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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

Appellate Case No. Case: 2025-001304

Case No. 2021-CP-10-03379

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

v.

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

# FINAL BRIEF OF APPELLANT/RESPONDENT

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## INTRODUCTION

This case is about false representations made by a plaintiffs' personal injury law firm to a neurosurgeon's office that it had no concerns that insurance coverages available to the law firm's client would pay for the medical services provided by the neurosurgery office to the client. The false and inaccurate representations concerned the availability of over $1 million in insurance coverage the law firm was pursuing to cover medical and surgical expenses for one of its clients. These representations induced the neurosurgery office to perform over $125,000 in surgery and related healthcare expenses for the law firm's client when contrary to the law firm's representations, there was no available insurance coverage other than approximately $6,000. The law firm did not stand behind its representations that there was sufficient coverage and that it would protect the neurosurgery office by paying for all of the treatment its client received. The law firm engaged in negligent misrepresentations and violations of the South Carolina Unfair Trade Practices Act.

## STATEMENT OF ISSUES

**I. Did the Circuit Court Err in Applying the Law of the Case Doctrine when Granting Summary Judgment to Respondents/Appellants Based on "Findings of Fact" in an Order on a Motion to Dismiss in Which the Circuit Court Stated The Facts Were Not Binding on Any Other Court?**

**II. Did the Circuit Court Err in Granting Summary Judgment on a Negligent Misrepresentation Claim When Respondents/Appellants Made a False Statement on Which Appellant/Respondent Reasonably Relied, or in the Alternative, Finding There Was No Genuine Issue of Material Fact Regarding Whether a False Statement Was Made on Which Appellant/Respondent Reasonably Relied?**

**III. Did the Circuit Court Err in Granting Summary Judgment on the Claim of Violations of the South Carolina Unfair Trade Practices Act in Concluding There was No Trade or Commerce?**

## STATEMENT OF THE CASE

On July 22, 2021, Appellant/Respondent Carolina Neurosurgery & Orthopedics, Inc. ("Appellant" or "CNO") filed a Verified Complaint (ROA 83-125) against Respondents/Appellants Michael A. Maucher, Esquire ("Maucher") and DeLuca & Maucher, LLP ("D&M") (collectively, "the Law Firm"), asserting seven causes of action, styled as (1) Breach of Contract, (2) Breach of Contract Accompanied by a Fraudulent Act, (3) Violation of the South Carolina Unfair Trade Practices Act, (4) Fraud, (5) Constructive Fraud, (6) Unjust Enrichment, and (7) Negligence. The Complaint centers on alleged representations and promises the Law Firm made to CNO to cover all medical expenses incurred by the Law Firm's client ("Client") who was the patient of CNO. The Client was in a car accident, injured, and received elective medical and surgical services from CNO and its surgeon Jason Highsmith, M.D.

In response, the Law Firm filed a Motion to Dismiss on October 22, 2021 under Rule 12(b)(6), SCRCP. (ROA 126-128.) Both parties briefed the Motion to Dismiss. (ROA 129-156.) On June 28, 2022, the Honorable Edgar W. Dickson[1] issued an Order on Defendants' Motion to Dismiss. (ROA 1-17.) In the order, Judge Dickson dismissed Breach of Contract Accompanied by a Fraudulent Act, Fraud, Constructive Fraud, Unjust Enrichment, and Negligence claims and allowed the Breach of Contract and Violations of the South Carolina Unfair Trade Practices Act ("UTPA") to continue. (*Id.*)

[1] CNO recognizes it is somewhat unusual to refer to the circuit court judge individually, rather than the circuit court, in an appellate brief. However, because this case involves the law of the case doctrine, CNO will refer by name to the two judges at issue—Judge Dickson and Judge Salvini—for clarity. Other judges made rulings in this case; however, CNO will refer to the "circuit court" with respect to those rulings.

On July 5, 2022, CNO filed a motion for reconsideration. (ROA 157-162[2].) The motion's grounds, in large part, were to remove certain "Findings of Fact" that were not alleged in the complaint. The motion for reconsideration was heard by Judge Dickson on March 3, 2023. Judge Dickson amended his order after the hearing on the reconsideration motion and issued an amended order which provides, in part, as follows:

> With Court agreement the parties stipulate that the content of the Order or this Amended Order will not be admissible in this lawsuit 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 Practices Act. The Order and Amended Order shall have no effect beyond that of which an order on a motion to dismiss would normally have.

(ROA 18-34.) In the Amended Order, Judge Dickson maintained his ultimate conclusions, keeping the Breach of Contract and Violation of the South Carolina Unfair Trade Practices Act claims and dismissing the Negligence, Fraud, Constructive Fraud, Unjust Enrichment, and Breach of Contract Accompanied by a Fraudulent Act claims. (*Id.*) Thus, the claims of Breach of Contract and Violation of the South Carolina Unfair Trade Practice Act continued.

The Law Firm filed an Answer regarding the remaining claims on April 6, 2023, generally denying the claims and asserting several affirmative defenses. (ROA 163-174.) The parties engaged in written discovery and depositions.

On August 22, 2023, the Law Firm filed a motion for summary judgment. (ROA 175-176.) On September 6, 2023, CNO filed a motion to amend its complaint to add additional legal theories and claims. (ROA 177-188.) The parties then mediated the case on December 18, 2023; however, it resulted in an impasse. (ROA 189.) The parties briefed both the motion for summary judgment

[2] The motion was erroneously styled as "Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss." In the body of the motion, it is evident that the filing was a motion to alter or amend under Rule 59(e), SCRCP. This styling was a mere scrivener's error.

and the motion to amend the complaint (ROA 190-583.) On August 26, 2024, the circuit court granted the motion to amend the complaint and postponed the hearing on the motion for summary judgment so that the parties could engage in additional discovery. (ROA 35-36.)

On September 5, 2024, CNO filed its Amended Complaint, alleging two new causes of action—Negligent Misrepresentation and Promissory Estoppel—in addition to its two causes of action for Breach of Contract and Violations of UTPA. (ROA 584-592.) Four days later, CNO withdrew this amended complaint without prejudice because it contained allegations outside of the pleading submitted with the motion to amend. (ROA 593.) The following day, CNO filed its Amended Complaint that was before the court with the motion to amend. (ROA 594-601.) In its Amended Complaint, CNO stated it "respectfully reserves its objections and potential appeal of the trial court's ruling granting Defendants' motion to dismiss Plaintiff's claims asserted in the original Complaint for Breach of Contract Accompanied by a Fraudulent Act, Fraud, Constructive Fraud, and Unjust Enrichment." (ROA 595.) In response to the Amended Complaint, the Law Firm filed Defendants' Answer to Amended Complaint. (ROA 602-610.)

On September 24, 2024, CNO filed a Second Amended Complaint, noting that Rule 15(a), SCRCP permits a party to "amend his pleading once as a matter of course, at any time before or within 30 days after a responsive pleading is served[,] . . . ." (ROA 611-619.)[3] In response, the Law Firm moved to strike the Second Amended Complaint. (ROA 620.) The circuit court denied the motion to strike. (ROA 37-38.) The Law Firm sought reconsideration of the order denying the motion to strike (ROA 834-893); however, it was denied (ROA 39-42).

[3] In the Second Amended Complaint, CNO maintained its objections and appellate rights with respect to Judge Dickson's rulings in his Amended Order. (ROA. 612 at 1, n.1.)

Additional discovery proceeded, and on March 31, 2025, the Honorable Jessica A. Salvini heard the Law Firm's Motion for Summary Judgment. (ROA 1356-1368.) Judge Salvini granted the motion for summary judgment via Form 4 order. (ROA 43-45.) A more formal order followed on May 2, 2025. (ROA 46-65.) The bases for the order are that CNO's claims were "preempted" by Judge Dickson's Amended Order regarding the motion to dismiss and that no genuine issues of material fact existed for the claims. On April 14, 2025, CNO filed Plaintiff's Motion to Alter or Amend the Order Granting Defendants' Motion for Summary Judgment. (ROA 1081-1088.) On May 8, 2025, the circuit court issued Initial Order Regarding Motion for Consideration, stating that it would rule on the motion based on written submissions. (ROA 66-67.)[4] On June 9, 2025, the circuit court denied the motion to reconsider. (ROA 73-74.) This appeal followed. (Notice of Appeal, June 27, 2025.)

## STATEMENT OF FACTS

CNO provides surgical services, through its primary surgeon Jason M. Highsmith, in Charleston, South Carolina, among other places in the State. (ROA 83-84, ¶ 2.) In 2018, Dr. Highsmith formed CNO, as an out-of-network provider that did not accept insurance for payment of medical bills. (ROA 470-471.) Dr. Highsmith provided services to the Law Firm's Client in the past, and when the Client was in a car accident in December 2018, the Client returned to Dr. Highsmith for treatment. (ROA 613 ¶ 7.)

[4] On May 12, 2025, the Law Firm filed a motion for sanctions. (ROA 1089-1233.) It was denied on June 18, 2026. (ROA 68-70.) The Law Firm filed a motion for reconsideration, which was denied. (ROA 1252-1258 & ROA 80-81.) The Law Firm is cross-appealing with the order denying the motion for sanctions and order denying the Law Firm's motion to strike the second amended complaint. (ROA 1268-1282.)

## I. Representations by Law Firm

On December 20, 2018, the Law Firm sent to CNO a letter of protection ("First Letter of Protection") promising that it would "protect any claim which you may have out of any settlement proceeds we may receive arising of the incident referred to above" to secure payment for all future surgeries and medical treatment expenses out of liability insurance proceeds providing coverage for all of Client's claims. (ROA 100.)

Approximately one month later, on January 21, 2019 and before any surgeries were performed, the Law Firm sent an email to CNO regarding available coverage to pay the claim of medical expenses owed to CNO. (ROA 104.) The January 21, 2019 email at 9:24 from the Law Firm reads as follows:

Tina

From: Tina
Sent: Monday, January 21, 2019 9:24 AM
To: 'Kiara Goodwine'
Cc: Brooke Dunsil; Kary Garcia
Subject: RE: Scott Demaskey

Kiara,

The at-fault party had a North Carolina Policy of automobile insurance. In order for them to disclosure the limits of their North Carolina Policy, we must provide them with a signed Medical Authorization allowing them to obtain copies of Scott Demaskey'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 Mr. Demaskey 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, we are not concerned that there will be enough over all coverage to pay the claim.

Thanks,
Tina

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(*Id.*) Of important note, after providing that Client had $1.1 million in coverage, the Law Firm unequivocally stated "we are not concerned that there will be enough over all coverage to pay the claim." (*Id.*)

Then, later that day around 11:58 am, the Law Firm sent an email stating Client "has advised our office that he will require surgery. Based upon the serious nature of his injury, and his pre-existing injuries, we would respectfully request that all of his treatment be filed with his private health insurance company. It would be best for everyone involved if we do NOT do the treatment under an Assignment/Letter of Protection." (ROA 105.) Of note, the Law Firm never revoked its representations about coverage or express any concerns about the availability of sufficient coverage to cover the surgical expenses incurred by CNO on behalf of the Law Firm's Client.

On March 7, 2019, the Law Firm sent a second Letter of Protection ("Second Letter of Protection") to CNO to "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 from the incident referred to above." (ROA 107 (emphasis added).)

## II. Reliance on the Law Firm's Representations

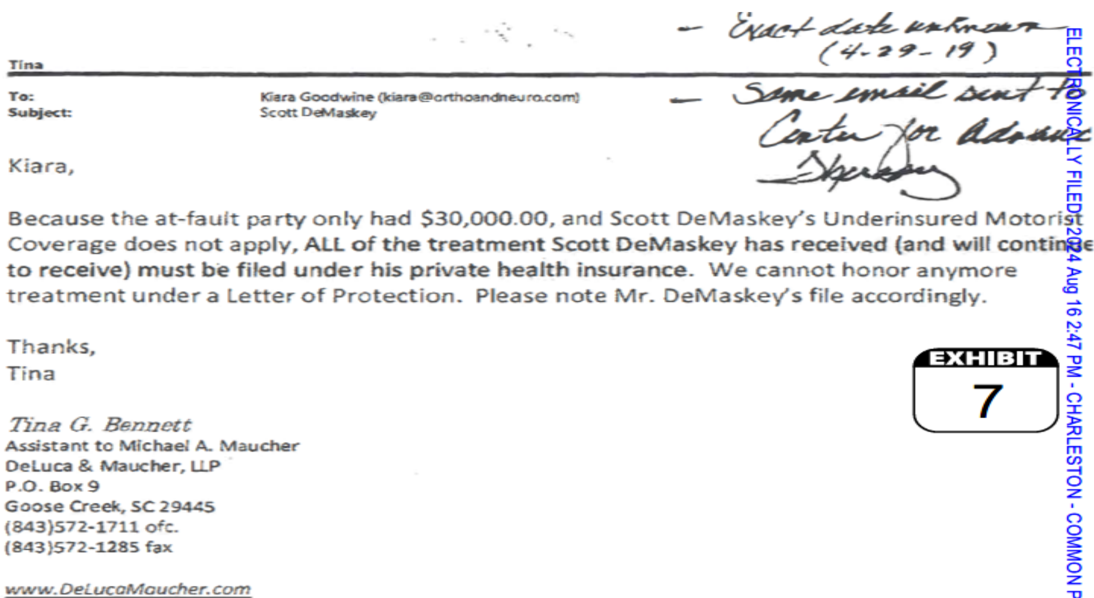
After receiving the two letters of protection, along with the representations about coverage, CNO performed two elective surgeries for the Law Firm's Client, the first on March 15, 2019 and the second on May 2, 2019. (ROA 102.) CNO was keeping the Law Firm apprised of the Law Firm's Client's condition. (ROA 108-110, ROA 113-122, ROA 123-125.)

CNO was an out-of-network provider; therefore, its reliance on the Law Firm's representations about the availability of coverage was critical in CNO's decision to provide the Law Firm's Client with two ***elective*** surgery procedures. (ROA 481-482) Dr. Highsmith testified

that they "trusted the agreement we had with his attorney" and believed that the Law Firm's letters of protection were "backed up by – by adequate coverage before providing approval to do the surgery." (ROA 473 & 476.) More specifically, CNO believed the Law Firm would be paying the medical bills. (ROA 476 (testifying CNO "expect[s] an agreement like this to be backed up by – by adequate coverage before providing approval to do a surgery" and that the Law Firm would pay the bills)). CNO understood from the representations by the Law Firm that there was coverage available to pay the invoices for the elective surgeries provided to the Law Firm's Client. (ROA 476 p. 44:4-9.)

### III. The Purported Email from the Law Firm

Before the second surgery, the Law Firm claims to have sent an "email" to CNO, claiming to have revoked the letter of protection. ("Email" purportedly from Tina Bennett of Law Firm, ROA 572.) The flaws in the assertion that the "email" was sent are that (1) it has no header, date, or reference to the sending party; (2) CNO's representatives all testified they never received the email; and (3) the Law Firm failed to produce anything resembling an actual email. The "email" looks as follows:


Tina

To: Kiara Goodwine (kiara@orthoandneuro.com)
Subject: Scott DeMaskey

– Exact date unknown (4-29-19)
– Same email sent to Center for Advanced Surgery

Kiara,

Because the at-fault party only had $30,000.00, and Scott DeMaskey's Underinsured Motorist Coverage does not apply, **ALL of the treatment Scott DeMaskey 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 Mr. DeMaskey's file accordingly.

Thanks,
Tina

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(*Id.*)[5] It is as if someone started typing an email, clicked "Print Preview" in Microsoft Outlook, and then printed out the draft of the email before it was sent. When asked about the email, Dr. Highsmith testified as follows:

86:16 A. Honestly I would actually hesitate to
17 call it an email.
18 Q. Why is that?
19 A. Because it has multiple missing fields.
20 There's no header. There's no evidence that it was
21 even sent. There's no from. There's no sent date
22 or time. Honestly it looks completed fabricated
23 like somebody copied and pasted something in Worc
24 I mean, this is not an email. This is a document.
25 I would give it that.
87: 1 Q. Do you have, like, a background in,
2 like, IT or something?
3 A. I do. I started an IT company in med
4 school and -- a security IT company, so I'm very,
5 very familiar with that.

------------------

87:20 Q. And so -- well, so it's your testimony
21 today that you believe this is fabricated, and it
22 was never sent to Kiara?
23 A. Absolutely. We have no evidence, and I
24 understand that Mr. Maucher said they had no
25 evidence of it being sent either. So if both
88: 1 parties agree an email wasn't sent and suddenly it
2 shows up with no identifying information, it's
3 very, very suspect especially when it is such an
4 important issue like this.
5 Q. Have you had conversations with Kiara
6 about this?
7 A. Yes, Kiara is excellent, and I know she
8 would not delete an email like that. She doesn't
9 delete any emails. She didn't throw anything away.

(ROA 487.)

[5] Interestingly, a similar email with a header, date, and reference to the sending party was sent to the surgical center where the surgery was to take place. (ROA 545.) In the email, the Law Firm informs the surgical center that it will not honor its letter of protection with the surgical center and that the insurance coverage does not apply. CNO never received the same notice from the Law Firm, contrary to the Law Firm's assertions that it sent the "email."

This purported "email"—*if it was ever sent*— would have been the first alleged notification to CNO that the at-fault party had only $30,000 in coverage to pay the medical expenses for the surgeries CNO provided to the Law Firm's Client. (ROA 491, pp. 102-03.) Dr. Highsmith further testified as follows:

103:24 We had a relationship with the
25 attorney through the letters that, you know, this
104: 1 is egregious that he would have only $30,000 in
2 coverage and they would approve not one but two
3 surgeries. It's unbelievable to me.
4 Q. Well, now, did DeLuca & Maucher approve
5 the surgeries?
6 A. Well, they provided coverage and
7 agreement that they would cover the bills based on
8 the letters of protection.
9 Q. Well, the letters of protection said
10 that they would protect claims of settlement
11 proceeds; isn't that correct?
12 A. It stipulates that, but I mean the fact
13 that they don't know the coverage and promised a
14 one million dollar policy early on but never --
15 never came to fruition.

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104:20 A. It doesn't affect my treatment
21 recommendations, no; but if it's an elective
22 surgery, I'm not going to put someone through a
23 huge bill if there's supposed coverage that doesn't
24 exist --
25 Q. And then at least --
105: 1 A. -- unless it's emergent.

(ROA 491.)

After the two elective surgeries, CNO was owed $125,409.28 for the medical services provided to the Law Firm's Client. (ROA 102.) Contrary to the Law Firm's representations, there was not enough coverage to pay for the medical services. One Beacon's successor-in-interest

attempted to pay only $6,323.50 for a bill that totaled $125,409.28. (ROA 1057.) This lawsuit followed.

## STANDARD OF REVIEW

On appeal from a grant of summary judgment motion, an appellate court "applies the same standard as that required for the circuit court under Rule 56(c), SCRCP." *Bass v. Gopal, Inc.*, 384 S.C. 238, 243, 680 S.E.2d 917, 919-20 (2009) (citing *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000)). Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment "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." Rule 56(c), SCRCP.

"Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002). "[T]he evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002). Similarly, "[o]n appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *RWE Nukem Corp. v. ENSR Corp.*, 373 S.C. 190, 195-96, 644 S.E.2d 730, 733 (2007).

# ARGUMENT

## I. The Circuit Court Erred in Applying the Law of the Case Doctrine When Granting Summary Judgment to Law Firm Based on "Findings of Fact" in an Order on a Motion to Dismiss.

The law of the case doctrine does not expand into "factual findings" at the motion to dismiss stage and preclude CNO from articulating new theories under causes of action. Judge Dickson dismissed Plaintiff's claims of negligence, fraud, constructive fraud, unjust enrichment, and breach of contract accompanied by a fraudulent act and permitted Plaintiff's claims of breach of contract and violations of UTPA to proceed. (ROA 1-17.) While dismissing certain claims, Judge Dickson was clear that he did not receive any evidence and was not making any findings of fact that would bind a future court.

### A. Judge Dickson's Order, Hearing on Motion for Reconsideration, and Amended Order

In the original order dismissing certain claims, Judge Dickson had sections called "Findings of Fact" and "Conclusions of Law" even though no testimony or other evidence was presented to Judge Dickson. (*Id.*) After all, this was a 12(b)(6) motion hearing where only allegations within the four corners of the complaint could be considered. Realizing his error once pointed out in CNO's motion for reconsideration, Judge Dickson stated at the hearing on the reconsideration motion as follows:

> But the other thing I don't want to get into – and I – is, and we can put this in the order if –when I recited things in here [Order] about what I considered in making my decision, okay, those are not supposed – **these are not supposed to be findings of fact**, but it's – it's what I used to make up my mind. I'm not saying that if y'all went to trial on this – you know, you allege things in your Complaint, you allege things in your Answer, that you believe to be true, **but until there's testimony in it, none of these things are what I would consider set in strong findings of fact**, you know what I'm saying.

(ROA 1328: 4-17 (emphasis added).) He then continues with the following:

> I just want something in there [proposed Amended Order] to make it clear that any findings related to the two causes of action to go forward, there's not been a – there's been no evidence or testimony about this. **So it's not going to be binding on any other – it's not going to be binding on the court**.

(ROA 1330:12-18 (emphasis added).) Judge Dickson then summarized that "[CNO's counsel], I understand your, your concern, because I wouldn't want that thrown up in the middle of trial. And if the trial begins, the judge has already found this, the judge – I mean, the judge for purposes of this, these are the findings that I've made, but it's not for purposes of an – like an admission of fact or anything like that." (ROA 1331:18-24.) And then Judge Dickson ended the hearing by agreeing with CNO's counsel statement that the "findings of fact" would "have no effect on the remaining causes of action." (ROA 1334:20 – ROA 1335:8.)

After this hearing, Judge Dickson issued an Amended Order on Defendants' Motion to Dismiss, in which he states on page one the following:

> With Court agreement the parties stipulate that the content of the Order or this Amended Order will not be admissible in this lawsuit 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 Practices Act. The Order and Amended Order shall have no effect beyond that of which an order on a motion to dismiss would normally have.

(ROA 18.) Thus, Plaintiff's claims for negligence, fraud, constructive fraud, unjust enrichment, and breach of contract accompanied by a fraudulent act were dismissed, but any purported factual findings are not preclusive or have any binding effect on the case as it proceeds.

**B. Judge Salvini's Order Granting Motion for Summary Judgment**

Despite this language from Judge Dickson's Amended Order and his intent evidenced in his statements in the hearing transcript, Judge Salvini used "findings" in Judge Dickson's Amended Order to "preempt" Plaintiff's claims that consisted of (1) breach of contract, (2)

violations of UTPA, (3) negligent misrepresentation, and (4) promissory estoppel. (ROA 46-65.) She found that all four claims were "preempted" because there were "numerous findings of fact and conclusions of law that have not been appealed [in Judge Dickson's Amended Order]" and therefore the law of case doctrine prevents CNO from proceeding with its four claims, two of which survived the motion to dismiss and the other two claims that were added after the Amended Order. (ROA 50-54.)

More specifically, Judge Salvini concluded that Judge Dickson's Amended Order decided a substantial right when it dismissed certain claims that were based "in part" on statements regarding insurance coverage. (ROA 50-51.) She goes on to say that Judge Dickson's order "made numerous findings of fact . . . that Plaintiff has not appealed." (*Id.*) Not so. Judge Dickson stated that he was not making any findings of fact that would bind any party. (ROA 18-34, ROA 1328-1335.)

Judge Salvini references CNO's argument that its theories changed (the breach of contract and UTPA claims) and were amended to be based on the Law Firm's representations regarding insurance coverage and no longer were based solely on the Law Firm's letters of protection. (ROA 51.) But she provides no reasoning as to why CNO is incorrect with this position and states that she agrees with the Law Firm that Judge Dickson's "findings of fact" preclude not only the amended breach of contract and UTPA claims, but also the new claims of negligent misrepresentation and promissory estoppel. (*Id.*) None of these claims, as amended, was before Judge Dickson. Judge Salvini then went on to list thirteen "findings" in Judge Dickson's Amended Order. (ROA 51-52.)

This list of "findings" was used to grant summary judgment to the Law Firm on the four claims that were not before Judge Dickson. (ROA 52-55.) For each of the four claims, she held

the claim should be dismissed as follows:

- Breach of Contract: Judge Dickson "found" that (1) CNO was on notice as of January 2019 that it needed to seek payment from the Client's private health insurance and the Law Firm did not intend to protect any payments; (2) CNO was aware on April 29, 2019 that the additional policy has a subrogation requirement and requirement to file with private health insurance; and (3) CNO had no right to rely on any statements about coverage, the statements were merely opinion, and CNO should have conducted due diligence to see if policies would provide coverage. (ROA 53.)
- UTPA: Judge Dickson "found" that CNO was notified of the April 29, 2019 email that purported to revoke any protection by the Law Firm. (ROA 53.) Even though CNO claims to have never received this email, Judge Salvini ruled that Judge Dickson's "finding" that CNO was notified of the April 29, 2019 email bound CNO—whether or not CNO actually received the email. Judge Salvini also used the same "findings" to support the dismissal of the breach of contract claim to support the dismissal of the UTPA claim.
- Negligent Misrepresentation: Judge Dickson "found" (a) that CNO could not justifiably or reasonably rely on the Law Firm's statement about coverage, (b) that CNO had a duty to find whether the statements were true, and (c) that any statements about coverage are opinions, not statements of fact. (ROA 55.)
- Promissory Estoppel: Same "findings" dismissing the negligent misrepresentation claim support the dismissal of the promissory estoppel claim. (ROA 63-64.)

### C. The Circuit Court Improperly Applied the Law of the Case Doctrine.

The law of the case doctrine does not override the language in Judge Dickson's Amended Order and supported by his discussion with counsel at the hearing on the motion for reconsideration. The contention that Judge Dickson made binding factual findings in the Amended Order on a motion to dismiss is not supported in the record. And the fact that an order granting, in part, a motion to dismiss is an immediately appealable interlocutory order does not change this analysis. The law of the case doctrine has been contorted in the present case to dismiss the entirety of CNO's Second Amended Complaint.

Undeniably, an order granting, in part, a motion to dismiss is immediately appealable. *Lebovitz v. Mudd*, 289 S.C. 476, 479, 347 S.E.2d 94, 96 (1986). "An unappealed ruling is the law of the case and requires affirmance." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). As discussed by the Supreme Court,

> The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right . . . . Ordinarily, an interlocutory order which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits.

*Id.* at 573, 743 S.E.2d at 785 (2013) (citing *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989) (alteration in original)). In *Shirley's Iron Works*, subcontractors sued the City of Union ("City") for failure to secure a bond under section 29-6-250 of the South Carolina Code and for attorney's fees under section 15-77-300. *Id*. at 565, 743 S.E.2d at 780-81. The City moved to strike the request for attorney's fees, and Judge Short granted the motion. *Id* at 565, 743 S.E.2d at 781. The subcontractors did not appeal the order. The subcontractors amended their complaint, adding a new claim of third-party beneficiary status between the contractor and the City. *Id.* The amended complaint asserted causes of action for (1) violations of section 29-6-250, (2) attorney's

fees for violation of section 27-1-15, (3) negligence, (4) quantum meruit, and (5) attorney's fees and prejudgment interest. *Id.* Additionally, the amended complaint "was considerably more detailed that the original complaint." *Id.* at 566, 743 S.E.2d at 781.

When faced with another motion to strike from the City, Judge John granted the motion to strike attorney's fees and prejudgment interest, stating that "Judge Short's unappealed order 'constitute[d] the law of the case,' which he was 'bound to apply.'" *Id.* Judge John's conclusion that Judge Short's previous order, which stated that the complaint sounded in tort, bound Judge John as he could not overturn the law of the case, which he believed prevented him from awarding attorney's fees. *Id.* Judge John thought he had to uphold Judge Short's statement that the case sounded in tort, precluding a fee award. *Id.*

This Court disagreed and held that "Judge John's and Judge Short's previous orders stated [subcontractors'] claims sounded in tort were not the law of the case" and the amended complaint sufficiently pled a third-party beneficiary claim. *Id.* at 567, 743 S.E.2d at 781. The Supreme Court agreed with this Court. It stated "[w]e find the orders of Judge John and Judge Short are not the law of the case insofar as the Amended Complaint is concerned. Neither Judge Short nor Judge John specifically ruled on the issues of whether [subcontractors] pled a third-party beneficiary breach of contract claim." *Id*. at 573, 743 S.E.2d at 785.

The same is true here. In his Amended Order, Judge Dickson did not make any factual findings. He specifically stated nothing in his Amended Order could be used "to prove or disprove any matter of fact" regarding the remaining causes of action for breach of contract and UTPA violations. (ROA 18.) It only follows that nothing in the Amended Order could be used "to prove or disprove any matter of fact" regarding the two claims that had yet to be pled—negligent misrepresentation and promissory estoppel. Like *Shirley*, Judge Dickson did not rule on the

amended claims and the new claims, and therefore, law of the case has no application. Judge Salvini erred in using the law of the case doctrine to grant summary judgment with respect to the Second Amended Complaint.

## II. The Circuit Court Erred in Granting Summary Judgment on the Negligent Misrepresentation Claim.

Judge Salvini granted summary judgment on CNO's negligent misrepresentation claim on the grounds that (1) CNO cannot establish that the Law Firm made a false statement to CNO and that (2) CNO reasonably relied on these statements. Respectfully, this conclusion is in error.

The Law Firm represented that it was "not concerned that there will be enough over all coverage to pay the claim." (ROA 104.) This statement was made against the backdrop of the Law Firm's two letters of protection, in which the Law Firm promised to protect any claim or portion of bill that the Law Firm believed it would collect from settlement proceeds. (ROA 100 & 107.) This representation of the Law Firm having no concern about coverage is false. Second, CNO had a right to rely on the Law Firm's statement about coverage. The Law Firm—the entity that routinely reviews policies and informs of coverage—is the entity to whom CNO should look for statements about coverage. If CNO cannot rely on what the Law Firm stated about coverage, to whom can it look? The circuit court erred in granting summary judgment regarding negligent misrepresentation on these two grounds.

### A. The Law of Negligent Misrepresentation

To establish liability for negligent misrepresentation, a plaintiff must allege and prove the following six elements:

1. the defendant made a false representation;

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 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 the proximate result of his reliance upon the representation.

*AMA Mgmt. Corp. v. Strasburger*, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992). The circuit court took issue with elements one and five.

**1. A Defendant Made a False Representation**

Unlike fraud, a false representation in a negligent misrepresentation claim is made negligently without an intent to defraud. *See Brown v. Stewart*, 348 S.C. 33, 42, 557 S.E.2d 676, 681 (Ct. App. 2001) (stating "a key difference between fraud and negligent misrepresentation is that fraud requires the conveyance of a known falsity, while negligent misrepresentation is predicated upon transmission of a negligently made false statement."). As stated by the authors of the Restatement (Second) of Torts,

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information if he fails to exercise reasonable care or competence in obtaining or communications the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

> (3) The liability of one who is under a public duty to give the information extends to a loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Restatement (Second) of Torts § 552 (1977)

"To be actionable, the representation must relate to a present or pre-existing fact and must be false when made." *Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 317 S.C. 520, 527, 455 S.E.2d 183, 187 (Ct. App. 1995). Additionally, the representation cannot be an opinion, and "the distinction between a matter of fact and a matter of opinion is generally characterized by what is susceptible of exact knowledge when the statement is made" *Id.*

The question of whether a representation is false is a jury question. *See Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 365, 563 S.E.2d 331, 335 (2002) (stating "we find the issue of whether he made a false representation with the actual intent to deceive presents a jury question."); *Gasque v. Voyager Life Ins. Co. of S.C.*, 288 S.C. 629, 633, 344 S.E.2d 182, 184 (Ct. App. 1986) ("Since the evidence is conflicting on the issue of whether Hodges knowingly made false statements to Voyager in obtaining the insurance, we hold a question of fact existed for the jury to determine."). Similarly, the question of whether a statement is an opinion is a jury question. *See Triple E, Inc. v. Hendrix & Dail, Inc.*, 344 S.C. 186, 191, 543 S.E.2d 245, 247 (Ct. App. 2001) ("Whether an affirmation creates an express warranty or is merely the seller's opinion or puffing is ordinarily a question of fact for the jury.").

**2. A Plaintiff Justifiably Relied on the Representation**

"A determination of justifiable reliance involves the evaluation of the totality of the circumstances, which includes the positions and relations of the parties." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 241, 692 S.E.2d 499, 508 (2010). Whether reliance is reasonable is generally a question of fact for the jury's determination. *Moseley v. All Things Possible*, 395 S.C.

492, 498, 719 S.E.2d 656, 689 (2011) (stating whether reliance was reasonable presents a question of fact whether defendant's fraudulent representations induced plaintiff to refrain from review of public records); *see also Quail Hill, LLC*, 387 S.C. at 241, 692 S.E.2d at 507 (providing reliance is generally jury question unless plaintiff knows the truth).

### B. The Law Firm's Representations of Insurance Coverage Present a Genuine Issue of Material Fact.

The Law Firm made a false statement upon which CNO relied and then incurred damages because of its reliance. At a minimum, there is a genuine issue of material fact as to whether the representation about coverage was false, which is a question for the jury to resolve.

Judge Salvini relies on five points to conclude the Law Firm's statement was not false. First, she states that the Law Firm correctly stated that (a) the Law Firm did not know how much the at-fault party's liability insurance was and (b) that the Law Firm's client "carried" a $100,000 Safeco policy and a $1 million One Beacon Policy. Second, she states that the Law Firm's statement that it "was not concerned that there will be enough overall coverage to pay the claim" was true at the time and only an opinion, and therefore, not a negligent misrepresentation. Third, she states that the Law Firm emailed CNO later in the day and told it CNO to proceed with private health insurance coverage and not proceed under a letter of protection, which according to Judge Salvini, shows that the Law Firm was concerned about coverage. Fourth, Judge Salvini relies on a response to the Law Firm's email from CNO stating "Okay thanks for the update." Fifth, Judge Salvini states that One Beacon did pay CNO "albeit at a reduced amount[,]" and therefore the statement about coverage could not be false.

The statement at issue is "[w]e are not concerned that there will be enough over all coverage to pay the claim." (ROA 104.) This is a false statement. And it is a statement, not an opinion. The Law Firm is a plaintiff's personal injury law firm—a firm that routinely reads and interprets

these types of insurance policies, quite unlike a neurosurgery practice. The Law Firm has special knowledge and when it conveyed that it had "no concern[]" about there being enough insurance money to pay the claim, it made a representation, not an opinion. The Restatement (Second) of Torts addresses this issue with respect to its analysis of a higher degree of a claim of fraudulent misrepresentation (unlike the lesser claim of negligent misrepresentation) when it discusses the "Opinion of Adverse Party." Restatement (Second) of Torts § 542, provides as follows:

> The recipient of a fraudulent misrepresentation solely of the maker's opinion is not justified in relying upon it in a transaction with the maker, unless the fact to which the opinion relates is material, and the maker
>
> (a) purports to have special knowledge of the matter that the recipient does not have, or
>
> (b) stands in a fiduciary or other similar relation of trust and confidence to the recipient, or
>
> (c) has successfully endeavored to secure the confidence of the recipient, or
>
> (d) has some other special reason to expect that the recipient will rely on his opinion.

*Id.* Again, the Law Firm's statement about its lack of concern about paying out the claim is a false statement, not an opinion, as referenced in this section from the Restatement. Further, the logic behind the Restatement is applicable here. The statement was material. The Law Firm does have special knowledge, as a law firm that routinely handles car wrecks, which necessarily involves reviewing and determining coverages. The Law Firm has successfully endeavored to secure the confidence of the recipient by issuing two letters of protection and then "doubling down" on those letters of protection by assuring CNO that it was not concerned about having enough coverage to pay the claim. The Law Firm had a special reason to expect that CNO would rely on the Law Firm's representation because it assumed the responsibility of payment under the letters of protection. The finding that the Law Firm's representation was one of opinion, and not a

misrepresentation, is in error. At a minimum, it presents a genuine issue of material fact for a jury to determine.

As for the fourth ground, the CNO employee was acknowledging receipt of the email, which stated to proceed under the Law Firm's Client's private health insurance. Importantly, there is no mention in the Law Firm's email (to which CNO's employee was responding) that the Law Firm is no longer concerned about enough coverage. Finally, as to the fifth ground about insurance paying some of the bill, it does not support the Law Firm's case. To the contrary, it belies its statement that "[w]e are not concerned that there will be enough over all coverage to pay the claim." (ROA 104). The insurance company's attempted payment of $6,323.50 is a far cry from the amount owed of $125,409.28. (ROA 1057 & 102.) And a far cry from the Law Firm's misrepresentation. At no time did anyone at the Law Firm notify CNO of discrepancies in coverage prior to the surgeries being performed. A genuine issue of material fact exists as to whether the Law Firm made a false representation.

### C. CNO Reasonably Relied on the Law Firm's Representations of Insurance Coverage.

CNO reasonably relied on the Law Firm's representations when it performed its services. The Law Firm unequivocally told CNO that there was $1.1 million in coverage and it had no concern that there would be enough coverage to pay the claim, despite CNO later conceding that the at-fault party's liability was capped at $30,000. Judge Salvini concluded CNO had no right to rely on the Law Firm's statements (even though it is a law firm), because Dr. Highsmith testified that (1) coverages do not affect his "treatment recommendation" (ROA 62); that (2) Dr. Highsmith could not recall if he saw the email about the insurance policies before the surgery; and that (3) in a situation where patient needs surgery, he will provide it. (ROA 62.)

These statements may be true, but they do not support the conclusion that CNO has no right to rely, and they do not capture the entirety of Dr. Highsmith's testimony. Regarding the first point, Dr. Highsmith testified that generally he would not put a patient through having high medical bills if the surgery was elective, like the ones here. (ROA 491.) If the patient needed an elective surgery, he would have sent him to another provider. (ROA 481, 63:5-18.). This does not mean that it affects his "treatment recommendation." Regarding the second point, Dr. Highsmith testified that he "trusted the agreement we had with [Law Firm]" and CNO "expect[s] an agreement like this to be back up by – by adequate coverage before providing approval to do a surgery." (ROA 473 & 476 pp. 43:19 – 44:16.) And that in this case, CNO expected the Law Firm to cover the bills. (*Id.*) CNO understood from the representations by the Law Firm that there was coverage available to pay the invoices for the elective surgeries provided to the Law Firm's Client. (ROA 476, p. 44:4-9.) Finally, it is true that Dr. Highsmith will provide surgery if a patient needs it. But this case involved two elective surgeries.

Looking at the totality of the circumstances, CNO reasonably relied on the Law Firm's representations. *See Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. at 241, 692 S.E.2d at 508. The position and the relation of the parties lead to this conclusion. The Law Firm unequivocally stated that it was not concerned about coverage. The Law Firm was the entity with the policies. It is the one whose job it is to review the terms and coverage of the policy. Doctor's offices do not have access to the policies potentially available to their patients who were in car accidents. The letters of protection demonstrate the relationship between the Law Firm and CNO. The Law Firm was going to pay for the claims out of settlement funds, which the Law Firm unambiguously stated (and never recanted) were going to cover all claims. CNO had a right to rely on the Law Firm's statements. At a minimum, there is a genuine issue of material fact.

### III. The Circuit Court Erred in Granting Summary Judgment on the Claim of Violations of the South Carolina Unfair Trade Practices Act in Concluding There Was No Trade or Commerce.

Judge Salvini concluded there was no violation of UTPA because the Law Firm was not engaged in trade or commerce with CNO. This finding is in error.

For a plaintiff to succeed under a UTPA claim, he must prove, among other things, that "the defendant engaged in an unfair or deceptive act in the conduct of trade or business[.]" *Health Promotion Specialists, LLC v. S.C. Bd of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013). "Trade or commerce" is statutorily defined as "the advertising, offering for sale, sale of 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). However, this is not a limiting definition of "trade or commerce." Section 39-5-10(b)'s "use of the words 'shall include' clearly suggests that the legislature did not intend to limit 'trade' and 'commerce' to only the listed transactions." *Baker v. Chavis*, 306 S.C. 203, 208–09, 410 S.E.2d 600, 603–04 (Ct. App. 1991) (citing S.C. Code Ann. § 39-5-10(b)). As stated by the Supreme Court, "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.'" *Health Promotion Specialists, LLC*, 403 S.C. at 639, 743 S.E.2d at 816 (citing *Black's Law Dictionary* (9th ed.2009)).

Judge Salvini narrowly construed the definition of "trade or commerce" and its application to conclude that the Law Firm was not "engaged in trade or commerce with [CNO] in a business context when the representations were made" because "[Law Firm was] not selling professional services to [CNO], and the communications were not related to the 'advertisement, sale, or distribution of services or property' to [CNO]." (ROA 60.) Respectfully, this analysis is incorrect.

Both the legal and the medical professions engage in trade or commerce. And the transaction at the heart of this case encompasses the provision and sale of medical services by CNO to the Law Firm's Client. In exchange for the representations by the Law Firm, and an expectation of payment for those services, CNO provided medical/surgical services to the Law Firm's Client.

Furthermore, it is beyond dispute that the provision of any service constitutes commerce within the meaning of the UTPA. The statute does not preclude professional services from its definition of commerce. Accordingly, " . . . they still constitute trade within the meaning of the UTPA." *Taylor v. Medenica*, 324 S.C. 200, 217-18, 479 S.E.2d 35, 44 (1996) ("The provision of *any* service constitutes commerce within the meaning of the UTPA. The statute does not exclude professional services from its definition. Accordingly, even if medical laboratory services are considered professional services, they still constitute a trade within the meaning of the UTPA." (emphasis in original).)

To the extent the Law Firm is arguing that it is somehow immune from UTPA claims, it is in error. Lawyers and law firms are subject to claims under the UTPA. Section 39-5-39 establishes UTPA claims against lawyers and law firms. *RFT Mgmt. Co. v. Tinsley & Adams, L.L.P.*, 399 S.C. 322, 337-38, 732 S.E.2d 166, 174 (2012) (stating UTPA claims are available against lawyers and law firms); *Camp v. Springs Mortgage Corp.*, 307 S.C. 283, 285, 414 S.E.2d 784, 786 (Ct. App. 1991) *aff'd in part, rev'd in part*, 310 S.C. 514, 426 S.E.2d 304 (1993) ("[T]here is no question but [t]hat legal services come within the definition of this statute."). While the UTPA does contain several exemptions, law firms are not one. *See RFT Mgmt. Co.*, 399 S.C. at 38, 732 S.E.2d at 174 ("Despite the trial court's *error in finding the UTPA is not available against the legal*

*profession*, RFT has shown no reversible error in this regard." (emphasis added)). Here, the Law Firm was engaging in trade or commerce with CNO.

## CONCLUSION

For the above-reasons, this Court should reverse the circuit court, finding that genuine issues of material fact exist, and remand the case to the circuit court.

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