses which do not conflict with the legislative

expression of the public policy of this State as revealed in the various motor vehicle insurance statutes are permitted."); Parker, 282 S.C. at 556, 320 S.E.2d at 464 (holding a policy containing a business use exclusion was "void to the extent of the minimum coverage contemplated" under the FRA).

South Carolina law therefore recognizes the dichotomy between mandatory coverage which insurers are required to write and optional coverage which they may offer. Mandatory coverage must be written to comply with the state's financial responsibility laws, and anything in a policy that excludes such mandatory coverage is void. See S.C. CODE ANN. § 56-9-20(5)(b). However, coverage which is not mandatory under South Carolina law – i.e. coverage in excess of the Financial Responsibility Act minimum limits – may be subject to any valid exclusion or condition agreed to in the insurance contract. See George, 344 S.C. at 586, 545 S.E.2d at 502; Hansen, 350 S.C. at 72, 565 S.E.2d at 118; Jordan, 262 S.C. at 297, 214 S.E.2d at 820; Parker, 282 S.C. at 556, 320 S.E.2d at 464. To that end, the Financial Responsibility Act specifically permits coverage beyond the mandated minimum limits of § 38-77-140, and further makes inapplicable the mandatory provisions of § 56-9-20(5)(d) to excess coverage. The Act provides in pertinent part:

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

S.C. CODE ANN. § 56-9-20(5)(d) (Supp.1999) [emphasis added.] The statutory section which sets the mandatory minimum liability limits further states that "[n]othing in this article prevents an insurer from issuing, selling, or delivering a policy providing liability coverage in excess of these requirements." S.C. CODE ANN. § 38-77-140 (Supp.1999). The courts have acknowledged "[i]t is clear that, while additional coverage is permitted by the Act, only the minimum limit is mandatory." Universal Underwriters Ins. Co. v. Metropolitan Prop. & Life Ins. Co., 298 S.C. 404, 410, 380 S.E.2d 858, 862 (Ct. App. 1989). Accordingly, an insurer may properly limit coverage in excess of the statutorily-mandated minimum limits pursuant to the terms agreed to among the parties and set forth in the contract of insurance.[1]

It is clear that under South Carolina law, coverage is required to be written for the named insured and for "any other person using or responsible for the use of the motor vehicle with the expressed or implied consent of the named insured." S.C. CODE ANN. § 38-77-142. However, "only the minimum limit is mandatory" because the Financial Responsibility Act expressly provides that "excess or additional coverage shall not be subject to the provisions of this chapter" – referring to the chapter containing mandatory requirements and minimum limits. See Universal Underwriters, 298 S.C. at 410, 380 S.E.2d at 862; S.C. CODE ANN. § 56-9-20(5)(d); see also George, 344 S.C. at 586, 545

[1] Appellant would argue that while mandatory minimum limits of coverage are intended to protect the general public, excess coverage is intended to protect the insured from adverse judgments. In the present case, Scott entered into an insurance contract with Appellant that provided $1,000,000 in liability coverage upon consideration of $3,141 in policy premiums. A reason for this unusually low policy premium was that AequiCap was able to control its risk and exposure to some degree by pre-approving drivers. As the Court of Appeals has previously noted, "[t]he premium charged reflects the exclusions contained in the policy." Hansen, 350 S.C. at 72, 565 S.E.2d at 118 (citing Parker, 282 S.C. at 551, 320 S.E.2d at 461).

S.E.2d at 502; Hansen, 350 S.C. at 72, 565 S.E.2d at 118; Jordan, 262 S.C. at 297, 214 S.E.2d at 820; Parker, 282 S.C. at 556, 320 S.E.2d at 464. Under these principles and authorities, the AequiCap Policy Endorsement requiring that Fiscal Transport submit its drivers for approval to AequiCap and receive pre-approval before coverage applies is valid as to coverage amounts in excess of the statutory minimum limits.

The question then turns to the applicable statutory minimum amount of coverage for this case.

II. BECAUSE THE INSURED WAS EXEMPT FROM COMMERCIAL MOTOR CARRIER INSURANCE REQUIREMENTS UNDER S.C. LAW, THE APPLICABLE MINIMUM LIMIT OF COVERAGE IS $75,000.

Carriers of property for compensation are generally required to maintain $750,000 in liability insurance. See S.C. CODE ANN. § 58-23-10, *et seq.*; S.C. CODE ANN. REGS. 38-414; see also Bovain v. Canal Ins., 383 S.C. 100, 678 S.E.2d 422 (2009). However, both the applicable statute and its accompanying regulation provide that the higher minimum limit of $750,000 for commercial vehicles does not apply to carriers such as Fiscal Transport operating as "[l]umber haulers engaged in transporting lumber and logs from the forest to shipping points in this State." S.C. Reg. § 38-407(4). The court in *Bovain* noted several definitions of forest for purposes of the lumber haulers exception, including: (1) "an extensive area of land covered by trees;" (2) "a tract of land covered with trees, or a tract of woodland with or without enclosed intervals of open and uncultivated ground," and (3) "a tract of land covered with trees; a wood, usually of considerable extent." Bovain, 383 S.C. at 111, 678 S.E.2d at 428. Herein, however, it is stipulated among the parties that the Insureds were "engaged in transporting lumber [and logs] from the forest" at the time the accident occurred. (Stipulation ¶¶ 12, 15, 16, 17, 25;

R. pp. 682-683). The parties disagree solely as to whether the transportation was to a "shipping point."

Unfortunately, the statute and regulation themselves do not define "shipping point," and the South Carolina appellate courts have not specifically addressed this definition. AequiCap would aver that pursuant to the logical, ordinary and plain meaning of the term, a "shipping point" is merely any point from which goods are shipped.[2] According to the Materials Management Division of the State of Minnesota, "shipping point" is synonymous with "point of origin" and is defined as "[t]he location where a shipment is received by a transportation line from the shipper."[3] Likewise, "ship" has been defined as "[t]o send (goods, documents, etc.) from one place to another, esp. by delivery to a carrier for transportation." BLACK'S LAW DICTIONARY 1383 (7th ed. 2001). In *Bovain* the court expressly stated that "[t]he express language of Regulation 38-407(4) exempts those hauling lumber ***from a forest as the point of production***." Bovain, 383 S.C. at 112, 678 S.E.2d at 428 (emphasis added). Thus, *Bovain* would support AequiCap's position that notwithstanding the definitions cited above, the forest is the "point of production" and cannot be the "shipping point" for the purposes of Regulation 38-407(4).

In South Carolina, it is clearly established that statutory terms "must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or

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[2] Arguably, even the forest itself is a shipping point; however, defining the forest as such in this context would render the statute and regulation absolutely meaningless. "The interpretation of a term set forth in a statute should support the statute and should not lead to an absurd result." Miller v. Lawrence Robinson Trucking, 333 S.C. 576, 582, 510 S.E.2d 431, 434 (Ct. App. 1998).

[3] http://www.mmd.admin.state.mn.us/mn06008.htm.

expand [their] operation." Bovain, 383 S.C. at 111, 678 S.E.2d at 428. To the extent Respondents ask this Court to interpret "shipping point" to mean the point at which logs are loaded in the forest, such interpretation of the statute renders it absurd on its face by making the exemptions contained in § 58-23-50(A)(6) and Regulation 38-407(4) meaningless. "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design and policy of lawmakers." TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998). Additionally, "[t]he interpretation of a term set forth in a statute should support the statute and should not lead to an absurd result." Miller, 333 S.C. at 582, 510 S.E.2d at 434; see also Virginia v. Browner, 80 F.3d 869, 877 (4th Cir. 1996)("A court should not – and we will not – construe a statute in a manner that reduces some of its terms to mere surplusage.")).

Moreover, timber – being distinct from "lumber" – is a raw material which must first be processed before it can be "shipped" as a product. This processing occurs at the mill, which necessarily must be the shipping point for the wood products. The South Carolina Forestry Commission has explained the process as follows:

> tractors skid the cut trees to a loading area ("log deck"). There the trunks are trimmed to size, loaded onto trucks by means of hydraulic cranes, and hauled directly to permanently established sawmills for processing.

(http://www.state.sc.us/forest/scindust.htm). Additionally, Regulation 38-407(4) has been classified a "farm-to-market exception." See Bovain, 383 S.C. at 112, 678 S.E.2d at 428. The record in this case establishes that, at the time of the accident, Best, driving pursuant to his employment by Scott, was "transporting lumber [and logs] from the forest to shipping points" in South Carolina – namely, the Collum Mill. Under *Bovain*, the lumber

hauling exemption is applied on a trip-specific basis, and the record unequivocally establishes that Best and Scott were hauling from a forest to an in-state mill when the accident occurred. Because the Collum Mill is the initial shipping point for wood products after they are harvested from the forest and processed, the exception in § 38-407(4) is applicable to this haul and Fiscal was not required to maintain commercial motor vehicle minimum limits of $750,000 in liability coverage.

Accordingly, and as Fiscal was exempt from commercial minimum liability limits pursuant to § 58-23-50(A)(6) and Regulation 38-407(4), the financial responsibility rules required only $75,000 combined single limits of liability coverage to be in force at the time of the accident.

CONCLUSION

For the reasons set forth hereinabove and pursuant to the applicable statutes, regulations and other legal authorities, this honorable Court should reverse the decision of the Trial Court, find that the AequiCap endorsement at issue is enforceable with respect to coverage amounts in excess of minimum limits, and find that AequiCap's insured is exempt from commercial motor carrier insurance requirements pursuant to S.C. CODE ANN. § 58-23-50(A)(6) and S.C. CODE ANN. REGS. 38-407(4).

Respectfully submitted,

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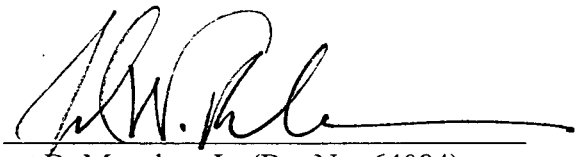
By: 

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief and Final Reply Brief of Appellant comply with Rule 211(b) of the South Carolina Appellate Court Rules.

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