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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

The Honorable G.D. Morgan, Jr., Circuit Court Judge

Appellate Case No.: 2021-001463

Anthony Wise, ...Appellant,

-v-

Kenneth W. Leap, Newberry Hospital, LLC d/b/a Newberry County Memorial Hospital, and West Fraser, Inc.,

Of Whom, West Fraser, Inc. is ..... Respondent.

RESPONDENT'S FINAL BRIEF

Anne Laurie McClurkin, Esq.
MAYNARD, COOPER & GALE, P.C.
RSA Battle House Tower
11 North Water Street, Suite 24290
Mobile, Alabama 36602
(t) 251.432.0001
amcclurkin@maynardcooper.com

Christopher B. Major, Esq.
HAYNSWORTH, SINKLER & BOYD
1 North Main Street, 2nd Floor
Greenville, South Carolina 29601
(t) 864.240.3200
cmajor@hsblawfirm.com

ATTORNEYS FOR RESPONDENT WEST FRASER, INC.

Additional counsel of record:

John E. Parker, Esq.
John E. Parker, Jr., Esq.
PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK, P.A.
101 Mulberry Street East
Hampton, South Carolina 29924
jayparker@pmped.com

John W. Carrigg, Jr., Esq.
CARRIGG LAW FIRM
120 North Lake Drive
Lexington, South Carolina 29072
jcarrigg@carrigglaw.com

ATTORNEYS FOR APPELLANT ANTHONY WISE

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4. Whether the Circuit Court properly entered summary judgment in Respondent's favor because it determined the above alleged defamatory statement could not reasonably be construed as defamatory by innuendo?

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6. Whether the Circuit Court committed reversible error in determining Appellant's Motion for Leave to Amend the Complaint, which sought to add a claim for breach of an alleged duty of confidentiality based on the same factual allegations as his defamation claim, had no impact on the appropriateness of granting summary judgment on Appellant's defamation claim?

STATEMENT OF THE CASE

This appeal arises from the Circuit Court's Order entered on October 11, 2021 granting Respondent West Fraser's ("West Fraser") Motion for Summary Judgment ("Motion") on Appellant Anthony Wise's ("Wise") sole claim for defamation.

I. Proceedings Below

On March 7, 2019, Wise initiated the underlying action by filing his Complaint asserting a claim for defamation against Newberry County Memorial Hospital ("NCMH"), Dr. Keith Leap ("Dr. Leap"), and West Fraser. (R. pp. 28-30; Compl.) As alleged in his Complaint, Wise was employed by West Fraser and worked at its lumber mill in Newberry, South Carolina. (R. p. 28 (Compl. at ¶4)). On November 7, 2017, Wise was injured while working on a forklift, and West Fraser's Safety Director, Keith Nelson ("Nelson"), drove Wise to NCMH for treatment. (R. p. 28). According to Wise's Complaint, upon arriving at NCMH, Dr. Leap examined Wise and then made the statement, "[l]ooks like somebody's been changing sexual partners. Looks like an STD." (R. p. 29 (Compl. at ¶5)). The Complaint asserted that Dr. Leap's alleged statements defamed Wise by falsely accusing him of having a sexually transmitted disease ("STD"). (R. p. 29). Further, the Complaint alleged that Nelson repeated Dr. Leap's alleged false and defamatory statements to other workers at West Fraser's mill and that West Fraser is liable for Nelson's alleged statements because they were made within the scope of Nelson's employment with West Fraser. (R. p. 29). On June 3, 2019, West Fraser filed its Answer denying the allegations in Wise's Complaint and asserting, among other defenses, that Wise's defamation claim failed because any

statements Nelson made were true; Nelson's statements were made within the scope of a qualified privilege; and Nelson's statements were made in good faith and without malice.[1] (R. p. 32).

Over the next approximately two years, Wise pursued his defamation claim against NCMH and West Fraser and conducted considerable discovery, including taking the depositions of Nelson, West Fraser's Plant Manager, and nine other West Fraser employees. On June 8, 2021, West Fraser filed a Motion for Summary Judgment ("Motion") on the grounds that: (i) the only statements Nelson actually made about Wise were true and therefore not defamatory; (ii) Nelson's statements could not reasonably be construed as defamatory per se because the statements could not reasonably be construed as inferring Wise had an STD; and (iii) Wise's claim for defamation per quod failed because Wise presented no evidence to establish the necessary elements of common law malice or special damages. (R. pp. 35-56).

West Fraser's Motion was set for hearing on August 11, 2021 before the Honorable G.D. Morgan ("Judge Morgan"). (R. pp. 121-151). Wise did not file a written opposition to West Fraser's Motion. During the August 11, 2021 hearing, Wise made oral arguments and offered certain documents in an effort to support that Nelson made alleged defamatory statements about Wise to one of Wise's co-workers, George Wilson ("Wilson"), and alternatively, to West Fraser's Plant Manager, D.J. Russell ("Russell"). (R. p. 133). In reply to Wise's argument concerning statements Nelson made to Russell, West Fraser argued that in addition to being true, any statements made by Nelson, a member of management, to other West Fraser managers pursuant to a common business interest were subject to a qualified privilege, and Wise submitted no evidence to show the privilege was exceeded. (R. p. 147). Following the hearing Wise requested and was

[1] On August 1, 2019, a Consent Order of Dismissal was filed dismissing Dr. Leap as a defendant.

permitted by Judge Morgan to file the complete transcripts of depositions that Wise referenced during the hearing as evidence opposing West Fraser's Motion. (R. p. 693 (Wise Sept. 1, 2021 correspondence to Clerk of Court confirming filing of evidentiary submission opposing summary judgment)).

On August 17, 2021, Wise filed a Motion for Leave to Amend his Complaint seeking to add a new claim for breach of an alleged duty of confidentiality. (R. p. 83). On August 23, 2021, Judge Morgan requested both parties file supplemental briefing addressing what impact, if any, Wise's Motion for Leave to Amend his Complaint had on West Fraser's pending Motion. (R. p. 693; Aug. 23, 2021 email from Hon. Morgan). Accordingly, on August 25, 2021, West Fraser filed its Supplemental Brief in Support of Summary Judgment demonstrating that Wise's Motion for Leave to Amend had no impact on West Fraser's Motion because Wise's proposed amendment was unfairly prejudicial and clearly futile because it was based on the same facts as Wise's defamation claim that West Fraser established were wholly lacking in evidentiary support and moreover, failed to state a viable claim under South Carolina law. (R. pp. 88-94). On August 26, 2021, Wise filed his supplemental brief arguing that the proposed amendment to the Complaint stated a viable claim and that Wise's Motion for Leave to Amend was not untimely or unfairly prejudicial to West Fraser. (R. pp. 95-99).

On August 27, 2021, Judge Morgan entered a Form 4 Order granting West Fraser's Motion and entering summary judgment in West Fraser's favor. (R. pp. 3-5). The Form 4 Order instructed West Fraser to prepare a proposed order and thus indicated that a formal order would follow. (R. pp. 3-5). On September 2, 2021, without waiting for the formal order, Wise filed a Motion for Reconsideration pursuant to Rule 59(e), SCRCP, asking Judge Morgan to reconsider his Order

granting summary judgment based on Wise's "belie[f] that the formal order will contain a clear error of law..." (R. pp. 100-101).

On October 11, 2021, Judge Morgan entered the formal Order granting summary judgment to West Fraser. (R. pp. 6-23). Specifically, the Order held that: (i) West Fraser had established the substantial truth of Nelson's statements to Wilson; (ii) Nelson's statements to Wilson could not reasonably be construed as defamatory by innuendo; and (iii) Nelson's statements to West Fraser's Plant Manager Russell were qualifiedly privileged. (R. pp. 6-23). Further, the Order held that Wise's Motion for Leave to Amend the Complaint had no impact on West Fraser's Motion for Summary Judgment because: (i) the proposed amended claim was based on the same facts Judge Morgan had already determined wholly lacked evidentiary support; (ii) the proposed amended claim failed to state a viable claim under South Carolina law; and (iii) the Motion for Leave to Amend was untimely filed and unfairly prejudicial to West Fraser. (R. pp. 20-21).

On October 14, 2021, Wise filed a Memorandum in Support of his Motion for Reconsideration asking Judge Morgan to reconsider the Order granting summary judgment to West Fraser.[2] (R. pp. 102-120). In support, Wise filed additional exhibits and made arguments that were not submitted or made to Judge Morgan during initial summary judgment briefing, the August 11, 2021 summary judgment hearing, supplemental briefing, or at any time prior to entering his Order granting summary judgment. On November 23, 2021, Judge Morgan entered a Form 4 Order denying Wise's Motion for Reconsideration. (R. pp. 24-26).

II. Wise's Appeal

On December 15, 2021, Wise filed a Notice of Appeal. (R. pp. 695-696). The Notice of

[2] On October 12, 2021, Wise and NCMH filed a Consent Order of Dismissal dismissing Wise's claims against NCMH.

Appeal states that Wise appeals the Circuit Court's October 11, 2021 Order granting West Fraser's Motion for Summary Judgment and the Circuit Court's November 23, 2021 Order denying Wise's Motion for Reconsideration. (R. pp. 695-696). While the Notice of Appeal purports to appeal both Orders, Wise's Initial Brief makes no argument and identifies no alleged error concerning the Circuit Court's Order denying Wise's Motion for Reconsideration.

STATEMENT OF FACTS

At the outset, and as demonstrated further herein (*see, infra,* at pp. 28-34), Wise's Statement of Facts and other portions of his Initial Brief improperly rely on evidence and arguments not presented to the Circuit Court prior to the entry of its Order granting West Fraser's Motion for Summary Judgment. Wise's improper evidence includes the signed notes, which Wise's brief refers to as a "statement," prepared by Melody Jepson ("Jepson"). (Wise's Final Br. at pp. 5, 12, 13, 18, 20, 22-23). Jepson's notes were not submitted or even mentioned to Judge Morgan in considering whether to grant summary judgment, and Wise's attempt to offer Jepson's notes as evidence supporting that Judge Morgan erred is improper. (*See generally* R. pp. 121-151 (Aug. 11, 2021 Tr.); R. pp. 95-99 (Wise's Memo. in Support of Mot. for Leave to Amend). West Fraser's Statement of Facts first sets forth the facts established by the evidence submitted to the Circuit Court prior to entering its summary judgment Order that are properly considered on appeal and second, addresses the alleged facts Wise contends are established by his newly submitted evidence. [3]

[3] For the reasons discussed in West Fraser's argument, *infra,* at pp. 21-24, Jepson's notes and Wise's other arguments that were not presented to the Circuit Court are not properly considered by this Court. However, even if Wise's improper evidence and new arguments are considered, they still do not establish a genuine factual issue concerning Wise's defamation claim and the Circuit Court's Order should be affirmed.

I. Facts Established to the Circuit Court

A. Wise's November 7, 2017 Workplace Injury

West Fraser is a lumber manufacturer that operates lumber mills in South Carolina, including one located in Newberry, South Carolina. (R. pp. 28). In approximately March 2015, West Fraser hired Wise to work as a forklift operator at its Newberry mill. (R. p. 189, lines 17-23). On November 7, 2017, Wise was assigned to work in the shipping department and arrived at work shortly before his shift was scheduled to begin at 6:00 A.M. (R. p. 250, line 21 – p. 251, line 5). Wise got to the mill at or around the same time as other employees scheduled to work the day shift, which begins at 6:00 A.M. (R. p. 252, lines 3-10). As Wise and other day shift employees were preparing to begin their shift, the night shift employees were finishing and leaving the mill. (R. p. 252, lines 11-13).

Shortly after clocking in on November 7, 2017, Wise began his pre-work inspection of the forklift he would be operating, and as he attempted to raise the hood, he "felt something give . . . [and] could feel everything swelling up." (R. p. 252, line 24 – p. 253 line 16). As Wise described in his deposition, his testicles were swollen and he was "hurting something terrible." (R. p. 253, line 17 – p. 254 line 6). A nearby co-worker (identified only as "Irving") saw the incident and asked Wise if he was okay, to which Wise replied, "[n]o, man, something gave." (R. p. 252 line 24 – p. 253 line 16). Wise immediately informed his supervisor Chuck Price about his injury and stated that he needed to see a doctor. (R. p. 253, line 23 – p. 254, line 6). Price reported Wise's injury to Superintendent Steve Johnson ("Johnson"). (R. p. 253, line 23 – p. 254, line 6). Johnson and a senior Superintendent, Quinton Wilson, came to the office where Wise was waiting. (R. p. 254, lines 7-17). They provided Wise with an ice pack for his testicles while they tried to reach West Fraser's Safety Director, Nelson. (R. p. 254, lines 7-17).

On the date of the incident, Nelson had been employed as West Fraser's Environmental Health and Safety Director ("Safety Director") for more than twenty (20) years. (R. p. 454, lines 4-8). As Safety Director, Nelson was responsible for overseeing all on-the-job injuries, including ensuring employees receive necessary medical care, reporting injuries or diagnoses that are compensable under West Fraser's workers' compensation plan to management, and reporting recordable incidents to the Occupational Safety and Health Administration ("OSHA"). (R. p. 456, line 16 – p. 457, line 4; R. p. 459, lines 16-20).

After learning of the incident Nelson arrived at the mill between approximately 6:30-7:00 A.M. (R. p. 262, lines 9-12). Wise testified that Nelson initially wanted Wise to wait until 8:30 A.M. when West Fraser's occupational health doctor's (i.e., workers' compensation provider) office opened, but Wise told Nelson he could not wait that long. (R. p. 263, lines 4-7). Nelson agreed that Wise needed to go to the emergency room and drove him to NCMH. (R. p. 263, lines 8-21). As Wise and Nelson left the mill, Wise was able to walk but was hunched over in pain, wobbling, and holding his groin area. (R. p. 256, line 5 – p. 257, line 8 (Wise Dep.)).

Other than the four individuals mentioned above (co-worker Irving, Supervisor Price, and Superintendents Johnson and Wilson), Wise testified that he could not recall any other employees he saw as he was waiting to be taken to the hospital. (R. p. 260 line 2 – p. 261 line 24). However, at least one night shift employee testified that he and another employee saw Wise while Wise was waiting for Nelson to arrive. (R. p. 441, lines 15-17 (Anthony Cannon Dep.)). Anthony Cannon ("Cannon") testified that as he and Robert Johnson ("Johnson") were ending their shift, they saw Wise holding his groin and in obvious pain. (R. p. 441, line 18 – p. 442, line 2). Cannon also testified that as they approached Wise, Johnson jokingly said to Wise, "[a]in't nothing wrong with

you, he's probably been with, you know ... [some woman]." (R. p. 439, lines 4-16; R. p. 442, lines 3-20).[4]

B. Wise and Nelson Arrive at the NCMH Emergency Room

On the way to the hospital, Wise called his wife, Pauline Wise ("Mrs. Wise") and asked her to meet him at the hospital. (R. p. 264, lines 1-12 (Wise Dep.)). Mrs. Wise was not there when Wise and Nelson arrived but she got to the hospital a little later. (R. p. 264, lines 21-23). Wise and Nelson walked in to the hospital together and then Wise signed in and was taken to an exam room. (R. p. 264 line 24 – p. 265 line 14). Nelson remained at the hospital but did not accompany Wise to the exam room. (R. p. 266, lines 11-19). Wise testified that Nelson "floated around," walking inside and outside the hospital, periodically coming back and "peeping in" the doorway of the exam room.[5] (R. p. 266, line 11 – p. 267, line 22). While Wise was waiting to be seen by a doctor, Mrs. Wise arrived at the hospital. (R. p. 273, lines 10-17). Shortly after Mrs. Wise arrived, Dr. Kenneth Leap entered the exam room and informed Wise that "we're going to take you back there and check you out." (R. p. 277, line 21 – p. 278, line 2). An X-ray technician then transported Wise to the X-ray room for an ultrasound. (R. p. 277, line 21 – p. 278, line 5). After the X-rays were taken, Wise returned to the exam room to wait for Dr. Leap, and while Wise was waiting a nurse gave him medication that made him "woozy." (R. p. 278, lines 6-14). Wise testified that he could not recall everyone who was present in the exam room when Dr. Leap returned but said it "was a bunch of people." (R. p. 282, lines 12-14). The individuals Wise

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[4] Cannon and Robert Johnson were leaving the mill at approximately 6:05 A.M. (R. p. 440, line 24 – p. 441, line 9 (Cannon Dep.)). Nelson did not arrive at the mill until 6:30 A.M. or later. (R. p. 262, lines 9-12 (Wise Dep.)). Clearly, nothing Nelson said was related to the sexual joke made by Robert Johnson and vice versa.

[5] Wise could not recall whether the exam room doorway had a door or curtain closure. (R. p. 275, line 15 – p. 276, line 7).

recalled being present included Mrs. Wise, Nelson, Dr. Leap, and a nurse. (R. p. 284, lines 11-23 (Wise Dep.)).

According to Wise, when Dr. Leap returned to the exam room, he made the following two statements: "I don't see anything to cause me to believe that you have a hernia," and "[l]ooks like somebody's been changing sexual partners." (R. p. 283, lines 2-9). Wise does not recall Dr. Leap saying anything else before he left the exam room. (R. p. 285, lines 18-22). Wise testified that Nelson left the exam room at the same time as Dr. Leap and that he could see Nelson speaking with Dr. Leap but could not hear what they discussed. (R. p. 302, lines 13-20).

Nelson testified that he talked with Dr. Leap following his examination of Wise to discuss Dr. Leap's diagnosis. (R. p. 459, lines 8-15). Nelson explained that he needed the information to determine whether Wise had suffered an on-the-job injury for workers' comp and OSHA reporting purposes.[6] (R. p. 459, lines 16-20). Nelson testified that Dr. Leap told him that Wise had an infection and that he wrote Wise a prescription which Dr. Leap provided to Nelson. (R. p. 459, lines 8 – 15 (Nelson Dep.); R. p. 299, lines 10-12 (Wise Dep.)). Nelson further testified that Dr. Leap did not describe the nature of Wise's infection and did not disclose anything further to Nelson about Wise's condition. (R. p. 460, lines 5-12).

While Nelson was speaking with Dr. Leap, Wise and Mrs. Wise were alone in the exam room. (R. p. 299, lines 17-20). Wise testified that he and his wife were upset by the comment Dr. Leap allegedly made about changing sexual partners and that Mrs. Wise was in shock. (R. p. 299, line 21 – p. 300, line 8). Wise testified that he and Mrs. Wise said to each other, "[l]et's get the

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[6] To be clear, the laws protecting the disclosure of health-related information (i.e., the HIPAA privacy rule) do not apply to employers who obtain or disclose information related to a workplace injury. 45 C.F.R § 164.512(b)(1)(V). In this context, a provider may release health related information to the patient's employer or workers' comp insurer even without patient consent. *See id.*

hell out of here" and prepared to leave. (R. p. 299, line 24 – p. 300, line 12). Wise and Mrs. Wise were planning to follow Nelson to the pharmacy to get Wise's prescription filled. (R. p. 302, lines 6-9). Nelson testified that he occasionally assists employees with filling prescriptions when the underlying injury may be covered by workers' comp. (R. p. 462, line 25 – p. 463, line 9).

The next time Wise spoke to Nelson was in the hospital parking lot outside of the emergency room exit as Wise waited on Mrs. Wise to get her car so that she and Wise could follow Nelson to the pharmacy. (R. p. 302, line 21 – p. 303, line 23). According to Wise, he was still trying to get over the "initial shock" of the alleged comment Dr. Leap made about changing sexual partners. (R. p. 304, lines 1-5). Wise testified that Nelson approached him as he was waiting outside and asked him if maybe Mrs. Wise had an infection. (R. p. 304, lines 12-20). Wise responded to Nelson, "[y]ou out of your mother-fucking mind?" (R. p. 305, lines 2-6). Wise testified that at this point Nelson was trying to get away from him because he knew Wise was "about to lose all my composure." (R. p. 305, lines 17-20). Nelson denies asking Wise if his wife may have had an infection but does agree that Wise was "very upset" and "pretty ticked off" that Dr. Leap allegedly accused Wise of having multiple sexual partners. [7] (R. p. 461, lines 3-17). Wise testified that following this exchange, he, Mrs. Wise, and Nelson drove in two vehicles to CVS pharmacy to fill Wise's prescriptions and that Mrs. Wise then drove Wise home. (R. p. 306,

[7] Nelson testified this is the first time he heard of Dr. Leap's alleged statement and that he was not in the exam room when Dr. Leap allegedly made the statement to Wise. While Nelson's and Wise's recollections differ, this factual dispute is immaterial and has no bearing on any issue before the Court. Additionally, while Wise argues in his Initial Brief that there is a factual dispute concerning whether Nelson was in the exam room and heard the alleged statements by Dr. Leap, this is immaterial because Nelson does not deny hearing about the alleged statements. As Nelson testified, Wise informed Nelson of the statements in the hospital parking lot. The issue of whether Nelson was not in the hospital room to hear them first hand is thus irrelevant to Nelson's knowledge of the issue. West Fraser's arguments are based on the truthfulness and privileged status of Nelson's comments to other plant personnel rather than on any claim that Nelson lacked knowledge. Wise's argument is a red herring, not evidence of a material factual dispute.

lines 8-24). Wise did not return to work that day or for the next several days. (R. p. 306, lines 16-20; R. p. 310, lines 1-9).

C. Nelson Returns to the Mill

Nelson returned to the mill immediately after leaving the pharmacy. (R. p. 465, lines 11-12 (Nelson Dep.)). He parked his vehicle in the mill parking lot and was walking toward the office when one of Wise's co-workers in the shipping department, George Wilson ("Wilson"), greeted Nelson. (R. p. 465, line 13 – p. 466, line 13). Nelson and Wilson were asked in their depositions to describe exactly what was said during their encounter after Nelson returned to the mill. Nelson testified as follows:

> So, George [Wilson] asked me, he said 'How's Hop [referring to Wise's nickname]?' And I said, 'He's doing fine. He has an infection so he got a prescription, or he's doing fine, he got a prescription because he has an infection.' And then that was the end of the conversation with George.

(R. p. 466, lines 9-13).

Wilson's recollection of the conversation was identical to Nelson's in all material respects:

> ... I seen Keith [Nelson] and I asked, Keith, what happened to Anthony [Wise]? I said, how was he doing? The only thing he said was that Anthony – the doctor said he [Wise] had an infection. And that's all he said. And then when he mentioned that and I stepped back in the shipping department and the guys asked me how is Anthony. I said, well, I just seen Keith and Keith said he has an infection. And I mentioned that and then I went on and went to do whatever I need[ed] to do.

(R. p. 527, lines 13-23).

Wilson testified that prior to seeing Nelson, he had learned from other shipping department employees that Wise had been injured that morning, but contrary to Wise's characterization of the facts, Wilson testified he did not know the details or nature of Wise's injury. (*Cf.* R. p. 526, line 19 – p. 527, line 23 (Wilson Dep.) *with* Wise's Final Br. at p. 5 (stating word had spread to Wilson that Wise had suffered a groin injury and Wilson believed Wise had pulled a muscle)). Wilson

explained that the only reason he asked Nelson about Wise's condition was because Wilson was genuinely concerned if Wise was okay. (R. p. 530, lines 8-14). Nelson testified that he understood Wilson's reason for asking to be just as Wilson described— a sincere concern about the wellbeing of a co-worker he believed to have been injured on the job. (R. p. 465, line 19 – p. 466, line 8). Nelson explained that the shipping department is a small department with about ten (10) employees. (R. p. 465, line 23 – p. 466, line 1). He testified it is not uncommon for employees to inquire about an employee after a workplace accident occurs and testified, "I mean, it's just human nature." (R. p. 466, lines 4 – 8). No one was in the area where Nelson and Wilson were talking and no one else overheard their conversation. (R. p. 532, lines 14-17 (Wilson Dep.)).

Both Nelson and Wilson testified unequivocally that Nelson never used the term STD or any other word that could imply a sexually-related condition. (R. p. 470, lines 3-8 (Nelson Dep.); R. p. 528, line 19 – p. 529 line 10 (Wilson Dep.)). Nelson also did not tell Wilson about Wise's complaint about Dr. Leap or Dr. Leap's alleged comment that Wise had been changing sexual partners. (R. p. 470, lines 16-19 (Nelson Dep.)). Nelson testified he believed his statements to Wilson that Wise had an infection and received a prescription were true and that it never crossed his mind that anyone would interpret the statements to mean Wise had an STD or to infer anything derogatory about Wise. (R. p. 512, lines 3-20). Nelson further testified that when he told Wilson that Wise had an infection he did not consider himself to be revealing sensitive medical information and did not intend to harm Wise or suggest anything disparaging about him. (R. p. 512, line 3 – p. 513, line 6). Nelson explained that if he thought there was even a possibility that his statement would lead anyone to believe Wise had contracted an STD, he would not have discussed the November 7, 2017 incident with anyone other than plant management. (R. p. 512, lines 15-20).

Likewise, Wilson testified he did not interpret Nelson's statement as suggesting anything sexually related or derogatory or to imply anything beyond the fact that Wise was not injured in an accident and just had some type of infection. In fact, Wilson testified repeatedly that the only person he ever heard mention that Wise had an STD, or rather did not have an STD, was Wise after Wise returned to the mill and complained to Wilson and many other employees about Dr. Leap's alleged comment. (R. p. 528, lines 5-8; R. p. 529, lines 2-10; R. p. 532, lines 3-8). Wilson further testified that Wise talked about Dr. Leap's comment and his alleged STD so often that it became tiresome, and Wilson began avoiding Wise because that was all he talked about. (R. p. 531, line 4 – p. 532, line 8).

D. Wise's Allegations of Defamation

Wise testified that when he returned to work approximately one week after the incident, several co-workers teased him about having an STD. (R. p. 291, line 9 – p. 292, line 23). Wise testified he believes Nelson was the source of the rumor based on the statement Nelson made to Wilson during their conversation in the parking lot. (R. p. 290, lines 6-11; R. p. 427, line 22 – p. 428, line 5). Wise admitted, however, he has no personal knowledge of anything Nelson said about him from the time Nelson returned to the mill on November 7, 2017 and when Wise returned to the mill on or about November 13, 2017 because Wise was not there. (R. p. 289, lines 16-25; R. p. 292, lines 4-10). To the contrary, Wise's knowledge of and his allegations about statements Nelson allegedly made to Wilson is based solely on hearsay (or double hearsay) from co-workers. (R. p. 289, lines 16-25; R. p. 292, lines 7-10). Moreover, even Wise's second-hand knowledge based on conversations he alleges his co-workers overheard and relayed back to Wise do not support that anyone personally heard Nelson state that Wise had an STD or had been changing sexual partners: "I can't sit here and say that they [co-workers] heard it directly from him [Nelson],

but it went through the plant like a wild fire." (R. p. 292, lines 11 – 23). Wise acknowledged that the statements he was told Nelson made about him stated only that Wise had received an antibiotic and had an infection. (R. p. 289, lines 11-25; R. p. 325, lines 7-23). Nevertheless, according to Wise, stating Wise "has an infection" is the same as stating Wise "has an STD." (R. p. 326, line 11 – p. 327, line 11; R. p. 344, lines 17-24). Wise explained that because he is a black man, anyone who heard that he had an infection would naturally assume it was a sexually transmitted infection: "**...[w]hen you a black man, that's all people think that you supposed to do. You got to be some kind of little whore or something like that.**" (R. p. 316, lines 11-14 (emphasis added)). Wise further testified that when a man says infection he means STD because "**when mens [*sic*] talk like that, that's what they talking about, sex. They ain't talking about no just plain infection.**" (R. p. 327, lines 9-11 (emphasis added)).

With regard to his alleged injuries, Wise acknowledged he suffered no monetary loss as a result of the alleged defamatory statements. (R. pp. 66-67 (Plf.'s Resp. to West Fraser's Interrog. at pp. 9-10, #17)). Instead, Wise's claimed injuries included only alleged injury to his reputation, privacy interests, and mental anguish he allegedly suffered as a result of the rumors. (R. p. 66 (Plf.'s Resp. to West Fraser's Interrog. at p. 9, #16)). Wise was unable to explain how the rumors harmed his reputation or identify anyone in the community whose opinion of him changed as a result of the alleged rumors. Wise testified that it was impossible to know what people were really thinking. (R. p. 408, line 9 – p. 410, line 22). Despite Wise's uncertainty, none of the nine (9) co-workers he identified in his discovery responses as having heard the alleged rumors testified that their opinions of Wise changed or that they believed Wise had an STD. (*See, e.g.,* R. p. 528, lines 5-10 (Wilson Dep); R. p. 610, lines 4-17 (Praylow Dep.); R. p. 542, lines 13-15 (Neal Dep.); R. p. 599, lines 13-19 (Maybin Dep.); R. p. 628, line 23 – p. 629, line 2 (Shealy Dep.)).

E. Nelson's Statements to Wilson Were True

Wise failed to produce a single witness or other form of admissible evidence to establish Nelson told Wilson that Wise had an STD or that Nelson said anything other than that Wise had an infection and was prescribed an antibiotic. Wise did not dispute that he had an infection and testified that was his understanding when he was discharged from the hospital on November 7, 2017. (R. p. 297, line 21 – p. 298, line 19). Moreover, Wise testified that after leaving the hospital, he saw his primary care physician the following day, and she confirmed he had a prostate infection. (R. p. 308, line 3 – p. 309, line 6). Likewise, when Wise was examined by West Fraser's occupational health physician several weeks later, he concurred Wise had an infection. (R. p. 312, line 11 – p. 313, line 21). Wise also did not dispute he received a prescription for an antibiotic to treat the infection. (R. p. 297 lines 3 – 24; R. p. 344, lines 6-12). The November 7, 2017 medical records produced by the NCMH as well as the records produced by Wise's primary care physician memorializing Wise's follow-up visit with his doctor corroborate that Wise was diagnosed with an infection and prescribed an antibiotic.[8] (*See* R. pp. 75-82 (Exs. 7-8 to West Fraser's Mot. for Summ. J.)). Notably, Wise's account of what he heard that Nelson relayed to Wilson (although based on inadmissible hearsay) is consistent with the testimonies of both Nelson and Wilson, the

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[8] The hospital's records reflect that Dr. Leap determined Wise had Epididymitis (inflammation or infection of the epididymis) and prescribed him Doxycycline (antibiotic) as treatment. (R. pp. 77-78 (bates# NCMH ED 9-10 in Ex. 7 to Mot. for Summ. J.)). The records produced by Wise's primary care physician, Dr. Hutson of Lexington Family Practice, show that when Wise was seen by Dr. Hutson the day after he was treated by Dr. Leap (November 8, 2017), Dr. Hutson concurred Wise had Epididymitis and prescribed Wise a different antibiotic, Ciprofloxacin, as treatment. She also ordered additional testing. When Wise returned to see Dr. Hutson two days later, her records state that "**Patient presents with - infection** *follow up*" and instructed him to continue taking the antibiotic "**to bring down the infection.**" (R. pp. 81-82 (Ex. 8 to Mot. for Summ. J.) (emphasis added)). Dr. Hutson reviewed the results of her testing with Wise and diagnosed him with a combination of infections: Prostatitis (prostate infection), Epididymitis (infection of the epididymis), and Cellulitis (skin infection). (R. p. 82 (Ex. 8 to Mot. for Summ. J.)).

only two individuals with personal knowledge of what Nelson stated to Wilson. (R. p. 315, line 11-24; R. p. 325, line 7 – p. 326, line 15).

F. Nelson's Statements to Russell Were True and Also Privileged

During the August 11, 2021 summary judgment hearing, Wise offered an alternative theory of an alleged defamatory publication based on Nelson's report of the incident to Plant Manager Russell. (R. pp. 142 line 13—p. 143 line 20). After Nelson's conversation with Wilson on the date of the forklift incident, Nelson went to Russell's office to discuss the incident. (R. p. 466, lines 14—25; R. p. 469 lines 1—25). As support for Wise's argument during the summary judgment hearing that Nelson made defamatory statements in the meeting with Russell, Wise's counsel pointed to Nelson's testimony purportedly establishing that Nelson "told Mr. Russell that the doctor had said that he [Wise] had an infection of a sexually transmitted disease" and argued that Nelson's alleged statement to Russell was in and of itself defamatory. (R. pp. 142 line 13—p. 143 line 20).

As an initial matter, Wise's counsel's description during the hearing of what Nelson told Russell is a true statement since Wise alleges Dr. Leap did make this statement. However, a review of Nelson's deposition testimony plainly establishes that what Nelson actually told Russell is that Wise was "very upset" that Dr. Leap asked Wise about changing sexual partners. (R. p. 466, lines 21-24). This also is a true statement since Wise agrees he was upset and "shock[ed]" by Dr. Leap's alleged statement. (R. p. 303, line 24 – p. 304, line 7; R. p. 300, line 1-14. *See also* R. pp. 28-30 (Compl.)).

The purpose and context of Nelson's communication to Russell is significant. Nelson testified that after returning from NCMH he went to Russell's office to discuss Wise's apparent on-the-job injury and whether it would result in a worker's compensation claim. (R. p. 466, lines 14-

25; R. p. 469 line 1—p. 470 line 2). Nelson testified this conversation was held "behind closed doors" in the privacy of Russell's office. (R. p. 466, lines 9-25). Nelson explained that the purpose of meeting with Russell was to inform Russell that Wise had been diagnosed with an infection and that Nelson did not believe Wise had suffered an on-the-job injury that would be covered by worker's compensation. (R. p. 469, line 1 – p. 470, line 2) ("you can't have like an incident happen and then have an infection like an hour and a half later . . . So, from a workers' comp perspective, I was relieved he [Wise] had an infection because, you know, I didn't have to go through no reporting to OSHA..."). Nelson testified he also told Russell that Wise was upset about the question Dr. Leap asked him because as the Plant Manager Russell needed to know.[9] (R. p. 466, lines 18-24). Nelson testified that the conversation with Russell was held in Russell's private office behind closed doors and that the information they discussed were kept strictly between Nelson as Safety Director and Russell as Plant Manager. (R. p. 466, lines 9—25; R. p. 469, line 1 – p. 470, line 23 (Nelson Dep.). *See also* R. p. 557, lines 4-6 & R, p. 558, lines 17-18 (Russell Dep.) (testifying any discussion about issues involving an hourly employee is kept between salaried (i.e., management) employees behind closed doors and discussing such issues with other hourly employees is not allowed)). Wise presented no evidence nor even allegation that Nelson's conversation with Russell was overheard by other employees in the mill or repeated to anyone else at the mill during the summary judgment hearing or any time prior to the Court's Order granting summary judgment. (*See generally* R. pp. 121-151 (Aug. 11, 2021 Tr.)).

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[9] As Nelson suspected, Wise elevated his informal complaint about Dr. Leap and on the day he returned to work made a formal complaint to Russell and other West Fraser managers about the doctor West Fraser had taken him to for treatment. (R. p. 553, lines 5-18; R. p. 574 (Russell's Nov. 13, 2017 notes from meeting with Wise)).

G. West Fraser's Response to Wise's Complaints

When Wise returned to work following the forklift incident, he complained to Russell and several other West Fraser managers about Dr. Leap's alleged comments in the emergency room and that a rumor was going around the mill that Wise had an STD that Wise believed started after Nelson's statement to Wilson in the parking lot on the day of the forklift incident. (R. p. 328, line 12 – p. 329, line 17; R. p. 338, line 11 – p. 339, line 14. *See also* R. p. 557, lines 10-17 (Russell Dep.)); R. pp. 574-576 and 580-581 (Russell Dep. Exs. 1-3 & 5)). During their November 13, 2017 meeting, Wise told Russell he was unhappy with how he was treated by the doctor West Fraser took Wise to for treatment (Dr. Leap) and stated the doctor was "a quack and showed racism." (R. p. 568, lines 16-25; R. p. 574). In another meeting on November 17, 2017, Wise told Russell that the rumor "had ruined his good name." (R. p. 575). Russell assured Wise he would investigate and take corrective action to address the issue and also encouraged Wise to identify the co-workers who allegedly were teasing him so that Russell could "take care" of it. (R. p. 554, lines 10-13; r. p. 557, lines 10-17). Wise refused to identify anyone. (R. p. 357, line 1 – p. 358, line 4 (Wise Dep.); R. p. 557, lines 10-17 (Russell Dep.)).

Having no other information to go on, Russell focused his investigation on Nelson's communication to Wilson and determined it was inappropriate for Nelson (a salaried manager) to share information about Wise's on-the-job injury with Wilson (an hourly employee). (R. p. 559, lines 15-24). Russell explained in his deposition that while West Fraser has no written rule or policy, as a matter of common sense and practice, any personnel matter involving an hourly employee only should be discussed among salaried employees (i.e., management). (R. p. 559, line 15 – p. 560, line 8; R. p. 556, lines 17—p. 557 line 9 (testifying the "salary team" only discusses issues related to hourly employees in private). On November 17, 2017, Russell met with

Nelson to counsel him against discussing personnel matters with hourly employees and provided Nelson with a written letter of reprimand. (R. p. 558, lines 8-18 (Russell Dep.); R. pp. 577-578 (Nov. 17, 2017 reprimand letter)). Russell testified this was the only reason Nelson was reprimanded. (R. p. 558, lines 15-18 (testifying Nelson was reprimanded "[f]or the incident that occurred talking to the hourly employee about another hourly employee. ***Strictly that and nothing else.***" (emphasis added))). Despite Wise's attempts both in the Circuit Court and on appeal to mischaracterize the reprimand letter as an admission that West Fraser considered Nelson's statements to be defamatory, the letter plainly lists the infractions Nelson was being reprimanded for, none of which include any finding or determination by Russell or West Fraser that Nelson made defamatory statements about Wise. (R. pp. 577-578). The language in the letter that Wise seizes on and insists constitutes an admission includes paragraph number 3, which counsels Nelson for putting West Fraser at risk because "verbally disclosing medical information about an employee can be considered *by the employee* as slanderous." (R. pp. 577-578 (emphasis added)). This language is parroting Wise's complaints to Russell and other West Fraser managers stating that the alleged rumor had ruined his good name and threatening litigation. It cannot reasonably be interpreted as an admission that West Fraser believed Nelson's statements were slanderous.

II. Facts Not Presented to the Circuit Court

As mentioned above, Wise's Initial Brief improperly relies on evidence and arguments not submitted or even mentioned to the Circuit Court prior to entering its final summary judgment Order. Nonetheless, Wise points to the new evidence, including Jepson's notes and deposition testimony of Supervisor Mike Shealy ("Shealy"), and urges this Court to find that the Circuit Court erred in holding Wise's summary judgment evidence failed to identify a genuine issue of material fact. As demonstrated, *infra,* at pp. 28-34, Wise's attempt to offer new evidence and make new

arguments is fundamentally unfair to the Circuit Court and improper. The South Carolina Appellate Rules and overwhelming case law preclude any consideration of Wise's new evidence and/or arguments, and they should be disregarded in considering Wise's appeal. However, even if this Court is inclined to consider evidence and arguments never presented to the Circuit Court in granting summary judgment, they still do not establish a genuine or material factual issue concerning Wise's defamation claim, and the Circuit Court's summary judgment Order should be affirmed.

A. Jepson's Notes Dated November 17, 2017

Wise filed Jepson's notes for the first time as an attachment to his Motion for Reconsideration filed on October 14, 2021. (R. p. 691 (Wise's Mot. for Reconsideration, Exhibit 4)). Wise testified in his deposition that Jepson is West Fraser's Human Resources ("HR") manager and one of several individuals Wise complained to about the alleged STD rumor. (R. p. 328, lines 12-25). Jepson also was Wise's point of contact for the short-term disability and worker's compensation claim Wise attempted to file following the forklift incident. (*See* R. p. 691 (Jepson's notes)).

Although Wise has been in possession of Jepson's notes since West Fraser produced them in the early stages of discovery on October 8, 2019, Wise did not depose Jepson during discovery. None of the West Fraser employees who were deposed were questioned about Jepson's notes, and her notes were not introduced as exhibits in any deposition taken in the underlying case. Nevertheless, Wise's Initial Brief relies heavily on Jepson's notes as alleged evidence establishing Nelson made defamatory statements about Wise to Jepson. (Wise's Final Br. at pp. 5, 12, 13, 18, 20, 22-23). Specifically, Wise argues that Jepson's notes establish that after Nelson left the

hospital and returned to the mill on November 7, 2017 Nelson told Jepson that Wise had a " 'long worded infection' that possibly originated from his sexual history." (Wise's Initial Br. at p. 5).

Wise's reliance on Jepson's notes, in addition to being improper, is sorely misplaced for several reasons. As reflected in Jepson's notes, which are titled "Anthony Wise W/C [worker's comp] Incident," Wise provided his medical records to Jepson and had several conversations with Jepson about the forklift incident because she also was involved in investigating whether Wise sustained a compensable on-the-job injury and also was attempting to assist Wise with filing a claim for short term disability benefits. (R. 691 (Jepson notes)). Even assuming Jepson's notes can be read to state that Nelson told her Wise's infection could be sexually related, which is a strained and unreasonable interpretation, statements between two managers investigating a potential on-the-job injury for the purposes of determining whether worker's compensation benefits are owed fall within the qualified privileged. (*See, infra*, at pp. 42-44).

Second, Wise misinterprets and grossly mischaracterizes Jepson's notes, presumably because he conducted no discovery to ascertain the context or meaning of them. If he had, Wise would have learned the references in Jepson's notes to "a 'long worded' infection that has several possibilities of origin (including past sexual history)," a phrase that notably appears in parentheticals, and to Dr. Leap's diagnosis and treatment prescribed to Wise are not describing statements Nelson made to Jepson on the date of the forklift incident (November 7, 2017). To the contrary, as evidenced by the date Jepson's notes were signed (November 17, 2017), they are describing information Jepson gathered during her review of Wise's medical information and alleged on-the-job injury days after the forklift incident. Indeed, the notes discuss events that occurred after Wise had returned to work more than a week after the forklift incident and his complaints to Jepson, Russell, and others about the comments allegedly made by Dr. Leap, the

rumor about him going around the plant, and not receiving worker's compensation benefits. (R. p. 691).

Considering the extensive discovery Wise conducted in the underlying action, if Wise genuinely believed Jepson's notes were the smoking gun evidence Wise argues on appeal, Wise would have included Jepson in the long list of West Fraser employees Wise deposed or at least questioned Russell and the other West Fraser deponents about Jepson's notes. Wise did not find Jepson's notes significant enough to explore them in discovery or to even mention to the Circuit Court in opposing summary judgment, and Jepson's notes are equally insignificant now. West Fraser will not further belabor clarifying Wise's mistaken interpretation of Jepson's notes because the notes were not part of the summary judgment record. They were never presented to or considered by the Circuit Court prior to its entry of summary judgment and they are not properly considered by this Court.

B. Shealy's Deposition Testimony

Wise's Initial Brief also makes new arguments based on the deposition testimony of Wise's supervisor at the time of the forklift incident, Shealy. (Wise Initial Br. at pp. 7, 22) Wise did not mention Shealy's testimony during the summary judgment hearing or include it in the evidentiary materials Wise filed in opposition to summary judgment following the hearing. (*See generally* R. pp. 121-151 (Aug. 11 2021 Hearing Tr.). *See also* R. p. 693 (Sept. 1, 2021 correspondence to Clerk of Court confirming filing of evidentiary submission opposing summary judgment)). Wise's new arguments based on Shealy's testimony were never presented to the Circuit Court prior to entering summary judgment and they are not properly considered by this Court. Even if the new arguments are considered, which they should not be, Shealy's testimony does not demonstrate a

genuine issue of material fact concerning Wise's defamation claim and the Circuit Court's Order should be affirmed.

As Wise's supervisor, Shealy was responsible for scheduling Wise's shifts, entering his time, and reporting attendance for compensation purposes. (R. p. 517, line 11 – p. 518, line 5 (Nelson Dep.)). Nelson testified the only employees he discussed Wise's condition with outside of Wise's presence were Wilson, Plant Manager Russell, and Shealy.[10] (R. p. 465, line 13 – p. 466, line 17; R. p. 485, lines 14-23). Nelson discussed this with Shealy because Shealy needed to know how long Wise would be out for staffing purposes and to accurately record Wise's absences for payroll. (R. p. 485, line 24 – p. 486, line 2; R. p. 517, line 24 – p. 518, line 5).

Shealy testified that all Nelson told him was that Wise had an infection and would be out a couple days. (R. p. 626, lines 16-23). Nelson did not say or communicate anything to Shealy to suggest the infection was sexually related, and Shealy did not know or form a belief as to what type infection Wise had. (R. p. 626, line 24 – p. 627, line 4). There is no evidence nor even allegation that Shealy repeated the statement that Wise had an infection to anyone. Shealy also testified that while he did not recall hearing rumors that the infection was sexually related *if* he heard such a rumor it did not change his opinion of Wise in anyway. (R. p. 626, lines 8-12; R. p. 628, line 23 – p. 629, line 2).

Wise argues that even if Nelson's statement to Shealy was qualifiedly privileged because Shealy needed to know the information as Wise's supervisor, it exceeded the scope of the privilege because Shealy did not need to know that Wise had an infection. (Wise Final Br. at pp. 7, 22).

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[10] Nelson also discussed the incident in a meeting with Wise and another West Fraser manager who is second in command at the mill below Russell, Quinton Wilson. (R. p. 485, line 20 – p. 486, line 15). Wise was present for the entire meeting, and there is no allegation that anything said in this meeting was defamatory or the basis for Wise's defamation claim.

Wise contends this establishes a factual issue concerning whether Nelson's statement to Shealy was defamatory. Wise's argument wholly fails. For starters, it is undisputed the statement "Wise has an infection" was true, which ends the analysis since truth is a complete defense to defamation. (*See, infra,* at p. 36). Moreover, it also is undisputed that Shealy did not interpret or understand either at the time Nelson made the statement or thereafter that Nelson's statement inferred that Wise had a sexual infection or suggested anything derogatory about Wise.

While Wise's arguments based on Nelson's statement to Shealy were not presented to the Circuit Court and should be disregarded entirely, even if considered they do not establish a defamatory statement or that summary judgment was improper.

STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court." *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998). As the South Carolina Supreme Court has aptly articulated, "[t]he purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

Pursuant to the well-settled standard, in determining whether a genuine factual issue exists, the evidence and all factual inferences drawn from it must be viewed in a light most favorable to the non-moving party. *George*, 345 S.C. at 452, 548 S.E.2d at 874. When a motion for summary judgment is made and supported by such facts as would be admissible in evidence at trial, the non-moving party may not rest upon the mere allegations of his pleadings but must identify specific facts establishing a genuine issue for trial. Rule 56(e), SCRCP. The South Carolina Supreme Court has explained the Rule 56 standards as follows:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is entitled to judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Baughman v. Am. Tel. and Tel. Co., 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991) (internal quotations omitted).

Where, as here, the underlying action requires proof by a preponderance of the evidence, the non-moving party must submit a "scintilla of evidence" to survive summary judgment. *Lemmons v. Macedonia Water Works, Inc.*, 431 S.C. 186, 199, 330, 847 S.E. 2d 471, 479 (Ct. App. 2020). " '[A] scintilla of evidence is material evidence which, taken as true, would tend to establish the issue in the mind of a *reasonable* juror.' " *Id.* (quoting *Crosby v. Seaboard Air Line Ry.*, 81 S.C. 24, 31, 61 S.E.2d 1064, 1067 (1908)). When a scintilla of evidence is susceptible to only one reasonable inference, no issue of fact arises and the circuit court can decide as a matter of law. *Nat'l Bank v. Barrett of Honea Path*, 174 S.E.2d 581 (1934). "[A]ny evidence, even a scintilla, that is useful to withstand a summary judgment motion must meet the prerequisite of being probative. *Bass vs. Gopal Inc.*, 384 S.C. 238, 246 n.6, 680 S.E.2d 917, 921 n.6 (Ct. App. 2009), *aff'd* 395 S.C. 129, 716 S.E.2d 910 (2011). The circuit court "is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine." *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984). "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a *genuine* issue of fact remaining for trial." *Sims v. Amisub of S..C, Inc.*, 408 S.C. 202, 208, 758 S.E.2d 187, 190-91 (Ct.

App. 2014), *aff'd* 414 S.C. 109, 777 S.E.2d 379 (2015) (emphasis added) (quoting *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004)).

Further, an appellate court "may affirm the grant of summary judgment on any ground found in the record." *Moore v. Weinberg*, 373 S.C. 209, 229, 644 S.E.2d 740, 750 (Ct. App. 2007). *See also* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.")

ARGUMENT

I. Wise Has Abandoned Any Appeal of the Circuit Court's Order Denying His Motion for Reconsideration.

While Wise's Notice of Appeal purports to appeal both the Circuit Court's October 11, 2021 Order granting summary judgment and the November 23, 2021 Order denying Wise's Motion for Reconsideration, Wise's Initial Brief makes no argument in support of reversing the Order denying his Motion for Reconsideration. His Initial Brief does not list this as one of the issues on appeal, address the appropriate standard of review applicable to a motion to reconsider, and does not even attempt to identify any error by the Circuit Court in denying his Motion for Reconsideration. Wise has abandoned his attempt to appeal the November 23, 2021 Order. Rule 207(b)(1)(B), SCACR ("[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). *See also Central Realty Corp. v. Allison*, 218 S.C. 435, 451-52, 63 S.E.2d 153, 160 (1951) (where appellant served notice of intent to appeal order but failed to address order in initial brief, Supreme Court considers that issue to have been abandoned; *State v. Hornsby*, 326 S.C. 121, 125, 484 S.E.2d 869, 871 N.1 (1997) (issue not addressed in initial brief is abandoned); *Fields v. Melrose Ltd. Partnership*, 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.")

II. Wise's New Evidence and Arguments Not Presented to the Circuit Court Prior to Entering Summary Judgment Are Improper and Should Not Be Considered.

A. Wise's New Evidence Should Be Disregarded.

South Carolina appellate courts have strictly enforced the rule that only evidence and arguments presented to the lower court in entering its judgment will be considered on appeal. *See Hickman v. Hickman*, 301 S.C. 455, 456-57, 392 S.E.2d 481, 482 (Ct. App. 1990) (rejecting claim raised for the first time in Rule 59 motion and observing the purpose of Rule 59 is not "providing a disappointed suitor with a post-judgment opportunity to argue that which could have been argued pre-judgment."). *See also Spreeuw v. Barker*, 385 S.C. 45, 68-69, 682 S.E.2d 843, 855 (Ct. App. 2009) (refusing to consider a form that "appears only as an attachment to [party's] Rule 59(e) motion"); *Jones v. Builders Inv. Grp., LLC*, 415 S.C. 321, 330 n.7, 781 S.E.2d 737, 742 (Ct. App. 2015) (trial court properly refused to consider new evidence at Rule 59(e) hearing and affirming decision granting directed verdict). *Norris v. Ferre*, 315 S.C. 179, 183, 432 S.E.2d 491, 493 (Ct. App. 1993) (denying party's motion to supplement record with matters not presented to trial judge). *See also Henning v. Kaye*, 307 S.C. 436, 438, 415 S.E.2d 794, 795 (1992) (ordering appellant to serve and file amended brief and designation of matter that comply with appellate rules and reminding appellant the record on appeal shall not contain matters not presented to the trial court).

Wise's new evidence consists of Jepson's notes, which Wise refers to in his Designation of Matter as "[w]ritten Statement of Melody H. Jepsen [*sic*], dated November 17, 2017" and in his Initial Brief as "Jepson's Statement," and the Deposition Transcript of Mike Shealy dated

December 19, 2019.[11] (Wise Designation of Matter at p. 3, ## 22 & 24; Wise Final Br. at pp. 5, 6, 7, 12, 18, 20, 22-23). As plainly evidenced by the summary judgment hearing transcript and Wise's correspondence to the Circuit Court Clerk confirming the filing of Wise's evidentiary submission opposing summary judgment, Wise did not mention Jepson or Shealy to the Circuit Court or file the so-called "Jepson's Statement" or Shealy's transcript with his evidentiary submission opposing summary judgment. (R. pp. 121-151 (Aug. 11, 2021 Hearing Tr.); R. p. 693 (Wise Sept. 1, 2021 correspondence to Clerk of Court confirming filing of evidentiary submission)). To the contrary, the first time Wise made any reference to or argument based on Jepson's notes was in his Memorandum Supporting Motion for Reconsideration filed on October 14, 2021 several days after the Circuit Court entered its final Order granting summary judgment.[12] (R. pp. 103-104 (citing Jepson's notes as Plf.'s Exhibit 4)). Wise's new argument based on an alleged defamatory publication to Shealy was not even raised in Wise's Motion for Reconsideration and was not presented to the Circuit Court at any time. (R. pp. 102-120). Wise cannot use a post-judgment motion to reconsider as a vehicle to introduce evidence into the record that was available to him and not presented to the Circuit Court prior to entering its summary judgment Order. The fact that Wise has attempted to do so in no way allows Jepson's notes or Shealy's deposition to properly be included in the record on appeal.

Further, Jepson's notes should not be considered for the additional reason that they are inadmissible hearsay. A party cannot rely on evidence that would not be admissible at trial to

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[11] As discussed in the fact section, *supra*, at p. 21, Melody Jepson is West Fraser's local HR Manager at the Newberry mill where Wise was employed. The correct spelling of her last name is "Jepson," not Jepsen.

[12] It is well settled under South Carolina law that a party cannot use a motion to reconsider to present evidence or make arguments that could have been presented prior to the entry of judgment but was not. *Hickman*, 301 S.C. at 456-57, 392 S.E. 2d at 482.

oppose summary judgment. *Hansen v. DHL Labs., Inc.*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (Ct. App. 1994), aff'd, 319 S.C. 79, 459 S.E.2d 850 (1995) ("A genuine issue of fact ... can be created only by evidence which would be admissible at trial." (citing SCRP 56 (e)). In his Initial Brief, Wise asserts in a footnote that "Jepson's Statement is admissible and is not hearsay under Rule 801, SCRE in that Jepson can testify at trial and be subject to cross-examination concerning the statement." (Wise Final Br. at p. 13 n.6). Wise's evidentiary argument, which also was not presented to the Circuit Court, misinterprets Rule 801(d)(2), SCRE. The fact that Jepson could be called to testify and subject to cross-examination on the "statement" does not make it admissible. To the contrary, extrinsic evidence of a witness's prior statement is not admissible until the witness's testimony expressly contradicts the prior statement. Rule 801(d)(2), SCRE, Advisory Committee's Note ("It should be noted that the foundation requirements of Rule 613(b) must be met before extrinsic evidence of a prior inconsistent statement is admissible.") Moreover, Jepson's notes are not a "statement" as contemplated by Rule 801(d), and they do not contain the indicia of reliability contemplated by any of the exceptions to the hearsay rule set forth in Rule 803. Rules 801(d) and 803, SCRE. There are obvious discrepancies and ambiguities within Jepson's notes (e.g., the notes reference dates occurring after the date her notes were signed and include vague references like "he" where it is unclear who the pronoun is identifying).

B. Wise's New Arguments Should Be Disregarded.

Wise's Initial Brief relies heavily on several new arguments that were not made to the Circuit Court in opposing summary judgment or at any time prior to entry of the summary judgment Order. "It is well-settled that appellants cannot raise new arguments or change their grounds between trial and appeal." *Morris v. Anderson Cty*, 349 S.C. 607, 611 n.4, 564 S.E.2d 649, 651 (2002) (where record did not establish statutory arguments made in appeal were raised

or ruled upon by trial court, arguments were not properly raised on appeal) (citing *Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996)). *See also I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (the "purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant's contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal.")

Wise's new arguments include additional theories of a defamatory publication based on:

(i) the improperly submitted "Jepson Statement" (i.e., Jepson's notes) (Wise Final Br. at pp. 5-6, 7, 12, 18 & 21-23);

(ii) testimony concerning statements Nelson made to Shealy (Wise Final Br. at pp. 6-7);

(iii) that before Nelson returned from the hospital, the alleged "prevailing belief" among mill employees was that Wise had pulled a groin muscle and this later shifted to a "consensus" that Wise had a sexually transmitted infection (Wise Final Br. at pp. 5, 12, 17, 19); and

(iv) Russell "denies" that Nelson told him Wise was very upset because the emergency room doctor made the comment about Wise changing sexual partners. According to Wise, this alleged discrepancy in the testimony by Nelson and Wilson concerning what they discussed creates an issue for the factfinder. (Wise Final Br. at p. 12).

None of these arguments were made to the Circuit Court prior to entering its summary judgment Order. (R. pp. 121-151). Arguments or evidence that were never presented to the Circuit Court clearly cannot be used to show the Circuit Court erred, and Wise cannot rely on issues raised for the first time on appeal. *See Taylor*, 324 S.C. at 222, 526 S.E.2d at 56); *I'On, L.L.C.*, 338 S.C. at 422, 526 S.E.2d at 724. The new arguments in Wise's Initial Brief should be disregarded entirely.

Even if Wise's new arguments are considered, which they should not be, they clearly do not establish the Circuit Court erred since the arguments were not presented to the Circuit Court. Additionally, Wise's arguments are based on distorted characterizations of the deposition

testimony and other record evidence and otherwise fail to identify a genuine issue of material fact concerning Wise's defamation claim.

For the reasons already discussed, *supra*, at pp. 21-23, neither Jepson's notes nor Nelson's statement to Shealy establish Nelson told them Wise had an STD. Wise's additional new arguments also are unavailing. Wise's argument that the consensus of mill employees shifted from believing he had pulled a groin muscle to believing Wise had an STD misrepresents the record testimony. For starters, none of the individuals who actually heard Nelson's statements knew anything about the nature of Wise's injury or concluded based on Nelson's statements that Wise had a sexually transmitted infection. (R. p. 526, line 19 – p. 527 (Wilson Dep.); R. p. 626, line 24 – p. 627, line 4 (Shealy Dep.)). Likewise, none of the nine co-workers Wise deposed testified he believed Wise had a sexually transmitted infection at any time, and most testified that if they heard the rumor they paid no attention to it and it did not change their opinion of Wise. (*See, e.g.*, R. p. 610, lines 4-17 (Praylow Dep.); R. p. 542, lines 16-18 (Neal Dep.); R. p. 599, lines 13-19 (Maybin Dep.); R. p. 628, line 23 – p. 629, line 2 (Shealy Dep.)). The only testimony Wise identifies to support the alleged "prevailing belief" among employees initially was that Wise pulled a groin muscle is the testimony of two coworkers, Anthony Cannon and Jeremy Neal.[13] (Wise Final Br. at p. 5). Even if Wise accurately described their testimony, which he does not, two employees hardly establishes a "prevailing belief" among all mill employees. Moreover, Cannon testified that before Wise was even taken to the hospital he overheard a coworker, Robert Johnson, joking

[13] Wise also cites the deposition of his wife, Pauline Wise, as supporting the "prevailing belief" among mill employees was that Wise pulled a groin. (Wise Final Br. at p. 5). The cited testimony does not even mention a belief that Wise had pulled a groin muscle. In any event, Mrs. Wise was not at the mill on the day of the incident and testified that everything she knew about incidents at the mill, including statements by mill employees, came from Wise. (R. p. 667, lines 17-23).

that Wise's injury was sexually related, and Cannon did not testify that he believed Wise had pulled a groin. (R. p. 439, lines 4-16 (Cannon Dep.). Neal was not even at the mill on the day of the incident. (R. p. 538, line 23 – p. 539, line 21 (Neal Dep.)). Neal testified he heard Wise "had pulled something" and when he returned to work a day or two later he also heard jokes made that Wise had an STD. (R. p. 538, line 23 – p. 539, line 21). Wise's argument based on the alleged shifting "prevailing belief" among employees, while not properly made to this Court because it was not presented to the Circuit Court, is not supported by the actual testimony. It also is based on pure speculation and is not *evidence* sufficient to withstand summary judgment.

Finally, Wise's misguided reliance on an alleged discrepancy between the testimony of Nelson and Russell concerning what Nelson told Russell misstates the testimony and is equally insufficient to establish a genuine issue of material fact. Wise asserts in his brief that Russell "denies" Nelson told him that Wise was upset by Dr. Leap's alleged comment about Wise changing sexual partners. (Wise Final Br. at pp. 12-13). That is not what Russell testified, and even if it were the testimony does not establish Nelson told Russell or anyone else Wise had an STD. Wise's argument is precisely the type of "vain attempt to create an issue of fact that is not genuine" that South Carolina courts have recognized is insufficient to defeat summary judgment and is utterly unhelpful to Wise's appeal. *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984). Only disputes concerning a *material* fact can avoid summary judgment. Rule 56(c), SCRCP. A factual dispute is material if it might affect the outcome of the case. *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019).

While Wise contends that a jury should be asked to decide the alleged dispute between Nelson's and Russell's testimony, this is not a *genuine* dispute concerning a *material* fact because regardless of which testimony is accepted as true, the outcome is the same: Wise's claim fails as a

matter of law. Construing Russell's testimony in a light most favorable to Wise, it supports that Nelson did not tell Russell about the doctor's comment. Obviously, if Nelson did not make the statement to Russell this cannot be the basis for Wise's defamation theory, and his claim fails. On the other hand, if Nelson did make the statement to Russell it is qualifiedly privileged (*see, infra, at* pp. 42-44), and Wise's claim still fails. The so-called factual dispute between Russell's and Nelson's testimony is immaterial and fails to create a genuine factual issue.

Notwithstanding the immateriality of Wise's new argument concerning the Nelson-Russell communication, Wise's mischaracterization of Russell's testimony deserves correction. Russell's actual testimony given more than two years after the forklift incident was, "I cannot say with all certainty exactly what Keith [Nelson] told me that day, other than – I feel rather certain, you know, he said he [Wise] had an infection and that it probably wasn't going to be work related." (R. p. 550, lines 7-11). Russell proceeded to testify that he did not recall Nelson mentioning the doctor's comment to Wise about changing sexual partners. (R. p. 550, lines 12-16). Nelson's testimony, which Wise's counsel misquoted in his questioning of Russell, was that Nelson told Russell Wise was "very upset" because the doctor asked Wise about changing sexual partners. (R. p. 466, lines 18-25). The fact that Russell did not recall everything Nelson told him two years later is hardly an unequivocal denial that Nelson relayed the information to Russell.

Wise argues throughout his brief that his improper new evidence and new arguments establish the Circuit Court erred in granting summary judgment. Even if considered, which they should not be, for the reasons demonstrated above, Wise's arguments fail and the Circuit Court's Order should be affirmed.

III. The Circuit Court Correctly Determined Wise's Defamation Claim Failed as a Matter of Law and Properly Granted Summary Judgment.

A. Defamation – Controlling Law

To prove defamation under South Carolina law, a plaintiff must establish the following elements:

> (1) a false and defamatory statement was made;
>
> (2) the unprivileged publication was made to a third party;
>
> (3) the publisher was at fault; and
>
> (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Fountain v. First Reliance Bank, 398 S.C. 434, 441, 730 S.E.2d 305, 309 (2012).

Defamation is classified as either actionable per se or not actionable per se (i.e., defamation per quod.) *Id.* at 442, 730 S.E.2d at 309. Where, as here, the alleged defamation involves slander (as opposed to libel), the statements are actionable per se if they charge the plaintiff with any of the following five acts and/or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession. *Id.* The classification of a statement as actionable per se is significant because in such instance the defendant " 'is presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages.' " *Id.* (quoting *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006)). On the other hand, if the statement is not actionable per se, "'the plaintiff must plead and prove both common law malice and special damages.'" *Id.* (quoting *Erickson*, 368 S.C. at 465, 629 S.E.2d at 664). In other words, where a statement is actionable per se, the plaintiff is not required to establish elements (3) or (4) to prove defamation. *See id.*

Whether a statement is actionable per se is a question of law for the court to resolve. *Id.*; *Erickson,* 368 S.C. at 465, 629 S.E. 2d at 664. In deciding this question, "[t]he trial court has the duty to determine whether words are reasonably capable of having the defamatory meaning attributed to them by the plaintiff." 20 S.C. JUR. *LIBEL AND SLANDER* § 19 (May 2021) (citing *Appliance Buyers Credit Corp. v. Baxley*, 241 S.C. 64, 68-69, 127 S.E.2d 8, 9 (1962)). In making this determination, words must be given their plain and popular or ordinary meaning. *Id.* Further, and as the South Carolina Supreme Court has explained, " '[t]he court will not hunt for a forced and strained construction to put on ordinary words, but will construe them fairly, according to their natural and reasonable import and the plain and popular sense in which the average reader naturally understands them.' " 20 S.C. JUR. *LIBEL AND SLANDER* § 19 (quoting *Timmons v. News & Press, Inc.*, 232 S.C. 639, 644, 103 S.E.2d 277, 280-81 (1958)); *Hospital Care Corp. v. Commercial Cas. Ins. Co.*, 194 S.C. 370, 379, 9 S.E.2d 796, 800 (1940). While statements that are not defamatory on their face may become actionable considering the context in which they were made or other insinuation or innuendo, the statement's defamatory meaning must be apparent based on a reasonable construction. *Fountain*, 398 S.C. at 442, 730 S.E.2d at 310. A construction based on "purely conjectural interpretations" is not reasonable and is insufficient to avoid summary judgment. *Id.*

Regardless of whether a statement is actionable per se or per quod, truth is an absolute defense to any defamation claim. *Id.* When the alleged defamatory statements are made by a private figure in a matter of private concern, it is the defendant's burden of "proving the substantial truth of each of the alleged defamatory statements." *Kunst v. Loree*, 424 S.C. 24, 41, 817 S.E.2d 295, 303 (2018). If the defendant presents evidence establishing the truth of the statements and there is no conflicting evidence to challenge the truth of the statements, summary judgment is

appropriate. *Fountain,* 398 S.C. at 442, 730 S.E.2d at 310 (even if statements were actionable *per se*, they could not be deemed defamatory because they were unquestionably true; affirming summary judgment for defendant).

B. Summary Judgment Was Properly Granted Because the Circuit Court Correctly Determined West Fraser Established the Substantial Truth of Nelson's Statements to Wilson.[14]

The only individuals present during the conversation between Nelson and Wilson were Nelson and Wilson, and they are the only individuals with personal knowledge of Nelson's statements to Wilson. Wise acknowledged in his deposition that he was not present at the time the conversation occurred and aside from rank hearsay (none of which was corroborated by any of the nine co-workers Wise deposed), Wise has no personal knowledge of the exact words Nelson used.[15] (R. p. 292, lines 4-23; Wise Dep. at p. 140 line 4 – 23 ("I don't know who all done said what. ...I was out of work a week.") Clearly, there can be no genuine dispute concerning what Nelson said to Wilson or the conclusions that can be drawn from Nelson's statements when the only two parties to the conversation, Nelson and Wilson, both testified consistently concerning what Nelson said and how it was interpreted.

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[14] While the Circuit Court did not make a determination concerning whether Nelson's statement to Shealy was true because this issue was never presented, if evidence of Nelson's statement to Shealy is considered on appeal, the Circuit Court's finding applies equally to the Shealy communication because Nelson's statements to Shealy were nearly identical to his statement to Wilson, i.e., that Wise had an infection.

[15] To be sure, co-worker statements claiming to have heard defamatory statements is not a publication by the employer and cannot be the basis of a defamation claim. *Todd v. Fed. Express Corp.,* 2012 WL 4006595, * 20 (D.S.C. July 16, 2012) (recommending summary judgment for employer on defamation claim) (*Todd v. Fed. Express Corp.,* 2012 WL 4006466 (D.S.C. Sept. 12, 2012 (adopting magistrate's recommendation and granting summary judgment on defamation claim).

As such, Wise presented no admissible evidence to the Circuit Court, nor could he, to challenge that the only statements Nelson actually made to Wilson were: (i) Wise has an infection, and (ii) Wise received a prescription and/or antibiotic, both of which were true statements. (*See* facts establishing truth, *supra*, at p. 16-17). Statements that are true are not defamatory as a matter of law, and summary judgment was proper for this reason alone. *Fountain*, 398 S.C. at 443-44, 740 S.E.2d at 310 (trial court properly granted summary judgment where plaintiff presented no evidence to contradict truth).

Nevertheless, Wise argues in his Initial Brief that the Circuit Court should have disregarded the testimony by Nelson and Wilson as not credible based on "circumstantial evidence," none of which was presented to the Circuit Court prior to entering summary judgment with the exception of Russell's November 17, 2017 letter of reprimand issued to Nelson. (Wise Initial Br. at p. 12-14 (discussing Jepson's statement, the alleged shift in the "prevailing belief" among employees about Wise's injury, and alleged discrepancy between Nelson's and Russell's testimony). As established above, with the exception of Russell's reprimand letter, none of Wise's "circumstantial evidence" should be considered, and regardless, the so-called "evidence" still fails to establish Nelson told anyone Wise had an STD or that the statements Nelson actually made were untrue. (*See, supra*, at pp. 31-34).

Turning to the only piece of evidence presented to the Circuit Court, the reprimand letter, the Circuit Court considered Wise's argument and properly rejected that the letter could reasonably be understood as an admission that Nelson made slanderous statements:

> At best, the letter of reprimand establishes West Fraser considered Nelson's statements to be inappropriate and contrary to company procedure. It does not support that Nelson's statements to Wilson implied a defamatory meaning. *See Fountain*, 398 S.C. at 443, 730 S.E.2d at 310 (banker's testimony that statements were inappropriate and not something a banker should say "falls far short of establishing an implied defamatory meaning.")

(R. p. 15; Oct. 11, 2021 Or. at p. 10). Wise's argument to this Court based on the reprimand letter advances the same distorted and false characterization of what the letter actually states and incorrectly concludes the Circuit Court improperly weighed the evidence. (Wise Final Br. at p. 13). The plain language in the reprimand letter and Russell's testimony concerning why the letter was issued and what he intended to communicate in the letter demonstrates that Wise's interpretation of the letter is patently unreasonable. In considering summary judgment, the Circuit Court was not required to construe inferences in Wise's favor that are either nonexistent or not reasonable. Wise's argument based on the reprimand letter fails to identify any legitimate error by the Circuit Court.

Wise failed to present sufficient evidence to the Circuit Court to rebut that the statements Nelson actually made were true and he has failed to present sufficient evidence to this Court to rebut the truth of the statements. The Circuit Court's Order entering summary judgment should be affirmed on this ground alone.

C. The Circuit Court Properly Granted Summary Judgment Because It Correctly Determined that Nelson's Statements to Wilson Could Not Reasonably Be Construed as Defamatory by Innuendo.

Wise next argues that even if there is insufficient evidence to support that Nelson actually told Wilson that Wise had an STD, his statements were defamatory by innuendo based on extrinsic evidence, including that multiple employees were aware Wise had suffered an injury to his groin at the time Nelson made the statement to Wilson. (Wise Final Br. at pp. 15, 17). Wise contends that the Circuit Court incorrectly analyzed whether Nelson's statement was reasonably capable of a defamatory meaning and considered irrelevant facts. (Wise Final Br. at pp. 15-16). Wise's point of error misconstrues the Circuit Court's analysis. As set forth in the summary judgment Order, the Circuit Court correctly followed the analysis established by the South Carolina Supreme Court

in *Fountain v. First Reliance Bank*, 398 S.C. 434, 442, 730 S. E. 2d 305, 310 (2012). (R. pp. 11-12; Oct. 11, 2021 Or. at pp. 6-7). Wise completely disregards that there is no evidence that anyone interpreted Nelson's statement to Wilson, which indisputably was heard only by Wilson, as implying Wise had an STD. The reasonableness of Wise's contention that the word "infection" used in the context of Nelson's statement to Wilson could reasonably be construed as implying Wise had a *sexual* infection is belied by Wilson's understanding of Nelson's statement. Indeed, in construing the meaning of alleged defamatory words, "**what matters is how those who heard the statement understood it.**" 20 S.C. JUR. *LIBEL AND SLANDER* § 19 (May 2021) (emphasis added). Wilson did not interpret Nelson's statements as communicating or implying anything of a sexual or defamatory nature and testified the only person he heard relate Wise's infection to a sexual infection was Wise. (R. p. 528, lines 5-10; Wilson Dep. at p. 7, line 5 – 10). Wise's argument based on the nature of his injury also is misplaced because Wilson testified he did not know the nature of Wise's injury when he asked Nelson if Wise was okay (R. p. 526, line 19 – p. 527, line 18; Wilson Dep. at p. 5, line 19 – p. 6, line 18). The only evidence presented to the Circuit Court to support that Nelson's statements were defamatory by innuendo was Wise's conjecture about stereotypes about black men and his equally speculative argument that Nelson was the only possible source of the rumor. The Circuit Court considered this evidence and properly declined to adopt Wise's offensive and racist stereotype, instead construing the common and ordinary meaning of Nelson's actual statements in the context they were made. The Circuit Court also correctly rejected Wise's theory that Nelson was the only possible source of the rumor and determined that based on the record as a whole, there were other possible sources and Wise's speculation was not evidence creating a triable issue.

Wise's remaining arguments offered to identify an alleged error by the Circuit Court in determining Nelson's statements were not defamatory once again rely on new arguments and/or evidence not presented to the Circuit Court. Wise makes the new argument that the visible nature and location of Wise's injury and the workforce's awareness of it are "extrinsic facts" showing that Nelson's statement to Wilson was defamatory by innuendo. (Wise Final Br. at p. 17). As an initial matter, Wise's new argument contradicts his assertion that before Nelson returned from the hospital, "the prevailing belief" among employees was that Wise had pulled a muscle. It also confuses the relevancy of the evidence West Fraser, *not Wise*, offered concerning the visible nature of Wise's injury and the sexual joke made to Wise by a co-worker before he ever left for the hospital. To be sure, in opposing summary judgment to the Circuit Court, Wise's principle argument was that other than Wise, Nelson was the only West Fraser employee who went to the hospital and could have learned of Dr. Leap's alleged comment. (R. pp. 132-133; Aug. 11, 2021 Tr. at pp. 12-13). Thus, according to Wise, since only Nelson returned to the mill for several days following the forklift incident Nelson was the only possible source of the alleged rumor about Wise. (R. pp. 132-133; Aug. 11, 2021 Tr. at pp. 12-13). In response to this argument, West Fraser pointed to evidence establishing a co-worker made comments about Wise's injury being sexually related before Wise was taken to the hospital. (R. p. 148); Aug. 11, 2021 Tr. at p. 28). West Fraser also pointed to testimony by several co-workers and Russell that Wise talked about having, or rather not having, an STD on numerous occasions to numerous employees. (R. p. 147; Aug. 11 Tr. at p. 27). As established by the hearing transcript, this evidence was offered to illustrate the fallacy and speculative nature of Wise's theory that Nelson was the only possible source of the rumor, and this was the precise purpose for which the Circuit Court considered the evidence. (R. p. 14 (citing *Williams v. Lancaster Cty. School Dist.*, 369 S.C. 293, 304, 631 S.E.2d 286, 292 (Ct.

App. 2006) (plaintiffs could not defeat summary judgment where there was no direct evidence that principal told anyone plaintiff was an adulterer and plaintiff's indirect evidence suggesting principal was only possible source of adultery rumor disregarded that other school employees were in the area after married male teacher was found in bathroom with female secretary)). The Circuit Court did not find that Wise was the source of the rumor as Wise asserts in his brief (Wise Final Br. at p. 19).

The evidence of other possible sources of the rumor also was not the basis for the Court's finding that Nelson's statement could not reasonably be construed as defamatory by innuendo. To the contrary, the Circuit Court reviewed the testimony by Nelson and Wilson and correctly concluded that there could be no dispute concerning the conclusions that could be drawn from Nelson's statements to Wilson when the only two parties to the conversation, Nelson and Wilson, both testified consistently concerning what Nelson said and how it was interpreted. Wise urges that reasonable minds could differ concerning the meaning of Nelson's statement to Wilson, but this is just more conjecture, not evidence. Wise has not identified any reversible error committed by the Circuit Court and the Circuit's Order should be affirmed.

D. The Circuit Court Properly Granted Summary Judgment Because It Correctly Held that Nelson's Statements to Russell Were Qualifiedly Privileged and Wise Failed to Present Any Evidence to Show the Privilege Was Exceeded or Abused.

Under South Carolina law, statements that are subject to a qualified privilege, even if defamatory, are not actionable unless the privilege is rebutted. *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310. Communications between agents of the same corporation made in the course of normal business are generally regarded as subject to a qualified privilege. *Conwell v. Spur Co. of Western South Carolina*, 240 S.C. 170, 179, 125 S.E.2d 270, 275 (1962). *See also Bell v. Evening Post Pub. Co.*, 318 S.C. 558, 560, 459 S.E.2d 315, 317 (Ct. App. 1995) (citing *Prentiss v.*

Nationwide Mut. Ins. Co., 256 S.C. 141, 147, 181 S.E.2d 325, 327 (1971)). The elements of a qualified privilege include:

> [G]ood faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within any narrow limits.

Bell, 318 S.C. at 560-61, 459 S.E.2d at 317 (quoting *Prentiss*, 256 S.C. at 147, 181 S.E.2d at 327). Whether an occasion gives rise to a qualified privilege is a question of law for the court to decide. *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310; *Wright v. Sparrow*, 298 S.C. 469, 474, 381 S.E.2d 503, 506-07 (Ct. App. 1989). Where an occasion giving rise to a qualified privilege exists, the burden shifts to the plaintiff to show the privilege was abused. *Wright*, 298 S.C. at 474, 381 S.E.2d at 506-07. Further, a statement that is qualifiedly privileged requires the plaintiff to prove the publisher was motivated by actual malice. *Id.*

Based on a nearly identical statement of the law, the Circuit Court held that Nelson's statement to Russell "is the type of communication South Carolina courts have held give rise to a qualified privilege." (R. pp. 18-20). As the Circuit Court explained, Nelson's statements to Russell were made pursuant to his duties as safety director and interest of reporting an employee concern raised during Nelson's response to an apparent on-the-job accident. (Order at p. 14 (citing *Bell,* 318 S.C. at 317, 459 S.E.2d at 560-61 (trial court did not err in finding statements made during employer's investigation of potential harassment claim were protected by qualified privilege); *Wright*, 298 S.C. at 474, 381 S.E.2d at 506-07 (employer's statements made about employee's job performance in meeting to discuss employee's termination were qualifiedly privileged)). During the summary judgment hearing and supplemental briefing, Wise offered no evidence to the Circuit

Court that would tend to show that Nelson's statements to Russell exceeded the scope of the qualified privilege.[16]

In support of his appeal, Wise argues that the Circuit Court's Order "erroneously states Plaintiff may only overcome the qualified privilege by demonstrating actual malice." (Wise Initial Br. at p. 21). Quite obviously, that was not stated in the Circuit Court's Order. (R. p. 18). The Order correctly states the showing Wise must make to rebut the qualified privilege, including evidence indicating the privilege was exceeded. (R. pp. 18-19). Wise wholly failed to make any such showing to the Circuit Court. The only evidence Wise points to on appeal in an attempt to rebut the privilege is Wise's new and improper evidence, including Jepson's notes and Nelson's statement to Shealy. (Wise Final Br. at pp. 22-23). Indeed, Wise contends that this evidence, which Wise knows was not presented to the Circuit Court prior to entering summary judgment, somehow is "in direct contradiction to the Circuit Court's finding that there is no evidence of an improper manner of publication." (Wise Final Br. at p. 23). Wise's assertion only highlights the reasons why a party on appeal cannot introduce evidence not presented to the lower court to show the lower court erred. Wise's attempt is highly inappropriate and supremely unfair to the Circuit Court. Additionally, Wise's reliance on Jepson's notes, albeit mischaracterized, and Nelson's statement to Shealy as evidence the privilege was exceeded overlooks that Jepson was the HR manager who shared responsibility for investigating Wise's workplace accident and handling his attempted worker's compensation claim. Even if her notes could be read to state that she discussed Dr. Leap's diagnosis with Nelson, which is a misinterpretation, any such discussion between two managers with a common business interest falls within the qualified privilege. Wise points to no evidence

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[16] As West Fraser pointed out during the hearing, Nelson's statements to Russell also were true. (R. p. 149). Wise did not attempt to rebut the truth of Nelson's statements to Russell during the hearing or at any time prior to entry of summary judgment.

that any such communication between Nelson and Jepson was in the presence of other employees or otherwise exceeded the privilege.

Wise's reliance on Nelson's statement to Shealy also does not save Wise's defamation claim because it is undisputed that the only statement Nelson made to Shealy was that Wise had an infection which, as already established, was true. Whether a truthful statement falls within the qualified privilege is irrelevant because truth is a complete defense to defamation.

Wise has utterly failed to identify any actual point of error in the Circuit Court's finding that Nelson's statements were qualifiedly privileged and Wise failed to offer evidence to rebut the privilege. The Circuit Court properly granted summary judgment on this ground and the other grounds West Fraser established. The Circuit Court's Order should be affirmed.

E. The Additional Grounds in West Fraser's Motion for Summary Judgment Provide Further Support for Affirming the Circuit Court's Order.

Pursuant to Rules 208 and 220, West Fraser may request the Court affirm and the Court on its own may affirm the Circuit Court's summary judgment Order based on any ground appearing in the record. SCACR 208 (b)(2), 220(c). In its Motion for Summary Judgment, West Fraser made additional arguments to the Circuit Court establishing fatal flaws in Wise's defamation claim. These included that Wise could not establish the necessary elements of actual malice or special damages, both of which are required to assert a claim for defamation per quod. (R. pp. 54-56). The statements Nelson made to Wilson do not rise to the level of defamation per se because the statements, on their face or based on any reasonable construction, do not suggest Wise had a loathsome disease or committed adultery. *See Fountain*, 398 S.C. at 444, 730 S.E.2d at 309 (discussing categories of defamation per se). As such, it was incumbent on Wise to present evidence establishing the additional elements of actual malice and special damages.

"Common law malice under South Carolina defamation law generally 'means that the defendant was actuated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff, or that the statements were published with such recklessness as to show a conscious indifference toward plaintiff's rights.' " *Tharp v. Media General, Inc.*, 987 F. Supp. 2d 673, 680 (D.S.C. 2013) (quoting *Jones v. Garner*, 250 S.C. 479, 488, 158 S.E.2d 909, 914 (1968)). There is no evidence that Nelson had any desire to harm Wise or that he made his statements with a conscious indifference toward Wise's rights. To the contrary, Nelson testified that he believed he was simply answering the question of a concerned co-worker and it never occurred to him anyone would infer something sexual or derogatory from his statement. (R. p. 465, line 23 – p. 466, line 8). Wise testified he and Nelson had a good working relationship, there was no history of animosity between them, and they never even had a disagreement. (R. p. 346, line 2 – p. 347, line 25). Additionally, Wilson testified that when Nelson made the statement to him there was no one else around and no one could have overheard the statement. Nelson's statement. (R. p. 532, lines 12-17). Wise has no evidence to show Nelson's statements were made with malice.

Wise also has no evidence to establish special damages. Special damages in the defamation context are tangible losses or injury to the plaintiff's business, occupation, or profession that can be assessed monetarily and result from actual injury to the plaintiff's reputation. *Kunst*, 424 S.C. at 46 n. 8, 817 S.E. 2d 306 n.8 (citing *Holtzscheiter v. Thompson Newspapers, Inc.*, 332 S.C. 502, 510 n.4, 506 S.E. 2d 497, 502 n.4 (1998)). They are distinct from general damages, which include mental anguish and the type reputational injuries that are incapable of definitive monetary valuation. Wise's only evidence of damages consisted of general damages. He has not and cannot establish any actual or quantifiable injury to his reputation. In fact, in his sworn interrogatory answers, Wise admitted he had not suffered any monetary loss because of Nelson's alleged

defamatory statement. (R. pp. 66-67; Wise Resp. to West Fraser's Interrog. at pp. 9-10, #17). Without the presumption of general damages that accompanies statements that are defamatory per se, Wise cannot rely only on alleged general damages and must present evidence of special damages, i.e., tangible loss. Wise's failure to do so is fatal to his defamation claim.

The Circuit Court did not decide the foregoing issues because it determined summary judgment was warranted for the numerous other reasons set forth in its October 11, 2021 Order granting summary judgment. The Circuit Court's Order should be affirmed for those reasons and on the additional grounds set forth above and in West Fraser's Motion for Summary Judgment.

F. The Circuit Court Properly Held Wise's Motion for Leave to Amend and His Proposed Amended Complaint Had No Impact on Whether Summary Judgment Should Be Granted on Wise's Defamation Claim.

The Circuit Court's Order set forth three grounds to support its finding that Wise's Motion for Leave to Amend had no impact on West Fraser's pending Motion for Summary Judgment and should be denied:

(i) Wise's proposed amended claim was based on the exact same facts as Wise's defamation claim that the Circuit Court already determined were wholly lacking in evidentiary support (i.e., that Nelson allegedly repeated Dr. Leap's statement that Wise had been changing sexual partners, accusing Wise of having an STD and/or committing adultery) and, therefore, allowing the amendment would be futile;

(ii) Wise's proposed amended claim sought to assert a claim against West Fraser for breach of a duty of confidentiality, a claim that has never been recognized against an employer under South Carolina law, and therefore, allowing the amendment would be futile; and

(iii) Permitting Wise to amend his Complaint to add a new theory of liability after the case had been pending for 2 ½ years and only 27 days before trial was unfairly prejudicial to West Fraser.

(R. pp. 20-21). The Circuit Court's Order should be affirmed for any one or all of the above reasons.

Wise's appeal challenges only the Circuit Court's analysis of prejudice and does not even attempt to address the additional reasons the Circuit Court determined his proposed amendment was futile and should fail. Wise's proposed claim was clearly futile, in part because it was based on the same factual allegations that the Circuit Court determined were completely lacking in evidentiary support. *See Salvo v. Hewitt, Coleman & Assoc., Inc.*, 274 S.C. 34, 38, 260 S.E. 2d 708, 711 (1979) (where trial court's reasoning in granting summary judgment would have doomed proposed amendment adding alternative theory, outcome of motion to amend was irrelevant). While Wise cites cases supporting that other courts have allowed motions to amend filed under timelines similar to Wise's, those cases did not involve claims that would have been futile. (Wise Initial Br. at pp. 24-25 (citing *Stanley v. Kirkpatrick*, 357 S.C. 169, 592 S.E. 2d 296 (2004) and *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 607 S.E.2d 711)). Indeed, neither *Stanley* nor *Parker* involved amended claims that were futile either because they were based on facts already established as unsupported or because the claim failed to assert a viable cause of action.

Wise asserts, in conclusory fashion, that because his amended claim was based on the same facts as his defamation claim the amendment would not have required additional discovery. However, as established by the authorities cited in the Circuit Court's Order, unfair prejudice can result when a proposed amendment is made shortly before trial and would require legal and factual analysis not already considered by the opposing party or would require the opposing party to introduce different evidence. (R. p. 21; Oct. 11, 2021 Or. at p. 16). *See also Holland ex. Rel. Knox v. Morbark, Inc.*, 407 S.C. 227, 235, 754 S.E.2d 714, 719 (Ct. App. 2014). Unfair prejudice also results where extensive discovery has been conducted and there have been no factual developments to justify the untimely amendment. *Holland,* 407 S.C. at 235, 754 S.E.2d at 719.

The timing of Wise's attempted amendment deprived West Fraser of any opportunity to file a dispositive motion on his purported claim for breach of a duty of confidentiality prior to the quickly approaching trial date. While Wise's amended claim was based on the same unsupported facts as his failed defamation claim, the amended claim was based on a different and novel legal theory that would have required West Fraser to present different evidence and conduct extensive legal research. Indeed, Wise's amended claim raised several new legal issues wholly unrelated to his defamation claim that West Fraser never considered and had no reason to consider, including whether an employer owes a duty of confidentiality to an employee, which no South Carolina Court has ever recognized, and whether any such duty can be breached by disclosing information to another employee. (*See* R. pp. 91-93). These are dispositive issues, none of which practically could have been decided based on the late filing of Wise's amendment, which as the Circuit Court noted was filed after the case had been pending 2 ½ years, 27 days before trial, and with no explanation or reason.

Wise has not established the Circuit Court abused its discretion in determining Wise's proposed amendment was futile, unfairly prejudicial, and wholly irrelevant considering the summary judgment findings. The Circuit Court's Order should be affirmed on any or all of these grounds.

CONCLUSION

Based on the foregoing, Respondent West Fraser respectfully submits that the Circuit Court's Order granting West Fraser's Motion for Summary Judgment should be affirmed in its entirety.

CERTIFICATE OF COMPLIANCE

By signing below, counsel for Respondent hereby certifies that Respondent's Final Brief

complies with Rule 211(b), SCACR.

/s/ Anne Laurie McClurkin
Anne Laurie McClurkin, Esq.
MAYNARD, COOPER & GALE,
P.C. RSA Battle House Tower
11 North Water Street, Suite 24290
Mobile, Alabama 36602
(t) 251.432.0001
amcclurkinamaynardcooper.com

and

/s/ Christopher B. Major
Christopher B. Major, Esq.
HAYNSWORTH, SINKLER & BOYD
1 North Main Street, 2nd Floor
Greenville, South Carolina 29601 (t)
864.240.3200 *cmajor@hsblawfirm.com*

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2022, a true and correct copy of Respondent's Final Brief was served via electronic mail on the following counsel for Appellant:

John E. Parker, Esq.
John E. Parker, Jr., Esq.
PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK, P.A.
101 Mulberry Street East
Hampton, South Carolina 29924
iayparker@pmped.com

John W. Carrigg, Jr., Esq.
CARRIGG LAW FIRM
120 North Lake Drive
Lexington, South Carolina 29072
jcarrigg@carrigglaw.com

ATTORNEYS FOR APPELLANT

/s/ Christopher B. Major