

allegation that Defendant Kirkland had any involvement in the circumstances giving rise to the lawsuit is broad: that Defendant Kirkland participated in the matters discussed in the Complaint.

The Complaint originally asserted six causes of action against Defendant Kirkland: (1) defamation per se and per quod; (2) defamation by innuendo; (3) invasion of privacy; (4) negligence; (5) intentional infliction of emotional distress; and (6) conspiracy. Defendant Kirkland moved to dismiss Plaintiff's Complaint, which this Court granted in part and denied in part on March 26, 2021, dismissing Plaintiff's causes of action for defamation by innuendo and negligence.

Defendant Kirkland served Plaintiff with Interrogatories, Requests for Production, and Requests for Admission. Plaintiff did not respond to any of the discovery requests and, as a result, Defendant Kirkland asked this Court to compel responses to the Interrogatories and Requests for Production, and deem admitted the matters in the Requests for Admission. At the hearing on the motion to compel on October 7, 2021, this Court required Plaintiff to respond to the Interrogatories and Requests for Production by October 15, 2021. On October 15, 2021, this Court entered an Order requiring Plaintiff to respond by that date. Plaintiff did not respond by October 15, 2021, did not respond within the additional courtesy extensions granted by Defendant Kirkland.

By Order dated November 5, 2021, this Court deemed admitted the matters in Defendant Kirkland's, and the co-defendants', Requests for Admission, conclusively proving those matters for trial. Pursuant to Order, Plaintiff has admitted the following:

1. Admit you have no documentation establishing Defendant Kirkland participated in the matters discussed in the Complaint, as referenced in Paragraph 64 of the Complaint.
2. Admit you have no documentation establishing Defendant Kirkland published any defamatory statements about you.
3. Admit you are unaware of whether Defendant Kirkland sent the defamatory emails or created the defamatory website alleged in the Complaint.

4. Admit you have no documentation establishing Defendant Kirkland publicized any private matters about you.
5. Admit you, as opposed to your wife, did not seek or obtain medical treatment as a result of any of Defendant Kirkland's actions.
6. Admit you have no documentation establishing Defendant Kirkland conspired with co-defendants to injure you, as referenced in the Complaint.

Defendant Kirkland moved for summary judgment on December 3, 2021, asserting the pleadings, admissions, and Plaintiff's failure to cooperate in discovery establishes there are no genuine issues for trial and warrant an order dismissing the remainder of Plaintiff's claims.

STANDARD

"Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003) (quoting Rule 56(c), SCRPC). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

The moving party has the initial burden to show the absence of a genuine issue of material fact. *Id.* Once the moving party meets its initial burden, the nonmoving party cannot rely on the allegations and denials in the pleadings to survive summary judgment. *Id.* Instead, the nonmoving party must come forward with specific facts showing a genuine issue for trial. *SSI Med. Servs. Inc. v. Cox*, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990). When ruling on a defendant's summary judgment motion, a court must determine whether the plaintiff has established that a genuine issue of material fact exists for *each element of a claim* in order to defeat summary judgment for that claim. *See Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007) ("[O]n a defendant's motion for summary judgment . . . a court cannot properly deny

the motion after only finding that a genuine issue of material fact exists as to one element of the plaintiff's claim; rather, under *Baughman*, the court must determine that a genuine issue of material facts exists for each essential element of the plaintiff's claim." (citing *Baughman v. Amer. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991)). Additionally, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine. *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006).

ORDER

I. There is no genuine issue of material fact as to any element of Plaintiff's claim for defamation per se or per quod.

In order to prove defamation, the plaintiff must show (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. *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). A statement is classified as defamatory per se when the meaning or message is obvious on its face. A statement is classified as defamatory per quod when the defamatory meaning is not clear unless the hearer knows facts or circumstances not contained in the statement itself, and the plaintiff must introduce extrinsic facts to prove the defamatory meaning. *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006). Truth is an absolute defense to defamation. *Parker v. Evening Post Pub. Co.*, 317 S.C. 236, 245, 452 S.E.2d 640, 645 (Ct. App. 1994).

Plaintiff's cause of action for defamation is based on the five allegedly defamatory emails and the website. Although the cause of action generally refers to "Defendants," the Complaint is devoid of any alleged statement by Defendant Kirkland regarding Plaintiff that was false. Plaintiff's cause of action for defamation is related to emails from an address that the owner is unknown, that he attempts to connect to other Defendants based on a common domain registrar

and common email marketing software. Plaintiff does not allege Defendant Kirkland has any connection to the domain registrar or software. Defendant Kirkland attempted to investigate support for Plaintiff's general allegations, but Plaintiff has failed to cooperate in discovery and the Court deemed admitted matters in Defendant Kirkland's requests for admission. Furthermore, as averred to in his affidavit, Defendant Kirkland had no involvement in the defamatory emails. Plaintiff has admitted he has no documentation establishing his general allegations, he has no documentation establishing Defendant Kirkland published any defamatory statements about him, and Plaintiff has no knowledge of whether Defendant Kirkland sent the allegedly defamatory emails or created the defamatory website.

This Court finds Defendant Kirkland has established there is no genuine issue of material fact and Plaintiff's claims for defamation should be dismissed, and Plaintiff has not come forth with specific facts showing a genuine issue for trial. *See SSI Med. Servs. Inc.*, 301 S.C. at 497, 392 S.E.2d at 792 (stating that once the moving party meets its initial burden, the nonmoving cannot rely on the allegations and denials in the pleadings to survive summary judgment; but instead must come forward with specific facts showing a genuine issue for trial). Thus, Defendant's motion for summary judgment on Plaintiff's claims for defamation per se and per quod is granted and those claims are dismissed.

In addition, shortly after Defendant Kirkland moved for summary judgment, this Court issued an order quashing Plaintiff's subpoena to Endurance International Group, dated December 29, 2021. The December 29 Order found that the statements on the allegedly defamatory website JeffDavisFirst.com were true and, therefore, not defamatory. Plaintiff alleges the defamatory emails were sent with links to this website. The findings in this Court's December 29 order are incorporated herein and serve as an additional ground for granting Defendant Kirkland summary judgment and dismissing Plaintiff's claims for defamation per se and per quod.

II. There is no genuine issue of material fact as to Plaintiff's claim for invasion of privacy.

Plaintiff's cause of action for invasion of privacy is based on the allegation Defendants gained personal knowledge, through an unwarranted invasion and trespass, and used that knowledge to further Defendants' financial and political interest. In South Carolina, the elements of invasion of privacy include: (1) publicizing; (2) absent any waiver or privilege; (3) private matters in which the public has no legitimate interest; (4) so as to bring shame or humiliation to a person of ordinary sensibilities. *Swinton Creek Nursery v. Edisto Farm Credit, et al.*, 334 S.C. 469, 514 S.E.2d 126 (1999).

Plaintiff has failed to establish that Defendant Kirkland possessed or publicized private matters about Plaintiff. The Complaint contains only general allegations and is devoid of any allegation Defendant Kirkland ever possessed or improperly accessed private matters relative to Plaintiff. Defendant Kirkland attempted to investigate what information Plaintiff has to support his general allegations, but Plaintiff has failed to cooperate in discovery. Nevertheless, Plaintiff has admitted he has no proof establishing Defendant Kirkland publicized private matters about Plaintiff. Furthermore, as averred to in his affidavit, Defendant Kirkland is entirely unaware of what private matters Plaintiff claims were publicized, and was not involved in any publication of private matters.

Because Plaintiff has no proof establishing Defendant Kirkland publicized private matters about him and Defendant Kirkland was not involved in any invasion of privacy, Plaintiff's allegations are insufficient to create a genuine issue of material fact and this Court grants Defendant Kirkland summary judgment and dismisses Plaintiff's invasion of privacy cause of action. *See SSI Med. Servs. Inc.*, 301 S.C. at 497, 392 S.E.2d at 792 (stating that once the moving party meets its initial burden, the nonmoving party cannot rely on the allegations and denials in the pleadings to survive summary judgment; but instead must come forward with specific facts showing a genuine issue for trial).

III. There is no genuine issue of material fact as to any element of intentional infliction of emotional distress.

To succeed on a claim for intentional infliction of emotional distress a plaintiff must prove: (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized society; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it. *Upchurch v. New York Times Co.*, 314 S.C. 531, 431 S.E.2d 558 (1993). "When ruling on a summary judgment motion, a court must determine whether the plaintiff has established a prima facie case as to each element of a claim for intentional infliction of emotional distress." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007).

Plaintiff's cause of action for intentional infliction of emotional distress is based on Defendants allegedly having knowledge of Plaintiff's spouse's medical conditions, and intentionally using that information to "inflict emotional distress on Plaintiff Davis and was outrageous beyond the bounds of conduct expected by members of society" such that Plaintiff suffered severe emotional distress. The allegations do not identify specific Defendants or specific conduct purportedly giving rise to this cause of action. Plaintiff does not identify the alleged medical condition or the manner by which Defendant Kirkland utilized that information to cause Plaintiff to suffer emotional distress. Defendant Kirkland attempted to investigate what information Plaintiff had in support of his claim, but Plaintiff has failed to cooperate in discovery. Additionally, as averred to in his affidavit, Defendant Kirkland denies having any knowledge of any medical conditions, and did not utilize any information to cause Plaintiff emotional distress. Thus, there is no genuine issue of material fact and this Court grants Defendant Kirkland summary

judgment and dismisses Plaintiff's cause of action for intentional infliction of emotional distress. *See SSI Med. Servs. Inc.*, 301 S.C. at 497, 392 S.E.2d at 792 (stating that once the moving party meets its initial burden, the nonmoving cannot rely on the allegations and denials in the pleadings to survive summary judgment; but instead must come forward with specific facts showing a genuine issue for trial).

IV. There is no genuine issue of material fact as to any element of conspiracy.

To recover for a cause of action alleging civil conspiracy, a plaintiff must establish: "(1) the combination or agreement of two or more persons, (2) to commit an unlawful act or lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff." *Paradis v. Charleston Cty. Sch. Dist.*, 433 S.C. 562, 574, 861 S.E.2d 774, 780 (2021). A claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than re-allege other claims within the complaint. *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 682 S.E.2d 871 (Ct. App. 2009).

Because civil conspiracy is an intentional tort, intent to harm is an inherent part of the analysis. *Paradis*, 861 S.E.2d at 780; *Bivens v. Watkins*, 313 S.C. 228, 235, 437 S.E.2d 132, 134 (Ct. App. 1993). Evidence the alleged conspirators "acted with malice" is required. *Waldrep Bros. Beauty Supply, Inc. v. Wynn Beauty Supply Co., Inc.*, 992 F.2d 59, 63 (4th Cir. 1993) (applying South Carolina law). The failure to allege intent to harm is fatal to a civil conspiracy claim. *See Jinks v. Sea Pines Resort, LLC*, No. 9:21-CV-00138-DCN, 2021 WL 4711408, at *3 (D.S.C. Oct. 8, 2021).

Plaintiff's claim fails as a matter of law because he has not alleged additional acts in furtherance of a conspiracy, and he does not allege Defendant Kirkland had an intent to harm. The basis for Plaintiff's claim of conspiracy is that, "by making false and defamatory statements, innuendo, and threat of withholding financial support," the "Defendants conspired together and

directed others to not do business or communicate with Plaintiff Davis.” Plaintiff fails to allege any acts in furtherance of the conspiracy. He alleges there is a conspiracy because Defendants made defamatory statements. Again, Plaintiff has not alleged any connection between Defendant Kirkland and the account that made defamatory statements. Also, Plaintiff has not alleged that Defendant Kirkland had a specific intent to harm Plaintiff.

Additionally, Plaintiff has admitted he has no documentation establishing Defendant Kirkland conspired with the other defendants to injure him. Furthermore, with respect to the remaining co-defendants, Plaintiff has admitted none of them conspired with each other to injure Plaintiff. Finally, Defendant Kirkland did not act with any other person or direct anyone not to do business with Plaintiff. Thus, due to Plaintiff’s admissions and the fact that Defendant Kirkland avers he was not involved, it is impossible to show “a combination of two or more persons,” an essential element of conspiracy, and the cause of action must be dismissed. Therefore, Defendant Kirkland’s motion for summary judgment is granted and Plaintiff’s claim for civil conspiracy is dismissed. *See SSI Med. Servs. Inc.*, 301 S.C. at 497, 392 S.E.2d at 792 (stating that once the moving party meets its initial burden, the nonmoving party cannot rely on the allegations and denials in the pleadings to survive summary judgment; but instead must come forward with specific facts showing a genuine issue for trial).

V. As an additional ground this Court dismisses Plaintiff’s Complaint for failure to comply with this Court’s October Order compelling discovery responses.

When a party fails to obey a court order to provide discovery, the circuit court can impose sanctions such as striking pleadings or dismissing the action. Rule 37(b)(2)(C), SCRCP. “When the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly.” *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999). Sanctions should be aimed at the specific conduct of the party but not go beyond the necessities of the

situation. *Id.*, 511 S.E.2d at 719. To determine the appropriateness of the sanction, a court can consider the following factors: (1) precise nature of the discovery; (2) discovery posture of the case; (3) willfulness; and (4) degree of prejudice. *See id.* at 199, 511 S.E.2d at 719. Deciding whether to sanction a party is within the sound discretion of the court, and severe sanctions such as dismissal should be imposed in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights. *McNair v. Fairfield County*, 379 S.C. 462, 466, 665 S.E.2d 830, 832 (Ct. App. 2008).

Striking a pleading or dismissing an action because of the discovery abuses of a party is tailored to the necessities of the situation as long as the sanction is specific to the parties affected by the discovery abuse. *See generally Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 543-44, 489 S.E.2d 679, 682-83 (Ct. App. 1997) (finding sanction dismissing complaint as to all parties was not tailored to the necessities of the situation when the sanctioned party's discovery abuse was related to only one party's discovery requests, and other parties not requesting relief were awarded a windfall).

The failure to comply with a court's prior orders warrant the sanction of striking the party's pleadings. *Griffin Grading*, 334 S.C. at 199, 511 S.E.2d at 719 ("If there was ever a case where striking a party's pleading was an appropriate sanction, it is this case where the record is full of multiple, egregious discovery abuses that blocked the opposing party's attempts to conduct meaningful discovery."). For example, failure to provide discovery responses more than 7 months after the court compels discovery is prejudicial to the party seeking the discovery and a "serious affront to the integrity of the judicial system." *McNair*, 379 S.C. at 467, 665 S.E.2d at 832.

Plaintiff's failure to comply with this Court's discovery order, the admissions, and Plaintiff attempting other discovery while failing to respond is tantamount to willful disobedience of this Court's order. After over 5 months of disregarding Defendant Kirkland's discovery requests, Plaintiff represented to the Court that he could provide responses by October 15, 2021. This

Court's October 15 order encompassed that promise. Yet Plaintiff has not provided responses to this date. In addition, the effect of Plaintiff's admissions establish he has absolutely no documentation or evidence to substantiate his claims that Defendant Kirkland was involved in any of the allegations of the Complaint.

For nine months Plaintiff has continued to defy this Court's order and frustrate Defendant Kirkland's ability to investigate the claims and conduct discovery. Plaintiff's failure to respond in light of this Court's order prejudices Defendant Kirkland and is a serious affront to the integrity of the judicial system. Therefore, this Court finds an appropriate sanction under the circumstances is to dismiss Plaintiff's claims against Defendant Kirkland with prejudice.

THEREFORE, IT IS ORDERED that Defendant Kirkland's Motion for Summary Judgment filed on December 3, 2021, is **GRANTED** in accordance with the above order and Plaintiff's causes of action for defamation per se and per quod, invasion of privacy, intentional infliction of emotional distress, and conspiracy against Defendant Kirkland are dismissed with prejudice. **IT IS FURTHER ORDERED** that Plaintiff's claims against Defendant Kirkland are dismissed because Plaintiff has failed to cooperate in discovery to Defendant Kirkland's prejudice, and has willfully disobeyed this Court's previous orders.

IT IS SO ORDERED.

The Honorable Donald B. Hocker

This ___ day of _____, 2022.



Newberry Common Pleas

Case Caption: Jefferson Davis Jr VS Chad Connelly , defendant, et al

Case Number: 2020CP3600382

Type: Order/Summary Judgment

Circuit Court Judge

s/Donald B. Hocker, Judge Code 2167