THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

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Appellate Case No. 2021-000797

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Saundra R. Hoffman, ..... Appellant,

v.

State Farm Fire and Casualty Company, ..... Respondent.

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# FINAL BRIEF OF RESPONDENT

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WHELAN MELLEN & NORRIS, LLC

Robert W. Whelan, Esquire
Post Office Box 939
Charleston, SC 29402
(843) 998-7099

*Attorneys for Respondent*

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## COUNTER-STATEMENT OF THE CASE

Four years and nine months after the subject water loss, Appellant Saundra Hoffman filed suit against State Farm Fire and Casualty Company ("State Farm") in Richland County. (R. 24.)[1] On February 8, 2019, State Farm filed a motion to transfer venue[2] to Lexington County and for dismissal of Hoffman's claim for breach of contract accompanied by a fraudulent act because fraud was not alleged with particularity. On June 10, 2019, State Farm's motion was heard by Judge Casey Manning. (R. 21). At the hearing, Hoffman's counsel offered to cure the issues raised by State Farm's motion to dismiss through an amended pleading. (R. 54)[3] However, no amendment was made after the June 10 hearing, and on August 21, 2019, Judge Manning issued an order finding venue should be transferred to Lexington County and providing "the plaintiff shall have thirty days from the date of this order to amend her complaint to state her cause of action for breach of contract accompanied by a fraudulent act with more particularity." (R. 22.)

Hoffman did not amend her complaint to state her cause of action "with more particularity" within thirty days of August 21. On November 6, 2019, State Farm moved for summary judgment,

[1] State Farm takes issue with the unsupported statements in Hoffman's statement of the case. For example, the unsupported statement on page two that "Plaintiff did not object to the venue being changed and Judge Manning permitted Hoffman to amend her pleadings to add more specificity to her fraud allegations in the motion hearing" is an inaccurate description of Hoffman's position, as is reflected by Judge Manning's subsequent Form 4 Order stating he had taken the motion to transfer venue under advisement. (R. 20.)

[2] In her complaint, Plaintiff alleged she resided in Richland County as opposed to Lexington County. (R. 24.)

[3] The parties have not obtained the June 10, 2019, hearing transcript. However, State Farm's November 6, 2019, motion for summary judgment stated, "At the hearing plaintiff's counsel offered to cure the deficiency through an amended pleading." (R. 54.) Hoffman did not dispute this statement.

in part based upon Hoffman's failure to amend her complaint. (R. 54.) However, Hoffman still did not amend or attempt to amend her complaint, nor has she ever done so.

## COUNTER-STATEMENT OF FACTS

Relevant facts germane to the Court's decision are below.[4]

- On January 8, 2014, a pipe burst over Saundra Hoffman's garage, damaging contents in the garage and a room over the garage. Hoffman testified she called her State Farm agent about the loss on January 8. (R. 60; Br. of Appellant at 4.)

- On February 4, 2014, Hoffman "formally fil[ed] a claim" for the loss against State Farm. (Br. of Appellant at 11.)

- On or about January 6, 2016, Hoffman submitted a list of approximately fifty items she claimed were damaged to State Farm. State Farm adjusted and paid for these items on or about March 4, 2016. (R. 91)

- January 8, 2017 marked three years from the date of loss, and Hoffman's notice to her State Farm agent.

- In March or April 2017, Hoffman alleged she called State Farm and asked whether she could add additional unspecified items to the claim. She testified State Farm said she could. (R. 72-73.)

- In October 2017, Hoffman submitted a claim for over seven hundred (700) additional items she had not previously told State Farm about. She claimed many of these items were wet clothes she placed in garbage bags and stored in her attic for over three years. (R. 87.)

[4] Hoffman's statement of the facts also contains numerous statements unsupported by the record. These include Hoffman's claim that on November 9, 2015, "the adjuster called the Plaintiff back … NOT, as the Defendant alleged in their Motion for Summary Judgment, a phone call initiated by State Farm to Hoffman to 'remind her' of a benefits deadline." (Br. of Appellant at 7.) However, Hoffman herself testified the adjuster "called, and she said that she just wanted to touch base with me and remind me that I needed to enter something into my claim by January 8…." R. 70.) Similarly, at page 11 Hoffman claimed she misplaced a "couple of bags of wet clothes" in the attic, and then on page twelve she reduced the number to "a bag of clothes." Contrast this with her deposition testimony where she estimated that "maybe six or seven or eight" bags of wet clothes were put in the attic. (*Cf.* Br. of Appellant at 11, *with* R. 87.) Similarly, attempts to suggest Hoffman informed State Farm of the seven hundred items prior to October 2017 through bald allegations that State Farm communicated with Hoffman "throughout the process" and "throughout 2017" are not supported by the record. (Br. of Appellant at 12.) Other references to the number of photographs submitted, and Hoffman's knowledge, beliefs, and concerns, are similarly unsupported.

- In January 2018 State Farm denied the claim for the seven hundred newly reported items.
- On October 12, 2018 Hoffman filed suit against State Farm. State Farm was served on December 21, 2018. (R. 23.)

## STANDARD OF REVIEW

The appellate courts apply the same standard as the trial court when reviewing a grant of summary judgment. *Woodson v. DLI Props., LLC*, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *King v. Am. Gen. Fin., Inc.*, 386 S.C. 82, 92, 687 S.E.2d 321, 326 (2009) (quoting *Cafe Assoc., Ltd. v. Gerngross*, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991)). "When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004).

Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Id.* Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003).

## ARGUMENT

### I. The Lower Court Correctly Held the Discovery Rule Does Not Save Hoffman from the Statute of Limitations.

#### A. The applicable statute of limitations is three years, and it is undisputed Hoffman filed suit over four years and nine months after the loss.

Hoffman does not contest that each of her causes of action are governed by the three-year statute of limitations set forth in S.C. Code Ann. § 15-3-530. It is similarly undisputed Hoffman did not file this lawsuit until October 12, 2018, over four years and nine months after the January 8, 2014, date of loss. Therefore, the complaint is barred as a matter of law.

#### B. The discovery rule works in tandem with the statute of limitations and cannot save Hoffman in these circumstances.

In determining when a cause of action arose under section 15-3-530, courts must apply the discovery rule. *Rumpf v. Massachusetts Mut. Life Ins. Co*., 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004). "Under this rule, a cause of action accrues for purposes of the statute of limitations when a plaintiff has notice that he **might** have a remedy for a harm." *Id.* (emphasis added). The statute runs from the date the injured party either knows or should have known by the exercise of **reasonable diligence** that a cause of action arises from the wrongful conduct. *Id.* (emphasis added). And the words "reasonable diligence" mean "that the injured party **must** act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party **might exist**." *Dean v. Ruscon Corp*., 321 S.C. 360, 468 S.E.2d 645, 647 (1996) (emphasis added). "Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial." *Id.*

The discovery rule does not support Hoffman's position. The record demonstrates (1) Hoffman knew she had a property damage loss on January 8, 2014; and (2) Hoffman knew she

had property insurance coverage for that damage, called State Farm on the date of loss, and formally filed a claim a month later. She certainly knew of her right to benefits under the contract at the time she called State Farm and made a claim. Hoffman is charged with knowledge of South Carolina's three-year statute of limitations. *City of Myrtle Beach v. Juel P. Corp*., 337 S.C. 157, 179, n. 11, 522 S.E.2d 153 (Ct. App. 1999) ("Ignorance of the law, which everyone is bound to know, excuses no man.") (quoting Black's Law Dictionary 573 (5th ed. 1979)), *rev'd on other grounds* 344 S.C. 43, 543 S.E.2d 538 (2001). In January 2017 (*i.e.,* three years after the loss) Hoffman knew she had not recovered for more than 700 items of personal property, yet she did nothing. In fact, she did not even *report* these 700 items of personal property to State Farm until long after the statute of limitations elapsed, and she did not file suit until October 2018, well over four years after it elapsed. In short, Hoffman was not "diligent" under any reasonable construction of the word.

### C. Hoffman's proposed rule runs counter to the principles behind the statute of limitations and the discovery rule.

The purpose behind both the statute of limitations and the discovery rule is to require a plaintiff to act with promptness and diligence. "Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *Carolina Marine Handling Inc. v. Lasch*, 363 S.C. 169, 175, 609 S.E.2d 548, 552 (Ct. App. 2005) (quoting *Moates v. Bobb*, 322 S.C. 172, 470 S.E.2d 402 (Ct. App. 1996)). In this vein, limitations provisions "provide potential defendants with certainty that after a set period of time, they will not be [haled] into court to defend time-barred claims" and "discourage plaintiffs from sitting on their rights." *Id*. at 175-76.

The discovery rule exists to protect the diligent plaintiff who, despite her reasonable efforts, is unaware of a potential right of action against a defendant. *Moriarty v. Garden Sanctuary Church,*

341 S.C. 320, 534 S.E.2d 672 (2000) (noting "the discovery rule exists to avoid the harsh and unjust result of closing the courtroom doors to a plaintiff whose 'blameless ignorance' resulted in a failure to pursue a cause of action within the limitations period"). However, the discovery rule does not operate to protect a plaintiff like Hoffman who, despite knowledge of a potential cause of action, fails to act with reasonable diligence or take appropriate action to protect her rights. *Id.* ("The limitations period is intended to run against those who are neglectful of their rights and who fail to exercise reasonable diligence in enforcing their rights.").

Hoffman contends the law enables her to sit on her hands in perpetuity without informing her insurer of a loss. And whenever she chooses to make a claim for those items—in this case nearly four years after the loss—she posits the statute of limitations provides an additional three years after the denial of such a claim to bring suit. Under Hoffman's theory, she could have waited as long as she wanted—she argued to Judge Dickson she could have waited *ten years*—to inform the insurance company of a right to benefits under the insurance contract before the statute of limitations commenced. (R. 48)

In fact, Hoffman says she ***still*** has multiple boxes of damaged items she still hasn't looked through. (*See*, R. 67 (noting there are still "many boxes [that] got wet [and] I haven't even looked through those boxes").) Just as she did with the seven hundred items submitted nearly four years after the loss, Hoffman is keeping her options open, stating that looking through the boxes to determine what is damaged "is something I'll get to down the road, you know, if I have time." (R. 67-68.)[5] As long as State Farm remains unaware of her damaged items, she argues, it cannot adjust her claim and the statute of limitations can never begin. And, according to Hoffman's theory, the

[5] In October 2017 when submitting the seven hundred plus new items to State Farm, Hoffman told State Farm that, if it would not pay her what she was looking for, she would continue adding items to the claim. (R. 91-92.)

law will provide her a completely new statute of limitations "down the road" whenever she gets time to see what else was damaged. She also would be free to add other items she knows about but has thus far chosen not to request payment for including: "my pictures," "the kids' toys and stuff," "a lot of my husband's stuff that I just threw away," "costume jewelry," "Bowflex" exercise equipment, and exercise weights. (R. 68, 86, 92)

Hoffman's argument sets a dangerous precedent and flies in the face of the purpose of statutes of limitation and the discovery rule. Her argument does not stimulate a plaintiff to act promptly; on the contrary, it rewards a plaintiff's apathy while depriving a defendant of certainty. The discovery rule should be a shield for an uninformed Plaintiff, not a sword to excuse lethargy. Endorsing Hoffman's interpretation of the discovery rule would enable a would-be litigant to turn the principles behind the statute of limitations on their head: doing the opposite of "stimulat[ing] activity, punish[ing] negligence, and promot[ing] repose," and should be rejected. *Carolina Marine Handling Inc.* at 175, 609 S.E. 2d at 552.

### D. As an additional sustaining ground, this Court could find the statute of limitations began to run no later than the date Hoffman filed a formal claim with State Farm.

As an additional sustaining ground, the Court could find the statute of limitations ran three years after the date of Hoffman's "formally filing a claim on February 4, 2014." (Br. of Appellant at 11). *See ION, LLC v. Town of Mt. Pleasant,* 338 S.C. 406, 526 S.E.2d 716 (2000) (confirming courts may affirm for any additional sustaining ground appearing the record). Hoffman claims the circuit court erred by holding the statute of limitations began to run on January 8, 2014, the day she discovered her loss and notified her insurance agent. Even if this Court does not accept this argument, the Court could also affirm the circuit court by holding the statute began to run no later than February 4, 2014—when Hoffman admits she made a formal claim for benefits—or even

May 5, 2014—90 days after her formal claim for benefits. (*See Compl.*, R. 26 (citing S.C. Code Ann. § 38-59-40 (providing for potential attorneys' fees when an insurer has not paid a claim within ninety days)). Hoffman's suit was filed well over four years after either scenario, so the Court's use of either date as the trigger for the statute of limitations would provide additional sustaining grounds for the lower court's ruling.

### E. Hoffman's claim is not saved by the doctrine of equitable estoppel or equitable tolling.

#### *1. Hoffman's equitable estoppel and/or equitable tolling theory has not been preserved for appellate review.*

To successfully preserve an issue for appellate review, the issue must be: "(1) raised and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007) (quoting Jean Hoefer Toal *et al.*, *Appellate Practice in South Carolina,* 57 (2d ed. 2002)).

Hoffman did not argue to the circuit court State Farm was estopped to rely on the statute of limitations. The words "equity" or "estoppel" or their derivatives were not uttered in Hoffman's fifteen-page opposition brief or during the December 17, 2020, hearing. Similarly, no argument was made at the hearing concerning reliance—one of the key concepts for any estoppel theory—and her fifteen-page brief only mentioned the word "rely" or its derivatives in Section III, which attempted to show she appropriately pleaded the elements of fraud. (Br. of Appellant at 6-12). In short, Hoffman never raised equitable estoppel or tolling until after the trial court issued its ruling. Accordingly, this argument is not preserved for appellate review.

#### *2. Equitable tolling does not apply under these facts.*

Even if Plaintiff argued equitable tolling in the trial court, which she did not, it does not apply under these facts. Equitable tolling is a doctrine that is "rarely applied" and "reserved for extraordinary circumstances." *See, e.g.*, *American Legion Post 15 v. Horry Cnty*, 381 S.C. 576, 674 S.E.2d 181, 184 (Ct. App. 2009). Our courts have recognized "equitable tolling is a doctrine that should be used sparingly." *Hooper v. Ebeneezer Senior Servs & Rehab Ctr.*, 386 S.C. 108, 687 S.E. 2d 29 (2009) (quoting American Jurisprudence). Moreover, it is Hoffman's burden to prove facts showing this rare and extraordinary doctrine should be applied. *Id*.

Equitable tolling is available only to a "diligent plaintiff," and no reasonable fact finder could find an insured who waits three years and nine months to submit a claim for 700 items and another ten months after denial to file suit was diligent. *See American Legion Post 15* at 583, 674 S.E.2d at 184. Additionally, equitable tolling is only applicable in those rare cases where the delay in filing suit "has been induced by the defendant's conduct." *Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55, 488 S.E.2d 327 (1997). Such inducement must consist either "of an express representation that the claim will be settled without litigation or conduct that suggests a lawsuit is not necessary." *Id.* (quoting *Wiggins v. Edwards*, 314 S.C. 126, 130, 442 S.E.2d 169, 171 (1994)).

Many times the South Carolina Supreme Court and Court of Appeals have affirmed summary judgment on equitable estoppel where a plaintiff claimed an adverse party tricked her into not filing suit. In *Black v. Lexington Sch. Dist. No. 2*, cited by Hoffman in her initial brief, the South Carolina Supreme Court held express statements by an adverse party conveying an interest in settling a case pre-suit were insufficient to create a question of material fact to defeat summary judgment on the statute of limitations. 327 S.C. 55, 488 S.E.2d 327 (1997). Similarly, the Supreme Court held actual settlement negotiations concerning a putative suit were insufficient as a matter of law to justify denial of summary judgment. *Gadsden v. Southern Railroad*, 262 S.C. 590, 206

S.E.2d 882 (1974); *see also, Vines v. Self Mem. Hosp.*, 314 S.C. 305, 443 S.E.2d 909 (1994) (adversary's assistance of the plaintiff with completing claims forms was not sufficient to defeat summary judgment); *Moates v. Bobb*, 322 S.C. 172, 470 S.E.2d 402 (Ct.App.1996) (fact an insurer wrote plaintiff expressing a goal of settlement and requested information so the parties could "get moving on settlement" was not sufficient to support equitable tolling).

As was the case in *Black, Gadsden, Vines,* and *Moates,* Hoffman simply cannot meet her burden of proving State Farm made "an express representation that the claim will be settled without litigation or conduct that suggest a lawsuit is not necessary." Hoffman's delay in submitting her 700-item list was not caused by State Farm. When asked why it took her two years to submit the first fifty items, she explained it was due to the volume of items, the difficulty of listing them, and her health condition. (R. 75-76.) As for why it took three years and nine months to submit the second set of items, Hoffman's testimony was similar. (R. 76.)[6] And the conduct complained of in Hoffman's Initial Brief—that State Farm had a twenty-minute phone conversation with Hoffman three years and nine months after the loss and participated in evaluating her claim—occurred after the statute of limitations expired and could not have been relied upon to Hoffman's detriment.

This is not a situation in which State Farm informed Hoffman she need not file a suit, misrepresented the statute of limitations, or otherwise led her to believe no suit was necessary. In fact, Hoffman's brief admits State Farm "never discussed the statute of limitations with Ms. Hoffman at any time." (Br. of Appellant at 4 (quoting deposition testimony of T. Edwards).) Indeed, the estoppel section of her brief reveals she is, at bottom, complaining State Farm did not inform her when the statute of limitations would expire. (Br. of Appellant at 15 ("The Plaintiff

[6] Hoffman also described a potential computer glitch on State Farm's website that was fixed after "maybe a couple of weeks." (R. 76.)

testified that …she did not know what the statute of limitations was for her claim…[and] I just assumed that since she told me about the opening of the claim, that she would tell me if the claim was coming near the closing.")).

In sum, even if her equitable estoppel argument was preserved, which it was not, Hoffman has not presented evidence to satisfy her burden, and this case does not present the rare and exceptional circumstances needed to give rise to equitable tolling.

### F. The loss settlement provisions providing insureds may recover additional benefits if they replace property within two years does not alter the statute of limitations or the discovery rule.

At page three of her brief Hoffman claims under the dwelling coverage (coverage A) an insured "must" repair or replace the property within two years, but she claims that for personal property (coverage B) there is "no time limitation." (Br. of Appellant at 3.) Hoffman appears to suggest a perceived difference in the loss-settlement provisions applicable to dwelling coverage and personal property saves her from the statute of limitations. This argument fails not only because the difference she points to doesn't exist, but also because the replacement cost time limit has no bearing on the statute of limitations.

First, Hoffman is mistaken in her assertion losses are settled differently under dwelling and personal property coverages. The loss settlement provisions are contained at pages eleven through thirteen of the policy booklet. (Policy pp. 11-13, R. 110) The dwelling coverage provides for actual cash value payments of damaged property. (Policy p. 11, R. 110) After repair or replacement of the damaged property, the insured may become entitled to recover the depreciated amounts up to the actual replacement cost. But, to receive these additional benefits, the insured "must complete the actual repair or replacement of the damaged part of the property within two years after the date

of loss."[7] (Policy p. 11, R. 110) Thus, if an insured recovered actual cash value payments but chose not to repair or replace her property within two years of the loss, she would be ineligible to recover the additional replacement cost benefits.

Similarly, personal property is addressed in section B1 "Limited Replacement Cost Loss Settlement." For most items "[u]ntil repair or replacement is completed, we will pay only the cost to repair or replace less depreciation." (Policy p. 12, R. 110) Again, an insured would not be entitled to recover replacement cost benefits unless the property was "repaired or replaced within two years after the date of loss." (Policy p. 12, R. 110) So, Hoffman's claim that there is a "time limitation" for dwelling coverage but not for personal property is simply wrong.

Second, the deadline to replace property to obtain replacement cost benefits under the contract, compared to the statute of limitations, are apples and oranges. The statute of limitations addresses the time Hoffman has to file suit against State Farm and is a function of South Carolina law. On the other hand, the time within which to obtain replacement cost benefits is imposed by the contract. Although the time within which to obtain replacement costs may limit an insured's recovery of certain policy benefits, it has no bearing on whether or when an insured must file suit.[8]

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[7] The entire sub-paragraph at issue is below. Hoffman's brief creates confusion by citing only a portion of it.

> (3) to receive any additional payments on a replacement cost basis, you must complete the actual repair or replacement of the damaged part of the property within two years after the date of loss, and notify us within 30 days after the work has been completed.…

[8] In fact, the Policy requires that any suit for benefits must be started within one year after the date of the loss or damage. (Policy p. 14, R. 111) However, under the South Carolina Code section 15-3-140, this provision could not be enforced because it would act to shorten the statute of limitations. Nevertheless, section 140 makes clear that the plaintiff's suit would still have to be brought within the statute of limitations. S.C. Code Ann. § 15-3-140 (holding an "action may be brought notwithstanding such clause, provision or agreement **if brought within the time prescribed by the statute of limitations** in reference to like causes of action.") (emphasis added).

Indeed, Hoffman has been unable to point to any case law or other authority suggesting a deadline to replace property under the policy could somehow eliminate the statute of limitations or discovery rule. No such authority exists, and her argument is unavailing. The lower court's order should be affirmed.

## II. The Lower Court Correctly Ruled State Farm Was Entitled to Judgment as a Matter of Law With Respect to Hoffman's Cause of Action for Breach of Contract Accompanied by a Fraudulent Act.

Hoffman does not challenge the fact Rule 9 of the South Carolina Rules of Civil Procedure required her to plead her allegations of fraud with particularity. Rather, she claims her complaint met this standard.

### A. Judge Manning's June 10, 2019, un-appealed order is the law of the case and Hoffman's non-compliance with the order warranted dismissal.

Hoffman continues to disregard Judge Manning's June 10, 2019, order stating she "**shall** have thirty days from the date of this order to amend her complaint to state her cause of action for BOCAF with **more** particularity." (R. 22 (emphasis added)). She did not and has not appealed that order and it remains the law of the case. *See Hudson v. Lancaster Convalescent Ctr.*, 393 S.C. 1, 709 S.E.2d 65, 68 (Ct. App. 2011) ("Appellant may not seek relief from the prior unappealed order of the circuit court because the order has become the law of the case." (quoting *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2000)).

Hoffman argued below the order should be interpreted to mean she had the option of amending the complaint, if she wanted to, but her failure to do so would have no consequence. Judge Dickson correctly rejected such an interpretation, as it would fly in the face of the rules of construction. It is well settled the word "shall" means an action is mandatory. *Spartanburg Buddhist Ctr. of S.C. v. Ork*, 417 S.C. 601, 790 S.E.2d 430 (Ct. App. 2016) ("Ordinarily, use of

the word "shall" means an action is mandatory."); *Wilson v. Charleston Cnty. Sch. Dist.*, 419 S.C. 442, 798 S.E.2d 449, n. 8 (Ct. App. 2017) (same). Hoffman's interpretation violates the well-understood meaning of "shall"; her conclusion that amendment was optional is the exact opposite of shall's mandatory meaning. Additionally, the rules of statutory construction require that language be given some effect. It is axiomatic, for example, the legislature does not intend for its words to be meaningless. *Breeden v. TCW, Inc./Tennessee Exp.*, 355 S.C. 112, 120, 584 S.E.2d 379, 383 (2003) (stating "[e]very word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction." (citation omitted)); *Davenport v. City of Rock Hill*, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993) ("It is never to be supposed that a single word was inserted in the law of this state without the intention of thereby conveying some meaning." (citation omitted)); *State v. Long*, 363 S.C. 360, 610 S.E.2d 809 (2005) (same). And the same must be said of courts. Hoffman's interpretation would write out the entire second section of Judge Manning's order, stripping it of meaning. For this reason, Judge Dickson correctly rejected Hoffman's interpretation. Hoffman's failure to either comply with or appeal Judge Manning's order forecloses her argument that she did not need to state her claim with more particularity.

### B. Regardless, Hoffman's Complaint failed to plead fraud with particularity, supporting dismissal.

Rule 9(b) of the South Carolina Rules of Civil Procedure requires that "[i]n all averments of fraud or mistake the circumstances constituting fraud or mistake shall be stated with particularity." This rule does not only apply to causes of action for fraud but applies to any claim or defense averring fraud. *Hansen v. DHL Laboratories, Inc.*, 450 S.E.2d 624, 316 S.C. 505 (Ct. App. 1994) (holding defense was improperly pleaded because the pleading did not include all the elements of fraud with particularity).

This would also include a cause of action for breach of contract accompanied by a fraudulent act. And while no located decisions of the South Carolina appellate courts have addressed the application of Rule 9 to that specific cause of action, federal courts interpreting South Carolina law have done so. *Neuman v. Levan*, 8:08-03418-HFF, 2009 WL 1856569 (D.S.C. 2009 ("Because Plaintiffs allege breach of contract accompanied by a fraudulent act, they must plead the allegations of fraud with particularity.")[9] Rule 9 serves an important purpose as it: (1) provides defendants with sufficient information to formulate a defense to an allegation of fraud; (2) protects defendants from frivolous suits since allegations of fraud are frequently only advanced for nuisance or settlement value; (3) eliminates fraud actions where the facts are learned after discovery; and (4) protects defendants from harm to their goodwill and reputation. *Id*. (collecting cases and citing primarily *U.S. ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003)).

In *Neuman*, Judge Floyd held that granting a motion to dismiss based on Rule 9(b) was appropriate where, as here, "Plaintiffs failed to allege fraud with particularity and instead resorted to general, conclusory statements." 2009 WL 1856569 at *3. Because the "who, what, when, where, and how" of the alleged fraud were not alleged, the defendant was not "sufficiently on notice of the fraudulent act complained of in the claim for breach of contract accompanied by a fraudulent act" and the motion to dismiss was granted. *Id*. (*quoting U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370 (4th Cir. 2008)).

Like the plaintiff in *Neuman*, Hoffman generally alleged State Farm committed a fraudulent act; however, no fraudulent actions have been pleaded with "particularity." As a result,

[9] Because Rule 9(b) of the South Carolina Rules is the same as the federal rule, federal case law is instructive. *See* S.C. R. Civ. P. 9, *Reporter's Notes* ("All parts of Rules 9(a) through 9(g) conform to the Federal Rules and to present state practice.").

State Farm was not put on "notice of the time, place, and contents of the false representations." *Id*. Moreover, Hoffman still has not explained the who, what, when, or why of the alleged fraudulent statement. Although nine pages of her initial brief concern the elements of fraud and how she claims she meets them, she never explains who it was making a fraudulent statement, when the fraudulent statement occurred, or what was stated that was fraudulent. (Br. of Appellant at 15-24.) Instead, she continues to make vague allegations that fraudulent misrepresentations occurred through "allowing the plaintiff" to submit items and "adjusting the claim." (Br. of Appellant at 16). Thus, she has still failed to meet the purpose behind Rule 9(b) and the lower court's ruling should be affirmed.

## III. The Lower Court Correctly Ruled State Farm was Entitled to Summary Judgment with Respect to Hoffman's Bad Faith Cause of Action.

"Under South Carolina law, an insurer acts in bad faith when there is no reasonable basis to support the insurer's decision." *Helena Chem. Co. v. Allianz Underwriters Ins. Co*., 357 S.C. 631, 594 S.E.2d 455, 462 (2004) (affirming trial court's decision to grant insurer's motion for summary judgment on plaintiff's bad faith claim) (citing *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co*., 321 S.C. 1, 466 S.E.2d 727 (1996). Thus, summary judgment is appropriate on a claim for bad faith—even where an insurer makes an improper coverage decision, provided the insurer had at least one reasonable basis for its decision. *See Jericho State Capital Corp. v. Chi. Title Ins. Co*., 431 S.C. 437, 453, 848 S.E.2d 572 (Ct. App. 2020) (affirming summary judgment on bad faith where insurer denied a covered claim but an unusual factual scenario "presented close policy interpretation issues."); *Poston v. National Fidelity Life Ins. Co*., 303 S.C. 182, 188, 399 S.E.2d 770 (1990) (reversing judgment on bad faith because Insurer's contract interpretation and partial denial did not rise to level of bad faith because policy was susceptible to more than one construction); *Agape Senior Primary Care, Inc. v. Evanston Ins. Co.*, 304 F.Supp.3d 492 (D.S.C.

2018) (granting judgment as a matter of law as to bad faith, even where coverage decision was wrong, because the decision was close and the trial judge considered ruling in the insurer's favor on coverage).

Here, there was a reasonable basis for State Farm's decision. Specifically, Hoffman waited nearly four years to inform State Farm of seven hundred items of personal property, well past South Carolina's statute of limitations. The reasonableness of State Farm's decision is proven by the Circuit Court's ruling. A long-tenured South Carolina Circuit Court judge, Edgar Dickson, came to exactly the same conclusion as did State Farm. Even if the Court were to determine Judge Dickson misapplied the law in some respect, Judge Dickson's decision below supports the reasonableness of State Farm's decision, and summary judgment as to the bad faith cause of action should be affirmed.

## CONCLUSION

For the forgoing reasons, Respondent respectfully requests this Court affirm the judgment in State Farm's favor.

Respectfully submitted,

WHELAN MELLEN & NORRIS, LLC

By: s/*Robert W. Whelan*

Robert W. Whelan
SC Bar No. 71174
E-Mail: robbie@whelanmellen.com
Post Office Box 939
Charleston, SC 29402
(843) 998-7099

Attorneys for Respondent

Charleston, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

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Appellate Case No. 2021-000797

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Saundra R. Hoffman, ..... Appellant,

v.

State Farm Fire and Casualty Company, ..... Respondent.

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**CERTIFICATE OF COUNSEL REGARDING RESPONDENT'S FINAL BRIEF**

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I, the undersigned, certify that Respondent's Final Brief comply with Rule 211(b), SCACR.

WHELAN MELLEN & NORRIS, LLC

By: s/*Robert W. Whelan*
Robert W. Whelan
SC Bar No. 71174
E-Mail: robbie@whelanmellen.com
Post Office Box 939
Charleston, SC 29402
(843) 998-7099

Attorneys for Respondent

Charleston, South Carolina

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