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**Nov 27 2024**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

Danniel Hall, Circuit Court Judge

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Appellate Case No. 2024-001311

Ina Shtukar,

Appellant,

v.

Erie Insurance Group,

Respondent.

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**APPELLANT'S REPLY BRIEF**

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November 27, 2024

s/ Ina Shtukar Steinberg  
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## ARGUMENTS

- i. Respondent's Statement of The Case and Facts contains impermissible arguments and contested matters, frequently unsupported by a record citation, handicapping appellate review, in violation of Rule 208.*

On November 18, 2024, Respondent filed its Initial Brief ("RIB") and Designation, indicating that "Respondent is dissatisfied with Appellant's Statement of Issues on Appeal and Statement of the Case and, therefore, has included its own within this brief pursuant to Rule 208(b)(2) of the South Carolina Rules of Appellate Court." *See* RIB p. 1. Respondent's Brief, however, does not comply with SCRAP 208. First, Respondent's Brief contains a "statement of the case" as well as a separate section labeled "facts." Respondent's logic in splitting the statement of the case into two (2) sections is unclear, to the extent both coningle procedural history with underlying facts, immaterial to any issues on appeal. Next, Respondent's statement of the case does not contain a single record citation in violation of Rule 208(b)(4), which states that a brief must "contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal." SCRAP 208. More fundamentally, both sections contain numerous references to contested matters, matters outside the record, speculations, legal arguments, as well as statements that come dangerously close to outright misrepresentations. *See* RIB pp. 5-8, 9-20. For instance, in its statement of the case, Respondent argued that "Appellant did not want the Subject Policy to be transferred to her ex-boyfriend *in hopes that it would leave her ex- boyfriend uninsured* for an unrelated motor vehicle accident and, as such, allegedly directed that the Subject Policy be terminated, even though Appellant was no longer a named insured under said Policy as of September 6, 2020." *Id.* at 6. First, this statement is a plain speculation unsupported by any evidence in the record. Second, Respondent intentionally misconstrues Appellant's factual contentions, supported by documentary evidence, to the extent Respondent

added a third party (“Bunn”) to Plaintiff’s policy without her knowledge or consent. *See* Complaint, Amended Complaint, Exhibits 1-13. Needless to say, this matter is contested<sup>1</sup>, but it is also entirely immaterial to any of the issues on appeal. Respondent also repeatedly argued that the Department of Insurance (“DOI”) was served with a “Sham” Complaint, which Appellant clearly contests<sup>2</sup> in her Brief. *See* AIB, RIB pp. 6, 8, 12, 13. Moreover, Respondent asserted as a “fact” that it was also served with the “Sham” Complaint by certified<sup>3</sup> mail for the first time on appeal, to the extent *none* of its filings below or oral arguments made this factual contention. RIB pp. 2, 3, 6, 7, 13, 14. *See* Transcript, D’s MTD, D’s Briefs. “It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733, (1998). Thus, Defendant’s contention is neither a “fact” nor a valid argument, but another contested matter. Defendant’s argument that Plaintiff’s certificate or affidavit of service somehow admit that she served a “Sham” Complaint borders on the absurd, to the extent it merely certifies the fact that the Summons and Complaint were properly served, which was conceded by Defendant through its failure to raise a timely objection. RIB p. 11, 13. At no time did Plaintiff “concede” that her service of process was in any way improper, nor did she have the burden, since she

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<sup>1</sup> To be precise, Respondent attempts to contest Appellant’s factual contentions, despite suffering a default in response to both pleadings, conceding each factual allegation. *See e.g., Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 319 (Ct. App. 2004) (“[B]y suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff’s allegations and have conceded liability.”) (quoting *Roche v. Young Bros.*, 332 S.C. 75, 81 (1998)).

<sup>2</sup> Respondent also argues that Appellant somehow “conceded” serving a “Sham” Complaint, however, no evidence in the record can logically support this contention.

<sup>3</sup> The record clearly shows that defense counsel used drafting of the proposed order as an opportunity to respond to Plaintiff’s argument that Respondent failed to challenge the certified mail service. Even though the trial court signed the order, its finding is not supported by any evidence in the record, amounting to abuse of discretion. *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (defining an abuse of discretion as a decision “based on an error of law, or, when grounded in factual conclusions, [a decision] without evidentiary support”) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

presented a *prima facie* showing of proper service, shifting the burden to Defendant to properly contest the issue, which it failed to do time and time again. *See Hammond v. Butler, Means, Evins & Brown*, 300 S.C. 458, 462, 388 S.E.2d 796, 798 (1990), *cert. denied sub nom. Kramer v. Hammond*, 498 U.S. 952, 111 S. Ct. 373, 112 L. Ed. 2d 335 (1990) (“South Carolina case law is settled that ‘at the pre-trial stage of the proceedings, the plaintiff need only make a prima facie showing by pleadings and affidavits.’”); *see White v. Stephens*, 300 S.C. 241, 387 S.E.2d 260 (1990); *Askins v. Firedoor Corp. of Florida*, 281 S.C. 611, 316 S.E.2d 713 (Ct. App. 1984). Once again, Respondents attempts to pass off another contested matter as a “fact.”

Respondent also attempts to use its statement of “facts” to contest some of Plaintiff’s factual allegations, by purposefully misconstruing them. For instance, it asserts that it was *Plaintiff* who contacted her agent to provide proof of insurance, when in reality it was the agent who contacted Plaintiff, who was unaware that her policy was still active, on September 30, 2020, to let Plaintiff know that Respondent renewed her policy, which was supposed to terminate due to Plaintiff’s relocation<sup>4</sup> on September 6, 2020, without Plaintiff’s knowledge or consent to provide Bunn, the “ex-boyfriend” who no longer resided with Plaintiff with coverage for his accident using Plaintiff’s policy without her knowledge or consent. RIB p. 9. Respondent also made numerous plainly argumentative statements, including that Plaintiff’s affidavit of service was “incorrectly” attested to, that its motion was “[i]n compliance with Rule 7,” that “Appellant’s argument was premised upon service of the Sham Complaint and Summons,” that its brief filed in response to Plaintiff’s motion was sufficient to properly raise its improper service objection, even though it

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<sup>4</sup> Respondent also attempts to cast doubt on Plaintiff’s relocation to South Carolina, however, public records held by York County Register of Deeds, accessible at any time, show Plaintiff’s Deed, recorded in Record Book 18488, Page 482-483, dated August 10, 2020. Even this Court can take judicial notice of facts that are not subject to reasonable dispute and can be easily verified. Rule 201(f), SCRE (“Judicial notice may be taken at any stage of the proceeding.”).

did not even cite the correct section of Rule 12(b), SCRCPP, and argued lack of personal jurisdiction, that its brief filed in response to plaintiff's motion was sufficient to negate statutory jurisdiction under S.C. Code Ann. § 15-9-285 without looking at a single shred of evidence, that it had no obligation to file a brief to support its motion to dismiss, that Plaintiff "removed jurisdiction" from the trial court, and that Plaintiff's Rule 59(e) motion was "null. RIB p.7 -16. All of these matters are obviously *contested issues of law*, not "facts." Respondent also made references to "facts" outside the record in violation of Rule 208(b)(4), indicating "[a]fter that hearing, Counsel for both parties discussed the filing of an amended complaint in which Appellant would name the proper entity, Erie Insurance Exchange, as the named defendant, and undersigned counsel agreed to accept service of the Amended Complaint on behalf of Respondent." RIB p. 11. Nor is this allegation in any way material, to the extent Plaintiff did not need Defendant's consent to amend her pleading, pursuant to SCRCPP 15(a), and suggests that Respondent misapprehends Rule 15, SCRCPP, to the extent it also noted that "[a]n Acceptance<sup>5</sup> of Service was never filed." RIB p. 11. Respondent also referenced the insurance policy, which is not part of the record. RIB pp. 1, 12. In addition, Respondent misconstrued Plaintiff's arguments made at the oral arguments, conflating Rule 6 with Rule 12, to the extent Plaintiff argued that improper service defense was waiver under SCRCPP 12(h), and relied on SCRCPP 6(b) in support of her contention that the parties lacked authority to consent to a 77-day extension. RIB p. 12.

In sum, Respondent's statement of the case and "facts" violates Rule 208(b)(1)(C), SCRAP, to the extent it contains impermissible arguments and contested matters, frequently unsupported

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<sup>5</sup> It appears that Respondent also believes that it can avoid being served even when the submission is made through the e-filing portal, which automatically serves all licensed attorneys of record, negating the need for traditional service. *See Eberly v. Advanced Flooring & Design Div. of ISI, LLC*, 901 S.E.2d 273, 274 (2024) (automatic service of the NEF upon the E-Filing constitutes proper service).

by a record citation, which handicaps appellate review. As our Supreme Court explained, “the South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State.” *Henning v. Kaye*, 415 S.E.2d 794, 794-795 (1992). As will be explained below, the remainder of Respondent’s Brief repeatedly violated Rule 208(b)(1)(E), SCRAP, and made arguments manifestly without merit.

*ii. Respondent’s argument that Plaintiff failed to commence her action under SCRCP 3 is manifestly without merit, to the extent it relies on a footnote of Estate of Mims v. S.C. Dep’t of Disabilities & Special Needs, as opposed to its holding, which discusses the previous version of the statute and associated rule.*

As an initial matter, each of Respondent’s arguments relies on an assumption that the original Complaint was *never* served, which is both legally and factually incorrect, to the extent Respondent’s own filings admit that service was in fact made, but argue it was improper – a defense Respondent clearly waived. RIB p. 17. *See Unisun Ins. v. Hawkins*, 342 S.C. 537 (Ct. App. 2000); SCRCP 12(h). D’s April 28, 2023 MTD. Because our Supreme court held that by waiving the insufficient service defense, a defendant waives all other related defenses, Respondent is barred from raising the issue of commencement, to the extent its failure to raise a timely objection amounts to a concession that service was proper. *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993). *See* AIB for a full discussion. Respondent’s brief fails to address these arguments, conceding them. *See First Union Nat’l Bank v. FCVS Communications*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) (noting if 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); *Dixon v. Pattee*, 442 S.C. 233, 240, 898 S.E.2d 158, 162 (2023 Ct. App) (“If a respondent fails to answer to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct.”).

Defendant also did not address Plaintiff’s argument that the action was properly commenced

under Rule 3, SCRCPP, but instead asserted its own arguments, misconstruing both Rule 3, SCRCPP, and S.C. Code Ann. § 15-3-20. RIB pp. 16-20, 22; AIB pp. 24-26. Defendant’s arguments rest entirely on this Court’s footnote 4 of *Estate of Mims v. S.C. Dep’t of Disabilities & Special Needs*, which discusses the former version of the statute and the corresponding rule, which were amended in 2002 and 2004 respectively, changing the way our court’s understand the issue of commencement. 422 S.C. 388, 396, 811 S.E.2d 807, 811 (Ct. App. 2017). Specifically, this footnote stated the following:

In 2002, the Legislature amended section 15-3-20(B) of the South Carolina Code, and, in 2004, the South Carolina Supreme Court correspondingly amended Rule 3(a), SCRCPP. Before the 2004 amendment, Rule 3(a), SCRCPP, stated, “A civil action is commenced by filing and service of a summons and complaint,” and lawsuits were found to have commenced on the day of service. *See, e.g., First Palmetto State Bank & Trust Co. v. Boyles*, 302 S.C. 136, 139, 394 S.E.2d 313, 315 (1990) (holding that because Rule 3(a), SCRCPP, stated a civil action is commenced by the filing and service of a summons and complaint, the action was commenced on the date of service, not the earlier filing date).

*Id.* Evidently, Respondent is relying on the pre-amendment version of Rule 3, SCRCPP, which has been clearly repealed. *Id.* Respondent’s assertion that “[t]o date, Respondent has not been served with a true and accurate copy of the Initial Complaint and Summons that were filed with the court on or around February 7, 2023, by Appellant,” even if accurate, is entirely immaterial in light of the fact that Plaintiff amended her Complaint, under the current version of the statute and the corresponding rule, which were amended “to provide a safety net<sup>6</sup> for cases filed near the end

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<sup>6</sup> The Supreme Court’s opinion in *Mims* is ambiguous, to the extent while it clarifies that the action is commenced even if service is made after the expiration of the statute of limitations as long as service is made within 120 days of the filing of the *amended* complaint, it leaves the date of such commencement uncertain. This Court subsequently interpreted *Mims* to mean that the action was commenced on the date amended complaint was filed in *Estate of Mims*, but this makes the action vulnerable to a statute of limitations challenge, even if the action is properly commenced. Such interpretation conflicts with the Supreme Court’s explanation that the statute and the rule were amended to provide a “safety net” for actions filed near the expiration of the statute of limitations.

of the statute of limitations and service is made after the limitations period has run.” *Mims v. Babcock Ctr., Inc.*, 399 S.C. 341, 346 (2012). Our Supreme Court in *Mims* addressed the very factual scenario urged by Respondent – a case where the original complaint was never served, followed by an amended complaint served outside the limitations period, but within 120 days of the filing of the amended pleading – holding that the action was properly commenced. *Id.* While Plaintiff conspicuously advanced this argument in her initial brief relying on *Mims*, which is controlling law, Respondent, did not address this argument, ignoring the fact that Plaintiff filed an Amended Complaint, which was automatically e-served, and instead advanced an argument manifestly void of merit, arguing that Plaintiff’s action was not properly commenced.

Respondent proceeded to make another meritless argument that “the trial court, at all times relevant, had the ability, at its own initiative, to dismiss the action for Appellant’s failure to serve a true and accurate copy of the Initial Complaint and Summons upon Respondent,” relying on Rule 5(d) of the SCRPC. RIB p. 18. The fallacy of Respondent’s argument is obvious, as no court has discretion to dismiss a properly commenced action, and when it does, as the trial court did here, it commits a reversible error. *See State v. Robinson*, 410 S.C. 519, 526 (2014); *State v. Wright*, 391 S.C. at 442, 706 S.E.2d at 326 (defining an abuse of discretion as a decision “based on an error of law, or, when grounded in factual conclusions, [a decision] without evidentiary support”) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Moreover, Respondent did not cite any law in support of its Rule 5(d), SCRPC, *sua sponte* dismissal argument and once again

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In essence, this approach treats the original complaint as a nullity. The undersigned read *Mims* to state that the action is commenced when the original process is filed as long as service is effectuated within 120 days of the filing of the amended complaint, which operates as a true “safety net” for actions filed near the expiration of the statute of limitations. *Mims*, 399 S.C. at 346 (“The statute and the rule, read together, provide that (1) an action is commenced upon filing the summons and complaint, if service is made within the statute of limitations, and (2) if filing but not service is accomplished within the statute of limitations, then service must be made within 120 days of filing.”).

failed to address Plaintiff’s arguments to the contrary, properly supported by persuasive authority. See AIB pp. 10-14. Respondent’s argument ignores the fact that Plaintiff did effectuate service and made a *prima facie* showing of proper service, which went unchallenged. See P’s affidavit of service and exhibits, D’s MTD. Respondent is arguing that the trial court should have *sua sponte* authority to dismiss the case for lack of service, even when the parties agree to waive formal service, or as in this case, to rescue a defendant who neglects to timely raise a defense, waiving it, but such use of *sua sponte* authority is inconsistent with well-settled law that holds that insufficient service is a waivable defense, as well as Rule 12(a) and (h) and Rule 4(d), SCRCF. See e.g., *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.”); *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993) (“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”); *Unisun Ins.*, 342 S.C. 537, 542 (Ct. App. 2000) (“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”); SCRCF 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.”); SCRCF 12(a). As the Supreme Court explained discussing a *sua sponte* dismissal

The circumstance that it was not asked for on behalf of the party for whose benefit it was made cannot properly be passed without notice. It is a dangerous innovation subversive of the conception of the proper limits of judicial authority entertained by our laws.

*State ex rel. McLeod v. Brown*, 278 S.C. 281, 284, 294 S.E.2d 781, 782 (1982). It is a notion that

firmly embedded in our jurisprudence that affirmative defenses must be properly pleaded<sup>7</sup>, and allowing the trial court to raise the issue of service *sua sponte* and dismiss the action based on the related affirmative defenses, namely statute of limitations, is also highly prejudicial to Plaintiff, whose *prima facie* showing is overruled without notice and a fair opportunity to refute. *See Parrish v. Allison*, 376 S.C. 308, 327, 656 S.E.2d 382, 392 (Ct. App. 2007) (“Generally, affirmative defenses to a cause of action in any pleading must be asserted in a party’s responsive pleading.”); *Hoffman v. Greenville County*, 242 S.C. 34, 39, 129 S.E.2d 757, 760 (1963) (“One who pleads an affirmative defense has the burden of proving it.”); *Heins v. Heins*, 344 S.C. 146, 152, 543 S.E.2d 224, 227 (Ct. App. 2001) (“It is well settled that ordinarily[,] a party may not receive relief not contemplated in his or her pleadings.”); *Collins Ent., Inc. v. White*, 363 S.C. 546, 563, 611 S.E.2d 262, 270 (Ct. App. 2005) (“The failure to plead an affirmative defense is deemed a waiver of the right to assert it.”). Moreover, since Respondent cited no authority in support of its argument and did not explain why Plaintiff’s persuasive authority should not be considered, Respondent abandoned its argument and conceded Plaintiff’s point. *See State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) (an issue is abandoned if the brief fails to provide legal authority); *First Union Nat’l Bank*, 321 S.C. at 502 (conceding the opponent’s argument); *White Oak Manor, Inc.*, 407 S.C. at 8-9. *See also* Rule 208(b)(1)(E), SCRAP.

Relatedly, Respondent also argues that “Appellant’s failure to serve a copy of the true initial complaint and summons [] within the applicable statute of limitations nor within 120 days after

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<sup>7</sup> While Respondent implies that its discussion of the discrepancy in the name in connection with the DOI’s Acceptance of Service embodied in its *responsive brief* filed after Plaintiff raised the issue of default somehow preserved its lack of service objection, this Court made it clear that the issue of insufficient service must be pled with specificity and in a timely manner, pursuant to Rule 12, SCRPC. *See e.g., Unisun Ins. v. Hawkins*, 342 S.C. 537 (Ct. App. 2000). RIB p. 9. D’s May 17, 2023 Brief. Notably, Defendant’s Brief, which is not a *pleading*, still does not sufficiently raise the issue of either service or statute of limitations.

fining the initial complaint bars (sic) Appellant’s claims.” RIB p. 22. But in *Mims*, the Supreme Court expressly rejected the trial court’s interpretation of the statute “to require actual service to be made within 120 days of filing in *all* cases” and held that an action was properly commenced when the amended complaint was served within 120 days of filing of the *amended* complaint. 399 S.C. at 346. Thus, even if Respondent’s contention was correct, the action was properly commenced under *Mims*. Respondent’s argument that Plaintiff’s action is time-barred is likewise without merit to the extent it rests entirely on its erroneous assumption that Plaintiff failed to serve the original Complaint. RIB p. 22. However, even if Plaintiff indeed made no effort to effectuate serve, Respondent was free to waive service of process and did waive any issue concerning service, when it noticed its appearance and filed a one-sentence motion to dismiss arguing lack of personal jurisdiction, simultaneously waiving the issue of statute of limitations as well, which was first mentioned by Respondent 1.5 years after the commencement of the action and at the time of the hearing. *See* Transcript p.12 ¶¶ 22-23. RIB p. 22. *See Unisun Ins*, 342 S.C. at 542-543 (“Having failed to allege process with even a minimal amount of specificity in his responsive pleading, Bruce may not now bootstrap the defense to his statute of limitations argument, a separate affirmative defense likewise subject to waiver.”), *id.* at 541 (“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*”) (citing *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993) (emphasis added). In fact, Defendant’s waiver of improper service defense dooms each of its arguments, and it is dispositive of all remaining issues.

Moreover, Respondent also failed to address either Appellant’s argument concerning the relation back doctrine under Rule 15(c), SCRCP, triggered by the amendment of the Complaint to change Respondent’s name, or the equitable tolling doctrine of recurrent malfeasance, in light of

the continuing and on-going nature of Respondent's violation of Appellant's rights as the owner of the policy, conceding these arguments as well. AIB pp. 27-35. *See e.g., First Union Nat'l Bank*, 321 S.C. at 502.

***iii. Respondent's lack of personal jurisdiction and minimum contacts argument is manifestly without merit because our legislature created an easy way to obtain statutory jurisdiction over an out-of-state insurer, through service on the DOI which is equivalent to in-state personal service.***

As an initial matter, Defendant's argument that the fact that Plaintiff used Defendant's registered trade to summon Defendant to court somehow deprived the court of jurisdiction is manifestly without merit and conspicuously unsupported by any authority, to the extent our courts (as well as virtually all other jurisdictions) have repeatedly found that improperly naming *the right defendant* has no impact on the court's jurisdiction, and that trade names may be used to properly summon a party. RIB generally, D's November 13, 2023 Brief. *See Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 240 (1990), *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), *Long v. Carolina Baking Co.*, 190 S.C. 367, 377, 3 S.E.2d 46, 50 (1939) ("If a corporation has acquired a name by usage, an adjudication against it by the name so acquired is valid and binding."), *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."), *Tunstall v. The Lerner Shops, Inc.*, 160 S.C. 557, 563, 159 S.E. 386, 388 (1931) (motion to amend judgment should have been granted). S.C. Code Ann. § 15-5-160 ("[a]ll unincorporated associations may be sued and proceeded against under the name and style by which they are usually known without naming the individual members of the association"), *Fowler v. Beasley*, 322 S.C. 463, 472, S.E.2d. 630, 633 (1996) ("[A]n unincorporated association may be

sued under the name by which it was generally known without naming the individual members of the association.”). Relatedly, Respondent’s “Sham Complaint” argument is manifestly without merit as well, to the extent our Supreme Court clearly held that a misnomer in a corporate name has no impact on the court’s jurisdiction. *Tri-County Ice & Fuel Co.*, 303 S.C. at 240 (“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.”) (quoting *Tunstall*, 160 S.C. at 563, 159 S.E. at 388 (1931)) (emphasis added). Respondent’s “Sham” label, coined in an effort to unfairly prejudice Plaintiff, ignores that fact that even if Respondent’s unsupported contentions were true, the document it presented to the trial court is *identical* to the initial Complaint *but for Defendant’s name*. See Complaint, D’s August 1 Exhibit. Lastly, Respondent did not address Plaintiff’s misnomer argument beyond a mere conclusory disagreement, once again conceding the issue. See *e.g.*, *First Union Nat’l Bank*, 321 S.C. 496, at 469. Nor did Respondent address Plaintiff’s argument that the plain language of the rules does not require a party to serve a *clocked* or *filed* copy of the filings, in addition to its own failure to sufficiently develop this argument and support it with authority, once again abandoning its argument and conceding Plaintiff’s point. AIB pp. 20-21, RIB. *First Union Nat’l Bank*, 321 S.C. 496, at 469. See *State v. Lindsey*, 394 S.C. at 363, 714 S.E.2d at 558 (an issue is abandoned if the brief fails to provide legal authority), *Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (an issue is deemed abandoned on appeal when no legal authority is cited to support the argument). See also Rule 208(b)(2)(E), SCRAP. Respondent also failed to address Plaintiff’s argument that the trade name she used *collectively* referred to *all* Erie entities, which authorized Plaintiff to use various Erie names interchangeably, as well as the fact that Respondent itself used a trade name on its own internal correspondence, once again conceding the

point. *Id.* See D’s August 1, 2024 Exhibit. AIB pp. 21-23. See also *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.’”).

Next, Respondent’s minimum contacts argument “mises the forest for the trees” because Defendant is not just a business, Defendant is an *insurer*, highly regulated by state law due to a recognized potential for abuse, demonstrated in the case at bar. Historically, South Carolina, along with other jurisdictions, enacted statutes collectively referred to as Uniform Unauthorized Business of Insurance Act in response to “a tremendous growth in mail order insurance business” because the “hardship of requiring an assured or his beneficiary to hire a lawyer to prosecute small claims in a state far from the residence of the policy holder soon became evident,” in order to afford an insured and easy way to obtain jurisdiction over an out-of-state insurer through service on the DOI. *Ross v. American Income Life Ins. Co.*, 232 S.C. 433, 436, 102 S.E.2d 743, 744 (1958); As our Supreme Court noted, “[t]he early tendency of the courts was to invalidate substituted service under these statutes[,] [b]ut the great weight of current authority is in the other direction.” *American Income Life Ins. Co.*, 232 S.C. at 436. The Supreme Court of the United States finally put this issue to rest back in 1957, when it found such statutory jurisdictional provisions constitutional and in compliance with the Due Process Clause. *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S. Ct. 199, 201, 2 L. Ed. 2d 223 (1957). Because Plaintiff served Defendant relying on S.C. Code Ann. § 38-25-510, found to be constitutional, which states that service of process on the DOI “is of the same legal force and validity as personal<sup>8</sup> service of process in this State upon the insurer,” the minimum contacts analysis is plainly superfluous and void of

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<sup>8</sup> Personal in-state service is always sufficient to grant personal jurisdiction irrespective of Defendant’s status as a nonresident. See *Pennoyer v. Neff*, 95 U.S. 714 (1877).

any merit. The focus of the inquiry under this statutory provision is on the unauthorized business of insurance, as defined by S.C. Code Ann. § 38-25-110. This statute specifically includes “renewals” of the policies originally issued in other states and “adjustment of claims.” S.C. Code Ann. § 38-25-110(6). Because the record contains evidence that clearly documents that Plaintiff’s policy was renewed after she relocated to South Carolina with the knowledge of such relocation and that Respondent began adjusting a claim under Plaintiff’s name subsequent to her relocation and without her knowledge, Respondent clearly engaged in unauthorized business of insurance. *See* Amended Complaint, Exhibits 3 and 4. This evidence was plainly sufficient to meet Plaintiff’s obligation to make a *prima facie* showing of personal jurisdiction. *See Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005) (“At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a *prima facie* showing of jurisdiction either in the complaint or in affidavits.”); *Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 332 (1993) (“There is no ‘other evidence’ requirement for personal jurisdiction where the complaint itself demonstrates jurisdiction.”). The record, however, shows that the trial court did not consider or rule on this argument, to the extent Respondent failed to sufficiently raise the issue beyond a conclusory denial that the DOI had no authority to accept service. *See* D’s May 17, 2023 Brief, D’s November 13, 2023 Brief, Answer. Obviously, the DOI disagreed when it accepted service, and it was incumbent on Respondent to timely move to quash or set aside such service, which it failed to do, once again waiving the issue of improper service. *See e.g., United Ins. Co.*, 64 F. Supp. at 897-898. Because the trial court did not address either Respondent’s minimum contacts argument or its unsupported declaration that the DOI could not accept service, Respondent failed to preserve these issues for review. *See* Memorandum of Opinion. *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).

***iv. Respondent’s argument that Plaintiff’s Rule 59(e) Motion was properly denied because it attempted to reargue the same issues is without merit because South Carolina’s approach to Rule 59 differs from the federal court’s interpretation, and persuasive authority cannot be used to overturn our Supreme Court.***

First, Respondent did not oppose Plaintiff’s Rule 59 motion below, conceding Plaintiff’s arguments. *See e.g., Dixon*, 442 S.C. at 240. Nor did it present its current theory to the trial court to convince it that it should deny Plaintiff’s motion because the federal courts do not allow Rule 59 motions to be used to reargue previously raised issue or to raise new issues. RIB pp. 25-26. This is one instance when this Court cannot adopt the federal approach, to the extent our Supreme Court expressly authorized Rule 59(e) motions to be used as a request to reconsider designed to preserve issues for review. *State Farm Mut. Auto. Ins. Co. v. Goyeneche*, 429 S.C. 211, 224, 837 S.E.2d 910, 917 (Ct. App. 2019) (“However, in considering [persuasive authority from other jurisdictions], we may not apply them in such a manner that we overrule supreme court precedent.”). *See also* S.C. Const. art. V, § 9 (“The decisions of the Supreme Court shall bind the Court of Appeals as precedents.”); *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (“The purpose of [a] Rule 59(e), SCRCPP, [motion] to alter or amend the judgment is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'”) (quoting *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200, 108 S. Ct. 1717, 100 L. Ed. 2d 178, (1988)); *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (“The losing party must first try to convince the [circuit] court it . . . has ruled wrongly and then, if that effort fails, convince the appellate court that the [circuit] court erred.”). In fact, when the issues are raised for the first time in the trial court’s dispositive order, as in the case at bar, a Rule 59(e) motion is virtually the only way to preserve the issues. *See Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 55 (Ct. App. 2006) (“[W]hen an appellant neither raises an issue at trial nor

through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review.”). In South Carolina, Rule 59(e) motions “serve a vital purpose for proper issue preservation.” *Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009). In light of the trial court’s unanticipated ruling based on *new* theories that were not properly raised in any of Respondent’s filings, Rule 59(e) motion was virtually the only way for Plaintiff to preserve the issues for appellate review.

- v. ***Respondent conceded that it suffered a default in response to Plaintiff’s Amended Complaint by once again failing to address Plaintiff’s argument both below and on appeal, and its argument that it had 30 days to respond is manifestly without merit to the extent Rule 15(a), SCRCP controls.***

Once again, Respondent did not oppose Plaintiff’s Rule 59(e) motion filed to preserve Plaintiff’s arguments, including that Respondent suffered a default *twice* - not only in response to its original Complaint but also in response to the Amended Complaint. Respondent’s wholesale failure to address *any* of Plaintiff’s arguments, conspicuously made and properly supported by authority, is a firm concession. *See First Union Nat'l Bank*, 321 S.C. at 502; *Dixon*, 442 S.C. at 240 (“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.”). The only portion of Respondent’s brief that touches on the issue of Respondent’s second default was embodied in a footnote:

Appellant attempts to make the argument that Respondent was late in responding to the Amended Complaint as Respondent did not file a response until February 5, 2024 – which is thirty-one (31) days after the Amended Complaint was filed. However, Appellant fails to explain that thirty (30) days after the Amended Complaint was filed would have been Sunday, February 4, 2024. As such, the next business day was in fact Monday, February 5, 2024. Moreover, as further explained below, the Amended Complaint is the only complaint in this action that could have “commenced” this action pursuant to Rule 3 of the SCRCP, as the Initial Complaint was never served upon Respondent. Further, as a new entity was named as a

defendant, Respondent would have had 30 days to respond to the Amended Complaint.

RIB p. 11, footnote 7. Once again, Respondent relies on an unsupported assumption that the original process was never served, which is factually incorrect, to the extent Respondent itself admits that the Complaint was indeed delivered to both the DOI and its office, but argues that it was a “Sham” Complaint because, although identical to the filed process, the documents bore a different corporate name. *See Hughes v. Water World Water Slide, Inc.*, 314 S.C. 211, 215, 442 S.E.2d 584 (1994) (“Although the corporate name was incorrect on the pleadings, the pleadings were served upon the president of the defendant corporation.”). Second, there is no evidence in the record that service was improper and the record shows that Respondent failed to raise the issue, waiving it pursuant to Rule 12(h), SCRCP. D’s MTD, D’s Answer. *See supra*. Respondent’s commencement argument rests on its erroneous assumption that it can raise this issue, which is inextricably intertwined with and buttressed on Respondent’s contention that the original Summons and Complaint were “never served,” without properly flagging the issue of insufficient service and despite its waiver of service. Since our Supreme Court held in *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993) that a waiver of improper service defense also waives all related issues, Respondent’s argument fails, and the action was properly commenced on February 7, 2023, when the original complaint was filed.

Next, 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). While Respondent hinted that its acceptance of service of the amended pleading was somehow material, it did not expressly challenge Plaintiff’s amendment of the Complaint, conceding that such amendment was proper. *Dixon*, 442 S.C. at 240, *First Union Nat’l Bank*, 321 S.C. at 502.

Lastly, Respondent cited no authority that stands for the proposition that Rule 15(a), SCRCF, does not apply, abandoning this argument. *Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) (“An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.”), *State v. Lindsey*, 394 S.C. at 363 (an issue is abandoned if the brief fails to provide legal authority), SCRAP 208(b)(1)(E) (requiring argument of each issue in an appellant's brief to include discussion of the issue as well as citations to authority). In short, Respondent’s brief concedes Plaintiff’s point.

### **CONCLUSION**

Respondent’s initial Brief is an amalgamation of implied concessions, attempts to raise issues for the first time on appeal, conclusory denials, and half-baked arguments void of merit. In addition to the violations of the Appellate Rules discussed *supra*, Respondent’s Brief was not accompanied by a certificate of service as required by Rule 262(b), SCRAP. Nor did Respondent bother to actually serve<sup>9</sup> its Brief, in violation of Rule 262(b), SCRAP. Rules are not mere formalities and failure to follow the rules impedes orderly proceedings. *See e.g., Henning*, 415 S.E.2d at 794-795. In fact, this entire appeal arose due to Respondent’s disregard for the rules, starting with Rule 12, SCRCF, which requires a timely response to the complaint and mandates timely invocation of certain defenses in the first filing. The record conclusively shows that Respondent did not deem insufficient service defense to be worthy of an orderly mention. Respondent’s Brief is conspicuously silent on the issue of waiver, which is dispositive of all remaining issues. In fact, the only issue this Court needs to consider to reverse the trial court’s dismissal is the issue of Respondent’s waiver of its service objection, which in this case is nearly self-evident. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d

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<sup>9</sup> The parties agreed to a less formal service via email when the action was first filed with the trial court. While Respondent emailed all of its previous submissions, it neglected to serve its Brief.

591, 598 (1999) (an appellate court need not address an appellant's remaining issues when its decision on a prior issue is dispositive).

Respectfully submitted,

November 27, 2024

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In The Court of Appeals

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

Danniel Hall, Circuit Court Judge

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Appellate Case No. 2024-001311

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**RECEIVED**

**Nov 27 2024**

**SC Court of Appeals**

Ina Shtukar,

Appellant,

v.

Erie Insurance Group,

Respondent.

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

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The undersigned hereby certifies that Appellant's Reply Brief complies with Rule 208(b)(3) and that it was served on counsel of record by electronic mail per the parties' written agreement, addressed as follows:

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November 27, 2024

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