

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2017-002220

LM Insurance Corporation,

v. Plaintiff,

Josh Steele,

v. Defendant, Third-Party Plaintiff,
Appellant,

Ernie Yarborough d/b/a Yarborough
Insurance Agency,

Third-Party Defendant,
Respondent.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

LM INSURANCE CORPORATION,
Plaintiff,

Civil Action No. 2017-CP-32-00507

v.

JOSH STEELE,

Defendant/Third-Party
Plaintiff,

v.

ERNIE YARBOROUGH D/B/A
YARBOROUGH INSURANCE AGENCY,

Third-Party Defendant.

**ORDER
GRANTING THIRD-PARTY
DEFENDANT ERNIE YARBOROUGH
D/B/A YARBOROUGH INSURANCE
AGENCY'S MOTION TO DISMISS**

NOW BEFORE THE COURT is Third-Party Defendant Ernie Yarborough d/b/a Yarborough Insurance Agency's ("Yarborough") Motion to Dismiss the Third-Party Complaint filed by Defendant/Third-Party Plaintiff Josh Steele ("Steele"). A hearing was held on August 2, 2017. Present at the hearing were Morgan S. Templeton, Esquire, on behalf of the Plaintiff, LM Insurance Corporation ("LM"), Robert D. Dodson, Esquire, on behalf of Steele and Elizabeth M. McMillan on behalf of Yarborough. The Court, having heard arguments of counsel and fully considering the matter, grants Yarborough's motion.

BACKGROUND

This matter comes before me upon Yarborough's Motion to Dismiss for Insufficient Service of Process pursuant to Rule 12(b)(5) of the South Carolina Rules of Civil Procedure. On or around April 21, 2017, Steele attempted to serve Yarborough by certified mail, with

instructions that delivery should be restricted to Yarborough. However, Sandy Pike, a sales and service representative employed by Yarborough signed the certified mail return receipt while Yarborough was out of the office. Yarborough asserts that Pike has no ownership interest in his agency and that her duties do not include signing for certified mail delivered to Yarborough's office. Additionally, Yarborough states that he has never represented that she is authorized to sign for certified mail or accept service on his behalf. Subsequently, Yarborough has not been personally served or any other manner contemplated by the Rules of Civil Procedure.

FINDINGS OF FACT AND LAW

Rule 4 of the South Carolina Rules of Civil Procedure specifies the methods in which the Summons and Complaint can be served to effectuate process on a defendant. "Rule 4, SCRPC, serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action." Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995). Pursuant to Rule 4(d)(8), SCRPC, a plaintiff may serve a the defendant "by registered or certified mail, return receipt requested **and restricted to the addressee.**" (emphasis added). Where, as here, service is accomplished by certified mail, delivery must be restricted to and the return receipt signed by the addressee. Langley v. Graham, 322 S.C. 428, 431, 472 S.E.2d 259, 260-61 (1996).

In this case, the Third-Party Complaint was addressed to Ernie Yarborough, an individual. It is undisputed that Sandra Pike, a sales and service representative of Yarborough's company, received delivery of and signed the return receipt for the Third-Party Complaint. As a result, Steele has failed to comply with the requirements of Rule 4(d)(8) and his attempt to serve Yarborough by mail is defective.

Further, even had Steele complied with the requirements regarding receipt and delivery,

Pike was not capable of accepting service on behalf of Yarborough. For service to be effective under Rule 4(d)(8), a plaintiff must serve the addressee or “an authorized person” for the individual. Graham Law Firm, P.A. v. Makawi and MKKM, Inc., 396 S.C. 290, 721 S.E. 2d 430, 433 (2012). The class of persons who may receive service of process on behalf of an individual or corporation as set forth in Rule 4(d)(8) is limited. See Rule 4(d)(1), SCRCF (limiting service on individuals to the named individual, a person of suitable age and discretion who resides at the individual’s home, or with an agent authorized by appointment or law); Rule 4(d)(3), SCRCF (limiting service on a corporation or partnership to officer, managing or general agents, or an agent authorized by appointment or law). For an agent to have implied authority, the agent must believe she had such authority. Roberson v. S. Fin. of S.C., Inc., 365 S.C. 6, 11, 615 S.E. 2d 112, 115 (2005) (citing 2A CJS *Agency* § 132 (2004)). In regard to apparent authority, an agent has apparent authority only where the principal knowingly permits the agent to exercise authority or the principal holds the agent out as possessing such authority. Id. Whether an agent has apparent authority is established by the actions and statements of the principal, not the agent. Id.

Here, the only evidence before me is that Pike did not have express, apparent, or implied authority to accept service on behalf of Yarborough. Yarborough submitted an affidavit in which he states that he did not give Pike express permission to accept service of process on his behalf or for his company and has never given Pike such authority. Similarly, Pike submitted an affidavit in which she confirms that Yarborough never gave her permission to accept service or sign on his behalf for certified mail. Furthermore, despite the Court granting Steele thirty days to conduct discovery regarding Pike’s authority to accept service, he has failed to present any evidence to the Court which contradicts Pike’s and Yarborough’s sworn statements.

Therefore, based upon the applicable law and facts before me, I grant Yarborough's motion to dismiss for insufficient service of process.

AND IT IS SO ORDERED.

The Honorable R. Knox McMahon
Administrative Judge

Dated: _____



Lexington Common Pleas

Case Caption: LM Insurance Corporation VS Josh Steele

Case Number: 2017CP3200507

Type: Order/Other

So Ordered

s/ R. Knox McMahon, #2145

Electronically signed on 2017-09-19 09:51:15 page 5 of 5

ELECTRONICALLY FILED - 2017 Sep 19 11:55 AM - LEXINGTON - COMMON PLEAS - CASE#2017CP3200507

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

LM INSURANCE CORPORATION

Plaintiff,

vs.

JOSH STEELE,

Defendant/Third-Party Plaintiff,

vs.

ERNIE YARBOROUGH D/B/A
YARBOROUGH INSURANCE AGENCY

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

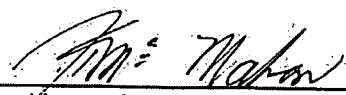
CASE NO: 2017-CP-32-00507

ORDER

The narrow issue before the court was the sufficiency of service as to the certified mail. Please see the Third Party Defendant's Motion to Dismiss. To clarify the Court's Order of September 19, 2017 the Court redacts the last sentence of paragraph one, page 2 of its Order for the following "Third Party Defendant Yarborough was not properly served by certified mail or in any other matter as of the date of the alleged attempted service on Sandy Pike on April 21, 2017." The Court's Order of September 19, 2017 is the Order of the Court in all other aspects and adopted in its entirety.

Granted in Part Denied in Part.

AND IT IS SO ORDERED, this 12th day of October, 2017.


The Honorable R. Knox McMahon

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

FILED

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

COPY

LM INSURANCE CORPORATION

LISA COMER
CLERK OF COURT
LEXINGTON, SC

CIVIL ACTION NO.:
COMPLAINT

Plaintiff,

vs.

JOSH STEELE,

Defendant.

NO JURY COLLECTION

2017CP3200507

The above-named Plaintiff, complaining of the Defendant herein, respectfully alleges:

1. That Plaintiff is a corporation authorized to conduct business in the State of South Carolina, existing under the laws of the State of South Carolina.
2. That upon information and belief, Defendant is authorized to conduct business in the State of South Carolina, existing under the laws of the State of South Carolina, having a business address at 105 Ballentine Lane, Chapin, South Carolina, 29036.
3. Plaintiff would allege, based on best information and belief, that Josh Steele is primarily engaged in the carpentry/construction business.
4. This Court has jurisdiction over this matter due to the fact that the matter in controversy involves an alleged failure of the Defendant to pay Plaintiff for worker's compensation and employer's general liability insurance coverage, which was provided by Plaintiff to Defendant. The matter involves the collection of a debt for unpaid premiums alleged to be owing by the Defendant to the Plaintiff pursuant to an account stated, an open account or contract.
5. In July of 2012, a policy was issued to Defendant. The Defendant was billed for the premiums due under the insurance policy based on the described business operations and estimated payroll, which information was provided by the Defendant to the Plaintiff.
6. When an audit was performed by Plaintiff, it was determined that the business operations had been grossly understated or underestimated, and that, as a result of the audit, legal additional premiums were due Plaintiff by the Defendant. The policy period in question was from July 26, 2012 to July 26, 2013, on Policy No. WC5-35S-529020-012. A Premium Adjustment Notice was generated by Plaintiff, billing the Defendant for the total corrected and adjusted premiums on October 18, 2016. A copy of said

Premium Adjustment Notice is attached hereto and made a part hereof as Exhibit "1".

7. The audit referenced above determined that the total premium owed by Defendant for worker's compensation and employer's general liability insurance during the stated policy period was \$85,467.00 as a result of the audit.
8. Plaintiff billed the Defendant a total of \$85,467.00 for premiums for the policy period in question.
9. The Defendant did not promptly pay the additional premiums of \$85,467.00, and at this time, still has not paid the additional monies due LM Insurance, in spite of numerous and frequent demands for payment.
10. The Defendant has failed and refused to pay the additional premiums due Plaintiff, and at this time continues to owe Plaintiff a total of \$85,467.00.
11. At the present time, Plaintiff claims the Defendant owes Plaintiff the principal amount of \$85,467.00 in unpaid worker's compensation and employer's general liability insurance premiums on Policy No. WC5-35S-529020-012 and claims that Defendant owes the Plaintiff interest on said unpaid debt, as determined by the court.
12. In August of 2013, a policy was issued to Defendant. The Defendant was billed for the premiums due under the insurance policy based on the described business operations and estimated payroll, which information was provided by the Defendant to the Plaintiff.
13. When an audit was performed by Plaintiff, it was determined that the business operations had been grossly understated or underestimated, and that, as a result of the audit, legal additional premiums were due Plaintiff by the Defendant. The policy period in question was from August 2, 2013 to July 26, 2014, on Policy No. WC5-35S-529020-023. A Premium Adjustment Notice was generated by Plaintiff, billing the Defendant for the total corrected and adjusted premiums on October 18, 2016. A copy of said Premium Adjustment Notice is attached hereto and made a part hereof as Exhibit "1".
14. The audit referenced above determined that the total premium owed by Defendant for worker's compensation and employer's general liability insurance during the stated policy period was \$125,574.00 as a result of the audit.
15. Plaintiff billed the Defendant a total of \$125,574.00 for premiums for the policy period in question.
16. The Defendant did not promptly pay the additional premiums of \$125,574.00, and at this time, still has not paid the additional monies due LM Insurance, in spite of numerous and frequent demands for payment.
17. The Defendant has failed and refused to pay the additional premiums due Plaintiff, and

- at this time continues to owe Plaintiff a total of \$125,574.00.
18. At the present time, Plaintiff claims the Defendant owes Plaintiff the principal amount of \$125,574.00 in unpaid worker's compensation and employer's general liability insurance premiums on Policy No. WC5-35S-529020-023 and claims that Defendant owes the Plaintiff interest on said unpaid debt, as determined by the court.
 19. In July of 2014, a policy was issued to Defendant. The Defendant was billed for the premiums due under the insurance policy based on the described business operations and estimated payroll, which information was provided by the Defendant to the Plaintiff.
 20. When an audit was performed by Plaintiff, it was determined that the business operations had been grossly understated or underestimated, and that, as a result of the audit, legal additional premiums were due Plaintiff by the Defendant. The policy period in question was from July 26, 2014 to July 26, 2015, on Policy No. WC5-35S-529020-024. A Premium Adjustment Notice was generated by Plaintiff, billing the Defendant for the total corrected and adjusted premiums on October 18, 2016. A copy of said Premium Adjustment Notice is attached hereto and made a part hereof as Exhibit "1".
 21. The audit referenced above determined that the total premium owed by Defendant for worker's compensation and employer's general liability insurance during the stated policy period was \$134,023.00 as a result of the audit.
 22. Plaintiff billed the Defendant a total of \$134,023.00 for premiums for the policy period in question.
 23. The Defendant did not promptly pay the additional premiums of \$134,023.00, and at this time, still has not paid the additional monies due LM Insurance, in spite of numerous and frequent demands for payment.
 24. The Defendant has failed and refused to pay the additional premiums due Plaintiff, and at this time continues to owe Plaintiff a total of \$134,023.00.
 25. At the present time, Plaintiff claims the Defendant owes Plaintiff the principal amount of \$134,023.00 in unpaid worker's compensation and employer's general liability insurance premiums on Policy No. WC5-35S-529020-024 and claims that Defendant owes the Plaintiff interest on said unpaid debt, as determined by the court.

COUNT I

Verified Statement of Account

26. Plaintiff adopts and incorporates paragraphs 1 through 25 as if fully set forth herein.

realleges those matters and further alleges:

27. Plaintiff claims of the Defendant the principal sum of \$345,064.00 plus interest as determined by the court, based on the attached verified statement of account, as of October 18, 2016.

COUNT II

Open Account

28. Plaintiff adopts and incorporates paragraphs 1 through 27 as if fully set forth herein, realleges those matters and further alleges:
29. Plaintiff claims of the Defendant the principal sum of \$345,064.00 plus interest as determined by the court, on open account as of October 18, 2016.

COUNT III

Breach of Contract

30. Plaintiff adopts and incorporates paragraphs 1 through 29 as if fully set forth herein, realleges those matters and further alleges:
31. On or about July 26, 2012, Plaintiff and Defendant entered into a contract whereby the Plaintiff was to provide worker's compensation and employer's general liability insurance coverage to cover and protect Defendant's business operations, and the Defendant agreed to pay premiums for said insurance, in accordance with the schedules under the policy.
32. Plaintiff provided worker's compensation and employer's general liability insurance for the Defendant's business operations from July 26, 2012 to July 26, 2013. An audit of the Defendant's business during the policy period determined that the total premium expense for the worker's compensation and employer's general liability insurance provided the Defendant by the Plaintiff during this policy period came to \$85,467.00.
33. The Defendant has failed and refused to pay Plaintiff the total due under this insurance coverage.
34. By failing to pay the premiums due Plaintiff, the Defendant has breached the contract between Plaintiff and Defendant.
35. As a result of the breach of the contract by Defendant, Plaintiff has suffered damages. Specifically, Plaintiff has been deprived of the proper amount of money to which it is entitled for providing worker's compensation and employer's general liability insurance to the Defendant's business operations from July 26, 2012 to July 26, 2013. Those damages amount to \$85,467.00, plus interest as determined by the court on said

amount from October 18, 2016 until the debt is paid or judgment entered.

36. On or about August 2, 2013, Plaintiff and Defendant entered into a contract whereby the Plaintiff was to provide worker's compensation and employer's general liability insurance coverage to cover and protect Defendant's business operations, and the Defendant agreed to pay premiums for said insurance, in accordance with the schedules under the policy.
37. Plaintiff provided worker's compensation and employer's general liability insurance for the Defendant's business operations from August 2, 2013 to July 26, 2014. An audit of the Defendant's business during the policy period determined that the total premium expense for the worker's compensation and employer's general liability insurance provided the Defendant by the Plaintiff during this policy period came to \$125,574.00.
38. The Defendant has failed and refused to pay Plaintiff the total due under this insurance coverage.
39. By failing to pay the premiums due Plaintiff, the Defendant has breached the contract between Plaintiff and Defendant.
40. As a result of the breach of the contract by Defendant, Plaintiff has suffered damages. Specifically, Plaintiff has been deprived of the proper amount of money to which it is entitled for providing worker's compensation and employer's general liability insurance to the Defendant's business operations from August 2, 2013 to July 26, 2014. Those damages amount to \$125,574.00, plus interest as determined by the court on said amount from October 18, 2016 until the debt is paid or judgment entered.
41. On or about July 26, 2014, Plaintiff and Defendant entered into a contract whereby the Plaintiff was to provide worker's compensation and employer's general liability insurance coverage to cover and protect Defendant's business operations, and the Defendant agreed to pay premiums for said insurance, in accordance with the schedules under the policy.
42. Plaintiff provided worker's compensation and employer's general liability insurance for the Defendant's business operations from July 26, 2014 to July 26, 2015. An audit of the Defendant's business during the policy period determined that the total premium expense for the worker's compensation and employer's general liability insurance provided the Defendant by the Plaintiff during this policy period came to \$134,023.00.
43. The Defendant has failed and refused to pay Plaintiff the total due under this insurance coverage.
44. By failing to pay the premiums due Plaintiff, the Defendant has breached the contract between Plaintiff and Defendant.
45. As a result of the breach of the contract by Defendant, Plaintiff has suffered damages.

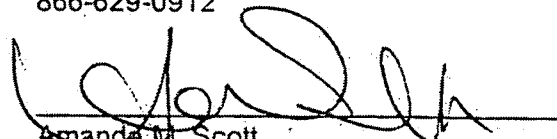
Specifically, Plaintiff has been deprived of the proper amount of money to which it is entitled for providing worker's compensation and employer's general liability insurance to the Defendant's business operations from July 26, 2014 to July 26, 2015. Those damages amount to \$134,023.00, plus interest as determined by the court on said amount from October 18, 2016 until the debt is paid or judgment entered.

46. Attached hereto and made a part of this complaint as Exhibit "2" is the affidavit of Kristi Couch, Senior Receivable Analyst of LM Insurance Corporation, verifying the amounts due under the insurance contract.

WHEREFORE, having fully set forth its Complaint, Plaintiff demands trial by nonjury and prays for the following:

- (a) Judgment against Defendant in the principal amount of \$345,064.00.
- (b) For the costs and disbursements of this action; and
- (c) For such other and further relief as the Court may deem just and proper.

Pamell & Crum, P.A.
P.O. Box 743
White Rock, SC 29177
866-629-0912


Amanda M. Scott
Attorney for Plaintiff
SC Bar Number: 73080

Dated: February 3, 2016

White Rock, South Carolina

2017

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

FOR THE ELEVENTH JUDICIAL CIRCUIT

LM INSURANCE CORPORATION,

Plaintiff,

vs.

JOSH STEELE,

Defendant/Third-Party Plaintiff,

vs.

ERNIE YARBOROUGH D/B/A
YARBOROUGH INSURANCE AGENCY,

Third-Party Defendants.

Civil Action No: 2017-CP-32-00507

THIRD-PARTY SUMMONS

FILED
2017 APR 20 AM 11:09
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

TO: THE THIRD-PARTY DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer DEFENDANT AND THIRD-PARTY PLAINTIFF'S ANSWER TO PLAINTIFF'S COMPLAINT, COUNTERCLAIMS AND THIRD-PARTY COMPLAINT in this action, a copy of which is hereby served on you, and to serve a copy of your Answer to the said THIRD-PARTY PLAINTIFF'S ANSWER, COUNTERCLAIMS AND THIRD-PARTY COMPLAINT upon the subscribers at 1722 Main Street, Suite 200, Columbia, South Carolina 29201, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the THIRD-PARTY PLAINTIFF'S ANSWER, COUNTERCLAIMS AND THIRD-PARTY COMPLAINT within the time aforesaid, judgment by default will be rendered against you for the relief demanded in such THIRD-PARTY PLAINTIFF'S ANSWER, COUNTERCLAIMS AND THIRD-PARTY COMPLAINT.

LAW OFFICES OF ROBERT D. DODSON, P.A.



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April 19, 2017
Columbia, South Carolina

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LISA M. COMER
CLERK OF COURT
LEXINGTON SC

FILED

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

LM INSURANCE CORPORATION

2017 APR 20 AM 11:09
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

Plaintiff,

vs.

JOSH STEELE,

Defendant/Third-Party Plaintiff,

vs.

ERNIE YARBOROUGH D/B/A
YARBOROUGH INSURANCE AGENCY,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE ELEVENTH JUDICIAL CIRCUIT

Civil Action No: 2017-CP-32-00507

DEFENDANT AND THIRD-PARTY
PLAINTIFF'S ANSWER TO
PLAINTIFF'S COMPLAINT,
COUNTERCLAIMS AND THIRD-PARTY
COMPLAINT

JURY TRIAL DEMANDED

Comes now the Defendant/Third-Party Plaintiff, by and through undersigned counsel, who would Answer Plaintiff's Complaint, make Counterclaims against the Plaintiff and who would bring a Third-Party Complaint as follows:

ANSWER
General Denial

1. Defendant/Third-Party Plaintiff (hereinafter referred to as Defendant) denies each and every allegation of Plaintiff's Complaint not specifically admitted herein.

Specific Denial

2. The allegations in paragraph 1 are legal conclusions that do not require a responsive pleading. To the extent a responsive pleading is required, Defendant is without sufficient knowledge or information to admit or deny the allegations and therefore denies the allegations and demands strict proof.
3. Defendant admits the allegations of paragraphs 2 and 3.

4. The allegations in paragraph 4 are legal conclusions that do not require a responsive pleading. To the extent a responsive pleading is required, Defendant admits so much of paragraph 4 as alleges that jurisdiction and venue are properly asserted in this case. Any remaining allegations are denied as stated.
5. Defendant admits so much of paragraph 5 as alleges Plaintiff issued a workers' compensation insurance policy to Defendant. Any remaining allegations in paragraph 5 are denied as stated.
6. The allegations of paragraphs 6 through 11 are denied as stated.
7. Defendant admits so much of paragraph 12 as alleges Plaintiff issued a workers' compensation insurance policy to Defendant. Any remaining allegations in paragraph 12 are denied as stated.
8. The allegations of paragraphs 13 through 18 are denied as stated.
9. Defendant admits so much of paragraph 19 as alleges Plaintiff issued a workers' compensation insurance policy to Defendant. Any remaining allegations in paragraph 19 are denied as stated.
10. The allegations of paragraphs 20 through 46 are denied as stated.

For a First Affirmative Defense
Failure to State a Claim

11. Plaintiff's Complaint fails to state facts showing it is entitled to relief and the Complaint should be dismissed pursuant to Rule 12(b)(6) SCRCP.

For a Second Affirmative Defense
Statute of Limitations

12. Plaintiff's action is untimely and is barred by the applicable statute of limitations.

For a Third Affirmative Defense
Waiver

13. Plaintiff's action and inaction constitutes a waiver and Defendant pleads the doctrine of waiver as absolute bar to this action.

For a Fourth Affirmative Defense
Fraud in the Inducement

14. As outlined and pleaded more fully below, Defendant would show that Plaintiff and the third-party Defendant committed fraud in the inducement of any contract and Defendant pleads this as a complete or partial bar to this action.

For a Fifth Affirmative Defense
Accord and Satisfaction

15. Defendant would show that he paid his premiums in full and therefore he pleads accord and satisfaction as a complete or partial bar to this action.

For a Sixth Affirmative Defense
Breach of Contract Accompanied by a Fraudulent Act

16. As outlined and pleaded more fully above and below, Defendant would show that Plaintiff and the Third-Party Defendant committed fraudulent acts in breaching the contracts at issue and Defendant pleads this as a complete or partial bar to this action.

For a Seventh Defense
Breach of Fiduciary Duty

17. As outlined and pleaded more fully above and below, Defendant would show that Plaintiff and the Third-Party Defendant breached their fiduciary duty and the Defendant pleads this as a complete or partial bar to this action.

For an Eighth Defense
Unconscionability

18. Defendant would show that the terms and conditions claimed and sought to be enforced by Plaintiff in this lawsuit are unreasonable and unconscionable and Defendant pleads the unconscionability doctrine as a complete and/or partial defense in this action.

For a Ninth Defense
Breach of Implied Term of Good Faith and Fair Dealing

19. Every contract has an implied term of good faith and fair dealing. Defendant would show that Plaintiff has violated this provision, has acted in bad faith and its conduct should operate as a complete and/or partial bar to any recovery.

For a Tenth Defense
Offset

20. Defendant has asserted counterclaims and third party claims as outlined and pleaded more fully below. Defendant pleads offset as a complete and/or partial defense in this action based upon the counterclaims and third party claims asserted below.

For an Eleventh Defense
Reservation of Other Affirmative Defenses

21. Defendant specifically reserves and does not intend to waive any other affirmative defenses available under common law or statutory law.

COUNTERCLAIMS AND THIRD-PARTY COMPLAINT

Factual Allegations

22. Defendant is a contractor and holds a contractor's license through the State of South Carolina.

23. The bulk of the work Defendant performs is remodeling houses, bathrooms, decks and porches and other parts of existing houses and homes in and around Columbia and Lexington, South Carolina.
24. Because Defendant owns a small business, his work flow varies significantly.
25. From time to time, he may be able to perform the physical work of contracting himself and at other times he may have to hire employees, independent contractors or others to assist him in completing a particular construction or remodeling job.
26. In this respect, Defendant's work is similar to other contractors similarly situated: When he has a sufficiently high work volume, he hires other people as necessary to help him and when his work volume is low he performs tasks and assignments himself.
27. On or around 2012, Defendant approached the Third-Party Defendant about obtaining a workers' compensation insurance policy to comply with South Carolina statutory law.
28. More specifically, Defendant knew that South Carolina required employers who regularly employed four or more employees to pay for and provide workers' compensation insurance coverage to employees.
29. Additionally, some of the projects that Defendant was hired to do required him to maintain workers' compensation insurance coverage.
30. At that time, on or around 2012, Defendant explained to the Third-Party Defendant the nature of his work, nature of his relationship with those he might hire to assist him on a project and his insurance needs as outlined and pleaded more fully above.
31. Third-Party Defendant agreed to procure workers' compensation insurance for the Defendant which he eventually did with the Plaintiff to this action.

32. Defendant maintained an active workers' compensation insurance policy with Plaintiff for several years and timely and regularly paid his premiums.
33. On information and belief and unknown to the Defendant at the time, the policy Plaintiff issued was ghost-policy – in effect, Plaintiff provided a certificate of insurance showing Defendant had workers' compensation insurance but his policy didn't actually cover anyone Defendant hired.
34. On information and belief, Plaintiff and the Third-Party Defendant conspired to provide what amounted to a fraudulent policy – it issued Defendant an insurance policy that did not actually provide the insurance they told and represented to Defendant he had in place.
35. On information and belief, during various points when he maintained workers' compensation 'ghost' insurance with Plaintiff, Plaintiff would conduct various audits by seeking additional information from Defendant and the Third-Party Defendant and then adjusting its premiums accordingly.
36. Each time one of these audits was performed, Defendant supplied Plaintiff and the Third-Party Defendant with the information they required and he paid any additional premiums required of him.
37. For several years Defendant maintained a clean claims history, i.e. he did not have any employees or others working for him who were hurt or injured on the job or who filed claims against him.
38. Unfortunately, on or around May, 2015 someone hired by Defendant to work on a home the Defendant had contracted to repair was hurt and injured on the job when he fell through a roof.

39. On information and belief, that employee/independent contractor was named Julio Guzman and on information and belief, Mr. Guzman tragically died of his injuries.
40. Because of his injuries and death, Mr. Guzman's dependents received workers' compensation benefits under the illusory "ghost" policy Plaintiff issued.
41. Thereafter and on information and belief, Plaintiff and the third-party Defendant sought to conspire to re-audit Defendant and effectively cook the books and bill Defendant excess and unreasonable amounts of money to claw back and recoup the loss on the Guzman claim plus other excessive and unreasonable amounts.

For a First Cause of Action Against Ernie Yarborough d/b/a Yarborough Insurance Agency Negligence

42. Defendant re-alleges the allegations above as if repeated herein verbatim.
43. In operating an insurance agency Yarborough has a duty to place clients like the Defendant and specifically including the Defendant in commercially reasonable policies that suit their needs and afford the coverage Yarborough represents.
44. Additionally, Yarborough had a duty to follow the directives of clients like the Defendant and specifically including the Defendant in securing appropriate coverage.
45. Yarborough breached these duties to the Defendant in one or more of the following particulars:
- a. In failing to secure commercially reasonable coverage;
 - b. Placing Defendant/Third-Party Plaintiff into commercially unreasonable insurance that effectively provided no insurance (i.e. an illusory "ghost" policy);
 - c. Failing to follow the directives of Defendant in securing appropriate insurance for him;

d. Failing to explain that the workers' compensation insurance policy he procured was a "ghost" policy and in failing to explain the implication of such a fraudulent policy.

e. Such additional and further particulars as may be learned during discovery and/or proven at trial during this matter.

46. As a direct and proximate result of Yarborough's negligence, as outlined and pleaded more fully above, Defendant has suffered injuries and damages.

47. More specifically, because of the events pleaded and outlined more fully above, Defendant's illusory "ghost" policy did not actually provide any meaningful coverage and left Defendant at the mercy of Plaintiff to his action.

48. In addition, Defendant has suffered additional and further damages to be proven at trial.

49. Defendant demands judgment against Yarborough and seeks all damages allowed by law including punitive damages in an appropriate amount.

For a Second Cause of Action Against Yarborough
Breach of Fiduciary Duty

50. Defendant/Third-Party Plaintiff re-allege the allegations above as if repeated herein verbatim.

51. Defendant and Yarborough had a fiduciary relationship that existed because of the special confidence Defendant placed in Yarborough to find appropriate insurance for him that was commercially reasonable and suited his particular individual needs given the nature of his business.

52. As outlined and pleaded above, Yarborough breached his fiduciary duties to Defendant in one or more of the following particulars:

- a. In failing to secure commercially reasonable coverage;
- b. Placing Defendant/Third-Party Plaintiff into commercially unreasonable insurance that effectively provided no insurance (i.e. an illusory "ghost" policy);
- c. Failing to follow the directives of Defendant in securing appropriate insurance for him;
- d. Failing to explain that the workers' compensation insurance policy he procured was a "ghost" policy and in failing to explain the implication of such a fraudulent policy.
- e. Such additional and further particulars as may be learned during discovery and/or proven at trial during this matter.

53. As a direct and proximate result of Yarborough's breach of fiduciary duty, as outlined and pleaded more fully above, Defendant has suffered injuries and damages.

54. More specifically, because of the events pleaded and outlined more fully above, Defendant's ghost policy did not actually provide any meaningful coverage and left Defendant at the mercy of Plaintiff to his action.

55. Defendant/Third-Party Plaintiff demand judgment against Yarborough and seek all damages allowed by law including punitive damages in an appropriate amount.

For a Third Cause of Action Against Yarborough
Negligent Misrepresentation

56. Defendant/Third-Party Plaintiff re-allege the allegations above as if repeated herein verbatim.

57. As outlined and pleaded more fully above, Yarborough made false and misleading representations to Defendant about securing commercially reasonable terms and conditions and terms and conditions that met his specific insurance needs.
58. On information and belief, Yarborough had a pecuniary interest in securing insurance because it was paid by Plaintiff for securing the insurance.
59. Nonetheless, and as outlined and pleaded more fully above, Yarborough also owed Defendant a duty of care to convey truthful and honest information.
60. As outlined and pleaded more fully above, Yarborough breached its duties to Defendant.
61. Defendant justifiably relied upon the representations of Yarborough because, among other things, and as outlined and pleaded more fully above, Yarborough was not only being paid by Plaintiff but was also acting in a fiduciary capacity to Defendant.
62. As a direct and proximate result of Yarborough's breach of fiduciary duty, as outlined and pleaded more fully above, Defendant has suffered injuries and damages.
63. More specifically, because of the events pleaded and outlined more fully above, Defendant's ghost policy did not actually provide any meaningful coverage and left Defendant at the mercy of Plaintiff to his action.
64. Defendant hereby demands judgment against Yarborough and seeks all damages allowed by law including punitive damages in an appropriate amount.

For a Fourth Cause of Action Against Yarborough and Plaintiff
Civil Conspiracy

65. Defendant re-alleges the allegations above as if repeated herein verbatim.
66. On information and belief, representatives of Plaintiff and Yarborough unlawfully and illegally conspired for the purpose of injuring and damaging the Defendant.

67. More specifically and as outlined and pleaded more fully above, Defendant explained to Yarborough the nature of his business and specifically that employees/independent contractors would frequently come and go depending on the projects that Defendant was working on.
68. As outlined and pleaded more fully above, Defendant retained Yarborough to secure commercially reasonable insurance for him on terms that met his individual needs given the nature of his business that he explained and which is outlined and pleaded more fully above.
69. On information and belief, despite these directives Yarborough and the Plaintiff, conspired to injure the Defendant.
70. More specifically, on information and belief, and as outlined and pleaded more fully above, Yarborough and Liberty Mutual issued a workers' compensation insurance policy that was a ghost policy and effectively covered no one.
71. Even more specifically, Yarborough and Liberty Mutual knew or reasonably should have known that because of the nature of contractors like the Defendant that the Defendant would have employees/independent contractors come and go on a regular basis.
72. Nonetheless and despite what Yarborough and Liberty Mutual knew or reasonably should have known, they effectively issued an insurance policy that was designed to cover no one.
73. In fact, and as outlined and pleaded more fully above, these parties' civil conspiracy has unlawfully and illegally injured the Defendant and because of the events pleaded and outlined more fully above, Defendant's ghost policy did not actually provide any meaningful coverage and left Defendant at the mercy of Plaintiff to his action.

74. Defendant demands judgment against Yarborough and Plaintiff and seeks all damages allowed by law including punitive damages in an appropriate amount.

For a Fifth Cause of Action Against Yarborough and Plaintiff
Fraud

75. Defendant re-alleges the allegations above as if repeated herein verbatim.

76. On information and belief, Yarborough was acting as an agent for Plaintiff, in that it was being paid by Plaintiff to write insurance policies for it including the insurance policy at issue in this lawsuit.

77. As outlined and pleaded more fully above, Yarborough individually and on behalf of Plaintiff, made representations to Defendant regarding the suitability of the insurance policy at issue and the terms and conditions contained therein.

78. As outlined and pleaded more fully above, these representations were false and misleading.

79. More specifically, and as outlined and pleaded more fully above, the terms and conditions were commercially unreasonable but even more significantly, the terms and conditions did not suit the individual needs the Defendants had expressed to Yarborough and Plaintiff.

80. Yarborough and Plaintiff knew of the falsity of the representations being made to Defendant.

81. The representations and misrepresentations were material in a number of respects.

82. First, Defendant would not have purchased an insurance policy that effectively covered no one and nothing and left him at the mercy of the Plaintiff if anyone actually filed a claim against the policy.

83. In addition, the representations were material because they are at the heart of this litigation now before this Court.
84. Yarborough and Plaintiff made material misrepresentations to Defendant with the specific intent that they act and rely upon them by purchasing the policy at issue.
85. Defendant was ignorant of the falsity and untruth in the statements and representations made to him by Yarborough and Plaintiff.
86. Defendant relied upon the truth of the representations made to him by Yarborough and Plaintiff.
87. Defendant had a right to rely upon the representations made by Yarborough and Plaintiff.
88. More specifically and as outlined and pleaded more fully above, Defendant enjoyed a fiduciary relationship with Yarborough and Defendant had a right to rely on this fiduciary relationship even if that fiduciary was also acting as an agent for Plaintiff.
89. As outlined and pleaded more fully above, Yarborough and Plaintiff's fraud and misrepresentations has injured the Defendant.
90. Defendant demands judgment against Yarborough and Plaintiff and seeks all damages allowed by law including punitive damages in an appropriate amount.

For a Sixth Cause of Action Against Yarborough and Plaintiff
Violation of South Carolina Unfair Trade Practices Act

91. Defendant re-alleges the allegations above as if repeated herein verbatim.
92. As outlined and pleaded more fully above, Yarborough and Plaintiff have engaged in unfair and deceptive practices in violation of the South Carolina Unfair Trade Practices Act (S.C. Code §§ 39-5-10 *et. seq.*).

93. More specifically, and as outlined and pleaded more fully above, Yarborough and Plaintiff took and accepted insurance premium payments from Defendant but those payments were for a "ghost" policy which is illusory and essentially covers nothing.
94. Despite such a policy that Plaintiff and Yarborough knew or reasonably should have known about, Plaintiff unlawfully and illegally tried to claw back money it paid once a claim was made on the policy despite the fact that it had previously audited the Defendant before a claim was made and found that the Defendant owed no additional premiums.
95. All of the conduct alleged and pleaded above, is capable of repetition and it fact has been repeated by these parties on multiple occasions.
96. As outlined and pleaded more fully above, Yarborough and Plaintiff's violation of the Unfair Trade Practices Act has injured the Defendant.
97. Defendant demands judgment against these parties and seek all damages allowed by law including treble damages, costs and attorney's fees.

**For a Seventh Cause of Action against Plaintiff and Yarborough
Breach of Contract Accompanied by a Fraudulent Act**

98. Defendant re-alleges the allegations above as if repeated herein verbatim.
99. As outlined and pleaded more fully above, Defendant entered an insurance contract with Plaintiff.
100. An implied term in any contract requires that the parties act in good faith and fair dealing toward one another.
101. Plaintiff and Yarborough have had a fraudulent intent in breaching the contract with Defendant.

102. More specifically and despite the fact that Defendant has always paid his premiums in full and on time, Plaintiff and Yarborough have committed numerous and repeated fraudulent acts by issuing a "ghost" policy that was illusory and essentially no coverage to Defendant.

103. Even more specifically, once a claim was made and Plaintiff was forced to pay out money on the policy at issue, it has attempted to claw back the money it paid by instituting its own fraudulent scheme to audit Defendant and claim that Defendant owes it hundreds of thousands of dollars not previously disclosed to Defendant.

104. As outlined and pleaded more fully above, Yarborough and Plaintiff's fraudulent acts and misrepresentations have injured the Defendant.

105. Defendant demands judgment against Yarborough and Plaintiff and seeks all damages allowed by law including punitive damages in an appropriate amount.

For an Eighth Cause of Action Against Yarborough and Plaintiff
Conversion

106. Defendant re-alleges the allegations above as if repeated herein verbatim.

107. As outlined and pleaded above, Defendant made numerous premium payments on the insurance policy at issue.

108. However, in making these payments, Defendant was buying something that really did not exist; a "ghost" policy that provided nothing but illusory coverage.

109. Plaintiff and Yarborough illegally and unlawfully stole and converted Defendant's premium payments for something that was nothing more than an illusory policy that covered nothing.

110. Defendant demands judgment against Plaintiff and Yarborough and seeks all damages allowed by law including punitive damages in an appropriate amount.

WHEREFORE, having fully Answered Plaintiff's Complaint and asserted Counterclaims and a Third-Party Complaint, Defendant/Third-Party Plaintiff prays for the following relief:

- A. That Plaintiff's Complaint be dismissed with prejudice;
- B. That Defendant/Third-Party Plaintiff be awarded all taxable costs;
- C. That Defendant/Third-Party Plaintiff be awarded attorney's fees pursuant to S.C. Code §15-36 et. seq.;
- D. That judgment be rendered against the Plaintiff and Third-Party Defendant (jointly and severally) and in favor of the Defendant/Third-Party Plaintiff and that the Defendant/Third-Party Plaintiff be awarded all actual, special, consequential and punitive damages in an appropriate amount (as determined by a jury);
- E. That Defendant/Third-Party Plaintiff be awarded treble damages where provided by statute; and
- F. That the Court award such additional and further relief that the Court deems just and proper.

In accordance with the United States Constitution and South Carolina State Constitution, Defendant/Third-Party Plaintiff demands a trial by jury.

Respectfully submitted,

LAW OFFICES OF ROBERT D. DODSON, P.A.



Robert D. Dodson, Esquire

FILED
2017 APR 20 AM 11:09
LISA M. COMER
CLERK OF COURT
LEXINGTON, SC

1722 Main Street, Suite 200
Columbia, South Carolina 29201
Phone: (803) 252-2600
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Attorney for Defendant

April 19, 2017

FILED
2017 APR 20 AM 11:09
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

FOR THE ELEVENTH JUDICIAL CIRCUIT

LM INSURANCE CORPORATION,

Plaintiff,

vs.

JOSH STEELE,

Defendant/Third-Party Plaintiff,

vs.

ERNIE YARBOROUGH D/B/A
YARBOROUGH INSURANCE AGENCY,

Third-Party Defendants.

Civil Action No: 2017-CP-32-00507

CERTIFICATE OF SERVICE

I, Marie Harris, employee of the Law Offices of Robert Dodson, P.A. do hereby certify that on April 19, 2017, I caused to be served a true, correct and accurate copy of **DEFENDANT AND THIRD PARTY PLAINTIFF'S ANSWER TO PLAINTIFF'S COMPLAINT, COUNTERCLAIMS AND THIRD-PARTY COMPLAINT** by depositing in United States Mail, postage prepaid, addressed to:

Amanda M. Scott
Parnell & Crum, P.A.
P.O. Box 743
White Rock, SC 29177
(Via U.S. Mail)

Ernie Yarborough
1034 Briargate Circle
Columbia, SC 29210
(Via Certified Mail, Restricted Delivery)

FILED
2017 APR 20 AM 11:09
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

Marie Harris
Marie Harris, Paralegal

1 State of South Carolina)

In the Court
Of Common Pleas

2 County of Lexington)

3 Docket No. 2017CP3200507

4
5
6 LM Insurance Corporation,)
Plaintiff,)

7 vs.)

Transcript of Record

8 Josh Steele,)

9 vs.)

10 Ernie Yarborough,)
11 d/b/a Yarborough Insurance)
Agency,)

12 Defendant.)

 **ORIGINAL**

13 August 2, 2017
14 Lexington, South Carolina

15
16 B E F O R E:

17 The Honorable R. Knox McMahon, Judge.

18
19 A P P E A R A N C E S:

20 Morgan S. Templeton, Esquire
Attorney for the Plaintiff

21 Robert Daniel Dodson, Esquire
Elizabeth McMillan, Esquire
22 Attorneys for the Defendants

23
24 Brenda J. Sigwald, Circuit Court Reporter
To The Honorable Doyet A. Early III
25 P.O. Box 206, Jackson, South Carolina 29831

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Certificate of Reporter.....	30

E X H I B I T S

<u>Number</u>	<u>Description</u>	<u>Page</u>
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(REPORTER'S NOTE: There were no exhibits
entered during this hearing.)

MOTIONS HEARING

THE CLERK: L. M. Insurance Corporation versus Josh Steele, 2017-CP-32-00507. This one has two motions.

THE COURT: All right. Let's see, I have one motion, this is Ms. -- filed by Mr. or Ms., I'm not sure; I haven't found it yet. Ms. McMillan.

MS. MCMILLAN: Yes, sire, Your Honor.

THE COURT: All right. And the clerk says there's another motion to dismiss.

THE CLERK: Yes, it's a plaintiff's motion to dismiss.

THE COURT: Yes, sir.

MR. TEMPLETON: Yes, sir, Your Honor Morgan Templeton on behalf of the plaintiff. I have a motion to dismiss the counterclaim that was filed by the defendant relating to two causes of action.

THE COURT: All right. Which was filed first?

MR. TEMPLETON: I believe my motion, was, Judge.

THE COURT: All right. Is that the order y'all want to hear them?

MR. TEMPLETON: It makes no difference to me how the Court wants to proceed.

THE COURT: It makes no difference to me either, that's why I always ask. I don't mean that -- I mean it in the same way you do.

1 MR. TEMPLETON: Certainly.

2 THE COURT: That's bad I take it like that.

3 All right. I'll be glad to hear from you. Yes,
4 sir?

5 MR. TEMPLETON: Yes, Your Honor. Again Morgan
6 Templeton on behalf of the plaintiff, L. M. Insurance
7 Corporation. By way of brief background, Judge, this is a
8 collection action related to failure, alleged failure, to
9 pay insurance premiums under a workers compensation
10 insurance policy. I did not bring the lawsuit. Parnell
11 and Parnell brought the suit. I've been engaged solely to
12 defend the counterclaim which was presented by Mr. Steele
13 in his response to pleading. There are a number of causes
14 of action that are asserted, but my motion relates solely
15 to two causes of action, one being the civil conspiracy and
16 the second being unfair trade practices.

17 The civil conspiracy, the basis for the motion to
18 dismiss on that is that there is no allegation of special
19 damage in connection or in furtherance of a conspiracy
20 which makes the cause of action subject to dismissal. With
21 respect to the UTPA claim, the code section 39-5-40
22 subparagraph C specifically exempts certain business
23 practices or certain industries from the application of the
24 act and one of those types of businesses is the insurance
25 industry.

1 At least five different federal judges that I have
2 found who have had occasion to opine on this subject have
3 all uniformly held, starting with Judge Curry in the early
4 90's and as recently as I guess the late 2000 -- early 2000
5 teens, Judge Anderson -- have had opportunities to weigh in
6 and uniformly agree that UTPA does not apply to the
7 insurers, basis being there's an entire code of laws that
8 regulates and governs the do's and the do not's of the
9 insurance industry. That's the basis of the motion, Judge.

10 THE COURT: All right, Thank you. Thank you very
11 much.

12 MR. DODSON: I know it's very confusing, we're both
13 sitting at the same table. I told him he could sit next to
14 me since there was no room at that table. Robert Dodson
15 for the defendant -- I almost said plaintiff because I'm so
16 used to saying that. As to the Unfair Trade Practices Act,
17 as Your Honor is aware, the standard on this is not whether
18 the general industry of insurance is regulated or not
19 because it clearly is. But for unfair trade practices
20 cause of action, it's whether the specific acts complained
21 of are regulated.

22 In here they're not and that language of that
23 specific act actually comes straight out of the case McLeod
24 versus Rhodes, the cite's 267 SC 2d 539. I think it's a
25 1980 case from the Supreme Court.

1 What we actually complain of in our counterclaim is
2 something fairly unique and something I gather is kind of
3 new. And it's basically this: The plaintiff issued, along
4 with Mr. Yarboroughs help, my client a worker's comp
5 insurance policy that didn't cover anything. It's
6 something that I think gets referred to as a ghost policy
7 because it actually does not cover a single employee,
8 including Mr. Steele. What they basically do is sell
9 something for, you know, a couple of thousand dollars and
10 you get a certificate of insurance that you can then take
11 to an up -- upstream contractor and say, look, I have
12 worker's comp insurance and the upstream contractor calls
13 the insurance company and says I have this certificate of
14 insurance, is this in fact valid and they say yes. The
15 problem is, if you ever hire an employee and that employee
16 makes a claim, then they say, oh, well, you had a policy
17 that didn't cover any employees. You added an employee and
18 then they come back and hit you with a \$300,000 lawsuit for
19 collections action. And that practice is not regulated at
20 all that I can find in the code and I didn't hear him
21 mention anything about that either.

22 And so my argument to the Court is before
23 dismissing that cause of action, allow me the opportunity
24 to do some discovery, particularly when this is, I think a
25 novel -- a fairly novel issue that I'm not aware of any

1 court in South Carolina addressing this specific issue and
2 I ought to be afforded, and my client ought to be afforded,
3 some rights to discovery on that.

4 Now, as to the civil conspiracy claim, my answer,
5 counterclaims, and third party complaint is actually 18
6 pages long. And I am sure in there I've made some specific
7 allegations that would satisfy him. I don't know that I
8 made it in the prayer or the complaint where he seems to
9 want it, but I think the remedy for that is allow me to
10 amend the complaint and -- as opposed to dismissing. But
11 frankly, I don't even think I need to do that because
12 regardless of what I put in my answer, regardless of what I
13 put in my counterclaims or third party complaints, they're
14 both going to deny it unless it's something short of my
15 client's right and -- or my client's wrong, your client's
16 right. He deserves to be taken outside back of the
17 courthouse and flawed with a rubber hose. They're going to
18 deny everything I say anyway. So I don't really see the
19 point, but if Your Honor is inclined to grant such a
20 motion, I think the proper remedy for that is to allow me
21 to amend.

22 THE COURT: All right.

23 MR. DODSON: Thank you.

24 THE COURT: No dog?

25 MS. MCMILLAN: I have no dog in this fight, Your

1 Honor.

2 THE COURT: Yes, sir?

3 MR. TEMPLETON: Just briefly in response with
4 regard to the conspiracy issue. The complaint says what it
5 says. It doesn't allege special damage. The Benedict
6 College case requires that there be under Rule 9, items of
7 special damages are claimed, they shall be specifically
8 stated. They're not, so it's defective. With regard to
9 the UTPA claim, I would respectfully submit counsel's in
10 error and that the jurists that have looked at this case or
11 this type of claim under that act have opined differently.
12 And we cited them in our memorandum and I'm happy to
13 provide the Court copies of them should the Court like.

14 THE COURT: All right. Thank you.

15 MR. TEMPLETON: Thank you, Judge.

16 THE COURT: Tell me a little bit about the age of
17 the case, the flow of any discovery at this point,
18 Mr. Dodson.

19 MR. DODSON: There's been no discovery, no
20 interrogatories to requests for production, no depositions
21 taken, we're -- they filed the lawsuit, I answered, and
22 they -- counterclaims and third party complaint and they
23 filed the pending motions to dismiss so there's been --
24 there's been no discovery been exchanged at this point.

25 THE COURT: Well, as far as the discovery, I mean,

1 this is a global but limited global question. As to this
2 issue, tell me what you are requesting as far as the
3 parameters of discovery on that issue.

4 MR. DODSON: Well, I mean, I'd like to just have
5 some normal discovery. I mean one of the things I
6 certainly would like to find out because it's a requirement
7 of an Unfair Trade Practices Act is, how many policies are
8 out there floating around with these ghost policies because
9 as Your Honor knows, you have to show that the act is
10 capable of repetition.

11 Well, one of the ways you can show that is if, in
12 fact, it has been repeated. And so I'd like to -- you
13 know, I'd like to look into that, but this -- this whole --
14 this whole practice of issuing an insurance policy for
15 worker's comp that doesn't cover a single worker and then
16 when you add a worker to the policy then they say -- they
17 come back later and they say, Oh, you owe us \$300,000
18 because that worker happened to -- it was a pretty tragic
19 case and he actually ended up getting killed and so, you
20 know, it ended up being a significant claim because of the
21 death involved. But -- I think there was a death involved.
22 I'm pretty sure there was.

23 But, you know, the other thing that I would point
24 out on discovery is there were several audits done of my
25 client by L. M. Insurance, Liberty Mutual Insurance and so

1 they would audit him periodically to make sure that -- that
2 the premiums that he was paying, were, in fact, accurate
3 and correct by their own actuarial standards and they never
4 assessed him for any additional premiums until and only
5 after somebody made this claim for worker's comp benefits.
6 Did they come back even after those audits and say, Oh, you
7 owe us additional money. And I just find that
8 extraordinarily curious that their own audits say you don't
9 owe us any money and he actually -- my client actually has
10 some documentation of that. I don't know how much more the
11 insurance company has. That's one of the things I'd like
12 to find out in discovery.

13 MR. TEMPLETON: Your Honor, just briefly.

14 THE COURT: Yes, sir.

15 DEFENSE ATTORNEY: Just so my silence doesn't get
16 construed as --

17 THE COURT: So that --

18 MR. TEMPLETON: So my silence doesn't get construed
19 as agreeing with this.

20 THE COURT: Oh, no, sir. I don't hold silence
21 against anybody.

22 MR. TEMPLETON: The first thing I want to point out
23 is --

24 THE COURT: I'm usually in criminal court.

25 MR. TEMPLETON: The first thing I want to point

1 out. In paragraph 40 of the complaint, or the
2 counterclaim, they specifically allege that Mr. Gouzman who
3 is the injured worker received worker's compensation
4 benefits. So there's been some benefit inferred by their
5 own allegations in their counterclaim. I'm not handling
6 the worker's comp procedure. I can't tell the Court what's
7 going on with that or not. But the allegation of the
8 complaint allege that there have been some benefit
9 received. This is not a ghost policy virtue of their own
10 counterclaim. This provides some benefit.

11 The other thing I want to point out for the Court's
12 benefit is the way that these worker's compensation
13 policies generally work is that when the insured goes to an
14 agency and requests worker's compensation insurance they're
15 essentially required to provide two pieces of critical
16 information. Piece number one is how many employees they
17 have. And piece number 2 is what is their revenue stream
18 that that business is generating. The reason for those two
19 things is so it can then go into the underwriting food
20 processer and figure out what the correct premium is going
21 to be.

22 Unlike a homeowners policy, unlike a G. L. Policy
23 and unlike an automobile insurance policy where you show up
24 and you say I want to insure my car and your cost is going
25 to be X. It's always going to be X for the life of that

1 policy. Worker's comp work's differently. It is generated
2 on the promise that the insured comes in and represents
3 both the revenue and the number of employees. And the
4 carrier reserves the right to perform audits. Liberty
5 Mutual did that.

6 Attached to the verified complaint that was filed
7 in the case is a statement of account required under rule 9
8 which sets forth the number of bills following the audits)
9 that were submitted to Mr. Steele's company and were not
10 paid. That is the reason this lawsuit has been brought.
11 So it is not correct to suggest there was not any give and
12 take or information provided to Mr. Steele when given an
13 opportunity to pay these things. He may disagree that he
14 owes it, he may disagree on a host of things; and there are
15 -- those are the reasons that this counterclaim has been
16 asserted.

17 But it doesn't change the fact that no amount of
18 discovery is going to change the fact that A, he hasn't
19 pled a proper civil conspiracy case; and B, the UTPA claim
20 doesn't apply. If he wants to pursue his fraud, his -- the
21 negligent inducement, the other causes of action he's
22 asserted, fine. I will take those things as they come.
23 But with respect to the two causes of action that are
24 before the Court, they're not proper. Thank you.

25 THE COURT: Thank you.

1 Mr. Dodson, one more round?

2 MR. DODSON: Sure. I'm sure all these folks behind
3 me love to hear me speak. I'm sure Your Honor does to.

4 THE COURT: Well, I don't -- like I said, I --
5 sometime I hold silence in someone's favor as opposed
6 against them, you know.

7 MR. DODSON: With regard to what he said about the
8 number of employees and the revenue stream, all I would say
9 is just let me have some discovery on that issue. It
10 doesn't mean that the Court can't revisit dismissing this
11 at a later date.

12 THE COURT: Thank you. Both of you send me
13 proposed orders to my law clerk, please. Wherever she may
14 be, but to my law clerk, please.

15 MR. DODSON: By the end of the week or?

16 THE COURT: Y'all know how busy you are, y'all tell
17 me? By the end of the week's fine with me. If you need
18 more time, just tell me.

19 MR. TEMPLETON: I'll have mine to you by the end of
20 the week.

21 THE COURT: All right.

22 MR. DODSON: Could I have until the end of next
23 week?

24 THE COURT: Sure.

25 MR. DODSON: Thank you.

1 THE COURT: The 11th? Is that right?

2 MR. DODSON: Yes, sir. I believe that's correct.

3 THE COURT: All right. Thank you.

4 Ms. McMillan?

5 MS. MCMILLAN: May it please the Court, Your Honor.

6 I am Beth McMillan and I'm representing Ernie Yarborough,
7 who does business as Yarborough Insurance Company. And my
8 motion to dismiss is based on the allegation of improper
9 service of process. I had submitted a memo to the Court,
10 Your Honor, and two affidavits. Ernie Yarborough owns his
11 own insurance agency. He's the sole owner. It's not
12 incorporated. It's just him individually, doing business
13 as Ernie Yarborough Insurance Company or Insurance Agency.

14 In April -- I think it was April 21st, 2017, the
15 third party complaint was served by -- was sent to him by
16 certified mail, restricted delivery to Mr. Yarborough.
17 Mr. Yarborough was not in the office that day when the post
18 office delivered it. He has a sales and service
19 representative Sandy Pike who just happens to sit near the
20 front of the office. The postal service came in, handed
21 the mail to her and handed her the slip of a piece of
22 paper for the certified mail and she signed it, not looking
23 at it, not knowing what it was, and the postal worker
24 didn't request if Mr. Yarborough was there.

25 So Sandy signs for it, doesn't know what's in it,

1 puts it in a stack of mail on Mr. Yarborough's desk. He
2 doesn't get to that mail until May 31st. Opens it up --

3 THE COURT: Tell me that first date, Ms. McMillan,
4 when it was handed over by the postal worker.

5 MS. MCMILLAN: Well, let me make sure I'm telling
6 you the correct date. It was mailed out on April 20th and
7 the signature, it's in my memo. I want to be accurate. It
8 was signed for on April 21st.

9 THE COURT: Okay. Thank you.

10 MS. MCMILLAN: So when he opened it up, he
11 immediately realized what it was and he contacted his
12 carrier. Our firm was contacted and looked at it and we
13 saw that, we believe, under the almost identical case from
14 the Supreme Court of Richardson versus Southern Finance,
15 Financial of South Carolina, Inc. decided in 2005 that
16 there was not proper service in this case. Mr. Yarborough
17 has submitted an affidavit and said he did not authorize
18 and never has authorized Sandy Pike to sign a letter on his
19 behalf or sign for certified mail on his behalf. He's
20 never done that. Never authorized her to accept service of
21 process for him.

22 She has given an affidavit and said he's never told
23 me I could do that. I just -- they put the mail in front
24 of me and I just signed without even thinking. So that's
25 what happened in this case and in those -- that factual

1 scenario, Your Honor, in this Richardson case, the Court
2 said that is not proper service under Rule 4(d)8 that you
3 have to serve -- if you don't give authority to the
4 individual and there's no actual implied or apparent
5 authority, then service on an individual who has no
6 authority is not sufficient service.

7 So that's why I filed the motion to dismiss, Your
8 Honor. There's no proof of any apparent authority,
9 apparent authority has to come from the principal.
10 Mr. Yarborough has never given any indication that Ms. Pike
11 was authorized to sign any certified mail on his behalf.
12 And I will say the letter was restricted delivery to Ernie
13 Yarborough, so it should have been delivered to him. And
14 under this Richardson case, Your Honor, which I would like
15 to hand up to you if I could.

16 THE COURT: Yes, ma'am, of course.

17 MS. MCMILLAN: And we believe based on that case
18 that there is -- there was insufficient service of process
19 in this case.

20 Another point I'd like to make, Your Honor, is that
21 on this past Friday, Mr. Dodson had a legal process server
22 come out and serve Mr. Yarborough individually. She sat in
23 the office and waited until he was off the phone and served
24 him with the third party complaint. My belief is that he
25 has now been effectively served on that for terms of the

1 time running from Friday when he got the summons and the
2 third party complaint served on him this past Friday. So I
3 would argue that there has been another -- there has been
4 another attempt to serve him. That service was this past
5 Friday and time should run from this past Friday.

6 THE COURT: Thank you, thank you, Ms. McMillan.

7 MR. DODSON: Thank you, Your Honor. I think the
8 last couple of sentences, if I may approach -- I have an
9 affidavit of service that have Mr. Yarborough personally
10 served on Friday. The motion is moot because of that and
11 because he's now been served twice. Both times within 120
12 days provided for under the rules.

13 THE COURT: He hasn't been served twice if the
14 first was ineffective.

15 MR. DODSON: Right. And -- but what I would submit
16 to Your Honor is that's no longer before Your Honor because
17 he's clearly served by this affidavit of service where he
18 was personally served.

19 THE COURT: That's not really before me. The
20 second part's not before me. The only motion that's before
21 me is a motion to dismiss on improper service.

22 MR. DODSON: And he's -- there's no question --

23 THE COURT: I'm not here to give advisory opinions
24 as to whether or not he was served properly last Friday or
25 not, I think.

1 MR. DODSON: And the only thing that I would point
2 out to Your Honor is they sought to dismiss the entire case
3 because they say service was improper. Okay. It's -- you
4 have an affidavit of personal service before you and
5 counsel admitted that her client was personally served on
6 Friday. No question that he has been properly served.

7 Now, whether he was properly served the first time
8 around is what she's seeking an advisory opinion from the
9 Court on because as it happens to be, he did not respond to
10 the lawsuit initially in a timely fashion. But we're not
11 here on a motion for default or motion for entry of
12 default. We're here because she sought to dismiss my
13 lawsuit. So in an abundance of caution, I just went and
14 had him served the second time so there would be no
15 dispute.

16 THE COURT: I'm not offering an opinion about what
17 you did or didn't do. I'm just ruling on this motion.
18 That's all I'm doing. That's all that's before me.

19 MR. DODSON: I understand.

20 THE COURT: Unless I'm -- and Mr. Dodson, don't get
21 me wrong. Sometime I don't track. You just tell me if I'm
22 not tracking.

23 MR. DODSON: Respectfully, Judge, I don't think
24 you're tracking.

25 THE COURT: All right. And that doesn't offend me.

1 Blood hounds get off the trails all the time. So just tell
2 me -- tell me why my tracking --

3 MR. DODSON: Because the Rules of Civil Procedure
4 provide that is I have to effectuate service within 120
5 days.

6 THE COURT: I track that.

7 MR. DODSON: Okay. That was done on Friday and
8 there is no dispute before the Court that that was done on
9 Friday.

10 THE COURT: Correct. There is no dispute. That's
11 what I'm tracking. There's no dispute before this Court of
12 what happened last Friday.

13 MR. DODSON: But she's seeking to dismiss --

14 THE COURT: That's the way I'm tracking it.

15 MR. DODSON: She's seeking to dismiss the entire
16 lawsuit by saying that it was improper service of process.
17 Well, it can't be improper service of process if there is
18 no dispute that he was served within the 120 days provided
19 for under the rule. And I have just submitted evidence to
20 the Court and, in fact, she has acknowledged that this is
21 correct, that he was served within 120 days. So there's
22 simply -- it's essentially a moot motion because of this.

23 THE COURT: Thank you. Thank you Mr. Dodson.

24 Ms. McMillan?

25 MS. MCMILLAN: Yes, sir, Your Honor. What I am

1 seeking is a ruling from you that the service on April 21st
2 was ineffective service of process. That's what I'm asking
3 the Court to rule on.

4 THE COURT: And that's all I thought was before me
5 whether or not when the postman came in left the mail with
6 Ms. Pike and Ms. Pike signed the green card. I guess you
7 still call those green cards.

8 MS. MCMILLAN: Yes, sir, Your Honor.

9 THE COURT: And I take it as factually undisputed.
10 And then Mr. Yarborough was not -- was he or was he not
11 properly served. I know he wasn't personally served in
12 that timeline. I thought that was all that was before me.

13 MS. MCMILLAN: That's what I asked -- that's what
14 my motion is, Your Honor.

15 THE COURT: And that's all my ruling would be as to
16 whether or not that was proper service.

17 MR. DODSON: And -- and --

18 THE COURT: As to whether or not that was proper
19 service. I restrict my order to saying that is not
20 properly served in May of whatever.

21 MS. MCMILLAN: April 21st.

22 THE COURT: April. Okay. I think it's May when he
23 opened the mail. Whenever it was. I don't remember the
24 date. But go right ahead.

25 MR. DODSON: That is not the motion before you

1 because she's not -- she's seeking to dismiss the lawsuit
2 for improper service. Now, she's twisted it here and
3 pivoted here to say all I'm doing is seeking an order as to
4 whether or not the April service was proper. That's an
5 advisory opinion that respectfully the Court cannot and
6 should not give.

7 THE COURT: Well, what -- so what are you asking me
8 to do, Mr. Dodson?

9 MR. DODSON: I'm just asking you deny the motion.
10 Just deny the motion because it's moot because he was
11 properly served within 120 days and there's no dispute
12 about that. But I do not -- I do take issue with the facts
13 are not disputed as to whether or not the April service was
14 effective.

15 THE COURT: I haven't heard that from you.

16 MR. DODSON: You haven't. That's why I'm bringing
17 it up now, Your Honor. Because they have submitted those
18 affidavits. But in the case Beige versus Southeastern
19 Roofing, which is 646 Southeastern 2d 153, the Court there
20 -- Court of Appeals there addressed a very similar issue
21 about whether or not an agent could accept service of
22 process and it was this same type of thing. It was
23 purportedly a secretary at the defendant company who
24 accepted service. And the defendant company submitted an
25 affidavit saying we didn't authorize this person. They're

1 just a secretary. And based on deposition testimony, Court
2 of Appeals said basically we're not buying that. Because
3 this person who accepted service did a lot more for this
4 company as evidenced by the deposition testimony. So I'm
5 going to take his deposition. I'm going to take the other
6 -- the Sandy Pike who also submitted an affidavit. But
7 with a pending motion to dismiss, I can't do any discovery
8 until there's actually an answer filed.

9 But I do dispute that -- that, you know, here's
10 somebody there and they -- we followed the Rules of Civil
11 Procedure in exact compliance by sending it certified mail
12 restricted delivery. Somebody in his office signs it and
13 then he says, Well, you know, well she didn't have
14 authority to do that.

15 THE COURT: Well, and they signed affidavits to
16 that effect.

17 MR. DODSON: I understand. And as Your Honor well
18 knows, affidavits tend to have a very myopic scope.

19 THE COURT: I don't -- I don't know a what that
20 word means.

21 MR. DODSON: Well, very --

22 THE COURT: I really don't. I apologize. What
23 does myopic mean?

24 MR. DODSON: Myopic is just sort of a word for
25 tunnel vision approach. A limited view of the facts.

1 THE COURT: I understand that. Where I'm from, we
2 understand that.

3 MR. DODSON: I understand. And so I think we'll
4 get to the bottom of the facts a lot sooner once I take
5 those depositions and I'm allowed to ask them my own
6 questions, not just have an affidavit that their attorney
7 writes and that they sign and they essentially go
8 unquestioned and that's -- I mean that's exactly what Court
9 of Appeals was getting at in the Beige --

10 THE COURT: Do you have that opinion?

11 MR. DODSON: I don't have a copy of it with me, but
12 again, I can e-mail it to Your Honor and it's, again the
13 cite is 646 Southeastern 2d 153. And that was -- that
14 opinion was vacated on other grounds, but as to the service
15 issues, that part of the opinion was never -- it wasn't
16 vacated on those grounds and it really tracks it kind of
17 nicely where we're at in this case.

18 So, you know -- but I think what she's really
19 seeking here is an advisory opinion from Your Honor that
20 the first service of process wasn't effective because if it
21 was effective her client is in default. She's got the deal
22 with the default issue so she's come in and tried to sort
23 of sneak that in the back door without -- without a motion
24 for default, motion for entry of default before the Court.

25 THE COURT: Ms. McMillan?

1 MS. MCMILLAN: Your Honor, the pivoting or twisting
2 in this case, arose from the fact that Mr. Dodson served
3 the complaint on Mr. Yarborough this past Friday. If
4 that's effective service, then the 30 days starts to run
5 from this past Friday. If the April 21st was not effective
6 service -- and I would submit that the Robertson case is a
7 Supreme Court opinion, Your Honor. That's not been vacated
8 and it is to take precedent over this Beige case that he's
9 cited from Court of Appeals which I haven't read yet, I
10 haven't seen it. But there is nothing to dispute in this
11 record that Mr. Yarborough did not authorize any -- they
12 don't get certified mail. He's never authorized her to do
13 that and there's nothing to dispute that in the record,
14 Your Honor.

15 And with regard to this -- I'm not asking for an
16 advisory opinion, I'm asking for you -- now, you can
17 dismiss it without prejudice so that he can try to
18 effectuate service. I don't have a problem with that, but
19 I do want a ruling on -- that's not an advisory opinion.
20 My motion is to dismiss because of ineffective service of
21 process pursuant to 4(d)A and squarely within the four
22 corners of the Supreme Court decision.

23 THE COURT: Thank you, Ms. McMillan.

24 Mr. Dodson?

25 MR. DODSON: And if you were to dismiss it without

1 prejudice, do I have to go back and serve him a third time?
2 I mean that just makes --

3 THE COURT: That's another advisory opinion.

4 MR. DODSON: I know it is.

5 THE COURT: Why don't you tell what you're arguing
6 about. I quote -- one of the best persons I ever quoted
7 was Alicia Keys. Don't make me read between the lines.
8 Tell me what it's about is it about he's going to be in
9 default if I say that was effective service and then I've
10 got a motion for default and you go and you re serve him?

11 THE PLAINTIFF'S/STATE'S ATTORNEY: No, sir.

12 THE COURT: I don't know.

13 MR. DODSON: If you deny this motion, there's
14 absolutely no ruling by the Court that that April service
15 was proper. That issue is -- is yet to be decided by the
16 Court. And I'm not trying to -- but until I raise that
17 issue with the Court through filing my own motion for entry
18 of default or some sort of default documents, that's not
19 properly decided by the Court.

20 THE COURT: Neither is it before me whether or not
21 the service of last Friday was effective. That's the point
22 I'm making. I've got a motion to dismiss before me that I
23 can either grant, deny on whatever grounds. And
24 Ms. McMillan can appeal it if she would like. You can
25 appeal it if you would like. You could appeal it if you'd

1 Like. And it, quite frankly, I don't get offended when
2 they reverse any of my cases because I want to do it right.
3 If I'm doing it wrong in civil court, in criminal court, in
4 civil court where it's affecting somebody's property and
5 somebody's rights or in criminal court where it's affecting
6 somebody's freedom, I want them to tell me, Bo, you wrong.
7 You need to go look up the law. That's all I want to do at
8 the end of the day.

9 I'm not trying to award Mr. Yarborough or punish
10 your client or award your client and punish Mr. Yarborough.
11 I just want to get it right. I've gone from a motion to
12 dismiss in front of me to whether or not service is
13 effective last Friday, to Ms. McMillan saying, you can
14 dismiss it without prejudice; and then does that mean you
15 have to serve him a third time? I don't know. I'm not a
16 lawyer. I'm not representing your client. I'm not
17 representing Ms. McMillan's clients. Or I wasn't going to
18 say co-counsel, but I do want to commend both of y'all for
19 sitting together in that regard. It makes me proud, quite
20 frankly, to be a member of the bar although the dues are
21 too high.

22 But be that as it may, Mr. Dodson. Tell me what
23 you're asking me to do. At one point it sounded like you
24 were saying, I want to take his deposition. I want to take
25 Ms. Pike's deposition. I want to take Mr. Yarborough's

1 deposition.

2 MR. DODSON: All I'm asking for is a denial of her
3 motion to dismiss the count ear claim and the third party
4 complaint. That's all I'm asking. It can be done on a
5 form 4 order. I'm happy to prepare a short order for the
6 Court. That's all I'm asking. There doesn't have to be
7 any additional findings. I'm not trying to sneak in
8 anything through the back door about April --

9 THE COURT: I'm not saying you're trying to sneak
10 anything in, Mr. Dodson. You're a good lawyer. All of you
11 are good lawyers. I don't think that at all. But I think
12 the myopic issue before me is was that effective service.
13 Now, if you're telling me you want to spend your time, if
14 you do and me take it under advisement for you to take
15 Mr. Yarborough's deposition and you to take Ms. Pike's
16 deposition and you to take the postmaster's deposition, I
17 don't care. If you want to do that I'll just take it under
18 advisement. If that's what you want to do.

19 I had an affidavit today I know was truthful and
20 correct because the affiant said, I lied. So I usually
21 believe somebody when they say they lie, but I've not --
22 that's no credibility on Mr. Yarborough or Ms. Pike or
23 anyone else. I take them at face value, just like I take
24 juror's answers at face value under oath; sure I can be a
25 fair and impartial juror. And then -- is that what you

1 want to do? I'll take it under advisement.

2 MR. DODSON: Let me make sure I'm clear. I'm
3 asking that the motion to dismiss the third party complaint
4 be denied by the Court. My alternative, my fall back
5 position is to take that under advisement and let me take
6 those deposition I just mentioned. That is a fall back
7 position if you're inclined to grant the motion to dismiss,
8 but if you deny the motion to dismiss, which is what I'm
9 asking for, I don't have to take the depositions as to
10 those points.

11 THE COURT: But that's not going to be what
12 Ms. McMillan's asking for. Reminds me of General Ridgeway
13 in Korea when he ran through the Regallen River and the
14 American Army was retreating. Somebody said, General why
15 are you retreating. He said I'm not retreating, I'm
16 attacking in a different direction. That's all he was
17 doing is attacking in a different direction and there's
18 nothing wrong with that. You've got to have -- you can't
19 have a disorganized retreat. You've got to have an
20 organized retreat or you get run over.

21 I'll take it under advisement for 30 days. All
22 right?

23 MR. DODSON: Thank you, Your Honor.

24 THE COURT: Y'all get me proposed orders. Thank
25 you. Thank y'all for being with us.

1 MS. MCMILLAN: So does that mean he gets to take
2 depositions?

3 THE COURT: That means he can -- yes, he can take
4 depositions on that limited matter.

5 MS. MCMILLAN: Thank you, Your Honor.

6 THE COURT: Is that an advisory upon, Ms. McMillan?

7 MS. MCMILLAN: I didn't think so, Your Honor, and I
8 wanted to be straight forward with the Court. Yes, there's
9 implication about the default issue, but I thought this was
10 my procedure, my route under the rules, Your Honor.

11 THE COURT: Thank you. Thank y'all very much.

12 * * * * * END OF TRANSCRIPT * * * * *

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1 State of South Carolina)

2 County of Aiken)

Certificate of Reporter

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5
6 I, Brenda J. Sigwald, Official Court Reporter for
7 the Second Judicial Circuit of the State of South Carolina,
8 do hereby certify that the foregoing is a true, accurate,
9 and complete Transcript of Record of the proceedings had
10 and evidence introduced in the trial of the captioned case,
11 relative to appeal, in the Court of Common Pleas in and for
12 the State of South Carolina on the 2nd day of August, 2017.

13 I FURTHER CERTIFY that I am neither kin, counsel,
14 nor of interest to any party hereto.

15 IN WITNESS WHEREOF, I have hereunto set my hand and
16 seal at Aiken County, this 19th day of December, 2017.

17
18
19
20
21 *Brenda J. Sigwald*

22 Brenda J. Sigwald,
23 Court Reporter and Notary Public
24 For the State of South Carolina
25 My commission expires
January 4, 2020.

FILED

STATE OF SOUTH CAROLINA)
2017 JUN 20 PM 3:53 IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)

LM INSURANCE CORPORATION,) Civil Action No. 2017-CP-32-00507
LISA COVER)
CLERK OF COURT)

Plaintiff,

vs.

JOSH STEELE,

MOTION TO DISMISS

Defendant/Third-Party
Plaintiff,

vs.

ERNIE YARBOROUGH D/B/A
YARBOROUGH INSURANCE AGENCY,

Third-Party Defendant.

YOU WILL PLEASE TAKE NOTICE that ten (10) days after service hereof, or as soon thereafter as counsel may be heard, THIRD-PARTY DEFENDANT, Ernie Yarborough d/b/a Yarborough Insurance Agency ("Yarborough"), by and through his undersigned attorney, will move before the Presiding Judge of the Lexington County Court of Common Pleas dismissing him from the above-captioned action pursuant to Rule 12(b)(5) of the *South Carolina Rules of Civil Procedure* as there is an insufficiency of service of process on Yarborough. More specifically, Plaintiff attempted to serve the Third Party Complaint on Yarborough by certified mail, restricted delivery to Yarborough. Yarborough was not in his office on the day the certified letter was presented and his assistant, Sandra Pike, signed for the letter. (See the Affidavit of Yarborough attached hereto as Exhibit A). Yarborough has never authorized her to sign certified mail directed to him on his behalf and did not authorize her to sign for him for that

letter. (Ex. A). He was not even aware that she had signed for the letter until almost six weeks after the letter had been presented. (Ex. A). According to the Supreme Court's decision in Roberson v. Southern Fin. of S.C., Inc., 365 S.C. 6, 615 S.E.2d 112 (2005), Plaintiff has not sufficiently served Yarborough with the Third Party Complaint. Therefore, it should be dismissed.

This motion may be based on such memoranda in support or affidavits which may be served on counsel for the Plaintiff prior to the date of the hearing on this motion.

Counsel for the Third Party Defendant attempted to resolve the issues regarding service with Plaintiff's counsel prior to filing this motion, but no resolution could be reached.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, LLC



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(864) 239-4000

ATTORNEYS FOR THIRD-PARTY
DEFENDANT, ERNIE YARBOROUGH D/B/A
YARBOROUGH INSURANCE

June 20, 2017

EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

LM INSURANCE CORPORATION,

Plaintiff,

vs.

JOSH STEELE,

Defendant/Third-Party
Plaintiff,

vs.

ERNIE YARBOROUGH D/B/A
YARBOROUGH INSURANCE AGENCY,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2017-CP-32-00507

**AFFIDAVIT OF ERNIE
YARBOROUGH**

PERSONALLY APPEARED BEFORE ME, the undersigned, Ernie Yarborough, who,
after being duly sworn, deposes and states:

1. I am over the age of 18 years and have personal knowledge of the
information in this affidavit.

2. I am the owner and operator of Ernie Yarborough Insurance Agency
("Agency"), a sole proprietorship in Columbia, South Carolina.

3. My office staff consists of three other employees including two sales and
service representatives and one associate agent.

4. Sandy Pike is a sales and service representative and she works at the front of
the office.

5. On April 21, 2017, a certified letter containing the Third Party Complaint was

delivered to our office that was supposed to be for restricted delivery to me.

6. I was not in the office at that time, and Sandy signed for this letter without my knowledge or authority.

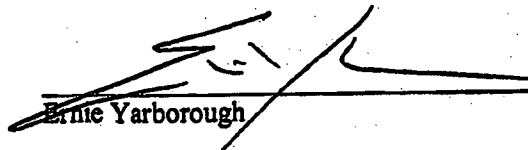
7. She placed it in a stack of other documents and I did not discover its existence until approximately May 31, 2017 when I immediately reported it to my insurance carrier.

8. In the 16 years I have been in business, my Agency has very rarely received certified mail. I have never authorized any of my employees to sign for certified mail that is addressed to me or the Agency, and I have never advised the U.S. Post Office or any other person that anyone in my office can sign for a certified letter on my behalf.

9. I specifically did not authorize Sandy to sign this certified letter at issue on my behalf and would not have done so as I am the owner of the Agency and expect any certified mail to be signed for by me.

10. Sandy's duties as a sales and service representative do not include signing for certified mail on behalf of me or the Agency.

FURTHER, AFFIANT SAYETH NAUGHT.


Ernie Yarborough

SWORN TO AND SUBSCRIBED BEFORE ME

This 20 day of June, 2017.


Notary Public for South Carolina
Clifford Pinkney
My Commission Expires: 5-14-2027

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

LM INSURANCE CORPORATION,
Plaintiff,

Civil Action No. 2017-CP-32-00507

v.

JOSH STEELE,

Defendant/Third-Party
Plaintiff,

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

vs.

ERNIE YARBOROUGH D/B/A
YARBOROUGH INSURANCE AGENCY,

Third-Party Defendant.

Third-Party Defendant Ernie Yarborough d/b/a Yarborough Insurance Agency ("Yarborough") submits this memorandum in support of its Motion to Dismiss for Insufficient Process.

STATEMENT OF THE CASE

This case arises out of a breach of contract and collection action filed by Plaintiff LM Insurance Corporation ("LM") on February 13, 2017 against Josh Steele ("Steele"). Steele purchased workers' compensation insurance from LM through his local insurance agent, Yarborough. LM maintains that when Steele applied for workers' compensation insurance for a period of three years from 2012 to 2014, he grossly understated or underestimated the business payroll and misstated the description of his business operations. LM alleges it discovered these misrepresentations from audits that were conducted on his business regarding the policies for

those three years. After LM paid out on a significant workers' compensation claim, it filed suit to recover \$345,064 in past due premiums it alleged Steele owed. In response to that lawsuit, Steele filed his Answer, Counterclaim and Third-Party Complaint against Yarborough on April 20, 2017 alleging, among other things, that Yarborough failed to obtain a commercially reasonable workers' compensation policy and breached various duties he owed to Steele.

Plaintiff attempted to serve Yarborough with the Summons and Third-Party Complaint by certified mail pursuant to the requirements of Rule 4(d)(8) of the South Carolina Rules of Civil Procedure. (Exhibit A). The return receipt listed the addressee as Ernie Yarborough and it indicated that the article being mailed was sent for "adult signature restricted delivery." (Exhibit A).

On April 21, 2017, Sandy Pike, a sales and service representative who works for Yarborough and who sits near the front of the office, signed the return receipt card. (Affidavit of Sandy Pike, attached hereto as Exhibit B; Exhibit A). Pike has no ownership in the agency run by Yarborough, and her duties do not include signing for certified mail delivered to Yarborough's office. (Exhibit B; Affidavit of Ernie Yarborough attached hereto as Exhibit C). At no time has Pike been given authorization to sign certified mail on behalf of Yarborough. (Exhibit B; Exhibit C). Yarborough rarely receives certified mail at his office, but it is his policy to sign for it himself and he has never given Pike permission to sign on his behalf. (Exhibit B; Exhibit C).

Pike has no specific recollection of signing the return receipt card, and she was unaware of what was contained within the envelope for which she signed. (Exhibit B). She was not made aware that a Third-Party Complaint had been included in that envelope until Yarborough saw it over a month later and this Motion to Dismiss was filed. (Exhibit B; Exhibit C) Yarborough did

not authorize Pike to accept service of process of this Summons and Third-Party Complaint.

On June 20, 2017, Yarborough filed a Motion to Dismiss the Third-Party Complaint for insufficiency of service of process and has submitted the affidavits of Pike and Yarborough in support.

ARGUMENT

The Court should grant Yarborough's Motion to Dismiss because Plaintiff's service of process was insufficient. Plaintiff failed to comply with the requirements of South Carolina Rule of Civil Procedure 4(d)(8) when attempting to serve Yarborough with the Summons and Third-Party Complaint. Yarborough's employee, Sandy Pike, signed the return receipt card instead of the restricted addressee, Ernie Yarborough. Because the restricted addressee did not sign for the mailing and because Wright did not have actual, apparent, or implied authority to accept service of process of this pleading, Steele's attempted service fails to satisfy the requirements of Rule 4(d)(8). As a result, Steele's Third-Party Complaint against Yarborough should be dismissed.

Rule 4 of the South Carolina Rules of Civil Procedure provides the different ways in which a Summons and Complaint can be served to effectuate process on a defendant to confer personal jurisdiction on a defendant. "The principal object of service of process is to give notice to the defendant corporation of the proceedings against it." Burris Chemical, Inc. v. Daniel Const. Co., 251 S.C. 483, 487, 163 S.E.2d 618, 620 (1968). "Rule 4, SCRCp, serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action." Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995). Exacting compliance with the rules is not required to effectuate service of process. Id. at 209-10, 456 S.E.2d at 899. "Rather, [the court must] inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant

and the defendant has notice of the proceedings.” *Id.* at 210, 456 S.E.2d at 899. According to SCRCP 4(d)(8), a plaintiff may serve a Summons and Complaint on a corporate defendant “by registered or certified mail, return receipt requested and restricted to the addressee.” (emphasis added).

Plaintiff’s Complaint should be dismissed because Plaintiff failed to serve the restricted named addressee or an authorized agent of Yarborough pursuant to the requirement of Rule 4(d)(8). As a result, Plaintiff’s Complaint should be dismissed because the Court does not have personal jurisdiction over Yarborough.

For service to be effective under Rule 4(d)(8), a plaintiff must serve the addressee or “an authorized person” for the individual. Graham Law Firm, P.A. v. Makawi and MKKM, Inc., 396 S.C. 290, 721 S.E. 2d 430, 433 (2012). The class of persons who may receive service of process on behalf of an individual or corporation as set forth in Rule 4(d)(8) is limited. *Id.* To accept service of process, an agent’s authority must be either express, implied, or apparent. Roberson v. Southern Finance of SC, Inc., 365 S.C. 6, 615 S.E. 2d 112, 115 (2005)(citing 2A CJS Agency § 132 (2004)). “Whether apparent authority can suffice to show authorization to accept service under Rule 4 is an unsettled question.” *Id.* In any event, apparent authority is present when the principal knowingly permits the agent to exercise authority or the principal holds the agent out as possessing such authority. *Id.* This apparent authority is established based on manifestations by the principal, not the agent. *Id.* For an agent to have “implied authority,” the agent must believe she had such authority. *Id.*

In our case, the restricted addressee, Yarborough, did not sign for the mailing. Instead, Pike, a sales and service representative who sits near the front of the office, signed for it. The evidence is clear that Pike did not have express, apparent, or implied authority to accept service

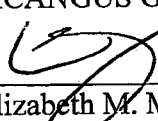
of process for Yarborough. The affidavit of Yarborough establishes that he did not give Pike express permission to accept service of process for the company and has never given Pike such authority. In Pike's Affidavit, she admits that she did not have permission to sign on behalf of Yarborough for certified mail and the certified letter itself stated that it was restricted for delivery to Yarborough. Also, no evidence exists to support that Pike had apparent or implied authority to accept service of process for Yarborough. See Roberson v. Southern Finance of SC, Inc., 365 S.C. 6, 615 S.E. 2d 112 (2005)(the Court found that a clerical employee who signed the return receipt card did not have apparent authority because no evidence existed to support that the employee had such authority and also found that the employee did not have implied authority because the employee had never been authorized to accept service in the past).

Plaintiff did not comply with the service requirements of Rule 4(d)(8) because he failed to serve the restricted addressee or an agent of Yarborough with authority to accept service of process of the Summons and Complaint. Although Yarborough was the restricted addressee on the certified mailing, Pike signed for it, and the evidence is clear that Pike did not have express, apparent, or implied authority to accept service of process on behalf of Yarborough. As a result, Steele's Third-Party Complaint should be dismissed because there was insufficient service of process and the Court does not have personal jurisdiction over Yarborough.

CONCLUSION

Based on the above, Steele's service of process is insufficient, and the Court does not have personal jurisdiction over Yarborough. Therefore, Yarborough respectfully requests that the Court grant its Motion to Dismiss Steele's Third-Party Complaint.

MCANGUS GOUDELOCK & COURIE, L.L.C.



Elizabeth M. McMillan

S.C. Bar No.: 15049

Post Office Box 2980

55 East Camperdown Way, Suite 300 (29601)

Greenville, South Carolina 29602

Phone: (864) 239-4000

Email: beth.mcmillan@mgclaw.com

ATTORNEYS FOR THIRD-PARTY
DEFENDANT, ERNIE YARBOROUGH
D/B/A YARBOROUGH INSURANCE AGENCY

July 28, 2017

EXHIBIT A

ORIGINAL

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

FOR THE ELEVENTH JUDICIAL CIRCUIT

LM INSURANCE CORPORATION,

Plaintiff,

vs.

JOSH STEELE,

Defendant/Third-Party Plaintiff,

vs.

ERNIE YARBOROUGH D/B/A
YARBOROGUH INSURANCE AGENCY,

Third-Party Defendants.

Civil Action No: 2017-CP-32-00507

**AFFIDAVIT OF SERVICE OF
THIRD-PARTY SUMMONS,
DEFENDANT AND THIRD-PARTY
PLAINTIFF'S ANSWER TO PLAINTIFF'S
COMPLAINT, COUNTERCLAIMS AND
THIRD-PARTY COMPLAINT**

PERSONALLY APPEARED before me Robert D. Dodson, who, being first duly sworn, says:

1. I am an attorney in good standing with the South Carolina bar.
2. On April 19, 2017, my office mailed, via Certified Mail, Return Receipt Requested and Restricted Delivery, a copy of the Third-Party Summons, Defendant and Third-Party Plaintiff's Answer to Plaintiff's Complaint, Counterclaims and Third-Party Complaint to Ernie Yarborough, 1034 Briargate Circle, Columbia, SC 29210.
3. The return receipt was executed by Sandra L. Pike on April 21, 2017 indicating that service was affected on Defendant on said date. See attached **Exhibit A**.

FURTHER DEPONENT SAYETH NOT.

Sworn to and Subscribed by Me

Deborah H. Harris

Notary Public

State of South Carolina

This 5th Day of June, 2017

My Commission Expires: 5-17-2020

Robert D. Dodson

Robert D. Dodson, Esquire

1722 Main Street, Suite 200

Columbia, South Carolina 29201

Phone: (803) 252-2600

Fax: (803) 771-2259

Email: rdodson@rdodsonlaw.com

Attorney for Defendant and Third-Party
Plaintiff

2017 JUN -8 PM 12:35
LISA McCOMBER
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

LM INSURANCE CORPORATION,

Plaintiff,

vs.

JOSH STEELE,

Defendant/Third-Party Plaintiff,

vs.

ERNIE YARBOROUGH D/B/A
YARBOROGUH INSURANCE AGENCY,

Third-Party Defendants.

Civil Action No: 2017-CP-32-00507

**AFFIDAVIT OF SERVICE OF
THIRD-PARTY SUMMONS,
DEFENDANT AND THIRD-PARTY
PLAINTIFF'S ANSWER TO PLAINTIFF'S
COMPLAINT, COUNTERCLAIMS AND
THIRD-PARTY COMPLAINT**

I, Deborah Harris, do hereby certify that I have caused the foregoing **AFFIDAVIT OF SERVICE OF THIRD-PARTY SUMMONS, DEFENDANT AND THIRD-PARTY PLAINTIFF'S ANSWER TO PLAINTIFF'S COMPLAINT, COUNTERCLAIMS AND THIRD-PARTY COMPLAINT** to be served upon the following parties at the following addresses via United States Postal Service, postage pre-paid or via email as indicated below:

Amanda M. Scott
Parnell & Crum, P.A.
P.O. Box 743
White Rock, SC 29177

Beth McMillan, Esquire
McAngus Goudelock & Courie
Beth.mcmillan@mgclaw.com
(Via Email Only)

2017 JUN -8 PM 12:35
LISA M. COMER
CLERK OF COURT
ELEVENTH JUDICIAL SC

This 5th Day of June, 2017
Columbia, South Carolina

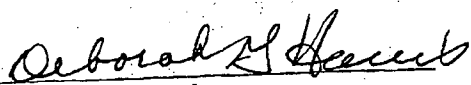

Deborah G. Harris

EXHIBIT A

7015 0640 0005 7305 7985

U.S. Postal ServiceTM
CERTIFIED MAIL[®] RECEIPT
 Domestic Mail Only

For delivery information, visit our website at www.usps.com.

OFFICIAL USE

Certified Mail Fee
 \$

Extra Services & Fees (check box, add fee as appropriate)

☐ Return Receipt (hardcopy)	\$
☐ Return Receipt (electronic)	\$
☐ Certified Mail Restricted Delivery	\$
☐ Adult Signature Required	\$
☒ Adult Signature Restricted Delivery	\$

Postage
 \$

Total Postage and Fees
 \$

Sent To
Ernie Yarborough
 Street and Apt. No., or PO Box No.
1034 Briargate Circle
 City, State, ZIP+4[®]
Columbia, SC 29210

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

UNIV OF SC CPU
 APR 19 2017
 COLUMBIA SC 29209

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Ernie Yarborough
1034 Briargate Circle
Columbia, SC 29210

9590 9402 2751 6351 0314 02

2. Article Number (Transfer from service label)
7015 0640 0005 7305 7985

COMPLETE THIS SECTION ON DELIVERY

A. Signature
☒ **Sondra L Pike** ☐ Agent ☐ Addressee

B. Received by (Printed Name)

C. Date of Delivery
4/21/17

D. Is delivery address different from item 1? ☐ Yes
 If YES, enter delivery address below: ☐ No

3. Service Type

☐ Adult Signature	☐ Priority Mail Express [®]
☒ Adult Signature Restricted Delivery	☐ Registered Mail [™]
☐ Certified Mail [®]	☐ Registered Mail Restricted Delivery
☐ Certified Mail Restricted Delivery	☐ Return Receipt for Merchandise
☐ Collect on Delivery	☐ Signature Confirmation [™]
☐ Collect on Delivery Restricted Delivery	☐ Signature Confirmation Restricted Delivery
☐ Insured Mail	
☐ Insured Mail Restricted Delivery (over \$500)	

Domestic Return Receipt

PS Form 3811, July 2015 PSN 7530-02-000-9053

2017-CP-32-Q5Q7

EXHIBIT B

COPY

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

LM INSURANCE CORPORATION,
Plaintiff,

Civil Action No. 2017-CP-32-00507

vs.

AFFIDAVIT OF SANDY PIKE

JOSH STEELE,

Defendant/Third-Party
Plaintiff.

vs.

ERNIE YARBOROUGH D/B/A
YARBOROUGH INSURANCE AGENCY,

Third-Party Defendant.

LISA COMER
CLERK OF COURT
LEXINGTON, SC

2017 JUL 26 PM 12:40

FILED

PERSONALLY APPEARED BEFORE ME, the undersigned, Sandy Pike, who, after
being duly sworn, deposes and states:

1. I am over the age of 18 and have personal knowledge of the information in
this affidavit.
2. I work for the Yarborough Insurance Agency as a Sales and Service
Representative.
3. Due to the location of my desk at the front of the office, I often receive the
mail that is brought into our office. However, I do not normally sign for certified letters, and
it is very rare that we receive any certified letters.
4. Ernie Yarborough, as the owner of the Yarborough Insurance Agency,
normally signs for any certified mail and has never authorized me to sign for any certified

letter on his behalf.

5. I have no independent recollection of signing for the certified letter that presumably contained the Third Party Complaint against the Yarborough Insurance Agency, and I never opened any package to see if a Complaint had been served and was not aware that one had been delivered to our office. In fact, I do not recall ever signing for any certified letter at the office.

6. Because my signature is on the receipt for the certified letter at issue, I can only presume that I was on the phone or otherwise preoccupied at the time I signed for it and that Ernie was out of the office at that time. I did not have permission from Ernie to sign for this letter or any other certified letter for restricted delivery to him.

FURTHER, AFFIANT SAYETH NAUGHT.

Sandy Pike
Sandy Pike

SWORN TO AND SUBSCRIBED BEFORE ME

This 25th day of July, 2017.

Clifford L. Pinckney
Notary Public for South Carolina

My Commission Expires: May 09, 2027

CLIFFORD L. PINCKNEY
Notary Public-State of South Carolina
My Commission Expires
May 09, 2027

EXHIBIT C

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

LM INSURANCE CORPORATION,

Civil Action No. 2017-CP-32-00507

Plaintiff,

vs.

JOSH STEELE,

Defendant/Third-Party
Plaintiff,

**AFFIDAVIT OF ERNIE
YARBOROUGH**

vs.

ERNIE YARBOROUGH D/B/A
YARBOROUGH INSURANCE AGENCY,

Third-Party Defendant.

PERSONALLY APPEARED BEFORE ME, the undersigned, Ernie Yarborough, who,
after being duly sworn, deposes and states:

1. I am over the age of 18 years and have personal knowledge of the information in this affidavit.
2. I am the owner and operator of Ernie Yarborough Insurance Agency ("Agency"), a sole proprietorship in Columbia, South Carolina.
3. My office staff consists of three other employees including two sales and service representatives and one associate agent.
4. Sandy Pike is a sales and service representative and she works at the front of the office.
5. On April 21, 2017, a certified letter containing the Third Party Complaint was

delivered to our office that was supposed to be for restricted delivery to me.

6. I was not in the office at that time, and Sandy signed for this letter without my knowledge or authority.

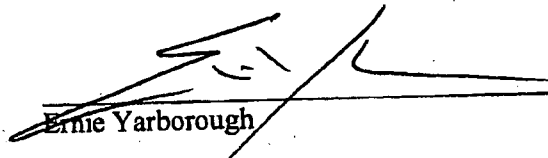
7. She placed it in a stack of other documents and I did not discover its existence until approximately May 31, 2017 when I immediately reported it to my insurance carrier.

8. In the 16 years I have been in business, my Agency has very rarely received certified mail. I have never authorized any of my employees to sign for certified mail that is addressed to me or the Agency, and I have never advised the U.S. Post Office or any other person that anyone in my office can sign for a certified letter on my behalf.

9. I specifically did not authorize Sandy to sign this certified letter at issue on my behalf and would not have done so as I am the owner of the Agency and expect any certified mail to be signed for by me.

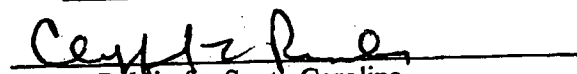
10. Sandy's duties as a sales and service representative do not include signing for certified mail on behalf of me or the Agency.

FURTHER, AFFIANT SAYETH NAUGHT.


Ernie Yarborough

SWORN TO AND SUBSCRIBED BEFORE ME

This 20 day of June, 2017.


Notary Public for South Carolina
Clifford Pinckney
My Commission Expires: 5-14-2027

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

FOR THE ELEVENTH JUDICIAL CIRCUIT

LM INSURANCE CORPORATION,

Plaintiff,

vs.

JOSH STEELE,

Defendant/Third-Party Plaintiff,

vs.

ERNIE YARBOROUGH D/B/A
YARBOROUGH INSURANCE AGENCY,

Third-Party Defendants.

Civil Action No: 2017-CP-32-00507

MOTION FOR RECONSIDERATION

Defendant/Third-Party Plaintiff, by and through undersigned Counsel and pursuant to SCRPC, Rule 59(e), moves the Court for an Order vacating and/or clarifying the Court's September 19, 2017 "Order Granting Third-Party Defendant Ernie Yarborough d/b/a Yarborough Insurance Agency's Motion to Dismiss" (hereinafter "Order"). The basis for this Motion is set forth below.

The Court's Order states: "Yarborough has not been personally served or any other manner contemplated by the Rules of Civil Procedure." (Order, p. 2). That statement is factually inaccurate and simply wrong - Yarborough was personally served on July 28, 2017 as evidenced by an Affidavit of Service signed/notarized by a process server, Tonya Reep. This Affidavit of Service was filed with the Clerk of Court and a copy given to the Court and His Honor at the August 2nd, 2017 hearing.

Because of this factual inaccuracy in the Order, the Order addresses only whether earlier service of process by certified mail and pursuant to Rule 4(d)(8) was effective service. This Court's Order found that it was not effective service but for purposes of a Motion to Dismiss that is not the issue or legal standard. Rather, for purposes of a Motion to Dismiss the issue and legal standard was whether Yarborough was ever served pursuant to any provision of Rule 4(d) not just Rule 4(d)(8). On this point, it is clear Yarborough was served personally pursuant to Rule 4(d)(1). The Court's Order simply does not address whether this was sufficient service and instead focuses only on an earlier attempt at service by certified mail.

Therefore, Defendant/Third-Party Plaintiff seeks an Order(s) from the Court and His Honor which either (1). vacates the September 19th Order as moot since there is no dispute that Yarborough was personally served pursuant to Rule 4(d)(1) or (2). clarifies and addresses the issue of personal service of the pleadings that occurred on July 28, 2017.

Respectfully submitted,

LAW OFFICES OF ROBERT D. DODSON, P.A.

/s/ Robert D. Dodson

Robert D. Dodson, Esquire

1722 Main Street, Suite 200

Columbia, South Carolina 29201

Phone: (803) 252-2600

Fax: (803) 771-2259

Email: rdodson@rdodsonlaw.com

Attorney for Plaintiff

Columbia, South Carolina
This 25th Day of September, 2017

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

LM INSURANCE CORPORATION,

Civil Action No. 2017-CP-32-00507

Plaintiff,

vs.

JOSH STEELE,

Defendant/Third-Party
Plaintiff,

vs.

ERNIE YARBOROUGH D/B/A
YARBOROUGH INSURANCE AGENCY,

Third-Party Defendant.

**THIRD-PARTY DEFENDANT'S
RESPONSE IN OPPOSITION TO
THIRD-PARTY PLAINTIFF'S
MOTION FOR RECONSIDERATION**

Third-Party Defendant Ernie Yarborough ("Yarborough"), respectfully opposes Third-Party Plaintiff Josh Steele's Motion for Reconsideration.

Steele contends that the court erred by not considering his attempt to properly serve Yarborough after Yarborough filed a motion to dismiss for insufficient service. Steele's argument is inapposite of the rules. Rule 4(i), SCRCF, states that the court "in its discretion and upon terms it deems just . . . may, by written order, allow any process or proof of service thereof to be amended . . ." Thus, Steele's argument is incorrect on two grounds. First, the Court was not required to allow Steele to amend his proof of service. Second, even were the Court inclined to allow Steele to amend, he did not seek the Court's written permission to do so. Moreover, Steele did not seek to amend his proof of service at the hearing on Yarborough's motion to dismiss. Instead, Steele's sole request was to depose Yarborough about the authority of his

employee to accept service. Therefore, Steele's attempt to present evidence of an amended proof of service was improper. As a result, the Court did not err in not considering Steele's improperly amended proof of service or by dismissing Steele's third-party complaint for insufficient service of process. Based on the foregoing, the Court should deny Yarborough's Motion for Reconsideration.

Respectfully Submitted,

MCANGUS GOUDELOCK & COURIE, L.L.C.

s/Elizabeth M. McMillan

Elizabeth M. McMillan

S.C. Bar No: 15049

Post Office Box 2980

55 East Camperdown Way, Suite 300 (29601)

Greenville, South Carolina 29602

(864) 239-4000

ATTORNEYS FOR THIRD-PARTY DEFENDANT,
ERNIE YARBOROUGH D/B/A YARBOROUGH
INSURANCE

September 28, 2017

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

LM INSURANCE CORPORATION

FILED

2017 JUN -8 PM 12:35

LISA M. COMER
CLERK OF COURT
LEXINGTON SC
Plaintiff,

IN THE COURT OF COMMON PLEAS

FOR THE ELEVENTH JUDICIAL CIRCUIT

vs.

JOSH STEELE,

Defendant/Third-Party Plaintiff,

vs.

ERNIE YARBOROUGH D/B/A
YARBOROUGH INSURANCE AGENCY,

Third-Party Defendants.

Civil Action No: 2017-CP-32-00507

AFFIDAVIT OF SERVICE OF
THIRD-PARTY SUMMONS,
DEFENDANT AND THIRD-PARTY
PLAINTIFF'S ANSWER TO PLAINTIFF'S
COMPLAINT, COUNTERCLAIMS AND
THIRD-PARTY COMPLAINT

PERSONALLY APPEARED before me Robert D. Dodson, who, being first duly sworn, says:

1. I am an attorney in good standing with the South Carolina bar.
2. On April 19, 2017, my office mailed, via Certified Mail, Return Receipt Requested and Restricted Delivery, a copy of the Third-Party Summons; Defendant and Third-Party Plaintiff's Answer to Plaintiff's Complaint, Counterclaims and Third-Party Complaint to Ernie Yarborough, 1034 Briargate Circle, Columbia, SC 29210.
3. The return receipt was executed by Sandra L. Pike on April 21, 2017 indicating that service was affected on Defendant on said date. See attached **Exhibit A**.

FURTHER DEPONENT SAYETH NOT.

Sworn to and Subscribed by Me

Deborah L. Harris

Notary Public

State of South Carolina

This 5th Day of June, 2017

My Commission Expires: 5-17-2020

Robert D. Dodson

Robert D. Dodson, Esquire

1722 Main Street, Suite 200

Columbia, South Carolina 29201

Phone: (803) 252-2600

Fax: (803) 771-2259

Email: rdodson@rdodsonlaw.com

Attorney for Defendant and Third-Party
Plaintiff

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

FOR THE ELEVENTH JUDICIAL CIRCUIT

LM INSURANCE CORPORATION,

Plaintiff,

vs.

JOSH STEELE,

Defendant/Third-Party Plaintiff,

vs.

ERNIE YARBOROUGH D/B/A
YARBOROUGH INSURANCE AGENCY,

Third-Party Defendants.

Civil Action No: 2017-CP-32-00507

**AFFIDAVIT OF SERVICE OF
THIRD-PARTY SUMMONS,
DEFENDANT AND THIRD-PARTY
PLAINTIFF'S ANSWER TO PLAINTIFF'S
COMPLAINT, COUNTERCLAIMS AND
THIRD-PARTY COMPLAINT**

I, Deborah Harris, do hereby certify that I have caused the foregoing **AFFIDAVIT OF SERVICE OF THIRD-PARTY SUMMONS, DEFENDANT AND THIRD-PARTY PLAINTIFF'S ANSWER TO PLAINTIFF'S COMPLAINT, COUNTERCLAIMS AND THIRD-PARTY COMPLAINT** to be served upon the following parties at the following addresses via United States Postal Service, postage pre-paid or via email as indicated below:

Amanda M. Scott
Parnell & Crum, P.A.
P.O. Box 743
White Rock, SC 29177

Beth McMillan, Esquire
McAngus Goudelock & Courie
Beth.mcmillan@mgclaw.com
(Via Email Only)

This 5th Day of June, 2017
Columbia, South Carolina


Deborah G. Harris

FILED
2017 JUN -8 PM 12:35
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

EXHIBIT A

7015 0640 0005 7305 7985

U.S. Postal Service™
CERTIFIED MAIL® RECEIPT
 Domestic Mail Only

For delivery information, visit our website at www.usps.com

OFFICIAL USE

Certified Mail Fee \$
 Extra Services & Fees (check box, add fee as appropriate)
☐ Return Receipt (hardcopy) \$
☐ Return Receipt (electronic) \$
☐ Certified Mail Restricted Delivery \$
☐ Adult Signature Required \$
☒ Adult Signature Restricted Delivery \$
 Postage \$
 Total Postage and Fees \$

Postmark Here
 APR 19 2017
 UNIV OF SC CPU
 COLUMBIA SC 29208

Sent To
 Ernie Yarborough
 Street and Apt. No., or PO Box No.
 1034 Briargate Circle
 City, State, ZIP+4®
 Columbia, SC 29210

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
■ Complete items 1, 2, and 3. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits. 1. Article Addressed to: Ernie Yarborough 1034 Briargate Circle Columbia, SC 29210 2. Article Number (Transfer from service label) 7015 0640 0005 7305 7985	A. Signature X <i>Sandra L Pike</i> ☐ Agent ☐ Addressee B. Received by (Printed Name) C. Date of Delivery 4/21/17 D. Is delivery address different from item 1? ☐ Yes If YES, enter delivery address below: ☐ No 3. Service Type ☐ Adult Signature ☒ Adult Signature Restricted Delivery ☐ Certified Mail® ☐ Certified Mail Restricted Delivery ☐ Collect on Delivery ☐ Collect on Delivery Restricted Delivery ☐ Insured Mail ☐ Insured Mail Restricted Delivery (over \$500) ☐ Priority Mail Express® ☐ Registered Mail™ ☐ Registered Mail Restricted Delivery ☐ Return Receipt for Merchandise ☐ Signature Confirmation™ ☐ Signature Confirmation Restricted Delivery

9590 9402 2751 6351 0314 02

PS Form 3811, July 2015 PSN 7530-02-000-9053 Domestic Return Receipt

AFFIDAVIT OF SERVICE

State of South Carolina

County of Lexington

Common Pleas Court

Case Number: 2017-CP-32-00507

Plaintiff:

LM Insurance Corporation

vs.

Defendant/Third-Party Plaintiff:

Josh Steele

vs.

**Ernie Yarborough D/B/A Yarborough Insurance Agency,
Third-Party Defendants**

For:

Robert Dodson

Law Offices Of Robert Dodson, A

1722 Main Street

Suite 200

Columbia, SC 29201

Received by Law Offices Of Robert Dodson to be served on Ernie Yarborough Jr D/B/A Yarborough Insurance Agency, 1034 Briargate Cir, Columbia, SC 29210.

I, Tonya Reep, being duly sworn, depose and say that on the 28th day of July, 2017 at 4:06 pm, I:

INDIVIDUALLY/PERSONALLY served by delivering a true copy of the **Third-Party Summons, Defendant and Third-Party Plaintiff's Answer to Plaintiff's Complaint, Counterclaims and Third-Party Complaint and Certificate of Service** to: **Ernie Yarborough Jr D/B/A Yarborough Insurance Agency** at the address of: **1034 Briargate Cir, Columbia, SC 29210**, in compliance with state statutes.

I certify that I am over the age of 18, have no interest in the above action, and am a Process Server in good standing in the judicial circuit in which the process was served.

Subscribed and Sworn to before me on the 28th day of July, 2017 by the affiant who is personally known to me.

Deborah J. Harris
NOTARY PUBLIC

My Commission Expires 5/17/2020

Tonya Reep
Tonya Reep
Process Server

**Law Offices Of Robert Dodson
1722 Main St.
Suite 200
Columbia, SC 29201
(803) 252-2600**

Our Job Serial Number: UPL-2017001764

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon, Circuit Court Judge

RECEIVED

APR 20 2018

SC Court of Appeals

Appellate Case No. 2017-002220

LM Insurance Corporation,

v. Plaintiff,

Josh Steele,

v. Defendant, Third-Party Plaintiff,
Appellant,

Ernie Yarborough d/b/a Yarborough
Insurance Agency,

Third-Party Defendant,
Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all materials proposed to be included by any of the parties and not any other material.

April 20, 2018



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