THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
WILLIAM H. SEALS, JR., CIRCUIT COURT JUDGE

Appellate Case No. 2025-000796

Gabriel Barnhill and GSB Enterprises, LLC, Respondents,

v.

J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K. Swilley, SMG Partners, LLC, SMS Services, LP, QC Financing, LLC, Heath Causey and Sage Financial Group, LLC, Defendants,

of which J. Floyd Swilley, Laurel Swilley and Heath Causey are the Appellants.

FINAL BRIEF OF RESPONDENTS

Nate Fata (S.C. Bar No. 9866)
Nate Fata, P.A.
Post Office Box 16620
Surfside Beach, SC 29587
843-238-2676
nfata@fatalaw.com
ATTORNEY FOR RESPONDENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. Do the law of the case and error preservation rules bar Appellants' arguments on the March 2016 Order and the June 2024 Order?

II. Did the trial court abuse its discretion in awarding damages, prejudgment interest and punitive damages when the admitted factual allegations and the evidence entered at the September 2024 hearing detail Appellants' deceptive investment schemes that targeted and harmed Barnhill, GSB and 20 other investors in 2011-2014?

III. Did Appellants fail to preserve their arguments when they did not file a Rule 59(e) motion in response to the April 2025 Order which substantially amended the November 2024 judgment to include an award of prejudgment interest and an award under the Uniform Securities Act?

STATEMENT OF THE CASE

Appellants Laurel Swilley and Floyd Swilley (collectively referred to as "Swilley") and Heath Causey ("Causey") appeal the trial court's award of damages, punitive damages and prejudgment interest in favor of Gabriel Barnhill ("Barnhill") and GSB Enterprises, LLC ("GSB") in connection with the damages hearing on September 12, 2024. (R.pp. 55-57). The trial court entered its Order awarding damages and punitive damages on November 4, 2024 and amended the award in its April 2, 2025 Order. (R.pp. 58-63). The judgment in favor of Barnhill against Swilley and Causey is $442,077. The judgment in favor of GSB against Swilley and Causey is $126,250. (R.pp. 58-63).

In Swilley and Causey's prior appeal, the Court of Appeals affirmed the trial court's March 22, 2016 Order ("March 2016 Order") striking their Answer, counterclaim, and pleadings as a sanction for discovery abuse. (R.pp. 33-37). The trial court also granted summary judgment to Gabriel Barnhill and GSB Enterprises LLC on the defendants' counterclaims. (R.p. 17-23).

Barnhill filed a Summons and Complaint on April 25, 2013, alleging a violation of the South Carolina Uniform Securities Act of 2005 ("Uniform Securities Act"), breach of fiduciary duty, accounting, fraud, negligence, conversion, and violation of the Unfair Trade Practices Act in connection with an investment scheme or Ponzi scheme promoting investments in 809 Holdings, L.P. ("809"). (R.pp. 68-91) Swilley and Causey answered and filed a counterclaim that was denied by Barnhill. Swilley and Causey were initially represented by Miles Adler ("Adler") and subsequently represented by John Leiter ("Leiter").

Barnhill and GSB filed a companion case as a derivative action in *Barnhill v. Swilley, et al.*, 2014-CP-26-3362. An Amended Complaint was filed in that action. (R.pp. 150-160). The two actions were later consolidated by a Consent Order filed April 27, 2015. (R.pp. 10-11).

During the litigation, Barnhill filed seven discovery motions and four sanctions motions for discovery abuse. (R.pp. 18-20). The trial court entered multiple orders granting attorney fees and other relief to Barnhill on the sanctions and discovery motions. (R.p. 19). In its March 2016 Order, the trial court struck Swilley's and Causey's Answer and pleadings for discovery obstruction. ("Defendants have for more than two years obstructed the discovery process and have prejudiced plaintiffs' ability to prepare for trial."). (R.p. 20). In addition, the trial court granted summary judgment and judgment on the pleadings against Swilley and Causey as to their counterclaims. (R.pp. 21-23). The trial court denied the Swilley Motions to Set Aside in its May 2016 Order. (R.pp. 27-32). Causey's Motion to Set Aside Summary Judgment was also denied. (R.p. 30). Swilley and Causey then appealed.

In a unanimous decision, the Court of Appeals rejected Swilleys' and Causey's arguments. (R.pp. 33-37). A rehearing was denied on September 8, 2021. (R.pp. 38-39). The South Carolina Supreme Court granted Writ of Certiorari. (R.p. 40). On December 20, 2023, after oral arguments, the South Carolina Supreme Court dismissed the Writ as improvidently granted. (R.pp. 42-43). Remittitur was filed with the Clerk of Court for Horry County on December 29, 2023. (R.pp. 44-45).

The Affidavit of Nate Fata for entry of default was filed on June 9, 2016. (R.pp. 193-194). In addition, the Affidavit of Nate Fata for Entry of Default was filed on January 19, 2024. (R.pp. 195-221). Barnhill's and GSB's Motion for Entry of Default was filed on January 25, 2024. (R.pp. 222-223). An Order of Entry of Default was entered on January 25, 2024. (R.pp. 46-48). Swilley and Causey filed a Motion for Relief from Entry of Default on January 26, 2024. (R.pp. 224-229). Barnhill and GSB filed a Motion for Default Judgment on January 29, 2024, requesting the Court to "...conduct a default damages hearing and award damages,

punitive damages, statutory damages, prejudgment interest and attorney fees and costs." (R.pp. 230-231). Swilley and Causey filed an Amended Motion for Relief from Entry of Default on February 9, 2024. (R.p. 235-240). Swilley and Causey filed their Return to Plaintiffs' Motion for Default Judgment on February 9, 2024. (R.pp. 232-234).

On May 22, 2024, the Affidavit of Gabriel Barnhill was filed in support of Barnhill and GSB's Motion for Default Judgment. (R.pp. 241-259). On June 6, 2024, Barnhill and GSB filed their Memorandum in Opposition to Defendants' Motion for Relief from Entry of Default. (R.pp. 260-291). On June 7, 2024, Barnhill and GSB filed their Memorandum in Support of the Motion for Default Judgment. (R.pp. 292-316). On June 10, 2024, Swilley and Causey filed a Reply to Barnhill and GSB's Memo in Opposition to Defendants' Motion for Relief from Entry of Default. (R.pp. 317-320). Barnhill and GSB filed their Notice of Tender under the Uniform Securities Act on June 14, 2024. (R.pp. 321-347).

On June 18, 2024, the trial court heard Swilley and Causey's Motion for Relief from Entry of Default. (R.pp. 682-704). Barnhill and GSB filed Exhibits for the hearing on June 18, 2024. (R.pp. 498-524). In its Form 4 Order filed June 18, 2024, the trial court denied Swilley and Causey's Motion for Relief from Entry of Default, held Swilley and Causey in default and held that a hearing to determine damages would be scheduled. (R.p. 49). Swilley and Causey filed a Motion to Reconsider on June 28, 2024. (R.pp. 525-526). Barnhill and GSB filed a Memorandum in Opposition thereto on July 12, 2024. (R.pp. 527-529). By Order filed on July 15, 2024, the trial court denied the Motion to Reconsider. ("This motion is decided on the contents of the defendants' motion and the plaintiffs' memorandum in opposition to the motion, without oral arguments."). (R.p. 52).

On September 12, 2024, Judge Seals conducted a damages hearing. (R.pp. 705-819). Gabriel Barnhill testified on behalf of himself and on behalf of GSB as its sole member. September 12, 2024 Transcript, pp. 13-83. (R.pp. 717-787). Respondents' Exhibits 1-12 were entered into evidence. (R.p. 706).

On November 6, 2024, the Court entered an order awarding damages of $112,540 and punitive damages of three times the actual damages, $337,620, to Barnhill and GSB. (R.pp. 55-57). Swilley and Causey filed a Motion to Reconsider and Motion for Post-Judgment Review of Punitive Damages Award on November 12, 2024. (R.p. 594-597). Barnhill and GSB filed a Motion to Alter or Amend the Order on Monday, November 18, 2024. (R.pp. 598-606). Swilley and Causey filed a Memorandum Addressing Both Pending Rule 59(e) Motions. (R.pp. 607-614). On February 7, 2025, Barnhill and GSB filed a Memorandum in Support of their Motion to Alter or Amend the Order filed on November 6, 2024 Pursuant to Rule 59(e) and in Response to Defendants' Motion to Reconsider. (R.pp. 615-647).

On April 2, 2025, the Court entered its Order Addressing Rule 59(e) Motions to Alter or Amend the Order Filed On November 6, 2024 ("April 2, 2025 Order"). (R.pp. 58-63). The April 2, 2025 Order provides, in part:

"The [November 6, 2024] Order is hereby amended to include the following award:

> On the common law causes of action, the Court hereby awards to Barnhill and against Heath Causey, Laurel K. Swilley, J. Floyd Swilley, WCP Limited, LLC and 809 Holdings, LP the following: damages of $87,540, plus punitive damages of $262,620, plus prejudgment interest of $91,917 for a total judgment of $442,077, which is subject to statutory post-judgment interest from November 6, 2024. Heath Causey is not subject to the breach of fiduciary duty or fraud cause of action award. The award for Barnhill under the Uniform Securities Act cause of action is $179,457 ($87,540 in damages, plus $91,917 in interest).

> On the common law causes of action, the Court hereby awards to GSB and against Heath Causey, Laurel K. Swilley, J. Floyd Swilley, WCP Limited, LLC and 809 Holdings, LP the following: damages of $25,000, plus punitive damages of $75,000, plus prejudgment interest of $26,250, for a total judgment of $126,250, which is subject to statutory post-judgment interest from November 6, 2024. Heath Causey is not subject to the breach of fiduciary duty or fraud cause of action award. The total award for GSB under the Uniform Securities Act cause of action is $51,250, $25,000 in damages plus $26,250 of interest.
>
> Because each Plaintiff is entitled to only one recovery, Barnhill is awarded judgment on the common law causes of action in the amount of $442,077, with post-judgment interest from November 6, 2024, against each Heath Causey, Laurel K. Swilley, J. Floyd Swilley, WCP Limited, LLC and 809 Holdings, LP, and GSB is awarded judgment on the common law causes of action in the amount of $126,250, with post-judgment interest from November 6, 2024, against each Heath Causey, Laurel K. Swilley, J. Floyd Swilley, WCP Limited, LLC and 809 Holdings, LP." (R.p. 61).

Although the April 2, 2025 Order substantially altered the November 6, 2024 judgment, no Rule 59(e) Motion was filed by Appellants. Swilley and Causey filed a Motion to Deposit Funds pursuant to Rule 67, SCRCP on April 15, 2025. An Order Granting Motion to Deposit Funds Pursuant to Rule 67, SCRCP was filed on April 22, 2025. (R.pp. 648-649). A Notice of Appeal was filed on April 24, 2025. (R.pp. 650-662). The Notice of Appeal attached the June 6, 2024 Order, the June 18, 2024 Order, the November 6, 2024 Order and the April 22, 2025 Order Granting Motion to Deposit Funds. The Notice of Appeal did not attach the April 2, 2025 Order.

STATEMENT OF FACTS

In the Complaint, Barnhill and GSB allege that in 2011 defendants engaged in a Ponzi scheme in which Barnhill, who was Floyd Swilley's accounting and financial advisory client, and GSB invested no less than $115,000 in 809 and received approximately $2,000 in return. See Complaint, paragraphs 60-80. (R.pp. 74-77). Barnhill was 26 years of age at the time and trusted Floyd Swilley. Complaint, Par. 8. (R.p. 69). The Complaint alleges that the defendants

joined in concert to make various misrepresentations and omissions of material facts in promoting their investment scheme. (R.p. 73). Paragraph 73 of the Complaint alleges, "The defendants orchestrated a Ponzi scheme in which they would raise money for their own start up company, get paid for doing it, and then leave the investors with nothing." (R.p. 75). The Complaint details the specific material omissions of fact and the material misrepresentations in multiple paragraphs. (R.pp. 73-79).

At the September 12, 2024 hearing, Barnhill testified individually and as the sole member of GSB Enterprises, LLC. (R.p. 718, lines 3-10). He testified that in 2011, he individually invested $90,000 in 809 Holdings with a payment in the amount of $41,000 and a payment in the amount of $49,000. (R.p. 718, line 11-p. 719, line 19. Exhibit 2 contains a copy of the $49,000 check. (R.p. 845). The two payments of $41,000 and $49,000 are reflected in Equity Trust Statement, Exhibit 1. (R.pp. 839-844). Barnhill further testified that GSB invested $25,000 in 2011. (R.p. 720, lines 16-22). A copy of GSB's check in the amount of $25,000 is included in Exhibit 2. (R.p. 845). A total of $115,000 was invested by Barnhill and GSB in 809. (R.p. 848). Exhibit 3, Defendants' Supplemental Response to Interrogatories, Int. No. 9, reflects the three Barnhill/GSB investment amounts and dates. (R.p. 848). These three amounts are further reflected on pages 2-3 of Exhibit 6. Order Granting Sanctions Against Defendants filed October 15, 2014. (R.pp. 855-856).

For 809, Swilley and Causey took $369,000 from seven investors. Exhibit 3, pages 5-6. (R.pp. 847-848). Only $42,000 was repaid to 809 investors. Exhibit 7, Response to Interrogatory 4, Defendants Answers to Supplemental Interrogatories. (R.pp. 861-862). Barnhill testified that he, individually, only received one check in the amount of $2,460.00, Exhibit 4, in return from 809 in October 2011. (R.p. 719, lines 20-25; pp. 850-851). GSB received nothing from 809.

Exhibits 1-4 reflect the three payments in 2011 of $41,000, $49,000 and $25,000, totaling $115,000, and the one payment from 809 Holdings in 2011 in the amount of $2,460. (R.pp. 839-851). At the hearing, prejudgment interest at the statutory prejudgment rate was requested and calculated as detailed in Exhibit 5. (R.pp. 852-853).

In late 2011, Swilley and Causey created another investment vehicle, Secured Asset Factoring Exchange ("SAFE"). Amended Complaint. (R.pp. 151-160). As alleged in paragraphs 21-27 of the Amended Complaint, Swilley and Causey siphoned the remaining funds in 809 and transferred them to SAFE. (R.p. 153). The Investor Report, Exhibit 9, reflects the monies raised by Swilley and Causey from 20 SAFE investors in 2011-2014. (R.p. 869). As set forth in Exhibit 8, Swilley and Causey took $896,325 from SAFE investors and only $533,659 has been repaid. (R.pp. 861-862). In their discovery responses entered into evidence, Appellants also disclosed they were involved in another investment scheme, Comcast, in which $45,000 was raised but no amounts were disclosed as being repaid as of October 2014. Exhibit 7, Defendants' Answers to Supplemental Interrogatories, No. 4. (R.p. 862). Finally, as discussed at the hearing and as reflected in Exhibit 11, Swilley was previously involved in an Oklahoma litigation in which investors allegedly lost $125,000,000. (R.pp. 872-890).

As discussed above in the Statement of the Case, this litigation ensued. The trial court found the Appellants obstructed discovery which prejudiced Barnhill and GSB and struck Appellants' Answers, Counterclaims and other pleadings as a sanction. The Court of Appeals upheld the sanctions. Thereafter, a damages hearing was held. Judgment was entered in favor of Respondents in November 2024. In April 2025, the judgment was then substantially amended to also include an award pre-judgment interest and an award under the Uniform Securities Act. This appeal followed.

STANDARD OF REVIEW

Abuse of discretion is the applicable standard of review in this appeal. As a general rule, appellate courts are bound by the factual findings of a lower court made in response to motions preliminary to trial where there has been conflicting evidence or where the findings are supported by evidence and not clearly wrong or controlled by error of law. *City of Chester v. Addison,* 277 S.C. 179, 284 S.E.2d 579 (1981); *Askins v. Firedoor Corp. of Florida,* 281 S.C. 611, 316 S.E.2d 713 (Ct. App. 1984). An abuse of discretion arises when the trial court was controlled by an error of law or when the order is without evidentiary support. *Hillman v. Pinion,* 347 S.C. 253, 554 S.E.2d 427 (Ct. App. 2001).

The trial judge has considerable discretion regarding the amount of damages, both actual and punitive. *Collins Entertainment Corp. v. Coats & Coats Rental Amusement,* 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003); *Kuzniak v Bees Ferry Associates,* 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000). Because of this discretion, review on appeal of damage and punitive damage awards is limited to the correction of errors of law. *Kuzniak,* 342 S.C. at 611, 538 S.E.2d at 32; *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). When reviewing a damages award, the appellate court does not weigh the evidence, but rather, it determines if there is any evidence to support the damages award. *Hutson v. Cummins Carolinas, Inc.,* 280 S.C. 552, 314 S.E.2d 19 (Ct. App. 1984). The appellate court must affirm the trial court's punitive damages finding if any evidence reasonably supports the judge's factual findings. *Carjow, LLC v. Simmons*, 349 S.C. 514, 563 S.E.2d 359 (Ct. App. 2002).

ARGUMENT

I. APPELLANTS' ARGUMENTS ON THE MARCH 2016 ORDER AND THE JUNE 2024 ORDER ARE BARRED AND ARE WITHOUT MERIT.

Swilley and Causey devote much of their Brief to making new arguments against the March 2016 Order and the June 2024 Order (holding them in default) that were never raised to or ruled upon by the trial court. On page 8 of their Brief, Appellants argue that after the Remittitur was filed, "It was only then that competing interpretations as to how the text of the March 2016 Order should be interpreted and applied..." Appellants then use the "competing interpretations" premise as a springboard to argue: (1) the trial court abused its discretion by failing to relieve them of default and default judgment upon the March 2016 Order, (2) the March 2016 Order does not provide a legitimate basis for default or default judgment, (3) default judgment was considered but rejected for an alternative in the March 2016 Order, (4) striking pleadings in the 2016 Order was not done with prejudice, (5) the terms of the March 2016 Order do not nullify or preclude Swilleys' Motion for Summary Judgment, (6) the March 2016 Order limited the sanction against Appellants to striking pleadings and cannot be overruled. As discussed below, none of these arguments was preserved. All are barred by the law of the case. All are without legal support.

A. The law of the case and error preservation rules bar Appellants' meritless arguments on the March 2016 Order.

All of Appellants' "competing interpretations" arguments concerning the March 2016 Order are barred by the law of the case doctrine. In addition, none of the six arguments was preserved. Appellants failed to timely raise any of the six arguments in the trial court, get a ruling on any of the arguments, or file a Rule 59(e) motion articulating any of them.

1. The law of the case bars Appellants' arguments on the March 2016 Order.

In March 2016, the trial court held that Defendants engaged in a well-documented pattern of discovery obstruction, and Plaintiffs were prejudiced by the discovery obstruction. (R.pp. 17-23). As a result, the trial court determined it was a reasonable and appropriate sanction to strike Defendants' Answers and pleadings. Appellants did not appeal the trial court's 2016 ruling that "Defendants have for more than two years obstructed the discovery process and have prejudiced Plaintiffs' ability to prepare for trial." March 2016 Order, p. 4. (R.p. 20). In their prior appeal, Swilley and Causey did not raise any issue as to the appropriateness of the trial court's decision to strike their pleadings based on Defendants' well-documented pattern of discovery obstruction. Thus, the March 2016 Order and May 2016 Order as to the appropriateness of the Court's decision to strike Defendants' Answers and pleadings are based on a well-documented pattern of discovery obstruction and are the law of the case. (R.p. 20). The 2016 Orders are the law of the case and preclude Appellants from arguing at this time that "good cause" exists for them to be relieved from the court ordered consequences of their discovery obstruction nine years ago. At the June 18, 2024 hearing, Judge Culbertson agreed that the law of the case precluded Appellants from being able to file an answer after the Court of Appeals affirmed the March 2016 Order striking their Answers. (R.p. 698, line 5- p. 700, line 18).

An unappealed ruling is the law of the case. *Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996) (stating that where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed grounds will become the law of the case). Under the doctrine, a party is precluded from relitigating, after an appeal, matters that were either (i) not raised on appeal, but should have been, or (ii) raised on appeal, but expressly rejected by the appellate court. See *Bakala v. Bakala,* 252 S.C. 612, 576 S.E.2d

156 (2003) (holding that a family court judge could not overrule the prior unappealed order of another family court judge because it had become law of the case); *In re: Morrison,* 321 S.C. 370 n.2, 468 S.E.2d 651 n.2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal). Any arguments as to the appropriateness of the March 2016 Order striking Appellants' Answers and pleadings for discovery obstruction which prejudiced Barnhill and GSB are barred under the law of the case doctrine.

2. Error preservation rules preclude Appellants' arguments.

Even if the law of the case doctrine did not bar Appellants' current arguments on the March 2016 Order, well established error preservation rules do. "Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Caldwell v. Wiquist*, 402 S.C. 565, 576, 741 S.E.2d 583, 589 (Ct. App. 2013) (quoting *Elam v. S.C. Department of Transportation*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-780 (2004)). If the issue was not ruled upon by the trial court and raised in a post-trial motion, then the issue may not be considered on appeal. *Pelican Building Centers of Horry -Georgetown, Inc. v. Dutton*, 311 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "It is well settled that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial court to be preserved." *Pye v. Estate of Fox,* 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006). *Summer v. Carpenter*, 328 S.C. 36, 43, 492 S.E.2d 55, 58 (1997) (where trial judge did not rule on issue at trial and party did not make Rule 59(e) motion for a ruling, issue is not preserved for review); When a party raises an issue and the judge does not rule on it, the party must file a Rule 59(e), SCRCP, motion in order to preserve the issue for appellate review. *I'on, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) (in discussion of additional sustaining grounds, Court reiterated the "important principle that all parties should raise all necessary issues

and argument to the lower court and attempt to obtain a ruling"); Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court.).

In June 2024, the trial court denied Swilley and Causey's Motion for Relief from Entry of Default and held them in default on a Form 4 Order. ("Defendant Swilley Motion for Relief from Entry of Default is denied.")(R.p. 49). The June 2024 Order also ruled, "A hearing to determine damages and relief sought in plaintiff's complaint will be scheduled."). (R.p. 49). Appellants agreed that a Form 4 Order would suffice. (Court: "Now does anybody need a formal order or will a Form 4 Order suffice?" Ms. Ballard: "I think a Form 4 will suffice as long as you add to it that I can appear and participate by cross examination."). (R.p. 700, lines 21-25). And Swilley and Causey raised only one argument in their June 2024 Rule 59(e) Motion, which is different from the arguments they now make on appeal. In that Motion, Appellants argued, "The Defendants will show that in the absence of directives from the appellate court and in the absence of a controlling rule, there is no law in South Carolina on how long and under what circumstances a defendant has to answer a Complaint following a remand from an appellate court's affirming of an order striking defendants' pleading. It was inappropriate for the Plaintiff to seek and obtain entry of default against the moving party." (R.pp. 525-526). Appellants did not object to Judge Culbertson's ruling on scheduling a damages hearing. (R.pp. 525-526).

The issue raised on appeal must be the same as that which was raised below. Where the appellate argument differs from the trial court argument, the issue is not preserved. *State v. McCray,* 332 S.C. 536, 506 S.E.2d 301 (1998); *Anderson v. Short,* 323 S.C. 522, 476 S.E.2d 475 (1996) (where a decision is based on more than one ground, the appellate court will affirm unless the Appellant appeals all grounds because the unappealed ground will become the law of the case). In addition, the issue must be raised to the trial court with sufficient specificity. *S.C.*

Dept. of Transportation v. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007). "When an issue presented to the circuit court in a civil case is not explicitly ruled upon in the final order, the issue must be raised by an appropriate post-trial motion to be preserved for appellate review." *Siau v. Kassel,* 369 S.C. 631, 632 S.E.2d 888, 894 (Ct. App. 2006).

Because Appellants' current six grounds for argument on the June 2024 Order were not raised in the trial court, or explicitly addressed by the trial court in its Form 4 Order filed June 18, 2024, or raised in Appellants' June 2024 Rule 59(e) Motion, they have not been preserved. In addition, Appellants did not file a Rule 59(e) Motion on the June 2024 Order's ruling that the matter would be scheduled for a damages hearing. Thus, Appellants have failed to preserve any issue as to the appropriateness of the damages hearing.

B. Appellants' arguments on the March 2016 Order are baseless.

Beyond the error preservation analysis, each of Appellants' arguments is without merit and without legal support. The trial court committed no abuse of discretion in denying Swilley and Causey's Motion for Relief from Entry of Default.

1. The trial court did not abuse its discretion in denying Appellants' Motion for Relief from Default.

The standard for granting relief from an entry of default is "good cause" as prescribed by the South Carolina Rules of Civil Procedure. Rule 55(c), SCRCP ("For good cause shown the court may set aside an entry of default..."); see *Wham v. Shearson Lehman Bros., Inc.,* 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989) (explaining the standard for granting relief under Rule 55(c) is "good cause"). "This standard requires a party seeking relief from an entry of default ... to provide an explanation for the default and give reasons why vacation of the default

entry would serve the [396 S.C. 145] interests of justice." *Sundown Operating Co. v. Intedge Indus., Inc.*, 373 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). Swilley and Causey ignore this standard and do not address it in their Brief.

The trial court committed no abuse of discretion or error of law in denying Apellants' request to be relieved of default. Appellants were served with the Complaint in 2013. Swilley's and Causey's Answers (including affirmative defenses) were struck by the trial court in 2016 due to their well-documented pattern of discovery obstruction which prejudiced the Plaintiffs. (R.pp. 17-23). The March 2016 Order was affirmed on appeal and is the law of the case. Swilley and Causey were in default in 2016. See *Stark Truss v. Superior Construction Corp.*, 360 S.C. 503, 509, 602 S.E.2d 99 (Ct. App. 2004) ("Appellants clearly failed to file an answer within thirty days of service of the summons and complaint upon them, and they were technically in default."). Whether to grant relief from entry of default was within the trial court's discretion. *Stark,* 360 S.C. at 510. The issue on appeal is whether the trial court's determination is supportable by the evidence and not controlled by an error of law. *Id.*

Eleven years after this action was commenced, the trial court was well within its discretion to deny Swilley and Causey's request to be relieved from default due to their well-documented pattern of discovery obstruction that prejudiced Barnhill and GSB. Appellants erroneously assert on page 10 of their Brief, "Yet the order itself lacks a basis for default or judgment thereon as part of its sanctioning effect." To the contrary, as a sanction for two plus years of discovery obstruction, the trial court struck Appellants' Answers and pleadings, which rendered them in default. Additionally, a trial court judge in 2024 could not overrule the March 2016 Order and May 2016 Order which struck Appellants' Answers and pleadings. South Carolina case law holds that one Circuit Court judge should not overrule the decision of another

Circuit Court judge in the same matter. See *Tisdale v. American Life Insurance Co.*, 216 S.C. 10, 56 S.E.2d 150 (1950); *Dickens v. Robbins,* 203 S.C. 199, 26 S.E.2d 689 (1943).

Appellants' appeal, if granted, would disregard the law of the case, render meaningless the 2016 decision of Circuit Court Judge McIntosh and the 2021 holding of the Court of Appeals, and eliminate the consequences of their well-documented discovery obstruction over two years which prejudiced Barnhill and GSB. In summary, the interests of justice would not be served by allowing Appellants to answer a Complaint eight years after the trial court struck their Answers based on a well-documented pattern of discovery obstruction which prejudiced Barnhill and GSB.

2. The March 2016 Order striking Appellants' Answers does not preclude a judgment from being entered after a damages hearing.

On page 10 of their Brief, Appellants err in their analysis of the March 2016 Order and SCRCP, Rule 37 in an attempt to argue the March 2016 Order prevents the entry of a judgment after a damages hearing because in 2016 the trial court could have entered a default judgment in its March 2016 Order, but declined to do so and, therefore, another judge could not later enter a judgment against them. Appellants then conclude that they should be relieved from the entry of default and any judgment resulting from the trial court striking their Answer and pleadings. Appellants cite no case law which supports any contention that when a trial court strikes a party's answer based on that party's repeated discovery obstruction, a judgment may not be entered at a later time. An issue is deemed abandoned on appeal if it is argued in a short conclusory statement without supporting authority. *Fields v. Melrose Ltd. Partnership,* 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993).

The March 2016 Order could not enter a default judgment against Swilley and Causey because (1) the Complaint requested, in part, punitive damages, and attorney fees, which are

unliquidated and require a later hearing, (2) the March 2016 Order provided that a later hearing would be held at the next term of court for attorney fees, and (3) written notice of any damages hearing was required under SCRCP, Rule 55(b) as Swilley and Causey had already appeared in the action. (R.p. 89; p. 20).

SCRCP, Rule 55(b)(2) provides, in part, "If the party against whom judgment by default is sought has appeared in that action, the party, or, if appearing by representative shall be served with written notice of the application for judgment at least 3 days prior to the hearing and such application." Thus, a judgment against Appellants who were in default could only be entered at a damages hearing sometime after the March 2016 Order, and after written notice of the damages hearing was provided. See *Stark Truss Co., Inc. v. Superior Construction Corp.*, 360 S.C. 503, 511, 602 S.E.2d. 99 (Ct. App. 2004). In addition, the March 2016 Order provided that attorney fees were to be awarded in a separate motion at the next term of court. March 2016 Order, p. 7. (R.p. 23). Moreover, if there is any ambiguity in the 2016 Order, which Appellants appear to argue, then Appellants waived any such ambiguity argument by not raising it in the prior appeal, or to the trial court or in any Rule 59(e) Motion.

3. Appellants' argument that the striking of their answer was temporary because the March 2016 Order did not include the phrase "with prejudice" is baseless.

Without any legal support, Appellants argue on Page 11 of their Brief an interpretation of the March 2016 Order which was not raised in the earlier appeal or in the trial court. In particular, Appellants argue that the March 2016 Order lacks the phrase "with prejudice," and, therefore, the striking of their Answers and pleadings after their two years of discovery obstruction was only temporary. Appellants have not preserved this issue as it was not raised to or ruled upon by the trial court. Moreover, Appellants cite no case law to support this position or

standard. Contrary to Appellants' position, South Carolina case law holds that one circuit court judge cannot overrule another circuit court judge. Another judge could not "unstrike" their Answers. Appellants were in default. Appellants' argument disregards case law, the law of the case, and the record.

4. Appellants' argument that Swilleys' summary judgment motion should have been heard is baseless.

Appellants did not raise any pending summary judgment motion argument in their June 2024 Rule 59 (e) Motion and have not preserved it. (R.pp. 525-526). Any procedural irregularity must be timely objected to or else it is waived. *Coon v. Coon,* 356 S.C. 342, 588 S.E.2d 624, 628 (Ct. App. 2003) (stating that as a general rule where there is no lack of subject matter jurisdiction, the court's judgment will be binding, even if affected by irregularity which would have defeated the proceeding if objection had been timely and properly made); *Bakala v. Bakala,* 352 S.C. 612, 629, 576 S.E.2d 156, 165 (2003) (Objections to personal jurisdiction, unlike subject matter jurisdiction, are waived unless raised.). Similarly, Appellants did not contest the June 2024 Order on the grounds that scheduling a damages hearing was not appropriate. Appellants have waived all arguments on the appropriateness of the damages hearing.

After the March 2016 Order, Adler, then counsel for Swilley only, filed a Motion for Summary Judgment on May 13, 2016. Swilley now argues on page 13 of the Brief that their Motion for Summary Judgment should have been heard. Causey did not file any Motion for Summary Judgment. The Swilley Motion for Summary Judgment argued that no damages were suffered by Barnhill or GSB. However, Swilley was in default due to having no answer. As a result, their argument was moot as all Complaint allegations were deemed admitted once they were in default.

The Complaint allegations included that Barnhill had invested $115,000 and received less than $3,000. (R.p. 78). As Appellants acknowledged in their Pretrial Brief, "By virtue of the entry of default against them, the operative defendants are precluded from contesting liability." (R.p. 532). And Appellants acknowledged they were limited to cross-examination and objection to evidence offered by Respondents. (R.p. 532). A party in default has three primary options: (1) do nothing pending entry of judgment by default under Rule 55(b), SCRCP, (2) file an appearance under Rule 55 (b)(2), SCRCP, in an attempt to protect its interest before the entry of judgment by default, (3) request the entry of default be set aside pursuant to Rule 55(c), SCRCP. *Palmetto Construction Group, LLC v. Restoration Specialists, LLC,* 432 S.C. 633, 635-36, 856 S.E.2d 150 (S.C. 2021). Furthermore, the March 2016 Order struck all pleadings of the Appellants. (R.pp. 17-23). Filing a summary judgment motion was not an option. Swilley was not entitled to summary judgment as Swilley was already in default and liability was admitted. The only remaining issue was a hearing on damages in which Appellants could only cross examine witnesses and object to evidence.

5. Judge Seal's Orders do not overrule Judge McIntosh's March 2016 Order.

On page 13 of their brief, Appellants start with the false premise that "...Barnhill asked for entry of default judgment when asking for sanctions in 2016,..." From there, Appellants then argue that because the March 2016 Order did not grant Barnhill's requested default judgment relief, Judge Seals eight years later is barred from entering a judgment against Appellants.

First, in 2015, Barnhill and GSB asked that the Court strike Swilley and Causey's Answer and Counterclaim due to repeated discovery abuse. See page 2, Motion to Compel filed December 15, 2015. ("Defendants did not appear for deposition. Multiple discovery sanction

orders have been entered in this case. Defendants are further delaying discovery... This Court should strike Defendants' Answer and Counterclaim, award attorney fees and costs and award all other appropriate relief.") (R.p. 903; p. 31). Second, in March 2016 the Court struck Appellants' Answer and pleadings pursuant to Rule 37(b), SCRCP which is expressly permitted to address a disobedient party's discovery abuse. (R.p. 23). Although that same rule allows the trial court to enter a judgment by default in some instances, Rule 55 (b)(2), SCRCP required notice for a damages hearing because Swilley and Causey had already appeared in the action. And the trial court could not enter a default judgment in March 2016 due to the award of attorney fees and assessment of punitive damages which were previously discussed above. Third, nothing in the March 2016 Order prevents subsequent circuit court judges from acknowledging the default of Appellants, scheduling a damages hearing, and awarding relief to Barnhill and GSB. Fourth, Barnhill and GSB requested a hearing to determine damages. (R.p. 231). The trial court duly followed the well-worn procedural rules before judgment was entered against parties in default.

6. Appellants did not "otherwise defend" within the meaning of Rule 55(a).

Swilley argues on page 14 of their brief that Swilley "otherwise defended" the action by filing a Motion for Summary Judgment in May 2016, so entry of default should not occur. However, "The words 'otherwise defend' refer to the interposition of various challenges to such matter as service, venue, and the sufficiency of the prior pleading, any of which might prevent a default if pursued in the absence of a responsive pleading." *Stark Truss v. Superior Construction Corp.*, 360 S.C. 503, 512, 602 S.E.2d 99, Ft. Note 1 (Ct. App. 2004). Appellants' discovery obstruction does not fall within the meaning of "otherwise defend" under Rule 55(a), SCRCP. Appellants cite no case law which supports their interpretation of "otherwise defend." And Swilley was without an answer and in default when Swilley filed the Motion for Summary

Judgment. There was no abuse of discretion to deny Appellants relief from entry of default. Again, Causey never filed a Motion for Summary Judgment as to damages so he has not preserved this argument.

7. No good cause exists.

The law of the case is that Appellants obstructed discovery over two years, prejudicing Barnhill and GSB. As a result of the repeated discovery abuse, the trial court struck Appellants' Answers and pleadings, rendering them in default. (R.pp. 17-23). Appellants have put forth no satisfactory explanation for their default. Nor could they. The good cause standard for setting aside a default requires, as a threshold burden, that the moving party is to put forth an explanation for the default and give reasons why the vacating of the entry of default would serve the interests of justice. *Limehouse v. Hulsey*, 397 S.C. 49, 723 S.E.2d 211 (S.C. App. 2011). The trial court was well within its discretion to deny any relief from default.

Moreover, Appellants' conclusory arguments on the timing of their Motion and their purported meritorious defense are wholly without merit or legal support. Appellants were without an answer for eight years after the March 2016 Order and had not requested relief in the four weeks following the Remittitur. Appellants had no meritorious defense to assert as their general denial and defenses were struck as a sanction for discovery abuse. Finally, the Appellants ignore the prejudice caused to Barnhill and GSB by their discovery obstruction, which is the law of the case. The trial court did not abuse its discretion.

II. THE COURT COMMITTED NO ERROR OF LAW IN AWARDING DAMAGES, PREJUDGMENT INTEREST AND PUNITIVE DAMAGES.

In their Motion to Reconsider the November 4, 2024 Order, Appellants asserted a total of six (6) grounds to alter or amend the judgment. (R.pp. 594-597). The first four grounds concerned damages and evidentiary issues: (1) the order is not supported by findings of fact, (2) the evidence does not establish proof of a $115,000 investment in 809, (3) the trial court did not rule on Appellants' request for judicial notice, and (4) the Barnhill 2014 family court disclosures negate or eliminate any claim of damages. Appellants asserted two (2) grounds relating to punitive damages: (1) the allegations in the Complaint are insufficient to support punitive damages, and (2) the punitive award is not supported by the evidence. (R.pp. 594-597).

Beginning on page 17 of their brief, Appellants now assert new arguments on damages and punitive damages on the November 6, 2024 Order and the April 2, 2025 Order that were not raised to and ruled upon by the trial court and which were not set forth in their Rule 59(e) Motion. As discussed below, the award is well-supported by the record. None of Appellants' arguments on the award have merit and most have not been preserved. When reviewing a damages award, the appellate court does not weigh the evidence, but rather, it determines if there is any evidence to support the damages award. *Hutson v. Cummins Carolinas, Inc.*, 280 S.C. 552, 314 S.E.2d 19 (Ct. App. 1984).

A. The Court's award is supported by the pleadings and overwhelming evidence, including exhibits, testimony, and Appellants' admissions.

The trial court did not make any error of law in awarding damages, punitive damages and prejudgment interest. First, the Barnhill damages consisted of two investment amounts of $41,000 and $49,000 less one check received for $2,460, for a mathematically certain loss or damage of $87,540.00. Appellants argued no other mathematical equation to calculate the loss

to Barnhill. Similarly, GSB made a single investment of $25,000 and received zero, resulting in the mathematically certain loss of $25,000. There is no other possible number for the GSB loss. Damages are the losses suffered because of a defendant's negligence. *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000).

1. Damages.

As set forth in the November 4, 2024 Order, the trial court admitted all evidence in the non-jury setting as the Supreme Court instructed in *Brown v. Allstate*, 344 S.C. 21, 27 542 S.E.2d 723 (S.C. 2001). (R.p. 55). Each of the three investment amounts was substantiated by documentary evidence, including checks, account statements, and Appellants' court-ordered discovery responses. (R.pp. 839-851). In addition, a 2014 trial court order confirms the same investment amounts. (R.pp. 855-856). Moreover, Barnhill testified as to the three investment amounts. (R.pp. 718-720).

The Equity Trust Barnhill IRA account documents confirm the two investment amounts by Barnhill and the single payment to Barnhill. (R.pp. 839-844). Swilley and Causey's discovery responses admitted into evidence conclusively confirm the three investment payments by Barnhill and GSB. (R.p. 848). The one 809 payment to Barnhill was confirmed by a copy of the 809 check. (R.pp. 850-851). Page 2 of the 2014 trial court order, entered into evidence as Exhibit 6, reflects the three investment amounts of Barnhill and GSB. (R.pp. 855-856). Finally, as stated at the hearing, Barnhill's and GSB's Notice of Tender that was filed with the Court in June 2024 reflects the tender or request for rescission under the Uniform Securities Act. (R.pp. 321-347). Thus, the award of damages under the common law causes of action and under the Uniform Securities Act was supported by overwhelming evidence.

2. Prejudgment interest.

The award of prejudgment interest was proper and required. The trial court awarded Barnhill and GSB damages under several common law causes of action, including conversion. "As a general rule, the measure of damages for the conversion of personal property is the value of property *with interest thereon*, and the jury may give the highest value up to the time of trial." (Emphasis added). *Mack v. Riley*, 316 S.E.2d 731, 733, 282 S.C. 100 (Ct. App. 1984), citing *Industrial Welding Supplies, Inc. v. Atlas Vending Co.*, 276 S.C. 196, 277 S.E.2d 855 (1981). "Where money has been converted, the measure of damages is *its amount with legal interest from the date of conversion*." (Emphasis added). *Mack*, 316 S.E. at 733, *citing McShane v. Howard Bank*, 73 Md. 135, 20 A. 775, 781 (1890) ("The whole sum and the interest on each item make up the true measure of damages against him for wrongfully taking and detaining or using the money of the bank."); *Social Security Administration v. Employers Mutual Liability Insurance, Co.*, 234 Md. 493, 199 A.2d 918 (1964). In paragraph 141, the Complaint alleges, "Plaintiffs' money is capable of being identified in discreet transactions in determinate sums." (R.p. 88). Thus, the conversion cause of action requires the inclusion of prejudgment interest.

In addition, prejudgment interest was expressly pled and requested in the Complaint. (R.p. 89). The admitted three investment amounts and the singular payment to Gabriel Barnhill by 809 provide a mathematical certainty for Barnhill's and GSB's damages under all common law causes of action. See *Butler Contracting, Inc. v. Ct. St. LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 258-259 (2006) and *Beckman v. United Fire and Casualty*, 360 S.C. 127, 132, 600 S.E.2d

76 (Ct. App. 2004) (liquidated damages are those made certain by mathematical calculations from known factors). Interest is also recoverable under the South Carolina Uniform Securities Act Cause of Action, S.C. Code Ann. § 35-1-509 (b)(1) ("The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at the legal rate of interest from the date of the purchase..."). Prejudgment interest in the amounts of $91,917 and $26,250 were properly awarded to Barnhill and GSB, respectively. (R.pp. 852-853).

3. Punitive damages.

Punitive damages of three times the actual damages are warranted and supported by the evidence due to the intentional and knowing actions, statements and omissions of Appellants over a period of years in which twenty or more investors lost their money. The appellate court should affirm the trial court's punitive damages finding if any evidence reasonably supports the judge's factual findings. *Carjow, LLC v. Simmons*, 349 S.C. 514, 563 S.E.2d 359 (Ct. App. 2002). In conducting a post judgment review of a punitive damage award, appellate courts are to conduct a review of the award to ensure the verdict is not excessive and is supported by the evidence. *Mitchell v. Fortis Insurance Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009). In reviewing the award, the court should determine the reprehensibility of the defendants' conduct, which is "perhaps the most important indicium of the reasonableness of a punitive damages award." *Mitchell*, 385 S.C. at 587, citing *Gore*, 517 U.S. at 565, 116 S.Ct. 1589. In addition, the court should consider the ratio of punitive to actual damages awarded, and whether the punitive award is comparable to other awards.

In determining the reprehensibility of a defendant's conduct, the appellate courts are to consider whether the harm was physical or economic, whether the tortious conduct evinced an

indifference to or reckless disregard for the health and safety of others, whether the target of the conduct had financial vulnerability, whether the conduct involved repeated actions or was an isolated incident, and whether the harm was the result of intentional malice, trickery, or deceit rather than mere accident. *Mitchell*, 385 S.C. at 587.

In his November 4, 2024 Order, Judge Seals found that Barnhill was a young and naïve investor. (R.pp. 55-56). Barnhill was financially vulnerable. After reviewing the Motions to Reconsider, Judge Seals further concluded the Court's punitive award was clearly supported and that the award did not violate any *Gamble* analysis. Judge Seals specifically addressed the reprehensibility factor when ruling, "In part, the reprehensibility of Defendants' conduct over a sustained period of time with other victims was more than sufficient to support an award of three times the actual damages." (R.pp. 61-62).

The evidence clearly shows Appellants' intentional disregard to vulnerable investors through their repeated deception and trickery spanning three years with the 809 and SAFE schemes in which they took hundreds of thousands of dollars from at least twenty investors. In addition to Barnhill and GSB, six other persons invested $264,000 in the 809 investment scheme. Exhibit 3, Defendants' Supplemental Responses to Plaintiffs' Interrogatories, pages 5-6. (R.pp. 847-848). With Barnhill and GSB's investment of $115,000, $379,000 was taken from 809 investors and only $42,000 was returned according to Appellants' admissions. (R.p. 862).

Swilley and Causey then redoubled their deceitful actions from September 2011 through January 2014 in the subsequent SAFE investment scheme in which even more investors lost their money, as reflected in the Investor Report. Exhibit 9. (R.p. 869). And in the fall of 2011, any money that 809 Holdings had was then siphoned from 809 Holdings and transferred to SAFE. (R.p. 153). As detailed in the Investor Report, from September 2011 through January 2014,

hundreds of thousands of dollars were taken by Swilley and Causey from 20 investors. (R.p. 869).

Swilley and Causey's actions were motivated primarily, if not solely, by unreasonable financial gain. The high likelihood of injury to Barnhill, GSB and others was known by Swilley and Causey, who withheld material facts and made material misrepresentations as set forth in the Complaint, and continued to take hundreds of thousands of dollars from other 809 investors.

And Swilley's past conduct further supports the punitive award. As set forth in *In Re: John F. Swilley*, Floyd Swilley and Laurel Knuckles Swilley agreed to stipulated facts in an Oklahoma federal case in which over $125,000,000 was sought from them in causes of action for money acquired under false pretenses, fraud, embezzlement, defalcation while acting in a fiduciary capacity. Exhibit 11. Order filed on April 17, 2003 by U.S. Bankruptcy Judge Waites in *In Re: John F. Swilley*, 02-09234-W, Adv. Pro. No. 02-80347-W., United States Bankruptcy Court, (D.S.C. 2003). (R.pp. 872-890). Swilley agreed to confess judgment in the amount of $300,000 conditioned in part on the judgment's non-dischargeability under the bankruptcy code. (R.pp. 874-875). With respect to Floyd Swilley in that bankruptcy case, Judge Waites stated, "Moreover, these inconsistent positions are an attempt to gain an unfair advantage as Defendant previously resolved litigation, which sought a recovery of $125,000,000 against him, for a significantly lesser amount conditioned upon its non-dischargeability." *In Re: John F. Swilley*, April 17, 2003 Order, p. 17. (R.p. 888).

The trial court's award of punitive damages of three times the actual damages is less than the seven times damages requested by Barnhill and GSB at the hearing. (R.p. 104, lines 12-16). The amount of punitive damages awarded to Barnhill is less than one half the amount allowed

under S.C. Code Ann. § 15-32-530(A). The ratio of three times the actual damages is within the amount allowed under S.C. Code Ann. § 15-32-530(A) and it is within the range of other comparable awards. Moreover, the punitive damage award of three times actual damages is in the low single digits and does not offend any due process or constitutional concerns.

B. Appellants' judicial notice argument is moot.

Appellants conceded at the hearing that they were "... not introducing any evidence...". (R.p. 785, lines 17-18). Earlier in the hearing the Court ruled, "I think what I'll do, since this is a non-jury setting, there's a case out there, *Allstate v. Brown* or *Brown v. Allstate*, but I will admit all the evidence and consider it in a non-adversarial situation and rule on it as I see fit. (R.p. 724, lines 18-23). Although Appellants agreed they could not admit evidence at the hearing, even if the domestic case and other case materials were offered by Appellants for consideration under judicial notice, the trial court considered those specific materials in a non-adversarial, non-jury setting. (R.p. 785, lines 3-21). (The Court: "I'll consider it in a non-jury setting."). Appellants' judicial notice argument is moot. Moreover, the materials were cumulative of the information elicited on cross examination of Barnhill. There was no harm and there was no error.

C. The pleadings are more than sufficient to support the award.

At the hearing, Appellants raised generalized arguments about the pleadings, did not receive a ruling on them and then failed to raise them with any specificity in their Rule 59(e) Motion. (R.pp. 594-597). Appellants have not preserved their vague, non-specific pleading arguments. "It is axiomatic that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review." *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Appellants' failure to raise their pleading arguments to the trial court or to this Court with any specificity results in a waiver

of them. See *S.C. Dept. of Transportation v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007).

Appellants, however, admit or acknowledge in their Statement of Facts that the Complaint allegations are deemed admitted because they are in default. "Barnhill otherwise did not provide a sufficient factual record to supplement his initial pleading, which had been deemed admitted when Appellants were placed in default, to support his contention of damages." Brief, p. 7. Thus, Appellants appear to argue that the allegations in the 153 paragraphs of the Complaint are insufficient to state a claim to support an award under the common law causes of action.

Contrary to Apellants' argument beginning on Page 18 of their Brief, the Complaint contains detailed factual allegations in 153 paragraphs and detailed requested relief for damages, prejudgment interest, attorney fees and punitive damages. (R. pp. 69-89). Each of the causes of action expressly incorporates the earlier paragraphs. The first cause of action asserted a claim and requested damages, interest, and attorney fees under the South Carolina Uniform Securities Act. The trial court awarded damages and interest thereunder. (R.pp. 58-63). Appellants' have not contested the trial court's award under the first cause of action, which is now the law of the case.

The fraud cause of action was pled with detailed particularity. Paragraph 122 of the Complaint expressly and specifically incorporates more than 40 paragraphs of material omissions or misrepresentations. (R.p. 85). The negligence cause of action has detailed allegations of gross negligence and requests punitive damages. The Court's award on the negligence cause of action was not addressed in the Rule 59(e) Motion or with any specificity in

this appeal. Conversion was properly alleged and requests punitive damages. "It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the Plaintiff's allegations and to have conceded liability." *Roche v. Young Brothers, Inc. of Florence*, 332 S.C. 75, 81, 504 S.E.2d 3ll, 314 (1998). Appellants conceded at trial that for the fiduciary duty cause of action, liability is established. (Ballard: "I realize that the Complaint, since we are in default, acknowledges that liability is established for breach of fiduciary duty because all he is asking for is the money back he paid."). (R.p. 796, lines 15-20). Appellants' failure to address all grounds in the trial court's rulings, including the award on the Uniform Securities Act, negligence, fraud, breach of fiduciary duty, and conversion causes of action renders the unappealed rulings the law of the case requiring an affirmation of the trial court. See *Anderson v. Short,* 323 S.C. 522, 476 S.E.2d 475 (1996). Similarly, Petitioners' threadbare arguments without any citation to authority requires a denial of their appeal. *Fields v. Melrose Ltd. Partnership,* 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993).

D. The trial court did not abuse its discretion in awarding damages.

The damage award of $87,540 and $25,000 to Barnhill and GSB, respectively, is well supported by the record. The trial court's award of damages should not be disturbed. Appellants' argument that Barnhill's disclosure in a 2013 divorce proceeding that the 809 investment was an investment gone bad somehow gave Barnhill a financial benefit and allows Swilley and Causey to be free of liability to Barnhill for their torts and violative actions is non-sensical. Moreover, Appellants' family court disclosure argument has no bearing on GSB's award.

Similarly confounding is Appellants' argument on page 19 of their Brief that Barnhill did not make an investment as "neither of the two checks claimed as evidence of investment by

Plaintiffs were made payable to any of the Appellants." In their court ordered discovery responses which were entered into evidence, Appellants admitted the three 809 payments made by Barnhill and GSB. (R.p. 848). Appellants apparently contend that a plaintiff only has a claim against a Ponzi scheme promoter if the plaintiff writes a check to the promoter and not to the Ponzi scheme vehicle. Appellants cite no legal authority to support this argument and disregard the binding effect of the admitted Complaint allegations.

E. Any failure to acknowledge large deposits is irrelevant.

Appellants argue the trial court did not appropriately weigh the evidence in light of some deposits made to Barnhill's bank account. The trial court's discretion to award damages should not be disturbed on appeal if there is evidence to support the award. When reviewing a damages award, the appellate court does not weigh the evidence, but rather, it determines if there is any evidence to support the damages award. *Hutson v. Cummins Carolinas, Inc.*, 280 S.C. 552, 314 S.E.2d 19 (Ct. App. 1984). There is ample evidence to support the award. Any deposits to the bank account are irrelevant to the damages sustained by Barnhill and GSB.

F. Appellants' prejudgment interest arguments have not been preserved.

In awarding prejudgment interest and relief under the Uniform Securities Act, the April 2025 Order substantively modified the November 2024 Order. As a result, Swilley and Causey were required to file a Rule 59(e) Motion to preserve any arguments on prejudgment interest or the award under the Uniform Securities Act. See *Chapman v. Upstate RV & Marine*, 364 S.C. 82, 84 n.2, 610 S.E.2d 852, 854 n.2 (Ct. App. 2005) (where trial court awarded attorney fees to plaintiff for first time in ruling on post-trial motions, defendant could properly submit a Rule 59(e) motion challenging award of attorney fees). Because the trial court did not rule on the prejudgment interest and Appellants filed no Rule 59(e) Motion addressing prejudgment interest

at any time, Appellants have waived their arguments as to prejudgment interest. See *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). In addition, the April 2, 2025 Order was not attached to the Notice of Appeal in violation of SCACR, Rule 203(d)(1)(B)(ii). ("The Notice filed with the Appellate Court shall be accompanied by the following...(ii) a copy of the orders and judgments to be challenged on appeal..."). Appellants have waived all arguments as to the April 2, 2025 Order, including the award of prejudgment interest and the award under the Uniform Securities Act.

Beyond an error preservation analysis, Appellants err in their other prejudgment interest arguments. To support their unliquidated damages argument, Appellants conflate punitive damages with damages in their reading of the Complaint. Punitive damages, as requested in the Complaint, are by rule unliquidated. Attorney fees are also unliquidated. However, damages, such as 809 investment losses due to tortious actions of Ponzi scheme promoters, are capable of mathematical calculation with certainty and are liquidated. Prejudgment interest was specifically requested in the Complaint. (R.p. 89) Interest was pled in the Complaint. (R.p. 83). The award of pre-judgment interest was proper.

Appellants also mistakenly argue that a hearing on damages was not necessary if the damages were in fact liquidated. As discussed above, a damages hearing was required as Appellants were entitled to notice of the same under SCRCP, Rule 55. Appellants did not timely object or move for reconsideration of Judge Culbertson's ruling that the matter be set for a damages hearing. Appellants have not preserved this argument. In addition, punitive damages and attorney fees had to be assessed by the trial court. Respondents requested attorney fees. See Exhibits 10 and 12. (R.pp. 870-871; pp. 891-901). Finally, the Uniform Securities Act, S.C.

Code Ann. § 35-1-509(b)(1) expressly provides for prejudgment interest. Under that Act, Barnhill and GSB made a tender, thus allowing the statutory relief including interest from the date of the investment. (R.pp. 321-347). The award under the Uniform Securities Act, with pre-judgment interest, was not addressed by Appellants and constitutes an additional sustaining ground.

G. The Complaint allegations clearly support the punitive damage award.

In the November 2024 Order, the Court stated it applied the *Gamble v. Stevenson,* 305 S.C. 104, 406 S.E.2d 350 (1991) factors and awarded punitive damages of $337,620. (R.p. 56). The April 2, 2025 Order further articulated the punitive award as to each Barnhill and GSB. The evidence in support of the punitive award was overwhelming, as discussed above in detail.

The allegations of the Complaint are more than sufficient for an award of punitive damages. Contrary to Appellants' conclusory assertions on page 23 of their Brief, the Complaint is not deficient. And Appellants' generalized statements in their attempt to minimize the detailed factual allegations is unconvincing. For example, Appellants ignore the allegations for the negligence cause of action, including all preceding paragraphs incorporated by reference, and then only reference two of eight subparts of paragraph 134 to argue that "... such commonly negligent acts... does not rise to the level of justification for punitive damages." Rather, Appellants wish to limit the award to rescission only damages. However, the pleadings and evidence support an award of punitive damages. The punitive award did not violate Appellants' rights to due process. The trial court found that Barnhill was young and unsophisticated investor who was the client of Swilley. Barnhill was financially vulnerable. Swilley and Causey took advantage of Barnhill and GSB. Swilley and Causey also took advantage of many others through their intentional and deceptive conduct promoting 809 and SAFE over several years, 2011-2014.

Many other investor victims lost hundreds of thousands of dollars. The evidence clearly satisfies the reprehensibility analysis and supports the punitive award.

CONCLUSION

The Court should deny the relief requested by Swilley and Causey and affirm the trial court's award of damages, punitive damages and prejudgment interest.

Respectfully submitted,

s/ Nate Fata

Nate Fata (S.C. Bar No. 9866)
Nate Fata, P.A.
Post Office Box 16620
Surfside Beach, SC 29587
Telephone 843-238-2676
Facsimile 843-238-0240
nfata@fatalaw.com
ATTORNEY FOR RESPONDENTS

November 21, 2025