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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge
Dale E. Van Slambrook, Circuit Court Judge
Jessica A. Salvini, Circuit Court Judge

Case No.: 2021-CP-10-03379

Appellate Case No. 2025-001304

Carolina Neurosurgery & Orthopedics, Inc., ...Appellant/Respondent

v.

Michael A. Maucher, Esq. and DeLuca & Maucher, LLP, ... Respondents/Appellants.

FINAL RESPONDENTS' BRIEF OF RESPONDENTS/APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court correctly grant summary judgment to D&M based on factual findings and legal conclusions in a prior judge's order granting a motion to dismiss as the law of the case when the changed claims required factual proof and conclusions contrary to the law of the case?

II. Did the Circuit Court correctly grant summary judgment to D&M on Carolina Neurosurgery's negligent misrepresentation claims when there was no genuine issue of material fact that the representation on coverage was true and no evidence Carolina Neurosurgery actually or justifiably relied on the statement?

III. Did the Circuit Court correctly grant summary judgment to D&M on Carolina Neurosurgery's unfair trade practice claim when there was no genuine issue of material fact that the parties were not engaged in trade or commerce with each other, and additional sustaining grounds exist to affirm the order?

STATEMENT OF THE CASE

This case arises from Appellant/Respondent Carolina Neurosurgery's failure to exercise due diligence and follow its financial policy before proceeding with approximately $125,000.00 in surgical treatment for Respondents/Appellants' client (Client), who was injured in a motor vehicle collision on December 14, 2018. Respondents/Appellants attorney Mike Maucher and Deluca & Maucher (collectively, D&M), were unaware that Carolina Neurosurgery and its surgeon, Dr. Jason Highsmith, were "out of network" healthcare providers under Client's private health insurance.

Further, despite repeated instructions from both D&M and Client regarding billing private health insurance for Carolina Neurosurgery's services, Carolina Neurosurgery never attempted to: (1) confirm with D&M its network status with Client's health insurance; or (2) submit the proposed procedures to the Client's health insurance for pre-approval before proceeding with the surgeries. Until recently, however, Carolina Neurosurgery had never attempted to submit claims for payment to any insurance following each of the surgeries. Moreover—despite D&M's offer to pay Carolina Neurosurgery out of the $30,000 settlement proceeds recovered for Client—Carolina

Neurosurgery not only rejected such offer, but it brought a debt collection action against Client.[1] Carolina Neurosurgery and Client resolved their case immediately prior to trial, with Carolina Neurosurgery accepting partial payment from Client's insurer for Client's medical bills Carolina Neurosurgery asserts Defendants owe.

STATEMENT OF FACTS

Client was injured in a car accident on December 14, 2018. **R. p. 613, ¶ 7**. Shortly thereafter, he retained attorney Mike Maucher and the law firm DeLuca & Maucher (collectively, D&M) to pursue claims against the at-fault driver. Before the accident, Client was a patient of Dr. Highsmith. **R. p. 613, ¶ 7**. Client chose to return to Dr. Highsmith to treat the injuries he sustained in the car accident.

At the behest of Carolina Neurosurgery, D&M sent Carolina Neurosurgery a letter of protection on December 20, 2018, that stated:

> Please accept this correspondence as our Law Firm's agreement to protect any claim which you may have out of any settlement proceeds we may receive arising out of the incident referred to above. The above-named individual has been informed that, in the event of insufficient recovery, he remains personally responsible for your outstanding balance.

R. p. 943.

On January 3, 2019, Client executed Carolina Neurosurgery's Financial Policy. **R. p. 945**. Under the section entitled "If you have insurance," the Financial Policy provides that Carolina Neurosurgery "will file with [the patient's] primary insurance." **R. p. 945**. The Financial Policy also provides that the patient may be responsible for all or part of the balance not paid by the

[1] *Carolina Neurosurgery and Orthopedics, Inc. v. Scott Demaskey*, 2021CP0801088.

insurance company. **R. p. 945**. At the time, Client had primary health insurance through Blue Cross/Blue Shield.

On January 21, 2019, Tina Bennett, a paralegal with D&M, responded to an inquiry from Kiara Goodwine, Carolina Neurosurgery's employee, regarding the "limits" for Client, explaining the at-fault carrier was from North Carolina and would not disclose policy limits without a medical authorization, and they were unable to discover how much liability coverage the at-fault driver had. **R. p. 947**. However, Bennett informed Goodwine that Client had $100,000 in UIM coverage on a Safeco Policy and carried $1,000,000 in "Occupational Accident Coverage" on a One Beacon policy. **R. p. 947**.

Hours later the same day, Bennett emailed Goodwine and explained Client advised her that he required surgery. **R. p. 946**. As a result, Bennett requested all of Client's treatment be filed with his private health insurance company. Further, that it "would be best for everyone involved if we NOT do the treatment under an Assignment/Letter of Protection." **R. p. 946**. Goodwine responded, "Okay thanks for the update." **R. p. 946**. At no point did Carolina Neurosurgery or any of its employees advise D&M that it did not accept Client's insurance or would not bill Client's health insurance.

On March 7, 2019, D&M sent a revised Letter of Protection to Carolina Neurosurgery, stating:

> Please accept this correspondence as our Law Firm's agreement to protect any portion of your bill not paid by private health insurance out of any settlement proceeds we may receive arising out of the incident referred to above. The above-named individual has been informed that, in the event of insufficient recovery, he remains personally responsible for your outstanding balance.

R. p. 948-49. That same day, Client completed a Health Insurance Verification form for his upcoming surgery, providing Carolina Neurosurgery with his BlueCross/BlueShield insurance information and the document was signed by Goodwine. **R. p. 950**.

Dr. Highsmith performed Client's first surgery on March 15, 2019 (First Surgery) and charged Client $58,697.41. **R. p. 951**. For the First Surgery, Carolina Neurosurgery did not submit any bills to BlueCross/BlueShield, despite Bennett's request and Goodwine's approval, the language in the Letter of Protection, and Client providing his insurance information.

As Client's personal injury case developed, it was determined that: (1) the at-fault driver did not have sufficient insurance coverage to fully cover Client's medical treatment; (2) one of Client's other additional policies was inapplicable; and (3) the other additional policy was subject to subrogation and only applicable after Client's primary private health insurance had been exhausted.

On April 29, 2019, D&M notified Carolina Neurosurgery via email of the foregoing issues, stating:

> Because the at-fault party only had $30,000.00 and [Client's] Underinsured Motorist Coverage does not apply, **ALL of the treatment [Client] has received (and will continue to receive) must be filed under his private health insurance.** We cannot honor anymore treatment under a Letter of Protection. Please note [Client] file accordingly.[2]

R. p. 1120 (emphasis in original).

On May 2, 2019, Dr. Highsmith performed additional surgery on Client, charging him an additional $62,451.87 (Second Surgery). **R. p. 951.** In total, Carolina Neurosurgery charged

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[2] Carolina Neurosurgery contests the authenticity of this email and has made it the focus of the case. As explained in more detail in the Argument below, their ability to contest the email was limited by the law of the case. Further, whether or not they received the email when it was sent is of no consequence to the case.

Client $125,409.28. **R. p. 951.** Despite receiving explicit instructions regarding claim submission and payment on several occasions prior to both surgeries, Carolina Neurosurgery did not file claims with Client's private health insurance. On January 3, 2020, Bennett wrote Goodwine and reminded her of the Letters of Protection and that it appeared Client's health insurance did not pay any of Carolina Neurosurgery's bills. **R. p. 952**. Bennett explained the recovery, being only $30,000, was insufficient to pay the medical bills and they needed to discuss how to allocate that amount amongst everyone. **R. p. 952.**

Because Client was unable to pay for Carolina Neurosurgery's services, Carolina Neurosurgery initiated a debt collection action against him on May 21, 2021. But Carolina Neurosurgery simultaneously demanded D&M pay for Client's medical bills. D&M attempted to tender payment to Carolina Neurosurgery out of the settlement proceeds they received, and Carolina Neurosurgery refused it.

Lawsuit

Carolina Neurosurgery sued D&M on July 22, 2021, asserting claims for (1) breach of contract; (2) breach of contract accompanied by a fraudulent act; (3) violation of the S.C. Unfair Trade Practice Act; (4) fraud; (5) constructive fraud; (6) unjust enrichment; and (7) negligence. ***See*** **R. p. 82.**

D&M moved to dismiss Carolina Neurosurgery's claims, which was granted in part, and the only remaining claims were for (1) breach of contract and (2) violation of the SC Unfair Trade Practice Act. **R. p. 953-69**. That order made numerous findings of fact and conclusions of law that Carolina Neurosurgery opted not to immediately appeal and, therefore, became the law of the case. There is, however, one caveat—that the "order will not be admissible . . . to prove or disprove any matter of fact or establish or challenge any conclusion of law with respect to *Plaintiff's*

remaining claims for Breach of Contract and violation of the South Carolina Unfair Trade Practice Act." **R. p. 953** (emphasis added). At the time, Carolina Neurosurgery's theory under breach of contract and SCUTPA was based on the letters of protection D&M sent Carolina Neurosurgery. ***See*** **R. p. 90, ¶ 41** ("Carolina Neurosurgery and the Lawyers entered into a contract described earlier as the [Letter of Protection].").

After significant written discovery and multiple depositions, D&M moved for summary judgment on August 22, 2023, asking the court to grant judgment based on the pleadings and discovery up to that date. Two weeks later, Carolina Neurosurgery moved to amend the complaint to change the theories of recovery and add two additional claims: Negligent Misrepresentation and Promissory Estoppel. The Court granted leave to file the amended complaint and postponed D&M's motion for summary judgment. **R. p. 970**. Carolina Neurosurgery filed the amended complaint, which D&M answered filed a revised motion for summary judgment. **R. p. 688**.

Carolina Neurosurgery, however, amended the complaint a second time but without leave or consent. Nevertheless, the Court refused to strike the improperly filed Second Amended Complaint. The Second Amended Complaint again changed Carolina Neurosurgery's theories of recovery. Instead of the letters of protection serving as the basis for the contract, Carolina Neurosurgery alleged a contract was formed based on the email about insurance limits. **R. p. 616, ¶ 35** ("Carolina Neurosurgery and the Lawyers entered into a contract wherein Carolina Neurosurgery would provide medical services to the Lawyers' client based on the Lawyers' representations about insurance coverage."). D&M answered the Second Amended Complaint, and filed a second revised memorandum in support of summary judgment. **R. p. 908**.

After a hearing, Judge Salvini granted D&M summary judgment and dismissed Carolina Neurosurgery's claims by formal order on May 2, 2025. **R. p. 46**. Importantly, the court found that

many of Carolina Neurosurgery's allegations were preempted by the court's prior order granting D&M's motion to dismiss, that there was no contract between Carolina Neurosurgery and D&M whereby D&M would be obligated to pay Client's medical bills, and that D&M were not engaged in trade or commerce with Carolina Neurosurgery to sustain a SCUTPA claim. **R. pp. 46-65**.

STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the [circuit] court under Rule 56, SCRCP." *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003) (quoting Rule 56(c), SCRCP).

Summary judgment's purpose is to expedite the disposition of cases not requiring a fact finder. *Nakatsu v. Encompass Indem. Co.*, 390 S.C. 172, 177, 700 S.E.2d 283, 286 (Ct. App. 2010). The burden of proof rests with the party seeking summary judgment; however, the non-moving party must make a showing sufficient to establish the existence of an essential element on which it will bear the burden to prove at trial. *Baughman v. Am. Tel. & Tel. Co*., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

The "mere scintilla" standard does not apply to defeat summary judgment, but instead the party must establish a genuine issue of material fact. *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023). "A fact is material if it 'might affect the outcome of the suit under the governing law.'" *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 313 (4th Cir. 2013) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A dispute is "genuine"

if "a reasonable jury could return a verdict for the non-moving party." *Strothers v. City of Laurel*, 895 F.3d 317, 326 (4th Cir. 2018) (quoting *Anderson*, 477 U.S. at 248). It is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine. *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013); *Nelson v. Piggly Wiggly Cent., Inc*., 390 S.C. 382, 390, 701 S.E.2d 776, 780 (Ct. App. 2010) (holding one may not create a genuine issue of material fact by speculation or an "inferential leap").

Summary judgment is mandated when a party fails to make a showing sufficient to establish the existence of an element essential to that party's case. *Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 59, 518 S.E.2d 301, 305 (Ct. App. 1999). In such a situation, the moving party is entitled to judgment as a matter of law because the non-moving party has failed to demonstrate a genuine issue of material fact as to a necessary part of that party's claim. *Id*.

ARGUMENT

I. This Court should affirm Summary Judgment because the circuit court correctly applied the law of the case doctrine based on findings in a prior judge's order granting a motion to dismiss.

Carolina Neurosurgery argues that the circuit court erred in applying the law of the case doctrine to grant D&M summary judgment on Carolina Neurosurgery's claims for (1) breach of contract, (2) violation of SCUTPA, (3) negligent misrepresentation, and (4) promissory estoppel. **App./Resp. Br. at 14-20**. This Court should affirm the grant of summary judgment on law of the case grounds because Carolina Neurosurgery did not preserve arguments on these grounds and the order on the motion to dismiss limited the finding's inapplicability to the *remaining* claims.

A. Arguments contesting the law of the case application are not preserved because Carolina Neurosurgery did not present the arguments to the circuit court.

An argument must be raised to and ruled upon by the lower court in order to be preserved for appeal.

> A great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.

Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23–24, 602 S.E.2d 772, 779–80 (2004). If an argument is presented to the circuit court but not ruled upon, the litigant is obligated to move for reconsideration to obtain a ruling in order to preserve the argument for appeal. *Kosciusko v. Parham,* 428 S.C. 481, 506, 836 S.E.2d 362, 375 (Ct. App. 2019).

The preservation requirement is imposed to give the lower court an opportunity to rule properly after considering the relevant facts, law, and arguments. *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). This Court noted:

> The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments…Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.

Id. Appellate courts will not reverse a lower court on a ground that was not submitted to the lower court. *Powers v. City of Aiken*, 255 S.C. 115, 117, 177 S.E.2d 370, 371 (1970). After all, the court of appeals is a court of review. *Id.* The purpose of an appeal is to determine whether the lower

court did not do something it should have, or did something it should not have. *Id.* To accomplish this review purpose, an argument must be sufficiently presented to the lower court so it has an opportunity to rule. *See id.* "An issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009).

Here, Carolina Neurosurgery attempts to characterize Judge Dickson's order in its favor, with reference to the hearing on the motion to reconsider that order, to argue against Judge Salvini's ruling on the law of the case. **App./Resp. Br. at 14-15**. Carolina Neurosurgery then, with reference to one case, argues Judge Dickson's rulings did not establish the law of the case. **App./Resp. Br. at 18-20**. Unfortunately for Carolina Neurosurgery, it did not present these arguments to the court on the motion for summary judgment hearing. After Carolina Neurosurgery amended its complaint to change its theories under breach of contract and SCUTPA, and add two additional claims, D&M argued application of the law of the case based on the language in Judge Dickson's order twice—on October 24, 2024, in their first revised memorandum in support of summary judgment (**R. p. 694-700**) and on March 25, 2025, in their second revised memorandum in support of summary judgment (**R. p. 914-21**).

Neither of Carolina Neurosurgery's two written submissions in opposition to summary judgment raised the arguments addressing the language of Judge Dickson's order or challenging application of the law of the case. ***See* R. p. 378-87; R. p. 1065-80**. Carolina Neurosurgery did not make any arguments at the hearing on the motion for summary judgment pertaining to application of law of the case or characterizing the language in Judge Dickson's order to overcome law of the case. ***See generally* R. p. 1356-68.**

Carolina Neurosurgery did not raise any arguments on law of the case or attempt to characterize the language in Judge Dickson's order until its motion for reconsideration of the order

granting summary judgment. However, that is too late to preserve the arguments because an issue or argument cannot be presented for the first time in a motion to reconsider. *See Johnson*, 381 S.C. at 177, 672 S.E.2d at 570. Because Carolina Neurosurgery did not raise to the circuit court prior to its motion to reconsider the arguments regarding law of the case or characterizing Judge Dickson's Order, those arguments are not preserved for appeal.

B. Even if preserved, the law of the case doctrine did apply pursuant to the language in the revised written order on the motion to dismiss to preempt or interfere with Carolina Neurosurgery's changed and additional claims.

As a threshold matter, the two-issue rule requires this Court to affirm the summary judgment grant with respect to breach of contract and promissory estoppel. *See Wofford v. City of Spartanburg*, 415 S.C. 152, 157, 781 S.E.2d 146, 149 (Ct. App. 2015) (stating that under the two issue rule the appellate court must affirm a decision based on multiple grounds when the appellant does not appeal all grounds). Carolina Neurosurgery challenges the law of the case doctrine's application to the grant of summary judgment in its entirety, which applied to its four claims of breach of contract, SCUTPA, negligent misrepresentation, and promissory estoppel. ***See generally*** **App./Resp. Br.** The circuit court also granted summary judgment after finding no genuine issue of material fact as to one or more elements of all four claims. **R. pp. 55-64**. Carolina Neurosurgery, however, does not challenge on appeal the circuit court's decision finding there were no genuine issues of material fact for the breach of contract and promissory estoppel claims. ***See*** **App./Resp. Br.** (arguing there was a genuine issue of material fact with respect to negligent misrepresentation and SCUTPA only).

Because the circuit court found no genuine issue of material fact on breach of contract and promissory estoppel but Carolina Neurosurgery does not challenge those rulings on appeal, this

Court must affirm the dismissal of those two claims based on the two issue rule regardless of how it decides the law of the case issue.

On the merits, Carolina Neurosurgery argues that the circuit court incorrectly applied the law of the case doctrine to grant summary judgment. In reaching its conclusion, Carolina Neurosurgery inaccurately characterizes the language in Judge Dickson's Order and the impact of his findings, claiming Judge Dickson made "clear that he did not receive any evidence and was not making any findings of fact that would bind a future court." **App./Resp. Br. at 14**.

"This State has a long-standing rule that one judge of the same court cannot overrule another." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). If a ruling is not appealed, whether it is wrong or right, it becomes the law of the case. *Id.* "The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right." *Id.* (quoting *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989)). Stated differently, the doctrine of law of the case applies to statements by the court that constitute a binding adjudication. *Cf. Weil*, 299 S.C. at 89, 382 S.C. at 473 ("The doctrine of law of the case is not applicable to a statement by the court [that] does not constitute a binding adjudication."). The law of the case applies to issues expressly and necessarily ruled on in the order. *See Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997). If the order, however, merely decides a point collateral to the issues of the case, it is not binding and can be reconsidered before a final order on the merits. *Shirley's Iron Works, Inc.*, 403 S.C. at 573, 743 S.E.2d at 785.

Here, there is no question that Judge Dickson's Order on the Motion to Dismiss determined a substantial right and made statements that constitute binding adjudications because Judge

Dickson evaluated the *verified* complaint and its attachments,[3] and ruled that most of the claims were insufficient and dismissed them. Those rulings were based on the insurance coverage statements Carolina Neurosurgery continued to litigate. Because Carolina Neurosurgery chose not to appeal that order, those rulings became the law of the case. Further, because one judge in the same court cannot overrule another, Judge Salvini could not make rulings contrary to Judge Dickson's order.

The one caveat is the language in the Order stating that it would not be admissible to prove facts of law for the "remaining claims for Breach of Contract and SCUTPA." **R. p. 18**. Carolina Neurosurgery mischaracterizes this language and Judge Dickson's comments at the hearing as a pronouncement that Judge Dickson "was not making any findings of fact that would bind a future court." **App./Resp. Br. at 14**. First, the language of the written order is clear and limits the application to only the remaining claims, which at the time were breach of contract and violation of SCUTPA based on the letters of protection. Indeed, when D&M argued for summary judgment the first time it was not based on Judge Dickson's Order or the law of the case. ***See*** **R. p. 190.** Circumstances changed, however, when Carolina Neurosurgery twice amended its complaint to include new causes of action (negligent misrepresentation and promissory estoppel) and to change its theory of recovery under all causes of action to be based on the insurance coverage statement. Thus, for the purposes of Judge Dickson's Order, there were no "remaining" claims to which the Order would not apply.

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[3] Carolina Neurosurgery argues that there was no evidence or testimony presented at the motion to dismiss and it was based on the four corners of the complaint, relaying that point to assert the factual findings and legal conclusions in Judge Dickson's Order were erroneous. **App./Resp. Br. at 14**. This is incorrect. Carolina Neurosurgery made detailed factual allegations in its complaint that were verified as true by Dr. Highsmith and included 11 exhibits. **R. pp. 82-125**. Under Rule 10(c), SCRCP, the exhibits were part of the complaint and functionally "evidence" that the court considered. *See* Rule 10(c), SCRCP.

Second, Carolina Neurosurgery improperly relies on statements made by Judge Dickson at the hearing to contradict the written order. It is well settled law that a judge is not bound by oral statements or rulings and may issue contradictory written findings, and that a written order controls over oral statements and contains the binding instructions the parties must follow. *See Corbin v. Kohler Co.*, 351 S.C. 613, 620-21, 571 S.E.2d 92, 96-97 (Ct. App. 2002). Thus, Judge Dickson's statements at the hearing are inconsequential to the written order. The written order controls, and it outlines exactly how it would apply moving forward. In addition, Carolina Neurosurgery's reliance on Judge Dickson's oral statements to argue Judge Salvini erroneously interpreted or applied his Order is interesting when Carolina Neurosurgery did not provide those statements or the transcript to Judge Salvini for her to consider when ruling. Stated differently, Judge Salvini could not have known any different interpretation of the Order if she did not have Judge Dickson's statements on which Carolina Neurosurgery relies. Otherwise, Judge Salvini understood the language in Judge Dickson's written Order, examined his various rulings that were not appealed, and faithfully applied those rulings to grant summary judgment.

Carolina Neurosurgery's changed and new claims in its Second Amended Complaint relied on facts or legal conclusions directly contrary to those that were established law of the case. Carolina Neurosurgery's breach of contract claim asserted it entered into a contract with D&M to provide Client medical services based on representations about insurance coverage. **R. p. 658, ¶ 35**. To prove its claim would require findings contrary to Judge Dickson's Order that Carolina Neurosurgery had no right to rely on statements about coverage, was aware of the need to seek payment from Client private health insurer, and that the statement about coverage was merely an opinion. With those findings, Carolina Neurosurgery could not establish D&M offered to pay for

Client's medical services based on statements about coverage and that Carolina Neurosurgery accepted that offer by providing services.

Carolina Neurosurgery's SCUPTA violation claim asserted it was unfair or deceptive to make promises to it that payments for medical services would be paid out of $1,100,000 in liability coverage. **R. pp. 978-79**. Carolina Neurosurgery could not prove that was unfair or deceptive in light of Judge Dickson's rulings that Carolina Neurosurgery knew to seek payment from Client's private health insurer prior to rendering services, that D&M did not intend to protect claims to proceeds after the statement about insurance coverage, that Carolina Neurosurgery was aware the additional policy had a subrogation requirement, that Carolina Neurosurgery had no right to rely on the opinion statement about coverage, and that Carolina Neurosurgery needed to perform its own due diligence. **R. pp. 20-28, ¶¶ 13, 16, 19, 20, 48, 50, 52, 56, and 57.** With those findings, Carolina Neurosurgery could not establish the statement in an email about coverage was unfair or deceptive and proximately caused it to provide services for which it was unpaid. *See generally Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013) (listing the elements of a SCUTPA violation claim).

Judge Salvini appropriately reached the same conclusion as to Judge Dickson's written Order's application to Carolina Neurosurgery's claims for negligent misrepresentation and promissory estoppel. Both claims require proving reasonable reliance. *See West v. Gladney*, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000) (listing the elements of negligent representation and including justified and reasonable reliance); *Woods v. State*, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993) (including as element of promissory estoppel "reasonable reliance upon the promise by the party to whom the promise is made"). Carolina Neurosurgery claimed reasonable reliance on representations of insurance coverage. **R. p. 617-18, ¶¶ 41, 45,**

49-50. The Order, however, states in multiple findings that Carolina Neurosurgery did not have a right to rely on representations about coverage. **R. p. 27, ¶ 48** ("Plaintiff was not entitled, by virtue of the parties' relationship to one another, to rely on Defendants' representations as to insurance coverage."); **R. p. 28, ¶ 57** ("Plaintiff apparently instead chose to rely solely on Bennett's first January 21, 2019 email to Goodwine—expressing only an opinion on available coverage—which, as discussed above, Plaintiff had no right to rely on."). The Order also found Carolina Neurosurgery had a duty to exercise reasonable diligence to determine the truth of the insurance coverage statements. Because proving its negligent misrepresentation and promissory estoppel claims would have required Carolina Neurosurgery to prove facts contrary to the law of the case, Judge Salvini was correct in awarding summary judgment.

In conclusion, because Judge Dickson's controlling written Order making findings of fact and conclusions of law dismissing the majority of the claims was the law of the case and limited its nonapplication to the existing claims for breach of contract and SCUTPA, but Carolina Neurosurgery added claims and changed its theories requiring it to prove facts or the court to make findings directly contrary to the law of the case, Judge Salvini correctly granted summary judgment and this Court should affirm.

II. The circuit court correctly granted summary judgment on negligent misrepresentation because there were no genuine issues of material fact on the truth of the coverage statement and Carolina Neurosurgery did not actually or justifiably rely on the statement.

To prevail on a cause of action for negligent misrepresentation as it relates to a pecuniary loss, a plaintiff must prove: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and

(6) the plaintiff suffered a pecuniary loss as a result of his reliance upon that representation. *AMA Management Corp v. Strasburger*, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992).

Carolina Neurosurgery argues the circuit court erred in granting summary judgment on negligent misrepresentation because there was at least a genuine issue of material fact on (1) the falsity of the insurance coverage statement and (2) whether Carolina Neurosurgery justifiably relied on the statement. **App./Resp. Br. at 23-27**. The circuit court did not err in granting summary judgment and this Court should affirm.

A. There was no genuine issue of material fact that the statements in the email from D&M were true, and were an expression of opinion as to future events.

Carolina Neurosurgery argues the statement "we are not concerned that there will be enough over all coverage to pay the claim" was false when considered against the backdrop of the letters of protection. **App./Resp. Br. at 20**. D&M disagrees.

For the tort of negligent misrepresentation, "the element of 'false misrepresentation' cannot be premised upon an omission or silence of a party." *Allegro, Inc. v. Scully*, 409 S.C. 392, 419, 762 S.E.2d 54, 68 (Ct. App. 2014), *rev'd in part on other grounds*, 418 S.C. 24, 791 S.E.2d 140 (2016). There is no claim for negligent misrepresentation, regardless of negligence in making a representation, "if: (1) there is no falsity; or (2) there is no factual statement." Hubbard & Felix, *The South Carolina Law of Torts*, p. 447 (5th Ed. 2023) (footnotes omitted).

"Not every statement made in the course of commercial dealings is actionable at law. A mere statement of opinion, commendation of goods or services, or expression of confidence that a bargain will be satisfactory does not give rise to liability in tort." *AMA Mgmt. Corp. v. Strasburger*, 309 S.C. at 222, 420 S.E.2d at 874. Misrepresentations must relate to present or pre-existing fact and be false when made. *Koontz v. Thomas*, 333 S.C. 702, 713, 511 S.E.2d 407, 413 (Ct. App. 1999).

An expression of opinion or a party's intention are not false statements of pre-existing fact. *See Winburn v. Insurance Co. of N. Am.*, 287 S.C. 435, 440, 339 S.E.2d 142, 145-46 (Ct. App. 1985) (finding no evidence that a party's expression that someone was a good marine mechanic was a negligent misrepresentation when after it was made that person allegedly insufficiently repaired a boat).

Evidence of broken promises or statements of future events are not statements of fact as actionable misrepresentations. *See Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003) (finding statement that a party would establish fair market value for lots through appraisals was a statement about the future because the appraisals had not been conducted at the time the statement was made).

There was no genuine issue of material fact that the statement Carolina Neurosurgery takes issue with was not an actionable statement of pre-existing fact, and was not false. In response to Goodwine's inquiry about "limits" for Client, Bennett replied with the following:

> The at-fault party had a North Carolina Policy of automobile insurance. In order for them to disclosure [*sic*] the limits of their North Carolina Policy, we must provide them with a signed Medical Authorization allowing them to obtain copies of [Client's] medical records. We are NOT willing to comply with that request. We are therefore unable to find out how much Liability Coverage is on their policy. Because [Client] carries $100,000.00 in Underinsured Motorist Coverage on his at-home policy with Safeco, and there is $1,000,000.00 in "Occupational Accident Coverage" to pay bills and wages under the One Beacon Policy, <u>we are not concerned that there will be enough over all coverage to pay the claim</u>.

R. p. 947. (emphasis added).

The emphasized statement is not an actionable statement of pre-existing fact. The emphasized statement is an expression of an opinion and a statement as to a future event. Importantly, the phrase "we are not concerned" that prefaces the statement expresses D&M's

opinion about coverage. Similar to *AMA Mgmt. Corp,* this is an expression of confidence and does not give rise to liability in tort. Carolina Neurosurgery improperly attempts to read out the opinion phrase to assert that D&M affirmatively represented the insurance policies would pay the claim. Because the statement is an opinion, it was not actionable and the circuit court properly granted summary judgment.

In addition, the statement is about future events. The statement was made on January 21, 2019, at 9:24 a.m., and used the phrase "will be" and referenced "the claim." **R. p. 947**. At the time, Carolina Neurosurgery had not performed any substantial services for Client, having previously seen him only once for a new patient evaluation and charging him $900.00. **R. p. 951**. The surgical costs were not incurred until March and May of that year. Thus, the statement was made when Carolina Neurosurgery did not have the claim they now seek to assert (repayment for medical costs after January 21, 2019). Second, the statement depended on making a claim on those policies, which had not occurred at the time the statement was made. Even if implied that a claim would be made, that reinforces that it was a statement as to a future event. Because the statement when made was about future events—the potential that there would be coverage to pay the claim—the statement is not actionable and the circuit court appropriately granted summary judgment.[4]

Last, the statements were true when made regardless of interpretation as an opinion or statement of fact. Bennett replied to Goodwine's email and told her that she did not know what the at-fault party's liability insurance was—a true statement. Bennett stated that Client "carried" a policy with Safeco with $100,000 in UIM and One Beacon Policy for "Occupational Accident

[4] To the extent this is not a specific holding of the circuit court granting summary judgment, D&M asserts this as additional sustaining grounds to affirm the circuit court because the factual basis for this argument appears in the record on appeal. *See* Rule 220(c), SCACR; Rule 208(b)(2), SCACR (stating a respondent may ask the court to affirm for any ground appearing in the record).

Coverage" for $1,000,000—a true statement that remained true. *See* **R. p. 1040 (50:3-7)**. Client had those policies in effect when Bennett communicated with Kiara Goodwine. In addition, Bennett mentioned that they were "not concerned that there will be enough overall coverage to pay the claim." Again, this statement was true at the time made and only a representation about their concern about coverage.

Moreover, One Beacon's successor did eventually accept coverage and attempted to pay Carolina Neurosurgery something for each of the services that it provided Client, albeit at a reduced cost. Carolina Neurosurgery submitted its medical bills to One Beacon for payment while litigation was pending. The Explanation of Benefits included on each page that "the patient is covered under an Occupational Accident Policy." **R. pp. 1049-56; 1057**. It also explained that "[u]nless otherwise noted, charges were reduced by the lesser of the usual and customary charges for the service, treatment or supply as reflected in the local Workers' Compensation schedule or negotiated rate." Comparing the explanation of benefits to the full list of charges for services to Client it is clear that One Beacon paid an amount for each one of the charges. ***Compare*** **R. pp. 1049-56** ***to*** **R. p. 951**. One Beacon found there was coverage under its Occupational Accident Policy that had $1,000,000 in coverage, even though it did not pay what Carolina Neurosurgery wanted. Thus, it is true that Client's One Beacon policy provided coverage. Because the statements were true when made, there is no false statement, the negligent misrepresentation claim fails and there was no genuine issue of material fact.

Carolina Neurosurgery includes in its argument on falsity references to the Restatement (Second) of Torts section 542 "Opinion of Adverse Party." **App./Resp. Br. at 24**. However, because that section concerns justifiable reliance, not falsity, D&M addresses it in the following argument.

B. There was no genuine issue of material fact that Carolina Neurosurgery could not have actually or justifiably relied on the statement about lack of concern over coverage.

Carolina Neurosurgery argues that it reasonably relied on D&M's representations of insurance coverage, and that it was at least a genuine issue of material fact. **App./Resp. Br. at 25-26**. The circuit court ruled that even construing the evidence in the light most favorable to Carolina Neurosurgery, the only reasonable inference was that Carolina Neurosurgery did not actually, reasonably, or justifiably rely on statements about insurance coverage. **R. p. 62**. The circuit court ruled correctly and should be affirmed.

Actual and justifiable reliance on a representation is required to establish a claim for negligent misrepresentation. *AMA Mgmt. Corp.*, 309 S.C. at 222, 420 S.E.2d at 874. There is no liability for statements on matters that a plaintiff could determine if he or she exercised due diligence. *Quail Hill, LLC v.*, 387 S.C. at 240, 692 S.E.2d at 508. Although reliance can be an issue of fact for the jury, it is one for the court and appropriate for summary judgment if the plaintiff could have learned the truth of the matter. *See id.* (reversing the court of appeals and finding no genuine issue of material fact that the plaintiff, an experienced real estate broker, did not justifiably rely on a county employee's representation about zoning ordinances when the broker could have reviewed the zoning map to determine the appropriate classification).

There is no genuine issue of material fact that Carolina Neurosurgery did not actually or justifiably rely on the statement of lack of concern over coverage. First, Carolina Neurosurgery did not actually rely on the statement. Carolina Neurosurgery has a financial policy on which it relies to secure payment for its services from its clients. **R. p. 987 (15:16-18)**. Moreover, Dr. Highsmith testified that he did not know whether he saw the email from Bennett referencing insurance policies prior to providing services to Client, and further that the substance of the emails

about coverage were not relevant to Client's medical care. *See* **R. p. 1013 (69:14-70:3)**. If the medical provider did not see the statements at any time prior to providing services, it is impossible that Carolina Neurosurgery could have relied on the statements. Further, Dr. Highsmith testified that insurance coverages do not affect his treatment recommendation. He stated that "if it's an elective surgery, [he] is not going to put someone through a huge bill if there's supposed coverage that doesn't exist." But Dr. Highsmith testified that the Client needed the surgery. *See* **R. pp. 1026-27 (104:6-105:5)**. He also testified that, in a situation where a patient needs surgery and he doesn't know anything about what insurance coverage is, he would still provide the surgery. *See* **R. pp. 1010-11 (66:22-67:1)**. In addition, when the statement was made Carolina Neurosurgery had already accepted Client as a patient, had him sign the financial policy, and provided introductory services. Thus, there is no genuine issue of material fact that Carolina Neurosurgery did not actually rely on the statement about coverage.

Second, even if there is a genuine issue of material fact as to "actual" reliance, Carolina Neurosurgery did not justifiably rely on the statement. Prior to any statement about coverage, Carolina Neurosurgery had a financial policy Client executed that says the patient is responsible for the bill and Carolina Neurosurgery relies on that financial policy. **R. p. 987(15:16-18)**. The letters of protection to Carolina Neurosurgery clearly indicated that, in the event of an insufficient recovery, the Client would be responsible for his own medical costs. Thus, Carolina Neurosurgery was cognizant of a potential for an insufficient recovery prior to providing the high-cost services. Moreover, mere hours after making the statement about lack of concern for coverage to pay the claim, Bennett informed Goodwine she had learned Client needed surgery and requested that Carolina Neurosurgery seek payment from Client's health insurance, i.e., obtain payment to cover the claim from a source other than the policies mentioned in the email. **R. p. 946.** Goodwine

responded to that email agreeing to the request. **R. p. 946**. Carolina Neurosurgery did not, and could not have, justifiably relied on the statement about coverage when it provided no services to Client between those two emails from Bennett.

Carolina Neurosurgery does not contest Dr. Highsmith's testimony on which the circuit court relied to grant summary judgment. **App./Resp. Br. at 26**. Carolina Neurosurgery does, however, point to other testimony of Dr. Highsmith in an attempt to create a genuine issue of material fact, referencing how Dr. Highsmith testified he would not put a patient through having high medical bills for elective surgeries and he would send that patient to another provider. **App./Resp. Br. at 26**. This point illustrates how unjustified the reliance would be when considered in light of Carolina Neurosurgery's "out-of-network" status with Client's health insurer that D&M was unaware of and D&M told Carolina Neurosurgery to bill that insurer. Assuming Dr. Highsmith had read the emails about coverage, he could have sent Client to another provider in network with Client's health insurance to perform the "elective" surgeries. This is especially true in response to Carolina Neurosurgery's arguments that D&M was in a better position to know about the coverages for the policies Bennett mentioned (**App./Resp. Br. at 26**)—Carolina Neurosurgery is in the best position as a health care provider with knowledge of health insurance policies to know it could not (or would not) bill Client's private health insurance and that should have raised red flags, leading Dr. Highsmith to send Client to another provider.

There simply is no reasonable inference from the evidence to create a genuine issue of material fact on justifiable reliance under the totality of the circumstances. Summary judgment on negligent misrepresentation was appropriate and should be affirmed.

In addition, Carolina Neurosurgery relies heavily on the Restatement (Second) of Torts to support its argument, citing Section 542 "Opinion of Adverse Party." **App./Resp. Br. at 24**. First,

Carolina Neurosurgery did not raise the Restatement (Second) of Torts to the circuit court in opposition to summary judgment and, therefore, that argument is not preserved. *See Elam v. S.C. Dep't of Transp.,* 361 S.C. 9, 23–24, 602 S.E.2d 772, 779–80 (2004); **R. pp. 385-87; R. pp. 1077-80**. Second, it does not appear that South Carolina courts have officially adopted section 542 of the Restatement (Second) of Torts and, therefore, it does not apply here. Third, even if adopted, the section conflicts with settled South Carolina law that expressions of opinion are not actionable for negligent misrepresentation. *See AMA Mgmt. Corp.*, 309 S.C. at 222, 420 S.E.2d at 874 (stating a mere expression of opinion in a commercial transaction is not actionable negligent misrepresentation). Fourth, Carolina Neurosurgery misconstrues the section's application. The section clearly applies to "opinions," but Carolina Neurosurgery argues the section supports finding the statement about lack of concern for coverage was a false statement and not an opinion. **App./Resp. Br. at 24**.

Setting aside the above, Carolina Neurosurgery did not present any evidence to create a genuine issue of material fact on the section's application. In the context of the statement itself, D&M did not "purport to have special knowledge" that Carolina Neurosurgery did not with respect to coverages, and did not have a fiduciary relationship with Carolina Neurosurgery. *See* Restatement (Second) of Torts, § 542 *Opinion of Adverse Party*. Carolina Neurosurgery claims D&M endeavored to secure its confidence by sending two letters of protection and then "doubling down" on those letters with the statement about lack of concern over coverage. **App./Resp. Br. at 24**. Carolina Neurosurgery forgets the timeline of events and content of the letters—(1) D&M sent a letter of protection that indicated Client was responsible for medical costs in the event of an insufficient recovery; (2) D&M made the statement about lack of concern for coverage; (3) <u>hours later</u> D&M expressed concern and requested Carolina Neurosurgery obtain payment from Client's

private health insurance; (4) D&M sent a second letter of protection requesting medical costs be submitted to private health insurance and noting Client was responsible in the event of an insufficient recovery. Under those circumstances, it is difficult to fathom a *genuine* issue of material fact as to whether Carolina Neurosurgery actually or justifiably relied on the statement. Last, there was no special reason to expect Carolina Neurosurgery would rely on the statement under the same circumstances.

In sum, this Court should affirm summary judgment on negligent misrepresentation because the only reasonable inference from the evidence is that Carolina Neurosurgery and Dr. Highsmith did not actually or justifiably rely on a statement of opinion about lack of concern of coverages when that statement was made and effectively retracted, Dr. Highsmith cannot recall if he ever saw it before providing services, and the statement pertained to a future event.

III. This Court should affirm summary judgment on the SCUTPA claim because there is no genuine issue of material fact that Carolina Neurosurgery and D&M were not engaged in trade or commerce with each other, and there exist additional sustaining grounds to affirm under Rule 220(c), SCACR.

SCUTPA makes unlawful "unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. Code Ann. § 39-5-20(a). To state a claim under SCUTPA, a plaintiff must show "(1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected [the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." *Health Promotion Specialists, LLC*, 403 S.C. at 638, 743 S.E.2d at 816 (quoting *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006)). A "deliberate or intentional breach of a valid contract, without more, does not constitute a violation of the Unfair Trade Practices Act." *Columbia E. Assocs. v. Bi-Lo, Inc.*, 299 S.C. 515, 522, 386 S.E.2d 259, 263 (Ct. App. 1989) (affirming trial court dismissal of SCUTPA claim based on breach of commercial lease agreement).

The circuit court granted summary judgment on the SCUTPA violation finding Carolina Neurosurgery and D&M were not engaged in trade or commerce. **R. p. 59**. Carolina Neurosurgery argues it was engaged in trade or commerce and, therefore, the circuit court should not have granted summary judgment. **App./Resp. Br. at 27-29**. D&M disagrees. There was no genuine issue of material fact that Carolina Neurosurgery and D&M were not engaged in trade or commerce with Carolina Neurosurgery such that D&M would be responsible for Client's medical bills. Further, there exist additional sustaining grounds to affirm because there are no genuine issues of material fact as to the other elements of the SCUTPA claim.

A. This Court should affirm the circuit court because D&M was not engaged in trade or commerce with Carolina Neurosurgery when the allegedly unfair or deceptive acts occurred.

Under the Act, "trade or commerce" includes "the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate." S.C. Code Ann. § 39-5-10(b). These terms make clear the Act applies "to business and consumer transactions." *Health Promotion Specialists, LLC*, 403 S.C. at 638, 743 S.E.2d at 816. "Furthermore, by its very definition, 'trade or commerce' involves '[e]very business occupation carried on for subsistence or profit and involving the elements of bargain and sale, barter, exchange, or traffic.'" *Id.* (quoting *Black's Law Dictionary* (9th ed. 2009)).

For example, our supreme court determined in *Health Promotion Specialists* that the Board of Dentistry was not engaged in trade or commerce under the Act when it promulgated a regulation because it was not involved in the "advertisement, sale, or distribution of services or property within a business context." 403 S.C. at 639, 743 S.E.2d at 816. The court also discussed how the act can apply to professional services, which the regulation governed, but it still was not within

the ambit of SCUTPA because it did not involve the sale of those services. *Id.* at 639 n.13, 743 S.E.2d at 816 n.13.

Here, D&M was not engaged in trade or commerce with Carolina Neurosurgery in a business context when Bennett made the representation about lack of concern about coverage. D&M were not selling professional services to Carolina Neurosurgery, the statement was not related to the "advertisement, sale, or distribution of services or property" to Carolina Neurosurgery. Carolina Neurosurgery gave nothing to D&M in response to the statement.

Carolina Neurosurgery argues the circuit court construed the definition of "trade or commerce" too narrowly, and that Carolina Neurosurgery's provision of medical services to Client in response to D&M's statement was "trade or commerce." **App./Resp. Br. at 27**. However, because SCUTPA creates a cause of action and creates liability where none existed at common law, the statute must be strictly, i.e., narrowly, construed. *See generally Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000) (strictly construing statute creating cause of action for wrongful death of a "person" as against common law principle that tort action dies with injured person). Thus, the circuit court was correct if its application of the statute could be considered a narrow construction of "trade or commerce" as applied between Carolina Neurosurgery and D&M. There simply was no "trade or commerce" between Carolina Neurosurgery and D&M. In the context of the statement about lack of concern over coverage, Carolina Neurosurgery was not providing medical services to D&M, and D&M was not providing legal services to Carolina Neurosurgery. Carolina Neurosurgery cannot claim it was in an attorney-client relationship with D&M.

Carolina Neurosurgery also relies on *Taylor v. Medenica* to argue that the provision of any services constitutes trade under SCUTPA. **App./Resp. Br. at 28**. While this is an accurate

statement from *Taylor*, the provision is taken out of context and significantly expanded beyond the clear intent of the legislature. In *Taylor*, a medical laboratory performed multiple unnecessary tests samples from a cancer patient, charging the patient a significant amount of money. 324 S.C. 200, 210, 479 S.E.2d 35, 40 (1996). The medical laboratory argued it was not subject to SCUTPA at all because providing laboratory services as a general matter is not trade or commerce. *Id.* at 217, 479 S.E.2d at 44. The Court noted that providing any service was commerce under the statute and, therefore, the medical laboratory was subject to the statute for providing laboratory services to the plaintiff. *Id.* In context, this holding has limited application to this case because (1) it was a general holding that a business was subject to the statute, and (2) the medical laboratory was providing services to the plaintiff for which it charged the plaintiff. Here, D&M does not argue it is not, as a general matter, subject to the statute. Instead, D&M argues it was not engaged in trade or commerce with Carolina Neurosurgery when the statement was made. Also, because *Taylor* involved laboratory services provided to the plaintiff and for which the laboratory charged the plaintiff, it is not applicable to this scenario where D&M did not provide any services to Carolina Neurosurgery for which it charged Carolina Neurosurgery.

Because there was no genuine issue of material fact that D&M was not engaged in trade or commerce with Carolina Neurosurgery when the statement about lack of concern over coverage was made, the circuit court appropriately granted summary judgment.

B. This Court should affirm summary judgment on SCUTPA on additional sustaining grounds that there is no genuine issue of material fact that D&M did not know Carolina Neurosurgery's out-of-network status, the statement about coverage was not unfair or deceptive, did not proximately cause damage, and the issue affected only the parties involved.

"Unfair" acts are acts that offend public policy or are immoral, unethical, or oppressive. *Bessinger v. Bi-Lo, Inc.*, 366 S.C. 426, 432, 622 S.E.2d 564, 567 (Ct. App. 2005). "Deceptive" acts are acts that have a tendency to deceive. *Health Promotion Specialists, LLC*, 403 S.C. at 638, 743 S.E.2d at 816.

"The legislature intended in enacting [SCUTPA] to control and eliminate 'the large scale use of unfair and deceptive trade practices within the state of South Carolina.'" *Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 477, 351 S.E.2d 347, 349 (Ct. App. 1986) (quoting Note, *Consumer Protection and the Proposed "South Carolina Unfair Trade Practices Act*," 22 S.C.L.Rev. 767, 787 (1970)). This is why SCUTPA requires the unfair or deceptive act to affect the people of South Carolina. *Id.* The purpose of the limitation is to circumscribe the "kind of trade or commerce" that can serve as a basis for a SCUTPA claim. *Id.* "An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the act's embrace . . . ." *Id.* at 479, 351 S.E.2d at 349-50.

Here, Carolina Neurosurgery asserted it is "unfair or deceptive" to "make representations, assurances, and promises to a healthcare provider that payments for elective surgical procedures to be rendered by the healthcare provider . . . would be paid out of $1,100,000 of liability coverage available to the at-fault party who allegedly injured the lawyer's client when the lawyer and law firm did not verify the availability of the insurance coverage before making the representations to the healthcare provider." Carolina Neurosurgery also alleges D&M knew Carolina Neurosurgery was an out-of-network provider. **R. p. 978**. Carolina Neurosurgery argues that it was unfair or

deceptive "for a lawyer and a law firm to make false representations about email communications that never occurred"—referencing the April 29, 2019 email from Bennett to Goodwine and alleging Carolina Neurosurgery didn't receive the email and did not know about it until after the surgeries were performed. ***Id.***

The email from Bennett stated, in pertinent part, that they did not know the limits of the liability coverage and because Client "carries $100,000.00 in Underinsured Motorist Coverage on his at-home policy with Safeco, and there is $1,000,000 in "Occupational Accident Coverage" to pay bills and wages under the One Beacon Policy, we are not concerned that there will be enough over all coverage to pay the claim." **R. p. 947**. Bennett confirmed this in her testimony and that when she mentioned "coverage" she was referring to the policy limits not whether the claim would be covered within the policies. **R. p. 1060 (Bennett Depo. at 27:3-14)**. Hours later that same day, once D&M knew Client needed surgery, Bennett informed Goodwine the treatment should be filed with private health insurance and it "would be best for everyone involved if we NOT do the treatment under an Assignment/Letter of Protection." **R. p. 946**. Goodwine responded "Okay thanks for the update."

1. The only reasonable inference from the evidence is that D&M did not know Carolina Neurosurgery was an out-of-network provider when D&M made statements about the other policies.

There was no genuine issue of material fact that D&M did not know Carolina Neurosurgery was out of network with Client's private health insurance. D&M testified that it did not know Carolina Neurosurgery was out-of-network. *See* **R. p. 1038 (D&M Depo. Tr. 48:16-49:7)**. There is no evidence in the record to establish, or support a reasonable inference, that D&M knew that Carolina Neurosurgery was out-of-network at any time before Carolina Neurosurgery stopped providing Client medical care. There is no evidence to show that D&M received Carolina

Neurosurgery's Financial Policy that discusses insurance, but the language does not clearly state Carolina Neurosurgery is out of network. *See* **R. pp. 1031-32 (18:14-19:10); R. p. 1034 (24:3-5)** ("We didn't know anything between [Client] and Dr. Highsmith. He went to Dr. Highsmith, and they didn't send us a copy of anything that he filled out.").

Furthermore, knowing it was out of network, Carolina Neurosurgery should have said something in response to the Letter of Protection and emails requiring that treatment be provided through and billed to Client's insurer. *See* **R. p. 1039 (49:10-20).** The fact that D&M made that request shows that it did not know Carolina Neurosurgery was out-of-network and assumed the opposite. Carolina Neurosurgery did not correct that misunderstanding. In fact, Carolina Neurosurgery responded and agreed to abide by the request to bill Client's health insurer when she said "Okay." Thus, contrary to Carolina Neurosurgery's allegation, there is no evidence to establish that D&M knew at the time of the statements about coverage that Carolina Neurosurgery was out-of-network.

2. Carolina Neurosurgery's allegations of the "unfair or deceptive" act are unsupported by the evidence.

Carolina Neurosurgery alleged it was unfair or deceptive to "make representations, assurances, and promises to a healthcare provider that payments for elective surgical procedures to be rendered by the healthcare provider . . . would be paid out of $1,100,000 of liability coverage available to the at-fault party." **R. p. 978**. The only reasonable inference from the evidence is that D&M never represented, promised or assured that Carolina Neurosurgery would be paid out of "$1,100,000 of liability coverage available to the at-fault party."

Bennett explained that the at-fault party had North Carolina auto insurance, and would not release the limits without a medical authorization that they were not willing to provide. **R. p. 947.** Thus, D&M did not know what liability insurance was available to the at-fault party. Moreover,

Bennett explained that *Client* had a UIM policy and an Occupational Accident Coverage policy. This was not liability coverage available to the at-fault party. In fact, the policy names imply certain preconditions to coverage that Carolina Neurosurgery was unaware of at the time. Carolina Neurosurgery could not have known if the $100,000 in underinsured motorist coverage applied, because no one at the time knew if the at-fault party was underinsured. Further, the name of the One Beacon policy—Occupational Accident Coverage—implies that the accident would need to occur within Client's occupation, which Carolina Neurosurgery was unaware of at the time. Essentially, Bennett never made any representation, promise, or assurance that *Carolina Neurosurgery's yet-to-be-incurred medical charges* would be paid out of those policies. Instead, she expressed that they were not concerned about there being enough overall coverage to cover the claim based on the limits of those policies. This is not tantamount to an assurance, promise, or representation that Carolina Neurosurgery's medical bills would be paid out of those amounts.

Accordingly, the unfair or deceptive act on which Carolina Neurosurgery relies is a mischaracterization of the statements by Bennett, unsupported by any evidence or reasonable inferences therefrom. Therefore, this Court should affirm on this additional sustaining ground.

3. There is no evidence or reasonable inferences from evidence to establish D&M's statements about coverage were unfair or deceptive.

The references to coverage cannot be an unfair or deceptive act because the statement, when made, was accurate. Goodwine asked Bennett in general what the "limits" were for Client. **R. p. 947**. Bennett stated that Client "carried" a policy with Safeco with $100,000 in UIM and One Beacon Policy for "Occupational Accident Coverage" for $1,000,000. That was a truthful statement of the limits of those policies, and remains true. *See* **R. p. 1040 (50:3-7)**. Client had those policies in effect when Bennett told Goodwine. In addition, Bennett mentioned that they were "not concerned that there will be enough overall coverage to pay the claim." Again, this

statement was true at the time made and only a representation about their concern about coverage. Because they were true when made, it is hard to fathom how it could constitute unfair or deceptive practice.

Even though Bennett said they were "not concerned," she followed up that same day after she found out that Client needed surgery, explaining to Carolina Neurosurgery's employee that all of Client's surgical treatment was to be filed with his private health insurance company, and that the treatment should not proceed under an assignment or Letter of Protection. As D&M testified, this shows they were concerned about coverage. *See* **R. p. 1043 (53:2-17)**. Thus, Carolina Neurosurgery knew after any statements about policies, that it was to process payment through the private health insurer—not the UIM policy or occupational policy limits. Also, Carolina Neurosurgery's employee did not bat an eye at the request for it to submit claims to health insurance, instead agreeing to do so when Goodwine said "Okay thanks for the update."

Also, after Bennett informed Goodwine about the Safeco and One Beacon policies, the Letter of Protection explained what would occur in the event of an insufficient recovery—Client would be responsible. The reference to "insufficient recovery" is directly contrary to Carolina Neurosurgery's belief forming the basis for the SCUTPA claim—the belief there would be a sufficient recovery on the policies mentioned to pay the claim. Dr. Highsmith agreed the letter outlined who would be responsible in the event of an insufficient recovery—the Client and not D&M. **R. pp. 1018-19 (74:23-75:8)**.

Last, it is ridiculous to continue to assert the statement about coverage is "unfair or deceptive" when Carolina Neurosurgery submitted its bills to One Beacon's successor during this litigation and the successor attempted to pay something for each one of Carolina Neurosurgery's services. **R. pp. 1049-56; R. p. 1057; R. p. 951**. The explanation of benefits sent Carolina

Neurosurgery expressly noted on every page that Client "is covered under an Occupational Accident Policy" and identified how much was being paid towards every one of the services Carolina Neurosurgery rendered Client.

Because the general references to other policies were true at the time, Bennett notified Carolina Neurosurgery it should seek payment for its surgical services from Client's health insurer, the subsequent letter informed Carolina Neurosurgery of the possibility of an insufficient recovery, and One Beacon's successor eventually found Client was covered under the $1,000,000 policy, the statements about the other policies were not unfair or deceptive, and this Court should affirm summary judgment on these additional sustaining grounds.

4. D&M's statement about coverage did not cause an ascertainable loss of money or property.

In order to recover actual damages under SCUTPA, the plaintiff must establish that the damages are the "natural and proximate result of deceptive conduct." *Wright v. Craft*, 372 S.C. 1, 24, 640 S.E.2d 486, 499 (Ct. App. 2006); *see Collins Holding Corp. v. Defibaugh*, 373 S.E.2d at 446, 451, 646 S.E.2d 147, 150 (Ct. App. 2007) (finding the trial court erred in finding for plaintiff on SCUTPA claim because plaintiff did not establish the deceptive act (reflexive payout on gaming machines) was the cause of the plaintiff's machines earning less money). Causation is a question for the court, not the jury, when the evidence supports only one reasonable inference there was no causation. *See Hurd v. Williamsburg Cnty.*, 353 S.C. 596, 613-14, 579 S.E.2d 136, 145 (Ct. App. 2003).

There is no genuine issue of material fact that the statement about coverage did not cause Carolina Neurosurgery any damages. Carolina Neurosurgery has a financial policy that says the patient is responsible for the bill and Dr. Highsmith relies on that financial policy. **R. p. 987 (15:16-18)**. In addition, Dr. Highsmith testified that coverages do not affect his treatment

recommendation. He stated that "if it's an elective surgery, [he] is not going to put someone through a huge bill if there's supposed coverage that doesn't exist." But Dr. Highsmith testified that the Client needed the surgery. *See* **R. pp. 1026-27 (104:6-105:5)**. He also testified that, in a situation where a patient needs surgery and he doesn't know anything about what insurance coverage is, he would still provide the surgery. **R. pp. 1010-11(66:22-67:1)**.

Moreover, Dr. Highsmith testified that he did not know whether he saw the email from Bennett referencing insurance policies prior to providing services to Client, and further that the substance of the emails about coverage were not relevant to Client's medical care. *See* **R. pp. 1013-14 (69:14-70:3).**

The only reasonable inference from the evidence above is that Carolina Neurosurgery did not rely on statements about insurance coverage from Bennett to provide medical care to Client. If he did not rely on those statements, those statements could not have proximately caused him damages, i.e., caused Carolina Neurosurgery to render medical services it thought would be covered by insurance that supposedly were not covered.

Also underlying Carolina Neurosurgery's SCUTPA claim is the allegation that it was unfair or deceptive to represent D&M sent an email to Carolina Neurosurgery that Carolina Neurosurgery did not receive—referring to the April 29, 2019 email wherein Bennett mentions issues with coverage. Carolina Neurosurgery refers to it as the "false email." However, this allegedly "unfair or deceptive" act cannot have proximately caused Carolina Neurosurgery any monetary loss because, according to its own allegations Carolina Neurosurgery had already treated Client and incurred medical costs. **R. pp. 889-90, ¶¶ 18-28** (noting Carolina Neurosurgery received the "false email" after the second surgery, and that occurred after Carolina Neurosurgery had already incurred $125,409.25 in medical costs through December 20, 2019). If the

representations about the April 29, 2019 email being sent occurred after Carolina Neurosurgery had already provided the services, i.e., the damages it is claiming in this lawsuit, then it cannot have caused Carolina Neurosurgery to provide those services and incur costs. Therefore, Carolina Neurosurgery cannot prove the representations about the April 29, 2019 email proximately caused an ascertainable loss of money.

Without a reasonable inference to support causation, Carolina Neurosurgery's claim for SCUTPA fails, and this Court should affirm summary judgment on this additional sustaining ground.

5. The allegedly unfair and deceptive acts affected only the parties involved, not the public interest.

"To be actionable under the UTPA, an unfair or deceptive practice or act must adversely affect the public interest." *Jefferies v. Phillips*, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994). "Therefore, conduct [that] only affects the parties to the transaction provides no basis for a UTPA claim." *Id.* "The act is not available to redress a private wrong . . . ." *Columbia East Assoc. v. Bi-Lo, Inc.*, 299 S.C. 515, 386 S.E.2d 259 (Ct. App. 1989).

The plaintiff must prove the impact on public interest based on specific facts, without which the court would be left to speculate on the public impact and that will not support a SCUTPA claim. *Jeffries*, 316 S.C. at 527, 451 S.E.2d at 23. The court must analyze each case and determine whether the wrongful conduct impacts the public, either through circumstances of the transaction or by evidence of similar acts. *Id.* at 529, 451 S.E.2d at 23.

"In the course of human endeavor, every action has some potential for repetition. The mere proof that the actor is still alive and engaged in the same business is not sufficient to establish this element." *Id.*, 451 S.E.2d at 24 (finding there was no evidence of similar acts or facts to establish

the conduct has potential for repetition in claim that a contractor overcharged for termite repair work, even though there were allegations the contractor might pad other bills).

Carolina Neurosurgery wants to use SCUTPA to redress a private wrong where only parties involved are impacted. Carolina Neurosurgery alleged a violation occurred when Bennett made "representations, assurances, and promises to a healthcare provider that payments for elective surgical procedures to be rendered by the healthcare provider . . . would be paid out of $1,100,000 of liability coverage available to the at-fault party." **R. p. 978**. The circumstances of this "transaction" establishes that it affected only the parties. The statement was in response to Carolina Neurosurgery's solicitation about Client's "limits," was based on the Client's case, his need for medical care, and what insurance policies the Client had. The circumstances are unique, entirely dependent on the facts of this matter. Therefore, there is no potential impact on the public interest.

Further, there is no evidence in this case that D&M made similar statements in other cases before Client's case and treatment. Therefore, there is no affect on the public interest based on previous similar acts.

Importantly, the deposition testimony and any allegations about D&M sending similar letters of protection in previous cases cannot be used to establish an impact on the public interest because Carolina Neurosurgery is relying on statements about insurance coverage to make its claim. Just because D&M continues to exist and practice law representing injured plaintiffs, is not sufficient to show that any conduct could be repeated. The only parties affected are the parties involved, and there is no evidence or reasonable inference from the evidence to create a genuine issue of material fact that Defendants' conduct could impact the public interest. Accordingly, this Court should affirm summary judgment on this additional sustaining ground.

CONCLUSION

For the foregoing reasons, this Court should affirm the circuit court's grant of summary judgment to D&M.

This 12th day of May, 2026.

Respectfully submitted,

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