

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

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

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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.

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

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ATTORNEYS FOR PETITIONERS

## REPLY ARGUMENT

Throughout its Return, Respondent (Buyer) conflates the award of damages in the May 2010 Order (the Merits Order at R. 11-25) with the subsequent determination of the amount of those awarded damages in the February 2016 Order (the Damages Order at R. 3-4). (*E.g.*, Return at 9). As a result, Buyer fails to address the error preservation and law of the case issues under the proper analytical framework. Once this conflation is unraveled, it becomes clear that Buyer's appellate arguments were not properly before the Court of Appeals as set forth in Petitioners' certiorari petition, rehearing petition, and Brief of Respondents, which are incorporated herein.

Throughout its Return, Buyer asserts that this appeal is about the amount of damages. (*E.g.*, Return at 16). This is true in that the only order appealed by Buyer was the order establishing the amount of damages. The Court of Appeals, however, did not reverse the trial court based on the amount of damages. Rather, the Court of Appeals held that Petitioners were not entitled to any damages in any amount. Thus, Buyer fails to defend the Court of Appeals' actual ruling, which was erroneous, because *inter alia* it violated the law of the case doctrine.

Buyer repeatedly asserts that the only damages recoverable under Paragraph 20 of the contract were litigation costs and fees, but litigation costs and fees are not damages. Buyer does this to hide the fact that the Master awarded damages in the Merits Order. Moreover, and contrary to Buyer's other arguments on Paragraph 20 of the contract, the Master did not simply award damages under Paragraph 20. Rather, the Master specified the types of damages being awarded as including property taxes and the holding costs on the property (R. 12), and the Master later determined the amount of those awarded damages in the Damages Order.

On the issue of Buyer's failure to make a 59(e) motion on the Damages Order, Buyer cites two new cases for the argument that the Master's general ruling was sufficient. (Return at 10).

Neither case supports Buyer's argument. In both cases, the issue was the denial of a directed verdict motion and/or a JNOV/New Trial motion in a jury trial. In both cases, the Court of Appeals held that the record of the trial proceedings set forth an explicit ruling and explained the basis for the ruling, thereby making it unnecessary to make a 59(e) motion or remand for further elucidation by the trial court. See *Clark v. South Carolina Dept. of Pub. Safety*, 578 S.e.2d 16, 26 & n.46 (S.C. App. 2002) and *Bailey v. Segars*, 550 S.E.2d 910, 913 (S.C. App. 2001). Here, nothing provides the explicit ruling missing from the Damages Order and, therefore, it was incumbent upon Buyer to make a 59(e) motion. Its failure to do so precludes its appellate arguments.

On the issue of trial by implied consent, Buyer relies principally upon the Court of Appeals' ruling that there must be an "extensive discussion" of the issue at trial. This ruling is based on the Court of Appeals' conclusion that this Court imposed an absolute "extensive discussion" requirement in *Fraternal Order of Police v. South Carolina Dept. of Rev.*, 574 S.E.2d 717 (S.C. 2002) (*FOP II*). As set forth in Petitioners' certiorari petition and rehearing petition, the Court of Appeals misread and misapplied this Court's ruling in *FOP II*, and the issue was tried by implied consent. Buyer argues that this Court approved the Court of Appeals' "absolute requirement" view of *FOP II* in its decision in *Lee v. Bunch*, 647 S.E.2d 197, 201 (S.C. 2007). This Court cited *FOP II* and parenthetically quoted it, but there was no specific holding in *Lee* that there had been an extensive discussion, nor that an extensive discussion is an absolute requirement in every trial by implied consent case. Here, the issue of "special" damages plainly entered the case through Petitioner's testimony at trial and, absent some objection or comment from Buyer, there was nothing else to discuss, extensively or otherwise.

As to Buyer's failure to appeal the Merits Order and the related 59(e) Order, Buyer misses the point of Petitioners' argument. Petitioners do not argue (and have never argued) that Buyer

should have appealed these orders immediately and its failure to do so gives rise to the law of the case. Rather, Petitioners' argument is that Buyer's failure to appeal those orders in this appeal, and its separate failure to challenge the rulings in those orders in this appeal, establishes the law of this case that requires affirmance of the Master's decision in those orders to award the challenged damages. The only remaining potential issue would be the amount of those damages as determined in the subsequent Damages Order, *i.e.*, some challenge to the sufficiency of the evidence to prove the amount, but the Court of Appeals did not reach this issue, because it erroneously ruled that the Petitioners were not entitled to any award in any amount.

As to all remaining points and arguments in Buyer's Return, Petitioners crave reference to and incorporates the arguments made in their certiorari petition, rehearing petition, and Brief of Respondents.

### CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in Petitioners' certiorari petition, rehearing petition, and appellate briefs, which are incorporated herein by reference, it is respectfully submitted that this Court should grant certiorari, reverse the Court of Appeals, and reinstate the appealed order.

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February 14, 2019  
Columbia, SC  
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PROOF OF SERVICE

I, Ann Shuler, an employee of Burr & Forman, LLP, do hereby certify that I have served the Reply to Return to Petition for Writ of Certiorari on Respondent by depositing a copy in the United States Mail, postage prepaid on February 14 2019, addressed to its attorneys of record:

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