THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Circuit Court Case No. 2014-CP-40-0313

Opinion No. 5562 (S.C. Ct. App. filed May 23, 2018)
Court of Appeals Case No. 2016-000192

Supreme Court Case No. 2018-002047

Raymond G. Farmer, as Director of the South Carolina Department of Insurance,	Petitioner,
v.	
CAGC Insurance Company, in Liquidation,	Respondent.
South Carolina Property and Casualty Insurance Guaranty Association,	Intervenor-Petitioner,
v.	
CAGC Insurance Company, in Liquidation; Raymond G. Farmer, in his capacity as Ancillary Receiver of CAGC Insurance Company, in Liquidation; and CompTrustAGC of South Carolina a/k/a CompTrustAGC of South Carolina, Inc.,	Intervenor-Respondents.
Of whom CompTrustAGC of South Carolina a/k/a CompTrust AGC of South Carolina, Inc., is	Petitioner,
And CAGC Insurance Company, in Liquidation; Raymond G. Farmer, in his capacity as Ancillary Receiver of CAGC Insurance Company, in Liquidation; and South Carolina Property and Casualty Insurance Guaranty Association are	Respondents.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

By and through its undersigned counsel, pursuant to Rule 242(d)(1), SCACR, Petitioner, CompTrustAGC of South Carolina a/k/a CompTrustAGC of South Carolina, Inc. ("CompTrust"), hereby certifies that the South Carolina Court of Appeals filed its opinion in this matter (the "Subject Decision") on May 23, 2018 (App. pp. 590–97); that CompTrust timely petitioned the Court of Appeals for rehearing (App. pp. 598–628); and that the Court of Appeals has finally ruled on CompTrust's petition, denying it by order filed October 18, 2018. (App. pp. 629–30.)

QUESTIONS PRESENTED

Broadly speaking, this appeal arises in the context of ancillary proceedings that were initiated by Raymond G. Farmer, as Director of the South Carolina Department of Insurance (the "Director" and the "SCDOI," respectively), with respect to CAGC Insurance Company, in Liquidation ("CAGC"), an insolvent North Carolina-domiciled property and casualty insurer. More specifically, though, it arises out of the circuit court's decision—the circuit court's *correct* decision, CompTrust maintains—to dismiss CompTrust as a party to a claim for declaratory judgment that the South Carolina Property and Casualty Insurance Guaranty Association (the "Association") injected into the proceedings as intervenor. To be clear, the circuit court only dismissed *one party* to the

Association's claim, CompTrust; the circuit court did not dismiss the Association's claim outright.

In response to the Association's appeal of its dismissal—and after first raising a potentially dispositive question of appellate jurisdiction, which it raises again herein—CompTrust argued that the circuit court's decision could not be reversed because the Association, i.e., the appellant, the party whose burden it was to affirmatively overcome that decision's presumptive validity, had not properly preserved below and presented on appeal any reversible error on the part of the circuit court. (*See generally* App. pp. 551–70.) As set forth in the Subject Decision,[1] however, the Court of Appeals reversed the circuit court's dismissal of CompTrust, and in consequence, the following questions are now presented:

1. **Did the Court of Appeals err in reversing the circuit court on the basis of its finding that the circuit court did not have the "discretion to answer [a] question of first impression[2] with no factual record while ruling upon a Rule 21 [, SCRCP] motion"[3]?**

   (a) **Is this an improper basis for reversal of the circuit court where it does not correspond to any issue/argument that was properly before the Court of Appeals for decision on appeal?**

   (b) **Is this finding by the Court of Appeals correct?**

2. **Did the Court of Appeals err in reversing the circuit court on the basis**

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[1] (*See generally* App. pp. 590–97.)

[2] The question to which the court refers here is "whether an unincorporated business trust can be sued after it has voluntarily dissolved . . . ." (App. p. 595.)

[3] (App. p. 595.)

of its finding that the Association's addition of CompTrust as a party to its complaint for declaratory relief "meets the 'right to relief' necessary for proper joinder under Rule 20, SCRCP . . . [and that] [d]ismissing CompTrust at this early stage of the lawsuit jeopardizes the judicial economy Rule 21 and the Declaratory Judge Act strive to foster"[4]?

(a) Is this an improper basis for reversal of the circuit court where it does not correspond to any issue/argument that was properly before the Court of Appeals for decision on appeal?

(b) Is this finding by the Court of Appeals correct?

3. Is the Court of Appeals' statute of limitations analysis incorrect?

(a) Did the circuit court, as the Court of Appeals found, "mischaracterize the Association's declaratory judgment claim"[5]?

(b) Even if it were true that the relief sought in the Association's complaint calls for investigation into the LPT Agreement,[6] which it does not, did the Court of Appeals properly account for the "exclusive jurisdiction" of the WCC[7] and the fact that the WCC approved the LPT Agreement?

4. Did the Court of Appeals err in relying on the Association's statutory authority under S.C. Code Ann. § 38-31-60(d) and (l) to reverse the circuit court?

(a) Is this an improper basis for reversal of the circuit court where it does not correspond to any issue/argument that was properly before the Court of Appeals for decision on appeal?

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[4] (App. p. 595.)

[5] (App. pp. 595–96.)

[6] The "LPT Agreement" is the Self-Insurance Loss Portfolio Transfer Assumption Agreement, which is further explained in the below Statement of the Case.

[7] The "WCC" is the South Carolina Workers' Compensation Commission.

(b) **Even though, generally speaking, the Association is directed and authorized as stated in the referenced statutory provisions, are these provisions nonetheless irrelevant here, where the case actually pleaded by the Association simply does not implicate them?**

5. **Is it error for the Court of Appeals to reverse the circuit court by viewing the Association's complaint more broadly than even the Association itself asked the circuit court to view it?**

6. **Is it enough to reverse the circuit court that "the Association has alleged a real and substantial controversy concerning whether the Guaranty Act obligates it to pay the Transferred Claims"[8]?**

7. **Did the Association present any proper argument to the Court of Appeals "concerning an employer's residual liability under [S.C. Code Ann.] § 42-1-150 . . ."[9]?**

8. **Did the Court of Appeals overlook or misapprehend the effect of the law of the case doctrine on the circuit court's unappealed ruling regarding denial of the Association's motion for reconsideration?**

9. **Did the Court of Appeals' citation to *Jones v. State*, 382 S.C. 589, 677 S.E.2d 20 (2009), *abrogated on other grounds by Smalls v. State*, Op. No. 27764 (S.C. filed Feb. 7, 2018) (Shearouse Adv. Sh. No. 6 at 43), actually dispose of CompTrust's two-issue-rule argument?**

10. **Did the Court of Appeals err in finding that the Association could not have appealed the circuit court's ruling that the Transferred Claims were "covered claims" the Association was responsible for paying?**

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[8] (App. p. 596.)

[9] (App. p. 597.)

STATEMENT OF THE CASE

South Carolina law[10] requires that employers either insure, or provide the WCC with "satisfactory proof of . . . ability to pay directly," i.e., to self-insure, their liabilities arising under the Workers' Comp Law. § 42-5-20. With WCC approval, an employer may qualify as a self-insurer via membership in a group self-insurance fund. *Id.*; *see generally* S.C. Code Ann. Regs. 67-1501 to -1516. The Workers' Comp Law grants the WCC "exclusive jurisdiction" over these group self-insurers and prohibits them from being deemed "insurance companies" or being regulated by the SCDOI. § 42-5-20.

Though now dissolved (as it was effective April 1, 2011) and assetless, CompTrust, an unincorporated business trust, was established in 1982 for the specific purpose of fulfilling its member employers' obligations and liabilities under the Workers' Comp Law. It operated as a WCC-approved group self-insurer for over 25 years until it closed June 30, 2009. At that time, CAGC was authorized to do business in South Carolina and able to write workers' compensation insurance policies to employers formerly self-insuring via CompTrust. (R. pp. 179–83, 190–200, 211–12.)

Effective December 30, 2010—following review and approval by the WCC

[10] (*See generally* The South Carolina Workers' Compensation Law, S.C. Code Ann. §§ 42-1-10 to -19-50 (the "Workers' Comp Law").)

and the North Carolina Department of Insurance (the "NCDOI")[11]—all of CompTrust's assets and liabilities were transferred to/assumed by CAGC under the terms of the LPT Agreement,[12] and CAGC became solely responsible for administration and disposition of all claims—past, present, and future—on account of CompTrust's now-former liabilities (the "Transferred Claims").

CAGC was declared insolvent in its domiciliary state and ordered into liquidation effective January 17, 2014, and on that date, the Director petitioned the Richland County Court of Common Pleas to be appointed ancillary receiver of CAGC in South Carolina. (R. pp. 61–89.) By order filed March 10, 2014, the circuit court, the Honorable L. Casey Manning presiding, approved commencement of ancillary proceedings and appointed the Director ancillary receiver of CAGC. (R. pp. 1–4.)

On May 7, 2014, the Association moved to intervene in the ancillary proceedings and to join CAGC; the Director, as receiver of CAGC; and CompTrust as respondents to a claim it wished to assert therein[13] for the following judicial declaration:

> [T]hat it has no statutory obligation for any claims arising out of the Self-Insured Coverage [i.e., for any of the Transferred Claims] because such claims are not

[11] (R. pp. 322–57.)

[12] (R. pp. 202–09.)

[13] (R. pp. 213–60.)

> "covered claims" as defined by the [South Carolina Property and Casualty Insurance Guaranty] Act; CAGC did not issue any policy of insurance by assuming the Self-Insured Coverage under the LPT Agreement; and/or the LPT Agreement would be "insurance written on a retroactive basis to cover known losses" for which the Association is not responsible.

(R. p. 221.)

The circuit court, the Honorable Deandra G. Benjamin presiding, heard the Association's motion to intervene on June 9, 2014,[14] and granted it that same day. (R. pp. 5–7.) Thus the Association's declaratory judgment action was brought within the ancillary proceedings, its complaint directed at three respondents (CAGC; the Director, as receiver of CAGC; and CompTrust) and seeking the same declaratory relief as stated in its motion to intervene. (R. pp. 90–138.)

Notably, the Association's complaint for declaratory judgment does not actually raise any question as to whether the Transferred Claims were validly transferred from CompTrust to CAGC. (*See generally* R. pp. 95–101.)[15] Rather,

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[14] (R. pp. 421–26.)

[15] To be sure, though, CompTrust certainly maintains the transaction was/is valid and above reproach. As a duly qualified, registered group self-insurer under the Workers' Comp Law, CompTrust was effectively an "insurer" issuing "insurance" policies as defined by S.C. Code Ann. § 38-1-20 (25). *See S.C. Prop. & Cas. Ins. Guar. Ass'n. v. Carolinas Roofing & Sheet Metal Contractors Self-Ins. Fund*, 315 S.C. 555, 446 S.E.2d 442 (1994). It was the shared intention of the parties to the LPT Agreement to transfer all CompTrust policies to CAGC via novation—with both the WCC and the NCDOI understanding and approving the transaction as such—as found to have occurred in *Bowles v. BCJ Trucking Servs.*,

the Association framed its case in terms that necessarily assume the valid transfer of liability (for the Transferred Claims) to CAGC, asking that—and only that—the court declare it (the Association) not liable for the Transferred Claims notwithstanding their transfer to CAGC, and doing so solely on the basis of statutory-construction arguments with no bearing on the validity of the LPT Agreement or its effect insofar as CompTrust is concerned. Indeed, the Association's complaint does not actually seek any relief against CompTrust at all.

After its joinder, CompTrust moved to quash the Association's discovery requests and also for its dismissal from the action. (R. pp. 143–212, 261–79, 358–97.) The circuit court, the Honorable G. Thomas Cooper, Jr., presiding, heard CompTrust's motions on September 18, 2015, and granted them by order filed September 30, 2015, dismissing CompTrust. (R. pp. 8–23, 427–82.) Following the circuit court's denial of its motion to reconsider,[16] the Association appealed.

As stated above, the Court of Appeals reversed the circuit court's dismissal of CompTrust via the Subject Decision (App. pp. 590–97) and thereafter denied CompTrust's timely petition for rehearing (App. pp. 598–630.) This petition for a writ of certiorari timely follows.

Inc., 172 N.C. App. 149, 615 S.E.2d 724 (N.C. Ct. App. 2005), as well as in CAGC's domiciliary proceedings. (*See* R. pp. 368–81, 383–86, 388–89.)

ARGUMENT

1. The Court of Appeals erred in reversing the circuit court on the basis of its finding that the circuit court did not have the "discretion to answer [a] question of first impression[17] with no factual record while ruling upon a Rule 21 motion."[18]

(a) This is an improper basis for reversal of the circuit court because it does not correspond to any issue/argument that was properly before the Court of Appeals for decision on appeal.

While the appellate court "may *affirm* any ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal[,]"[19] it "may not, of course, *reverse* for any reason appearing in the record." *I'On, L.L. C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000) (emphasis in original); *see also State v. Roach*, 377 S.C. 2, 3, 659 S.E.2d 107, 107 (2008) (noting that issues not preserved for review should not be addressed); *Elam v. S. C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("South Carolina appellate courts do not recognize the 'plain error rule,' under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party."); *id.* at 25, 602 S.E.2d at 780 (instructing that South Carolina's error

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[16] (R. pp. 58–60, 398–406.)

[17] Again, the question to which the Court of Appeals refers here is "whether an unincorporated business trust can be sued after it has voluntarily dissolved . . . ." (App. p. 595.)

[18] (App. p. 595.)

[19] Rule 220(c), SCACR (emphasis added).

preservation requirements are "mandatory"); *Hendrix v. E. Distrib., Inc.*, 320 S.C. 218, 464 S.E.2d 112 (1995) (issue not preserved for review before the Court of Appeals should not have been addressed and thus portion of opinion was vacated by Supreme Court). Indeed, an appealed order comes to the appellate court with a presumption of correctness, with the burden on the appellant to demonstrate reversible error to the appellate court, which is obliged to reverse when error is duly called to its attention, but is not required—or even empowered—to figure out on its own whether error exists. *McCall v. IKON*, 380 S.C. 649, 659–60, 670 S.E.2d 695, 701 (Ct. App. 2008); *Watson v. Underwood*, 407 S.C. 443, 452, 756 S.E.2d 155, 160 n.9 (Ct. App. 2014) ("'[A]ppellants have the responsibility to identify errors on appeal, not the [c]ourt.' '[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.'") (citations omitted). It is thus error for the Court of Appeals to reverse a circuit court decision unless the appellant carries the affirmative burden of both preserving below[20] and properly presenting on appeal—in the appellant's principal appellate brief[21]—argument demonstrating reversible error on

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[20] This, of course, requires issues/arguments to be raised to and ruled on by the lower court. *Elam*, 361 S.C. at 23, 602 S.E.2d at 780 ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.").

[21] *Jinks v. Richland County*, 355 S.C. 341, 344, 585 S.E.2d 281, 283 n.3 (2003) (an issue which is not argued in the brief is deemed abandoned and

the part of the circuit court.

The Association did not properly preserve below or present to the Court of Appeals any argument for reversal of the circuit court on this basis;[22] accordingly, the Court of Appeals erred in reversing the circuit court on this basis.

(b) This finding by the Court of Appeals is incorrect.

The only legal authority that the Court of Appeals cites in support of this finding is *Evans v. State*, 344 S.C. 60, 543 S.E.2d 547 (2001). And indeed *Evans* does support the "general rule" that "important questions of novel impression should not be decided on a . . . motion to dismiss . . . [and] [i]nstead, a novel issue is best decided in light of the testimony to be adduced at trial." *Id.* at 68, 543

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precludes consideration on appeal); *First Savings Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (same); *Glasscock, Inc. v. US. Fidelity & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) ("[A]n argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief."); *Cont'l Ins. Co. v. Shives*, 328 S.C. 470, 474, 492 S.E.2d 808, 811, n.2 (Ct. App. 1997) (an issue not raised in the appellant's principal brief may not be raised via a reply brief); *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993) ("The partners make several new arguments relating to estoppel and ratification in their reply brief. However, these arguments are not properly before this Court because an appellant cannot make new arguments for reversal in a reply brief.") (citation omitted); *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court."); *In the Interest of Bruce O.*, 311 S.C. 514, 515, 429 S.E.2d 858, 858 n.1 (Ct. App. 1993) ("This court will not grant relief on an alleged error asserted for the first time on appeal. Further, an appellant may not use oral argument as a vehicle to argue issues not argued in the appellant's brief.").

[22] (*See generally* R. pp. 9–23, 400–05; App. pp. 521–42.)

S.E.2d at 551. More importantly, though, the *Evans* Court followed its statement of the general rule with this: "However, where the dispute is not as to the underlying facts but as to interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss for failure to state a claim." *Id.* (emphasis added).

Here, the circuit court certainly had discretion to determine that the matter before it for decision presented a question of law, not of disputed fact, and that development of the record would not be helpful. And the Court of Appeals did not merely find that the circuit court "abused" discretion that it had; rather, it found that the circuit court did not even have certain discretion to begin with. In other words, Court of Appeals has not merely curbed some supposed "abuse" of the circuit court's discretion but rather restricted the scope of the circuit court's discretion so as to effectively abridge its subject matter jurisdiction. *See Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237–38, 442 S.E.2d 598, 600 (1994) (quoting *Bank of Babylon v. Quirk*, 192 Conn. 447, 472 A.2d 21, 22 (1984)) ("Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong.'"). Certainly, the circuit court had the power to hear and determine the legal issues presented to it and, along with that power, the discretion to determine whether it was appropriate to rule as a matter of law or if development of the record was needed. The Court of Appeals' determination

that the circuit court did not even have discretion to make the threshold determination as to whether it could appropriately rule as a matter of law is erroneous and, if it stands, effectively announces a new rule that the circuit court can never rule on a novel issue as a matter of law without development of the record, because the circuit court will be left without discretion to do otherwise.

2. The Court of Appeals erred in reversing the circuit court on the basis of its finding that the Association's addition of CompTrust as a party to its complaint for declaratory relief "meets the 'right to relief' necessary for proper joinder under Rule 20 . . . [and that] [d]ismissing CompTrust at this early stage of the lawsuit jeopardizes the judicial economy Rule 21 and the Declaratory Judge Act strive to foster."[23]

(a) This is an improper basis for reversal of the circuit court because it does not correspond to any issue/argument that was properly before the Court of Appeals for decision on appeal.

In making this finding, the Court of Appeals first examines certain federal authority in search of guidance in interpreting Rule 21 and concludes that misjoinder under Rule 21 is analogous to a failure to satisfy the preconditions for permissive joinder under Rule 20(a). (App. pp. 594–95.) The Court then cites certain provisions of the Declaratory Judgment Act, most notably, S.C. Code Ann. § 15-53-80, which requires that, "[w]hen declaratory relief is sought[,] all persons . . . be made parties who have or claim any interest which would be affected by the declaration . . . ." (App. p. 595.)

[23] (App. p. 595.)

The Association did not properly preserve below or present to the Court of Appeals any argument for reversal of the circuit court on this basis;[24] accordingly, the Court of Appeals erred in reversing the circuit court on this basis. (*See* authorities cited in Argument 1(a), *supra*.)

(b) This finding by the Court of Appeals is incorrect.

While the Court of Appeals finds that the Association's addition of CompTrust to its complaint for declaratory relief "meets the 'right to relief' necessary for proper joinder under Rule 20 . . . ," the court's finding does not account for the entirety of the language in Rule 20(a), language the court itself had indeed cited on the preceding page of the Subject Decision, specifically, this language: "As to joining parties as defendants, Rule 20(a), SCRCP, states: 'All persons may be joined in one action as defendants if there is asserted *against them* . . . any right to relief in respect of or arising out of the same transaction . . . ." (App. p. 595 (emphasis added).)

It is indisputable that the Association's complaint alleges no claim whatsoever *against CompTrust*. (*See generally* R. pp. 95–101.) All the Association's complaint asks for is a declaration that the Association itself is not obligated for the "covered claims" (i.e., the Transferred Claims)—and, at that, it bases its alleged right to this determination solely on an argument of statutory

[24] (*See generally* R. pp. 9–23, 400–05; App. pp. 521–42.)

construction that requires no factual inquiry. The Association's complaint does not ask for a declaration that CompTrust, or any other party, is obligated for the Transferred Claims, and it makes no challenge to the validity of the LPT Agreement.

This point also proves the Court of Appeals' reliance on § 15-53-80 to be misplaced. This statute directs only that those persons "who have or claim any interest which *would be* affected by the declaration" are to be made parties to an action for declaratory judgment. *Id.* (emphasis added). Again, it is indisputable that the Association's complaint does not actually seek any relief that "would . . . affect" any interest of CompTrust. (*See generally* R. pp. 95–101.)

3. The Court of Appeals' statute of limitations analysis is incorrect.

(a) The circuit court did not, as the Court of Appeals found, "mischaracterize the Association's declaratory judgment claim."[25]

To the contrary, the Court of Appeals' characterization of the Association's declaratory judgment action is mistaken. According to the Court of Appeals, the Association "brought a declaratory judgment action to determine who is responsible for paying claims presented to it pursuant to the Guaranty Act." (App. p. 596.) Again, as explained above, it is simply not correct that the Association's declaratory judgment action seeks a determination of "who" is responsible for the

[25] (App. pp. 595–96.)

claims; the Association's complaint asks only whether "it" (the Association) is responsible, no more. (*See generally* R. pp. 95–101.)

(b) Even if it were true that the relief sought in the Association's complaint calls for investigation into the LPT Agreement, which it does not, the Court of Appeals did not properly account for the "exclusive jurisdiction" of the WCC and the fact that the WCC approved the LPT Agreement.

As stated above, § 42-5-20 grants the WCC 'exclusive jurisdiction' over group self-insurers, and the WCC—as well as, for that matter, the NCDOI, i.e., the regulatory authority in CAGC home state—reviewed and approved the LPT Agreement at the time it was entered. (R. pp. 322–57.) Thus, the regulatory authority expressly identified by the State of South Carolina as having *exclusive* jurisdiction with respect to CompTrust's affairs knew about and approved of the LPT Agreement by December 2010, yet the Subject Decision is to the effect that another state agency (i.e., an agency other than the WCC, and without the WCC's regulatory authority), the Association, can come in more than three years later and effectively disapprove of the LPT Agreement. This is error.

4. The Court of Appeals erred in relying on the Association's statutory authority under § 38-31-60(d) and (l) to reverse the circuit court.

(a) This is an improper basis for reversal of the circuit court because it does not correspond to any issue/argument that was properly before the Court of Appeals for decision on appeal.

The Association did not properly preserve below any argument for reversal

of the circuit court on this basis;[26] accordingly, the Court of Appeals erred in reversing the circuit court on this basis. (*See* authorities cited in Argument 1(a), *supra*.)

(b) Even though, generally speaking, the Association is directed and authorized as stated in the referenced statutory provisions, these provisions are nonetheless irrelevant here, where the case actually pleaded by the Association simply does not implicate them.

According to the Court of Appeals, these provisions direct the Association to "'investigate claims brought against [it]'" and to "'perform any other acts necessary or proper to effectuate purpose of [the Guaranty Act],'" and thus "allow[] [the Association] to scrutinize the LPT Agreement, an endeavor that would be impaired by CompTrust's absence." (App. p. 596.) Even assuming, *arguendo*, these provisions direct and empower the Association as the court states, it does not change the fact that, again, the Association's complaint in this particular case does not actually call for any scrutiny of the LPT Agreement in the first place. (*See generally* R. pp. 95–101.)

5. It is error for the Court of Appeals to reverse the circuit court by viewing the Association's complaint more broadly than even the Association itself asked the circuit court to view it.

In finding that the circuit court erred to the extent it dismissed CompTrust under Rule 12(b)(6), SCRCP, "for failure to state a claim," the Court of Appeals

[26] (*See generally* R. pp. 9–23, 400–05.)

cited the Rule 12(b)(6) standard—indicating that the question asked of it on appeal was "whether the complaint would entitle the plaintiff to relief under any theory"—and it found "the Association's complaint states a valid claim." (App. p. 596.) While this may be an accurate statement of the standard to be applied by the circuit court in the first instance when presented with a motion under Rule 12(b)(6), it is of no moment on appeal unless the appellant has properly preserved some issue/argument relating to the circuit court's application of the standard. The Association has preserved no such argument here,[27] and it is error for the Court of Appeals to reverse the circuit court by viewing the Association's complaint more broadly than even the Association itself asked the circuit court to view it—for instance, by somehow construing the claim for relief that was actually set forth in the Association's complaint to encompass a claim in challenge to the validity of the LPT Agreement or otherwise against CompTrust (which, again, the Association's complaint does not, though any notion to the contrary is not preserved in any event). (*See* authorities cited in Argument 1(a), *supra.*)

6. It is not enough to reverse the circuit court that "the Association has alleged a real and substantial controversy concerning whether the Guaranty Act obligates it to pay the Transferred Claims."[28]

The circuit court did not dismiss the Association's complaint altogether, it

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[27] (*See generally* R. pp. 9–23, 400–05.)

[28] (App. p. 596.)

only dismissed CompTrust as a party. It is not enough to reverse the circuit court's dismissal of CompTrust to find that the Association has alleged a claim that can be adjudicated under the Declaratory Judgment Act; the question is whether the Association's complaint alleges a claim *for relief against CompTrust*. And, again, the Association's complaint simply does not allege any such claim, as the circuit court correctly found. (*See* R. p. 15 ("The [Association's] Complaint makes no allegations against the CompTrust; it merely sets forth the facts outlined herein. The Complaint asserts no cause of action against the CompTrust and does not reference the CompTrust in its prayer for relief.").)

7. The Association did not present any proper argument to the Court of Appeals "concerning an employer's residual liability under § 42-1-150 . . . ."[29]

The Court of Appeals "also f[ound] it was premature to toss out CompTrust on grounds of futility given the Association's argument concerning an employer's residual liability under § 42-1-150 . . . ." (*Id.*) But in fact the Association made no such argument in its principal brief;[30] accordingly, this is not a proper basis for reversal of the circuit court. (*See* authorities cited in Argument 1(a), *supra*.)

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[29] (App. p. 597.)

[30] (*See generally* App. pp. 521–42.)

8. The Court of Appeals overlooked or misapprehended the effect of the law of the case doctrine on the circuit court's unappealed ruling regarding denial of the Association's motion for reconsideration.

The circuit court denied the Association's motion for reconsideration for two reasons:

> [(1)] After careful consideration of the record in this case and the submissions of the parties, the Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or facts no appropriately considered. [(2)] *In addition, the Court was not served with a copy of the Association's [motion to reconsider] as is required under Rule 59(g) of the South Carolina Rules of Civil Procedure.*
>
> Accordingly, this Court hereby **DENIES** [the motion] . . . .

(R. p. 60 (bold, all-capitals type in original) (italics added for emphasis).)

The Association itself raised in its principal appellate brief the rule that "an unappealed ruling, 'right or wrong,' is the law of the case." (App. p. 533, n.3 (attempting to assert this rule against CompTrust, arguing that CompTrust's "[f]ailure to seek relief of the Order of Judge Benjamin [granting the Association's motion to join CompTrust] ma[d]e the ruling the 'law of the case.' *See Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160–61, 177 S.E.2d 544, 544 (1970) (holding that an unappealed ruling, 'right or wrong,' is the law of the case).").)

Thus the question is not whether the circuit court was "right or wrong" in

ruling that Rule 59(g) required the Association to "serve" its motion for reconsideration on the court, but rather this: What is the impact of this ruling where it is conclusively established as the law of the case? Consequently, the Court of Appeals' citation in the Subject Decision to *Gallagher v. Evert*, 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002) is misplaced. (App. p. 594.) In other words, *Gallagher* is of no moment because what is *the law of the instant case*–that Rule 59(g) required the Association to "serve" its motion for reconsideration on the circuit court and the Association failed to do so–was not the law of the case in *Gallagher*. Proper analysis of this argument requires that the conclusively established law of the case—the law of *this* case—be followed. And it is the law of this case that a Rule 59(e) motion for reconsideration is not properly made unless it is served on the presiding judge.

Timely service of a notice of appeal is a jurisdictional requirement, and it is only proper service of a motion under Rule 59(e) that stays the time for serving a notice of appeal. *See Wells Fargo Bank, NA. v. Fallon Props. S.C., LLC*, 413 S.C. 642, 646—47, 776 S.E.2d 575, 577—78 (Ct. App. 2015); *Elam*, 361 S.C. at 14—15, 602 S.E.2d at 775; *id.* at 20, 602 S.E.2d at 778. Because it is the law of this case that the Association did not properly serve its motion for reconsideration, the time for the Association to appeal was not stayed by its motion for reconsideration, and appellate jurisdiction is lacking because the Association did not timely appeal.

And in the absence of appellate jurisdiction, the Court of Appeals' only proper option was to dismiss the appeal.

9. The Court of Appeals' citation to *Jones*, 382 S.C. 589, 677 S.E.2d 20, did not actually dispose of CompTrust's two-issue-rule argument.

While it is true, as the Court of Appeals noted, that the *Jones* Court evaluated the merits of the State's appeal despite the PCR judge's dismissal of the State's motion for reconsideration for failure to comply with Rule 59(g), the *Jones* Court did so without ever actually addressing the two-issue-rule argument CompTrust duly raised to it. (*See generally* App. pp. 563–66.) Accordingly, *Jones* does not stand for the rejection of CompTrust's argument; it is simply silent on the point, and the Court of Appeals should have addressed CompTrust's argument distinctly as it is necessary to the decision of this appeal and fairly arises upon the record. *See* Rule 220(b), SCACR.

10. The Court of Appeals erred in finding that the Association could not have appealed the circuit court's ruling that the Transferred Claims were "covered claims" the Association was responsible for paying.

Addressing the circuit court's denial of the Association's motion for summary judgment, the Subject Decision states as follows:

> In denying the Association's motion for summary judgment, the circuit court found the Transferred Claims were "covered claims," therefore the Association was responsible for their payment. The Association did not—and could not—appeal this interlocutory ruling. *Ballenger v. Bowen*, 313 S.C. 476, 477–78, 443 S.E.2d 379, 380 (1994) ("A denial of a motion for summary

> judgment decides nothing about the merits of the case [and] does not establish the law of the case . . . [t]herefore, an order denying a motion for summary judgment is not appealable.").

(App. p. 593.)

While the Court of Appeals is certainly correct that the Association "did not" appeal the circuit court's ruling that the Transferred Claims were "covered claims" the Association was responsible for paying, it erred in finding that the Association "could not" have done so. To be sure, when it comes to the mere denial of a motion for summary judgment, not only is such a ruling not immediately appealable, it is never appealable. *See Ballenger*, 313 S.C. at 477–78, 443 S.E.2d at 380. But South Carolina precedent instructs that such rulings are only granted the unique status of being completely invulnerable to appeal because, when all the lower court has done is merely deny a motion for summary judgment, it has not really done anything so significant as to warrant appellate review, the lower court having decided nothing about the merits of the case, having not established the law of the case, and having, as a practical matter, done no more than determine that the case ought to proceed to trial, without any prejudice to any party in regard to the claims/defenses to be tried. *See, e.g., Id.* Here, however, in view of the plain language of the circuit court's order, the foregoing rationale (for the nonappealability of the mere denial of summary judgment) cannot be reconciled with the substance and effect of the circuit court's ruling.

It is substance and effect, not labeling, that controls the classification of order as appealable or not. *See Dorn v. Cohen*, 418 S.C. 126, 138, 791S.E.2d 313, 319 (2016); *see also Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011). Here, the substance and effect of the Association's motion was to place squarely before the circuit court a question not of disputed fact, which the court could not have properly decided, but of law, which indeed it did properly decide—and not just any legal question, either, but the one which the Court of Appeals itself recognized to be "the core of this case." (App. p. 591.)

And so it was, with this question properly put to it, that the circuit court ruled against the Association on the basis of its finding that the Transferred Claims were "covered claims" the Association was responsible for paying. (App. p. 593 ("In denying the Association's motion for summary judgment, the circuit court found the Transferred Claims were 'covered claims,' therefore the Association was responsible for their payment.") (emphasis added).) Clearly, unlike a mere denial of summary judgment, the substance and effect of the circuit court's ruling here did indeed decide something about the merits of this case—indeed, it decided the case on the merits outright, establishing not just the law of the case, but that as a matter of law the Association had lost the case, and it is error for the Court of Appeals to deem the circuit court's ruling to be something less than dispositive.

CONCLUSION

For the foregoing reasons, CompTrust asks this Honorable Court to review the Subject Decision via issuance of a writ of certiorari to the Court of Appeals, to reverse the Subject Decision, and to affirm the circuit court's dismissal of CompTrust.

Respectfully submitted,
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Charleston, South Carolina

Dated: 12/10/18

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

DEC 1 3 2018

S.C. SUPREME COURT

Appeal from Richland County
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Circuit Court Case No. 2014-CP-40-0313

Opinion No. 5562 (S.C. Ct. App. filed May 23, 2018)
Court of Appeals Case No. 2016-000192

Supreme Court Case No. 2018-002047

Raymond G. Farmer, as Director of the South Carolina Department of Insurance,	Petitioner,
v.	
CAGC Insurance Company, in Liquidation,	Respondent.
South Carolina Property and Casualty Insurance Guaranty Association,	Intervenor-Petitioner,
v.	
CAGC Insurance Company, in Liquidation; Raymond G. Farmer, in his capacity as Ancillary Receiver of CAGC Insurance Company, in Liquidation; and CompTrustAGC of South Carolina a/k/a CompTrustAGC of South Carolina, Inc.,	Intervenor-Respondents.
Of whom CompTrustAGC of South Carolina a/k/a CompTrust AGC of South Carolina, Inc., is	Petitioner,
And CAGC Insurance Company, in Liquidation; Raymond G. Farmer, in his capacity as Ancillary Receiver of CAGC Insurance Company, in Liquidation; and South Carolina Property and Casualty Insurance Guaranty Association are	Respondents.

PROOF OF SERVICE

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Petitioner, CompTrustAGC of South Carolina a/k/a CompTrustAGC of South Carolina, Inc., hereby certify that the foregoing **PETITION FOR A WRIT OF CERTIORARI** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on December 10, 2018, properly posted for delivery to the following addressees:

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I further certify that a copy of the foregoing petition was on this date, December 10, 2018, filed with the South Carolina Court of Appeals by depositing the same in the U.S. Mail.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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