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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.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to South Carolina Appellate Court Rules 221 and 240, Berkshire Hathaway Direct Insurance Company ("Appellant") hereby petitions the Court for a rehearing of this matter following its Opinion dated July 30, 2025 (Unpublished Opinion No. 2025-UP-264). The purpose of a Petition for Rehearing under SCAR 221 is not to reargue the case in the appellate court a second time or regurgitate issues already argued/briefed. *See* Kennedy v. S.C. Retirement Systems, 349 S.C. 531, 564 S.E.2d 322 (2011). Rather, to prevail in its Petition for Rehearing a party must show that the Court overlooked or misapprehended a specific fact or argument. *Id.* For the ensuing reasons, Appellants respectfully submit that the Court has misapprehended numerous issues/arguments and facts presented in this case and should grant this Petition for Rehearing to amend its rulings accordingly.

ARGUMENTS

I. The SAF and UEF cannot enforce Core Services' contractual rights

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 contractual rights. This case obviously involves a contract of insurance between Appellant and Core Services, LLC ("Core") that was cancelled prior to the date of loss that is the subject of this underlying claim. The Court's 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). The Court's 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-beneficiaries to the policy can enforce the insured's rights under an insurance policy. Again, for the reasons already previously argued/briefed the answer to this question is unequivocally "NO." As such, the Court should rehear and reconsider this issue to reconcile its ruling on standing in general with well-established South Carolina contract law pertaining specifically to who may enforce coverage under an insurance policy.

II. Core *stipulated* that it did not have coverage under the Act for Claimant's accident; thus, conceding that Appellant's cancellation of its policy was valid.

In addition misapprehending the legal issue of UEF"s and SAF's ability to enforce Core's rights under the policy, the Court's 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 nevertheless sought to read Core's mind by concluding that it did not waive any rights against Appellant 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*."** (emphasis added). This is essentially an admission that Appellant's cancellation of Core's coverage for that period was valid. Even if Core reserved "rights" against Appellant 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 here, it did in fact waive any rights it retained under the Agreement. As such, the Court must bind SAF and UEF to that stipulation and waiver.

Relying on Bowman v. State Roofing Co., 365 S.C. 112, 616 S.E.2d 699 (SC 2005) the Court holds 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."). 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.

III. Kentucky law governs the cancellation of Core's policy.

The Court's 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.

In this case, the Kentucky cancellation endorsement in BiBerk's policy for Core was an "express provision" that Kentucky law governs cancellation of coverage. 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." R. p. 74. Second, the policy terms/conditions for cancellation mirror applicable Kentucky statutes, in many instances verbatim. 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 Commission erred as a matter of law in applying South Carolina law to the cancellation issue, the Court should amend its Opinion to REVERSE and REMAND back to the Commission for proper findings of fact governed by the correct law. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981)(the Court may reverse the Commission's decision if it is clearly erroneous or affected by an error of law).

IV. Appellant properly cancelled Core's policy under 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*…. (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. 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. Appellant 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 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 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.

V. In the alternative, Core's policy was also effectively cancelled under 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's and 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 Appellant "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) Appellant 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's 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. The Court should amend its Option 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

For all the aforementioned reasons, the Court should withdraw its Opinion and issue a substituted Opinion finding that a) Appellant properly cancelled its insurance coverage prior to Claimant's accident; or b) the case was governed by an error of law should be remanded to the Commission for factual findings in accordance with correct legal standards.

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