THE STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge
J. Mark Hayes, II, Circuit Court Judge
J. Derham Cole, Circuit Court Judge

Opinion No. 4863 (S.C. Ct. App. Filed August 10, 2011)

White Oak Manor, Inc,
and White Oak Manor–York, Inc.,.....Petitioners,

v.

Lexington Insurance Company,
Caronia Corporation and
Certain Underwriters at Lloyd's London,
subscribing to Certificate No.
UP02US382030,.....Defendants,

of Whom Lexington Insurance Company is
the.....Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

Petitioners White Oak Manor Inc. and White Oak Manor-York, Inc. (collectively "White Oak") commenced suit on April 22, 2005, against U.S. Risk, Inc., Caronia Corporation, and Respondent Lexington Insurance Company ("Lexington"). {R. pp. 22-28}. Lexington did not file an Answer to the suit. The parties to this appeal dispute whether this Summons and Complaint were properly served on Lexington.

On July 7, 2005, White Oak filed an Affidavit of Default. {R. p. 126}. By Order dated July 15, 2005, the Honorable J. Mark Hayes, II held Lexington in default. {R. p. 1}. Thereafter, White Oak filed a Notice of Motion and Motion for Damages, pursuant to Rule 55(b).

On September 14, 2005, White Oak filed an Amended Complaint, substituting Certain Underwriters at Lloyd's London as a defendant in place of U.S. Risk.[1] {R. pp. 29-35}. White Oak served Lexington by mail with a packet containing the Amended Summons and Complaint and the Order of Default on September 14, 2005. {R. p. 37}.

Lexington answered the Amended Complaint on September 26, 2005, and contemporaneously filed a motion to set aside the entry of default against it. {R. pp. 38-42; pp. 49-50}.

After a hearing, the Circuit Court denied Lexington's motion to set aside the entry of default via a Form 4 Order. {R. p. 2}. The Circuit Court subsequently issued a formal order denying Lexington's motion on September 11, 2007. {R. pp. 6-13}.

Lexington timely filed a Rule 59(e) motion to alter or amend the order denying its motion to set aside the entry of default. {R. pp. 54-55; pp. 57-58}. A hearing was held on Lexington's

[1] Certain Underwriters ultimately was granted summary judgment and dismissed from the action. {R. p. 3}.

Rule 59(e) motion on December 18, 2007. The Circuit Court denied this motion by Form 4 Order, filed June 19, 2008, and formal order, filed September 17, 2008. {R. pp. 14-17}.

On November 17, 2008, a hearing was held on White Oak's motion for damages. The Circuit Court issued an order entering judgment against Lexington in the amount of $153,266.00 and denying White Oak's request for prejudgment interest. {R. pp. 18-21}.

Lexington appealed and the Court of Appeals reversed and remanded. White Oak Manor v. Lexington Ins. Co., Op. No. 4863 (Ct. App. filed August 10, 2011) {App. pp. 1-6}. White Oak now seeks a review of this decision by the Supreme Court.

STATEMENT OF THE FACTS

I. Pre-Suit Communications Between the Parties

The Amended Complaint in the instant action alleges that on November 3, 2001, White Oak's employees reinserted a PEG tube into Viola Floyd, one of its residents, thereby causing Ms. Floyd injury. {R. p. 31, ¶ 8}.

On March 27, 2003, a malpractice suit encaptioned Patricia A. Thacker, as duly appointed Guardian of Viola S. Floyd v. White Oak Manor, Inc. d/b/a White Oak Manor-York, Donald M. Shuler, M.D. and Family Medicine Associates, Case No. 2003-CP-46-884, was filed against White Oak. Paragraph 12 of the Complaint herein states "[a]fter discovery had been substantially completed in the Viola Floyd lawsuit, mediation was scheduled for August 2004. Prior thereto, Plaintiff's counsel notified Lexington of the mediation, giving Lexington the opportunity to participate. Lexington declined." {R. p. 32, ¶ 12}.

However, in spite of the requirement found in both Lexington policies, as in most insurance policies, mandating immediate notice of any lawsuit against the insured {see. e.g., R. pp. 234-235; pp. 294-295}, the first notice of the Floyd action given to Lexington was not provided until it received a letter sixteen months after suit was commenced. {R. p. 159}. This letter was faxed on July 26, 2004, to Mitch Halpern of AIG Technical Services[2] from Luanne Runge of Gallivan, White & Boyd, attorneys for White Oak in the Floyd malpractice suit. (Id.). The letter merely stated mediation had been scheduled in the Floyd action. The letter was addressed to other attorneys involved in the suit and Mitch Halpern was not a named person to receive a copy. However, Gallivan, White & Boyd and Henderson, Brandt & Vieth, counsel for White Oak, were aware from prior cases that Mitch Halpern was the AIG Technical Services claims handler with respect to suits against White Oak Manor.

[2] Lexington is an AIG member company.

On August 5, 2004, in response to the letter regarding the upcoming mediation, counsel for Lexington, Attorney Peter Dworjanyn of the undersigned firm, Collins & Lacy, P.C., sent a letter to Attorney Runge, notifying her, and thus White Oak, that he represented Lexington with respect to insurance coverage issues arising out of the policies issued to White Oak. {R. pp. 164-67}. In fact, Attorney Dworjanyn had, in previous cases, represented Lexington in coverage issues between White Oak and Lexington, said issues stemming largely from lack of notice provided by White Oak of suits against them. The letter did not decline coverage, but stated neither Lexington nor AIG Technical Services had any prior knowledge of the Floyd suit. In addition, the letter asked: (1) whether White Oak was seeking coverage; (2) the date and form of the first demand against White Oak; and (3) the date and form of any notice White Oak provided to any other insurance companies for this suit. (Id.).

On August 25, 2004, Attorney Dworjanyn received a telephone call from Howard Boyd, Esquire, of Gallivan, White & Boyd. In a letter dated August 26, 2004, Attorney Boyd discussed portions of that conversation. {R. pp. 169-71}. As described in Attorney Boyd's letter, Attorney Dworjanyn stated he was not in a position to advise AIG concerning the coverage issues. (Id.) This is because White Oak had not responded to the questions raised in the August 5, 2004, letter.

On September 27, 2004, Attorney Dworjanyn received a telephone call from Matthew Henderson, Esquire, of Henderson, Brandt & Vieth. Attorney Henderson prepared a follow-up letter dated September 30, 2004, regarding that conversation. {R. pp. 173-75}. Attorney Henderson's letter reflected White Oak's position that its failure to provide timely notice of the suit should be excused if there was no prejudice to Lexington. However, the letter failed to

respond to Lexington's query as to when a claim was first made against White Oak for its purported malpractice. (Id.)

On December 10, 2004, Attorney Dworjanyn, on behalf of Lexington, sent a letter to Attorney Boyd and Attorney Henderson. {R. pp. 177-79}. That letter discussed the coverage issues, and included the following:

> In light of the fact that this is a claims-made policy, and in light of the fact that no information has been presented to Lexington to suggest a claim was made prior to 2003, it does not appear to me that the policy provides coverage for this suit. I respectfully request that you communicate to me any points in this letter with which you disagree. If White Oak Manor contends that a claim for this matter was communicated to them prior to 2003, please provide the identity of the person who made the claim, the terms of the claim, and the manner in which the claim was communicated. If for some reason White Oak Manor contends, absent such a claim, that the policy provides coverage, please explain, so that Lexington can consider that contention.

{R. p. 177}.

Attorney Henderson responded with a letter dated December 28, 2004. {R. pp. 181-82}. That letter discussed reporting to Caronia and indicated that Caronia apparently had notice of an incident on January 10, 2002. However, the December 28 letter still did not state when a claim had been made against White Oak. (Id.).

On February 24, 2005, Attorney Dworjanyn had a telephone conversation with Attorney Henderson, which was followed with a letter dated February 25, 2005. {R. pp. 184-85}. That letter again inquired:

> Also, please indicate the date and manner in which a claim was made against White Oak Manor as a result of this incident. Lexington Insurance Company will gladly reconsider its position, but your letter did not respond to my inquiry as to when White Oak Manor alleges a claim was first made against it as a result of this incident. If it is White Oak Manor's position that notice of the incident equates to a claim, please let me know.

{R. p. 184}.

White Oak never responded to this letter.

II. Service of the Instant Suit

On April 22, 2005, White Oak filed the instant action against Lexington and U.S. Risk, seeking an order declaring the rights and legal relations of the parties arising out of three insurance policies. {R. pp. 24-28}. White Oak also alleged negligence and breach of contract claims against Caronia, its third party claims administrator, based on Caronia's alleged failure to properly report the Floyd claim to White Oak's insurer.

The service of suit provision in White Oak's Lexington policies provides service of process in a suit against Lexington may be made upon "Counsel, Legal Department, Lexington Insurance Company, 200 State Street, Boston MA, 02109 or his or her representative." {R. p. 228; p. 288}.

On May 16, 2005, White Oak served the original Summons and Complaint on Lexington by mailing a copy of the same via certified mail, return receipt requested, to "Lexington Insurance Company, 200 State Street, Boston, MA 02109, ATTN: LEGAL DEPARTMENT." {R. p. 214}. The return receipt indicated the Summons and Complaint were received on May 20, 2005, by an individual named Thomas Dinam. {R. p. 127}. However, as set forth in the affidavit of Stephen Andrick, Vice-President and Senior Associate General Counsel for Lexington, Lexington moved from 200 State Street to 100 Summer Street in August 2003 and had not occupied State Street since that time. {R. p. 129, ¶ 4}. Lexington has no record of an employee named Thomas Dinam; Dinam was not authorized to accept service on behalf of Lexington. {R. p. 129, ¶ 7}.

Lexington candidly notified the Circuit Court the log of mail received by Lexington on May 20, 2005, indicated that a copy of a summons and complaint bearing the caption White Oak

Manor v. Lexington Insurance Company was received by Lexington on May 20, 2005. The log further indicated a copy of the summons and complaint was personally delivered to William Eddows, Claims Counsel for Lexington, on May 27, 2005. {R. p. 130, ¶¶ 11-13}. However, neither Eddows nor the Lexington employee to whom he would pass on the suit papers, Director of the Professional Liability Claims Department Howard Tripolsky, have any recollection of receiving the suit papers. {R. p. 131, ¶ 15}. Accordingly, Andrick concluded the copy of the summons and complaint logged in was either misplaced or misfiled. {R. p. 131, ¶ 16}. Therefore, Lexington did not file an Answer to the Summons and Complaint.

On July 7, 2005, counsel for White Oak filed an Affidavit of Default, attaching the return receipt signed by Thomas Dinam as an exhibit. {R. pp. 126-27}. Thereafter, the Circuit Court issued an order holding Lexington in default. {R. p. 1}.

On September 14, 2005, White Oak served Lexington via U.S. Mail with an Amended Summons and Complaint. {R. p. 37}. This Amended Complaint substituted Certain Underwriters for U.S. Risk and alleged White Oak purchased two policies insuring its nursing home facility from Lexington and one policy from Certain Underwriters. Lexington issued a policy to the Plaintiffs providing coverage from September 30, 2001 to May 16, 2002. {R. pp. 271-315}. Certain Underwriters provided coverage from May 13, 2002 to March 31, 2003. Lexington then issued another policy providing coverage from March 31, 2003 to March 31, 2004. {R. pp. 215-70}. Each policy contained a self-insured retention. According to White Oak, one of these three policies provided coverage for the Floyd medical malpractice lawsuit brought against it on March 27, 2003.

The Amended Summons and Complaint were served on Lexington via certified mail, return receipt requested, at two addresses:

1) Counsel, Legal Department
Lexington Insurance Company
200 State Street
Boston, MA 02109

2) Counsel, Legal Department
Lexington Insurance Company
100 Summer Street
Boston, MA 02110-02103[3]

{R. p. 37}.

Attached as an exhibit to the Amended Summons and Complaint was a copy of the order holding Lexington in default. {R. p. 36}.

Lexington timely answered the Amended Summons and Complaint and contemporaneously moved to set aside the entry of default. {R. pp. 38-42; pp. 49-50}.

III. Lexington's Motion to Set Aside the Entry of Default

Lexington enumerated several grounds in support of its motion to set aside the entry of default. Specifically, Lexington contended the service of suit clause contained the Lexington policies was invalid because it conflicts with S.C. Code Ann. § 15-9-270, which mandates service of process be made on an insurance company through the South Carolina Department of Insurance. Because White Oak did not serve Lexington through the Department of Insurance as required by law, Lexington argued the entry of default must be set aside. {R. pp. 142-43}.

In the alternative, Lexington argued even if the service of suit provision was valid, service was not effective because White Oak failed to comply with the service of suit provision as White Oak did not personally serve "Counsel...or his representative" as specificed by the

[3] Lexington is unaware of how or when White Oak becamse aware that Lexington was in fact now located on Summer Street.

provision, but instead merely addressed the summons and complaint generically to an entire department and mailed it. {R. p. 145}. Lexington also contended service was improper because service was not made on a person authorized to accept service by either operation of Rule 4(d)(8), SCRCP, or the service of suit provision. {R. pp. 145-46}.

Lexington additionally argued that even if it was properly served with the Summons and Complaint, the factors to be considered in ruling on a motion to set aside an entry of default, as set forth in Wham v. Shearson Lehman Brothers, 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989), weighed in favor of setting aside the entry of default against it. {R. pp. 147-52}.

Lexington also argued that the mislaying or misfiling of suit papers by an insurance company or its counsel does not unequivocally justify the denial of a motion to set aside an entry of default. {R. pp. 154-56}.

Finally, Lexington contended the entry of default should be set aside based on equitable grounds under the circumstances presented by this case, where counsel for White Oak was aware Lexington was represented by counsel and had in fact been in direct communication with Lexington's counsel prior to the commencement of suit, but failed to serve Lexington's counsel with a copy of the Summons and Complaint or otherwise notify him of the suit, or of the puported default or motion for entry of default. {R. pp. 152-54}. There is no evidence that the affidavit of default, or any motion for Order of Judgment by default was served on Lexington; they were not served on Lexington's counsel.

In opposition to Lexington's motion to set aside the entry of default, White Oak contended the parties were permitted to agree in the insurance policy on the method by which service of process will be effectuated and White Oak substantially complied with this method. {R. p. 74, line 20-p. 77, line 17}. White Oak additionally relied on the fact that Lexington's mail

log indicated it received the lawsuit, but apparently misplaced it, citing to Roche v. Young Brothers, Inc. of Florence, 318 S.C. 207, 456 S.E.2d 897 (1995). {R. p. 77, line 18-p. 79, line 25}.

The Circuit Court denied Lexington's Rule 55 motion to set aside the entry of default by Form 4 order filed February 7, 2006. {R. p. 2}. The Circuit Court issued a formal order denying Lexington's motion on September 11, 2007. {R. pp. 6-13}. Therein, the Circuit Court ruled it was not necessary for White Oak to serve Lexington through the Department of Insurance because parties can agree to another method of service of process. {R. p. 10}. The Circuit Court further held White Oak's method of addressing the suit papers amounted to substantial compliance and was effective to accomplish service on Lexington. {R. p. 11}. In reaching this conclusion, the Circuit Court also relied on the fact Lexington's records indicate that the Summons and Complaint were forwarded to the appropriate person at Lexington. (Id.).

In addition, the Circuit Court determined the requirements of Rule 4, SCRCP, did not apply to the instant case because White Oak substantially complied with the service of suit clause. In essence, the Circuit Court ruled it was irrelevant that an unknown and unauthorized individual, Thomas Dinam, accepted service on behalf of Lexington. (Id.).

Finally, the Circuit Court summarily held Lexington failed to show good cause as to why the entry of default should be set aside pursuant to Rule 55. The Circuit Court provided no reasoning for this decision, other than to state that Lexington did not provide any justification for its failure to respond to the original Summons and Complaint aside from misplacing the suit papers. {R. pp. 11-12}. According to the Circuit Court, "[l]osing a summons and complaint within the corporation is not a ground to set aside a default judgment." {R. p. 12}. Accordingly, the Circuit Court denied Lexington's motion to set aside the entry of default. {R. pp. 12-13}.

Lexington timely filed a motion to alter or amend the order denying its motion to set aside the entry of default. {R. pp. 54-55; pp. 57-58}. The Circuit Court held a hearing on the motion and took the matter under advisement. {R. pp. 92-107}. In its order denying Lexington's motion to alter or amend, the Circuit Court expanded upon its previous ruling regarding the parties' ability to consent to a method of service of process other than that prescribed by § 15-9-270. Specifically, the Circuit Court held Lexington waived its right to insist on service of process via the statutory method by including the service of suit clause in the policies. {R. p. 16}.

On November 17, 2008, the Circuit Court held a hearing on White Oak's motion for damages, which requested judgment be entered against White Oak in the amount of $158,627.00. {R. p. 43; pp. 109-24}. This amount represented the total legal fees incurred in defending the Floyd malpractice action, legal fees incurred in prosecuting the instant declaratory judgment action, and the settlement paid in the Floyd malpractice action after the deduction of White Oak's self-insured retention. {R. p. 46}. White Oak also requested pre-judgment interest at the hearing on its motion. {R. p. 115, line 20-p. 116, line 2}.

Lexington argued at the hearing that it was not yet proper for the Circuit Court to award damages to White Oak because the Complaint did not seek liquidated damages, but merely sought a declaratory judgment from the Court declaring the rights and obligations between the parties arising out of the three policies. Rather, Lexington contended the Court must examine whether any of the three policies provided coverage for the Floyd lawsuit. {R. p. 117, line 5-p. 120, line 6}. Lexington additionally argued White Oak was not entitled to prejudgment interest because it failed to request it in the Complaint or Amended Complaint and no contractual or

statutory basis existed to support an award of attorney's fees incurred in pursuing the instant action. {R. p. 120, line 7-p. 121, line 1}.

By order filed November 21, 2008, the Circuit Court granted White Oak's motion for damages. The Circuit Court reasoned the Complaint contained sufficient requests for reimbursement and monetary relief to allow the entry of a default judgment against Lexington. {R. p. 20}. However, the Circuit Court denied White Oak's requests for attorney's fees and pre-judgment interest. Therefore, the Circuit Court entered a default judgment in the amount of $153,266.00. {R. pp. 20-21}.

Lexington appealed and the Court of Appeals reversed and remanded. White Oak Manor v. Lexington Insurance Company, Op. No. 4863 (Ct. App. filed August 10, 2011) {App. pp. 1-6}. The Court of Appeals reasoned that the requirements for service upon an insurance company set forth in §§ 38-5-70 and 15-9-270 are mandatory and that the service of suit provision did not waive these requirements. Accordingly, because White Oak failed to serve the Summons and Complaint upon the Director of the Department of Insurance as required by the statutory scheme, the Court of Appeals set aside the entry of default.[4] White Oak now seeks a review of this decision.

[4] Finding this ground dispositive, the Court of Appeals declined to rule on Lexington's other grounds in support of setting aside the entry of default.

LAW/ANALYSIS

I. The Court of Appeals Correctly Held § 15-9-270 Provides the Exclusive Method of Service Upon an Insurance Company

The Court of Appeals properly set aside the entry of default against Lexington based on White Oak's failure to comply with the statutory scheme concerning service on an insurance company licensed to do business in South Carolina. South Carolina Code Ann. § 38-5-70 mandates, in pertinent part:

> Every insurer **shall**, before being licensed, appoint in writing the director and his successors in office to be its true and lawful attorney upon whom **all** legal process in any action or proceeding against it **must** be served and in this writing shall agree that any lawful process against it which is served upon this attorney is of the same legal force and validity as if served upon the insurer and that the authority continues in force so long as any liability remains outstanding in the State.

(emphasis added).

In addition, the method of service upon an insurer is specified by statute:

> The summons and any other legal process in any action or proceeding against it **must be served on an insurance company** as defined in Section 38-1-20, including fraternal benefit associations, **by delivering two copies of the summons or any other legal process to the Director of the Department of Insurance**, as attorney of the company with a fee of ten dollars, of which five dollars must be retained by the director to offset the costs he incurs in service of process and of which five dollars must be deposited to the credit of the general fund of the State. A company shall appoint the director as its attorney pursuant to the provisions of Section 38-5-70. **This service is considered sufficient service upon the company.** When legal process against any company with the fee provided in this section is served upon the director, he shall immediately forward by registered or certified mail one of the duplicate copies prepaid directed toward the company at its home office or, in the case of a fraternal benefit association, to its secretary or corresponding officer at the head of the association.

S.C. Code Ann. § 15-9-270 (emphasis added).

The legislature's intent should be ascertained primarily from the plain language of the statute. State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004). Courts must only resort to rules of statutory construction where the terms of a statute are ambiguous. Wade v. Berkeley

Cnty., 348 S.C. 224, 559 S.E.2d 586 (2002). If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and a court has no right to look for or impose another meaning. Tilley v. Pacesetter Corp., 355 S.C. 361, 585 S.E.2d 292 (2003); Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995); Cowan v. Allstate Ins. Co., 351 S.C. 626, 571 S.E.2d 715 (Ct. App. 2002), rev'd on other grounds, 357 S.C. 625, 594 S.E.2d 275 (2004); see also City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) ("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language.").

Rather, when the terms of a statute are clear, the court must apply those terms according to their literal meaning. Patterson v. State, 359 S.C. 115, 597 S.E.2d 150 (2004); Holley v. Mount Vernon Mills, Inc., 312 S.C. 320, 440 S.E.2d 373 (1994). This is because what a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001). "In seeking the intention of the legislature, we must presume that it intended by its action to accomplish something and not to do a futile thing." State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964). "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." South Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989).

The plain language of §§ 38-5-70 and 15-9-270 requires an insurer licensed in South Carolina to appoint the Director of Insurance as the insurer's agent for service on which **all** process against the insurer **must** be served. The language of these statutes is mandatory in

nature and does not leave room for alternate methods of service. To interpret these statutes in such a way as to allow the parties to an insurance contract to agree upon another method of service would void the compulsory language of the statutes and render these sections meaningless.

The mandatory nature of the statutory scheme for service upon insurance companies has been recognized by this Court.

In Murray v. Sovereign Camp W.O.W., 192 S.C. 101, 5 S.E.2d 560 (1939), the Court discussed the evolution of what is now § 38-5-70 and concluded that the use of imperative words in the version at issue, which were not included in a similar, repealed statute, clearly indicated an intention of the part of the legislature to exclude every other method of service upon a foreign insurance company. Id. at 101, 5 S.E.2d at 562. Accordingly, the Court held "in view of the history of the legislation above pointed out, and of the deliberate insertion by the Legislature in the light of the facts before it, of the word 'shall' in the act of 1917, [] service on foreign insurance companies as provided for in Section 7964 of the Code of 1932 [now § 38-5-70] is exclusive, and that service made in any other was upon such corporations in invalid." Id.

In Equilease Corporation v. Weathers, 275 S.C. 478, 484, 272 S.E.2d 789, 792 (1980), this Court stated that § 15-9-270 provides the exclusive method of service upon foreign insurance companies, and service made in any other way upon such a corporation is invalid: "Clearly, in such a case where jurisdiction has not yet been acquired over an insurance company, service under the applicable substituted service statute is the proper and **exclusive** method of obtaining jurisdiction over the insurance company.") (emphasis added); see also 16 Couch on Ins. § 231:45 ("If a statute requires service of process on a specified officer, such as the superintendent of insurance, the method is exclusive. Accordingly, where a provision of the

state Insurance Code requires that service of process against a foreign corporation be accomplished exclusively by serving the director of insurance, who is required to be appointed as the insurer's agent for service of process, this is the only manner in which service on such an insurer may be accomplished, and a party cannot validly serve an agent of the company in accordance with the Rules of Civil Procedure applicable generally to corporations."). Therefore, the Court of Appeals properly gave deference to the plain language of §§ 38-5-70 and 15-9-270 by setting aside the entry of default on the grounds that White Oak failed to effect service because it did not serve Lexington by way of the Department of Insurance.

In addition, as the Court of Appeals noted in its opinion, while other substituted service statutes specifically state the statutory manner of service is not exclusive or required, § 15-9-270 contains no such optional provision. See S.C. Code Ann. § 15-9-210(d); § 15-9-240(c); § 15-9-245(f). Had the Legislature intended service upon the Director of Insurance to be optional or subject to waiver by the parties, it could have included such a provision in § 15-9-270. State ex rel. McLeod, 244 S.C. at 314, 136 S.E.2d at 782 ("In seeking the intention of the legislature, we must presume that it intended by its action to accomplish something and not to do a futile thing."). The absence of a provision authorizing alternate methods of service on insurance companies further reinforces the Court of Appeals' holding that § 15-9-270 was the exclusive method of service on Lexington and not subject to waiver via the service of suit clause.

Moreover, as the Court of Appeals recognized, service pursuant to § 15-9-270 is mandatory and cannot be waived by the insurance carrier is consistent with other statutory provisions concerning the responsibilities of the Department of Insurance. Section 38-5-10 requires that every insurer doing business in South Carolina "must be licensed and **supervised** by the director or his designee." S.C. Code Ann. § 38-5-10 (emphasis added). To that end, § 38-

3-110 sets forth several duties to be performed by the Director of Insurance, including to: (1) "see that all laws of this State governing insurers or relating to the business of insurance are faithfully executed[,]"; (2) "report to the Attorney General or other appropriate law enforcement officials criminal violations of laws relative to the business of insurance or the provisions of this title which he considers necessary to report[,]"; and (3) institute civil actions when appropriate. S.C. Code Ann. § 38-3-110. The existence of these statutory responsibilities supports the conclusion that the Director of Insurance is not required to be appointed the agent for service of process on insurance companies simply so he can perform the administrative function of forwarding a copy of the pleadings to the carrier. Rather, reading § 15-9-270 in conjunction with the other statutory responsibilities imposed on the Director of Insurance demonstrates that being privy to the existence of lawsuits against insurance companies doing business in this State assists the Director in carrying out his obligation to supervise these companies.

White Oak characterizes an insurance policy as a private contract in which the parties are free to agree to a method of service of process that varies from the statutory scheme. However, insurance contracts are not entirely private in nature due to the significant level of regulation the state exerts over the insurance industry. The South Carolina Code contains numerous statutes and regulations governing the conduct and business of insurers, as well as the contents of insurance contracts. Sections 15-9-270 and 38-5-70 express one such restriction. It is the well-settled law of this State that if an insurance policy provision conflicts with a statutory mandate, the policy provision is invalid and the statute controls.

Here, the above-described statutory scheme provides the sole and exclusive means of serving process on an insurer regulated by the South Carolina Department of Insurance. This method is clearly in direct conflict with the manner set forth in the service of suit clause of White

Oak's policy. Therefore, the service of suit clause is void and cannot be applied to effectuate service in this case. Rather, service upon Lexington is effective only if achieved in compliance with the procedure described in §§ 38-5-70 and 15-9-270. Equilease Corp., 275 S.C. at 484, 272 S.E.2d at 792.

White Oak also contends this Court has previously held parties can agree on a method for service of process.[5] However, the South Carolina cases White Oak cites in support of this argument, Palmetto Homes, Inc. v. Bradley, 357 S.C. 485, 593 S.E.2d 480 (Ct. App. 2004) and Myrtle Beach Lumber Company, Inc. v. Globe International Corporation, 281 S.C. 290, 315 S.E.2d 142 (Ct. App. 1984), are easily distinguished. Neither Palmetto Homes nor Myrtle Beach Lumber concerns an entity for which service is governed by a controlling, mandatory statutory scheme. Accordingly, the parties in those cases were free to agree to alternate methods of service. The parties in the instant case did not possess this freedom, as the statutory scheme outlined above provides the exclusive method for service upon a foreign insurance company. Therefore, the attempt by the parties in this case to agree to a method of service other than that sanctioned by the statutory law of this state fails.

In short, the language of §§ 38-5-70 and 15-9-270 is clear and unambiguous—service upon the Director of the Department of Insurance is not an option, but a mandate. Regardless of whether service on the Director of the Department of Insurance is a right possessed by the Director or by the insurance carrier, the parties to an insurance contract are not permitted to waive the application of a mandatory statutory provision. Therefore, the Court properly set aside

[5] White Oak likewise contends other jurisdictions have held parties to a contract may agree on the method of service of process in the event litigation arises between the parties. (Br. of Pet'rs pp. 6-7). However, as with Palmetto Homes and Myrtle Beach Lumber, none of these cases address the scenario at bar, as they do not concern service upon an entity governed by a mandatory statutory scheme.

the entry of default on the basis that § 15-9-270 provides the exclusive method of service upon an insurance company.

II. Additional Sustaining Grounds Support Denial of the Petition

Numerous additional grounds exist on which to affirm the decision of the Court of Appeals.

A. White Oak Did Not Comply With the Service of Suit Clause or Rule 4, SCRCP

The entry of default should also be set aside because White Oak failed to comply with the service of suit clause.

The service of suit clause states service against Lexington may be made on "Counsel, Legal Department, Lexington Insurance Company, 200 State Street, Boston MA, 02109 or his or her representative." Contrary to the finding of the Circuit Court, White Oak's manner of addressing the letter containing the Summons and Complaint to "Lexington Insurance Company, 200 State Street, Boston, MA 02109, ATTN: LEGAL DEPARTMENT" did not substantially comply with the service of suit clause. Merely directing the letter to the attention of the legal department is not akin to serving it on a representative of Lexington's Counsel as required by the service of suit clause. The address utilized by White Oak does not identify a representative of Lexington's Counsel, either generally or specifically; rather, the correspondence is directed to an entire department, out of which only a limited number of employees are responsible for handling new lawsuits commenced against Lexington. Accordingly, White Oak cannot be said to have substantially complied with the service of suit clause by addressing the Summons and Complaint generically to an entire department rather than the specified recipient or his representative.

Regardless of whether White Oak substantially complied with the service of suit provision, Lexington argues substantial compliance is not sufficient under the circumstances. If

White Oak is permitted to deviate from the statutory scheme requiring service upon the Director of the Department of Insurance, at the very least, it should be required to fully and completely comply with the terms of the service of suit provision. The requirement that legal process be directed to "Counsel" is not an arbitrary mandate meant to trick or deceive those desiring to serve process on Lexington. To the contrary, it is a mechanism to ensure that crucial and time-sensitive legal documents reach their proper destination rather than being aimlessly passed around a large department in an even larger company.

Moreover, White Oak has not complied with the service of suit provision, substantially or otherwise, because service neither made on, nor accepted by, an authorized person — in this case, Counsel or his representative. Here, the return receipt was signed for by someone who appears to be named Thomas Dinam. However, Lexington has no record of an employee named Thomas Dinam. At a minimum, Thomas Dinam was not Counsel or a representative of Counsel for Lexington Insurance Company and was not authorized by Lexington to receive service of process. {R. p. 129, ¶ 7, p. 132, ¶ 3}. Accordingly, because White Oak failed to serve the Summons and Complaint on "Counsel or his representative" as required by the service of suit provision, White Oak did not obtain effective service upon Lexington and the entry of default must be set aside. See Rule 4(d)(8) ("Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed by an unauthorized person."), cited in Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 338, 644 S.E.2d 793, 796 (Ct. App. 2007).

In addition, White Oak's service upon Thomas Dinam was insufficient to obtain jurisdiction over Lexington under the South Carolina Rules of Civil Procedure. Rule 4(d)(3), SCRCP, specifies that service shall be made "[u]pon a corporation or upon a partnership or other

unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant." However, Rule 4(d)(8), SCRCP, allows for service upon corporations to be effected by certified mail if certain requirements are met:

> Service of a summons and complaint upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule may be made . . . **by registered or certified mail, return receipt requested and delivery restricted to the addressee.** Service is effective upon the date of delivery as shown on the return receipt. **Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing the acceptance by the defendant. Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed by an unauthorized person.**

(emphasis added).

The service of suit provision merely advises White Oak the location and person upon whom to effect service of process—to counsel or his representative at 200 State Street. However, the provision does not obviate the need to comply with the requirements for service of process set forth in Rule 4, SCRCP. Lexington has demonstrated that an unauthorized person, Thomas Dinam, signed the return receipt. Therefore, pursuant to Rule 4(d)(8), service has not been properly effected on Lexington by mail, and the Entry of Default must be set aside.

Furthermore, to properly obtain personal jurisdiction over Lexington, White Oak must not merely get the summons and complaint in the hands of Lexington by any method available. Rather, White Oak must serve Lexington with legal process pursuant to the method prescribed by law. See Langley v. Graham, 322 S.C. 428, 432, 472 S.E.2d 259, 261 (1996) (defendant's acknowledgement that he received the summons and complaint is not equivalent to service upon

him) (citing State v. Cohen, 13 S.C. 198 (1880)). In short, Lexington's alleged possession of the summons and complaint, does not lead to the conclusion that service upon Lexington was properly perfected.

B. Lexington Has Shown Good Cause Exists to Set Aside the Entry of Default

Rule 55(c), SCRCP, provides that a court may set aside an entry of default "for good cause shown." Rule 55(c) should be liberally construed to promote justice and dispose of cases on the merits. Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995). In passing on a motion to set aside entry of default, the trial court should consider:

(1) the timing of the defaulting party's Motion for Relief;
(2) whether the defaulting party has a meritorious defense to the Complaint; and
(3) the degree of prejudice, if any, to the non-defaulting party if relief is granted to the defaulting party.

Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989).

Application of the Wham factors to the instant case reveals good cause exists to set aside the entry of default:

1. Lexington Acted Promptly Once It Learned It Was in Default

Although Lexington's motion to set aside the entry of default was not filed until eighty-one days after the Filing of the Affidavit of Default, this date should not be utilized in examining the timeliness of Lexington's motion, as Lexington did not receive notice of its default status at that time. Rather, White Oak appears to have mailed Lexington the Order of Judgment by Default on September 14, 2005. Lexington received the packet containing the Amended Summons and Complaint and Order of Judgment By Default on September 22, 2005. Lexington immediately filed a Motion to Set Aside the Entry of Default and an Answer to the Amended Complaint on September 22, 2005. (R. pp. 48-51.) Accordingly, Lexington promptly sought relief from the entry of default upon learning of its existence. Lexington's swift response to the

entry of default shows it is serious about defending this action.

2. Lexington Has Meritorious Defenses to White Oak's Claims

To establish a meritorious defense, it is not necessary that Lexington "establish that [it] would prevail on the merits, but only that [its] defense[s] are meritorious." Thompson v. Hammond, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989). A meritorious defense need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence. Graham v. Town of Loris, 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978).

Lexington's meritorious defense to this case is two-fold. Most general liability policies provide coverage based on the date of the "occurrence." However, as is common with malpractice policies, the two Lexington policies are claims-made policies. There is a distinction between an "occurrence" and a "claim." This is reflected in the express language of the Lexington policy at issue in the instant case. Specifically, the Lexington policy provides that a notice of an "occurrence" is not a "claim." {R. p. 248}. Despite Lexington's written requests to White Oak prior to commencement of this action, White Oak has provided no information regarding when it considers a "claim" was first made with regards to the Floyd malpractice suit.

A review of the case law reveals that South Carolina's appellate courts have not addressed the meaning of the word "claim" within the context of a claims-made policy. Therefore, we are compelled to examine cases emanating from other jurisdictions for assistance.

In Atlas Underwriters, Ltd., v. Meredith-Burda, Inc., 343 S.E.2d 65 (Va. 1986), the Supreme Court of Virginia held that the term "claim," which was not defined by the policy, was clear and unambiguous and susceptible of but one meaning. The Court cited Black's Law Dictionary 1366 (5th ed. 1979) for the following definition: "'Claim' contemplates the assertion

of a legal right by a third person for damages caused by conduct of the named insured." Id. at 67.

The Court of Appeals for the Ninth Circuit considered the context of the word "claim" in Hoyt v. St. Paul Fire & Marine Insurance Company, 607 F.2d 864 (9th Cir. 1979). In Hoyt, the Court — applying Arizona law — looked to the policy's notice provision to find context. The policy's notice clause read "if claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or the representative." Id. at 867. The court held that thus, the claim contemplated is unambiguously in the nature of a demand or a notice. Id.

Also instructive is Hartford Fire Insurance Company v. Guide Corporation, No. IP 01-572-C-Y/F, 2005 WL 675406 (S.D. Ind. Feb. 14, 2005). While the court did not provide an expansive recitation of the facts in this opinion, it seems clear there was a dispute regarding coverage. The court concluded that the plain, ordinary meaning of the term "claim" includes "a demand, written or unwritten, alleging liability or responsibility on the insured and seeking a remedy that is covered by the policy." Id. at 3.

Lexington issued a policy to White Oak providing coverage from September 30, 2001 to September 30, 2002. However, at the request of White Oak, that policy was cancelled effective May 16, 2002. {R. p. 273}. Certain Underwriters at Lloyd's, London, provided coverage from May 13, 2002 to March 31, 2003. White Oak then again obtained coverage through Lexington with a policy providing coverage from March 31, 2003 to March 31, 2004. {R. p. 215}. Lexington does not believe that a claim was first made against White Oak during either Lexington policy period, and therefore Lexington has a meritorious defense to this claim. As demonstrated in the correspondence between counsel for Lexington and counsel for White Oak,

Lexington inquired repeatedly as to when a claim was made against White Oak for this suit. As is further demonstrated by that correspondence, White Oak never made even a partial response to that inquiry. White Oak's correspondence set forth considerable detail about the merits of the malpractice suit against it and argued that its failure to provide Lexington with timely notice of the suit would be excused due to lack of prejudice. However, despite the very specific requests, White Oak never responded at all to the request for information with respect to when a claim was first made against it for the purported damages suffered by Ms. Floyd.

On January 27, 2003, during the Lloyd's policy period, Grady McMehan, Esquire, wrote a letter to White Oak notifying it of his representation of Ms. Floyd and requesting a copy of her file. {R. p. 187}. On February 7, 2003, during the Lloyd's policy period, Asby Fulmer, Esquire, of Mr. McMehan's firm, wrote a letter to White Oak, enclosing a certificate of appointment of Ms. Thacker as guardian for Ms. Floyd, which notified White Oak that Ms. Floyd's file was potential evidence in a possible suit against multiple parties. {R. p. 189}. The malpractice suit was filed during the Lloyd's policy period. While Lexington is not privy to all of the correspondence and conversations between the attorneys for Ms. Floyd and White Oak, it seems possible, if not likely, that a claim was first made against Lexington during the Lloyd's policy period. Lexington has a meritorious defense to coverage for the malpractice suit.. This is a real controversy - arising from real facts - which is worthy of inquiry. Certainly, it would be an unusual result to make an insurance carrier, who had corresponded in good faith with the insured, pay a claim that was payable by another insurance company.

Assuming, for the sake of argument, that a claim was made against White Oak during the Lexington policy period - an issue that cannot be addressed absent some discovery - Lexington

still has as a defense to coverage by way of the policy condition regarding failure of White Oak to provide timely notice of this suit. The policy requires the following from the insured:

> VI. CONDITIONS
>
> A. Duties in the Event of a Claim, Suit or Medical Incident
>
> 1. If during the policy period, the First Named Insured shall become aware of any medical incident which may reasonably be expected to give rise to a claim being made against any insured, the First Named Insured must notify us in writing as soon as practicable. To the extent possible, notice should include:
>
> a. How, when, and where the medical incident took place;
> b. The names and addresses of any injured persons and witnesses; and
> c. The nature and location of any injury or damage arising out of the medical incident.
>
> . . . .
>
> Receipt by us of an incident report, including but not limited to variance reports, will not be considered a claim to us.
>
> . . . .
>
> 2. If a claim or suit is brought against an insured arising out of a medical incident, the First Named Insured must:
>
> a. Immediately record the specifics of the claim or suit and the date received;
> b. Provide us with written notice of the claim or suit as soon as practicable; and
> c. Immediately send us copies of any demands, notices, summonses, or legal papers received in connection with the claim or suit.

{R. pp. 234-35; pp. 294-95}.

White Oak defended this suit for over fifteen months before notifying Lexington of the suit. Lack of notice of the suit, on first blush, may not be a defense appealing to the Court. However, this is not the first time White Oak has failed to provide Lexington with notice of a suit against it. {R. pp. 191-92} (letter from Attorney Henderson responding to correspondence from the AIG adjuster pointing out failure of White Oak to notify Lexington of a 2001 suit

against White Oak). Accordingly, Lexington has an arguable basis on which to contest coverage based on lack of notice.

Lexington has several meritorious defenses to the instant action. Therefore, it is apparent that this case presents a dispute based on conflicting evidence which is worthy of judicial inquiry.

3. White Oak Will Not Be Prejudiced if the Entry of Default is Set Aside

Setting aside the entry of default will not cause any prejudice to White Oak. Rather, White Oak merely will be required to demonstrate which policy provides coverage for the underlying suit. White Oak will not be hindered in its ability to pursue its claim. Moreover, White Oak cannot assert loss of available evidence, increased potential for fraud or collusion, or substantial reliance on default to support a finding of prejudice. Cf. Feliciano v. Reliant Tooling Co., 691 F.2d 653 (3rd Cir. 1982) (mere delay in recovery does not amount to prejudice).

4. Roche v. Young Brothers Is Not Dispositive of the Case Sub Judice

Lexington anticipates White Oak will argue that based on Roche v. Young Brothers, Inc. of Florence, 318 S.C. 207, 456 S.E.2d 897 (1995), Lexington has not provided an adequate explanation as to why it did not timely respond to the summons and complaint. However, Lexington's explanation as to why it did not timely respond to the suit — the Summons and Complaint were either misfiled or misplaced within its office — is not a per se basis on which to deny the motion to set aside entry of default. Although the defaulting party's reason for failing to answer is taken into account, along with the Wham factors, when determining whether good cause exists to set aside an entry of default, this explanation should not be deemed dispositive in the instant case. When all these facts are considered together and Rule 55(c) is given its proper liberal construction, it is evident that Lexington has shown good cause exists to set aside the

entry of default. See Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 609, 681 S.E.2d 885, 889 (2009) ("the presence of other factors, **in the totality of the circumstances**, may amount to a showing of 'good cause'. . . .").

Additionally, a close analysis of Roche reveals a key difference from the case at hand. Specifically, Roche dealt with a Rule 60(b) motion to set aside a **default judgment** based on inadvertence or excusable neglect, not a Rule 55(c) motion to set aside an **entry of default**, as is at issue in this case. The Rule 55(c) "good cause" standard is more lenient than the standard for granting relief from judgment under Rule 60 based on mistake, in advertence, or excusable neglect. Sundown Operating Co., 383 S.C. at 607, 681 S.E.2d at 888; Hill v. Dotts, 345 S.C. 304, 310 n.1, 547 S.E.2d 894, 897 n.1 (Ct. App. 2001) ("Although applicable to both rules, the factors are applied with greater liberality within the context of Rule 55(c) vis-à-vis Rule 60(b)[,] . . . [t]he disparate application of the default factors reflects the different standards of the two rules."). This is because relief granted after an entry of default is within the equitable power of the court and excuses the previous failure to act promptly, while, in contrast relief from judgment destroys the finality of judgments and is contrary to the strong public policy that the parties should be able to rely on judgments once they are obtained. James F. Flanagan, South Carolina Civil Procedure 440 (2d ed. 1996). Accordingly, although losing a summons and complaint might not amount to inadvertence or excusable neglect under Rule 60(b)'s more rigorous standard to set aside a default judgment, Roche does not hold that is a per se reason to deny a Rule 55(c) motion to set aside an entry of default.

Moreover, the sole case cited by the Roche Court in support of its holding that "[l]osing a summons and complaint with the corporation is not a ground to set aside a default judgment" does not address default judgments or entry of default. This case, Inter-City Products Corp. v.

Willey, 149 F.R.D. 563 (M.D. Tenn. 1993), addressed the defendant's motions to dismiss for lack of personal jurisdiction, lack of venue, and insufficient service of process, as well as the defendant's motions to strike certain affidavits filed by the plaintiff in opposition to the defendant's motion to dismiss. At no point does Inter-City Products discuss the setting aside of a default judgment based on a filing error. This case simply does not support the proposition that losing a summons and complaint is not a basis to set aside a default judgment.

However, a number of cases from other jurisdictions support the opposite contention — that a default judgment was properly vacated, or that a motion to vacate such a judgment was improperly denied, where the default resulted from the mislaying or misfiling of the suit papers or case file in the office of the insurer or its counsel. Such a result was reached in the following cases:

- Ellington v Milne, 14 F.R.D. 241 (E.D.N.C. 1953)

A motion to vacate a default judgment was granted where the defendant was insured and the insurer was given the summons and complaint, but by the carelessness or indifference of some employee of the insurer, neither the insurer's legal department nor any officer of the insurer had knowledge of the summons or complaint until after judgment had been entered on the default, when the summons and complaint were found in storage files in the basement of the insurer's offices.

- Toon v Pickwick Stages, Northern Div., Inc., 226 P. 628 (Cal. Dist. Ct. App. 1924)

The court reversed an order denying a motion to set aside a default judgment. The defendant was represented in settlement negotiations before suit by his insurer's claims attorney, and the defendant's secretary, upon receiving the summons and complaint, mailed them to the insurer without an accompanying letter. Thereafter, one of the claims attorney's employees filed

the documents away without calling them to the attorney's attention, who did not know that default had been entered until he overheard a chance remark to that effect, after which he acted diligently. The court concluded that the person solely responsible for the default was an inexperienced employee in the office of the claims attorney and that the defendant's neglect was "excusable."

- Spencer v. American United Cab Association, 208 N.E.2d 118 (Ill. Ct. App. 1965)

The insurance company was notified of action against its insured but, because of loss or misplacement of original notice in insurer's office, no appearance was made in the action and default judgment was taken. The court noted that the trial court had discretion to set aside default and properly did so where it was shown that the defendant had acted promptly and in good faith, intended to defend and show a meritorious defense, and there had been no prejudice to plaintiff in delay of an expeditious trial.

- Triangle Transport, Inc. v. Markel Insurance Co. 794 N.Y.S.2d 363 (Sup. Ct. App. Div. 2005)

The Court determined an insurer had a reasonable excuse for its failure to answer the complaint, as required to support vacatur of default judgment entered against it. Although the insurer had forwarded the insured's pleadings to its claims administrator, those pleadings were lost or incorrectly filed and, accordingly, never assigned to counsel for handling. In addition, the insurer was unaware the action had gone undefended until it received notice of execution on the judgment.

- Parsons v. McCoy, 202 S.E.2d 632 (W. Va. 1973)

The West Virginia Supreme Court upheld the setting aside of a default judgment where the insurer had misfiled the suit. In so doing, the court noted that the majority of the reported cases appear to hold that where an insurance company has misfiled papers, this amounts to

excusable neglect on the part of the defendant. Id. at 636 (citing Annot., 87 A.L.R.2d 870, 879; Toon v. Pickwick Stages, 226 P. 628 (Cal. Dist. Ct. App. 1924); Orange Transp. Co. v. Taylor, 230 P.2d 689 (Idaho 1951); Schuyler v. Board of Ed., 217 N.Y.S.2d 255 (Sup. Ct. App. Div. 1961); Scott v. McEwing, 10 A.2d 436 (Pa. 1940); Hinz v. Northland Milk & Ice Cream Co., 53 N.W.2d 454 (Minn. 1952)).

Therefore, as discussed above, the facts of this case, when viewed in their totality rather than in light of a single sentence from Roche, provide good cause to set aside the entry of default.

C. Equitable Considerations Support Setting Aside the Entry of Default

White Oak was aware the undersigned counsel represented Lexington in connection with this matter long before White Oak instituted the instant action. As outlined above, White Oak's counsel and the undersigned counsel were in repeated contact regarding Lexington's provision of coverage for the underlying medical malpractice action. In fact, this contact began as much as eight months before White Oak filed the Summons and Complaint in this case.

Although the South Carolina Rules of Civil Procedure may not require it, it is common among attorneys to serve a "courtesy copy" of a complaint on a party's attorney when serving the party. White Oak's attorneys did not provide Lexington's South Carolina counsel with a courtesy copy of the suit, nor any other notice that suit had been filed. Moreover, Petitioner's attorneys did not provide Lexington's South Carolina counsel, or Lexington, with notice of the motion for default. Even if the Rules of Civil Procedure do not explicity require it, Rule 402(k) requires that counsel pledge fairness, integrity and civility to opposing parties and counsel.

Other jurisdictions that have considered the issue have not found favor with a motion to enter an order of default against a party whom the moving party knew to be represented by

counsel.

In Owens v. Neely, 866 S.W.2d 716 (Tex. 1993), the Texas Supreme Court set aside a judgment by default, noting that the moving party knew that the defaulting parties were represented by counsel, yet failed to notify their counsel of the hearing on his motion for default judgment. Commenting on that failure of notice, the court stated, "[t]hus, equitable principles could have allowed the trial court to grant a new trial based upon Neely's actions." Id. at 720.

Similarly, in Cook v. Aurora Motors, Inc., 503 P.2d 1046 (Alaska 1972), the court was presented with a motion to dismiss an appeal made exactly thirty days after a judgment was entered and without contacting opposing counsel. The Alaska Supreme Court commented:

> Although it should not be determinative of the case, the court notes that the motion to dismiss was made exactly 30 days after judgment without ever contacting opposing counsel. Even though neither the American Bar Association Canons of Professional Ethics nor the Alaska Bar Rules contain such a specific provision, we feel that the better practice is that outlined in the Code of Trial Conduct of the American College of Trial Lawyers:
>
> > 14(a) . . . When (a lawyer) knows the identity of a lawyer representing an opposing party, he should not take advantage of the lawyer by causing any default or dismissal to causing any default or dismissal to be entered without first inquiring about the opposing lawyer's intention to proceed. Lawyers Code of Trial Conduct No. 14(a), p. 149 (1971-72).
>
> This practice is a highly desired courtesy to the opposing side, which can help avoid unnecessary, time-consuming motions before the court.

Id. at 1050, n.6.

Accordingly, refusing to set aside the entry of default under the circumstances presented by this case would be unjust and result in an inequitable outcome. Cf. Ex Parte Dibble, 279 S.C. 592, 595 310 S.E.2d 440, 442 (Ct. App. 1983) ("Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible."); see

also McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008).[6]

CONCLUSION

Lexington was not properly served with the Summons and Complaint in this case. Additionally, Lexington has shown that good cause exists to set aside the entry of default, and further, that equitable considerations weigh in favor of setting aside the entry of default under the circumstances presented by the case at hand. Accordingly, Lexington respectfully requests the Supreme Court affirm the decision of the Court of Appeals.

[SIGNATURE PAGE ATTACHED]

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[6] In McClurg, the appellant employer and employee moved for relief pursuant to Rule 60 from default judgment, which had been denied by the trial court. The Court of Appeals affirmed the grant of the default judgment. The majority held the appellants met the surprise or excuseable neglect element, but did not satisfy the meritorious defense requirement.

In a separate opinion, Chief Judge (now Justice) Hearn concurred in part and dissented in part. The Chief Judge stated she would have reversed the denial of the Rule 60 motion. An issue pertaining to service of a courtesy copy of the pleadings upon the carrier existed in that case, which the Chief Judge closely analyzed. The Chief Judge recognized that there exists an inherent fairness in advising the carrier and/or its representative of a lawsuit after the plaintiff and the carrier had engaged in substantive pre-suit settlement discussions/negotiations. Id. at 580-84, 687 S.E.2d at 96-98 (observing such fairness obviates the prospect of a "gotcha" moment for defense counsel after the parties had been engaged in good faith discussions).

While McClurg is not on all fours with the instant factual or procedural scenario, it is similar enough that Respondent maintains the analytical foundation has been laid by Chief Judge Hearn's opinion to serve as a platform for a holding by this Court regarding the necessity for courtesy copies of pleadings, or – at the very least – some sort of substantive notice to opposing counsel, where there has been active pre-suit negotiation between counsel for prospective litigants. The trial bench and bar would be edified and well-served by such an opinion.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT LEXINGTON INSURANCE COMPANY

FINAL BRIEF OF RESPONDENT

Columbia, South Carolina
February 13, 2013

THE STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge
J. Mark Hayes, II, Circuit Court Judge
J. Derham Cole, Circuit Court Judge

Opinion No. 4863 (S.C. Ct. App. Filed August 10, 2011)

White Oak Manor, Inc,
and White Oak Manor–York, Inc.,.....Petitioners,

v.

Lexington Insurance Company,
Caronia Corporation and
Certain Underwriters at Lloyd's London,
subscribing to Certificate No.
UP02US382030,.....Defendants,

of Whom Lexington Insurance Company is
the.....Respondent.

PROOF OF SERVICE

I hereby certify that I served Respondent's Brief upon Respondents White Oak Manor, Inc. and White Oak Manor-York, Inc., by placing a copy in the United States mail, postage prepaid, to counsel of record, Matthew A. Henderson, Esquire and Joshua M. Henderson, Esquire, Henderson Brandt & Vieth, PA, 360 E. Henry St., Suite 101, Spartanburg, South Carolina 29302, on February 13, 2013.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT LEXINGTON INSURANCE COMPANY

PROOF OF SERVICE - RESPONDENT'S BRIEF

Columbia, South Carolina
February 13, 2013