THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Opinion No. 2018-UP-010 (S.C. Ct. App. filed January 10, 2018

Ard Trucking Company ..... Petitioner,

v.

Travelers Property Casualty Company of America d/b/a
The Travelers Indemnity Company of Illinois ..... Respondent.

PETITION FOR WRIT OF CERTIORARI

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INDEX

CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled on the by Court of Appeals on April 18, 2018.

QUESTIONS PRESENTED

1. Whether the Court of Appeals failed to properly apply South Carolina law to the two identical "LSRP Notification Endorsements" which Respondent itself incorporated into Respondent insurer's two policies (an initial and a replacement policy) issued to Petitioner, which resulted in the Court of Appeals' failure to enforce Respondent's own *clear and unambiguous exclusion* of the "Loss Sensitive Rate Plan surcharge premium" from applying to the two policies Respondent issued to Petitioner?

2. Whether the Court of Appeals erred by rewriting the insurance policies issued by Respondent to Petitioner in favor of Respondent by relying on a rule of law which only arises when an ambiguity exists, after the Court of Appeals agreed with both parties that there was no ambiguity in the policies Respondent issued to Petitioner?

3. Whether the Court of Appeals erred in factually concluding that Petitioner intended for the "LSRP surcharge premium" to apply to the two policies Respondent issued to Petitioner, when this factual conclusion was incorrect and, more importantly, inappropriate since undertaking a factual analysis required the Court of Appeals to disregard, ignore and rewrite Respondent's own *clear and unambiguous exclusion* of "LSRP surcharge premium" contained in Respondent's "LSRP Notification Endorsement" Respondent incorporated into both policies issued to Petitioner?

STATEMENT OF THE CASE

Petitioner is a family owned trucking company in the Pee Dee area of South Carolina which has been in business since 1945. Petitioner employs over 70 truck drivers and 40 office administrators and supplies national transportation for Petitioner's customers. (Appendix 00503.)

This case arises from a dispute between Petitioner, as named insured under an insurance policy, and Respondent, as Petitioner's insurer, regarding the applicability of an "LSRP surcharge premium" to the insurance coverage Respondent issued to Petitioner. The initial

insurance policy was issued in December of 2003 (Appendix 00594-00615). The same policy replaced by Respondent in March of 2003 (Appendix 00616-00647). Both policies provided Petitioner with workers compensation insurance and both policies contained an identical "LSRP Notification Endorsement" prepared by Respondent and required by the South Carolina Department of Insurance (SCDOI) in order to ensure that all named insured parties would be on notice of the intent and details of the "LSRP surcharge premium plan" whenever it applied to a policy issued by insurers to named insureds. (Appendix 00575.)

The lower court issued an order dated February 5, 2015 holding that the "LSRP Notification Endorsement" prepared by Respondent and incorporated into both policies issued to Petitioner clearly, unequivocally and unambiguously *excluded* the application of the "LSRP surcharge premium" from the two policies Respondent issued to Petitioner and ordered Respondent to refund Petitioner's $52,114 letter of credit Respondent had applied to Respondent's claim for a $175,000 "LSRP surcharge premium" from Petitioner. (Appendix 001 - 0014)

Respondent appealed the lower court's decision to the South Carolina Court of Appeals and, on January 10, 2018, the Court of Appeals reversed the lower court by holding that the "LSRP surcharge premium" applied to both policies issued by Respondent to Petitioner. (Appendix 767-0771) Petitioner's timely request for a rehearing was denied by the Court of Appeals by an order dated April 18, 2018. (Appendix 0804.) Thereafter, Petitioner timely filed this Petition for a Writ of Certiorari seeking a review of the Court of Appeals' decision by the South Carolina Supreme Court.

BACKGROUND FACTS

On November 1, 2003, six (6) days prior the effective date of the initial policy Respondent issued to Petitioner on November 7, 20023, the SCDOI *conditionally* authorized South Carolina assigned risk insurers, including Respondent, to charge an extraordinary "Loss Sensitive Rate Plan surcharge premium" to certain policy holders in South Carolina. (Appendix 547.) However, SCDOI required participating insurers to provide prospective insured parties with a "notification" that the LSRP surcharge premium would apply to their policies. Specifically, SCDOI's BASIC MANUAL of LSRP rules (Appendix 00566-00590) required insurers intending to apply the "LSRP surcharge premium" to their policies to incorporate into each policy an "LSRP Notification Endorsement" which would "ensure" that any South Carolina insured party affected by the LSRP surcharge premium would be "notified of the intent and details of the (LSRP) Plan:"

> D. Notice to Assigned Risk Policyholders.
> All assigned risk policies shall be endorsed with policy endorsement WC 00 04 17 - Assigned Risk Loss Sensitive Rating Plan (LSRP) Notification ("LSRP Notification Endorsement") in order to ensure that all possible qualifying risks are notified of the intent and details of the Plan. All assigned carriers shall be required to attach this endorsement to all assigned risk policies.
>
> (Emphasis supplied.) (Appendix 00575.)

Pursuant to the foregoing SCDOI notification requirement, both policies issued to Petitioner contained a version of the "LSRP Notification Endorsement" prepared by Respondent which was based on a model "LSRP Notification Endorsement" provided by SCDOI. (Appendix 00582,) Respondent incorporated its own version of the "LSRP Notification Endorsement" into

Petitioner's initial policy at Appendix 00608 and into Petitioner's replacement policy at Appendix 00628.

It is noted here that Respondent's own version of the "LSRP Notification Endorsement" actually *excluded* the application of the "LSRP surcharge premium" from all South Carolina policies. The first sentence of Respondent's version of the "LSRP Notification Endorsement" states:

> This endorsement is issued because you may qualify to have the cost of your insurance subject to the assigned risk mandatory Loss Sensitive Rating Plan (LSRP).
>
> (Appendix 00608 and Appendix 00628.)

After listing the seven (7) qualifications for LSRP "eligibility, " Respondent's own version of the "LSRP Notification Endorsement" ended with the following sentence:

> This endorsement applies in the states listed in the schedule below:

SCHEDULE

STATE	**PREMIUM ELIGIBILITY**
Alabama	$200,000
Alaska	$200,000
Connecticut	$200,000
District of Columbia	$200,000
Georgia	$200,000
Idaho	$200,000
Illinois	$200,000
Indiana	$100,000
Kansas	$200,000
Nevada	$200,000
New Hampshire	$175,000
North Carolina	$200,000
South Dakota	$200,000

Therefore, Respondent's own plain, clear and unambiguous language it incorporated into its version of the "LSRP Notification Endorsement," *excluded* the application of the "LSRP

surcharge premium" from all South Carolina insurance policies, including the two policies Respondent issued to Petitioner.

Not withstanding the *exclusion* of the "LSRP surcharge premium" from the two policies issued to Petitioner, Respondent *nevertheless* asserted a claim against Petitioner for an "LSRP surcharge premium" of $175,0000 after the policy coverage year had concluded and applied Petitioner's $52,114 letter of credit to the asserted "LSRP surcharge premium." As a result, Petitioner filed this lawsuit to recover from Respondent the $52,114 Letter of Credit Petitioner had pledged to cover any additional workers compensation premium found due. After extensive discovery, both parties filed motions summary judgement in the lower court.

After applying South Carolina law regarding interpretation of insurance policies to Respondent's "LSRP Notification Endorsement," the lower court held that the Respondent's "LSRP Notification Endorsement" *excluded* the application of the "LSRP premium surcharge" from the policies issued by Respondent to Petitioner, and ordered Respondent to refund the $52,114 sum under Petitioner's letter of credit. (Appendix 001 - 0014). Respondent appealed the lower court's order to the Court of Appeals. As indicated above, on January 10, 2018, the Court of Appeals reversed the lower court's order in favor of Petitioner by holding that Respondent's "LSRP Notification Endorsement" did not exclude the "LSRP premium surcharge" from applying to the policies issued by Respondent to Petitioner.

Petitioner seeks a writ of certiorari to review the Court of Appeal's decision to reverse the decision of the lower court in favor of Petitioner.

ARGUMENT

I. The Court of Appeals failed to properly apply South Carolina law to the two identical "LSRP Notification Endorsements" which Respondent itself incorporated into Respondent insurer's two policies (an initial and a replacement policy) issued to Petitioner, which resulted in the Court of Appeals' failure to enforce Respondent's own *clear and unambiguous exclusion* of the "Loss Sensitive Rate Plan surcharge premium" from applying to the two policies Respondent issued to Petitioner.

After properly stating the South Carolina rules of insurance policy interpretation, the Court of Appeals nevertheless failed to properly apply these rules to the *exclusionary* language contained in Respondent's own "LSRP Notification Endorsement," which was incorporated by both of the policies issued to Petitioner.

Respondent's version of the "LSRP Notification Endorsement" used in both of the subject policies contained a clear and unambiguous list of all states wherein Respondent intended to apply the "LSRP premium surcharge." Very clearly, the state of South Carolina *does not appear on the list*. This omission by Respondent of the state of South Carolina effectively *excluded* both of the South Carolina policies Respondent issued to Petitioner from applying the "LSRP premium surcharge" from the subject policies.

It is further noted here that Respondent's insurance policy itself sets out contractual principles controlling any policy "change" to Respondent's insurance policy:

> **GENERAL SECTION**
>
> **A. The Policy**
>
> This policy includes at its effective date the Information Page and all endorsements and schedules listed there. It is a contract of insurance between you (the employer named in Item 1 of the Information Page) and us (the insurer named on the Information Page). The only agreements relating to this insurance are stated in

> this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy. (Emphasis supplied.)(Appendix 00603.)

Clearly, Respondent's own policy prohibits any "change" in the policy's terms "except by endorsement issued by (Respondent) to be part of this policy."

Respondent's appeal from the lower court's decision is clearly an effort by Respondent to avoid the consequences of its own clear and unequivocal policy terms Respondent itself used in preparing its version of the "LSRP Notification Endorsement." While Respondent persuaded the Court of Appeals to *rewrite* Respondent's "LSRP Notification Endorsement" for Respondent's benefit, the Court of Appeals not only invalidated the controlling insurance contract law its order cites, but also violated Respondent's own insurance contract which clearly prohibits unilateral policy changes. *See*, *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) (Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning.)

Respectfully, the Court of Appeals was taken in by Respondent's false proposition that the *conditional allowance* by SCDOI to allow insurers in South Carolina to apply the "LSRP surcharge premium" to their South Carolina policies, meant that the "LSRP surcharge premium" would be *automatically* incorporated into all South Carolina policies, "as a matter of law," simply by mentioning "LSRP surcharge premium." However, this proposition is totally false.

To the contrary, SCDOI specifically required all insurers intending to apply the "LSRP surcharge premium," to incorporate an "LSRP Notification Endorsement" into each policy in order to "ensure that all possible qualifying risks are notified of the intent and details of the (LSRP) Plan.":

> D. Notice to Assigned Risk Policyholders.
> All assigned risk policies shall be endorsed with policy endorsement WC 00 04 17 - Assigned Risk Loss Sensitive Rating Plan (LSRP) Notification ("LSRP Notification Endorsement") in order to ensure that all possible qualifying risks are notified of the intent and details of the Plan. All assigned carriers shall be required to attach this endorsement to all assigned risk policies.
>
> (Emphasis supplied.) (Appendix 00575.)

However, the Respondent's version of the "LSRP Notification Endorsement," which it incorporated into both polices issued to Petitioner, *utterly failed to notify* Petitioner that the "LSRP surcharge premium" would apply to South Carolina policies, including the two policies issued by Respondent to Petitioner. To the contrary, the clear, unequivocal and unambiguous language Respondent used in its version of the "LSRP Notification Endorsement" *excluded* "LSRP premium surcharge" from applying to the South Carolina policies Respondent issued to Petitioner.

Respondent's clear and unambiguous *exclusion* of the "LSRP premium surcharge" from applying to the South Carolina policies issued by Petitioner should have been enforced against the Respondent by the Court of Appeals, just like the lower court did. Instead, the Court of Appeals embraced Respondent's false proposition that SCDOI's conditional requirement for insurers to incorporate the "LSRP Notification Endorsement" into their to policies somehow "amended/supplanted" (Respondent's Final Brief at Appendix 00680, Line 6) and/or "revised and amended" (Respondent's Final Brief at Appendix 00628, Line 12) the plain, ordinary, clear and unambiguous *exclusionary language* Respondent used in its version of the "LSRP Notification Endorsement" that it incorporated into its South Carolina policies.

The false proposition Respondent used to overcome Respondent's own language in its version of the "LSRP Notification Endorsement" requires the Courts to ignore and disregard time-honored South Carolina rules of law binding contracting parities to their own clear and unambiguous contractual terms. The Court of Appeals erred by condoning such an aberration, which unabated and uncorrected, would result in the plain, clear, unambiguous terms in insurance contracts in South Carolina no longer being enforceable. Respondent's false proposition would permit insurers to contest their own clear and unambiguous terms to suit their own self-serving ends.

Our courts should not assist insurers rewrite their own policy *exclusions* in order to drastically change and alter the plain, ordinary and unambiguous meaning of policy terms. Our courts should not bend applicable rules of law to the point of breaking them in order to give an insurer relief from their self-created dilemmas and their own choice of exclusionary language. The only fair, reasonable and proper interpretation of Respondent's "LSRP Notification Endorsement" is that it *excluded* from all South Carolina policies, such as the ones Respondent issued to Petitioner, the application of the "LSRP premium surcharge."

Auto-Owners Insurance Company v. Benjamin, 415 S.C. 137, 781 S.E. 2d 137 (Ct. Ap. 2015) (Shearouse Adv. Sh. No. 48 at 36) is but one example of legions of cases which bind contracting parties to their plain, specific, unequivocal language used in their own insurance contracts:

> Insurance policies are subject to the general rules of contract construction. Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012) (quoting M & M Corp. of S.C. v. Auto-Owners Ins. Co., 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010)). The cardinal rule of contract interpretation is to ascertain

> and give legal effect to the parties' intentions as determined by the contract language. Id. (quoting McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning. Id. (quoting USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008)).
>
> Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. Whitlock, 399 S.C. at 615, 732 S.E.2d at 628 (quoting McGill, 381 S.C. at 185, 672 S.E.2d at 574).
>
> (Emphasis supplied.)

II. The Court of Appeals erred by rewriting the insurance policies issued by Respondent to Petitioner in favor of Respondent by relying on a rule of law which only arises when an ambiguity exists, after the Court of Appeals agreed with both parties that there was no ambiguity in the policies Respondent issued to Petitioner.

In interpreting the clear and unambiguous *exclusion* contained in Respondent's "LSRP Notification Endorsement," the Court of Appeals erroneously decided to "consider the policy as a whole" in its effort to "second guess" the intention of the parties. However, there was no reason for the Court of Appeals to look any further than the clear and unequivocal *exclusion* of the "LSRP surcharge premium" from the policies issued to Petitioner and contained in Respondent's "LSRP Notification Endorsement."

Instead enforcing Respondent's policy as written, the Court of Appeals undertook to determine what the contracting parties intended. To facilitate this effort, the Court of Appeals resorted to a rule of law that only arises whenever an ambiguity exists. However, in this case, the Court of Appeals had agreed with both parties that no ambiguity existed in Respondent's policy. Nevertheless and without the existence of an ambiguity, the Court of Appeals rewrote the insurance policies issued by Respondent to Petitioner in favor of Respondent.

Under South Carolina law, parties are bound by the plain, specific, unequivocal language used in their insurance contracts. Courts are required to enforce insurance policies as written, and they cannot second guess what the contracting parties may have intended. However, an exception may exist whenever there is an ambiguity, in which case Courts are permitted to look beyond the ambiguous terms in order to ascertain the intention of the contacting parties. Conversely, however, where no ambiguity exists, courts should not superimpose their own interpretation upon the clear, unambiguous policy language used by the parties.

The foregoing rules are enunciated in the case of *Auto-Owners Insurance Company v. Benjamin*, *supra*. First of all, *Auto-Owners Insurance Company* states that the "cardinal rule" of construction requires courts to ascertain and give legal effect to the insurance contract language:

> Insurance policies are subject to the general rules of contract construction. (Citations omitted.) The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. (Citations omitted.) "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." (Citations omitted.) Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." (Citations omitted.)

Secondly, whenever a Court determines that the insurance contract's language is ambiguous, the Court is permitted to look beyond the ambiguous language and consider the "whole document" to assist the Court determine the intention of the parties:

> Whether the language of a contract is ambiguous is a question of law for the court. An insurance contract is read as a whole document so that 'one may not, by pointing out a single sentence or clause, create an ambiguity.'" (Citations omitted.) However, this court must construe "[a]mbiguous or conflicting terms in an insurance policy . . . liberally in favor of the insured and strictly against the insurer." (Citations omitted.) Insurance policy

> exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." (Citations omitted.)

Again, the intention of the parties to an insurance contract where the terms are clear and unambiguous should be deduced from the plain, ordinary and unambiguous policy language itself. The *exclusion* created by Respondent under in its version of the "LSRP Notification Endorsement," is not ambiguous. Accordingly, the Court of Appeals should have enforced the endorsement as written, just as the lower court did. Stated differently, there was no reason for the Court of Appeals to go beyond the plain language of Respondent's "LSRP Notification Endorsement," in order to interpret its clear and unambiguous language stating that "LSRP surcharge premium" did not apply to South Carolina policies such as the policies issued to Petitioner.

III. The Court of Appeals erred in factually concluding that Petitioner intended for the "LSRP surcharge premium" to apply to the two policies Respondent issued to Petitioner, when this factual conclusion was incorrect and, more importantly, inappropriate since undertaking a factual analysis required the Court of Appeals to disregard, ignore and rewrite Respondent's own *clear and unambiguous exclusion* of "LSRP surcharge premium" contained in Respondent's "LSRP Notification Endorsement" Respondent incorporated into both policies issued to Petitioner.

The intention of parties to a clear and unambiguous insurance contract should only be deduced from the plain, ordinary and unambiguous policy language itself. The Court of Appeals failed to enforce the plain language used by Respondent's "LSRP Notification Endorsement," which clearly and ambiguously *excluded* the "LSRP surcharge premium" from applying to the policies Respondent issued to Petitioner. Instead, the Court of Appeals undertook to second guess and analyze what the contracting parties intended. In doing so, the Court of Appeals rewrote the insurance policies issued by Respondent to Petitioner in favor of Respondent.

The factual conclusion by the Court of Appeals that Petitioner intended for the "LSRP surcharge premium" to apply to the two policies issued to Petitioner by Respondent is contradicted by affidavits provided by Petitioner's officers (President Allen Ard at Appendix 00503-00508 and Safety Director Harry Brown at Appendix 00545-00546). These officers of Petitioned stated that no one ever explained the "LSRP" to Petitioner.

According to Petitioner's Safety Director Brown, a brochure explaining the "LSRP surcharge premium" would not have been relevant to Petitioner because both policies issued by Respondent to Petitioner *excluded* the "LSRP surcharge premium" from applying to the two South Carolina policies issued to Petitioner. (Appendix 00546) Petitioner's president, Allen Ard, states that Petitioner understood the $52,114 letter of credit Petitioner gave to Respondent "would be rescinded by (Respondent) as soon as the final audit was completed and the Final Premium paid by (Petitioner.)" (Appendix 00507)

As the lower court stated, the scant use by Respondent of the term "LSRP" in the insurance contracts issued by Respondent to Petitioner failed to alter the clear, unambiguous *exclusion*, which in Respondent's own words used in the "LSRP Notification Endorsement" *excluded* the application of the "LSRP surcharge premium" from the two South Carolina policies issued to Petitioner. (Appendix 008) There is no factual basis for the Court of Appeals concluding that Petitioner intended for Respondent to charge Petitioner the "LSRP surcharge premium."

More importantly, the factual conclusion by the Court of Appeals that Petitioner intended for the "LSRP surcharge premium" to apply to the two policies issued to Petitioner by Respondent is contradicted by the plain and unambiguous language Respondent itself used in its

own "LSRP Notification Endorsement," which clearly and specifically *excluded* the "LSRP surcharge premium" from applying to the two policies Respondent issued to Petitioner. Stated differently, there was no basis for the Court of Appeals to factually conclude that Petitioner knew Respondent would apply the "LSRP surcharge premium" to Petitioner's policies after the Respondent's policies were delivered to Petitioner with Respondent's "LSRP Notification Endorsement" incorporated therein, which endorsement clearly, plainly and unambiguously notified Petitioner that the "LSRP surcharge premium" was *excluded* from Respondent's South Carolina policies.

Under South Carolina insurance law, the intention of the parties to an insurance contract is best derived from looking at the language used in the insurance contract itself. Whenever insurance contract language is clear and unambiguous, Courts should not rewrite an insurance contract, undertake to second guess what the parties intended, or otherwise torture the plain, unambiguous language contained in the contract, in an effort to arrive at an alternative interpretation, meaning or conclusion that favors one party and harms the other. See, *Auto-Owners Insurance Company v. Benjamin, supra.*

The fact that both policies issued by Respondent to Petitioner *excluded* "LSRP surcharge premium" from application in Petitioner's policies should have been recognized as overriding anything else to the contrary. The factual conclusion by the Court of Appeals is contradicted by the plain and unambiguous language used by Respondent in its own "LSRP Notification Endorsement," which clearly and specifically *excluded* the "LSRP surcharge premium" from applying to the two policies Respondent issued to Petitioner.

In sum, there was no basis for the Court of Appeals to factually conclude that Petitioner knew Respondent would apply the "LSRP surcharge premium" to Petitioner's policies after the policies were delivered by Respondent to Petitioner with Respondent's "LSRP Notification Endorsement" contained therein, which clearly, plainly and unambiguously informed Petitioner that the "LSRP surcharge premium" was *excluded* from Respondent's South Carolina policies. The intention of the parties to an clear and unambiguous insurance contract is best derived from looking at the language the parties used in the insurance contract itself.

CONCLUSION

For the foregoing reasons, Petitioner Ard Trucking Company respectfully requests that this Court grants its Petition for Writ of Certiorari.

Respectfully Submitted,

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APPEAL FROM DARLINGTON COUNTY
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Ard Trucking Company . . . . . Petitioner,

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Travelers Property Casualty Company of America d/b/a
The Travelers Indemnity Company of Illinois . . . . . Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari upon counsel of record and the Clerk of Court of Appeals by depositing a copy of the same in the United States Mail, postage prepaid, on May 17, 2018 addressed as follows:

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May 17, 2018

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RE: Ard Trucking Company v. Travelers Property Casualty Company of America d/b/a The Travelers Indemnity Company of Illinois
Appellate Case No. 2018-UP-010

Dear Mr. Shearouse:

Enclosed please find for filing the original and seven (7) copies of the Petition for Writ of Certiorari and two (2) copies of the Appendix (one bound, one unbound), along with the Proof of Service and check in the amount of $100.00 for the filing fee. I would appreciate your acknowledge receipt of these documents by date-stamping the extra copy of the enclosed Petition for Writ of Certiorari and returning to me in the enclosed stamped return envelope.

By copy of this letter, I am serving opposing counsel with these documents and the Honorable Jenny Abbott Kitchings, Clerk of Court of Appeals, with a copy of the Petition for Writ of Certiorari and the Proof of Service. Should you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,

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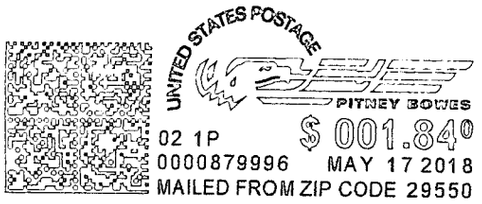

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