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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE
SOUTH CAROLINA COURT OF APPEALS

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.

BERKSHIRE HATHAWAY DIRECT INSURANCE COMPANY'S PETITION FOR CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Berkshire Hathaway Direct Insurance Co. ("biBERK") hereby certifies that their Petition for Rehearing to the Court of Appeals was denied via Order filed on October 8, 2025.

QUESTIONS PRESENTED

1) First, did the Court of Appeals misapprehend established contract law in holding that a party not in privity of contract, and not an intended to be third-party beneficiary to such contract, may enforce the party in privity's contractual rights because the third-party has standing in the underlying dispute?
2) Did the Court of Appeals misinterpret the capitulation agreement between the insured and the Commission ("Agreement") in finding that the insured did not waive any rights against biBERK to contest the cancellation of the policy by signing the Agreement?
3) Did the Court of Appeals err in applying South Carolina law when considering the validity of the cancellation of the insurance policy when that policy included a choice of law provision stipulating that cancellation of the policy would be governed pursuant to Kentucky law?
4) Did the Court of Appeals err in holding that the insurance policy was not cancelled pursuant to South Carolina law *even if* South Carolina law had applied?
5) Did the Court of Appeals otherwise err in failing to REVERSE the Full Commission's decision that Core Services, LLC had valid workers' compensation insurance coverage by and through biBERK for the underlying claim and that the South Carolina Department of Transportation, SAF, UEF were properly dismissed with prejudice, when that decision was based upon fundamental misunderstandings of the laws of

contracts, standing, and conflict of laws as they pertain to workers compensation insureds, insurers, insurance policies, and third parties?

STATEMENT OF THE CASE

Core Services, LLC ("Core") is a landscaping/maintenance contractor headquartered in Lexington, Kentucky. It is undisputed that Core does not maintain any locations or own property in South Carolina. Core purchased a workers' compensation policy directly through Berkshire Hathaway Direct Insurance Company ("biBERK") with a coverage period of March 6, 2019 to March 6, 2020. That policy specifically endorses coverage in Kentucky under Part 3 A of the policy.[1] The policy also contains a cancellation endorsement designating Kentucky as the choice of state law governing its cancellation. R. p. 74. The language of the endorsement mirrors Kentucky statutes governing cancellation of an insurance policy. *Id.* Part 3 C of the policy contains a standard "Other States" endorsement that provides coverage under the laws of all states other than those specifically enumerated. R. p. 192.[2] Tree removal and excavation is specifically disavowed on the business description of the Information Page. *Id.* The South Carolina Department of Transportation ("DOT") contracted with Core to perform highway right of way maintenance and roadside mowing via contract executed March 4, 2019. R. pp. 3-5.

[1] States typically listed as 3.A "primary states" in a standard workers compensation policy include the following: the state where the insured's home office is located; states where the insured's branch offices are located; the insured's state of incorporation; where the insured is required to register to conduct business; any state where a contract of hire is made; any states where a subcontractor is hired to perform work; and any state that has "significant contact" with an employee. [Valley Insurance Agency Alliance, *Which States Should Be Listed In Item 3A In the Workers Compensation Policy?* https://viaa4u.com/which-states-should-be-listed-in-item-3a-in-the-workers-compensation-policy/

[2] "Other States Coverage" in a standard workers' compensation policy provides coverage for an insured's employees temporarily working in states other than the insured's home state, as specifically listed in item 3.C of the information page of the policy. This endorsement expands the policy so that an injured employee can receive compensation benefits as prescribed by other states listed in the endorsement. [International Risk Management Institute Glossary of Insurance Terms, "*Other States Coverage," http: https://www.irmi.com/term/insurance-definitions/other-states-coverage*]. biBERK concedes this endorsement would apply to South Carolina.

Within thirty (30) days after the policy went into effect, biBERK moved to cancel Core's policy for misrepresentation of its business operations, specifically, its land clearing operations. R. pp. 220-223. In accordance with policy terms and Kentucky statutes, the notice of cancellation was mailed by biBERK to Core on April 2, 2019 at the policyholder address noted in the contract. R. p. 180. The effective date of cancellation was April 21, 2019 per that notice. *Id*. The National Council on Compensation Insurers ("NCCI") received notice of the cancellation on behalf of the commonwealth of Kentucky on April 2, 2019. R. p. 183. Incidentally, NCCI is also the S.C. Worker's Compensation Commission's authorized agent for notice of cancellations per WCC R. 67-405 (C).

Claimant, Steven Brant, was injured within the course and scope of his employment with Core on May 6, 2019, in Beaufort County, South Carolina. It is undisputed that Claimant was directly employed by Core on the date in question performing services pursuant to Core's contract with the S.C. Department of Transportation ("DOT") to provide roadside mowing and right of way maintenance in certain South Carolina counties. It is also apparent that Core's work for DOT was an essential and necessary part of DOT's mission to maintain the public highways in South Carolina to the extent that DOT should be considered Claimant's "statutory employer" and potentially liable for benefits as an "upstream" employer pursuant to S.C. Code §42-1-400 *et seq.* The South Carolina Uninsured Employers Fund ("UEF") was added as a party to the claim as well.

biBERK contends Core's policy was effectively cancelled at the time of Claimant's injury. biBERK submitted an entry from its mail room log and postmark, along with other evidence, confirming the cancellation notice was mailed to Core. R. p. 177. There is admittedly a discrepancy between the address noted in the log and Core's mailing address in the policy information page. The mailing log notes Core's address is "828 E. Hight Street Lexington, Ky

40502," but its address per the policy is "828 E. High Street **PMB 272** Lexington, KY 40502." (emphasis added). The designation "PMB" presumably refers to a private mailbox.[3] The actual cancellation documents themselves contain the PMB number. There is no evidence in the record establishing that Core never actually received the cancellation notice despite the discrepancy. In fact, there is circumstantial evidence that Core in fact did receive the notice of cancellation, including, but not limited to, the undisputed facts that it never appeared in this matter to dispute the cancellation, as well as its stipulation that it was operating in South Carolina without coverage at the time of Claimant's accident.

UEF and the SAF argue that biBERK's cancellation of the Core policy was ineffective under South Carolina law and that the policy remained in effect to cover Claimant's accident. They rely upon clerical discrepancy between Core's mailing address noted in the policy's information page and the address noted in biBERK's proof of mailing log. biBERK initially countered that, as an elementary matter of black letter contract law, neither the UEF nor the SAF can contest the cancellation of Core's policy since they are not parties to it. Moreover, Core, as the insured under the policy, essentially stipulated that the policy was effectively cancelled when it executed the Agreement with the Commission admitting it was uninsured at the time of Claimant's accident. Again, Core itself has never contested the cancellation of its coverage. In the alternative, biBERK submitted that Core's policy was effectively cancelled under the governing law of Kentucky regardless of the discrepancy relied upon by UEF and SAF. Finally, biBERK argued even if South Carolina law governs the cancellation issue, the evidence in the Record confirms the policy was not in effect on the Claimant's date of accident.

[3] A Google search of the 828 E. High Street address in Lexington, Kentucky confirms a UPS Store at that location.

By Order dated June 9, 2021 Commissioner Susan Barden found that biBERK did not effectively cancel Core's policy under South Carolina law and that coverage remained in effect on Claimant's date of accident. She awarded Claimant temporary total disability (TTD) and permanent partial disability (PPD) compensation benefits, as well as ordered payment of incurred causally related medical expenses against biBERK.

biBERK appealed Commissioner Barden's Decision and Order to the Full Commission arguing that SAF and UEF had no standing to enforce Core's rights under the insurance policy by challenging the cancellation of the policy and that the policy was effectively cancelled prior to the Claimant's injury. However, the the Full Commission affirmed by essentially adopting Commissioner Barden's findings and Order.

biBERK appealed the Full Commission's order to the South Carolina Court of Appeals pursuant to S.C. Code §42-17-60. On appeal, biBERK again argued that SAF and UEF could not enforce the contractual rights of a third-party uninsured employer, that the Full Commission erred in applying South Carolina law to the cancellation of Core's workers compensation coverage, that the insurance policy was effectively cancelled prior to the date of the underlying accident pursuant to Kentucky law, and that even if South Carolina law governed cancellation of the policy, that it was effectively cancelled under South Carolina law prior to the underlying accident occurring.

The Court of Appeals affirmed the Full Commission's order without holding oral arguments in their unpublished opinion filed July 30, 2025. The Court of Appeals held that SAF and UEF had standing to contest the cancellation of Core's policy with biBERK, that the "compliance agreement" between Core and the Commission did not waive any claims Core may have against an insurance company, that South Carolina law applied to the cancellation, and that

the insurance policy was not effectively cancelled pursuant to South Carolina law at the time of Claimant's injury.

ARGUMENTS

biBERK submits that the Court of Appeals' affirmation of the Full Commission's order holding that a party or parties, who are not in privity of contract with an insurer via an insurance policy, can enforce the insured's rights under that insurance policy to escape liability is patently erroneous and contrary to elementary contract law. Further, the Court of Appeals' order fundamentally challenges well established law regarding waiver of contractual rights by parties to a contract, standing of third-party beneficiaries to a contract, the rights of third-party beneficiaries to a contract, the validity of choice of law provisions in contracts involving out-of-state or multistate entities, procedural methods for cancellation of insurance policies, and notice requirements for cancellation of insurance policies, among other issues. As such, the Court of Appeals' order has broad-reaching and significant implications that extend far beyond the facts and issues of this claim and far beyond the realm of workers' compensation or insurance law in general. The questions and issues presented by the Court of Appeals order, raised by biBERK herein, cannot be answered simply by applying established law to these facts – they involve practical business and policy implications that merit very careful reflection by the Supreme Court.

I. THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN FINDING THAT A PARTY, NOT IN PRIVITY OF CONTRACT, AND NOT AN INTENDED TO BE THIRD-PARTY BENEFICIARY TO SUCH CONTRACT, MAY ENFORCE THE PARTY IN PRIVITY'S CONTRACTUAL RIGHTS MERELY BECAUSE THEY HAVE STANDING IN THE UNDERLYING DISPUTE.

As an initial matter, biBERK emphasizes the well settled principle that an insurance policy is essentially a contract between the insured and its insurer. As such, the rules of contract law apply to construction and effect of the policy. See B.L.G Enterprises v. First Financial Insurance

Co., 334 S.C. 529, 514 S.E.2d 327 (1999) (insurance policies are subject to the general rules of contract construction and the Court must give policy language its plain, ordinary, and popular meaning). South Carolina contract law carries a presumption that an individual who is not a party to a contract, including an insurance policy, lacks privity to enforce it. Trancik v. USAA Insurance Co., 354 S.C. 549, 581 S.E.2d 858 (Ct. App. 2003). Further, 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. Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994). As such, a party not in privity of contract with another cannot maintain an action for breach of the contract, and any damage resulting from such breach is not recoverable by the third party lacking privity. *Id*.

In this case, SAF and UEF were clearly not parties to, or otherwise in privity with, the insurance contract between Core and biBERK. Moreover, Core and biBERK did not specifically intend to make SAF or UEF a third-party beneficiary to the contract either. The only third-party beneficiary to the workers compensation policy is Claimant himself. See S.C. Code §42-5-80 (B) (an insurance policy "must be construed to be a direct promise by the insurer to the person entitled to compensation enforceable in his name."). The mere fact that UEF and SAF may become liable for this claim by operation of law merely renders them incidental or consequential casualties of any alleged breach of the insurance contract. Consequently, UEF and/or SAF lack legal standing to contest biBERK's alleged breach of its contract with Core, even if they have standing in the underlying claim due to potential liability.

For the first time in the history of South Carolina jurisprudence a Court of this state has held, without citing any precedent on point, that a party not in privity of contract, and not an

intended third-party beneficiary to such contract, may enforce the party in privity's (Core's) contractual rights by challenging the cancellation of Core's policy with biBERK. This case obviously involves a contract of insurance between biBERK and Core Services, LLC ("Core") that was cancelled prior to the date of loss that is the subject of this underlying claim. The Court of Appeals' holding that SAF and UEF can enforce coverage merely because they otherwise may be negatively affected via responsibility for this claim is categorially contrary to elementary South Carolina contract law. *See* 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).

Several prior cases have dealt with the issue of uninsured employers whose coverages were allegedly not cancelled properly, thus making the UEF potentially liable for the underlying claims. *See* Bowman v. State Roofing Co., 365 S.C. 112, 616 S.E.2d 699 (SC 2005); Burris v. Propst Lumber & Logging, 396 S.C. 85, 719 S.E.2d 695 (Ct. App. 2011); Crews v. W.R. Crews Inc., 380 S.C. 15, 699 S.E.2d 189 (Ct. App. 2010); and Jefferey v. Sunshine Recycling Inc., 386 S.C. 174, 687 S.E.2d 322 (Ct. App. 2009). **In all those cases the alleged uninsured employers appeared before the Commission to contest the validity of the cancellation of their respective policies.** The UEF was also a party to those aforementioned cases and obviously joined the aggrieved employers' arguments to deflect its own liability. In contrast to these cases, Core has not made such an appearance in this case or made any attempt to contest the validity of the cancellation of its' policy with biBERK.

The Court of Appeals' Opinion focuses merely on the concept of standing in general while overlooking the specific issue presented here- whether parties not in privity of contract with an

insurer and not intended third- party beneficiaries to the policy can enforce the insured's rights under an insurance policy. Due to the unique circumstances of this claim, it is distinguished from those cited above in that Core never disputed the validity of the policy cancellation. Under the Court of Appeals reasoning, UEF, in particular, can contest the validity of any policy cancellation of an alleged uninsured employer which may impose liability upon UEF, **whether or not** the employer, who was a party to the insurance policy, admits that it was uninsured or otherwise fails to contest the validity of the policy cancellation. This finding is fundamentally contradictory to established contract law as outlined above.

For these reasons, the Court of Appeals Opinion must be REVERSED.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE CAPITULATION AGREEMENT BETWEEN THE INSURED AND THE COMMISSION DID NOT WAIVE ANY RIGHTS AGAINST BIBERK TO CONTEST THE CANCELLATION OF THE POLICY AND THEREFORE DID NOT WAIVE THE RIGHTS OF SAF OR UEF WHO WERE NOT PARTIES TO EITHER THE AGREEMENT OR THE INSURANCE POLICY.

In addition misapprehending the legal issue of UEF"s and SAF's ability to enforce Core's rights under the policy, the Court of Appeals' interpretation of the capitulation agreement between Core and the Commission ("Agreement") is patently erroneous. Even though Core made no appearance to state its position in this matter, the Court of Appeals nevertheless sought to read Core's mind by concluding that it did not waive any rights against biBERK to contest the cancellation of the policy by signing the Agreement. However, Core's representative clearly *stipulated* in the Agreement**, "I acknowledge for the period from April 21, 2019 until May 15, 2019, when coverage was obtained, the *Respondent was operating without worker's compensation insurance in violation of S.C. Code Ann. § 42-5-10 and § 42-5-20*."** R. p. 1 (emphasis added). This is essentially an admission that biBERK's cancellation of Core's coverage for that period was valid. Even if Core reserved "rights" against biBERK under the Agreement, what rights could it have maintained contrary to this clear

stipulation? In light of Core's undisputed failure to make an appearance to contest the validity of the policy cancellation, SAF and UEF must be bound to Core's stipulation.

Relying on Bowman v. State Roofing Co., 365 S.C. 112, 616 S.E.2d 699 (SC 2005) the Court of Appeals held that the UEF and SAF can basically "step into the shoes" of Core to contest the cancellation under the Agreement. However, this reliance is misplaced for two reasons. First, the Agreement in this case only reserves *Core's* rights ("Executing the agreement does not … waive any claims or causes of action the *Respondent* [Core] may have against any third party, insurance company, agent, or broker.") R. p. 1. The Agreement does not create rights or causes of action for others like UEF or SAF. Second, Bowman *supra* is easily distinguishable from the instant case because **the alleged uninsured employer in that case actually appeared before the Commission to contest the validity of the cancellation of its policy.** *See also* Burris v. Propst Lumber & Logging, 396 S.C. 85, 719 S.E.2d 695 (Ct. App. 2011); Crews v. W.R. Crews Inc., 380 S.C. 15, 699 S.E.2d 189 (Ct. App. 2010); and Jefferey v. Sunshine Recycling Inc., 386 S.C. 174, 687 S.E.2d 322 (Ct. App. 2009). Again, it is telling that Core has not made an appearance in this case to remedy the alleged harm that has allegedly befallen it as a result of the cancellation. If Core does not contend that it has been harmed by an invalid cancellation of its policy, then SAF and UEF cannot make that claim on Core's behalf just because one of them may ultimately be responsible for this claim by operation of law.

For these reasons, the Court of Appeals Opinion must be REVERSED.

III. THE COURT OF APPEALS ERRED IN APPLYING SOUTH CAROLINA LAW WHEN CONSIDERING THE VALIDITY OF THE CANCELLATION OF THE INSURANCE POLICY WHEN THAT POLICY INCLUDED A VALID CHOICE OF LAW PROVISION STIPULATING THAT CANCELLATION OF THE POLICY WOULD BE GOVERNED PURSUANT TO KENTUCKY LAW.

The Court of Appeals' blanket application of S.C. Code § 38-61-10 to the cancellation of Core's insurance policy misapprehends fundamental notions of jurisdiction and choice of law. Specifically, S.C. Code § 38-61-10 does not supplant a valid choice of law provision in a 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."). Moreover, S.C. Code § 38-61-10 does not void or render voidable an otherwise valid choice of law provision that does not otherwise offend South Carolina public policy.

Although South Carolina certainly has subject matter jurisdiction over the merits of the claim under S.C. Code §42-15-10 because the accident occurred in South Carolina, South Carolina law is not applicable to the coverage cancellation **because biBERK initiated efforts to cancel Core's coverage on April 2, 2019, an entire month before South Carolina interests were even implicated by the occurrence of Claimant's accident on May 6, 2019.** Simply put, South Carolina had no interest in biBERK's cancellation of Core's policy at the time those efforts were initiated. *See* Lister v. NationsBank, 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997) (South Carolina contract choice of law jurisprudence holds that in the absence of an effective choice of law by the parties Courts will typically look to which state has the most significant relationship to the *transaction and the parties at issue*)(emphasis added).

In this case, the Kentucky cancellation endorsement in biBERK's policy for Core was an "express provision" that Kentucky law governs cancellation of coverage. R. p. 74 This endorsement's intent to designate Kentucky law is crystal clear on its face. First, the cancellation endorsement is entitled **"Kentucky Cancellation and Nonrenewal Endorsement.**" *Id*. Second, the policy terms/conditions for cancellation mirror applicable Kentucky statutes, in many instances verbatim.

Kentucky has the most significant relationship to the cancellation transaction and parties (biBERK, and Core) as of April 2, 2019. Core is a Kentucky registered LLC headquartered in Lexington, Kentucky and Kentucky is the Part 3 A endorsed state of coverage in the policy R. p. 56. The policy was purchased directly from biBERK without an agent or broker in Kentucky, but the policy

for all practical intents and purposes was entered into in Kentucky. South Carolina's interests did not arise until the accident occurred on May 6, 2019 and conferred jurisdiction of the underlying claim via Part 3.C of the policy. As such, there is no basis for application of South Carolina law to the cancellation issue.

In sum, application of Kentucky law via the policy's choice of law provision governing cancellation 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 states whose interests may be implicated. Due process would not tolerate the laws of multiple states with differing standards governing a valid cancellation. This policy contains the solution to this potential conundrum- the Kentucky choice of law designation in its cancellation endorsement. Since the Court of Appeals and the Full Commission erred as a matter of law in applying South Carolina law to the cancellation issue, the Supreme Court should GRANT biBERK's Petition for Writ of Certiorari, REVERSE the Court of Appeals' decision and REMAND the claim back to the Commission for findings of fact pursuant to Kentucky law.

a. **BIBERK'S CANCELLATION OF THE POLICY WAS VALID PURSUANT TO KENTUCKY LAW.**

Kentucky Revised Statutes (K.R.S.) §304.20-320 provides that notice of cancellation of an insurance policy must be mailed to the insured "at least fourteen (14) days prior to the effective date of the cancellation if the cancellation is for nonpayment of premium *or occurs within sixty (60) days* of the date of the insurance policy." (emphasis added). K.R.S §304.20-320 (c) further states "proof of mailing of notice of cancellations or of reasons for cancellation to the named insured at the address shown in the policy shall be sufficient proof of notice." Further, K.R.S §342.340(2) also governs

cancellation of workers compensation policies in Kentucky. The statute provides, in pertinent part, the following:

> [e]very insurance carrier or self-insured group shall in like manner notify the commissioner upon the cancellation, lapse, termination, expiration by reason of termination of the policy period, or non-renewal of any policy issued by it….The above filings are to be made on the forms prescribed by the commissioner. *Termination of any policy of insurance under the provisions of this chapter shall take effect no greater than ten (10) days prior to the receipt of the notification by the commissioner*…. K.R.S §342.340(2) (emphasis added).

In this case, the policy in question had been in effect less than 60 days prior to biBERK initiating cancellation of same. As such, the fourteen (14) day effective date provision of Kentucky law applies. Notice of cancellation ("NOC") was mailed on 4/2/2019 and the effective cancellation date was 4/21/2019. R. pp. 182, 183. This is greater than the fourteen (14) day statutory period. The effective cancellation date time requirements of K.R.S. §342.340(2) have clearly not been implicated here- the statute states that the effective date of coverage cancellation cannot be more than ten (10) days ***prior to*** notice to the Kentucky workers compensation commission and the effective cancellation date here occurred greater than 14 days ***after*** notice was provided. There is no evidence that biBERK failed to comply with K.R.S. §342.340(2)'s requirements on the form of notice to the applicable workers compensation authority in Kentucky. Indeed, the coverage verification screen on the Kentucky government website confirms the cancellation was effective as of April 21, 2019 R. p. 184. NCCI's website also confirms receipt of notice to cancel on April 2, 2019 and effective date of cancellation of April 21, 2019. R. p. 183.

Next, the discrepancy between Core's address as noted in the policy and the address to which the NOC was mailed according to the proof of mailing is inconsequential under Kentucky law. biBERK substantially complied with Kentucky law governing cancellation of insurance and Core has not rebutted the statutory presumption that a letter properly mailed has been received. The Kentucky Supreme Court specifically addressed these issues in Goodin v. General Accident Fire and Life Assurance Corp, 450 S.W.2d 252 (1970). The Court of Appeals in that case deemed similar

discrepancies harmless, where the name of the addressee to whom a cancellation notice was mailed differed slightly from the named insured policyholder. In addition, the insured argued that the address itself was misleading because it denoted both the city and the county in the insured's address. Despite the insured's protests in Goodin that he never received the cancellation notice, the Court of Appeals concluded the policy was effectively cancelled because the insured could not rebut the presumption under Kentucky law that a properly mailed document had been received. 450 S.W.2d at 255 ("[p]roof of mailing from the office of the insurer is sufficient to sustain a finding the notice was effective without proof that such notice was actually received by the insured and even though the insured denies receipt of the communication." [internal citations omitted]).

In this case, it cannot be stressed enough that Core never claimed that it did not receive the notice of cancellation. Moreover, no reasonable inference of non-delivery can be drawn from any purported omission of the private mailbox number from Core's address. There is no evidence that the notice addressed to Core was returned as undeliverable by the private mail vendor. Further, it is certainly reasonable to expect that a private mail vendor would know to deposit mail addressed to a customer at its location without the actual box number noted in the address line.

Other evidence in the Record supports the inference that the notice of cancellation was indeed mailed to Core at the address noted in the policy, including the PMB number. Specially, the address page from the notice of cancellation package sent to Core that clearly contains the PMB number from the policy information page on its face. R. p. 83-89. This address would have been clearly visible to the mail carrier through the address window of a standard 9 x 11 catalog envelope. It is also significant to note that Core's PMB address is also noted on every other notice of cancellation document mailed to it. R. p. 83-89. The fact Core has not even made an appearance in this case alleging it did not receive the NOC is further proof that it received the notice. To that extent this case is distinguishable from Goodin *supra* where the insured in that case at least protested receipt of the notice and rebutted the

presumption of a valid mailing. Again, Core has never done so here., which means Core has not rebutted the presumption of a valid mailing under Kentucky law.

For these reasons, the Court of Appeals Opinion must be REVERSED.

IV. THE COURT OF APPEALS ERRED IN HOLDING THAT THE INSURANCE POLICY WAS NOT EFFECTIVELY CANCELLED PURSUANT TO SOUTH CAROLINA LAW.

Proof of delivery and/or receipt of the cancellation notice by the insured is not required for a valid cancellation under South Carolina or Kentucky law. *See* J.M. Edens v. S.C. Farm Bureau Mutual Ins. Co., 279 S.C. 377, 308 S.E.2d 670 (Ct. App. 1983) (where a cancellation clause provides that an insurer may cancel by mailing to the insured's address, or where it contains *substantially similar language*, the mere mailing is sufficient to effect cancellation). Regarding the mode and manner of an effective cancellation, S.C. Code §38-75-730 (c) provides that the policy may be cancelled for any reason "by *furnishing to the insured* at least thirty days written notice of cancellation.. ." While subsection (b) of this same statute states that notice may "delivered" or "mailed" and that "proof of mailing is sufficient proof of notice" to the insured for purposes of that subsection, **§38-75-730 (c) contains no such provisions**. The distinct differences between the statutory requirements of subsections (b) and (c) are obviously meaningful and significant as a general rule of statutory construction. As such, the questions become what constitutes "furnishing" to the insured thirty days written notice of cancellation for policies in effect in less than 120 days? This is a two part inquiry. First, furnishing notice is not defined term under this section, therefore the term must be ascribed its plain and ordinary meaning. "furnish" is defined by *Black's Law Dictionary* as to "provide." biBERK submits that the "furnishing" of notice within the meaning of §38-75-730 (c) allows a broader standard than the proof of mailing presumed acceptable under §38-75-730 (b). As such, the Court of Appeals' and Full Commission's sole focus on a single dispositive piece of evidence for "proof of mailing" of notice as the standard for effective cancellation in this case is misplaced.

The evidence in the record establishes that biBERK "furnished" Core written notice of the cancellation within 30 days of its effect in accordance with S.C. Code §38-75-730 (c). *See* Noisette v. Ismail, 299 S.C. 243, 384 S.E.2d 310 (Ct. App. 1989) (cancellation of an insurance policy must be proved by a preponderance of the evidence). The proof of the following undisputed facts in the Record confirm same: a) biBERK generated a written document addressed to Core at its full address noted in the policy- "828 E. High Street **PMB 272** Lexington, KY 40502- advising of the cancellation of its policy due to "material misrepresentation/fraud" (R. p. 180); b) Core's full address, including the PMB number, was generated on the address label page of the notice of cancellation packet forwarded to Core in a position in the paper that would be visible to the mail carrier through the address window of a standard 9 x 11 catalog envelope (R. p. 83); c) biBERK produced a notice of cancellation proof of mailing log referencing Core Services, including a postmark dated April 2, 2019, confirming the notice was placed in the U.S. Mail (R. p. 182); d) Margaret Yoh testified that the notice of cancellation was mailed to Core at 828 E. High Street PMB 272 Lexington, KY 40502 (R. pp. 220, 222); e) there is no evidence that the notice was returned to sender or was otherwise undeliverable to Core for any reason (R. p. 222); f) Core has never appeared in this matter or otherwise represented that it never received the notice of cancellation; g) Core has not appeared in this matter or taken any other action to contest the cancellation of its coverage based on insufficiency of notice; and h) Core stipulated it was operating without coverage in South Carolina at the time of Claimant's accident.

In sum, the Court of Appeals' fixation on the "proof of mailing" ledger is misplaced because the statutory mandate of "furnishing notice" of cancelation to the insured does not refer to a single dispositive piece of evidence. 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). Relying solely on the "proof of mailing" ledger epitomizes the elevation of form over substance, which should have no place in South Carolina law. Because the Court of Appeals clearly misinterpreted and misapplied § 38-75-730(b) and 38-75-730 (b), the Supreme Court

should GRANT biBERK's Petition for Writ of Certiorari, review the case under the correct statutory interpretation, REVERSE the Court of Appeals' Opinion accordingly and remand the case back to the Commission with instructions to weigh the preponderance of the evidence as a whole instead of hinging its decision on a single discrepancy with dubious import.

CONCLUSION

biBERK respectfully submits that the Court of Appeals erred as a matter of law in allowing SAF and UEF to enforce Core's contractual rights, in applying South Carolina law in spite of a valid choice of law provision, and in holding that biBERK's cancellation of the insurance policy was invalid under South Carolina law. For the reasons stated herein, biBERK prays that this Court grant it Petition for a Writ of Certiorari to correct these fundamental errors.

Respectfully submitted,

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