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SC Court of Appeals

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case Number 2022-000154

Steven M. Brant, Employee, Claimant,

-vs-

Core Services, LLC and South Carolina Department of Transportation, Employer, Berkshire Hathaway Direct Insurance Co., Carrier, Markel Ins. Co. and South Carolina State Accident Fund, and South Carolina Workers' Compensation Uninsured Employers' Fund; Defendants.

Of which Berkshire Hathaway Direct Insurance Company is the Appellant,

And South Carolina Department of Transportation, South Carolina State Accident Fund, and South Carolina Workers' Compensation Uninsured Employer's Fund are the Respondents.

APPELLANT'S FINAL REPLY BRIEF

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This Reply is intended to jointly counter arguments advanced by the UEF and SAF in their respective Briefs regarding the privity/standing, choice of law, and poof of cancellation issues. Regarding the facts, BiBerk first notes that both Respondents mischaracterize the testimony of BiBerk's underwriting coordinator, Margaret Yoh. Respondents contend that Ms. Yoh unequivocally confirmed that BiBerk did not mail the notice of cancellation to Core's correct mailing address as reflected in the policy. [*See* SAF Brief p. 5]. However, this is **not** what Ms. Yoh stated. Ms. Yoh merely acknowledged that the private mailbox number was not on the proof of mailing ledger. R. p. 222. When asked by SAF's counsel whether she had any proof of mailing that the notice was actually sent to Core's full and complete address, Ms. Yoh testified, "I believe that the notice... *I don't know.* The notice of cancellation is our proof of mailing. I don't know if there's a different proof of mailing that includes that or doesn't include that." *Id.* (emphasis added). Moreover, when asked if other proof of mailing exists reflecting the private mailbox number Ms. Yoh testified, "I don't know. Our mailing room would take care of that.. ." *Id.* Respondents never called a witness from BiBerk's mail room. In sum, Ms. Yoh testified that she has no personal knowledge of the address to which the notice of cancellation was actually mailed.

I. SAF and UEF lack standing to assert Core's coverage rights under the BiBerk policy

Respondents argue they have standing to contest BiBerk's cancellation of Core's policy merely because they may be "negatively affected" via responsibility for this claim otherwise. Respondents also seems to suggest that their status as state agencies confers some sort of special standing beyond contractual principles applicable to other parties. However, Respondents cite no valid legal authority for either proposition. Indeed, South Carolina contract law is crystal clear that only parties in privity of contract and/or intended third-party beneficiaries have standing to enforce contractual rights. Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 424, 440 S.E.2d

890, 891 (Ct. App. 1994) (a third party not in contractual privity with the contracting parties has no right to enforce the contract unless the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to that third person). Respondents cite valid law regarding the concept of legal standing in *general* but cite no legal authority supporting their position here that negative impact of an alleged breach of contract on a third-party confers first party standing to them to enforce another parties' rights under a contract of insurance. Indeed, persons injured in motor vehicle accidents caused by negligent drivers benefit from insurance coverage, but that does not create a right for them to sue the insurer directly for the coverage. For these reasons, the negative effect that may fall upon a third-party due to the breach of a contract between other parties, or the benefit a third-party may gain from the performance of a contact between other parties, does not confer third-party standing to enforce the contract.

Likewise, the Court must reject artificial distinctions without a difference between coverage under an insurance policy and performance of the policy's obligations. Respondents seemingly argue they have standing to contest the former, while acknowledging it may not have standing to enforce the latter. Respondents fail to cite any legal authority for this illogical hair splitting proposition. Rather, coverage and performance go hand in hand because one begets the other. For example, if BiBerk indeed improperly cancelled Core's policy, then such action is tantamount to unjustifiably refusing to cover a loss protected by such policy, which would clearly be a breach of its contract with Core. As noted previously, insurance policies are contracts between the insurance company and the insured. Murphy v. Jefferson Pilot Commc'ns. Co., 657 F. Supp. 2d 683, 693 (D.S.C. 2008) (citing Coakley v. Horace Mann Ins. Co., 656 S.E.2d 17, 18-19 (2007)). To bring a claim for breach of contract under South Carolina law, a plaintiff must show: 1) a binding contract; 2) the contract was breached; and 3) the breach led to damages. Hennes v. Shaw,

725 S.E.2d 501, 506 (S.C. Ct. App. 2012). "Only parties to a contract may be sued for a breach of contract cause of action." Murphy, 657 F. Supp. 2d at 693; *See also* Hammond *supra* ("Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third party is not, as such, recoverable by the plaintiff."). Therefore, Respondents' argument that cancellation of Core's policy does not implicate a possible breach of that contract must be rejected.

The Commission found that authority for Respondents' standing to contest BiBerks' cancellation arises out of S.C. Code § 42-1-440, which confers an upstream "principal" contractor or "statutory employer" with the right to add an injured worker's direct employer or any other "intermediate" contractor as a party to the claim and request that liability be imposed upon them. The Commission reasons that this statute has no teeth if the statutory employer cannot assert that the direct employer and/or intermediate contractor's coverage is appliable. This conclusion of law is patently erroneous and commands reversal. The statute certainly permits the South Carolina Department of Transportation ("DOT") as Claimant's purported "statutory employer" in this case to add Core as a party to the claim and seek to impose liability upon it. However, the statutory right to merely add Core as a party to the action is not synonymous with conferring a right by DOT to enforce Core's coverage rights under the Act via its private contract of insurance with BiBerk. The issue of liability under the Act and whether such liability is secured by insurance are distinct concepts. Once added as a party to the claim it is the *direct employer's* right to assert coverage for the accident under the policy.

In addition, as the entity tasked with paying claims subject to the Act when an employer has failed to insure its liability for same, the UEF is not even implicated by § 42-1-440. The UEF is not a "principal" or "intermediate" contractor within the meaning of this statute. The

Commission's finding that either Respondent's standing to contest coverage derives from S.C. Code § 42-1-440, as well as Respondents' reliance on same, is legally untenable.

Next, Respondents cites the case of Bessinger v. R-N-M Builders, 421 S.C. 329, 806 SE.2d 731 (Ct. App. 2017) for the proposition they have standing to contest BiBerk's cancellation of the Core policy. In that case, the UEF argued against the validity of the insurer's common law rescission of an employer's policy based on fraud. However, Respondents' reliance on Bessinger is misplaced because the carrier in that case never objected to the UEF's standing to contest the rescission of the policy. Because defense counsel never argued the UEF lacked standing in that case, the Court obviously never ruled on that issue. As such, Bessinger is not binding for the proposition that the UEF or other upstream employer/carrier has standing to enforce an employer's contractual rights under an insurance policy in this case.

Further, there is a significant legal distinction between parties to a proceeding, whose interests are aligned, echoing each other's respective positions to deflect their own liability, and one party trying to enforce another's exclusive contractual rights in the absence of the other party in the action. That distinction is further amplified here when Core never even made an appearance and stipulated to the Commission that BiBerk properly cancelled its coverage prior to Claimant's accident. Core's reservation of *its own rights* in that Compliance Agreement does not confer standing or create rights for SAF or UEF any more than the policy itself. Respondents were not parties to the Compliance Agreement and Core never assigned any of its reserved rights to Respondents thereafter. In sum, the Compliance Agreement does not create any right of action by the Respondents related to BiBerk's cancellation of Core's policy.

Finally, Bowman v. State Roofing Co., 365 S.C. 112, 616 S.E.2d 699 (2005) is imminently distinguishable from the instant case. The purported uninsured employer in that case signed a

Capitulation Agreement similar to the agreement at issue here admitting that it was operating without insurance coverage on the date of accident but reserved all its rights otherwise. Unlike the instant case, however, the uninsured employer Bowman actually appeared before the Commission represented by counsel and "remained adamant that it had coverage." Bowman 365 S.C. 112, 116. The Supreme Court ultimately held that the uninsured employer had not waived its claim that the carrier's cancellation of its policy was invalid because it made an appearance in the action to contest the purported cancellation. Bowman 365 S.C. 112, 117.

Contrarily, Core never appeared before the Commission in this case to contest BiBerk's cancellation of its coverage despite having notice of the proceedings and issues before the Commission. R. pp. 366-389. As such, unlike the employer in Bowman, Core **waived** its right to contest the cancellation of its policy by failing to appear. *See* Pitts v. New York Life Insurance Co., 247 S.C. 545, 148 S.E.2d 369 (1966) and Lyles v. BMI, Inc., 292 S.C. 153, 355 S.E.2d 282 (S.C. App. 1987) (an implied waiver results from acts and omissions of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable). Again, if Core waived its right to contest BiBerk's cancellation of its own policy by executing the Compliance and failing to appear in this matter, then Respondents as third parties to the coverage issue certainly lack standing to step into Core's shoes to do so.

II. Kentucky law applies specifically to the cancellation of Core's policy

Respondents contend South Carolina law applies to the cancellation of the policy via the sweeping language of S.C. Code §38-61-10 by asserting "the current matter obviously involves insurance written for South Carolina interests." BiBerk counters that the statute is not applicable to the specific coverage cancellation issue presented here because South Carolina "interests" were not implicated when cancellation of the coverage was undertaken.

First, § 38-61-10 does not automatically supplant the traditional doctrine of *lex loci contractus* in every case. Bowman v. Continental Ins. Co., 229 F.3d 1141 (4th Cir.2000) (unpublished opinion) (applying South Carolina law). Indeed, courts have often held that § 38-61-10 is inapplicable, noting "a lack of connection, interest, or nexus to South Carolina," such that it could not be said that the "property, lives, or interests" insured were located in South Carolina. *See* Bowman, 229 F.3d at 3 (finding that § 38-61-10 was not applicable to an insurance coverage dispute because at the time of the automobile accident the insured person and property were located in Georgia and the insured's sole connection with South Carolina was that the automobile accident merely occurred in South Carolina); Yeager v. Maryland Casualty Co., 868 F. Supp. 141, 144 n. 5 (D.S.C.1994) (finding that § 38-61-10 was not applicable to an insurance coverage dispute where there were no "interests" in South Carolina); Unisun Ins. Co. v. Hertz Rental Co., 312 S.C. 549, 436 S.E.2d 182, 184 (S.C.1993) (applying the rule of *lex loci contractus* after finding that § 38-61-10 was not applicable in a case where the property and interests insured were located outside of South Carolina at the time the contract was made).

The courts in both Bowman and Maryland Casualty Co. rejected application of § 38-61-10 in favor of the rule of *lex loci contractus.* In both cases, the only connection to South Carolina was that the automobile accident occurred there. *See* Bowman, 229 F.3d at 3; Maryland Casualty Co. *supra.* In this case, BiBerk initiated cancellation of Core's policy on April 2, 2019, which is **over a month** prior to Claimant's accident occurring in South Carolina. At that time, South Carolina had no interest whatsoever in the policy because the Part 3C "other states endorsement" for covering a claim arising under South Carolina law was only implicated by the actual occurrence of the accident in South Carolina on May 6, 2019. As such, the occurrence of the accident a month

after the cancellation was initiated cannot afford the basis for application of South Carolina law to the cancellation issue *ex post facto.*

Respondents argue that South Carolina "interests" were implicated before the Claimant's accident via Core's operations in South Carolina and BiBerk's policy is in effect a "South Carolina insurance policy." However, there is no evidence in the Record regarding when Core's South Carolina operations actually commenced, specifically, whether it was before or after BiBerk's cancellation efforts ensued. Cancellation was actually initiated less than a month after the policy went into effect. There is likewise no evidence in the Record that BiBerk knew or should have known of any purported operations in South Carolina by Core at the time of the policy's inception or at the time it initiated cancellation efforts. This begs the question of how BiBerk could have possibly been on notice that South Carolina law could apply to its cancellation of Core's policy. It is elementary that holding BiBerk to a standard without such notice offends every notion due process of law. For these reasons, Respondents assertion that BiBerk "obviously" insured South Carolina "interests" is untenable.

Respondents can only point to *subsequent* events and conduct by BiBerk that implicated South Carolina interests. They also erroneously conflate the distinct concepts of subject matter jurisdiction over the *merits* of the claim in South Carolina, which triggered the 3C "Other States" endorsement for coverage under the policy via he occurrence of the accident in South Carolina, and personal jurisdiction over the parties at the time the policy was entered into. The latter notion only implicates Kentucky law for the reasons previously discussed. Again, Respondents' arguments would be valid if South Carolina was an endorsed state for coverage under Part 3A of the policy. However, Kentucky was the only 3A endorsed state in BiBerk's policy with Core. As

such, only conditions existing at the time of the policy inception and/or cancellation are relevant to the narrow issue of the validity of the cancellation.

Perhaps most importantly, S.C. Code § 38-61-10 does not apply when there is a valid choice of law provision in the policy specifying that state law other than South Carolina's will apply. *See* Team IA Inc. v. Lucas, 395 S.C. 237, 717 S.E.2d 103 (Ct. App. 2011)(choice of law clauses are generally honored in South Carolina and "traditional choice of law rules only apply in the absence of an express provision regarding the applicable law to govern the contract."). Respondents cite no legal authority for its assertion that the statute voids or renders voidable an otherwise valid choice of law provision that does not otherwise offend South Carolina public policy. **Again, choice of law rules, including S.C. Code § 38-61-10, only apply in the absence of an express provision regarding the applicable law governing the contract.** Lucas *supra; See also* Bowman v. Continental Ins. Co., 229 F.3d 1141 (4th Cir.2000)(§ 38-61-10 does not automatically supplant the traditional doctrine of *lex loci contractus* in every case).

The question next becomes whether the Kentucky cancellation endorsement in BiBerk's policy for Core was an "express provision" that Kentucky law would apply to any cancellation of coverage. Despite Respondents protestations to the contrary, the endorsement's intent to designate Kentucky law is crystal clear on its face. First, the cancellation endorsement is entitled **"Kentucky Cancellation and Nonrenewal Endorsement."** R. p. 74.. Second, the policy terms/conditions for cancellation mirror applicable Kentucky statutes, in many instances verbatim, including proof of mailing to the address noted in the policy information page. For these reasons, the "Kentucky Cancellation and Nonrenewal Endorsement" is a valid choice of law provision.

Moreover, notwithstanding the South Carolina statute, Kentucky's own choice of law principles command application of its law to the cancellation. Kentucky follows the Restatement

of Conflicts of Laws (Second) §6 (1971) approach, which looks to the state with the state with the most significant relationship to the ***transaction and the parties.*** State Farm v. Hodgkiss-Warrisk, 413 S.W.3d 975 (Ky. 2013). Simply put, all other relevant factors at the time of the transaction- the entering into the contracting and/or the cancellation of the policy- demonstrate a closer nexus with Kentucky than South Carolina, including, but not limited to, the fact that Core, as the insured, is a registered LLC under the laws of Kentucky and is headquartered in Lexington, Kentucky.

Finally, application of Kentucky law via the policy's choice of law provision to the coverage cancellation issue resolves two paramount policy concerns of any multistate insurance coverage dispute- protection of justified expectations and the certainty, predictability, and uniformity of result. *See* Restatement of Conflicts of Laws (Second) §6 (1971). Hypothetically, it is not hard to imagine the resulting chaos that would ensue if multiple claims against Core arising under the laws of two or more different Part 3C endorsed states occurred. Under Respondents' theory, the law of multiple states with differing standards would apply to the cancellation. This blatant double standard obviously offends any reasonable notion of due process to the insurer. Luckily, BiBerk's policy contains the solution to this potential conundrum- the Kentucky choice of law designation in its cancellation endorsement.

III. BiBerk effectively cancelled Core's policy under Kentucky and/or South Carolina law prior to Claimant's accident

As BiBerk points out in its Appellant's Brief, and will reiterate again here, "proof of mailing" of a notice of cancellation to the insured does not refer to a single dispositive piece of evidence as the Commission held BiBerk's proof of mailing ledger constitutes. This is an error of law that commands reversal. In fact, the applicable statute, assuming *arguendo* that South Carolina law applies, does not even contain the term "proof of mailing." It only references "furnishing

notice." BiBerk is not arguing that "furnishing" notice requires something less than mailing the cancellation to the insured at its address in the policy in accordance with the terms of same. Rather, cancellation of an insurance policy must only be proved by a *preponderance of the evidence* based on the record as a whole. Noisette v. Ismail, 299 S.C. 243, 384 S.E.2d 310 (Ct. App. 1989). For the reasons set forth in BiBerk's Appellant's Brief, the preponderance of the evidence in the record confirms that the notice of cancellation was mailed to the correct address and *actually received* by Core.

Again, proof of delivery and/or receipt of the cancellation notice is not required for a valid cancellation under South Carolina or Kentucky law. Nevertheless, common sense dictates that the more stringent standard of proof of delivery and/or receipt trumps mere proof of mailing. In this case, the preponderance of the evidence weighs in favor of Core's receipt of BiBerk's notice of cancellation, including Core's failure to contest its receipt of the notice, Core's failure to appear in this matter and waiver of its right to otherwise contest the cancellation, and perhaps most importantly, Core's stipulation to the Commission that it was operating without coverage in South Carolina at the time of Claimant's accident.

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Of which Berkshire Hathaway Direct Insurance Company is the Appellant,

And South Carolina Department of Transportation, South Carolina State Accident Fund, and South Carolina Workers' Compensation Uninsured Employer's Fund are the Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief contains all material proposed to be included by any of the parties and not any other material.

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I certify that I have served the Appellant's Final Reply Brief by electronic mail on December 20, 2022, addressed to all attorneys of record as shown below:

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