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

Case No. 2008-CP-05-0127
Case Tracking No. 2010-180986

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.

FINAL REPLY BRIEF OF APPELLANT

Robert D. Moseley, Jr. (#64084)
C. Fredric Marcinak (#73609)
Joseph W. Rohe (#79313)
Smith Moore Leatherwood LLP
300 East McBee Avenue, Suite 300 (29601)
Post Office Box 87
Greenville, South Carolina 29602-0087
Telephone: (864) 242-6440
Facsimile: (864) 240-2475
rob.moseley@smithmoorelaw.com
fredric.marcinak@smithmoorelaw.com
joseph.rohe@smithmoorelaw.com
Attorneys for Appellant

ORIGINAL

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Post Office Box 87
Greenville, South Carolina 29602-0087
Telephone: (864) 242-6440
Facsimile: (864) 240-2475
rob.moseley@smithmoorelaw.com
fredric.marcinak@smithmoorelaw.com
joseph.rohe@smithmoorelaw.com
Attorneys for Appellant

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I. THE COURT IS BOUND BY GEORGE v. EMPIRE FIRE & MARINE AND OTHER CASES, AND SHOULD REJECT RESPONDENTS' ATTEMPT TO DISTINGUISH THESE CASES

Without doubt, the policy issued by AequiCap ("the Policy") excludes coverage under the facts of this case. While AequiCap has conceded that the Policy's exclusion is unenforceable under the South Carolina Financial Responsibility Act, it is clear that the Policy's exclusion is valid and enforceable for coverage beyond the mandatory minimums required by the Act. This has long been the law in South Carolina, as recognized by cases from both the Supreme Court and this Court, which, as much as Respondents disagree with them, are binding precedent with respect to the present appeal.

George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 545 S.E.2d 500 (2001), is directly on point. Although, as Respondents point out, there are some factual differences between George and the present case, the Supreme Court's holding in George is clear. There, as here, the Court confronted a policy that excluded coverage for permissive users of certain vehicles owned or leased by Shields Auto. The similarity between the two exclusions is apparent from the Court's description of the limitation at issue in George:

> **This limitation excluded customers as "insureds,"** with two exceptions. First, if the customer had no liability insurance of her own, then the policy would provide liability coverage up to the statutory minimum limits. Second, if the customer had liability insurance for less than the statutory minimum limits, the policy would provide liability coverage for the difference between the customer's coverage and the statutory minimum limits. **The effect of the endorsement was to completely exclude liability coverage under the Empire policy for customers** who had their own personal liability insurance in an amount equal to or greater than the statutory limits. . . . Because the endorsement did not provide coverage for Shields Auto customers if they had their own insurance coverage for at

> least the statutory limits, the Empire policy on its face excluded [its customer] from any coverage.

Id., 344 S.C. at 502-03, 545 S.E.2d at 585-87 (emphasis added). Facing this limitation, the Court framed the issue as follows: "The Empire policies contain an endorsement which excludes liability coverage for customers. . . . Although the parties agree that the exclusion is invalid under South Carolina law, they disagree as to the effect of removing the illegal exclusion from the policy." Id., 344 S.C. at 502, 545 S.E.2d at 585. This is the exact issue faced by the Court in the present appeal.

The George Court had no trouble resolving this issue. Relying on long established principles of South Carolina law, the Court held:

> "[L]egal reformation" of the policy only affords coverage for [Shield's customer] in the amount of the statutory minimum limits. As the Court of Appeals correctly found, when endorsements such as these are invalidated, reformation of the policies is "for the mandatory minimum coverage of 15/30/5, not the policy limits."
>
> The reasoning of Potomac [Ins. Co. v. Allstate Ins. Co., 254 S.C. 107, 173 S.E.2d 653 (1970)] mandates this result. In Potomac, the Court found that an endorsement which excluded liability coverage for a customer, who was a permissive user driving a loaned vehicle, violated the provisions of the South Carolina Financial Responsibility Act. The Potomac Court noted that two sections of the statute are considered as though written into the liability policy. Potomac, 254 S.C. at 111, 173 S.E.2d at 655 (citing Pacific Ins. Co. of New York v. Fireman's Fund Ins. Co., 247 S.C. 282, 147 S.E.2d 273 (1966)). The first defines a permissive user as an insured. See S.C. Code Ann. § 38-77-30(7). The second requires minimum statutory liability limits in every automobile insurance policy. See S.C. Code Ann. § 38-77-140 (1989).
>
> Following the rationale of Potomac, when a liability policy contains an exclusion which conflicts with § 38-77-30(7), then the policy must be reformed as a matter of law to comply with § 38-77-140. Accordingly, the Empire policy, without the illegal endorsement, provides Shields Auto with coverage for [its customer] up to the statutory minimum limits of 15/30/5. Therefore, contrary to what the trial court decided, the legal reformation of the Empire policy does not provide $1 million coverage.

Id., 344 S.C. at 502-04, 545 S.E.2d at 587-89. Plainly, the Court in George was construing the very financial responsibility statutes at issue in the present case: the permissive user statute and the mandatory minimums statute. Here, Respondents seek reformation of the Policy based on an argument that the endorsement excluding coverage for certain permissive users violates the South Carolina Financial Responsibility Act and its definition of "insured" to include permissive users. The George court spoke on this very issue. Its clear holding that the policy's provisions excluding coverage for certain permissive users must be reformed only to the extent of statutorily required, mandatory minimum coverage is binding here. This Court should follow George, reverse the judgment of the circuit court, and hold that the AequiCap Policy is reformed only to the extent of coverage that is mandatory under the Financial Responsibility Act.

George is not an isolated holding. Both the Supreme Court and this Court have reached similar results in other cases. For example, in Universal Underwriters Ins. Co. v. Metropolitan Property and Life Ins. Co., 298 S.C. 404, 410, 380 S.E.2d 858, 862 (Ct.App.1989), this Court held, "It is clear that, while additional coverage is permitted by the Act, only the minimum limit is mandatory." Likewise, in Jordan v. Aetna Cas. & Sur. Co., 264 S.C. 294, 297, 214 S.E.2d 818, 820 (1975), the Supreme Court noted that "a policy provision which contravenes an applicable statute *is to that extent invalid.*" [emphasis added]. Similarly, in Auto. Ins. Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 556, 320 S.E.2d 458, 464 (Ct. App. 1984), this Court held that a policy containing a business use exclusion was "void to the extent of the minimum coverage contemplated" under the Act. Moreover, as this Court has recognized, the

majority of compulsory jurisdictions invalidate exclusion clauses only to the extent of the statutorily prescribed mandatory minimum limits of liability coverage. 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., 86 Md. App. 98, 585 A.2d 286, 294 (1991)) (emphasis added)).

Respondents ask the Court to distinguish the clear and binding holdings of these prior cases. However, Respondents fail to offer any reason why any of these cases are different in any material way from the case at hand. Respondents first suggest that George should be disregarded because it dealt with a private passenger automobile and the present case involves a commercial motor vehicle. Respondents argue that the different language used in S.C. Code §§ 38-77-142(A) and -142(B) creates a dichotomy between private passenger automobiles and commercial motor vehicles and that this leads to the conclusion that, for private passenger automobiles—such as the ones at issue in George—policy provisions excluding coverage for permissive users will be voided only to the extent of statutory minimum amounts, while such provisions applicable to commercial motor vehicles will be voided in their entirety, enabling access to the full amount of coverage under the respective policy. These code sections will not bear the weight Respondents seek to place on them. Nothing in the language of §§ 38-77-142(A) or -142(B) suggests that commercial motor vehicles must be treated differently from private autos when financial responsibility or coverage for permissive users is concerned. The provisions requiring coverage for permissive users are found in the Financial Responsibility Act, which applies to both private passenger autos and commercial motor

vehicles. Compare S.C. Code § 38-77-30(9) with §§ 38-77-140, -142(A), -142(B). Nothing in the statutes suggests that the scope of coverage required for permissive users differs based on the type of vehicle being operated by the user. Simply put, George cannot be cast aside because it involved a different type of automobile than the commercial truck in the present case.

Respondents next contend that George can be distinguished because the policy being reviewed in that case was an excess garage policy. (Resp. Brief at 15). Regardless of whether an excess policy would or should be treated differently for purposes of financial responsibility, Respondents are simply mistaken about the nature of the policy at issue in George. The policy there was a primary garage policy for the insured. Although a vehicle being serviced, leased, or maintained by an automobile dealer may have other coverage, the garagekeepers policy is primary. S.C. Code § 38-77-143. Therefore, Respondents cannot disregard George as simply involving an excess policy.[1]

Respondents lastly argue that this Court should depart from George because George did not address § 38-77-142, which Respondents contend should be treated differently from §§ 38-77-30(7) and -140, the statutes examined by the George Court. Respondents appear to accept that George was rightly decided based on the statutes it examined. Accordingly, Respondents argue that when an endorsement is void as violative of the statutes at issue in George, the rule announced in George controls and the endorsement is void only to the extent of mandatory minimum coverage under the statute; but that when an endorsement is void as violative of § 38-77-142, it is void in its entirety and the full policy limits apply.

---

[1] Indeed, both the parties and the Court in George recognized that the S.C. Financial Responsibility Act applied to the policy.

Respondents' position must be rejected. Statutes are to be construed in context and consistently with each other. Denman v. City of Columbia, 387 S.C. 131, 691 S.E.2d 465 (2010). Were the Court to construe § 38-77-142 as requiring full policy coverage where an endorsement limiting coverage for permissive users is voided, §§ 38-77-30(7) and -140, which were applied by the Court in George, would be, in effect, nullified. As the courts have long recognized, the interpretation of 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); 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."). Instead, the Court must presume that the legislature intended every word it enacted to have meaning and to apply. Interpreting § 38-77-142 as having a different purpose, scope, and effect from the surrounding statutes in the same chapter of the Code renders superfluous the statutes at issue in George and thwarts the legislative will expressed in those statutes. Because this Court must presume that the General Assembly enacted § 38-77-142 with the Supreme Court's longstanding[2] and unamended interpretation of § 38-77-30(7) and § -140—and, indeed, the entirety of Chapter 38—in mind, Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997) (recognizing basic presumption that the legislature has knowledge of judicial decisions construing legislation when statutes are enacted concerning related subjects), the Court must presume that the legislature intended to leave the Court's interpretation of existing statutes intact and for § 38-77-142 to be interpreted consistently with those

[2] As recognized by the George Court, it was simply applying an interpretation of the Financial Responsibility Act that dated to at least 1970. George, 344 S.C. at 502-04, 545 S.E.2d at 587-89 (citing Potomac Ins. Co. v. Allstate Ins. Co., 254 S.C. 107, 173 S.E.2d 653 (1970)).

statutes. This Court should—in fact, must—follow the Supreme Court's decision in George, decline Respondents' attempt to use § 38-77-142 as a vehicle for circumventing George, and reverse the judgment below.

For these reasons, the court below erred when it reformed the Policy to allow for full coverage as provided under the Policy. This Court should reverse and hold that the Policy should be reformed only for the minimum coverage required by the Financial Responsibility Act: $75,000.

II. THE LUMBER HAULER EXEMPTION APPLIES

As AequiCap conceded in its opening brief, 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). Respondents argue that this lumber hauler exemption does not apply because the mill to which Eddie Best was hauling at the time of the accident does not qualify as a "shipping point." This argument is without merit.

Although "shipping point" is not defined in the statute or regulation, there are several reasons why Respondents' reading of the term must be rejected. First, in Bovain, the Supreme Court discussed the purpose and scope of the lumber hauler exemption. There, 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]. Moreover, the Bovain Court recognized that the lumber hauler exemption is a "farm to market" exemption. 678 S.E.2d at 428. The "market" end of the farm to market exemption is the mill where the logs are sold for processing. Here, that point is the mill to which Best was transporting the logs. The "market" could not be the forest itself, where Best loaded the logs, because the logs were not marketed or sold at the forest. As such, Respondents' reading of "shipping points" conflicts with—and would require this Court to ignore—the Supreme Court's construction of the lumber hauler exemption in Bovain. Additionally, if "shipping point" were read in the manner suggested by Respondents, Bovain would not have needed to address the meaning of "forest," a much more difficult term to define given the need to parse between small and large tracts of land and the regularity of timber cutting operations. If transport by a common carrier[3] to a mill did not come within the exemption in any event—as suggested by Respondents—the exemption in Bovain would not have applied under any circumstances. Thus, Bovain itself recognizes that the exemption cannot be restricted in the manner suggested by Respondents.

Second, Respondents' reading of "shipping point" means that the exemption will not cover transport of logs from the forest to the mill, and such a reading will render the lumber hauler exemption a nullity. The canons of statutory interpretation will not permit

[3] Respondents argue that the exemption is not for companies hired to haul logs but only for "mom and pop" operations hauling their own logs. (Resp. Brief at 25, 28). This interpretation renders the exemption redundant and meaningless because someone hauling his own property is already exempt as a private carrier. Bovain, 383 S.C. at 105-06, 378 S.E.2d at 425. As Respondents note, "One hauling his own products in his own motor vehicles does not come within the purview of the Act, and no provision for his exemption is necessary." (Resp. Brief at 25 (citing State v. Hicklin, 168 S.C. 440, 467 S.E. 674 (1933))). Accordingly, the lumber hauler exemption, to have any meaning, can apply only to common carriers hauling property for compensation.

this result. "The 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 Browner, 80 F.3d at 877 ("A court should not – and we will not – construe a statute in a manner that reduces some of its terms to mere surplusage."). Respondents believe that the term "shipping points" refers not to the mills where the logs are taken for production but to the area of the forest where the cut trees are transported to be loaded onto log trucks for transport to the mills. Under this argument, the lumber hauling would exempt motor carriers from commercial insurance requirements during the time that cut timber is transported from the forest to the loading area in the forest, but not during the subsequent trip to the mill. Such a reading of the statute is absurd and must be rejected out of hand. First, there is no transport of logs from the forest to a loading area which could qualify as a shipping point. Logs are cut in the forest and are loaded onto log trucks in the area in which they are cut. Therefore, there is no meaningful transport of the logs from the forest to a loading area to qualify as a shipping point. Further, granting a lumber hauler an exemption from the forest to a "shipping point" within the forest but not for the subsequent trip to the mill would be meaningless. Such an interpretation would be unworkable, rendering the lumber hauler exemption useless. Respondents' interpretation of "shipping points" would lead to the exemption being rendered surplusage, and such an interpretation should be rejected.

Respondents next resort to reliance on equal protection cases from the 1930s to make their argument that the exemption for lumber haulers should not apply here.[4] Aside from the fact that the continued vitality of these cases is in doubt, see, e.g., United States v. Central Adjustment Bureau, Inc., 823 F.2d 880 (5th Cir. 1987); Retail Industries Leaders Ass'n v. Fielder, 435 F.Supp.2d 481 (D. Md. 2006) (both noting subsequent changes in equal protection jurisprudence), Respondents overstate their holdings.

For example, Respondents cite State ex rel. Coney v. Hicklin, 167 S.E. 674 (S.C. 1933), as authority for the claim that applying the lumber hauler exemption in the manner asserted by AequiCap is unconstitutional. The Hicklin Court faced the issue of whether a "farm-to-market" exemption, similar to the exemption at issue in this case, unconstitutionally discriminated between contract haulers and farmers, dairymen and lumber haulers, who carried their goods to market. Based on this, Respondents attempt to create a test to determine whether an individual can be classified as a lumber hauler under the exemptions in Section 58-23-50 and Regulation 38-407. Under Respondents' test, only those who make moderate or occasional use of the highways would be entitled to the statutory exemption for lumber haulers.

[4] Respondents contend that AequiCap has waived any challenge to the circuit court's equal protection analysis by not raising the issue in its opening brief. Respondents have not waived this issue, as the opening brief clearly states, as the second issue on appeal: "Because the Insured was Exempt from Commercial Motor Carrier Insurance Requirements Under S.C. law, the Applicable Minimum Limit of Coverage is $75,000." (Appellant Br. at i). Plainly, this issue fairly encompasses the circuit court's opinion that AequiCap's insured was not exempt from commercial insurance requirements because, in part, the exemption must be interpreted to avoid creating a constitutional issue. Because the issue of how the statutory and regulatory exemption must be interpreted was clearly raised, the constitutional issues were fairly included in the second issue raised in AequiCap's opening brief.

For several reasons, Respondents' reading of these cases is misplaced. First, in Hicklin itself, our Supreme Court sustained the constitutionality of the exemption in Section 58-23-50, in the process distinguishing the United States Supreme Court decision in Smith v. Calhoon, 283 U.S. 553 (1931).[5] Specifically, the state court noted that unlike the statute at issue in Calhoon, which exempted "any transportation company" hauling certain goods, the South Carolina exemption is limited as to both the type of goods hauled and the type of company hauling them. As the court put it, "[T]here is a double element involved in the classification in this case, the class of persons and the class of products, while there was only one element of classification involved in the Calhoon case, namely, the class of products." Hicklin, 167 S.E. at 678. The court also noted that the statute applies only to those whose professions are farmer, dairyman, or lumber hauler—and not to those who merely "incidentally" engage in farming, dairying, or lumber hauling. Id. at 679. While the court did remark that the legislature could consider the frequency of use of the highways or the fact that certain use was only seasonal, it is clear that this was only one factor the court used to find the statutory exemption

[5] To the extent Respondents rely on the United States Supreme Court's interpretation of the state statutory exemption for lumber haulers when it reviewed Hicklin on appeal, such reliance is misplaced. See Hicklin v. Coney, 290 U.S. 169 (1933). The United States Supreme Court has no authority to overturn or alter a state supreme court's interpretation of a state statute. City of Chicago v. Morales, 527 U.S. 41, 61 (1999) ("We have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court."); Johnson v. Fankell, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state."). To the extent the U.S. Supreme Court purported to alter the state court's interpretation of the state statute in Hicklin, this likely occurred because Hicklin predated the important case of Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), which established the principle that federal courts are bound by a state supreme court's interpretation of state law.

constitutional. Simply put, the Hicklin case cannot be read for the proposition that a lumber hauler who makes more than occasional use of the highways falls outside the statutory exemption.

Second, Respondents' view that only those who occasionally use the highways are entitled to the statutory exemption departs from the plain and express language of the statute. If Respondents' view were adopted, the statute would have to be rewritten to grant an exemption to lumber haulers "occasionally engaged" in hauling lumber from the forest to the shipping points. As noted above, the Court has no authority to depart from the statute's plain terms and to effect a revision of the statutory language.

Third, it is unclear how the Court should distinguish between moderate and excessive use of the highways to haul their products. Does the fact that Fiscal operated multiple log trucks result in excessive use of the highways, especially when compared with trucking companies which operate fleets of hundreds of vehicles? Respondents' new reading of the statute creates an ambiguity and makes the statute unworkable on a practical level.

Finally, if Respondents are challenging the constitutionality of the statutory exemption for lumber haulers—and his brief is ambiguous on this point—his challenge must be summarily rejected because he has not pled such a challenge in this case nor has he followed the proper legal procedures for mounting a constitutional challenge.[6]

[6] See S.C. R. Civ. P. 4(d)(4)(B): "In any action attacking the Constitutionality of a State statute when the State, officer or agency is not made a party, a copy of the summons and complaint shall be sent by registered or certified mail to the Attorney General." S.C. R. Civ. P 24(c) also requires that "[w]hen the constitutionality of a statute is drawn in question in any action in which the State or an officer, agency or employee thereof is not a party, the party shall also serve the motion on the Attorney General."

For these reasons, the lumber hauler exemption applies, and AequiCap's coverage is limited to $75,000. The Circuit Court's ruling to the contrary should be reversed.[7]

III. THE CIRCUIT COURT'S ALTERNATIVE RULINGS DO NOT PRECLUDE REVERSAL

The Circuit Court ruled that even if AequiCap is correct and that the Policy should be reformed to afford coverage of only $750,000 or $75,000, the Policy nonetheless affords full coverage for the negligent maintenance allegations made against Travis Scott d/b/a Fiscal Transport directly, regardless of whether coverage is limited or excluded for the allegations of negligence against Eddie Best. However, the scope of the Policy clearly recognizes that **all coverage for all insureds** is excluded in the event that a loss arises from the operation of a vehicle by an unapproved driver[8]:

> **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

[7] However, should this Court conclude that the lumber carrier exemption does not apply, the result would be reforming the Policy to $750,000 under Bovain, not the stated limits of $1 million.

[8] Respondents assert that this issue has been waived, but this is incorrect. AequiCap clearly indicated throughout its initial brief that there was no coverage for both insureds. (E.g., App. Br. at 6 "Neither the driver nor the named insured is covered under 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.

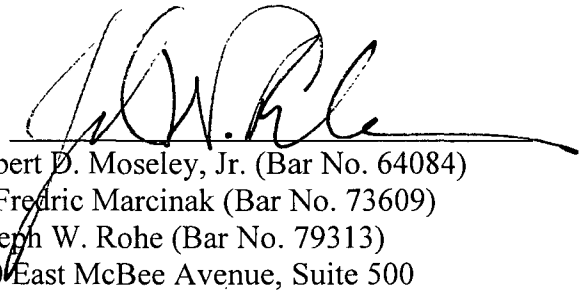
(Stipulation ¶ 4; Record p. 681). The terms of this Endorsement clearly provide coverage for both the named insured ("You") and for any authorized driver of the vehicle only where such driver has been submitted to AequiCap for preapproval. Because the parties have stipulated that Best was not submitted to AequiCap for approval and, even if he had been submitted, would not have been approved, it is clear that the vehicle was not being operating by an approved driver at the time of the loss. (Stipulation ¶ 9-10; R. p. 682). Accordingly, the Endorsement plainly provides that neither Travis Scott (the named insured or "You") nor Eddie Best is an insured for purposes of the underlying loss. Therefore, the Court's alternative ruling that full coverage is afforded for Travis Scott separately even if coverage under the Policy is otherwise limited or excluded for Eddie Best does not preclude reversal and the entry of judgment limiting coverage for both Scott and Best to $75,000.

CONCLUSION

For these reasons, AequiCap requests that the Court reverse the judgment below and direct that AequiCap's coverage is limited to $75,000.

Respectfully submitted,

SMITH MOORE LEATHERWOOD, LLP

By: 

Robert D. Moseley, Jr. (Bar No. 64084)
C. Fredric Marcinak (Bar No. 73609)
Joseph W. Rohe (Bar No. 79313)
300 East McBee Avenue, Suite 500
P.O. Box 87, Greenville, SC 29602
Telephone: (864) 242-6440
Facsimile: (864) 240-2475
rob.moseley@smithmoorelaw.com
fredric.marcinak@smithmoorelaw.com
joseph.rohe@smithmoorelaw.com
Attorneys for Appellant AequiCap Insurance Company

Greenville, South Carolina

Dated: November 14, 2012

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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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SMITH MOORE LEATHERWOOD, LLP

By: _____

Robert D. Moseley, Jr. (Bar No. 64084)
C. Fredric Marcinak (Bar No. 73609)
Joseph W. Rohe (Bar No. 79313)
300 East McBee Avenue, Suite 300 (29601)
Post Office Box 87
Greenville, South Carolina 29602-0087
Telephone: (864) 242-6440
Facsimile: (864) 240-2475
rob.moseley@smithmoorelaw.com
fredric.marcinak@smithmoorelaw.com
joseph.rohe@smithmoorelaw.com
Attorneys for Appellant AequiCap Insurance Company

Greenville, South Carolina

Dated: November 14, 2012