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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Danniel Hall, Circuit Court Judge

Appellate Case No. 2024-001311

Ina Shtukar,

Appellant,

v.

Erie Insurance Group,

Respondent.

**APPELLANT'S SURREPLY TO RESPONDENT'S REPLY TO APPELLANT'S
RETURN TO RESPONDENT'S MOTION TO DISMISS**

October 2, 2024

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I. INTRODUCTION

In an effort to “force a square peg into a round hole,” Respondent’s Reply to Appellant’s Return raises a new argument that Appellant’s premature Notice of Appeal left *both* the trial court and this Court without jurisdiction over the case. Specifically, Respondent claims, without citing any authority, that Appellant’s appeal of the Form 4 Order divested the trial court of further jurisdiction to do anything else with the case, including the issuance of the final order, but at the same time it did not vest this Court with jurisdiction either. Obviously, Respondent cannot have it both ways. Because this is a new argument raised for the first time by way of a reply, a surreply is the only way for Appellant to respond.

II. RELEVANT PROCEDURAL HISTORY

The trial court issued a Form 4 Order denying Plaintiff’s Motion for Entry of Default and granting Defendant’s Motion to Dismiss the case in its entirety on August 6, 2024. Plaintiff timely noticed her appeal with the trial court that same day, and Defendant was e-service with the Notice of Appeal. On August 7, 2024, Plaintiff filed the Notice of Appeal with the Court of Appeals. Ten days later, on August 16, 2024, the trial court issued a more complete Memorandum of Decision. Upon reviewing the decision, Plaintiff determined that a Rule 59(e) Motion was warranted because the language of the trial court’s decision raised *new* issues for the first time in the course of the litigation, in order to preserve such new issues for appellate review. On August 18, 2024, Plaintiff timely filed a Rule 59(e) Motion. On August 29, 2024, the trial court issued a Form 4 Order denying Plaintiff’s Motion 59(e). On September 19, 2024, Respondent filed a Motion to Dismiss arguing that Appellant appealed an “interlocutory” Form 4 Order, which announced the trial court’s decision to dismiss the case in its entirety, because it instructed defense counsel to prepare a proposed order. *See* D’s MTD. On September 20, 2024,

Appellant filed an Amended Notice of Appeal to include the denial of the Rule 59 Motion in the scope of appellate review, and a Return to Respondent's Motion to Dismiss, arguing that the Form 4 Order was the *final* order to the extent it ended the case and left nothing else to be done prior to the determination of the parties' rights, that SCRAP Rule 203(b)(1), which states that "[w]hen a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party *need not* appeal until receipt of written notice of entry of the more complete order or judgment," expressly permitted Appellant to notice an appeal upon the issuance of the Form 4 Order and that the Notice of Appeal should be treated as if filed on the date the Memorandum of Decision was filed on August 16, 2024, that the trial court had jurisdiction to rule on Appellant's Rule 59(e) Motion because it addressed new issues raised for the first time by the Memorandum of Decision pursuant to Rule 205, SCRAP, and that Appellant's timely filed Amended Notice of Appeal made Respondent's Motion to Dismiss Moot. *See* Pl's Return. On September 27, 2024, Respondent filed a Reply to Appellant's Return arguing that Appellant's August 6, 2024 Notice of Appeal left *both* courts, the trial court and the Court of Appeals, without jurisdiction over the case, and made the trial court's Memorandum of Decision drafted by defense counsel null and void, without citing authority that stands for this proposition.

III. APPLICABLE LAW

Rule 240 (f), SCRAP states that "[t]he moving party shall have five (5) days from the date of service of a return to file a reply with the clerk and serve on all parties a copy of the reply. The provisions of Rule 240(c) apply to a reply." Rule 240 (c), SCRAP states

(c) Form and Content of Motions and Petitions. All motions or petitions filed in an appellate court shall be in writing, shall state the grounds thereof, and shall comply with the requirements of Rule 267. The pages of the motion or petition and all supporting

documents shall be consecutively numbered. Each motion or petition shall include the following:

[...]

(2) A memorandum *with citation of authorities* in support of the motion.

Id. (emphasis added). Next, Rule 240 (g), SCRAP states that “failure of the moving party to perform any act required by this Rule may be deemed an abandonment of the motion or petition.”

Moreover, a party’s failure to support an argument with authority constitutes an abandonment of the issue raised. *See Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) (“An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.”); *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) (“An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.”); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (“South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.”); *Solomon v. City Realty Co.*, 262 S.C. 198, 203 S.E.2d 435 (1974) (“An issue is also deemed abandoned if the argument in the brief is merely conclusory.”); *State v. Colf*, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (1998) (finding a conclusory, two-paragraph argument that cited no authority other than an evidentiary rule was abandoned). Furthermore, by failing to address the opponent’s argument properly supported by authority, the party concedes the argument. *See Dixon v. Pattee*, 442 S.C. 233, 240, 898 S.E.2d 158, 162 (2023 Ct. App) (“If a respondent fails to answer to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant’s position is correct.”). Lastly, this Court may award sanctions if a motion or return makes a

frivolous argument. SCRAP Rule 269.

IV. ARGUMENT

- i. A surreply is warranted to the extent Respondent raised a new argument in its reply brief, depriving Appellant of an opportunity to respond.*

South Carolina law does not address¹ the use of a surreply, hence, federal law is once again persuasive. *See State Farm Mut. Auto. Ins. Co. v. Goyeneche*, 429 S.C. 211, 224 (Ct. App. 2019) (“When there is no South Carolina case directly on point, our courts may look to persuasive authority from other jurisdictions.”) (citing *Williams v. Morris*, 320 S.C. 196, 200, 464 S.E.2d 97, 99 (1995).); *Unisun Ins. v. Hawkins*, 342 S.C. 537, 539 (“In the absence of prior state law on an issue in question, federal cases interpreting the rule are persuasive.”). Generally, “new arguments cannot be raised in a reply brief” before the trial court. *United States v. Smalls*, 720 F.3d 193, 197 (4th Cir. 2013). A rule to the contrary runs the risk of depriving a nonmovant of an fair opportunity to respond, rendering the proceedings constitutionally infirm. *De Simone v. VSL Pharms., Inc.*, 36 F.4th 518, 531 (4th Cir. 2022) (citing *Mt. Hebron Dist. Missionary Baptist Ass'n. of AL v. Sentinel Ins. Co.*, No. 16-cv-658, 2018 U.S. Dist. LEXIS 224052, 2018 WL 6822621, at *1 (M.D. Ala. Oct. 24, 2018) (“[T]his rule is designed to prevent any prejudice that might result when a party is deprived of the opportunity to respond to new arguments.”)); *Toney v. Ability Ins. Co.*, No. 3:10-CV-2311-CMC, 2011 U.S. Dist. LEXIS 66761, 2011 WL 2532414, at *2 (D.S.C. June 22, 2011) (declining to consider new basis for summary judgment that could have been raised in principal brief but was not raised until reply).

In its Reply, Respondent argued that “Appellant raised new issues in her reply that require a response,” erroneously referring to Appellant’s Return as a “reply.” While Respondent selectively addressed some of the arguments made by Appellant (none of which were “new”

¹ The undersigned’s Lexis search produced three (3) decisions in which a surreply was used, but none of the opinions discussed when a surreply is appropriate.

arguments to the extent they simply responded to the issues raised in Respondent's Motion), Respondent itself made a new argument that Appellant's Notice of Appeal left both courts without jurisdiction over the case and transformed "both the Final Order and Appellant's Rule 59(e) motion [] [into] nullities." D's Reply p.2. Specifically, it argued that Appellant's Notice of Appeal filed in response to the Form 4 Order, which ended the case, created a "procedural quagmire" which "deprive[d] this Court of jurisdiction and require[s] dismissal of her appeal." D's Reply p. 3. Without citing any authority, Respondent further argued that "[b]ecause the Appellant's attempted appeal of the Form 4 divested the Circuit Court of jurisdiction to enter the Final Order and consider Appellant's Rule 59 motion, she cannot at this stage appeal the entry of these orders either." *Id.* at 3-4. Because this new reply-only argument was not raised in Respondent's Motion to Dismiss, which argued that the Form 4 Order that announced the trial court's decision to grant Defendant's motion to dismiss the case in its entirety and its subsequently issued more complete Memorandum of Decision were *two* separate orders with the form order being "interlocutory" and as such not appealable, a Surreply to address Respondent's argument that *neither* court had jurisdiction and that the case cannot be either finally decided or reviewed is warranted to ensure procedural fairness of these proceedings.

ii. The language from Cloyd is mere dicta which does not control this Court's determination of the effect of an early notice of appeal filed in response to the trial court's announcement of the final order and whether an amended notice is required.

In its motion to dismiss the appeal, Respondent essentially argued that Appellant "pulled the trigger too soon" by noticing her appeal in response to a form order, because she could not appeal a Form 4 Order but *had to wait* until the trial court issued a more complete decision to file a notice of appeal. *See* D's MTD. Notably, in its Reply, Respondent did not address Appellant's arguments that the South Carolina Rules of Appellate Procedure expressly permit an appellant to

notice an appeal in response to a form order and before a more complete order is issued pursuant to Rule 203(b)(1), and that a Form 4 Order was appealable because it was akin to an oral announcement of the final order and the rules expressly permit an appellant to notice an appeal before an order is reduced to writing pursuant to 203 (d)(1)(B), conceding these arguments. *See Dixon*, 442 S.C. at 240, 898 S.E.2d at 162 (Ct. App. 2023) (If a respondent fails to answer to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct.). *See* SCRAP 203(b)(1) (“When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment”). *See also* SCRAP 203 (d)(1)(B) (which contemplates that a notice of appeal can be filed before an order is reduced to writing). Instead, in its Reply, Respondent addressed only Appellant’s use of the federal rules of appellate procedure as persuasive authority, arguing that the federal law discussed in Appellant’s Return could not be used for guidance because the South Carolina Appellate Rules do not have a similar provision and because *Cloyd* controls. *Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 567 S.E.2d 514 (Ct. App. 2002).

First, the South Carolina Rules of Appellate Procedure, while similar to the federal rules to the extent they expressly contemplate that a notice of appeal may be filed in response to an announced decision that ends the case, are silent on the effect of the early filing of a notice of appeal and the need to amend the notice of appeal. Thus, using federal² provisions as gap fillers

² While Respondent complains about Appellant’s use of federal law as persuasive authority especially when it comes to its placeholder motion to dismiss, the use of federal law in that particular situation was particularly appropriate, because this Court has previously adopted the standard of specificity with which a motion to dismiss for improper service must be pled and a placeholder is *per se* insufficient to satisfy it. *See Unisun Ins. v. Hawkins*, 342 S.C. 537, 539, 537 S.E.2d 559, 561-2 (Ct. App. 2000). At any rate, persuasive authority is better than no authority, and instead of complaining, Respondent should adopt this habit and replace its old habit of making arguments unsupported by any authority.

to clarify the South Carolina rules is appropriate. See *Unisun Ins. v. Hawkins*, 342 S.C. 537, 539, 537 S.E.2d 559, 561-2 (Ct. App. 2000). See also *Dunbar v. Vandermore*, 295 S.C. 493, 497, 369 S.E.2d 150, 152 (Ct. App. 1988) (finding federal case law persuasive in interpreting the federal rules). But more importantly, the language³ Respondent heavily relies on found in *Cloyd* is mere *dicta* – it was not the holding of the case. See *Black's Law Dictionary* 465 (10th ed. 2014) (“An opinion by a court [] that is not essential to the decision and therefore not binding even if it may later be accorded some weight.”). “*Dicta* or, as it is also known, *dictum* ‘is a statement on a matter not necessarily involved in the case, and is not binding as authority. Dictum is an opinion expressed by a court, but which, not being necessarily involved in the case, is not the court’s decision.’” *Nash v. Tindall Corp.*, 375 S.C. 36, 40-41 (Ct. App. 2007) (quoting 21 C.J.S. *Courts* § 227 (2006)). Moreover, this *dicta* from *Cloyd* is inconsistent with the language of Rule 203(b)(1), which expressly contemplates that a notice of appeal may be filed in response to a form order and *before* a more complete order is issued, even when the form order indicates that a more complete order is going to be issued. See SCRAP 203(b)(1), SCRAP 203 (d)(1)(B). As was noted above, Respondent’s Reply does not reconcile or explain away the inconsistencies, and concedes Appellant’s arguments. Because this language from *Cloyd* does not control this Court’s determination and because it did not address the effect of a notice of appeal filed in response to an announcement of the final decision but before such final decision is issued, it is upon this

³ The undersigned concedes the oversight. She carefully reviewed the decision and checked the exact pinpoint citation, which contained different language. The undersigned also read the dissent to make sure the language relied on by Respondent did not originate there. Lastly, she checked the procedural history to make sure there were no other decision. She did not see this language when she drafted a Return. When she went to Lexis to download the opinion to use as an exhibit for her Surreply, she located the language cited by Respondent. As such, Appellant was indeed mistaken when she argued in her Return that the language cited did not come from *Cloyd*. That being said, while it is true that this language did come from *Cloyd*, Appellant’s arguments still stand, to the extent *Cloyd* held that a form order *was* the final order and the language cited by Respondent is mere *dicta*.

Court to clarify the rules and it may properly look to federal law for guidance because the federal provisions address the very situation that is before the Court. While Respondent argues that federal law can only be considered when it addresses a similar rule, the use of persuasive authority is not limited in such a manner, but can be used when the law of this State is silent on a particular issue. *See e.g., State Farm Mut. Auto. Ins. Co. v. Goyeneche*, 429 S.C. 211, 224 (Ct. App. 2019) (“When there is no South Carolina case directly on point, our courts may look to persuasive authority from other jurisdictions.”) (quoting *Williams v. Morris*, 320 S.C. 196, 200, 464 S.E.2d 97, 99 (1995)). The only limitation on the use of persuasive sources is that it cannot be used to overturn the South Carolina Supreme Court precedent. *Id.*

Moreover, *Cloyd* had nothing to say even in *dicta* about the need to amend a notice of appeal, when after a notice of appeal is filed, a timely Rule 59 motion is filed to address new issues brought to light by the language of the more complete decision issued after the original notice of appeal is filed. Notably, Defendant did not address these additional issues, conceding Appellant’s argument that an amended notice was a proper way to bring the trial court’s ruling on Rule 59(e) Motion within the scope of appellate review. *See e.g., Dixon*, 442 S.C. at 240, 898 S.E.2d at 162 (Ct. App. 2023) (If a respondent fails to answer to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct.). In short, contrary to Respondent’s contention, *Cloyd* is not controlling.

iii. Respondent’s argument that neither the trial court nor the Court of Appeals had jurisdiction has no merit, because an appeal of a non-appealable order had no impact on the trial court’s jurisdiction to issue final order and rule on a rule 59 motion.

Respondent’s remaining arguments rest on an erroneous premise that an appeal of an interlocutory order that cannot be properly appealed divests the trial court of jurisdiction to enter a final order and rule on a Rule 59(e) motion. In essence, Respondent argues that a premature

notice of appeal leaves *both* courts without jurisdiction and destines the case to remain in perpetual limbo without either a final order or appellate review. *See* D’s Reply *generally*. This novel proposition is contrary to well-settled precedent, which holds that a notice of appeal filed in response to an interlocutory order that cannot be properly appealed has no impact on the trial court’s jurisdiction - the trial court retains continuing jurisdiction over the case. *See State v. Dingle*, 279 S.C. 278, 282, 306 S.E.2d 223, 225 (1983) (holding because the order “[wa]s not appealable until final judgment [wa]s rendered, the trial court had continuing jurisdiction over the subject matter of the case”), *abrogated on other grounds by Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990); *S.C. Pub. Serv. Auth. v. Arnold*, 287 S.C. 584, 586, 340 S.E.2d 535, 536 (1986) (“Where an order is interlocutory, and thus not appealable, the notice of intent to appeal does not transfer jurisdiction to this [c]ourt, nor does it stay further proceedings in the [trial] court.”); *id.* at 585-86, 340 S.E.2d at 536 (holding “the [trial court] never lost jurisdiction and properly proceeded to trial” notwithstanding “[t]he trial was completed five days before the remittitur was issued” because the supreme court dismissed the appeal on the basis that the order appealed from “was interlocutory, and not appealable”). Because Respondent argues that a Form 4 Order was not appealable, then it necessarily follows that the trial court retained jurisdiction to issue its Memorandum of Decision and rule on Appellant’s timely filed Rule 59(e) Motion, and that Appellant’s timely filed Amended Notice of Appeal conferred jurisdiction onto this Court to consider the Form 4 Order that granted Defendant’s Motion to Dismiss, Memorandum of Decision, and Form 4 order denying Plaintiff’s Rule 59(e) Motion.

On the other hand, if the Form 4 Order was the final order, then this Court has jurisdiction over the appeal. Moreover, “[t]he service of a notice of intent to appeal divests the trial court of

jurisdiction *only over the order being appealed.*” *Wayne Smith Constr. Co. v. Wolman, Duberstein, & Thompson*, 294 S.C. 140, 149 (1987). Thus, even if the trial court lost jurisdiction over the Form 4 Order, it nonetheless retained jurisdiction to enter its Memorandum of Decision and rule on Appellant’s Rule 59(e) Motion, which did raise several *new* issues, including the relation back doctrine under Rule 15(c), SCRPC, continuous accrual doctrine, e-service of the Amended Complaint as sufficient to commence the action under Rule 3, SCRPC, and Respondent’s second default suffered in response to the Amended Complaint, contrary to Respondent’s unsupported declaration that the Rule 59(e) Motion made the same arguments previously briefed in Plaintiff’s Memoranda. *See* Pl’s Rule 59(e) Motion and Pl’s Supplemental Briefs as **Exhibit A-D** respectively. Notably, Respondent’s argument that the trial court lost jurisdiction and could not consider and rule on Rule 59(e) Motion is limited to its declaratory statements unsupported by either a record citation or authority. D’s Reply. As such, Respondent abandoned these arguments. *See, e.g., Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) (“An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.”). *See also* Rule 240 (g), SCRAP (which states that “failure of the moving party to perform any act required by this Rule [which includes citations to authority] may be deemed an abandonment of the motion or petition”). Next, Plaintiff’s timely filed Amended Notice of Appeal vested this Court with jurisdiction to review these additional issues preserved by way of a Rule 59(e) Motion, in addition to the issues covered by the original Notice of Appeal. While Respondent argued that Appellant’s “Rule 59(e) motion attempt[ed] to re-litigate the same issues argued at the July 31 hearing and in the supplemental briefs of both parties, which were the basis of the court’s Final Order and Appellant’s original appeal,” this contention is both factually and legally incorrect, to the extent

the Motion raised new issues which first appeared in the trial court's Memorandum of Decision, prepared by defense counsel, and a Rule 59 motion can be and should be properly used to both preserve new issues for review and convince the trial court to reconsider its prior rulings. D's Reply p.2. *See* Exhibit A-D. *See also Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) ("The purpose of [a] Rule 59(e), SCRCF, [motion] to alter or amend the judgment is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'") (quoting *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200, 108 S. Ct. 1717, 100 L. Ed. 2d 178, (1988)).

Respondent's remaining arguments are raised in a purely conclusory manner and unsupported by any authority. For instance, Respondent argued that "[p]er Rule 205, the moment Appellant served her notice of appeal, the circuit court no longer had jurisdiction to issue its final order, or entertain Appellant's Rule 59(e) motion." D's Reply p. 7. But as was explained above, this is a plainly frivolous argument because the trial court loses jurisdiction only if the order is properly appealable and only over the matters "effected by the appeal." *See supra*. *See also* SCRAP 205 ("Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal"). This is precisely why the federal rules require an amended notice of appeal, which implicitly recognizes that the trial court retains some jurisdiction to make additional rulings even after a notice of appeal transfers jurisdiction over the trial court's prior rulings encompassed in its final decision to the higher court. *See* Fed. R. App. P. 4(a)(4)(B). Respondent also argued that "[b]ecause the first notice of appeal and the Rule 59(e) motion encompass the same issues, and the notice of appeal was served prior to the Final Order, all procedural acts that took place after the August 6, 2024 are procedurally null." This argument is once again manifestly unsupported by any authority or reason. As such,

Respondent's argument is waived. *Bryson*, 378 S.C. at 510, 662 S.E.2d at 615.

In short, Respondent's novel proposition that an early notice of appeal filed in response to a Form 4 order, which announced the trial court's final decision ending the case, operates to divest both the trial court and the Court of Appeals of jurisdiction over the case and destines the case to remain in limbo in perpetuity is without merit. Even if Appellant's original notice was indeed premature and ineffective, then the trial court retained jurisdiction and Amended Notice of Appeal provides this Court with jurisdiction over the appeal. In the alternative, if the original notice was simply prompt but effective, then this Court obtained jurisdiction over the rulings encompassed in the Form 4 Order, pursuant to the original notice of appeal, as well as the trial court's subsequent ruling on the Rule 59(e) Motion, pursuant to the amended Notice of appeal. Either way, the end result is the same, because Appellant filed a timely Rule 59(e) Motion to raise new issues and subsequently amended her Notice of Appeal to include the trial court's denial of the Motion within the scope of appellate review. This Court has jurisdiction over this appeal and dismissal is not warranted. Moreover, this case presents an excellent opportunity for this Court to clarify the effect of an early notice of appeal filed before a more complete order is issued and whether an amended notice of appeal is required, when the trial court's subsequently issued memorandum of decision raises more issues resulting in a timely Rule 59 motion.

V. CONCLUSION

While Respondent claims that this appeal is a "mess," the only messy part is Respondent's own arguments unsupported by authority or reason. In its Reply, Respondent once again urges the Court to adopt an approach where a single procedural misstep lands to catastrophic consequences leaving the case stuck in limbo in perpetuity without a final decision and entirely unreviewable. Respondent's argument is contrary to well-settled precedent that an appeal of the

non-appealable order has no effect on the trial court's jurisdiction, the plain language of the appellate rules which permit a notice of appeal to be filed before a more complete order is issued, as well as common sense, which counsels that a premature notice of appeal cannot possibly leave *both* courts without jurisdiction over the case and render the case both unreviewable as well as half-backed and disqualified from a final determination. This indeed would be an absurd result.

Respectfully submitted,

October 2, 2024

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EXHIBIT A

ELECTRONICALLY FILED - 2024 Aug 18 6:02 PM - YORK - COMMON PLEAS - CASE#2023CP4600392

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Ina Shtukar,
Plaintiff,

vs.

**Erie Insurance Exchange, aka Erie
Insurance Group, Erie Insurance
Company, and Erie Insurance.**
Defendant.

)
)
) **PLAINTIFF’S MOTION**
) **TO ALTER OR AMEND JUDGMENT**
) (Rule 59(e) SCRCP)

CASE NO. 23-CP-460039

NOW COMES Plaintiff and respectfully moves the Court to reconsider its ruling pursuant to Rule 59(e) SCRCP.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed a Complaint on February 7, 2023, asserting bad faith and unfair and deceptive trade practices as the main causes of action. Plaintiff’s Complaint contained sufficient factual allegations, i.e., *prima facie* showing, which, taken as true, as required at the pleading stage of the proceedings, show that Defendant engaged in unauthorized business of insurance by renewing Plaintiff’s policy after she moved to South Carolina and began adjusting a claim under Plaintiff’s name. *See* Pl. Complaint, *generally*. Plaintiff subsequently served Defendant pursuant to S.C. Code § 15-9-285, which authorizes a resident of South Carolina to serve an unauthorized insurer through the South Carolina Department of Insurance (“SCDOI”). This statute was specifically crafted by the South Carolina Legislature to create an easy and simple way for its residents to effectuate service and obtain personal jurisdiction over an out-of-state insurance company, based on the premise that by engaging in enumerated actions, that constitute unauthorized business of insurance, the unauthorized insurer appoints the South Carolina Director of Insurance as its agent

for the purposes of service of process. S.C. Code § 15-9-285. *See also White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 753 S.E.2d 537 (S.C. 2014) (We have previously interpreted insurance service statutes as “designed by the legislature to provide a simple and *easy method of obtaining jurisdiction over a foreign insurance company*” (emphasis added) (internal quotation omitted). The SCDOI accepted service of process effective February 10, 2023. Plaintiff also served the Summons and Complaint by certified mail, which was acknowledged by defense counsel on two separate occasions. (See **Exhibit A** and **Exhibit B**). On March 2, 2023, Plaintiff filed a Certificate of Service by Certified Mail and an Affidavit of Compliance with S.C. Code § 15-9-285(c), supported by two exhibits – DOI’s Acceptance of Service, which clearly bore “Erie Insurance Exchange *et al.*” as Defendant’s name, and a return receipt, which clearly showed that Defendant was served by certified mail in addition to service on the DOI. Defendant’s attorney entered their appearance on February 16, 2023, and contacted Plaintiff to obtain an extension of time to respond to the Complaint. Plaintiff agreed to a 30-day extension, being unaware that the date selected by Defendant was outside the time-period authorized by the South Carolina Rules of Civil Procedure. Defendant did not object to Plaintiff’s Affidavit of Compliance, even though the DOI’s Acceptance of Service clearly bore Defendant’s slightly different name plus “*et al.*”

On April 28, 2023, 77 days after SCDOI accepted service on Defendant’s behalf, Defendant filed a one-sentence motion unsupported by a brief, citing Rule 12(b)(2) (lack of personal jurisdiction) and 12(b)(6) (failure to state a claim) and notifying the Court that “[t]his motion will be supported by Defendant’s forthcoming brief.” *See D’s MTD*. Plaintiff subsequently moved for Entry of Default and Default Judgment on May 31, 2023, before Defendant filed its brief. The motions were subsequently set for hearing on November 14, 2023. On Friday, November 10, 2023, Defendant filed a Memorandum in support of its motion to dismiss filed 196

days earlier, and set to be heard in two business days from the date of the filing of the brief. In its brief, Defendant argued that Plaintiff incorrectly named Defendant by its fictitious name “Erie Insurance Group” and that this misnomer deprived the Court of personal jurisdiction. *See* D’s Memo in Support of MTD. Defendant also argued that the Court had no personal jurisdiction because Defendant “does not conduct business in South Carolina.” *Id.* Defendant’s 12(b)(6) argument concerned only Plaintiff’s request for injunctive relief to prevent Defendant from continuously using Plaintiff’s policy and her credit. *Id.* Importantly, Defendant did not assert 12(b)(4) (insufficiency of process) or 12(b)(5) (insufficiency of service of process) in either their motion or their brief. argue that Plaintiff failed to serve Defendant or that her service was improper. In sum, Defendant did not argue that Plaintiff’s service was deficient in its first responsive filing. The motions were heard by the Honorable Dan Hall on November 14, 2023. At the time of the hearing, Plaintiff’s counsel moved for leave of court to amend the Complaint to correct Defendant’s name. Defendant stated that it had no objection to the request to amend, and Plaintiff’s motion to amend was orally granted by the Court. The pending motions were taken under advisement and the Court encouraged the parties to explore a settlement.

On January 5, 2024, Plaintiff filed an Amended Complaint, to correct Defendant’s name, fix the deficiency noted by Defendant concerning Plaintiff’s request for an injunction, converting it to a common law injunction, and add additional causes of action, including conversion and misappropriation of identity. *See* Pl’s Amended Summons & Complaint. Plaintiff’s amended pleading did not add any new factual allegations and remained substantially unchanged in terms of the factual basis for Plaintiff’s claims. On February 5, 2024, 31 days after Defendant was served with Plaintiff’s Amended Complaint, Defendant filed a motion to extend time to respond to the Amended Complaint, arguing that it needed more time to investigate Plaintiff’s factual allegations.

See D’s Motion to Extend Time. Later that same day, however, Defendant filed “Motion to Dismiss for Lack of Personal Jurisdiction and Answer,” in which it raised 16 “affirmative defenses.” *See* D’s Answer. None of said defenses argued either lack of personal jurisdiction or improper service. *Id.* Aside from the title of the document and a brief notation that “none of the defendants issue policies of insurance in South Carolina,” Defendants’ response to the Amended Complaint did not argue either lack of jurisdiction or improper service. In fact, by filing an Answer, Defendant consented to the Court’s jurisdiction and abandoned its lack of personal jurisdiction defense. *See infra.* The Court next held a status conference on June 5, 2024, and set the case to be called for a jury in the first week of December, despite the fact that at the time of the conference, the motions remained pending, which Plaintiff brought to the Court’s attention, indicating that setting the case for trial was premature. Because the motions were not ruled on, Plaintiff subsequently contacted the court administrator and asked for another hearing, which was originally set for June 24, 2024, and subsequently rescheduled for July 31, 2024.

The motions were heard on July 31, 2024. At the time of the hearing, Defendant introduced a document that was not part of the record, which, judging by the cover page, appeared to be Defendant’s internal document titled “Litigation Transmittal.” (*See Exhibit C*). Following Defendant’s cover page that bore its logo “Erie Insurance¹,” the document contained DOI’s Acceptance of Service and an unfiled Summons and Complaint, which bore a slightly different name of Defendant Erie (“Erie Insurance Exchange”) than the name that appeared on the Complaint actually filed with the Court (“Erie Insurance Group”). Other than Defendant’s name, the Summons and Complaint were identical to those filed with the Court. This document was not

¹ Notably, even Defendant’s internal documents do not state its *proper* name and instead use a fictitious trade name – “Erie Insurance.”

properly authenticated, no foundation was laid, and defense counsel did not explain how she came in possession of this document. In fact, the record contains *no evidence* whatsoever that shows that this was the document Plaintiff served on the DOI. Defense counsel then announced that she “just noticed” earlier that day the discrepancy in Defendant’s name, argued that Plaintiff served DOI with a “sham complaint.” Defendant also argued that because Plaintiff allegedly served this unfiled Summons and Complaint, she failed to properly serve Defendant and failed to properly commence this action in accordance with Rule 3 SCRCP, because the Statute of Limitations expired. Defendant’s improper service arguments were not included in Defendant’s previously filed motion to dismiss and its brief in support. Nor did Defendant raise lack of proper service in response to Plaintiff’s Amended Complaint. As to Plaintiff’s motion for entry of default, Defendant argued that Plaintiff consented to the extension beyond 60 days. Lastly, Defendants also argued that Plaintiff’s Amended Complaint made both pending motions moot.

In response to the new arguments based on lack of proper service, Plaintiff argued that Defendant waived any objection to the manner and sufficiency of Plaintiff’s service of process, because Defendant raised only lack of personal jurisdiction in accordance with Rule 12(b)(2) as a defense in response to both Plaintiff’s original Complaint and her Amended Complaint, and improper service is a waivable defense. Plaintiff argued that Defendant failed to preserve its objection. Moreover, Plaintiff argued that at the time Defendant moved to dismiss, it was technically in default, which made its motion invalid anyway. Plaintiff also noted that Defendant failed to oppose her Supplemental Brief filed in support of her motion for entry of default, which explained that the parties lacked authority to consent to an extension beyond 60 days in accordance with Rule 6(b) SCRCP and that entry of default was a mandatory in accordance with Rule 55(a) SCRCP. Defendant had a full opportunity to respond to Plaintiff’s arguments fully articulated in

Plaintiff's filings and to raise new contentions, especially since the hearing was rescheduled last minute. The Court did not seem bothered by the fact that Plaintiff, on the other hand, had no adequate opportunity to respond to Defendant's new grounds for its motion to dismiss based on lack of service and did not give Plaintiff time to file a response, indicating that it was going to rule on the motions by the end of the week. Because the hearing was held on Wednesday, Plaintiff rushed back to her office to draft and file a supplemental brief in support of her argument that Defendant waived its objection to the propriety of Plaintiff's service pursuant to Rule 12(h) SCRPC. *See* Pl's Second Supp. Memo. The following day, Plaintiff filed another supplemental brief to address Defendant's misnomer argument, citing binding authority that a mere misnomer "misnomer of a corporation in a notice, *summons*, notice by publication, garnishment citation, writ of certiorari, *or other step in a judicial proceeding* is immaterial if it appears that [Defendant] could not have been, or was not misled," as compared to a misjoinder, because the right Defendant was before the Court. *See* Pl's Third Supp. Brief. The following day, Defendant filed its brief which reduced its new arguments to writing. *See* D's Brief in Support. First, Defendant argued that the motions were moot, citing a single decision by the federal court for the District of South Carolina, which was not binding on any court including this Court. *Id.* Second, Defendant argued that Plaintiff's motion for entry of default should be dismissed because she failed to commence the action pursuant to rule 3 SCRPC. *Id.* Defendant's argument rested on an idea that Plaintiff allegedly served a Summons and Complaint on the DOI which bore a misnomer, unsupported by either evidence or binding authority. *Id.* While noting that an unambiguous statute should be interpreted in accordance with its plain meaning, Defendant asserted that Plaintiff was required to serve "the actual complaint she filed upon the Defendant to commence her action." *Id.* (emphasis original). No supporting authority was cited for this proposition and none exists, to the extent the

Court has no authority to add qualifying words of its choosing to an unambiguous statute, which would also ignore a well-settled body of law which holds that a mere misnomer in Defendant's name is of no moment. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute."). *See also* ("The instructions sought by [defendant] effectively would have added the word "sole" to the statute, creating a different element of the crime, which would have prohibited entry into a marriage "for the [sole] purpose of evading any provision of the immigration laws." We will not construe the statute in such a manner, because we are required to interpret statutory language as written and are not permitted to add words of our own choosing."). *United States v. Sonmez*, 777 F.3d 684, 688 (4th Cir. 2015). In sum, Defendant's argument has no support in either fact or law. Lastly, Defendant asserted that Plaintiff's Complaint somehow remains unserved and that Plaintiff's Amended Complaint cannot relate back to the ordinal Complaint, concluding that the action was time barred. *Id.* No supporting authority was cited in support of Defendant's novel argument against the doctrine of relation back and none exists. Importantly, Defendant neglected to mention that Defendant was also served by certified mail and filed both a motion to dismiss and an answer without articulating any objection based on service of process.

On August 3, 2024, Plaintiff filed a Reply Brief responding to Defendant's arguments. *See* Pl's Reply Brief. Specifically, Plaintiff noted that Defendant's own exhibits showed that in addition to service on DOI, Defendant was also served by certified mail. Notably, Defendant did not make any allegations that the Summons and Complaint served by certified mail different in any way from those filed with the Court. Next, Plaintiff noted that other than the misnomer, the Sommons and Complaint were identical to those filed with the Court, and cited authority that a mere misnomer in the Summons and Complaint allegedly served on the DOI does not invalidate

Plaintiff's service. In addition, Plaintiff argued that "Erie Insurance Group" was a fictitious trade name that referred to all Erie entities collectively and that Defendant itself used this fictitious name in its dealings with Plaintiff, which was established by way of an exhibit. *Id.* Plaintiff also cited authority that South Carolina law permits the use of fictitious names and that by using this trade name, Defendant binds itself to it, which makes an amendment not even necessary, as all various Erie names referred to the same insurance company. *Id.* Lastly, Plaintiff noted that Defendant attempted to disguise its motion to dismiss for lack of proper service by citing to Rule 3 SCRPC, it also admitted in its brief that this was "undoubtedly" an issue of service, and since Defendant waited 1.5 years to raise the issue, it was a clear case of a waiver under Rule 12(h) SCRPC. Plaintiff also argued and cited authority that Defendant could not have relied on Plaintiff's consent to an extension of 77 days and that Defendant's negligence in calculating its due date could not constitute "good cause." Lastly, Plaintiff presented documentary evidence that Defendant did renew her policy after she moved to South Carolina and began adjusting a claim under her name, which leads to only one reasonable inference – that Defendant falsified its records after the fact and that it is in fact Defendant who is using "sham documents." Unlike a mere misnomer, Defendant's backdated documents removed Plaintiff's name from her own policy, which most certainly had profound legal consequences. *See* Exhibits to Pl's Amended complaint.

On August 6, 2024, the Court issued a Form 4 order granting Defendant's motion to dismiss and denying Plaintiff's motion for entry of default. *See* Form 4. The Court also asked Defendant to draft a proposed order. On August 13, 2024, Plaintiff filed a motion for a new trial/hearing, noting that in addition to suffering a default in response to Plaintiff's original Complaint, Defendant once again defaulted in response to Plaintiff's Amended Complaint to the extent Rule 15(a) SCRPC required Defendant to respond within 14 days, and Defendant filed its Answer on

day 31 after being e-served with Plaintiff's Amended Complaint. Plaintiff argued that because Defendant suffered a default in response to both pleadings, its most recent motion based on improper service is also invalid and thus the Court is precluded from granting Defendant's "Rule 3" motion to dismiss. Instead of emailing its proposed order to the chambers and the undersigned, Defendant filed it with the Court, on August 14, 2024. This proposed order was not served on the undersigned, even though Defendant repeatedly noted in its filings and at the hearing that Plaintiff was an attorney admitted to practice in South Carolina, who was representing herself.

II. LEGAL FRAMEWORK

While the language of Rule 59(e) does not expressly state so, "[h]e purpose of [a] Rule 59(e), SCRCP, [motion] to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (quoting *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200, 108 S. Ct. 1717, 100 L. Ed. 2d 178, (1988)) (internal quotations omitted). "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

The Court failed to rule on essentially any of Plaintiff's arguments, wherefore a Rule 59(e) motion is warranted. Moreover, the Court's final Opinion raised new issues, which Plaintiff had no opportunity to argue. In addition to Plaintiff's new arguments contained in this Motion, Plaintiff expressly incorporates all of her prior motions, briefs, and oral arguments, which the Court failed to rule on, including but not limited whether Defendant's motion to dismiss was a mere placeholder

insufficient to preserve any defense, and whether Defendant suffered a default both due to filing the motion 77 days after the effective date of service and due to insufficiency of its one-sentence motion unaccompanied by a brief.

Lastly, Rule 59(e), SCRCP states that “[a] motion to alter or amend the judgment shall be served not later than [ten] days after receipt of written notice of the entry of the order.” While the Court issued a Form 4 Order on August 6, 2024, the Order did not articulate the Court’s reasoning. In addition, the Court issued its Opinion on August 16, 2024, exactly ten (10) days after it made its rulings on the motions. Next, the opposing counsel, who drafted the Order, did not serve it on the undersigned to give her an opportunity to comment, as required by Rule 5 (b)(3), SCRCP, despite repeatedly noting that Plaintiff is an attorney admitted to practice in South Carolina who is representing herself in this case. *See* Rule 5 (b)(3), SCRCP (“Any party providing a proposed order, proposed findings of fact or conclusions of law, or proposed judgment or other paper to the court for its consideration in any pending matter shall serve the same on all counsel of record at the same time and by the same means.”). As such, Plaintiff had no prior opportunity to raise the issues, which were illuminated by the August 16 Opinion.

III. ARGUMENT

- a. The Court erred in finding that Plaintiff “never served” the Summons and Complaint and concluding that Plaintiff’s action is time-barred, because Defendant failed to properly plead either insufficient service, insufficient process, or statute of limitation to preserve its defenses, waiving them instead pursuant to Rule 12(h).*

At the July 31, 2024 hearing, Defendant orally moved the Court to dismiss the action asserting that Plaintiff failed to serve Defendant and as such her action was now time-barred. After the hearing, on August 2, 2024, Defendant filed a written brief in support of its argument. As was noted in prior filings, Defendant’s brief was short on legal authority and long on unsupported assumptions, contrary to well-settled law. Nonetheless, on August 16, 2024, the Court issued an

Opinion, which found that “Plaintiff never served the Summons or the Filed Summons and Complaint.” *See* Memorandum of Opinion, ¶11. As will be shown *infra*, this finding is both clearly erroneous and contrary to law.

Rule 12(b) states in relevant part:

Every defense . . . to a cause of action in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (5) insufficiency of service of process A motion making any of these defenses shall be made *before pleading if a further pleading is permitted*.

Rule 12(b), SCRCP (emphasis added). Additionally, Rule 12(h)(1), SCRCP, expressly provides that the defense of insufficiency of service of process is waived “if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.” As Plaintiff has previously shown, Defendant asserted two defenses in response to Plaintiff’s original Complaint – lack of personal jurisdiction under Rule 12(b)(2) and failure to state a claim under Rule 12(b)(6) – by way of its untimely one-sentence motion to dismiss, which was not accompanied by a brief. In response to Plaintiff’s amended Complaint, Defendant filed “Motion to Dismiss for Lack of Personal Jurisdiction and Answer” once again asserting lack of personal jurisdiction because “[n]one of defendants issue policies of insurance in South Carolina.” *See* D’s Answer. This procedural history alone, conclusively establishes that Defendant waived any objection to the mode of delivery or lack of delivery of the Summons and Complaint pursuant to Rule 12(g) and (h), SCRSP. *See* SCRCP 12(g) (“If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated”). Because Defendant asserted only lack of

personal jurisdiction in response to Plaintiff's Amended Complaint, the Court erred when it permitted defendant to make an oral motion to dismiss for lack of service of the original Complaint.

Next, our Court of Appeals adopted the standard used by federal courts and explained that "objections to the sufficiency of service of process must be specific and must point out in what manner the plaintiff has failed to satisfy the rule relating to the service provisions." *Unisun Ins. v. Hawkins*, 342 S.C. 537, 542 (Ct. App. 2000). Specifically, it held that "the averment that [plaintiff] 'failed to serve [defendant] within the three-year statute of limitations' is insufficient, standing alone, to raise the defense of insufficiency of service of process." *Unisun Ins.*, 342 S.C. at 542-543. The court further explained that the defense was not sufficiently pled because defendant failed to "identify that he was moving to challenge service of process pursuant to Rule 12 and failed to specify any defects in the service of process." *Id.* In the case at bar, Defendant failed to even mention "service" of process in response to either Plaintiff's original Complaint or in response to Plaintiff's Amended Complaint, and instead only identified lack of personal jurisdiction as one of its 12(b) defenses, triggering SCRCP 12(h) and (g). "A court [shall] not [] write into the pleadings allegations and defenses that are not presented." *Unisun Ins.*, 342 S.C. at 539. As such, as Plaintiff has previously argued both at the hearing and in her memoranda, Defendant clearly waived any objection to the mode or sufficiency of Plaintiff's service of process. In addition, the Court of Appeals also explained that Rule "12(b)(5) is the proper vehicle for challenging both the mode of delivery or the *lack of delivery* of the summons and complaint" as Defendant attempts to argue in the case at bar, asserting that Plaintiff "never served" the "filed" process. *Unisun Ins.*, 342 S.C. at 539 (emphasis added).

Importantly, relying on our Supreme Court decision in *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993), which "held that a party who fails to properly raise the defense of insufficient

service of process under Rule 12 waives any issues or defenses regarding service, including a statute of limitations defense,” the Court of Appeals further held that in order to preserve its statute of limitations defense, defendant had to first adequately plead its objection to the sufficiency of service because “statute of limitations claim is inextricably tied to the attempted service.” *Unisun Ins.*, 342 S.C. at 541. As in *Unisun Ins.* and *Garner*, Defendant argued and the Court agreed that Plaintiff’s action is time barred because she “never served” Defendant. This legal conclusion is contrary to law.

In its brief, Defendant actually admits that its new argument rests entirely on its contention that “Plaintiff never served” the original complaint. *See* D’s brief at 7 (“This goes beyond an issue of service, although it undoubtedly is one, and on to whether Plaintiff ever properly initiated this action in the first place.”). And while Defendant attempted to disguise a Rule 12(b)(5) objection of insufficiency of service² as a novel “Rule 3” motion to dismiss, in order to argue Rule 3, SCRPC, Defendant was first required to adequately *plead* insufficiency of service defense to avoid a waiver under Rule 12(h), SCRPC, in its first responsive filing, because Defendant’s current position is inextricably intertwined with Defendant’s untimely lack of service objection and cannot be maintained unless Defendant shows lack of service. *See Garner, Unisun Ins.*

In the absence of prior state law on an issue in question, federal cases interpreting the rule are persuasive. *Unisun Ins.*, 342 S.C. at 539. The federal law interpreting nearly identical rules holds that by failing to timely raise the defense of deficient service “either in a pre-answer motion or, if

² While Defendant’s argument actually raises the issue of insufficiency of process under Rule 12(b)(4), not the issue of insufficiency of service of process under Rule 12(b)(5), to the extent it argues that the documents delivered to the DOI were not identical to those filed with the court, the same fate must meet Defendant’s objection, despite its failure to properly identify Rule 12(b) defense and confusing insufficiency of process with insufficiency of service, because both defenses are subject to Rule 12(h) waiver. *See also Patterson v. Whitlock*, 392 Fed. Appx. 185, 189 (4th Cir. 2010) (insufficiency of process must be pled with specificity).

no such motion is made, then in its answer, a defendant waives that defense and submits to the personal jurisdiction of the court.” *See Pusey v. Dallas Corp.*, 938 F.2d 498, 501 (4th Cir 1991). More importantly, when a defendant waives his insufficiency of service defense, the Court lacks authority to dismiss for failure to serve the summons and complaint. *See Pusey*, 938 F.2d at 501 (“A party's waiver operates not only to cut off his right to raise the defense, but the court's power to invoke it.”) (internal quotations omitted). In sum, Defendant’s waiver not only precludes it from filing a motion to dismiss for failure to serve the process at this juncture, it also deprives the Court of *sua sponte* authority to dismiss based on the same grounds, to the extent Defendant consented to the Court’s jurisdiction. As such, dismissal of the action as time-barred for lack of service is contrary to law.

b. The Court also erred in finding that “Plaintiff never served the Summons or the Filed Summons and Complaint” to the extent Defendant was served by certified mail and a mere misnomer did not invalidate Plaintiff’s service on DOI.

Even if Defendant properly preserved its service objection, the dismissal would not be proper because Plaintiff in fact did serve Defendant by certified mail. At the time of the hearing and in its brief, Defendant argued that Plaintiff failed to commence her action under Rule 3, SCRCP, because she “never served” the Summons and Complaint actually filed with the Court and the process served on the DOI bore “Erie Insurance Exchange,” instead of “Erie Insurance Group.” Despite the fact that Defendant’s argument lacked support in both fact and law, the Court agreed.

First, there is no factual support in the record that Plaintiff did not serve the DOI with the Summons and Complaint she actually filed with the Court. At the time of the hearing, Defendant presented its internal document that enclosed an unfiled Summons and Complaint identical to the one filed with the Court other than a discrepancy in Defendant’s name. Defendant did not lay any foundation for this document and did not explain how it came in possession of this document.

Moreover, this document was not properly authenticated. While in its Opinion, the Court noted that “Plaintiff never offered an explanation to the Court that explained the discrepancies between her Filed Summons and Complaint and the different documents she sent to the S.C. Department of Insurance and Erie Insurance Exchange,” Plaintiff neither had an opportunity to provide an explanation nor had a duty to do so due to Defendant’s failure to plead its objection to service. *See Unisun Ins. v. Hawkins*, 342 S.C. 537, 542 (Ct. App. 2000). Plaintiff repeatedly noted that Defendant’s filings failed to raise the issue, however, this key point was met with a deaf ear and a blind eye. Moreover, Defendant’s contention that Plaintiff sent “different documents” to the DOI finds no factual support in the record before the Court, which contains no evidence of what documents Plaintiff actually served on the DOI. *See* Opinion, ¶14. On the contrary, the record contains unchallenged evidence that raises a presumption of proper service. Specifically, Plaintiff filed a Certificate of Service by Certified mail and an Affidavit of Compliance with S.C. Code Ann. §15-9-285. Defendant did not challenge either of the two filings. As was explained above, Defendant had a duty to challenge service at the outset of litigation. *See Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993). “The plaintiff need only show compliance with the rules. When the civil rules on service are followed, there is a presumption of proper service.” *Moore v. Simpson*, 322 S.C. 518, 523, 473 S.E.2d 64, 66 (Ct. App. 1996) (citing *Roche v. Young Bros., Inc., of Florence*, 318 S.C. 207, 456 S.E.2d 897 (1995)). Here, Plaintiff showed that she *prima facie* complied with S.C. Code Ann. §15-9-285, raising the presumption of proper service, and because Defendant failed to timely challenge this presumption, it is now bound by it. SCRCP 12(g), (h).

Next, Rule 4(d), SCRCP, states that “[v]oluntary appearance by defendant is equivalent to personal service; and written notice of appearance by a party or his attorney shall be effective upon mailing, or may be served as provided in this rule.” Defense counsel filed a notice of appearance

on February 16, 2023, voluntarily accepting service of process. Next, in accordance with Rule 4(d)(7), SCRCPP, “[s]ervice upon a defendant ... is also sufficient if the summons and complaint are served in the manner prescribed by statute,” such as S.C. Code Ann. §15-9-285. Lastly, Rule 4(d)(8), SCRCPP, authorizes service by registered or certified mail, return receipt requested on “a corporation or upon a partnership or other unincorporated association which is subject to suit under a common name.” SCRCPP 4(d)(3) and (8). Here, Plaintiff used two different methods to serve Defendant – service on the DOI and certified mail. As was noted above, defense counsel acknowledged service by certified mail and also failed to properly preserve its objection to statutory service on the DOI. (**Exhibit A and B**). Defendant is not alleging that the Summons and Complaint served by certified mail differed from those filed with the Court. As such, the evidence in the record conclusively establishes that Plaintiff in fact did serve Defendant by certified mail and this mode of service remains entirely unchallenged by Defendant. Here, however, even if Plaintiff failed to serve Defendant at all, defense counsel accepted service on behalf of Defendant by voluntarily appearing on the record. SCRCPP 4(d). As such, the Court’s finding that Plaintiff “never served Defendant” is clearly erroneous from the factual standpoint and contrary to law.

Next, Plaintiff maintains that service on the DOI was also proper because a misnomer in Defendant’s name has no legal significance. As an initial matter, “Rule 4, SCRCPP serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action.” *Roche v. Young Brothers, Inc.*, 318 S.C. 207, 456 S.E.2d 897, 899 (1995). However, “[t]he principal object of service of process is to give notice to the defendant... of the proceedings against it.” *Mull v. Ridgeland Realty, LLC*, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (Ct. App. 2010) (quoting *Burris Chemical, Inc. v. Daniel Const. Co.*, 251 S.C. 483, 487, 163 S.E.2d 618, 620 (1968)); see also *Moore v. Simpson*, 322 S.C. 518, 523, 473 S.E.2d 64, 66 (Ct. App.

1996). Further, the courts “have never required exacting compliance with the rules to effect service of process... Rather, we inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings.” *Roche*, 318 S.C. at 210, 456 S.E.2d at 899. Moreover, South Carolina courts have found that service cannot be defeated on a mere technicality when the principal object of service - to provide notice of the suit to the defendant - has clearly been accomplished. *See Mull*, 387 S.C. at 486-87, 693 S.E.2d at 31. Here, Plaintiff substantially complied with the rules that govern service of process. Plaintiff’s service by certified mail alone was sufficient to both confer jurisdiction and provide notice of the commencement of the action. In addition, however, Plaintiff substantially complied with the rules that govern service on an unauthorized insurer. Defendant did not respond to Plaintiff’s argument that the name discrepancy is a mere misnomer that does not invalidate Plaintiff’s service on the DOI and presented no conflicting authority. According to our Supreme Court “the misnomer of a corporation in a notice, *summons*, [] *or other step in a judicial proceeding* is immaterial if it appears that [defendant] could not have been, or was not misled.” *Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 240 (quoting *Tunstall v. The Lerner Shops, Inc.*, 160 S.C. 557, 563, 159 S.E. 386, 388 (1931)). As such, the Court’s finding of lack of service is contrary to the weight of well settled authority, binding on this Court under the doctrine of *stare decisis*.

Had Defendant timely asserted this defense in response to either Plaintiff’s original or amended pleading, Plaintiff would have provided an explanation and showed that she in fact served *both* the Summons and Complaint that bore “Erie Insurance Group” and “Erie Insurance Exchange” on the DOI, because she did not know which name to use. The search with the Secretary of State revealed that Defendant used seven (7) different variations of its name, including two fictitious names “Erie

Insurance” and “Erie Insurance Group.” See **Exhibit D**. While it was a fictitious name, “Erie Insurance Group” was one of Defendant’s names that Defendant itself registered with the Secretary of State. *Id.* Moreover, in her filings, Plaintiff cited a federal case, in which Defendant admitted that “Erie Insurance Group” was its fictitious name which *collectively* referred to *all* Erie entities. See Pl’s Supp. Briefs and Reply Brief. See *Givens v. Erie Ins. Co.*, 2022 U.S. Dist. LEXIS 125645, *9 (DSC July 14, 2022) (“The Erie Defendants admit that The ERIE is a trade name and Erie Insurance Group ‘is a fictitious name used to refer to various Erie entities collectively, not individually.’”). Because “Erie Insurance Group” was a name used by Defendant itself to collectively refer to all of its Erie entities, this fictitious name incorporated all other Erie names, including “Erie Insurance Exchange.” Plaintiff also cited authority that under South Carolina law, a company can be sued under its fictitious trade name by which it is known. *Tri-County Ice*, 303 S.C. at 240-241 (quoting *Tunstall*). Furthermore, Plaintiff presented documentary evidence that Defendant used three different names in its dealings with Plaintiff, including “Erie Insurance Exchange” and “Erie Insurance Group.” Lastly, Plaintiff asserted in her Complaints and in her memoranda that Defendant deleted all of her insurance policies and policy related documents from her online portal, making it even more difficult to determine which name to use to sue Defendant. See Pl’s Complaints and Memoranda. Unsure of which of Defendant’s numerous slight variations of its name was the proper name to use, Plaintiff elected to use the name that collectively referred to all Erie entities to cover all possible variation.

The DOI was aware that Plaintiff used two variations of Defendant’s name yet it elected to accept service on Defendant’s behalf and added “*et al*” after Defendant’s name, which signified both that it was clearly aware that Plaintiff used two different names and also that “Erie Insurance Group” was a *collective* name that referred to all other Erie entities, including “Erie Insurance

Exchange.” *See* DOI’s Acceptance of Service. Under South Carolina law, substituting one name for another had no legal significance because both names referred *to the same* insurance company. *See Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237.

In sum, even if Defendant managed to timely preserve its service objections, which it clearly failed to do, under South Carolina law, the discrepancy in Defendant’s name was a mere misnomer that did not impact the validity of Plaintiff’s service on the DOI and Plaintiff fully complied with S.C. Code Ann. §15-9-285. The Court’s finding that Plaintiff “never served” Defendant is a classic example of allowing “service [] [to] be defeated on a mere technicality [] [even though] the principal object of service, to provide notice of the suit to the defendant, has clearly been accomplished.” *See Mull*, 387 S.C. at 486-87, 693 S.E.2d at 31. As the Fourth Circuit observed in another case, where an insurance company attempted to challenge service based on a technicality,

A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant . . . it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else. . . . As a general rule the misnomer of a corporation in a notice, summons . . . or other step in a judicial proceeding is immaterial if it appears that [the corporation] could not have been, or was not, misled.

Morrel v. Nationwide Mut. Fire Ins. Co., 188 F.3d 218, 224 (4th Cir. 1999).

c. The Court erred in finding that Plaintiff failed to commence the action in accordance with Rule 3, SCRCF, because Plaintiff’s service of the Amended Complaint was sufficient to commence the action, even if Plaintiff never served the original Complaint.

At the time of the hearing and its subsequently filed brief (as opposed to a motion), Defendant argued that because Plaintiff “never served” Defendant, she failed to properly commence her action in accordance with Rule 3, SCRCF. Defendant’s argument is without merit and the Court’s conclusion, conspicuously unsupported by any legal authority, is contrary to well-settled law.

First, as was explained above, Plaintiff in fact did serve Defendant using two different methods – service by certified mail, which remains entirely unchallenged, and service on the DOI, which was also proper because a misnomer did not impact its validity. *See supra*. In addition, even if the Court were correct in finding that Plaintiff “never served” Defendant with her *original* Complaint, the action was still properly commenced because Plaintiff filed an Amended Complaint, which was properly e-served upon Defendant’s counsel of record. *See Eberly v. Advanced Flooring & Design Div. of ISI, LLC*, 901 S.E.2d 273, 275 (2024) (“automatic service of the NEF upon the E-Filing of [] [an amended pleading] constitutes proper service [] as to parties who are represented by counsel and proceeding in the E-Filing System”). Our Supreme Court addressed this very issue in a case involving a plaintiff who actually never served the original complaint (unlike Plaintiff who did in fact serve her original pleading), and filed an amended complaint a year later after the statute of limitations expired, finding that the action was properly commenced under Rule 3, SCRCPP, because the amended complaint was served within 120 days after it (i.e., amended complaint) was filed. *See Mims v. Babcock Ctr., Inc.*, 399 S.C. 341, 347 (2012) (“we conclude the trial court erred in finding Mims's amended complaint should be dismissed for failure to serve it within 120 days of filing the original complaint”). The court expressly noted that Rule 3, SCRCPP does not require “that service must be made in *all* cases within 120 days of filing,” as Defendant argued in the case at bar. *Id.* at 346-347 (emphasis original). The court further explained that “[t]he 120-day period only has relevance if service is accomplished outside of the statute of limitations. When service occurs outside of the statute of limitations it must occur within 120 days of filing the complaint.” *Id.* The court reasoned that because plaintiff amended his unserved pleading, the 120-day period began to run from the date the amended pleading was filed, not from the date of the original filing. *Id.* at 47.

The court also clarified that a plaintiff may amend its pleading “even if the original complaint has not been served” and that “a party may amend her pleadings once without leave of court before a responsive pleading is served, and no responsive pleading had been served by Defendants prior to [plaintiff’s] service of the amended complaint. *Id.* See also Rule 15(a), SCRCPP (“A party may amend his pleading once as a matter of course *at any time before* or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served.”) (emphasis added). Therefore, even if the Court were correct and Plaintiff “never served” her *original* Complaint, she had a right to amend her pleading, which she actually did here with Defendant’s express consent and leave of court. In accordance with this supreme Court decision, even if the original Complaint was never served, this action was properly commenced because service was accomplished within 120 days after the filing of the Amended Complaint. In sum, the Court’s conclusion that Plaintiff failed to commence her action in accordance with Rule 3, SCRCPP, is contrary to law.

d. The court erred in finding that Plaintiff’s action was time barred in light of the relation-back provision under Rule 15(c).

In its brief (as opposed to a motion), Defendant also argued that “[t]his amended complaint cannot relate back to an action that was never commenced in the first place.” See D’s Brief. Contrary to Defendant’s baseless argument unsupported by any citation to authority, the relation back doctrine is fully applicable to the case at bar.

As an initial matter, while the Court agreed with Defendant, most of Defendant’s arguments were conclusory and unsupported by citations to authority (aside from Defendant’s citation to a single federal case, which was not binding on this case). This was an error in itself because it is a well settled principle that a conclusory argument unsupported by authority results of in forfeiture

of the issue. *See also Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (finding that when a party made only a conclusory argument and cited no legal authority the issue was abandoned). Most of Defendant's arguments made in the course of this litigation fall in this category and by agreeing with Defendant, the Court made an error of law and abused its discretion, to the extent its rulings are manifestly unsupported by reason (or authority).

The relation back doctrine is fully applicable to the case at bar, because even if Defendant were correct that Plaintiff's original Complaint named Defendant incorrectly (which Plaintiff disputes, because, under South Carolina law, a registered fictitious trade name can be used to sue a corporate defendant), Plaintiff amended her Complaint, adding Defendant's proper name along with its other fictitious trade names. Rule 15(c), SCRCP, states

An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Both requirements are satisfied here, because Plaintiff's amendment did not substitute Defendant for another party, but only corrected the misnomer in Defendant's name. *See* Pl's Amended Complaint. As Plaintiff maintained throughout this litigation, the proper Defendant is before the Court. Importantly, the rule does not require Plaintiff to serve Defendant under its correct name, before the statute of limitations runs, but only requires Plaintiff to give Defendant *notice* of the commencement of the action before the expiration of the applicable statute of limitations. This requirement is clearly satisfied here. Moreover, Defendant never argued that Plaintiff sued the wrong party – it argued that Plaintiff used the wrong name to summon Defendant to court. *See* D's filings, generally. Defendant certainly knew that but for the confusion surrounding its name,

Plaintiff would have named Defendant by its proper name. Thus, even if Plaintiff never served Defendant, as the Court concluded, the Amended Complaint relates back to the time of the original filing, which saves the action from the operation of the statute of limitations. Lastly, as was explained above, because the Amended Complaint was served upon its filing, the action was properly commenced. In interpreting this Rule and how it relates to misnamed defendants (as in the case at bar), our Supreme Court reasoned that

Although the corporate name was incorrect on the pleadings, the pleadings were served upon the president of the defendant corporation. The pleadings described an incident which occurred while the president of the corporation was present and the name on the original pleadings was a trade name used by the defendant corporation. Under our reading of the South Carolina Rules of Civil Procedure, the Plaintiff has met all of the requirements of Rules 3(b) and 15(c).

Hughes v. Water World Water Slide, 314 S.C. 211, 215. The Court should have reached the same conclusion here, because “all pleadings shall be so construed to do substantial justice to all parties” and “the rules should be liberally construed.” See *Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991); *Hughes v. Water World Water Slide*, 314 S.C. 211, 214-215.

The application of the relation back doctrine to this case is also consistent with South Carolina precedential decisions that hold that a mere misnomer in a summons or any other stage of the proceedings is of no moment and that a company is bound by its fictitious trade name used to conduct business. *Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 240 (quoting *Tunstall v. The Lerner Shops, Inc.*, 160 S.C. 557, 563, 159 S.E. 386, 388 (1931), *Waldrop v. Leonard*, 22 S.C. 118 (1885) (“where a defendant sued by a wrong name omits to plead in abatement and suffers the plaintiff to proceed to judgment, though he has never appeared to the wrong name, this Court will not interfere to set aside the proceedings.”), *Long v. Carolina Baking Co.*, 193 S.C. 225, 8 S.E.2d 326 (1939) (judgment would not be invalidated against corporation

who is incorrectly named where corporate defendant has suffered no prejudice), *Tunstall v. The Lerner Shops, Inc.*, 160 S.C. 557, 159 S.E. 386 (1931) (motion to amend judgment should have been granted). *See also Givens v. Erie Ins. Co.*, 2022 U.S. Dist. LEXIS 125645, *9 (DSC July 14, 2022) (holding that the South Carolina law allows a party to sue the Erie Defendant under its fictitious trade name “Erie Insurance Group”). In sum, it is essentially axiomatic that Plaintiff’s Amended Complaint relates back to time of the original filing and this action is not barred by any of the applicable statute of limitations.

e. The Court also erred in finding Plaintiff’s causes of action to be time barred to the extent the violation of Plaintiff’s rights is ongoing and Defendant’s malfeasance is recurrent in nature, which restarts the statute of limitations every time Defendant renews Plaintiff’s policy under a third-party’s name without Plaintiff’s consent.

As an initial matter, the Court erred when it concluded that Plaintiff’s causes of action accrued in October of 2020, when Plaintiff first learned that Defendant renewed her policy after Plaintiff asked to terminate it upon moving to South Carolina and began adjusting a claim under Plaintiff’s name, subsequently back-dating the renewal of Plaintiff’s policy under a third-party’s name without Plaintiff’s consent, in essence converting Plaintiff’s insurance policy. However, Plaintiff’s Complaint also asserted that in February of 2023, Plaintiff learned that Defendant was still using her policy to insure this third-party despite being informed that the tortfeasor misappropriated Plaintiff’s identity. *This* was the reason Plaintiff sued Defendant. Plaintiff’s understanding of the initial violation of her rights was that it occurred because Defendant wanted to give the third-party coverage of the accident, reasoning that “the accident was not the third-party’s fault.” *See* Pl’s Complaint. Plaintiff believed that once Defendant accomplished its goal, it would terminate the policy to curtail its liability for misappropriating Plaintiff’s policy and her credit history. Defendant, however, elected to continue to violate Plaintiff’s rights, which it does every time it renews Plaintiff’s policy, while collecting premiums and financially benefiting from its

wrongdoing, because theft does not transfer title (I.e., this is still Plaintiff's policy). There was absolutely no moral justification for Defendant's decision to continue to violate Plaintiff's rights, which defense counsel even admitted in a phone conversation with the undersigned, asserting that "the policy has no value" to Plaintiff to justify its wrongful conduct.

As an initial matter, the burden of establishing the statute of limitations defense is on the party seeking to impose it. *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962). Defendant clearly failed to meet its burden of showing that all of Plaintiff's causes of action, including Plaintiff's request for injunctive relief, were time-barred, to the extent Defendant's argument was entirely conclusory and unsupported by any citations to authority. As was explained above, Plaintiff's Complaint actually presents *ongoing* violations of Plaintiff's rights that continued *after* October 1, 2020, when Plaintiff first learned of the violation of her rights, and, upon information and belief, the violations are still ongoing. Because the Complaint asserts a series of discrete and recurrent violations which recur every time Defendant renews Plaintiff's policy, each such violation of Plaintiff's rights is an independently actionable wrong, which triggers a statute of limitations anew. *See State ex rel. Wilson v. Ortho-Mcneil-Janssen Pharms.*, 414 S.C. 33 (2015). Consistent with the doctrine of continuous accrual, Plaintiff continues to suffer new wrongs, such as having a lapse in her coverage, which was caused by the third-party who was insured under Plaintiff's policy without her knowledge or consent. Plaintiff's pleadings clearly show that her credit continues to be detrimentally impacted. Next, one of Plaintiff's causes of action is for a violation of South Carolina Unfair and Deceptive Trade Practices Act ("SCUDTPA"), and the language of the Act expressly contemplates that an unlawful act or practice may result in multiple statutory violations, and it is the violations themselves that cause the statute of limitations to begin to run." *See* S.C. Code Ann. § 39-5-110. Our Supreme Court adopted "the view that aligns with

legislative intent as reflected in section 39-5-110, a common sense approach recognizing that the SCUTPA statute of limitations begins to run anew with each violation.” *Id.* at 79. The Court further explained that the doctrine of continuous accrual rectifies the

inequities that would arise if the expiration of the statute of limitations period following a first breach of duty or instance of misconduct were treated as sufficient to bar suit for any subsequent breach or misconduct; parties engaged in long-standing malfeasance would thereby obtain immunity in perpetuity from suit even for recent and ongoing malfeasance. In addition, where malfeasance is ongoing, a defendant's claim to repose, the principal justification underlying the limitations defense, is vitiated. Accordingly, separate, recurring invasions of the same right can each trigger their own statute of limitations. Generally speaking, continuous accrual applies whenever there is a continuing or recurring obligation: when an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period.

Id. at 77-79. *See Estate of Livingston v. Livingston*, 404 S.C. 137, 147-48, 744 S.E.2d 203, 209 (Ct. App. 2013) (finding a new statute of limitations begins to run after each separate injury, and therefore statute of limitations barred only claims falling outside the three-year time period and did not bar claims occurring within that time), *cert. granted*, No. 2013-001505, 2014 S.C. LEXIS 485 (S.C. Sup. Ct. filed Oct. 24, 2014); *see also Hogar Dulce Hogar v. Cmty. Dev. Comm'n of Escondido*, 110 Cal. App. 4th 1288, 2 Cal. Rptr. 3d 497, 502 (Ct. App. 2003) (“When an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period.” (citation omitted)).

In sum, even if Plaintiff filed her Complaint on the date her Amended Complaint was filed (i.e., even if relation back doctrine did not apply and even if Plaintiff never served the original Complaint), the Court’s conclusion that Plaintiff’s *entire* action was time barred is erroneous, because Defendant continued to violate Plaintiff’s rights after it converted Plaintiff’s insurance

policy. Because Plaintiff asserted an ongoing violation of her rights, her action would not be time-barred, even if the relation back doctrine did not apply.

f. The Court erred by denying Plaintiff's motion for entry of default, because Defendant defaulted in response to both the original and amended pleading.

In terms of the Court's discussion of Plaintiff's Motion for Entry of Default, it was limited to one sentence:

Default judgment cannot be granted on a claim that was never properly served or commenced under Rule 3(a), and this court finds no basis for changing the law to allow this to occur.

See Memorandum of Decision, ¶28. As was explained above, Plaintiff did properly commence her action, because she properly served both her original Complaint and her Amended Complaint. *See supra*. As such, the Court's refusal to enter default was in error. In addition to previously made arguments, which are hereby expressly incorporated as if fully set forth herein, Plaintiff asserts that Defendant suffered a default *twice* – in response to both the original and amended pleading.

Rule 15(a) states that “[a] party shall plead in response to an amended pleading within the time remaining for response to the original pleading or *within fifteen days* after service of the named amended pleading, whichever period may be the longer, unless the court otherwise orders.” SCRCP 15(a) (emphasis added). Since Defendant did not accrue any extra time in responding to Plaintiff's original Complaint (as it filed its motion to dismiss 77 days after the DOI accepted service), it had fifteen (15) days to respond to the Amended Complaint, or until January 21, 2024. *Id.* On February 5, 2024, 31 days after Defendant was served with Plaintiff's Amended Complaint, (1) Defendant moved to extend time until March 5, 2024 to file its Answer to “investigate” Plaintiff's factual allegations, and later that same day, (2) Defendant filed its untimely Answer, which made its motion moot. *See* D's Motion to Extend Time; D's Answer. At the time Defendant filed its Motion, its deadline to file an Answer had already expired and it was technically in default

once again. *See* SCRCP 15(a), 55. Defendant's Motion did not assert any good cause sufficient to find excusable neglect for missing this crucial deadline the second time around, to the extent Plaintiff's Amended Complaint did not make any *new* factual allegations. *See* Pl's Amended Complaint. Plaintiff moved to amend her Complaint primarily to correct the misnomer. *Id.* Because the Complaint, asserting nearly identical factual allegations, was first filed on February 7, 2023, essentially a year prior to Defendant's Motion to extend time, Defendant's request for additional time to further investigate the claims was not warranted and it actually showed lack of due diligence on Defendant's part, which precludes a finding of excusable neglect. *See e.g., Worrell v. Satterfield Constr. Co.*, 269 S.C. 532, 534 (1977).

In sum, even if the Court found that Defendant's reliance on Plaintiff's consent to extend the time beyond 60 days was somehow reasonable (which Plaintiff disputes to the extent Rule 6(b), SCRCP expressly precludes such reliance), Defendant defaulted in response to Plaintiff's Amended Complaint all on its own. Moreover, once again, as was previously explained, the fact that a default is not formally entered has no legal significance, because entry of default is a mere formality. *See Thynes v. Lloyd*, 294 S.C. 152, 153-54, 363 S.E.2d 122, 123 (Ct. App. 1987) (holding that "whether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by the affidavit" of the moving party). Thus, while the Court allowed Defendant to submit an oral Rule 3 motion to dismiss Plaintiff's action, Defendant's request was invalid because it was made while Defendant was technically in default. This is yet another reason why the Court could not have granted Defendant's motion to dismiss.

WHEREFORE, Plaintiff respectfully moves the Court to reconsider its Opinion in light of numerous errors noted above, pursuant to Rule 59(e), SCRCP.

Respectfully submitted,

August 18, 2024.

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over an out-of-state insurance company, based on the premise that by engaging in enumerated actions, that constitute unauthorized business of insurance, the unauthorized insurer appoints the South Carolina Director of Insurance as its agent for the purposes of service of process. S.C. Code § 15-9-285. *See also White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 753 S.E.2d 537 (S.C. 2014) (We have previously interpreted insurance service statutes as “designed by the legislature to provide a simple and *easy method of obtaining jurisdiction over a foreign insurance company*” (emphasis added) (internal quotation omitted). The SCDOI accepted service of process effective February 10, 2023. Plaintiff subsequently filed an Affidavit of Compliance as required pursuant to S.C. Code § 15-9-285(c), which enclosed SCDOI’s Acceptance of Service as an Exhibit. Defendant’s attorney entered their appearance on February 16, 2023, and contacted Plaintiff to obtain an extension of time to respond to the Complaint. Plaintiff agreed to a 30-day extension, being unaware that the date selected by Defendant was outside the time-period authorized by the South Carolina Rules of Civil Procedure.

On April 28, 2023, 77 days after SCDOI accepted service on Defendant’s behalf, Defendant filed a one-sentence motion unsupported by a brief, citing Rule 12(b)(2) (lack of personal jurisdiction) and 12(b)(6) (failure to state a claim) and notifying the Court that “[t]his motion will be supported by Defendant’s forthcoming brief.” *See D’s MTD*. Plaintiff subsequently moved for Entry of Default and Default Judgment on May 31, 2023, before Defendant filed its brief. The motions were subsequently set for hearing on November 14, 2023. On Friday, November 10, 2023, Defendant filed a Memorandum in support of its motion to dismiss filed 196 days earlier, and set to be heard in two business days from the date of the filing of the brief. The motions were heard by the Honorable Dan Hall on November 14, 2023. At the time of the hearing, Plaintiff’s counsel objected to Defendant’s brief on timeliness grounds and moved for leave of

court to amend the Complaint. Defendant agreed to the request to amend, and Plaintiff's motion to amend was orally granted by the Court. The motions were taken under advisement and the Court encouraged the parties to explore settlement options.

On January 5, 2024, Plaintiff filed an Amended Complaint, to correct Defendant's name add additional causes of action, including conversion and misappropriation of identity. Plaintiff also asked for a common law injunction to prevent Defendant from continuous use of Plaintiff's insurance policy and her personal information, including Plaintiff's credit history. On February 5, 2024, Defendant responded to the Amended Complaint by filing a "Motion to Dismiss for Lack of Personal Jurisdiction and Answer." *See* D's Answer. Because the motions were not ruled on, Plaintiff asked for another hearing, which was set for June 24, 2024, following a status conference. The hearing was subsequently rescheduled for July 31, 2024.

The motions were heard by the Honorable Dan Hall on July 31, 2024. At the time of the hearing, Defendant argued that Plaintiff failed to properly serve Defendant because there was a discrepancy in the name of the Defendant and presented Defendant's internal document that contained Defendant's cover letter, the Department of State's Acceptance of Service previously filed with the court, and Plaintiff's unfiled Complaint that named Defendant "Erie Insurance Exchange, *et al*" as opposed to "Erie Insurance Group." This document is not part of the record. Defendant also cited Rule 3 of the SCRCP arguing that Plaintiff "failed to properly commence" this action. Defendant further argued that Plaintiff's Complaint was a "sham" because of the discrepancy in the name and the fact that the Complaint served on the Department of State was not clocked. Lastly, Defendant argued that because Plaintiff amended her Complaint to correct Defendant's name, both motions were moot. Defendant did not raise these issues in either their one-sentence motion to dismiss or their subsequently filed brief. Nor did Defendant cite any

authority in support of its novel arguments. Plaintiff responded to Defendant's arguments, arguing that Defendant waived its improper service defense by not including it as one of the grounds in its motion to dismiss, which cited only two grounds – failure to state a claim and lack of personal jurisdiction. Plaintiff also argued that her Amended Complaint did not cure Defendant's default and referenced binding authority that stands for the proposition that filings made by a defendant while technically in default are invalid, even if default is not formally entered, because entry of default is a ministerial task. Plaintiff further argued that because Defendant was technically in default at the time it filed its motion to dismiss, the motion is simply invalid. Plaintiff is now submitting supplemental briefing in opposition to Defendant's Motion to dismiss in order to formally object to Defendant's lack of proper service defense, which was not properly preserved.

II. LEGAL FRAMEWORK

Rule 12(b) SCRCP sets forth various defenses and objections, including “(1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state facts sufficient to constitute a cause of action, (7) failure to join a party under Rule 19, (8) another action is pending between the same parties for the same claim.” The rule permits a party to raise lack of subject matter jurisdiction and failure to state a claim at any time. SCRCP 12. However, Rule 12 (h) requires certain specified defenses to be raised in the initial responsive filing, be it a motion to dismiss or an answer:

(1) A defense of lack of jurisdiction over the person, improper venue, *insufficiency of process*, *insufficiency of service of process*, or that another action is pending between the same parties for the same claim is waived (A) if omitted from a motion in the circumstances described in subdivision (g) or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

III. ARGUMENT

i. Defendant waived any objection based on improper service or insufficient process.

According to the procedural history outlined above, Defendant failed to raise an improper service or insufficient process objection both in response to the original Complaint as well as Plaintiff's Amended complaint. As such, Defendant waived any defense it could have otherwise raised based on improper service or insufficient process². *See* SCRCP 12(h); *see also Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993) (failure to timely assert improper service waives any issue regarding its validity).

ii. None of Defendant's filings are valid because they were made while Defendant was technically in default.

In addition to Defendant's failure to preserve its objections to the manner or propriety of Plaintiff's service, Defendant's filings were made after it had suffered a default. The Rule 55(a) states in relevant part:

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk **shall** enter his default upon the calendar (file book).

Rule 55, SCRCP (emphasis added). When interpreting a court rule, the Court "appl[ies] the same rules of construction used in interpreting statutes. Therefore, the words of [the rule] must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule." *Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994). When

² While Defendant failed to specify its objections, it appears that it attempted to argue that service was improper because the Department of Insurance did not receive a clocked copy of the Complaint and because there was a discrepancy in Defendant's name. This, however, is a not improper service but rather insufficient process defense. Regardless, neither defense was properly preserved by Defendant.

the language of a court rule is clear and unambiguous, the court is obligated to follow its plain and ordinary meaning.

If a party has failed to "plead or otherwise defend as provided by [the South Carolina Rules of Civil Procedure] and that fact is made to appear by affidavit or otherwise," the clerk of court will enter default. Rule 55(a), SCRCP. Notably, the Rule speaks in mandatory terms and does not leave any discretion to the trial court or the clerk of court. This is so, because entry of default is a ministerial act which a clerk is required to perform once default is made to appear by the affidavit of the moving party or "otherwise." *See Thynes v. Lloyd*, 294 S.C. 152, 153-54, 363 S.E.2d 122, 123 (Ct. App. 1987) (holding that "whether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by the affidavit" of the moving party).

Here, the Court was made aware of Defendant's default by way of a motion properly supported by Plaintiff's notarized Affidavit of Compliance with S.C. Code § 15-9-285, which authorizes service on the SCDOI, as well as SCDOI's Acceptance of Service. As such, Plaintiff has fully complied with Rule 55, SCRCP. Our Court of Appeals has explained that because an entry of default is a ministerial task, whether a default is actually entered on the record is of no consequence, and any filing made by a defendant while technically in default is invalid:

Although Appellants' late answer amounted to a "pleading" filed prior to entry of default, it did not comply with the time requirements of Rule 12(a), SCRCP. Appellants clearly failed to file an answer within thirty days of service of the summons and complaint upon them and they were technically in default. Thus, Appellants' answer was not a valid pleading or defense "as provided by" the Rules of Civil Procedure. A plain reading of Rule 55(a) allows entry of default when a pleading or defense is asserted in a manner noncompliant with the Rules of Civil Procedure. To hold otherwise would render the requirements in Rule 12(a), SCRCP, meaningless.

Stark Truss Co. v. Superior Constr. Corp., 360 S.C. 503, 508-509 (Ct. App. 2006). In *Stark Truss Co.*, defendant attempted to argue that entry of default was improper because it filed a late pleading, citing to cases from other jurisdictions. *Id.* Our Court of Appeals rejected this argument indicating that “[t]hat is not the current law in this state.” *Stark Truss Co.*, 360 S.C. at 509. The court further explained that while an untimely pleading constituted an “appearance,” the filing itself was still invalid, and the only consequence was that the defaulting defendant was entitled to a notice of hearing (i.e., default judgment could not be entered *ex parte*). *Id.* at 512.

At the time of the hearing, Defendant attempted to argue that Plaintiff’s consent to a 30-day extension somehow justified its default. However, Rule 6 SCRPC expressly states that “the time may be extended by written agreement of counsel for an additional period not exceeding the original time provided in these rules.” Defendant attempted to argue that it was “unclear” what the starting point was for the extension, however, read together with other rules of civil procedure make it clear that the parties cannot consent to an extension beyond 60 days from the date of service. *See* Rule 12(a) SCRPC. The starting point to calculate the deadline to respond to a complaint is always the date of service and because Defendant failed to properly challenge sufficiency or propriety of Plaintiff’s service on the department of Insurance, the starting point was the date the department accepted service on Defendant’s behalf. Lastly, Defendant takes issue with the fact that Plaintiff originally named Defendant “Erie Insurance Group” arguing that it “does not exist,” however, “Erie Insurance Group” is a trade name used by Defendant and the rules permit a party to use a trade name to name a party. *See Givens v. Erie Ins. Co.*, 2022 U.S. Dist. LEXIS 125645, *9 (DSC July 14, 2022) (“Importantly, S.C. Code Ann. § 15-5-160 only provides a procedure for bringing parties before the court, and any ‘liability of the members of the association, if any, is determined by the applicable substantive law.’ *Graham*, 296 S.C. at 256. The Erie

Defendants admit that The ERIE is a trade name and Erie Insurance Group ‘is a fictitious name used to refer to various Erie entities collectively, not individually.’”)

IV. CONCLUSION

Contrary to the Court’s view of Defendant’s attempt to argue that *both* Plaintiff’s motion for entry of default and Defendant’s motion to dismiss are moot, Defendant is not doing Plaintiff any favors here, to the extent all of its filings were made while it was in default and as such, they are all invalid. While it is true that the Amended Complaint did moot Defendant’s motion to dismiss to the extent it rested primarily based on Defendant’s argument that naming Defendant by its fictitious name deprived the Court of personal jurisdiction (which is further reinforced by the fact that Defendant did not argue failure to state a claim in response to the Amended Complaint), Plaintiff’s Amended Complaint did not cure Defendant’s default. Defendant cited no authority that stands for the proposition that amending a complaint cures defendant’s default, and none exists.

WHEREFORE, Plaintiff respectfully moves the Court to strike Defendant’s improper service objections, deny Defendant’s motion to dismiss as moot, and enter a default.

Respectfully submitted,

July 31, 2024.

/s/ Ina Shtukar Steinberg

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clocked. Lastly, Defendant argued that because Plaintiff amended her Complaint to correct Defendant's name, both motions were moot. Defendant did not raise these issues in either their one-sentence motion to dismiss or their subsequently filed brief. Nor did Defendant cite any authority in support of its novel arguments. Lastly, Defendant did not respond to or otherwise opposed Plaintiff's supplemental brief in support of her motion for entry of default, electing to forego this opportunity to raise its new arguments as well.

Plaintiff responded to Defendant's arguments, arguing that Defendant waived its improper service defense by not including it as one of the grounds in its motion to dismiss, which cited only two grounds – failure to state a claim and lack of personal jurisdiction. Plaintiff also argued that her Amended Complaint did not cure Defendant's default and referenced binding authority¹ that stands for the proposition that filings made by a defendant while technically in default are invalid, even if default is not formally entered, because entry of default is a ministerial task. Plaintiff further argued that because Defendant was technically in default at the time it filed its motion to dismiss, the motion is simply invalid.

In response to Defendant's big revelation that the Complaint served on the DOI bore a different Erie name, which in Defendant's view made the Complaint a "sham," Plaintiff responded that other than the difference in the name, the Complaints were identical and the right Defendant was before the Court. Prior to the hearing, Defendant's attorney asked to speak to Plaintiff to "give her one last chance" and in a threatening manner revealed that she "just noticed" (1.5 years after the commencement of this action) that the name ("Erie Insurance Exchange *et al*") on the Complaint

¹ Said authority was also cited in Plaintiff's supplemental brief in support of her motion for entry of default.

served on the DOI was not the same as the name (“Erie Insurance Group”) on the Complaint that was filed with the Court, essentially accusing Plaintiff of defrauding the Court.

Upon obtaining an opportunity to research the naming issue further, Plaintiff is submitting another supplemental brief to dispel the unfair and meritless accusation of filing a “sham Complaint” or in any way misleading the Court, to the extent the discrepancy in the name is a mere misnomer of no legal significance or impact on the Court’s jurisdiction.

II. LEGAL FRAMEWORK

Many jurisdictions including South Carolina have tackled the issue of incorrectly naming a defendant, either individual or corporate, finding that a misnomer occurs when a plaintiff incorrectly names but correctly sues the “right person,” as distinguished from a misjoinder, which occurs when a plaintiff correctly names but incorrectly sues the “wrong person.” *See e.g. Hampton v. Meyer*, 299 Va. 121 (2020) (collecting cases) (for a thorough discussion of what constitutes a mere misnomer as opposed to a jurisdictional misjoinder), *State v. Blackstone*, 113 S.C. 528, 101 S.E. 845 (1920) (The motion to quash was overruled, the amendment was allowed, and the true name of the defendant inserted in the indictment without resubmission to the grand jury.), *State v. O’Neal*, 210 S.C. 305, 308 (1947), *First Fed. Sav. & Loan Ass’n v. Dangerfield*, 307 S.C. 260 (COA 1992) (A misnomer was immaterial because the correct entity received the funds.), *Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 239-240 (1990) (“This Court has been faced with this issue in a number of cases and has allowed amendment of the record to substitute one name for another.”) etc.

Virtually all jurisdictions uniformly hold that a misnomer has no legal significance, i.e., a misnomer does not deprive the Court of the jurisdiction, and should be corrected by amending the pleading or the judgment. *See e.g. Waldrop v. Leonard*, 22 S.C. 118, 120 (1885) (when the writ

was served on the correct person, such an error “should be considered a mere misnomer” which does not “go[] deeper and touch[] the very jurisdiction of the Court.”), *See also Olschesky v. Houston*, 84 N.C. App. 415, 352 S.E.2d 884 (1987) (where service of process is made on party intended to be sued, a misnomer may be corrected by amendment), *Cunningham, Tallman, Pennington, Inc. v. Case-Hoyte Color Printers*, 174 Ga. App. 488, 330 S.E.2d 598 (1985) (where real defendant is properly served, plaintiff can amend to correct misnomer).

In fact, South Carolina went even further and our Supreme Court held that a judgement is binding upon the incorrectly named defendant even without a proper amendment. *See Waldrop v. Leonard*, 22 S.C. 118 (1885) (“where a defendant sued by a wrong name omits to plead in abatement and suffers the plaintiff to proceed to judgment, though he has never appeared to the wrong name, this Court will not interfere to set aside the proceedings.”), *Long v. Carolina Baking Co.*, 193 S.C. 225, 8 S.E.2d 326 (1939) (judgment would not be invalidated against corporation who is incorrectly named where corporate defendant has suffered no prejudice), *Tunstall v. The Lerner Shops, Inc.*, 160 S.C. 557, 159 S.E. 386 (1931) (motion to amend judgment should have been granted).

As our Supreme Court succinctly put it

As a general rule the misnomer of a corporation in a notice, *summons*, notice by publication, garnishment citation, writ of certiorari, or *other step in a judicial proceeding* is immaterial if it appears that [defendant] could not have been, or was not misled.

Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 240 (quoting *Tunstall v. The Lerner Shops, Inc.*, 160 S.C. 557, 563, 159 S.E. 386, 388 (1931)). Other Courts including the Fourth Circuit have also ruled that a misnomer does not defraud either the court or other parties:

Because the Contractor had been served as effectively as if its correct corporate name had appeared on the Application, the inclusion of its correct name on the final judgment changed no legal

aspect of the case and did not prejudice Nationwide. Consequently, this misnomer did not serve in any way to defraud the court or any party to the proceeding.

Morrel v. Nationwide Mut. Fire Ins. Co., 188 F.3d 218, 225 (4th Cir 1999).

III. ARGUMENT

i. Defendant's "Perry Mayson moment" revealing its discovery that Defendant's name on the Complaint served on the DOI was entirely of no moment.

First and foremost, Plaintiff neither intended to mislead either the Court or Defendant nor did mislead anyone, to the extent the right party was brought to Court. While Defendant's attorney presented her belated discovery as an attempt to defraud the Court, the DOI's Acceptance of Service was filed with the Court just weeks after the commencement of the action and it clearly displayed a slightly different name of Defendant (Erie Insurance), i.e., "Erie Insurance Exchange *et al.*" This was one of the first documents filed by Plaintiff and it has been staring Defendant in the face from the commencement of this action, yet, it took Defendant over 1.5 years to even notice this conspicuously displayed fact. Next, Plaintiff admitted in her filings that she was not certain as to which name to use, because Defendant used three (3) different names in its dealings with Plaintiff and a search of the Secretary of State's website revealed that Defendant uses at least five (5) slightly different variations of its name, and that all variations refer to the same company to the extent they all have the same registered agent and the same registered address or headquarters. Lastly, Erie Insurance Group is a fictitious trade name created by Defendant itself to refer to its various Erie Insurance entities collectively. *See Givens v. Erie Ins. Co.*, 2022 U.S. Dist. LEXIS 125645, *9 (DSC July 14, 2022) ("The Erie Defendants admit that The ERIE is a trade name and Erie Insurance Group 'is a fictitious name used to refer to various Erie entities collectively, not individually.'") Thus, Defendant was the one fully responsible for creating the confusion surrounding its proper name, and contrary to its unfair accusation that Plaintiff was trying to

mislead the Court, was the one misleading everyone in the first place most likely intentionally to make it more difficult to sue the entity. This ploy, however, is pointless as our Supreme Court also found that where “a corporation has acquired a name by usage an adjudication against it by the name so acquired is valid and binding.” *Tri-County Ice*, 303 S.C. at 240-241 (quoting *Tunstall*). *See also Carroll v. Equico Lessors*, 141 Ga. App. 279, 233 S.E.2d 255 (1977) (a corporation conducting business in a trade name may sue or be sued in the trade name). Because it was defendant itself which used “Erie Insurance Group” as a trade name even in its dealings with Plaintiff, it is bound by it and cannot object to Plaintiff’s use of this trade name. In sum, even if Defendant managed to preserve its objection as to the name’s discrepancy, it would still be of no consequence, as both “Erie Insurance Group” and “Erie Insurance Exchange” refer to the same insurance company. Lastly, as Plaintiff alleged in her Complaint, after converting Plaintiff’s policy to give it a third party over Plaintiff’s objection, Defendant deleted all prior policies and policy related documents from Plaintiff’s online portal, making it harder for Plaintiff to determine which of Erie Insurance names to use to sue Defendant. To date, Defendant failed to produce any of Plaintiff’s prior policies. Instead, it only produced the policies that bore the third party’s name which was added to the policy without plaintiff’s consent, which makes the entire policy a complete “sham.” Ironically, while Defendant is accusing Plaintiff of defrauding the tribunal in open court, Defendant was the one who backdated the 2020 policy renewal and the liability claim to delete Plaintiff’s name, which Plaintiff proved through her exhibits to the Amended Complaint. And despite this evidence being in the record, Defendant’s attorney stood in open Court and righteously argued that it did not renew the policy under Plaintiff’s name and did not begin adjusting the claim under Plaintiff’s name. The only party who is responsible for using sham documents in these proceedings is Defendant.

IV. CONCLUSION

Once again, there is nothing gracious about Defendant's request to find both motions moot. Defendant suffered a default and it should have been noted essentially a year ago when Plaintiff first moved the Court for entry of default. Defendant's arguments in support of its motion to dismiss based on the naming issue is entirely meritless. Lastly, Defendant's quite graceless accusations of filing a "sham complaint" are entirely unfounded, as a mere misnomer does not defraud either the Court or any other party, let alone Defendant, who self-induced the confusion surrounding its proper name. The right Defendant is before the Court.

Respectfully submitted,

August 1, 2024.

/s/ Ina Shtukar Steinberg

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Appearing on her own behalf

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Ina Shtukar,
Plaintiff,

vs.

**Erie Insurance Exchange, aka Erie
Insurance Group, Erie Insurance
Company, and Erie Insurance.**
Defendant.

)
) **PLAINTIFF’S REPLY BRIEF**
) **TO DEFENDANT’S SUPPLEMENTAL**
) **MEMORANDUM**

)
)
) CASE NO. 23-CP-460039
)

NOW COMES Plaintiff and respectfully replies to Defendant’s Supplemental Memorandum as follows:

1. In its supplemental brief filed on August 2, 2024, Defendant argues that Plaintiff failed to properly commence the action in accordance with Rule 3, SCRCF. However, its own exhibits show that this argument is meritless, to the extent Plaintiff not only served her original Complaint on the Department of Insurance, but also served Eries by registered mail. (*Please see* Certified Mail Return Receipt as **Exhibit A**, previously filed as Plaintiff’s Certificate of Service Exhibit 2, on March 2, 2023). Thus, even if Defendant’s argument as to Plaintiff’s service on its Statutory Attorney in Fact had merit (which Plaintiff’s disputes), the action was still properly commenced because the original Complaint was also served on Defendant by registered mail in accordance with Rule 4, SCRCF. Notably, Defendant does not assert that Plaintiff failed to serve the original Complaint that bore Defendant’s “Erie Insurance Group” name by registered mail. Thus, even if Plaintiff failed to serve the Department of Insurance, the action was properly commenced in accordance with Rule 3, SCRCF.

2. Next, as was explained in Plaintiff's Second Supplemental Brief, the fact that the Complaint served on the Department of Insurance bore a slightly different name ("Erie Insurance Exchange"), is of no legal significance, as the naming discrepancy was a mere misnomer. *See Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 238 (1990) ("As a general rule the misnomer of a corporation in a notice, summons, notice by publication, garnishment citation, writ of certiorari, or other step in a judicial proceeding is immaterial if it appears that it could not have been, or was not misled"). Thus, Plaintiff's service on the Department of Insurance was properly effectuated.

3. In addition, "Erie Insurance Group" is a fake name that refers to *all other Erie Insurance entities collectively*, meaning this fictitious trade name included "Erie Insurance Exchange." *See Givens v. Erie Ins. Co.*, 2022 U.S. Dist. LEXIS 125645, *9 (DSC July 14, 2022) ("The Erie Defendants admit that The ERIE is a trade name and Erie Insurance Group 'is a fictitious name used to refer to various Erie entities collectively, not individually.'"). The Department of Insurance's Acceptance of Service clearly signified that the original Complaint named *other* Erie Insurance entities by including "*et al*" after Defendant's name. Because Plaintiff's original Complaint used the name that *collectively referred to all other Erie Insurance entities*, no amendment to the original Complaint was even necessary, and various Erie Insurance names could be used interchangeably without any impact on the Court's jurisdiction. *See Tri-County Ice & Fuel Co.*, 303 S.C. 237.

4. Lastly, as Plaintiff has shown, Defendant itself created and used "Erie Insurance Group" in its dealings with Plaintiff. (*See Exhibit B* previously filed with the Court as exhibit to Plaintiff's Amended Complaint.) and as our Supreme Court stated, Defendant is bound by this name. *See Tri-County Ice & Fuel Co.*, 303 S.C. 237 ("where a corporation has acquired a name by usage an

adjudication against it by the name so acquired is valid and binding.”) (internal quotations omitted).

5. While Defendant attempts to disclaim that it is raising the issue of service, it also admits in its own memorandum that “[t]his goes beyond an issue of service, *although it undoubtedly is one.*” D’s Supp. Brief at 7. As was explained in Plaintiff’s Supplemental Brief filed on July 31, 2024, Defendant’s waived any objection based on improper service, in accordance to Rule 12(h) SCRCPP, which makes this defense waivable and requires it to be asserted in the first responsive filings, be it an answer or a motion to dismiss. Defendant’s arguments are based on Plaintiff’s service on the Department of Insurance and because Defendant first raised these arguments 1.5 years after the commencement of this action, Defendant clearly waived its objection to the propriety or sufficiency of Plaintiff’s service on the Department of Insurance. *See* P’s Supp Brief.

6. In asserting that Plaintiff served the Department of Insurance with a “sham complaint,” Defendant neglects to mention that other than the discrepancy in Defendant’s name, the Complaint served on the Department of Insurance is identical to the Complaint filed with the Court. And because the naming error is entirely immaterial as a mere misnomer, Defendant’s arguments miss the mark. *See Tri-County Ice & Fuel Co.*, 303 S.C. 237. In sum, Defendant’s argument that Plaintiff served a “sham complaint” is entirely void of merit. Plaintiff stands by her originally filed Certificate of Service and reaffirms that the Department of Insurance was properly served in accordance with SCRCPP.

7. In support of its argument that both motions are moot, Defendant cited one unpublished decision of District of South Carolina (*Rowley v. City of N. Myrtle Beach*, Civil Action No. 4:06-1873-TLW-TER, 2009 U.S. Dist. LEXIS 131683 (D.S.C. Feb. 23, 2009)), which is not binding on this Court. Plaintiff, on the other hand, cited our Court of Appeals, which held that any filing made

by Defendant while technically in default even if default is not properly entered is invalid. *See Stark Truss Co. v. Superior Constr. Corp.*, 360 S.C. 503 (Ct. App. 2006). This precedent is binding on this Court. *See also Thynes v. Lloyd*, 294 S.C. 152, 153-54, 363 S.E.2d 122, 123 (Ct. App. 1987) (holding that “whether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by the affidavit” of the moving party). While Plaintiff agrees that her Amended Complaint rendered Defendant’s motion moot to the extent it centered in its entirety on Plaintiff’s use of “Erie Insurance Group” name, the amendment did not cure Defendant’s default. Defendant did not cite any authority that stands for this proposition and the only precedential decisions before the Court clearly hold that Defendant’s filings are invalid. Moreover, by voluntarily consenting to Plaintiff’s request to amend the Complaint, Defendant once again waived any objection to the naming error, including in connection with Plaintiff’s service on the Department of Insurance.

8. Next, Defendant’s argument that it “reasonably” and “in good faith” relied on Plaintiff’s consent to a 30-day extension is without merit, to the extend Defendant’s attorneys are charged with knowledge of the Rules of Civil Procedure, which expressly preclude Defendant’s reliance on Plaintiff’s consent to an extension beyond 60 days and make such reliance plainly *unreasonable*. SCRCP 6. The mere fact that Defendant asked for 77 days to file *a one-sentence motion* to dismiss for lack of personal jurisdiction and failure to state a claim makes Defendant’s handling of the crucial first responsive filing *unreasonable*. *See* D’s MTD filed on April 28, 2023. Moreover, Defendant’s *negligence* in calculating its deadline cannot constitute “good cause.” *See Richardson v. P. V, Inc.*, 383 S.C. 610, 618-19 (2009) (“Negligence of an insurance company is imputed to a defaulting litigant and cannot constitute good cause to relieve [that defaulting party] from the entry of default.”) (citing *Roberts v. Peterson*, 292 S.C. 149, 355 S.E.2d 280 (Ct. App.

1987) (observing that the “courts of this state have consistently held that the negligence of an insurance company is imputable to a defaulting litigant” and negligence cannot constitute “good cause”)).

9. Plaintiff further notes that Defendant’s attorney maintains that Defendant did not nominate the Department of Insurance as its statutory agent because “Defendant did not issue or accept any premiums on a policy in South Carolina.” *See* D’s Supp. Memo at 7. However, Plaintiff presented evidence that conclusively show that Defendant renewed Plaintiff’s auto policy *after* she moved to South Carolina and began adjusting a claim under Plaintiff’s name. (*See Exhibit C and Exhibit D* previously filed as exhibits to Plaintiff’s Amended Complaint.). The fact that Defendant later falsified the documents to backdate the renewal and remove Plaintiff’s name from both the policy and the claim and the fact that Defendant intends to use these “sham” documents in these proceedings accomplish only one result – destroy Defendant’s credibility. In sum, both the proper Defendant and the proper defense attorney are before the Court, to the extent defense counsel admitted in its discovery responses that it was Martineau King PLLC which originally advised Defendant to convert (i.e., steal) Plaintiff’s auto policy and give it to a third party over Plaintiff’s written objection.

CONCLUSION

In conclusion, Plaintiff will use the words of other legal scholars, as she cannot find a more eloquent way to put it. As the Fourth Circuit aptly noted

Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. The normal rule of course is that failure to raise an issue for review in the prescribed manner constitutes a waiver.

Manning v. Caldwell, 930 F.3d 264, 268 (4th Cir. 2019). Next, the Court also observed the following in another case against another insurance company, which also attempted to play the “naming game”:

A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant . . . it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else. . . . As a general rule the misnomer of a corporation in a notice, summons . . . or other step in a judicial proceeding is immaterial if it appears that [the corporation] could not have been, or was not, misled.

Morrel v. Nationwide Mut. Fire Ins. Co., 188 F.3d 218, 224 (4th Cir. 1999).

Respectfully submitted,

August 3, 2024.

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Oct 02 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Danniel Hall, Circuit Court Judge

Appellate Case No. 2024-001311

Ina Shtukar,

Appellant,

v.

Erie Insurance Group,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the foregoing Surreply was served on all counsel of record by electronic mail and depositing a copy of the same with the United States Postal Service, postage prepaid, addressed as follows:

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October 2, 2024

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