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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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. Appellate Case No. 2016-000636
Case No. 2005-CP-40-6132

Norwest Properties, LLC, ...Respondent,

v.

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

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

PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 18, 2018.

QUESTIONS PRESENTED

1. The Court of Appeals erred in reversing the Master's award of damages to Seller, because the matter was tried by implied consent, and Buyer's appellate arguments against the award were not preserved for appeal.

2. The Court of Appeals erred in finding the issue of awarding damages to Seller was not tried by implied consent.

3. The Court of Appeals erred in ruling that "implied consent" arises only when there is an "extensive discussion" at trial without objection.

4. Assuming South Carolina law imposes an absolute "extensive discussion" requirement for trial by implied consent, the law should be overruled or modified

5. The Court of Appeals erred in finding that Buyer's appellate arguments on the failure to plead special damages were preserved for appeal, because those arguments were not timely raised to the Master

6. The Court of Appeals erred in finding that Buyer's appellate arguments on the failure to plead special damages were preserved for appeal, because the Master did not rule on those arguments and Buyer did not make a motion to obtain a ruling.

7. The Court of Appeals erred in reversing the Master's award of damages to Seller, because Buyer failed to appeal or challenge the orders awarding those damages, thereby making those orders the law of this case.

STATEMENT OF THE CASE

This is a breach of contract case. Respondent (Buyer) contracted to buy an undeveloped residential lot from Petitioners (Seller). A survey revealed that improvements by an adjoining landowner (Defendant Mitchell) slightly crossed the property line. Buyer filed a lis pendens, sued for specific performance, and sought removal of the encroaching improvement. (See R. 30-34). Seller appeared and defended *pro se* throughout the trial proceedings. (R. 42).

The master-in-equity (Master) tried the case and issued his Merits Order in favor of Seller, finding that Buyer breached the contract and Seller was entitled to damages against Buyer, with the amount of those damages to be determined at a later hearing. (R. 11-25, *passim*). Buyer made a 59(e) motion, which the Master denied in his 59(e) Order. (R. 5-9).

The Master held a damages hearing and issued a Damages Order that determined the amounts of the damages previously awarded in the Merits Order and reaffirmed in the 59(e) Order. (R. 3-4). Buyer did not file a 59(e) motion on the Damages Order. Buyer appealed the Damages Order but not the Merits Order or the 59(e) Order. (R. 1-4; App. Br. *passim*).

The Court of Appeals reversed the Master's award of damages. (Appx. 8-14). Seller petitioned for rehearing. (Appx. 15-26). The Court of Appeals denied rehearing. (Appx. 27).

INTRODUCTION & SUMMARY OF ARGUMENT

The Master awarded Seller $40,388.00 in damages for property taxes, homeowner association fees, carrying costs, and litigation costs suffered as a result of Buyer's fraudulent inducement of the sales contract and meritless lawsuit to enforce the sales contract. (R. 3-4; 12, 17-25; 49-51). The Court of Appeals reversed except for $350 in litigation costs. (Appx. 8-14, *passim*). This was error as summarized below.

It is undisputed that Seller did not breach the sales contract. (R. 16-17). It is also undisputed that Buyer fraudulently induced Seller to enter into the contract and then breached the contract. (R. 17, 19-20 & n.3). The contract specifically limited Buyer's remedies for the property line encroachment to either terminating the contract or closing the sale as scheduled. (R. 11, 14-16, 23-25). Buyer nevertheless sued for specific performance of the fraudulently induced contract and sought remedies expressly prohibited by the contract, thereby causing Seller to suffer the damages awarded by the Master and necessitating Seller's *pro se* defense. (*Id.*, see also R. 4; 5, 7, 8).

Seller's Answer sought damages but did not specify the types of damages. (R. 42). At trial, Seller identified the types of damages being sought and testified that Buyer had caused him to suffer these damages. (R. 124). Buyer did not object to this, did not complain that the damages were "special damages," did not complain that the damages had not been pleaded in the Answer, and did not claim any prejudicial surprise resulting from Seller's testimony. (R. 124-152, *passim*).

The Master awarded the damages sought by Seller. (R. 12, 25). Buyer filed a 59(e) motion but, again, Buyer did not raise any "special damages" or "failure to plead" issues, did not claim any prejudicial surprise from Seller's claim, and did not claim any surprise from the Master's award of the damages. (R. 43-48). The Master denied Buyer's 59(e) motion. (R. 5-9).

The foregoing, undisputed facts establish that the damages issue was tried by implied consent. The Court of Appeals reversed, erroneously ruling that implied consent arises only if there is an "extensive discussion" of the un-pleaded issue at trial. This was error, because the Court of Appeals misconstrued and misapplied this Court's opinion in *FOP* II, *infra*, as imposing an absolute "extensive discussion" requirement. Moreover, under the particular facts of this case, there was nothing to discuss further absent Buyer objecting to or otherwise addressing Seller's clear and explicit assertion at trial that he suffered and was seeking an award of those damages.

Buyer raised the "special damages" and "failure to plead" issues for the first time at the damages hearing. (R. 176). The Court of Appeals ruled that raising the issue at the damages hearing was timely. This ruling violates the fundamental error preservation rule that issues must be raised at the first opportunity. Here, Buyer had the unfettered opportunity to raise this issue at trial or, at the very least, after receiving the Merits Order that awarded these damages.

The Master did not rule expressly on Buyer's "special damages" and "failure to plead" arguments in the Damages Order. (R. 3-4). Buyer did not make a 59(e) motion to obtain a ruling. The Court of Appeals ruled that the Damages Order sufficiently ruled on the "special damages" issue. This ruling violates the fundamental error preservation rule that a 59(e) motion must be made if the appealed order does not rule explicitly on an issue raised to the court.

On appeal, Buyer did not appeal or challenge the Merits Order or the related 59(e) Order. (R. 1-4; App. Br., *passim*). The award of damages in the Merits Order therefore became the law of this case, leaving only the potential issue of the amounts of damages awarded. The Court of Appeal disagreed, ruling that these orders were not immediately appealable. This was error, because these orders clearly were appealable after the final judgment entered under Damages Order, but Buyer did not appeal them or challenge them on appeal.

The Court of Appeals reversed the Master upon the grounds that Seller's *pro se* Answer failed to plead the damages awarded by the Master, and this damages issue was not tried by implied consent. The Court of Appeals did not address any other issues raised on appeal. This petition therefore does not address these un-addressed issues, but Seller incorporates the opposing arguments made in his Brief of Respondent. (See App. Br. 7-11; Resp. Br. 10-15; and Reply Br. 7-12).

ARGUMENT

I. The Court of Appeals erred in reversing the Master's award of damages to Seller, because the matter was tried by implied consent, and Buyer's appellate arguments against the award were not preserved for appeal.

It is axiomatic that if a party fails to object to evidence on an issue not raised in the pleadings, the issue is tried by implied consent and must be treated in all respects as if it were raised in the pleadings. *E.g., Upchurch v. Upchurch*, 624 S.E.2d 643, 648 (S.C. 2006); *McComb v. Conard*, 715 S.E.2d 662, 667 (S.C. App. 2011). As shown below, Seller's opening statement and trial testimony raised all damage issues now challenged by Buyer, but Buyer did not object at trial. Thus, the issue was tried by implied consent and, therefore, Buyer's "special damages" and "failure to plead" arguments have no merit.

A. Background Facts and Procedural History on Implied Consent Issue

Seller's answer sought an award of damages but did not specify the types of damages sought. (R. 42). Buyer never complained about this lack of specificity. At trial, Seller argued in his opening statement that Seller "should be awarded damages." (R. 84). Buyer made no response to this argument. (R. 82-87). Also at trial, during a colloquy with the Master, Seller stated that his answer sought an award of damages, and he testified that he was seeking damages for "financial carrying costs, property taxes, homeowner's association fees, maintenance costs, and costs of administration.". (R. 124). Buyer did not object to this testimony or dispute Seller's assertion that his answer requested these damages. (R. 124-125). In particular, Buyer did not argue that Seller's claimed damages were "special damages" that could not be awarded because Seller did not plead

"special damages," nor did Buyer argue that any failure to plead caused prejudicial surprise to Buyer that prevented it from addressing the merits of Seller's claimed damages. (R. 124-125).[1]

The Master issued his Merits Order and rejected Buyer's claims. (R. 11-25). The Master awarded damages to Seller under the following analysis:

1. "[Seller] in his Answer requested costs and damages, including property taxes on the property at issue . . . , as well as the holding costs of such property." (R. 12).

2. "Such costs and damages are supported by Paragraph 20 of the Contract between [Buyer] and [Seller]." (R. 12).

3. Buyer, not Seller, breached the parties' contract. (R. 12-24, *passim*).

4. *[Seller is] awarded* his costs and damages in this case . . . [and Seller] shall submit those actual amounts with supporting documentation to the Court for final determination of the *amount* of this award." (R. 25) (emphasis added).

Buyer filed a 59(e) motion to reconsider, alter, or amend the judgment granted in the Merits Order. (R. 43). The only ground for reconsideration was Buyer's assertion that the Master erred in not granting specific performance to Buyer. (R. 44-48). Buyer did not mention or otherwise challenge the Master's award of damages to Seller, nor did Buyer dispute any of the Master's analysis in awarding these damages to Seller. (R. 43-48, *passim*). In particular, Buyer did not argue that the

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[1] The following colloquy occurred between the Master and Seller, with the Seller testifying to the types of damages being sought at trial (R. 124) (emphasis added):

> [Seller]: [I]s it appropriate in my testimony to ask for damages, as I sit here?
>
> THE COURT: Well - - *in your Pleadings did you ask for damages*?
>
> [Buyer]: *Yes, I did*, Your Honor.
>
> THE COURT: Okay, you can go ahead and talk about it.
>
> [Seller]: *Defendant* would like - - *in the Pleadings has asked for damages*. Defendant has been damaged to the extent that he has costs of ownership beyond August 31, 2005, the contractual closing date. These costs are *financial carrying costs, property taxes, homeowner's association fees, maintenance costs, and costs of administration*. And further, the defendant requests damages for resources expended in defending this action.
> Thank you, Your Honor.

awarded damages were "special damages" that were not pleaded as required by law, nor did it argue that any failure to plead caused prejudicial surprise to Buyer that prevented it from addressing the merits of Seller's claimed damages. (*Id.*).

The Master denied Buyer's 59(e) motion in his written 59(e) Order with a detailed analysis and rejection of Buyer's 59(e) grounds. (R. 5-9). Thereafter, pursuant to the reaffirmed Merits Order, Seller moved to determine the amount of the damages awarded in the Merits Order. (R. 49-51). The Master held a hearing on this motion (R. 172-183). At this hearing, Buyer handed up a memorandum in opposition to Seller's motion. (R. 176; see memo at R. 54-77). For the very first time in this case, Buyer raised the "special damages" and "failure to plead" issue upon which the Court of Appeals eventually reversed the Master.[2] Buyer argued that the damages sought by Seller are "special damages" that must be but were not pleaded with specificity. (R. 176-177; see also R. 55-56, 57, 59). Seller responded that he testified to these damages at trial without objection, and it was inappropriate to challenge the award of these damages at this time and in response to a motion to determine the amount of the awarded damages. (R. 175-176; 181-182). Notably, Buyer never argued that the failure to plead these damages resulted in prejudicial surprise that prevented it from the addressing the issue on the merits.

The Master granted Seller's motion in his Damages Order. (R. 3-4). The Master did not rule specifically on Buyer's "special damages" and "failure to plead" issue Buyer appealed immediately without making a 59(e) motion to obtain a specific ruling.

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[2] Seller filed his answer in March 2009, asserting a claim for costs and damages. (R. 40-42). Buyer never questioned or challenged this claim prior to trial. This case was tried in November 2009 – Buyer did not question or challenge Seller's claim for damages at trial. (R. 78-153). In May 2010, the Master issued his Merits Order and awarded the damages to Seller. (R. 11-25). Buyer moved to reconsider in June 2010 and a hearing was held in November 2010 (R. 4), but Buyer never mentioned or challenged the damages awarded to Seller by the Merits Order. (R. 43-48). In May 2011, Seller moved to determine the amount of the damages awarded by the Merits Order. (R. 49-51). The Master heard this motion in July 2011, and Buyer raised the "special damages" issue for the very first time at this hearing. (R. 172-183; see also R. 54-77).

On appeal, Buyer argued that Seller failed to plead for the damages awarded by the Master and, therefore, the Master erred in awarding those damages. (App. Br. 6-7). Seller responded *inter alia* that the issue had been tried by implied consent, because Seller expressly raised the issue at trial without objection by Buyer and, in any event, Buyer's appellate challenge to the award was not preserved for appeal and was barred by the law of the case. (Resp. Br. 3-9). The Court of Appeals ruled that the issue of damages had not been tried by implied consent, and that Buyer's appellate arguments were properly before it for appellate review. This was error as set forth below.

B. The Court of Appeals erred in finding the issue of awarding damages to Seller was not tried by implied consent.

The Court of Appeals ruled that the damages issue was not tried by implied consent, because Seller's testimony and statements at trial did not satisfy the "extensive discussion" requirement for implied consent imposed by this Court in *FOP, II, infra.* (Appx. 12-13). As shown below, the Court of Appeals erred in finding that the issue of awarding damages to Seller was not tried by implied consent.

1. The Court of Appeals erred in ruling that "implied consent" arises only when there is an "extensive discussion" at trial without objection.

The Court of Appeals' "extensive discussion" ruling rests upon its reading of this 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). The Court of Appeals misapprehended this Court's decision in *FOP* II as imposing an absolute "extensive discussion" requirement. The Court of Appeals overlooked the facts and circumstances that gave rise to and informed this Court's 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. This 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, this 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, and Buyer did not object. (R. 124-125).

3. After trial, in his Merits, the Master awarded the 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 Merits Order. (R. 43-48).

This 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.

This Court's "extensive discussion" ruling must be viewed in the context of the case decided. Nothing indicates this Court intended to create an absolute rule requiring "extensive discussion" in every case involving trial by implied consent. This 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.[3] 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, in response to the Merits Order awarding these types of damages subject to proof of the amount of those damages. Accordingly, the matter was tried by implied consent, and the Court of Appeals therefore erred in reversing the Master.

2. Assuming South Carolina law imposes an absolute "extensive discussion" requirement for trial by implied consent, the law should be overruled or modified.

Assuming that *FOP* II specifically, or South Carolina law generally, imposes 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

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[3] In *FOP* II, 574 S.E.2d at 725, this Court cited and relied upon the Court of Appeals' 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 the Court of Appeal, because it had not been raised at trial. The Court of Appeals 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). The Court of Appeals simply noted that there had been an extensive discussion, and this was sufficient to raise the issue. The Court of Appeals never ruled that an "extensive discussion" at trial was a requirement for any trial by implied consent and, in *FOP II*, this Court did not elevate "extensive discussion" to an absolute requirement for trial by implied consent.

with sufficient specificity as to alert 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 – the Master clearly recognized the issue had arisen at trial given that he awarded those types of damages in the Merits Order subject to proof of the amount of those damages. Buyer failed to object to or otherwise challenge these damages as being unpled special damages at trial, and Buyer also failed to do so in response to the Merits Order awarding those damages. Therefore, the issue was tried by implied consent, and the Court of Appeals erred in reversing the Master's award of those damages.

C. The Court of Appeals erred in finding that Buyer's appellate arguments on the failure to plead special damages were preserved for appeal.

The Court of Appeals ruled that implied consent did not apply, because Buyer timely objected to Seller's claim for damages by raising it for the first time at the hearing on Seller's motion to determine the amount of damages previously awarded in the Merits Order. The Court of Appeals reasoned that, since the amount of damages was yet to be determined in a hearing to be held after the Merits Order awarding those damages, Buyer was free to wait and raise its "failure to plead" argument until the hearing to determine the amount of that award.[4] Thus, the Court of Appeals found that implied consent did not arise and Buyer preserved its appellate arguments against implied consent. This was manifest error, because Buyer did not raise its "special damages" argument at its first opportunity and, therefore, the issue was tried by implied consent and Buyer's appellate arguments were not preserved for appeal.

[4] The Court of Appeals ruled: "[N]o specific final judgment amount was sought or included in the [Merits 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." (Appx. at 13) (emphasis added).

It is axiomatic that an issue must be raised at the first opportunity to preserve it for appellate review.[5] 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 to raise the issue, the Master awarded those types of damages in his May 2010 Merits Order. At the very least, this order triggered Buyer's earliest opportunity to raise its "failure to plead" argument but it failed to do so, even though it made a 59(e) motion on other grounds. The fact that there would be a later hearing on the amount of damages awarded in the Merits Order did not change the fact that Buyer's earliest opportunity to raise its "failure to plead" argument was at trial or, at the very latest, when the Master awarded those types of damages in his May 2010 Merits Order. Buyer failed to do so and, therefore, the Court of Appeals erred in reaching this issue and reversing the Master's award of damages.[6]

Moreover, Buyer further failed to preserve its appellate arguments by failing to make a 59(e) motion in response to the Master's Damages Order. Although Buyer raised its "special damages" arguments at the damages hearing, the Master did not rule upon it specifically in his Damages Order. It was therefore incumbent upon Buyer to make a 59(e) motion. See, *e.g.*, *Noisette*

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[5] *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).

[6] When an order rules upon an issue not raised to the trial court, it is incumbent upon the aggrieved party to challenge that ruling in a 59(e) motion. *E.g., In re Estate of Timmerman*, 502 S.E.2d 920, 923 (S.C. App. 1998). Therefore, assuming Seller failed to raise the damages issue at trial, the Master's award of those damages in the Merits Order triggered a requirement that Buyer make a 59(e) motion raising its objections to the award. Buyer made a 59(e) motion but failed to raise any "special damages" or "failure to plead" issues.

v. Ismail, 403 S.E.2d 122, 124 (S.C. 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).

The Court of Appeals ruled that a 59(e) motion was unnecessary, because Buyer's argument "was rejected [*i.e.*, ruled upon] when the Master awarded Seller special damages." (Appx. 11). This was error for two reasons. First, the 2010 Merits Order, not the 2016 Damages Order, awarded the damages to Seller and thereby triggered Buyer's obligation to preserve the issue for appeal. Buyer failed to do so. Second, assuming Buyer's objections at the damages hearing timely raised the "special damages" issue, the Master did not rule specifically and therefore Buyer again became obligated to make a 59(e) motion but failed to do so. It is axiomatic that a general ruling that does not address the specific issue raised by an appellant is insufficient to preserve the specific issue for appeal unless the appellant makes a 59(e) motion. *E.g., USAA Prop. & Cas. Ins. Co v. Clegg*, 661 S.E.2d 791, 795 (S.C. 2008), *citing Floyd v. Floyd*, 615 S.E.2d 465, 474 (S.C. App. 2005).

In ruling that a 59(e) motion was not necessary, the Court of Appeals relied on this Court's decision in *Spence v. Wingate*, 674 S.E.2d 169 (S.C. 2009). This was error.

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.[7] This 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 Damages 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.

Under the Court of Appeals' ruling, any silent failure to award requested relief or any general ruling in favor of the opposing party would obviate any need to make a 59(e) motion. In other words, raising the issue preserves it for appeal, even if the trial court does not rule on it explicitly. This is not the law in South Carolina. Rather, the law is that a general ruling by the trial court does not preserve a specific argument in the absence of a 59(e) motion. *E.g.*, *Clegg*, 661 S.E.2d at 795; *Floyd*, 615 S.E.2d at 474. The Court of Appeals therefore erred in reversing the Master's award of damages.

II. The Court of Appeals erred in reversing the Master's award of damages to Seller, because Buyer failed to appeal or challenge the orders awarding those damages, thereby making those orders the law of this case.

It is axiomatic that the failure to appeal an order makes that order the law of the case. *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). Buyer did not appeal the Merits Order or the 59(e) Order; these orders are not mentioned in the notice of appeal and were not attached to or filed with the notice of appeal.[8] The Merits Order, as confirmed in the 59(e) Order, held that Seller was entitled to an award of damages, subject only to subsequent proof of the amount of those damages. Thus, the un-appealed Merits Order and 59(e)

[7] See *Spence v. Wingate*, 663 S.E.2d 70, 72 (S.C. App. 2008) (agreeing that "trial judge did not explicitly rule").
[8] See Notice of Appeal R. 1-4. See also Rule 203(d)(1)(B)(ii), SCACR (appellant must file a notice of appeal that is accompanied by a "copy of the order(s) and judgment(s) to be challenged on appeal if they have been reduced to writing") and Rule 203(e)(1)(C), SCACR (notice must include the date of the order being appealed).

Order established Seller's right to an award for the types of damages identified at trial and in the order. The Court of Appeals therefore erred in reversing the Master's award of damages, because its reversal is based solely upon reversing Seller's entitlement to an award of damages.

Assuming Buyer's appeal of the Damages Order included an appeal of the Merits Order and 59(e) Order, it is nevertheless axiomatic that an unchallenged ruling in an appealed order is the law of the case. *E.g.*, *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). On appeal, Buyer did not specifically challenge the Merits Order or the 59(e) Order. (App. Br., *passim*). Thus, the orders remain the law of this case even if appealed and, therefore, the Court of Appeals erred in reversing the Master.

The Court of Appeals held that the Merits Order and 59(e) Order did not establish the law of the case for the following reason:

> Because Buyer did not appeal the [Merits Order] or the [59(e) Order], Seller reasons those orders have become the law of the case. However, neither of those orders was a final ruling on the *damages amount*, given the Master expressly left open the damages issue open for later determination. *There was no final damages order to appeal until the [Damages Order] was issued.*

(Appx. 10 (emphasis added)). To support this ruling, the Court of Appeals cited two cases for the generally correct proposition that interlocutory orders are not immediately appealable, but these cases do not support the Court of Appeals' rejection of Seller's "law of the case" argument.

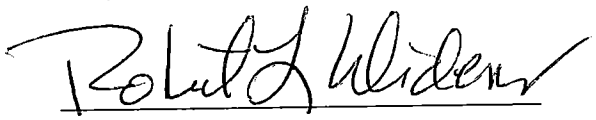
The Court of Appeals cited *Ex parte Wilson*, 625 S.E.2d 205 (S.C. 2005) and *Good v. Hartford Acc. & Indem. Co.*, 21 S.E.2d 209 (S.C. 1942). (Appx. 10). Both cases involved the dismissal of appeals from orders that were not immediately appealable. Seller's "law of the case" argument was not based on a failure to immediately appeal the Merits Order and 59(e) Order. Rather, Seller's argument is based on Buyer's failure to appeal those orders in conjunction with

its appeal of the Damages Order, and alternatively on Buyer's failure to argue against the Merits Order and 59(e) Order on appeal. (Resp. Br. 2, 8-9, 10-11, 11-12). The fact that these orders could not be appealed until after the entry of the Damages Order does not relieve Buyer of its obligations to appeal these orders and to argue against them on appeal. Buyer failed to do so, thereby making these orders the law of this case. The Court of Appeals therefore erred in reaching and reversing the Master's award of damages.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in Final Brief of Respondent and Petition for Rehearing, it is respectfully submitted that this Court should grant certiorari, reverse the Court of Appeals, and reinstate the Master's award of damages to Petitioners (Seller).

Respectfully Submitted,



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Columbia, SC
December 17, 2018

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Norwest Properties, LLC, ...Respondent,

v.

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

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

PROOF OF SERVICE

I, Lisa Gibson, an employee of McNair Law Firm, P.A., do hereby certify that I have served the Petition for Writ of Certiorari and Appendix on Respondent by depositing a copy of it in the United States Mail, postage prepaid on December 17, 2018, addressed to its attorneys of record:

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