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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 INITIAL BRIEF

October 17, 2024

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II. Did the trial court err when it found that "Plaintiff never served the Summons or the Filed Summons and Complaint," where the record shows that Defendant was served by certified mail, and that Defendant acknowledged it without raising an objection, and because a mere misnomer did not invalidate Plaintiff's statutory service on the DOI?

III. Did the trial court err when it found that Plaintiff failed to commence the action in accordance with Rule 3, SCRCP, because Plaintiff's service of the Amended Complaint was sufficient to commence the action, even if Plaintiff never served the original Complaint?

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V. Did the trial court also err when it determined that Plaintiff's causes of action were time barred, to the extent Plaintiff's Complaint sets forth well-pleaded factual allegations that show that the violation of Plaintiff's rights is ongoing and Defendant's malfeasance is recurrent in nature, which operates to restart the statute of limitations every time Defendant renews Plaintiff's policy under a third-party's name without Plaintiff's consent?

VI. Did the trial court err when it denied Plaintiff's motion for entry of default, because Defendant's one-sentence motion unsupported by a brief was insufficient as a matter of law to assert any Rule 12(b) defense and amounted to a mere "placeholder," designed to circumvent Rule 12(a) deadline, and if allowed, this practice would render Rule 12(a) deadline meaningless?

VII. Did the trial court err when it denied Plaintiff's motion for entry of default, because the record shows that Defendant defaulted in response to both the original and amended Complaint, and the trial court's reasoning for denying entry of default rested on an error of law?

STATEMENT OF THE CASE

The record before the Court shows that Plaintiff filed a Complaint on February 7, 2023. The original Complaint identified Defendant as "Erie Insurance Group." Plaintiff's Complaint contained factual allegations, which, taken as true, show that Defendant engaged in unauthorized

business of insurance by renewing Plaintiff's policy and adjusting a claim under Plaintiff's name after she moved to South Carolina. *See* Complaint, *generally*. The record also shows that Plaintiff served Defendant by certified mail and pursuant to S.C. Code § 15-9-285, which allows a resident of South Carolina to serve an unauthorized insurer through the South Carolina Department of Insurance ("DOI"). The DOI accepted service of process effective February 10, 2023. Defendant's attorneys filed a notice of appearance on February 16, 2023, before Plaintiff filed her proof of service. Plaintiff also served the Summons and Complaint by certified mail on February 27, 2023, which was acknowledged by defense counsel. *See* Rule 59(e) Motion Ex 1, 2. On March 2, 2023, Plaintiff filed a Certificate of Service and an Affidavit of Compliance with S.C. Code § 15-9-285(c), supported by a return receipt and DOI's Acceptance of Service, which identified Defendant as "Erie Insurance Exchange *et al*." Defendant did not move to strike or otherwise object to Plaintiff's Certificate of Service or Affidavit of Compliance. The record also shows that Plaintiff agreed to defense counsel's request for an extension of time until April 28, 2023 to respond to the Complaint, and that defense counsel was aware that 60 days from the date of service on the DOI expired on April 11, 2023. *See* D's May 17, 2023 Memo Ex 1. On April 28, 2023, 77 days after the DOI accepted service on Defendant's behalf, Defendant filed a one-sentence Motion to Dismiss unsupported by a brief, which cited Rule 12(b)(2) and 12(b)(6) and stated that "[t]his motion will be supported by Defendant's forthcoming brief." *See* D's MTD.

On May 15, 2023, Plaintiff filed a Memorandum in Opposition to Defendant's Motion to Dismiss and moved for Entry of Default, arguing that Defendant's Motion was untimely because Rule 6(b), SCRCP, did not allow the parties to agree to a 77-day extension and because Defendant's one-sentence Motion unsupported by a brief was a mere placeholder designed to circumvent Rule 12(a) deadline, and that it did not comply with Rule 7(b), SCRCP, particularity

requirement. Plaintiff also argued that Defendant's Motion to Dismiss for lack of personal jurisdiction was baseless because Defendant engaged in unauthorized business of insurance, as defined by S.C. Code § 15-9-285, and the court acquired personal jurisdiction because the DOI accepted service on Defendant's behalf, in accordance with S.C. Code § 15-9-280 and S.C. Code § 15-9-285. In addition, Plaintiff argued that the court had jurisdiction pursuant to S.C. Code § 36-2-803, South Carolina long-arm statute, and that Defendant waived its personal jurisdiction defense by making a voluntary appearance. Lastly, Plaintiff argued that Defendant's motion to dismiss for failure to state a claim also failed because Defendant was in default. On May 17, 2023, Defendant opposed Plaintiff's motion for entry of default arguing that "the DOI had no authority to accept service for Defendant," and that Defendant's motion was sufficient because Defendant did "what most attorneys in this state do (i.e. wait and file a brief once the motion is set for hearing by the Clerk)" and because its motion "[told] the Plaintiff all she needs to know: the Court lacks personal jurisdiction, and Plaintiff has failed to state facts sufficient to state a cause (or causes) of action against [Defendant]." *See* D's May 17 Memo. Defendant, however, still did not file a brief in support of its one-sentence Motion to Dismiss. On May 31, 2023, Plaintiff moved for entry of default and default judgment, arguing that Defendant suffered a default because Plaintiff had no authority to consent to a 77-day extension, merely citing Rule 12(b)(2) and (6) was insufficient to put the Court and Plaintiff on notice of Defendant's arguments, specifically its argument that the DOI had no authority to accept service, and that Defendant waived any objection to improper service. Defendant did not oppose Plaintiff's Motion for Entry of Default and Default Judgment and did not address Plaintiff's waiver argument in any of its subsequent filings. The case was subsequently docketed for a hearing[1] on November 14, 2023. On November 11, 2023, 275 days

[1] While the case was docketed for a hearing, no orders were entered and the motions were continued to give the parties an opportunity to explore a settlement.

after the DOI accepted service of process and three (3) days (two of which were Saturday and Sunday) before the hearing, Defendant filed a brief in support of its Motion to Dismiss filed pursuant to SCRCP 12(b)(2) and (6), arguing that a misnomer of Defendant's name deprived the Court of personal jurisdiction and that Defendant lacked "minimum contacts" to the state of South Carolina. Defendant's 12(b)(6) argument was limited to Plaintiff's request for an injunction. On November 20, 2023, the Court continued the Motions.

On January 5, 2024, Plaintiff filed an Amended Summons and Complaint, which named Defendant "Erie Insurance Exchange, aka Erie Insurance Group, Erie Insurance Company, and Erie Insurance" and converted Plaintiff's request for injunctive relief to a common law injunction. The amended pleading was based on the same factual allegations as the original one. The Amended Complaint was supported by 13 Exhibits, which showed *inter alia* that Defendant used three (3) different names (Erie Insurance Group, Erie Insurance Company, and Erie Insurance) and that a search with the Secretary of State revealed that Defendant had seven (7) different registered names, including a trade name "Erie Insurance Group." Plaintiff's exhibits also provided documentary evidence that Defendant renewed Plaintiff's policy and began adjusting a claim under Plaintiff's name after she moved to South Carolina and with knowledge of Plaintiff's relocation. On February 5, 2024, 31 days after it was e-served with Plaintiff's Amended Complaint, Defendant filed a motion seeking an extension of time to respond to the Amended Complaint arguing that "[g]iven the extensive nature of the Plaintiff's allegations, additional time is required to investigate these claims internally." *See* D's Motion to Extend Time. Later that same day, however, Defendant filed a "Motion to Dismiss for Lack of Personal Jurisdiction and Answer," which rendered its motion moot.

On June 5, 2024, the court held a status conference, docketing the case for trial over

Plaintiff's objection due to Plaintiff's pending Motion for Entry of Default. Plaintiff subsequently contacted the clerk and the unresolved motions were ultimately set for a hearing on July 31, 2024. At the time of the hearing, Defendant introduced a document that was not part of the record, comprised of Defendant's internal cover letter, which bore Defendant's name "Erie Insurance[2]," the DOI's Acceptance of Service, and a copy of Summons and Complaint, which named Defendant "Erie Insurance Exchange," as opposed to "Erie Insurance Group." *See* Exhibit C to Pl's Rule 59(e) Motion. Other than Defendant's name, the Summons and Complaint were identical to those filed with the Court. This document was not properly authenticated, no foundation was laid, and defense counsel did not explain how she came in possession of this document. The record before the Court contains no evidence that shows that this was the Summons and Complaint Plaintiff served on the DOI. Based on this internal document, Defendant argued that because Plaintiff allegedly served the DOI with a "sham complaint," she failed to properly commence this action in accordance with SCRCP 3, as the statute of limitations had already expired. Plaintiff responded that Defendant's argument was not properly pleaded, to the extent Defendant's filings asserted only lack of personal jurisdiction and failure to state a claim, and that Defendant waived its improper service defense, according to SCRCP 12(h). Plaintiff argued that Defendant suffered a default because the parties lacked authority to agree to a 77-day extension and that Defendant's Motion to Dismiss was invalid as it was filed while Defendant was technically in default, because entry of default is a ministerial task. In response, Defendant argued that Plaintiff's Amended Complaint made both pending motions moot. That same day, Plaintiff also filed a supplemental brief, citing Rule 12(h), SCRCP, and authority that stands for the proposition that filings made by a defendant while in default are invalid.

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[2] Notably, even Defendant's internal documents do not use Defendant's *proper* name and instead use another fictitious trade name – "Erie Insurance."

On August 1, 2024, Plaintiff filed a second supplemental brief arguing that Defendant's misnomer had no legal significance because Defendant could not have been and was not misled, relying on binding authority. On August 2, 2024, Defendant filed a brief, arguing that both Plaintiff's Motion for Entry of Default and its Motion to Dismiss were moot because Plaintiff amended her Complaint and Defendant filed an answer. Defendant also argued that Plaintiff failed to commence the action because her service on the DOI was improper, despite admitting that Defendant filed an Answer responding to Plaintiff's Amended Complaint. No supporting authority[3] was cited in support of Defendant's Rule 3 argument, filed 1.5 years after this action was commenced. Lastly, Defendant argued that Plaintiff's Motion should be denied because it "reasonably relied in good faith on" Plaintiff's extension, falsely asserting that "[Defendant] first became aware of Plaintiff's Complaint on February 28, 2023," even though defense counsel entered their appearances on February 16, 2023. On August 3, 2024, Plaintiff filed a reply brief to address Defendant's SCRCP 3 contentions, arguing that Defendant's own filings show that Plaintiff properly commenced her action because she served Defendant by certified mail in addition to serving the DOI, which Defendant never disputed in any way. Plaintiff also noted that the DOI Acceptance of Service added "*et al*" after Defendant's name, which signified that it was aware that the original Complaint used a collective name to identify Defendant, and argued that because Plaintiff's original Complaint used a fictitious name, which "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." Lastly, Plaintiff argued that Rule SCRCP 6(b) precludes Defendant's reliance on Plaintiff's consent to a 77-day extension, that its filing of a one-sentence Motion to Dismiss was

[3] The record shows that Defendant consistently made farfetched arguments unsupported by any authority.

insufficient to avoid a default, and that its negligence in calculating its deadline cannot constitute "good cause" to set aside Defendant's default, citing binding authority.

On August 6[4], 2024, the Court issued a Form 4 Order granting Defendant's Motion to Dismiss and denying Plaintiff's Motion for Entry of Default, despite the fact that at the time of the hearing, the Court stated that Amended Complaint "is not going to be dismissed." *See* Form 4 Order; T. p. 8, ¶¶ 1-5. That same day, Plaintiff filed a Notice of Appeal, listing the Form 4 Order, which announced the court's final rulings ending the case. On August 13, 2024, Plaintiff filed a Motion for a New Trial or Hearing[5], bringing to the trial court's attention 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) SCRCP required Defendant to respond within 14 days, and Defendant filed its Answer on day 31 after being e-served with Plaintiff's Amended Complaint. Defendant did not oppose this motion. On August 14, 2024, Defendant e-filed[6] its proposed order, without first serving it on Plaintiff, as required by Rule 5(b)(3), SCRCP. On August 16, 2024, 10 days after it issued a Form 4 Order, the Court filed a Memorandum of Decision, which recited immaterial factual allegations from Plaintiff's original Complaint, instead of articulating the trial court's findings of fact, and summarily found that the action was not properly commenced because "Plaintiff never served the Summons or the Filed Summons and Complaint," without citing any evidence or legal authority. The trial court concluded that all of Plaintiff's causes of action were time barred, even though it expressly noted that the trial court continued the motions "to give the Plaintiff time to amend her original complaint." Lastly, the Court opined that "[d]efault judgment cannot be granted on a claim that

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[4] The case was docketed for jury trial on August 5, 2024, which made the trial court's unexpected ruling seem even more odd, both procedurally and substantively.
[5] The trial court never ruled on this motion.
[6] When a proposed order is e-filed, the other side cannot view it; only the trial court can.

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* Decision. On August 18, 2024, Plaintiff filed a timely Rule 59(e), SCRCP, Motion[7] asking the trial court to reconsider its rulings and raising additional issues which came to light due to the court's reasoning contained in its Memorandum of Decision. Even though Defendant did not oppose Plaintiff's Motion, the Court denied it, on August 29, 2024, via Form 4 Order. On September 20, 2024, Plaintiff filed an Amended Notice of Appeal, adding September 16, 2024 Memorandum of Decision and August 29, 2024 Form 4 Order denying Plaintiff's Rule 59(e) Motion to Reconsider. This Court subsequently consolidated the two notices into a single appeal on October 2, 2024.

STANDARD OF REVIEW[8]

As a general rule, the standard for appellate review of the trial court's findings of fact is whether there is any evidence that reasonably supports the trial court's findings. *See Townes Assoc. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); *Unisun Ins. Co. v. First S. Ins. Co.*, 319 S.C. 419, 423 (1995). Questions of law, on the other hand, are subject to *de novo* review, and the appellate court may decide such questions without any deference to the trial court. *S.C. Dep't of Soc. Servs. v. Boulware*, 422 S.C. 1, 6, 809 S.E.2d 223, 226 (2018). However, our courts have recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. *Small v. Pioneer Mach.*, 329 S.C. 448, 461 (Ct. App. 1997). Moreover, "[t]he question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case. The decision of the trial court should

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[7] Rule 59(e) motion "shall be served not later than 10 days after receipt of written notice of the entry of the order." *Overland, Inc. v. Nance*, 423 S.C. 253, 255-256 (2018), SCRCP 59(e).

[8] The standard of review of the trial court's dismissal under Rule 3, SCRCP, is unclear, and the issue is further complicated here by the fact that the Court granted Defendant's Motion to Dismiss, which only raised lack of personal jurisdiction and failure to state a claim, waiving lack of service of process defense which is at the heart of the Rule 3, SCRCP commencement issue.

be affirmed unless unsupported by the evidence or influenced by an error of law." *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005) (internal citation omitted)). In addition, "[t]he trial court's findings of fact regarding validity of service of process are reviewed under an abuse of discretion standard." *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 294-95, 721 S.E.2d 430, 432 (2012). "[A]n an abuse of discretion as a decision based on an error of law, or, when grounded in factual conclusions, a decision without evidentiary support." *State v. Robinson*, 410 S.C. 519, 526 (2014) (internal quotations omitted) (quoting *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011)). Lastly, a 12(b)(6) motion is usually used to seek the dismissal of a claim barred by a statute of limitations and the appellate court usually applies the same standard of review as the trial court in applying Rule 12(b)(6), SCRCP. *See Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009) ("On appeal from the dismissal of a case pursuant to Rule 12(b)(6) SCRCP, an appellate court applies the same standard of review as the [circuit] court.").

ARGUMENTS

I. The trial court erred when it considered Defendant's lack of service objection and found that Plaintiff "never served" the Summons and Complaint, concluding that Plaintiff's action was time-barred, because Defendant failed to properly plead either insufficient service, insufficient process, or statute of limitation in its first responsive filing to preserve its defenses, waiving them instead pursuant to Rule 12(h).

The record shows that at the July 31, 2024 hearing, Defendant argued that Plaintiff failed to serve Defendant and that this action was now time-barred. After the hearing, on August 2, 2024, Defendant filed a supplemental brief in support of its Motion to Dismiss, filed pursuant to SCRCP 12(b)(2) and 12(b)(6) on April 28, 2023, arguing that Plaintiff's service on the DOI was improper. The record, however, shows that Defendant failed to properly plead its improper service defense in response to Plaintiff's Complaint. As was noted in Plaintiff's filings below, Defendant's August

2, 2024 Brief was short on legal authority and long on unsupported assumptions, contrary to well-settled law. *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."). Nonetheless, on August 16, 2024, the Court issued a Memorandum of Decision, which found that "Plaintiff never served the Summons or the Filed Summons and Complaint." *See* Decision, ¶11. As will be shown *infra*, this finding is both unsupported by any evidence in the record and influenced by an error of 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." The record shows that Defendant asserted two defenses in response to Plaintiff's original Complaint – lack of personal jurisdiction under Rule 12(b)(2), SCRCP, and failure to state a claim under Rule 12(b)(6), SCRCP – by way of its one-sentence Motion to Dismiss, which was not accompanied by a brief. In response to Plaintiff's Amended Complaint, Defendant filed a "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 trial court erred when it allowed Defendant to argue lack of service defense, which was not first raised in Defendant's filings, and subsequently granted Defendant's Motion to Dismiss for lack of service of the *original*[9] Complaint.

Next, this Court has 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, this Court held that "the averment that [plaintiff] 'failed to serve [defendant] within the three-year statute of limitations' was insufficient, standing alone, to raise the defense of insufficiency of service of process." *Id.* at 542-543. The Court also stated 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[(b)(5)] 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 her 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," which is precisely what the trial court did here, allowing

[9] As will be explained below, the trial court also erred when it disregarded the fact that the original Complaint was "amended out of existence" as Defendant's own brief asserted and justified its decision to dismiss by Plaintiff's alleged failure to serve the *original* pleading.

Defendant to attack service of process of the *original* Complaint for the first time 1.5 years after the action was filed and despite the fact that this defense was not properly preserved. *Unisun Ins.*, 342 S.C. at 539. 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 original Summons and Complaint. *Unisun Ins.*, 342 S.C. at 539 (emphasis added). In short, as Plaintiff argued below both in her filings and at the time of the hearing, Defendant failed to sufficiently plead its lack of service defense and clearly waived any objection to the mode or sufficiency of Plaintiff's service of process or sufficiency of process.

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*, 342 S.C. at 541. As in *Unisun* and *Garner*, Defendant argued (and the trial court agreed) that Plaintiff's action was time barred because she "never served" Defendant. This legal conclusion is contrary to law. Having failed to allege process with even a minimal amount of specificity in its responsive filings, Defendant cannot "bootstrap the defense to [its] statute of limitations argument, a separate affirmative defense likewise subject to waiver." *Unisun*, 342 S.C. at 539. In its brief, Defendant actually conceded that its new argument concerning the statute of limitations defense rested entirely on Defendant's allegation 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 its SCRCP 12(b)(5) insufficiency of service[10] objection as a Rule 3 issue, in order to argue SCRCP 3, Defendant was first required to adequately *plead* lack of service defense to avoid the SCRCP 12(h) waiver in its *first* responsive filing, because Defendant's new argument is inextricably intertwined with Defendant's untimely lack of service objection and cannot be maintained unless Defendant actually shows lack of service, which Defendant is procedurally barred from being able to accomplish. *See Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847, *Unisun Ins. v. Hawkins*, 342 S.C. 537.

Next, no South Carolina case has squarely addressed the impact of defendant's waiver of the lack of service defense on the trial court's power to dismiss the case for lack of service pursuant to Rule 5(d), SCRCP. *See* SCRCP 5(d) ("Proof of service shall be filed within ten (10) days after service of the summons and complaint. Upon failure to serve the summons and complaint, the action may be dismissed by the court on the court's own initiative or upon application of any party."). However, the language of Rule 5(d), SCRCP is substantially similar to the provisions of Federal Rules of Civil Procedure. It is well established that "[i]n construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules." *Maybank v. BB&T Corp.*, 416 S.C. 541, 565 (2016); *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991). Under the federal law, which interpreted nearly identical provisions that govern waivable defense of lack of service and the trial court's power to dismiss for lack of service, when a defendant fails to timely raise the defense of insufficient service "either in a pre-answer motion or, if no such motion is made, then in its answer, a defendant waives

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[10] Because Defendant contended that the documents delivered to the DOI were not identical to those filed with the court, it actually raised the issue of insufficiency of *process* under SCRCP 12(b)(4), not the issue of insufficiency of *service* of process under Rule 12(b)(5). Both objections, however were waived due to Defendant's failure to timely plead either under SCRCP 12(h).

that defense and submits to the personal jurisdiction of the court" and, most importantly, defendant's failure to object deprives the court of its authority to dismiss *sua sponte* for failure to serve the summons and complaint. *See Pusey v. Dallas Corp.*, 938 F.2d 498, 501 (4th Cir 1991) ("A party's waiver operates not only to cut off his right to raise the defense, but the court's power to invoke it" on its own accord.) (internal quotations omitted). Because this Court has already adopted the federal court's approach to pleading the improper service defense, and South Carolina law also holds that when defendant fails to properly raise the improper service defense, it submits to the court's personal jurisdiction, this Court should also adopt the federal courts' interpretation of the waiver's impact on the court's *sua sponte* power to dismiss for lack of service. *Unisun Ins.*, 342 S.C. at 539 ("In the absence of prior state law on an issue in question, federal cases interpreting the rule are persuasive."); *see also White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 8-9 (2014) ("Consistent with this purpose, parties are generally permitted to agree to particular methods of service or waiving service altogether."); SCRCP 4(d) ("Voluntary 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."). In sum, Defendant's waiver of lack of service defense precludes Defendant from arguing not only lack of service, but also failure to commence, and statute of limitations, because by failing to object and making a voluntary appearance, Defendant consented to the court's personal jurisdiction. Lastly, the trial court likewise lacked authority to dismiss the Complaint for lack of service.

II. The trial court erred when it found that "Plaintiff never served the Summons or the Filed Summons and Complaint" to the extent Defendant was served by certified mail, which was acknowledged by Defendant, and a mere misnomer did not invalidate Plaintiff's statutory service on the DOI.

Even if Defendant preserved its service of process objection, the dismissal would not be proper because Plaintiff also served Defendant by certified mail, in addition to statutory service on the

DOI, and a mere misnomer of Defendant's name had no legal significance because the proper Defendant was before the court. 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." Defendant did not argue that Plaintiff's service by certified mail was in any way defective, and actually conceded during oral arguments that Defendant received the Summons and Complaint which were filed with the Court. T 13, ¶ 21. Despite the fact that Defendant's argument concerning service on the DOI lacked support in both fact and law, the trial court agreed with Defendant.

First, there is no evidence 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 the 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 Memorandum of Decision, the trial 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[11]," 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 the service of process, by which Defendant waived its ability to challenge Plaintiff's service in any

[11] The record shows that Defendant conceded that it received the original Complaint at the time of the hearing. T 13, ¶21.Moreover, the record also shows that defense counsel acknowledged certified mail service. Rule 59(e) Motion Ex 1, 2. Defendant did not argue that the Summons and Complaint served by certified mail differed in any way from those filed with the court. Thus, the trial courts statement that "different documents [] [were] sent" to both the DOI and Defendant finds no support in the record.

way and conceded that service was proper. *See Unisun*, 342 S.C. 537, 542. The record shows that Plaintiff repeatedly noted that Defendant's filings failed to raise the improper service issue, however, this key point was met with a deaf ear and a blind eye on the part of the trial court, which allowed Defendant to pull a classic "Perry Mayson" move and endorsed trial by ambush and surprise, in violation of Plaintiff's Due Process rights. *See* T 17, ¶ ¶ 11-19 ("I don't grasp that.").

Moreover, Defendant's contention that Plaintiff sent "different documents" to the DOI finds no evidentiary support in the record before the Court, which contains no evidence of what documents Plaintiff actually served on the DOI. *See* Decision, ¶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[12] of Compliance with S.C. Code Ann. §15-9-285, which detailed the steps taken to serve Defendant as required by the statute. Defendant did not challenge either of the two filings. As was explained above, Defendant had a duty to challenge service at the outset of the litigation and in its first responsive filing. *See Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847. "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)), *Roberson v. S. Fin. of South Carolina*, 365

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[12] While at the time of the hearing Defendant attacked Plaintiff's Affidavit of compliance, arguing that it contained "false statements" because Defendant filed a declaration page that showed only the name of the third party who was added to Plaintiff's policy without her knowledge and consent, Plaintiff presented documentary evidence that directly contradicted this backdated declaration page, including Defendant's agent's and adjuster's emails, which showed that Defendant renewed Plaintiff's policy and began adjusting a claim under Plaintiff's name after she relocated to South Carolina. Plus, the timing of this argument made for the first time 1.5 years after the action was filed and during oral arguments shows a clear waiver of service defects. *See e.g., Patterson v. Whitlock*, 392 Fed. Appx. 185 (4th 2010) (concluding that defendants waived their insufficiency of service of process defense by "fil[ing] an Answer that attacked the sufficiency of process in barebones fashion only, and then waited over a year before submitting a Rule 12 motion actually spelling out the missing pages contention").

S.C. 6, 10, 615 S.E.2d 112, 114-15 (2005). Here, Plaintiff presented documentary evidence 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. *See* S.C. Code Ann. §15-9-285(c) ("(1) Notice of the service and a copy of the process are sent within ten days thereafter by registered mail by the plaintiff's attorney to the defendant at its last known principal place of business; and (2) The defendant's receipt or a receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff's attorney showing compliance herewith are filed with the clerk of court in which the action is pending by the date the defendant is required to appear or within such further time as the court may allow."); SCRCP 4(g) ("If service was by mail, the person serving process shall show in his proof of service the date and place of mailing, and attach a copy of the return receipt or returned envelope when received by him showing whether the mailing was accepted, refused, or otherwise returned. [] The return along with the receipt or envelope and any other proof shall be promptly filed by the clerk with the pleadings and become a part of the record."), SCRCP 12(g) and (h). Lastly, there is no evidence in the record to support the trial court's finding that Plaintiff "sent different documents" when she served Defendant by certified mail, to the extent Defendant did not attack Plaintiff's certified mail service either at the hearing or in its filings. *See e.g., Townes Assoc. v. City of Greenville,* 266 S.C. 81, 221 S.E.2d 773, *Burnette v. City of Greenville*, 401 S.C. 417, 419 (Ct. App. 2012) (a finding of fact may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it).

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." The record shows that defense counsel filed a notice of appearance on February 16, 2023, before Plaintiff even perfected her service and before she filed the Certificate of Service and her Affidavit of Compliance. This procedural history conclusively establishes that Defendant made a voluntary appearance, accepting service of process. *Id.* Therefore, even if Plaintiff failed to perfect her service, Defendant would nonetheless be prevented from challenging service of process in light of its voluntary appearance. Next, in accordance with Rule 4(d)(7), SCRCP, "[s]ervice upon a defendant … is also sufficient if the summons and complaint are served in the manner prescribed by statute," such as, e.g., S.C. Code Ann. §15-9-285. Because Plaintiff filed an Affidavit of Compliance, which went unchallenged, service of process is presumed to be sufficient. Lastly, Rule 4(d)(8), SCRCP, 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." SCRCP 4(d)(3) and (8). Here, Plaintiff used two different way to serve Defendant – service on the DOI and certified mail. The record also shows that defense counsel actually acknowledged service by certified mail, in addition to their failure to properly preserve its objection to statutory service on the DOI. (Pl's 59(e) Motion, **Exhibit A** and **B**). *See White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1 (finding "substantial compliance" with the contractual service provisions and noting that "the insurer acknowledged that the complaint was received by its claims counsel"). Lastly, Defendant did not challenge Plaintiff's service by certified mail in any way and did not allege that the Summons and Complaint served by certified mail differed from those filed with the Court in any way either in its filings or at the time of the hearing. The record also suggests that Defendant included this finding in its proposed order *in response to* Plaintiff's argument that certified mail service was sufficient, even if Plaintiff did not serve the DOI. *See* Pl's August 3 Brief. The record

also shows that Plaintiff filed a certificate of service by certified mail and attached a signed return receipt, complying with Rule 4(g), SCRCP, and raising a presumption of proper service by certified mail. As such, the evidence in the record conclusively establishes that Plaintiff in fact did serve Defendant by certified mail and this mode of service went entirely unchallenged by Defendant. Here, however, even if Plaintiff failed to serve Defendant at all, defense counsel first *accepted* service on behalf of Defendant by voluntarily appearing on the record before Plaintiff perfected her service, and then *waived* their objection to sufficiency of service by neglecting to raise an objection in Defendant's first responsive filing. SCRCP 4(d), SCRCP 12(g) and (h). In short, the trial court's finding that Plaintiff "never served Defendant" is contrary to both the unchallenged evidence in the record and well-settled 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, SCRCP 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. 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. *Mull*, 387 S.C. at 486-87, 693 S.E.2d at 31.

The record shows that 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 statutory service on an unauthorized insurer. 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 (1990) (quoting *Tunstall v. The Lerner Shops, Inc.*, 160 S.C. 557, 563, 159 S.E. 386, 388 (1931)). Therefore, even if the record contained any evidence to support Defendant's allegation that Plaintiff served the DOI with a summons and complaint that named Defendant using what it claims to be its official name - Erie Insurance Exchange – this alone would not have invalidate service on the DOI, to the extent the Summons and Complaint were otherwise identical[13] to those filed with the court and the right Defendant was both notified of the commencement of the action and brought to court (not to mention that Defendant made a voluntary appearance before Plaintiff perfected service on the DOI and even though Plaintiff notified Defendant's counsel that she was still in the process of perfecting her statutory service). While at the time of the hearing and in its brief, Defendant attempted to argue that Plaintiff had a duty to serve a clocked copy of the process, the language of the applicable rules that govern service of process do not require a party to serve a file-stamped copy of the filing and expressly contemplate that certain filings can be served *before* they are even filed with the court. *See* SCRCP 3, 4, 5 ("All papers required to be served upon a party except as provided in Rule 26(g)(1), shall be filed with the court within five (5) days after service thereof.

[13] Defendant conceded that the Summons and Complaint allegedly served on the DOI was identical to the one filed with the Court but for Defendant's name. T. p. 13, ¶18.

The summons and complaint shall be filed before service. Proof of service shall be filed within ten (10) days after service of the summons and complaint."). In addition, Defendant misquoted SCRCP 4(a), which states "[c]opies of the original summons shall be served upon each defendant," not "copies of the *original* summons and complaint," as urged by Defendant. *See* D's Brief at 6 (emphasis original). The word "original" is not equivalent to "clocked" or "filed." Furthermore, because "[i]n interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes," and statutes are interpretated based on the plain meaning of the language used, Defendant's argument that Plaintiff had to serve a clocked copy of the Summons and Complaint is without merit. *See Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 443 S.E.2d 906 (1994); *Knotts v. S.C. Dept. of Natural Resources*, 348 S.C. 1, 558 S.E.2d 511 (2002); *Maxwell v. Genez*, 356 S.C. 617, 620 (2003). *See also United States v. Sonmez*, 777 F.3d 684, 688 (4th Cir. 2015) (The court declined to add the word "sole" to the statute indicating "[w]e 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."). Lastly, because the summons and complaint Defendant claims (without any proof) were served on the DOI were identical to those filed with the court but for the misnomer, and our Supreme Court clearly held that a misnomer in a summons or complaint is entirely immaterial, Defendant's argument that Plaintiff's service on the DOI was improper and the trial court's finding of lack of service rest on the error of law. *See Tri-County Ice*, 303 S.C. 237.

Relatedly, Defendant's original argument that the use of Defendant's fictitious trade name somehow deprived the trial court of personal jurisdiction, made in support of its Motion to Dismiss, is likewise without merit. *Id.* Moreover, in her filings, Plaintiff contended that she was impliedly authorized to use any of Defendant's registered names interchangeably, because she chose a trade

name used by Defendant itself to *collectively* refer to all of its Erie entities. As the record reflects, a 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 to Amended Comp. While it was a fictitious name, "Erie Insurance Group" was one of Defendant's names *registered* with the Secretary of State by Defendant itself. *Id.* Moreover, in her filings, Plaintiff cited a federal case, in which Defendant admitted that "Erie Insurance Group" was a 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. *See e.g., Tri-County Ice*, 303 S.C. at 240-241 (where "a corporation has acquired a name by usage an adjudication against it by the name so acquired is valid and binding."). *See also Rollins v. Junior Miller Roofing Co.,* 55 N.C. App. 158, 284 S.E.2d 697 (1981) (if real party receives notice, no prejudice results in permitting him to be sued in trade or fictitious name). The record shows that Plaintiff presented documentary evidence that Defendant used three (3) different names in its dealings with Plaintiff, including "Erie Insurance Exchange" and "Erie Insurance Group." (Exhibit A2 to Amended Complaint). Lastly, Plaintiff asserted in her pleadings 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, in light of Defendant's registration of seven (7)

different variations of its name with the Secretary of State. *See* Pl's Complaints and Memoranda. Under the circumstances, Plaintiff's decision to use the name that collectively referred to all its entities was reasonable and it allowed Plaintiff to use all variations of Defendant's name interchangeably to accomplish statutory service on the DOI, as reflected in its Acceptance of Service which added "*et al*" after Defendant's name to signify that other Erie entities were also named as Defendants. This alone shows that the DOI was aware that Plaintiff used a different name in her Summons and Complaint filed with the court, yet elected to accept service of process, even though it could have easily declined to do so. The only reasonable inference that can be drawn based on the evidence in the record is that the DOI agreed with Plaintiff that "Erie Insurance Group" impliedly incorporated "Erie Insurance Exchange," because Defendant itself created, registered, and used "Erie Insurance Group" to collectively refer to all of its entities. In any event, the burden of showing that the DOI had no authority to accept service on Defendant's behalf rested with Defendant, not Plaintiff, who met her burden of raising a presumption of a valid service, which shifted the burden to Defendant to dispute it. *See Roberson*, 365 S.C. 6, 10 ("A plaintiff need only show compliance with the rules. [] When the rules are followed, it is presumed that service was proper.") (quoting *Roche*, 318 S.C. at 211, 456 S.E.2d at 900). Lastly, the evidence in the record shows that Plaintiff substantially complied with the rules that govern service of process and provided Defendant with the notice of the commencement of the action, shifting the burden to Defendant to timely challenge service, which it failed to do. *Id.*

In sum, even if Defendant raised a timely service objection, 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. Lastly, the trial 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." *Mull*, 387 S.C. at 486-87, 693 S.E.2d at 31. As another court aptly observed, where another insurance company attempted to challenge service based on a misnomer:

> 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). In addition to being in conflict with the law concerning the impact of a misnomer, the trial court's finding was plainly inequitable. "The rules of practice and procedure are devised to promote the ends of justice, not to defeat them," and by failing to recognize that the right Defendant was brought to court, the trial court chose form over substance, which equity abhors. *See Manning v. Caldwell*, 930 F.3d 264, 268 (4th Cir. 2019); *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 249-250 (Ct. App. 2011) ("equity applies substance over form").

III. The trial court erred when it found that Plaintiff failed to commence the action in accordance with Rule 3, SCRCP, because Plaintiff's service of the Amended Complaint was sufficient to commence the action, even if Plaintiff never served the original Complaint.

The record shows that at the time of the hearing and its subsequently filed brief, Defendant argued that because Plaintiff "never served" Defendant with her *original* Complaint, she failed to properly commence her action in accordance with Rule 3, SCRSP, ignoring the fact that Plaintiff

amended her Complaint and Defendant filed a response[14]. Defendant's argument is without merit and the trial court's legal conclusion that the action was not properly commenced, conspicuously unsupported by any legal authority, is contrary to well-settled law, because Plaintiff' amended her original Complaint out of existence and Plaintiff's Amended Complaint was properly served[15].

First, as was explained above, the record shows that Plaintiff in fact did serve her original Complaint using two different methods – service by certified mail, which was acknowledged by defense counsel, and service on the DOI, which was also proper because a misnomer did not impact its validity. *See supra*. In addition, even if 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 nonetheless properly commenced under Rule 3, SCRCP, because the amended complaint was served within 120 days after it (i.e., amended complaint) was filed. *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, SCRCP does not require "that service must be made in *all* cases

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[14] While Plaintiff amended her Complaint as of right, Defendant also conceded that it consented to Plaintiff's counsel's request to amend the Complaint. T p.16, ¶¶ 12-13.

[15] At the hearing, defense counsel also conceded that the Amended Complaint was properly filed and served, arguing that Defendant's Motion to dismiss was moot. T p. 6, ¶25.

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 has relevance only 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, and 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," which is analogous to what happened in this case, to the extent Defendant elected to file a stand-alone motion to dismiss without filing an answer in response to Plaintiff's Complaint. *Id. See also* Rule 15(a), SCRCP ("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 Plaintiff did not serve her *original* Complaint, automatic service of the Amended Complaint satisfied SCRCP 3 requirements, because Plaintiff had a right to amend her pleading, and even obtained Defendant's express consent. T. p. 16 ¶¶ 12-13. *See Eberly*, 901 S.E.2d 273. In accordance with the holding of *Mims v. Babcock Ctr., Inc.*, even if Plaintiff's original Complaint was never served, as Defendant claimed, this action was nonetheless properly commenced because service was accomplished within 120 days of the filing of the Amended Complaint. 399 S.C. 341. The trial court's conclusion that Plaintiff failed to commence her action in accordance with Rule 3, SCRCP, is based on an error of

law, because Plaintiff amended her pleading, which was e-served on Defendant.

IV. The trial court erred when it found that Plaintiff's action was time barred in light of the relation-back provision under Rule 15(c).

In its brief, 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 declaration conspicuously unsupported by any authority, the relation back doctrine is fully applicable to the case at bar. As an initial matter, while the trial court agreed with Defendant, most of Defendant's arguments were conclusory in nature and unsupported by authority (aside from Defendant's citation to a single federal case, which was not binding on the court). By accepting Defendant's conclusory allegations unsupported by authority, the trial court abused its discretion, to the extent it is well-established that a conclusory argument unsupported by authority operates as a forfeiture. *See 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); *Bryson*, 378 S.C. at 510, 662 S.E.2d at 615 ("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."). Most of Defendant's arguments made in the course of this litigation fall in this category, and by siding with Defendant, the trial court acted arbitrarily and capriciously and made rulings manifestly unsupported by reason (or authority). *See e.g., Fowler v. Branker*, 2013 U.S. Dist. LEXIS 43513, *76 (WDNC Mar 26, 2013) ("An abuse of discretion occurs when a ruling is manifestly unsupported by reason, which is to say it is so arbitrary that it could not have been the result of a reasoned decision.") (internal quotations omitted).

Next, the relation back doctrine is fully applicable to the case at bar, because even if 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 registered fictitious trade names, to highlight her point that a proper defendant was before the court and that Defendant cannot complain that it was improperly named, since it created, registered, and used multiple names in its business dealings with insureds. 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 merely corrected the misnomer. *See* Pl's Amended Complaint. While defense counsel referred to its client as "Erie defendants" in her filings, her approach is intentionally misleading, as all names refer to a single defendant – the one which was summoned to court – and it is a distinction without a difference that Plaintiff chose a trade name over Defendant's preferred name, which it claims is the proper name. Defendant's argument and the fact that Defendant registered seven (7) different names suggest intentional efforts to evade service and trip up plaintiffs with meritorious claims against the insurer based on technical deficiencies in order to avoid liability based on a trickery and deceit. As Plaintiff maintained throughout this litigation, the proper Defendant is before the Court, and trial court erred when it failed to recognize what was apparent to everyone else, and sacrificed equity for technical niceties.

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. SCRCP 15(c). *See also Hughes v. Water World Water Slide, Inc.*, 314 S.C. 211, 442 S.E.2d 584 (1994).

This requirement is clearly satisfied here, to the extent the right defendant made a voluntary appearance before Plaintiff even perfected her service. Moreover, Defendant never argued that Plaintiff *sued the wrong party* – it argued that Plaintiff *used the wrong name* to summon Defendant to court, without citing any authority that stands for the proposition that a fictitious yet registered trade name cannot be used to sue an insurer. *See* D's filings, generally. Defendant certainly knew that but for the confusion surrounding its name, Plaintiff would have used Defendant's proper name. Thus, even if Plaintiff never served Defendant, as the trial court erroneously concluded, the Amended Complaint relates back to the time of the initial filing, which saves the action from the operation of the statute of limitations, in addition to Defendant's waiver of this defense. *See supra.* SCRCP 15(c). Lastly, as was explained above, because the Amended Complaint was automatically served upon its filing, the action was properly commenced, irrespective of whether or not the original complaint was served. 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, 314 S.C. at 215 (emphasis added). The trial court should have reached the same conclusion here, because Defendant was named by its registered trade name and defense counsel was aware of the situation involving Plaintiff's policy[16], to the extent "all pleadings shall be so construed to do substantial justice to all parties" and "the rules should be liberally construed." *See*

[16] Defendant admitted in its discovery responses that it retained Martineau King to represent it in connection with Plaintiff's complaint regarding unauthorized policy changes.

Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991); *Hughes*, 314 S.C. at 214-215. The trial court erred to the extent it strictly construed Plaintiff's pleadings to work an injustice.

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.*, 303 S.C. at 240 (quoting *Tunstall*, 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*, 160 S.C. 557, 159 S.E. 386 (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 nearly axiomatic that Plaintiff's Amended Complaint relates back to the time of the original filing, and this action is not barred by any of the applicable statutes of limitations.

V. The trial court also erred when it found 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 operates to restart the statute of limitations every time Defendant renews Plaintiff's policy under a third-party's name without Plaintiff's consent.

Irrespective of the relation back doctrine, the trial court also erred when it concluded that Plaintiff's causes of action accrued in October of 2020, when Plaintiff first discovered 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. *See* Pl' Complaint. However, Plaintiff's Complaint, which must be viewed in the light most favorable to Plaintiff, to the extent a statute of limitation defense is usually asserted pursuant to a Rule 12(b)(6), SCRCP, motion, also asserted that in February of 2023, Plaintiff discovered that Defendant was *still* using her policy to insure this third-party under Plaintiff's policy despite being informed that the tortfeasor misappropriated Plaintiff's identity and Plaintiff never gave her consent to the policy change that added this third-party to her policy without her knowledge. S*ee Rydde*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 ("On appeal from the dismissal of a case pursuant to Rule 12(b)(6) SCRCP, an appellate court applies the same standard of review as the [circuit] court."); *id.* ("That standard requires the [c]ourt to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the [appellant] to relief on any theory of the case.") (internal quotations omitted). The Complaint further asserted that Plaintiff once again contacted Defendant in an effort to convince the insurer to terminate her policy and insure the third-party under his own policy and in accordance with his own credit history, as opposed to Plaintiff's, explaining that she was informed by another insurer that this policy was impacting Plaintiff's premiums because the third-party had lapses in his coverage due to failure to pay premiums on time, and these lapses[17] were still showing in the system under Plaintiff's name. Pl's Amen. Compl at 62. When Defendant declined to terminate the policy indicating that it had "duties" to the tortfeasor who misappropriated Plaintiff's identity and added himself to Plaintiff's policy without her knowledge, Plaintiff proceeded with the litigation. *This* was the reason Plaintiff

[17] Defendant admitted in its discovery responses that the third-party had lapses in coverage.

sued Defendant – Plaintiff's realization that her rights were still being violated and her discovery of new injury coupled with Defendant's stubborn refusal to terminate the policy.

The impact on Plaintiff's premiums and credit was a new and separate injury which resulted due to Defendant's *recurrent* malfeasance – its renewals of the policy with full knowledge of the underlying circumstances – as opposed to the initial unauthorized policy changes discovered in October of 2020. Instead of terminating the policy to curtail its liability after the third-party's accident was covered, which was the reason Defendant's agent decided to convert Plaintiff's policy in the first place, indicating that "the accident was not his fault," Defendant elected to continue to violate[18] 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). *See* Pl's Complaint at 74. *See e.g., Marvin v. Connelly*, 272 S.C. 425, 426 (1979) ("a thief or even one in the subsequent chain of title could not grant good title to stolen property"). Therefore, while the statute of limitations as to the initial violations of Plaintiff's rights, i.e., Defendant's unauthorized changes to Plaintiff's policy, policy renewal after Plaintiff asked to terminate the policy, Defendant's adjustment of a claim under Plaintiff's name, and Defendant's backdated renewal of the policy under the third-party's name which amounted to conversion of the policy, may have commenced to run in October of 2020, when Plaintiff discovered the initial wrongdoings, because Defendant continued to violate Plaintiff's rights which led to new and distinct injuries, the statute of limitations does not bar Plaintiff's action.

As an initial matter, the burden of establishing the statute of limitations defense is on the party

[18] In a phone conversation, defense counsel admitted that Defendant's agent violated Plaintiff's rights when she first added a third party to the policy without Plaintiff's consent and then removed Plaintiff from her own policy, but insisted that Defendant's actions were justified because the policy "had no value."

seeking to impose it. *See Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962). Defendant clearly failed to meet its burden of establishing 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, which also means that Defendant waived the issue on appeal[19]. *See 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); *Talley v. South Carolina Higher Educ. Tuition Grants Comm.*, 289 S.C. 483, 487, 347 S.E.2d 99, 101 (1986) (an issue must be raised and ruled upon by the trial judge in order to be preserved for appellate review). 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 violations 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 detrimental impact on her credit and lapses in coverage, caused by the third party.

Next, one of Plaintiff's causes of action is for a violation of South Carolina Unfair and

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[19] The only issue Defendant actually preserved was whether the amendment of the Complaint mooted the motions. Plaintiff maintains that while the Amended Complaint superseded the original one, which did moot Defendant's Motion to Dismiss filed in response to the *original* Complaint, Plaintiff's motion was not moot and it should have been granted *before* Plaintiff amended her Complaint to correct the misnomer. Courts in both this jurisdiction and other jurisdictions allow pleadings to be amended before the case proceeds to trial, where no prejudice would result to the other side. *Holland v. Morbark, Inc.*, 407 S.C. 227, 754 S.E.2d 714 (Ct. App. 2014). *See also* SCRCP 16(a)(2). Plaintiff's amendment did not raise a new legal theory that would require gathering and analysis of facts not already considered by the opposing counsel, who also consented to Plaintiff's attorney's request to amend. T. p. 16, ¶¶ 12-13.

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 § 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 misfeasance 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 short, 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 trial court's conclusion that Plaintiff's *entire* action was time barred would still be erroneous, because Plaintiff's Complaint asserts that Defendant continued to violate Plaintiff's rights after it converted Plaintiff's insurance policy in October of 2020. In addition, the trial court's finding that all of Plaintiff's causes of action accrued in October of 2020, is not supported by any evidence in the record.

VI. The trial court erred when it denied Plaintiff's motion for entry of default, because Defendant's one-sentence motion unsupported by a brief was insufficient as a matter of law to assert any Rule 12(b) defense and amounted to a mere "placeholder," designed to circumvent Rule 12(a) deadline, and if allowed, this practice would render Rule 12(a) deadline meaningless.

In terms of the trial court's discussion of Plaintiff's Motion for Entry of Default, it was embodied in 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. Ironically, the trial court did attempt to "change the law," when it dismissed Plaintiff's Complaint under SCRCP 3, despite Defendant's voluntary appearance and failure to plead its service objection, because as was explained above, Plaintiff properly commenced her action, and served both her original Complaint and her Amended Complaint. *See supra*. As such, the trial court's conclusion that entry of default was not warranted in accordance with Rule 3, SCRCP, rested on the legal error, especially since service of the Amended Complaint was sufficient to commence the action, even if Plaintiff "never properly served" the *original* Complaint, as the trial court erroneously found. While the trial court did mention in its Memorandum of Decision that Plaintiff amended her Complaint, it did not properly analyze this crucial procedural development, when it granted Defendant's Motion to Dismiss, even

though Defendant's own brief argued that Plaintiff's Amended Complaint amended her original Complaint "out of existence," which was the only argument Defendant actually supported by case law, and not just Defendant's own mistaken interpretation of the Rules of Civil Procedure. *See* Memorandum of Decision at ¶ 15, D's Brief in Support.

First, the trial court erred when it continued Plaintiff's Motion for Entry of Default because Defendant's Motion was filed in violation of SCRCP 12(a) and 6(b) and Defendant's argument that it relied on Plaintiff's extension is void of merit. The record conclusively shows that Defendant filed a one-sentence Motion to Dismiss 77 days after the DOI accepted service of process and that Defendant did not dispute service until 1.5 years after the commencement of the action. Moreover, Defendant did not oppose[20] Plaintiff's Motion for Entry of Default and Default Judgment filed on May 31, 2023, and did not challenge Plaintiff's Certificate of Service, Affidavit of Compliance, Return Receipt, and the DOI Acceptance of Service. The record also shows that while Plaintiff agreed to Defendant's request for an extension, defense counsel was fully aware that this date was outside the permissible time period under Rule 6, SCRC, as evidenced by his own email, in which he also acknowledged that the DOI accepted service effective February 10, 2023. D's 5/17/23 Memo in Opp. Exhibit 1. As Plaintiff argued in her Brief in opposition to Defendant's Motion to Dismiss filed on May 15, 2023, Defendant suffered a default because Rule 6(b), SCRCP, expressly limits counsel's ability to consent to an extension in excess of the original time, which in this case was 30 days in accordance with Rule 12(a), SCRCP. *See* SCRCP 6(b) ("the time may be extended

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[20] The mere fact that Defendant did not oppose Plaintiff's Motion alone should have been sufficient to grant it, as failure to respond constitutes a concession. *See e.g., Dixon v. Pattee*, 442 S.C. 233, 240, 898 S.E.2d 158 (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.); *Campbell v. Rite Aid Corp.*, No. 7:13-cv-02638, 2014 U.S. Dist. LEXIS 107009, 2014 WL 3868008, at * 2 (D.S.C. Aug. 5, 2014) ("Plaintiff failed to respond to [Defendant's] argument regarding causes of action 1 and 2, and the Court can only assume that Plaintiff concedes the argument").

by written agreement of counsel for an additional period not exceeding the original time provided in these rules"). The Note to Rule 6(b) states that "[t]his Rule 6(b) is the same as the Federal Rule, which is in turn a more concise statement of Code §§ 15-13-90 and 15-27-120 and Circuit Rule 62, except that the Rule continues the present State practice of allowing *one limited extension of time by agreement of counsel*." SCRCP 6, Note (emphasis added). Next the rule permits the trial court "upon motion made after the expiration of the specified period, for good cause shown, permit the act to be done." SCRCP 6(b). Accordingly, the language of the rule and the note clearly limit counsel's ability to consent to an extension of time beyond the time period authorized by the rules and require a motion and a showing of good cause before the trial court can permit an act to be done after the expiration of the deadline. Here, the record shows that Defendant did not file a motion, even though defense counsel was aware of the limitation under Rule 6(b), SCRCP. As such, the record shows that defense counsel gambled that they could file a motion in violation of the Rules of Civil Procedure and assumed the risk of filing an untimely response in violation of the Rules of Civil Procedure. Under the circumstances, Defendant's reliance on Plaintiff's assent to Defendant's request for an extension was plainly unreasonable, because defense counsel knew of the limitation on Plaintiff's ability to agree to an extension and elected to punt. As the United States Supreme Court explained, "the [] Rules of Civil Procedure have the force and effect of law." Any reliance on an agreement made in violation of the law is plainly unreasonable. *See Carolina Care Plan, Inc. v. United HealthCare Servs.*, 361 S.C. 544, 555 (2004) ("The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution.").

Moreover, the application of the general principles that govern justifiable reliance also leads to the same conclusion that Defendant's reliance was not reasonable, because defense

counsel knew that the parties could not agree to an extension beyond 60 days and that the DOI accepted service effective February 10, 2023. *See* Exh. 1 to D's May 17 Memo. "[W]hile issues of reliance are ordinarily resolved by the finder of fact, 'there can be no reasonable reliance on a misstatement if the plaintiff knows the truth of the matter.'" *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010) (quoting *McLaughlin v. Williams*, 379 S.C. 451, 457-58, 665 S.E.2d 667, 671 (Ct. App. 2008)). The record also shows that when Defendant filed its response to the original Complaint, it did not challenge service of process. Under the circumstances, defense attorney's decision to ask for an extension in violation of the rules and without any intent of formally challenging service on the DOI was a classic gamble, not reasonable reliance. Lastly, Plaintiff was a *pro se* party at the time Defendant sought its 77-day extension and she had no duty to either ensure that Defendant complied with the Rules of Civil Procedure or to advise defense counsel of the applicable rules. *Id.* ("A determination of justifiable reliance involves the evaluation of the totality of the circumstances, which includes the positions and relations of the parties."). Nor did Plaintiff induce[21] Defendant to seek a 77-day extension to file a one-sentence motion. In short, based on the parties' relations and their respective positions as a *pro se* party and two defense attorneys, defense counsel were not justified to count on Plaintiff's knowledge or experience or to trust that Plaintiff was looking out for Defendant's best interests. Lastly, defense counsel's negligence in determining this crucial deadline cannot possibly constitute "good cause" to accept Defendant's untimely filing. *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.") (internal citations omitted).

The record also shows that Plaintiff's decision to move for entry of default was triggered

[21] Nor did Plaintiff make any misrepresentations as Defendant claims. She simply stated she had no objection to Defendant's request. She did not agree to waive the issue of Defendant's default.

not only by the untimeliness of Defendant's Motion to Dismiss, but primarily by Defendant's failure to support its Motion with a brief, including Defendant's notation that its brief was "forthcoming," which was a plainly abusive litigation tactic prohibited under the federal law. The record shows that in response to Defendant's one-sentence Motion unsupported by a brief, Plaintiff filed a brief in opposition arguing that an entry of default was proper irrespective of the Motion's timeliness, because the motion was insufficient as a matter of law. Rule 7, SCRCP, states that a motion "shall state with particularity the grounds therefor." However, no South Carolina case has squarely addressed the issue of sufficiency of a 12(b) motion submitted as an initial responsive filing under Rule 7, SCRCP, and whether a first stand-alone responsive motion to dismiss (as opposed to a motion included in the answer or filed therewith) unsupported by a brief is sufficient to avoid entry of default. On the other hand, our rules allow a motion to strike an insufficient defense from the pleading. SCRCP 12(f). In South Carolina, an affirmative defense is subject to the pleading requirements outlined in Rule 8 which "require the defendant also to stick to 'fact' pleading." *See* S.C. R. Civ. P. 8, Note. Defendant's one-sentence Motion to Dismiss contained no factual averments what-so-ever. Specifically, while in its brief filed 197 days (or 6.5 months) later Defendant argued that the court had no jurisdiction because of the misnomer and that Plaintiff failed to state her request for an injunction under UDTP Act, Defendant's motion did not provide any notice of these arguments to enable either Plaintiff or the trail court to decipher Defendant's actual arguments. Under the circumstances, the Motion could have been and should have been stricken pursuant to SCRCP 12(f), because no further factual development was needed to determine that Defendant's defenses embodied in a single sentence were insufficiently pled as a matter of law. *See Mayes v. Paxton*, 313 S.C. 109, 112, 437 S.E.2d 66, 69 (1993) (Granting a Rule 12(f) motion is appropriate when "further development of the issues through a trial on the merits

is not required for [the trial court] to determine the sufficiency" of defenses *as a matter of law*.) (*citing C.F.Archambault v. Sprouse*, 215 S.C. 336, 55 S.E.2d 70 (1949)). *See also, e.g., Racick v. Dominion Law Assocs.*, 270 F.R.D. 228, 233-34 (E.D.N.C. 2010) (following the majority of courts in this circuit that mandate the same pleading requirements for complaints as for affirmative defenses) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). However, because Defendant did not file an answer but filed its defenses as a standalone motion, entry of default was proper.

Moreover, the record shows that when Plaintiff raised the issue concerning Defendant's unfair tactic of filing a mere placeholder unsupported by a brief, Defendant argued that its motion "told Plaintiff everything she needed to know" and that it was a "local custom" to file motions unsupported by a brief, without citing any authority even a persuasive one (such as another circuit court's opinion that blessed this litigation tactic) or a rule followed by any other jurisdiction that permitted placeholders to be used as defendant's *first* defensive move. Defendant, however, still failed to file a brief in support of its motion until 6.5 months later and only three (3) days before the hearing, two (2) of which were Saturday and Sunday, even though it did file a brief in opposition to Plaintiff's brief and request for entry of default. This procedural history conclusively shows that Defendant's failure to support its motion with a brief was not a mere oversight but an intentional tactical effort to circumvent Rule 12(a) deadline and unilaterally extend the time for filing the first initial response to the complaint, rendering this crucial deadline plainly meaningless. Pliantly put, it was gamesmanship. While no South Carolina case has addressed this practice, this Court has already adopt the federal standard of specificity when it comes to pleading a waivable defense of improper service and statute of limitations, finding that to properly raise the defense the filing must actually explain in what way exactly service is defective and rejecting "[p]laintiffs have

failed to serve defendant [] within the three year statute of limitations" as a sufficiently pled defense of either lack of service or statute of limitations. *Unisun Ins. v. Hawkins*, 342 S.C. 537, 539; *see also supra*. Therefore, it is proper to turn to federal case law interpreting nearly identical procedural rules, including a Rule 12 provision for striking an insufficient defense, for guidance. *See Maybank v. BB&T Corp.*, 416 S.C. 541, 565.

To begin with, most federal district courts have Local Rules, which require a motion to be accompanied by a *contemporaneous* brief, which explains why case law addressing this issue is scarce. *See e.g.*, DSC Local Rule 7.04 ("All motions made other than in a hearing or trial or to compel discovery shall be timely filed with an accompanying supporting memorandum"); MDNC Local Rule 7.3(a) (motions must "be accompanied by a brief."). The cases that did address this issue held that a motion or defense unsupported by a brief is a mere "placeholder," fatally defective or insufficient as a matter of law. *See e.g., Koehler v. United States*, 2012 U.S. Dist. LEXIS 163816, *4 (EDNC November 15, 2012) ("defendant's defenses regarding standing, contributory negligence, intervening and superseding negligence, as well as its "placeholder" defense, as discussed at the hearing, are as plead insufficient as a matter of law"); *id.* ("prejudice to plaintiff in having to defend against these insufficient defenses is sufficient to warrant to warrant such a disfavored remedy (to strike defenses)"); *RJF Chiropractic Ctr., Inc. v. BSn Med., Inc.*, 2017 U.S. Dist. LEXIS 167949, *4 (WDNC October 11, 2017) ("By 'placeholder,' BSN alludes to motions that relate back to the filing date, allowing plaintiffs to "race to the courthouse to file empty, placeholder motions that may or may not ever be litigated, and that are neither required nor encouraged by the Federal Rules of Civil Procedure."); *United States v. Zuhrieh*, 2015 U.S. Dist. LEXIS 197611, *8 (DNM October 8, 2015) (finding that filing a placeholder constituted an "effort to circumvent the Rule 33 deadline or extend unilaterally the time for filing such motions"); *Fine's*

Gallery, LLC v. From Eur. to You, Inc., 2011 U.S. Dist. LEXIS 132257, *6 (MDFL November 16, 2011) ("Since this is not an affirmative defense, and defendants have not cited to any federal rule which allows a 'placeholder', the motion to strike will be granted."). While federal courts are split on this issue, many held that an affirmative defense is subject to the same pleading standard as a complaint, which is consistent with South Carolina law, to the extent it expressly allows insufficiently pled defenses to be stricken. *See* SCRCP 12(f). For instance, in *TWD, LLC v. Grunt Style LLC*, No. 18 C 7695, 2019 U.S. Dist. LEXIS 183288, at *7-8 (N.D. Ill. Oct. 23, 2019), the court explained:

> An affirmative defense must contain "sufficient factual matter to be plausible on its face." *See Edwards v. Mack Trucks, Inc.*, 310 F.R.D. 382, 386 (N.D. Ill. 2015) (citing *Iqbal*, 556 U.S. at 678). After all, affirmative defenses must withstand a Rule 12(b)(6) challenge, *Bernfeld v. U.S. Airways Inc.*, 2015 U.S. Dist. LEXIS 66677, 2015 WL 2448275, at *3 (N.D. Ill. 2015), the analysis of which now incorporates the plausibility requirement. "As a practical matter, however, affirmative defenses rarely will be as detailed as a complaint (or a counterclaim); nor do they need to be in most cases to provide sufficient notice of the defense asserted. ***But a problem arises when a party asserts boilerplate defenses as mere placeholders without any apparent factual basis***." *Dorsey v. Ghosh*, 2015 U.S. Dist. LEXIS 71521, 2015 WL 3524911, at *4 (N.D. Ill. 2015).

Id. (emphasis added). Some jurisdictions even found that a motion unsupported by a brief constitutes an admission that the motion is frivolous, which is also consistent with South Carolina law, to the extent our courts hold that an issue is abandoned unless it is supported by a citation to authority. *See In re Marriage of Grounds*, 256 Mont. 397, 398, 846 P.2d 1034, 1035 (1993) ("Where a moving party failed to file a brief in support of his motion, such failure to file a brief is to be viewed as an admission by the moving party that his motion is without merit."). *See also Bryson*, 378 S.C. at 510, 662 S.E.2d at 615. Lastly, some federal courts view the use of a placeholder, i.e., a motion unsupported by a contemporaneous brief, as "an effort [] to indefinitely

maintain a posture," which operates as a waiver of the defense of improper service pursuant to Fed. R. Civ. P. 12(h)(1). *See Pennymac Loan Servs., LLC v. Johnson*, No. 1:20CV175, 2021 U.S. Dist. LEXIS 42260, at *12-13 (M.D.N.C. Mar. 8, 2021). The federal waiver provisions are nearly identical to the South Carolina rules, and Plaintiff consistently maintained throughout this litigation that Defendant waived its defenses. *See* SCRCP 12(g) and (h). Therefore, this Court should find the reasoning of these courts persuasive and hold that a motion to dismiss unadorned by any facts and unsupported by a brief is fatally defective and that it operates as a waiver of the defenses which must be raised in the first responsive filing. Moreover, this Court should also hold that a mere placeholder filed as the first responsive filing is insufficient as a matter of law to avoid entry of default, because it constitutes an attempt to circumvent Rule 12(a) deadline and unilaterally and indefinitely extend this crucial deadline, and if allowed, this practice would make proceedings fundamentally unfair and render Rule 12(a), 6(b), and 55(a) meaningless. *See* SCRCP 6, 12, 55.In short, the trial court erred when it granted Defendant's Motion to Dismiss, which was unaccompanied by a brief and pled defenses in conclusory manner, citing SCRCP 12(b)(2) and (b)(6), and abused its discretion when it considered Defendant's briefs in support, despite the fact that the first supporting brief was filed 6.5 months after the one-sentence placeholder was submitted, and the second supporting brief was filed one year and three (3) months after the motion to dismiss the original complaint was filed. Lastly, the trial court also abused its discretion when it allowed Defendant to argue the defense of lack of service which was not pled in either its one-sentence Motion, first supporting brief, or its Answer to the Amended Complaint.

VII. The trial court erred when it denied Plaintiff's motion for entry of default, because Defendant defaulted in response to <u>both</u> the original and amended Complaint, and the trial court's reasoning for denying entry of default rested on an error of law.

The record shows that in her Rule 59(e) Motion, Plaintiff asserted that Defendant suffered

a default *twice* – in response to both the original and amended pleading. As a preliminary matter, because Defendant did not oppose either Plaintiff's Motion for Entry of Default and Default Judgment or her Rule 59(e) Motion, which argued that Defendant defaulted in response to the Amended Complaint for the first time, it conceded Plaintiff's argument and abandoned any potential issues on appeal concerning its second default suffered in response to the Amended Complaint, to the extent even a conclusory argument waives the issue on appeal, and here, Defendant made no argument at all. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting that when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal); *Talley*, 289 S.C. 483, 347 S.E.2d 99 (issue must be raised and ruled upon by the trial judge in order to be preserved for appellate review); *Dixon*, 442 S.C. at 240, 898 S.E.2d at 162 (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, Defendant forfeited an opportunity to oppose Plaintiff's argument on appeal that Defendant suffered a default twice.

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." SCRCP 15(a) (emphasis added). Since Defendant did not accrue any extra time in responding to Plaintiff's original Complaint (as it moved 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. The record also shows that 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, despite the fact that no default was formally entered. *See* SCRCP 15(a), 55(a). *See also Stark Truss Co. v. Superior Constr. Corp.*, 360 S.C. 503 (2006) ("A plain reading of S.C. R. Civ. P. 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 S.C. R. Civ. P. 12(a) meaningless."). Under Soth Carolina law, the fact that a default was not formally noted was of no consequence, and Defendant's pleading as well as its motion were invalid. *See Stark Truss Co.*, 360 S.C. at 508-509 ("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.") (citing *Thynes v. Lloyd*, 294 S.C. 152, 153-54, 363 S.E.2d 122, 123 (Ct. App. 1987)). Moreover, our federal district court interpreting Fed. R. Civ. P. 55, which is nearly identical to the South Carolina rule that governs defaults, held that entry of default is mandatory and the trial court has no discretion to decline entry of default, when default is made apparent either by affidavit or otherwise. *See Campodonico v. Stonebreaker*, 2016 U.S. Dist. LEXIS 33936, *4-5 (DSC February 25, 2016) ("Nevertheless, an entry of default is mandatory, not discretionary, and a party who has failed to plead or otherwise defend is considered to be in default even if the formal entry of default has not yet been made.") (citing 10A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2692 at 85 (3d ed.2004)). *See also* SCRCP 55(a) ("When a party [] 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.") (emphasis added). Notably, the rule does not even require a motion. *Id.* Lastly, this Court has previously held that in order to grant defaulting defendant's motion to extend time to file an answer, the trial court must first address defendant's default and

grant relief from entry of default, which requires a showing of good cause. *See Thynes*, 294 S.C. 152, 153-154 ("A ruling extending the time for Mr. Lloyd to answer would necessarily require granting him relief from the entry of default."). *See also* SCRCP 55(c) ("For good cause shown the court may set aside an entry of default.").

Therefore, the trial court abused its discretion when it granted Defendant's motion to extend time to respond to the Amended Complaint without first addressing the issue of Defendant's default. In addition, the Order was based on an error of law, to the extent it stated that "the time allowed has not expired," which erroneously assumed that Defendant's response was governed by SCRCP 12(a), when it was actually subject to SCRCP 15(a). *See Robinson*, 410 S.C. at 526 (defining an abuse of discretion as a decision based on an error of law). Moreover, because Defendant filed its Answer before the trial court ruled on its motion, the motion was moot, and should have been denied or dismissed as such. *See Moot*, Black's Law Dictionary (10th ed. 2014) ("Having no practical significance; hypothetical or academic."). *See also Simmons v. Boyle B.A.*, 2023 U.S. Dist. LEXIS 22668, *8 (E.D. Va. February 8, 2023) (dismissing motion for an extension of time to file a response as moot because the mover filed a response).

Next, Defendant's motion, which was filed *after* the expiration of the time period under Rule 12(a), stated that Defendant needed more time to investigate "extensive factual allegations" of the Amended Complaint. Both Rule 6(b) and 55(c) required Defendant to make a showing of good cause. SCRCP 6(b), 55(c). The good cause standard requires, as a threshold burden, that the party seeking relief put forth "an explanation" for the party's failure to comply with the rules and give reasons why granting its request "would serve the interests of justice." *Sundown Operating Co. v. Intedge Indus. Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). "Once a party has put forth a satisfactory explanation ... the trial court must also consider [the *Wham* factors]: (1) the

timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." *Id.* at 607-08, 681 S.E.2d at 888. A trial court need not make specific findings of fact for each factor if sufficient evidence supports the trial court's determination. *Id.* Defendant's request for an extension did not assert any good cause sufficient to avoid entry of default or warrant an extension to file an answer, because the Amended Complaint made nearly identical factual allegations and based on the procedural history, Defendant had 11 months to "investigate" Plaintiff's factual contentions. *See* Pl's Complaint, Amended Complaint. The record shows that Plaintiff amended her Complaint primarily to fix the misnomer and to convert her request for injunctive relief from statutory to a common law injunction, not to make new or radically different factual allegations. *Id.*

In sum, even if the trial court found that Defendant's reliance on Plaintiff's consent to extend the time beyond 60 days was somehow reasonable (which Plaintiff disputes), Defendant defaulted in response to Plaintiff's Amended Complaint all on its own, and the trial court abused its discretion when it granted Defendant's untimely motion to extend time filed after the time period set forth in Rule 12(a) had passed and while Defendant was once again in default, because the motion did not articulate a good cause that would warrant relief from entry of default and justify extending time for Defendant's Answer.

CONCLUSION

For the reasons stated *supra*, Appellant respectfully asks the Court of Appeals to reverse the trial court's order denying Plaintiff's Motion for Entry of Default and granting Defendant's Motion to Dismiss, find that Defendant suffered a default in response to both the original and Amended Complaint, and remand the case for the determination of the amount of damages and entry of default judgment. *See State v. Brewton*, 442 S.C. 169, 182 (2024) (where facts and

circumstances pertinent to the issue are clearly apparent from the record and support only one conclusion, remand is not necessary).

October 17, 2024

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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.

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned hereby certifies that Appellant's Initial Brief complies with Rule 208 and that it was served on all counsel of record by electronic mail per the parties' written agreement, addressed as follows:

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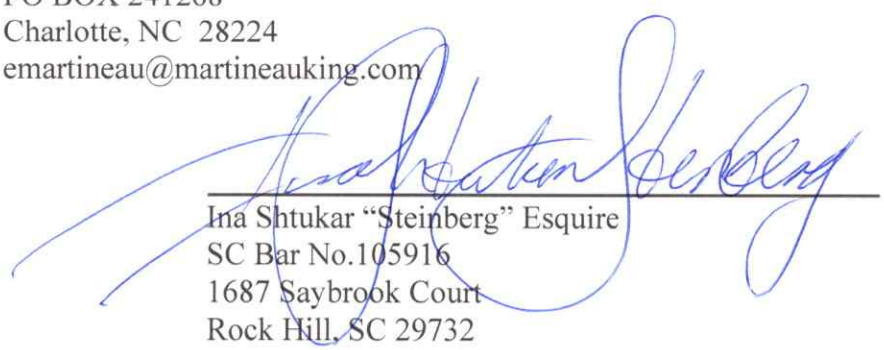
October 17, 2024



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