

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Newberry County  
Court of Common Pleas

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

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South Carolina Court of Appeals Unpublished Opinion No. 2013-UP-015

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Travelers Property Casualty Co.,

Respondent,

v.

Senn Freight Lines, Inc.,

Petitioner.

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

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**S.C. SUPREME COURT**

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## INTRODUCTION

Petitioner Senn Freight Lines, Inc. (hereinafter “Senn”) craves reference to and relies upon its Statement of Facts contained in its Petition for Writ of Certiorari in this case in addition to the matters set forth herein. This Reply will address only certain points in the Return not already fully set forth in Senn’s Petition for Writ of Certiorari.

## ARGUMENTS

### **I. THIS IS A PROPER CASE FOR REVIEW BY THE SOUTH CAROLINA SUPREME COURT AND SENN’S PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.**

The existence of a cause of action for bad faith cancellation of a worker's compensation insurance policy presents a novel question of law in this matter. While no South Carolina court has directly ruled upon this issue in a case with facts similar to those found here, the South Carolina case of Mitchell v. Fortis, 385 S.C. 570, 686 S.E.2d 176 (2009) opened the door for a bad faith cancellation cause of action. Senn also provided much authority from other states allowing for a bad faith cancellation of policy cause of action.<sup>1</sup> The Court of Appeals failed to rule directly on this issue stating that “even if our

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<sup>1</sup> The Ohio court in Pate v. Guarantee Trust Life Ins. Co. stated it best: “the insurer has a duty to act in good faith toward its insured in carrying out its responsibilities under the policy of insurance.” (Pate citing Hoskins v. Aetna Life Ins. Co., 452 N.E.2d, 1315, 1319 (Ohio 1983).Johnson v. Liberty Mutual Fire Ins. Co., 653 F.Supp.2d 1133 (D. Colo. 2009) (District Court in Colorado found that the insurer and insured have a special relationship with an implied duty of good faith and fair dealing that is actionable in tort, even if the claim is eventually defended and/or paid.); Ballow v. Phico Ins. Co., 875 P.2d 1354 (Colo. 1993) (Colorado Supreme Court found that there is a duty of good faith that is broad and wide ranging and extends to “everything pertaining” to provisions of insurance services, including bad faith as it relates to renewal or nonrenewal of policies); Bariski v. Reassure America Life Ins. Co. 2011 WL 2651427 (M.D. PA. 2011) (In a case dealing with a statute of limitations, the 2 years statute of limitations for instituting a bad faith suit on a life insurance policy begins on the date the insured knew it was cancelled which was well before the death of the insured and well before payment would be due.); Dune v. American Ins. 251 P.3d 1232 (Col. App. 2010.) (The duty of good faith for an insurer extended to the “duty to adequately and promptly communicate in response to Plaintiff’s claim.”); Pate v. Guarantee Trust Life Ins. Co. 2010 WL

courts recognized a claim for bad faith cancellation of an insurance policy...” (emphasis added), leaving the question open for interpretation. (App. p. 3). As stated below, there is ample evidence to support a proper bad faith cancellation cause of action. The validity of this cause of action is an important and novel question of law which is best determined by the highest court of our state.

Furthermore, the Opinion is in direct conflict with black letter law as determined by the South Carolina Supreme Court on issues regarding the Plaintiff’s burden of proof and the jury’s authority as fact finders to weigh the evidence presented at trial. For example, Respondent Travelers and the Opinion assert that Senn was responsible for proving something to the jury in order to prevail against Travelers’ debt collection claim. The Opinion usurped the jury’s fact finding mission and replaced the jury’s determination as to the evidence with its own. This is in conflict with the basic principles of law regarding the granting of directed verdict motions, burden of proof and a direct invasion on the jury’s province to hear and weigh the evidence. M & T Grp., LLC v. Palmetto Point of Williamston, LLC, 391 S.C. 73, 705 S.E.2d 20 (2011); Smith v. Durham Life Ins. Co., 202 S.C. 392, 25 S.E.2d 247, 248 (1943) (Holding that the case was properly submitted to the jury, "the usual finders of the facts" and that a jury's findings will not be disturbed on appeal unless there is no evidence to support same).

Given the novel issues of law and the Opinion’s invasion on the jury’s duty to weigh the evidence and determine the facts, this case is ripe for the granting of the Petition for Writ of Certiorari.

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987090 (ND Ohio 2010) (The case found that bad faith liability may rise from the legal duty created by the party’s relationship and not merely from a breach of the policy terms.)

**II. THE OPINION ERRED IN  
DETERMINING THAT RESPONDENT  
TRAVELERS WAS ENTITLED TO A  
DIRECTED VERDICT ON ITS DEBT  
COLLECTION ACTION FOR UNPAID  
WORKER’S COMPENSATION PREMIUMS.**

Contrary to Travelers’ arguments, Senn properly preserved the issue regarding unpaid premiums due under Section 5(C)(2) of the policies at issue in this case. The Petition for Rehearing and Memorandum of Support of Petition for Rehearing specifically rely upon the wording of this section of the insurance policy and it was argued during oral arguments before the South Carolina Court of Appeals. (App. p. 8-11). The Court of Appeals specifically ruled upon this issue in Footnote 1 of the Opinion. (App. p. 3). Furthermore, the interpretation of this clause is specifically related to and intertwined with the arguments regarding statutory employees, independent contractors, and the number of employees of each owner operator. These arguments were presented *ad nauseum* in the Final Brief of Travelers and Senn Freight to the Court of Appeals. Lastly, the contracts of insurance specifically discussed are all a part of the Record in this matter and were presented to the jury in this matter. The issue was preserved, and any argument regarding same is proper. Any assertion that Senn waived this argument is incorrect.

The Opinion was correct in determining that the phrase “lawfully secured their worker’s compensation obligations” is ambiguous and that because this was a contract of adhesion, it should be construed to mean “proof of compliance with worker’s compensation laws” and not proof of actual worker’s compensation insurance. (App. p. 3) However, the Opinion went further and erred in determining that Senn had not provided proof of said compliance with the worker’s compensation laws.

The Opinion improperly shifted the burden of proof to Petitioner Senn and erroneously found that Senn did not provide Travelers with the necessary documents and information necessary to defeat Travelers' claims in its debt collection action. Assuming arguendo that the burden was upon Senn, an abundance of evidence contained within the Record in this matter provided an ample basis for the jury to rest its verdict. The Court of Appeals improperly substituted its own interpretation of the evidence for that of the jury. The trial court must deny directed verdict motions when the evidence yields more than one inference or its inference is in doubt. Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006).

Travelers is simply parsing words in their response to each quote from the Record contained in the Petition for Writ of Certiorari. Travelers once again attempts to shift the burden of proof to Senn by stating on page 11 of its Return that the testimony "fails to specify what was given to Travelers and when it was provided." However, the very next portion of quoted testimony of Danny Senn indicates that it was provided twice, including in February of 2005. (R. p. 79, ll. 17-22). Furthermore, Mr. Senn repeatedly testified that the information was provided to the auditor and again to Ms. Smeltzer. (R. p. 78, ll. 12-24). While the testimony of Danny Senn may not have been perfectly clear given Travelers' attempt to throw the red herring issue of the leased drivers into the fray, it was certainly clear to the jury that Senn had provided everything asked of it and everything required under the policy.

In its Response, Travelers further relies upon the testimony of a witness who was not involved in the audit of Senn and who never visited Senn to review the documents. Mr. Evangelista even specified that he would not know for certain what was provided as

the documents are often simply reviewed at the business location and are not actually contained in the file located at Travelers' home office. (R. p. 116, lines 1-17). The jury obviously felt that Travelers failed to meet its burden of proof and therefore found against them on their debt collection action. To interpret this in another manner is once again simply ignoring the proper determination made by the jury and trial court in this matter. "The Supreme Court will reverse a court's ruling on a directed verdict motion only where there is **no** evidence to support the trial court's ruling, or where the ruling was controlled by an error of law; essentially, the Court must resolve whether it would be reasonably conceivable to have a verdict for a party opposing the motion under the facts as liberally construed in the opposing party's favor." Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006) (emphasis added).

### **III. THE OPINION IMPROPERLY FOUND THAT SENN FAILED TO PROVIDE PROOF OF BAD FAITH CANCELLATION BY TRAVELERS.**

As argued in Petitioner's Petition for Writ of Certiorari and underlying briefs to the South Carolina Court of Appeals, South Carolina has recognized a bad faith cancellation of a health insurance policy. Mitchell v. Fortis, 385 S.C. 570, 686 S.E.2d 176 (2009). Petitioner would admit that there is no case law in South Carolina regarding bad faith cancellation of a worker's compensation insurance policy under the Assigned Risk Plan. However, the South Carolina Court of Appeals left this question open for interpretation and this matter is ripe for said determination by this Court. The Petitioner craves reference to his Petition for Writ of Certiorari and Final Brief to the South Carolina Court of Appeals regarding the case law from both South Carolina and other jurisdictions regarding insurance bad faith causes of action.

Petitioner further relies upon the quotes and examples of bad faith as presented in his Petition for Writ of Certiorari and Final Brief to the South Carolina Court of Appeals. However, Petitioner must respond specifically to the colloquy from pages 105-107 of the Record as quoted on page 19 of Respondent's Return to Petition for Writ of Certiorari in this matter. Travelers relies upon the testimony of Steven Evangelista, the only witness testifying on behalf of Travelers, who made a broad assertion that records may not have been provided to Travelers during the audit process. (R. p. 105, l. 18 – p. 107, l. 1). What Travelers and the Opinion fail to recognize is that the jury simply did not believe the broad, non-fact based assertions of Mr. Evangelista. This was a reasonable finding by the jury given Evangelista's testimony that the records of which he complains are often reviewed at the business and not placed in the actual file of Travelers. (R. p. 116, lines 1-17). This, coupled with Danny Senn's repeated assertions that Travelers was provided with everything they asked for, and coupled with the fact that Mr. Evangelista was reviewing the Travelers' file years after the audit and only a week before the trial in this matter, obviously led the jury to believe that this "non-compliance" assertion was not credible. Travelers is simply attempting to find evidence in the Record which does not exist.

Evidence to support the jury's verdict exists. When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, the appellate court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the non-moving party. RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P., 399 S.C. 322, 732 S.E.2d 166 (2012), reh'g denied (Sept. 19, 2012), cert. denied, 133 S. Ct. 1255, 185 L. Ed. 2d 182 (U.S.S.C. 2013). If, and only if, there is NO

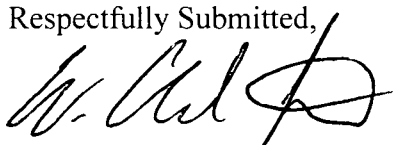
evidence to support the jury's findings, and if that evidence is capable of only one inference, may a JNOV motion be properly granted. Id. at 332. Here, the Opinion improperly found the trial judge and jury's determination to be irrelevant.

### CONCLUSION

The Opinion erred in substituting the appellate court's own view of the testimony for that of the jury and the trial court regarding Travelers' Motion for Directed Verdict/JNOV as to its debt collection actions and Senn's counterclaim for breach of contract. Furthermore, there is a valid cause of action for bad faith cancellation of the Assigned Risk Plan Worker's Compensation insurance policy and Senn provided ample proof of said bad faith to support the jury's verdict. The Opinion of the Court of Appeals should be reversed and the trial court's judgment should be reinstated. Petitioner respectfully requests that this Court grant its Petition for Writ of Certiorari to fully consider these issues.

Respectfully Submitted,

By:



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Newberry, South Carolina  
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No. 2011189987

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**PROOF OF SERVICE**

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The undersigned employee of Pope & Hudgens, P.A., Attorneys at Law, Post Office Box 190, 1508 College Street, Newberry, South Carolina 29108, does hereby certify that she has served the following named individual(s) with a copy of the pleading(s) indicated below by mailing a copy of same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the 6<sup>th</sup> day of June, 2013:

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Petitioner's Reply To Respondent's Return To Petition For Writ  
Of Certiorari



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