

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity

Opinion No. 5582 (S.C. Ct. App. filed Aug. 1, 2018)
S.C. Ct. App. Case No. 2016-000636
Case No. 2005-CP-40-6132

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SC Court of Appeals

Norwest Properties, LLC,Appellant,

v.

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

OF WHOM Michael T. Strebler and Lisa W. Strebler are, Respondents.

PETITION FOR REHEARING

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ATTORNEYS FOR RESPONDENTS

INTRODUCTION

The respondents (Seller) did not breach the sales contract at issue here – this is the unappealed ruling of the Master. (R. 16-17). The appellant (Buyer) fraudulently induced Seller to enter into the sales contract at issue here – this too is the unappealed ruling of the Master. (R. 17, 19-20 & n.3). The contract expressly and specifically limited Buyer’s remedies for the deficiencies alleged as a breach of contract by Seller to either terminating the contract or accepting those deficiencies and closing the sale on the closing date – this too is the unappealed ruling of the Master. (R. 11, 15-16, 23-24). Buyer nevertheless sued Seller for specific performance of the fraudulently induced contract, thereby causing Buyer to suffer the damages awarded by the Master.

GROUNDS FOR REHEARING

I. The damages awarded by the Master were tried by implied consent, and this Court’s contrary ruling misapprehends and overlooks the relevant facts and applicable law.

This Court ruled that the damages issues was not tried by implied consent for two reasons: (1) the damages were not “discussed extensively at trial,” and this is an absolute requirement for implied consent under *Fraternal Order, infra*; and (2) since the May 2010 order awarding these types of damages reserved the determination of the amount of these damages for a subsequent hearing, Buyer’s “special damages” objections in that subsequent hearing were sufficient to avoid a trial by implied consent. *Norwest Props., LLC v. Strebler*, Op. No. 5582 (S.C. Ct. App. filed Aug. 1, 2018) (Shearouse Adv. Sh. No. 31 at 35, 40-41) (hereinafter cited as Op. at ___). Respectfully, both rulings are in error for the reasons set forth below.

A. The “extensive discussion” issue.

This Court’s “no extensive discussion” ruling rests upon its reading of the Supreme Court’s decision in *Fraternal Order of Police v. South Carolina Dep’t of Rev.*, 574 S.E.2d 717 (S.C. 2002) (hereinafter cited as *FOP II*). Respectfully, this Court has misapprehended the actual ruling in

FOP II as imposing an absolute “extensive discussion” requirement and, in reaching this erroneous conclusion, has overlooked the facts and circumstances that gave rise to and informed the decision in *FOP II*.

In *FOP II*, the appellants (Taxpayers) brought an action against the South Carolina Department of Revenue (the Department) to recover taxes paid under several statutes. The appeal was presented under the following stipulated facts:

1. In 1993, Taxpayers filed a circuit court action based on constitutional and non-constitutional challenges to the statutes (the 1993 Action). 574 S.E.2d at 719.
2. In 1994, the circuit court dismissed the 1993 Action with leave to restore upon motion. The dismissal was based on Taxpayers’ failure to exhaust administrative remedies by failing to file a refund claim with the Department. *Id.*
3. In 1995, Taxpayers filed a refund claim and raised all of the non-constitutional claims previously made in the 1993 Action. The Department denied the claim, and Taxpayers appealed. The Supreme Court affirmed on two of the three non-constitutional grounds but reversed and remanded on the third non-constitutional ground. *Id.*, citing *Fraternal Order of Police v. South Carolina Dept. of Rev.*, 506 S.E.2d 495 (S.C. 1998) (*FOP I*).
4. In 1997, Taxpayers moved to restore the 1993 Action and proceed on the constitutional issues not raised or addressed in *FOP I*. The circuit court granted the motion and reinstated the complaint in the 1993 Action, “but the *parties stipulated* that they were *only raising* the constitutional challenges to *equal protection and due process* within the original [1993] complaint.” *FOP II*, 574 S.E.2d at 720 (all emphasis added). The circuit court denied all of Taxpayers’ claims, and Taxpayers appealed to the Supreme Court. Notably, the 1993 complaint had not raised any free speech claims. *Id.*

On appeal, Taxpayers presented three constitutional challenges: equal protection, due process, and free speech. *Id.* at 721. The Supreme Court affirmed the circuit court on the merits of the due process and equal protection grounds. *Id.* at 722-724. As to the “free speech” issue, the Supreme Court ruled as follows that the issue was not preserved for appeal:

The Taxpayers argue that the challenged statutes violate their right to freedom of speech. *This argument is not preserved for review by this Court.*

Taxpayers did not allege a violation of free speech in their complaint. After the 1996 action, the only causes of action remaining were Taxpayers' equal protection and due process claims. *At the hearing before the circuit court, Taxpayers' counsel stated, "so we are here today basically on the re-filed complaint, when the action was restored solely on the due process and equal protection claims."* Although *counsel later referred to some Supreme Court cases involving First Amendment challenges, it never presented a **direct argument** that the statutes in question violated the First Amendment. The circuit court did not address a **First Amendment challenge in its order either.***

Generally, claims or defenses not presented in the pleadings will not be considered on appeal. This rule is consistent with the concept that one cannot present one theory at trial, lose, and then attack the decision below on another theory not argued at trial. Although some issues not raised in the pleadings may become part of the case by implied consent of the parties, this is not such a case. *In order to be tried by implied consent, the issue must have been discussed extensively at trial. As the **First Amendment challenge was not** pleaded, discussed extensively at trial, **or ruled upon by the trial judge**, it is *not preserved for review.**

FOP II, 574 S.E.2d at 724-725 (all emphasis added) (citations omitted). The present case is readily distinguishable from *FOP II* for the following reasons:

1. There was never any stipulation or statement that Seller was not seeking the damages awarded by the Master in the May 2010 order, nor had the case gone up and down the appellate ladder, and then back up the appellate ladder before the damages claim was asserted by Seller.
2. To the contrary Seller presented a direct, express, and specific claim for those damages during the trial on the merits. Buyer did not object.
3. After trial, in his May 2010 order, the Master awarded the types of damages claimed by Seller at trial, subject to a subsequent determination of the amount of those damages. (R. 12, 25). Buyer did not challenge this ruling in its motion to reconsider the May 2010 order. (R. 43-48).

The Supreme Court's "extensive discussion" ruling in *FOP II* was in response to pre-trial and in-trial stipulations that only equal protection and due process claims were being made, the Taxpayers' failure to make a direct argument on its free "speech claim" at trial, and the trial court's

failure to make any “free speech” ruling in its order. Moreover, the “extensive discussion” observation reflected a conclusion that merely discussing some cases that also involved free speech did not raise the free speech issue without Taxpayers more directly raising a free speech issue.

The Supreme Court’s “extensive discussion” ruling must be viewed in the context of the case decided. Nothing indicates the Supreme Court intended to create an absolute rule requiring “extensive discussion” in every trial by implied consent case. The Supreme Court relied on a case that held an extensive discussion at trial had resulted in trial by implied consent, but that case never held that an extensive discussion was a requirement for any trial by implied consent.¹ Moreover, an “extensive discussion” would not have added anything here, as it would have added in *FOP II*.

Here, Seller expressly, directly, and specifically stated that he was seeking the types of damages awarded by the Master. Absent some objection or comment from Buyer, there was nothing further to discuss. If Buyer believed those types of damages were not properly at issue in this case, it was incumbent upon it to raise that issue immediately or, at the very least, to commence some discussion on that issue. Having failed to do so at its earliest opportunity at trial or, at the

¹ In *FOP II*, 574 S.E.2d at 725, the Supreme Court cited and relied upon this Court’s decision in *Andrews v. Von Elten & Walker, Inc.*, 432 S.E.2d 500 (S.C. App. 1993). In *Andrews*, the plaintiff sued for breach of contract damages. A primary issue was whether the plaintiff had complied with the UCC requirements for disposition of collateral. The plaintiff argued the UCC issue was not properly before this Court, because it had not been raised at trial. This Court ruled the issue had been tried by implied consent:

The first question presented is a legal one: may [the plaintiff] retain the collateral and initiate the instant action on the non-competition and consulting agreements? Stated another way, was [the plaintiff] required to dispose of the collateral in a commercially reasonable manner as a condition precedent to recovery on the agreements?

Andrews asserts that the [defendants] did not raise any defense in their answer or counterclaim based upon the UCC, nor did they provide any evidence at trial in support of any UCC defenses. It is true that the answer and counterclaim do not mention the UCC, *but the parties and the court discussed the applicability of the UCC extensively at trial. [The plaintiff] did not object to the court considering the issue at trial. The issue was therefore tried by consent of the parties.*

Andrews, 432 S.E.2d at 502 (emphasis added) (citations omitted). This Court simply noted that there had been an extensive discussion, and this was sufficient to raise the issue. This Court never ruled that an “extensive discussion” at trial was a requirement for any trial by implied consent.

very least, in response to the May 2010 order awarding these types of damages subject to proof of the amount of those damages, the matter was tried by implied consent.

Finally, to the extent that *FOP II* can be read as imposing an absolute “extensive discussion” requirement for trial by implied consent, even if as here the trial court awarded those damages after the trial without objection by the other party, it should be modified or overruled. The real test for trial by implied consent is or should be that the issue was raised with sufficient specificity as to apprise a reasonable person that the issue was being raised in the case. Here, Seller’s direct, express, and specific assertion that he was seeking to recover the specific types of damages ultimately awarded by the Master apprised any reasonable person that those issues were being raised in the case – any doubt about this is resolved by the fact that the Master awarded those types of damages in the May 2010 order subject to proof of the amount of those damages in a subsequent damages hearing. Buyer failed to object to or otherwise challenge these damages as being unpled special damages at trial or in response to the May 2010 order awarding those damages. Therefore, the issue was tried by implied consent.

B. The “no specific final judgment amount” issue.

This Court’s second ruling on the “implied consent” issue focused on the Master’s May 2010 order as follows:

The second and more glaring problem is that no specific final judgment amount was sought or included in the 2010 order. Instead, that order notes damages would be finally determined at a later hearing, a reality Seller acknowledged by filing its "motion to approve damages." We hold Buyer's memorandum opposing the motion, as well as its arguments at the damages hearing pointing to Seller's failure to plead special damages, constituted timely and proper objections to the Master's consideration of special damages.

(Op. at 40) (emphasis added). Respectfully, the import of this ruling is not entirely clear. It appears this Court is ruling that, since the amount of damages was yet to be determined in a subsequent

hearing to be held after the May 2010 order awarding those damages, Buyer was free to wait and raise its “failure to plead” argument until the advent of the damages hearing. If this was the Court’s ruling, then it is respectfully submitted that this ruling was erroneous for the reasons set forth below. If this Court intended something different, then it is respectfully requested that this Court issue an amended opinion clarifying its ruling with a more explicit explanation of its ruling so that Seller can make an informed petition for rehearing.

The May 2010 order awarded the damages at issue here. The only remaining question was the amount of damages. This “amount” issue has no relevance to the question of implied consent, *i.e.*, whether the type of damage issue had arisen without objection at the merits trial that gave rise to the May 2010 order, and whether it had also arisen in the May 2010 order itself. In either scenario, it was incumbent upon Buyer to raise its “failure to plead” objection at its earliest opportunity. This is a long-standing and axiomatic rule of error preservation, repeatedly applied by this Court and the Supreme Court to a wide array of cases and issues. *E.g.*, *Clyde v. Southern Pub. Utilities Co.*, 96 S.E. 116, 118 (S.C. 1918); see also *Ex Parte Cannon v. Georgia Atty. Gen. Office*, 725 S.E.2d 698, 701 (S.C. 2012), *citing Hurst v. Sumter County*, 1 S.E.2d 238 (S.C. 1939); *Hampton v. Dodson*, 126 S.E.2d 564, 569 (S.C. 1962); *Kan Enters. v. South Carolina Dep’t of Rev.*, 803 S.E.2d 882, 888 (S.C. App. 2017); *Wright v. Hiester Constr. Co.*, 698 S.E.2d 822, 833 (S.C. App. 2010), *citing State v. Sullivan*, 426 S.E.2d 766 (S.C. 1993); and *Johnson v. Hoechst Celanese Corp.*, 453 S.E.2d 908, 911-912 (S.C. App. 1995).

Here, Buyer’s first opportunity to raise its “failure to plead” objection was at the merits trial when Seller directly, expressly, and specifically stated the types of damages being sought for Buyer’s breach of contract. No further discussion was needed or required to alert Buyer that Seller was seeking these types of damages and, therefore, Buyer’s first opportunity arose at that time.

Assuming Seller's testimony at trial was insufficient, the Master awarded those types of damages in his May 2010 order on the merits. At the very least, the May 2010 order triggered Buyer's earliest opportunity to raise its "failure to plead" argument but it failed to do so, even though it made a Rule 59(e) motion on other grounds. The fact that there would be a later hearing on the amount of damages to be awarded did not change the fact that Buyer's earliest opportunity to raise its "failure to plead" argument was at the trial on the merits in response to Seller's testimony or, at the very latest, when the Master awarded those types of damages in his May 2010 order. Buyer filed a 59(e) motion regarding the May 2010 order, but it never raised any "special damages" issue. (See R. 43-48; see also Arg. II(A), *infra*).²

II. Assuming the damages awarded by the Master were not tried by implied consent, Buyer's appellate arguments were not properly before this Court for appellate review, and this Court's contrary ruling misapprehends and overlooks Seller's arguments, the relevant facts, and the applicable law.

A. This Court has misapprehended Seller's "law of the case" argument and erroneously conflated concepts of appealability with the failure to appeal an order after final judgment and the failure to challenge the rulings in an order.

In the May 2010 order on the merits of the case, the Master held that the types of damages claimed by Seller at the hearing were recoverable under his pleadings and the contract, and the order awarded those damages, subject to a "final determination of the amount of this award" in a hearing on the amount of those damages. (R. 12, 25) (emphasis added). Buyer made a 59(e) motion, but it did not challenge these rulings, did not challenge Seller's assertion at trial that Seller was seeking the types of damages awarded by the Master, and did not make any "special damages"

² This Court also rejected Seller's error preservation arguments based on its view of the analytical significance that the May 2010 order did not determine the amount of damages with finality. As shown herein, Seller respectfully submits that this was error. To the extent that this matter informed this Court's ruling that Buyer's objections were timely, Seller's responsive arguments are incorporated herein as an additional argument that this Court erred in finding the damages issue was not tried by implied consent. The pendency of a hearing to determine the amount of damages did not change Buyer's obligation to raise its "special damages" argument in its 59(e).

arguments. (R. 43-48). The Master denied Buyer's 59(e) motion in a full written order (the January 2011 order) and specifically ruled *inter alia* that "[Buyer's] motion simply asserts that based on the evidence presented at trial, that the Court came to the wrong conclusion." (R. 7). The Master also noted that Buyer had not made any argument that the May 2010 order did not rule on all issues raised at trial, had ruled on issues not raised at trial, or was unclear, which are the established appellate-purpose grounds for 59(e) motions. (*Id.*).³

Buyer did not appeal the May 2010 order or the January 2011 order denying Buyer's 59(e) motion regarding the May 2010 order, because these orders are not set forth in the notice of appeal and were not attached to the notice of appeal. (See R. 1-4). Moreover, even if Buyer is assumed to have appealed these orders, it never made any appellate arguments against these orders. (See App.Br. *passim*). Therefore, for each of these reasons, those orders are the law of the case under axiomatic principles of law. *Judy v. Martin*, 674 S.E.2d 151, 153 & n.4 (S.C. 2009) (a "prior unappealed order [becomes] the law of the case"); *McCall v. State Farm Mut. Auto. Ins. Co.*, 597 S.E.2d 181, 184 (S.C. App. 2004) (same); see also *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544, 544 (S.C. 1970) (an un-appealed ruling in an appealed order is the law of the case and, right or wrong, requires affirmance).

In rejecting Seller's "law of the case" argument, this Court correctly noted that the May 2010 order did not include a final ruling on the amount of damages, correctly noted that the "amount" issue had been reserved for later determination, and then ruled as follows:

³ This Court ruled that the Master's 2016 order incorrectly stated that Seller's pleadings had requested the damages awarded by the Master. (Op. at 39). To the extent this is a basis for this Court's reversal of the damage award, it is in error for the following reasons: (1) the Master made this same statement in the May 2010 order, see R. 12; (2) Buyer did not challenge this statement in its 59(e) motion on the May 2010 order, see R. 43-48; and (3) Buyer did not appeal or argue against the rulings in the May 2010 order or the January 2011 order denying the 59(e) motion.

[N]either of those orders was a final ruling on the damages amount, given the Master expressly left the damages issue open for later determination. There was no final damages order to appeal until the 2016 Order [determining the amount of damages] was issued.

(Op. at 37) (emphasis added). In support of this analysis and ruling, this Court cited *Ex parte Wilson*, 625 S.E.2d 205 (S.C. 2005) and *Good v. Hartford Acc. & Indem. Co.*, 21 S.E.2d 209 (S.C. 1942). (Op. at 37-38).

The *Wilson* and *Good* cases involved the dismissal of appeals from orders that were not immediately appealable. It thus appears that this Court has misapprehended Seller's "law of the case" argument as being based on a failure to immediately appeal the May 2010 and January 2011 orders. This is not and never has been Seller's argument. To the contrary, Seller's argument is based on Buyer's failure to appeal those orders in conjunction with its current appeal of the 2016 order and its failure to argue against the rulings in the May 2010 and January 2011 orders. (Resp. Br. 2, 8-9, 10-11, 11-12). Therefore, the May 2010 and January 2011 orders are the "law of this case" and, right or wrong, require affirmance.⁴

B. This Court erred in ruling that a 59(e) motion on the 2016 order determining the amount of damages was not required to preserve Buyer's "failure to plead special damages" argument for appeal.

Buyer raised its "failure to plead special damages" argument for the first time in response to Seller's motion to determine the amount of damages awarded in the May 2010 order. This was untimely as argued by Seller, and this Court should reverse its contrary ruling as set forth above. Assuming Buyer timely raised this issue, it nevertheless remains unpreserved for appeal, because the Master did not rule on the issue explicitly (R. 3-4), and Buyer did not make a 59(e) motion to obtain an explicit ruling.

⁴ If this Court's analysis and ruling was based on something different, then Seller respectfully requests an amended opinion setting forth that analysis and ruling so that Seller can make an informed petition for rehearing.

This Court held that a 59(e) motion was unnecessary, because Buyer’s argument “was rejected when the Master awarded Seller special damages.” (Op. at 38). Respectfully, this Court’s ruling was in error for two reasons.

First, the 2016 order determined the amount of special damages – the Master awarded these damages in the May 2010 order. Buyer did not challenge this award in its 59(e) motion on the May 2010 order. Buyer did not appeal the May 2010 order or the January 2011 order denying the 59(e) motion. Buyer did not challenge the May 2010 order or the January 2011 order on appeal. Thus, the award of these damages is the law of the case.

Second, this Court supported its ruling by relying on the Supreme Court’s decision in *Spence v. Wingate*, 674 S.E.2d 169 (S.C. 2009). In *Spence*, the Court of Appeals held that the appellant’s argument was not preserved for appeal, because the trial court had not ruled on it explicitly, and the appellant did not make a 59(e) motion to obtain a ruling. *Id.* at 170.⁵ The Supreme Court disagreed and held that the trial court had, in fact, “explicitly” ruled on the appellant’s argument and, therefore, there was no need for a 59(e) motion. 674 S.E.2d at 170. Here, nothing in the Master’s 2016 order determining the amount of the damages previously awarded in the May 2010 order is an “explicit” ruling on Buyer’s special damages argument. The “*Spence* relationship” between the arguments made and the trial court’s ruling do not exist here. Therefore, the issue is not preserved for appeal.

Respectfully, this Court’s interpretation and application of *Spence* will effectively overrule the fundamental error preservation requirement that a 59(e) motion is required when a trial court does not rule explicitly on an issue, because any silent failure to award requested relief would obviate any need to make a 59(e) motion. See, e.g., *Noisette v. Ismail*, 403 S.E.2d 122, 124 (S.C.

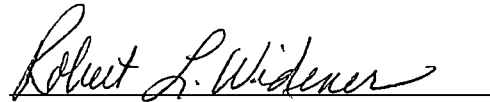
⁵ See also this Court’s opinion: *Spence v. Wingate*, 663 S.E.2d 70, 72 (S.C. App. 2008) (agreeing with respondent that “trial judge did not explicitly rule”).

1991) (if trial court “[does] not rule explicitly on [appellant’s] argument,” it is not preserved for appeal unless appellant makes a 59(e) motion); *McMaster v. Columbia Bd. of Zoning Appeals*, 719 S.E.2d 660, 662 n.3 (S.C. App. 2011) (trial court did “not specifically address” the issue and appellant did not make a 59(e) motion); *Chastain v. Hiltabidle*, 673 S.E.2d 826, 829-830 (S.C. App. 2009) (trial court did not “specifically rule on [an] issue” and appellant did not make a 59(e) motion); *Floyd v. Floyd*, 615 S.E.2d 465, 474 (S.C. App. 2005) (trial court “[did] not address the specific argument” and appellant did not make a 59(e) motion). Under this Court’s ruling, all of the foregoing cases are effectively overruled.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Brief of Respondent, which are incorporated herein verbatim, it is respectfully submitted that this Court should grant rehearing and issue an amended opinion that affirms the Master’s award of damages to Seller.

Respectfully Submitted,



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Columbia, SC
November 13, 2018

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CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, certify that I served the Respondents' Petition for Rehearing by placing a true and correct copy in the U.S. Mail, sufficient postage pre-paid to Appellant's counsel at the addresses shown below, on November 13, 2018:

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SC Court of Appeals

Re: Norwest Properties v. Michael Strebler
Appellate Case No. 2016-000636
Opinion No. 5582 - Submitted May 1, 2018 - Filed August 1 - 2018

Dear Ms. Kitchings:

Enclosed for filing, please find the original and seven copies of Respondents Michael T. Strebler and Lisa W. Strebler's Petition for Rehearing. Please file the Petition in your office and return the file stamped extra copy to me via our courier. The filing fee of \$50 is enclosed.

Thank you for your assistance in this matter.

Respectfully yours,

McNAIR LAW FIRM, P.A.



Robert L. Widener

RLW/as
Enclosures

cc: Kathleen Chewing Barnes Esquire
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