THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM NEWBERRY COUNTY
In The Court of Common Pleas

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S.C. Supreme Court

Eugene C. Griffith, Circuit Court Judge
Civil Action No. 2008-CP-36-417

Appellate Case No. 2013-000602
South Carolina Court of Appeals Unpublished Opinion No. 2013-UP-015

Travelers Property Casualty Co., ...Respondent,

v.

Senn Freight Lines, Inc., ... Petitioner.

RETURN TO PETITION FOR WRIT OF *CERTIORARI*

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COUNTERSTATEMENT OF THE CASE

I. Background Facts

Defendant-Respondent Senn Freight Lines, Inc. ("Senn Freight") is a for-hire freight carrier, engaged in the business of hauling cargo nationwide on flatbed tractor-trailers. (*See* R. p. 57, lines 8-12). As a "for-hire" carrier, Senn Freight typically receives requests from customers to move loads of freight from one location to another. (*See* R. p. 57, lines 13-19). During the time at issue in this case (2003-05), Senn Freight had an annual employee payroll of approximately $3-4 million. (*See* R. p. 57, line 20- p. 58, line 8).The President of Senn Freight is Danny Senn ("Mr. Senn"), who was one of two witnesses at trial. (*See* R. p. 56 line 24- p. 57 line 1). Mr. Senn's responsibilities included procuring insurance coverage for Senn Freight, including the workers' compensation insurance policies at issue in this case. (*See* R. p. 58, lines 9-16).

Senn Freight often utilized two classes of drivers to perform its primary business of hauling freight. First, Senn Freight utilized leased employees ("Leased Drivers") hired through a leasing company (also known as a Professional Employee Organization, or PEO); in such an arrangement, the PEO would provide workers' compensation insurance covering those leased drivers. (*See* R. p. 53, lines 19-21, p. 61, lines 16-21). From 2002 through February, 2004, Senn Freight engaged a leasing company, Vanguard. (*See* R. p. 72, lines 1-7). After that time, in late March, 2004, Senn Freight began leasing employees from Workforce Outsourcing. (*See* R. p. 72, lines 8-10; *accord* R. pp. 208-12). In February, 2005, Senn Freight began leasing employees from Certified HR Services. (*See* R. p. 74, line 5- p. 75, line 1.9). Evidence at trial included Certificates of Liability Insurance for Vanguard, Workforce and Certified HR, containing the following language:

> THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

(*See* R. pp. 213-15).

Senn Freight also utilized the services of "contractor" and/or "owner-operator" drivers (collectively "Contractor Drivers"); these drivers were required to retain their own workers' compensation coverage. (*See* R. p. 61, line 22- p. 62, line 3, p. 88, line 19- p. 90, line 3). The evidence at trial included numerous 1099-MISC forms from Senn Freight that identified and memorialized the remuneration that Senn Freight paid to the Contractor Drivers for calendar years 2003, 2004 and 2005. (*See* R. pp. 186-206). However, Senn Freight did not proffer any evidence at trial that the Contractor Drivers had sufficient workers' compensation insurance coverage to cover any claims they might make. The evidence at trial disclosed that — while Senn Freight claims it had proof of workers' compensation insurance coverage for the Contractor Drivers — the actual insurance certificate that Great American Insurance Group issued states that "[t]his policy does not provide workers compensation coverage . . . ." (*See* R. p.67, line 1- p. 70, line 25; p. 207). The Certificate introduced into evidence at trial was, according to the testimony, "an example of what [Senn Freight] provided to Traveler's (sic) when they asked for proof of that coverage." (*See* R. p. 68, lines 13-16). Thus, there was no evidence that Senn Freight ever provided Travelers proof of actual workers compensation coverage for the Contractor Employees.

II. <u>The Insurance Policies at Issue</u>

This lawsuit concerns three Workers Compensation and Employers Liability Policies issued from Appellants Travelers Property Casualty Company of America and The Travelers Indemnity Company of Illinois ("Travelers") to Senn Freight (collectively the "Policies"):

- Policy Number 6JUB-7803A47-6-03, covering the period of July 10, 2003 through July 10, 2004 (*See* R. pp. 133-48);
- Policy Number 6JUB-7803A47-6-04, covering the period of July 10, 2004 through July 10, 2005 (*See* R. pp. 149-66); and

- Policy Number 6JUB-7803A47-6-05, covering the period of July 10, 2005 through July 10, 2006 ("Third Policy") (*See* R. pp. 167-85).

Specifically, this lawsuit arises out of Travelers' efforts to obtain payment of earned premiums under the Policies and Senn Freight's claims that Travelers wrongfully cancelled the Third Policy.

There are numerous provisions of the Policies that are relevant to this case and Travelers' claim of earned premiums for the Contractor Drivers.[1] The workers' compensation portions of the Policies detailed how the total ultimate premium Senn Freight was to pay would be calculated. That premium was to be calculated based upon the application of a factor to the amounts of "remuneration" that Senn Freight paid to various classes of people who performed work for it:

> Premium for each work classification is determined by **multiplying a rate times a premium basis**. Remuneration is the most common premium basis. This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of:
>
> 1. All your officers and employees engaged in work covered by this policy; and
>
> 2. All other persons engaged in work that could make us liable under Part One (Workers Compensation Insurance) of this policy. If you do not have payroll records for these persons, the contract price for their services and materials may be used as the premium basis. This paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers compensation obligations.

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[1] The Policies include an "EMPLOYEE LEASING CLIENT EXCLUSION ENDORSEMENT," which states:

> As used in this endorsement, "employee leasing" shall mean an arrangement whereby an entity utilizes the services of a third party to provide its workers for a fee or other compensation. The third party providing employee leasing services shall be referred to as a "labor contractor." The entity receiving the services shall be referred to as a "client."
>
> This endorsement applies only with respect to your leased workers engaged in any work provided under an employee leasing arrangement. Your policy does not provide coverage for workers you lease from labor contractors below.

(*See* Pls.' Tr. Exhibits 1-3). The first two Policies identify the "labor contractor" as Vanguard Southeast, Inc.; the final Policy states that Senn Freight was to provide Travelers with leasing information. (*See* Pls.' Tr. Exhibits 1-3). Under this provision, coverage was excluded for the Leased Drivers – but not the Contractor Drivers.

(*See* R. p. 141 ¶ 5.C (emphasis added), p. 157 ¶ 5.C (emphasis added) and p. 175 ¶ 5.C (emphasis added)).

The Policies further provide that "Item 4 of the Information Page shows the rate and premium basis for certain businesses or work classifications," which included drivers. (*See* R. p. 141 ¶ 5.B, p. 157 ¶ 5.B and p. 175 ¶ 5.B). Based upon these rates and classes of workers, the Policies indicated that premiums would be initially estimated and, later, finally set based on actual remuneration data. (*See* R. p. 141 ¶ 5.E (emphasis added), p. 157 ¶ 5.E (emphasis added) and p. 175 ¶ 5.E).

In connection with calculation of premiums, the Policies obligated Senn Freight to "keep records of information needed to compute premiums" and to "provide us [Travelers] with copies of those records when we ask for them." (*See* R. p. 141 ¶ 5.F, p. 157 ¶ 5.F and p. 175 ¶ 5.F; *accord* R. p. 141 ¶ 5.G, p. 157 ¶ 5.G and p. 175 ¶ 5.G).

Travelers contended at trial — and Senn Freight did not disprove — that Senn Freight did not fulfill its duties to provide information to permit calculation of premiums. As a consequence, Travelers cancelled the Third Policy on or about October 25, 2005. (*See* R. p. 113, lines 12-14).

III. Procedural History

Travelers commenced this action against Senn Freight on August 11, 2008 by Summons and Complaint. The Complaint asserted a claim to recover $197,958.00 for unpaid premiums. (*See* R. pp. 19-20 ¶¶ 4-5). On November 10, 2008, Senn Freight filed its Answer and Counterclaim, denying liability for Traveler's claims and asserting counterclaims against Travelers, including breach of contract and bad faith. (*See generally* R. pp. 25-30).

This case proceeded to a jury trial conducted on August 3-4, 2010. The jury returned a verdict against Travelers on its primary claims and in favor of Senn Freight on its counterclaims. (*See* R. pp. 14-16). After Travelers appealed, the South Carolina Court of Appeals reversed the trial court, holding that Senn Freight could not succeed on

its Counterclaim and that Travelers was entitled to a directed verdict as to liability on its claim for unpaid premiums. Senn Freight has petitioned this Court for a writ of *certiorari.* For the reasons that follow, this Court should deny Senn Freight's Petition.

ARGUMENTS

I. Senn Freight Has Not Shown That This Is a Proper Case for Review

Senn Freight's Petition for Writ of *Certiorari* is defective in that it has not shown "special and important reasons" why this case is appropriate for this Court's consideration. Rather, Senn Freight simply argues that the Court of Appeals erred in its analysis of this case. Travelers respectfully submits that, in light of the absence of significant factors warranting Supreme Court review, this Honorable Court should decline to exercise its discretion to review this case.

The Appellate Court Rules set forth numerous guidelines for the granting of *certiorari*:

> A writ of *certiorari* is not a matter of right, but of sound judicial discretion, and will be granted **only where there are special and important reasons**. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:
>
> (1) Where there are novel questions of law.
>
> (2) Where there is a dissent in the decision of the Court of Appeals.
>
> (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
>
> (4) Where substantial constitutional issues are directly involved.
>
> (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

See S.C.A.C.R., Rule 226(b) (emphasis added). Senn Freight has not argued or shown that any reasons of such character exist in this case, supporting review by this Court.

Senn Freight does not argue that there are novel questions of law that require clarification from this Court. Moreover, there was no dissenting opinion in the Court of Appeals suggesting the existence of a legal question necessitating Supreme Court review. Furthermore, Senn Freight does not argue that the Court of Appeals' decision directly conflicts with a prior decision of the Court of Appeals or this Court. In addition, this case does not involve any constitutional issues or federal questions.

Senn Freight's Petition for Writ of *Certiorari* does not argue that any "special and important reasons" in this case justify the exercise of this Court's discretion to hear the case. To the contrary, Senn Freight makes substantive arguments and simply argues that the Court of Appeals committed an error in reversing the trial court's decision. Without more, Travelers submits that this Court should not grant review of this case.

II. Contrary to Senn Freight's Contention in Its Petition, the Court of Appeals Properly Ruled in Travelers' Favor on Traveler's Claim for Unpaid Premiums

For the reasons set forth herein, the Court of Appeals properly concluded that the trial court erred in denying Travelers' Post-Trial Motions with regard to its breach of contract cause of action for earned premiums.

A. The Court of Appeals Correctly Held That Section 5(C)(2) Does Not Preclude Travelers' Claim for Unpaid Premiums

The crux of Senn Freight's argument in its Petition concerning Traveler's unpaid premiums claim is that it was not obligated to pay premiums calculated based on certain drivers because it provided proof to Travelers of workers' compensation coverage. Senn Freight relies on the following provision of the policies in this regard:

> Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of:
>
> 1. All your officers and employees engaged in work covered by this policy; and

> 2. All other persons engaged in work that could make us liable under Part One (Workers Compensation Insurance) of this policy. If you do not have payroll records for these persons, the contract price for their services and materials may be used as the premium basis. **This paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers compensation obligations.**

(*See* R. p. 141 ¶ 5.C (emphasis added), p. 157 ¶ 5.C (emphasis added) and p. 175 ¶ 5.C (emphasis added)). For the reasons that follow, contrary to Senn Freight's present contentions, the highlighted language of Section 5(C)(2) does not make the Court of Appeals' decision erroneous.

1. Senn Freight Has Waived This Argument

Senn Freight is now arguing, for the first time, that it was not obligated to pay Travelers unpaid premiums under Section 5(C)(2) of the Policies. Senn Freight's argument must fail because it has not properly preserved this issue.

Under South Carolina law, an issue can only be argued as a basis for *certiorari* if it has been properly raised and preserved below:

> The State did not raise this issue in its brief to the Court of Appeals. Instead, it argued the comment was cured by the trial judge's charge and was, at most, harmless error in light of the evidence against Primus. The State offered its present argument for the first time in its petition for rehearing. **Because the State failed to raise its current argument in its brief to the Court of Appeals, the issue is not properly preserved for this Court's consideration on writ of *certiorari*.** Rule 226(d)(2), SCACR (only questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for a writ of *certiorari*); *see Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue*, 342 S.C. 34, 535 S.E.2d 642 (2000) (issue not argued in brief is deemed abandoned and precludes consideration on appeal).

See State v. Primus, 349 S.C. 576, 583, 564 S.E.2d 103, 107 (2002), *overruled on other grds. by, State v. Gentry,* 363 S.C. 93, 610 S.E.2d 494 (2005) (emphasis added).

Before the Court of Appeals, Senn Freight did not argue that Travelers was precluded from recovering unpaid premiums under Section 5(C)(2) of the Policies. This argument was also not made to the trial court. Neither lower court has had an opportunity to decide this issue. Instead, in the courts below, Senn Freight argued only

that it was not obligated to pay premiums calculated on remuneration paid to Contractor Drivers because those drivers were independent contractors and were not statutory employees of Senn Freight. Because this issue was not properly raised and preserved below, it is not a proper ground for the granting of *certiorari* to this Court.

Therefore, for the foregoing reasons, this Court should deny Senn Freight's Petition for Writ of *Certiorari.*

2. Senn Freight's Argument Fails Because There is No Evidence That Senn Freight Gave Travelers Proof That the Contractor Drivers' Employers Lawfully Secured Their Workers Compensation Obligations

Assuming *arguendo* that Senn Freight has properly preserved the issue for this Court's review, its argument is without merit. Senn Freight argues that the Court of Appeals erred in holding that Senn Freight had never provided the proof that Section 5(C)(2) of the Policies requires. The Court of Appeals held that, construing it against Travelers, Section 5(C)(2) applies where there is "proof of compliance with workers' compensation laws" and that Senn Freight had failed to show such compliance:

> Although Mr. Senn consistently testified all of the owner/operators had less than four employees and he provided Travelers with all the information Travelers. asked for, he did not testify he provided Travelers with *proof* either the owner/operators had statutory workers' compensation insurance or employed less than four people.

(*See* Appendix at p. 3 (emphasis in original)). Senn Freight has not shown that the Court of Appeals' statement was incorrect in any way. As a result, this Court should deny *certiorari.*

In order to comply with the workers' compensation law, an employer is required to either provide proper workers' compensation insurance or be excluded from the scope of the workers' compensation system by, for example, having fewer than four employees. *See* S.C. Code §§ 42-1-360(2) and 42-5-10. Thus, under Senn Freight's argument, in order for Section 5(C)(2) to apply, Senn Freight would have had to prove to Travelers

that the Contractor Drivers' employers **all** either: (a) had fewer than four employers and/or (b) provided proper coverage for potential workers' compensation claims by the Contractor Drivers.

In its Petition for Writ of *Certiorari*, Senn Freight relies on several excerpts of Mr. Senn's trial testimony to claim proof of compliance with Section 5(C)(2). However, this testimony does not demonstrate that Senn Freight ever provided proof to Travelers of compliance with the workers' compensation laws by the Contractor Drivers' employers. In fact, a careful analysis of the testimony cited by Senn Freight illustrates that **none** of it supports Senn Freight's contentions in its Petition for Writ of *Certiorari*:

QUOTED TESTIMONY:

"The Traveler's policy requires us to prove we have coverage for the drivers and we did so, over and over again. That is what the policy requires." (R. p. 76, lines 13-15).

TRAVELERS' RESPONSE: This testimony refers to alleged proof of insurance of **Leased** Drivers. However, Travelers' claims relates to premiums earned in connection with **Contractor** Drivers. As such, this testimony has no bearing upon Travelers' claim. Mr. Senn does not testify that he provided any proof of compliance with the workers' compensation laws to Travelers with regard to Contractor Drivers as required for application of Section 5(C)(2) of the Policies.

QUOTED TESTIMONY:

Q: Did you get a contract with each one of these guys?"

A: Absolutely

Q: And you verified they had workers' compensation insurance coverage?

A: Yes Sir. (R. P. 65, lines 12-16).

TRAVELERS' RESPONSE: This testimony only claims that Senn Freight received verification of insurance coverage. This does not mean that Travelers was provided with proof of compliance with the workers' compensation laws with regard to Contractor Drivers as required for application of Section 5(C)(2) of the Policies.

QUOTED TESTIMONY:

Q: Do you recall me asking you about the documentation you provided to me for what coverage they had?

A: We probably provided proof of the coverage.

Q: You, in fact, provided documentation of an occupational accident policy. Is that correct?

A: Yes, sir.

Q: That's not workers' compensation is it?

A: Yes, it is. It's not statutory, but it is workers' compensation. (R. p. 67, lines 10-18).

TRAVELERS' RESPONSE: This testimony refers to documentation that that Senn Freight provided to Travelers' counsel in connection with this litigation. Mr. Senn does not testify that he provided any proof of compliance with the workers' compensation laws to Travelers with regard to Contractor Drivers as required for application of Section 5(C)(2) of the Policies.

QUOTED TESTIMONY:

Q: Okay. That's for one of the occupational accident policies. Is that right?

A: Yes, sir.

Q: Is that -- would that be an example of what you provided to Traveler's when they asked for proof of that coverage?

A: Yes, sir. (R. p. 68, lines 10-16; R. p. 207).

TRAVELERS' RESPONSE: Mr. Senn's testimony here is only a vague suggestion that Exhibit 7 is an example of what was provided to Travelers. First, Exhibit 7 is a single certificate that stated that "[t]his policy **does not** provide workers compensation coverage . . . ." (See R. p.67, line 1- p. 70, line 25; p. 207). Moreover, Mr. Senn does not state when and what — if anything — he actually provided to Travelers. Mr. Senn does not testify that he provided any proof of compliance with the workers' compensation laws to Travelers with regard to Contractor Drivers as required for application of Section 5(C)(2) of the Policies.

QUOTED TESTIMONY:

Q: Now, Mr. Senn, following this audit in October 2005, you received correspondence from Travelers, early December 2005. Is that correct?

A: There was a subsequent letter, which we responded to.

Q: Okay. And they were requesting certain information. Is that right?

A: Requesting the same information that had been given to the auditor, but we gave it to Ms. Smeltzer again.

Q: They were asking for valid certificates of insurance for your subcontractors?

A: That was part of it.

Q: These drivers here?

A: It was provided. (R. p. 78, lines 12-24).

TRAVELERS' RESPONSE: While claiming — contrary to all evidence — that Senn Freight had provided documentation regarding insurance, yet again this testimony fails to specify what was given to Travelers and when it was provided. Mr. Senn does not testify that he provided any proof of compliance with the workers' compensation laws to Travelers with regard to Contractor Drivers as required for application of Section 5(C)(2) of the Policies.

QUOTED TESTIMONY:

Q: Do you recall them asking you for proof of workers' compensation for your drivers through March 2004?

A: We provided it.

Q: And the last two weeks of January -- I mean, February of2005?

A: We provided it twice. (R. p. 79, lines 17-22).

TRAVELERS' RESPONSE: While claiming — contrary to all evidence — that Senn Freight had provided documentation regarding workers' compensation insurance covering Contractor Workers, the following pages of this testimony (and Trial Exhibits 11-13 referenced therein), make clear that Mr. Senn was testifying about **Leased Drivers**. Mr. Senn does not testify that he provided any proof of compliance with the workers' compensation laws to Travelers with regard to Contractor Drivers as

required for application of Section 5(C)(2) of the Policies.

Simply put, there was **no** testimony or evidence proffered at trial to show that the employers of the Contractor Drivers complied with workers' compensation laws. Senn Freight relies upon a few snippets of vague and ambiguous testimony, none of which demonstrates exactly **what** was provided to Travelers and **when**. It has not proven that it provided copies of any insurance policies to Travelers. It has not shown that it informed Travelers of which Contractor Drivers were covered by what nature of coverage and the effective dates of that coverage. Plainly, Senn Freight has not proffered sufficient evidence to support a jury ruling in its favor on this issue.

Moreover, Senn Freight's argument under Section 5(C)(2) fails to the extent it invokes evidence relating to proof of insurance that Senn Freight provided to Travelers relating to Leased Drivers, not the Contractor Drivers whose remuneration is relevant to Travelers' premium claim. (*See* Senn Freight's Final Resp. Br., at p.15 (emphasis added)). The Court of Appeals' opinion discloses that Travelers' claim for unpaid premiums only related to remuneration paid to Contractor Drivers, not Leased Drivers:

> Travelers argues the trial court erred in denying its JNOV and new trial motions as to its debt collection claim because Senn Freight owes earned premiums **for remuneration paid to owner/operators** based upon the audit calculations. Travelers argues the policies covered the owner/operators and contemplated the final premium due would be based upon remuneration paid to these **owner/operators**.

(*See* Appendix, at p. 2 (emphasis added)). To the extent Senn Freight relies upon evidence concerning **Leased** Drivers, that evidence is irrelevant to whether Section 5(C)(2) applies.

In light of the foregoing, contrary to Senn Freight's instant arguments, there was **no** evidence developed at trial that Section 5(C)(2) precluded Traveler's claims in this case. Specifically, there is no evidence that Senn Freight provided any proof of compliance with the workers' compensation laws to Travelers with regard to Contractor Drivers as required for application of Section 5(C)(2) of the Policies. To the contrary, the

only relevant evidence is that Senn Freight did not provide such proof. (*See generally* R. p. 105, line 18- p.107, line 1; R. pp. 101-107).

Therefore, for the foregoing reasons, this Court should deny Senn Freight's Petition for Writ of *Certiorari*.

B. The Court of Appeals Correctly Held That Travelers Is Entitled to Premiums for Contractor Drivers Because Such Drivers Were Statutory Employees

In its Opinion, the Court of Appeals properly concluded that the trial court erred in denying Travelers' Post-Trial Motions, because the undisputed evidence establishes, beyond any doubt, that the drivers at issue were "statutory employees" of Senn Freight and, consequently, properly included in the premium calculation. While not focusing on the issue, Senn Freight suggests that the Court of Appeals may have erred in concluding that drivers were "statutory employees." Senn Freight does not cite any authority or make any substantive argument in this regard.

Before the Court of Appeals, the ultimate question as to Travelers' claims was whether the Contractor Drivers — who are indisputably within the classes of drivers listed on the Policies' Information Pages — "**could** make us [Travelers] liable" to provide coverage for workers' compensation claims. For the reasons set forth below, the undisputed evidence showed that Senn Freight — and consequently Travelers — *could* have been liable under the workers' compensation laws to the Contractor Drivers. Consequently, Travelers earned premiums to be calculated based on the remuneration paid to the Contractor Drivers.

Coverage under the South Carolina Workers Compensation Act generally depends on the existence of an employer-employee relationship. *See McDowell v. Stilley Plywood Co.*, 210 S.C. 173, 41 S.E.2d 872 (1947); *Tillotson v. Keith Smith Builders*, 357 S.C. 554, 593 S.E.2d 621 (Ct. App. 2004). One exception is for "statutory employees":

> When any person, in this section and §§ 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of

> his trade, business or occupation and contracts with any other person (in this section and §§ 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

See S.C. Code Ann. § 42-1-400. South Carolina case law defines "statutory employee":

> Three tests are applied in determining whether the activity of an employee of a subcontractor is sufficient to make him a statutory employee within the meaning of § 42-1-400:
>
> (1) is the activity an important part of the owner's business or trade;
>
> (2) is the activity a necessary, essential, and integral part of the owner's trade, business, or occupation; or
>
> (3) has the identical activity previously been performed by the owner's employees?
>
> . . . **Any doubts as to a worker's status should be resolved in favor of including him or her under the Workers' Compensation Act**. *Riden*, 313 S.C. at 263, 437 S.E.2d at 158.

See Edens v. Bellini, 359 S.C. 433, 442-43, 597 S.E.2d 863, 868 (Ct. App. 2004). "If the activity at issue meets **even one** of these three criteria, the injured employee qualifies as the statutory employee of 'the owner.'" *See Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003) (emphasis added).

Here, the evidence supports only one conclusion: that the Contractor Drivers were Senn Freight's statutory employees. Senn Freight was engaged in business as a for-hire freight carrier, hauling cargo nationwide on flatbed tractor-trailers. (*See* R. p. 57, lines 8-12). As Mr. Senn testified at trial, "Senn hauls freight, sir." (*See* R. p. 64, line 14). It would be disingenuous to suggest that truck drivers were not important, necessary, essential and integral parts of Senn **Freight**'s business. In reality, it is self-evident that the work performed by the Contractor Drivers was highly important to Senn Freight's business — in fact, the performed the very work that Senn Freight was incorporated to engage in. There was no evidence at trial contradicting that the Contractor Drivers

performed work that was an important part of Senn Freight's business or trade. As such, drivers contracted to haul loads for Senn Freight are Senn Freight's statutory employees. There was no evidence to permit the jury to determine otherwise.

The Court of Appeals, in an unpublished opinion, ruled on facts nearly identical to those at bar and held that similar contractor drivers were a carrier's statutory employees:

> Here, Massey, a truck driver, sustained injuries while transporting loads for Werner, a common carrier. Clearly, the transportation of goods is an important, integral part of Werner's trade, business, or occupation.
>
> Massey admits she and her husband entered into a "contract" with Werner to lease their truck pursuant to an owner-operator agreement. Moreover, Massey concedes she signed an "Owner-Operator Compensation Coverage Agreement," wherein she is referred to as a "Contractor," and she sought workers' compensation coverage under Nebraska law. Further, in a "Declaration of Employment Status" document, Massey declared she was "self-employed." . . .
>
> Further, Massey's status as an independent contractor does not preclude her from receiving benefits as a statutory employee. *See Smith v. T.H. Snipes & Sons, Inc.*, 306 S.C. 289, 411 S.E.2d 439 (1991). In *Smith*, Smith's decedent, a self-employed welder, was fatally injured while repairing a metal shearing machine in T.H. Snipes' place of business. *Id.* at 290, 411 S.E.2d at 439. Our supreme court found the decedent was T.H. Snipes' statutory employee even though the decedent was "self employed" and a "subcontractor." *Id.* at 290-91, 411 S.E.2d 439-40. The court stated "nothing in the language of [§ 42-1-400] precludes classification of a subcontractor as a statutory employee." *Id.* at 291, 411 S.E.2d at 440. We see no distinction between *Smith* and this case, except that the decedent in Smith was a welder and Massey was a truck driver.
>
> We therefore affirm the circuit court's holding that Massey is entitled to benefits as a statutory employee.

See Massey v. Werner Enterp., Inc., Opinion No. 2010-UP-001 (S.C. Ct. App. filed Jan. 7, 2010), withdrawn, substituted and refiled March 24, 2010 (attached to Travelers' Finial Brief)). This persuasive case reiterates and bolsters Travelers' contention that the Court of Appeals' decision was correct.

As set forth above, the undisputed evidence shows that the Contractor Drivers "*could*" be statutory employees entitled to benefits under the South Carolina Workers Compensation Act. As a result, there was no evidence to support the jury's verdict. Therefore, the remuneration paid to Contractor Drivers should be considered in determining the final premium due to Travelers under the Policies. The Court of Appeals correctly concluded that the trial court erred in denying Travelers' Post-Trial Motions. Therefore, for the foregoing reasons, this Court should deny Senn Freight's Petition for Writ of *Certiorari*.

III. The Court of Appeals Correctly Ruled in Travelers' Favor on Senn Freight's Bad Faith Counterclaim for Wrongful Termination of the Policies

Senn Freight next argues that the Court of Appeals erred in ruling against it on its bad faith cancellation claims. For the reasons that follow, Senn Freight's claims are without merit.

A. Senn Freight Has Proffered No Evidence Whatsoever That Travelers' Cancelled the Policies in Bad Faith

As argued below, South Carolina has never recognized a cause of action for bad faith for cancellation of an insurance policy (as opposed to improper claims handling). Assuming, *arguendo,* that South Carolina recognizes that a bad faith claim *could* be asserted for the wrongful cancellation of a commercial workers' compensation policy, the undisputed evidence cannot support a reasonable conclusion that Travelers acted in bad faith in cancelling the Third Policy. To the contrary, the only evidence of record — aside from Senn Freight's speculative innuendo — demonstrates that Travelers cancelled the Third Policy because of Senn Freight's refusal to cooperate it.

In the context of insurance, "bad faith" requires proof of the insurer's knowingly culpable conduct:

> "Bad faith is a knowing failure on the part of the insurer to exercise an honest and informed judgment in processing a claim.... [A]n insurer acts in bad faith where there is no reasonable basis to support the insurer's

> decision." *American Fire & Cas. Co. v. Johnson*, 332 S.C. 307, 311, 504 S.E.2d 356, 358 (Ct. App. 1998); *see also Cock-N-Bull Steak House v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996).

See Doe v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n, 347 S.C. 642, 649, 557 S.E.2d 670, 674 (2001). "Bad faith, like fraud, connotes dishonesty. It should not be rashly charged or lightly inferred." *Miles v. State Farm Mut. Auto. Ins. Co.*, 238 S.C. 374, 382, 120 S.E.2d 217, 221 (1961). As the Verdict Form recognized, Senn Freight was required to prove bad faith cancellation of the Third Policy be clear and convincing evidence. (*See* R. pp. 14-16). However, Senn Freight did not present **any** evidence at trial to carry its burden of showing that Travelers acted in bad faith.

The Third Policy expressly reserved to Travelers the right to cancel that insurance policy:

> 2. We may cancel this policy. We must mail or deliver to you not less than ten days advance written notice stating when the cancellation is to take effect. Mailing that notice to you at your mailing address sown in Item 1 of the Information Page will be sufficient to provide notice.
>
> 3. The policy period will end on the day and hour stated in the cancellation notice.

(*See* R. p. 176 ¶ 6.D(2) and (3)). This provision of the Third Policy permits termination with or without cause. It does not restrict or limit Travelers' right to terminate. Therefore, it is clear that — irrespective of whether or not Senn Freight breached the agreement — Travelers had the contractual right to terminate. There was no evidence that the cancellation of the Third Policy violated any express terms of that agreement so as to cause any damage to Senn Freight.

In response to this broad contractual right to terminate, Senn Freight did not present a scintilla of evidence showing that Travelers exercised that right in bad faith. Instead, Senn Freight relies upon speculation and innuendo in an effort to carry its heavy burden. The only "evidence" of bad faith that Senn Freight proffered was Mr. Senn's self-serving testimony that he subjectively considered the cancellation of the final Policy

to be in bad faith. (*See* R. p. 125, lines 6-8). Senn Freight did not present any expert witness testimony supporting its claim that Travelers acted in bad faith. Senn Freight did not present any admissions by Travelers that it knowingly lacked a reasonable basis to cancel the Third Policy. Senn Freight did not present any evidence of an ulterior motivation or purpose by Travelers. Simply put, there was no evidence whatsoever that could support a jury finding of bad faith.

To the contrary, the **only** evidence as to Travelers' motivation supports the contrary conclusion, *i.e.,* that Travelers had a proper and legitimate reason to cancel the Third Policy under the terms of that agreement. The Third Policy obligated Senn Freight to "keep records of information needed to compute premiums" and to "provide us with copies of those records when we ask for them." (*See* R. p. 175 ¶ 5.F). In addition, in the Third Policy, Senn Freight agreed to grant Travelers open and unrestricted access to a broad range of its business records and to permit an audit:

> You will let us examine and audit **all** your records that relate to this policy. These records include **ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data**. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by the audit will be used to determine final premium.

(*See* R. p. 175 ¶ 5.G (emphasis added)). Mr. Senn testified that he was aware of these obligations under the Third Policy:

> Q: Now, the policy also provides, and you're aware of this that you were subject to being audited. Is that correct?
>
> A: Yes.
>
> Q: Okay. And that means that you were obligated and Traveler's had a right to review your books, disbursement journals, general ledgers and all that information that you said a few minutes ago was vital to conducting a complete and accurate and reliable audit. Is that correct?

A: An auditor can look at what has happened. That doesn't mean every record we have.

(*See* R. p. 63, lines 15-25).

The only evidence at trial demonstrated that Senn Freight failed to comply with its contractual obligations to provide information to Travelers regarding the Leased and Contractor Drivers to permit Travelers to calculate its premium. For example, Stephen Evanglista of Travelers testified that Senn Freight failed to provide Travelers with certain requested information:

Q: So backing up to the terms of the policy, Senn's to provide us with information. Is that correct?

A: That's correct.

Q: Travelers has a right to review this information. Is that correct?

A: That's correct.

Q: Now, based upon your review of the records subsequent to this audit of October 17, 2005, was there any indication this information was requested of Senn?

A: Yes. Yes, I believe so. . . .

Q: Now, Mr. Evanglista, you stated there is an indication in your view of the records that this information was subsequently requested from Senn, correct?

A: Yes.

Q: Based on your review of the records subsequent to this audit as well as the request for that information, is there any indication that this information has been provided to Travelers?

A: No. No, it hasn't been provided to us.

(*See* R. p. 105, line 18- p.107, line 1; *see generally* R. pp. 101-107). Moreover, with regard to the Leased Drivers, Mr. Senn's testimony established that Senn Freight did not provide Travelers with relevant and sufficient information (such as copies of binding insurance policies) to definitively establish that those drivers were covered under the PEOs' workers' compensation insurance policies as required by the Policies for all

relevant times. (*See* R. p. 78, line 12-p. 88, line 25; R. pp. 213-15).

On the other hand, Senn Freight did not provide any specific evidence showing bad faith intention on the part of Travelers so as to permit a jury to disregard this evidence and find bad faith. As the trial judge instructed the jury, Senn Freight had a heavy burden to prove bad faith by clear and convincing evidence. Senn Freight did nothing to fulfill its obligation. Senn Freight did not present a shred of evidence of bad faith — let alone sufficient evidence to carry that heavy burden. Aside from Mr. Senn's self-serving and subjective testimony based on innuendo, there is **nothing** in the record whatsoever to support a finding of bad faith. Thus, the record could not support a verdict in Senn Freight's favor.

Senn Freight seeks to distract the Court from the primary issue on its bad faith claims, by focusing on alleged conduct that was either completely irrelevant to the cancellation of the Third Policy or occurred **after** cancellation. Such evidence is insufficient to support a finding of bad faith:

- Senn Freight first argues that Travelers acted in bad faith because "the policy was cancelled before the term expired and after the plaintiff had received the agreed upon premiums." (*See* Petit., at p.12). Contrary to Senn Freight's innuendo, this is not indicative of bad faith in any way.

- Senn Freight next argues that "Travelers refused to refund the premium despite the cancellation of the policy." (*See id.*). Again, this is not suggestive of there being no basis to support Travelers' decision.

- Senn Freight next posits that "Travelers attempted to unilaterally raise the premium without justification and instituted a lawsuit regarding this unilateral raise in premium only after the worker's compensation claims period had passed." (*See id.*, at p.13). None of this suggests that Travelers acted in bad faith in connection with the cancellation of the Third Policy.

Senn Freight's resort to this specious evidence makes clear that Senn Freight cannot contradict Travelers' position that it cancelled the Third Policy for legitimate reasons.

In its Petition for Writ of *Certiorari*, Senn Freight cites for the first time *Crews v. W.R. Crews, Inc.*, 390 S.C. 15, 699 S.E.2d 189 (Ct. App. 2010), arguing that the fact that

the Policies were issued pursuant to the South Carolina Assigned Risk Plan "mak[es] the unilateral cancellation of this policy all the more alarming." (*See* Petit., at p.13). However, because this authority was not presented to the Court of Appeals, it has not been preserved for review by this Court. *See State v. Primus*, 349 S.C. 576, 583, 564 S.E.2d 103, 107 (2002), *overruled on other grds. by, State v. Gentry,* 363 S.C. 93, 610 S.E.2d 494 (2005). Senn Freight has never presented or argued the actual terms of the Plan in this matter. In fact, Senn Freight **still** does not specifically state the circumstances under which the Third Policy could be cancelled. It may not now resort to this argument at the eleventh hour.

Moreover, *Crews* does not support Senn Freight's arguments in this case. The relevant portion of the *Crews* case states:

> The Assigned Risk Plan allows a carrier to initiate cancellation procedures if it determines one of the five conditions enumerated above exists; however, Plan rules specify the carrier must first provide an opportunity to cure. Furthermore, the Plan requires a servicing carrier "[t]o work with and assist the ... employer ... on problems relating to coverage and service under the Plan." It follows that a carrier is to adopt a flexible approach when dealing with an insured who is unable to strictly comply with the policy terms but is making reasonable efforts to do so.

See Crews, 390 S.C. at 25, 699 S.E.2d at 194. Here, Senn Freight produced no evidence that it was denied an opportunity to cure its breaches of the requirements of the Third Policy. There is no evidence that Senn Freight was ever making reasonable efforts to provide the specific information requested by Travelers. In fact, the only evidence was that Senn Freight wholly failed to do what it was obligated to do under the Policies.

Therefore, for the foregoing reasons, this Court should deny Senn Freight's Petition for Writ of *Certiorari*.

B. South Carolina Law Does Not Recognize a Cause of Action for Bad Faith Cancellation of an Insurance Policy

Although it did not rule upon this specific issue, the Court of Appeals' decision was correct because South Carolina law does not recognize, and has never recognized, a

bad faith claim relating to cancellation of an insurance policy — as opposed to the denial of coverage for a particular claim. Senn Freight's bad faith claim must fail, insofar as it is premised upon Traveler's cancellation of the Third Policy, rather than denial of coverage for a particular claim. South Carolina has never explicitly recognized the extension of the bad faith cause of action to such facts.

The only bad faith action recognized in South Carolina concerns an insurer's alleged bad faith failure to pay benefits under a first-party insurance policy or to defend or indemnify under a liability policy. The elements of the bad faith cause of action have been defined as follows:

> The elements of an action for breach of the covenants of good faith and fair dealing in an insurance contract are as follows:
>
> 1) the existence of a mutually binding contract of insurance between plaintiff and defendant;
>
> **2) a refusal by an insurer to pay benefits due under the contract;**
>
> 3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing in the contract;
>
> 4) that causes damage to the insured.
>
> *See Cock-N-Bull Steak House, Inc. v. Generali Ins., Co.*, 321 S.C. 1, 6, 466 S.E.2d 727, 730 (1996) (emphasis added) (enumerating the elements of a claim for bad faith refusal to pay benefits under an insurance contract).

See Gaskins v. Southern Farm Bureau Cas. Ins. Co., 343 S.C. 666, 673, 541 S.E.2d 269, 272 (Ct. App. 2000) (emphasis added). "A **necessary element** of this cause of action is 'a refusal by the insurer to pay benefits due under the contract.'" *See Walters v. Canal Ins. Co.*, 294 S.C. 150, 151, 363 S.E.2d 120, 121 (Ct. App. 1987) (*quoting Bartlett v. Nationwide Mut. Fire Ins. Co.*, 290 S.C. 154, 158, 348 S.E.2d 530, 532 (Ct. App. 1987)). Of particular note, no South Carolina case has ever explicitly stated that the bad faith tort

may be extended to encompass bad faith cancellation of an insurance policy (in the absence of denial of coverage for a particular claim). Rather, every South Carolina appellate bad faith case has involved a failure to pay a specific claim, rather than the mere cancellation of a policy in the abstract.

This conclusion is bolstered by this Court's holding in *Masterclean, Inc. v. Star Ins. Co.*, 347 S.C. 405, 556 S.E.2d 371 (2001). There, this Court declined to recognize a bad faith claim in the context of a purely commercial surety bond, citing in part this Court's "reluctance to extend tort actions for violating good faith obligations." Likewise, in this case the parties' dispute is, at its heart, purely commercial. This dispute does not concern coverage for a particular accident or indemnity. Rather, it involves the termination of the commercial relationship between Travelers and its customer. This is simply not a proper case for the invocation of the specter of bad faith liability.

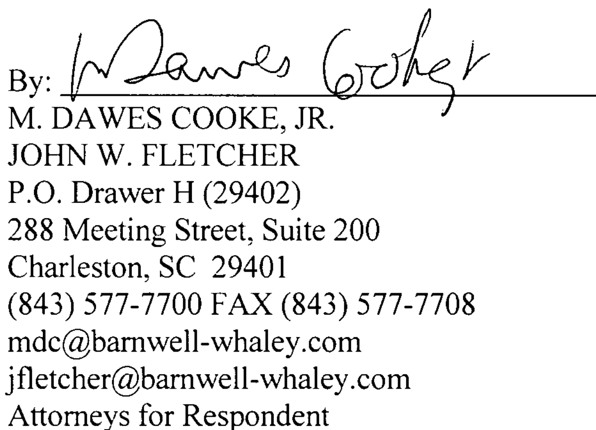
In its Petition for Writ of *Certiorari*, Senn Freight cites *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009), stating that it "specifically allowed a cause of action for bad faith cancellation of a health insurance policy." (*See* Petit., at p.14). However, this is in error. While the *Mitchell* Court did affirm a bad faith judgment stemming from the rescission of an insurance policy, it did not go nearly as far as Senn Freight suggests. First, the *Mitchell* Court was not presented with the specific legal argument that Travelers raises here: whether South Carolina's bad faith tort, as a matter of law, should extend to policy cancellation. Moreover, *Mitchell* concerned a first-party health insurance policy that was cancelled after the insured was diagnosed as HIV-positive. In essence, the cancellation of the policy in *Mitchell* **was a denial of coverage** for a particular health condition. On the other hand, in this case, there is no allegation or evidence of a pending claim at the time of cancellation of the Third Policy. As such, *Mitchell* is not controlling and has no application.

Simply put, South Carolina has **never** recognized the claim Senn Freight seeks to assert in this case. Therefore, because the Court of Appeals' decision was correct, this Court should deny Senn Freight's Petition for Writ of *Certiorari*.

CONCLUSION

For all of the reasons set forth herein, this Court should deny Senn Freight's Petition for Writ of *Certiorari*.

BARNWELL WHALEY PATTERSON & HELMS, LLC



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Date: May 24, 2013
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM NEWBERRY COUNTY
In The Court of Common Pleas

RECEIVED

MAY 31 2013

S.C. SUPREME COURT

Eugene C. Griffith, Circuit Court Judge
Civil Action No. 2008-CP-36-417

Appellate Case No. 2013-000602
South Carolina Court of Appeals Unpublished Opinion No. 2013-UP-015

Travelers Property Casualty Co., ... Respondent,

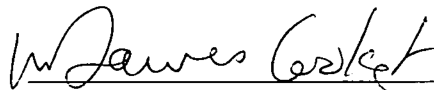
v.

Senn Freight Lines, Inc., ... Petitioner.

PROOF OF SERVICE

I certify that I have served the Return to Petition for Writ of *Certiorari* on Senn Freight Lines, Inc. by depositing a copy of it in the United States Mail, postage prepaid on, on May 24, 2013, addressed to its attorney of record, W. Chad Jenkins, Esquire, Post Office Box 190, Newberry, South Carolina 29108.

May 24, 2013



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