NO. A21-0761

State of Minnesota
In Supreme Court

HISCOX INSURANCE COMPANY,

Appellant,

v.

GLEN EDIN OF EDINBURGH ASSOCIATION,

Respondent.

APPELLANT HISCOX INSURANCE COMPANY'S OPENING BRIEF

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STATEMENT OF THE ISSUE

Does a plaintiff avoid dismissal under Minn. R. Civ. P. 5.04(a) when a defendant files its answer within one year of commencement of the action?

This issue was addressed in the district court's March 9, 2021 Order Dismissing Case and in the district court's April 22, 2021 Order Denying Motion to Vacate Judgment. The Court of Appeals reversed the dismissal of the action in an April 4, 2022 decision. This Court granted review.

Apposite Authorities:

Ellis v. Doe, 924 N.W.2d 258 (Minn. 2019)

Rhein v. Rhein, 244 Minn. 260, 69 N.W.2d 657 (1955)

Gams v. Houghton, 884 N.W.2d 611 (Minn. 2016)

STATEMENT OF THE CASE

This action arises out of damage to Respondent's property caused by a June 11, 2017 hail storm. (Add. 1). Respondent reported the claim to Appellant Hiscox Insurance Company, Inc. in August 2017, after which the property was promptly inspected. (DOC ID # 36). After the parties reached an agreement on the scope of repair Respondent signed four (4) Sworn Proofs of Loss reflecting total damages of $565,677.19, each of which Appellant paid in full. (*Id.*, Exs. G, H, I). Then, in late 2019—more than two years after the June 2017 loss date—Respondent claimed, for the first time,

that the cedar shake roofs on its property were damaged by hail. (DOC ID #36, ¶¶ 24-25; DOC ID #37, ¶ 5; DOC ID #38, ¶¶ 12-13).

On June 11, 2019—the last possible date to commence suit under the Hiscox policy—Respondent served, but did not file, a complaint alleging breach of contract and seeking declaratory relief. (DOC ID #22, 23). *Twenty-one months later*, the Honorable Jamie L. Anderson, Judge of Hennepin County District Court, dismissed the action pursuant to Minn. R. Civ. P. 5.04(a), due to Respondent's failure to file the action within one year of commencing suit. Respondent moved to vacate the dismissal but the motion was denied: "There is no question that [Respondent's] counsel missed the filing deadline required by Minn. R. Civ. P. 5.04(a)." (Add. 17).

Respondent timely appealed and in an April 4, 2022 decision the court of appeals reversed the dismissal of the action. Appellant timely petitioned this Court for review and the petition was granted.

STATEMENT OF FACTS

A. Respondent Submits a Claim for Hail Damage and Appellant Promptly Investigates and Pays the Claim

This appeal arises out of a claim for hail damage to Respondent Glen Edin of Edinburgh Association's property in Maple Grove, Minnesota that

was allegedly caused by a June 11, 2017 storm (the "Storm"). (Add. 1). The claim was reported to Appellant Hiscox Insurance Company, Inc. on August 1, 2017. (DOC ID # 36). Appellant retained Engle Martin & Associates to independently investigate the claim. (*Id.*). The property was promptly inspected on August 14, 2017 but no hail damage to the roofs of Respondent's property was observed nor did Respondent claim the roofs were damaged during the Storm. (*Id.*). Indeed, Respondent reported a drone was flown over its property to search for hail damage from the Storm but no damage to the cedar shake roofs was observed. (*Id.*).

On August 30, 2017 Sean Miller with J.S. Held LLC inspected the property at Engle Martin's request. (DOC ID # 36, Ex. A). In a September 27, 2017 report Miller concluded "[t]he cedar shake roof is not damaged by this storm." (*Id.*, Ex. A). Consistent with Engle Martin's findings, J.S. Held issued a repair estimate that did not include the repair or replacement of the cedar shake roofs on any of the buildings on Respondent's property. (*Id.*, Ex. B at p. 2 (Scope Recap)).

As the claim progressed Respondent retained Gates General Contractors, Kole Windows and later, Minnesota Exteriors, Inc. to evaluate whether Respondent's property was damaged during the Storm. (DOC ID

#36). None of Respondent's contractors claimed Respondent's property sustained roof damage from wind or hail on June 11, 2017. (*Id.*, ¶ 25). Minnesota Exteriors submitted a repair estimate Respondent that did not include repair or replacement of the cedar shake roofs. (*Id.*, Ex. E). In fact, Respondent's expert *agreed* with JS Held's assessment that the roofs were not damaged by wind or hail during the Storm. (*Id.*, Ex. F (stating Minnesota Exteriors, Inc, "[a]greed with the original JS Held report on those repairs.")).

Having reached an agreement on the scope of repair, Engle Martin sent a Statement of Loss and a Deductible Worksheet itemizing the repair costs for Respondent's property. (DOC ID # 36, Ex. C). Between September 2018 and December 2019, Respondent signed four (4) Sworn Proofs of Loss confirming payments on the agreed-upon scope of repair:

- September 7, 2018, in the amount of $200,820.86;
- January 25, 2019, in the amount of $2,703.13;
- May 10, 2019, in the amount of $285,621.34; and
- December 20, 2019, in the amount of $76,531.86.

(DOC ID # 36, Exs. G, H). Through December 2019, Appellant paid Respondent $565,677.19 for damage caused by the Storm. (*Id.*, Ex. I (Payment History)).

B. Respondent Commences Suit in June 2019

The Summons and Complaint were served on June 11, 2019, two years after the Storm occurred and on the last possible date to commence suit under the Hiscox insurance policy. (DOC ID # 22-23). In June 2019, Respondent demanded appraisal. (DOC ID # 36, Ex. I). Then in October 2019—more than two years after the alleged loss date—Respondent claimed, for the first time, that the cedar shake roofs on its property were damaged during the Storm. (DOC ID #36, ¶¶ 24-25; DOC ID #37, ¶ 5; DOC ID #38, ¶¶ 12-13). A dispute arose over the belatedly reported roof claim and the parties appointed their respective appraisers, but the appraisers could not agree on an umpire and, on October 22, 2019, Respondent filed a Motion to Appoint an Umpire. (DOC ID # 1-2).

On December 5, 2019, the district court issued an Order Appointing Neutral Umpire. (Add.1-3). The Order included final judgment language, located just above Judge Jamie L. Anderson's signature, indicating "LET JUDGMENT BE ENTERED ACCORDINGLY." (Add. 3). Judgment was entered on December 6, 2019. (Add.4). The Court Administrator certified the Order Appointing Neutral Umpire "Constitutes the Entry of Judgment of the Court[.]" (Add. 7). On December 6, 2021, counsel for the parties were

served with a Notice of Filing of Order and Entry of Judgment, again confirming the Order Appointing Neutral Umpire had been filed and that a final judgment dismissing the case had been entered. (Add. 4).

For well over a year after final judgment was entered, there were no proceedings before the district court—nor did Respondent perform any of the actions attendant with the filing of a civil action. Respondent did not attempt to schedule a discovery planning conference. *See* Minn. R. Civ. P. 26.06(a) ("the parties must confer as soon as practicable - and in any event within 30 days from the initial due date for an answer."). Respondent did not prepare a discovery plan. *See* Minn. R. Civ. P. 26.06(b) ("A written report outlining the discovery plan must be filed with the court within 14 days after the conference or at the time the action is filed, whichever is later."). No discovery plan was submitted. No scheduling order was issued. No status conferences with the district court were held. No motions were scheduled or heard. No trial date was assigned—nor was one requested. (Add. 18-19).

On February 26, 2021—over thirteen (13) months after final judgment was entered—Appellant notified Respondent the action was automatically dismissed pursuant to Minn. R. Civ. P. 5.04 (a) because Respondent did not file the action within one year of the June 11, 2019 service date. (Add. 19).

Appellant denied the action was not timely filed. (DOC ID # 35, Ex. C). On March 3, 2021 Respondent blamed the failure to file the action on "a clerical error," and claimed the failure to file the action within one year of service "will not have the effect of dismissing of the action. To be prudent we have sent the initial pleadings into the court today with a correspondence explaining the situation and where the case is at." (*Id.*, Ex. E).

C. The Case is Dismissed Pursuant to Minn. R. Civ. P. 5.04(a)

On March 3, 2021—21 months after the action was commenced—Respondent belatedly filed the Summons and Complaint. (DOC ID # 22-23). In a March 3, 2021 letter to the district court, Respondent described the failure to file the action within one year of commencing suit as "simply an oversight[.]" (DOC ID # 21, 25).

An informal hearing was held on March 9, 2021, after which the district court issued an Order Dismissing Case. (Add. 13-14). The district court noted that "[Minn. R. Civ. P. 5.04] is clear that 'any action…against any party' must be filed. An Answer is not an action against a party, but rather, obviously, filed in defense of an action." (*Id.*). The district court observed "[t]here is no case law that would indicate a motion is sufficient to replace a Complaint for purposes of the filing requirement in [Minn. R. Civ. P. 5.04(a)].

Even in cases where parties have actively litigated (conducted discovery, etc.), but failed to file the action with the Court within one year, the appellate courts have ruled that such cases were rightly dismissed under 5.04(a)." (*Id.*). The Order directed entry of judgment dismissing the case "pursuant to Minn. R. Civ. P. 5.04(a) because of [Appellant's] failure to file the Complaint with the court within one year of commencement." (Add. 14).

Respondent moved to vacate the judgment of dismissal but on April 22, 2021, the district court issued an Order Denying Motion to Vacate Judgment. (Add. 15-20). As the district court concluded, "There is no question that [Respondent's] counsel missed the filing deadline required by Minn. R. Civ. P. 5.04(a)." (Add. 17).

D. The Court of Appeals Reverses

Respondent timely appealed and the court of appeals reversed the dismissal of the action, concluding "the plain language" of Minn. R. Civ. P. 5.04(a) "is not limited to filing a complaint, but would also include filing an answer[.]" (Add. 22).

In reaching that conclusion the appellate court deviated from this Court's decision in *Ellis v. Doe* that "a defense is not an action[.]" *Id.*, 924 N.W.2d 258, 263 (Minn. 2019) (quoting with approval *Ellis v. Doe*, 91 N.W.2d

24, 28 (Minn. App. 2018). Further, the appellate court's conclusion that an answer is an action under the "plain language" of Rule 5.04(a) conflicts with the appellate courts' decision in *MCHS v. Red Wing* that Rule 5.04(a) is "ambiguous" in terms of what must be served to commence an action. *Id.*, 961 N.W.2d 780, 783 (Minn. App. 2021). Finally, the court of appeals' novel interpretation of Rule 5.04(a) would frustrate the effective and efficient case management objectives that spurred adoption of the one-year filing deadline, and would leave district courts with insufficient information with which to effectively manage the cases before them.

STANDARD OF REVIEW

At issue in this appeal is the proper construction of Minn. R. Civ. P. 5.04(a). The interpretation of the Minnesota Rules of Civil Procedure is a question of law that is subject to de novo review. *Gams v. Houghton*, 884 N.W.2d 611, 616 (Minn. 2016). Interpretation of a court rule begins with the rule's "plain language." *Id.* at 616 (quoting *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 601 (Minn. 2014)). If the language of a rule is plain and unambiguous then the plain language will be applied. *Id.* A rule is ambiguous only if the language of the rule is subject to more than one reasonable interpretation. *Id.* The Minnesota Supreme Court "is not bound

by the decision of the court of appeals" on a question of law. *McClain v. Begley*, 465 N.W.2d 680, 682 (Minn. 1991).

ARGUMENT

I. The District Court Properly Dismissed the Action Due to Respondent's Failure to File the Complaint Within One Year of Service

Minn. R. Civ. P. 5.04 (a) states"[a]ny action that is not filed with the court within one year of commencement against any party is deemed dismissed with prejudice[.]" Rule 5.04(a)'s adoption put litigants "on notice of the consequences for failing to file [the] **complaint**[.]" *Gams v. Houghton*, 884 N.W.2d 611, 617 (Minn. 2016) (emphasis added). "[A] case is automatically 'deemed' dismissed with prejudice upon failure to file, or obtain a stipulation, within the 1–year deadline in the rule." *Id.*[1] Consistent with *Gams*, courts have consistently pointed to the timely filing of a complaint as the means by which Rule 5.04(a) is satisfied. *Cole v. Wutzke*, 868 N.W.2d 925, 928 (Minn. App. 2015) (plaintiff violated Rule 5.04(a) "by filing

[1] In *Gams* the district court sua sponte dismissed the action due to Gams' failure to file the complaint within one year of service. *Id.* at 615. The issue on appeal was whether Gams had the right to move to vacate the judgment of dismissal under Minn. R. Civ. P. 60.02. *Id.* This Court determined Rule 60.02 applies to dismissals under Rule 5.04(a). *Id.* at 616.

a complaint more than one year after service[.]"), *aff'd as modified*, 884 N.W.2d 634 (Minn. 2016), *Johnson v. City of Duluth*, 903 N.W.2d 1, 2 (Minn. App. 2017) (plaintiff "fail[ed] to meet the one-year complaint-filing deadline.").[2]

[2] *Gams*, *Cole*, and *Johnson* are among the many cases that have recognized Rule 5.04(a) requires the timely filing of the complaint in order to avoid dismissal. See, e.g., *Makowski v. Children's Minnesota*, No. A20-1371, 2021 WL 3722162, at *3 (Minn. Ct. App. Aug. 23, **2021**) ("Here, appellant's motion to dismiss was filed and decided well before appellants had to file their complaint under rule 5.04(a)."); *Curtin v. RS Eden*, No. A19-1205, 2020 WL 2116570, at *1 (Minn. Ct. App. May 4, **2020**), review denied (July 23, 2020) ("Although Curtin and Plaza's attorney served the complaint, he did not file it with the district court by the deadline set forth in Minnesota Rule of Civil Procedure 5.04(a)."); *Agee v. City of Minneapolis*, No. A19-0771, 2020 WL 1909675, at *2 (Minn. Ct. App. Apr. 20, **2020**), review denied (June 30, 2020) ("A case is deemed dismissed with prejudice if a plaintiff does not file the summons and complaint or obtain a stipulation for a deadline extension within the one-year timeframe provided under the amended rule."); *Luskey v. Eggum*, No. A18-0623, 2019 WL 178521, at *1 (Minn. Ct. App. Jan. 14, 2019), review denied (Apr. 16, **2019**) (affirming denial of Rule 60.02 motion to vacate where plaintiff-appellant "fail[ed] to file the complaint within one year of commencing the action[.]"); *Discover Bank v. Kaufmann*, No. A18-0671, 2018 WL 6837470, at *2 (Minn. Ct. App. Dec. 31, **2018**) ("[R]ule 5.04, which provides that any complaint that is not filed with the district court within one year of service upon the opposing party is 'deemed dismissed with prejudice against all parties unless the parties within that year sign a stipulation to extend the filing period.'"); *Siegle v. Karst*, No. A17-1360, 2018 WL 3014668, at *2 (Minn. Ct. App. June 18, **2018**) ("Any complaint that is not filed with the district court within one year of serving the complaint against any party is 'deemed dismissed[.]'"); *Cornell v. Ripka*, 897 N.W.2d 801, 807 (Minn. App. **2017**) (plaintiff's action "was deemed dismissed upon her failure to file the complaint.").

Consistent with the foregoing authorities, the district court properly dismissed the action due to Respondent's failure to file the Complaint within one year of commencing suit: "There is no question that [Respondent's] counsel missed the filing deadline required by Minn. R. Civ. P. 5.04(a)." (Add. 17).

While Respondent claims it believed Rule 5.04(a) was satisfied when Appellant filed its answer, that is a position Respondent reached for only after it was confronted with the failure to file the Complaint in March 2021 — 21 months after suit was commenced. Respondent's shifting positions confirm this fact. When initially alerted to the automatic dismissal of the action in March 2021, Respondent claimed the failure to timely file the Complaint was "a clerical error" and "simply an oversight[.]" (DOC ID #25; Doc. ID# 35, Ex. E). When Respondent moved to vacate the judgment dismissing the action, Respondent argued it "did not catch" the complaint-filing deadline (DOC ID #40 (Respondent's Reply Br.), p. 5), and that its failure to timely file the Complaint "was an oversight[.]" (*Id.*, p. 7). And when the motion to vacate the judgment was argued, "[Respondent's] counsel said at the hearing, that the failure to file the complaint within one

year of commencement was [Respondent's] counsel's mistake due to a calendaring error." (Add. 17).

The truth of the matter is that Respondent did nothing to engage the district court or advance the court file in the 21 months after suit was commenced: "[T]he Court agrees with [Appellant's] argument that in addition to the final Judgment, the case did not proceed through regular litigation (e.g., no civil cover sheet submitted, no scheduling order issued, no trial date set)." (Add.18-19). Indeed, "[i]t was not until 14 months later [after final Judgment was entered], when [Appellant] filed a letter asking for dismissal, that [Respondent] took action." (Add. 18). Respondent's belief that Rule 5.04(a) was satisfied when Appellant filed its answer is belied by Respondent's inaction in the 14 months after the answer was filed.

II. The Plain Meaning of "Action" Does Not Encompass an Answer

This Court's decision in *Ellis v. Doe* answers the question raised in this appeal: "a defense is not an action[.]" *Id.*, 924 N.W.2d at 263 (citation omitted). *Ellis* held that a tenant asserting the covenants of habitability as a defense to a rent-escrow action need not comply with the notice procedures for eviction actions under Minn. Stat. § 504B.385 (2018). *Id.* The decision turned on the plain meaning of the word "action," which the legislature has

defined as meaning "any proceeding in any court of this state." *Id.* (quoting Minn. Stat. § 645.45(2) (2018)). "'[P]roceeding' encompasses the entire lawsuit and is broader than any single act in a lawsuit." *Id.* (quoting Proceeding, Black's Law Dictionary (10th ed. 2014) (citing Edwin E. Bryant, The Law of Pleading Under the Codes of Civil Procedure 3–4 (2d ed. 1899)) (defining "proceeding" as "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment" and commenting that a proceeding "is more comprehensive than the word 'action.' ").

Applying the plain meaning of "action" and "proceeding" *Ellis* held "the statutory rent-escrow action was intended to be for **affirmative actions** by tenants and does not apply to a habitability defense raised in response to a landlord's eviction action." *Id.* at 263-64 (emphasis added); *id.* at 263 ("[R]eading the rent-escrow statute in context makes it clear that it is intended to be an **affirmative action**, not a habitability defense for a tenant.") (emphasis added). Thus, the tenant's answer, in which allegations supporting the rent-escrow action were denied and the covenants of habitability were raised as an affirmative defense, was not an "action"

requiring the tenant to comply with the statutory procedures for commencing a rent-escrow action. *Id.*

The rule that *Ellis* establishes is clear: an "action" means a claim for affirmative relief and not defenses raised in response to an action. *Id.* at 263-64 ("Accordingly, the more relevant definitions of 'proceeding' support our holding that the statutory rent-escrow action was intended to be for affirmative actions by tenants[.]"). The plain meaning of the word "action" does not encompass a defense to an action; thus, Respondent did not avoid dismissal when Appellant filed its answer. As the district court aptly stated: "An Answer is not an action against a party, but rather, obviously, filed in defense of an action." (Add. 13).

This conclusion is firmly rooted in the Rules of Civil Procedure. An answer is a responsive pleading that states defenses to each claim and admissions or denials of the averments in a complaint. Minn. R. Civ. P. 8.02; see also *Nash v. City of St. Paul*, 11 Minn. 174, 178 (1866) ("An answer must either deny the *facts alleged in the complaint*, or set up new matter by way of avoidance.") (original emphasis). Averments that are not denied in a responsive pleading are admitted. Minn. R. Civ. P. 8.04. Certain affirmative defenses that are not raised in a responsive pleading are waived. Minn. R.

Civ. P. 12.08. Rule 8 and 12 speak to the fact an answer is served in response to an action and does not constitute an action in and of itself.

Courts outside of Minnesota have reached the same conclusion. In *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC*, the California Supreme Court examined the meaning of "action" in determining whether the assertion of an affirmative defense was an action or proceeding for purposes of a contractual attorney fee provision. *Id.*, 3 Cal. 5th 744, 753, 398 P.3d 556, 562 (2017). The court rejected the assertion that an affirmative is equal to or constitutes an action:

> We first address the underlying supposition that the assertion of an affirmative defense equates to or constitutes an action because it is encompassed within the latter. We cannot agree with this reasoning. Even though an action may refer to the "entire judicial proceeding"[citation omitted], this does not mean that each individual occurrence within this process is itself an "action." In this attorney fees context, "courts generally treat the term 'action,' as defined by Code of Civil Procedure section 22, as referring to the *whole* of a lawsuit rather than to discrete proceedings within a lawsuit." [citations omitted] In other words, while an affirmative defense is a "real *part* of any action" [citation omitted], it does not, in and of itself, constitute an "action" for purposes of recovering attorney fees.

Id., 3 Cal. 5th at 753, 398 P.3d at 562 (original emphasis); see also *Tanguilig v. Neiman Marcus Grp., Inc.*, 22 Cal. App. 5th 313, 327, 231 Cal. Rptr. 3d 749, 761 (2018) ("*Mountain Air* addresses whether the contractual term 'any legal

action or any other proceeding' includes the assertion of an affirmative defense to a claim, and holds that it does not.").

Similarly, in *Epps v. 4 Quarters Restoration LLC*, the Michigan Supreme Court examined whether a Michigan statute prohibited an unlicensed builder from "bring[ing] or maintain [ing] an action ... for the collection of compensation...." *Id.*, 498 Mich. 518, 529, 872 N.W.2d 412, 418 (2015) (quoting MCL 339.2412(1)). *Epps* affirmed a court of appeals decision that held the statute "does not bar the compensation itself, but only an 'action' to collect it." *Id.* *Epps* turned on the clear distinction between an action and a defense to an action:

> By contrast, a "defense"…is not an action, such as a complaint, cross-claim, counterclaim, or third-party claim, but rather an assertion made in *response* to an action. Therefore, a party may bring an "action" seeking compensation by filing a complaint and the adverse party may then assert a "defense" as a reason why the complainant should not recover what he or she seeks or otherwise prevail in the action. **An "action" and a "defense" are separate assertions** and are essentially a call and a response, the assertion of the former preceding and triggering the latter. A party bringing an "action" seeks to recover from the opposing party, while a party asserting a "defense" seeks to "diminish" or "defeat" that action.

Epps, 498 Mich. at 530, 872 N.W.2d at 418 (emphasis added).[3]

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[3] Not surprisingly, the states that, like Minnesota, allow a civil action to be commenced by serving the pleadings require the *complaint* be filed with the court—not an answer. That is the rule in **Colorado**. See Colo.R. Civ. P. 303 ("The **complaint must be filed** within 14 days of the service of the summons and not less than 7 days in advance of the return date. If the complaint is not timely filed, the service of summons shall be deemed ineffective and void without notice.") (emphasis added). That is the rule in **Maine**. See Me.R.Civ.P.3 ("[A] civil action is commenced (1) by the service of a summons, complaint, and notice regarding Electronic Service or (2) by filing a complaint with the court. When method (1) is used, the **complaint must be filed** with the court within 20 days after completion of service. … If the complaint or the return of service is not timely filed, the action may be dismissed on motion notice.") (emphasis added). That is the rule in **North Dakota**. See N.D.R.Civ.P. 5(d)(2)(A)(iii) ("The defendant may demand that the plaintiff file the complaint. … If the plaintiff does not **file the complaint** within 20 days after service of the demand, service of the summons is void.") (emphasis added). That is the rule in **North Carolina**. See Nc.R.Civ.P.3(a) ("A civil action may also be commenced by the issuance of a summons when (1) A person makes application to the court stating the nature and purpose of his action and requesting permission to **file his complaint** within 20 days….") (emphasis added). That is the rule in **Vermont**. See Vt. R. Civ. P. 3 ("When an action is commenced by service, the **complaint must be filed** with the court within 21 days after the completion of service upon the first defendant served. If service is not timely made or the complaint is not timely filed, the action may be dismissed on motion.[.]") (emphasis added). And that is the rule in **Washington**. See Wash.Ct.Civ.R.3 ("A civil action is commenced by service of a copy of a summons together with a copy of the complaint. . . or by filing a complaint. Upon written demand by any other party, the plaintiff instituting the action shall pay the filing fee and **file the summons and complaint** within 14 days after the service of the demand or the service shall be void.") (emphasis added).

The foregoing authorities confirm what this Court concluded in *Ellis v. Doe*: that an action is quite different from an answer, which constitutes a response to an action and not a separate, stand-alone proceeding.

III. The Court of Appeals Erred When It Concluded an Answer Is an Action

A. The Court of Appeals Misapplied *Ellis v. Doe*

The court of appeals deviated from this Court's precedent when it concluded Rule 5.04(a) was satisfied when Appellant filed its answer. While the court of appeals noted *Ellis's* broad definition of "action," "encompasses the entire lawsuit and is broader than any single act in a lawsuit[,]" the court erred in its application of that definition. (Add. 25). The appellate court appears to have concluded that because "action" was broadly defined in *Ellis*, the "action" in Rule 5.04(a) encompasses pleadings other than a complaint. (*Id.* ("These definitions conflict with the narrow interpretation offered by [Appellant] and encompass pleadings like the answer filed in this case….")). But as just noted, *Ellis* says the opposite—that defenses raised in response to an action are altogether different than the action to which the defenses respond. *Ellis* at 263 ("[A] defense is not an action.") (citation omitted).

Under the doctrine of stare decisis, the court of appeals is required to "adhere to former decisions in order that there might be stability in the law." *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 406 (Minn. 2000), review denied (Minn. Oct. 26, 2005). The court of appeals has no authority to overrule decisions of the supreme court. *Mueller v. Theis*, 512 N.W.2d 907, 912 (Minn. App. 1994), review denied (Minn. Apr. 28, 1994). The court of appeals deviated from *Ellis'* holding and that is reason enough to reverse.

B. The Court of Appeals' Interpretations of Rule 5.04(a) Are Irreconcilably Inconsistent

The court of appeals concluded the filing of an answer satisfies Rule 5.04(a) based on the "plain language" of the rule. (Add. 22, 24). Yet in *MCHS v. Red Wing*, the court of appeals determined Rule 5.04(a) is "ambiguous" in terms of what must be served to commence an action: "Rule 5.04(a) is therefore ambiguous, and we must determine whether there is any event not listed in rule 3.01 by which an action is commenced for purposes of rule 5.04(a)." *Id.*, 961 N.W.2d 780, 783 (Minn. App. 2021). The appellate court's interpretations of Rule 5.04(a) in *MCHS* and in the case at bar are mutually exclusive—they cannot both be true. Respectfully, Rule 5.04(a) cannot be simultaneously ambiguous with respect to what commences the one-year

filing deadline yet unambiguous with respect to what must be filed to satisfy the filing deadline. In any event, the appellate court's conclusion that an action encompasses an answer is inconsistent with *Ellis v. Doe* and must be reversed.

C. A Boilerplate Request for Attorney's Fees and Costs Is Not a Claim for Affirmative Relief

The court of appeals again deviated from established precedent when it concluded that an answer which includes a boilerplate request for attorney's fees, costs and disbursements constitutes a claim for affirmative relief. (Add. 25). As just noted, there is a clear distinction between claims for affirmative relief (i.e., an "action") and defenses to an action. *Ellis*, 924 N.W.2d at 263-64. Further, this Court determined long ago that a request for attorney fees and expenses in an answer does not constitute a clam for affirmative relief. See *Rhein v. Rhein*, 244 Minn. 260, 263, 69 N.W.2d 657, 660 (1955).

Rhein held that a request for attorney's fees and expenses in an answer filed in response to a divorce proceeding did not constitute a demand for affirmative relief that precluded the plaintiff from voluntarily dismissing the

action. *Id.* Central to the decision was the Court's definition of affirmative relief:

> [T]hat for which a party might maintain an action entirely independent of the plaintiff's claim, and which he might proceed to establish and recover even if plaintiff abandoned his cause of action, or failed to establish it. In other words, the answer must be in the nature of a cross-action, thereby rendering the action defendant's as well as plaintiff's.

Id., 69 N.W.2d at 659 (quoting *Koerper v. St.P. & N.P.Ry.Co.*, 40 Minn. 132, 134, 41 N.W. 656 (1889)). "A demand for affirmative relief cannot be implied or assumed." *State by Mattson v. Goins*, 286 Minn. 54, 59, 174 N.W.2d 231, 234 (1970).

Like the defendant in *Rhein*, the boilerplate request for attorney's fees and costs in Appellant's answer does not fit the bill. The defendant in *Rhein* "obviously could not maintain [an action for attorney's fees] independent of an action for divorce or separation[,]" because the defendant, in her answer, "specifically ask[ed] for alimony and support money '*during the pendency of this action*.' *Rhein*, 69 N.W.2d at 660 (emphasis added). So too here. Appellant's answer raised the same garden-variety request for attorney fees and costs that is commonly found in an answer to a civil suit, especially one seeking money damages: "That [Appellant] be awarded the costs,

disbursements and attorney's fees [Appellant] incurs *defending this action*[.]" (Add.12) (emphasis added). Like the defendant in *Rhein*, Appellant's request for attorney's fees and costs was tied to its defense of the action. Appellant's answer did not entitle Appellant to maintain an action independent of Respondent's claim, and that confirms no affirmative relief was sought.

Burt v. State Bank & Tr. Co. of Redwood Falls further demonstrates this distinction. *Id.*, 186 Minn. 189, 242 N.W. 622 (1932). *Burt* involved a dispute over ownership of corporate stock. *Id.* After the plaintiff commenced suit seeking to be adjudged the stock's owner, the defendant served an answer asking that plaintiff's interest be adjudged void and that defendant be declared the owner of the stock. *Id.* The Court concluded that "affirmative relief was effectually demanded by answer." *Id.*, 186 Minn. at 191, 242 N.W. at 622. Unlike the defendant in *Burt*, Appellant did not assert a counterclaim nor seek affirmative relief in its answer; thus, filing Appellant's answer did not satisfy Rule 5.04(a).

D. Neither of the Decisions Cited by the Court of Appeals Is Binding or Persuasive Authority for the Novel Conclusion that An Answer Is an Action

The court of appeals pointed to its decisions in two cases as supporting its novel interpretation of Rule 5.04(a): *Sorchaga v. Ride Auto, LLC*, 893 N.W.2d 360 (Minn. App. 2017), *aff'd on other grounds*, 909 N.W.2d 550 (Minn. 2018), and *MCHS v. Red Wing*, supra, 961 N.W.2d 780. (Add.26). Neither decision supports the conclusion that an answer is an action under Rule 5.04(a).

The court of appeals' reliance on *Sorchaga v. Ride Auto, LLC* rests on a footnote that was not central to *Sorchaga's* holding and is unpersuasive and irrelevant dicta. *Id.*, 893 N.W.2d at 367 n.1. Whether the plaintiff-respondent in *Sorchaga* timely filed her amended complaint was not preserved for appeal, and the appellate court declined to consider the issue. *Id.* at 367 ("Ride Auto admits that it did not raise this issue before the district court. We therefore need not consider this issue."). Whether Rule 5.04(a) was satisfied when the defendant-appellant filed its *answer* was a secondary issue relegated to a footnote, further distancing the issue from the body of the opinion. *Id.* at 367 n.1. The footnote does not "squarely address[] the facts

and legal issues before the court[,]" and is therefore dicta. *Wheeler v. State*, 909 N.W.2d 558, 563 n.1 (Minn. 2018).

Furthermore, to the extent the dicta in *Sorchaga* says the filing of an answer satisfies Rule 5.04(a), *Sorchaga*, which was decided in 2017, is squarely at odds with this Court's decision in *Ellis v. Doe*, which was decided two years later, and is no longer good law with respect to the narrow issue raised in this appeal. Compare *Sorchaga*, 893 N.W.2d at 367 n.1, with *Ellis*, 924 N.W.2d at 263 (agreeing with the court of appeals' conclusion that "a defense is not an action[.]").

MCHS v. Red Wing turns on a unique set of facts that are not present here. The plaintiff in *MCHS* ineffectively served the pleadings but the defendant served an answer without raising ineffective service as an affirmative defense. *Id.*, 961 N.W.2d at 783. The issue was whether the one-year filing deadline commenced and if so, whether the filing deadline ran from the (ineffective) service of the complaint or service of the defendant's answer. *Id.* *MCHS* held the one-year filing deadline began to run when the answer is served—but only after the plaintiff ineffectively served the action and the defendant did not raise ineffective service as an affirmative defense.

Id. at 786. Those unique circumstances are not present here, and *MCHS* is inapposite.

Furthermore, even under the unique facts in *MCHS*, the complaint had to be served—though ineffectively—before the service date of the answer became the date on which the one-year filing deadline began to run. *Id.* at 786. *MCHS* cannot be read to say that service of an answer—without more—commences an action under Rule 5.04(a). *MCHS* lends no support to the notion that filing an answer is tantamount to filing "the action" under Rule 5.04(a). If anything, *MCHS* underscores the fact that an answer is a response to an action and not an action in and of itself.

Neither *Sorchaga* nor *MCHS* supports the conclusion that Rule 5.04(a) is satisfied when a defendant files its answer, and the appellate court exceeded its authority by adopting a novel interpretation of Rule 5.04(a). *See Lake George Park, L.L.C. v. IBM Mid-America Employees Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998) ("This court, as an error correcting court, is without authority to change the law."), *review denied* (Minn. June 17, 1998).

IV. The Court of Appeals' Novel Interpretation Would Frustrate The Objectives that Spurred Rule 5.04(a)'s Adoption

"The supreme court adopted [the] amendment to rule 5.04 at the recommendation of the Minnesota Supreme Court Civil Justice Reform Task Force." *MCHS v. Red Wing*, 961 N.W.2d at 784-85 (citing *Order Adopting Amendments to the Rules of Civil Procedure and General Rules of Practice Relating to the Civil Justice Reform Task Force*, No. ADM10-8051 (Minn. Feb. 4, 2013) ("Order Amending Rule 5"); *Gams*, 884 N.W.2d at 614). The Task Force was established "to review the Civil Justice Forum Report and civil justice reform initiatives undertaken in other jurisdictions and recommend to the court changes that will facilitate more effective and efficient case processing." *MCHS* at 784 (quoting *Recommendations of the Minnesota Supreme Court Civil Justice Reform Task Force*, No. ADM10-8051 (Minn. Dec. 23, 2011) ("Task Force Recommendations"), at 4). "Chief among the task force's objectives was to propose rule changes that would address 'excessive cost and delay that affect both administrative efficiency and the accessibility of our civil justice system.'" *Id.*

"[T]he intent behind rule 5.04(a) was to preserve the benefits of hip-pocket service while also addressing the issues it posed." *MCHS* at 784

(citing Task Force Recommendations at 21–22). "[M]any task force members believe[d] that cases can only be effectively managed when a judge is assigned to the case, and that managing cases in a way that is effective for courts and parties makes a difference in reducing cost and delay." *Id.* "Such judicial case management is, of course, only possible after an action is filed with the district court." *MCHS* at 785.

The novel expansion of Rule 5.04(a) that the court of appeals adopted would frustrate the objectives that spurred the amendment to Rule 5.04(a). Armed with only an answer, the district courts would have scant information with which to effectively and efficiently process the cases before them. How could a district court evaluate jurisdiction, venue or make an appropriate judicial assignment with nothing more than the bare admissions and denials of the allegations in a complaint, and a handful of affirmative defenses? In a notice pleading state such as Minnesota, a defendant's answer simply will not yield sufficient information for the district court to make informed decisions about the case, yet that is precisely the situation the court of appeals' decision would foster.

This is especially true where, as here, the defendant's answer contains none of the allegations establishing a basis for subject matter or personal

jurisdiction, the appropriateness of the forum the plaintiff selected, or any of the substantive allegations describing either the relief the plaintiff seeks or the basis for it. (Add.8-12). The rule the appellate court adopted would deprive district courts of the very information that is needed to effectively and efficiently manage their civil dockets.

Furthermore, the appellate court's novel interpretation of Rule 5.04(a) would allow cases to languish outside of judicial management for well over a year, frustrating the effective case management objective that spurred Rule 5.04(a)'s adoption. As the Task Force recognized: "When cases eventually come into court many years after service, everything is harder to accomplish." (Task Force Recommendations at 22). That is precisely what happened here. Twenty-one months after the action was commenced, Respondent had neither filed the action nor taken any steps to advance the court file. Respondent did not seek court involvement until 14 months after its motion to appoint an umpire was granted—and only after Appellant advised Respondent the action was dismissed. By adopting Respondent's argument the appellate court condones such dilatory tactics, frustrates the concerns Rule 5.04(a) was adopted to avoid, and creates a loophole in the one-year filing rule.

CONCLUSION

Therefore, and based on the foregoing, Appellant Hiscox Insurance Company, Inc. respectfully requests that the decision of the court of appeals be reversed and that the decision of the district court to dismiss the case be affirmed.

Dated: 8/18/2022

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CERTIFICATE OF COMPLIANCE WITH RULE 132.01

I certify that I have reviewed the foregoing Brief of Appellant. This Brief consists of 6,545 words, which is less than the maximum number of words permitted.

Date: 08/18/2022

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CERTIFICATE OF SERVICE

I hereby certify that on 08/18/2022, I electronically filed the foregoing with the Clerk of the Court for the Supreme Court of Minnesota by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/Christopher L. Goodman