THE STATE OF SOUTH CAROLINA
In the Supreme Court

ORIGINAL

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2010175606

RECEIVED
AUG 30 2012
S.C. Supreme Court

RFT MANAGEMENT CO., LLC,

Appellant,

v.

TINSLEY & ADAMS, LLP, &
WELBORN D. ADAMS, INDIVIDUALLY,

Respondents.

APPELLANT'S PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240, SCACR, Appellant RFT Management Co., LLC ["RFT"] hereby petitions the Court for rehearing in connection with the Court's Opinion No. 27157.

In support of this Petition, RFT hereby identifies the following points as having been overlooked or misapprehended by the Court in its opinion:

A. The Court overlooked the fact that the following grounds for its opinion were not raised at the trial level and/or by the parties in their appellate briefs with the result that RFT has been denied its due process right to be heard on said grounds:

1. that RFT allegedly did not move for a directed verdict on the grounds that the sale of lots to RFT constituted an illegal flip transaction and that Law Firm gave misleading information and failed to disclose material facts;

2. that RFT allegedly failed to contest in the trial court that the conflict of interest claim presented a question of fact for the jury;

3. that the trial judge's order constituted a ground for affirming the denials of JNOV and a new trial on the malpractice claim because the trial judge stated that the RFT's counsel allegedly had agreed that negligence was a question of fact;

4. that RFT allegedly erred because it failed to challenge the trial judge's order denying the motions for a new trial on the ground that the trial judge failed to state in the order all of his reasons for denying a new trial;

5. that knowledge of RFT's alleged real estate agent of the contents of the title opinion letter should be imputed to RFT;

6. that issue preclusion arising from the jury verdict required denial of the new trial motions as to the fiduciary duty, UTPA, and securities claims; and

7. that Law Firm's Attorney Representation Disclosure Form ("ARD") allegedly released Law Firm from liability for aiding and abetting a violation of the South Carolina Uniform Securities Act of 2005.

B. The Court also overlooked or was not aware of the fact that a number of the Court's grounds for denying RFT's JNOV and new trial motions, even assuming *arguendo* that they had been properly raised below and/or on appeal (which they had not), are contradicted by the trial transcript, by other portions of the trial court's file, and by portions of the Record on Appeal,[1] to include the following:

1. that contrary to the Court's conclusion, the Trial Transcript, RFT's Rule 59(e) motion, and Law Firm's response to that motion all unambiguously establish that RFT always contested the Trial Judge's conclusion that the malpractice claim presented a question of fact to be decided by the jury and never conceded those facts;

2. that contrary to the Supreme Court's findings, the Trial Transcript reflects unambiguously that during argument on RFT's directed verdict motions, RFT characterized the lot sales to it as "flip transactions";

3. that the Supreme Court overlooked the fact that during argument on its directed verdict motions, RFT raised as grounds for the motions the creation and dissemination by Law Firm of misleading documents and information and the failure by Law Firm to disclose material facts;

[1] The fact that so many of the grounds relied upon by the Supreme Court in its opinion were not raised by the Trial Judge or by Law Firm at the trial or appellate levels made many portions of the Transcript irrelevant to the appeal. Because grounds raised for the first time in the Opinion are contradicted by the Transcript and by other trial court records, RFT has moved to supplement the Record on Appeal with additional portions of the Transcript and the Trial Court's file.

4. that the Supreme Court overlooked the fact that the Record on Appeal does not support the Court's conclusion that RFT's real estate agent had knowledge of the title opinion letter and that Law Firm's statement in its Brief to the contrary is clearly belied by the Trial Transcript;

5. that the Supreme Court overlooked the fact that opinions of Law Firm's expert witness were contradicted by the trial transcript and applicable law;

6. that the Supreme Court overlooked the fact that its interpretation of the ARD is contradicted by the language of the ARD to the extent the Court reads the ARD as waiving Law Firm's liability for violation of the securities act.

C. The Supreme Court has overlooked and/or misapprehended various applicable legal rules and principles, as follows:

1. Grounds for affirming the trial judge's denial of RFT's post-trial motions could not be raised by Law Firm for the first time on appeal;

2. An appellate court may not properly affirm or reverse a trial court's order based upon grounds which were not raised in the trial court and/or were not properly raised on appeal;

3. Ordinarily, an appellate court may not decide issues on appeal which do not appear in the party's Statement of Issues on Appeal;

4. It is improper for an appellate court to infer from words of the Record on Appeal what the speaker actually meant by those words, especially when the Court was not present when the words were spoken;

5. The trial transcript is the only reliable record of the trial, especially when the Trial Judge's order reflecting his recollection of what was argued or stated at a hearing was not issued until months after the hearing took place;

6. A party has no duty to contest a case raised for the first time by the other party at the end of all of the evidence during argument on a directed verdict motion;

7. It is improper to infer that a party acquiesces in a legal point made by the other party from the mere fact that the first party was unable at the time to present contrary case law;

8. It is improper for an appellate court to treat as controlling authority an unidentified case, the holding and facts of which appear nowhere in the Record on Appeal;

9. In assessing the sufficiency of the evidence at trial to support a jury's verdict, neither the trial court nor the Appellate Court may give weight to purported expert testimony and opinions which are not supported by trial evidence, are conclusory, are contradicted by the trial record, are contrary to law, and/or are non-sensical, all of which apply to the testimony of Law Firm's expert in this case;

10. The Supreme Court overlooked the fact that contract language which purportedly releases a party from the duty to comply with the South Carolina Uniform Securities Act is void under the Act;

11. The Supreme Court overlooks the fact that exculpatory language appearing in a contract must precisely and unambiguously relieve a party from liability for the exact conduct for which the language is raised;

12. The Supreme Court misapprehends the law as it relates to issue preclusion or direct estoppel by according estoppel or preclusion effect to the jury verdict even though it is impossible to determine from the verdict which issues were actually and necessarily decided by the jury; and

13. The Supreme Court overlooks the fact that a trial court has no power to combine or merge various causes of action.

Grounds for this Petition and supporting legal authority are set forth in the Memorandum of Law filed contemporaneously herewith, which is incorporated by reference herein.

Respectfully submitted,

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August 30, 2012

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PROOF OF SERVICE

I certify that I have served Appellant's Petition for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, on August 30, 2012, addressed to the attorney of record, Matthew H. Henrikson, Clarkson, Walsh, Terrell & Coulter, PA, at his Post Office Box 26554, Greenville, South Carolina 29616 on August 30, 2012.

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APPELLANT'S MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR REHEARING

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Columbia, South Carolina
August 30, 2012

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Appellant RFT Management Co., LLC ("RFT") hereby respectfully submits its Memorandum of Law in Support of Petition for Rehearing.

Preliminary Statement

RFT appealed the trial judge's denial of its JNOV and new trial motions on the First Cause of Action for legal malpractice and the trial judge's denial of RFT's motions for reconsideration and new trials on RFT's causes of action for breach of fiduciary duty, violation of the South Carolina Unfair Trade Practices Act ["UTPA"], and aiding and abetting a violation of the South Carolina Uniform Securities Act of 2005 ["SCUSA"]. In filing this appeal, RFT assumed that the Supreme Court's scope of review would be limited to consideration of the grounds for RFT's motions, to the stated grounds for the trial judge's decisions on those motions, and to any additional sustaining grounds raised by the Respondents (collectively referred to as "Law Firm" herein).

Upon reading the Court's opinion affirming the trial judge, RFT learned that the Court based its decision almost entirely upon grounds which were not raised at the trial level and very often, not on appeal. Moreover, as to certain grounds, the Court's decision was based upon a misapplication of law and/or upon misinterpretations of discussions among counsel and the trial judge during argument on the parties' post-trial motions. In at least one instance, the Court's decision was based upon an alleged fact which is not contained in the Record on Appeal and which is belied by the trial transcript. In another instance, the court affirmed the trial judge upon an alleged error by RFT's counsel which in fact never occurred. Surprisingly, the Court did not weigh the evidence presented by the parties in support of their positions nor did it assess the legal conclusiveness of the evidence introduced by RFT in order to establish the elements of its malpractice cause of action.

Because the stated grounds for decision were, in RFT's view, either improper, legally incorrect, and/or contradicted by the Trial transcript, RFT filed the instant Petition for Rehearing.

Standard for Decision

In filing its Petition under Rule 221(a), SCACR, RFT is mindful that

> "[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time."

Herron v. Century BMW, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011) (citation omitted). The purpose of the petition is to present points which the petitioner believes were overlooked or misapprehended by the Court.

RFT believes that it has been faithful to that purpose. Most of the grounds provided by the Court in support of its opinion were not raised at the trial level or on appeal, and it appears that the Court may not have noticed or may have overlooked this circumstance. In addition, RFT believes that the Court has misapprehended RFT's position on other matters and statements by RFT's counsel during argument on the post trial motions. As well, the Court has overlooked and not addressed most of the legal and factual grounds for RFT's post-trial motions and for this appeal. And, finally, RFT suggests that the Court may have misapprehended the law relating to certain of its grounds for affirming the trial judge.

For these reasons, RFT respectfully submits that the grounds for this Petition are within the intendment of Rule 221(a).

Argument and Citation of Authority

I. RFT WAS ENTITLED TO JNOV ON THE MALPRACTICE CLAIM.

RFT respectfully submits that the Court erred in affirming the trial court's denial of RFT's JNOV motion on the First Cause of Action for legal malpractice. The Court's opinion should be withdrawn because (1) it is based upon grounds never raised by Law Firm and as to which RFT therefore has never had a hearing or an opportunity to respond; (2) it is based upon misinterpretations of the Record; and (3) it relies in part on facts not contained in the record.

A. Even Assuming *Arguendo* that Law Firm Had Taken the Position that the Existence of a Flip Transaction and Law Firm's Misleading Conduct Had Not Been Raised in Connection with RFT's Motion for a Directed Verdict, the Trial Transcript Unambiguously Reflects That Those Issues Were Raised and Argued.

In setting forth its initial reason for affirming the trial court's denial of RFT's JNOV motion, the Court stated:

> In reviewing the record as an initial matter *we agree with Law Firm that RFT did not move for a directed verdict* . . . based on the second ground it now urges on appeal, i.e., that this was an improper flip transaction and Law Firm gave misleading information while failing to make required disclosures.

RFT Management Co., L.L.C. v. Tinsley & Adams, L.L.P., 2012 WL 3524812 at *4 (S.C. August 15, 2012) (emphasis added). When RFT first read this language, it was shocked for several reasons.

First, RFT has scoured through the Record and could not find a single instance in which Law Firm has claimed that *any* ground for JNOV or appeal had been waived due to a failure by RFT to raise that ground in connection with its directed verdict motion. The only language in the record addr essing any type of omission appears at p. 149 in Law Firm's Memorandum in

Opposition to Post-Trial Motions in which it states: "Plaintiff then attempts to raise for the first time that the transactions were illegal flip transactions." This phrase does not mention the directed verdict motions or waiver. It is restated at page 15 of Law Firm's Brief, also without mention of RFT's directed verdict motion or waiver.

This language can be reasonably construed only as a complaint about RFT's characterization of the closings as "illegal flip transactions" and nothing else. Indeed, the use of misleading information and non-disclosures are *not* claimed by Law Firm to be issues raised for the first time in connection with post-trial motions. The actual mechanisms and timing of the closings, as explained in RFT's Reply Brief at 8-10, have always constituted the core of RFT's case. Thus, even if they were not called "illegal flip transactions," the non-disclosures and misstatements which were used to execute those transactions nonetheless may serve to establish liability. *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("a party is not required to use the exact name of a legal doctrine in order to preserve the issue."). In addition, contrary to the Court's conclusion, Law Firm has never even suggested that RFT failed to argue in connection with its directed verdict motions that "Law Firm gave misleading information while failing to make required disclosures."

Second, what is also unfair is the manner in which the Record on Appeal is used by the Court in its Opinion. Because the issue of waiver by not raising various grounds at the directed verdict stage was never listed in Law Firm's Statement of Issues Presented on Appeal, large portions of the transcript of the directed verdict argument were omitted from the Record on Appeal,[1] and RFT had no reason to address them in argument in its Brief on that issue. *See, id.*,

[1] The argument on the directed verdict motions appeared from page 881 through 923 of the Transcript; yet, of the total of 41 transcript pages, only 15 were included in the record on appeal.

at 466, 719 S.E. 2d at 642 ("Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal.").

Having no notice that the grounds asserted in support of its directed verdict motion were in issue, RFT considered it to be improper to include the entire motions argument in the Record on Appeal. *See* SCACR 209(c); Affidavit of Harry A. Swagart, III ("Swagart Aff.") at p. 2, ¶ 4. RFT therefore submits that affirmance of the denial of its JNOV motion based upon a ground which was not raised below, which was not briefed on appeal, and which it has never had an opportunity to address is fundamentally unfair. *State v. Prioleau*, 345 S.C. 404, 412, 548 S.E.2d 213, 217 (2001).

Third, once the transcript of the full record of the motion hearing is considered, it becomes indisputable that the presence of a "flip transaction," the provision by Law Firm of misleading information, and Law Firm's failure to make required disclosures were all repeatedly argued by RFT in connection with all of its causes of action. Thus, a lawyer's duties to make full disclosures and not to mislead clients were specifically invoked by RFT. Tr. p. 908, lines 7-24, App. at ___; p. 906, lines 17-20, App. at ___.

In addition, RFT argued specifically as to the types of material fact which were not disclosed. Tr. p. 915, lines 7-23, App. at ___. And the inaccuracies and misleading statements contained in the HUD-1's and affidavits of consideration were repeatedly raised. *See, e.g.*, Tr. p. 920, lines 9-16; , App. at ___; pp. 890 line 18 to p. 891 line 18, App. at ___. RFT specifically argued that Law Firm engaged in a pattern of misleading by the manner in which the closings were conducted. Tr. at p. 892:13 to p. 893:8, App. at ___. Finally, and most tellingly, while handing the trial judge a copy of this Court's opinion in *In re Johnson*, 375 S.C. 499, 654 S.E.2d 272 (2007), RFT's attorney stated:

> I ask you to read there and there and you will see what the Supreme Court says about *the duty with HUD-1's in flip transactions such as this one.* It could not be clearer.

Tr. at p. 920, lines 20-23, App. at ___.

The above passages render it indisputable that flip transactions, the provision of misleading information, and the failure to make full disclosures were all argued as grounds for RFT's directed verdict motion. Even if RFT had been informed in Law Firm's brief that it took the position that all of those grounds had been waived, the above excerpts from the trial transcript would have been included in the record on appeal and the above arguments would have appeared in RFT's Reply Brief.

Thus, to the extent that the Court's opinion rests on the assertion that grounds were not raised at the directed verdict level, it should be withdrawn and corrected.

B. It Was RFT's Consistent Position at Trial that It Was Undisputed that Law Firm Committed Malpractice by Representing Both RFT and Seller While Subject to an Unwaivable Conflict of Interest.

The Court affirmed the trial judge's denial of JNOV on that portion of the malpractice action based upon Law Firm's conflict of interest on the ground that RFT allegedly failed to contest that the conflict presented an issue of fact; upon the trial judge's statement in his Order that "[b]oth counsel for the Plaintiff and the counsel for the Defendants agreed that the issue of negligence was a factual question;" and because the existence of an unwaivable conflict would not establish all of the remaining elements of the malpractice claims.[2] 2012 WL 3524812 at **4-5. RFT will argue below that the Court erred in ruling on these grounds because (1) they were not raised by Law Firm in its opposition to RFT's appeal; (2) they are contrary to what is

[2] While this is a correct statement of the law, RFT submits that its appellate briefs cite the Court to a plethora of evidence which establish without dispute that even if the conflict were waivable, it was not properly disclosed by Law Firm, and was not knowingly waived. App. Brief at 13-16; Reply at 1-5.

actually reflected in the trial transcript; (3) they cannot be properly inferred from a failure to contest authority raised for the first time during argument on the directed verdict motion; (4) the trial judge's statement in the Order is ambiguous, contrary to the record, and not a reliable or controlling basis for decision by the Court; and (5) the other elements of the conflict of interest claim are undisputed in the record, and the Court has identified no elements which had not been proved.

(1) The Court's Decision Is Based upon Grounds Which Were Not Raised by Law Firm.

Law Firm has never taken the position that RFT was precluded from seeking JNOV on the Conflict of Interest claim by the trial judge's order or by an alleged concession by RFT that the existence of a conflict of interest presented a question of fact for the jury. Had it done so, those arguments would have been addressed in RFT's Reply Brief and portions of the Transcript which relate directly to those arguments would have been included in the Record on Appeal.

(2) It Is an Incontestable Fact that RFT Never Conceded that the Existence of Law Firm's Conflict Presented a Question of Fact for the Jury.

In its Opinion, the Court does not cite the portion of the trial transcript which it interpreted[3] as evidencing a concession by RFT that the conflict of interest issue presented a question of fact for the jury. The only portion of the Transcript which addresses the issue establishes unequivocally that RFT's position was that the issue was not disputed and that RFT was entitled to a directed verdict. For example, the trial judge asked RFT's attorney, "Is the question of whether there is a conflict or not, is that not a factual question?" (Tr. at p. 898, lines

[3] RFT submits that interpreting the words of RFT's counsel while he was arguing RFT's directed verdict was not proper, especially when the Court was not present when the words were spoken, does not know the context in which they were used, and does not know the meaning attributed to those words by RFT's counsel.

22-24, App. at ___). RFT's attorney responded, "In this circumstance the answer is no." (Tr. at p. 898, line 25 to p. 899, line 1, App. at ___). Counsel thereupon explained that while it is possible for the conflict issue to be one of fact, clear precedent made it a question of law in this case. (Tr. at p. 899, line 7 to p. 901, line 7 (*citing State v. Buyer's Service, Co.*; S.C. Ethics Advisory Opinion No. 94-08; RPC 1.7, Comment 16). Based upon this precedent and the record, Counsel concluded:

> we believe that there was no dispute that there was a conflict of interest, that it wasn't properly waived, and that it couldn't have been properly waived because of the information Mr. Adams had.

(Tr. at p. 901, lines 3-7, App. at ___). The Court then confirmed with counsel that it was RFT's position that the existence of a conflict was factually uncontradicted. (Tr. at 901, lines 8-21, App. at ___). Further on in the argument, Law Firm's attorney admitted, "There is always an inherent conflict when one lawyer represents more than one person . . . .," to which the trial judge replied, "I buy that." (Tr. at p. 902, lines 13-15, App. at ___).

Again seeking confirmation on the issue, the trial judge asked the attorneys, "You believe the conflict is a legal issue, not a factual question?" (Tr. at p. 911, lines 1-2, App. at ___). RFT's counsel thereupon repeated his belief that "it's a legal issue whether or not he had a conflict going on in the closing." (Tr. at p. 911, lines 8-10, App. at ___). Based upon this discussion, the trial judge stated, "I believe that a conflict existed based upon what I have heard and my understanding of the rule . . . ." (Tr. at p. 911, lines 8-10, App. at ___).

At this point, when it appeared the trial judge was about to rule against his client, Law Firm's attorney announced that his co-counsel had found an unidentified case which supposedly stood for the proposition that the existence of the conflict presented a fact issue for the jury. (Tr. at p. 912, lines 1-5, App. at ___). It does not appear from the transcript that the case was handed

up to the Court or to RFT's counsel. In any event, based upon the abrupt change of position of Law Firm's counsel, the Court stated:

> If it's a factual question, I would rather instruct it, no question in my mind that's what I would rather do. If you all both agree it's a legal issue, I will tell you what I am going to rule.

(Tr. at p. 912, lines 15-19, App. at ___). Because there was then a dispute between Law Firm's counsel and Plaintiff's counsel as to the issue being legal in nature, the trial judge did not announce a ruling on the issue. Finally, having decided the conflict issue was going to the jury, the trial judge then questioned counsel as to *how* (and not as to *whether*) the conflict issue should be instructed to the jury. RFT's counsel then stated that the steps outlined by the trial judge made up the correct procedure for presenting a conflict issue to the jury.

As the above citations to the record reflect, RFT never changed its position that Law Firm had a conflict as a matter of law. When the trial judge outlined the procedure for instructing the jury, however, counsel saw the hand-writing on the wall, stating: "Your Honor, I think I know where you are going with your ruling, and I will state the rest of my motion on that cause of action." (Tr. at p. 915, lines 7-10, App. at ___).

The only discussions in the trial transcript regarding whether the existence of a conflict presented a disputed issue of fact are those discussed above. *See* Swagart Aff. at pages 2-3, ¶¶ 7-10. Based upon the trial transcript, RFT submits that it is not possible to conclude that it ever took the position that the conflict issue presented a question of fact.[4] And because the discussions unequivocally support RFT's rights to a directed verdict and JNOV, they should not form any part of the basis for denying those motions.

[4] None of the excerpts discussed above, to RFT's knowledge, were included in the record on appeal. As a result, RFT is unable to determine with certainty which portion of the record was relied upon by the Court.

(3) Acquiescence May Not Be Properly Implied from an Excusable Failure to Present Contrary Case Law.

The clear implication of the Court's opinion is that because RFT did not present authority contrary to an unidentified case referenced by Law Firm during argument on RFT's directed verdict motion, RFT somehow conceded that the existence of a conflict presented a question of fact. RFT submits that this implication is an extremely unfair one for several reasons.

First, it has never been raised by Law Firm as a ground for denying RFT's motions. Second, the case is not identified in the record; and other than the fact that it was supposedly discovered by Law Firm's attorneys just prior to the time the trial judge was going to decide the issue in favor of RFT, there is no evidence on the record indicating that a copy was provided to RFT's counsel or that RFT's counsel was given an opportunity to read it. In this regard, the Court should consider that right up until the time that the trial judge raised the conflict issue, it had been Law Firm's position that it presented a question of law. RFT's counsel was certainly surprised at the hearing when Law Firm abruptly changed its position, leaving him no opportunity to research the issue or to shepardize the case.

Moreover, at this stage, the Court cannot possibly conclude that the unidentified case in fact amounted to competent authority for anything. The fact that the court in that case may have treated the existence of a conflict as presenting a question of fact *under the circumstances then before it*, there is no way to conclude from the record that it had any application to the facts of this case. Moreover, the record reveals that even before the alleged case materialized, RFT had argued that under the *Buyer's Service* case and RPC 1.7(b)(2), Comment [16], the existence of a conflict of interest inhered in every real estate closing. Tr. at pp. 898-901, App. at ___. Thus,

the conclusion that the phantom case was not contradicted on the record cannot withstand scrutiny, and it should not have been relied upon for any purpose.[5]

(4) The Trial Judge's Statement in the Order Cannot Legally Serve as a Ground for Denying the JNOV Motion.

In the Order, the Trial Judge stated: "Both the counsel for the Plaintiff and the counsel for the Defendants agreed that the issue of negligence was a factual question." R. at p. 6. In its Opinion, the Supreme Court misinterpreted that sentence as meaning that the parties had agreed at trial that the legal malpractice claim involved questions of fact that required submission of the claim to the jury. 2012 WL 3524812 at *4. The trial judge's statement did not constitute a ground for denying the JNOV motion on the conflict issue for at least three reasons: (a) it has never been raised as a ground with the result that RFT has never had an opportunity to confront it; (b) it is clearly contradicted by the trial transcript; and (c) it does not unambiguously support the contention that RFT's attorney agreed that the malpractice claim should be submitted to the jury for decision.

a. The Statement in the Trial Judge's Order Has Never Been Raised as a Ground for Denying the Post-Trial Motions.

When RFT's attorney first read the trial judge's order, his first reaction was to draft and to file a motion under Rules 52(b), 59(e), and 60(b)(1) in order to alter or amend the order for the purpose, *inter alia,* of correcting the trial judge's misstatement as to what counsel had agreed. A copy of that motion will be included in the Appendix accompanying this motion. Therein, RFT stated

> While a professional negligence cases [*sic*] often present *disputed* factual issues requiring resolution

[5] RFT would submit, moreover, that it had no duty to present contrary authority where the phantom case had never been raised prior to argument on the directed verdict motions and that nothing could be reasonably inferred from its failure to do so.

> by the jury, it has always been Plaintiff's position that there was no dispute with respect to professional negligence. As a result, Plaintiff must object to the Court's order as written in order to insure that its position as to the absence of disputed factual issues in connection with the professional negligence claim is not misinterpreted and is preserved as a ground for appeal.

App. at _____ (emphasis in original). In responding to RFT's motion, Law Firm stated:

> RFT's requested relief falls in two categories; first, RFT requests the Court modify the order to clarify that it did not agree that negligence was a question of fact; secondly, RFT requests that the court make specific findings in support of its order denying RFT's post-trial motions. Neither request is necessary. Both are duplicative of the issues raised in the previous post trial motions.

Law Firm's Response will appear in the Appendix.

With Law Firm's agreement that the Rule 59(e) motion was unnecessary to preserve RFT's position that "there was no *disputed* factual issue as to Defendants' professional negligence . . .," RFT agreed to drop its motion rather than to take up the lower court's time in rendering an unnecessary decision. With Law Firm's assurance that the disputed language in the trial court's order would not prevent RFT from arguing that professional negligence was not subject to factual dispute, RFT was naturally shocked upon reading in this Court's opinion where it is implied that RFT's counsel carelessly locked RFT into the position that the professional negligence claim must go to the jury, a result which the parties had agreed would not flow from the trial judge's order. The above facts explain why Law Firm did not raise the trial judge's language in opposition to RFT's appeal.

They also indicate the unfairness of this Court's Opinion. Obviously, had the language in the trial judge's order been raised by Law Firm as preventing RFT from arguing that the facts as

to a conflict were not disputed, RFT would have included in the Record on Appeal its motion to amend the judgment and Law Firm's response and the excerpts from the Transcript discussed above at pp. 11-12; and it most certainly would have made the arguments it is now making. Finally, an appellate court may not render decision based on a ground which was not raised below or on appeal. *State v. Prioleau*, 345 S.C. at 412, 548 S.E. 2d at 217.

b. The Language in the Transcript Does Not Support the Trial Court's Language or this Court's Interpretation of that Language.

As discussed in detail above (pp. 5, 7-9 *supra*), a reading of the full transcript of proceedings on the directed verdict motion shows that RFT consistently and clearly expressed its position that there were no factual disputes on the conflict claim and, consequently, that it presented a legal issue.[6] Indeed, the trial judge asked RFT's counsel three times to confirm that position, and each time he responded that it was an issue of law. Nowhere does RFT or its counsel ever deviate from that position.

Accordingly, the trial transcript uniformly validates RFT's position that a question of law was presented, and provides no support for the trial judge's words to the extent that they could be read as stating that RFT agreed that negligence presented a question of fact or that the issue should be submitted to the jury.

c. The Trial Judge's Language Does Not Unambiguously Support the Court's Interpretation.

Language in the trial judge's order was not raised by Law Firm on appeal as a ground for affirming that order and, therefore, should not be relied upon by the Court as a ground for affirming the Order. Even if it could have been properly considered by the Supreme Court, the trial judge stated in the Order only that the parties agreed that *negligence* presented a question of

[6] The trial transcript is the only reliable record of the trial, and the trial judge's recollection of what was said has no evidentiary value especially in view of the facts that it is contradicted by the Transcript and the order was not issued until months after the trial.

fact. He did not mention "conflict of interest." He did not identify to which negligence issue (conflict of interest or misleading/nondisclosure) he was referring. He did not state that the parties agreed that the issue should be submitted to the jury. Indeed, an issue of fact can be disputed or undisputed. The legal effect of an undisputed issue of fact presents an issue of law. Finally, he said only that he submitted the issue to the jury, which was consistent with his denial of the motions for a directed verdict. He did not say that he submitted the issue to the jury *because* counsel agreed that negligence was an issue of fact. As the transcript reflects, he treated the presence of the conflict as a question of fact only because Law Firm's counsel refused to agree with RFT's counsel that it was a question of law. Tr. at p. 912, lines 15-22, App. at ____.

Given these indisputable facts in the record, it is not possible to unambiguously interpret the language of the trial judge's order as stating that RFT's counsel agreed that the conflict issue was a question of fact *or* that it should be submitted to the jury.

C. The Record on Appeal Conclusively Establishes that a Directed Verdict or JNOV Should Have Been Entered in Favor of RFT on the Malpractice Cause of Action.

In Appellant's Brief and in the Reply Brief, RFT meticulously demonstrated through precise citations to the Record on Appeal that every element of the two malpractice claims was established through undisputed facts. Rather than addressing RFT's factual arguments, the Court chose instead to hold (incorrectly) that grounds were waived by their alleged omission from RFT's directed verdict motion or that RFT somehow abandoned positions that it had consistently asserted, only to adopt Law Firm's position. RFT believes that it has forcefully shown that the grounds relied upon by the Court could not be supported by applicable law or in the Record on Appeal and were not properly raised. RFT therefore invites the Court to again review the grounds for reversing the trial court and the record evidence cited in support of those grounds.

D. The Testimony of Law Firm's Expert Is Not Sufficiently Reliable or Probative to Preclude the Entry of JNOV as a Directed Verdict in RFT's Favor.

When Law Firm responded to RFT's brief, it relied almost exclusively on the conclusory opinions of its expert, Mr. Tighe, principally because it had no facts upon which to mount its opposition. Thus, Tighe, while on the stand, "opined" (1) that Law Firm had no conflict of interest, despite the fact that Law Firm's counsel had admitted that all real estate closings are subject to an inherent conflict of interest; (2) that in order to properly disclose a conflict of interest when representing both parties to a closing, an attorney need only inform each party that he was representing both parties, which is blatantly contrary to the directions set forth in *McNair v. Rainsford*, 330 S.C. 332, 344, 499 S.E.2d 488, 494 (Ct.App. 1998); *Bankers Trust of South Carolina v. Bruce*, 283 S.C. 408, 420, 323 S.E.2d 523, 530 (Ct.App. 1984); Rule of Professional Conduct 1.7(b)(2), Comment [16]; and S.C. Bar Ethics Advisory Opinion No. 94-08; (3) that a client who had never had the term "conflict of interest" and its many ramifications explained to him could knowingly waive a conflict which he indisputably did not understand; (4) that waiver could be accomplished by having the client sign a form which does not contain the terms "waiver" or "conflict of interest," refers only to a "conflict" between two clients, does not mention the *attorney's* conflict of interest, and implies that there is no conflict; (5) that it was possible to comply with the deed statute, S.C. Code Ann. 12-24-30(A)(2000), by reflecting in the affidavit that consideration was paid in "money or money's worth" in an amount in excess of what was actually paid; (6) that a form which did not mention a lawyer's duty to make full disclosure of material facts to the client could somehow waive that duty without even mentioning it; and (7) that HUD-1's and deed affidavits were properly prepared although they failed to show from whom and to whom funds were paid and how much was paid, even though statutory and case law requires that information to be properly reflected on the forms.

One possible interpretation of the Court's opinion is that if an expert states an opinion which is admitted into evidence, that opinion must be viewed as supporting the jury's verdict, no matter that the opinion is without an underlying factual basis, non-sensical, flatly contrary to existing law, totally contrary to undisputed evidence on the record, vague, conclusory, and/or based upon an incorrect statement of the law, (all of which describe Tighe's opinions in this case). RFT argued in its Reply brief that such a rule was contrary to the rule followed by the United States Supreme Court and many other jurisdictions. Reply Brief at 10-11 (citing *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993); *Price v. City of Charlotte, N.C.*, 93 F.3d 1241, 1248-49 (4th Cir. 1996); *Integra Life Sciences I, Ltd. v. Merck K GaA*, 496 F.3d 1334, 1342 (Fed.Cir. 2007), and others). Since arguing the appeal in this case, RFT has learned that up until now, this Court has followed the same rules. Thus, in *Young v. Tide Craft, Inc.*, 270 S.C. 453, 470, 242 S.E.2d 671, 679 (1978), the Court held that expert testimony which did not have a sufficient underlying factual basis "is devoid of probative force and cannot support a verdict." The only "facts" actually relied upon by Tighe were the attorney representation disclosure form ("ARD") and the title opinion letter. As discussed in detail in RFT's briefs, the ARD and the title opinion letter are at most, and if anything, only partial and minimal disclosures which were insufficient to relieve Law Firm of its duty to make full disclosure regarding the conflict of interest and of all material facts relating to the sales transactions. App. Brief at 29-30; Reply Brief at 7-8.

For these reasons, RFT again submits that Tighe's opinions were not sufficiently probative to create factual issues and, therefore, should not have been considered in connection with RFT's post-trial motion or this appeal.

II. THE COURT ERRED IN AFFIRMING THE DENIAL OF RFT'S NEW TRIAL MOTIONS.

RFT moved for a new trial under Rule 59(a) on the ground that the verdict was against the greater weight of the evidence and under the 13th juror doctrine on the ground that the evidence at trial does not justify the verdict. This Court affirmed the denials of both motions (1) because the trial court's order did not state reasons for denying the motions; (2) because the trial judge found that the malpractice claim presented a question of fact, a finding which RFT allegedly did not challenge; (3) because "the jury could have properly found that there was no deceitful action by Law Firm . . . ," given the alleged facts that the ARD form strictly limited the scope of Law Firm's representation and that "RFT's own real estate agent had knowledge of the October 30th title letter outlining the status of the properties;" and (4) because Law Firm's expert testified that most residential closings are handled by one attorney, and the ARD "limited the scope of Law Firm's representation and its obligation to RFT." 2012 WL 3524812 at ** 4-5.

As RFT will explain, none of these reasons form a legally cognizable basis for affirming the denial of RFT's new trial motions.

A. South Carolina Procedural Law Does Not Require Trial Judges to State in Their Orders the Reasons for Denial of a New Trial Motion.

Citing a case decided in 1913, the Supreme Court implies that because the trial judge did not articulate any of his reasons for denying the new trial motion, it is free to rely upon any reason which finds support in the trial record whether or not it was raised as a ground at trial, and may ignore the trial court's reasoning as it appears in the Trial Transcript. RFT submits that the Court's reasoning as to the effect of the trial judge's order does not comply with current South Carolina law on the issue.

Thus, in *Clark v. Dept. of Pub. Safety*, the Court of Appeals explained,

> The trial court's order denying the Department's post-trial motions is sufficient as the [trial] court's reasoning for the denial can be determined from the record on appeal. Further, *there is no blanket requirement that the trial judge set forth a separate explanation of all of the rulings on post-trial motions.*

353 S.C. 291, 311, 578 S.E.2d 16, 26 (2003) (emphasis added), *aff'd on other grounds*, 362 S.C. 577, 668 S.E.2d 573 (2005). More recently, the Court of Appeals cited *Bailey v. Segars*, 346 S.C. 359, 550 S.E.2d 910 (2001), *cert. dismissed as improvidently granted*, 354 S.C. 57, 579 S.E.2d 605 (2003), for the proposition that

> a form order stating only that applicant's post-trial motion for JNOV and new trial were denied, was, together with the record of the proceedings, adequate to enable appellate review.

Porter v. Labor Depot, 372 S.C. 560, 569, 643 S.E.2d 96, 100 (2007).

Finally, RFT would direct attention to the fact that Law Firm has never asserted at trial or on appeal that the trial judge's order was in any respect defective. Indeed, in its Response to RFT's Rule 59(e) motion, Law Firm argued that correcting the order was unnecessary. App. at ___. So, as things stand now, RFT wrongly faces denial of its new trial motion based upon a ground which had never even been mentioned until the Court's opinion.

B. RFT Has Never Taken the Position that the Malpractice Claim Presented Questions of Fact to be Decided by the Jury.

At pages 5, 7-9 above, RFT explains in great detail that the trial transcript shows without dispute that RFT has never conceded that the malpractice claim was subject to disputed factual issues to be decided by the jury, and that such a phantom concession could not properly be used as a basis for denying the JNOV motion. For the same reasons that it provides no grounds for

denying JNOV, it provides no grounds for denying the new trial motion. This is yet another ground which did not see the light of day until the Supreme Court's opinion.

C. The ARD Does Not Relieve Law Firm from Its Fiduciary Duties.

As explained in RFT's brief, the ARD form states only that Law Firm was not required to give advice or to negotiate the deal, and that it was hired for the sole purpose of obtaining marketable title. The form does not state that Law Firm could not provide those services and others should it so choose; it simply said that Law Firm could not be required to do so. It does not state that Law Firm was excused from its legal and fiduciary duties not to mislead RFT or to disclose material information regarding the transaction; nor does it shield Law Firm from liability for misdeeds committed while performing services which it chose to perform. In addition, it does not state that Law Firm, while performing services for RFT such as orchestrating closings and preparing affidavits and HUD-1's was free to do so in a manner which was false, illegal, and/or misleading. The ARD does not address Law Firm's duty of loyalty or suggest that it was free to perform its services in manner which favored the interests of the seller over those of RFT. Finally, it does not address the facts that Law Firm could not legally take on representation of both parties in a complex investment real estate transaction; that even if representation could have legally been undertaken, disclosure of the legal ramifications of the representation were necessary and were not provided; or that without those full disclosures, RFT could not effectively waive the conflict.

D. RFT Did Not Have a Real Estate Agent Whose Knowledge of the Title Opinion Letter Could Be Imputed to It.

As noted above, the Court, apparently imputing an alleged agent's knowledge of the title opinion letter to RFT's manager, stated: "RFT's own real estate agent had knowledge of the October 30th title letter outlining the status of the properties." Apart from the fact that imputing a real estate agent's knowledge to RFT has never been an issue below or on appeal, the statement is contradicted by the Transcript.

Upon reading this statement, RFT's attorney reviewed the transcript and Record on Appeal and could find no evidence that RFT had a real estate agent or that an agent was aware of the contents of the letter. At page 16 of its brief, however, Law Firm erroneously states that Jan Bradshaw was RFT's real estate agent. The actual trial transcript is completely to the contrary. Upon questioning by Law Firm's attorney, Ms. Bradshaw testified:

> I was working as a realtor for Carolina Waterfront Properties.
> * * * *
> Carolina Waterfront Properties was Affiliated with Lake Greenwood Developers [the Seller]. We were the real estate sales side of the development. We strictly did the sales part.

Tr. p. 678, line 18 to p. 679 line 3; App. at ___. Thus, Ms. Bradshaw was the Seller's agent, not RFT's. Later in her testimony, the following question and answer occurred.

> MR. HENRIKSON: Okay. Now at any point did you become [Plaintiff's] agent?
>
> MS. BRADSHAW: No.

Id. at p. 691, lines 7-9; App. at ___. Further, Ms. Bradshaw never testified that she read the title opinion letter, and she did testify that she did not know which documents were in the package

allegedly provided her to give to Mr. Roatch. *Id.* p. 694, line 22 to p. 695, line 5; p. 709, lines 1-5. App. at ____.

Thus, as the record stands now, there is no evidence that RFT received the letter at or before the closing. Moreover, the letter does not disclose the myriad of other material facts which were falsified or not disclosed to include: facts relating to the Seller's financial difficulties; facts relating to the Seller's need for RFT's funds in order to acquire the lots; to the fact those funds would not be used to finish out the subdivision; or to the fact that the Seller desperately needed the funds in order to avoid defaulting on buy-back agreements with the Owners. In short, the title opinion letter could not serve to insulate Law Firm from any liability for malpractice. Finally, and perhaps most important, imputation of the agent's knowledge to RFT was not raised at trial or on appeal and, thus, is not a ground appearing in the record. *Prioleau.*

Third, as discussed above at pp. 15-16, testimony of Law Firm's expert was conclusory, contrary to law, and not sufficiently probative to support the verdict. The fact that residential real estate closings are usually handled by only one attorney means nothing, especially when the attorney's conflict is not fully explained and not knowingly waived. Moreover, this was not a typical residential real estate closing, but was a complex investment transaction involving buy-backs and second mortgages. *See* Appellant's Brief at 7-9.

The expert's opinion does not address the plethora of material facts which Law Firm did not disclose to RFT, nor did it address Law Firm's unquestioned duty to disclose those facts. The expert's opinion that the HUD-1's and deed affidavits met the standard of care was specious in that it ignored decisional law of this court and federal criminal statutes, all as explained in Appellant's Brief at 33-36; Reply Brief at 11-12.

RFT respectfully submits that based upon the record in this case, Law Firm's liability to RFT was a proven fact, precluding denial of a new trial under Rule 59(a) or under the thirteenth juror doctrine.

III. THE COURT ERRED BY ACCORDING ESTOPPEL EFFECT TO THE JURY VERDICT.

Among the reasons given by the Court for affirming denials of new trials on the fiduciary duty, securities, and UTPA causes of action is that, in the Court's view, they are based upon identical facts to those of the malpractice cause of action, with the result that the verdict against RFT on that cause of action leaves nothing to be tried under the other causes of action. RFT believes that this portion of the Court's decision constitutes error because it is based on a ground never before raised below or on appeal and involves a misapprehension of the law relating to issue preclusion.

A. Issue Preclusion Has Never Been Raised as a Defense to any Cause of Action.

The Court holds that the jury verdict requires denial of the new trial motions on the breach of fiduciary duty, UTPA, and securities claims. As explained below, this holding constitutes an improper application of issue preclusion or direct estoppel. More importantly, however, it is a ground which is unavailable for consideration on appeal.

The first and only time that Law Firm argued that the jury verdict required denial of JNOV and new trial motions was in Respondents' Brief at page 28. The argument was not made in Law Firm's memorandum in opposition to RFT's post-trial motions. R. at 150-57.

> It is well-settled, [however], that an issue cannot be raised for the first time on appeal, and must have been raised and ruled upon by the trial court to be preserved.

Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006); *Milliken & Co. v. Morin*, 386 S.C. 1, 10 n. 9, 685 S.E.2d 828, 833 n. 9 (Ct.App.2009) (defendant "raises this argument for the first time on appeal; thus, the issue is not preserved."). In its Reply to Law Firm's brief, RFT objected to the assertion of the argument upon the ground that "the first time this argument has surfaced in this case was in T&A's appellate brief . . . ." Reply at 24.

For the above reasons and based upon the above cases, RFT submits granting preclusive effect to the jury verdict could not properly be relied upon as a ground for denying its new trial motions as to *any* cause of action. Again, it is a ground to which RFT has not been provided a fair opportunity to respond until this Petition for Rehearing, upon which RFT has yet to be heard. *Prioleau, supra.*

B. One Cannot Determine from the Jury Verdict which Issues Had Been Actually and Necessarily Decided.

Another name for issue preclusion is collateral estoppel. Under collateral estoppel, a party is precluded from relitigating issues which were *actually and necessarily decided* in an earlier case. *Carman v. S.C. Alcoholic Bev. Comm'n*, 317 S.C. 1, 6, 451 S.E.2d 383, 386 (1994). Issue preclusion may also occur in a single case where an issue necessarily decided in connection with one claim prevents relitigation of the same issue in connection with other claims. *See, e.g.*, *AgServices of America, Inc. v. Nielson*, 231 F.3d 726, 731-32 (10th Cir. 2000); *Williams v. First Gov't Mtg. and Investors*, 225 F.3d 738, 748 (D.C. Cir. 2000); *Neugebauer v. Neugebauer*, 804 N.W.2d 450, 456 (S.D. 2011). When issue preclusion is applied in a single case, it is sometimes referred to as "direct estoppel." 18 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* at 479 (West 2002). It is the rule in South Carolina, as in most other jurisdictions, that

> "estoppel does not extend to matters not expressly adjudicated, and which can be inferred only by argument and construction from the judgment, except where there are necessary and inevitable inferences in the sense that the judgment could not have been rendered as it was without deciding such points."

Carman, 317 S.C. at 6, 451 S.E.2d at 386 (citation omitted). Moreover, the issue which was necessarily determined in the earlier ruling must be essential to that ruling. Thus, for issue preclusion to apply in this case, the Court must be able to determine from the words of the jury verdict that every fact which is essential to liability in the fiduciary duty, UTPA, and securities claims was necessarily decided by the jury against RFT in deciding the malpractice claim. That determination cannot possibly be made or even inferred from the jury verdict on which the Court relies.

On the jury verdict form, the jury answered "no" to the following question with respect to the malpractice claim: "Was the conduct of Tinsley & Adams, L.L.P., and Welborn D. Adams negligent?" R. at 9. The jury was not asked to decide whether Law Firm engaged in particular conduct, whether Law Firm engaged in conduct which was intentionally misleading or unethical, or whether particular conduct even occurred. And there is no way to discern or to infer from the verdict whether the jury actually or necessarily decided any of those things. Indeed, the verdict form assumes that some conduct did in fact occur but asks only whether the jury would characterize that conduct as negligent.

Among the possibilities left open by the jury verdict are the following. First, the jury verdict does not foreclose the possibility that Law Firm performed every act of which it is accused, but that those actions did not violate the standard of care. Second, it also leaves open the possibility that the jury did not consider actions which were intentional or reckless, so that

intentional unlawful acts were not found to be negligent. Third, non-disclosures may not have been considered "conduct", or may have been found by the jury (contrary to law) not to have violated an attorney's standard of care. Fourth, the jury may have incorrectly decided Law Firm's representation of both parties while subject to a conflict of interest to have been authorized by the ARD form, or that the ARD form relieved Law Firm from making disclosures.

The point, of course, is that there is no way to tell from the verdict form which issues were necessarily decided by the jury. That being the case, the jury verdict cannot possibly serve to preclude the litigation and decision of *any* issues involved in *any* of the other claims. Affirming denials of a new trial based solely on the verdict form would therefore constitute error, even if issue preclusion was a ground upon which the Court could have properly relied.

IV. RFT IS ENTITLED TO A NEW TRIAL ON THE CLAIM FOR BREACH OF FIDUCIARY DUTY.

In addition to its misapplication of issue preclusion in connection with the fiduciary duty claim, the Court affirmed denial of a new trial on that claim because, in the Court's view, it was identical to the legal malpractice claim, in that it was purportedly based entirely upon a duty created by the attorney-client relationship and upon identical facts giving rise to the malpractice claim. 2012 WL 3524812 at *6. In so holding, the Court rejected RFT's argument that it was possible for a jury to render a verdict in favor of RFT on one claim and against it on the other. According to the Court, RFT's attempts to illustrate this point were not made until after the trial judge had made his decision and could not be considered on appeal. *Id.* at *6 n. 7.

RFT believes these rulings by the Court are incorrect because Law Firm has never argued that the jury verdict on the malpractice claim required denial of a new trial on the fiduciary duty claim; because the totally ambiguous jury verdict will not support issue preclusion on any claim, as explained above at pp. 23-24; and because the Court should not have excluded from

consideration RFT's explanations as to how disparate verdicts could be rendered on the two claims.

A. Issue Preclusion Is Not a Proper Ground for Denying a New Trial on the Fiduciary Duty Cause of Action.

As discussed above, the only time that Law Firm has suggested that the jury verdict required denial of a new trial motion was in connection with the UTPA cause of action. The first time it was raised in connection with the fiduciary duty cause of action was in the Court's opinion, which was too late.

B. RFT Was Entitled to Offer Reasons in Its Reply Brief as to Why the Jury Verdict Did Not Preclude a New Trial on the Fiduciary Duty Cause of Action.

The Court held that RFT's illustrations of situations in which a jury could render disparate verdicts on the malpractice and fiduciary duty claims could not be reviewed on appeal because they were not argued to the trial judge at the hearing on the directed verdict motion. RFT had some difficulty in understanding this position. RFT did argue that the jury could, under certain circumstances, render a verdict against RFT on malpractice but in its favor on fiduciary duty in order to show that the two claims are not necessarily duplicative and, thus, that the trial judge erred by consolidating them and not sending fiduciary duty to the jury. If the Supreme Court after reviewing the Record accepts this position, then the fiduciary duty claim must be sent back for trial. The fiduciary duty cause of action was not submitted to the jury, so there is no jury verdict against which to weigh the evidence. If the causes of action were improperly merged, a new trial must follow.

In this case, RFT is entitled to a new trial because the malpractice and fiduciary duty cases had been improperly combined, given that the jury could have decided the two claims differently. The first time RFT had an opportunity to present these grounds *in support of its new*

trial motion was in its memoranda in support thereof, which it did. (*See* RFT's Mem. in supp. of post-trial motions, R. at 137-38, RFT's Reply Memorandum, R. at 176-77.) In those memoranda, RFT described in precise detail scenarios under which a jury could render a favorable verdict on the malpractice claim and a defense verdict on the fiduciary duty claim and vice versa. *Id.* The trial court held no hearing on the post-trial motions. Those same arguments were repeated in RFT's appellate briefs, (Appellant's Brief at 40-41; Reply Brief at 14), and have yet to be debunked or refuted by Law Firm or by the Court.

Thus, in RFT's view, this Court erred by not considering properly raised arguments which established that the two claims do not necessarily arise from the same facts or the same legal duty. Based on those arguments, RFT submits that it had an absolute right to have both claims separately submitted to the jury. As the Court of Appeals explained in *Harper v. Ethridge*, 290 S.C. 112, 121, 348 S.E.2d 374, 379 (1986):

> in cases where the complaint stated different causes of action, but only one recovery was sought, and the causes of action were so stated because of an uncertainty as to which the evidence might establish or on which it might appear that plaintiff was entitled to recover, no election was required.
>
> * * * *
>
> the case can go to the jury on all causes of action supported by the evidence at trial, with election required after the verdict but before judgment is entered.

Accord, Adams v. Grant, 292 S.C. 581, 586, 358 S.E.2d 142, 144 (Ct.App. 1986) (no pre-verdict election required where plaintiff "is uncertain of which he will be able to prove . . . .").

For the above reasons, RFT submits that it was entitled to have the Court consider its arguments in support of a new trial on the fiduciary duty claim, which in turn would have required reversal of the trial judge's denial of a new trial.

C. The Jury Verdict Does Not Support Issue Preclusion.

RFT has explained in detail above why the jury verdict on malpractice does not support issue preclusion on *any* of the other claims. *See* pp. 23-25 *supra*. At pages 40-41 of Appellant's Brief, RFT describes a number of scenarios in which disparate verdicts were possible.

For all of the above reasons, RFT requests the Court to withdraw its Opinion and to issue a replacement opinion reversing the trial judge's denial of RFT's motion for a new trial on the fiduciary duty cause of action.

V. RFT IS ENTITLED TO A NEW TRIAL ON THE UTPA CLAIM.

The Court affirmed the denial of a new trial on the UTPA claim on the ground of issue preclusion arising from the jury verdict and on the unexplained ground that RFT "has not shown it could have established all of the necessary elements of this claim." 2012 WL 3524812 at *8. That the jury verdict carries with it no estoppel or issue preclusion effect and is not a properly raised ground for affirming the trial judge has been established above. *See* pp. 23-25 *supra*.

RFT does not understand how the Court's conclusion that RFT has not shown that it can establish all of the necessary elements of its UTPA claim is a legal basis for denying a new trial. In its Opinion, the Supreme Court rejects the trial judge's sole ground for directing a verdict on the UTPA claim. Given that ruling, the only way the trial judge's order could be affirmed on appeal would be for this Court to find that there is no factual dispute as to one or more of the additional sustaining grounds raised in Law Firm's brief and that any such ground defeats the UTPA claim as a matter of law.

In addition to issue preclusion, the only additional sustaining grounds raised by Law Firm in its brief were that there is no evidence that Law Firm performed unfair and deceptive acts in connection with the closing and that there is no evidence of an adverse effect on the public interest. In its Reply Brief at page 20-23, RFT showed through detailed citations to the record that there was more than sufficient evidence to preclude a directed verdict on Law Firm's additional grounds.

That being the case and with no jury verdict against which to weigh the evidence, RFT believes that the UTPA claim must be retried.

VI. RFT WAS ENTITLED TO A NEW TRIAL ON ITS CAUSE OF ACTION FOR AIDING AND ABETTING A VIOLATION OF THE SOUTH CAROLINA UNIFORM SECURITIES ACT ("SCUSA").

The trial judge directed a verdict against RFT on its securities cause of action on the sole ground that the sales of lots did not involve the sale of a security. Tr. at 896, App. at ___. Surprisingly, the Supreme Court did not address this ground, but instead affirmed the denial of a new trial on two grounds not raised to the trial judge and not raised by Law Firm on appeal: (1) that the jury verdict decided all factual issues under the securities claim and (2) that the ARD somehow released Law Firm from liability for securities violations. 2012 WL 3524812 at *8.

A. The Jury Verdict Does Not Prevent the Supreme Court from Granting a New Trial on the Securities Cause of Action.

RFT explained above that the jury verdict on the malpractice cause of action is legally incapable of preventing consideration on appeal of any of the issues in this case because it is impossible to tell from the verdict anything about what the jury actually and necessarily decided. This conclusion applies to the securities cause of action just as it does to the others. Thus, the

jury verdict was an improper basis upon which to affirm the trial judge's denial of a new trial on the securities cause of action.

The Supreme Court's holding is particularly surprising given what appears in the trial transcript. While arguing in favor of RFT's directed verdict motion and against Law Firm's motion, RFT's counsel explained in detail to the trial judge how RFT had introduced evidence covering every element of the claim. Tr. at 893-96, App. at ____. From there, the following exchange took place between RFT's counsel and the trial judge:

> MR. SWAGART: So you go from there and then the only issue becomes if Mr. Adams was aware that this kind of misleading conduct was going on and he acted in these closings with knowledge of the conduct and with knowledge that what he was doing in the closings would assist the conduct, that we [*sic*] [he] qualify as an aider and abetter [*sic*] under the statute and I think we have introduced facts that would cover all of those elements.
>
> THE COURT: All right. *I agree with you all the way down the line* except, I have done some research last night and again this morning, I don't believe this investment by your client was a security under the definition provided under Title 35, so I will dismiss or grant a directed verdict [for Defendants] on that cause of action.

Tr. at p. 895, line 23 to p. 896, line 13, App. at ___ (emphasis added). What this discussion means, of course, is that if the trial judge *had* concluded that RFT's investment *did* constitute a security, the trial judge very probably would have denied Law Firm's motion for a directed verdict and would have either granted RFT's motion for a directed verdict or would have sent the securities claim to the jury.

Thus, with the exception of the legal issue of whether or not a security was involved, the trial judge had determined that sufficient (and possibly conclusive) evidence had been introduced

as to every other element of the securities claim. This determination by the trial judge, who was present for the entire trial, in effect precludes any possibility that the jury could have rationally decided differently based on the evidence, and it would be totally illogical to infer from the malpractice verdict that the jury decided factual issues underlying the securities claim against RFT.

B. The ARD Form Does Not Constitute a Release from Liability under the Securities Laws.

The Supreme Court raises for the first time in this case the affirmative defense that RFT released Law Firm for violations of the securities laws when it signed the ARD form. 2012 WL 3524812 at *8. It is axiomatic, however, that an appellate court may not base its decision on a ground which was neither presented below nor on appeal. *State v. Prioleau*, 345 S.C. at 412, 548 S.E. 2d at 217. Law Firm did not plead and has never argued that the ARD provided an affirmative defense to any cause of action other than the malpractice claim; nor did Law Firm assert such a ground in its brief. The ARD, thus, cannot be relied upon as a ground for affirming the denial of RFT's new trial motion on the securities claim.

RFT submits, moreover, that even assuming *arguendo* that such a defense were properly raised, it is legally unsupportable. A reading of the ARD form indicates that there is not a single word in it from which one might infer that by signing the ARD, RFT released Law Firm from liability for anything. The wording of the ARD further reveals only that it specifies the particular services for which Law Firm was being retained and that Law Firm was not being retained in order to negotiate the transaction or to provide substantive advice about the transaction. The obvious and only purpose of the form was to protect Law Firm from liability for *not* negotiating or advising. Nothing in the form states, however, that in the event Law Firm thereafter chose to perform other services for RFT, to assist in negotiations, or to render advice, it could not be held

liable for malfeasance in doing so. Nor did the form purport to relieve Law Firm from ethical and fiduciary duties which it owed to its client, RFT. Respondent Adams admitted under oath that there was no wording in the ARD stating that he was relieved from disclosing material information to RFT. R. p. 605, lines 1-10.

While the Supreme Court does not use the term "release" in describing the ARD firm, it does state that by signing the form "RFT absolved Law Firm of any potential liability resulting from an allegation of aiding and abetting a securities violation." 2012 WL 3524812 at *8. In the Court's view, therefore, the ARD does constitute a form of release. As such, RFT contends that it is void and unenforceable.

Section 35-1-509(l) of SCUSA provides in relevant part that a "condition, stipulation, or provision . . . directly or indirectly binding a person purchasing or selling a security or receiving investment advice to waive compliance with this chapter or a rule adopted or order issued under this chapter is void." S.C. Code Ann. §35-1-509(l) (Cum. Supp.2011). Under the Supreme Court's reading of the ARD, RFT was required to waive Law Firm's compliance with SCUSA. Therefore, as a matter of law, the ARD was void to the extent that it purported to relieve Law Firm from liability for aiding and abetting a violation of the Act.

Even if the ARD were not void under the Act, it would be unenforceable as an exculpatory clause. A release from potential liability is a form of exculpatory clause. *McCune v. Myrtle Beach Indoor Shooting Range, Inc.*, 364 S.C. 242, 248, 612 S.E.2d 462, 465 (Ct.App.2005). As such, contracts such as the ARD

> [a]re not favored by the law. Pride [v. Southern Bell Tel & Tel Co.,] 244 S.C. [615] 619, 138 S.E.2d [155,] 157[(1964)]. An exculpatory clause, our supreme court has held, is to be strictly construed against the party relying thereon. *Id.* An exculpatory clause will never be construed to exempt a party

> from liability for his own negligence [or wrongdoing] "'in the absence of explicit language clearly indicating that such was the intent of the parties.'" [citations omitted].

Id. Construing the ARD most strongly against Law Firm, and given the absence of explicit language exempting it from liability under SCUSA or even mentioning SCUSA, the only possible conclusion is that even if it were not barred by SCUSA, it does not exempt Law Firm from liability for anything.

C. Unless the Supreme Court Affirms the Trial Judge's Order Directing Verdict on the Ground Relied upon by the Trial Judge or upon an Additional Sustaining Ground Raised by Law Firm, the SCUSA Claim Should Be Remanded for Trial.

The trial judge granted a directed verdict based upon his conclusion that the transaction in issue did not involve the purchase or sale of a security. The Supreme Court declined in its Opinion to address this issue. Thus, assuming that the grounds relied upon by the Supreme Court in its Opinion are not legally meritorious grounds for decision, the trial judge's order cannot be affirmed unless the Supreme Court addresses the security issue and decides it against RFT or, failing that, unless Law Firm has raised additional sustaining grounds which the Court finds to be supported by undisputed facts and legally controlling.

RFT submits that the law and the facts discussed in its briefs establish, at a minimum, that there are disputed issues of fact as to whether the sales to RFT involved the sales of securities, whether they are viewed as investment contracts or evidences of indebtedness. Appellant's Brief at pages 43-47, Reply at pages 16-17. In addition, RFT addressed each of Law Firm's additional sustaining grounds by showing that it lacked legal merit and/or that there was a dispute as to the relevant facts. Reply at pages 17-20.

Absent the Supreme Court's reliance on the ground for the trial court's order or one of one of Law Firm's sustaining grounds, this case should be remanded for re-trial.

Conclusion

Based upon the above points and authorities, the trial transcript, and the Record on Appeal, RFT respectfully submits that the Court's opinion should be withdrawn and a new opinion entered granting RFT JNOV or a new trial on the malpractice cause of action, and remanding the fiduciary duty, UTPA, and SCUSA causes of action to the trial court for a new trial.

Respectfully submitted,

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August 30, 2012

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

RECEIVED
AUG 30 2012
S.C. Supreme Court

Case No. 2010175606

RFT MANAGEMENT CO., LLC

Appellant,

v.

TINSLEY & ADAMS, LLP, &
WELBORN D. ADAMS, INDIVIDUALLY,

Respondents.

PROOF OF SERVICE

I certify that I have served Appellant's Memorandum of Law in Support of Petition for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, on August 30, 2012, addressed to the attorney of record, Matthew H. Henrikson, Clarkson, Walsh, Terrell & Coulter, PA, at his Post Office Box 26554, Greenville, South Carolina 29616 on August 30, 2012.

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August 30, 2012

The Supreme Court of South Carolina

Harry Swagart

08/30/2012

RECEIPT #65386

Case No:	2010-175606
Case Short Title:	RFT Management v. Tinsley & Adams
Event:	
Fee Type:	Motion Fee
Amount:	$25.00
Payment Type:	Check
Reference No:	3838
Check/Money Order Date:	08/30/2012
Comments:	