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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

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FINAL REPLY BRIEF OF APPELLANT/RESPONDENT

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OVERVIEW OF RESPONDENT'S ARGUMENT

Respondents' Brief of Respondents/Appellants ("Brief") heavily relies on the law of the case doctrine to maintain that alleged findings of fact from an order granting in part and denying in part a motion to dismiss "preempt" Carolina Neurosurgery & Orthopedics, Inc. ("CNO" or "Appellant") from prosecuting its case against Michael A. Maucher, Esq. and DeLuca & Maucher, LLP (collectively, "the Law Firm" or "Respondents") for making negligent misrepresentations to CNO and violating the South Carolina Unfair Trade Practices Act ("UTPA"). More specifically, the Law Firm argues that CNO cannot challenge the law of the case doctrine because CNO did not preserve its arguments regarding the same. It maintains this argument even though CNO objected to the alleged "findings" being "findings" when no evidence was before the circuit court at a motion to dismiss; thus, there can be no findings of fact. And the issue was continually raised throughout the litigation. Next, the Law Firm then presents its argument as to why the negligent misrepresentation and UTPA claims fail. Finally, the Law Firm looks to four additional sustaining grounds to support its position that summary judgment was proper.

In this reply brief, CNO will show that its ability to challenge the law of the case doctrine has been preserved. CNO will rely on its brief in chief to challenge the Law Firm's arguments that summary judgment was proper on CNO's negligent misrepresentation and UTPA claims. Finally, CNO will dispute in this brief each of the four additional sustaining grounds and show that there are genuine issues of material fact on each of the four grounds.

ARGUMENT

I. Any Challenges to the Law of the Case Doctrine Are Preserved.

The issue of whether Judge Dickson's purported "findings of fact" are binding has been pervasive throughout this case. After Judge Dickson issued his order granting, in part, and denying, in part, Law Firm's Motion to Dismiss, CNO promptly filed a motion for reconsideration because his order contained "findings of fact." (ROA 1-17 & 157-162.) At the hearing on the motion for reconsideration, Judge Dickson stated "these are not supposed to be findings of fact." (ROA 1328:4-17.) Additionally, he stated "it's not going to be binding on any other – it's not going to be binding on this court." (ROA 1330:12-18.) Thus, Judge Dickson issued an amended order stating:

> 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.) Then, in both amended complaints, CNO raised the issue that it "respectfully reserves its objections and potential appeal of the trial court's ruling granting Defendant's motion to dismiss Plaintiff's claim asserted in the original Complaint for Breach of Contract Accompanied by a Fraudulent Act, Fraud, Constructive Fraud, and Unjust Enrichment." (ROA 595 & 612.) This issue of the errors regarding the "findings of fact" permeated from the outset of this litigation.

Then, at the hearing on the motion for summary judgment, the issue was raised again. (ROA 1358:14 – ROA 1366:23.) The Law Firm noted CNO's issue with the Order and that the CNO reserved its rights with respect to Judge Dickson's order and that "[CNO doesn't] have to appeal it until the end of the case, but they still have to deal with the impact on the claims as they

are now." (ROA 1365:4-9.) After hearing much about the law of the case doctrine, Judge Salvini tells the Law Firm's counsel "I understand. You've told me that now three times. Even if the Order is wrong, even if the Order is wrong. I understand. . . . Yeah, it's dead, and I've got the point – I've written it down and I've even given some check marks for you every time you say it. You've got to give me your good argument. I mean . . ." (ROA 1366:12-21.) To which the Law Firm's counsel states "I'll move on. I promise." (ROA 1366:22.) CNO's counsel discussed the prior order too. (ROA 1367:17-20.) Then, CNO raised the issue to the circuit court in its motion to reconsider.[1] (ROA 1083.) To argue that this issue was not raised and ruled on and not preserved because it was not presented to the circuit court is incorrect.

The Law Firm's preservation argument is hyper-technical because it focuses on the proposition that CNO did not preserve the issue. This is the exact argument that the Supreme Court has cautioned against adopting. *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644–45 (2011) ("We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner."); *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) ("While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved."). After all, "'[i]ssue preservation rules are designed to give the trial court a fair

[1] The Law Firm proffers another hyper-technical argument that CNO cannot argue against the law of the case doctrine because an issue cannot be raised for the first time in a motion for reconsideration. (Brief at 10.) Here, Judge Dickson's Order and its impact have been argued since the near-beginning of this case as discussed above. It was not raised for the first time in a motion for reconsideration of the order granting summary judgment. It was raised in the motion for reconsideration of the order regarding the motion to dismiss, the hearing on the motion for reconsideration, the amended complaints, the hearing at the motion for summary judgment, and the motion for reconsideration on the order granting the motion for summary judgment.

opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Herron*, 395 S.C. at 465, 719 S.E.2d at 642 (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006))

"At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial court." *Id.* Moreover, "[o]f course a party is not required to use the exact name of a legal doctrine in order to preserve the issue." *Id.* at 466, 719 S.E.2d at 642. "Once [an] issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved . . . ." *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 704, 869 S.E.2d 859, 867 (2022). This is not a case where a party is "'keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.'" *Herron*, 395 S.C. at 470, 719 S.E.2d at 645 (quoting *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 406, 526 S.E.2d 716, 724 (2000)). The issue has been raised and ruled on, and the issue has been preserved for CNO to argue against its application.

II. The Additional Sustaining Grounds Do Not Provide Sufficient Grounds for Summary Judgment.

In section III of its Brief, the Law Firm asks the Court to affirm summary judgment on four different additional sustaining grounds on which the circuit court did not rule. (Brief at 29-37.) This Court has discretion as to whether it will consider these additional sustaining grounds. *I'On*, 338 S.C. at 420, 526 S.E.2d at 723. Even if this Court considers the grounds, they do not support summary judgment against CNO.

A. The Law Firm Should Have Conducted Its Due Diligence Regarding CNO's Status as an Out-Of-Network Provider.

The Law Firm claims that it did not violate the UTPA because it did not know that CNO was out of network with its client's private health insurance. The Law Firm's argument is unclear as to why the alleged fact is dispositive of the UTPA claim. The Law Firm appears to argue that CNO should have told the Law Firm that it was not in network when the Second Letter of Protection and January 21, 2019 11:58 email from the Law Firm referred to the client's private health insurer. This leads to the inescapable question of why did the Law Firm not ask if its client had private health insurance that CNO accepted and whether that insurance was in network? The Law Firm relies on an argument that CNO did not do its due diligence in determining whether the liability policies at issue provided sufficient coverage for CNO. (*See, e.g.*, Brief at 21) The same should apply here. But Dr. Highsmith left a prior practice and formed CNO as an out-of-network provider that did not accept insurance payments for its patients' payment of medical bills. (ROA 470, p 21:17 – ROA 471, pp. 22:10 & ROA 471, p. 24:9-12.) The Law Firm should have asked if CNO was in-network and accepted insurance. The Law Firm's argument is an insufficient additional sustaining ground to support summary judgment and presents genuine issues of material fact.

B. CNO's Allegations of the Unfair and Deceptive Act of Sending Misrepresentations to CNO Do Support a UTPA Claim.

The Law Firm tries to contort its representation about coverage to say that "[the Law Firm] 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, [the Law Firm] expressed that they were not concerned about there being enough overall coverage to cover the claim based on the limits of those policies." (Brief at 32 (emphasis in original).) This argument is a distinction

without a difference. However, to support this proposition, the Law Firm states the names of the policies "imply certain preconditions" for the policies to be applicable. (*Id.*) Moreover, the Law Firm states "no one at the time knew if the at-fault party was underinsured[,]" and therefore, the Law Firm is protected from its unequivocal position of "we are not concerned that there will be enough over all coverage to pay the claim." (ROA 568.)

Equally as important, note how the Law Firm prefaces this misrepresentation: "Because [Client] carries $100,000 in Underinsured Motorist Coverage on his at-home policy with Safeco, and ***there is $1,000,000 in 'Occupational Accident Coverage' to pay his bills and wages under the One Beacon Policy***, we are not concerned that there will be enough over all coverage to pay the claim." (*Id.* (emphasis added).) The Law Firm may be talking about coverage and limits with respect to the UIM policy, but it is unequivocal that there is $1 million "to pay his bills and wages[.]" (*Id.*) This representation includes CNO bills. The Law Firm clearly and unambiguously represented that there was enough money to pay the claim to CNO. This additional sustaining ground fails and presents genuine issues of material fact.

C. The Misrepresentation About Coverage Was Unfair and Deceptive, as Was the Sending of the "Fake" Email.

The Law Firm argues the representations cannot be unfair or deceptive because the statements were true at the time. (Brief at 32.) This is an incorrect argument as discussed in the above section. The Law Firm unambiguously stated "there is $1,000,000 in 'Occupational Accident Coverage' to pay his bills and wages under the One Beacon Policy . . . ." (*Id.*) That is a false statement.

Next, the Law Firm says even though it first said it was not concerned about having enough over all coverage to pay the claim, it stated it was concerned about coverage when it emailed CNO on the same day that "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 570.) This email is not a revocation of the Letters of Protection or the representation that "there is $1,000,000 in 'Occupational Accident Coverage' to pay his bills and wages" and "we are not concerned that there will be enough over all coverage to pay the claim." (ROA 568.) Contrast this language to the language in the "false" email that was not sent to CNO where the Law Firm used definitive language:

> Because the at-fault party only had $30,000, and [Client'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 [Client's] file accordingly.

(ROA 572 (emphasis in original).) This language in the false "email" is starkly different than that the Law Firm's "request" that treatment be filed with Client's health insurance and that it would be "best for everyone" if no treatment was performed under the Letter of Protection. The false "email" is a clear effort to revoke the Letter of Protection. If the Law Firm was as concerned about coverage as it argues, it would have sent correspondence more akin to the false "email" than the equivocal language of "requesting" filing under private health insurance and suggesting it "would be best for everyone" not to proceed under the Letter of Protection.

Next, the Law Firm argues that the reference to "[t]he above-named individual has been informed that, in the event of insufficient recovery, he remains personally responsible for your outstanding account balance" in the Second Letter of Protection somehow vitiates CNO's UTPA claim. (Brief at 33.) No one has informed CNO that there is not $1.1 million dollars of coverage. CNO is still relying on this representation. The fact that the Client has been informed that he is responsible for any balance does not change this analysis. This is not news to CNO. The financial

policy signed by Client states that Client is responsible for medical bills. (ROA 101.) The Law Firm decided to take over part of this responsibility from Client in its Letters of Protection.

Finally, the Law Firm tries to defeat the UTPA claim by stating that the insurer paid some money toward the claim. (Brief at 33-34.) The Law Firm represented to CNO that "there is $1,000,000 in 'Occupational Accident Coverage' to pay his bills and wages under the One Beacon Policy . . . ." (ROA 568.) One Beacon's successor tried to pay only $6,323.50 for a bill that totaled $125,409.28. (ROA 102 & 1057.) To put it simply, there was not $1,000,000 in One Beacon's policy to pay the Client's bills, including his doctor's bills. All of these additional sustaining grounds fail and provide for genuine issues of material fact.

D. The Law Firm Caused an Ascertainable Loss of Money.

The Law Firm argues that CNO did not suffer an ascertainable loss of money because CNO has a financial policy and that Dr. Highsmith relies on that financial policy. (Brief at 34-35.) Dr. Highsmith also testified that he relied on the promises and representations made by the Law Firm. (ROA 991-993, 999-1000, 1007 & 1010.) Moreover, he does not perform elective surgery when there is no coverage, and he would have sent the patient to another provider. (ROA 1025-1027 & 1007.) The Law Firm tries to avoid this testimony by stating that when a patient needs surgery, Dr. Highsmith performs the surgery and that Dr. Highsmith did not know whether he saw the email from the Law Firm regarding the representations of coverage. (Brief at 35.) This presents a genuine issue of material fact. Moreover, this testimony ignores that fact that it makes no economical sense for Dr. Highsmith to perform elective surgery when there is insufficient coverage for the elective surgery. Who would perform over $120,000 worth of elective medical procedures when the patient cannot pay for it? Similarly, who would perform over $120,000 worth

of elective medical procedures if there was only $30,000 of coverage, as represented by the Law Firm in its false "email"?

Both surgeries were performed after the Letters of Protection were issued. The Law Firm, a plaintiffs personal injury firm, took a position on coverage. CNO relied on those representations regarding coverage and the Letters of Protection. CNO's reliance on these representations caused it ascertainable damage, specifically, $125,409.28 worth of damage. This additional sustaining ground fails and provides a genuine issue of material fact.

E. The Unfair and Deceptive Acts of the Law Firm Affect the Public Interest.

The Law Firm argues that the unfair and deceptive acts only affected the parties involved, and therefore, it does not adversely affect the public interest. (Brief at 36-37.) The requirement to show impact on the public interest may be met by showing the acts or practices have potential for repetition. *Daisy Outdoor Advert. Co. v. Abbott*, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996). "After alleging and proving facts demonstrating the potential for repetition of the defendant's actions, the plaintiff has proven an adverse effect on the public interest. The plaintiff need not allege or prove anything *further* in relation to the public interest requirement." *Id.* (emphasis in original). There are two ways for show "potential for repetition":

> 1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or 2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts.

Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998). As noted by the Supreme Court, "[w]e specifically declined in *Daisy* to hold that these are the only means for showing potential repetition and stated each case must be evaluated on its own merits." *Id.*

The Law Firm's issuance of misleading emails on the available insurance coverage to support a proposed Letter of Protection impacts not only CNO, but also other healthcare providers

relying on such assurances. Evidence indicates that the Law Firm has employed similar letters of protection in numerous cases, suggesting a broader pattern of conduct that could affect the public interest. (ROA 399, p. 42 & 402-403, pp. 57-58.) Not only did the Law Fim create a false "email," but also it made false representations about coverage. In other words, the Law Firm is actually repeating unfair and deceptive actions. Such practices are inherently capable of repetition and warrant scrutiny under the UTPA. This additional sustaining ground fails and presents a genuine issue of material fact.

CONCLUSION

For the above-reasons and those in CNO's brief in chief, 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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