THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Appellate Case No. 2025-000860

Ina Shtukar Steinberg, Appellant,

v.

South Carolina Property and Casualty Insurance Guaranty Association, as a statutory successor in interest to St. Johns Insurance, insolvent insurer, Respondent.

INITIAL BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF THE CASE

Following denial of her homeowner's insurance claim for roof replacement due to hail damage, Appellant Ina Shtukar Steinberg ("Steinberg") filed a Complaint in the York County Court of Common Pleas, asserting claims for breach of contract, breach of covenant of good faith,[1] and declaratory relief on April 1, 2024. [R. *, Compl.]

Respondent South Carolina Property and Casualty Insurance Guaranty Association ("the Guaranty" or "SCGA"), as a statutory successor in interest to St. Johns Insurance, insolvent insurer, filed its Answer and a Partial Motion to Dismiss on March 15, 2024. [R. *, Answer; R. *, Mot. to Dismiss.] Steinberg filed a response in opposition on May 22, 2024. [R. *, P's Response in Opp. to Mot. to Dismiss.] A hearing on the Guaranty's Partial Motion to Dismiss was held on September 11, 2024, before the Honorable William A. McKinnon, and taken under advisement. [R. *, 2024 Hr'g Transcript.] That evening, Steinberg filed a supplemental brief in opposition to

[1] Respondent references this claim as the "bad faith claim" throughout its briefing.

the Partial Motion to Dismiss. [R. *, P's Supp. Brief in Opp. to Motion.] On October 21, 2024, Judge McKinnon entered an Order granting Defendant's Partial Motion to Dismiss, dismissing the claims for bad faith and declaratory relief. [R. *, Order Granting Partial Dismissal.]

On February 10, 2025, Steinberg filed a Motion for Summary Judgment as to the sole claim for breach of contract. [R. *, P's Mot. for Summ. J.; R. *, P's 2/10/25 Affidavit.] The Guaranty filed a Cross-Motion for Summary Judgment on March 3, 2025. [R. *, Def.'s Cross-Mot.] Steinberg filed a Memorandum and Affidavit in opposition to the Cross-Motion on March 6, 2025. [R. *, P's Memo. in Opp.; R. *, P.'s 3/6/25 Affidavit.] The Guaranty filed its Memorandum in Support of Summary Judgment and supporting exhibits on March 11, 2025.[2] [R. *, Def.'s Memo.] A hearing on the Cross Motions for Summary Judgment was held on March 12, 2025, again before Judge McKinnon. [R. *, 2025 Hr'g Transcript.] On April 4, 2025, Judge McKinnon entered an Order granting summary judgment in favor of the Guaranty. [R. *, Order on Summ. J.]

Thereafter, Steinberg noticed an appeal from both of the lower court's Orders.

STATEMENT OF FACTS

Steinberg is an owner of a residential home in Rock Hill, South Carolina, which was insured under a Homeowners Policy with St. Johns Insurance Company ("St. Johns"), policy no. SC31019957, effective August 10, 2021, to August 10, 2022 ("the Policy"). [R. *, 2021 Policy.] This was a renewal of a prior policy with effective dates of August 10, 2020, to August 10, 2021. [R. *, P's 2/10/25 Affidavit at ¶1; R. *, 2020 Policy Dec Page.]

[2] Respondent concedes that its filing was titled as a Motion and Memorandum in error, as the Cross-Motion was previously filed on March 3, 2025, to which this served as the Memorandum in Support. Additionally, while the Memorandum references a declaratory judgment action, breach of contract was the sole remaining claim at the time of the March 2025 hearing. The trial court understood this and properly considered the competing motions for summary judgment as to the breach of contract claim.

The Policy contains two express provisions that provide temporal limitations on coverage. First, the Policy conditions provide:

> **P. Policy Period**
>
> This policy applies only to loss which occurs during the policy period.

[R. *,2021 Policy at HO 00 03 10 00, p. 15 of 22.] Second, the Policy includes the following clear and unambiguous exclusion from coverage for pre-existing damage:

> **EXISTING DAMAGE EXCLUSION ENDORSEMENT**
>
> It is understood and agreed that this policy is not intended to and does not provide coverage for any damages which occurred prior to policy inception.
>
> It is also understood and agreed that this policy is not intended to and does not provide coverage for any claims or damages arising out of workmanship, repairs and/or lack of repairs arising from damage which occurred prior to policy inception.
>
> It is understood and agreed that this policy does not provide coverage for any stated amount until and unless all structures covered by your previous policy have been fully and completely repaired. Prior to the completion of such repairs, coverage will be limited to the greater of: 1) the actual cash value of the property at the time of a covered loss occurring during this policy period; or (2) the cost of repairing the property to the state at which it existed at the time of a covered loss, provided that such repairs have been made.
>
> **This endorsement applies to all coverage under this policy.**

[R. *,2021 Policy at SJ HO 120 12 03.]

On or about September 29, 2021, a claim was initiated under the Policy related to wind and hail damage alleged to have occurred on or about August 19, 2021. Senior claims associate Marsha Lillie was the adjuster assigned to oversee the investigation and assess coverage on behalf of St. Johns. [*See* R. *, Denial Ltr.]

Lillie engaged Davis Claim Services to assign an independent adjuster ("IA") to conduct the field investigation and prepare an estimate regarding the claimed damage. The Report and Estimate generated following the roof inspection on October 4, 2021, provided that the actual cause of loss was from a hailstorm, with hail hits on the East, South, and West slopes of the roof

and on the gutters and downspouts. [R. *, Davis Report & Repair Estimate at SCGA D0067-68]. Accompanying the report was an estimate for a total roof replacement, which included the following disclaimer:

> THIS IS A REPAIR ESTIMATE ONLY. THE ABOVE FIGURES ARE SUBJECT TO THE INSURANCE COMPANY REVIEW AND APPROVAL. THE INSURANACE POLICY MAY CONTAIN PROVISIONS THAT WILL REDUCE OR LIMIT ANY PAYMENT THAT MIGHT BE MADE. RECEIPT OF A COPY OF THIS ESTIMATE IS NOT TO BE INTERPRETED AS AN ACCEPTANCE OF LIABILITY, OR A SETTLEMENT OF THIS CLAIM. THIS ESTIMATE IS NOT AN AUTHORIZATION TO REPAIR. AUTHORIZATION TO REPAIR OR GUARANTEE OF PAYMENT MUST COME FROM THE OWNER OF THE PROPERTY. NO ADJUSTER OR APPRAISER HAS THE AUTHORITY TO AUTHORIZE OR GUARANTEE PAYMENT.

[*Id.* at SCGA D0070.] The Davis report and estimate do not include any assessment of the age of the hail damage. [*See id.*]

St. John's engaged Hagg Engineering ("Haag") to further evaluate the cause of loss because the weather database used by the adjuster did reflect any weather reports of hail in the area of the Property during the relevant time period. [*See* R. *, Emails re: Haag Retention.] Professional engineer Ryan Plancer was assigned. He ultimately prepared and provided a sealed report to St. Johns, referred to throughout this litigation as "the Haag report." [R. *, Haag Report.] As detailed therein, Plancer conducted an inspection on the property on November 16, 2021. [R. *, *id.* at p. 1.] Plancer spoke with Steinberg's roofing contractor, Will Robinson, who advised that "he did not know when hail had fallen at the site" and could not confirm August 19, 2021, as anything more than the date around which hail damage was first observed. [R. *, *id.* at p. 2.] Plancer reviewed hailstorm data from the period of January 1, 2025, to August 31, 2021, finding that multiple hailstorms were reported in York County during that time period. [R. *, *id.* at pp. 2-3] However, he determined "[t]he closest and most significant hailstorm occurred on June 24, 2015, when a hailstorm orienteered from the southeast and located less than 3 miles northeast of the

property passed through the area with maximum hailstones of 1.50 inches in diameter." [R. *, *id.*] The underlying weather data was attached to his report as Exhibit B. [R. *, *id.* at Exh. B.] Plancer provided the following conclusions:

> 1. Inspection revealed no remaining indications of a recent hailstorm as no spatter marks were visible on roof or building appurtenances.
> 2. Our inspection revealed that shingles facing southwest and shingles facing southeast were bruised by hail on the order of 3 bruises per 100 square feet. One ridge shingle was also bruised by hail. Accounting for total surface areas, an estimated 54 shingles on southeast facing slopes were bruised by hail and an estimated 78 shingles on southwest facing slopes were bruised by hail.
> 3. Hail-caused bruises were aged in appearance and weather records revealed that the most likely storm to cause the observed hail caused damage occurred in 2015.
> 4. Hail-damaged shingles can be replaced individually utilizing standard insert repair techniques.

[R. *, *id.* at pp. 5-6.]

On December 20, 2021, St. Johns denied the claim on the basis that the hail damage to the roof was pre-existing to the policy inception of August 10, 2020, such that the Policy did not provide coverage. [R. *, Denial Ltr.] The letter included a copy of the Haag report. [R. *, *id.*] Following receipt of additional communications from Steinberg and her roofer, the denial was reaffirmed. [R. *, 02-28-22 Email.]

After the initial denial, St. Johns was declared insolvent. [R. *, 03-15-22 Email.] Following the insolvency, Plaintiff timely renewed her claim with the South Carolina Property and Casualty Guaranty Insurance Association, which affirmed the prior denial. [R. *, SCGA Ltr.]

Coverage litigation ensued. Following two separate hearings, Steinberg's claims for bad faith and declaratory judgment were dismissed and the Guaranty succeeded on its cross-motion for summary judgment on the breach of contract claim.

ARGUMENT

Steinberg's claims all fail because St. Johns conducted a reasonable investigation, including obtaining an engineer's report, and properly determined that there was no coverage under the Policy because the hail event that caused the damage to Steinberg's roof most likely occurred outside the Policy period. Disgruntled by the trial court's decisions, Steinberg asserts that the Circuit Court Judge was "confused about the standard of review and his role," "did not meaningfully engage with the record," and "cut her off, preventing Plaintiff from fully presenting her oral objections." *See* Brief of App., at pp. 21, 23, 36 n. 22. On the contrary, the Record reflects the patience and diligence exercised by the Court in considering the procedural and substantive arguments presented by the cross-motions for summary judgment. Steinberg's arguments were saturated with speculation and misrepresentation, neither of which are sufficient to avoid summary judgment. Despite repeated prompting by the Court, Steinberg presented evidence only of other hail events—which were also acknowledged in the Haag engineering report—but was unable to present any admissible evidence that contradicted the engineer's opinion on the timing of the loss. Because of this, the trial court properly determined that there was no genuine dispute of material fact, and the Guaranty was entitled to judgment as a matter of law.

I. The Circuit Court Did Not Abuse Its Discretion By Considering Respondent's Supporting Memorandum And Exhibits Filed The Day Prior To The Motions Hearing, Including The Engineering Report Obtained During Adjustment Of The Claim.

Standard of Review

The Guaranty agrees that the appellate court reviews a lower court's rulings on evidentiary and procedural objections at the summary judgment stage under the same abuse of discretion standard that would be applied had the decision been made at trial. *See* App. Br., pp. 6-7; *Hofer v. St. Clair*, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989) ("[T]he admission of evidence is a matter

addressed to the sound discretion of the trial judge and absent clear abuse of discretion amounting to an error of law, the lower court's ruling will not be disturbed on appeal."); *Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55, 60, 488 S.E.2d 327, 329 (1997) (analyzing exclusion of untimely affidavit under abuse of discussion standard). "An abuse of discretion occurs when the trial court's rulings either lack evidentiary support or are controlled by an error of law." *Hamilton v. Reg'l Med. Ctr.*, 440 S.C. 605, 623, 891 S.E.2d 682, 692 (Ct. App. 2023).

Discussion

A. Timeliness of Memorandum and Supporting Materials

Steinberg argues that the Guaranty's memorandum in support of summary judgment and the exhibits thereto —none of which included an affidavit—were untimely filed. *See* Appellant's Brief, at Issue IV. However, Steinberg cannot point to any South Carolina Rule that required the filing to be made two days prior to the hearing and was unable to demonstrate any undue surprise or prejudice since she had been in possession of the Haag report for years prior to the hearing. Neither Rule 6(d) nor Rule 56(c) of the South Carolina Rules of Civil Procedure require that a supporting memorandum and its non-affidavit exhibits be filed ten (10) days prior to the hearing. Rather, by its plain language, Rule 6(d) requires only that a written motion, notice of the hearing, and supporting affidavit be served not later than ten days before the time specified for the hearing, unless a different period is fixed by these rules or by an order of the court. Rule 6(d), SCRCP ("A written motion… and notice of the hearing thereof, shall be served not later than ten days before the time specified for the hearing, unless a different period is fixed by these rules or by an order of the court…. When a motion is to be supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), additional or opposing affidavits may be served not later than two days before the hearing, unless the court permits them to be served at

some other time."). Rule 56 provides that a motion for summary judgment be filed ten days before the hearing and that an adverse party may serve opposing affidavits not later than two days before the hearing. *See* Rule 56(c), SCRP. Steinberg's brief admits these Rules "do not expressly prohibit the filing of a motion apart from the brief and supporting exhibits." *See* Appellant's Brief, at p 37.

Notably, the Civil Motions Pilot Program instituted by the South Carolina Supreme Court in September 2015 further illustrates the absence of any requirement in the South Carolina Rules that supporting authority be served with a written motion. *See* S.C. Sup. Ct. Order re: Civil Motions Pilot Program (filed Sept. 10, 2015). This program, which requires parties to file and serve supporting authority together with written motions, was piloted in the Third and Fifteenth Judicial Circuits only and never expanded. *Id.* If such contemporaneous filing were already required under the state court Rules, then this pilot program would have been obsolete. Similarly, the Greenville County Court of Common Pleas requires that any supporting memorandum be filed at least 72 hours prior to the hearing. *See* Greenville County: Court Support Memorandum Policies, available at https://www.greenvillecounty.org/courtsupport/MemPolicies.aspx. The York County Court of Common Pleas does not have any such requirement.

While the "the trial court *may* refuse to consider materials that were not timely served such that the opposing party had no time to prepare a response," this is not a requirement and would certainly not be proper where materials were not untimely served. *Black*, 327 S.C. at 60, 488 S.E.2d at 329 (emphasis added) (refusing to consider affidavit served three hours before hearing on the summary judgment and where no good excuse asserted for the failure to timely serve it). Other than *Black*, Steinberg's brief cites primarily to out of state case law and federal court orders, none of which are an application of the Rules applicable to the subject hearing.

The additional South Carolina cases cited by Steinberg are taken out of context by their selective quotation. For example, Steinberg cites the following from *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003), but purposefully omitted the word "discovery": "The gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party." *See* Appellant's Brief at p. 35. Steinberg also cites *Garrison v. Target Corporation*, 429 S.C. 325, 360, 838 S.E.2d 18, 37 (Ct. App. 2020), *reversed in part,* 435 S.C. 566, 869 S.E.2d 797 (2022), for its admonition that a defendant should not be permitted to ambush plaintiff with an unexpected defense. However, Steinberg failed to include the context, which was a discussion of the requirement to plead affirmative defenses. *See Garrison*, 429 S.C. at 360, 838 S.E.2d at 37. Here, all of the exhibits to the Guaranty's Memorandum were produced in discovery months before the hearing, and the Haag Report specifically was sent to Steinberg with the initial denial letter in December 2021. [*See* R. *, Denial Letter; R. *, 2025 Hr'g Tr. at p 11, line 8 – p. 12, line 22.] Thus, the present case is both procedurally and substantively distinguishable.

Steinberg further argues that to the extent the trial court was going to consider the Guaranty's filings, it was required to continue the hearing. *See* Appellant's Brief at p. 38. "It is axiomatic that an issue cannot be raised for the first time on appeal ...." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Notably, the Record does not contain any request by Steinberg that the March 12, 2025, hearing be continued. [R. *, 2025 Hr'g Tr.]. There was a break in the audio-visual recording following which Steinberg said "--necessitating continuances," but her continued argument made clear that she was requesting the Judge "decline to consider" the Guaranty's filing and not requesting a continuance. [R. *, *id.* at p. 9, line 13 – p. 10, line 17.] Moreover, there was no ruling by the trial judge on any request for continuance. [*See* R. *, *id.*]

Accordingly, Steinberg's argument that the trial court erred in failing to grant a continuance is not properly preserved. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the [circuit court]."); *Duncan v. CRS Sirrine Eng'rs, Inc.*, 337 S.C. 537, 543-44, 524 S.E.2d 115, 119 (Ct. App. 1999) (appellant's contentions were not preserved for appellate review when he failed to plead the issue, raise it to the circuit court, or argue it in a Rule 59(e), SCRCP, motion); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party *must* file [a Rule 59(e), SCRCP,] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review."); *Register v. Duke*, 302 S.C. 195, 197-98, 394 S.E.2d 718, 720 (Ct. App. 1990) (issue of whether the circuit court erred by refusing a continuance was not preserved when the issue was raised to but not ruled on by the circuit court and appellant made no Rule 59(e), SCRCP, motion).

Even had Steinberg requested a continuance, denial of the same would have been proper where there was no surprise or prejudice to Steinberg. Steinberg's claimed prejudice was that she "did not have an opportunity to file an evidentiary motion to fully brief the issue of the Haag report." [R. *, 2025 Hr'g Tr., p. 13, lines 4-7.] However, Steinberg was well aware of the Haag report, as demonstrated in the brief she filed ahead of the March 2025 hearing, in which she argued that the report was hearsay and not within the business records exception. [R. *, P.'s Opp. to Cross-Mot., at pp. 18-19, 26-27.] She reiterated these arguments at the hearing. [R. *, 2025 Hr'g Tr., p. 11, line 24 – p. 12, line 5; R. * at *id*., p. 15, lines 1-6.]

Accordingly, the trial court did not abuse his discretion when it declined to impose the harsh punishment advocated by Steinberg for violation of a requirement that simply does not exist under South Carolina's procedural rules.

B. Consideration of Haag Report

Steinberg argues that, even if the memorandum and exhibits were not untimely, the Haag engineering report relied upon in the adjustment and denial of her claim should not have been considered because it is hearsay and the Guaranty did produce an affidavit from the custodian of the report or the authoring engineer. *See* Appellant's Brief, at Issues I and IV. Notably, as with Steinberg's failure to request a continuance, Steinberg never argued that an affidavit was necessary to authenticate the Haag report.[3] Rather, Steinberg argued that the report was inadmissible because it does not fall within the business records exception and "was not procured to investigate the claim" but instead "solely to deny the claim with an eye toward litigation." [*See* R. *, 2025 Hr'g Tr., p. 11, line 4 – p. 13, line 7; p. 15, lines 1-6.] The Guaranty argued, and the Court agreed, that the Haag report was an admissible part of the claim file. [R. *, *id.* at p. 12, lines 8-19.]

The litany of cases cited by Steinberg discuss the admissibility of reports **at trial** when the expert does or does not offer live testimony or where the purported expert was not duly qualified. *See* App. Br., pp. 8-10. None of these cases stand for the proposition that an affidavit or live testimony must accompany or replace an expert's report at summary judgment. Rather, the law requires only that "materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence." *Hall v. Fedor*, 349 S.C. 169, 168, 561 S.E.2d 654, 657 (Ct. App. 2002). This does not equate to a requirement that every piece of evidence presented at the summary judgment stage be done in the same manner as for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) ("We do not mean that the nonmoving party must produce

[3] Had the authentication issue been raised, it is notable that the Haag report was signed by Plancer and stamped with his professional engineer seal and the seal of Haag Engineering. [*See* R. *, Haag Report.] "The seal and signature of a licensee certifies that the document was prepared by the licensee or his agent." S.C. Code § 40-22-270(9).

evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.").

The business records exception to the hearsay rule permits the admission of records of regularly conducted activity unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. *See* Rule 803(6), SCRE. Reports and documents prepared in the ordinary course of business, as opposed to for the primary purpose of litigating, are generally presumed to be reliable. *See Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 204 (4th Cir. 2000). In *Traum v. Equitable Life Assur. Soc'y of the U.S.*, the federal district court admitted a claim file as a business record. 240 F. Supp. 2d 776, 780-81 (N.D. Ill. 2002). The *Traum* Court explained:

> To the extent the [claim] file is cited to show what information was before defendants or that defendants took certain action as to the claim, it is certainly admissible because it is not being used to show the truth of the matter contained therein or because it is showing defendants' own conduct through their own business records. However, to the extent defendants rely on third party statements or documents to show the truth of the matters contained therein, such evidence is not admissible unless an additional basis for admission exists. One possibility is that the evidence would be admissible under another hearsay exception. Another possibility is that the third-party statement or document will have adequate sources of corroboration to deem it admissible.

Id. at 781 (internal citations omitted).

Steinberg's brief makes a misleading attack on the trustworthiness of the Haag report by inaccurately citing to *Underwriters at Lloyd's of London v. Tarantino Props.,* 2012 WL 3835385 (W.D.MI. Sept. 4, 2012), for the quotation: "Haag was hired despite State Auto's knowledge that

Haag had previously been involved in multiple cases in which they were found to have acted with bias in favor of Insurance companies." App. Br., p. 16. Respondent was able to locate the quoted language in another federal district court order. *State Auto. Mut. Ins. Co. v. Freehold Mgmt., Inc.*, 2019 WL 1436659, at *19 (N.D. Tex. Mar. 31, 2019). However, the language cited was not that of any analysis or ruling by the district court, but rather a portion of the report prepared by the insured's expert, Roger Grimm, in that matter. *See id.* The district court ultimately granted the motion to exclude Grimm for various reasons, including the lack of factual basis to support Grimm's opinion that Haag was biased.[4] *Id.* at *27.

Here, the Haag investigation was obtained during the course of the claim investigation to determine the timing of the hail damage, prior to any decision on coverage and any perceived threat of or actual litigation. Specifically, the Haag report was provided on or about December 10, 2021, claim denial letter was sent on December 20, 2021, the Guaranty affirmed the denial by letter on May 7, 2022, and the underlying Complaint was not filed until April 1, 2024. [R. *, Haag Report; R. *, Denial Ltr; R. *, SCGA Ltr.; R. *, Compl.]. Had the case not resolved at the summary judgment stage, the Haag report would have still been admissible at trial for establishing what was relied upon by the insurer in determining coverage. *See Waites v. S.C. Windstorm & Hail Underwriting Ass'n*, 279 S.C. 362, 365, 307 S.E.2d 223, 225 (1983) ("Where, regardless of the truth or the falsity of a statement, the fact that it has been made is relevant, the hearsay rule does not apply, but the statement may be shown."); *Traum*, *supra*. Further, the same opinions expressed in the Haag report could have be admitted through Plancer's live expert testimony at trial. *See Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155, 160, 345 S.E.2d 711, 714 (1986) (finding

[4] While Appellant is self-represented, it is worthy of noting that Ms. Steinberg is a South Carolina barred attorney familiar with how to review and cite case law and her responsibility for candor with the Court.

any error in failing to admit expert report at trial harmless where the author of the report testified as to its contents). Accordingly, the trial court did not err in considering the Hagg report.

II. Appellant's Breach Of Contract Claim Fails As A Matter Of Law Where The Evidence Demonstrated That The Hail Damage To Appellant's Roof Occurred Outside Any Relevant Policy Period.

Standard of Review

The Guaranty agrees that "Appellate courts apply the same standard of review applied by the trial court to review the grant of summary judgment pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure." *Williams v. Jeffcoat*, 444 S.C. 224, 233, 906 S.E.2d 588, 593 (2024). "[T]he 'mere scintilla' standard does not apply under Rule 56(c)."[5] *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023). Rather, "[s]ummary judgment is proper when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Williams*, 444 S.C. at 233, 906 S.E.2d at 593. "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Willis v. Wu,* 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004).

"However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). "Conjecture and speculation… does not create any genuine issue of material fact." *McKnight v. S.C. Dep't of Corr.*, 385 S.C. 380, 390, 684 S.E.2d 566, 571 (Ct. App. 2009). Further, "[a] plaintiff cannot create a genuine issue of material fact with the argument that the jury does not

[5] Steinberg argued the incorrect "scintilla of evidence" standard at the summary judgment hearing and was corrected by the Court. [R. *, 2025 Hr'g Tr. p. 23, lines 3-10.]

have to believe a witness." *Hoard ex rel. Hoard v. Roper Hosp., Inc.,* 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010).

Where the facts are undisputed and the Court is presented with a purely legal question of insurance coverage, the case is ripe for summary judgment. *OneBeacon Ins. Co. v. Metro Ready-Mix, Inc.*, 242 Fed.App. 936, 939 (4th Cir. 2007). Moreover, "[w]here cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). It indicates "the parties' belief that further development of the facts was unnecessary." *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 319 n.2, 731 S.E.2d 869, 872 n.2 (2012). Accordingly, both the lower court and this Court are authorized "to assume that there is no evidence which needs to be considered other than that which has been filed by the parties." *Id.* (quoting *Harrison W. Corp. v. Gulf Oil Co.*, 662 F.2d 690, 692 (10th Cir. 1981)).

Discussion

The Guaranty argued, and the trial court agreed, that there was no genuine dispute of material fact as to whether Steinberg's claim was covered under the Policy and the Guaranty was entitled to judgment as a matter of law because the only evidence reflects that Plaintiff's roof damage was old and occurred before inception of the Policy, which included a pre-existing damage exclusion. [R. *, Order on Summ. J., at p. 9.] The Court further rejected Steingberg's argument that the insurer was required to present evidence that, at the time of the original denial, the application of the policy exclusion "must be free from doubt." [*See* R. *, 2025 Hr'g Tr., p. 13, line 24 – p. 15, line 13; p. 21, line 22 – p. 22, line 3; p. 24, line 10 – p. 25, line p. 10; R. *, Order on Summ. J., at p. 8.]

As an initial matter, Steinberg argues that the Guaranty filed to sufficiently plead its policy exclusions under Rule 8, SCRCP. *See* App. Br., Issue V. The Guaranty's Answer denied the allegations of breach of contract asserted by Steinberg and included the following as its Eighteenth Defense: "Plaintiff's claims for losses or damages are, in whole or in part, limited or excluded under the Policy, the Act, or the Florida Insolvency Order dated February 25, 2022, for St. Johns which are incorporated herein in their entirety by this reference." [R. *, Answer.] The same policy provisions cited in the Guaranty's arguments before the Courts were cited in the claim denial letter sent to Steinberg, such that she was most certainly not surprised. [R. *, Denial Ltr.] Regardless, a policy exclusion is not one the affirmative defenses listed under Rule 8(c), SCRCP. "[A] denial based on scope of coverage is not a 'defense,' as a "defense" presupposes the insurer's existing obligation to provide coverage." *Gateway Residences at Exch., LLC v. Illinois Union Ins. Co.*, 917 F.3d 269, 274 (4th Cir. 2019). Moreover, "under South Carolina law, the doctrine of waiver cannot create insurance coverage where none existed." *Morton v. New York Life Ins. Co.*, 836 F.2d 547 (4th Cir. 1987); *Laidlaw Env't Servs. (TOC), Inc. v. Aetna Cas. & Sur. Co. of Illinois*, 338 S.C. 43, 53, 524 S.E.2d 847, 852 (Ct. App. 1999) ("Waiver cannot create coverage and cannot bring into existence something not covered in the policy.") (quoting *Alverson v. Minnesota Mut. Life Ins. Co.,* 287 S.C. 432, 434, 339 S.E.2d 140, 142 (Ct.App.1985)). Thus, Steinberg's procedural objection was and remains unfounded.

Turning to the merits of the breach of the contract claim, it is well established in South Carolina that insurance policies are subject to general rules of contract construction. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 514 S.E.2d 327, 330 (1999). "When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used." *Id.* The Court must enforce, not write, contracts of insurance and must give policy language its

plain and ordinary meaning. *Id.* An insurer's obligation under a policy of insurance is defined by the terms of the policy itself and cannot be enlarged by judicial construction. *S.C. Ins. Co. v. White*, 301 S.C. 133, 390 S.E.2d 471, 474 (Ct. App. 1990).

Insurers have the right to limit their liability provided they do not contravene a statutory provision or public policy. *Burns v. State Farm Mut. Auto Ins. Co.*, 297 S.C. 520, 377 S.E.2d 569 (1989). In South Carolina, "the initial burden to prove that a loss is covered under an insurance policy is on the insured, and once the insured has done so, the burden shifts to the insurer to prove that an exclusion applies to defeat coverage." *Ex parte Builders Mut. Ins. Co.*, 431 S.C. 93, 102, 847 S.E.2d 87, 92 (2020). If the insurance company meets it burden, then the burden shifts back to the insured to prove an exception to the exclusion applies in order to restore coverage. *See id.* (citing *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 642 n. 5, 594 S.E.2d 455, 460 n. 5. (2004)). The applicable burden on each issue is by a preponderance of the evidence. *See Rutledge v. St. Paul Fire & Marine Ins. Co.*, 286 S.C. 360, 372, 334 S.E.2d 131, 138 (Ct. App. 1985) ("In South Carolina, a party having the burden of an issue ordinarily must carry it by a preponderance of the evidence.").

Here, the Policy unquestionably contains two express provisions that limit coverage to damage that occurs during the Policy period and specifically exclude coverage for pre-existing damage. [*See* R. *, 2021 Policy at HO 00 03 10 00, p. 15 of 22; R. *, 2021 Policy at SJ HO 120 12 03.] For purposes of summary judgment, it can be accepted as true that Steinberg observed hail on the property in or around August 2021. The question—on which only the Guaranty produced any admissible evidence—was whether that storm or any other storm within the policy period was casually related to the observed hail damage.

As discussed *supra*, the insurer initially coordinated for an independent adjuster to evaluate and estimate the loss, resulting in "the Davis report," which documented hail damage but did not assess its timing. [R. *, Davis Report & Estimate.] The timing of the hail damage was questionable because the weather reports obtained by the adjuster as of October 8, 2021, did not show any hail at the insured premises during the policy period. Accordingly, the insurer retained Haag Engineering to evaluate the roof in more detail. [*See* R. *, Emails re: Haag Retention.] Haag engineer Ryan Plancer conducted an inspection and reviewed weather data, resulting in his determination that the hail damage most likely occurred in 2015.[6] [R. *, Haag Report at p. 5.] The Circuit Court readily identified that the scope and analysis of the two reports were not the same and did not create a dispute of material fact. [R. *, Order on Summ. J., at pp. 5-8.]

With her own Motion for Summary Judgment, Steinberg submitted an affidavit from herself, stating that she observed a roof replacement at a neighboring property on September 6, 2021, when she "recalled observing a pretty bad hail storm [sic] a few weeks earlier." [R. *, P's 2/10/25 Aff. at ¶2.] In addition to being replete with personal opinions, Steinberg's Affidavit contains hearsay regarding her communications with roofer Will Robinson, who she states inspected her roof and "found recent hail damage," and with the Davis adjuster who inspected the roof, who she alleges "told us that he found recent hail damage to the roof and gutters." [*Id.* at ¶¶

[6] Steinberg appears to misapprehend the Haag report as stating that there was no hail in the subject area since 2015. *See* App. Br., p.16 n. 8. That is not an accurate interpretation of the analysis and objective opinions expressed in the Haag report or the weather data attached thereto. [*See* R. *, Haag Report]. Additionally, Steinberg's Motion and appellate brief further contend that the Court should take judicial notice of facts regarding the reliability of weather data. App. Br., n. 2 & 7; [*see also* R. *, P's Mot. for Summ. J., at p. 2, n.1.] "A fact is not subject to judicial notice unless the fact is either of such common knowledge that it is accepted by the general public without qualification or contention, or its accuracy may be ascertained by reference to readily available sources of indisputable reliability." *Martin v. Bay*, 400 S.C. 140, 152, 732 S.E.2d 667, 674 (Ct. App. 2012). Further, Steinberg made no mention of a request for judicial notice at the 2025 hearing or via a Rule 59(e) motion.

3-4.] Steinberg also submitted emails from Susan Ryder of Carolina Storm Roofing—the company seeking a contract to repair or replace Steinberg's roof—to the St. Johns adjuster regarding the reasons she believed the damages was from a "'new' storm" and questioning the Haag report. [R. *, 12-18-21 Email.] No affidavit or other materials were produced to establish Davis, Robinson, or Ryder's qualifications to provide any opinions regarding the age of hail damage to Steinberg's property. Thus, the trial court did not consider the emails to be admissible evidence, and neither should this Court. [R. *, 2025 Hr'g Tr. at p. 23, line 11 – p. 24, line 13.]

Accordingly, the grant of summary judgment on the breach of contract claim should be affirmed. However, even if the Court were to find summary judgment for the Guaranty was error, the proper remedy would be remand for a trial and not a grant of summary judgment in favor of Steinberg.

III. Appellant's Bad Faith Claim Was Properly Dismissed Without Prejudice Where The Complaint Failed To Allege Any Facts To Support A Claim For Bad Faith Against The Guaranty, Which Is Not Statutorily Responsible For Extracontractual Damages Unless Awarded Against The Guaranty

Standard of Review

The Guaranty agrees that "[i]n reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Doe v. Marion,* 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." *Id.* "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper." *Id.* "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Id.*

Discussion

The second cause of action set forth in the Complaint was for "Breach of Covenant of Good Faith." [R. *, Compl., pp. 13-15, ¶¶55-60.] Specifically, the Complaint alleged the following:

> The insurer breached its duty of good faith when it (1) set out to deny the claim prior to properly investigating it, because it was insolvent and based on the size of Plaintiff's roof, (2) disregarded its own expert report that recommended approval of the claim, (3) shopped around for an expert who recommended the denial of the claim, (4) failed to articulate a valid reason for ordering another expert report other than the insurer's dissatisfaction with the first expert's conclusion that the hail damage was compensable, (5) failed to reconsider its denial in light of the additional evidence submitted by Plaintiff's expert that discredited the Haag report, relied on by the insurer to deny the claim, (6) never responded to any of Plaintiff's and her expert's arguments that challenged the Haag report, and (7) withheld the first expert report favorable to Plaintiff.

[R. *, Compl., p. 15, ¶59.] The alleged conduct giving rise to the bad faith claim specified in the Complaint were all actions or inactions attributable to St. Johns, not the Guaranty.

Created by the South Carolina Property and Casualty Insurance Association Guaranty Act ("the Act"), "the Guaranty is a nonprofit, unincorporated association, of which all property and casualty insurers conducting business in South Carolina are members." *Buchanan v. S.C. Prop. & Cas. Ins. Guar. Ass'n*, 424 S.C. 542, 546, 819 S.E.2d 124, 126 (2018); S.C. Code Ann. §§ 38-31-40 and -60. "The Guaranty's 'purpose is to provide some protection to insureds whose insurance companies become insolvent.'" *Id.* (quoting *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Carolinas Roofing & Sheet Metal Contractors Self-Ins. Fund*, 315 S.C. 555, 557, 446 S.E.2d 422, 424 (1994)); *Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 124, 754 S.E.2d 486, 492 (2014) ("Guaranty is a last resort insurer created by the legislature to protect consumers in the event that their insurer becomes insolvent."). Pursuant to the Act, when the Guaranty steps into the shoes of an insolvent insurer, "its liability is derivative of the insolvent insurance company's direct liability to the consumer." *Hudson*, 407 S.C. at 124, 754 S.E.2d at 492. "The

legislature has limited this liability to a 'covered claim' which is defined by § 38-31-20(8) as '... an unpaid claim ... which arises out of ... an insurance policy to which this chapter applies issued by an insurer, if the insurer is an insolvent insurer.'" *Id.* "'Covered claim' does not include: (a) any amount awarded as extra-contractual damages unless awarded against the association, …." S.C. Code § 38-31-20(8)(a).

Accordingly, the Guaranty filed a Motion to Dismiss in Part pursuant to Rule 12(b)(6), SCRCP. [R. *, Mot. to Dismiss in Part.] The lower court agreed that "[t]aking the facts and pleadings of the Complaint in the light most favorable to the Plaintiff, all of the actions upon which Plaintiff relies for her bad faith claim were actions or inactions attributable to St. Johns." [*See* R. *, Order Granting Partial Dismissal at p. 2.] "Bad Faith is an extracontractual, punitive claim for damages outside of the statutory liability of the SCGA because the pleadings relate to the actions/inactions of the insolvent insurer and would not be encompassed in a 'covered claim.'" [*Id.* at pp. 2-3.] Because the legislative intent of the creation of SCGA was "not to pay for the bad actions" of insolvent carriers, Plaintiff's claims for breach of good faith and improper claims practices as espoused in 'Count Two' of the Complaint are invalid in this context." [*Id.* at p. 3.]

In her written opposition and at the hearing on September 11, 2024, Steinberg spent much of her time attempting to distinguish the claim she asserted from a claim for bad faith. [*See* R* 2024 Hr'g Tr. p. 11, line 7 – p. 14, line 10; *see also* R. *, Pl.s' Opp. to Mot. to Dismiss.] Our Supreme Court recently "clarif[ied] what was already clear: the only claims available to the insured under an insurance contract are contract and bad faith claims." *Hood v. United Servs. Auto Ass'n*, 445 S.C. 1, 12, 910 S.E.2d 767, 773 (2025). Accordingly, Steinberg seems to have abandoned this effort on appeal.

Nonetheless, Steinberg still appears to misapprehend the defect in the Complaint and the scope of the ruling below. *See* App. Br., pp. 43-46. Her lengthy discussion of statutory construction is not relevant to any issue actually before the trial court. Assuming *arguendo* that Steinburg *could* assert a direct claim against the Guaranty for bad faith arising from the Guaranty's own action, the fact remains that she failed to do so in her Complaint. This is why the trial court properly granted the Motion to Dismiss her bad faith claim.

Steinberg states that to the extent the facts were not sufficiently pled in the Complaint, the court… had to give [her] and opportunity to amend before it entered partial dismissal." App. Br., p. 46. "Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004). While Steinberg made cursory reference to this in the conclusion of her filed Responses, she failed to raise this at the hearing or raise the issue in any Rule 59(e) motion. [*See* R. *, P's Response in Opp. to Motion to Dismiss; R. *, P's Supp. Brief in Opp. to Motion; R. * 2024 Hrg. Tr. at pp. 11-15.] Moreover, Steinberg's reliance on *Skydive Myrtle Beach v. Horry Cnty* is misplaced, as reversal was only necessary in *Skydive* because the lower court's order improperly provided for dismissal "with prejudice." 426 S.C. 175, 189, 826 S.E.2d 585, 592 (2019) ("A circuit court does not have 'discretion' to dismiss a complaint **with prejudice** for failure to state a claim under Rule 12(b)(6) without at least considering whether to allow leave to amend under Rule 15(a)[, SCRCP]. Under Rules 12(b)(6) and 15(a), the circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and **after considering the amended pleading**, the court is certain there is no set of facts upon which relief can be granted." (emphasis added)).

"Ordinarily,… the time for requesting leave to amend to correct a Rule 12(b)(6) pleading defect is after the trial court has determined the original pleading was deficient." *Skydive*, 426 S.C. at 181, 826 S.E.2d at 588. "When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice." *Spence v. Spence*, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006). Here, the Order did not use any "with prejudice" language. [*See* R. *, Order on Summ. J.] Thus, nothing prevented Steinberg from filing a Motion for Leave to Amend and proposed Amended Complaint asserting a direct claim against the Guaranty, the sufficiency of which could have been evaluated by the court in adjudicating a Rule 15, SCRCP, motion. She simply failed to do so.

In sum, the issue before the lower court was whether the bad faith claim raised in the Complaint stated facts sufficient to constitute a cause of action for bad faith against the Guaranty. It did not. Whether Appellant could have articulated a direct claim for extracontractual damages against the Guaranty is irrelevant and hypothetical because she never attempted to do it. Accordingly, the trial court's dismissal of the bad faith claim of the Complaint should be affirmed.

IV. The Trial Court Properly Dismissed Appellant's Declaratory Judgment Claim Where the Requested Declarations Were Not Related To The Subject Insurance Policy.

The South Carolina Uniform Declaratory Judgment Act ("the SCDJA"), S.C. Code Ann. § 15-53-10 *et seq.* is designed as a vehicle for courts to determine the "rights, status, and legal relations" between parties pursuant to, *inter alia,* a contract. Here, in the insurance context, it is an action to seek declarations of the obligations, if any, that parties have under a policy of insurance. The requested declarations set forth in Steinberg's Complaint are summarized as follows:

1. That the Guaranty is liable for the insolvent insurer's breach of the covenant of good faith in handling a claim as a "covered claim." (¶ 63);

2. That St. Johns acted in bad faith when it denied the claim (¶ 64);

3. That an aggravation theory of liability applies in full force to property insurance and neither the age of the property nor its preexisting condition isolates the insurer from liability as long as an aggravation is shown similar to those in worker's compensation cases (¶ 65);

4. That insurers assume liability for damages that exist prior to a policy's inception by extending coverage without conducting any pre-coverage inspection and are estopped from denying a claim based on the preexisting conditions policy exception unless the preexisting nature of the damage is proven by clear and convincing evidence (¶ 66);

5. That insurers must resolve conflicting evidence as to the preexisting nature of the property damage in Plaintiff's favor where there was no pre-coverage inspection to determine and document the preexisting condition of the property (¶ 67).

[R. *, Compl., pp. 15-16.]

As a threshold issue, a Declaratory Judgment action is narrowly defined by statute and is not intended to address these types of issues. The Plaintiff's plea for declarations pertain—not to obligations under the subject contract—but for advisory opinions by the Court. This use of the SCDJA is improper and has been rejected by South Carolina Courts. *See Orr v. Clyburn*, 277 S.C. 536, 542, 290 S.E.2d 804, 807 (1982) (the Declaratory Judgment Act is not properly invoked for an advisory opinion to be put on ice by the plaintiff for use and it is not a license to fish in the judicial pond for legal advice) (citing *City of Columbia v. Sanders*, 231 S.C. 61, 68, 97 S.E.2d 210, 213 (1957)). Pursuant to the SCDJA, the court may refuse a request for declaratory judgment or a decree that, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. S.C. Code Ann. §15-53-70.

Here, none of Steinberg's requested declarations are proper. As discussed *supra* in Part III, the absence of the Guaranty's liability for the bad faith of the insolvent insurer is expressly controlled by statute and does not need declaration. S.C. Code § 38-31-20(8)(a) ("'Covered claim' does not include: (a) any amount awarded as extra-contractual damages unless awarded against

the association, ….”). Given the insolvency of St. Johns, any declarations regarding their prior bad faith would not have any effect on the actual dispute between the parties.

Steinberg further seeks a declaration that South Carolina insurance contracts *throughout the state* should be rewritten to include aggravation damages via a formula used in the Worker’s Compensation context. This argument lacks any authority or even factual foundation to the present case, which does not involve bodily injury. Similarly, with respect to Steinberg’s varied requests for declarations that an insurer be required to conduct a pre-coverage inspection and limit their defenses where none is completed, there is no South Carolina case law or statute that would establish any legal duty for an insurer to inspect a risk before issuing a policy. *See generally Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465, 471, 377 S.E.2d 343, 347 (Ct. App. 1988) (“Generally, an insurer and its agents owe no duty to advise an insured.”); *Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 12, 620 S.E.2d 326, 329 (2005) (“[A]s a general rule, an insurance agent has no duty to advise an insured at the point of application, absent an express or implied undertaking to do so.”); *see also City of Amsterdam v. Lam*, 270 A.D.2d 603, 605, 703 N.Y.S.2d 606, 609 (3d Dep’t 2000) (“[A]n insurer does not have a duty to inspect the premises before issuing a policy[.]”) (collecting cases).

Not only do these unfounded requests run afoul the basic tenets of well-established South Carolina insurance law, they would not terminate the controversy as to the Guaranty and the trial court properly refused entertain these requested declarations. Accordingly, the trial court’s dismissal of the declaratory judgment claim of the Complaint should be affirmed.

CONCLUSION

Based on the foregoing, Respondent South Carolina Property and Casualty Insurance Guaranty Association respectfully requests that the Circuit Court be affirmed.

Respectfully submitted,

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November 11, 2025

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CERTIFICATE OF SERVICE
(Appellate Case No. 2025-000860)

I, the undersigned, attorney for Respondent, do hereby certify that I have on this date, November 11, 2025, served the foregoing **Initial Brief of Respondent** upon all parties by electronic mail, addressed to the following:

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