

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master in Equity

Case No. 2016-000636

RECEIVED
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SC Court of Appeals

Norwest Properties, LLC, Appellant,

v.

Michael T. Strebler, Lisa W. Strebler, and Paul J. Mitchell, Defendants,

Of Whom, Michael T. Strebler and Lisa W. Strebler are the Respondents.

INITIAL REPLY BRIEF OF APPELLANT

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FACTS

Norwest Properties discusses only those facts relevant to its reply to the Streblers' brief. It is undisputed that the Streblers requested only general damages in their Answer, specifically asking for "costs and damages." (Ans. p. 3). The Streblers do not dispute this fact but, rather, argue that the issue of special damages was tried by implied consent. (Br. of Resp't pp. 3, 7-8). This is incorrect. The entirety of any statement at the November 2009 trial regarding the Streblers' alleged damages consists of the following statement by Mr. Strebler:

Defendant would like – in the Pleadings has asked for damages. Defendant has been damaged to the extent that he has costs of ownership beyond August 31, 2005, the contractual closing date. The costs are financial carrying costs, property taxes, homeowner's association fees, maintenance costs, and costs of administration. And further, the defendant requests damages for resources expended in defending this action.

(Nov. 2009 Tr. p. 115 Ins. 16-23). This is not evidence of special damages. Mr. Strebler did not testify as to what any of the elements of the alleged damages consisted of or present any testimony or evidence of the amount of the alleged damages. He provided the Master with no documented proof of the alleged damages.

In his May 2010 Order finding Norwest Properties breached the contract, the Master clearly indicated he was not making a final ruling as to damages. The Order states "That Strebler be awarded his costs and damages in this case in accordance with Paragraph 20 of the Contract.¹ Strebler shall submit those actual amounts with supporting documentation to the Court for *final* determination of the amount of this award." (Order p. 15) (emphasis added).

¹ Paragraph 20 of the Contract states the only recoverable damages are "costs, including reasonable attorney's fees." (Pl.'s Exh. 2 p. 3 ¶ 20).

ARGUMENT

The Streblers fail to respond as to the merits for the majority of Norwest Properties' arguments on appeal. The Streblers avoid the merits by almost entirely discussing alleged procedural issues that misconstrue issue preservation law. The Court should reject this attempt to shift the focus of this appeal away from the merits. As explained below, the issues are all properly preserved and the law of the case doctrine is inapplicable.

At issue in this appeal is the amount of damages awarded, including what alleged damages are recoverable. Norwest Properties properly appealed from the March 2016 damages Order and its challenges to the damages awarded are properly preserved. The March 2016 damages Order is the first time the Master issued a final ruling on damages. Norwest Properties properly appealed from that Order and maintains that the Master erred in awarding more than \$350.00 in damages.

I. The Issue of Special Damages was Not Tried by Implied Consent

The Streblers failed to specifically plead special damages, as required by Rule 9(g), SCRCP, and presented no evidence of special damages at the November 2009 trial. Therefore, they incorrectly argue that simply because Mr. Strebler stated he sought damages, the issue of special damages was tried by implied consent.

Under Rule 15(b), SCRCP, “[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” It is undisputed that the issue of special damages was not tried by express consent, and the Streblers make no such argument. “Where issues are not raised by the pleadings but are tried by consent, amendments to the pleadings are desirable because they bring the pleadings in line with the issues *actually developed at the trial.*” *Williams v. Addison*, 314 S.C. 35, 38, 443 S.E.2d 582, 584 (Ct. App. 1994) (emphasis added) (affirming trial court’s decision to deny motion to amend pleadings to conform to the evidence). In this case, no issue regarding special damages

was actually developed at trial. Rather, Mr. Strebler, representing himself *pro se*, simply made a statement that he requested damages. *See Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) (“Arguments of counsel are also not evidence.”).²

As noted above, the Streblers presented no evidence as to the specific damages sought, the basis for the damages, or the damage amounts. *See* Rule 15(b), SCRPC (“[A]mendment of the pleadings as may be necessary to cause them to conform *to the evidence* and to raise these issues may be made upon motion of any party at any time” (emphasis added)). “Evidence” is defined as “[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact.” *Black’s Law Dictionary* 595 (8th ed. 2004). Nothing, by way of testimony or documents, was presented at the trial of this case that tended to prove or disprove the existence or amount of special damages. *See Sunvillas Homeowners Ass’n v. Square D Co.*, 301 S.C. 330, 335, 391 S.E.2d 868, 871 (Ct. App. 1990) (“[I]mplied consent depends on whether the parties recognized an issue not raised by the pleadings entered the case during the trial.”). Therefore, special damages was not tried by implied consent.

This is especially true where, in this case, the issue a party seeks to argue (on appeal)³ was tried by implied consent is one that is required to be specifically pled. *See* Rule 9(g), SCRPC; *McNaughton v. Charleston Charter Sch. for Math & Sci., Inc.*, 411 S.C. 249, 261, 768 S.E.2d 389, 396 (2015) (“[S]pecial damages . . . may be recovered *only when* sufficiently stated and claimed.” (emphasis added)). The Court should reject the Streblers’ implied consent argument.

² That Mr. Strebler said in his opening statement he “should be awarded damages” is irrelevant to any issue on appeal, is consistent with pleading for general damages, and is not evidence because it is an argument of counsel. (Nov. 2009 Tr. p. 6 lns. 6-7).

³ The Streblers never made a motion to amend their answer to conform to any alleged evidence of special damages at trial. Rule 15(b), SCRPC.

II. Norwest Properties' Issues on Appeal are Not Barred by the Law of the Case Doctrine

For brevity, Norwest Properties addresses the Streblers' law of the case arguments in one argument section because they are based on the same premise. As to three of Norwest Properties' arguments—(1) the failure to plead special damages, (2) carrying costs and homeowners' association fees were not within the contemplation of the parties at the time of the contract, and (3) the Streblers continued to possess and use the property while paying property taxes⁴—the Streblers assert that the May 2010 Order and January 2011 Order denying Norwest Properties' Rule 59(e), SCRCR, motion establish the law of the case. (Br. of Resp't pp. 8-12). This is incorrect because neither of those Orders contain a final ruling regarding the merits of the damages issues on appeal.

In the May 2010 Order, the Court stated in introductory dicta that "Defendant Strebler in his Answer requested costs and damages, including property taxes on the property at issue for the years 2006, 2007, 2008 and 2009, as well as holding costs of such property. Such costs and damages are supported by Paragraph 20 of the Contract between Plaintiff and Defendant Strebler." (May 2010 Order p. 2). However, neither the "Findings of Fact" nor the "Conclusions of Law" sections of the Order discuss any damages issue. *Id.* at pp. 2-15. Rather, in the final paragraph, the Master states "It is, therefore, ordered, . . . That Strebler be awarded costs and damages in this case in accordance with Paragraph 20 of the Contract. Strebler shall submit those actual amounts with supporting documentation to the Court for *final* determination of the amount of this award."

⁴ The Streblers list in their Statement of Issues that "Appellant's 'measure of damages' argument is barred by the law of the case doctrine", but have no argument on that issue in their brief. *See* Rule 208(b)(1)(D), SCACR (stating an argument must be "followed by discussion and citations of authority"). The measure of damages argument is contained within footnote 1 of the Streblers' brief and discusses only issue preservation. To the extent the Court finds that issue is actually raised by the Streblers, Norwest Properties incorporates its Argument section II above in reply.

Id. at p. 15 (emphasis added). Therefore, the May 2010 Order did not contain any “final” determination of the Streblers’ damages and their attempt to construe it as such on appeal is unavailing.

The statement in the May 2010 Order that the Streblers rely on is dicta. “The law of the case doctrine does not apply to *dicta*.” Jean Hoefler Toal et al., Appellate Practice in South Carolina 215 (3d ed., South Carolina Bar 2016) (citing *White’s Mill Colony, Inc. v. Williams*, 363 S.C. 117, 123 n.1, 609 S.E.2d 811, 814 n.1 (Ct. App. 2005)). “The doctrine of the law of the case is not applicable to a statement by the court which does not constitute a binding adjudication.” *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989). In this case, the statement in the May 2010 Order was not a finding of fact or conclusion of law by the Court and was not part of any “final determination” as to damages. (Order p. 15); *Ex parte Wilson*, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005) (“Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final.”). Therefore, it cannot be the basis for application of the law of the case doctrine.

The January 2011 Order denying Norwest Properties Rule 59(e) motion supports its interpretation of the May 2010 Order. The January 2011 Order repeats the “conclusions of law” and what the Master “ordered” in the May 2010 Order. (Jan. 2011 Order pp. 1-2). Nowhere does it state anything about special damages or a final determination of damages. It states only “That Strebler be awarded his costs and damages in this case in accordance with Paragraph 20 of the Contract.” *Id.* at p. 2. This is consistent with the general damages pled in the Streblers’ answer.

Neither the May 2010 nor the January 2011 Order contain a final ruling on the damages issues on appeal. Therefore, the law of the case doctrine is inapplicable.

III. Norwest Properties' Argument that the Streblers Failed to Plead Special Damages is Properly Preserved

It is apparent from the arguments presented to the Master and his subsequent ruling awarding special damages that he rejected Norwest Properties' arguments regarding the failure to plead special damages. (Memo. in Opp. pp. 2-3; July 2011 Tr. pp. 5-6; March 2016 Order). This satisfies the requirement that an argument is raised to and ruled upon by the lower court. That the Master did not expressly state that in the Order does not mean Norwest Properties was required to file a Rule 59(e), SCRCP, motion. *See Bailey v. Segars*, 346 S.C. 359, 364-65, 550 S.E.2d 910, 913 (Ct. App. 2001) (finding issues preserved even though the lower court "did not explicitly rule on the issues" and the appellant did not file a Rule 59(e) motion because the appellant raised the issues, presented them in the record on appeal, and the motion "was denied in a form order").⁵ In this case, the Master ruled on the special damages issue raised by awarding such damages to the Streblers and, therefore, Norwest Properties did not need to file a Rule 59(e) motion.

"Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it." *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (finding an issue preserved where the parties argued clearly conflicting amortization schedules and "the trial court ruled on Seller's objections by expressly adopting Buyer's amortization schedule in its order"). In this case, Norwest Properties raised the issue that the Streblers failed to plead special damages both in its Memorandum in Opposition and at the damages hearing. (Memo. in Opp. pp. 2-3; July 2011 Tr. pp. 5-6). The Master ruled on Norwest Properties' arguments by awarding the Streblers special damages. (March 2016 Order). Therefore, the issue is preserved.

⁵ *See also Clark v. S.C. Dep't of Pub. Safety*, 353 S.C. 291, 312, 578 S.E.2d 16, 26 (Ct. App. 2002) ("[T]here is no blanket requirement that the trial court set forth a separate explanation on all of its rulings on post-trial motions.").

Moreover, Norwest Properties was not required to appeal from or file a motion to reconsider the May 2010 and January 2011 orders because they were not final orders determining damages. The May 2010 Order specifies that the Master will make a “final determination” of damages at a later date. (Order p. 15). “Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final.” *Ex parte Wilson*, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005). As to the damages award, the 2010 and 2011 orders were not final and, therefore, Norwest Properties did not need to file a Rule 59(e) motion or appeal those orders.

The issue of whether the Streblers pled special damages is properly preserved, and the Court should address the merits, which the Streblers do not challenge.

IV. Norwest Properties’ Argument that the Master’s Award of Damages Exceeds the Scope of Recoverable General Damages is Properly Preserved

The Streblers argue in a footnote that Norwest Properties’ argument on the Master’s use of an improper measure of damages is unpreserved. (Br. of Resp’t p. 9 n.1). They assert that this issue is unpreserved “for the same reasons” as the special damages issue discussed above. *Id.* For brevity, Norwest Properties incorporates the argument above as to the proper preservation of the failure to plead special damages into this section and asserts the measure of damages argument is also properly preserved.

The first time the measure of damages issue arose in this case was in May 2011 when the Streblers filed a motion to approve amount of damages. (Mot.). In response to the first evidence in this case of the specific elements of damages sought, the years of damages sought, and the amounts of damages sought, Norwest Properties filed a Memorandum in Opposition and argued at the damages hearing that the proper measure of damages in an action for breach of a real estate contract is either the difference between the contract price and the fair market value at the time of

the breach or the difference between the fair market value on the date of the breach and the price for which it is later sold. (Memo. in Opp. pp. 3-4; June 2011 Tr. pp. 6-9). The Master ruled on this argument by awarding the Streblers the special damages sought and, thereby, rejecting Norwest Properties' argument that the proper measure of damages was \$0. (March 2016 Order). "In order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court." *Holy Loch Distribs. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *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). This issue was raised to and ruled upon by the Master and, therefore, is properly preserved.

The issue is properly preserved, and the Court should address the merits, which the Streblers do not challenge.

V. Norwest Properties' Argument that Carrying Costs and Homeowners' Association Fees are not Recoverable as Special Damages Because they were Not within the Parties' Contemplation at the Time of the Contract is Properly Preserved

Norwest Properties raised to the Master its argument regarding the absence of the carrying costs and homeowners' association fees at the time of the contract. (Br. of Resp't p. 10). At the hearing, Norwest Properties argued the carrying costs are speculative damages not allowed by law in this situation where the Streblers wanted to keep the property, indicating no need for financing. (July 2011 Tr. pp. 7-8). Norwest Properties also argued the homeowners' association fees became due only because the Streblers continued to own the property. *Id.* Finally, Norwest Properties attached the contract, which contains the representation by the Streblers that there are no homeowners' association fees, to its Memorandum in Opposition to the motion to approve damages. (Exh. B to Memo. in Opp.). The issue was raised to the Master.

Norwest Properties was not required to make a Rule 59(e), SCRCPP, motion regarding the March 2016 damages order because the Master ruled on this issue by rejecting Norwest Properties' argument and awarding the Streblers special damages. *See Bailey*, 346 S.C. at 364-65, 550 S.E.2d at 913 (finding issues preserved even though the lower court "did not explicitly rule on the issues" and the appellant did not file a Rule 59(e) motion because the appellant raised the issues, presented them in the record on appeal, and the motion "was denied in a form order"); *Wilder Corp.*, 330 S.C. at 77, 497 S.E.2d at 734 ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it."). In this case, the Master ruled on the special damages issue raised by awarding such damages to the Streblers and, therefore, Norwest Properties did not need to file a Rule 59(e) motion.

Finally, Norwest Properties was not required to appeal or file a motion to reconsider from the May 2010 and January 2011 orders because they were not final orders as to damages. "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." *Ex parte Wilson*, 367 S.C. at 12, 625 S.E.2d at 208.

The issue is properly preserved, and the Court should address the merits, which the Streblers do not challenge.

VI. Norwest Properties' Argument Regarding Property Taxes is Properly Preserved and Supported by the Record

As with the Streblers' other issue preservation arguments, they are again incorrect that Norwest Properties was required to file a Rule 59(e), SCRCPP, motion as to the March 2016 damages Order to preserve the property tax issue. (Br. of Resp't p. 11). Norwest Properties raised this issue in both its Memorandum in Opposition to the Streblers' motion to approve damages and at the hearing on the motion. (Memo. in Opp. p. 4-5; July 2011 Tr. pp. 6-7). The Master ruled on

the issue by rejecting this argument and awarding the property tax amounts to the Streblers. (March 2016 Order); *Bailey*, 346 S.C. at 364-65, 550 S.E.2d at 913 (finding issues preserved even though the lower court “did not explicitly rule on the issues” and the appellant did not file a Rule 59(e) motion because the appellant raised the issues, presented them in the record on appeal, and the motion “was denied in a form order”). Therefore, no Rule 59(e) motion was necessary and the issue is properly preserved. *Wilder Corp.*, 330 S.C. at 77, 497 S.E.2d at 734 (“Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it.”).

Norwest Properties was also not required to appeal from or file a motion to reconsider from the May 2010 order because it was not a final order as to damages but stated the Master would make a “final determination” at a later time. (May 2010 Order p. 15). “Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final.” *Ex parte Wilson*, 367 S.C. at 12, 625 S.E.2d at 208.

Finally, on the merits of the issue, Norwest Properties maintains that the payment of property taxes is a special damage the Streblers incurred due solely to their continued use, ownership, and possession of the property. The Streblers argument that they would have sold the property to Norwest Properties is unavailing because it works both ways—Norwest Properties would have purchased the property free of encumbrances, as the Streblers promised in the Contract. (Pl.’s Exhs. 1 & 2 ¶ 11). The Streblers maintained the contract terminated as of the closing date. (Nov. 2009 Tr. p. 112 lns. 20-21). It is undisputed that, at the time of trial, Mr. Strebler testified his “present plan” was to keep the property and his wife told him he had “to keep the property.” (Nov. 2009 Tr. p. 143 lns. 16-22). When asked about his October 2005 statement that he wanted to sell the property to someone else, he testified, “No, I would like not like to; my

wife told me not to.” (Nov. 2009 Tr. p. 143 lns. 17-20). Therefore, there is no question that the Streblers had no intention to resell the property at least through November 2009 and they presented no evidence as to when that intention changed so as to warrant damages. That the Streblers sold the property in 2011 is not evidence that they wanted to sell the property prior to the sale. The only evidence in the record regarding the sale is the deed, which Norwest Properties provided at the damages hearing. (Exh. D to Memo. in Opp.). Therefore, the fact of the sale is irrelevant to whether property tax damages were recoverable. (Mot. to Approve Damages; March 2016 Order).

The property tax argument is properly preserved and supported by the record.

VII. Norwest Properties’ Argument as to the Streblers’ Failure to Present Sufficient Evidence of Damages is Properly Preserved and Supported by the Record

Norwest Properties raised the sufficiency of the Streblers’ damages evidence to the Master. In its Memorandum in Opposition to the motion to approve an amount of damages, Norwest Properties notes the Master’s prior order requiring the Streblers to present “supporting documentation to the Court” of damages and then argues that there is no factual basis for special damages. (Memo. in Opp. pp. 1-3). At the damages hearing, Norwest Properties argued the alleged carrying cost damages were “speculative” and “speculative damages” because the Streblers failed to specify the damages. (July 2011 Tr. pp. 7-8). The issue was raised to the Master.

Norwest Properties was not required to make a Rule 59(e), SCRCPP, motion regarding the March 2016 damages order because the Master ruled on the sufficiency of the Streblers’ evidence of damages by rejecting Norwest Properties’ argument and awarding the Streblers the special damages they requested. *See Bailey*, 346 S.C. at 364-65, 550 S.E.2d at 913 (finding issues preserved even though the lower court “did not explicitly rule on the issues” and the appellant did not file a Rule 59(e) motion because the appellant raised the issues, presented them in the record on appeal, and the motion “was denied in a form order”); *Wilder Corp.*, 330 S.C. at 77, 497 S.E.2d

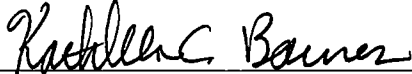
at 734 (“Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it.”). In this case, the Master ruled on the issue raised by awarding the damages to the Streblers and, therefore, Norwest Properties did not need to file a Rule 59(e) motion.

Finally, as to the merits, Norwest Properties maintains that the Streblers’ one page recitation of damage amounts with no supporting documentation is insufficient and speculative as to proof of carrying costs. At the damages hearing, Mr. Strebler gave no testimony or argument as to what constituted these “costs.” He stated generally that he sought “carrying costs of the property for five years, the property taxes, homeowner’s association fees and assessments” and referred to financing “the property with a personal line of credit” but provided no documentation or testimony as to the amount or terms of the note or the property tax or homeowners’ association fees. (July 2011 Tr. p. 5 lns. 7-9, p. 10 lns. 6-7). This is not proof of the alleged basis for or amount of these damages. *See Jackson v. Midlands Human Res. Ctr.*, 296 S.C. 526, 528, 374 S.E.2d 505, 506 (Ct. App. 1988) (“Where a [party] seeks special damages in addition to his general damages, he must plead and prove both the fact of damage and the amount of damage.”). Therefore, the Court should reverse the Master’s award of these damages.

CONCLUSION

Norwest Properties requests the Court reject the Streblers’ procedural arguments, reverse the Master in Equity’s decision to award damages, and remand the case for entry of judgment in the amount of \$350.00.

Respectfully submitted,



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Michael T. Strebler, Lisa W. Strebler, and Paul J. Mitchell, Defendants,

Of Whom, Michael T. Strebler and Lisa W. Strebler are the Respondents.

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing *Initial Reply Brief of Appellant* has been served upon all counsel of record by mailing one copy by United States Mail, addressed as shown below this 12 day of September, 2016.

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Via U.S. Mail

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Norwest Properties, LLC v. Michael T. Strebler and
Lisa W. Strebler*
Appellate Case No. 2016-000636

Dear Ms. Kitchings:

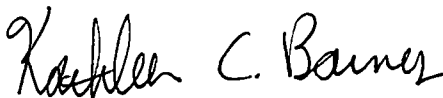
Enclosed for filing please find the original and one copy of Appellant Norwest Properties, LLC's Initial Reply Brief of Appellant in the above-referenced case. Also enclosed is proof of service of the Reply Brief.

Please file the documents and return one file-stamped copy to me in the enclosed self-addressed, stamped envelope. By copy of this letter, I am serving all counsel of record with a copy of the same.

If you have any questions, please do not hesitate to contact me. Thank you.

With kind regards, I am,

BARNES LAW FIRM, LLC



Kathleen C. Barnes

Enclosures

cc: Robert L. Widener
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Phillip A. Curiale (via e-mail)

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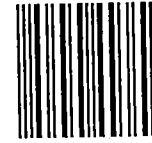
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