THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
No. 2011189987

APPEAL FROM NEWBERRY COUNTY
In the Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Civil Action No. 2008-CP-36-417

Travelers Property Casualty Co.,

Appellant,

v.

Senn Freight Lines, Inc.,

Respondent.

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

W. Chad Jenkins
POPE AND HUDGENS, P.A.
1508 College Street
Post Office Box 190
Newberry, South Carolina 29108
(803) 276-2532
(803) 276-8684 FAX
cjenkins@popeandhudgens.com

Attorneys for Respondent

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STATEMENT OF THE CASE

Respondent Travelers Property Casualty Company of America & The Travelers Indemnity Company of Illinois (hereinafter "Travelers") filed a Complaint with the Newberry County Clerk of Court on September 3, 2008 for a non-jury debt collection. (R. p. 19). Respondent Senn Freight Lines, Inc., (hereinafter "Senn Freight") filed its Answer & Counterclaim on November 10, 2008 asserting a general denial and alleging counterclaims for breach of contract, insurance bad faith and a surety bond claim. (R. p. 25). A trial was held before the Honorable Eugene C. Griffith, Jr. in the Court of Common Pleas for Newberry County on August 3-4, 2010. The jury issued its unanimous verdict for Defendant Senn Freight on Travelers' Complaint and awarding Senn Freight $4,851.06 on its breach of contract claim, $6,000.00 in actual damages on its insurance bad faith claim, $100,000.00 in punitive damages on its bad insurance bad faith claim, and $2,360.00 plus interest on the surety bond claim. (R. p. 15).

Travelers filed its Motion for Judgment Notwithstanding the Verdict/New Trial Absolute and The Honorable Eugene C. Griffith, Jr. heard oral arguments on same. Travelers alleged there was no evidence to support the jury's verdict and award of damages on each claim and counterclaim and that the jury acted improperly, necessitating the trial court granting a new trial absolute under the thirteenth juror doctrine. (R. p. 38).

The trial court issued its Order filed March 7, 2011 denying Travelers Motions on the Complaint and Counterclaims for breach of contract and insurance bad faith and affirming the jury's damages awards, including the punitive damage award. (R. p. 1). The trial court granted Travelers' JNOV motion regarding the surety bond claim and Senn

Freight did not appeal same. Whereby Travelers argues the trial court erred in denying Travelers' past trial motions.

STATEMENT OF FACTS

Senn Freight Lines, Inc., or its corporate predecessors, has been operating a flat bed trucking business since the mid 1950's. (R. p. 56, lines 11-14). Senn Freight typically receives a call from a prospective shipper, negotiates with said shipper for the price to carry cargo that would fit on a flat bed trailer and hauls it anywhere within the continental United States. (R. p. 57, lines 8-12).

As is required with businesses employing four or more persons, Senn Freight provided worker's compensation insurance coverage for certain office and clerical employees and applied to have this coverage provided through the South Carolina Assigned Risk Plan. Travelers provided coverage pursuant to the Assigned Risk Plan for the office and clerical staff of Senn Freight. Senn Freight applied for and received coverage only for the office and clerical employees. (R. p. 96, lines 10-18; R. p. 121, lines 13-21). At no time did Senn Freight ask for or receive any coverage for any driver and at no times were any claims submitted to Travelers for any drivers. (R. p. 93, lines 1-11).

Senn Freight has not employed drivers since 1994. (R. p. 92, lines 19-23). Senn Freight often utilized leased drivers obtained through a leasing company, also known as Professional Employee Organization or PEO, whereby PEO provides the employee and the worker's compensation insurance covering those drivers. (R. p. 61, lines 16-21). Several leasing companies were utilized. Senn Freight also utilized owner-operators who provided their own trucks and supplies and were responsible for their own insurance,

maintenance, taxes food and all other necessities of the job. (R. p. 90, lines 4-21). Senn Freight utilized no more than four or five owner-operators at any given time. (R. p. 64, lines 15-25). The owner-operators were free to conduct business as they saw fit with no control or authority exercised by Senn Freight. Senn Freight was only concerned that the loads went from point A to point B efficiently. (R. p. 94, lines 16-24).

Travelers filed its non-jury debt collection action via Complaint dated August 11, 2008 and filed on September 3, 2008 in the Newberry County Clerk of Court's office (R. p. 19). The policy periods applicable to this case began on July 10, 2003 and ended on October 25, 2005. (R. pp. 133-148; pp. 149-166; pp. 167-185). If the last policy, which was cancelled early by Travelers, had run to its end date, it would have run only until July 10, 2006. (R. pp. 167-185). Travelers waited over two years, until after the expiration of any possible claims period for worker's compensation claims under the policies, before filing this lawsuit in September 2008. (R. p. 19).

Travelers' Complaint in this matter originally alleged damages due for premiums earned but not paid on the leased drivers and the auditor who visited Senn Freight in October 2005 focused on the leased drivers. (R. p. 19; R. p. 97, lines 7-9). Over $300,000.00 worth of worker's compensation claims were filed for drivers covered by the PEOs during the policy terms at issue in this case and each claim was covered by the worker's compensation carrier provided by the PEO. Travelers was not asked to cover any of them. (R. p. 97, lines 10-25). At trial, Travelers turned their attention to the owner-operator drivers which were also utilized by Senn Freight, arguing that they should be classified as employees or statutory employees. These drivers utilized their own vehicles, maintained their own vehicles, were responsible for their own insurance,

gas and incidentals and signed an owner-operator agreement with Senn Freight declaring that they were in fact independent contractors. (R. p. 65, lines 12-13; R. p. 90, lines 4-21). Owner-operators are called by Senn Freight and offered individual loads as they may be available and as Senn Freight and driver sees fit. (R. p. 94, line 9 – p. 95, line 11). These independent contractors are paid on a different basis because they are responsible for their own trucks, maintenance, repair, gas and other incidentals so the funds received by them cannot be viewed in the same light as would be for a leased driver who is paid a salary. (R. p. 90, lines 4-21). Senn Freight did not have the right to control the owner operators as they could choose their own route and what work they wanted. (R. p. 94, line 18 – p. 95, line 11).

Senn Freight required each owner-operator to produce proof of insurance coverage, which was normally in the form of an occupational accident policy. (R. p. 78, lines 12-24; R. p. 79, lines 17-22). The individual owner-operators are not legally required to carry statutory worker's compensation insurance due to the fact that they have less than four employees so Senn Freight allowed for occupational accident polices and these policies have always covered the claims. (R. p. 90, line 22; R. p. 91, lines 10-20).

Travelers argued at trial that any policy cancellation was due to "non-cooperation" by Senn Freight in the audit process. (R. p. 106, line 18 – p. 107, line 1). Travelers did not produce as a witness at trial any person who participated in the 2005 audit of Senn Freight. Instead, it called Steven Evanglista, an auditor who was named as a witness the day before trial and became acquainted with the Senn Freight file only a few weeks before the trial date. He testified that both IRS Form 1099s and a Form 1096 were made available to Travelers during the audit. (R. p. 103, lines 1-12; R. p. 120, lines

12-22). He further testified that auditors typically just look at records at the place of business and do not take the records with them if possible. (R. p. 116, lines 1-4). This witness never went to Senn Freight's office, never talked to the actual auditor and never spoke to Senn Freight employees regarding this matter. (R. p. 116, lines 1-25). Regardless of this fact, he insinuated that Senn Freight had not cooperated with the audit but admitted that he had little knowledge of this case. Furthermore, as evidenced by the 10 day notice requirement in the contract and the date of the actual cancellation by Travelers, the Notice of Cancellation was sent before the October 17, 2005 audit at which non-compliance was complained was set to take place. (R. p. 71, lines 9-11; R. p. 96, line 19 – p. 97, line 9; R. pp. 167-185). The president of Senn Freight testified repeatedly that the records were provided. (R. p. 71, lines 9-22; R. p. 73, lines 1-14; R. p. 74, line 20 – p. 75, line 4). Travelers called no witness to refute this testimony.

Over two years later, Travelers instituted its action seeking to collect a "debt" in the amount of $197,958.00 for worker's compensation insurance premiums. Senn Freight denied the allegations of the Complaint and Counter-claimed, alleging breach of contract, bad faith insurance cancellation and damages on a surety bond.

ARGUMENT

I. THE LOWER COURT PROPERLY DENIED TRAVELERS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND MOTION FOR NEW TRIAL ON PLAINTIFF'S DEBT COLLECTION ACTION.

The lower court carefully considered the evidence presented at the trial of the case and properly denied Travelers' Motion for Judgment Notwithstanding the Verdict and Motion For A New Trial regarding Appellant's Complaint seeking to collect a debt. If there is any evidence to support a jury's verdict, the verdict should be upheld and the Motion for Judgment Notwithstanding the Verdict should be denied. Pope v. Heritage Communities, Inc, 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011). If, viewing the evidences and inferences that can reasonably be drawn therefrom in the light most favorable to the non moving party, there is any support for the jury's verdict, the verdict must be upheld. Id. There is an abundance of evidence to support the jury's verdict that Travelers did not meet its burden of proof on its Complaint.

Travelers argues that all of the owner-operators who performed services for Senn Freight are automatically statutory employees of Senn Freight and therefore covered under the worker's compensation insurance policy issued by Travelers through the South Carolina Assigned Risk Plan. Travelers further argues that the figures and calculations presented by their witness at trial are undisputed and the lower court should grant JNOV on its Complaint, awarding them $197,308.00. Travelers is wrong on all accounts and is simply attempting to initiate a ploy whereby they get all premiums and no risk. Travelers had no duty to provide coverage to any driver and therefore no right to collect premiums

as they were only asked to provide coverage for office and clerical staff as specified in the application for insurance. (R. p. 96, lines 10-18; R. p. 121, lines 13-21). Furthermore, the owner-operators were not Senn Freight Employees and were covered by proper insurance policies. Lastly, even though no monies are owed to Travelers, Senn Freight disputed the amounts claimed.

First and foremost, the application for insurance filed by Senn Freight seeking coverage through the South Carolina Assigned Risk pool seeks coverage for only office and clerical staff. (R. p. 121, lines 13-21). The president of Senn Freight testified that most of the drivers were leased employees covered through Professional Employee Organizations (PEO) which provide the worker's compensation insurance covering those leased drivers. (R. p. 53, lines 19-21; R. p. 61, lines 16-21).

The second class of driver discussed at trial is the owner-operator. These drivers were either companies or individuals that are usually one-man operations and all employing four or fewer persons. (R. p. 90, line 22 – p. 91, line 2). Pursuant to S.C. Code Ann. §42-1-360(2)(Supp. 2009), employers with four or less employees are not required to carry statutory worker's compensation insurance. Regardless, Senn Freight required the owner-operators to provide proof of coverage for occupational accidents and did in fact provide proof of same to Travelers. (R. p. 91, lines 10-20; R. p. 90, line 22 – p. 91, line 2; R. p. 74, line 23 – p. 75, line 4; R. p. 76, lines 9-15). Appellant states that Senn Freight misconstrues S.C. Code Ann. §42-1-360(2)(Supp. 2009). That is not the case. Senn Freight understands that it is an employer with four or more employees as listed for the office, clerical and warehouse staff. The drivers are not employees as they are either leased or owner-operators.

The owner-operators were not employees of Senn Freight. The owner-operators utilize their own vehicles, are responsible for their own maintenance and repairs, are free to work or not, are free to work for other companies, and have never been paid via W-2 wages. Senn Freight does not control the details of their work, their chosen routes and does not supply them with most of their "tools of the trade." (R. p. 94, line 9 – p. 95, line 25). Each owner-operator enters into a contract with Senn Freight agreeing that they are in fact independent contractors and that they will provide their own insurance coverage. (R. p. 65, lines 12-13). An independent contractor is one who contracts to do a piece of work as he sees fit and in accordance with his own judgment and methods without being subject to the authority of the employer except as to the result of the work. McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872 (1947). In the case of every owner-operator utilized by Senn Freight, the only concern was getting a load from point A to point B in an efficient amount of time. (R. p. 94, lines 18-24).

It is clear that the owner-operators were not employees of Senn Freight. An independent contractor is "one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer except as to the result of his work. . . ." Gomillion v. Forsythe, 218 S.C. 211, 62 S.E.2d 297 (1950). In Gomillion, the Supreme Court found that the workers' status was a question for the jury – even when the employee was a milk deliveryman and the company provided his truck and maintained it, the company provided his gas and oil and retained the right to fire him. Id.

To determine whether or not an individual is an employee or independent contractor, one must look at the company's right and authority to control and direct the

particular work and the manner or means of its accomplishment. Kilgore Group, Inc. v. South Carolina Employment Security Commission, 313 S.C. 65, 437 S.E.2d 48 (1993); Todd's Ice Cream, Inc. v. South Carolina Employment Security Commission, 281 S.C. 254, 315 S.E.2d 373 (Ct. App. 1984). The factors to consider in determining whether the right to control exists are (1) direct evidence of the right to or exercise of said right, (2) method of payment, (3) furnishing of equipment and (4) right to fire. Felts v. Richland County, 303 S.C. 354, 400 S.E.2d 781 (1991); Tharpe v. G.E. Moore, 254 S.C. 196, 174 S.E.2d 397 (1970). Senn Freight simply notified an owner-operator that a load was available and where it was to be delivered – concerning itself only with the load getting from point A to B efficiently. (R. p. 94, lines 16-24). The owner-operators provided their own vehicles and were responsible for their own insurance, gas and incidentals. Furthermore, the owner-operators were paid on a different basis and signed an owner-operator agreement with Senn Freight agreeing to provide their own insurance. (R. p. 90, lines 4-21; R. p. 65, lines 12-13). A contract between the parties has considerable weight in determining employment status. Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969). The Young Court also stated that a company's right to designate the route for its drivers "was but a right to designate the result to be obtained and did not give Southeastern any control for the obtaining of that result." Id. at 196.

The case of Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009) is squarely on point. In Wilkinson, the Supreme Court noted that while worker's compensation laws are to be construed liberally in favor of coverage, this principal does not "justify an analytical framework that preordains the result." Id. at 301. The facts of Wilkinson are that the driver began as an employee for Palmetto and later

altered the employment relationship to that of an independent contractor via contract. In Wilkinson, the driver furnished his own tractor, was paid by the mile, was solely responsible for all expenses associated with acquiring financing, maintaining and insuring the tractor and was responsible for all withholding and employment taxes. Wilkinson complied with the terms of his contract requiring him to have worker's compensation coverage by purchasing an occupational accident policy and was therefore responsible for providing his own worker's compensation coverage. The Supreme Court considered these facts, in conjunction with the four factors as outlined in Felts v. Richland County, 303 S.C. 354, 400 S.E.2d 781 (1991) and Tharpe v. G.E. Moore, 254 S.C. 196, 174 S.E.2d 397 (1970) and found that Wilkinson was not entitled to receive worker's compensation benefits. In considering the four factors, the Court found: (1) no direct evidence of the right or exercise of control and a contract that clearly stated he was an independent contractor; (2) Wilkinson was paid per mile via a IRS form 1099 and was responsible for his own expenses and insurance and was therefore paid differently than an employee ; (3) Wilkinson furnished much of his own equipment; and (4) and there was no "right to fire" simply because Palmetto could terminate the owner-operator contract. Wilkinson at 301 – 304. When applying these factors to the present case in an even-handed manner as required by Wilkinson, it is crystal clear that the owner-operators were not employees of Senn Freight.

Assuming that there is contradictory evidence as to whether an individual is an independent contractor or employee, the question becomes one of fact. South Carolina Workers' Compensation Comm. V. Ray Covington Realtors, Inc., 318 S.C. 546, 459 S.E.2d 302 (1995). Despite facts that could be considered evidence of an employee-

employer relationship, including the company supplying office space and business forms to their salesman, the salesman's belief that he could be fired and the company having the right to terminate the independent-contractor relationship, the Supreme Court reversed the commission and the lower court and the salesman was declared to be an independent contractor. Id.

The Court of Appeals similarly held that the analysis must be made on a case by case basis in Todd's Ice Cream, Inc. v. South Carolina Employment Security Commission, 281 S.C. 254, 315 S.E.2d 373 (Ct. App. 1984). In that case, the drivers in question were paid on a commission basis and Todd's provided the trucks, provided major maintenance and repairs, maintained the retail licenses, and gave the drivers assigned territories. While the Court in Todd's upheld the Employment Security Commission's finding that drivers of the ice cream trucks in question were employees, it insinuated that had the administrative agency ruled the other way, the finding would have been upheld as well because "reasonable men might draw two inconsistent conclusions from the evidence presented." Id. at 259. There was ample evidence to support the jury's finding that the owner-operators of Senn Freight were independent contractors and that Travelers was not owed any premiums for these drivers.

Travelers further argues that the owner-operators are statutory employees of Senn Freight and that they are entitled to retroactively collect premiums for these persons, even though Senn Freight never asked for or received coverage for these drivers. Appellant wishes to gloss over the fact that most of the cases cited for the proposition that the owner-operators are statutory employees are cases dealing with whether or not the exclusivity provisions of S.C. Code Ann. §42-1-540 (1976) apply to a subcontractor,

usually when a defendant seeks to have the plaintiff limited to a worker's compensation action. Boone v. Huntington and Guerry Elec. Co., 311 S.C. 550, 430 S.E.2d 507 (1993); Olmstead v. Shakespeare, 354 S.C. 421, 581 S.E.2d 483 (2003); Revels v. Hoechst Celanese Corp., 301 S.C. 316, 391 S.E.2d 731 (Ct. App. 1990); Meyer v. Piggly Wiggly No. 24, Inc., 338 S.C. 471, 527 S.E.2d 761 (2000); Tillotson v. Keith Smith Builders, 357 S.C. 554, 593 S.E.2d 621 (Ct. App. 2004); Riden v. Kemet Electronics Corp., 313 S.C. 261, 437 S.E.2d 156 (Ct. App. 1993); Smith v. T.H. Snipes & Sons, Inc., 306 S.C. 289, 411 S.E.2d 439 (1991); Edens v. Bellini, 359 S.C. 433, 597 S.E.2d 863 (Ct. App. 2004). The remaining cases are appeals from a worker's compensation claim which was filed by an injured employee where no other coverage was available. Massey v. Werner Enterp., Inc., Opinion No. 2010-UP-001 (S.C. Ct. App. Filed Jan 7, 2010)(withdrawn, substituted and refiled March 24, 2010); McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872 (1947). Furthermore, Travelers relies heavily on Massey which is an unpublished opinion.

Travelers fails to point out that the cases hold that "there is no easily applied formula and each case must be decided on its own facts." Meyer v. Piggly Wiggly No. 24, Inc., 338 S.C. 471, 473, 527 S.E.2d 761, 763 (2000). Travelers simply wants to lump each and every owner-operator together in this case - ignoring that differences may exist for each one. Each owner-operator's status must be decided on a unique factual basis regarding the facts of the individual case and the individual who is alleged to have been an employee. Here, each and every driver that Travelers is attempting to allege that is insured, (after any statute of limitations for the claims period has passed) had other insurance available as shown through the documents and testimony of Danny Senn. (R.

p. 91, lines 10-20; R. p. 78, lines 16-24; R. p. 79, lines 6-9; R. p. 79, lines 17-22). Even Travelers' own witness and auditor, Steven Evanglista, admitted that the certificates of insurance produced by Senn Freight were sufficient. He testified that the certificates of insurance are exactly what Travelers would offer as proof if asked and that Travelers intended for people to rely upon those certificates. (R. p. 117, line 24 – p. 118, line 9; R. p. 119, lines 11-20).

Although Respondent contends that no drivers are employees of Senn Freight and therefore were not intended to be and were not covered under the Travelers' insurance policy, the Appellant further errs in arguing that the amounts paid to the owner-operators and remuneration are the same thing and therefore there is no question as to the amount owed by Senn Freight. Remuneration is defined as "reward; recompense; salary." (Black's Law Dictionary, Revised 4th Ed. (1968). Remuneration is not defined in the insurance contract but is commonly referred to as salary. At best, the term "remuneration" is ambiguous and any ambiguity arising within a contract must be construed against the drafter, especially when the contract is one of adhesion. Southern Atlantic Financial Services, Inc. v. Middleton, 349 S.C. 77, 562 S.E.2d 482 (Ct. App. 2002).

Here, Danny Senn went to great lengths in his testimony to explain that the $2,332,896.98 paid during the policy periods to owner-operators was not in fact salary or a proper basis for worker's compensation premiums, but rather the total of all payments to the owner-operators. Mr. Senn further explained that the owner-operators must pay for all of their own expenses, including maintenance on their vehicles, food, insurance, lodging, and any other expenses related to their handling loads for Senn Freight and that

approximately 1/3 of the amounts paid to those owner-operators would be considered salary given the expenses they incur. (R. p. 90, lines 4-21). Senn Freight employed no more than four or five owner-operators at any given time yet paid them approximately $2.3 million in gross commissions for the three year policy period. (R. p. 64, lines 15-25; R. p. 66, lines 21-24). Senn Freight's entire payroll for the years in question was between three million and four million dollars. (R. p. 57, line 20 – p. 58, line 6). For the sake of argument, the amount of money which would be due if Appellant's position regarding the owner-operators was correct, and it is not correct, is highly disputed by Senn Freight, both now and at trial.

Travelers spent much time at trial and in its brief arguing that some of the leased employees were not covered by worker's compensation insurance at all times during the policy period. However, at trial, no evidence of any damages relating to these drivers was presented to the jury and this issue is simply a red herring. Senn Freight offered proof of coverage via certificates of insurance for these leased drivers, certificates just like the ones utilized by Travelers and that Travelers expects others to rely upon. (R. p. 117, line 24 – p. 118, line 9; R. p. 119, lines 11-20). Furthermore, Senn Freight's President testified that he provided all applicable certificates of insurance for the leased drivers and all other documents requested or needed by Travelers during the audit process. (R. p. 74, line 23 – p. 75, line 4; R. p. 76, lines 9-15; R. p. 78, lines 16-24).

There is no statutory authority allowing Travelers to attempt to cover the drivers retroactively, after the statute of limitations has passed for any possible claims. There is no statutory prohibition on obtaining worker's compensation for only a certain class of employees or certain types of employees through the South Carolina Worker's

Compensation Assigned Risk Plan. S.C. Code Ann. §38-73-540 (Rev. 2002). In this instance, Senn Freight listed specific employees for which it wanted coverage: its office and clerical staff. If a driver had any type of claim, there were numerous other avenues for coverage, including the PEO policies, the owner-operator policies and, if all else fails, Senn Freight would be liable.[1] There is no legal basis for Travelers' attempt to obtain payment for coverage they never provided after any claims period had passed.

The simple fact is that Travelers seeks to institute the perfect insurance scam, i.e. obtaining premiums for persons they were not asked to cover, and provided no coverage for, long after any claims could possibly be filed. There would be no better outcome for the insurer than all premiums paid in and no claims paid out which is exactly what Travelers seeks to obtain through its Complaint. The statutory employee doctrine was designed to protect the employee, not to enrich insurance companies after the fact.

Travelers waived any right to argue that the jury's verdict was based upon incorrect jury charge or any other improper error of law. The trial court properly charged the jury regarding independent contractors, business or employers employing less than four persons, and owner-operators as well as the general law regarding statutory employees pursuant to the Worker's Compensation Act. The jury's verdict was based upon the facts as presented to them and the law as provided to them by the presiding judge. The jury's verdict for the Defendant Senn Freight on Plaintiff's Breach of Contract/Debt Collection Cause of Action was properly upheld by the trial court.

[1] If any claims had been filed, pursuant to the worker's compensation uninsured employers fund under S.C. Code Ann. §42-7-200 *et. seq.* (Supp. 2009), the employer's assets can be attached to recover amounts paid from the uninsured employers' fund.

II. THE LOWER COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND MOTION FOR NEW TRIAL ON RESPONDENT'S BREACH OF CONTRACT COUNTERCLAIM.

The facts supporting the trial court's denial of Travelers' Motion for Judgment Notwithstanding the Verdict/Motion for New Trial and Traveler's Breach of Contract/Debt Collection claim also support the trial court's denial of Travelers' Motion for Judgment Notwithstanding the Verdict and Motion for a New Trial on Senn Freight's Breach of Contract Counterclaim. Respondent will not reiterate the facts as stated in Argument I. above, but supplements as follows.

It is undisputed that Senn Freight paid $5,436.00 for the office and clerical staff worker's compensation coverage for the policy term of July 10, 2005 to July 10, 2006. The policy amount had gone up yearly, as some of the employees for whom coverage was sought and provided made more money and one employee listed took on additional duties. After 107 days, Travelers unilaterally and without reason, cancelled the policy. (R. p. 98, lines 5-22). Their cancellation letter was actually sent before the audit was even scheduled to occur. Travelers did not provide 258 days of coverage of the policy term in question and therefore Travelers did not earn $3,822.23. (R. p. 216; R. p. 124, line 20 – p. 125, line 3). Travelers unilaterally breached the contract without cause and therefore owes Senn Freight the amount determined by the jury - $4,851.06, which represent paid but unearned premium with interest. It is clear that the jury believed the testimony of Senn Freight President Danny Senn over the testimony of an auditor who never visited Senn Freight and knew nothing about Senn Freight and their worker's

compensation policy until shortly before the trial. Danny Senn testified repeatedly that Senn Freight had fully complied with the audit initiated by Travelers and that all documentation had been provided to the auditor. Travelers attempted to prove non-cooperation through the use of a witness that was not present at the audit and had no direct participation in the audit process, yet failed to realize that their notice of cancellation which was sent to Senn Freight, required 10 days notice pursuant to the policy and was therefore sent before the audit was even scheduled to take place. There is simply no evidence that Senn Freight did anything to violate the terms of the insurance contract and there is ample evidence that Travelers did in fact breach the contract by accepting payment of premiums and refusing to provide the necessary and needed coverage. The jury's verdict was proper and the trial court properly upheld same.

III. THE LOWER COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND MOTION FOR NEW TRIAL ON SENN FREIGHT'S BAD FAITH CANCELLATION OF INSURANCE POLICY COUNTERCLAIM.

Senn Freight's Counterclaim pled a valid cause of action for bad faith cancellation of the insurance policy pursuant to the standards set forth in Mitchell v. Fortis, 385 S.C. 570, 686 S.E.2d 176 (2009). The trial court correctly charged that the elements of an insurance bad faith claim are: 1) a mutually binding contract of insurance; 2) refusal by the insurer to provide benefits under the contract; and 3) that the refusal resulted from bad faith or unreasonable action in breach of an implied covenant of good faith and fair

dealings. Id; Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 466 S.E. 2d 727, 730 (1996).

It is admitted by Travelers that there was a binding contract of insurance and that they did in fact refuse to provide benefits under the contract as they admitted that they unilaterally cancelled the contract of insurance effective October 25, 2005. Therefore, the only determination to be made was whether or not the refusal to provide benefits under the contract resulted from bad faith or an unreasonable action as set out in below.

Travelers argues that the policy was cancelled simply because Senn Freight did not provide the documentation requested in their worker's compensation audit. These facts are simply not supported by the evidence in this case and Travelers wants to infer that the auditor who actually performed the audit came to testify and indicated non-cooperation was a problem. Instead, Travelers called an auditor who had no relation to Senn Freight and who had not visited Senn Freight or spoken to Senn Freight prior to testifying at trial. This auditor was named as a witness only one day prior to trial and provided no evidence or testimony that Senn Freight did not comply with all requests by Travelers other than to say some materials were not "in the file." The auditor went on to testify that the normal process includes a review of documentation at the business location and that the documents are not normally included with the insurance company's file. He did not visit the business; he only reviewed Travelers' file the week before trial. (R. p. 99, line 20 – p. 100, line 7; R. p. 116, lines 1-25). Furthermore, Danny Senn testified specifically and repeatedly that he provided all documentation sought by Travelers during the audit process. (R. p. 73, lines 1-14; R. p. 74, lines 20-25).

Evidence of bad faith exists in abundance. It is undisputed that the policy was cancelled before the term expired and after the plaintiff had received the agreed upon premiums. (R. p. 98, lines 5-22; R. p. 216). Furthermore, Travelers refused to refund the premium despite the cancellation of the policy. Most importantly, Travelers attempted to unilaterally raise the premium without justification and instituted a lawsuit regarding this unilateral raise in premium only after the worker's compensation claims period had passed. S.C. Code Ann. §42-15-40 (Supp. 2009); (R. p. 122, line 20 – p. 123, line 11). It is important to remember this is a policy of adhesion. Senn Freight had no choice as to the terms or who the insurer would be pursuant to the S.C. Assigned Risk Plan. S.C. Code Ann. §38-73-540 (Rev. 2002).

The jury obviously had an unfavorable view of Travelers' scheme of waiting until the statute of limitations would bar any possible worker's compensation claims before seeking premiums. This was a major factor in determining whether or not Travelers' breach of contract was in fact in bad faith. Travelers asserts that Senn Freight failed and refused to cooperate with their audit but failed to call the auditor and other Travelers' employees who might offer some scintilla of proof as to the non-cooperation.[2] They alleged that the non-cooperation with the audit occurred on or around October of 2005 and before. They filed suit in August of 2008. Interestingly enough, this is approximately one month after any claims under the worker's compensation policies could have been filed if the policy had run to its end date of July 2006. S.C. Code Ann. §42-15-40 (Supp. 2009). These actions by Travelers show not only an indifference to the

[2] The trial court offered the jury the opportunity to speak privately with him following their verdict. After doing so, the court stated: "You know the main question? Where was Mr. Barnette?" (R. p. 131, lines 9-12). It is clear that in his absence, the jury believed Danny Senn's testimony.

rights of Senn Freight, but a calculated effort to run the perfect insurance scam by seeking premiums for employees on which it is assured no worker's compensation claims can be filed.

Travelers asserts that South Carolina does not recognize a cause of action for bad faith cancellation of insurance policy. This is incorrect as Mitchell specifically allowed a cause of action for bad faith cancellation of a health insurance policy. Mitchell v. Fortis, 385 S.C. 570, 686 S.E.2d 176 (2009). While Senn Freight has been unable to locate any South Carolina case law whereby a bad faith cancellation of policy has been applied in the worker's compensation arena, other jurisdictions allow for a cause of action regarding bad faith in any area of an insurance policy, not simply the denial of claims.[3]

Although no claims were submitted by Senn Freight under the worker's compensation policy provided by Travelers for office and clerical staff during the time period the policy should have been in effect (i.e. until July 2006), damages were sustained by Senn Freight. Senn Freight was forced to spend a tremendous amount of time due to the unexpected and improper cancellation of the policy and bad faith. (R. p. 125, lines 3-8). This time, coupled with the stress, worry and possible ramifications of not

[3] 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 torte, 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 previsions 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 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.)

having worker's compensation insurance, could have been catastrophic had an office employee fell and become permanently disabled while at work. This, coupled with the fact that this was an assigned risk plan and not a policy procured through the open market, means that Travelers well knew Senn Freight would likely be unable to obtain insurance coverage for the clerical and office staff quickly enough to avoid any gaps in coverage. Most of all, Senn Freight suffered risk, the very thing for which Travelers claims it is entitled to be paid. The jury properly found damages had been suffered and valued those damages at $6,000.00.

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). The case of Mitchell v. Fortis has already extended the bad faith cause of action to cases involving wrongful termination of a policy of insurance. If, for the sake of argument, the Mitchell case does not extend said causes of action to include bad faith cancellation of a policy, this Court should, given the facts of this case, follow the lead taken by other states in similar situations.

IV. THE LOWER COURT PROPERLY CONSIDERED ALL FACTORS REGARDING PUNITIVE DAMAGES AND PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT REGARDING THE JURY'S PUNITIVE DAMAGES AWARD.

The jury and the trial court properly considered all factors when considering an award of punitive damages. The trial court properly upheld the jury's award of punitive damages on Respondent's Bad Faith Cause of Action.

The trial judge properly charged the jury on punitive damages and all of the elements to be considered before the awarding of punitive damages would be proper, including the fact that the breach of contract must be reckless, willful and wonton and that there must be a conscious failure to exercise due care or conscious indifference to the rights of the insured. The trial court indicated that Senn Freight must prove by clear and convincing evidence that the conduct complained of included consciousness of a wrong doing at the time of the conduct. All of the factors were laid out, including the reprehensibility of the conduct, the harm caused by the conduct and the Appellant's awareness of the conduct's wrongfulness. (R. p. 128, line 1 – p. 130, line 4). The Appellant made no objection to the jury charge and waived any objections thereto.

The trial court, in hearing the post trial motions and issuing its order, considered the guidelines established by the South Carolina Supreme Court in the case of Mitchell v. Fortis Ins. Co. 385 S.C. 570, 688 SE.2d. 176 (2009). The trial court made the following specific findings regarding the award of punitive damages:

- The Court considered the reprehensibility of Travelers' conduct and concluded that Senn Freight was placed at great risk due to the actions of Travelers and that Travelers was indifferent to this risk and acted with reckless disregard for the defendant's rights under the policy.

- Travelers' acts were intentional as they wanted until the claims period had passed before instituting a lawsuit to recover premiums.

- This incident was not isolated and is very capable of repetition.

- The evidence showed that the conduct and actions of Travelers was reprehensible and egregious and worthy of the punitive damages award levied by the jury.

- The Court considered the ratio of actual damages to punitive damages and found that the damages were not out of proportion in that they were less than 10 times the actual damages awarded in this matter.

- Travelers offered no indication that they could not pay the $100,000.00 punitive damages award and it was clear that Travelers, an insurance company, easily has the ability to pay such a relatively small punitive damages award.

- The Court found that the deterrent nature of the $100,000.00 award was proper and actually may not have been enough considering the fact that Travelers attempted to collect almost $200,000.00 in premiums in their Complaint. (R. p. 9-10).

Both the jury and the trial court properly considered all of the factors relevant to the award of punitive damages. Travelers did not object to the jury charge regarding punitive damages. The jury's award was not excessive and was in line with the facts of the case. The trial court properly upheld the jury's punitive damages verdict.

V. THE LOWER COURT PROPERLY DENIED TRAVELERS MOTION FOR NEW TRIAL ABSOLUTE UNDER THE THIRTEENTH JUROR DOCTRINE WHEN THERE IS NO EVIDENCE THE JURY ACTED WITH ANY IMPROPER PURPOSE OR GOAL.

Travelers offered no evidence that the jury's verdict was due to passion or caprice and the trial court correctly refused to institute the 13th juror doctrine and grant the appellant a new trial absolute. Appellant Travelers glosses over this issue and states its position in its post-trial motions supporting its position that the judge should exercise his

power as the 13th juror and grant Travelers a new trial absolute. Regardless, the trial court properly denied this motion as Travelers failed to produce any valid argument that the jury acted with passion or prejudice or that the verdict was motivated by any improper purpose or reasoning.

On a motion for new trial, the decision of the trial judge will not be disturbed absent an abuse of discretion. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008); Prince v. Beaufort Mem. Hosp., 392 S.C. 599, 709 S.E.2d 122 (Ct. App. 2011). An appellant court must find that a directed verdict was necessary to find an abuse of discretion and a denial of a motion for a new trial absolute. Curtis v. Blake, 292 S.C. 494, 709 S.E.2d 79 (Ct. App. 2011). Travelers admitted in its post-trial motions for a new trial absolute that "the Plaintiff cannot know with certainty that this affected the jury's decision, it can however reasonably surmise that *something* in addition to the specific jury instructions given by the court confused or tainted the jury..." (R. p. 36). Travelers' Motion for a New Trial Absolute states no basis in fact or law for the granting of the new trial absolute.

Travelers implies that the Defendant being a local business and the Plaintiff being an out of town insurance company could have affected the jury's verdict. There is no evidence or basis for believing that the jury allowed this to enter into their deliberations. The jury followed the instructions of the Court and the instructions on the verdict form despite the allegation to the contrary by Travelers. The jury's verdict was clear and the notes written on the verdict form actually allowed the Court and the parties to understand their findings even more clearly than simply answering the questions would have. There is no evidence of confusion as the jury's verdict was completely consistent and within the

law charged by the trial court. An appellate court will not overturn a trial judge's order granting or denying a new trial upon the facts unless the trial judge's order on a motion for a new trial upon the facts is wholly unsupported by the evidence or the conclusion is controlled by an error of law. Curtis v. Blake, 292 S.C. 494, 709 S.E.2d 79 (Ct. App. 2011) *citing* Folkens v. Hunt, 300 S.C. 251, 254-55, 387 SE 2d 265, 267 (1990). If the scant evidence in the Curtis v. Blake case whereby the jury awarded and the trial court upheld a $450,000.00 verdict, an amount more than 100 times greater than the plaintiff's medical expenses and lost wages, the evidence presented at trial in this matter is more than sufficient to support the jury's verdict and the trial court's proper denial of Travelers' Motion for a New Trial Absolute.

Travelers argues or implies that the jury finding for Senn Freight on the surety bond claim goes to show prejudice against Travelers.[4] However, the trial court properly noted that Travelers did not contest the surety bond claim and presented no evidence regarding same. The jury finding in favor of Senn Freight on the surety bond claim was rendered because Travelers did not present any evidence to contradict the claim.

There was no basis for the trial court to negate the jury's verdict. The verdict was proper and based on the evidence presented at trial. No proof of passion or prejudice on the part of the jury was offered and Traveler's admitted that their contention otherwise was mere speculation.

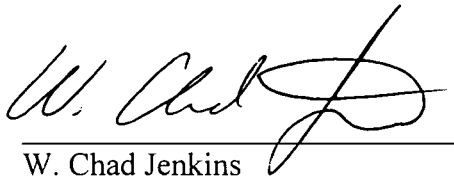
[4] The Trial Court granted Appellant's JNOV Motion regarding the surety bond claim and Respondent did not appeal that ruling.

CONCLUSION

For the reasons set forth herein, this Court should affirm the trial court's denial of Respondent's Post Trial Motions for JNOV and New Trial Absolute.

Respectfully Submitted

POPE AND HUDGENS, P.A.

By: 

W. Chad Jenkins
1508 College Street
Post Office Box 190
Newberry, South Carolina 29108
(803) 276-2532
cjenkins@popeandhudgens.com
Attorneys for Respondent

Newberry, S.C.
May 23, 2012

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
No. 2011189987

Appeal from Newberry County
Court of Common Pleas

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

Travelers Property Casualty Co.,

Appellant,

v.

Senn Freight Lines, Inc.,

Respondent.

PROOF OF SERVICE

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 24th day of May, 2012:

COUNSEL SERVED:
M. Dawes Cooke, Jr., Esquire
John W. Fletcher, Esquire
Barnwell Whaley Paterson & Helms, LLC
PO Drawer H
Charleston, SC 29402

PLEADING SERVED:
Respondent's Final Brief

SC Court of Appeals
MAY 25 2012
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Katherine Barnett

THE STATE OF SOUTH CAROLINA
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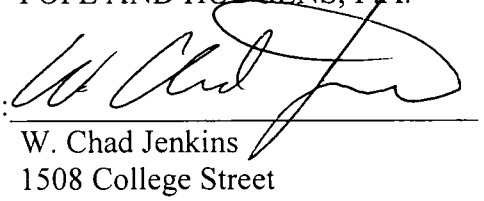
CERTIFICATE OF COUNSEL

I, W. Chad Jenkins, Esquire, do hereby certify that the Final Brief of Respondent complies with Rule 211(b).

POPE AND HUDGENS, P.A.

By: 

W. Chad Jenkins
1508 College Street
Post Office Box 190
Newberry, South Carolina 29108
(803) 276-2532
Attorneys for Respondent

Newberry, S.C.
May 23, 2012

JOSEPH W. HUDGENS
THOMAS H. POPE III
W. CHAD JENKINS

KYLE B. PARKER

POPE & HUDGENS ATTORNEYS. P.A.

1508 COLLEGE STREET-P.O. BOX 190
NEWBERRY, SOUTH CAROLINA 29108
PHONE (803) 276-2532 FAX (803) 276-8684
WWW.POPEANDHUDGENS.COM

THOMAS H. POPE
(1913-1999)
ROBERT D. SCHUMPERT
(1927-1994)

May 25, 2012

Via Hand Delivery
V. Claire Allen, Deputy Clerk
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211-1629

RE: Travelers Property Casualty Co., Appellant v. Senn Freight Lines, Inc., Respondent
Case Tracking No. 2011189987
Civil Action No. 2008-CP-36-417

Dear Ms. Allen:

Enclosed herewith for filing please find the original and fifteen (15) copies of the Final Brief of Respondent as well as my Proof of Service of same upon M. Dawes Cooke, Jr. and John Fletcher, attorneys for appellant.

I have also included two (2) extra copies of these documents which I would appreciate your having clocked-in. Thank you for your assistance in this matter.

With kind regards.

Sincerely,

POPE AND HUDGENS, P.A.

W. Chad Jenkins

SC Court of Appeals
MAY 25 2012
RECEIVED

WCJ:kb
Enclosures

cc: M. Dawes Cooke, Jr. Esq. & John Fletcher, Esq.,