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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity

Appellate Case No. 2018-002045

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.

RESPONDENT'S RETURN TO PETITION FOR A WRIT OF CERTIORARI

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IV. Whether the Court of Appeals Correctly Held Respondent was Not Required to Appeal from the 2010 and 2011 Orders Because Neither Order Included a Final Award of Damages.

[1] Respondent restates the issues raised by Petitioners but addresses and responds to all issues.

COUNTER STATEMENT OF THE CASE

This is an appeal from a damages award. The appeal involves only the proper amount of damages and not whether an award of damages is warranted. After Respondent Norwest Properties, LLC, lost the merits of this action in the lower court, the Master granted damages to Petitioners Michael and Lisa Strebler in the amount of $40,388.00, which includes $350.00 in case costs and $40,038.00 in special damages. Respondent asserts Petitioners are not entitled to any special damages because they were not specifically pled, were not tried by implied consent, and were not warranted by the applicable law or the evidence presented. In response, Petitioners focus almost exclusively on issue preservation. Therefore, Respondent focuses much of the statement of the case on the exact procedural history. As shown and explained below, the Court of Appeals correctly found all issues raised on appeal properly preserved and reversed the award of special damages. The Court should deny the petition for writ of certiorari.

In 2005 Respondent Norwest Properties, LLC, contracted to purchase a residential lot from Petitioners Michael and Lisa Strebler. (R. p. 65). After signing the contract but before the closing occurred, Respondent discovered encroachments on the property placed there by the neighbor, defendant Paul Mitchell. Respondent demanded Petitioners remove the encroachments but Petitioners refused.

On November 18, 2005, Respondent filed a complaint against Petitioners for specific performance and breach of contract. (R. pp. 26-29). The real estate contract contains a damages provision. It states, in pertinent part: "If Purchaser shall default under this Contract, Seller shall have the option of suing for damages or rescinding this Contract. . . . In any action to enforce the provisions of this Contract, the prevailing party and Broker(s) shall be entitled to the award of their

costs, including reasonable attorney's fees." (R. p. 160, ¶ 20). The Contract plainly provides for only general damages, costs, and attorney's fees. It does not provide for special damages.

On February 13, 2009, Respondent filed an amended complaint adding Mr. Mitchell as a defendant to remove the encroachments. (R. p. 30). On March 27, 2009, Petitioners filed an answer to the amended complaint. (R. pp. 40-42). Petitioners appeared *pro se*. As to damages, their answer includes only the following generic statement: "the defendants, having fully answered the complaint of the plaintiff, prays that the same be dismissed with costs and damages to the Defendants." (R. p. 42).

On November 9, 2009, the Master-in-Equity held a non-jury trial. (R. p. 78). In his opening statement, Petitioner described his position as one of "defense" and asked the Master to dismiss the case and that "the defendants should be awarded damages." (R. pp. 83-84). Petitioners did not ask the Master to find that Respondent breached the contract. Counsel for Mr. Mitchell argued that Respondent breached the contract. (R. p. 87). Respondent reserved the right to have a hearing about fees at a later time. (R. pp. 105-06). After Petitioners stated "No objection" to this request, the Master granted the motion. (R. p. 106 lns. 3-4).

Petitioner Mr. Strebler testified on his own behalf at trial. At the end of his testimony, he asked the Master if it was appropriate to ask for damages. (R. p. 124 lns. 10-11). The following exchange then occurred:

> THE COURT: Well – in your Pleadings did you ask for damages?
>
> MR. STREBLER: Yes, I did, Your Honor.
>
> THE COURT: Okay, you can go ahead and talk about it.
>
> MR. STREBLER: Defendant would like - - in the Pleadings has asked for damages. Defendant has been damaged to the extent that he has costs of ownership beyond August 31, 2005, the contractual closing date. The costs are financial carrying costs, property taxes, homeowner's association fees, maintenance costs, and costs

> of administration. And further, the defendant requests damages for resources expended in defending this action.

(R. p. 124 lns. 10-23). That is the only mention of Petitioners' damages at the trial.

It is undisputed that Petitioners did not plead special damages. Petitioners' mention of pleading damages could only be interpreted to refer to the general damages requested in the Answer. That Petitioners may have assumed they could seek these additional damages did not negate the fact that they failed to plead them and specifically testified the damages they asked for related back to the pleadings, which sought only general damages.

At the end of trial, the Master told the parties to forego a closing argument and, instead, to submit proposed orders. (R. pp. 150-52). On May 20, 2010, the Master filed an Order finding Respondent failed to prove breach of contract and specific performance. (R. pp. 11-25). The Master found Respondent breached the contract. (R. p. 18). The last page of the Order states:

> That Strebler [Petitioners] be awarded his costs and damages in this case ***in accordance with Paragraph 20 of the Contract.*** Strebler shall submit those actual amounts with supporting documentation to the Court for final determination of the amount of this award.

(R. p. 25) (emphasis added). This is not a final order awarding any amount of damages. Further, Paragraph 20 provides for an award of only "costs, including reasonable attorney's fees." (R. p. 160). Therefore, as of May 20, 2010, Respondent reasonably believed the Master's Order referred only to costs and attorney's fees, which are not special damages. Petitioners do not argue that Paragraph 20 permits the recovery of special damages. Their argument is limited to an assertion that the parties tried the issue by implied consent based on Mr. Strebler's lone statement at trial.

Respondent filed a Rule 59(e), SCRCP, motion arguing the Master erred in finding Respondent breached the contract and finding he failed to prove specific performance. (R. pp. 44-47). A ruling in Respondent's favor in this motion would necessarily mean that Petitioners would not receive damages. On January 12, 2011, the Master denied the motion. In its Order denying

the motion, the Master stated it previously ordered "That Strebler be awarded his costs and damages in this case ***in accordance with Paragraph 20 of the Contract.***" (R. p. 6) (emphasis added). The Order makes no other mention of Petitioners' damages. Respondent did not appeal. The only final ruling at that time was that Respondent breached the contract. There was no final order as to damages.

On May 16, 2011, Petitioners filed a Motion to Approve Amount of Damages. The motion falsely states Petitioners "in their Answer requested costs and damages, including property taxes on the property at issue for the years 2006, 2007, 2008, and 2009, as well as the holding costs of such property." (R. p. 49). It is undisputed that Petitioners' Answer asks for only "costs and damages to the Defendants." (R. p. 42). At the end of the motion is a half-page chart with alleged damages and no supporting documentation. (R. p. 51). The amount of damages sought is $48,713.00, consisting of the following items:

1. Real estate taxes: $6,842.00
2. Homeowners Association: $2,560.00
3. Cost of Capital: $30,637.00
4. Litigation Costs: $8,675.00

(R. p. 51). Litigation costs are the only damage that falls within the parameters of Paragraph 20 of the Contract. The litigation costs included a calculation Mr. Strebler came up with for his time in representing himself in the amount of $8,325.00 and $350.00 in expenses. (R. p. 51). The "cost of capital" appears to relate to Petitioners' financing of their purchase of the property and includes an unexplained 3% interest rate.[2] *Id.* Notably, the homeowners' association fees are not included

[2] At the hearing on the motion for damages, counsel for Respondent described this amount as "sort of 'give me interest on my money if it had been invested somewhere else.' . . . Meaning, I want my property, but I want to have whatever I could have invested in the stock market or wherever . . . ." (R. pp. 178-79).

as a cost until 2007, two years after the parties entered into the Contract because it specified that the property is not subject to a homeowners' association fee. (R. p. 159 ¶ 9.B.).

On July 29, 2011, the Master held a hearing on the motion. (R. p. 172). Respondent submitted a memorandum in opposition to the motion and argued (1) the damages recoverable for breach of a real estate contract are limited to the difference between the purchase price and either the fair market value or a subsequent sale price, (2) Petitioners did not plead special damages and the contract limits recovery to only costs and fees, (3) he is not responsible for taxes or homeowners' association fees because Petitioners retained possession of the property during the litigation, and (4) a *pro se* litigant is not entitled to attorney's fees. (R. pp. 176-80). The Master stated he would "take it under advisement." (R. p. 182).

For over four years, nothing occurred in this case. On October 23, 2015, Petitioners sent the Master an *ex parte* letter asking that he grant the motion for damages. (R. pp. 52-53). On February 23, 2016, Respondent filed the Memorandum in Opposition to Defendant Streblers' Motion to Approve Amount of Damages with accompanying exhibits that he previously submitted to the Court at the 2011 hearing. (R. pp. 54-60). On March 3, 2016, without another hearing or status conference, the Master ordered payment of $40,388.00, which is all of the requested damages except for the $8,325.00 in *pro se* fees because a *pro se* litigant is not entitled to attorney's fees. (R. pp. 3-4). This is the first appealable, enforceable order as to damages in this case.

On March 25, 2016, Respondent filed a Notice of Appeal from the Order awarding damages. (R. p. 1). Respondent did not appeal the award of $350.00 in litigation costs. (Br. of App. p. 5 n.3). Petitioners did not appeal the Master's denial of their request for $8,325.00 in *pro se* attorney's fees. Therefore, at issue in the appeal is the Master's award of (1) $6,842.00 in real estate taxes, (2) $2,560.00 in homeowners' association fees, and (3) $30,637.00 in cost of capital.

It is undisputed that all of these constitute special damages. Petitioners do not argue that these damages are provided for in the contract or recoverable as a normal element of breach of contract.

Respondent raised three arguments in the appeal: (1) Petitioners did not specifically plead special damages, (2) the damages are not recoverable as an element of breach of contract, and (3) even if Petitioners could seek special damages, they failed to prove such damages by sufficient evidence. (Br. of App. pp. 6-11). In response, Petitioners argued special damages were tried by implied consent. They further argued that Respondent either did not preserve the appellate issues or such issues are subject to the law of the case doctrine. The basis for these arguments is an assertion that Respondent should have either appealed the May 2010 Order stating Petitioner is awarded damages in accordance with Paragraph 20 of the contract and to submit amounts "for final determination" or filed a Rule 59(e), SCRCP, motion as to that order or the 2016 order on appeal. (Br. of Resp't pp. 8-15). Petitioners also summarily argued that the evidence supported the Master's award of damages for property taxes and capital costs. (Br. of Resp't pp. 12-15). Petitioners did not dispute that they failed to plead special damages or that the damages awarded exceed the scope of damages recoverable in a breach of contract action.[3]

The Court of Appeals disagreed with all of Petitioners' arguments. *Norwest Props., LLC v. Strebler*, 424 S.C. 617, 819 S.E.2d 154 (Ct. App. 2018). It "quickly jettison[ed]" Petitioner's issue preservation arguments. *Id.* at 622, 819 S.E.2d at 157. The Court of Appeals held that neither the May 2010 Order finding Respondent did not prove his claims nor the January 2011 order

[3] "In the case of a lost sale of a house, the proper measure of damages is the difference between the contract price and either (1) the fair market value of the house on the date of the breach or (2) the price at which the house is subsequently sold." *Jackson v. Midlands Human Res. Ctr.*, 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct. App. 1988). In this case, the difference is $0 because Petitioners sold the house to Mr. Mitchell for the exact sale price of the contract with Respondent--$175,000.00. (R. pp. 158, 74-77).

denying Respondent's Rule 59(e) motion "was a final ruling on the damages amount, given the Master expressly left the damages issue open for later determination." *Id.* "There was no final damages order to appeal until the 2016 Order was issued." *Id.* The Court of Appeals also held Respondent was not required to file a Rule 59(e) motion as to the 2016 Order regarding the special damages issue because he raised the issue "before and during the damages hearing" and it "was rejected when the Master awarded Seller special damages." *Id.* at 623, 819 S.E.2d at 157.

As to the merits, the Court of Appeals held Petitioners failed to plead special damages and the issue was not tried by implied consent. The Court found "no evidence Seller specifically pled special damages", which Petitioners do not dispute. *Id.* at 624, 819 S.E.2d at 158. The Court further held the issue of special damages was not tried by implied consent. It made two, independent rulings on this issue—(1) "First", Petitioners' testimony at the hearing was insufficient to inject the issue of special damages into the case because it "was more of an aside than an extensive discussion" and he did not submit any evidence of the methodology or amount, and (2) "second", Respondent "timely and proper[ly]" objected to the issue when it was raised by Petitioners' motion to approve damages. *Id.* at 625, 819 S.E.2d at 159.

The Court of Appeals reversed the damages award, except for the $350.00 in unappealed costs. *Id.* at 627, 819 S.E.2d at 160. Petitioners filed a petition for rehearing, which the Court of Appeals denied, and then filed the Petition for Writ of Certiorari. For the reasons stated herein, the Court of Appeals correctly ruled on the issues, and this Court should deny the Petition.

ARGUMENT

It is undisputed that Petitioners failed to plead special damages and that the damages awarded are not recoverable under a breach of contract action generally or the parties' contract (except as to the $350.00 in costs). Put simply, there is no legal basis for the damages awarded.

As such, Petitioners fight to keep a legally invalid damages award with issue preservation arguments. The Court of Appeals correctly ruled that Respondent preserved the issues raised and that the parties did not try special damages by implied consent.

I. RESPONDENT PROPERLY PRESERVED ALL ISSUES RAISED ON APPEAL

Respondent properly preserved all issues raised on appeal by objecting to the issue special damages when it arose—upon the filing of Petitioners' motion to approve an amount of damages. As the Court of Appeals correctly held, neither the May 2010 Order finding Respondent breached the contract nor the January 2011 order denying reconsideration "was a final ruling on the damages amount, given the Master expressly left the damages issue open for later determination." *Norwest Props., LLC v. Strebler*, 424 S.C. 617, 622, 819 S.E.2d 154, 157 (Ct. App. 2018). "If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory. If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment." *Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993).

At the November 2009 hearing, the Master granted Respondent's motion to have a hearing on any applicable fees at a later date. (R. pp. 102-06). Petitioner's statement at the hearing that he sought damages did not include any supporting evidence. In short, it was an argument of counsel that is not evidence. *See Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are also not evidence."). As there was no evidence of an amount of special damages, the Master could not have even ruled on the issue at the time. Therefore, there was no basis or need for Respondent to object. A party cannot object to, ask for reconsideration of, or file an appeal from a non-existent ruling. The issue of whether the Master should award special damages arose for the first time when Petitioners filed a motion to approve an amount of damages.

Petitioners also argue that Respondent should have filed a Rule 59(e), SCRCP, motion as to the 2016 order awarding special damages before filing a notice of appeal. (Pet. for Cert. pp. 13-15). The Court of Appeals correctly rejected this argument because it is a misunderstanding of the purpose of and need to file a motion to reconsider. The only time "[a] party *must* file such a motion [to reconsider is] when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. S.C. DOT*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). In this case, Respondent raised the issue of special damages to the Master by opposing the motion to approve damages, and the Master ruled on the issue by expressly awarding damages in direct contravention of Respondent's arguments that he not award damages. *See Spence v. Wingate*, 381 S.C. 487, 489-90, 674 S.E.2d 169, 170 (2009) (finding an issue preserved without the filing of a Rule 59(e), SCRCP, motion where the lower court's order did not restate the appellant's grounds for opposition to the motion but did expressly grant the motion on the grounds argued by the appellant); *Clark v. S.C. Dep't of Pub. Safety*, 353 S.C. 291, 312, 578 S.E.2d 16, 26 (Ct. App. 2002) ("[T]here is no blanket requirement that the trial court set forth a separate explanation on all of its rulings on post-trial motions."); *Bailey v. Segars*, 346 S.C. 359, 364-65, 550 S.E.2d 910, 913 (Ct. App. 2001) (finding issues preserved even though the lower court "did not explicitly rule on the issues" and the appellant did not file a Rule 59(e) motion because the appellant raised the issues, presented them in the record on appeal, and the motion "was denied in a form order"). A ruling that Respondent is required in this case to file a Rule 59(e) motion would essentially force all appellants to file such a motion every time the Court rules against them. This is contrary to existing appellate practice. *Elam*, 361 S.C. at 24, 602 S.E.2d at 780. The Court of Appeals properly held Respondent was not required to file a motion to reconsider because the issues related to special damages were raised to and ruled upon by the Master.

All issues raised to the Court of Appeals were properly preserved, and this Court should deny the Petition on this basis.

II. RESPONDENT TIMELY OBJECTED TO THE ISSUE OF SPECIAL DAMAGES AND IT WAS NOT TRIED BY IMPLIED CONSENT

Whether special damages was tried by implied consent is based on the answer to one question—whether Petitioners' statement at trial was sufficient to raise the issue of special damages such that Respondent should have objected at that moment.[4] The Court of Appeals correctly answered that question "no".

The Rules of Civil Procedure require a party to specifically plead special damages. "When items of special damages are claimed, they ***shall be*** specifically stated." Rule 9(g), SCRCP (emphasis added). When determining whether an issue subject to Rule 9's specific pleading requirement is tried by implied consent, the Court must consider the purpose of the specific pleading requirement. "Special damages are those elements of damages that are the natural, but not the necessary or usual, consequence of the defendant's conduct. . . . Special damages . . . are not implied at law because they do not necessarily result from the wrong." *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 116-17, 682 S.E.2d 871, 875 (Ct. App. 2009) (internal citations omitted). "Special damages must, therefore, be specifically alleged in the complaint to avoid surprise to the other party." *Id.* at 117, 682 S.E.2d at 875. In other words, without a specific pleading as to special damages, the opposing party has no way to prepare to defend it or contemplate it in his discovery and litigation decisions.

The procedure by which a non-pled issue may enter a case by implied consent is stated in Rule 15(b), SCRCP, which covers two situations.

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[4] Petitioners do not challenge the Court of Appeals' ruling that there is "no evidence Seller specifically pled special damages." *Norwest*, 424 S.C. at 624, 819 S.E.2d at 158.

> First, if an issue not raised by the pleadings is tried by express or implied consent of the parties the court may permit amendment of the pleadings to reflect the issue. Second, if a party objects to the introduction of evidence as not being within the pleadings the court may permit amendment of the pleadings subject to a right to grant a continuance if necessary.

Sunvillas Homeowners Ass'n v. Square D Co., 301 S.C. 330, 334, 391 S.E.2d 868, 870-71 (Ct. App. 1990). The first situation does not apply because Petitioners never moved to amend the pleadings. The second situation permits amendment by implied consent and without a court ruling only when the opposing party does not object to the issue as being outside of the pleadings.

The Court of Appeals made two, independent rulings as to why the issues of special damages were not tried by implied consent. Both are correct and either one is sufficient to deny the Petition.

First, the Court stated the law that "[f]or an issue to have been tried by implicit consent, it 'must have been discussed extensively at trial.'" *Norwest*, 424 S.C. at 625, 819 S.E.2d at 159 (quoting *Fraternal Order of Police v. S.C. Dep't of Revenue*, 352 S.C. 420, 435, 574 S.E.2d 717, 725 (2002)). Petitioner's "brief testimony at the 2009 hearing" "was more of an aside than an extensive discussion, and no concrete evidence of the methodology or amount of his special damages" was introduced. *Norwest*, 424 S.C. at 625, 819 S.E.2d at 159. Petitioners challenge the Court of Appeals reliance on *Fraternal Order* and its finding that there was not an extensive discussion of special damages at the 2009 hearing. (Pet. for Cert. pp. 8-11). They are incorrect. The holding in *Fraternal Order* applies directly to this case and dictates denial of the Petition.

Fraternal Order addressed whether an issue not pled but referred to at a hearing would be considered on appeal as one tried by implied consent. 352 S.C. at 435, 574 S.E.2d at 724-25. This Court held that "[i]n order to be tried by implied consent, the issue must have been discussed extensively at trial." *Id.* at 435, 574 S.E.2d at 725. This case is analogous. The issue of special damages was neither pled nor discussed extensively or even briefly at trial. Petitioner stated "in

the Pleadings [he] has asked for damages", where it is undisputed and the law of the case that the pleadings only request general damages, and then he listed some categories of damages. (R. p. 124). He did not present evidence of the amounts or the basis for his request. There was no "discussion" of it between himself and any other counsel or the Court. A statement by one party is insufficient to create an issue tried by implied consent, especially where the issue is one that the law requires a party to specifically plead. Rule 9, SCRCP.

To the extent Petitioners challenge the law stated in *Fraternal Order*, they are incorrect. (Pet. for Cert. pp. 11-12). Petitioners state that the requirement for an extensive discussion to result in an issue tried by implied consent is incorrect and the law should be that an issue is tried by implied consent when it is "raised with sufficient specificity as to alert a reasonable person that the issue was being raised in the case." (Pet. for Cert. pp. 11-12). Glaringly absent from Petitioners' entire challenge to *Fraternal Order* is a citation to any law supporting its position. *See Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review."). Regardless, this Court's holding in *Fraternal Order* is a correct statement of law that this Court continues to follow. *See Lee v. Bunch*, 373 S.C. 654, 661, 647 S.E.2d 197, 201 (2007) (quoting the "discussed extensively" passage from *Fraternal Order* to support a holding that the parties tried an issue by implied consent"). The standard of an extensive discussion is necessary to ensure that one party does not insert an issue without the other party's awareness and is fair because it permits an issue to enter a case by implied consent only when it is evident that all parties were aware of the issue and participated in it.

The second, independent basis upon which the Court of Appeals found the issue of special damages was not tried by implied consent is the "more glaring problem" that there is no ruling on

the issue in the 2010 order issued after the hearing at which Petitioner made his brief statement about damages. *Norwest*, 424 S.C. at 625, 819 S.E.2d at 159. Therefore, the Court held that Respondent's memorandum in opposition to the motion to approve damages and argument at the hearing on the motion for damages "constituted timely and proper objections to the Master's consideration of special damages" which "triggered" the portion of Rule 15(b), SCRCP, that the Court must expressly rule on a motion to amend when a party objects. *Id.* at 625-26, 819 S.E.2d at 159. Petitioners argue the Court of Appeals erred because Respondent should have objected during the 2009 hearing when Petitioner stated he sought damages or after the Master issued the 2010 order awarding "costs and damages in this case in accordance with Paragraph 20 of the Contract" and asking Petitioner to submit damage amounts "for final determination." (Pet. for Cert. pp. 12-13; R. p. 25). This is similar to the issue preservation argument in that Petitioners continue to incorrectly argue that the lone statement by Petitioner at trial triggered a duty to object.

Petitioner said in his opening statement to the Master that he sought "costs of ownership", "financial carrying costs, property taxes, homeowner's association fees, maintenance costs, and costs of administration", and "resources expended in defending this action." (R. p. 124). This single statement is insufficient to inject into a case an issue that the law requires a party to specifically plead. Any other holding would effectively eliminate the pleading requirements of Rule 9, SCRCP, because a party could tactically not plead an issue, mention it for the first time at trial, and forego giving the other party notice and an opportunity to conduct discovery. The parties did not discuss the issue and no party presented evidence on the issue. In fact, Respondent could

not, in the middle of trial, have adequately defended against claimed damages as to which he conducted no discovery and as to which Petitioners presented no actual evidence.[5]

The Court of Appeals correctly held Respondent's opposition to Petitioners' motion to approve damages "constituted timely and proper objections to the Master's consideration of special damages." *Norwest*, 424 S.C. at 625, 819 S.E.2d at 159. Petitioners' arguments to the contrary are unavailing, without legal support, and undermine the purpose of Rule 9, SCRCP.

Finally, Petitioners' argument that Respondent not filing a Rule 59(e), SCRCP, motion to the 2016 order constitutes trial of special damages by implied consent also fails. (Pet. for Cert. pp. 13-14). As discussed above, Respondent was not required to file a Rule 59(e) motion to preserve the issue because the Master ruled on it by ordering the exact opposite of what Respondent argued and, thereby, rejected Respondent's arguments about special damages. *Allegro, Inc. v. Scully*, 418 S.C. 24, 33, 791 S.E.2d 140, 145 (2016) ("Preservation rules are designed to provide an adequate platform for appellate review by ensuring the trial court has had the opportunity to rule on an issue prior to this Court considering the matter.").

Petitioners incorrectly state the 2010 Order awarded damages to Petitioner. (Pet. for Cert. p. 14). First, the 2010 Order stated damages would be awarded, "in accordance with Paragraph 20 of the Contract", and asked for further evidence to enable the Master to make a final determination. (R. p. 25). This is not an order awarding special damages because it is ***undisputed*** that paragraph 20 of the Contract does ***not*** provide for special damages. Therefore, there was no way for Respondent to know the Court contemplated special damages by its statement. Second, the Order

[5] *See, e.g.*, *Patton v. Miller*, 420 S.C. 471, 491-92, 804 S.E.2d 252, 262-63 (2017) ("Rule 15 prejudice is some result flowing from the amendment that puts the non-moving party at a disadvantage in defending the merits, which disadvantage the party would not have faced if the amended claim had been included in the original pleading or a timely motion to amend.").

is not final because it clearly leaves the amount of damages for later determination and, as such, it was not an appealable order as to damages. *Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993) ("If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory. If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment."). The Court of Appeals correctly held for two, independent reasons that the issues of special damages was not tried by implied consent and the Court should deny the Petition on this basis.

III. THE LAW OF THE CASE DOCTRINE IS NOT APPLICABLE TO THIS APPEAL AND DOES NOT BAR RESPONDENT'S CHALLENGE ON APPEAL TO THE AMOUNT OF DAMAGES AWARDED

For clarity, the issue on appeal is solely the amount of damages that should be awarded to Petitioners. Respondent does not argue that Petitioners are not entitled to damages. Under Paragraph 20 of the Contract, Petitioners are the "prevailing party" and are "entitled to the award of their costs, including reasonable attorney's fees." (R. p. 67, ¶ 20). Respondent does not appeal the award of $350.00 in costs, and Petitioners did not appeal the Master's refusal to award "attorney's fees" to a *pro se* litigant. Therefore, the only issue in this appeal was the amount of damages. There was no final order as to the amount of damages until the 2016 order that Respondent appealed.

Petitioners' law-of-the-case argument is lost by their own admission that the 2010 and 2011 orders were "subject only to subsequent proof of the amount of those damages." (Pet. for Cert. 15). The issue on appeal is the amount of damages. If the 2010 and 2011 orders were not final orders on that issue, they cannot constitute the law of the case. "The law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so. Where the party is not yet able to appeal due to the lack of a final judgment, the issue is not precluded by the law of the case doctrine as there was no prior opportunity for appeal." *Bone v.*

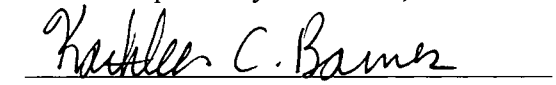
United States Food Serv., 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012). Respondent could not have appealed from the 2010 or 2011 orders as to the amount of damages. Neither order awarded damages but, rather, stated damages would be awarded in accordance with the Contract that only provided for general damages, and specified that the actual award was for a later, final determination.

Respondent did not appeal from the 2010 and 2011 orders because they are not final orders as to the amount of damages and do not even substantively award damages except to say that damages in accordance with the Contract will be awarded later. As explained, Respondent does not challenge a damages award in accordance with the Contract and, thus, has no reason to appeal from those orders. The Court of Appeals correctly rejected Petitioners' law-of-the-case argument, and this Court should deny the Petition on this basis.

CONCLUSION

For the reasons stated, the Court should deny Petitioners' request for a writ of certiorari in this matter.

Respectfully submitted,



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Attorneys for Respondent

February 4, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity

Appellate Case No. 2018-002045

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

The undersigned certifies that a copy of the foregoing *Respondent's Return to Petition for a Writ of Certiorari* have been served upon the following counsel of record by mailing one copy by United States Mail, addressed as shown below this 4th day of February, 2019.

Robert L. Widener
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Burr Forman McNair
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February 4, 2019

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