THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Circuit Case No. 2012-CP-07-1352
Appellate Case No. 2013-002578

Bruce R. Hoffman,

Appellant,

v.

Seneca Specialty Insurance Company; CRC Insurance Company; CRC Insurance Services, Inc. d/b/a Southern Cross Underwriters of Sumter; Adylette Services of Lowcountry, Inc., and Capstone ISG, Inc.,

Defendants,

Of whom Seneca Specialty Insurance Company is the Respondent.

FINAL BRIEF OF RESPONDENT

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INTRODUCTION

This case arises out of the denial of a property insurance claim.

Respondent Seneca Specialty Insurance Company ("Seneca") issued the subject insurance policy to Appellant Bruce R. Hoffman ("Hoffman"). The policy excludes coverage "for loss or damage caused by or resulting from . . . [n]esting or infestation, or discharge or release of waste products or secretions, by insects, birds, rodents or other animals." While admitting that the subject property damage was caused by/resulted from raccoons, Hoffman contends that raccoons are not "insects, birds, rodents or other animals" under the policy and his insurance claim was wrongfully denied.

The circuit court's grant of summary judgment in favor of Seneca should be affirmed (as should the court's denial of summary judgment to Hoffman), because it correctly determined that the policy was not ambiguous and clearly excluded Hoffman's insurance claim from coverage and that all of Hoffman's causes of action against Seneca failed as a matter of law.

Moreover, to upset the presumptive validity of the circuit court's ruling, Hoffman has the affirmative obligation to preserve for appeal and properly present issues, argument, and analysis to this Court sufficient to show reversible error on the part of the circuit court. *See* McCall v. IKON,

380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct. App. 2008) (noting an appealed order comes to the appellate court with a presumption of correctness, with the burden on the appellant to demonstrate reversible error, and an appellate court is obliged to reverse when error is called to its attention, but it is not in the business of figuring out on its own whether error exists). Because, respectfully, Hoffman has not met this burden, the circuit court's summary judgment in favor of Seneca should be affirmed in any event.

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I. **Did the circuit court correctly grant summary judgment in favor of Respondent (while denying Appellant's competing motion for summary judgment, refusing to allow Appellant to file a supplement to his complaint, and deeming Appellant to have admitted Respondent's requests to admit), and, in any event, has Appellant preserved for appeal and properly presented issues, argument, and analysis to this Court sufficient to show reversible error on the part of the circuit court?**

II. **Was the circuit court's grant of summary judgment in favor of Respondent (and denial of summary judgment to Appellant) matter not affected by the then pending appeal involving Appellant and another Defendant in this case, such that the circuit court had jurisdiction rule on the summary judgment motions?**

III. **Did the circuit court's decision to adopt and enter proposed orders submitted by Respondent's counsel (granting Respondent summary judgment and denying Appellant summary judgment) render the orders void for lack of due process, and, in any event, is any issue in this regard preserved for appellate review?**

IV. **Because Appellant did not appeal the circuit court's summary judgment in favor of Defendant Capstone ISG, Inc., nor did Appellant present any argument in his appellate brief to challenge the circuit court's grant of summary judgment in favor of Capstone, is Capstone's summary judgment conclusively established, and, in any event, was it correctly granted by the circuit court on the merits such that it would rightfully be affirmed (if somehow Appellant were found to still have a viable appellate challenge thereto)?**

RESPONDENT'S STATEMENT OF THE CASE

On February 3, 2012, Hoffman made a claim for property insurance coverage for damage to his office building caused by raccoons. (R. p. 110.)

Adjuster Robert Dodd ("Dodd"), of Defendant Capstone ISG, Inc. ("Capstone"), investigated Hoffman's claim on behalf of Seneca, personally inspecting the subject office building on February 8, 2012. (R. p. 93 [¶¶ 2-3].) Providing photographs documenting the conditions he observed, Dodd determined "that the damage to [Hoffman's] office was caused by infestation, waste products and secretions of animals in the duct work of the HVAC system and elsewhere," noting that "[a]nimal droppings were observed beneath HVAC ducts;" "that the cause of Mr. Hoffman's loss was nesting or infestation or discharge or release of waste products by animals, including raccoons and, probably, squirrels and rats as well;" and that "the damage was clearly caused by animal infestation." (R. pp. 93-94 [¶¶ 4, 6-8], 95-103.)

The subject insurance policy contains the following exclusion:

> **B. Exclusions**
>
> . . .
>
> **2.** We will not pay for loss or damage caused by or resulting from any of the following:
>
> . . .
>
> **[d.](5)** Nesting or infestation, or discharge or release of waste products or secretions, by insects, birds, rodents

or other animals.

(Supp. R. p. 2.)

By correspondence dated March 15, 2012, Seneca advised Hoffman that its investigation into the facts and circumstances surrounding his claim was concluded, that the claim was not covered under the subject insurance policy, and that coverage for the loss was therefore denied. (R. pp. 104-105.)

On April 3, 2012, Hoffman commenced this action against Seneca (and other Defendants herein[1]) alleging that his claim was wrongfully denied, pleading causes of action for breach of contract, insurance bad faith, and violation of the South Carolina Unfair Trade Practices Act[2] ("SCUTPA"), and also seeking declaratory relief. (R. pp. 36-43.)[3]

By motion filed May 4, 2012, Hoffman sought "summary

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[1] Seneca is the only respondent to this appeal and the only remaining defendant in this case By order filed April 8, 2013, the circuit court granted summary judgment to Defendant CRC Insurance Services, Inc. d/b/a Southern Cross Underwriters of Sumter ("CRC"). At first, Hoffman appealed CRC's summary judgment to this Court, but he later withdrew his appeal, with the remittitur being sent down on January 14, 2014 (R. pp. 133-134; R. pp 34-35, r. pp. 148-150.) The circuit also granted summary judgment in favor of Defendants Capstone and Adylette Services of Lowcountry, Inc. ("Aydlette")—the circuit court's order granting Capstone summary judgment also granted summary judgment to Seneca. (R. pp. 22-32; R. pp. 17-21.) Hoffman did not appeal the order granting summary judgment to Aydlette and his notice of appeal from the order granting summary judgment to both Capstone and Seneca was only as to Seneca, not Capstone. (R. p 147) Consequently, Seneca is the only respondent to this appeal and the only remaining defendant in this case.

[2] S.C. Code Ann. §§ 39-5-10 to -180.

[3] Seneca timely answered Hoffman's complaint, denying Hoffman's material allegations and raising a number of affirmative defenses. (R. pp. 51-57.)

adjudication on the issue of coverage/injunctive relief against [Defendants] . . . on the ground that there is coverage under the insurance policy for damage to the office building at issue, proximately caused, Defendants claim, by raccoons." (R. p. 44.) Hoffman contended that the subject insurance policy was ambiguous, requiring it to be construed in favor of coverage. (R. p. 45.) According to Hoffman, "the policy . . . could have, but doesn't say, all animals or even all other animals, and the only reasonable/logical interpretation is that 'other animals' is other animals like insects, birds, rodents, i.e., vermin, not wild animals ***like*** raccoons, descended from bears, which den not nest, and one of which . . . growled at [Hoffman] when he confronted them (which vermin are not known to do)." (R. p. 45) (emphasis in original.) "Under these circumstances," Hoffman argued, "the burden to prove raccoon damage is excluded is on the insurer, not on [him], and objectively here, their use of 'other animals' is ambiguous on its face, and coverage and repair must occur." (R. p. 45)

Hoffman's motion was heard by the circuit court on May 22, 2012, The Honorable Marvin H. Dukes III presiding. (R. p. 3.) By order filed May 30, 2012, Judge Dukes denied Hoffman's motion, not only rejecting Hoffman's ambiguity argument, but affirmatively "find[ing] the words 'other animals' not to be ambiguous." (R. p. 6) In so doing, Judge Dukes

"f[ou]nd that hearing [Hoffman's] motion require[d] no discovery as the determination sought by [Hoffman] involve[d] nothing more than examining the exclusion to determine if the use of 'other animals' is ambiguous." (R. p. 4 [n. 1].) "While broad," Judge Dukes determined, "'animal' . . . is clearly defined, commonly used and well-understood." (R. p. 6)

Thereafter, in denying Hoffman's motion for reconsideration, by order filed January 7, 2013, Judge Dukes ruled as follows:

> [T]his Court previously denied [Hoffman's] Motion for Summary Judgment regarding the exclusion in the insurance policy at issue that excluded coverage for "nesting or infestation, or discharge or release of waste products or secretions, by insects, birds, rodents or other animals." The Court found that the exclusion was not ambiguous. See Order of Judge Dukes, dated May 30, 2012.
>
> [Hoffman] filed a Motion to Reconsider its previous position arguing . . . the doctrine *ejusdem generis*. [Hoffman] argued that under that doctrine, the only "other animals" excluded under the policy provision were animals like insects, birds, or rodents, and that raccoons would not be excluded under the policy.
>
> Having considered [Hoffman's] argument, the Court denies his Motion for Reconsideration. The Court finds that the group of animals in this policy is a broad group containing what in scientific circles are all "Kingdom Animalia." Therefore, the policy is not ambiguous when it excludes "nesting or infestation, or discharge or release of waste products or secretions" by other

"animals."

(R. pp. 7-8.)

On May 6, 2013, Seneca filed a motion for summary judgment as to all of Hoffman's claims against it. (R. pp. 77-78; *see also* R. pp. 79-132.) That same date, Hoffman filed another[4] motion for "Summary Judgment or summary adjudication" as part of a document titled "Plaintiff's Motion for Pre-Trial Hearing/Status Conference (Rule 16) and for Summary Judgment (Rule 56)." (R. p. 73) (capital lettering and bold print in original title of document omitted.)

Both Seneca and Hoffman's motions were heard by the circuit court on October 2, 2013, The Honorable D. Craig Brown presiding. (R. pp. 183-221.)[5] In separate orders filed November 12, 2013, Judge Brown granted summary judgment in favor of Seneca and denied Hoffman summary

[4] As this matter proceeded in the circuit court, Hoffman made a number of motions seeking some form of summary disposition In addition to Hoffman's motions that were ruled upon via Judge Dukes' orders filed May 30, 2012, and January 7, 2013, The Honorable Carmen T. Mullen (presiding circuit judge) filed an order on April 24, 2013, denying Hoffman summary judgment. (R p. 14.)

[5] The motions had previously been heard in the circuit court by Judge Mullen on June 24, 2013. (R pp 150-182) During the June 24, 2013, Hoffman alleged that Judge Mullen (like Judge Dukes, Hoffman claimed) was biased against him and asked that she recuse herself. (R. p. 177, line 11 - p. 179, line 18.) Thereafter, Judge Mullen recused herself from the case. (R. p. 222.)

judgment. (R. pp. 22-32; R. p. 33.)[6]

This appeal of Judge Brown's November 12, 2013, orders, as to Seneca only, followed—without Hoffman seeking reconsideration, alteration, or amendment of either of the appealed orders. (R. p. 147.)

[6] As noted above, Judge Brown's order granting Seneca summary judgment also granted summary judgment to Capstone. Hoffman has only appealed as to Seneca and has not challenged the summary judgment in favor of Capstone (R. p. 147; *see also* Letter from the Clerk of this appellate Court dated December 12, 2013, advising of correct caption for appeal, which identifies only Seneca as Respondent)

ARGUMENT

Hoffman states six (6) issues on appeal in his appellate brief. (App's Br. pp. 3-4.) He appears, however, to divide the argument that he presents in his brief into only four (4) parts, setting them forth in all capital letters and bold, underlined type. (App's Br. pp. 4-15.)

Respectfully, neither Hoffman's issue statement nor the argument he presents in his brief appears to comply with the requirements of Rule 208(b), SCACR. *See* Rule 208(b)(1)(B) (requiring the appellant's brief to contain "[a] statement of each of the issues presented for review," with the statement being "concise and direct as to each issue . . ." and not in "[b]road general statements . . . ."); Rule 208(b)(1)(D) (requiring briefs to be "divided into as many parts as there are issues to be argued," with "the particular issue to be addressed . . . set forth in distinctive type . . . [a]t the head of each part . . . ."); *see also* Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2001) (holding every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to grope in the dark to ascertain the precise point at issue) (internal citation and quotation marks omitted).

In making the counter-argument presented herein, Seneca has attempted to identify and rebut every discrete ground presented in

Hoffman's brief.

I. The circuit court correctly granted summary judgment in favor of Seneca (while denying Hoffman's competing motion for summary judgment, refusing to allow Hoffman to file a supplement to his complaint, and deeming Hoffman to have admitted Seneca's requests to admit), and, in any event, Hoffman has not preserved for appeal and properly presented issues, argument, and analysis to this Court sufficient to show reversible error on the part of the circuit court.[7]

A. Hoffman cannot now attempt to undermine the circuit court's grant of summary judgment in favor of Seneca by arguing that the subject exclusion is ambiguous, because (1) the exclusion's lack of ambiguity is the law of the case and (2) Hoffman conceded and took the position that the exclusion was not ambiguous in the circuit court.

It appears Hoffman's first argument is that the subject exclusion does not include raccoon damage. It further appears that the essential premise of this argument is that the policy is ambiguous. This essential premise fails, however, as Hoffman cannot now challenge the circuit court's grant of summary judgment in favor of Seneca by arguing that the exclusion is ambiguous, because (1) the exclusion's lack of ambiguity is the law of the case and (2) Hoffman conceded and took the position that the exclusion was not ambiguous in the circuit court.

(1) The exclusion's lack of ambiguity is the law of the case.

[7] To be clear, Seneca's argument here both supports affirmance of the trial court's grant of summary judgment in its favor and denial of summary judgment to Hoffman.

Hoffman's complaint sought "declaratory relief/judgment as to the rights/liabilities/obligations of the parties under the insurance contract and otherwise . . . ." (R. p. 42; *see also* R. p. 41 [¶¶ 17-18].) Judge Dukes' orders filed May 30, 2012, and January 7, 2013, expressly determined that the exclusion was not ambiguous and that "the group of animals in this policy is a broad group containing what in scientific circles are all 'Kingdom Animalia.'" (R. pp. 3-6, 7-10.)

Accordingly, not only did the circuit court expressly find that the subject policy was not ambiguous, it found that this unambiguous language of exclusion ("other animals") was of such breadth of meaning as to easily include raccoons within its embrace. And, to be sure, a ruling of this nature is squarely within the province of the circuit court. Bennett & Bennett Const., Inc. v. Auto Owners Ins. Co., 405 S.C. 1, 4, 747 S.E.2d 426, 427 (2013) ("Insurance policies are subject to the general rules of contract construction. **Whether a contract is ambiguous is a question of law, and the interpretation of an unambiguous contract is a question of law.**") (citations omitted) (emphasis added); Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 732 S.E.2d 626 (2012) ("**Whether language is ambiguous is a question of law for the Court** . . . .") (emphasis added).

With Judge Dukes having affirmatively ruled, as a matter of law, that

the exclusion was unambiguous (which ruling was properly addressed to Judge Dukes as a question of law for the court), and that ruling being incapable of thereafter being overruled by another circuit judge,[8] it was incumbent upon Hoffman to appeal this ruling or else it would become the law of the case. First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct.App.1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance").

Because Hoffman has not appealed this ruling—and it would be too late for him to attempt to do so now[9]—it is the law of the case. Moreover, as reflected in Hoffman's statement of issues on appeal, he has not briefed any challenge to Judge Dukes' May 30, 2012, and January 7, 2013, orders; accordingly, any such challenge has been abandoned and precludes consideration on appeal. Jinks v. Richland County, 355 S.C. 341, 344, 585 S.E.2d 281, 283, n. 3 (2003) (an issue which is not argued in the brief is deemed abandoned and precludes consideration on appeal). This alone dooms Hoffman's challenge to the summary judgment granted in favor of

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[8] Enoree Baptist Church v. Fletcher, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) ("One Circuit Court Judge does not have the authority to set aside the order of another.")

[9] *See* Rule 203(b)(1), SCACR (addressing time for service of notice of appeal from the court of common pleas); Mears v. Mears, 287 S.C. 168, 169, 337 S.E 2d 206, 207 (1985) ("Service of the notice of intent to appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice of intent to appeal must be served ").

Seneca.

While Hoffman may attempt to argue that Judge Dukes' May 30, 2012, and January 7, 2013, orders cannot establish the law of the case, because they were in the context of denying summary judgment,[10] such an argument is unavailing.

It is a well-recognized legal concept in South Carolina that motions should be treated based on substance and effect as opposed to how they are styled by the moving party. *See* Mickle v. Blackmon, 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970); Standard Fed. Sav. & Loan Ass'n v. Mungo, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991) (stating it is the substance of the relief sought that matters "regardless of the form in which the request for relief was framed").

Unlike the circumstance addressed by the Ballenger Court, Judge Duke's May 30, 2012, and January 7, 2013, orders resulted in a binding adjudication of the rights of the parties on the issue of ambiguity and the meaning of subject exclusion. Based on their substance and effect, Judge Duke's orders are not properly viewed as mere unappealable, non-binding denials of summary judgment, but as orders "in a law case involving the

[10] *See* Ballenger v Bowen, 313 S.C 476, 477, 443 S.E 2d 379, 380 (1994) ("A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial.")

merits in actions commenced in the court of common pleas . . ." appealable under S.C. Code Ann. § 14-3-330(1). And, being appealable, but not actually appealed, renders them the law of the case.

(2) Hoffman conceded and took the position that the exclusion is not ambiguous in the circuit court.

Though he now argues to this Court that the subject exclusion is ambiguous—indeed, the existence of ambiguity is an essential premise of the argument presented in his appellate brief—Hoffman previously conceded the lack of ambiguity in the circuit court:

From the June 24, 2013, hearing before Judge Mullen

> [**COURT**]: My question is, is that it looks like Judge Dukes said that the exclusion is not ambiguous. So how is that not a matter of law at that point?
>
> [**SENECA'S COUNSEL**]: Exactly. That's our argument, your Honor.
>
> [**HOFFMAN**]: That's not the issue in this case, though. **It's <u>not</u> ambiguous. It says, animals.** The problems is a raccoon is not one of the animals that falls into that exclusion . . . .

(R. p. 167, lines 6-11) (emphasis added.)

> [**SENECA'S COUNSEL**]: [Hoffman] has asked for a declaratory judgment and he got one from Judge Dukes, which said that specific provision was not ambiguous. . . .
>
> [**COURT**]: And that's what I'm asking is I almost

feel like my hands have gotten tied by Judge Dukes has already - - not tied, but, you know, I'm bound by what he has found and ruled - - and appropriately so.

[**HOFFMAN**]: But he said that the exclusion - - it's not ambiguous. That it includes animals. He didn't rule on what kind of animals, okay. That's the difference. He didn't rule on that issue. That's the issue that's before us today. Raccoons are not one of the animals that is included in the exclusion. . . .

(R. p. 170, lines 9-23.)

From the October 2, 2013, hearing before Judge Brown

[**HOFFMAN**]: **But I'm <u>not</u> necessarily saying that the phrase is ambiguous.** I'm saying it just - - just that raccoons are just not included in that exclusion because they are not like those other types of animals.

(R. p. 173, lines 19-22) (emphasis added.)

[**COURT**]: This order that Judge Dukes signed addressing the very issue that is before this court.

[**HOFFMAN**]: He addressed whether it was ambiguous. I am saying raccoons are not even in that. **I'm <u>not</u> saying it is ambiguous.** I'm saying that raccoons are just not part of that exclusion.

(R. p. 175, lines 20-25) (emphasis added.)

[**HOFFMAN**]: But today I'm saying that raccoons are just not even covered by that exclusion. **That is <u>not</u> a question of ambiguity.** It's a question of raccoons are not even covered.

(R. p. 210, lines 8-11) (emphasis added.)

With Hoffman having conceded the lack of ambiguity in his argument to the circuit court—advancing his position that raccoons were not among the "animals" excluded even though the language of the exclusion was unambiguous—Hoffman cannot now argue to this Court that the language of the exclusion is ambiguous. TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 617 503 S.E.2d 471, 474 (1998) ("An issue conceded in the lower court may not be argued on appeal."); *cf.* Taylor v. Medenica, 324 S.C. 200, 216, 479 S.E. 2d 35, 43 (1996) (a party may not argue one at trial and an alternate ground on appeal). Therefore, his appellate argument necessarily fails of its essential premise—i.e., the supposed ambiguity of the exclusion—and it is necessarily unavailing.

B. Hoffman's argument regarding ejusdem generis is not preserved for appellate review.

"Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004). Where the lower court does not explicitly rule on an argument raised, and the appellant makes no Rule 59(e), SCRCP, motion to obtain a ruling, the appellate court may not address the issue. Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991); *see also* Floyd v. Floyd, 365 S.C. 56, 73, 615 S.E.2d 465, 474

(Ct.App.2005) ("When a trial judge makes a general ruling on an issue, but does not address the specific argument raised by the appellant and the appellant does not make a motion to alter or amend pursuant to Rule 59(e), SCRCP, to obtain a ruling on the argument, the appellate court cannot consider the argument on appeal.").

Nowhere in the circuit court's order granting Seneca summary judgment is ejusdem generis actually addressed[11] and Hoffman did not make a motion to alter or amend pursuant to Rule 59(e) to obtain a ruling thereon. Hoffman's argument regarding ejusdem generis is not preserved for appellate review.

C. The subject exclusion is not ambiguous; therefore, the doctrine of ejusdem generis is not applicable, because, in the absence of ambiguity, there can be no resort a rule of construction, and the clear language of the policy controls.

As explained above, Hoffman is barred from arguing to this Court that the subject exclusion is ambiguous. But even assuming, *arguendo*, Hoffman was not so barred, the exclusion is indeed not ambiguous. And, since the exclusion is not ambiguous, there can be no resort a rule of construction like the doctrine of ejusdem generis, and the clear language of the policy controls.

"Insurance policies are subject to the general rules of contract

[11] (R pp. 7-10.)

construction." B.L.G. Enters., Inc. v. First Fin. Ins. Co., 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." Sloan Constr. Co. v. Central Nat'l Ins. Co. of Omaha, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977). "Words cannot be read into a contract which impart intent wholly unexpressed when the contract was executed." Blakeley v. Rabon, 266 S.C. 68, 72, 221 S.E.2d 767 (1976). "When a policy does not specifically define a term, the term should be defined according to the usual understanding of the term's significance to the ordinary person." State Farm Fire & Cas. Co. v. Barrett, 340 S.C. 1, 8, 530 S.E.2d 132, 136 (Ct. App. 2000).

Although exclusions in an insurance policy are construed against the insurer,[12] insurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition. Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 523, 377 S.E.2d 569, 570 (1989). Courts "should not . . . torture the meaning of policy language in order to extend or defeat coverage that was never intended by the parties." Barrett, 340 S.C. at 8, 530 S.E.2d at 135 (Ct. App. 2000). "When a contract is unambiguous, clear, and explicit,

[12] Boggs v. Aetna Cas. & Sur. Co., 272 S.C. 460, 464, 252 S.E.2d 565, 568 (1979).

it must be construed according to the terms the parties have used. B.L.G. Enters., 334 S.C. at 535, 514 S.E.2d at 330. "Courts are without authority to alter a contract by construction or to make new contracts for the parties." Gilstrap v. Culpepper, 283 S.C. 83, 86, 320 S.E.2d 445, 447 (1984). "The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully." Blakeley, 266 S.C. at 73, 221 S.E.2d at 769.

Here, the subject exclusion provides that Seneca "will not pay for loss or damage caused by or resulting from . . . [n]esting or infestation, or discharge or release of waste products or secretions, by insects, birds, rodents or other animals." (Supp. R. p. 2.) As the circuit court—both Judge Dukes and Judge Brown—correctly found, there is only one reasonable way to interpret this language, with the word "animal," while broad, being clearly defined and well understood in common usage. (R. pp. 4-6; R. pp. 7-8; R. pp. 26-27.) There being only one reasonable interpretation of the plain and ordinary language of the exclusion, the circuit court correctly determined there was no ambiguity. *See* Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 46, 747 S.E.2d 178, 184 (2013) ("[A] contract is ambiguous when its terms are capable of having more than one meaning when viewed by a reasonably intelligent person who has examined the entire

agreement.")

Indeed, it is Hoffman that attempts to create ambiguity in the face of clear policy language by the improper invocation of the doctrine of ejusdem generis. *See* State v. Wilson, 274 S.C. 352, 355, 264 S.E.2d 414, 415 (1980) (instructing that the doctrine of ejusdem generis "is only a rule of construction to be applied as an aid in ascertaining intent and has no application where it clearly appears that no such limitation was intended."). In his brief, he attempts to identify ambiguity with the rhetorical question, "What 'other animals' are we talking about?" (App's Br. p. 4.) But no such question is begged by the plain and ordinary language of the exclusion; rather, Hoffman has attempted to artificially interject this question by begging the Court to bypass the plain and ordinary language in favor of the doctrine of ejusdem generis. Because the circuit court correctly determined that the subject exclusion was not ambiguous—and, in any event, Hoffman is barred from now arguing otherwise—the doctrine of ejusdem generis is inapplicable and improperly invoked by Hoffman; it is the clear, plain and ordinary language of the policy that controls and must be enforced. Progressive Max, 405 S.C. at 46, 747 S.E.2d at 184 ("'If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the

instrument's force and effect.'") (quoting Ellie, Inc. v. Miccichi, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004)); Blakeley, 266 S.C. at 72, 221 S.E.2d at 769 ("To ascertain the intention of an instrument, resort is first to be had to its language, and if such is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument.").

D. Assuming, *arguendo*, the doctrine of ejusdem generis applies; Hoffman's argument that its application favors his position is patently conclusory and cannot undermine the circuit court's summary judgment in favor of Seneca.

According to Hoffman, "it is the ejusdem generis rule that cures what would otherwise be an ambiguity (what other animals?) in the exclusion at issue here." (App's Br. p. 5.) Thus, under Hoffman's own view, for his position to ultimately prevail, it would not be enough for the doctrine of ejusdem generis merely to apply; its application would have to place raccoon damage outside the bounds of the subject exclusion.

In this regard, Hoffman's argument is conclusory, relying solely upon bald assertions like "raccoons are certainly NOT of that same kind as those specifically enumerated in the exclusion" and "the raccoons that caused the damage at issue here are not animals like insects, birds or rodents. They

den, not nest.[13] They are North American wild animals (furbearing and protected in South Carolina) descended from bears. They have been held to not be vermin. They growled at [Hoffman] . . . , which vermin are not known to do." (App's Br. pp. 5 and 8.)

Argument of this nature is rightfully deemed abandoned and insufficient to upset the circuit court's summary judgment in favor of Seneca. *See* First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994) (stating the appellant was deemed to have abandoned issue for which he failed to provide any argument or supporting authority).

E. Hoffman's argument that raccoons "fall outside any vermin-like exclusion in a policy . . ." is unavailing.

The closest Hoffman comes to substantiating his position that application of the ejusdem generis doctrine would place raccoons outside the bounds of the subject exclusion is when he argues that raccoons "have been held to not be vermin." (App's Br. p. 8.)

Nowhere, in the circuit court's order granting summary judgment in favor of Seneca is this argument addressed, however, and Hoffman did not make a Rule 59(e) to obtain a ruling thereon. (R. pp. 22-32). Accordingly, it is not preserved for appellate review. Elam, 361 S.C. at 23, 602 S.E.2d at

[13] Seneca notes that Hoffman appears to have overlooked or ignored the "[n]esting **or** infestation" language of the exclusion. (Supp. R. p. 2) (emphasis added)

779-80; Noisette, 304 S.C. at 58, 403 S.E.2d at 124; *see also* Floyd, 365 S.C. at 73, 615 S.E.2d at 474.

Regardless, Hoffman's reliance upon authorities addressing the definition of the word "vermin" is misguided, because that issue is simply not involved in this case. In the present case, as both Judge Dukes and Judge Brown found, the word "animal," while broad, is clearly defined and reasonably understood, and the words "other animals" contained in the subject exclusion are not ambiguous. (R. pp. 3-6; R. pp. 7-10; R. pp. 22-32.)

F. Hoffman's alternative argument about being "sold an inappropriate policy by [Respondent's] agents"[14] and not being allowed to file a supplement to this complaint to elaborate on this point is unavailing.

Nowhere in the circuit court's order granting summary judgment in favor of Seneca is this argument addressed, and Hoffman did not make a Rule 59(e) to obtain a ruling thereon. (R. pp. 22-32). Accordingly, it is not preserved for appellate review. Elam, 361 S.C. at 23, 602 S.E.2d at 779-80; Noisette, 304 S.C. at 58, 403 S.E.2d at 124; *see also* Floyd, 365 S.C. at 73, 615 S.E.2d at 474.

Moreover, during the hearing on October 2, 2013, the following exchange occurred between Hoffman and Judge Brown:

[HOFFMAN]: I now have here a supplement

[14] (App's Br. p. 8)

> to the complaint . . . . And I assumed I needed to leave the court to file this. But if I get - - can get leave of court I can file this and serve this now. . . .
>
> [**COURT**]: Well, that motion is not current and proper before the court at this time. You are outside of the timeframe for purposes of filing an amended complaint. If you so desire to file an amended complaint, you need to file it. If they don't consent, you need to file a motion and get that before the Court.
>
> [**HOFFMAN**]: Okay, it was the supplement. Does it matter, same - - -
>
> [**COURT**]: Same thing. As far as the court is concerned I mean if you're changing it, it is an amended. It's an amended complaint.
>
> [**HOFFMAN**]: **Okay. All right. So I will move on**. . . . .

(R. p. 203, line 2 - p. 204, line 4) (emphasis added).

The record makes clear that conceded this issue in the circuit court and cannot argue it now. TNS Mills, 331 S.C. at 611, 503 S.E.2d at 474 (1998). Also, Hoffman's brief is patently conclusory on this point—citing not legal authority at all—and it is rightfully deemed abandoned. McLean, 314 S.C. 361, 444 S.E.2d 513.

G. Hoffman's argument based on "pages from the Property Loss Research Bureau (PRLB)"[15] is unavailing.

Nowhere in the circuit court's order granting summary judgment in

[15] (App's Br p 9)

favor of Seneca is this argument addressed, and Hoffman did not make a Rule 59(e) to obtain a ruling thereon. (R. pp. 22-32). Accordingly, it is not preserved for appellate review. Elam, 361 S.C. at 23, 602 S.E.2d at 779-80; Noisette, 304 S.C. at 58, 403 S.E.2d at 124; *see also* Floyd, 365 S.C. at 73, 615 S.E.2d at 474.

Also, Hoffman's brief is patently conclusory on this point—citing no legal authority at all—and it is rightfully deemed abandoned. McLean, 314 S.C. 361, 444 S.E.2d 513. And even assuming, *arguendo*, that Seneca did—as Hoffman simply concludes—"admit[] that raccoons are not rodents," as explained above with respect to Hoffman's citation of authority addressing the word "vermin," such an admission is wholly irrelevant with respect to the term words "other animals," which the circuit court found not to be ambiguous. (R. pp. 3-6; R. pp. 7-10; R. pp. 22-32.)

Moreover, with particular respect to Hoffman's insurance bad faith cause of action, citing Crossley v. State Farm Mutual Auto Insurance Company, 307 S.C. 354, 359-60, 415 S.E. 393, 396-97 (1992), the circuit court recognized that "'if there is a reasonable basis for denial of the insured's claim, there can be no bad faith'" and found that Seneca had a reasonable basis for denial in light of the investigation by Dodds/Capstone on Seneca's behalf and the uncontroverted fact "that animal infestation was

the cause of the damage to the property." (R. p. 28.) There is no reasonable question as to whether Seneca had a reasonable basis for denial of Hoffman's claim. *See* Rife v. Hitachi Constr. Mach. Co. Ltd., 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005) ("[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.").

H. Hoffman's argument based on the applicability or potential applicability of an ensuing loss exception to the subject exclusion[16] is unavailing.

Nowhere in the circuit court's order granting summary judgment in favor of Seneca is this argument addressed, and Hoffman did not make a Rule 59(e) to obtain a ruling thereon. (R. pp. 22-32). Accordingly, it is not preserved for appellate review. Elam, 361 S.C. at 23, 602 S.E.2d at 779-80; Noisette, 304 S.C. at 58, 403 S.E.2d at 124; *see also* Floyd, 365 S.C. at 73, 615 S.E.2d at 474.

Also, Hoffman's brief is patently conclusory on this point—citing no legal authority and undertaking no substantive legal analysis at all—and it is rightfully deemed abandoned. McLean, 314 S.C. 361, 444 S.E.2d 513.

Moreover, the policy language that Hoffman cites as being "the relevant provision in the insurance policy that would allow coverage even

[16] (App's Br. p. 10.)

with an exclusion," is irrelevant. The language Hoffman cites is under section "**B.3**" on the policy's "Causes of Loss – Special Loss" and has applicability only to "an excluded cause of loss that is listed in **3.a** through **3.c.** . . ." (Supp. R. p. 3) (emphasis in original).) By its own terms, section "**B.3**" has no impact upon the subject exclusion, which is set forth in section "**B.2**." (Supp. R. pp. 2-3) (emphasis in original.)

Further still, Hoffman's reference to the page from the PLRB manual is unavailing. While section "**B.2**" is where the subject animal exclusion is contained, in pertinent part, that sections provides as follows: "[b]ut if an excluded cause of loss that is listed in **2.d.(1)** through **(7)** results in a 'specified cause of loss' or building glass breakage, we will pay for the loss or damage caused by that 'specified cause of loss' or building glass breakage." (Supp. R. p. 3) (emphasis in original.) In keeping with the conclusory nature of his argument, Hoffman provides no analysis as to how this provision helps his position. Indeed, Hoffman does not at all address the following (particularly pertinent) language from the very PLRB page that he cites: "[h]owever, keep in mind that the resulting loss provision that applies to the nesting, infestation, etc., of insects, birds, rodents or other animals, only covers those resulting losses caused by the 'specified causes of loss' or building glass breakage, not any covered loss." (R. p. 50.) Hoffman has

offered no analysis to show that any "specified causes of loss" or building glass breakage are involved here—and, indeed, a review of the policy in this regard does show any relevance to this case. (Supp. R. p. 9.)

I. Hoffman's argument about unjust enrichment[17] is unavailing.

Hoffman's brief includes a reference to a claim of unjust enrichment. As an initial matter, no such claim has been pleaded by Hoffman. (R. pp. 37-43.) Not surprisingly, nowhere in the circuit court's order granting summary judgment in favor of Seneca is this argument addressed, and Hoffman did not make a Rule 59(e) to obtain a ruling thereon. (R. pp. 22-32). Accordingly, it is not preserved for appellate review. Elam, 361 S.C. at 23, 602 S.E.2d at 779-80; Noisette, 304 S.C. at 58, 403 S.E.2d at 124; *see also* Floyd, 365 S.C. at 73, 615 S.E.2d at 474. Also, Hoffman's brief is patently conclusory on this point—citing no legal authority and undertaking no substantive legal analysis at all—and it is rightfully deemed abandoned. McLean, 314 S.C. 361, 444 S.E.2d 513.

J. Hoffman's challenge to the circuit court's grant of summary judgment to Seneca on his cause of action for violation of SCUTPA[18] is unavailing.

In granting Seneca summary judgment on Hoffman's SCUTPA claim,

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[17] (App's Br. p. 10)
[18] (App's Br. p. 10.)

the circuit court utilized a number of independent bases, any one of which would support the summary judgment. The circuit court found that the legislature exempted insurance claims practices from the provisions of SCUTPA; that, even if, Hoffman could show a breach of contract, such a breach of contract between private parties is insufficient to support a SCUTPA claim; and that Hoffman failed to produce any evidence to establish the essential element of impact upon the public interest. (R. pp. 29-30.)

A review of Hoffman's brief shows that he has not effectively challenged all of the independent bases of the circuit court's summary judgment on the SCUTPA claim—indeed, Seneca does not believe that Hoffman has effectively challenged any of these bases. Accordingly, Hoffman cannot undermine the circuit court's grant of summary judgment to Seneca on appeal. Jinks, 355 S.C. at 344, 585 S.E.2d at 283, n. 3 (an issue which is not argued in the brief is deemed abandoned and precludes consideration on appeal); Soden, 333 S.C. at 566, 511 S.E.2d at 378 (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance"); Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all

grounds because the unappealed ground will become the law of the case.").

Also, Hoffman's brief is patently conclusory on this point—citing no legal authority and undertaking no substantive legal analysis at all—and it is rightfully deemed abandoned. McLean, 314 S.C. 361, 444 S.E.2d 513.

K. Hoffman's argument that that the circuit erred in deeming the requests to admit that Seneca served upon him admitted is unavailing.

As an initial matter, this issue/argument is irrelevant, because there is no genuine issue as to any fact deemed by the circuit court to have been admitted by Hoffman anyway. Indeed, Hoffman has elsewhere in the record plainly admitted that a raccoon is an animal, that raccoons or other animals caused damage to the subject property, that he made a property damage claim on February 3, 2012; and that Dodd personally inspected the property on February 8, 2012, on behalf of Seneca. (*See, e.g.,* R. p. 204, lines 5-15; *see generally* App's Br.) Deeming the requests admitted was not necessary to support the summary judgment in favor of Seneca.

Nonetheless, Hoffman's argument is without merit. As well explained by the circuit court,[19] Hoffman's purported response to Seneca's requests to admit via one-line post script on a letter not addressed to Seneca's counsel, but merely on which Seneca's counsel was copied, is

[19] (*See* R. pp. 31-32)

nowhere close to compliance with Rule 36, SCRCP, and Hoffman has in no way shown any abuse of discretion on the part of the circuit court in deeming the requests admitted. To the contrary, Hoffman's assertion that he did "all that is required by SCRCP, Rule 36"[20] is patently conclusory and rightfully deemed abandoned. McLean, 314 S.C. 361, 444 S.E.2d 513.

II. The circuit court's grant of summary judgment in favor of Respondent (and denial of summary judgment to Appellant) was matter not affected by the then pending appeal in this case involving Hoffman and CRC; consequently, the circuit court had jurisdiction rule on the summary judgment motions.

Rule 205, SCACR, makes clear that, notwithstanding service of a notice of appeal, the circuit court retains jurisdiction over, and may proceed with, matters not affected by the appeal. *See also* Rule 241(a), SCARC ("The lower court . . . retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal."); Metts v. Mims, 384 S.C. 491, 498, 682 S.E.2d 813, 817 (2009) ("The trial court's ruling on the constitutional actual malice issue was clearly unrelated to the discovery dispute involving the Newspapers' financial data. Thus, the trial court properly proceeded on the summary judgment motion, despite the pending appeal on the contempt order. Rule 205, SCACR.").

The question of the circuit court's jurisdiction pending appeal

[20] (App's Br at p. 15) (underline in original omitted.)

therefore turns on the relationship, or lack thereof, between the matter on appeal and the matter before the circuit court. Here, again, Hoffman's brief is conclusory—without actually analyzing the order on appeal—simply proclaiming the summary judgment orders were affected by the order on appeal, and this point may be deemed abandoned. McLean, 314 S.C. 361, 444 S.E.2d 513.

In any event, the unrelated nature of the order on appeal (which granted summary judgment to CRC) is clear when its substance is examined:

> Defendant CRC Insurance is a brokerage and underwriting company. It does not insure persons or businesses nor does it write insurance policies. It is not party to the Subject Policy. It is not party to any written or oral contract with Plaintiff. Defendant CRC did not investigate Plaintiff's claim. It did not deny Plaintiff's claim. Defendant CRC acted strictly as an underwriter/broker for the Subject Policy.

(R. p. 12.) Against this backdrop, the circuit court found that CRC was entitled to summary judgment as to Hoffman's breach of contract and insurance bad faith claims, because CRC had no contractual relationship with Hoffman, and the existence of such a relationship is a key element for both causes of action, and likewise entitled to summary judgment on Hoffman's SCUTPA claim, because CRC owned no duties or obligations to Hoffman under the subject policy. (R. p. 12.) In this same vein, the circuit

court found that CRC was entitled to summary judgment on Hoffman's SCUTPA claim, because "[e]ven if [Hoffman] is successful and the Court ultimately declares the loss was covered by the Subject Policy, this would in no way implicate CRC because it is not party to the insurance contract." (R. p. 12.)

The summary judgment motions that the circuit court decided by orders filed November 12, 2013, were matters unaffected by the then pending appeal of the summary judgment in favor of CRC; consequently, the circuit court possessed jurisdiction to grant summary judgment to Seneca and deny the same to Hoffman.

III. That the circuit court chose to adopt and enter proposed orders submitted by Seneca's counsel (granting Seneca summary judgment and denying Hoffman summary judgment) does not render the orders void for lack of due process, and, in any event, any issue is this regard is unpreserved for appellate review.

As an initial matter, any issue in this regard is clearly not preserved for appellate review, because Hoffman did not raise the issue and obtain a ruling on it in the circuit court. Elam, 361 S.C. at 23, 602 S.E.2d at 779-80; Noisette, 304 S.C. at 58, 403 S.E.2d at 124; *see also* Floyd, 365 S.C. at 73, 615 S.E.2d at 474.

Moreover, Hoffman's statement that Judge Brown "did not give the matter the meaningful attention or consideration that his oath of office and

due process requires . . ." is more insult than analysis—not to mention rank speculation. Seneca submits that this argument is sufficiently conclusory in its presentation and development that it may rightfully be deemed abandoned. McLean, 314 S.C. 361, 444 S.E.2d 513.

In any event, as the authority Hoffman himself cites instructs, due process is a flexible concept, not mandating any particular procedure, with "[t]he fundamental requirement of due process [being] the opportunity to be heard at a meaningful time and in a meaningful manner." S.C. Department of Social Services v. Holden, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995). It is beyond reasonable dispute that Hoffman was given such an opportunity here. Moreover, and while there is no impropriety in a circuit judge requesting a proposed order and thereafter exercising the discretion to adopt and enter the order if it meets with approval, Rule 59(e) did, of course, provide Hoffman with a procedure to raise any issue in this regard directly to Judge Brown, but Hoffman did not avail himself of this procedure.

IV. Because Hoffman did not appeal the circuit court's summary judgment in favor of Capstone, nor did Hoffman present any argument in his appellate brief to challenge the circuit court's grant of summary judgment in favor of Capstone, Capstone's summary judgment is conclusively established, but, in any event, it was correctly granted by the circuit court on the merits and would rightfully be affirmed.

Out of an abundance of caution, based upon the authority cited herein

(which is incorporated by reference) regarding appellate issue preservation and proper presentation of issues, argument, and analysis to this Court, to the extent that there is any question in this regard, it is hereby argued that the summary judgment in favor of Capstone is conclusively established because Hoffman did not appeal the judgment nor did Hoffman advance any argument to challenge the judgment in his appellate brief. Still, to the extent that any argument in this regard may be necessary, the circuit court's specific ruling that Capstone was entitled to summary judgment because it is not a party to the subject contract of insurance is correct on the merits, and that portion of the circuit court's order is incorporated herein by reference. (R. p. 30.) Also, as to the other aspects of the circuit court's ruling that support summary judgment in favor of Seneca, they also support summary judgment in favor of Capstone, and the arguments herein as to Seneca are incorporated by reference as to Capstone.

CONCLUSION

For the foregoing reasons, along with any other reason that may be evident upon the record, Seneca (and Capstone, to the extent necessary) asks that the Court affirm, in its entirety, the circuit court's summary judgment in its favor and also affirm the circuit court's denial of summary judgment to Hoffman.

Respectfully submitted,

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Dated: 12/3/14

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
DEC 05 2014
SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Circuit Case No. 2012-CP-07-1352
Appellate Case No. 2013-002578

Bruce R. Hoffman,

Appellant,

v.

Seneca Specialty Insurance Company; CRC Insurance Company; CRC Insurance Services, Inc. d/b/a Southern Cross Underwriters of Sumter; Adylette Services of Lowcountry, Inc., and Capstone ISG, Inc.,

Defendants,

Of whom Seneca Specialty Insurance Company is the Respondent.

RESPONDENT'S CERTIFICATION FOR FINAL BRIEF

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I, Russell G. Hines, do hereby certify that the Final Brief of Respondent complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

Respectfully submitted,

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Respondent above named, do hereby certify that I have served the **FINAL BRIEF OF RESPONDENT** and **RESPONDENT'S CERTIFICATION FOR FINAL BRIEF** on all other parties to this appeal by depositing a copy of the same in the United States Mail, postage prepaid, on December 3, 2014, addressed as follows to said parties or their counsel of record:

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Respectfully submitted,

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