THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Judge

Appellate Case Number 2016-000232

Civil Action Number 2014-CP-42-1759

Denise Parker . . . . . Respondent,

v.

The National Honorary Beta Club . . . . . Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF CASE

Parker commenced this action on April 29, 2014. Parker's Amended Complaint sets forth a claim for breach of contract accompanied by fraudulent act ("BOCAFA").

This matter came to trial on September 28, 2015. The jury heard evidence on September 28, September 30, and October 1st. The parties presented closing argument on October 2nd, and the jury deliberated and returned a unanimous verdict that same day.

The only contractual promise put to the jury was Appellant's promise to not fire her for speaking with the Board of Director's Internal Affairs Committee. The jury found that Appellant breached that promise.

As to the BOCAFA claim, the jury awarded punitive damages of Three Hundred Fifty Thousand Dollars ($350,000). The trial court entered Judgment as of October 2, 2015.

On October 12, 2015, Appellant filed its post-trial Motions with a supporting memorandum. On December 7, 2015, Appellant filed a "Supplemental Memorandum" that raised new arguments for the first time.

On January 6, 2016, the trial judge entered an Order, denying Appellant's Motions. The trial court did not address any of the new arguments Appellant raised for the first time in Appellant's December, 2015 filing. Appellant filed no further motions.

On February 5, 2016, Appellant filed its Notice of Appeal, raising issues solely as to the availability of punitive damages under the BOCAFA claim. Appellant does not challenge the jury's determination that Appellant breached the contract to not fire Parker for speaking to the Internal Affairs Committee.

COUNTERSTATEMENT OF FACTS

Appellant's recitation of facts, while relatively short, is permeated with self-serving statements that were sharply disputed at trial. Accordingly, a more comprehensive review of the facts is necessary to understand the fallacies underlying Appellant's ever-changing arguments.

A. Parker's work history

Parker began her employment with Appellant on November 1, 1975. (R. p. 131, lines 5-6 (Parker)). She remained employed for thirty-eight years until her termination on November 4, 2013. (R. p. 150, line 7 – p. 151, line 25 (Parker); r. p. 358, line 11 – p. 359, line 11 (Bright)).

During her tenure, Parker worked in a variety of departments. (R. p. 131, line 18 – p. 132, line 11 (Parker)). The last department to which Parker was assigned was the membership department where Melody Cooper was Parker's supervisor. (R. p. 132, line 12 – 133, line 4; r. p. 136, line 24 – p. 137, line 4 (Parker)).

Appellant contends that Ritchie Garland and Shannon Meyer complained "about difficulties they were having working with Parker," that Parker "was not helpful with tasks," and that executive director Bob Bright "noticed that Parker was not getting along with her coworkers and was demonstrating a negative attitude." (Appellant Initial Brief at 4). This narrative simply did not hold up at trial.

Cooper, Parker's supervisor, Glenn Stribling, another former supervisor and coworker, and Lanie Curry, a co-worker with a forty-eight years of experience with Appellant, all testified that Parker was an excellent employee, a team player, that she had an excellent attitude, and that she was always eager to help her fellow co-workers. (R. p. 178, line 24 – p. 179, line 22; r. p. 182, line 16 – r. p. 183, line 10 (Cooper); r. p. 197, line 25 – p. 200, line 22 (Stribling); r. p. 210, lines 17-21 (Moore); r. p. 436, line 20 – p. 437, line 15; r. p. 438, lines 16-18 (Curry)). Parker had many supervisors and prior CEO's in her long tenure, and never had any difficulty working with any of them. (R. p. 133, line 8 – r. p. 134, line 7 (Parker); *see also* r. p. 179, lines 14-22; r. p. 182, line 16 - p. 183, line 10 (Cooper); r. p. 198, line 5 - p. 199, line 12 (Stribling); *see also* r. p. 462, lines 12-24; *id.* p. 463, lines 13-24, r. p. 464, lines 3-15; *id.* p. 493, lines 22-25; id. p. 76,

lines 1-9). Parker's performance evaluations bear out that team work, hard work, and eagerness to help others were her hallmarks. (*See, e.g.*, R. p. 517 ("Denise is a true team player. She diligent at every task assigned."); id. at p. 518 ("Hard worker;" "She is the one the department goes to for a thorough and accurate job"); *id.* at p. 519 ("Denise is a pleasure to work with!" "Excellent worker")).

Prior to the events giving rise to this litigation, Parker had never received any discipline in her thirty-eight year employment with Appellant. (R. p. 133, line 17 – p. 134, line 2 (Parker)).

B. Enter Bob Bright

In January 2013, Bob Bright became executive director of Appellant. (R. p. 134, lines 18-20 (Parker)). Serious morale issues in the office developed after Bright became executive director. (R. p. 134, line 21 – p. 135, line 2 (Parker); r. p. 202, line 9 – p. 203, line 21; r. p. 205, lines 12-25 (Stribling); *see also* r. p. 365, lines 4-25 (Bright acknowledging that none of the witnesses in the case testified to any morale problems before his arrival).

C. Parker and other representatives on Staff Liaison Committee address employee concerns about morale.

Parker was selected by her coworkers to serve on Appellant's staff liaison committee ("SLC"). (R. p. 142, line 16 – p. 143, line 3 (Parker)). The purposes of the SLC were to address employee concerns at work, to serve as a liaison with management, and to meet with the Internal Affairs Committee of Appellant's Board of Directors ("IAC"). (R. p. 143, lines 7-21 (Parker); r. p. 468, line 9 – p. 489, line 3; r. p. 415, line 5 – p. 417, line 12 (Dinkins)). Pat Mabry was chair of

the SLC, and Barbara Anderson was the other elected member. (R. p. 143, lines 4-6; r. p. 144, lines 4-8 (Parker); r. p. 511-12).

In September, 2013, the SLC, including Parker, met with employees, and then with Bright. (R. p. 143, line 22 – p. 144, line 3 (Parker)) The SLC was addressing issues, including divisions within the staff and morale, which it discussed with Bright. (R. p. 144, line 1 (Parker); r. p. 513-14; *see* r. p. 166, lines 4-20 (Parker)).

Bright's response to the SLC during the September meeting was to accuse them of being a "gossip circle," and Parker documented that he accused the SLC of being the problem. (R. p. 144, line 22 – p. 145, line 20; r. p. 167, lines 15-25 (Parker); r. p. 513).

Under the terms of the Beta Club Constitution, Appellant's Board of Directors formed the IAC that met with SLC once or twice per year to address issues at the home office. (R. p. 145, line 21 – p. 146, line 20 (Parker)).[1]

On October 25, the SLC was scheduled to meet with the IAC in conjunction with the Board's regularly-scheduled meeting. (R. p. 145, lines 15-24 (Parker)). Bright knew that the meeting would occur, and he knew of Parker's

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[1] Article III of the Beta Club Constitution provides that Appellant is governed by a National Board of Directors. (R. p. 526). The Bylaws state in Article 1(K): "[t]he National Board shall set up such organizational committees as shall be necessary for the proper supervision and direction of the affairs of the organization." (supp. r. p. 612). Pursuant this provision, Appellant established an Internal Affairs Committee. Under the policies adopted by the Board, the Internal Affairs Committee is charged with gathering information, "[m]eeting with staff to receive staff input concerning daily operations," "[m]eeting with the Staff Liaison Committee about suggestions and concerns for improving the National Beta Club," and other duties to learn about and deal with internal issues. (R. p. 466; *see also* r. p. 466, line 4 – p. 468, line 8; id. p. 469, line 4 – p. 470, line 13).

role on the SLC. (R. p. 389, line 13 – p. 390, line 20; r. p. 392, lines 15-24 (Bright)).

D. Bright's shot across the bow

With full knowledge of the morale issues being addressed by the SLC, and knowing that it was to meet with his superiors, Bright swung into action. On October 21--just days before the upcoming SLC/IAC meeting--Bright issued Parker the first reprimand she ever received in her thirty-eight year career. (R. p. 137, lines 5-12; r. p. 138, lines 7-25 (Parker); r. p. 510). It came as quite a surprise as Bright had never criticized Parker's performance or told her that he was unhappy with her in any way. (R. p. 135, lines 8-14; r. p. 140, line 24 – p. 141, line 2 (Parker); r. p. 373, lines 3-22 (Bright)). Parker's supervisor had no issues with Parker, and Bright never discussed any professed concerns about Parker with her. (R. p. 138, lines 1-6 (Parker); r. p. 179, lines 11-13; r. p. 188, line 16 – p. 189, line 1 (Cooper)).

The reprimand lists three areas of concern: (1) Failure to sustain a professional growth strategy; (2) Does not demonstrate an exceptional mastery of professional skills; and (3) Professional manner in which coworkers are addressed. (R. p. 510).

1. Failure to sustain a professional growth strategy issue

Bright never explained to Parker what he meant by failure to sustain a professional growth strategy. (R. p. 107, lines 8-24 (Parker)). When Bright dodged the question at trial, the jury heard his prior deposition testimony in which he claimed to not be aware of anyone telling Parker to learn anything new. (R. p. 375, line 6 – p. 376, line 9 (Bright)). Bright also contradicted himself as to whether anyone ever told Parker she had a role in growing Appellant. (R. p. 376, line 23 – p. 377, line 11 (Bright)).

2. Demonstration of exceptional mastery of professional skills

Bright also did not explain to Parker what was meant by her alleged failure to demonstrate exceptional mastery of professional skills. (R. p. 139, line 25 – p. 140, line 5 (Parker)). The jury again heard conflicting testimony from Bright himself in which he earlier testified that this contention related to Parker taking initiative. (R. p. 377, lines 12-25 (Bright)). To top it off, Bright also attempted to change his testimony as to whether he could cite any example of Parker failing to do so, as he earlier testified he could not cite an example. (R. p. 378, lines 3 – 17; r. p. 379, lines 2-19 (Bright)).

3. Professional manner in which coworkers are addressed

As to the third reason given for the reprimand, Bright told Parker that she did not help Barbara Anderson earlier that morning, and that he "'could bring the whole office staff down here and give [her] examples of where [she] ha[d] not been helpful.'" (R. p. 140, lines 6-23 (Parker) (quoting Bright)). Parker explained that she had done what Anderson requested that morning. (R. p. 170, line 8 – p.

171, line 5 (Parker)). Parker also followed up with Anderson, who denied knowing anything about any problem and offered to speak to Bright. (R. p. 142, lines 1-15 (Parker)).

At trial, Bright attempted to assert that there were examples of Parker addressing coworkers in an unprofessional manner when he earlier testified that he had no such examples. (R. p. 388, lines 9-21 (Bright)). Although Bright claimed the entire office would vouch for Parker's petulance, her co-workers at the time, including her supervisor, lauded Parker as a helpful colleague. (See, e.g., r. p. 201, lines 1-9 (former supervisor and coworker of 34 years, Glenn Stribling, stating that Appellant's characterization of Parker was "not the Denise Parker that I know or that I worked with.")

4. Bright threatens Parker's employment

During the October 21 meeting, Bright "pointed toward the road and he said 'as a matter of fact, Denise, there is people lined up in the street out there waiting for your job.'" (R. p. 140, lines 21-23 (Parker) (quoting Bright)). Bright's surprise warning on October 21 had the intended effect of scaring Parker and leaving her in fear of the job she had held for thirty-eight years. (R. p. 173, lines 6-25 (Parker)).

E. IAC promises Parker she won't be fired and directs her to share information about Bright warning her.

The IAC met with the SLC on October 25 as planned. (R. p. 146, lines 15-24 (Parker)). The IAC-SLC meeting occurred in the context of employee concerns about morale in the office. (R. 147, lines 6-11). At the meeting, Parker would not volunteer any information, as Bright had successfully scared her about

the possibility of being fired. (R. p. 147, line 15 – p. 148, line 5; r. p. 174, lines 6-24 (Parker)). Pat Mabry told the IAC that it needed to ask Parker about her warning from Bright because Parker wouldn't volunteer any information. (*Id.*; r.p. 476, line 20 – p. 39, line 5; r. p. 419, line 11 – p. 420, line 8 (Dinkins)).

One of the IAC Committee members was Dr. Ken Dinkins -- vice chair of the Board, chair of the South Carolina council, and a prior Board Liaison and member of several committees. (R. p. 473, lines 5-13).[2] Dr. Dinkins repeatedly confirmed that Parker was extremely reticent, reluctant to speak at the meeting, and was fearful of losing her job. (R. p. 504, lines 13 – p. 505, line 4 ("[S]he did make the comment she was afraid she would be fired or she thought she would get fired or something to that effect."); r. p. 420, lines 9-25 (Dinkins)).

In the presence of the other Board members, Dr. Dinkins told Parker that she was required to answer their questions about what happened, and he assured Parker that Bright could not fire her for answering their questions. (R. p. 148, lines 6-11 (Parker); r.p. 479, line 6 – p. 480, line 4; r. p. 424, line 24 – supp. r. p. 607, line 12; supp. r. p. 607, line 18 – p. 426, line 1 ("What we said was 'you know, what you tell — 'we want the truth and what you tell the Internal Affairs Committee, you are not going to be fired for what you tell us.'") (Dinkins); r.p. 503, lines 7-13 ("You have to remember she said she was worried that she might be fired, and like we said, like we testified earlier, we told her that we want you to

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[2] Other members of the IAC in attendance were Pat Stout (Board chair), Dennis Campbell (chair of the IAC, board liaison, and vice chair of the Board), and Board members Stan Long and Mark Conley. (Tr. p. 146, line 25 – p. 147, line 5 (Parker); r.p. 488, line 4 – p. 489, line 1; r. p. 418, lines 4-18 (Dinkins)).

share accurate information with the committee, and that's what we told her. At that point we did not know she was going to be fired the next week.")).

Dinkins testified that Bright did *not* have the authority to fire Parker for answering the IAC's questions. (R.p. 483, lines 5-12 ("He can't fire the employee for giving information to the Internal Affairs.")). He explained that the IAC instructs employees to answer the IAC honestly as is necessary in order for the IAC to get the information needed it to fulfill its role. (R.p. 481, lines 4-17).

After this instruction, Parker truthfully told the IAC about her write up and about Bright's comments about people waiting in line for her job. Parker also told the Board how Bright accused her of not helping Barbara Anderson (who was present in the IAC meeting as a member of the SLC). (R. p. 148, line 24 – p. 149, line 9 (Parker); r.p. 480, lines 5-10; *id.* p. 483, lines 2-4; p. 502, line 2 – p. 503, line 5).

F. IAC meets with Bright and discusses issues raised, Bright's complaints about Parker, and the possibility Bright might fire Parker.

The IAC met with Bright after its meeting with Parker and the SLC. (R. p. 485, lines 8-22). Although Bright denied it at trial, the jury heard his prior testimony that, during his meeting with the IAC, Bright discussed his allegations about Parker's attitude and the possibility of him terminating Parker's employment. (R. p. 395, line 25 – p. 396, line 17 (citing r. p. 575, line 21 – p. 576, line 3; *id.* at p. 577, ll. 16-25) (Bright)).

Dinkins recalls telling Bright, "Bob, somebody who has been here 37 or 38 years, it seems to me that we need to -- if they have done something wrong, I could go along with that, write it up, give them an improvement plan and have

them meet your expectations." (R. p. 498, lines 7-12). Dinkins further testified that he told Bright that Bright had to provide "due process" rather than just fire such employees at will. (R. p. 426, lines 9-13 (Dinkins)). Other than Parker, there was no other evidence of any employee with such a tenure whose employment was known to be in jeopardy or who expressed fear of the same.

G. There were no issues with Parker after the October 21 warning.

Regardless of the validity of Bright's reasons for reprimanding Parker, there is no evidence that she did anything anyone found objectionable between the time of the October 21 warning and the termination of her employment (other than answer the IAC's questions as directed). Nobody at Beta Club expressed any concerns about Parker between October 21 and the SLC-IAC meeting on October 25. (R. p. 398, lines 7-20 (Bright)). There were no issues on October 25. (R. p. 149, lines 10-12 (Parker)). Bright was out of town the entire next week (October 28 – November 1).[3] (R. p. 149, lines 13-20 (Parker)). Nobody had any concerns about Parker that week, and nobody informed Bright that there were any issues with Parker. (R. p. 398, line 24 – p. 526, line 15 (Bright)). The following Monday (November 4), Bright returned to work. (R. p. 150, lines 4-6 (Parker)). There were no problems with Parker that day either. (R. p. 400, lines 9-21 (Bright)). In sum, from the time Bright issued his warning on October 21, through November 4, there were no complaints or issues regarding Parker.

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[3] The normal work week at Appellant is Monday through Friday. (Tr. p. 149, line 22 – p. 150, line 3 (Parker)).

H. Bright terminates Parker on his first day back after the IAC-SLC meeting for being negative with the Board.

On Bright's first day back, he called Parker into the office. Bright told Parker "I heard you were negative with the Board," and that he was terminating her employment. (R. p. 151, line 4 – p. 152, line 2 (Parker)). Parker explained to Bright that she had only answered the questions the Board members posed to her. (R. p. 176, line 20 – p. 177, line 11 (Parker)).

Appellant makes the bizarre claim that "[i]t is uncontroverted that Bright did not enter that meeting with the intention of terminating Parker's employment." (Appellant Initial Brief at 5). It is very much contested. Firing Parker was the first thing subsequent to the IAC-SLC meeting that Bright did after returning to the office, even though she did nothing to which any of Appellant's witnesses could point as a legitimate issue.

I. Bright's November 4 Memorandum contains two demonstrably false claims regarding performance.

At the November 4 meeting, Bright presented another document, however, that listed "continued negativity" and an issue regarding communication and responding to emails. (R. p. 514).

1. The "continued negativity" charge

Appellant continues to attempt the claim that Bright "felt that Parker's attitude had not changed" since his October 21 meeting (Appellant Initial Br. at 6), even though: (a) it does not challenge the jury's determination that Appellant breached the contract; and (b) the evidence contradicts the notion that there was any issue with Parker or her performance. As discussed above (Section G),

there simply were no complaints or issues with Parker, and Bright was not even present to observe anything about her at work.

Bright did not document any instance of negativity. (R. p. 403, line 25 – p. 404, line 2 (Bright)). Appellant instead relied on the testimony of Bright, Garland, Meyer, and Lewis to the effect that Parker was difficult and even "belligerent." (*See, e.g.*, r. p. 305, lines 18, 22-24 (Meyer)). Putting aside the conflicting evidence offered by Parker, her supervisor, and her coworkers (upon which the jury was entitled to rely), Appellant's efforts backfired.

First, Appellant's witnesses were repeatedly impeached by their prior, inconsistent testimony over two dozen times and they attempted to dodge and evade simple questions they previously answered with no difficulty. (*See infra* Argument Section A(2) & nn. 9-12).

Second, the only instances Appellant's witnesses tried to cobble together not only were disputed, but all well preceded even the initial October 21 warning. None of them, even if true, would constitute "continued negativity." Neither Garland nor Meyer (or even Lewis) had any problems with Parker or even dealings with her during the time period related to either the October 21 warning or the November the November 4 termination of employment (R. p. 267, line 16 – p. 268, line 17; r. p. 286, lines 23-25 (Garland); r. p. 322, lines 21-25; r. p. 323, lines 9-15 (Meyer); r. p. 431, lines 2-4; r. p. 431, line 20 – p. 432, line 1 (Lewis)). All of Meyer's communications with Parker were positive, appreciative, and they further showed Parker's responsiveness to her. (R. p. 559-63; r. p. 309, line 7 – p. 311, line 16).

Third, Garland, Meyer, and other managers and supervisors were not complaining to Bright about Parker at the time. Garland and Meyer confirmed that they never complained about Parker in October or November, and Lewis never complained to Bright about Parker at all. (R. p. 272, lines 16-24 (Garland); r. p. 323, lines 16-18; r. p. 324, lines 5-7 (Meyer); r. p. 431, lines 9-11 (Lewis); r. p. 387, lines 5-8 (Bright)). Garland and Meyer, while claiming to be Parker's supervisors at an earlier time,[4] never took any action against her for any negativity (r. p. 272, line 25 – p. 273, line 6 (Garland)). Meyer never told Parker she was unhappy with any services Parker provided her. (R. p. 318, lines 12-14 (Meyer)). Parker's supervisor testified that neither Meyer nor Garland complained about Parker (R. p. 187, lines 15-20 (Cooper)). Garland acknowledged that the only time he ever indicated any dissatisfaction with Parker's performance was during a meeting in September when he simply admonished that employees needed to move beyond the negativity in the office, which was the harshest thing he ever said to Parker. (R. p. 272, lines 8-24 (Garland)). Garland never indicated after the meeting in September that he was unhappy with Parker's performance. (R. p. 277, line 16 – p. 278, line 6; r. p. 278, line 20 – p. 279, line 2 (Garland)). Bright acknowledged that he cannot identify a single email in which anyone ever complained about Parker. (R. p. 411, line 8 – p. 539, line 9 (Bright)). Parker's supervisors had no issues with Parker's attitude. (R. p. 188, line 16 – p. 189, line 1 (Cooper); r. p. 288, line 8 – p. 289, line 7 (Garland); r. p. 387, lines 17-20; r. p. 411, lines 6-7 (Bright)).

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[4] Parker reported to Anderson in September and Cooper in October. (Tr. 271, lines 20-25 (Garland)).

Fourth, despite Appellant's Herculean efforts to characterize Parker as a chronic malcontent about whom Garland and Ritchie earlier had to complain, it is easy to see how the jury rejected this narrative. Garland admitted that Parker never said anything negative about him, never expressed any dissatisfaction about any decision he made, never said she did not want him to be successful, and he never heard Parker refer to him or use his name in a negative way. (R. p. 284, line 17 – p. 285, line 24 (Garland)). Likewise, neither Garland nor Meyer ever heard Parker say anything negative about Meyer. (R. p. 285, line 25 – p. 286, line 3 (Garland); r. p. 321, lines 3-14 (Meyer)). Moreover, neither Garland nor Meyer contend that Parker ever complained about anything after a department meeting in September where Garland sought Parker's opinion. (R. p. 269, line 25 – p. 270, line 18; r. p. 278, line 7 – p. 279, line 2; r. p. 286, lines 13-18 (Garland)). Lewis confirmed she never heard Parker make any comments about Garland, Meyer, or Bright, and Parker never complained to Lewis about anything (r. p. 430, line 19 – p. 431, line 6 (Lewis)). Curry confirmed that Parker never spoke poorly about her superiors. (R. p. 437, lines 3-15 (Curry).

In short, the only "negativity" that the jury could have substantiated is Bright's improper characterization of Parker's truthful responses to the IAC.

2. The failure to respond to email charge

The November 4 document Bright presented also cited "communication and failure to respond to emails promptly." (R. p. 514). Appellant tries to pass off as "fact" the argument that "Bright . . . believed that Parker was not answering her emails." (Appellant Initial Br. at 6). The evidence at trial clearly belied such a notion.

Appellant presented no emails to which Parker did not respond, and its witnesses could point to none. (E.g. tr. 321, lines 18-20 (Meyer)). The other employees confirmed that there are no known situations in which Parker did not properly respond to an email. (R. p. 183, line 22 – p. 184, line 3 (Cooper); r. p. 200, lines 23-25 (Stribling); *see* r. p. 152, lines 3 – 18; r. p. 176, lines 16-19 (Parker)).

Bright ducked and weaved, but tacitly admitted that nobody ever told him Parker failed to respond to any emails. (R. p. 408 line 8 – p. 410, line 5 (Bright)). Moreover, Bright admitted that he knows nothing of the substance of any email at issue, and did nothing to determine their substance. (R. p. 404, line 25 – p. 407, line 14 (Bright)).

Bright never showed Parker any emails to which she did not respond, nor any documentation to show that she had not responded to emails. (R. p. 152, line 19 – p. 153, line 2; supp. r. p. 606, lines 19-24 (Parker)).

Parker spoke to Appellant's information technology (IT) head, Jay Moore, who told her that he tried to explain to Bright that the emails to which she did not respond were spam. (R. p. 153, line 3 – p. 154, line 7 (Parker)). Moore told

Cooper that he had spoken to Bright and informed him of the spam emails. (R. p. 186, lines 14-25, r. p. 187, lines 9-14 (Cooper). Moore even testified that he told Bright that some of the emails received may be spam. (R. p. 209, lines 15-22). Melody Cooper, Parker's supervisor at the time, also informed Bright that Parker was receiving spam emails and UPS notices. (R. p. 184, line 4 – p. 186, line 13 (Cooper); r. pp. 556-58). After being informed of this, Bright never asked Moore to verify the information. (R. p. 209, line 23 – p. 210, line 5 (Moore)). Moore, who compiled statistics on emails testified that he never represented to Bright that the emails sent were responses to emails received and he never checked to see whether they were. (R. p. 207, line 23 – p. 208, line 15; r. p. 209, line 23 – p. 210, line 16 (Moore)).

In short, the jury could have easily rejected the notion that Bright believed Parker did not respond to emails. For appellant to state as a fact that Bright believed otherwise blatantly ignores the standard of review.

J. Bright concocts additional post hoc reasons for Parker's termination.

In discovery responses, Bright stated in verified interrogatory responses that the bases for terminating Parker's employment included her "fail[ure] to keep up with advances in computer programs to allow her to perform necessary job functions," that she was "resistant to change and to embrace new ideas," and that she "fail[ed] to keep up her technical skills." (R. p. 548 (Int. 11)).

Neither Bright nor any other witness for Appellant offered testimony that she was deficient in these areas. (*E.g.* r. p. 321, line 21 – p. 322, line 6 (Meyer)).

In addition to her own testimony, Parker offered testimony from others, including both her supervisor at the time and Moore, to the effect that Parker was adept at operating the technology at work and that she learned programs as necessary to proficiently use all of the software necessary to perform her job. (R. p. 126, line 23 - p. 158, line 23 (Parker); r. p. 183, lines 11-15; tr. 187, line 21 – p. 188, line 4 (Cooper); r. p. 206, line 16 – p. 207, line 1 (Moore)).

ARGUMENT

A. Appellant's first argument: fraudulent intent.

1. Appellant has not preserved the issues.

Section A of Appellant's argument is dedicated to the proposition that if Bob Bright did not know of the promise made to Parker by Appellant, he could harbor no fraudulent intent in breaching the same. (Appellant Initial Br. at 8-13).

However, Appellant stated only one ground in its post-trial Motions regarding the BOCAFA claim. Although the issue pressed below relates to Appellant's second argument here (regarding *independent fraudulent acts*), Appellant's argument had nothing to do with the issue of fraudulent *intent*. Appellant's motion was limited to the following: "Appellant is entitled to judgment on Parkers breach of contract accompanied by fraudulent act claim because Parker failed to present evidence of an independent fraudulent act accompanying the alleged breach of contract." (R. p. 53). Likewise, the thrust of Appellant's directed verdict motions was that Parker's mere disagreement with the reasons for her termination,[5] and her claim that the reasons have changed, did not

[5] These earlier and self-serving characterizations by Appellant of Parker 's positions are inaccurate as well.

evidence an independent fraudulent act on the part of Appellant. (R. p. 213, line 20 – p. 216, line 11; *id.* p. 441, lines 7-20).[6] The fraudulent intent issues were not properly raised either at directed verdict or in the Motion JNOV.

Not only did Appellant not raise the fraudulent intent argument in its October 12 post-trial Motion (Def. Motion JNOV or New Trial), Appellant actually took the opposite view that it now takes. In Appellant's supporting Memorandum, it said: "Even if [Parker] presented sufficient evidence to show that Bright lied to her about the reasons for her discharge, **this would only establish that the contract was breached with a fraudulent intent or purpose**." (R. p. 66 (emphasis added)). That is precisely what the jury found.

Appellant's untimely Supplemental Memorandum raised, for the first time, the contrary argument as to whether Parker presented evidence of fraudulent intent,[7] whether the October 21 warning Bright issued evidences fraudulent intent, whether fraudulent intent can be inferred from facts preceding the formation of the contract, and whether Bright knew about the contract. (R. pp. 92-96). Such arguments, however, are not preserved because they were not timely raised.

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[6] In the first DV motion, *after* the portion of the motion addressing BOCAFA, Appellant argued about Bright's knowledge, but only in the context of the element of whether there was a breach as to the separate contract cause of action. (Tr. p. 220, line 20 – p. 221, line 8). That is far different from the argument pressed here and, because the context is different, the issue is not preserved.

[7] At trial, counsel for Appellant made passing reference to "fraudulent intent" in the context of mentioning it as an element and the argument that a mere disagreement with the reason is not evidence of fraudulent intent (an argument Defendant presses in Section B of its Argument). (Tr. p. 213, lines 17-18; *id.* p. 216, lines 4-5). This is not proper preservation and that is not the issue here.

Appellant's untimely arguments raised in December, 2015, also are not preserved because they were not ruled on.

Appellant also never objected to the jury charge or pressed for an instruction as to the purported requirement of knowledge it now seeks to advance as grounds for reversal. The trial court charged the jury as to the BOCAFA claim. (R. p. 450, line 14 – p. 451, line 11). Appellant raised no objection to the jury charges (R. p. 692, lines 16-20). It did not raise the issue in its new trial motion, and Appellant has not appealed the denial of its new trial motion.

Finally, Appellant interjects a new argument that Parker had to present clear and convincing evidence of willful, wanton, or reckless conduct. (Initial Brief at 7-8 & n. 34, 13 & n. 53). This was never raised, and it was never ruled upon.

The black-letter principles of issue preservation are well settled in South Carolina: "'There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.'" *S.C. DOT v. First Carolina Corp.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (quoting Honorable Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002)).

As to the first requirement, "only grounds raised in the directed verdict motion may properly be asserted in the JNOV motion." The Honorable Jean Hoefer Toal, Amelia Walker & Margaret E. Baker, Appellate Practice in South

Carolina 208 (3d ed. 2016) (citations omitted); *Allegro, Inc. v. Scully*, 409 S.C. 392, 413, 415, 762 S.E.2d 54, 65-66 (Ct. App. 2014) (citations omitted).

Likewise, an issue is not preserved unless it also is raised in a post-trial motion. "Issues . . . which were not raised in a post-trial motion are not preserved for appeal." *Dixon v. Besco Eng'g*, 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct. App. 1995) (citing *Goddard v. Fairways Dev. Gen. Partnership*, 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993)); *SSI Med. Services, Inc. v. Cox*, 301 S.C. 493, 499, 392 S.E.2d 789, 793 (1990) ("Although this issue was raised in Cox's answer to SSI's complaint, it was never . . . raised in an appropriate post-trial motion. Therefore, this issue is not properly before this Court.").

The first element also requires that the issue be ruled upon. The trial court never ruled on the arguments Appellant attempted to raise months after the deadline for post-trial motions, and Appellant never moved for reconsideration. [8] "It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to **and ruled upon** by the trial court to be preserved for appellate review." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (emphasis added, citations omitted); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

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[8] If an issue is properly and timely raised and not ruled upon, it is incumbent on the appellant to file a Rule 59(e) Motion prior to attempting to argue that matter in this Court. *Home Med. Sys. v. S.C. Dep't of Revenue*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009). However, a "party cannot use a Rule 59(e) motion to present an issue to the court that could have been raised prior to judgment but was not so raised." *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 380 S.C. 349, 380, 669 S.E.2d 899, 915 (Ct. App. 2008) (citations omitted), *rev'd on other grounds*, 390 S.C. 418, 702 S.E.2d 246 (2010).

The third element of preservation requires that the issue be raised in a timely manner. Here, Appellant sought to raise additional arguments months after the expiration of the deadline for post-trial motions (that the trial court did not address and therefore did not rule upon). These also are barred. An issue cannot be preserved if not timely raised in accordance with the rules. *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 380 S.C. 349, 379, 669 S.E.2d 899, 915 (Ct. App. 2008) ("To preserve an issue for appeal, it must be. . . raised in a timely manner . . . .") (citing *First Carolina Corp. of S.C.*, 372 S.C. at 301-302, 641 S.E.2d at 907), *rev'd on other grounds*, 390 S.C. 418, 702 S.E.2d 246 (2010). Rule 7(b)(1) is explicit. "An application to the court for an order shall be by motion . . . , in writing, [and] shall state **with particularity** the grounds therefor . . . ." Rule 7(b)(1), SCRCP (emphasis added). The time for specifying grounds for any post-trial relief was ten days after the verdict of October 2, 2016. Rule 50(e), SCRCP. New arguments raised after that time are not preserved.

The fourth element of preservation requires that, unlike here, issues be raised with clarity and specificity. *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("[T]he issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge."); *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 380 S.C. 349, 379-80, 669 S.E.2d 899, 915 (Ct. App. 2008) ("To preserve an issue for appeal, it must be. . . raised . . . with sufficient specificity.") (citing *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C.

295, 301-302, 641 S.E.2d 903, 907 (2007)), *rev'd on other grounds*, 390 S.C. 418, 431, 702 S.E.2d 246, 253 (2010).

As to trial and post-trial motions, Rule 50(a) is clear: "A motion for a directed verdict shall state the specific grounds therefor." Rule 50(a), SCRCP; *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012) ("A party making a motion for a directed verdict must state the specific grounds relied upon therefor . . . .").

Appellant cannot cherry pick contract arguments made at trial and later alter them to argue fraudulent intent issues on appeal. This Court has made clear that grounds for reversal must have been specifically presented to the trial court in the same context as in which they are raised in post-trial motions and before this Court. *Armstrong v. Collins*, 366 S.C. 204, 225-26, 621 S.E.2d 368, 378-79 (Ct. App. 2005); *e.g. Sanderson v. Sanderson*, 391 S.C. 249, 255, 705 S.E.2d 65, 67 (Ct. App. 2010) (finding issue not preserved even though facts were argued, they were raised below as to a separate legal issue); *Sierra v. Skelton*, 307 S.C. 217, 414 S.E.2d 169, 171-72 (Ct. App. 1992) ("The South Carolina Rules of Civil Procedure require a party to state the specific grounds for a directed verdict motion. Rule 50(a), SCRCP. These same grounds form the basis of the motion for judgment notwithstanding the verdict.")

Nor does reciting elements in passing constitute preservation. "[C]onclusory statements unaccompanied by argument and citation to authority are insufficient to preserve an issue for appellate review." *State v. Crocker*, 366 S.C. 394, 399 n.1, 621 S.E.2d 890, 893 n. 1 (Ct. App. 2005) (citing *Fields v.*

Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (holding that failure to provide argument or supporting authority for an issue renders it abandoned) and Toal, *supra* at 75-76 (2d. ed. 2002)); *see, e.g., Cunningham v. Anderson County*, 414 S.C. 298, 302, 778 S.E.2d 884, 886 (2015) (determining that "a mere reference to [a] case in a document filed with the court insufficient to preserve the argument" made in court as to the manner in which the case applied).

Finally, where the jury needs to decide a factual issue to which it must apply the law, it is incumbent on an appellant to show that it sought a jury charge on the issue. Here, Appellant seeks to undo the entire proceedings based on a factual dispute (what Bright knew) that needed to be charged to the jury so it could apply the charged law to the facts. A party may not assert the improper application of the law where it did not seek to have the jury charged on the point (or otherwise preserve an objection to the charge). *State v. Humphries*, 325 S.C. 28, 36, 479 S.E.2d 52, 57 (1996) ("[D]efense counsel never requested charges on the statutory mitigating circumstances pertaining to diminished capacity. Absent such a request, the issue is not preserved."). If Bob Bright's knowledge (a disputed fact) was, in fact, a legal requirement or element of the BOCAFA claim, then the jury needed to be so informed so it could resolve the disputed issue and apply the law charged. Appellant never preserved an issue as to the charge.

2. Appellant ignores the standard of review and relies solely on disputed evidence viewed in the light most favorable to it.

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses that there is **no evidence** which reasonably supports the jury's findings." *Erickson v. Jones St. Publrs., LLC*, 368 S.C. 444, 464, 629 S.E.2d 653, 663-64 (2006) (emphasis added) (citing *Townes Assoc, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976)).

In reviewing the motions for directed verdict and for judgment notwithstanding the verdict, this Court must view the evidence and all inferences that may reasonably be drawn therefrom in the light most favorable to Parker. *Triple E, Inc. v. Hendrix & Dail, Inc.*, 344 S.C. 186, 189-90, 543 S.E.2d 245, 246 (Ct. App. 2001) (citations omitted).

As discussed above in the Facts section, Appellant's statement of "Relevant Facts" is based on hotly-disputed testimony the jury clearly saw fit to resolve in Parker's favor. Appellant has not appealed the findings related to either the existence of a contract or its breach. Even if it had, it is the exclusive province of the jury to determine whom it believes, and to what extent. *See State v. Rogers*, 405 S.C. 554, 569 n.5, 748 S.E.2d 265, 273 (Ct. App. 2013) (citations omitted); *accord Fredericks v. Commercial Credit Co.*, 145 S.C. 380, 387, 143 S.E. 179, 181 (1928) ("[I]t is not for this Court to pass on the credibility of witnesses--that is a matter for the jury.") The jury was even free to completely disbelieve uncontradicted testimony. *Vinson v. Hartley*, 324 S.C. 389, 409-10,

477 S.E.2d 715, 726 (Ct. App. 1996) (quoting Black v. Hodge, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991)).

Appellant's version of the facts rests on testimony that led to more than two dozen instances of impeachment by way of prior, inconsistent deposition testimony: Garland five times;[9] Meyer five times;[10] Lewis twice;[11] and Bob Bright *thirteen* times.[12]

At a trial where Bright's veracity was a central issue, the jury also was able to observe Bright, on numerous occasions, argue, issue bizarre directives to

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[9] (1) Tr. p. 266, line 23 – p. 268, line 17, p. 269, line 25 – p. 270, line 18 (citing r. p. 596, line18 – p. 53, line 1, p. 592, line 23 – p. 593, line 17); (2) Tr. p. 274, line 25 – p. 276, line14 (citing r. p. 590, line 20 – p. 591, line 2); (3) r. p. 276, line 21 – p. 277, line 15 (citing r. p. 591, lines 3-8); (4) r. p. 278, line 15 - p. 279, line 2 (citing r. p. 594, lines 3-8); and (5) r. p. 287, line 13 - p. 288, line 16 (citing r. p. 595, lines 7-14).

[10] (1) Tr. p. 301, lines 12-16, r. p. 311, line17 – p. 313, line 16 (citing r. p. 601, lines12-16); (2) r. p. 316, line 6 – p. 318, line 3 (citing r. p. 601, line 23 – p. 602, line 1; *id.* p. 603, lines 1-14); (3) r. p. 320, line 7 – p. 321, line 2 (citing r. p.604, lines13-16); (4) r. p. 322, lines 7-15 (citing r. p. 605, lines 11-13); and (5) r. p. 323, lines1-11, r. p. 324, line 18 – r. p. 325, line 3, r. p. 327, line 16 – p. 428, line 9.

[11] (1) Tr. p. 427, lines 7-25; r. p. 428, line 22 – supp. r. p. 608, line 25 (citing r. p. 598, line 25 – p. 599, line 4); and (2) r. p. 429, line 15 – p. 430, line 18 (r. p. 600, lines 10-16).

[12] (1) Tr. p. 329, line 22 – p. 330, line 7; id. p. 367, line 3 – p. 369, line 9; (2) r. p. 375, line 6 – p. 376, line 9 (citing r. p. 578, lines 5-12); (3) r. p. 376, line 23 – p. 377, line 11 (citing r. p. 579, lines 6-9); (4) r. p. 377, lines 12-25 (citing r. p. 580, lines 11-17); (5) r. p. 378, lines 3-17, p. 379, lines 2-19 (citing r. p. 581, line 19 – p. 582, line 4); (6) r. p. 382, line 14 – p. 384, line 18 (citing r. p. 582, lines 19-22); (7) r. p. 385, line 4 – 387, line 23 (citing r. p. 573, line 23 – p. 574, line 2, *id.* p. 584, lines 9-12); (8) r. p. 386, line 24 – p. 387, line 11 (citing r. 584, lines 12-14); (9) r. p. 388, lines 9-21 (citing r. p. 585, lines 5-9); (10) r. p. 393, line 24 – p. 394, line 1, p. 395, line 25 – p. 396, line 17 (citing r. p. 575, line 21 – p. 576, line 3, id. p. 577, lines 16-25); (11) r. p. 398, lines 1-15 (citing r. p. 586, lines17-22); (12) r. p. 399, line 18 – p. 400, line 21 (citing r. p. 587, lines 11-13); and (13) r. p. 402, line 21 – p. 403, line 22 (citing r. p. 588, lines 17-22).

Parker's counsel, and even make a baseless accusation against him for "cussing" during Bright's deposition.[13] The jury also was present when the trial court repeatedly admonished Bright to simply answer the questions posed.[14] Given the thirteen times Bright impeached himself, his evasiveness, his argumentative and combative behavior, and even his repeated refusals to heed

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[13] *See* r. p. 366, lines 13-14 ("I thank you for not cussing me today. I appreciate that, unlike our last meeting, sir."); *see also id.*, lines 6-12 ("A. Now, you asked me to answer the question. Q. Yes. A. If you want me to answer the question, please let me answer the question. Q. Please do. A. Don't let me begin and you scream 'answer the question,' please."); r. p. 368, lines 21-22 ("Are you answering the questions for me, or do you want me to answer the question"); r. p. 378, line 19 – p. 379, line 1 (arguing about whether the deposition testimony with which he was being impeached is being read "in context")).

This last example led to another veritable meltdown where Bright accused the Undersigned of not reading "the dashes," or reading with Bright's preferred "emphasis." (Tr. p. 378, line 24 – p. 380 line 1 (citing Bright Dep. p. 74, lines 19-25)). When simply asked if his deposition testimony was read back correctly, the jury then observed Bright quip, "who is playing the game here, sir," and then snap, "you are confusing all over the place. So what is your question, sir?" (Tr. p. 380, lines 1-4); *see also* r. p. 385, line 20 – p. 386, line 10; *id.* p. 387, lines 5-8 (arguing over the definition of the word "complain" and tries to rephrase it as "formal complaint"); r. p. 397, lines 16-25 (after attempting to again rephrase the question himself: "Q. Did I ask you that? A. I don't know if you asked me that, sir. That's my answer to the question that you asked.")

[14] Tr. p. 374, lines 7-17 ("THE COURT: — but just take a breath here, because he's just asking you a straight question. And if you will just answer that, I think you will be all right."); tr. 376, lines 16-17 ("Mr. Bright, please, when he asks a question, just answer the question, okay?"); tr. 383, lines 17-21 ("THE COURT: Mr. Bright, I think maybe he's asking a different question maybe not specific to that. THE WITNESS: Okay. THE COURT: Listen to his question one more time, please."); r. p. 396, line 24 ("Just answer the questions, okay?"); r. p. 404, lines 3-17 (MR. MURPHY: Your Honor — THE COURT: Mr. Bright. Mr. Bright — THE WITNESS: Yes. THE COURT: — please, once again, answer his questions, please, just the question itself."); r. p. 407, line 1-5 ("THE COURT: Sir, answer. Mr. Bright — THE WITNESS: Yes. THE COURT: — it's yes or no answer, please. A. If you want me to answer yes or no. THE COURT: Yes, sir.").

the trial judge's increasingly-stern directives, it is no surprise that the jury likely placed little weight on his version of the facts.

Finally, the jury was free to consider the fact that Appellant relied on exempt-level employees currently employed by Appellant that report to Bright. In contrast, Parker's witnesses (with the exception of Moore) do not answer to Bright and had no stake in the outcome of the case. (R. p. 371, line 9 – p. 372, line 22 (Bright)).

3. Bright knew about the promise.

Appellant's arguments fail because they rely on disputed facts resolved in Parker 's favor. Although Appellant tried to mislead the jury into believing that the IAC and Bright did not discuss the IAC's communication with Bright, the jury heard evidence from Bright himself that they discussed her situation. The jury also heard Dr. Dinkins's testimony of his recollection that he instructed Bright that employees with 37 or 38 years of service could not simply be fired. (See supra Facts Section F).

As Appellant previously conceded, fraudulent intent can be inferred from the basic fact that Bright gave false reasons for the termination. "Even if [Parker] presented sufficient evidence to show that Bright lied to her about the reasons for her discharge, **this would only establish that the contract was breached with a fraudulent intent or purpose**." (R. p. 66 (emphasis added)). And that is precisely what happened.

The sufficiency of this evidence is no longer contestable. Appellant does not challenge the jury's determination that Parker was fired for speaking to the

IAC in breach of the promise not to fire her for doing so. (R. p. 48). This unappealed determination is now law of the case. *Dreher v. S.C. Dep't of Health & Envtl. Control*, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015); cf. *Piedmont Mfg. Co. v. Columbia & G. R. Co.*, 19 S.C. 353, 370 (1883) ("[W]hatever may be the contract in a given case, is a question of fact for the jury, which, when found and properly construed, must become the law of the case."). Nor is it contested that Appellant maintained that other reasons drove the decision. Because the real reason is now law of the case, it is conclusively established that the reasons Appellant gave for the termination were not the true reason. Parker has provided sufficient evidence of fraudulent intent even under Appellant's own analysis.

Fabrication of reasons for termination would simply be unnecessary if, as Bright claims, he had no knowledge of any contractual limitation on his ability to terminate at will. If Bright did not believe terminating Parker for being negative with the Board violated anything, he would have just stuck with that reason. The jury necessarily found that it was the real reason (in order to find a breach) and Appellant does not challenge that finding on appeal.

Bright's knowledge that his permissible grounds for termination were limited also can be inferred from the timing of the termination vis-à-vis the anecdotal stories upon which Appellant relied. The disputed issues Appellant claims occurred in July-September. If those were the real impetus, why was Parker terminated in November during a time when even Appellant's witnesses claimed there were no issues? (*See* Fact Section G). Both parties agree there were no contractual restrictions on termination when the issues purportedly

occurred. (See r. p. 413, line 19 – p. 414, line 8 (Bright)). Bright's attempt to reach back in time to cite what are established as false reasons for termination further show he was aware of the fact he could not give the real reason.

Finally, before Bright fired Parker, she told Bright about the discussion with the IAC and how she only answered the questions they specifically directed to her. (See supra Facts Section H).

The jury was well aware that, in the context of Count I and the contract argument (but not the requirement of fraudulent intent as to the extant tort claim), Appellant hammered the theory that Bright was blissfully unaware of any promises made to Parker. Counsel for Appellant even made it a key issue in closing as to the contract claim. (R. p. 448, line 15 – p. 449, line 14). Obviously, the jury, as fact finder, both rejected this theory and found Parker was terminated for speaking to the IAC.

Notwithstanding the fact that Appellant's argument is not preserved and is improperly framed,[15] there is ample evidence upon which the jury could have

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[15] From a conceptual standpoint, Appellant argues wrongly that Parker must prove that the agent that breached the contract had to know of its terms. Appellant essentially tries to interject Bright as the party to the contract. Parker did not sue Bob Bright for breach of contract, and she never asserted he was party to the contract. Parker sued Appellant. Moreover, there is no longer even a dispute as to whether Appellant knew of the contract or breached it. The argument that one particular agent did not know something ignores settled law that the knowledge of an agent is imputed to the principal (i.e. Appellant). *See Bankers Trust Co. v. Bruce*, 283 S.C. 408, 423, 323 S.E.2d 523, 532 (Ct. App. 1984) (citing *Crystal Ice Co. Of Columbia, Inc. v. First Colonial Corp.*, 273 S.C. 306, 257 S.E.2d 496, 497-98 (1979)). The trial court charged the jury on these very principles. (Tr. p. 451, line 12 – p. 452, line 7). The argument that the agent who causes a breach must know about the contract is simply another false paradigm that Appellant has dreamt up for this case. Contrary to Appellant's argument, such a proposition is both unprecedented and contrary to the law of

found that Bright knew full well of the promise he was breaching. Appellant's prior arguments concede the existence of evidence of fraudulent intent. It was for the jury to resolve that issue.

4. Appellant mis-states the law.

Appellant begins its argument with the proposition that "The law is clear in South Carolina that in order for a person to harbor dishonest designs as it relates to the breaching of a contract, they must have some personal knowledge of the agreement." (Appellant Initial Br. at 8 & n. 36). Appellant's proffered authorities fail to even touch upon the proposition Appellant baldly claims is "rooted" in the law. (*Id.* at 8).[16]

The *Thompson* case certainly states no such rule. There, the Supreme Court affirmed a verdict for BOCAFA, in part, because "[t]he fraudulent act existed in appellant's issuance and delivery of the replacement policies with

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agency. Whether a party to a contract breaches it – which is not even an issue before this Court – has never been an intent based analysis. Intent only comes into play is in the manner in which the breach occurs, i.e. whether there is fraudulent intent related to the breach and a fraudulent act accompanying the breach. On that point, for the reasons discussed below, *Conner v. City of Forest Acres* is controlling.

For the instant purposes, Appellant's attempt to create new law is inappropriate here. Even if Appellant had preserved the argument, changing the law is solely within the purview of the Supreme Court. *Marcum v. Bowden*, 372 S.C. 452, 458, 643 S.E.2d 85, 88 (2007) ("It is within th[e Supreme] Court's purview to change the common law.")

[16] As support, Appellant provides the following cites: "*Thompson v. Home Sec. Life Ins.*, 271 S.C. 54, 55, 244 S.E.2d 533, 534 (1978); *see also D.R.Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 556, 730 S.E.2d 340, 355 (Ct. App. 2012), *aff'd in part as modified, vacated in part*, 410 S.C. 319, 764 S.E.2d 701 (2014)(noting that there must be a showing of fraudulent intent related to the breach)."

knowledge of respondent's *diabetes*." *Thompson v. Home Sec. Life Ins.*, 271 S.C. 54, 56, 244 S.E.2d 533, 534 (1978) (emphasis added). An agent's knowledge of the insured's diabetes is the only context in which the term "knowledge" appears in the decision. The case has nothing to do with knowledge of terms of a contract. Likewise, this Court's decision in *D.R. Horton* had nothing to do with the breaching party's purported knowledge of the agreement. *D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 556, 730 S.E.2d 340, 354 (Ct. App. 2012), *aff'd in part and vacated in part on other grounds*, 410 S.C. 319, 764 S.E.2d 701 (2014). Appellant simply is not fairly representing the case law to which it cites.

5. Appellant's straw man arguments regarding prior warning

Appellant also argues that "[e]vidence relating to Bright's 'fraudulent intent' in relation to Parker's contract begins with the Conference Note received on October 21, 2013." (Initial Br. at 9). Why Appellant says this is unclear.[17] It is not the basis of the trial court's decision from which this appeal is taken.

To confuse matters more, Appellant states that "Parker contends that Bright's reasons for the discipline she received on October 21 were dishonest, pretextual, and evidence of a dishonest design by Bright." (*Id.* at 10). Appellant cites pages 9-12 of Parker's opposition to Appellant's post-trial motions, which have nothing to do with the October 21 warning.[18] (R. pp. 81-84).

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[17] This was certainly not Parker's theory, nor a finding by the trial judge in his denial of the post-trial motions.

[18] The cited portions of Parker 's argument focus solely on reasons for the termination that occurred in November and those made after then. (R. pp. 81-84).

In this case, however, this Court need not reach this issue because Appellant has incorrectly framed it. The evidence of Bright's preemptive October 21 warning was offered for other purposes. Parker presented the evidence to show: (1) Bright manufactured false reasons for disciplining Parker in a successful effort to intimidate her from disclosing to the IAC what he knew would otherwise be discussed based on his September conversation with the SLC; and (2) to show that the assurances the IAC provided that formed the contract were necessitated by Bright's attempts at intimidation – a proposition with which Dr. Dinkins himself seemingly agreed.

Appellant thus poses two false premises to support the false conclusion that whatever Bright did prior to October 25 (the date of the IAC/SLC meeting) cannot serve as relevant evidence that he harbored fraudulent intent with regard to his subsequent actions that breached the contract.

If the Court decides to address the issue, it is clear that Appellant's argument is unsupported by any actual case law. While predicate actions alone cannot constitute the *breach* of an embryonic contract, there is no case law to support the bizarre notion that evidence of one's intentions is limited to any particular point in time.[19] In many contexts, fraudulent intent can often be gleaned by one's actions that induces the other party to enter into the contract in the first place with the intent to breach the same. A blanket rule that such

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[19] It is well settled that the fraudulent *act* giving rise to the claim may precede the breach. *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 54, 336 S.E.2d 502, 504 (Ct. App. 1985) ("The fraudulent act may be prior to . . . the breach of contract . . . ."). How then can actions preceding the breach also not be illuminating as to one's *intent*? Appellant's position would lead to the absurd result that one can act fraudulently without the intent to do so.

evidence is irrelevant per se not only was not pressed below, but there is no support for it in any cases cited by Appellant.

The trial court never found that the background evidence regarding Bright's efforts to scare Parker was evidence of fraudulent intent as to the breach of the contract. Appellant's muddying of the issues does not call into question anything in the trial judge's Order denying Appellant's post-trial motions. Even if Appellant was correct as to the legal principle it advocates, it simply does not matter.

6. Appellant's argument about unanswered emails completely misses the mark.

In Section A(2), Appellant argues that Bright's perception as to whether Parker responded to emails cannot evidence fraudulent intent because he formed this opinion before the IAC made Parker the promise that forms the basis of her contractual claim. (Appellant Initial Brief at 11). Once again, Appellant either misses the point, or is creating another diversion. And, once again, it appears Appellant is taking aim at the finding of breach that it did not appeal and that is law of this case.

Whether Bright was monitoring email traffic statistics prior to the IAC-SLC meeting is not the point. The issue never was whether Bright's monitoring of the traffic in October established fraudulent *intent*. The issue is whether Bright's subsequent giving of pretextual reasons for termination in November and afterwards can constitute a fraudulent *act* – which is an entirely different element of the tort. Prior to firing Parker, Bright knew that email statistics did not show that Parker was failing to respond to emails. (See Facts Section I(2)). Bright's

undeniable use of reasons for Parker's termination that he knew *at the time* to be false is the issue under *Conner v. City of Forest Acres*, 348 S.C. 454, 465–66, 560 S.E.2d 606, 612 (2002) (discussed below). Once again, Appellant is seeking to change the subject, divert attention from the trial court's actual decision, and avoid facts that are now law of the case.

B. Appellant's second argument: Independent fraudulent act

1. Appellant continues to mis-state the issue.

Appellant states: "Parker contends the same act constituting the breach may also form the basis of the independent fraudulent act." (Appellant Initial Br. at 13-14). That was *never* Parker's argument. Appellant continues to argue as to what Parker supposedly thinks, rather than focusing on whether there is error in the trial court's ruling. Although Appellant is demonstrably wrong about Parker's position, what Parker argues is not the issue. This Court should affirm if there is any basis for doing so, regardless of what the parties have argued. Rule 220(c), SCACR; *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 418, 526 S.E.2d 716, 722 (2000). The sole focus must be on the actual Order from which the appeal is taken – the one thing Appellant repeatedly ignores.

The notion that the breach is the fraudulent act was *never* the basis for the trial court's denial of Appellant's Motions. (R. p. 237, lines 5-15; *id.* at p. 445, line 14 – p. 446, line 1; r. pp. 81-84; r pp. 19-20). To the contrary, the trial court specifically charged the jury that "[t]he mere breach of a contract does not constitute fraud." (R. p. 450, lines 20-21).

The trial court repeatedly explained the distinction between the act constituting the breach (the termination) and the acts constituting the fraudulent

acts (the pretextual reasons). Judge Kelly first explained the distinction in his summary judgment denial. (R. p. 5). As to the Order presently before this Court, Judge Kelly could not have been more clear: (1) the breach in this case is the termination that violated the specific promise by the IAC; and (2) that the fraudulent acts were the bogus reasons Bright gave at the time and subsequently. (R. p. 19). He *never* stated that the breach was the fraudulent act. Accordingly, there is no error.

To the extent that this Court indulges Appellant in an analysis of Parker's prior arguments, it will find only that Parker also has fought Appellant's efforts to mis-state the issue. On this point, the Undersigned previously argued:

> Defendant's effort to complicate the simple is unavailing, and this Court already addressed it in the summary judgment order. Defendant simply continues to ignore that, just as in *Conner*, the breach in this case is not the same thing as the dishonesty that attended it:
>
> - The breach in this case was the termination of Plaintiff for communicating with the Board; and
>
> - The fraudulent acts are the multiple lies by Bob Bright as to the reason.

(R. p. 81). As Parker argued during the second directed verdict, Appellant could have terminated Parker (thus breaching the agreement), been truthful about its reasons, and probably would not have been liable in tort. (R. p. 445, line 14 – p. 446, line 1). But that's not what happened. To frustrate Parker 's contractual rights, Appellant (through Bright) continually lied about the reasons, both at the time and subsequent to the termination. The lies are separate acts, which are

related directly to the breach as the law requires. That has always been Parker's position.

Although Appellant is free to challenge the trial court's interpretation of the law, it is should not mis-state the applicable legal issues in a back-door attempt to attack the trial judge's rulings, which contain no error. Appellant simply is not fairly addressing either the actual positions taken in the case, or the rulings made. It is just one straw man argument after another.

2. The trial court's analysis is entirely consistent with settled precedent.

In *Conner*, The Supreme Court already has spoken on the central issue in this case. Appellant fails to even argue that the trial court incorrectly applied the controlling precedent:

> **The act of the termination and the giving of reasons are separate, distinct, and independent of each other.** The former may exist without the latter. At the same time, they are related as they must be and the latter accompanies the former. *Conner*, 560 S.E.2d at 612 (recognizing that the fraudulent intent must "relat[e] to the breaching" and that the fraudulent act must "accompany[] the breach.").
>
> Although the appellate courts have recognized that the facts and circumstances of each case will be unique, in this particular context, *Conner* clearly provides clear legal authority to support the jury's determination. In *Conner*, a police dispatcher alleged that her termination for job performance violated provisions in a handbook. After upholding the Court of Appeals' determination that it was for the jury to resolve disputed testimony regarding the termination, the Supreme Court provided guidance as to breach of contract accompanied by fraudulent act. Again, the Supreme Court determined that it was for the jury to resolve the matter. Although the plaintiff argued that there were several fraudulent acts in which the Appellant engaged, the Supreme Court found one allegation sufficient to send the case to the jury. The Supreme Court noted: "Primarily . . . Conner's claim is that the City fabricated pretextual reasons for Conner's termination knowing the reasons were false

> and did not justify termination for cause." *Conner*, 348 S.C. at 466, 560 S.E.2d at 612). The Court held that conflicting testimony as to whether the reasons were false create "a genuine issue of material fact as to whether the City fraudulently breached its contract." *Id.*
>
> As in *Conner*, the giving of allegedly-pretextual reasons for the termination **is an act separate and distinct from the termination itself and yet it accompanied it**. And, as in *Conner*, it was for the jury to resolve the disputed testimony on this point.

(R. pp. 19-20 (emphases added)).

Appellant never actually explains how any of the above-quoted rationale is incorrect. Indeed, Appellant never cites to any portion of the Order to assert error.

The unambiguous declaration in *Conner* that lying about the reasons for breaching the contract constitutes a fraudulent act was not unprecedented. As the *Conner* Court noted, "'[f]raud,' in this sense, 'assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence.'" *Conner*, 348 S.C. at 465–66, 560 S.E.2d at 612 (quoting *Sullivan v. Calhoun*, 117 S.C. 137, 139, 108 S.E. 189, 189 (1921)). The fraudulent act can be "any act characterized by dishonesty in fact, [or] unfair dealing." *Harper v. Ethridge*, 348 S.E.2d 374, 290 S.C. 112 (Ct. App. 1986). "The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character." *Floyd v.*

Country Squire Mobile Homes, Inc., 287 S.C. 51, 54, 336 S.E.2d 502, 504 (Ct. App. 1985).

Conner's determination that giving pretextual reasons for the breach constitutes a fraudulent act is entirely consistent with cases from this Court, including this Court's oft-cited decision in *Floyd, which* involved false representations of a mobile home salesman, who had promised to obtain financing that yielded a particular payment, failed to do so, and then lied about whether he had. It was the perpetuation of that misrepresentation and the dishonesty about the breach that this Court relied upon in finding evidence of a fraudulent "act connected with the breach." *Id.* at 54-55, 336 S.E.2d 504. Likewise, in *Scott v. Mid Carolina Homes*, 293 S.C. 191, 359 S.E.2d 291 (Ct. App. 1987) a misrepresentation as to the reason for breaching the contract was enough to support a finding of both fraudulent intent and a fraudulent act accompanying the breach. *Id.* at 197-98, 359 S.E.2d at 295.

Appellant attempts to distinguish *Conner* from this case on the basis that "The [*Conner*] Court did not find that terminating the dispatcher without cause amounted to a fraudulent act." (Appellant Initial Br. At 17). Neither did the trial court here. Appellant's effort to distinguish *Conner* by relying on a non-issue is simply another red herring, released to divert attention from the fact that the trial judge faithfully applied the law to the actual issues raised by the parties.

Appellant also argues that Parker's theory "attempt[s] to undo six decades of precedent," (*id.* at 16), and "disrupts the settled rule that a plaintiff must establish a separate and distinct fraudulent act." (*Id.* at 17). As discussed

above, the trial court specifically discussed this issue and the application of *Conner*. Appellant's simple refusal to focus on the actual issues in the case is no basis for finding error with regard to the trial court's rulings.

Appellant also argues that the Supreme Court decisions of *Hardee* and *Smith* and this Court's decision in *D.R. Horton* somehow mandates a result contrary to *Conner*. For the reasons that follow, they don't.

Hardee v. Penn Mut. Life Ins. Co., 215 S.C. 1, 53 S.E.2d 861 (1949) simply stands for the proposition cited by the trial court that there must be a fraudulent act accompanying the breach. *Id.* at 4, 53 S.E.2d at 861. That is not in dispute. Nothing in *Hardee* states that providing pretextual reasons does not constitute a fraudulent act.

The trial court's decision not only is consistent with *Smith v. Canal Ins. Co.*, 275 S.C. 256, 269 S.E.2d 348 (1980), but the trial court specifically cited it. (Order at 11 (citing *Smith*)). Other than standing for the trial court's proposition that a distinct, yet related, act is required, *Smith*, which was a 12(b)(6) case, adds nothing to the analysis here.

Finally, this Court's decision in *D.R. Horton* certainly never attempted to overrule *sub silentio* the Supreme Court's decision in *Conner*. To the contrary, the D.R. *Horton* Court was well aware of *Conner* and cited it. *D.R. Horton,* , 398 S.C. at 555, 730 S.E.2d at 354 (citing *Conner*). This Court obviously found no tension with *Conner*, which is not surprising as the issues presented in those cases were very different. In *D.R. Horton*, the appellants relied on a number of alleged fraudulent acts, including the successive filing of lis pendens, threats to

tie up property, and shifting reasons for refusing to close on property. *Id.* at 555, 730 S.E.2d at 354. Appellant grasps onto this last passage to conflate the notion of "shifting reasons" with the giving of pretextual reasons. Although this Court did note in *D.R. Horton* that the fact that different reasons were given at different times did not evidence a fraudulent act, this Court never determined the reasons at issue were untrue – just that different ones were given over time. Moreover, the *Horton* Court was careful to note that the appellant against whom summary judgment was entered offered nothing more than mere speculation to support the BOCAFA claim. *Id.* at 556, 730 S.E.2d at 354.

Finally, *Horton* is distinguishable because whether the reasons for the breach in *Horton* were true or not did not affect whether the breach occurred. In *Horton*, it didn't matter what the reason was for the breach. Whether the breaching party cited reason x or reason y was immaterial. Here, as in *Conner*, the independent act of giving pretextual reasons is directly related to the breach, as it must be, because it was a means to carry out the frustration of Parker's contractual rights. Appellant was free to terminate Parker for any reason other than the one issue for which the jury found it terminated her. The fabrication of reasons for Parker's termination to avoid the sole reason for which she could not be fired was done to frustrate her contractual rights just as allegedly-pretextual reasons were given in *Conner* in a purported attempt to harmonize the termination of the plaintiff there with the applicable policy in that case.

In the context of giving false reasons for the termination of employment in abrogation of an enforceable promise, *Conner* controls and this Court never attempted to say otherwise in *D.R. Horton*.

3. Appellant's argument to abolish the BOCAFA cause of action in the employment context is frivolous.

Appellant raises the new issue as to whether BOCAFA should exist in the employment context. (Appellant Initial Br. at 18-19). This argument is patently frivolous.

a. Appellant did not preserve this issue.

Appellant's argument that BOCAFA should not apply in the employment context has never been raised before. It certainly was never ruled on. Nor is this issue identified in Appellant's Issues presented. Rule 208(b)(1)(B), SCACR; Toal, *supra* at 443 (3d ed. 2016). For these three reasons, Appellant has not preserved this argument and this Court should deem it waived. *See supra* Section A(1).

b. This Court should not abolish or change the common law.

Appellant essentially argues that the BOCAFA claim must be abolished, but only in the employment context. Especially given our appellate courts' repeated recognition of the tort's application in this context (discussed below), this Court should not seek to change the common law. *Marcum v. Bowden*, 372 S.C. 452, 458, 643 S.E.2d 85, 88 (2007).

c. Appellant's argument that employers should be exempt from BOCAFA claims is both contrary to settled precedent and baseless.

Appellant's opinion that, "[i]t is unlikely employment contracts were contemplated when the cause of action for breach of contract accompanied by fraudulent act was created" is simply immaterial. (Appellant Initial Br. at 18). Even if one could determine when the cause of action was established, the circumstances contemplated by the particular judges in that case is not the issue here. The issue is whether the trial court committed error in applying current precedent. Appellant refuses to address that.

The application of BOCAFA in the employment context is well established. *See, e.g.*, *Conner*, 348 S.C. at 466, 560 S.E.2d at 612; *Zinn v. CFI Sales & Mktg.*, 415 S.C. 93, 112, 780 S.E.2d 611, 621 (Ct. App. 2015); *Shelton v. Oscar Mayer Foods Corp.*, 319 S.C. 81, 90, 459 S.E.2d 851, 857 (Ct. App. 1995); *Hendrix v. Eastern Distribution, Inc.*, 316 S.C. 34, 45-46, 446 S.E.2d 440, 446-47 (Ct. App. 1994), *aff'd in part and vacated in part on other grounds*, 320 S.C. 218, 464 S.E.2d 112 (1995).[20]

In *Shelton*, this Court rejected the same argument made as to the implied covenant of good faith and fair dealing, the existence of which also unquestionably pre-dates recognition of enforcing promises limiting an employer's right to terminate employment.[21] In *Shelton*, this Court noted, "we

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[20] Appellant's advocacy for a ruling that circumvents a number of published decisions is somewhat ironic given its claim that Parker is the one seeking to upset settled precedent. (Appellant Initial Br. at 16, 17).

[21] See *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 366-67, 147 S.E.2d 481, 484 (1966) (recognizing the common-law implied covenant

find no authoritative case law holding the implied covenant of good faith and fair dealing is not applicable to employment contracts that alter the employee's at-will status." *Shelton*, 319 S.C. at 91, 459 S.E.2d at 857. Likewise, the only "authoritative case law here" establishes that BOCAFA also applies in the employment context in the same manner as the implied covenant in *Shelton* and all other generally-applicable contract principles.

Appellant's hyperbolic cries that this case will convert every contract case into a BOCAFA case ring hollow. Many termination of employment contract cases do not involve BOCAFA claims. *E.g. Williams v. Riedman*, 339 S.C. 251, 260, 529 S.E.2d 28, 32 (Ct. App. 2000). There are other cases in which contract claims proceed even though there is insufficient evidence to support a BOCAFA claim. *E.g.*, *Shelton,* 319 S.C. at 90, 459 S.E.2d at 857 (permitting contractual claims, but affirming dismissal of BOCAFA). Again, the sole issue here is whether the trial court committed error in this case.

Finally, Appellant's reliance on the dissent from an irrelevant case does not warrant the reversal of Judge Kelly's Order that faithfully applies actual precedent.[22]

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of good faith and fair dealing in contracts); *Small v. Springs Industries*, 292 S.C. 481, 357 S.E.2d 452, 454 (1987) (recognizing the right of employees to sue in contract to enforce promises stated in mandatory terms notwithstanding the employment at will doctrine).

[22] In support of its policy argument, Appellant relies solely on *Dunsil v. E.M. Jones Chevrolet Co*, 268 S.C. 291, 298, 233 S.E.2d 201, 204 (1977), *cited in* Appellant Initial Br. at 19 & n. 66. Appellant, however, fails to note that it is quoting the dissent in that case. *See id.* (Lewis, J., dissenting). In any event, the only purpose for which Appellant cites *Dunsil* is to reiterate the principles already recognized in the trial court's order.

Appellant's belief that BOCAFA should not apply to employment contracts the same way it applies to every other kind of contract contravenes settled law. Once again, Appellant's unpreserved arguments fail to explain how Judge Kelly failed to properly apply actual law.

CONCLUSION

For the foregoing reasons, the Order denying Appellant's JNOV motion as to the award of punitive damages should be affirmed.

Respectfully submitted this 27th day of September, 2016.

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