THE STATE OF SOUTH CAROLINA
In The Court of Appeals
No. 2011189987

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APPEAL FROM NEWBERRY COUNTY
In The Court of Common Pleas

Eugene C. Griffith, Circuit Court Judge

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Case No. 2008-CP-36-417

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Travelers Property Casualty Co., ..... Appellant

v.

Senn Freight Lines, Inc., ..... Respondent

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# APPELLANT'S FINAL BRIEF

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## STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in denying Travelers' Post-Trial Motions as to its breach of contract claims for unpaid premiums where the evidence showed only that the Contractor Drivers were "statutory employees"?

   SUGGESTED ANSWER: YES.

2. In light of the resolution of issue #1, should this Court award Travelers $197,308.00 in damages for unpaid premiums?

   SUGGESTED ANSWER: YES.

3. Did Travelers properly preserve for appellate review the question of whether South Carolina recognizes a cause of action for the alleged bad faith cancellation of an insurance policy?

   SUGGESTED ANSWER: YES.

4. Did the trial court err in concluding that South Carolina would recognize a cause of action for the alleged bad faith cancellation of an insurance policy?

   SUGGESTED ANSWER: YES.

5. Did the trial court err in denying Travelers' Post-Trial Motions and holding that there was evidence that Travelers cancelled the insurance policy at issue in bad faith?

   SUGGESTED ANSWER: YES.

6. Did the trial court err in denying Travelers' Post-Trial Motions and holding that there was evidence supporting the amount of compensatory damages awarded on Senn Freight's bad faith counterclaim?

   SUGGESTED ANSWER: YES.

7. Did the trial court err in denying Travelers' Post-Trial Motions and holding that there was evidence supporting the award of punitive damages?

   SUGGESTED ANSWER: YES.

8. Did the trial court err in denying Travelers' Post-Trial Motions and holding that the jury's award of punitive damages was not excessive?

   SUGGESTED ANSWER: YES.

## STATEMENT OF THE CASE

### I. Background Facts

#### A. The Nature of Senn Freight's Business

Defendant-Respondent Senn Freight Lines, Inc. ("Senn Freight") is a for-hire freight carrier, engaged in the business of hauling cargo nationwide on flatbed tractor-trailers. (*See* R. p. 57, lines 8-12). As a "for-hire" carrier, Senn Freight typically receives requests from customers to move loads of freight from one location to another. (*See* R. p. 57, lines 13-19). During the time at issue in this case (2003-05), Senn Freight had an annual employee payroll of approximately $3-4 million. (*See* R. p. 57, line 20- p. 58, line 8).The President of Senn Freight is Danny Senn ("Mr. Senn"), who was one of two witnesses at trial. (*See* R. p. 56 line 24- p. 57 line 1). Mr. Senn's responsibilities included procuring insurance coverage for Senn Freight, including the workers' compensation insurance policies at issue in this case. (*See* R. p. 58, lines 9-16).

Senn Freight often utilized two classes of drivers to perform its primary business of hauling freight. First, Senn Freight utilized leased employees ("Leased Drivers") hired through a leasing company (also known as a Professional Employee Organization, or PEO); in such an arrangement, the PEO would provide workers' compensation insurance covering those leased drivers. (*See* R. p. 53, lines 19-21, p. 61, lines 16-21). From 2002 through February, 2004, Senn Freight engaged a leasing company, Vanguard. (*See* R. p. 72, lines 1-7). After that time, in late March, 2004, Senn Freight began leasing employees from Workforce Outsourcing. (*See* R. p. 72, lines 8-10; *accord* R. pp. 208-12). In February, 2005, Senn Freight began leasing employees from Certified HR Services. (*See* R. p. 74, line 5- p. 75, line 9). Evidence at trial included Certificates of Liability Insurance for Vanguard, Workforce and Certified HR, containing the following language:

> THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPN THE CERTIFICATE

HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

(*See* R. pp. 213-15).

Senn Freight also utilized the services of "contractor" and/or "owner-operator" drivers (collectively "Contractor Drivers"); these drivers were required to retain their own workers' compensation coverage. (*See* R. p. 61, line 22- p. 62, line 3, p. 88, line 19- p. 90, line 3). The evidence at trial included numerous 1099-MISC forms from Senn Freight that identified and memorialized the remuneration that Senn Freight paid to the Contractor Drivers for calendar years 2003, 2004 and 2005. (*See* R. pp. 186-206). However, Senn Freight did not proffer any evidence at trial that the Contractor Drivers had sufficient workers' compensation insurance coverage to cover any claims they might make. The evidence at trial disclosed that — while Senn Freight claims it had proof of workers' compensation insurance coverage for the Contractor Drivers — the actual insurance certificate issued by Great American Insurance Group stated that "[t]his policy does not provide workers compensation coverage . . . ." (*See* R. p. 67, line 1- p. 70, line 25; p. 207). The Certificate introduced into evidence at trial was, according to the testimony, "an example of what [Senn Freight] provided to Traveler's (sic) when they asked for proof of that coverage." (*See* R. p. 68, lines 13-16). Thus, there was no evidence that Senn Freight ever provided Travelers proof of actual workers compensation coverage for the Contractor Employees.

### B. The Insurance Policies at Issue

This lawsuit concerns three Workers Compensation and Employers Liability Policies issued from Appellants Travelers Property Casualty Company of America and The Travelers Indemnity Company of Illinois ("Travelers") to Senn Freight (collectively the "Policies"):

- Policy Number 6JUB-7803A47-6-03, covering the period of July 10, 2003 through July 10, 2004 ("Policy One") (*See* R. pp. 133-48);

- Policy Number 6JUB-7803A47-6-04, covering the period of July 10, 2004 through July 10, 2005 ("Policy Two") (*See* R. pp. 149-66); and

- Policy Number 6JUB-7803A47-6-05, covering the period of July 10, 2005 through July 10, 2006 ("Policy Three") (*See* R. pp. 167-85).

Specifically, this lawsuit arises out of Travelers' efforts to obtain payment of earned premiums under the Policies and Senn Freight's claims that Travelers wrongfully cancelled the Third Policy.

There are numerous provisions of the Policies that are relevant to this case and Travelers' claim of earned premiums for the Contractor Drivers.[1] The workers' compensation portions of the Policies detailed how the total ultimate premium Senn Freight was to pay would be calculated. That premium was to be calculated based upon the application of a factor to the amounts of "remuneration" that Senn Freight paid to various classes of people who performed work for it:

> Premium for each work classification is determined by **multiplying a rate times a premium basis**. Remuneration is the most common premium basis. This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of:
>
> 1. All your officers and employees engaged in work covered by this policy; and

---

[1] The Policies include an "EMPLOYEE LEASING CLIENT EXCLUSION ENDORSEMENT," which states:

> As used in this endorsement, "employee leasing" shall mean an arrangement whereby an entity utilizes the services of a third party to provide its workers for a fee or other compensation. The third party providing employee leasing services shall be referred to as a "labor contractor." The entity receiving the services shall be referred to as a "client."
>
> This endorsement applies only with respect to your leased workers engaged in any work provided under an employee leasing arrangement. Your policy does not provide coverage for workers you lease from labor contractors below.

(*See* R. pp. 133-185). The first two Policies identify the "labor contractor" as Vanguard Southeast, Inc.; the final Policy states that Senn Freight was to provide Travelers with leasing information. (*See* R. pp. 133-185). Under this provision, coverage was excluded for the Leased Drivers – but not the Contractor Drivers.

2. All other persons engaged in work that could make us liable under Part One (Workers Compensation Insurance) of this policy. If you do not have payroll records for these persons, the contract price for their services and materials may be used as the premium basis. This paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers compensation obligations.

(*See* R. p. 141 ¶ 5.C (emphasis added), p. 157 ¶ 5.C (emphasis added) and p. 175 ¶ 5.C (emphasis added)).

The Policies further provide that "Item 4 of the Information Page shows the rate and premium basis for certain businesses or work classifications." (*See* R. p. 141 ¶ 5.B, p. 157 ¶ 5.B and p. 175 ¶ 5.B). In Policy One, the Item 4 of the Information Page set forth the following data for use in calculation of premiums:

| CLASSIFICATION | CODE | PREMIUM BASIS ESTIMATED TOTAL ANNUAL REMUNERATION | RATES PER $100 OF REMUNERATION | ESTIMATED ANNUAL PREMIUM |
|---|---|---|---|---|
| . . . | | | | |
| TRUCKING: LONG DISTANCE HAULING — ALL EMPLOYEES & DRIVERS | 7229 | IF ANY | 10.47 | |
| CLERICAL OFFICE EMPLOYEES NOC | 8810 | 434460 | .31 | 1347 |

(*See* R. p. 136). Similarly, the Information Page of Policy Two provided as follows:

| CLASSIFICATION | CODE | PREMIUM BASIS ESTIMATED TOTAL ANNUAL REMUNERATION | RATES PER $100 OF REMUNERATION | ESTIMATED ANNUAL PREMIUM |
|---|---|---|---|---|
| . . . | | | | |
| TRUCKING: LONG DISTANCE HAULING — ALL EMPLOYEES & DRIVERS | 7229 | IF ANY | 10.47 | |
| CLERICAL OFFICE EMPLOYEES NOC | 8810 | 477906 | .31 | 1482 |

(*See* R. p. 152). Finally, the Information Page for Policy Three set forth the following rates and classifications:

| CLASSIFICATION | CODE | PREMIUM BASIS ESTIMATED TOTAL ANNUAL REMUNERATION | RATES PER $100 OF REMUNERATION | ESTIMATED ANNUAL PREMIUM |
|---|---|---|---|---|
| . . . | | | | |
| TRUCKING: LOCAL HAULING ONLY – ALL EMPLOYEES AND DRIVERS | 7228 | IF ANY | 12.25 | |
| TRUCKING: LONG DISTANCE HAULING — ALL EMPLOYEES & DRIVERS | 7229 | IF ANY | 15.06 | |
| WAREHOUSING NOC | 8292 | 33462 | 6.55 | 2192 |
| CLERICAL OFFICE EMPLOYEES NOC | 8810 | 525697 | .52 | 2734 |

(*See* R. p. 170). As the Information Pages from the three Policies disclose, Travelers and Senn Freight anticipated that there might be drivers performing work for Senn Freight who might fall within the scope of the Policies (and impact the premium due).

Based upon these rates and classes of workers, the Policies indicated that premiums would be initially estimated and, later, finally set based on actual remuneration data:

> The premium shown on the Information Page, schedules, and endorsements is an estimate. **The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy**. If the final premium is more than the premium you paid to us, you must pay us the balance.

(*See* R. p. 141 ¶ 5.E (emphasis added), p. 157 ¶ 5.E (emphasis added) and p. 175 ¶ 5.E (emphasis added)). Mr. Senn testified that he understood that the initial premiums set forth on the Information Pages to the Policies were only estimates based on whatever information that Senn Freight had provided to Travelers on its application. (*See* R. p. 59, line 17- p. 60, line 7). Mr. Senn stated that Senn Freight did not provide information concerning remuneration to drivers during the application process, since the Leased

Drivers would be covered under workers compensation policies issued to the PEO's:

> Q: Okay. You didn't intend. You didn't submit that information as a potential for your driver's. Is that correct?
>
> A: Correct.
>
> Q: Because at the time, you were using some leasing companies. Is that right?
>
> A: The driver's were covered by the PEO's.
>
> Q: Okay. And the PEO was the one that carried the insurance. Is that right?
>
> A: Yes, sir.

(*See* R. p. 61, lines 12-21).

In connection with calculation of premiums, the Policies obligated Senn Freight to "keep records of information needed to compute premiums" and to "provide us [Travelers] with copies of those records when we ask for them." (*See* R. p. 141 ¶ 5.F, p. 157 ¶ 5.F and p. 175 ¶ 5.F). The Policies further detailed Senn Freight's obligations to provide information:

> You will let us examine and audit all your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by the audit will be used to determine final premium.

(*See* R. p. 141 ¶ 5.G, p. 157 ¶ 5.G and p. 175 ¶ 5.G).

Travelers contended at trial — and Senn Freight did not disprove — that Senn Freight did not fulfill its duties to provide information to permit calculation of premiums. As a consequence, Travelers cancelled Policy Three on or about October 25, 2005. (*See* R. p. 113, lines 12-14).

## II. Procedural History

Travelers commenced this action against Senn Freight on August 11, 2008 by

Summons and Complaint. The Complaint asserted a claim to recover $197,958.00 for unpaid premiums (calculated based on 1099-MISC forms for the Contractor Drivers that were provided to Travelers):

> 4. The terms of the policy of insurance further provided that, at the inception of the policy term the Defendant would be charged an estimated premium and, at the close of the policy term, the Defendant would be charged an additional earned premium (or credit therefore) premised upon a pay-roll audit for the policy term. The Defendant failed to cooperate with Plaintiff's audit and Plaintiff has proceeded upon an estimated audit, consistent with the terms of its contract of insurance, and your Plaintiff has provided its billing to the Defendant for additional earned premium.
>
> 5. That part of said account has been paid by credit or otherwise and there is not due and owing thereon [$197,958.00].

(*See* R. pp. 19-20 ¶¶ 4-5).

On November 10, 2008, Senn Freight filed its Answer and Counterclaim, denying liability for Traveler's claims and asserting three counterclaims against Travelers:

(a) Breach of contract relating to termination of the Policies;

(b) Bad faith, again relating to termination of the Policies; and

(c) A claim under a surety bond for $2,360.00.

(*See generally* R. pp. 25-30). Travelers responded to these Counterclaims on March 6, 2009. (*See generally* R. pp. 32-35).

This case proceeded through discovery and motions practice and, ultimately, was resolved through a jury trial conducted on August 3-4, 2010. The jury returned a verdict against Travelers on its primary claims; the jury also returned a verdict in favor of Senn Freight on its counterclaims, concluding that:

(a) When the Policies were cancelled, Senn Freight was owed $4,851.06 in unearned premiums;

(b) Travelers cancelled the Policies in bad faith, entitling Senn Freight to compensatory damages of $6,000.00 and punitive damages of $100,000.00; and

(c) Senn Freight was entitled to payment of $2,360.00 and interest on the surety bond.

(*See* R. pp. 14-16).

Subsequently, on or about August 13, 2010, Travelers filed timely post-trial motions, in the form of a Motion for Judgment Notwithstanding the Verdict/New Trial Absolute ("Post-Trial Motions"). (*See* R. pp. 37-52). The trial court denied Travelers' Post-Trial Motions in a March 4, 2011 Order, which Travelers' counsel received on March 11, 2011. (*See* R. p. 7). Travelers timely served and filed its Notice of Appeal from that Order on April 11, 2011. (*See* R. pp. 219-21).

For the reasons set forth herein, this Court should reverse the trial court's denial of Travelers' Post-Trial Motions.

## ARGUMENTS

### I. Standard of Review

#### A. Appeal from Denial of Motion for Judgment N.O.V.

"When reviewing a motion for directed verdict or JNOV, an appellate court must employ the same standard as the trial court." *See Wright v. Craft*, 372 S.C. 1, 17, 640 S.E.2d 486, 495 (Ct. App. 2006).

> The trial judge must deny motions for directed verdict or judgment notwithstanding the verdict "when the evidence yields more than one inference or its inference is in doubt." *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). An appellate court "will reverse the trial court only when there is no evidence to support the ruling below." *Id.*

*See Wright v. Hiester Const. Co.*, 389 S.C. 504, 512-13, 698 S.E.2d 822, 826-27 (Ct. App. 2010). "The appellate court must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his favor." *See Jones v. General Elec. Co.*, 331 S.C. 351, 356, 503 S.E.2d 173, 176 (Ct. App. 1998).

#### B. Appeal from Denial of Motion for New Trial Absolute

The standards governing a motion for a new trial absolute are well-settled in South Carolina:

> A circuit court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. *Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993). "The jury's determination of damages, however, is entitled to substantial deference." *Id.* The circuit court should grant a new trial absolute on the excessiveness of the verdict only if the amount is so grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives. *Id.* at 379–80, 426 S.E.2d at 805.
>
> The grant or denial of new trial motions rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989); *see also Boozer v. Boozer*, 300 S.C. 282, 283, 387 S.E.2d 674, 675 (Ct. App. 1988) (stating the court

> of appeals has no power to review circuit court's ruling unless it rests on basis of fact wholly unsupported by evidence or is controlled by error of law). "In deciding whether to assess error to a court's denial of a motion for a new trial, we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Umhoefer*, 298 S.C. at 224, 379 S.E.2d at 297.

*See Brinkley v. South Carolina Dep't of Corrections*, 386 S.C. 182, 185-86, 687 S.E.2d 54, 56 (Ct. App. 2009).

## II. The Trial Court Erred in Denying Traveler's Post-Trial Motions as to Traveler's Breach of Contract Claim

For the reasons set forth herein, the trial court erred in denying Travelers' Post-Trial Motions with regard to its breach of contract cause of action for earned premiums.

### A. The Policies Plainly Provide the Travelers Is Entitled to Premiums for the Drivers at Issue

The trial court erred in denying Travelers' Post-Trial Motions, because the undisputed evidence establishes, beyond any doubt, that Travelers was entitled to earned premiums under the Policies.

The Policies provided for calculation of the premium to be paid to Travelers based upon a percentage of "remuneration" that Senn Freight paid to people who might conceivably make workers compensation claims.

> Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of:
>
> 1. All your officers and employees engaged in work covered by this policy; and
>
> 2. **All other persons engaged in work that *could make us liable* under Part One (Workers Compensation Insurance) of this policy.** If you do not have payroll records for these persons, the contract price for their services and materials may be used as the premium basis. This paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers compensation obligations.

(*See* R. p. 141 ¶ 5.C (emphasis added), p. 157 ¶ 5.C (emphasis added) and p. 175 ¶ 5.C

(emphasis added)). The Policies further provided that the final premiums would be based upon the actual premium basis, *i.e.*, the amounts of "remuneration" that Senn Freight actually paid:

> The premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance.

(*See* R. p. 141 ¶ 5.E, p. 157 ¶ 5.E and p. 175 ¶ 5.E).

As set forth above, the Policies stated an initial estimated premium, which was based upon information provided in Senn Freight's application. Initially, the Policies only estimated premiums for clerical/office and warehouse employees. Mr. Senn stated that Senn Freight did not provide information concerning drivers' remuneration in its application:

> Q: Okay. You didn't intend. You didn't submit that information as a potential for your driver's. Is that correct?
>
> A: Correct.
>
> Q: Because at the time, you were using some leasing companies. Is that right?
>
> A: The driver's were covered by the PEO's.
>
> Q: Okay. And the PEO was the one that carried the insurance. Is that right?
>
> A: Yes, sir.

(*See* R. p. 61, lines 12-21). However, the Information Pages of the Policies also included rates to calculate premiums for remuneration paid to drivers "if any." (*See* R. pp. 136, 152, and 170). As such, the parties specifically contemplated that drivers were included among the classes of people with regard to whom Travelers and Senn Freight "*could*" be liable for workers' compensation.

The ultimate question as to Travelers' claims is whether the Contractor Drivers — who are indisputably within the classes of drivers listed on the Policies' Information Pages — "**could** make us [Travelers] liable" to provide coverage for workers' compensation claims. For the reasons set forth below, the undisputed evidence showed that Senn Freight — and consequently Travelers — *could* have been liable under the workers' compensation laws to the Contractor Drivers. Consequently, Travelers earned premiums to be calculated based on the remuneration paid to the Contractor Drivers. As a result, the trial court erred in denying Travelers' Post-Trial Motions.

Coverage under the South Carolina Workers Compensation Act generally depends on the existence of an employer-employee relationship. *See McDowell v. Stilley Plywood Co.*, 210 S.C. 173, 41 S.E.2d 872 (1947); *Tillotson v. Keith Smith Builders*, 357 S.C. 554, 593 S.E.2d 621 (Ct. App. 2004). One statutory exception to this general rule is for "statutory employees":

> When any person, in this section and §§ 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§ 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

*See* S.C. Code Ann. § 42-1-400. South Carolina case law defines who is a "statutory employee":

> Three tests are applied in determining whether the activity of an employee of a subcontractor is sufficient to make him a statutory employee within the meaning of § 42-1-400:
>
> (1) is the activity an important part of the owner's business or trade;
>
> (2) is the activity a necessary, essential, and integral part of the owner's trade, business, or occupation; or
>
> (3) has the identical activity previously been performed by the owner's

employees?

> *Boone v. Huntington and Guerry Elec. Co.*, 311 S.C. 550, 430 S.E.2d 507 (1993); *Riden v. Kemet Elec. Corp.*, 313 S.C. 261, 437 S.E.2d 156 (Ct. App. 1993); *see also Meyer v. Piggly Wiggly No. 24, Inc.*, 338 S.C. 471, 473, 527 S.E.2d 761, 763 (2000) (holding there are three tests used to determine whether an employee was "engaged in an activity that is part of the owner's trade, business, or occupation"); *Smith v. T.H. Snipes and Sons, Inc.*, 306 S.C. 289, 411 S.E.2d 439 (1991) (listing the three factors of the statutory employee test); *Revels v. Hoechst Celanese Corp.*, 301 S.C. 316, 318, 391 S.E.2d 731, 732 (Ct. App. 1990) (finding the test used to determine if one is a statutory employee is "whether or not [the work] being done is or is not a part of the general trade, business or occupation of the owner."). . . . **Any doubts as to a worker's status should be resolved in favor of including him or her under the Workers' Compensation Act**. *Riden*, 313 S.C. at 263, 437 S.E.2d at 158.

*See Edens v. Bellini*, 359 S.C. 433, 442-43, 597 S.E.2d 863, 868 (Ct. App. 2004). "If the activity at issue meets **even one** of these three criteria, the injured employee qualifies as the statutory employee of 'the owner.'" *See Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003) (emphasis added).

In this case, the evidence supports only one conclusion: that the Contractor Drivers were Senn Freight's statutory employees. Senn Freight was engaged in business as a for-hire freight carrier, hauling cargo nationwide on flatbed tractor-trailers. (*See* R. p. 57, lines 8-12). As Mr. Senn testified at trial, "Senn hauls freight, sir." (*See* R. p. 64, line 14). It would be disingenuous to suggest that truck drivers were not important, necessary, essential and integral parts of Senn **Freight**'s business. In reality, it is self-evident that the work performed by the Contractor Drivers was highly important to Senn Freight's business — in fact, the performed the very work that Senn Freight was incorporated to engage in. There was no evidence at trial contradicting that the Contractor Drivers performed work that was an important part of Senn Freight's business or trade. As such, drivers contracted to haul loads for Senn Freight are Senn Freight's statutory employees. There was no evidence to permit the jury to determine otherwise.

This Court, in an unpublished opinion, has ruled on facts nearly identical to those

at bar and held that similar contractor drivers were a carrier's statutory employees:

> Here, Massey, a truck driver, sustained injuries while transporting loads for Werner, a common carrier. Clearly, the transportation of goods is an important, integral part of Werner's trade, business, or occupation.
>
> Massey admits she and her husband entered into a "contract" with Werner to lease their truck pursuant to an owner-operator agreement. Moreover, Massey concedes she signed an "Owner-Operator Compensation Coverage Agreement," wherein she is referred to as a "Contractor," and she sought workers' compensation coverage under Nebraska law. Further, in a "Declaration of Employment Status" document, Massey declared she was "self-employed." . . .
>
> Further, Massey's status as an independent contractor does not preclude her from receiving benefits as a statutory employee. *See Smith v. T.H. Snipes & Sons, Inc.*, 306 S.C. 289, 411 S.E.2d 439 (1991). In *Smith*, Smith's decedent, a self-employed welder, was fatally injured while repairing a metal shearing machine in T.H. Snipes' place of business. *Id.* at 290, 411 S.E.2d at 439. Our supreme court found the decedent was T.H. Snipes' statutory employee even though the decedent was "self employed" and a "subcontractor." *Id.* at 290-91, 411 S.E.2d 439-40. The court stated "nothing in the language of [§ 42-1-400] precludes classification of a subcontractor as a statutory employee." *Id.* at 291, 411 S.E.2d at 440. We see no distinction between *Smith* and this case, except that the decedent in Smith was a welder and Massey was a truck driver.
>
> We therefore affirm the circuit court's holding that Massey is entitled to benefits as a statutory employee.

*See 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). This persuasive case reiterates and bolsters Travelers' contention that the trial court erred in denying its Post-Trial Motions.

Travelers anticipates that Senn Freight will argue that the South Carolina Workers Compensation Act did not encompass the Contractor Drivers because of S.C. Code Ann. § 42-1-360(2), which provides that the workers' compensation scheme does not apply to:

> any person who has regularly employed in service less than four employees in the same business within the State or who had a total annual payroll during the previous calendar year of less than three thousand dollars regardless of the number of persons employed during that period.

*See* S.C. Code Ann. § 42-1-360(2). However, Senn Freight misapplies this statute. It is undisputed that Senn Freight has more than four employees — particularly when the number of statutory employee Contractor Drivers are included. While the Contractor Drivers may be individuals (or themselves have fewer than four employees), this is of no moment to whether the Contractor Drivers may be statutory employees vis-à-vis Senn Freight. The only relevant inquiry is whether the Workers Compensation Act would apply to employees of Senn Freight; if so, then it may also apply to Senn Freight's statutory employees.

Travelers also anticipates that Senn Freight will rely upon a section of the Workers Compensation Act providing that it does not apply to owner-operators of tractor trailers:

> an individual who owns or holds under a bona fide lease-purchase or installment-purchase agreement a tractor trailer, tractor, or other vehicle, referred to as "vehicle", and who, under a valid independent contractor contract provides that vehicle and the individual's services as a driver to a motor carrier. For purposes of this item, any lease-purchase or installment-purchase of the vehicle may not be between the individual and the motor carrier referenced in this title, but it may be between the individual and an affiliate, subsidiary, or related entity or person of the motor carrier, or any other lessor or seller. Where the lease-purchase or installment-purchase is between the individual and an affiliate, subsidiary, or related entity or person of the motor carrier, or any other lessor or seller, the vehicle acquisition or financing transaction must be on terms equal to terms available in customary and usual retail transactions generally available in the State. This individual is considered an independent contractor and not an employee of the motor carrier under this title. The individual and the motor carrier to whom the individual contracts or leases the vehicle mutually may agree that the individual or workers, or both, is covered under the motor carrier's workers' compensation policy or authorized self-insurance if the individual agrees to pay the contract amounts requested by the motor carrier. Under any such agreement, the independent contractor or workers, or both, must be considered an employee of the motor carrier only for the purposes of this title and for no other purposes.

*See* S.C. Code Ann. § 42-1-360(9). However, this section did not become effective until 2007, well after the Policy periods at issue in Travelers' claims:

> The 2007 amendment, in item (1), deleted ", and Federal employees in this State" following "42-1-130"; deleted item (3) relating to Textile Hall Corporation.; redesignated items (4) and (5) as items (3) and (4); **and added items (5) to (9)**

*See* S.C. Code Ann. § 42-1-360(9) "EFFECT OF AMENDMENT". The 2007 amendment to Section 42-1-360 expressly provided that it "applies to injuries that occur on or after this date [June 20, 2007]." *See* 2007 S.C. Acts 111. Therefore, this provision — excluding owner-operators from the South Carolina Workers Compensation Act in some circumstances — was not in effect at any time relevant to this lawsuit.

As set forth above, the undisputed evidence shows that the Contractor Drivers "*could*" be statutory employees entitled to benefits under the South Carolina Workers Compensation Act. As a result, there is no evidence to support the jury's verdict. Therefore, the remuneration paid to Contractor Drivers should be considered in determining the final premium due to Travelers under the Policies. The trial court erred in denying Travelers' Post-Trial Motions.

### B. The Evidence Supports the Amount of Premiums Claimed by Travelers in This Case

As set forth above, the **only** conclusion that the evidence supports is that Travelers was entitled to premiums based upon the remuneration paid to the Contractor Drivers. For the reasons that follow, the evidence presented at trial provided — again, without dispute — a basis for calculating to a reasonable degree of certainty the amount of premiums to which Travelers was entitled under the Policies.

The evidence presented at trial demonstrated — based on the 1099-MISC forms — that Senn Freight paid the Contractor Drivers the following amounts in 2003, 2004 and 2005:

| PERSON/ ENTITY | REMUNERATION PAID (2003) | REMUNERATION PAID (2004) | REMUNERATION PAID (2005) |
|---|---|---|---|
| William N. Ward | $95,975.97 | $119,586.35 | $104,305.92 |

| | | | |
|---|---|---|---|
| Taylor Trucking Co., Inc. | $52,886.88 | $69,944.79 | $138,601.24 |
| Randy Anderson | $9,280.98 | $0.00 | $0.00 |
| Marshall Carver | $37,578.99 | $0.00 | $0.00 |
| Bert Hayes | $43,595.46 | $0.00 | $0.00 |
| Mitchell Wright | $92,274.13 | $117,044.21 | $112,233.50 |
| Melroy Houser | $100,026.08 | $121,133.15 | $103,951.59 |
| John B. Abney | $77,504.14 | $66,995.56 | $40,966.36 |
| GEO Trucking Co., Inc. | $81,952.80 | $114,919.15 | $96,412.57 |
| ASAP Logistics, Inc. | $0.00 | $43,563.16 | $0.00 |
| Christopher P. Rahrer | $0.00 | $0.00 | $7,430.28 |
| BME Trucking | $0.00 | $0.00 | $311,635.56 |
| Richard Summers | $0.00 | $0.00 | $66,450.50 |
| Sue Chandler | $0.00 | $0.00 | $106,647.66 |
| **TOTALS** | $591,075.43 | $653,186.37 | $1,088,635.18 |

(*See* R. pp. 186-206). Stephen Evanglista — an employee of Travelers — testified that the remuneration information reflected on the 1099-MISC forms was appropriate to use to calculate the premium due:

> Q: But aside from all of that, the information is provided to you on these 1099's. If you are using it to calculate a premium for the policy period, how do you handle your evaluation of this?
>
> A: Oh, I see. I see. Well, we look at the amount that was paid to these

individuals, we take the amounts that were paid and, again, apply to the rate that's established on the policy. Like you said, divide the amount that was paid by a hundred and multiply it by the rate that's on the policy.

(*See* R. p. 107, line 23- p. 108, line 8). More to the point, he testified that — in the absence of Senn Freight providing additional information — these documents provided the best information available to calculate the premium:

Q: All right. And let me back up again -- do you take the amount of those 1099's unless there's some other guidance as far as what was actually paid to somebody?

A: Right. In the absence of any other records, we do have rules that we can apply to the amount paid to sub-contractors or independent contractors for the works that's being performed. But without having supporting documentation to know how to apply those rules to the payroll for the amounts paid to the subcontractors in order to give a proper adjustment to derive at the correct amount that should be included in the basis of premium, there's really no way of knowing how much to pick up. So in absence of the insured providing us that documentation, we take the full amount that was paid because we have no idea how to -- what adjustments to make to that.

(*See* R. p. 108, line 17- p. 109, line 6).

Applying the methodology discussed above and the rates contained in the Policies, the undisputed testimony at trial was that, based upon the amount of remuneration referenced in the 1099's (R. pp. 186-206), the premiums on the policies for the Contractor Drivers would total **$197,308.00**, itemized as follows:

- ***For the Policy period July 10, 2003-July 10, 2004***: $65,137.00
- ***For the Policy period July 10, 2004-July 10, 2005***: $91,184.00
- ***For the Policy period July 10, 2003-July 10, 2004***: $40,987.00

(*See* R. p. 110, line 5- p. 115, line 9). Senn Freight did not present any evidence challenging: (a) that the Contractor Drivers were included within the classes of drivers contained on the Information Pages; (b) the accuracy of the data contained in the 1099's; or (c) the calculations Travelers used to arrive at the final premium.

Therefore, in light of the trial court's error in denying Travelers' Post-Trial Motions as to liability and the undisputed evidence establishing the amount of damages, this Court should reverse the trial court and enter judgment in favor of Travelers in the amount of $197,308.00.

## III. The Trial Court Erred in Denying Traveler's Post-Trial Motions as to Senn Freight's Bad Faith Counterclaim for Wrongful Termination of the Policies

For the reasons set forth herein, the trial court erred in denying Travelers' Post-Trial Motions with regard to Senn Freight's bad faith cause of action relating to the cancellation of the Third Policy.

### A. South Carolina Law Does Not Recognize a Cause of Action for Bad Faith Cancellation of an Insurance Policy

As an initial matter, the trial court erred in denying Travelers' Post-Trial Motions with regard to Senn Freight's bad faith claim. South Carolina law does not recognize, and has never recognized, a bad faith claim relating to cancellation of an insurance policy — as opposed to the denial of coverage for a particular claim.

#### 1. Travelers Did Not Waive Its Argument That South Carolina Does Not Recognize a Bad Faith Claim Arising Out of the Cancellation of an Insurance Policy (as Opposed to a Denial of Coverage for a Particular Claim)

In its Order denying Traveler's Post-Trial Motions, the trial court initially ruled that Traveler's challenges to Senn Freight's "bad faith cancellation" counterclaims were waived because Travelers did not timely raise them:

> The Plaintiff waived his (sic) objections to the Defendant's cause of action for bad faith cancellation of policy by failing to object to the jury charge. Plaintiff cannot raise an issue for the first time on appeal and must make a timely objection. *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 598 S.E.2d 712 (2004).
>
> Plaintiff also failed to plead in its Reply to Counterclaim that the cause of action was improper and simply issued a standard denial. Plaintiff did not allege failure to state a cause of action or failure to state a claim in its Reply and the issue cannot be raised for the first time on appeal. *Mains v. K-Mart Corp.*, 297 S.C. 142, 375 S.E.2d 311, 314 (Ct. App. 1988).

(*See* R. pp. 6-7). However, this conclusion was in error and should be reversed.

"'[W]hen an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review.'" *See McComb v. Conard*, 394 S.C. 416, 426-27, 715 S.E.2d 662, 667 (Ct. App. 2011) (*quoting Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 55 (Ct. App. 2006)). However, the Supreme "Court does not require parties to engage in futile actions in order to preserve issues for appellate review." *See Staubes v. City of Folly Beach*, 339 S.C. 406, 415, 529 S.E.2d 543, 546–47 (2000). Travelers did more than enough under these standards to preserve this issue for appellate review.

At the close of evidence on Senn Freight's counterclaims, but before the case was submitted to the jury, Travelers' trial counsel moved for a directed verdict as to this very argument:

> Working off the insurance bad-faith, again, Your Honor, there's absolutely no evidence in the case. **South Carolina only recognizes bad faith in refusal to pay benefits in a first party or third party situation. There's been no allegation whatsoever that there was a refusal to pay benefits in this case.** And really reading the allegations of that particular fourth defense in the counterclaim, it's just a restatement of a breach of contract. **It's in a sheep's clothing of an insurance bad faith claim**. Testimony from the stand, I believe, basically was do you feel like it was done in bad-faith, yes. Without any further evidence or testimony of any insurance bad faith and refusal to pay benefits. So we believe that the Plaintiff would be entitled to directed verdict on that counterclaim.

(*See* R. p. 126, lines 4-18 (emphasis added)). The trial court rejected this argument, denied Travelers' motion and submitted the bad faith claim to the jury:

> All right. My ruling is I'm going to deny the motion right now. I'm going to go off the record just for a second. . . . Y'all were arguing the motions for directed verdict for Plaintiff and Defendant. If y'all want to be heard further on those, I'll let you -- hear you further on those, but my feeling before we took a break and as we had the conference in chambers was to deny them both ways and proceed with the verdict form that we fashioned roughly back in chambers.

(*See* R. p. 127, lines 3-5 and 8-14). Subsequently, Travelers raised the issue yet again in

its Post-Trial Motions. (*See* R. pp. 37-52). The trial court then again ruled upon and rejected this argument, this time in writing; this is the Order presently on appeal. (*See* R. pp. 1-13). Thus, Travelers raised this issue twice before the trial court and was twice unsuccessful. This was more than sufficient to preserve the issue for appellate review.

Therefore, this Court should reverse the trial court's denial of Travelers' Post-Trial Motions as to Senn Freight's bad faith claims.

### 2. Senn Freight's Claim of Bad Faith Is Not Authorized by South Carolina Law

As to the merits, Senn Freight's bad faith claim must fail, insofar as it is premised upon Traveler's cancellation of the Third Policy, rather than denial of coverage for a particular claim. South Carolina has never explicitly recognized the extension of the bad faith cause of action to such facts. Therefore, the trial court erred in denying Travelers' Post-Trial Motions.

The only bad faith action recognized in South Carolina concerns an insurer's alleged bad faith failure to pay benefits under a first-party insurance policy or to defend or indemnify under a liability policy. The elements of the bad faith cause of action have been defined as follows:

> The elements of an action for breach of the covenants of good faith and fair dealing in an insurance contract are as follows:
>
> 1) the existence of a mutually binding contract of insurance between plaintiff and defendant;
>
> **2) a refusal by an insurer to pay benefits due under the contract;**
>
> 3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing in the contract;
>
> 4) that causes damage to the insured.

*See Cock-N-Bull Steak House, Inc. v. Generali Ins., Co.*, 321 S.C. 1, 6, 466 S.E.2d 727, 730 (1996) (emphasis added) (enumerating the elements

> of a claim for bad faith refusal to pay benefits under an insurance contract).

*See Gaskins v. Southern Farm Bureau Cas. Ins. Co.,* 343 S.C. 666, 673, 541 S.E.2d 269, 272 (Ct. App. 2000) (emphasis added). "A **necessary element** of this cause of action is 'a refusal by the insurer to pay benefits due under the contract.'" *See Walters v. Canal Ins. Co.*, 294 S.C. 150, 151, 363 S.E.2d 120, 121 (Ct. App. 1987) (*quoting Bartlett v. Nationwide Mut. Fire Ins. Co.*, 290 S.C. 154, 158, 348 S.E.2d 530, 532 (Ct. App. 1987)). Of particular note, no South Carolina case has ever explicitly stated that the bad faith tort may be extended to encompass bad faith cancellation of an insurance policy (in the absence of denial of coverage for a particular claim). Rather, every South Carolina appellate bad faith case has involved a failure to pay a specific claim, rather than the mere cancellation of a policy in the abstract.

Simply put, South Carolina has **never** recognized the claim Senn Freight seeks to assert in this case. In its Order denying Travelers' Post-Trial Motions, the trial court relied heavily upon *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009), stating that *Mitchell* "specifically states that bad faith cancellation is a cause of action." (*See* R. p. 7). However, this is in error. While the *Mitchell* Court did affirm a bad faith judgment stemming from the rescission of an insurance policy, it did not go nearly as far as the trial court suggests. First, the *Mitchell* Court was not presented with the specific legal argument that Travelers raises here: whether South Carolina's bad faith tort, as a matter of law, should extend to policy cancellation. Moreover, *Mitchell* concerned a first-party health insurance policy that was cancelled after the insured was diagnosed as HIV-positive. In essence, the cancellation of the policy in *Mitchell* was a denial of coverage for a particular health condition. On the other hand, in this case, there is no allegation or evidence of a pending claim at the time of cancellation of the Third Policy. As such, *Mitchell* is not controlling and has no application.

For the foregoing reasons, this Court should reverse the trial court's denial of

Travelers' Post-Trial Motions.

### B. The Undisputed Evidence Establishes That Travelers' Cancelled the Policies in Good Faith

Assuming, *arguendo,* that South Carolina recognizes that a bad faith claim *could* be asserted for the wrongful termination of an insurance policy, the trial judge nevertheless erred in denying Travelers' Post-Trial Motions. The undisputed evidence cannot support a reasonable person to conclude that Travelers acted in bad faith in cancelling the Third Policy. To the contrary, the only evidence of record — aside from Senn Freight's speculative innuendo — demonstrates that Travelers cancelled the Third Policy because of Senn Freight's refusal to cooperate it.

In the context of insurance, "bad faith" requires proof of the insurer's knowingly culpable conduct:

> "Bad faith is a knowing failure on the part of the insurer to exercise an honest and informed judgment in processing a claim.... [A]n insurer acts in bad faith where there is no reasonable basis to support the insurer's decision." *American Fire & Cas. Co. v. Johnson*, 332 S.C. 307, 311, 504 S.E.2d 356, 358 (Ct. App. 1998); *see also Cock-N-Bull Steak House v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996).

*See Doe v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 649, 557 S.E.2d 670, 674 (2001). "Bad faith, like fraud, connotes dishonesty. It should not be rashly charged or lightly inferred." *Miles v. State Farm Mut. Auto. Ins. Co.*, 238 S.C. 374, 382, 120 S.E.2d 217, 221 (1961). As the Verdict Form recognized, Senn Freight was required to prove bad faith cancellation of the Third Policy be clear and convincing evidence. (*See* R. pp. 14-16). However, Senn Freight did not present **any** evidence at trial to carry its burden of showing that Travelers acted in bad faith.

The Third Policy expressly reserved to Travelers the right to cancel that insurance policy:

> 2. We may cancel this policy. We must mail or deliver to you not less than ten days advance written notice stating when the cancellation is to take effect. Mailing that notice to you at your mailing address sown in

Item 1 of the Information Page will be sufficient to provide notice.

3. The policy period will end on the day and hour stated in the cancellation notice.

(*See* R. p. 176 ¶ 6.D(2) and (3)). This provision of the Third Policy permits termination with or without cause. It does not restrict or limit Travelers' right to terminate. Therefore, it is clear that — irrespective of whether or not Senn Freight breached the agreement — Travelers had the contractual right to terminate. There was no evidence that the cancellation of the Third Policy violated any express terms of that agreement so as to cause any damage to Senn Freight.

In response to this broad contractual right to terminate, Senn Freight did not present a scintilla of evidence showing that Travelers exercised that right in bad faith. Instead, Senn Freight relies upon speculation and innuendo in an effort to carry its heavy burden. The only "evidence" of bad faith that Senn Freight proffered was Mr. Senn's self-serving testimony that he subjectively considered the cancellation of the final Policy to be in bad faith. (*See* R. p. 125, lines 6-8). Senn Freight did not present any expert witness testimony supporting its claim that Travelers acted in bad faith. Senn Freight did not present any admissions by Travelers that it knowingly lacked a reasonable basis to cancel the Third Policy. Senn Freight did not present any evidence of an ulterior motivation or purpose by Travelers. Simply put, there was no evidence whatsoever that could support a jury finding of bad faith.

To the contrary, the **only** evidence as to Travelers' motivation supports the contrary conclusion, *i.e.*, that Travelers had a proper and legitimate reason to cancel the Third Policy under the terms of that agreement. The Third Policy obligated Senn Freight to "keep records of information needed to compute premiums" and to "provide us with copies of those records when we ask for them." (*See* R. p. 175 ¶ 5.F). In addition, in the Third Policy, Senn Freight agreed to grant Travelers open and unrestricted access to a broad range of its business records and to permit an audit:

> You will let us examine and audit **all** your records that relate to this policy. These records include **ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data**. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by the audit will be used to determine final premium.

(*See* R. p. 175 ¶ 5.G (emphasis added)). Mr. Senn testified that he was aware of these obligations under the Third Policy:

> Q: Now, the policy also provides, and you're aware of this that you were subject to being audited. Is that correct?
>
> A: Yes.
>
> Q: Okay. And that means that you were obligated and Traveler's had a right to review your books, disbursement journals, general ledgers and all that information that you said a few minutes ago was vital to conducting a complete and accurate and reliable audit. Is that correct?
>
> A: An auditor can look at what has happened. That doesn't mean every record we have.

(*See* R. p. 63, lines 15-25).

The only evidence at trial demonstrated that Senn Freight failed to comply with its contractual obligations to provide information to Travelers regarding the Leased and Contractor Drivers to permit Travelers to calculate its premium. For example, Stephen Evanglista of Travelers testified that Senn Freight failed to provide Travelers with certain requested information:

> Q: So backing up to the terms of the policy, Senn's to provide us with information. Is that correct?
>
> A: That's correct.
>
> Q: Travelers has a right to review this information. Is that correct?
>
> A: That's correct.
>
> Q: Now, based upon your review of the records subsequent to this audit of October 17, 2005, was there any indication this information was requested of Senn?

A: Yes. Yes, I believe so. . . .

Q: Now, Mr. Evanglista, you stated there is an indication in your view of the records that this information was subsequently requested from Senn, correct?

A: Yes.

Q: Based on your review of the records subsequent to this audit as well as the request for that information, is there any indication that this information has been provided to Travelers?

A: No. No, it hasn't been provided to us.

(*See* R. p. 105, line 18- p.107, line 1; *see generally* R. pp. 101-107). Moreover, with regard to the Leased Drivers, Mr. Senn's testimony established that Senn Freight did not provide Travelers with relevant and sufficient information (such as copies of binding insurance policies) to definitively establish that those drivers were covered under the PEOs' workers' compensation insurance policies as required by the Policies for all relevant times. (*See* R. p. 78, line 12-p. 88, line 25; R. pp. 213-15).

On the other hand, Senn Freight did not provide any specific evidence showing bad faith intention on the part of Travelers so as to permit a jury to disregard this evidence and find bad faith. As the trial judge instructed the jury, Senn Freight had a heavy burden to prove bad faith by clear and convincing evidence. Senn Freight did nothing to fulfill its obligation. Simply put, Senn Freight did not present a shred of evidence of bad faith — let alone sufficient evidence to carry its heavy burden of showing bad faith by clear and convincing evidence. Aside from Mr. Senn's self-serving and subjective testimony based on innuendo, there is **nothing** in the record whatsoever to support a finding of bad faith. Thus, the record could not support the jury's verdict.

For the foregoing reasons, this Court should reverse the trial court's denial of Travelers' Post-Trial Motions.

## IV. The Trial Court Erred in Denying Traveler's Post-Trial Motions as to Senn Freight's Bad Faith Counterclaim Because There Is No Evidence to Support the Amount of Damages Awarded

The trial court also erred in denying Travelers' Post-Trial Motions because there is no evidence to support the measure of Senn Freight's compensatory damages.

South Carolina law has long required that a party seeking to recover damages must present sufficient evidence to permit the jury to determine the amount of damages with reasonable certainty:

> In order for damages to be recoverable, the evidence should be sufficient to "enable the court or jury to determine the amount thereof with reasonable certainty or accuracy." *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981). "While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required." *Id.* The evidence, however, should be such that a court or jury can reasonably determine an appropriate amount. *Gray v. S. Facilities, Inc.*, 256 S.C. 558, 570, 183 S.E.2d 438, 444 (1971). Moreover, bald allegations are insufficient to establish a claim for diminution in value, and the evidence must not be speculative as to the amount of the alleged diminution. *See Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 117, 410 S.E.2d 537, 546 (1991).

*See Winters v. Fiddie*, 394 S.C. 629, 647, 716 S.E.2d 316, 325 (Ct. App. 2011). Senn Freight never even attempted to present evidence sufficient to satisfy this standard.

On its bad faith cancellation counterclaim, the jury awarded Senn Freight $6,000.00 in compensatory damages. (*See* R. pp. 14-16). However, there was not a scintilla of evidence supporting such an award of damages. There was no objective basis for the jury to use to estimate the amount of actual harm from cancellation. The only specific damage figure that Senn Freight presented to the jury was the amount of "unearned premium" it claimed it was entitled to recover because of the early cancellation of the Third Policy — which was awarded on Senn Freight's breach of contract claim and could not have been included in the bad faith verdict. Rather, the amount of the bad faith damage award was cut from whole cloth. It was sheer speculation, unsupported by any

evidence.

For the foregoing reasons, this Court should reverse the trial court's denial of Travelers' Post-Trial Motions.

## V. There Is No Evidence Supporting the Jury's Award of Punitive Damages

The trial court also erred in denying Travelers' Post-Trial Motions because there is no evidence supporting the jury's award of punitive damages.

> In order to recover punitive damages, the plaintiff must present clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights. S.C.Code Ann. § 15–33–135 (2005) ("In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence."); *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). "The test by which a tort is to be characterized as reckless, wil[l]ful or wanton is whether it has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights." *Rogers v. Florence Printing Co.*, 233 S.C. 567, 577–78, 106 S.E.2d 258, 263 (1958); *see also Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (*quoting Rogers*). "It is this present consciousness of wrongdoing that justifies the assessment of punitive damages against the tort-feasor...." *Rogers*, 233 S.C. at 578, 106 S.E.2d at 263. In other words, "at the time of his act or omission to act the tort-feasor [must] be conscious, or chargeable with consciousness, of his wrongdoing." *Id.* at 578, 106 S.E.2d at 264.

*See Cody P. v. Bank of America, N.A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct. App. 2011). There was no evidence presented at trial that could support the jury's imposition of punitive damages on Travelers.

As described above, Senn Freight did not present a scintilla of evidence of Travelers' culpable or wrongful conduct. To the contrary, Senn Freight has relied solely on speculation, conjecture and innuendo. This is insufficient to carry the burden of proving entitlement to punitive damages by "clear and convincing evidence." Senn Freight never presented any evidence that Travelers cancelled the Third Policy in such a blameworthy manner as to warrant punitive damages. At the very most, Travelers exercised a contractual right to cancel for a reason that Senn Freight does not agree with.

Therefore, this Court should determine that there is no evidence supporting the award of punitive damages and that the trial court's denial of Travelers' Post-Trial Motions was in error.

## VI. The Jury's Award of Punitive Damages Was Plainly and Unjustifiably Excessive

The trial court also erred in denying Travelers' Post-Trial Motions because the jury's award of punitive damages was plainly excessive.

> Our supreme court recently indicated an appellate court's scope of review to be *de novo*. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 185, 183 (2009).
>
> In reviewing an award of punitive damages, we consider (1) the reprehensibility of the conduct, (2) the disparity or "ratio" between actual harm and the punitive damage award, and (3) the comparative penalties. *Fortis*, 385 S.C. at 587–89, 686 S.E.2d at 185–86.

### 1. Reprehensibility

> In considering reprehensibility, a court should consider whether:
>
> > (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.
>
> *Id.* at 185, 686 S.E.2d at 587. This encompasses the defendant's culpability, the duration of the conduct, the defendant's awareness or concealment, and the existence of similar past conduct. *Id.* at 185, n. 7, 686 S.E.2d at 587, n.7.

*See Limehouse v. Hulsey,* 397 S.C. 49, 723 S.E.2d 211, 227 (Ct. App. 2011). On Senn Freight's bad faith counterclaim, the jury returned a verdict of compensatory damages in the amount of $6,000.00 and punitive damages in the amount of $100,000.00. (*See* R. pp. 14-16). For the reasons that follow, that award is plainly excessive.

There is no evidence to support a finding of reprehensibility in this case. Any harm that Senn Freight sustained was purely economic, not physical. There was no

evidence that Travelers was indifferent to the health or safety of others. Moreover, Senn Freight is a sophisticated and successful business entity, not a financially vulnerable party. Mr. Senn testified that he was a college-educated, experienced Certified Public Accountant who had been involved with Senn Freight for most of his life; as such, he had knowledge of and experience with accounting practices and audits. (*See* R. p. 54, line 15-p. 58, line 16). Senn Freight presented no evidence of trickery, deceit or intentional malice by Travelers. This was a single, discrete incident (cancellation of the Third Policy); there was no evidence of similar conduct by Travelers.

Moreover, the ratio of punitive to actual damages here is patently unreasonable. The amount of punitive damages awarded ($100,000.00) was **16.67** times the amount of compensatory damages awarded ($6,000.00). This ratio is facially excessive. *See Hollis v. Stonington Development, LLC,* 394 S.C. 383, 399, 714 S.E.2d 904, 912-13 (Ct. App. 2011) ("The ratio of punitive damages awarded by the jury in this case to actual damages is 8.75 to 1. We find this to be an excessive disparity between the punitive damages awarded and the harm actually suffered by the Hollises and Robinsons."). While there is no concrete limit on the ratio between actual and punitive damages, "few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process." *See State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 410 (2003). Finally, there is no evidence to support that cases involving similar facts have warranted such draconian punitive damage awards.

Therefore, this Court should determine that the award of punitive damages was excessive and that the trial court's denial of Travelers' Post-Trial Motions should be reversed.

## CONCLUSION

For all of the reasons set forth herein, this Court should reverse the trial court's denial of Travelers' Post-Trial Motions.

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Attorneys for Appellant

Date: May 25, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
No. 2011189987

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APPEAL FROM NEWBERRY COUNTY
In The Court of Common Pleas

Eugene C. Griffith, Circuit Court Judge

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Case No. 2008-CP-36-417

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Travelers Property Casualty Co., ..... Appellant

v.

Senn Freight Lines, Inc., ..... Respondent

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## CERTIFICATE OF COMPLIANCE

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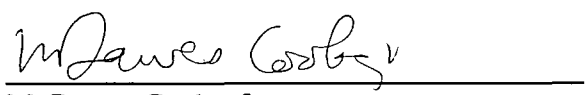
The undersigned certifies that this Appellant's Final Brief complies with Rule 211(b), SCACR.



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PROOF OF SERVICE

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I certify that on the 25th day of May, 2012, I served three (3) bound copies of the Appellant's Final Brief on counsel of record by depositing a copy of it in the United States Mail, postage prepaid, addressed as follows:

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May 25, 2012

Honorable Jenny A. Kitchings
Clerk, S.C. Court of Appeals
1205 Pendleton Street
Columbia, SC 29201

RE: Travelers Property Casualty Co. v. Senn Freight Lines
Case # 2011189987
Our File No.: 6.554



Dear Ms. Kitchings:

Enclosed are the following:

1) Original and 15 copies of the Appellant's Final Brief, along with the original and one copy of the Proof of Service for same;
2) Original and 15 copies of the Appellant's Final Reply Brief, along with the original and one copy of the Proof of Service for same.

Please date stamp and return one copy of each to me in the envelope provided herein.

By copy of this letter, I am serving three copies of each Brief upon counsel for Respondent.

Sincerely,

Dawes Cooke

M. Dawes Cooke, Jr.

MDCjr//klj
Enclosures
c: W. Chad Jenkins, Esquire