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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2024-000557

Roberta Moore, Appellant,

v.

Rebecca Giesler, Respondent.

INITIAL BRIEF OF RESPONDENT

Roberta Moore
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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE..... 1

STANDARD OF REVIEW 6

SUMMARY OF ARGUMENT 7

ARGUMENT 8

I. The Circuit Court Correctly Granted Summary Judgment on Respondent’s Claim for Breach of Contract..... 8

A. Appellant failed to preserve all issues of this appeal with the Circuit Court... 8

B. Any argument concerning Respondent’s first set of interrogatories or Appellant’s response to interrogatories are irrelevant to this appeal..... 10

C. The Circuit Court correctly applied the clear language under Rule 36, SCRPC..... 10

D. The Circuit Court reviewed the court file in its entirety..... 11

E. After the admissions were deemed admitted, no genuine issue of material fact existed under Appellant’s Amended Complaint..... 12

F. Respondent’s formal order was appropriately submitted..... 14

CONCLUSION16

TABLE OF AUTHORITIES

CASES

<i>Baughman v. Am. Tel. & Tel. Co.</i> , 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991)	9
<i>Brown v. Bi-Lo, Inc.</i> , 354 S.C. 436, 440 n.3, 581 S.E.2d 836, 838 n.3 (2003)	11
<i>Callawassie Island Members Club, Inc. v. Dennis</i> , 429 S.C. 493, 497, 839 S.E.2d 101, 103 (Ct. App. 2019).....	3
<i>Conner v. City of Forest Acres</i> , 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002).....	9
<i>David v. McLeod Reg'l Med. Ctr.</i> , 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006)	4
<i>Ellis v. Davidson</i> , 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).....	4
<i>Fuller v. Eastern Fire & Casualty Insurance Co.</i> , 240 S.C. 75, 124 S.E.2d 602, 610 (1962)	9
<i>Goddard v. Fairways Dev. Gen. P'ship</i> , 310 S.C. 408, 412, 426 S.E.2d. 828, 831 (Ct. App. 1993).....	6
<i>Hotel & Motel Holdings, LLC</i> , 414 S.C. 635, at 651.....	3
<i>Kitchen Planners, LLC v. Friedman</i> , 440 S.C. 456, 892 S.E.2d 297 (2023).....	3-4
<i>Rumph v. Mass. Mut. Life Ins. Co.</i> , 357 S.C. 386, 392, 593 S.E.2d 183, 186 (Ct. App. 2004).....	4
<i>S.C. Dep't of Transp. v. First Carolina Corp. of S.C.</i> , 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007)	6
<i>Schmidt v. Courtney</i> , 357 S.C. 310, 317, 592 S.E.2d 326, 330 (Ct. App. 2003).....	4
<i>State v. Geer</i> , 391 S.C. 179, 193, 705 S.E.2d 441, 448 (Ct. App. 2010).....	6
<i>State v. Morales</i> , 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023)	6
<i>State v. Sheppard</i> , 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011)	5
<i>Wilder Corp. v. Wilke</i> , 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)	6

OTHER AUTHORITIES

Rule 36, SCRCP.....	7-8
Rule 56, SCRCP.....	3
Rule 56(a), SCRCP.....	3
Rule 56(c), SCRCP.....	3
Rule 501, Code of Judicial Conduct.....	11-12

STATEMENT OF ISSUES ON APPEAL

1. Whether the Circuit Court correctly applied Rule 36, SCRCF, to the present action.
2. Whether the Circuit Court correctly concluded that no genuine issue of material fact remained after Request for Admissions was deemed admitted.

STATEMENT OF THE CASE

This case arises out of a real estate contract dispute for real estate located at 3194 Pine Bluff Way, Fort Mill, South Carolina (the “Property”). On or about July 27, 2015, Appellant and Respondent entered into two real estate contracts for the purchase and sale of the Property, whereas Appellant was the purchaser and Respondent was the seller. Respondent agreed to offer seller financing to Appellant, and Appellant signed a promissory note for the benefit of Respondent.

Thereafter, Appellant failed to comply with certain terms under the contract(s) and promissory note, including, among others, the failure to pay property taxes; the failure to tender all monthly payments; and the failure to obtain financing by the maturity date of the promissory note.

Pursuant to the promissory note, if financing was not secured by August 31, 2020, the interest rate was increased to 10.25% based on a 35-year amortization scheduled and the new payment would apply either until a closing occurred or a new agreement was reached. Respondent informed Appellant that the interest rate increased after August 2020, and that Respondent was retroactively adding the difference of payments since that time to Appellant’s arrears. Respondent further requested that Appellant tender payment for delinquent property taxes.

Despite numerous attempts, Appellant and Respondent failed to reach an amicable new agreement, and based upon the uncured defaults and arrears owed, Respondent requested that Appellant vacate the Property.

Shortly after Appellant was asked to vacate the Property, Appellant initiated the present action against Respondent on April 24, 2023, and filed an Amended Complaint on June 8, 2023, alleging eight causes of action against Respondent, namely: (1) Violation of the South Carolina Unfair Trade Practices Act (“SCUPTA”); (2) Breach of Contract; (3) Breach of Contract Accompanied by a Fraudulent Act; (4) Invasion of Privacy; (5) Negligence; (6) Gross Negligence; (7) Intentional Infliction of Emotional Distress; and (8) Negligent Infliction of Emotional Distress.

Respondent filed a Motion to Dismiss, Answer, and Counterclaim on May 7, 2023, and filed an Amended Motion to Dismiss, Answer, and Counterclaim on June 19, 2023, alleging three counterclaims of breach of contract, breach of contract accompanied by a fraudulent act, and unjust enrichment.

Pursuant to Respondent’s Motion to Dismiss within the Amended Answer, Appellant and Respondent appeared before the Honorable Judge Gibbons on July 24, 2023, and the Motion to Dismiss was taken under advisement. On July 25, 2023, Judge Gibbons partially granted Respondent’s Motion to Dismiss by dismissing the following causes of action from the Appellant’s Complaint: violation of the South Carolina Unfair Trade Practices Act; invasion of privacy; negligence; gross negligence; intentional infliction of emotional distress; and negligent infliction of emotional distress. Judge Gibbons denied Respondent’s Motion as to Appellant’s causes of action for breach of contract and breach of contract accompanied by a fraudulent act.

On September 26, 2023, Respondent served Appellant with Respondent’s First Set of Interrogatories, Request for Admissions, and Request for Production of Documents. The discovery request was delivered to Appellant on September 29, 2023. Appellant failed to respond to Respondent’s discovery request in its entirety. Respondent then filed a Motion for Summary Judgment on November 15, 2023, alleging that no genuine issue of material fact existed under any

cause of action in Appellant's Complaint, along with Respondent's cause of action for breach of contract. The basis for the summary judgment motion was that because Appellant failed to respond to Respondent's Request for Admissions, all admissions were deemed admitted and left no genuine issue of material fact existed.

The motion for summary judgment was heard by the Honorable Judge Gibbons on January 8, 2024. At the conclusion of the hearing, Appellant provided Respondent with a deficient response to only Respondent's Request for Interrogatories. On March 5, 2024, the Circuit Court granted Respondent's motion for summary judgment against all causes of action in Appellant's Complaint and Respondent's cause of action for breach of contract. This appeal followed, with Appellant's Request for Appeal being filed on April 2, 2024, and served upon Respondent's counsel on April 3, 2024.

STANDARD OF REVIEW

"When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the [circuit] court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Callawassie Island Members Club, Inc. v. Dennis*, 429 S.C. 493, 497, 839 S.E.2d 101, 103 (Ct. App. 2019).

Rule 56, SCRCP, provides that a party may move, with or without supporting affidavits, for summary judgment in her favor as to all or part of a claim. Rule 56(a), SCRCP. The trial court must grant the motion "if the pleadings, depositions, answers to interrogatories, and admission 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." Rule 56(c), SCRCP; *Hotel & Motel Holdings, LLC*, 414 S.C. 635, at 651; *see also Kitchen Planners, LLC v. Friedman*, 440

S.C. 456, 892 S.E.2d 297 (2023) (holding that the “mere scintilla” standard does not apply under Rule 56(c), and the correct standards is the “genuine issue of material fact” standard).

In determining whether a genuine issue of fact exists, a court must assume as true the evidence of the nonmoving party and draw all reasonable inferences in favor of that party. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006); *Rumph v. Mass. Mut. Life Ins. Co.*, 357 S.C. 386, 392, 593 S.E.2d 183, 186 (Ct. App. 2004). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." *Schmidt v. Courtney*, 357 S.C. 310, 317, 592 S.E.2d 326, 330 (Ct. App. 2003).

When 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).

SUMMARY OF ARGUMENT

This appeal concerns the granting of summary judgment as to Appellant’s Amended Complaint in its entirety, and as to Respondent’s first Counterclaim for breach of contract. The primary argument made under the summary judgment motion was that Appellant failed to respond to Request for Admissions, and based upon the admissions being admitted, no genuine issue of material fact remained. (*see generally* Def. Memo for Summ. Judgment).

The admitted facts related to both statements or opinions of fact and the application of law to fact. Based upon the admissions, Appellant’s Amended Complaint listed no additional facts that created any issue of material facts under any cause of action, thus entitling Respondent to the grant of summary judgment as to Appellant’s Amended Complaint in full as a matter of law. Similarly, based upon the admissions, Appellant admitted to numerous breaches of the real estate contracts

and that Appellant was in default, thus further entitling Respondent to a grant of her counterclaim as a matter of law. (Def. Memo for Summ. Judgment, Exh. A, pp. 8-10).

Appellant contends summary judgment was erroneously granted because (1) the Circuit Court did not dismiss Appellant's claim for breach of contract accompanied by a fraudulent act under Respondent's Rule 12(b)(6), SCRCF motion; (2) Respondent's counsel allegedly failed to timely file a formal summary judgment proposed order; (3) Respondent's counsel failed to include all contracts in the summary judgment motion; (4) Respondent's counsel's discovery request was unnecessarily cumulative and duplicative and Respondent incorrectly stated in formal paperwork that no objections were made in court in regard to interrogatories; and (6) Respondent or Respondent's counsel engaged in the criminal act of extortion. (*See generally* App. Amd. Brief).

First and foremost, Appellant failed to raise any issue on appeal herein with the Circuit Court. Second, Appellant provides no legal argument for this appeal and has listed no facts sufficient to appeal the Circuit Court's ruling, and more so, nothing offered by Appellant warrants reversal of the grant of summary judgment in favor of Respondent.

ARGUMENT

I. The Circuit Court Did Not Err in Granting Summary Judgment in Favor of Respondent.

A. Appellant failed to preserve all issues of this appeal with the Circuit Court.

South Carolina appellate courts do not follow the "plain error" standard when sitting in review of a trial court's decision. *State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) ("[T]he plain error rule does not apply in South Carolina state courts."). "Instead, a party must have a contemporaneous and specific objection to preserve an issue for appellate review." *Id.* "[I]t is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so

amounts to a waiver of the alleged error.” *State v. Geer*, 391 S.C. 179, 193, 705 S.E.2d 441, 448 (Ct. App. 2010) (quoting *S.C. Dep’t of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007)). “One primary purpose of our issue preservation rules is to ‘give the trial court a fair opportunity to rule.’” *State v. Morales*, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023). Pursuant to the South Carolina Supreme Court, “[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Further, any “[i]ssues on which the trial judge never ruled and which are not raised in a post-trial motion are not properly preserved for appeal.” *Goddard v. Fairways Dev. Gen. P’ship*, 310 S.C. 408, 412, 426 S.E.2d. 828, 831 (Ct. App. 1993).

Appellant argues that the Circuit Court’s summary judgment grant should be reversed because Respondent’s counsel allegedly failed to timely file a formal proposed order; Respondent’s counsel did not submit all contracts in the summary judgment hearing; and Respondent’s interrogatories were cumulative and/or duplicative and the formal order stated no objections had been received at the time of the summary judgment hearing. (*See generally* App. Amd. Brief).

Appellant received Respondent’s discovery request on September 29, 2023, which included interrogatories, request for admissions, and request for production of documents. (Def. Memo for Summ. Judgment, Exh. B and C). Respondent provided tracking for the discovery requests and Appellant admitted receiving the documents at the summary judgment hearing (Feb. 12 transcript, p. 4). Neither Respondent, nor Respondent’s counsel, received any communication regarding the discovery requests, including any objection to any admission within Respondent’s request for admissions. (*Id.* p. 2) To date, Appellant has not provided a response or objection to

Respondent's request for admissions. The only discovery response received from Appellant was a deficient response to Respondent's interrogatories at the conclusion of the summary judgment hearing. (*Id.* pp. 6-7). At no point in time from receiving the discovery requests on September 29, 2023, through the date of this appeal, did Appellant file any motion, notice, or objection with the Circuit Court regarding Respondent's discovery requests.

Upon the grant of summary judgment, Appellant immediately appealed the Circuit Court's order. Appellant never filed a motion to reconsider or any other post-judgment motion with the Circuit Court. As such, any issue with discovery being cumulative and/or duplicative; the Circuit Court not reviewing the entirety of the file for summary judgment; the formal order signed by the presiding judge; or the failure to timely file an order with the Circuit Court were never heard by the Circuit Court and therefore, cannot be heard for the first time in this appeal.

B. Any argument concerning Respondent's first set of interrogatories or Appellant's response to interrogatories is irrelevant to this appeal.

The Circuit Court did not grant summary judgment based upon the failure to respond to Respondent's interrogatories, but rather the failure to respond to Respondent's Request for Admissions. (March 26, 2024, Order Granting Summ. Judgment). Appellant incorrectly alleges that the failure to respond to Respondent's interrogatories was the basis for dismissal. (App. Amd. Br., p. 6). Respondent's interrogatories and/or Appellant's responses therein were not taken into consideration for the summary judgment grant.

As such, any argument concerning Respondent's interrogatories is irrelevant to this appeal.

C. The Circuit Court correctly applied the clear language under SCRCP Rule 36.

The language of Rule 36, SCRCP, states, in pertinent part, "[t]he matter is admitted unless, within 30 days after service of the request . . . the party to whom the request is directed serves

upon the party requesting the admission a written answer or objection addressed to the matter. . .” Rule 36, SCRCPC. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. *Id.*

Here, Appellant failed to respond or object to Respondent’s request for admissions within 30 days, and Respondent requested that the Circuit Court deem the admissions admitted. (Feb. 12 transcript pp. 2-3). The Circuit Court granted Respondent’s request. (March 5, 2024, Form 4 Order and March 26, 2024, Order Granting Summ. Judgment). Appellant provides no argument concerning this subject, but because it is the actual basis for the grant of summary judgment, Respondent has included it for completeness.

D. The Circuit Court reviewed the court file in its entirety.

Appellant contends that the summary judgment grant should be reversed because Respondent’s counsel failed to include the Addendum to Prior Contract within the motion for summary judgment and the memorandum in support thereof. (*See generally* App. Amd. Brief, pp. 7, 9).

The Addendum to Prior Contract was included in the case file as Exhibit D in Appellant’s Amended Complaint. (Pl. Amd. Complaint, Exh. D, pp. 35-37). Further, at the summary judgment hearing, Appellant asked the presiding judge, “[c]an we also make sure we consider the addendum that she did not include in this information?” and the judge responded “[y]es ma’am. I’m going to consider all of that.” (Feb. 12. Transcript p. 7).

Based upon the above, any allegation relating to the addendum and it not being considered in the summary judgment grant is factually incorrect and does not warrant reversal of the Circuit Court.

E. After the admissions were deemed admitted, no genuine issue of material fact existed under Appellant's Amended Complaint.

"Once [the] moving party carries its initial burden, [the] opposing party must, under Rule 56(e), 'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

To maintain an action for breach of contract, a plaintiff must prove three elements: (1) a binding contract entered into by the parties; (2) breach or unjustifiable failure to perform the contract; and (3) damage suffered by the plaintiff as a direct and proximate result of the breach." *Fuller v. Eastern Fire & Casualty Insurance Co.*, 240 S.C. 75, 124 S.E.2d 602, 610 (1962). To maintain an action for breach of contract accompanied by a fraudulent act, a plaintiff must prove three elements: "(1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." *Conner v. City of Forest Acres*, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002). "Fraudulent act" is broadly defined as "any act characterized by dishonesty in fact or unfair dealing." *Id.* at 466, 560 S.E.2d at 612.

In this case, Appellant failed to show any genuine issues of material fact remained after the admissions were admitted. Appellant's argument under both causes of action was that Respondent "breached the Contract by failing and/or refusing to get Bond for Title submitted to the County of Lancaster Property Tax Office for tax bill purposes." (Pl. Amd. Complaint ¶ 26, p. 7). Appellant alleged "the breach was accomplished with a fraudulent intention to the extent that Respondent made promises that she knew or should have known would not be fulfilled." (*Id.* ¶ 35, p. 8). Appellant further alleges that an agreement was made between the parties to pay outstanding arrears, including missed property taxes, and that part of that agreement allegedly stated that

Respondent would provide mortgage history and payment records to either Appellant or the SC Home Rescue Program, and that Respondent failed to provide such documentation. (*Id.* at ¶ 11-12, pp. 3-4).

Based upon the admissions, Appellant admitted that “no executed contract and/or agreement requires Appellant to provide a Bond for Title” and “no addendum was executed regarding a Bond for Title.” (Def. Memo for Summ. Judgment, Exh. B, ¶¶ 2, 3, p. 8). Further, it was deemed admitted that on November 6, 2017, Appellant was specifically informed by Respondent’s late husband that they “were not going to move forward with the bond for title after speaking with numerous attorneys.” (*Id.* at ¶ 4, p. 9).

Regarding the allegations that Respondent breached the contract by failing to provide mortgage history and payment records, Appellant admitted that an updated Check Register was sent to Appellant on both February 10, 2023, and February 15, 2023. (*Id.* at ¶¶ 19-20, p 6).

Appellant further stated:

“[u]pon information and belief, Defendant’s breach was accompanied by a fraudulent act in that her actions and conduct surrounding its breach—including her failure or refusal to provide mortgage payment statements and tax documents for refinancing—could be well characterized by dishonesty in fact, unfair dealing, and/or unlawful appropriation of Plaintiff’s performance of her contractual duties by design.”

(*Id.* at ¶ 36, p. 8). Again, these allegations are extinguished for the same reasons outlined above. Because Appellant failed and/or refused to respond to Respondent’s Request for Admissions within the allotted 30 days, the admissions as listed above fully contradict the Appellant’s allegations and extinguish the causes of action against Respondent.

Appellant further argues that “there was still [sic] fraudulent actions that were still in question pending that needed to be ruled on;” (App. Amd. Br., p. 6) “Respondent should not have

been entitled to a summary judgment because there was a genuine issue related to Breach of Contract with A Fraudulent Act. . .” (*Id.* at p. 11) and various references to criminal extortion and criminal fraud. (*Id.* at pp. 6-8, 10).

Respondent incorrectly alleges that because two causes of action survived Respondent’s prior Rule 12(b)(6), SCRCF motion, that the causes of action should survive the summary judgment motion. As outlined above, both causes of action failed to list additional facts to survive the summary judgment grant.

As to Appellant’s criminal extortion and criminal fraud claims, the Circuit Court would not have had jurisdiction to hear these claims; therefore, these claims cannot be heard in this appeal.

F. Respondent’s formal order was appropriately submitted.

Appellant argues that Respondent’s counsel failed to meet the ten-day deadline provided by the Circuit Court to file a formal order and that Respondent’s counsel engaged in *ex parte* communications. (App. Amd. Br., pp. 6, 11).

Ex parte communication consists of prohibited communication between counsel and the court when opposing counsel is not present.” *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440 n.3, 581 S.E.2d 836, 838 n.3 (2003). Pursuant to the Code of Judicial Conduct,

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; . . .

CJC, Rule 501, SCACR. The commentary for this Rule further states that *ex parte* communication is approved when facilitating scheduling and other administrative purposes. *Id.*

In this case, Respondent's counsel submitted two proposed orders granting summary judgment via electronic mail to the Circuit Court judge on March 8, 2024, three days after the Circuit Court issued a Form 4 Order granting summary judgment. (March 8, 2024, Email to Judge Gibbons). After realizing a formal order had not been signed, counsel forwarded the proposed orders to the Clerk of Court, at which point counsel was instructed to file the proposed orders via the electronic filing system. (March 26, 2024, Email to Clerk of Court). Notably, Judge Gibbons never answered the electronic mail, nor acknowledged the electronic mail sent with the proposed orders.

At no point in time was anything communicated between Respondent's counsel, the Clerk of Court, nor the presiding judge that touched upon any substantive issues with the case. As such, there was no unauthorized *ex parte* communication.

Appellant further argues that the Circuit Court decision should be overturned based upon Respondent's counsel failing to file a formal order within ten days of the Form 4 Order; however, Respondent's counsel did file a formal order within ten days and Appellant cites no legal basis for overturning a decision based upon the untimely filing of a formal order.

Based upon the above, Respondent appropriately submitted the formal order granting summary judgment and no unauthorized *ex parte* communications took place between Respondent's counsel and either the Clerk of Court or Judge Gibbons.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that the Circuit Court's summary judgment grant be AFFIRMED, and this appeal be DISMISSED.

Respectfully submitted,

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