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**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

William A. McKinnon, Circuit Court Judge

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Appellate Case No. 2025-000860

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Ina Shtukar Steinberg,

Appellant,

v.

SC Property and Casualty Insurance  
Guaranty Association, as a successor in  
interest to St. Johns Insurance, insolvent  
insurer,

Respondent.

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**APPELLANT'S FINAL BRIEF**

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December 25, 2025

s/ Ina S. Steinberg  
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## STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court rely on inadmissible evidence in granting Defendant's motion for summary judgment?
- II. Did the trial court misapply the summary judgment standard of review, failing to consider crucial evidence and to view the evidence it did consider in the light most favorable to Plaintiff in ruling on Defendant's motion, and resolve a key dispute of material fact, finding that the damage to Plaintiff's roof was "old hail"?
- III. Did the trial court err substantively, when it placed the entire burden of proof onto Plaintiff, because the claim was denied based solely on a policy exclusion, which flipped the burden of proof, and found that Plaintiff failed to make a *prima facie* showing of coverage?
- IV. Did the trial court abuse its discretion when it turned a blind eye to Defendant's procedural gamesmanship and rejected Plaintiff's timeliness objection to Defendant's intentionally delayed summary judgment materials?
- V. Did the trial court err when it rejected Plaintiff's argument that Defendant failed to sufficiently plead its policy exclusions?
- VI. Did the trial court err when it partially dismissed Plaintiff's Complaint, to the extent S.C. Code Ann. §38-31-20 expressly allows recovery of extra-contractual damages awarded against Defendant and a justiciable controversy existed between the parties?

## STATEMENT OF THE CASE

The facts of this case are largely undisputed, however, as will be explained below, the parties disagree about the inferences to be drawn from the facts, and the trial court improperly accepted Defendant's version of events while ruling on Defendant's motion. *See e.g., Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979) (the nonmoving party is entitled to have the "[her] version of all that is in dispute accepted, [and] all internal conflicts in it resolved favorably to [her]"). The record before the Court shows that on or about August 10, 2020, Plaintiff purchased home insurance from St. Johns (Policy No SC31019957). R. pp. 176-179. Plaintiff subsequently renewed the policy on August 10, 2021<sup>1</sup>. R. pp. 180, 368. On or

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<sup>1</sup> At the hearing, Defendant asserted that "[t]he first notice of this hail claim was nine days after

about September 6, 2021, Plaintiff observed a roof replacement at a neighboring property, located in the same cul-de-sac, which was performed by Carolina Storm Roofing Company (“CS Roofing”). R. pp. 176-179. She recalled observing a hail storm a few weeks earlier on or about August 19, 2021. *Id.* Plaintiff contacted CS Roofing and Will Robinson (“Will”), who was a project manager on the neighbor’s property, inspected the roof on or about September 13, 2021, and found recent hail damage to Plaintiff’s roof and gutters. *Id.* Will offered to assist with placing a claim and provided Susan Ryder’s phone number, who subsequently placed the claim. *Id.* Upon receiving the claim, the insurer assigned the claim to Davis Claim Services to investigate it. *Id.* After inspecting the roof on October 4, 2021, the adjuster issued a thorough report, recommending the approval of the claim and a full roof replacement. R. pp. 189-267. Despite the adjuster’s findings, supported by photographic evidence, and the claims director’s warning that “with our IA stating that some of the damage was from hail and recommending roof replacement, it would be a problem if the engineer comes in later with a different opinion,” the insurer ordered a reinspection by Haag, solely because StormIntel Verify Jail History Report, which was only one of many storm reports available, showed “No Data” for the date of loss, August 19, 2021. R. pp. 266-268. The insurer, however, knew or should have known that weather reports<sup>2</sup> are not entirely reliable, as reflected by the report’s own conspicuously made disclaimer that “No Data” meant only that the company “*could not verify* hail of at least 0.75 inch in diameter at the property address during the requested search period,” not that it did not

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the policy went into effect,” which is factually incorrect, as the policy inception took place in 2020 and the claim was made in 2021.

<sup>2</sup> Plaintiff respectfully asks the Court to take judicial notice, pursuant to Rule 201, SCRE, that according to Haag itself, there are many different storm reports databases and that “[i]t is important to remember that these databases are not fully quality-controlled, so while these reports are mappable and publicly available, the lack of a quality control process means that they could be prone to errors.” The Haag publication can be accessed using this link: <https://haagglobal.com/featured-post/storm-reports-part-2-how-do-we-use-them-september-2024/>

hail. R. p. 268 (emphasis added). The insurer subsequently denied the claim, when, as the claims director predicted, Haag issued a report that contradicted the adjuster's report, finding that the damage to the roof was "old hail" and recommending individual shingles replacement, which the investigating adjuster expressly rejected in light of the age of the roof. R. pp. 189-265, 269-271. While at the time of the denial, the insurer had two conflicting reports, it denied coverage solely based on the second report, without even mentioning the first report and without making any effort to resolve the two conflicting opinions. *Id.* Moreover, while the insurer's first report documented many *dark* in color hail bruises as well as hail splatter on the soft metal and the gutters, the insurer completely disregarded this evidence, and asserted that the hail bruises were all *faded* and that there was no visible hail splatter. *Id.* The insurer handled the claim as if the first report and the evidence it contained did not exist. *Id.* In addition to disregarding the first report, the insurer also disregarded additional materials submitted by Plaintiff's contractor, including a Benchmark Hail Report, which documented hail on August 19, 2021, at Plaintiff's location, the fact that the contractor replaced three roofs based on the approved claims with the same date of loss, which contradicted the insurer's determination that it did not hail on the date in question. R. pp. 272-277. Instead of addressing any of the conflicting evidence and the issues raised by Plaintiff and her contractor, the insurer summarily reaffirmed its denial without refuting any of the concerns, referencing the insurer's insolvency, which indeed explained the insurer's stubborn refusal to approve the claim, since it no longer cared about keeping Plaintiff as an insured. R. pp. 278-280. When Plaintiff renewed the claim with Defendant, it rubber stamped the insurer's denial, parroting its reasoning. R. p. 281. Both the insurer and Defendant did not disclose the first report's findings and recommendations and ignored Plaintiff's request to obtain a copy of the investigating adjuster's report. *Id.*; R. pp. 176-179.

After Plaintiff had timely submitted a Proof of Claim to the Division of Rehabilitation and Liquidation of the Florida Department of Financial Services, pursuant to with S.C. Code Ann. §38-31-60(2), she filed a Complaint for breach of contract, breach of covenant of good faith, and declaratory judgment on April 1, 2024. R. pp. 291-320. The court subsequently dismissed the declaratory judgment and breach of covenant of good faith counts on October 21, 2024. R. pp. 1-5, 48-62, 90-97, 126-147. Plaintiff filed a motion for summary judgment on February 10, 2025, supported by 11 Exhibits and her affidavit. R. pp. 98-113, 176-281. The matter was subsequently continued per Defendant's motion and set for hearing on March 12, 2025. R. p. 6. On March 3, 2025, despite having extra time to respond, Defendant submitted a filing titled "Notice of Motion and Motion for Summary Judgment," which did not address any of Plaintiff's arguments and evidentiary objections to the Haag Report. R. pp. 114-117. This filing was not supported by any exhibits. *Id.* On March 6, 2025, Plaintiff filed a timely response to Defendant's motion supported by seven (7) Exhibits and another Affidavit, addressing Defendant's half-backed arguments and raising a procedural objection to Defendant's gamesmanship in delaying the filing of the actual motion. R. pp. 148-175, 282-322. On March 11, 2025, 18 hours before the hearing, Defendant made another filing titled "Cross Motion for Summary Judgment," which was supported by four (4) exhibits, including the Haag report<sup>3</sup>. R. pp. 118-125, 323-431. D's MSJ; T at 4. On March 12, 2025, the court orally granted Defendant's motion overruling Plaintiff's procedural and evidentiary objections. R. pp. 63-89. A written order was entered on April 4, 2025. R. p. 8. Ironically, on April 10, 2025, the clerk of court docketed the matter for a hearing on Defendant's March 11 motion, which the court has heard on March 12, 2025. R. pp. 432-439. Plaintiff timely noticed her appeal on May 1, 2025.

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<sup>3</sup> Defense counsel also contemporaneously emailed a copy of the filing to the court. This filing likewise failed to address Plaintiff's evidentiary objections to the Haag report.

## STANDARD OF REVIEW

### *i. Summary Judgment*

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). Our Court of Appeals has adopted the framework set out by the Supreme Court in *Celotex* for cases where the nonmoving party bears the burden of proof and persuasion as to the claim subject to a motion for summary judgment:

“Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). “With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility may be discharged by ‘showing’--that is, pointing out to the [trial] court--that there is an absence of evidence to support the nonmoving party’s case.” *Id.* (alteration in original) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548 (1986)) (internal quotation marks omitted). “The moving party need not ‘support its motion with affidavits or other similar materials negating the opponent's claim.’” *Id.* (quoting *Celotex*, 477 U.S. at 323); see also *Richardson v. State-Record Co.*, 330 S.C. 562, 499 S.E.2d 822 (Ct. App. 1998). Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial. *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545.

*Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004).

### *ii. 12(b)(6) Motion to Dismiss*

“On appeal from the dismissal of a case pursuant to Rule 12(b)(6) SCRPC, an appellate court applies the same standard of review as the [circuit] court.” See *Rydde v. Morris*, 381 S.C.

643, 646, 675 S.E.2d 431, 433 (2009); *id.* (“That standard requires the [c]ourt to construe the complaint in a light most favorable to the nonmovant and determine if the ‘facts alleged and the inferences reasonably deducible from the pleadings would entitle the [appellant] to relief on any theory of the case.’”). Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below. *Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 411 S.C. 557, 560, 769 S.E.2d 847, 848 (2015) (quoting *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012)).

**iii. Rulings on evidentiary and procedural objections**

“The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion.” *Allegro, Inc. v. Scully*, 400 S.C. 33, 44, 733 S.E.2d 114, 120 (Ct. App. 2012) (quoting *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 57-58 (2011)). Abuse of discretion as a decision “based on an error of law, or, when grounded in factual conclusions, [a decision] without evidentiary support.” *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (internal citation omitted). To warrant reversal based on the admission of evidence, the appealing party must also show prejudice. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008). Prejudice ensues when it is likely the challenged evidence influenced the outcome of the case. *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). In similar vein, rulings on procedural objections will not be disturbed absent a showing of abuse of discretion that prejudiced a party. *See e.g., Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55, 60, 488 S.E.2d 327, 329 (1997) (“[T]he trial court may refuse to consider materials that were not timely served such that the opposing party had no time to prepare a response.”); *Spreeuw v. Barker*, 385 S.C. 45, 68-

69, 682 S.E.2d 843, 855 (Ct. App. 2009).

## ARGUMENTS

***I. The summary judgment cannot stand because the trial court relied on inadmissible evidence to rule in Defendant's favor on its motion for summary judgment.***

The record shows that Plaintiff repeatedly objected to the introduction of the Haag report as inadmissible hearsay, both in her filings and at the time of the hearing. R. pp. 75, 77, 84, 100-101 (footnote 2), 172-174. Even though Defendant failed to even mention Plaintiff's conspicuously made evidentiary objection in its summary judgment briefing and made only a conclusory argument at the time of the hearing, unsupported by either evidence or authority, that the Haag report was admissible because Plaintiff knew about its existence and it was produced in discovery, the trial court orally overruled Plaintiff's objection because "the defendant was relying on [] an expert report that's many years old" and subsequently signed an order that stated that "the Haag Engineering Report is admissible and does meet the business records exception to the Hearsay Rule," which was the extent of the court's analysis. R. pp. 10, 72 ¶¶ 20-22, 73 ¶¶ 22-23. Because the court's conclusion is not supported by any evidence in the record and because it is based on the error of law, the court's reliance on the Haag report was arbitrary or capricious, particularly given its lack of explanation<sup>4</sup> in overruling Plaintiff's hearsay objection.

"Our appellate courts have interpreted Rule 56(e) to mean 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, 175, 561 S.E.2d 654, 657 (Ct. App. 2002). *See Baughman.*, 306 S.C. at 410; *Moon v. Jordan*, 301 S.C. 161, 390 S.E.2d 488 (Ct. App. 1990); *Moss v. Porter Bros., Inc.*, 292 S.C. 444, 357 S.E.2d 25 (Ct. App. 1987); *see also Hansen v. DHL Labs., Inc.*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (Ct. App. 1994), *aff'd*, 319 S.C. 79, 459 S.E.2d 850 (1995) ("A genuine

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<sup>4</sup> The age of the report has no bearing on whether it is hearsay.

issue of fact ... can be created only by evidence which would be admissible at trial.”) (citing, *inter alia*, Rule 56(e), SCRCPP). *See also Md. Highways Contractors Ass’n v. Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991) (“[H]earsay evidence, which is inadmissible at trial, cannot be considered on a motion for summary judgment.”). “Hearsay,” in its simplest terms, is an out-of-court statement offered for the truth of the matter asserted. SCRE 801(c). As a general rule, hearsay is not admissible. SCRE 802. Expert reports are generally inadmissible hearsay. *Scully*, 409 S.C. at 411, 762 S.E.2d at 64 (reversed on other grounds) (“Here, McHenry was allowed to rely on hearsay in his report when giving his expert opinion. However, the admission of the report itself simply because McHenry used it in forming his expert opinion was in error.”); *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 410-411, 764 S.E.2d 249, 252 (Ct. App. 2014). *See also, Tokio Marine & Fire Ins. Co. v. Norfolk & W. Ry*, 1999 U.S. App. LEXIS 476, \*10 (4th Cir 1999) (“Even if Clark were qualified as an expert, the report was inadmissible hearsay. Reports stating an expert opinion are not admissible without the preparer being present in court to testify as to his qualifications as an expert and to be cross-examined on the substance.”) (citing *Forward Communications Corp. v. United States*, 221 Ct. Cl. 582, 608 F.2d 485, 511 (Ct. Cl. 1979)); *Reckley v. Cmty. Nursing, Inc.*, 2021 U.S. Dist. LEXIS 163976, \*3-4, 2021 WL 3861270 (D.MT. August 30, 2021) (“Expert reports are generally inadmissible hearsay.”); *Page v. Va. State Bd. of Elections*, No. 3:13-cv-678, 2015 U.S. Dist. LEXIS 73514, 2015 WL 3604029, at \*30 n.42 (E.D.VA. June 5, 2015) (noting that that “expert reports are hearsay and hence not admissible usually”); *David v. Summit Cmty. Bank*, 2023 U.S. Dist. LEXIS 153782, \*28, 2023 WL 5615983 (E.D.VA. August 30, 2023) (“The expert report is hearsay outside the delineated exceptions,” and its admission is “arbitrary or capricious [] particularly given its lack of explanation in overruling David’s hearsay objection”); *Escobar v.*

*Airbus Helicopters SAS*, 2016 U.S. Dist. LEXIS 137957, 2016 WL 6024441, at \*1 (D. Haw. Oct. 4, 2016) (citing *Hunt v. City of Portland*, 599 Fed. Appx. 620, 621 (9th Cir. 2013) (concluding that expert report was inadmissible hearsay)). Application of the hearsay rule to “expert reports is quite straightforward[–][t]he reports are out-of-court statements by witnesses offered for their truth and so fall within the definition of hearsay.” *Alexie v. United States*, 2009 U.S. Dist. LEXIS 4103, 2009 WL 160354, at \*1 (D. Alaska Jan. 21, 2009). The same holds true here, to the extent the Haag report was an out-of-court statement offered by Defendant for the truth of the matter asserted—that damage to Plaintiff’s roof was old hail—which means that it is not admissible unless an exception to the hearsay rule applies. The record shows that Defendant failed to not only identify an applicable hearsay exception or argue that the report has any non-hearsay purpose in its summary judgment briefing or at the hearing, but it also failed to refute Plaintiff’s evidentiary arguments supported by authority, asserted in Plaintiff’s motion for summary judgment filed before Defendant even moved for summary judgment. R. pp. 100-101 (footnote 2), 114-125, 172-174. Nonetheless, the court stated in its order that the Haag report was a “business record,” even though the burden<sup>5</sup> was on Defendant to *show* that an exception applied. *See State v. Simmons*, 423 S.C. 552, 563, 816 S.E.2d 566, 572 (2018) (“After an objection is raised, the proponent of hearsay testimony has the burden of showing it fits appropriately within a hearsay exception.”). The fallacy of the court’s conclusion is obvious, to the extent Defendant utterly failed to carry its burden in addressing Plaintiff’s objection. R. p. 74 ¶¶ 8-22. *See MYR Equip., LLC v. Plant Site Logistics, Inc.*, 2022 U.S. Dist. LEXIS 7493, \*7-8, 2022 WL 137974 (D.MT. August 30, 2021) (“MYR has not identified an applicable hearsay exception or argued that the report has any non-hearsay purpose. Therefore, the report is inadmissible at trial.”); *Cf. Wilson v.*

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<sup>5</sup> As will be explained below, the court placed all relevant burdens onto Plaintiff’s shoulders without any hesitation.

*Wexford Health Sources, Inc.*, 932 F.3d 513, 522 (7th Cir. 2019) (finding no abuse of discretion where district court excluded expert reports as inadmissible hearsay); *Dean v. Wexford Health Sources, Inc.*, 18 F.3d 214, 232-33 (7th Cir. 2021) (finding that district court abused its discretion in admitting expert report that had no non-hearsay purpose). Moreover, even if Defendant were to properly invoke the business record exception, Defendant is not in the business of preparing engineering expert reports—it is in the business of insurance—and it is well settled that defense counsel’s conclusory advocacy uttered for the first time at the hearing is *not evidence*.

As an initial matter, Defendant failed to either refute Plaintiff’s hearsay objection or properly assert a hearsay exception, waiving the issues on appeal:

This court has held that before the trial court may admit a business record into evidence, a qualified witness must “lay the foundation to meet the requirements of Rule 803(6) and section 19-5-510.” *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 73, 773 S.E.2d 607, 615 (Ct. App. 2015). *Black’s Law Dictionary* defines “laying a foundation” as “[i]ntroducing evidence of certain facts needed to render later evidence relevant, material, or competent.” *Laying a Foundation, Black’s Law Dictionary* (10th ed. 2014). “[F]oundation’ is simply a loose term for preliminary questions designed to establish that evidence is admissible.” *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001)). Our court has noted “[t]he Uniform Business Records as Evidence Act . . . contains prerequisites to admission of the record.” *State v. Sarvis*, 317 S.C. 102, 107, 450 S.E.2d 606, 609 (Ct. App. 1994). In *Sarvis*, this court did not admit into evidence one page of a document because the custodian of the records testified she had no knowledge of the “program [referenced on that page of the document] and no further foundation was presented to establish the manner in which the records were prepared.” *Id.* This court concluded “[t]he requirements of the statute were not satisfied[;] therefore[,] the document was properly excluded.” *Id.*

*State v. Meador*, 425 S.C. 625, 642 (Ct. App. 2018). The record shows that no foundation was laid—defense counsel’s entire argument was limited to an unsupported conclusory declaration that the Haag report was admissible simply because it was “part of the claims file.” R. p. 74 ¶¶ 8-

22. But defense counsel is not a “custodian,” nor was her conclusory argument supported by an affidavit of a custodian, as the rule clearly requires. *Id.* SCRE 803(6). Defendant’s failure to take any necessary steps to admit the Haag report into evidence is particularly egregious in the face of Plaintiff’s vocal protestation and conspicuously made arguments asserted *before* Defendant moved for summary judgment, giving Defendant ample opportunity to both counter Plaintiff’s objection and properly assert a hearsay exception as it had a duty to do. *Simmons*, 423 S.C. at 563, 816 S.E.2d at 572. *E.g.*, *Cady v. Ride-Away Handicap Equipment Corp.*, 702 Fed. App’x 120, 124 (4th Cir. 2017); *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001). Because Defendant’s oral business record argument was entirely conclusory and unsupported by *any* authority or record citations, Defendant both conceded Plaintiff’s points and abandoned the issue on appeal. *See e.g.*, *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (“South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.”); *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) (“An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.”); *State v. Colf*, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (1998) (finding a conclusory, two-paragraph argument that cited no authority other than an evidentiary rule was abandoned); *R & G Constr., Inc. v. Lowcountry Reg’l Transp. Auth.*, 343 S.C. 424, 437 (Ct. App. 2000) (same); *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 (Ct. App. 2023) (same); *Solomon v. City Realty Co.*, 262 S.C. 198, 203 S.E.2d 435 (1974) (same).

*See also W. Va. Coal Workers' Pneumoconiosis Fund v. Bell*, 781 Fed. Appx. 214, 226 (4th Cir. 2019) (“In my view, our opinion in Alvarez got things right: an appellee’s wholesale failure to respond to a conspicuous, nonfrivolous argument in the appellant’s brief ordinarily constitutes a forfeiture.”); *Eady v. Veolia Transp. Services, Inc.*, 609 F. Supp. 2d 540, 560-561 (D.S.C. 2009) (“The failure of a party to address an issue raised in summary judgment may be considered a waiver or abandonment of the relevant cause of action.”). In short, Defendant failed to properly raise a hearsay exception at the trial court level, which in addition to making the court’s reliance on the report plainly arbitrary, operated as a waiver for failure to preserve the issue for review.

However, even if the argument were preserved, the business-records exception would still fail substantively. The Rules of Evidence contain exceptions to the rule against hearsay. SCRE 803, 804. A business record exception is one such exception. SCRE 803(6). According to the business records exception to the rule against hearsay, evidence is not excluded if it is:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and *if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.*

SCRE 803(6) (emphasis added); S.C. Code Ann. §19-5-510 (2014) (“A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.”). *See Coates v. Johnson & Johnson*, 756 F.2d 524, 549 (7th Cir. 1985); *United*

*States v. Chappell*, 698 F.2d 308, 311 (7th Cir. 1983). None of the requirements are met here<sup>6</sup>. First, Defendant, the Guaranty Association proceeding on behalf of a bankrupt insurer, is not in the business of preparing expert engineering reports. *See e.g., United States v. Blackburn*, 992 F.2d 666, 670 (7th Cir. 1993) (“Clearly, the report in this case was not kept in the course of a regularly conducted business activity, but rather was specially prepared at the behest of the FBI and with the knowledge that any information it supplied would be used in an ongoing criminal investigation.”). Second, there was no testimony or affidavit of a custodian or other qualified witness introduced at the trial court level. Third, it is well established that documents prepared in anticipation of litigation are not admissible as “business records” under Rule 803(6) as they demonstrate lack of reliability. *See Palmer v. Hoffman*, 318 U.S. 109, 113-14, 63 S. Ct. 477, 87 L. Ed. 645 (1943); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009); *Certain Underwriters at Lloyd's v. Sinkovich*, 232 F.3d 200, 201, (4th Cir. 2000) (“because the business records admitted by the district court were prepared in anticipation

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<sup>6</sup> As Plaintiff explained in her filings, adjuster reports are considered business records while expert reports are not. *See Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268, 275 (Neb. 1986); *Zelko v. Bisbee*, 1994 Ohio App. LEXIS 2609, \*1, 1994 WL 264308 (8th Cir. 1994) (“the trial court did not abuse its discretion in qualifying the author of the adjuster’s report as an expert, and the report was properly admitted under the business records exception to the hearsay rule because it was compiled in the ordinary course of business”); *Jordan v. Binns*, 712 F.3d 1123, 1136 (7th Cir. 2013) (“It is difficult to see what purpose, other than preparing for litigation, is served by an insurance adjuster’s report created after an accident investigation.”); *Hansen v. Country Mut. Ins. Co.*, No. 18 C 244, 2023 U.S. Dist. LEXIS 171461, 2023 WL 6291629, at \*16 n. 19 (N.D. Ill. Sept. 25, 2023) (if properly authenticated, “adjuster’s written memorialization[s] contained in the claim file [] could fall within the business records exception”); *Fowler*, 410 S.C. at 410-411, 764 S.E.2d at 252; *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 205 (4th Cir. 2000) (“Litigants cannot evade the trustworthiness requirement of Rule 803(6) by simply hiring an outside party to investigate an accident and then arguing that the report is a business record because the investigator regularly prepares such reports as part of his business. If that were the case, parties that face litigious situations could always hire such nonaffiliated firms and investigators to prepare a report and then seek to admit the document over hearsay objection.”). While defense counsel argued at the hearing that the Haag report was made in the “regular course of business,” she admitted that Haag was retained as an expert while Davis Claims services – as an investigating adjuster. T at 16.

of litigation, the district court erred by relying on the business record exception under Fed. R. Evid. 803(6)"); *Applebaum v. Target Corp.*, 831 F.3d 740, 744 (6th. Cir. 2016) ("Business records that meet these criteria may still be excluded if they were made in anticipation of litigation because the circumstances of their preparation tend to indicate a lack of trustworthiness."). Here, Defendant hired Haag to prepare its report *after* Davis Claims Services, the insurer's investigating<sup>7</sup> adjuster, concluded its investigation and recommended to approve the claim, to refute the Davis Claims Services Report, but at the summary judgment stage Defendant claimed that the first report was a mere "estimate<sup>8</sup>." R. pp. 68-69, 78 ¶¶ 4-25, 82-83, 114-125, 176-179 (IA congratulating Plaintiff on a new roof), 189-271. Both evidence and common sense dictate otherwise. The record clearly shows that Haag was hired because the insurer refused to approve the claim despite the investigating adjuster's recommendation, based solely on an inconclusive weather report, although Haag itself considers weather reports unreliable<sup>9</sup>. R. pp. 189-271. Thus, the main purpose for securing the Haag report was not to investigate the claim (Davis Claims Services has already conducted a thorough investigation and prepared a 70-page report), but to justify the insurer's stubborn refusal to approve the claim based on a single

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<sup>7</sup> The insurer's claim notes show that Davis Claims Services served as an investigating adjuster ("IA"). P's MSJ, Exh. 4.

<sup>8</sup> Defense counsel actually contradicted her "mere estimate" theory, to the extent in explaining the process of a claim adjustment, she stated "if IA says there's hail damage, then we need to pay [the claim.]" R. p. 83 ¶¶ 1-2.

<sup>9</sup> Plaintiff sked the court below to take judicial notice of the Haag's advisory, pursuant to SCRE 201, available here: <https://haagglobal.com/featured-post/storm-reports-part-2-how-do-we-use-them-september-2024/>. SCRE 201(f) ("Judicial notice may be taken at any stage of the proceeding."). Publications are usually subject to judicial notice. Notably, both South Carolina Rule 201 as well as the federal one *require* the court to take judicial notice if it is requested. *See Kale v. Alfonso-Royals*, 2025 U.S. App. LEXIS 13491, \*15, 2025 LX 193833, \_\_ F.4th \_\_, 2025 WL 1561700 (4th Cir. 2025) ("we can take notice of the existence of these documents"); *Bryant v. Woodall*, 1 F.4th 280, 288-89 & n.2 (4th Cir. 2021) (taking judicial notice of the publication of an opinion piece in the *Washington Post*). Moreover, both this Court as well as trial court may take judicial notice, and must do so, if it is properly requested by a party. *Megaro v. McCollum*, 66 F.4th 151, 158 (4th Cir. 2023). Lastly, Defendant made no attempt to oppose Plaintiff's request for judicial notice.

weather report that could not *verify* that it hailed on the date in question, as opposed to *certifying* that it in fact did not hail on the date in question. R. pp. 189-267. It is difficult to see what purpose, *other than preparing for litigation*, is served by an expert report created *after* the completion of the investigation. *See Sinkovich*, 232 F.3d at 205 (“Litigants cannot evade the trustworthiness requirement of Rule 803(6) by simply hiring an outside party to investigate an accident and then arguing that the report is a business record because the investigator regularly prepares such reports as part of his business. If that were the case, parties that face litigious situations could always hire such nonaffiliated firms and investigators to prepare a report and then seek to admit the document over hearsay objection.”); *see also Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1258-59 (9th Cir. 1984) (audit performed by third-party accounting firm was not a business record because it was commissioned only after accounting problems were suspected); *Jordan v. Binns*, 712 F.3d 1123, 1136 (7th Cir. 2013) (“Here, U.S. Xpress hired Niles to prepare the Adjuster's Report and then offered that report into evidence at trial. It is difficult to see what purpose, other than preparing for litigation, is served by an insurance adjuster's report created after an accident investigation.”). The primary motive for commissioning reports such as the Haag report “is a better indicator of trustworthiness than the form of the investigation or the identity of the investigator.” *Sinkovich*, 232 F.3d at 205. Because the record shows that the Haag report was commissioned to *deny* the claim and not to *investigate* it, it is inadmissible as a business record, even if all other requirements were satisfied (and here, they are not). *See e.g., Sinkovich*, 232 F.3d at 204-06; *Echo Acceptance Corp. v. Household Retail Services, Inc.*, 267 F.3d 1068, 1091 (10th Cir. 2001); *Scheerer v. Hardee's Food Systems, Inc.*, 92 F.3d 702, 706-07 (8th Cir. 1996). The court also ignored the fact that “a nonaffiliated investigator may have pecuniary motives to skew a report in favor of the client that hired him,

for a damaging report may result in the client looking elsewhere next time around,” which further casts doubt on its trustworthiness. *Binns*, 712 F.3d at 1136. R. pp. 282-283. Under the circumstances, the Haag report was “dripping with motivations to misrepresent.” *Hoffman v. Palmer*, 129 F.2d 976, 991 (2d Cir. 1942). In addition, the court failed to consider that the insurer was facing insolvency, rejecting Plaintiff’s contention that this fact suggested that the insurer no longer cared about keeping Plaintiff as an insured, further casting doubt on the insurer’s motivation for refusing to approve the claim per its own adjuster’s recommendation. R. pp. 278-280. In short, under the circumstances, the trustworthiness of the Haag report was in serious doubt, which makes even a business record inadmissible. R. pp. 109-110, 282-283. *See* SCRE 803(6) (“unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness”); *Underwriters at Lloyd’s of London v. Tarantino Props.*, 2012 U.S. Dist. LEXIS 124972, \*4, 2012 WL 3835385 (W.D.MI. September 4, 2012) (“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.”). Thus, the court abused its discretion in rejecting Plaintiff’s objection. Lastly, the court was prohibited from making credibility<sup>10</sup> determinations at the summary judgment juncture, which prevented summary judgment in Defendant’s favor *even if the Haag report was indeed admissible*, because other evidence in the record placed the report’s credibility at issue. R. pp. 176-179, 189-265, 272-277. *See e.g., L & W Wholesale v. Gore*, 305 S.C. 250, 253, 407 S.E.2d 658, 659 (1991) (“Nor does the judge make credibility determinations[.]”); *Hiers by Hiers v. Mullens*, 310 S.C. 63, 68, 425 S.E.2d 57, 60, (Ct. App. 1992) (“matters of credibility should not be determined at the summary judgment stage”); *Murphy v. Tyndall*, 384 S.C. 50, 56, 681 S.E.2d 28, 31 (Ct. App.

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<sup>10</sup> Plaintiff submitted an affidavit that she personally observed a hail storm on or about the date of loss that contradicted the Haag’s assertion that it had not hailed since 2015. R. pp. 176-179. This alone created an issue of material fact.

2009) (“issues of credibility are generally for a jury's determination”); *Anderson v. The Augusta Chronicle*, 355 S.C. 461, 475, 585 S.E.2d 506, 513 (Ct. App. 2003) (stating credibility determinations and the drawing of legitimate inferences from the facts are jury functions).

***II. The trial court misapplied the summary judgment standard of review, failing to consider crucial evidence and to view the evidence it did consider in the light most favorable to Plaintiff in ruling on Defendant's motion, and resolved a key dispute of material fact, finding that the damage to Plaintiff's roof was “old hail.”***

The trial court's misapprehension of its role at a summary judgment stage of the proceedings and the standard of review it was supposed to apply becomes apparent within the first few sentences of its Order, which declared that the court was granting Defendant's cross-motion “[b]ased on the findings of fact [] contained herein,” because at the summary judgment stage of the proceedings the trial court neither determines facts, nor draws inferences from the facts, nor resolves competing inferences drawn from the facts. R. p. 8. *See David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006) (“A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony[.]”); *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (quoting *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000)) (“Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts”); *Gore*, 305 S.C. at 253, 407 S.E.2d at 659 (“We note that at the summary judgment stage of litigation, the judge does not weigh conflicting evidence with respect to a disputed material fact. Nor does the judge make credibility determinations with respect to statements made in affidavits, [] or depositions.”) (cleaned up) (internal quotation marks omitted). *See also*<sup>11</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

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<sup>11</sup> Because our Supreme Court has consistently turned to the federal law for guidance in ascertaining the proper standard of review and in rejecting the mere scintilla standard in its most recent decision, it is appropriate to rely on the federal law in discussing the trial court's

265, 106 S. Ct. 2505, 2519 (1986) (“the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial”); *Miller v. Prince George's County*, 475 F.3d 621, 628-629 (4th Cir. 2007) (“at this stage we do not find facts”); *Pumphrey v. Coakley*, 684 F. App’x 347 (4th Cir. 2017) (“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge ruling on a motion for summary judgment.”) (internal citation omitted). As the summary judgment order evidences, the trial court undertook all three of these impermissible functions. R. pp. 8-17.

Specifically, the trial court drew the following inferences of highly questionable reasonableness in the moving party’s favor and resolved such inferences as follows, while addressing Plaintiff’s arguments made *in opposition*<sup>12</sup> to Defendant’s motion, which required the court to view the record in the light most favorable to Plaintiff:

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misconceptions, failures, and omissions at the summary judgment juncture. *See Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463–64, 892 S.E.2d 297, 301 (2023). And while Plaintiff did mention the “mere scintilla” standard at the hearing unaware of the recent change to South Carolina law, she argued the correct standard of review in her filings, making such stray reference entirely inconsequential. R. pp. 85 ¶¶ 5-7, 98-113.

<sup>12</sup> The transcript shows that even though Plaintiff was the first party to move for summary judgment and, in doing so, raised evidentiary objections to Defendant’s anticipated attempt to introduce the Haag report, the trial court wanted to hear from Defendant first and allowed it to argue its *cross*-motion first, relying exclusively on the Haag report. R. p. 66 ¶¶ 11-13. The court also capriciously rejected Plaintiff’s procedural objections, forcing Plaintiff to argue against Defendant’s motion served 18 hours before the hearing. The court permitted Defendant’s *cross*-motion to dominate the hearing and neglected to consider Plaintiff’s motion altogether. Because the court was faced with *cross*-motions, however, it was required to “examine[] each motion separately.” *See e.g., Rossignol v. Voorhaar*, 316 F.3d 516, 522-523 (4th Cir. 2003) (“When considering each individual motion, the court must take care to ‘resolve all factual disputes and any competing, rational inferences in the light most favorable’ to the party opposing that motion”) (quoting *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 230 (1st Cir. 1996)); *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 630 F.3d 351, 354 (4th Cir. 2011) (“When *cross*-motions for summary judgment are before a court, the court examines each motion separately, employing the familiar standard under Rule 56 of the Federal Rules of Civil Procedure”). The court’s failure to do so is apparent on the face of its order, which failed to address *any* of Plaintiff’s written arguments and only mentioned Plaintiff’s oral arguments made *in opposition* to Defendant’s untimely served motion. R. pp. 8-17, 63-89, 98-113, 148-175.

Plaintiff also argued that the insurer's internal emails showed an initial recommendation to pay the claim, *but the Court's examination of the email revealed that the author of the email did not understand the purpose of the retention of the engineer* and that this recommendation was before the Haag Engineering Report concluded the damage pre-existed the policy. *The Court does not agree with the Plaintiff* that the subject emails created a material question of fact as to the veracity of the investigation or that Plaintiff's claim fell within the coverage of her homeowner's policy. Instead, *the emails reflected an internal discussion about engagement of a forensic expert* to determine whether the hail damage occurred prior to the policy period.

R. pp. 12-13 (emphasis added). First, the court's conclusion that the claims director, who holds a supervisory position, "did not understand the purpose of the retention of the engineer" is pulled out of thin air, because defense counsel's argument to that extent *is not evidence*. R. pp. 82-83. Regardless, the court was obviously both drawing inferences and resolving conflicting inferences *against* Plaintiff in ruling on *Defendant's motion*, contrary to the standard which required the court to view the evidence and all inferences in the light most favorable to Plaintiff, the nonmoving party in respect to Defendant's motion—the only motion the trial court actually considered. *See e.g., SSI Medical Servs., Inc. v. Cox*, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990) ("In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the nonmoving party."); *Charbonnages de France*, 597 F.2d at 414 (the party opposing a summary judgment is entitled to have the "credibility of [her] evidence as forecast assumed, [her] version of all that is in dispute accepted, [and] all internal conflicts in it resolved favorably to [her]."). The court then proceeded to resolve another conflicting inference against Plaintiff, rejecting her contention that because the Davis Claims Services report along with the insured's internal correspondence showed that the investigating adjuster found the hail damage to the roof to be compensable, recommending the approval of the claim, the insurer was faced with two competing reports—the Davis Claims

Services report that found the loss compensable and the Haag report that found it to be preexisting—indicating that “the Court does not agree that the reports were conflicting since both reports reflect that hail damage was present, but the Haag Engineering Report is the only one that addresses the age of the damage before the policy period.” R. p. 13. *See e.g., Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 659 -60 (4th Cir. 2018) (“A court improperly weighs the evidence if it fails to credit evidence that contradicts its factual conclusions or fails to draw reasonable inferences in the light most favorable to the nonmoving party.”); *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962) (“In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party.”). To begin with, this inference defies all common sense, to the extent an investigating adjuster’s report that recommends the approval of the claim reasonably implies that the loss is *covered* by the policy as well as *compensable*. Why else would the field adjuster recommend approving the claim and replacing the entire roof? The court also ignored Plaintiff’s argument that Davis Claims Services was an expert, to the extent courts routinely qualify field adjusters as experts. P’s MSJ at 3 footnote 3. *See e.g., Bump*, 221 Neb. 678, 380 N.W.2d at 275 (The purpose of an insurance adjuster’s report is “to separate fact from fiction regarding a claim and obtain information to enable the insurance company to distinguish the valid claim from a claim for which the insurance company is not liable under its policy.”); *Zelko v. Bisbee*, 1994 Ohio App. LEXIS 2609, \*1, 1994 WL 264308 (“the court rejected the tortfeasor’s claim that Rule 803(8) did not apply to the [adjuster’s] report because it was evaluative and investigative. Further, the trial court did not abuse its discretion in qualifying the author of the adjuster’s report as an expert, and the report was properly admitted under the business records exception to the hearsay rule because it was compiled in the ordinary course of

business at or near the time that the adjustment process took place.”). To explain away its nonsensical conclusion that the two reports were not conflicting, the court again weighed the evidence and drew more irrational inferences, indicating that

Plaintiff attempts to argue that the Davis Claims Services Report (“Davis Report”) recommended approval of the claim and a full roof replacement, thereby creating a duty on the insurer to approve the claim. *See* Pl.’s Mot. For Summary Judgment at p. 9. Plaintiff both relies on an incorrect standard of law and misconstrues the effects of the Davis Report. *Davis Claims Services was retained to conduct a repair estimate, not provide an expert engineering report.* The estimate clearly and unambiguously provides: “THIS IS A REPAIR ESTIMATE ONLY... RECEIPT 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.”

Order at 8 (emphasis added). This excerpt shows that there was only one person confused about the standard of review as well as his role—the judge himself. The trial court cannot weigh evidence at the summary judgment stage. *See e.g., Anderson*, 477 U.S. at 265, 106 S. Ct. at 2519 (“at the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter”). Moreover, the trial court’s finding that Davis Claims Service “was retained to conduct a repair estimate, not provide an expert engineering report” is a mere conjecture and unsupported speculation. *See infra*. Order at 8. The record shows that in making this “finding,” the trial court relied solely on the defense attorney’s creative oral argument<sup>13</sup> that the purpose for hiring Davis Claims Services was to prepare a repair estimate. R. p. 78 ¶¶ 4-25, 79 ¶¶ 1-15. But an attorney’s argument is not “evidence.” *See, e.g., Trivelas v. S.C. DOT*, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001) (“Arguments of counsel are not evidence, and absent stipulation, they do not provide a factual basis for summary judgment. []

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<sup>13</sup> A careful reading of the Transcript, however, reveals that defense counsel contradicted her self to the extent she admitted that Davis Claims Services was hired to investigate the claim. T. at 16.

Furthermore, we cannot base a factual review upon them.”); *Cobb v. Benjamin*, 325 S.C. 573, 581 n.2, 482 S.E.2d 589, 593 n.2 (Ct. App. 1997) (“Where there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record.”); *Caraway v. City of Pineville*, 111 F.4th 369, 379 (4th Cir. 2024) (“But a brief is not evidence.”); *Kulhawik v. Holder*, 571 F.3d 296, 298 (2d Cir. 2009) (“An attorney’s unsworn statements in a brief are not evidence.”); *Estrella v. Brandt*, 682 F.2d 814, 819-20 (9th Cir. 1982) (“Legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid summary judgment.”); *Skyline Corp. v. N.L.R.B.*, 613 F.2d 1328, 1337 (5th Cir. 1980) (“Statements by counsel in briefs are not evidence.”). Moreover, the court’s conclusion flies in the face of the fact that field adjusters are routinely qualified as experts and defies common sense. *See infra*. Why would the insurer hire an adjuster to prepare a repair estimate *before* conducting an investigation? And if that is what defense counsel is asserting, then her position is an admission that the insurer employes bad faith practices as it apparently bases its compensability decisions *solely on the cost of repairs*<sup>14</sup>. R. pp. 77-79, 124-125. Furthermore, the court’s view of the report as a mere estimate is at war with the insurer’s internal emails, which show that the insurer referred to Davis Claims Services as its “IA,” “*investigating* adjuster,” and not an *appraiser*. R. p. 266. Even more fundamentally, had the court bothered<sup>15</sup> to actually look at the report (and not just the disclaimer), it would discover that while it contained a repair

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<sup>14</sup> At the same time, defense counsel also admitted that usually when the IA finds damage to the roof, the insurer pays the claim, contradicting her own unsupported contention. R. p. 83 ¶¶ 1-2.

<sup>15</sup> While Judge McKinnon claimed that he “just read the document that [] you were referencing,” referring to the Davis Claims Services report, it obviously only read the disclaimer language as evidenced by its declaration that “it says exactly what Ms. LaFave says it says, which is that it is a repair estimate only and not a determination of coverage.” T at 17. To begin with, the disclaimer does not state that it is “not a determination of coverage” and clearly limits its application to the “figures” of the estimate, which are naturally “subject to the insurance company review and approval.” Exh. 3 to Pl’s MSJ.

estimate, it was also investigative and evaluative in nature, to the extent it contained many photographic exhibits and a thorough assessment of the claim, and that the disclaimer language cited by the court clearly applied *only* to the estimate portion of the report and not to the adjuster's *final* report. R. pp. 189-195, 196-265. After all, as Plaintiff argued in her filings, the Davis Claims Services report was more thorough than the Haag report, and it clearly contradicted the Haag's conclusions, to the extent it contained photographs of both hail splatter and dark hail bruises. *Id.* R. pp. 323-367. Ironically, while discounting the Davis Services report to a mere "estimate," the court failed to even notice that the Davis Services report was 70 pages long, while the Haag report – only 45 pages long, and that both reports were titled "Final Report," which suggests that the trial court did not meaningfully engage with the record and failed to even review and compare the reports before it rejected Plaintiff's contention that the two reports were conflicting, once again abusing its discretion. *See e.g., Rodriguez-Arias v. Whitaker*, 915 F.3d 968, 974 (4th Cir. 2019) (explaining that the court may not "arbitrarily ignore relevant evidence" and must "meaningfully engage" with testimony and documentary evidence submitted by the parties); *Lagos v. Barr*, 927 F.3d 236, 249 (4th 2019). While reducing the investigative report to a mere estimate amounted to an impermissible function of weighing the evidence, its mischaracterization of the report as a "repair estimate" was a glaring error of fact. In short, the court's conclusion that a 70-page report was a "repair estimate" is a plainly unreasonable inference in conflict with the evidence in the record.

Following Defendant's lead, the court also twisted the facts, indicating that "[d]uring its investigation of the claim, St. Johns retained the services of Haag Engineering ("Haag") to inspect the property and collect evidence of the alleged hail damage," to the extent the record clearly shows that the insurer retained *Davis Claims Services to investigate the claim and collect*

evidence, and hired Haag solely to justify the insurer's capricious decision to deny the claim *in spite* of the field adjuster's recommendation to approve it based solely on a *single*<sup>16</sup> weather report, which stated only that it *could not verify* whether it hailed (and not that it did not hail) on the date in question. R. p. 14, 176-179, 189-271. See *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 306 S.E.2d 616 (1983) (recognizing a cause of action for bad faith refusal to pay benefits due under an insurance contract); *Laur v. Safeco Ins. Co. of Ind.*, LEXIS 14576, \*13, 2024 WL 2991196 (5th. Cir. 2024) ("An insurer breaches its duty of good faith and fair dealing by denying a claim when the insurer's liability is reasonably clear."); *Gulf Wide Towing, Inc. v. F.E. Wright (U.K.), Ltd.*, 554 So. 2d 1347, 1353 (1989 La. App.) ("Whether or not a refusal to pay benefits is arbitrary, capricious or without probable cause depends primarily on the facts known<sup>17</sup> to the insurer at the time of its action."). The court then proceeded to resolve a key

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<sup>16</sup> The fact that the insurer failed to even consider any other weather reports, which were readily available, made its stubborn refusal to approve the claim even more egregious, especially in light of the Haag's advisory that emphasizes their general lack of reliability. R. p. 268. The record also shows that the insurer maintained its denial and never addressed the deficiencies of the Haag report raised by the roofing contractor, who also provided a conflicting weather report and other evidence, disputing Haag's conclusions. R. pp. 272-278. In addition, Defendant raised no objection to any of Plaintiff's exhibits, waiving it. *Byers*, 392 S.C. at 444, 710 S.E.2d at 58 ("For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented."). Lastly, as Plaintiff explained in her filings, the evidence she relied on was used to show the insurer's state of mind in denying the claim—doubt—and its failure to resolve doubt in Plaintiff's favor, and not for the truth of the matter asserted (unlike Defendant), making her contractor's emails admissible. R. pp. 272-277. *E.g.*, *Lukasik v. State Farm Fire & Cas. Co.*, 2024 U.S. Dist. LEXIS 61240, \*13, 2024 WL 1435313 (N.D.IN. April 2, 2024) ("The statements also are admissible to show the information relied on by the individuals who made the final decision to deny the claim.").

<sup>17</sup> While Defendant's Denial Letter attempted to reserve the right to assert other defenses, such reservation is entirely pointless, because none of such other defenses are relevant to the issue at hand—whether the insurer breached its obligations under the policy, which depends on the circumstances *known to the insurer at the time it decides to deny the claim*. R. pp. 269-271. See *Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 448, 450 S.E.2d 582, 584 (1994) (per curiam) (The bad faith determination must be judged by the evidence before the insurance company at the time it denied the claim.); *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 170, 829 S.E.2d 707, 713-714 (2019) ("evidence arising after the denial of the claim is not relevant to the propriety of the insurer's conduct at the time of its refusal"). Here, the record shows that the

factual dispute by making an eye-widening statement that “the Court finds<sup>18</sup> that the evidence reflects that Plaintiff’s roof damage was old and occurred before the policy inception.” R. p. 16. Plainly, it was never its function to determine the underlying facts and resolve conflicting inferences drawn from such facts. *See e.g., David*, 367 S.C. at 250, 626 S.E.2d at 5 (“A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony[.]”); *Quail Hill, LLC*, 387 S.C. at 235, 692 S.E.2d at 505 (“Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts”). In short, the trial court misapplied both the summary judgment standard of review and, as will be explained *infra*, the underlying insurance law.

***III. The trial court also erred substantively, when it placed the entire burden of proof onto Plaintiff, because the claim was denied based solely on a policy exclusion, which flipped the burden of proof, and even if Plaintiff still had the initial burden, it was limited to a prima facie showing of coverage, which Plaintiff clearly sustained.***

Next, the court capriciously rejected Plaintiff’s contention that under South Carolina law, as well as authority from countless other jurisdictions, an insurer may deny a claim based on a policy exclusion if the evidence supports “only one reasonable inference” that the loss preexisted the policy inception and when faced with conflicting evidence, the insurer *must* resolve doubt in

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insurer made its decision to deny the claim based on a single weather report before it retained Haag, making the Haag report not only inadmissible but also *irrelevant*, to the extent the duty to approve arose at the time Davis Claims Services concluded its investigation and recommended to approve the claim. R. pp. 84, 266-267. Moreover, the fact the insurer once again breached its duty when it failed to resolve doubt in Plaintiff’s favor upon receiving the Haag report only aggravates its initial breach. As Plaintiff has always maintained, because settled law requires an insurer to resolve doubt in the insured’s favor, retaining Haag *after* the investigating adjuster concluded that the damage was compensable did nothing to cure the initial default. R. p. 98.

<sup>18</sup> In addition to being an impermissible function, the court’s “finding” misses the forest for the trees, to the extent the ultimate question is *not* whether the damage to Plaintiff’s roof was “old hail” or “new hail,” but whether the insurer breached the contract, when it denied the claim based on a policy exclusion. *See e.g., State Farm Fire & Casualty Co. v. Barton*, 897 F.2d 729, 731 (4th. Cir. 1990) (discussing South Carolina law) (“Whether such an objectively reasonable basis for denial exists depends on the circumstances existing at the time of the denial.”).

favor of extending coverage. R. pp. 103-112, 162-166, 172-174. See *Johnson v. Wabash Life Insurance Co.*, 244 S.C. 95, 135 S.E.2d 620 (1964) (“An insurer has the right to contract against liability resulting from pre-existing diseases, and in such case *if the only reasonable inference* from the evidence is that the claim of the insured resulted from disease already contracted and active at the time of the date and delivery of the policy, nonliability follows as a matter of law.”) (emphasis added); *Ellis v. Capital Life & Health Ins. Co.*, 229 S.C. 388, 93 S.E.2d 118 (1956) (applying “the only reasonable inference” standard in ruling on the applicability of an exclusion for preexisting conditions); *Chastain v. United Ins. Co.*, 230 S.C. 465, 96 S.E.2d 464 (1957) (same). See also *Hartford Cas. Ins. Co. v. Chase Title, Inc.*, 247 F.Supp.2d 779, 780 (D. Md. 2003) (“It is well-settled that any doubt about the potentiality of coverage is resolved in favor of the insured.”); *International Minerals & Chemical Corp. v. Liberty Mutual Insurance Co.*, 168 Ill. App. 3d 361, 367, 522 N.E.2d 758, 119 Ill. Dec. 96 (Ill. App. 1988) (“where an exclusionary clause is relied upon to deny coverage, its applicability must be clear and free from doubt because any doubts as to coverage will be resolved in favor of the insured”); *Gore Design Completions, Ltd. v. Hartford Fire Ins. Co.*, 538 F.3d 365, 369 (5th Cir. 2008) (The Fifth Circuit has recognized that the “eight corners” rule is “very favorable to insureds because doubts are resolved in the insured’s favor.”); *Arawak Aviation, Inc. v. Indem. Ins. Co. of N. Am.*, 285 F.3d 954, 956 (11th Cir. 2002) (“we are required to abide by the Florida rule that exceptions to coverage in an insurance policy are strictly construed against the insurer and any doubt or ambiguity is resolved in favor of the insured”) (cleaned up) (internal quotation marks omitted); *Wagner v. Erie Ins. Co.*, 2002 PA Super 166, 801 A.2d 1226, 1231 (Pa. Super. 2002) (providing that the insurer has the burden to show that an asserted exclusion *clearly* and *unambiguously* prevents the coverage of a claim); *Czapski v. Maher*, 954 N.E.2d 237, 240 (Ill. App. 2011) (“The burden is on the insurer to establish that a policy exclusion applies, and its applicability must be definite and free from doubt.”). Ironically, neither the court nor Defendant cited *any* authority to counter Plaintiff’s contention that clear and convincing evidence was the proper standard that governed policy exclusions and the only

authority cited by both actually supported Plaintiff's argument. R. pp. 12 (citing *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 701 S.E.2d 33, 35 (2010) (“[g]enerally, policy exclusions are construed *strongly in favor of coverage* and the insurer bears the burden of establishing the exclusion's applicability”)) (emphasis added), 121 (same). Tellingly, the trial court failed to clearly articulate the standard of proof, while siding with Defendant who declared preponderance of the evidence as the correct standard without citing any authority that stood for that proposition, turning a blind eye to uncontroverted authority that applied a much higher standard. Order at 9 (“This Court finds that this is not the correct standard of care for an insurer...”). If the court were correct, insurers would be able to shop around for a conflicting report by an outside engineer to avoid liability based on policy exclusions (contrary to the weight of authority), rendering their duty of good faith entirely meaningless.

Relatedly, the court arbitrarily rejected Plaintiff's contention that coverage was not in dispute because the sole question before the court was whether the insurer breached the contract when it denied the claim based on a policy exclusion, which impliedly conceded coverage, even though Defendant entirely failed to refute Plaintiff's argument, supported by authority, that Defendant's coverage argument was nothing more than a disingenuous attempt to shift its burden onto Plaintiff by artful pleading. R. pp. 161-166. See e.g., *Williams v. Pekin Ins., Inc.*, 230 N.E.3d 939, 943 (Ind. App. 2024) (“In this regard, a coverage exclusion effectively admits the insured's coverage allegations but asserts some additional matter barring relief.”). As other jurisdictions have recognized, a denial of a claim based on a coverage exclusion impliedly concedes that “coverage” exists but contends that it is excluded under the policy provisions. See *Mut. Fire Ins. Co. of Calvert Cty. v. Ackerman*, 162 Md. App. 1, 872 A.2d 110, 114 (Md. Ct. Spec. App. 2005) (under Maryland law, an insurer can invoke an exclusion as an affirmative defense to coverage);

*Williams*, 230 N.E.3d at 943 (“a coverage exclusion effectively admits the insured’s coverage allegations but asserts some additional matter barring relief”) (citing *Willis v. Westerfield*, 839 N.E.2d 1179, 1185 (Ind. 2006)); *Ica Invs., Inc. v. Lexington Ins. Co.*, 2023 U.S. Dist. LEXIS 21318, \*6, 2023 WL 1987866 (S.D.FL. February 8, 2023) (“I agree with those who conclude that an insurance exclusion is an affirmative defense. Under Florida law, an insurer has the burden of proving that a policy exclusion applies. [] Treating a policy exclusion as an affirmative defense incorporates this burden of proof, whereas treating the exclusion as a denial would appear to be inconsistent with Florida law.”); *Griffin v. Schwegmann Brothers Giant Supermarkets, Inc.*, 542 So.2d 710, 714 (4th Cir. 1989) (under Louisiana law, the denial of coverage based on an exclusion in an insurance policy is considered an affirmative defense). It is misleading to assert that the policy “does not provide coverage for preexisting conditions.” R. p. 114. Instead, the policy *excludes* coverage for preexisting conditions. *Black's Law Dictionary* 711 (11th ed. 2019) (an exclusion in an insurance policy “excuses or exempts [the insurer] from liability under [specified] circumstances.”). Treating a denial of the claim based on a policy exclusion as a question of *coverage* is inconsistent with South Carolina law that squarely places the burden of proving a policy exclusion onto insurers. *Jericho State Capital Corp. v. Chi. Title Ins. Co.*, 431 S.C. 437, 451 (Ct. App. 2020) (“In deciding whether a policy exclusion bars coverage, the burden of proof flips[.]”); *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005) (“Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion’s applicability.”); *Bierman Family Farm LLC v. United Farm Family Ins. Co.*, 812 Fed. Appx. 139, 143 (4th Cir. 2020) (distinguishing a condition precedent to coverage from a policy exclusion, which is treated as an affirmative defense, to ascertain the parties’ respective burdens).

In addition, the court arbitrarily concluded that Plaintiff failed to show coverage without discussing Plaintiff's arguments, the evidence in the record, and what a *prima facie* showing of coverage actually entailed. R. p. 16. There is ample evidence in the record to belie this proposition. The court's reasoning reveals that it is unfortunately *not* as "well familiar" with insurance law as it claims to be, to the extent under South Carolina law and the law of many other jurisdictions, an insurance policy itself serves as *prima facie* evidence of insurance coverage and the insured's right to recover and a policy *alone* satisfies the insured's burden. R. p. 12. *See Baker v. Metropolitan Life Ins. Co.*, 106 S.C. 419, 421, 91 S.E. 324, 325 (1917) ("The plaintiffs had the policy which was the contract of insurance, and that was *prima facie* evidence of their right to recover."); *Gulf Wide Towing, Inc., Ltd.*, 554 So. 2d at 1352 ("*Prima facie* evidence of the existence of an insurance contract and coverage under that insurance contract is the insurance contract itself.") (citing *Cf. Holland v. Aetna Life & Casualty Insurance Co.*, 385 So.2d 316 (La. App. 1st Cir. 1980)); *Suntrust Mortg., Inc. v. AIG United Guar. Corp.*, 800 F. Supp. 2d 722, 733, 2011 U.S. Dist. LEXIS 70818, \*28 (E.D.VA. June 30, 2011) (finding that certificates of insurance and even the certificate numbers met the insurer's initial burden to show *prima facie* coverage). Even if coverage were in dispute, Plaintiff met her burden of establishing *prima facie* coverage, because the policy unambiguously covers hail and wind damage and the evidence in the record shows that Plaintiff's roof had hail and wind damage (as conceded by defense counsel), that it hailed on the date in question, and that Defendant was on the risk on the date in question. R. pp. 79, 82, 155-166 (discussing policy coverage), 176-267, 282-320. Indeed, the insurer's denial letter *alone* confirms the existence of insurance coverage, to the extent the claim was denied based on a policy exclusion, which is an affirmative defense. R. p. 269. *See Bierman Family Farm LLC*, 812 Fed. Appx. at 143 (distinguishing a condition precedent to

coverage from a policy exclusion, which is treated as an affirmative defense, to ascertain the parties' respective burdens). Moreover, Defendant did not make any attempt<sup>19</sup> to challenge Plaintiff's *prima facie* showing of coverage and its contention that there was no coverage rested entirely on the policy exclusion for preexisting conditions—but Defendant itself (and not Plaintiff) must shoulder the burden of showing that such policy exclusion applied. R. p. 116 ¶7. *See e.g., Jericho State Capital Corp.*, 431 S.C. at 451 (“In deciding whether a policy exclusion bars coverage, the burden of proof flips: the insurer must prove the exclusion applies.”); *Clayton*, 364 S.C. at 560, 614 S.E.2d at 614 (“Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion’s

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<sup>19</sup> For instance, Defendant did not argue that Plaintiff failed to provide a timely notice of loss or that she did not comply with the deadline set by the court pursuant to S.C. Code Ann. §38-31-60(2), *etc.* It only argued that Plaintiff cannot prove that the damage occurred while the insurer was on the risk. R. pp. 67-68. But a *prima facie* showing does not require Plaintiff to do that. A contract of insurance alone was sufficient to prove that the loss was covered. *See e.g., Baker*, 106 S.C. at 421, 91 S.E. at 325 (“The plaintiffs had the policy which was the contract of insurance, and that was *prima facie* evidence of their right to recover.”). As Plaintiff argued in her Response in opposition, proving coverage entails only a showing that the *type of loss* is insured against by the policy, citing the reasoning of California Court of Appeals which relied on a statutory definition of an “insurance contract” to define the term “coverage” and “covered claim” which are not defined by a statute. R. pp. 157-158, 163-164. *Aloha Pacific, Inc. v. California Ins. Guarantee Assn.*, 79 Cal. App. 4th 297, 308-309 (Cal. App. 2000). Neither were these terms defined by the South Carolina Legislature. R. p. 157 footnote 2 (citing S.C. Code Ann. §38-1-20 (25) defines “insurance” as “a contract where one undertakes to indemnify another or pay a specified amount upon determinable contingencies” and (45) defines a “policy” as “a contract of insurance.”). To hold otherwise would turn settled insurance law on its head and place the burden of negating a policy exclusion onto the insured, essentially isolating the insurers from liability, voiding their duty of good faith (which is the basis for insurer’s duty to resolve doubt in favor of coverage) of any meaning. Moreover, Defendant failed to address any of Plaintiff’s arguments that her claim was indeed a “covered claim” as this term is defined by the statute in its summary judgment filings, conceding the point. R. pp. 155-166. *See Pattee*, 442 S.C. at 240, 898 S.E.2d at 162; *Bell*, 781 Fed. Appx. at 226 (“In my view, our opinion in Alvarez got things right: an appellee’s wholesale failure to respond to a conspicuous, nonfrivolous argument in the appellant’s brief ordinarily constitutes a forfeiture.”); *Eady*, 609 F. Supp. 2d at 560-561 (“The failure of a party to address an issue raised in summary judgment may be considered a waiver or abandonment of the relevant cause of action.”). Lastly, Defendant’s oral argument that Plaintiff “cannot” meet her burden of showing that the claim was covered was entirely conclusory to the extent it failed to even explain what a *prima facie* showing is. R. pp. 68-69.

applicability.”); *Walde v. Ass’n Ins. Co.*, 401 S.C. 431, 439, 737 S.E.2d 631, 635 (Ct. App. 2012) (“Policies are construed in favor of coverage, and exclusions in an insurance policy are construed against the insurer.”) (quoting *M & M Corp.*, 390 S.C. at 259, 701 S.E.2d at 35). Because Defendant relied exclusively on the inadmissible Haag report, it utterly failed to carry its burden of establishing that a policy exclusion applied.

Contrary to all reason, evidence, and authority *cited by the court itself*, it concluded that Plaintiff “cannot meet her burden of proof,” erroneously assuming that Plaintiff had to negate a policy exclusion for preexisting conditions as a part of her *prima facie* showing of coverage, ignoring Plaintiff’s filings that contained an extensive discussion of the parties’ respective burdens and called Defendant out on its attempt to repackage a policy exclusion as a question of coverage, to avoid its own burden of proof. R. pp. 12 (citing *M & M Corp.*, 390 S.C. 255, 701 S.E.2d at 35), 104-105, 160-162. *See also Long v. Glidden Mut. Ins. Ass’n*, 215 N.W.2d 271, 274 (Iowa 1974) (“The insured is not required to negate the exclusion in order to present a *prima facie* case.” (citations omitted)); *Auto-Owners Ins. Co. v. Neisler*, 334 Ga. App. 284, 779 S.E.2d 55, 59 (Ga. Ct. App. 2015) (“An insurer seeking to defeat a claim based on a policy exclusion has the burden of proving that the exclusion is applicable, and the absence of evidence does not prove the exclusion applies. [] Insurance-policy exclusions are narrowly and strictly construed against the insurer and [forgivingly] construed in favor of the insured to afford coverage.”) (internal citation and quotation marks omitted); *Lodge at Mt. Vill. Owner Ass’n, Inc. v. Eighteen Certain Underwriters of Lloyd’s of London*, 591 F. Supp. 3d 1008, 1015 (D. Colo. 2022) (“the insurer bears the burden of proving that a particular loss falls within an exclusion in the contract.”); *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 657; 899 NW2d 744 (Mich. App. 2017) (“[r]eliance on an exclusionary clause in an insurance policy is an affirmative defense”).

In short, the court’s reasoning rests on its misapprehension of insurance law—the parties’ respective burdens and the standard of proof for denying coverage based on a policy exclusion. The summary judgment cannot stand, because the insurer made its decision to deny the claim based on a single weather report in spite of the insurer’s investigating adjuster’s favorable recommendation made upon completion of the investigation. R. pp. 189-267. In fact, in light of the evidence in the record, the court had no choice but to enter summary judgment in Plaintiff’s favor, because to avoid liability, the insurer must prove that at the time it made a decision to deny the claim based on a policy exclusion for preexisting conditions, the evidence was free from doubt. *See infra*. For Defendant, this is a hard wall, because the Haag report is not admissible. More fundamentally, even if it were admissible, the Haag report is simply irrelevant, because the breach occurred when the insurer capriciously refused to extend coverage based on an inconclusive weather report, contrary to its adjuster’s recommendation, even though its liability was reasonably clear. *Covil Corp. v. Pa. Nat’l Mut. Cas. Ins. Co.*, 444 S.C. 117, 133, 906 S.E.2d 558, 566 (2024) (“policy exclusions are construed<sup>20</sup> most strongly against the insurance company”); *Laur*, 2024 U.S. App. LEXIS 14576, \*13, 2024 WL 2991196 (“An insurer breaches its duty of good faith and fair dealing by denying a claim when the insurer’s liability is reasonably clear.”). Lastly, common sense dictates that an insurer cannot eliminate doubt by obtaining a conflicting report to counter its own investigation results, as the insurer’s director of complex claims admitted in his email to the adjuster. R. pp. 266-267 (“with our IA stating that some of the damage was from hail and recommending roof replacement, it would be a problem if

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<sup>20</sup> The trial court’s arbitrary rejection of the applicable standard is also inconsistent with the notion that exclusions are construed against the insurer, which implies that doubt is resolved against the insurer and in favor of coverage. *See e.g., Boyd & Stevenson Coal Co. v. Dir., OWCP*, 407 F.3d 663, 667-668 (4th Cir. 2005) (“Finally, doubtful, ambiguous language in an insurance policy will be given an interpretation which grants coverage, rather than one which withholds it.”); *St. Paul Ins. v. Nusbaum & Co.*, 227 Va. 407, 411, 316 S.E.2d 734, 736 (Va. 1984).

the engineer comes in later with a different opinion”).

***IV. The trial court abused its discretion when it turned a blind eye to Defendant’s procedural gamesmanship and rejected Plaintiff’s timeliness objection to Defendant’s intentionally delayed motion and supporting evidence.***

The record shows that on March 3, nine (9) days before the hearing, Defendant made a filing deceptively titled “Defendant’s Notice of Motion and Motion for Summary Judgment,” and that it filed and served its *actual* motion<sup>21</sup> titled “Cross-Motion for Summary Judgment” and its supporting exhibits only 18 hours before the hearing. R. pp. 114-125. Ironically, *after* the court had already granted Defendant’s “cross-motion” on March 12, 2025, the clerk’s office docketed it for a hearing on May 5, 2025. R. pp. 432-438. At the hearing, Plaintiff raised a procedural objection<sup>22</sup> asking the trial court to decline to consider Defendant’s delayed submission, made in violation of SCRCF 6(d) and 56(c). R. pp. 69-75, 118-125, 151-155. Even though Defendant failed to present *any* justification for its decision to intentionally delay the filing of its summary judgment materials despite being on notice of Plaintiff’s evidentiary and procedural objections, clearly aiming at impairing Plaintiff’s ability to respond, the court summarily rejected Plaintiff’s objection, commenting that “I don’t think the rules require that. I know that they do in federal court. They don’t in South Carolina,” and in its subsequent written order added that “Plaintiff had been provided all of the materials that were submitted by the Defendant that had been exchanged in discovery or otherwise provided for months or years; thus, there was no surprise to

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<sup>21</sup> At the time Plaintiff filed her Response in Opposition to Defendant’s Notice of Motion, she believed that Defendant delayed the filing of its *brief* and argued that the filing of a motion unsupported by brief intentionally delayed until the eve of the hearing is a prohibited motion practice at the federal level because it is contrary to the spirit of the Rules of Procedure, which encourage timely disclosure. R. pp. 151-155. To defeat Plaintiff’s argument, Defendant named its filing a “Cross-Motion.” R. p. 118, 69-72. If anything, the chosen title makes Defendant’s violation of SCRCF 6(d) and 56(c) and its gamesmanship even more apparent. *See also* R. pp. 432-438 (conceding the filing was an amended motion).

<sup>22</sup> Plaintiff also raised her objection preemptively in her brief in opposition to Defendant’s original filing, which entirely failed to articulate Defendant’s “repair estimate” argument, as she has previously witnessed South Carolina attorneys using this unfair tactic. R. pp. 151-154.

the Plaintiff.” R. pp. 9-10, 72.

The court’s justification for overruling Plaintiff’s objection misses the forest for the trees, amounting to an abuse of discretion, as it rests on an error of law and lacks evidentiary support. R. p. 73 (“It’s many years old [] – I mean that’s not new.”). *Wright*, 391 S.C. at 442, 706 S.E.2d at 326; *State v. Robinson*, 410 S.C. 519, 526 (2014). To begin with, discovery captures both admissible and *inadmissible* evidence—production of a document in discovery does not automatically guarantee its admissibility at trial. SCRPC 26(b)(1) (“It is not ground for objection that the information sought will be inadmissible at the trial ...”). Instead, the Rules of Evidence govern the admissibility of discovery materials. *See infra*. Nor does discovery production have any bearing on whether Plaintiff was “surprised”<sup>23</sup> as a result of Defendant’s intentional delay in filing and serving its supporting evidence, because Plaintiff was not timely served with Defendant’s summary judgment materials in accordance with SCRPC 6(d) and 56(c)—up until 18 hours before the hearing, Defendant kept Plaintiff in the dark as to its arguments and evidence, intentionally handicapping her ability to fully respond, raise evidentiary objections by way of a motion to strike, and prepare for the hearing, which is what constitutes a “surprise” from the legal standpoint. *See e.g., Reive v. Deutsche Bank Nat. Tr. Co.*, 190 So. 3d 93 (Fla. 4th DCA 2015) (holding that admission of documents not timely disclosed constituted “surprise in fact”). It is not enough to be aware of the existence of the Haag report. Under the Rules, Plaintiff was entitled to a 10-day notice of both Defendant’s exact arguments and its supporting exhibits. Defendant intentionally withheld both until the very eve of the hearing. This unfair tactic is classic gamesmanship because it is designed “to minimize adequate notice to one’s adversary”

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<sup>23</sup> Plaintiff was in fact surprised because Defendant could have (and should have) used the Haag’s engineer’s affidavit instead, especially since Plaintiff has already raised her objection to the report itself preemptively.

and deprive the other side of a fair opportunity<sup>24</sup> to respond—Plaintiff was forced to follow Defendant’s breadcrumbs in an effort to negate anticipated arguments and raise objections preemptively. *See e.g., Collins v. CSX Transp., Inc.*, 114 N.C. App. 14, 20, 441 S.E.2d 150, 153 (N.C. App. 1994) (“[G]amesmanship and actions designed to minimize adequate notice to one’s adversary have no place within the principles of professionalism governing the conduct of participants in litigation.”) (internal marks omitted). In other words, Plaintiff, who was entitled to *know*, was forced to *guess*. Plaintiff was particularly prejudiced to the extent Defendant asserted for the first time only 18 hours before the hearing that the disclaimer language contained in the Davis Claims Services report allegedly reduced its investigation to a mere repair estimate. D’s MSJ at 7-8; T at 16-17. As was explained above, while Defendant’s argument is superficially appealing, especially when the disclaimer is pulled out of context, it is ultimately unveiling. *See infra*. Just because Plaintiff was able to guess that Defendant would try to use the Haag report and predicted its attempt to unfairly shift the burden of proof does not mean Plaintiff was not “surprised in fact,” because “[t]he gist and gravamen of the [] rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party.” *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003). The fact that Plaintiff was not given a fair opportunity to respond and prepare for the hearing was in and of itself unfairly prejudicial. *See e.g., Garrison v. Target Corp.*, 429 S.C. 324, 360, 838 S.E.2d 18, 37 (Ct. App. 2020) (“A defendant should not be permitted to lie behind a log and ambush a plaintiff with an unexpected defense.”) (internal marks omitted).

Next, the court’s outright rejection of Plaintiff’s timeliness objection amounted to an abuse of discretion in light of clear prejudice suffered by *pro se* Plaintiff. *See e.g., Foman v. Davis*, 371

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<sup>24</sup> Plaintiff was entitled to an opportunity to file a motion to strike to fully present her evidentiary objections to the Haag report.

U.S. 178, 182, 83 S. Ct. 227, 230 (1962) (“outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.”) (emphasis added). The Rules at issue clearly evidence the general purpose to “facilitate the disclosure prior to trial of any unprivileged information that is relevant and material to the lawsuit so as to permit the receiving party to adequately prepare her case.” *GEA, Inc. v. Luxury Auctions Mktg., Inc.*, 259 N.C. App. 443, 451, 817 S.E.2d 422, 429 (N.C. App. 2018) (internal marks and citation omitted). While neither Defendant nor the court is able to articulate a sound reason for allowing the moving party to withhold its evidence and its brief until the eve of the hearing, both seem to believe that this holdover vestige, which somehow survived the adoption of the Rules of Procedure, is the way things are done in South Carolina state courts. Such view is an outdated methodology that lacks foundation in law and employes questionable logic. The Rules of Procedure were adopted to end trials by ambush and surprise, which were common back when formalism was the vogue. *See e.g., Fields*, 363 S.C. at 35, 609 S.E.2d at 514 (recognizing that “the primary purpose of the civil procedural rules [is] preventing or limiting ambush tactics at trial”); *Atl. Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712, 717 n.6 (4th Cir. 1983) (“the basic purpose of the Federal Rules of Civil Procedure [is] to prevent ‘the use of surprise and procedural ambush’”); *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108, 111 (Fla. 1970) (“A primary purpose in the adoption of the Florida Rules of Civil Procedure is to prevent the use of surprise, trickery, bluff and legal gymnastics.”); *Perry v. Univ. Hosps.*, 2004-Ohio-4098, P29 (Ohio App. 2004); *Norris v. State*, 735 So. 2d 363, 365 (Miss. 1999). The court’s dismissive<sup>25</sup> attitude

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<sup>25</sup> The Transcript shows that not only did the trial court allowed Defendant to ambush Plaintiff, it also cut her off, preventing Plaintiff from fully presenting her oral objections, depriving Plaintiff of the *only* opportunity to address Defendant’s belated filings, making the proceedings fundamentally unfair in violation of procedural Due Process. T at 13.

reveals its misapprehension of the policy behind the Rules of Procedure, which are not mere technicalities. As Justice Scalia explained:

The principle that “mere technicalities” should not stand in the way of deciding a case on the merits is more a prescription for ignoring the Federal Rules than a useful guide to their construction and application. By definition all rules of procedure are technicalities; sanction for failure to comply with them always prevents the court from deciding where justice lies in the particular case, on the theory that securing a fair and orderly process enables more justice to be done in the totality of cases. It seems to me, moreover, that we should seek to interpret the rules neither liberally nor stingily, but only, as best we can, according to their apparent intent. Where that intent is to provide leeway, a permissive construction is the right one; where it is to be strict, a permissive construction is wrong. Thus, the very first of the Rules of Civil Procedure does not prescribe that they are to be “liberally construed,” but rather that they are to be “construed to secure the just, speedy, and inexpensive determination of every action.”

*Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 319, 108 S. Ct. 2405, 2410 (1988) (citing Fed. Rule Civ. Proc. 1). SCRCP 1 mirrors the federal rule. And while the rules do not expressly prohibit the filing of a motion apart from the brief and supporting exhibits, and instead only reference a motion and affidavits, interpreting SCRCP 6 and 56 to permit Defendant’s motion practice is entirely inconsistent with both the spirit of the Rules of Procedure as embodied in SCRCP 1, which requires the courts to interpret the Rules to secure a “just” determination of every action, as well as the plain meaning of SCRCP 6 and 56, which require the moving party to show its cards at least 10 days before the hearing. The intent of the legislature is clear—to provide the opposing party with sufficient time to respond. Notably, our Supreme Court did not limit its holding to affidavits alone, but instead stated that “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.” *Black*, 327 S.C. at 60, 488 S.E.2d at 329 (emphasis added). In short, the court abused its discretion when it refused to exercise it to prevent prejudice to Plaintiff, who did not have a

fair opportunity to respond to Defendant’s last-minute filings. *See e.g., Richardson v. Twenty-One Thousand & no/100 Dollars (\$21,000.00) United States Currency & Various Jewelry*, 430 S.C. 594, 601, 846 S.E.2d 14, 17 (Ct. App. 2020) (“A court that does not use discretion—or recognize it has discretion—when discretion exists commits an error of law.”). And if the court wanted to consider the materials, it had to continue the hearing to provide Plaintiff with a fair opportunity to address the filings and prepare for the hearing. *See e.g., Richardson*, 430 S.C. at 601, 846 S.E.2d at 17 (“The use of a continuance as a remedy in similar [] situations has long been endorsed.”); *Callen v. Callen*, 365 S.C. 618, 627, 620 S.E.2d 59, 63-64 (2005) (holding trial court has duty to delay trial to determine whether exclusion of undisclosed witness is appropriate). *See also Montero v. Corzo*, 320 So. 3d 976, 979-980 (Fla. App. 2021) (failure to timely disclose evidence “will bar the information’s use as evidence in the cause unless the trial court finds that the failure to disclose was not willful and either that no prejudice will result or that any existing prejudice may be overcome by allowing a continuance[.]”). Lastly, as before, the court<sup>26</sup> failed to recognize that Defendant, the party who violated the Rules, had the burden to show good cause and lack of prejudice before it considered the untimely served materials. *See e.g., Scott*, 353 S.C. at 652, 579 S.E.2d at 158 (“[u]nless the party [] can show lack of prejudice, reversal is mandated”); *Insignia Hospitality Group, Inc. v. Jalaram Guru, LLC*, LEXIS 4146, \*4-5, 2020 WL 2786676 (Tex. App. 2020) (“any finding of good cause or lack of surprise must be supported by the record”); *Locascio v. Mongrain*, LEXIS 8795, \*25, 2019 WL 6525795 (Tex. App. 2019). Defense counsel made no attempt to articulate good cause for its intentional delay in

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<sup>26</sup> Because Plaintiff’s filings had already preemptively raised both an evidentiary and procedural objections, the court’s odd decision to hear from Defendant *first* (although Plaintiff was the first party to move for summary judgment) gave away both its lack of familiarity with the filings and its inability to grapple with the parties’ respective burdens, both substantive and procedural. R. pp. 66 ¶¶ 11-13 (“let me hear the South Carolina Property and Casualty’s motion for summary judgment first”), 98, 148.

serving the summary judgment materials and the court’s conclusory remarks that the Haag report was not “new evidence” are both misguided and insufficient to overrule Plaintiff’s timeliness objection. R. pp. 72-75. Lastly, because Defendant’s entire argument rested on the Haag report as evidence that damage to Plaintiff’s roof was “old hail,” the court’s abuse of discretion in admitting the report was highly prejudicial. *Fields*, 363 S.C. at 26, 609 S.E.2d at 509.

Briefly, the court also erred when it reasoned that “Plaintiff has had ample time and opportunity to conduct discovery, retain experts, and provide evidence to support her claim for coverage<sup>27</sup>” because the record shows that Defendant failed to fully respond to Plaintiff’s discovery requests, ignored Plaintiff’s deficiency letter, interposed numerous boilerplate objections, and improperly withheld numerous documents, including Plaintiff’s pre-coverage inspection report, claim notes, and the insurer’s internal emails concerning Plaintiff’s claim. R. pp. 70, 154-155, 284-290<sup>28</sup>. Because Defendant made only a conclusory attempt to respond, the court abused its discretion in rejecting yet another procedural objection, to the extent our Supreme Court counseled that “[s]ince it is a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues” and instructed “that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” *Baughman*, 306 S.C. at 112, 410 S.E.2d at 543-544 (internal marks omitted); *Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986). Nor does it matter that “[p]rior to the parties’ cross motions, the parties were

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<sup>27</sup> As was explained *ante*, coverage is not in dispute, the evidence already in the record plainly satisfies a *prima facie* showing of coverage, and it was Defendant who bore the duty to show that coverage was *excluded*.

<sup>28</sup> Even though Plaintiff’s Deficiency Letter is hearsay, Defendant waived its objection by failing to timely raise it, because evidentiary objections are waived unless timely raised. *See e.g., Scully*, 400 S.C. at 44-45, 733 S.E.2d at 120-121 (“For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented.”). And, unlike Plaintiff, defense counsel had ample time to raise an objection.

engaged in discovery for almost ten (10) months,” because the delay in completing discovery was attributable to *Defendant* (not Plaintiff) and there is no evidence that Plaintiff was dilatory in pursuing discovery. *Baughman*, 306 S.C. at 113, 410 S.E.2d at 544 (“We acknowledge that more than three years elapsed between the filing of these actions and the final granting of partial summary judgment as to personal injury. The delays in completing discovery, however, may not fairly be attributed solely to Plaintiffs’ inaction.”). Plaintiff has also demonstrated that she was not merely engaged in a “fishing expedition” by clearly identifying the improperly withheld materials and establishing a likelihood that further discovery would uncover additional evidence relevant to the issue of the insurer’s breach, such as its pre-coverage inspection report, as well as the issue of policy coverage and Plaintiff’s burden of making a *prima facie* showing, raised by Defendant in its cross-motion, including Plaintiff’s insurance policies, which additional discovery would yield. R. pp. 154-156.

Relatedly, the court also erred when it found that Plaintiff conceded that she has had an adequate opportunity to conduct discovery, because any concession applied only to the issues raised in Plaintiff’s own motion for summary judgment—Defendant’s inability to substantiate its policy exclusion defense in light of the Haag’s report’s inadmissibility. *E.g.*, *Wiegand v. U.S. Auto. Ass’n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011) (“Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law.”). Because Defendant bore the burden of establishing a policy exclusion, Plaintiff had no duty to “support her motion with affidavits or other similar materials negating the opponent’s claim” and Plaintiff’s initial responsibility was “discharged by ‘showing’ – that is, pointing out to the [trial] court – that there is an absence of evidence to support the nonmoving party’s case.” *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545 (citing *Celotex*, 477 U.S. at 325). R. p. 98. Thus,

in regards to the issue of policy exclusions, Plaintiff did concede that she did not need discovery, however, Defendant’s cross-motion, on the other hand, attempted to raise an entirely different issue—that Plaintiff cannot make a *prima facie* showing that her hail claim was covered by the policy—and shift Defendant’s burden onto Plaintiff, which Plaintiff flagged in her response in opposition. R. pp. 114-125, 154-155. As to this issue, the insureds typically bear the burden of proof. *See ante*. However, because Plaintiff’s motion argued that the insurer impliedly conceded coverage when it denied the claim based on a policy exclusion, and Defendant failed to counter Plaintiff’s argument conceding the point, Plaintiff neither anticipated having to present evidence of coverage nor conceded that she had an adequate opportunity to conduct discovery as to *this* issue. *See Pattee*, 442 S.C at 240, 898 S.E.2d at 162 (“If a respondent fails to answer to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant’s position is correct.”). *See also Sasser v. Safe Home Sec., Inc.*, No. 18-CV-746, 2019 U.S. Dist. LEXIS 138619, 2019 WL 3858607, at \*5 (M.D.N.C. Aug. 16, 2019) (collecting cases “in both this District, and throughout the Fourth Circuit, agree[ing] that failing to respond to an argument constitutes an abandonment of a claim”); *Bell*, 781 Fed. Appx. at 226 (“an appellee’s wholesale failure to respond to a conspicuous, nonfrivolous argument in the appellant’s brief ordinarily constitutes a forfeiture”). The fact that Defendant delayed the service of its summary judgment materials until the eleventh hour in addition to withholding discovery materials only strengthens Plaintiff’s timeliness objection, making summary judgment just as procedurally unfair as it was substantively defective. *E.g., Collins*, 114 N.C. App. at 20, 441 S.E.2d at 153 (“[G]amesmanship and actions designed to minimize adequate notice to one’s adversary have no place within the principles of professionalism governing the conduct of participants in litigation.”).

***V. The trial court erred when it rejected Plaintiff's argument that Defendant failed to sufficiently plead its policy exclusions.***

In addition to being untimely, there was yet another reason why the court should not have considered Defendant's arguments to the extent they all related to an affirmative defense of preexisting conditions. R. pp. 36-47, 75, 148-175. Briefly, the record shows that Defendant filed an Answer which raised 21 affirmative defenses, however, *none* was supported by any factual averments to put Plaintiff on notice of Defendant's preexisting conditions policy exclusion arguments, and specifically, its argument that the Davis Claims Services report was a mere estimate. R. pp. 45-46. Instead, Defendant relied on boilerplate language that tracked SCRCP 8(c) and incorporated *all* policy exclusions as defenses. The residuary clause of the Rule requires "any other matter constituting an avoidance or affirmative defense" to be "set forth affirmatively," and the overwhelming majority of jurisdictions have held that policy exclusions are defenses subject to the residuary clause. *See Strickland v. Strickland*, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007); *Ingraham v. United States*, 808 F.2d 1075, 1078 (5th Cir. 1987). Because South Carolina applies the same pleading standard set forth under SCRCP 8 to affirmative defenses, Defendant's Answer waived its policy exclusions defenses by neglecting to identify *any* specific policy exclusion and using boilerplate language unenhanced by *any* factual allegations. *See e.g., Rotec Servs. v. Encompass Servs.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004) (finding that "Defendant pleads the affirmative defense of privilege" is an insufficiently pled affirmative defense because "[t]his statement alone is purely a legal conclusion and clearly falls below the standard mandated by Rule 8."); SCRCP 8, Note (an affirmative defense is subject to the pleading requirements outlined in Rule 8 which "require the defendant also to stick to 'fact' pleading."); *Unisun Ins. v. Hawkins*, 342 S.C. 537, 542-543 (Ct. App. 2000) ("We hold the averment that Unisun 'failed to serve Bruce Hawkins within the three-

year statute of limitations’ is insufficient.”).

**VI. The court also erred when it partially dismissed Plaintiff’s Complaint, to the extent S.C. Code Ann. §38-31-20 expressly allows recovery of extra-contractual damages awarded against Defendant and a justiciable controversy existed between the parties.**

The record shows that whether Plaintiff stated a claim for breach of duty of good faith and punitive damages against Defendant itself, as opposed to the insolvent insurer, is a matter of statutory construction reviewed *de novo*. R. p. 2. See e.g., *Protopapas v. Wall, Templeton & Haldrup, P.A.*, 442 S.C. 217, 225 (Ct. App. 2023) (“Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below.”) (quoting *Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. S.C. Med. Malpractice Liab. Joint Underwriting Ass’n*, 411 S.C. 557, 560, 769 S.E.2d 847, 848 (2015)). The Act directs that the IGA “shall investigate claims brought against the association and adjust, compromise, settle, and pay covered claims to the extent of the association’s obligation.” *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 581 (2018) (emphasis added); S.C. Code Ann. §38-31-60(d). What constitutes a “covered claim” is defined by §38-31-20(8), which states in relevant part:

“Covered claim” means an unpaid claim [], which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if the insurer is an insolvent insurer and [] (b) the claim is for first-party benefits for damage to property permanently located in this State. “Covered claim” does not include:

(a) any amount awarded as extra-contractual damages *unless awarded against the association*;

S.C. Code Ann. § 38-31-20(8)(b) (emphasis added). “In interpreting statutes, the [c]ourt looks to the plain meaning of the statute and the intent of the Legislature.” *Gay v. Ariail*, 381 S.C. 341, 344, 673 S.E.2d 418, 420 (2009). “Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Lambries v. Saluda Cnty. Council*, 409 S.C. 1,

10-11, 760 S.E.2d 785, 790 (2014). The language of the statute at hand is clear—in an action against the association, it bars recovery of extra-contractual damages *awarded against the insolvent insurer* but expressly allows such damages *if awarded against Defendant*. On its face, the statute does not limit the insured’s ability to bring a claim for bad faith or breach of duty of good faith based on Defendant’s own acts or omissions, and only limits Defendant’s liability to contractual damages for actions or omissions of the insolvent insurer. In addition, since this statute is remedial in nature, it should be liberally construed to “giv[e] the words the largest, the fullest, the most extensive meaning of which they are susceptible.” *See Allen v. Union Oil & Mfg. Co.*, 59 S.C. 571, 577, 38 S.E. 274, 276 (1901). It logically follows that if the Act expressly permits extra-contractual damages to be recovered as long as they are awarded against Defendant itself, that the Act expressly contemplates that extra-contractual claims may be brought against the Association, because a breach of contract claim does not permit recovery of extra-contractual damages, such as punitive or treble damages. *See, e.g., Smith v. Canal Ins. Co.*, 275 S.C. 256, 260, 269 S.E.2d 348, 350 (1980) (“plaintiff must show the breach was accomplished with a fraudulent intention and was accompanied by a fraudulent act.”). Any other reading renders the statute a garble. *See Davis v. Sch. Dist. of Greenville Cty.*, 374 S.C. 39, 45, 647 S.E.2d 219, 584 (2007) (“goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd”) (internal marks omitted). Therefore, contrary to Defendant’s argument, the plain meaning of the Act does not bar Plaintiff from asserting bad faith or breach of covenant of good faith directly against Defendant *for its own handling* of the covered claim. Moreover, Defendant “is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, *duties, and obligations of the insolvent insurer* as if the insurer had not become insolvent.” S.C. Code Ann.

§38-31-60(b) (emphasis added). Accordingly, in regards to “covered claims,” Defendant owed Plaintiff the same duties as her insolvent insurer, including a heightened duty of good faith. *Id.* In her Complaint, Plaintiff asserted that the insurer disregarded a favorable expert report that found hail damage to the roof to be compensable (i.e., “new hail”) and shopped around for a conflicting report that found the damage to be preexisting (i.e., “old hail”). Complaint at 3-12. She also asserted that the claims file contained two conflicting reports and that Plaintiff renewed her hail claim with Defendant after the insurer was declared insolvent. *Id.* In respect to Plaintiff’s renewed claim, Defendant owed Plaintiff the same duties “to investigate [] and adjust, compromise, settle, and pay [] [it]” as her insolvent insurer. *Farmer*, 424 S.C. at 581; S.C. Code Ann. § 38-31-60(d). Plaintiff’s Complaint also asserts that instead of conducting a good faith investigation, Defendant rubber stamped the insurer’s denial, as conceded by defense counsel, without addressing Plaintiff’s challenges to the Haag report, turning over the Davis Claims Services report in disregard of Plaintiff’s request, or explaining why it resolved doubt against Plaintiff when faced with two conflicting reports, as it was required to do. R. pp. 67 ¶¶ 19-22 (renewed claim “was denied again [by Defendant] based on the investigation that was conducted by the insolvent insurer”), 20-29. *Owners*, 364 S.C. at 560, 614 S.E.2d at 614 (“Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion’s applicability.”); *Walde*, 401 S.C. at 439, 737 S.E.2d at 635. *See also Gore Design Completions, Ltd.*, 538 F.3d at 369 (“doubts are resolved in the insured’s favor”); *International Minerals & Chemical Corp.*, 168 Ill. App. 3d at 367, 522 N.E.2d at 119 (exclusionary clause “applicability must be clear and free from doubt because any doubts as to coverage will be resolved in favor of the insured.”). Defendant itself breached its duties to Plaintiff when it neglected to properly investigate the renewed claim, relying on the insurer’s

denial instead, and ignored Plaintiff's request to produce the Davis Claims Services report and refute the deficiencies of the Haag report identified by Plaintiff's contractor. S.C. Code Ann. §38-31-60(b). See *Duncan v. Provident Mut. Life Ins. Co. of Phila.*, 310 S.C. 465, 468, 427 S.E.2d 657, 659 (1993) ("this State's long held philosophy [is] that those in the insurance industry who fail to deal in good faith should be penalized."); *Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155, 345 S.E.2d 711, 713 (1986) (holding that relying on expert report, in and of itself, will not immunize an insurer from liability for bad faith). Thus, viewed in the light most favorable to Plaintiff, the Complaint sufficiently stated a bad faith claim *against Defendant itself* for its own mishandling of the renewed claim. *Rydde*, 381 S.C. at 646, 675 S.E.2d at 433 ("[The 12(b)(6)] standard requires the [c]ourt to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the [appellant] to relief on any theory of the case.") (internal marks omitted). Lastly, if the court believed that Plaintiff's Complaint was insufficient, it had to give Plaintiff an opportunity to amend her Complaint before it ordered a partial dismissal. *Skydive Myrtle Beach v. Horry Cty.*, 426 S.C. 175, 180 (2019). R. pp. 139, 147.

The court also erred in dismissing the declaratory judgment count. To begin with, "generally speaking, [] a motion to dismiss 'is rarely appropriate in a declaratory judgment action.'" *Brown-Thomas v. Hynie*, 412 F. Supp. 3d 600, 606 (D.S.C. September 12, 2019); *120 W. Fayette St., LLLP v. Mayor & City Council of Baltimore City*, 413 Md. 309, 355, 992 A.2d 459, 487 (Md. 2010). Pursuant to South Carolina's Uniform Declaratory Judgments Act, "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. § 15-53-20. "Any person ... whose rights, status or other legal relations are affected by a statute ... may have

determined any question of construction or validity arising under the [] statute ... and obtain a declaration of rights, status or other legal relations thereunder.” *Id.* S.C. Code Ann. § 15-53-30. The *only* requirement is to demonstrate a justiciable controversy. *Thompson v. State*, 415 S.C. 560, 565, 785 S.E.2d 189, 191 (2016) (“To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy”) (internal citation omitted). As our Supreme Court stated, “[w]here a concrete issue is present, and there is a definite assertion of legal rights and a positive legal duty with respect thereto, which are denied by the adverse party, there is a justiciable controversy calling for the invocation of declaratory judgment action.” *Power v. McNair*, 255 S.C. 150, 153–54, 177 S.E.2d 551, 553 (1970) (quoting *Dantzler v. Callison*, 227 S.C. 317, 321, 88 S.E.2d 64, 66 (1955)). There is no need to dwell on these requirements, to the extent the record plainly demonstrates concrete issues, definite assertion of rights, and a breach of duty with respect thereto. *Broadwater v. State*, 303 Md. 461, 466, 494 A.2d 934, 936 (Md. 1985) (“even though the plaintiff may be on the losing side of the dispute, if he states the existence of a controversy which should be settled, he states a cause of suit for a declaratory decree.”).

In dismissing the declaratory judgment count, the court agreed with Defendant that “Plaintiff’s Declaratory Judgment cause of action does not seek declarations related to the insurance policy, but, rather, requests for advisory opinions on general duties by insurers in South Carolina, improperly asks the Court to rewrite insurance contracts, and will not terminate the uncertainty/controversy in question,” even though Defendant’s contention that “the *insurance policy is the only gateway* by which a Declaratory Judgment can be brought” plainly lacked any merit. R. p. 4 (emphasis added), 94-95. Plaintiff’s Complaint sought a declaration concerning the parties’ respective rights and obligations under the Insurance Guaranty Act (“the Act”), which is

“the precise type of concrete controversy the Declaratory Judgment Act contemplates, as it invites a party affected by a statute to ask a court to define how the statute impacts the party’s rights.” *Farmer*, 424 S.C. at 588; S.C. Code Ann. § 15-53-30. Specifically, in her filings, Plaintiff stressed the lack of relevant case law interpreting the Act and recited several first impression issues, including *inter alia* whether a breach of duty of good faith can be asserted against Defendant itself, where it rubber stamps the insurer’s wrongful denial. R. pp. 19-35, 142. Our Supreme Court has already held that issues of statutory interpretation as well as issues of first impression are particularly suitable for the Declaratory Judgment Act and that it is not within the court’s discretion to dismiss a question of first impression with no factual record, as the court did here, because “[m]otions to dismiss are no place for novelty.” *Farmer*, 424 S.C. at 586-88. The premature nature of the dismissal and the need for declaratory judgment becomes even more apparent in light of the fact that in addition to the issues identified in the Complaint, several other issues emerged in the course of the litigation, when Defendant attempted to repackage a claim denial based on a policy exclusion as a coverage dispute, including whether such denial impliedly concedes coverage, as many other jurisdictions have found. R. pp. 63-89, 114-125. *See e.g.*, *Williams*, 230 N.E.3d at 943 (“In this regard, a coverage exclusion effectively admits the insured’s coverage allegations but asserts some additional matter barring relief.”); *Ackerman*, 162 Md. App. 1, 872 A.2d at 114 (an exclusion is an affirmative defense to coverage); *Ica Invs., Inc.*, 2023 U.S. Dist. LEXIS 21318, \*6, 2023 WL 1987866 (“treating the exclusion as a denial would appear to be inconsistent with Florida law.”). The record shows that, while Defendant caused the declaratory judgment count to be dismissed, accusing Plaintiff of seeking “advisory opinions on general duties by insurers in South Carolina” and the court readily agreed with Defendant’s absurd proposition that Plaintiff sought “to rewrite insurance contracts,”

both the court and Defendant later struggled to articulate many of the *general* concepts of insurance law, including the proper standard for denying a claim based on a policy exclusion, which the court ultimately left entirely unanswered. R. pp. 15-16. The cruel irony is that Defendant *itself* attempted to resurrect the declaratory judgment count in its summary judgment filings, ignoring the fact that it is bound by its own pleadings. R. p. 114 (“Pursuant to the South Carolina Uniform Declaratory Judgment Act, S.C. Code Ann. § 15-53-10 *et seq.*, the Defendant SCGA seeks a determination of the rights and obligations, if any, of the parties.”). Under the circumstances, Defendant’s motion for summary judgment amounts to a concession<sup>29</sup> that its request to dismiss the declaratory judgment count was meritless. *See also Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) (“It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise”). “Any allegations, statements, or admissions contained in a pleading are conclusive against the pleader, and a party cannot subsequently take a contrary or inconsistent position.” *Charleston County Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 425 (2006). “[A] declaratory judgment action is appropriate when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and ... when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.” *Centennial Life Ins. Co. v. Poston*, 88 F.3d 255, 256 (4th Cir. 1996) (internal marks omitted). Plaintiff’s Complaint did just that—it asked the Court to *clarify* the uncertainty concerning Defendant’s liability and the parties’

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<sup>29</sup> In addition to being procedurally defective, Defendant’s request for a declaration is substantively defective, to the extent it is subsumed into the breach of contract claim and serves “no useful purpose,” to the extent a breach of contract has already occurred, unlike Plaintiff’s request which seeks a broader ruling that clarifies substantive law. *CC 101 N. Tryon, LLC v. Ne. Univ.*, 2024 U.S. Dist. LEXIS 95608, \*3-4, 2024 WL 2753257 (W.D.N.C. 2024) (“where the alleged breach of contract has already occurred, there is ‘no useful purpose to be achieved in granting declaratory relief’”). As with nearly each argument Defendant made in the course of this litigation, the law is the polar opposite of Defendant’s contentions.

respective burdens and duties. In short, Plaintiff stated a claim for declaratory judgment relief and the court erred in dismissing it.

### **CONCLUSION**

For the reasons stated *ante*, Appellant respectfully asks the Court of Appeals to reverse Judge McKinnon’s order granting Defendant’s motion to dismiss in part as well as Defendant’s motion for summary judgment, find that Defendant is liable for breach of contract as well as bad faith, and remand the case to determine the amount of damages and enter declaratory judgment clarifying that Defendant is amenable to liability for punitive damages under the Act based on its own mishandling of the claim, Defendant’s failure to conduct an independent investigation amounted to bad faith, policy exclusions are affirmative defenses, a denial based on a policy exclusion concedes coverage, and the proper standard for denying a claim based on a policy exclusion is clear and convincing evidence. *See State v. Brewton*, 442 S.C. 169, 182 (2024) (where facts and circumstances pertinent to the issue are clearly apparent from the record and support only one conclusion, remand is not necessary).

Respectfully submitted,  
December 25, 2025

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Dec 29 2025

SC Court of Appeals

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.

SC Property and Casualty Insurance  
Guaranty Association, as a successor in  
interest to St. Johns Insurance, insolvent  
insurer,

Respondent.

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned hereby certifies that Appellant's Final Brief complies with Rule 211 and that it was served on all counsel of record by electronic mail addressed as follows:

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December 25, 2025

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