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 insure, Respondent.

APPELLANT'S REPLY BRIEF

November 25, 2025

s/ Ina Shtukar Steinberg
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i. Respondent's "response" brief failed to refute Appellant's argument, supported by authority and record citations, that the trial court relied on inadmissible evidence (the Haag report) to rule in Respondent's favor on Respondent's motion for summary judgment, because Respondent failed to properly assert any hearsay exception below, forfeiting all of them instead, in response to Appellant's conspicuously made objection asserted before Respondent even moved for summary judgment, and attempted to make evidentiary objections to Appellant's summary judgment materials, which Respondent likewise waived below, failing to preserve any objection for appellate review.

As an initial matter, Respondent's "response" brief concedes more than it refutes. Most arguments Respondent makes on appeal have been addressed and foreclosed as meritless both below and on appeal. Yet, Respondent is still to address most of Appellant's properly supported arguments. The basic function of a *response* brief (which Respondent does not have to file) is to respond to appellant's arguments. While Respondent filed a brief titled a "response" brief, its brief fails to address nearly all of Appellant's arguments, but instead makes half-backed contentions, which Appellant has clearly refuted in her summary judgment briefing below as well as in her initial brief on appeal. Such wholesale failure to address conspicuously made arguments *twice* amounts to a clear concession. *See Dixon v. Pattee*, 442 S.C. 233, 240, 898 S.E.2d 158, 162 (Ct. App. 2023) ("If a respondent fails to answer to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct.").

Specifically, the record conclusively shows that Respondent failed to properly assert a hearsay exception or argue that the Haag report had any non-hearsay purpose in its summary judgment briefing or at the time of the hearing (aside from a few conclusory remarks insufficient to assert any exception as a matter of law) in response to Appellant's hearsay objection conspicuously made before Respondent even moved for summary judgment, both conceding Appellant's evidentiary objections and forfeiting all hearsay exceptions. R. pp. 74, 98-125, 148-175. *See Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) ("An issue is deemed abandoned and will

not be considered on appeal if the argument is raised in a brief but not supported by authority."). First, Respondent's brief conceded Appellant's contention that it bore the burden of showing that the Haag report fit appropriately within a hearsay exception. *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."). Similar to its strategy in handling its burden of establishing a policy exclusion discussed below, Respondent attempts to shift its burden of properly raising a hearsay exception onto Appellant by arguing "Steinberg never argued that an affidavit was necessary to authenticate[1] the Haag report." RIB at 11. Appellant discharged her burden and preserved her evidentiary objections by sufficiently articulating them in her summary judgment briefing–Appellant had no duty to negate hearsay exceptions *which were never properly asserted in the first place*. *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"). It was Respondent who had the burden of complying with the prerequisites of a business record exception as a proponent of hearsay evidence, including laying a proper foundation. *See State v. Mealor*, 425 S.C. 625, 642 (Ct. App. 2018); SCRE 803(6); S.C. Code Ann. §19-5-510. By failing to properly lay a foundation to invoke a hearsay exception below, orally argued in a plainly conclusory fashion, Respondent effectively abandoned its evidentiary arguments. *See Williams v. Leventis*, 290 S.C. 386, 350 S.E.2d 520 (Ct. App. 1986). In its brief, Respondent boldly yet plainly erroneously argues "[o]bviously, Rule 56 does not require the nonmoving party to depose her own witnesses," because the issue with the Haag report is not SCRCP 56 but SCRE 803(6) and S.C. Code Ann. §19-5-510, which do require either an affidavit or custodian's testimony before the Haag report can be relied

[1] Besides, the issue was not authentication but Respondent's failure to lay the foundation as required by SCRE 803(6) and S.C. Code Ann. §19-5-510.

on to enter summary judgment. RIB at 11-12. *Celotex* had nothing to say about the use of *expert* reports and the issue before this Court–whether the court erred by relying on the Haag report in granting Respondent's summary judgment in light of Respondent's failure to properly invoke a hearsay exception and lay a proper foundation by way of a custodian's affidavit in response to Appellant's evidentiary objection–and held[2] that the moving party had no duty to support its motion with an affidavit, *where the burden of proof on a dispositive issue fell on the nonmoving party*. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548 (1986). Here, unlike in *Celotex*, the burden of both establishing a hearsay exception and a policy exclusion fell on Respondent's shoulders and it could not meet its burden because the only evidence that supported a policy exclusion was an expert report inadmissible at trial. *See Simmons*, 423 S.C. at 563; *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: the insurer must prove the exclusion applies."). Respondent's contention that "the Haag report would have still been admissible at trial

[2] Any remarks concerning the use of hearsay evidence in *Celotex* were also *dicta*. *Nash v. Tindall Corp*., 375 S.C. 36, 40-41 (Ct. App. 2007). The form in which the evidence is presented at the summary judgment stage indeed frequently differs from the form in which the evidence is introduced at trial, but just because a motion for summary judgment is usually supported by an affidavit, and not live testimony, does not mean Respondent had no duty to lay the foundation to be able to rely on the Haag report as a business record. SCRE 803(6); S.C. Code Ann. §19-5-510 (2014). More fundamentally, the issue here, unlike in *Celotex*, is Respondent's reliance on an *expert report* because expert reports are treated differently than other types of evidence. *See Allegro, Inc. v. Scully*, 400 S.C. 33, 48, 733 S.E.2d 114, 122 (Ct. App. 2012). Expert reports are not admissible in evidence as they are typically commissioned for the purposes of litigation. *See Palmer v. Hoffman*, 318 U.S. 109, 113-14, 63 S. Ct. 477, 87 L. Ed. 645 (1943). Both Appellant's summary judgment briefing and her initial brief explained this nuance. AIB at 12, footnote 5. Respondent fails to grapple with these crucial distinctions and ignores Appellant's conspicuously made arguments supported by authority that the Haag report could not be used to support a summary judgment motion because it would not be admissible at trial *either*. *See Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) ("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."); *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 issue of fact … can be created only by evidence which would be admissible at trial.").

for establishing what was relied upon by the insurer in determining coverage" borders on the absurd because the sole reason the report was introduced was for the truth of the matter asserted– that damage was old hail. R. pp. 114-125; RIB at 4-5, 13, 18 (relying on the Haag opinions as "facts"). Moreover, establishing the fact that the adjuster ordered a second inspection by Haag *after its investigating*[3] *adjuster had already recommended the approval of the claim* neither calls for nor authorizes the admission of the Haag report itself, as the authority conspicuously cited in Appellant's brief explained. AIB at 8 citing *Allegro, Inc. v. Scully*, 400 S.C. 33, 48, 733 S.E.2d 114, 122 (Ct. App. 2012) ("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."). Second, Respondent never addressed Appellant's argument that the business record exception, even if properly invoked, would fail substantively, because the insolvent insurer was not in the business of preparing engineering reports, conceding this point. AIB at 7-17; RIB at 11-14. *See* SCRE 803(6); S.C. Code Ann. §19-5-510 (2014). *See also 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

[3] Respondent also attempts to mislead the Court to believe that "IA" stood for an "independent adjuster" as opposed to an "investigating adjuster" but its own brief concedes that the insurer hired Davis Claims Services "to conduct the field investigation" of the claim. RIB at 3. Based on the evidence in the record, Appellant's contention that "IA" stood for an "investigating adjuster" makes more sense because a field adjuster is the one who conducts an investigation and reports back to a desk adjuster, and as a nonmoving party in respect to Respondent's motion, Appellant was entitled to have her version of all that is in dispute accepted. AIB at 14 footnote 6; 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 the engineer comes in later with a different opinion"). *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]"). Nor did Respondent present any evidence or make an attempt to challenge Appellant's interpretation at the trial court level once again conceding the point.

it supplied would be used in an ongoing criminal investigation."). Respondent's argument that the Haag report is admissible simply because it was "part of the claims file" also fails because no foundation was laid to admit the claims file either. RIB at 11. And even if Respondent laid a proper foundation to admit the claims file, that alone would not make the admission of the hearsay expert report automatic–Respondent would still face the same hurdle of invoking a hearsay exception to Appellant's objection *directed specifically at the Haag report* (not the claims file), as a double hearsay scenario requires a proponent of the evidence to establish an exception to each level of hearsay. SCRE 805. *See Bain v. Self Memorial Hosp*., 281 S.C. 138, 145, 314 S.E.2d 603, 607-08 (Ct. App. 1984). Nor did Respondent attempt to admit the claims file itself (which it also failed to produce in discovery as Appellant's summary judgment briefing pointed out)–instead, it relied exclusively on the Haag report, which is why the admissibility of the claims file is simply a nonissue and an attempt to deflate. R. pp. 114-125, 282-283. Third, Respondent attempts to challenge one of Appellant's trustworthiness arguments for the first time on appeal, even though it forfeited its contention at the trial court level by neglecting to address Appellant's arguments that the circumstances[4] of preparation of the Haag report indicate lack of trustworthiness, which makes the Haag report inadmissible even if it fell within the business record exception, pursuant to SCRE 803(6) and S.C. Code Ann. §19-5-510. R. pp. 68-69, 74, 78-83, 114-125, 164-166, 176-179 (IA congratulating Appellant on a new roof), 189-271. *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); *Applebaum v. Target Corp*., 831 F.3d 740, 744 (6th. Cir. 2016). Specifically, in its brief, Respondent accuses Appellant of making "a misleading attack on the

[4] Respondent's brief conceded that the adjuster retained Haag based solely on an inconclusive weather report, although Haag itself considers weather reports unreliable.

trustworthiness of the Haag report by inaccurately citing to *Underwriters at Lloyd's of London v. Tarantino Props*., 2012 WL 3835385 (W.D.MI. Sept. 4, 2012)," but aside from being totally accurate, this citation was only *one* of several ways Appellant challenged the trustworthiness of the report, which have not been addressed either below or on appeal. R. pp. 75, 77, 84, 100-1001 footnote 2, 165-166, 173-174. Specifically, Appellant argued that the trustworthiness of the Haag report was in serious doubt because (1) the insurer's primary motive for commissioning the report was to justify the desk adjuster's stubborn refusal to approve the claim despite the field adjuster's fully favorable report and recommendation to approve the claim based on a *single*[5] inconclusive weather report, and not to investigate the claim as Respondent suggests, to the extent the investigating adjuster had already completed[6] its field investigation, issued a through report, and recommended to approve the claim, *before* the adjuster retained Haag solely to deny the claim, as Respondent conceded[7] on appeal, (2) Haag had pecuniary motives to skew its report in favor of the insurer that hired him, and (3) the insurer no longer cared about keeping Appellant as an insured, to the extent it was facing insolvency. R. pp. 176-179, 278-280. *See e.g., Jordan v. Binns*,

[5] Elsewhere in its brief, Respondent misstates the facts indicating that the adjuster obtained "weather reports" even though the record clearly shows the adjuster latched onto a single inclusive weather report, even though the contractor presented another weather report that did document the hail storm in question. RIB at 18.

[6] Respondent's assertion that "the Haag investigation was obtained *during the course of the claim investigation* to determine the timing of the hail damage, *prior to any decision on coverage*" is conspicuously unsupported by any record citation. RIB at 13. Despite Respondent's full awareness of Appellant's contention that Haag was retained for the sole reason of justifying the denial of the claim, Respondent elected to gamble by neglecting to present any evidence by way of an affidavit or otherwise to refute Appellant's contention, which was properly supported by evidence in the record, including the claims director's email to the desk adjuster warning her 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," which clearly suggest that the field adjuster had already concluded its investigation. R. pp. 266-267.

[7] Respondent admitted in its brief that the insurer retained the field adjuster to "investigate" the claim and that the desk adjuster rejected the field adjuster's recommendation to approve the claim solely based on a single inclusive weather report. RIB at 18.

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*.") (emphasis added); *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 ..."). None of these arguments have been refuted either below or on appeal. Instead, on appeal Respondent focused on Appellant's citation, which shows that Haag has a reputation for giving the client what it wants and that it has been found to be biased in many other cases. RIB at 12-13. In addition, the record also contains uncontroverted evidence that professionals who work in the insurance industry are well aware that most experts are in fact biased in favor of either the insurers or the insureds and as a result they customarily maintain lists of experts to either use or stay away from. R. pp. 176-179. Because Appellant properly raised a hearsay objection, Respondent had a duty to refute Appellant's arguments and show trustworthiness of the Haag report before it could be used to support a motion for summary judgment. *Simmons*, 423 S.C. at 563, 816 S.E.2d at 572. Then, not now, was Respondent's only chance to establish a hearsay exception, which it failed to do time and again. Lastly, Respondent's argument that the mere fact that the engineer who prepared the Haag report *could* testify to its contents somehow nullified the court's error in admitting the Haag report without a proper foundation, despite Appellant's hearsay objection, misstates the authority, because the expert's testimony (and the fact that he is subject to cross-examination) is a *prerequisite* for Respondent's ability to introduce the report itself, which is otherwise inadmissible. RIB at 13. *See Shields v. S.C. Dep't of Highways & Public Transp*., 303 S.C. 439, 442-443, 401 S.E.2d 185, 188 (Ct. App. 1991) ("the introduction of a conclusion contained in a written report

through the testimony of the person who prepared it and *who was available for cross-examination* is not reversible error"). Aside from the fact that the report contained an opinion on the ultimate issue of fact (i.e., that it was old hail), Respondent continues to ignore the fact that it failed to properly assert a hearsay exception and lay the foundation to have the report admitted as a business record. *See also S.C. Dep't of Motor Vehicles v. McCarson*, 391 S.C. 136, 147, 705 S.E.2d 425, 430 (2011) (noting Rule 803(8), SCRE, provides for the admission of certain public records but still excludes "investigative notes involving opinions, judgments, or conclusions" because these reports lack trustworthiness).

Ironically, in addition to its forfeiture of any hearsay *exception*, Respondent also waived all of its hearsay *objections* to any of the materials relied on by Appellant to support her summary judgment motion. R. pp. 98-125, 148-175. Specifically, in its brief, Respondents attacks Appellant's affidavit and her contractor's emails, all of which went entirely unopposed at the trial court level. RIB at 18-19. Aside from being meritless[8], these objections were not properly

[8] As Appellant's summary judgment briefing explained, most of the exhibits used by Appellant were not hearsay to begin with because they were not used for the truth of the matter asserted but to show the desk adjuster's state of mind–doubt–to the extent policy exclusions require the insurer to resolve doubt in the insured's favor. Pl's MSJ at 3-4, 8-9. *See*, *e.g., Gore Design Completions, Ltd. v. Hartford Fire Ins. Co.*, 538 F.3d 365, 369 (5th Cir. 2008) ("doubts are resolved in the insured's favor"). Unlike Respondent, Appellant used all of the exhibits to show what materials were before the adjuster at the time it denied the claim in order to establish that the insurer breached the contract by failing to resolve doubt in Appellant's favor, which makes all of her exhibits non-hearsay. R. pp. 98-113, 148-175. For instance, some of the internal emails show that the desk adjuster considered submitting the contractor's emails (which challenged the engineer's findings, his logic, and his conclusions, noting that many of the hail bruises were still dark in color and that Appellant's gutters showed hail splatter, as well as to the engineer's recommendation to individually replace damaged shingles, which both Davis Claims Services and the contractor rejected due to the brittle nature of the shingles in light of the roof's age, and noted that the contractor replaced several roofs in Appellant's neighborhood as a result of the same hail storm that occurred on or about August 19, 2021, offering another weather report that did document the hail storm) to Haag to obtain its explanation to resolve doubt created by the contractor, but elected not to do so, which once again amounted to a breach, because the insurer must resolve doubt in the insured's favor. R. pp. 272-278. Lastly, any objection to Appellant's affidavits were waived below and cannot be resurrected on appeal. *See State v. Burton*, 326 S.C. 605, 609, 486 S.E.2d

preserved for appellate review. *See State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) ("For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented."); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (same); *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (same). Once again, then, not now, was the time for all of Respondent's belated objections, because this Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, 125 S. Ct. 2113 (2005).

Contrary to Respondent's conspicuously unsupported declaration that a remand is somehow necessary, the court need not proceed any further to reverse the summary judgment and enter a judgment in Appellant's favor, to the extent the Haag report is the *only* piece of evidence Respondent relied on to support its contention that a policy exclusion applied. RIB at 19. *See Small v. Pioneer Mach*., 329 S.C. 448, 461 (Ct. App. 1997) ("Our courts have recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court."). Even more fundamentally, as will be explained below, a remand would not be necessary *even* if Respondent met its burden of properly invoking a hearsay exception and even if the expert report was found to be trustworthy, because the insurer breached the agreement when it shopped around for a conflicting expert report to override the field adjuster's conclusion that damage was compensable and rejected its recommendation to approve the claim based on an inherently unreliable weather report, failing to resolve doubt that the adjuster had based on an inconclusive weather report in Appellant's favor. *See, e.g., 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

762, 764 (Ct. App. 1997) ("Failure to object when the evidence is offered constitutes a waiver of the right to object.").

the insured."); *Wagner v. Erie Ins. Co.*, 2002 PA Super 166, 801 A.2d 1226, 1231 (Pa. Super. 2002) (insurer has the burden to show that an asserted exclusion *clearly* and *unambiguously* prevents the coverage of a claim); *Czapski v. Maher*, 2011 IL App (1st) 100948, 17, 954 N.E.2d 237, 352 Ill. Dec. 377 ("The burden is on the insurer to establish that a policy exclusion applies, and its applicability must be definite and free from doubt.").

ii. Aside from its conclusory "Argument" section, unsupported by authority or record citations, that attacked Appellant's argument that Judge McKinnon was confused about the standard of review and his role at the summary judgment stage of the proceedings, which forfeited the argument instead of presenting it for review, Respondent entirely failed to address any of Appellant's arguments that the trial court misapplied summary judgment standard of review, conceding her points.

As an initial matter, as was explained above, "[a] genuine issue of fact … can be created only by evidence which would be admissible at trial." *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). In addition to relying *exclusively* on inadmissible evidence (the Haag report) to rule in Respondent's favor, the summary judgment order as well as the transcript of the hearing conclusively demonstrate that the trial court only considered Respondent's cross-motion and Appellant's oral arguments made in response to Respondent's cross-motion served 18 hours before the hearing, and that in ruling on Respondent's motion, the trial court undertook to find facts, weigh evidence, make credibility determinations, as well as draw inferences and resolve competing inferences against Appellant, the nonmoving party, while ruling on Respondent's motion. R. pp. 8-17, 63-89. *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) ("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"); *L & W Wholesale v. Gore*,

305 S.C. 250, 253, 407 S.E.2d 658, 659 (1991) ("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); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 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."); *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.").

Aside from a conclusory attack on Appellant's contention that Judge McKinnon was confused about the standard of review he was supposed to apply in ruling on competing motions for summary judgment, Respondent utterly failed to develop its bold yet unsupported declaration into an argument, leaving Appellant's arguments entirely unrefuted and erroneously arguing that Appellant bore the burden of refuting a policy exclusion. RIB at 6, 14-19. The remainder of Respondent's discussion of the trial court's application of the summary judgment standard of review attempted to raise evidentiary objections waived below. *Id*. As such, Respondent conceded that Judge McKinnon (1) resolved the key disputed issue of fact indicating "the Court finds that the evidence reflects that Appellant's roof damage was old and occurred before the policy inception," clearly demonstrating his confusion, (2) repeatedly drew questionable inferences in

Respondent's favor, indicating that the insurer's internal email, which documented that the field adjuster had recommended to approve the claim and replace the entire roof upon completing its investigation, somehow suggested that the claims director "did not understand the purpose of the retention of the engineer," (3) repeatedly resolved competing inferences against Appellant, while ruling on Respondent's motion, contrary to the standard of review, which required him to accept Appellant's version of events, expressly indicating "the Court does not agree" with Appellant's interpretation of the documentary evidence, once again revealing his confusion about his role as a neutral arbiter as opposed to an inquisitor, (4) weighed the evidence when it failed to credit evidence that contradicts its factual conclusions, including the fact that the field adjuster's recommendation to approve the claim implied that Davis Claims Services, who would qualify as an expert, found the damage to the roof to be covered and compensable, and instead accepted Respondent's last-minute argument (which is not evidence) that the field adjuster was retained *solely*[9] "to conduct a repair estimate," asserted 18 hours before the hearing, and (5) failed to meaningfully engage with the record, ignoring Appellant's unchallenged affidavits and exhibits, which clearly contradicted Respondent's version of events, including that the insurer and Respondent refused to turn over the Davis Claims Services report, that neither the desk adjuster nor Haag called the Davis Claims Services report, its conclusion, and its recommendation into question by pointing to any internal inconsistencies or flawed logic, that the weather report did not certify that it did not hail on the date in question but instead stated it could not verify whether it

[9] Realizing that she had her foot in her mouth, defense counsel attempted to backpedal on arguing that a 70-page report was a "mere estimate," which serves as an admission that the insurer employs bad faith practices by making its compensability decisions based on the cost of repairs. R. pp. 63-89; RIB. *See Bump v. Firemens Ins. Co*., 221 Neb. 678, 686, 380 N.W.2d 275 (Neb. 1986) ("Otherwise, an insurance company's sending an inept or incompetent adjuster, or one who is otherwise incapable of ascertaining and reporting a loss, spawns skepticism about good faith dealing with an insured -- a specter the insurance industry has long labored to dispel.").

hailed, that Appellant herself witnessed the hail storm in question, that the Davis Claims Services report contained photographs of *both* dark and faded hail bruises and fresh hail splatter on Appellant's gutters, that the desk adjuster elected not to submit the contractor's email to Haag for feedback as it normally does, and that the insurer was facing insolvency and declined to reconsider its denial citing its insolvency, without addressing any of Appellant's or her contractor's arguments. Order at 5-6, 8, 9; T at 15-17; D's MSJ at 7-8. *See McNeil* v. *Wisconsin,* 501 U.S. 171, 181, n. 2, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991) ("What makes a system adversarial rather than inquisitorial is [] the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties."); *Bump*, 221 Neb. at 686 (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 trial court did not abuse its discretion in qualifying the author of the adjuster's report as an expert").

Respondent's factual contentions also clearly reveal its own confusion about the applicable standard of review, which explains a poorly drafted summary judgment order, to the extent it repeatedly argued not the facts but *inferences favorable to itself*, even though Appellant is entitled to every inference to be drawn in her favor, including that (1) "IA" stood for an "independent adjuster," while admitting that he was hired "to conduct the field investigation," (2) the field adjuster was retained *solely* to provide a repair estimate, contrary to its own admission made elsewhere in the brief, (3) "Davis report [] documented hail damage but did not assess its timing," even though other undisputed evidence in the record showed that the field adjuster found the loss

to be compensable and recommended to approve the claim, (4) the color of hail bruises was faded and there was no hail splatter, even though the photos enclosed with the Davis Claims Services report documented otherwise, (5) the engineer "spoke with Steinberg's roofing contractor, Will Robinson, who advised that 'he did not know when hail had fallen at the site,'" without once again addressing the issue of double hearsay and despite Appellant's hearsay objection, which were preserved for appellate review (unlike Respondent's objections), (6) opinions contained in the inadmissible Haag reports were "facts," (7) litigation at hand was a "coverage" dispute, without ever refuting Appellant's argument that a denial based on a policy exclusion concedes coverage, (8) Appellant's filings were "saturated with speculation and misrepresentation" without providing a single example of either, (9) Appellant was "unable to present any admissible evidence that contradicted the engineer's opinion on the timing of the loss," ignoring the fact that the record contains unchallenged evidence, including Appellant's affidavit, her contractor's email, which noted that three (3) other roofs were replaced in the same neighborhood as a result of the same storm, and that another weather report did list the storm in question, which directly contradicted the engineer's contention that it had not hailed in seven (7) years, which should not have been cited as a fact to begin with as it was inadmissible hearsay of questionable trustworthiness as well as a contested matter, (10) the Haag report "was obtained during the course of the claim investigation," although documentary evidence shows that the field adjuster had already completed its investigation and found the damage to be compensable, before the desk adjuster retained Haag clearly not to investigate the claim, but to justify its decision to deny the claim despite the field adjuster's favorable investigation report, and (11) that desk adjuster pulled "weather reports" even though the record clearly demonstrates that the adjuster set out to deny the claim based on a *single*

unreliable and inconclusive weather report[10] and ignored Appellant's contractor's references to another weather report that did document the storm in question. RIB at 3, 4, 13, 18; R. pp. 266-267, 272-277. *See Egbert v. Boule*, 596 U.S. 482, 505, 213 L. Ed. 2d 54, 74 (2022) (Because "[t]his case comes to the Court following the District Court's grant of summary judgment to [Respondent]," the Court is "bound to draw all reasonable factual inferences in favor of Appellant."). Aside from being contested matters improperly pawned onto this Court as facts contrary to SCRAP 208(a), Respondent was not entitled to draw favorable inferences in its own favor under the applicable standard of review.

iii. Respondent failed to address Appellant's argument that the trial court erred substantively by placing the burden of refuting a policy exclusion onto Appellant and conflating the standard that governs the applicability of policy exclusions with the general standard of proof that applies to civil litigation, conceding these points as well.

Respondent's brief does more to hurt than help Respondent's case, to the extent its wholesale failure to respond to a conspicuous, nonfrivolous argument in Appellant's brief constitutes a concession. RIB; AIB at 25-32. *See Dixon*, 442 S.C. at 240. Both on appeal as well as below, Appellant argued that (1) coverage is not in dispute because a claim denial based on a policy exclusion concedes coverage, (2) to avoid liability, an insurer may deny a claim based on a policy exclusion only if its applicability is free from doubt and the evidence raises "the only reasonable

[10] Respondent also attempts to challenge Appellant's request for judicial notice concerning Haag's own publication that explains that weather reports are inherently unreliable, erroneously arguing that Appellant did not ask for judicial notice below. RIB at 18 footnote 6. *See 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*). First, Appellant did ask the trial court to take several judicial notices. R. pp. 99 footnote 1, 158. Second, Respondent failed to object to Appellant's requests, foreclosing its belated objection. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). R. PP. 63-89, 114-125. Third, even if Appellant failed to ask for judicial notice below, judicial notices "may be taken at any stage of the proceedings," including on appeal. SCRE 201(f). *See Megaro v. McCollum*, 66 F.4th 151, 158 (4th Cir. 2023). Fourth, the trial court had no discretion to decline Appellant's unopposed request for judicial notice. SCRE 201(d).

inference" that the loss preexisted the policy inception, and (3) when faced with conflicting evidence, the insurer *must* resolve doubt in favor of extending coverage, because policy exclusions are strongly construed against the insurer. R. pp. 103-112,159-166, 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 [conditions], and in such case *if the only reasonable inference* from the evidence is that the claim of the insured resulted from [condition] already [] [in existence] 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); *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). *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.*, 168 Ill. App. 3d at 367 ("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); *Arawak Aviation, Inc. v. Indem. Ins. Co. of N. Am*., 285 F.3d 954, 956 (11th Cir. 2002); *Wagner*, 2002 PA Super 166, 801 A.2d 1226, 1231 (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."); *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.").

At this point, Respondent has conceded Appellant's substantive arguments twice, to the extent it failed to address Appellant's contentions even after Appellant called Respondent out on its disingenuous attempt to pass its burden onto Appellant by couching a policy exclusion as a *prima facie* coverage dispute, indicating the "[p]olicy does not provide coverage for 'preexisting conditions.'" R. pp. 104-112, 163-164. *See 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). Moreover, while repeatedly arguing both below and on appeal that Appellant failed to make a *prima facie* showing of coverage, Respondent failed to both (1) explain what such showing entails and (2) refute Appellant's argument supported by authority that a policy itself serves as *prima facie* showing of coverage. RIB, D's MSJ. *See Baker v. Metropolitan Life Ins. Co*., 106 S.C. 419, 421, 91 S.E. 324, 325 (1917) ("The Appellant s had the policy which was the contract of insurance, and that was *prima facie* evidence of their right to recover."); *Gulf Wide Towing, Inc. v. F.E. Wright (U.K.), Ltd*., 554 So. 2d 1347, 1352 (1989 La. App.) ("*Prima facie* evidence of the [] coverage under that insurance contract is the insurance contract itself."). Nor did Judge McKinnon bother to explain in his poorly written order what a *prima facie* showing required. R. p. 16. Lastly, both the trial court's order and Respondent's brief failed to cite any authority that stands for the proposition that preponderance of evidence isolates the insurer from liability, where the applicability of a policy exclusion is in doubt, conflating this standard with the ordinary burden of proof in civil litigation, which if true would void the insurer's heightened duty of good faith.

Needless to say, Respondent's contention runs headlong into settled authority cited in Appellant's briefing that disfavors policy exclusions and requires the insurer to resolve doubt in favor of extending coverage. RIB at 17; R. p. 16.

iv. Respondent failed to address Appellant's argument that the court abused its discretion in overruling Appellant's timeliness objection to Respondent's summary judgment motion and supporting exhibits served 18 hours before the hearing to blindside Appellant with its last-minute argument that a 70-page adjuster's report was a "mere estimate" and impede Appellant's ability to prepare for the hearing.

First, Respondent takes a stab at Appellant's timeliness argument, indicating that both SCRCP 6 and 56 require that a written motion and supporting affidavits be served at least 10 days before the hearing and that neither prohibits a party from filing a *memorandum* and supporting affidavits separately from a motion. RIB at 7-8. But this is not what transpired in this case. The record shows that on March 3, nine (9) days before the hearing scheduled for March 12, 2025, Respondent made a filing deceptively titled "Respondent's Notice of Motion and Motion for Summary Judgment," citing boilerplate declaratory judgment (which was dismissed pursuant to Respondent's own motion) and summary judgment standards of review and arguing in a plainly conclusory manner that "Appellant failed to bring a claim within coverage" of the policy, without adorning its argument with *any* factual averments or even referencing any particular policy exclusion. R. pp. 114-117. The record also shows that 18 hours before the hearing, Respondent served its *actual* motion titled "Cross-Motion for Summary Judgment" and its supporting exhibits, arguing for the first time in the course of the proceedings that the 70-page Davis Claims Services report was a mere "repair estimate[11]" and that a filed adjuster, who inspected the property, was hired *solely* to assess the repair costs and not to investigate the claim. R. pp. 118-125. *Neither* filing was timely

[11] To prepare a repair estimate, the insurer did not even have to inspect the property, to the extent insurers and contractors alike use Eagleview online database (and not a yardstick) to crunch the numbers.

in accordance with SCRCP 6 and 56. Ironically, *after* the court had already granted Respondent's "cross-motion" on March 12, 2025, the clerk's office docketed it for a hearing on May 5, 2025. R. pp. 432-439. In her email to the clerk, defense counsel stated that the second filing was an *amended motion*. *Id*. The record also shows that Judge McKinnon's reasoning for rejecting Appellant's objection rested on an error of law because the mere fact that the Haag report was "exchanged in discovery" does not negate resulting prejudice–lack of a fair opportunity to prepare for the hearing to the extent Respondent's "Notice" filing provided *no notice* of Respondent's actual arguments and *willfully* kept Appellant in the dark until the eve of the hearing. R. pp. 9-10, 72. The fallacy of the court's reasoning is obvious. To begin with, discovery captures both admissible and inadmissible materials. SCRCP 26(b)(1). Moreover, neither the court nor Respondent cited a legal definition of "surprise" and instead relied on a layman's understanding of this term. *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"). The fact that the court declined to use its discretion despite (1) willful nature of Respondent's gamesmanship, (2) Respondent's failure to articulate any good cause for delaying the filing of its actual motion until the eleventh hour, and (3) obvious prejudice to Appellant, who did not have an adequate opportunity to prepare, was an error of law. *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). Lastly, true to its habit[12], Respondent attempts to pass on its own burden onto Appellant, arguing that

[12] In the course of this litigation, Respondent attempted to shift its own burden onto Appellant three (3) times, when it argued that (1) Appellant had to point out that the Haag report was not accompanied by an affidavit, although Respondent failed to properly assert *any* hearsay exception in respond to Appellant's objection, (2) Appellant had to negate a policy exclusion to show that her claim was "covered," and (3) Appellant had to seek a continuance, even though Respondent failed to come forward with any good cause and refute prejudice in response to Appellant's objection. RIB at 6, 11. Following Appellant's timely objections, the burden was squarely on Respondent, and because it failed to meet its burden, Appellant had *nothing* to refute.

Appellant had to seek a continuance–the case law, however, instructs that the party who violated the rules has to show good cause and lack of prejudice or that prejudice may be overcome by allowing a continuance, to have its untimely materials considered. *See e.g*., *Richardson*, 430 S.C. at 601, 846 S.E.2d at 17. All Appellant had to do was raise a timely objection.

In short, Appellant was entitled to *know* Respondent's arguments to be able to adequately prepare for the hearing, to the extent the rules require a party to state the grounds for a motion with specificity, which usually means pleading facts. *See e.g*., *Rotec Servs. v. Encompass Servs*., 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004) (finding that "Respondent 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."). Here, resulting prejudice was augmented by the fact that in addition to intentionally delaying the filing of its motion, Respondent also failed to fully respond to Appellant's discovery. R. pp. 154-155, 282-290. *See Baughman v. Am. Tel. & Tel. Co*., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) ("summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery"). As will be explained below, because Respondent was relying on a policy exclusion, which is an affirmative defense, it had a duty to plead enough facts both in its Answer as well as in its motion, which had to be served at least 10 days before the hearing. Respondent failed to do either.

v. Respondent conceded that it failed to sufficiently plead its policy exclusions by relying on a meritless denial foreclosed by authority conspicuously cited in Appellant's brief.

At first glance, Respondent appears to be addressing Appellant's arguments but such impression is short-lived, to the extent Respondent asserts that SCRCP 8 does not list policy

exclusions as affirmative defenses, but neglects to reach Appellant's argument, supported by authority, that 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, and instead cites a Fourth Circuit decision that ironically distinguishes coverage disputes from affirmative defenses, such as policy exclusions, because policy exclusions "presuppose" coverage but excuse the insurer from having to cover the loss, all while accusing Appellant of taking citations out of context. *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); *Black's Law Dictionary* at 711 (11th ed. 2019) (an exclusion in an insurance policy "excuses or exempts [the insurer] from liability under [specified] circumstances."); *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). Nor did Respondent address Appellant's argument that all of its boilerplate defenses fail as a matter of law to the extent a defendant must plead *facts* to meet the plausibility pleading standard and provide a plaintiff with sufficient notice of its arguments. RIB at 16; AIB at 41-42. As with many other issues, these arguments have now been conceded twice, both below and on appeal.

vi. Respondent's brief attempted to mislead the Court to believe that the trial court dismissed the bad faith count because it found the allegations of the complaint to be insufficient, but the transcript shows that Judge McKinnon did not believe a claim for extra-contractual damages could be asserted against Respondent at all, and argued an incorrect standard of pleading declaratory judgment relief, rehashing its old arguments, previously rebutted by Appellant, while failing to refute the fact that justiciable controversy existed.

Once again, Respondent "responds" to Appellant's arguments without addressing any of her points. RIB. First, the transcript of the hearing shows that Judge McKinnon never considered the

allegations of Appellant's Complaint because it was under an impression that the statute barred claims for extra-contractual damages whether awarded against Respondent or the insolvent insurer. R. pp. 48-62. *This* was the reason it granted Respondent's motion, and not the allegations of the Complaint were insufficient. Moreover, while in opposing Respondent's motion, Appellant readily admitted that her Complaint is far from being a model of the careful drafter's art, the Rule 8(a)(2) of Civil Procedure "requires only a plausible 'short and plain' statement of the plaintiff's claim, not an exposition of his legal argument." *See Skinner v. Switzer*, 562 U.S. 521, 530, 179 L. Ed. 2d 233, 242 (2011). Appellant's Complaint, liberally construed "to do substantial justice to all parties," asserted that Respondent itself breached the covenant of good faith and fair dealing, to the extent it failed to properly investigate the renewed claim, address the deficiencies noted by Appellant and her contractor, which called the Haag report into doubt, and turn over the Davis Claims Services report per Appellant's request, rubberstamping the insolvent insurer's wrongful denial instead, as defense counsel conceded at the hearing, despite the fact that the claims file contained two conflicting reports, and failing to resolve doubt in favor of extending coverage all over again, despite the fact that Respondent owed Appellant the same duties "to investigate [] and adjust, compromise, settle, and pay" the claim as her insolvent insurer. R. pp. 18-35, 52 (renewed claim "was denied again [by Respondent] based on the investigation that was conducted by the insolvent insurer"). *Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 33, 530 S.E.2d 369, 371 (2000); *Farmer v. CAGC Ins. Co*., 424 S.C. 579 (2018); S.C. Code Ann. §38-31- 60(d). For the purposes of Appellant's *renewed* claim, Respondent was the *insurer* and as one, it had to act with utmost good faith in addressing Appellant's concerns. *Id*. Instead, it chose to repeat the insolvent insurer's misconduct, who likewise never addressed any of Appellant's concerns and withheld Davis Claims Services report. R. pp. 176-179, 273-277. Because Respondent had all of

the obligations of the insurer, the factual allegations of Appellant's Complaint that served as the basis for Appellant's bad faith count, which specifically stated "insurer" and not St. Johns, are as much applicable to Respondent as they are to the insolvent insurer, especially since Respondent repeated its misconduct. R. pp. 32 (¶59). These factual allegations are plainly sufficient to state a cause of action against both Respondent and St. Johns, to the extent both owed duties and obligations of an insurer. Judge McKinnon never got over the statutory construction hurdle[13] and did not address the sufficiency of Appellant's Complaint, which is why Appellant briefed the issue, and he erred because (1) the plain meaning of S.C. Code Ann. § 38-31-20(8)(b) permits Appellant to seek extra-contractual damages "awarded against the association" itself and (2) the Complaint pleaded enough facts to state a claim for bad faith against either Respondent or the insolvent insurer, to the extent Respondent repeated the same misconduct. A motion to dismiss should not be granted "if facts sufficient to constitute a cause of action can be fairly gathered from the complaint, however uncertain, defective, or imperfect the allegations of the complaint may be," because the Rules of Civil Procedure are intended to provide a minimum standard, according to which plaintiff must give defendant fair notice of plaintiff's claim. *Riedman Corp. v. Jarosh*, 289 S.C. 191, 192, 345 S.E.2d 732, 733 (Ct. App. 1986); *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S. Ct. 99 (1957); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 550, 127 S. Ct. 1955 (2007).

Relatedly, Respondent failed to refute Appellant's argument that Appellant's declaratory judgment count fits neatly within the parameters set forth by the Declaratory Judgment Act, because Appellant's and Respondent's "rights, status or other legal relations are affected by a statute" and, as our Supreme Court explained, "[w]here a concrete issue is present, and there is a

[13] The transcript shows that both Respondent itself simply argued that a claim for extra-contractual damages could not be asserted against Respondent because it was not a "*pro forma*" first-party claim. R. pp. 1-5, 48-62.

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." S.C. Code Ann. § 15-53-20; *Power v. McNair*, 255 S.C. 150, 153–54, 177 S.E.2d 551, 553 (1970). Instead, of addressing Appellant's arguments, Respondent rehashed its meritless "policy is the only gateway" argument, *without citing any authority* that stands for this proposition (and none exists) and while admitting that this is not a *pro forma* insurance claim to the extent Respondent's obligations are controlled by a statute. RIB at 23-25. R. pp. 93-96. As an initial matter, Respondent misstated[14] the grounds for Appellant's declaratory judgment ground, intentionally omitting the fact that Appellant sought a clarification of the standard that governs the insurer's ability to exclude coverage for preexisting conditions and whether the insurer had a duty to resolve doubt in Appellant's favor when considering policy exclusions, both of which need to be clarified to resolve the controversy at bar. R. pp. 32-34 (¶¶ 64, 65). AIB at 25-32. While it is true that other grounds could have been stated more eloquently, Appellant had no duty to articulate a "precise exposition of her legal arguments" to state a cause of action for declaratory judgment, because the only requirement is the existence of a justiciable controversy. *Switzer*, 562 U.S. at 530. *See 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"). Afterall, "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).

CONCLUSION

Respondent's initial Brief is an amalgamation of implied concessions, previously refuted

[14] It is unclear how defense counsel can now argue against the declaratory judgment count with a straight face, to the extent it itself made an embarrassing error of citing declaratory judgment as one of the grounds for its own motion for summary judgment. R. pp. 114-125.

or half-baked arguments void of merit, conclusory denials, unsupported declarations, and attempts to raise objections for the first time on appeal. RIB. Respondent's understanding of the issue on summary judgment says it all–"[Respondent] argued, and the trial court agreed, that there was no genuine dispute of material fact as to whether Steinberg's claim was covered." RIB at 15. No argument there. Coverage is simply a nonissue–a policy exclusion is. The question Appellant's motion posed for Judge McKinnon was whether Respondent can meet its burden of establishing that the applicability of the policy exclusion was free from doubt and the evidence led to only one reasonable conclusion that the hail damage predated the policy inception. R. pp. 98-113. Such showing is beyond Respondent's reach, *even with the Haag report in the record*, because two conflicting expert reports cannot resolve doubt, and policy exclusions require the insurer to err in favor of the insured to prevent coverage from being illusory. But the only issue this Court needs to consider to reverse the trial court is the admissibility of the Haag report and Respondent's failure to properly invoke any hearsay objection, which in this case is truly self-evident. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (an appellate court need not address an appellant's remaining issues when its decision on a prior issue is dispositive).

Respectfully submitted,

November 25, 2025

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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 insure, Respondent.

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned hereby certifies that Appellant's Reply Brief complies with Rule 208 and that it was served on all counsel of record by electronic mail addressed as follows:

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