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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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

Appellate Case No. 2023-000870

James Dustin Lucas, ... Appellant,

v.

State Farm Mutual Automobile
Insurance Company, ... Respondent.

FINAL BRIEF OF RESPONDENT

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2. Whether the circuit court correctly granted summary judgment on Appellant's breach of contract accompanied by a fraudulent act claim because the ADR Rules would prevent Appellant from presenting evidence necessary to prove a breach of contract.

3. Whether the circuit court correctly granted summary judgment on Appellant's claims because the damages are speculative and incapable of being determined to any reasonable degree of certainty.

4. Whether the circuit court correctly granted summary judgment before discovery.

STATEMENT OF THE CASE

This lawsuit arises from and concerns an alleged agreement made between counsel in a different lawsuit, *James Dustin Lucas v. Meghan Seely and Andre Knox*, 2020-CP-23-02877 (the "Underlying Action"), which Appellant filed against Meghan Seely and Andre Knox, the individuals who he alleged caused him injuries in a motor vehicle accident. (*See gen.* Compl., R pp. 16-22.) Respondent was not a party in the Underlying Action. (Compl. ¶ 11, R. p. 17; Answer ¶ 11, R. p. 24.) Rather, Respondent was Knox's liability carrier which retained an attorney to defend Knox against Appellant's claims. (Compl. ¶ 12, R. p. 17; Answer ¶ 12, R. p. 24.)

The alleged agreement was made in the Underlying Action between Appellant's counsel and Knox's counsel through a series of emails. The exchange of emails stated Knox, who was in default, would be let out of default and Appellant and Knox would participate in an immediate

mediation in which Respondent would "negotiate between the amount of [Respondent's] reserve and the policy limit," which was $25,000. (Compl. ¶ 12, R. p. 17; Answer ¶ 12, R. p. 24, 25; April 20, 2021 Emails, Ex. B to Respondent's Mot. for Summary J., R. pp. 33-37; June 2, 2021 Emails, Ex. B to Respondent's Mot. for Summary J., R. p. 49-57.) Following the exchange of emails, Knox was let out of default and a mediation, which did not result in settlement, took place in the Underlying Action.

After the unsuccessful mediation, Appellant's counsel emailed Knox's counsel expressing disappointment and asserting Respondent had not negotiated between its reserve and the policy limit:

> We were disappointed by [Respondent]'s bad faith at mediation today, especially since we agreed to let [Knox] (who was not present) out of default. [P]art of the deal . . . was an agreement to negotiate between the reserve . . . and the policy limit. [Respondent] breached that agreement.

(Sept. 10, 2021 Email, Ex. B to Respondent's Mot. for Summary J., R. p. 59.) Knox's counsel replied, asserting Respondent had negotiated between its reserve and the policy limit:

> I'm sorry to hear you were disappointed. We did negotiate between the reserves and the limits, as we agreed to. Given the liability dispute, however, I do not believe this case is worth the limits, which from my understanding was your only demand.

(Sept. 10, 2021 Email, Ex. B to Respondent's Mot. for Summary J., R. p. 60.)

Ten months later, Appellant filed this lawsuit asserting breach of contract accompanied by a fraudulent act and fraud against Respondent based on Appellant's counsel's belief Respondent, during the mediation in the Underlying Action, did not negotiate between its reserve and the policy limits and, therefore, had breached the alleged agreement made between him and Knox's counsel. (*See gen.* Compl., R. pp. 16-22.)

Following Respondent's Answer to the Complaint, Appellant and Respondent filed cross motions for summary judgment (R. 30, 31; 81-87) Appellant filed a response in opposition to Respondent's motion for summary judgment (hereinafter, "Appellant's Opposition Brief"), which purported to fully respond to and oppose Respondent's motion and, conversely, did not raise nor demonstrate the need for any discovery. (*See gen*. Appellant's Opposition Br., R. pp. 65-70.) Both Appellant's and Respondent's motions for summary judgment were heard before Judge G. D. Morgan, Jr. who, after taking the matter under advisement, granted Respondent's motion for summary judgment and denied Appellant's. Appellant never requested a continuance of the hearing and never submitted an affidavit demonstrating the need for discovery to fully respond to and justify his opposition to Respondent's motion for summary judgment.

Appellant moved for reconsideration of Judge Morgan's March 20, 2023 order on the motions for summary judgment (the "March 20 Order"). (R. 124-142) Appellant's motion for reconsideration was denied by a May 23, 2023 order of Judge Morgan (the "May 23 Order") (R. 12). Thereafter, Appellant filed a notice of appeal of the May 23 Order denying reconsideration, not the March 20 Order ruling on the motions for summary judgment. (Notice of Appeal, May 26, 2023.) Despite the notice of appeal being limited to the May 23 Order, Appellant's brief argues the circuit court erred only in its March 20 Order by granting summary judgment on the breach of contract accompanied by a fraudulent act claim.[1] Accordingly, this brief addresses Appellant's arguments and the grounds upon which the March 20 Order should be affirmed.

[1] Appellant's brief does not challenge the circuit court's March 20 Order granting summary judgment to Respondent on Appellant's fraud claim and, therefore, that ruling of the circuit court is not on appeal.

STANDARD OF REVIEW

This appeal is from cross-motions for summary judgment and involves interpretation of a procedural rule. "When the parties file cross-motions for summary judgment, the issue becomes a question of law for the [appellate] Court to decide de novo." *S.C. Pub. Int. Found. v. Calhoun Cnty. Council*, 432 S.C. 492, 495, 854 S.E.2d 836, 837 (2021) (citing *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011)); *see also, e.g.*, *Progressive Direct Ins. Co. v. Groves*, 438 S.C. 26, 31, 882 S.E.2d 464, 466 (2022); *United Servs. Auto. Ass'n v. Pickens*, 434 S.C. 60, 64, 862 S.E.2d 442, 444 (2021). Additionally, "[i]nterpretation of a rule is a question of law [the appellate court] review[s] de novo." *Ex parte Travelers Home & Marine Ins. Co. v. Stringfellow*, 427 S.C. 238, 241, 830 S.E.2d 718, 720 (Ct. App. 2019).

ARGUMENT

I. The circuit court's March 20 Order granting summary judgment on the claim for breach of contract accompanied by a fraudulent act should be affirmed.

The circuit court granted summary judgment to Respondent on Appellant's breach of contract accompanied by a fraudulent act claim because there was no enforceable contract; even if there were, Appellant could only prove a breach thereof by presenting evidence of confidential communications during mediation, which is prohibited; and there was no evidence of a fraudulent act. (Order 3-5, R. pp. 6-8.) Summary judgment should be affirmed for any or all of these independent grounds relied upon by the circuit court.

A. Summary judgment was appropriate because no enforceable contract existed between Appellant and Respondent.

Appellant argues "the parties entered into a binding contract for [him] to let Knox out of default in exchange for [Respondent] mediating the case between its highest reserve and the policy limit." (Appellant's Br. 7.) This is incorrect. The circuit court correctly determined the alleged

agreement was subject to Rule 43(k) and was unenforceable because it did not meet the requirements of Rule 43(k). (Order 3, R. p. 4-11.)

1. *The alleged "contract" was an agreement between counsel affecting the proceedings in an action such that it had to satisfy the requirements of Rule 43(k) to be binding.*

"Having a contract is a prerequisite to proving breach of contract accompanied by a fraudulent act." *Armstrong v. Collins*, 366 S.C. 204, 223, 621 S.E.2d 368, 377 (Ct. App. 2005). Appellant presumes an enforceable contract existed between Appellant and Respondent because, through an exchange of emails between Appellant's counsel and Knox's counsel, Appellant's counsel, as to the Underlying Action, offered to let Knox out of default subject to a mediation in which Respondent, as Knox's liability carrier, would negotiate between its reserve and the liability limit of Knox's policy, and Knox's counsel accepted. (Appellant's Br. 5-6.) This presumption is invalid because Rule 43(k) of the South Carolina Rules of Civil Procedure governs the alleged agreement between counsel affecting the Underlying Action, not traditional concepts of offer and acceptance applicable to formation of contracts.

Under Rule 43(k), "No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel." S.C. R. Civ. P. 43(k). "[T]he purpose of rules like Rule 43(k) is to prevent disputes concerning the existence and terms of agreements and to relieve the court of the necessity of determining such disputes." *Young v. Cooler*, 347 S.C. 362, 365, 555 S.E.2d 410, 412 (Ct. App. 2001) (citing *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 494, 458 S.E.2d 533, 534 (1995)).

It is unclear from Appellant's brief whether he contends Rule 43(k) is inapplicable. (*See* Appellant's Br. 9-10 (arguing *Chen* is inapplicable but also suggesting Rule 43(k) applies only to

settlement agreements); *see also*, Appellant's Br. 11 ("Lucas has not moved to enforce a settlement in this case, which is what SCRCP 43(k) applies to.").) In fact, Rule 43(k) applies to "agreement[s] between counsel affecting the proceedings in an action," S.C. R. Civ. P. 43(k), the alleged agreement was between counsel and affected the proceedings in an action, and any contention Rule 43(k) applies only to settlement agreements is wrong given "[t]he unambiguous language of Rule 43(k) contains no such limitation," *Ashfort Corp. v. Palmetto Const. Grp., Inc.*, 318 S.C. 492, 494, 458 S.E.2d 533, 535 (1995).[2] Additionally, while the rule sets forth the conditions necessary to render binding any "agreement between counsel affecting the proceeding," the last sentence of Rule 43(k) further specifies "[s]ettlement agreements shall be handled in accordance with Rule 41.1," confirming the rule applies to more than just settlement agreements. Thus, the circuit court correctly held Rule 43(k) applies to the alleged agreement upon which Appellant's claim of breach of contract accompanied by a fraudulent act is based.

2. *The alleged agreement between Appellant's and Knox's counsel did not satisfy the requirements of Rule 43(k) and, therefore, is not binding.*

For the alleged agreement between Appellant's counsel and Knox's counsel to be binding and, therefore, enforceable, at least one of Rule 43(k)'s conditions must have been satisfied. *See* S.C. R. Civ. P. 43(k); *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 725 (2006) (explaining "an agreement is non-binding until a condition [of Rule 43(k)] is satisfied"). In this regard, "[s]ubstantial compliance [with Rule 43(k)] is not sufficient" to render binding an agreement between counsel affecting a proceeding. *S.C. Hum. Affs. Comm'n v. Zeyi Chen*, 430 S.C. 509, 521, 846 S.E.2d 861, 867 (2020).

[2] In *Ashfort*, the Supreme Court of South Carolina considered and rejected an argument that Rule 43(k) was inapplicable to settlement agreements and was instead limited to agreements on evidentiary or other trial matters.

Here, none of the conditions necessary to render an agreement between counsel binding were present. First, the alleged agreement, made through an exchange of emails, was never reduced to the form of a consent order. Second, it was not reduced to a written stipulation, signed by counsel, and entered in the record. Third, it was not made in open court and noted upon the record. Fourth, it was not reduced to a writing signed by both the parties and their counsel.

According to Appellant, the alleged agreement satisfied Rule 43(k)'s condition of being "reduced to writing and signed by the parties and their counsel" because "[t]he emails contained signature blocks for both parties: [Appellant's counsel] on behalf of [Appellant] and defense counsel on behalf of [Respondent]." (Appellant's Br. 10.) In support, Appellant points out the portion of Rule 43(k) which states "the signature of counsel retained by an insurer on behalf of the Defendant(s) . . . shall suffice in place of the signature of the insured party." (Appellant's Br. 10 (quoting S.C. R. Civ. P. 43(k)).) Importantly, this portion of Rule 43(k) applies only "where the parties reach a settlement agreement during a mediation . . . and the settlement agreement involves payment by an insurer." S.C. R. Civ. P. 43(k). Here, the parties did not reach a settlement agreement during mediation and, therefore, this caveat of Rule 43(k) is inapplicable. Even so, there is no such provision in Rule 43(k) excusing the absence of Knox's signature. Accordingly, even if Appellant's argument as to Knox's counsel's signature block is accepted, the agreement was still not "reduced to writing and signed by the parties and their counsel."

Appellant also argues the alleged agreement satisfied Rule 43(k)'s condition of "being made in open court and noted upon the record" because the undersigned, during the hearing on the motions for summary judgment in this lawsuit, described the emails exchanged between Appellant's counsel and Knox's counsel in the Underlying Action. (Appellant's Br. 10.) Appellant cites no authority to support this argument, and by no stretch of the imagination can the act of

describing an alleged agreement for purposes of arguing there was no binding agreement constitute making an agreement "in open court" and noting it upon the record as required under Rule 43(k).

In short, Appellant's interpretation of Rule 43(k) is not merely strained, it contradicts the plain wording of the rule. Significantly, "[w]here Rule 43(k) applies, [the Supreme] Court has held its terms are mandatory, which precludes a party from turning to contract or equitable principles (or counter public policy arguments) to vitiate those terms." *Chen*, 430 S.C. at 521, 846 S.E.2d at 867. *Chen* forbids Appellant's attempt to circumvent Rule 43(k) by resorting to contract principles, claiming substantial compliance with the rule, and citing counter public policy arguments.

Because the alleged agreement was subject to Rule 43(k) but did not satisfy any condition of the rule and, therefore, is not binding, there is no valid contract upon which Appellant can premise his breach of contract accompanied by a fraudulent act claim. Thus, the circuit court's grant of summary judgment on this ground should be affirmed.

B. Summary judgment was appropriate because there was no probative, admissible evidence Respondent breached the alleged agreement.

If there was a valid and enforceable contract upon which Appellant's claims were based, the circuit court nonetheless correctly granted summary judgment because there was no probative, admissible evidence of breach. "[M]aterials used to support or refute a motion for summary judgment must be those which would be admissible in evidence." *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. Ap. 2002). While Appellant's brief relies heavily on *Hancock v. Mid-South Management, Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009), which held a motion for summary judgment can be overcome by a mere scintilla of evidence presented, South Carolina no longer recognizes "the 'mere scintilla'" standard. *Kitchen Planners, LLC v. Friedman*, No. 2020-001669, 2023 WL 5420401, at *3 (S.C. Aug. 23, 2023) ("We now clarify that the 'mere scintilla' standard does not apply under Rule 56(c). Rather, the proper standard is the 'genuine

issue of material fact' standard set forth in the text of the Rule."). Regardless of the standard applied, "any evidence, even a scintilla, that is useful to withstand a summary judgment motion must meet the prerequisite of being probative." *Bass v. Gopal, Inc.*, 384 S.C. 238, 247, 680 S.E.2d 917, 921 n.6 (Ct. App. 2009), *aff'd*, 395 S.C. 129, 716 S.E.2d 910 (2011) (citing *McDowell v. Stilley Plywood Co.*, 210 S.C. 173, 179, 41 S.E.2d 872, 874-75 (1947)).

Here, Appellant did not create a genuine issue of material fact—nor submit a scintilla of probative evidence—Respondent breached the alleged agreement. Appellant's opposition to Respondent's motion for summary judgment, his own motion for summary judgment, and his appellate brief are suffused with bald assertions Respondent breached the alleged agreement, by either allegedly failing to mediate between its reserve and Knox's liability limits, have Knox present at mediation, or otherwise by breaching the alleged agreement's implied covenant of good faith and fair dealing, the latter of which is not preserved for appellate review because it was not ruled on by the circuit court. (*Compare* Appellant's Br. 12-14, *with* Order, R. pp. 4-10.) These assertions, however, are not probative evidence overcoming Respondent's motion for summary judgment. As confirmed by Appellant's lack of any citation to the record in support, the sole source of the assertions is Appellant's counsel. (*See, e.g.*, Appellant's Br. 3, 6-7, 12-14.)

"The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively." *Collins Entertainment v. White*, 363 S.C. 546, 563, 611 S.E. 2d 262, 271 (Ct. App. 2005) (*quoting State v. Capps*, 276 S.C. 59, 65, 275 S.E.2d 872, 875 (1981)). As a result, "[i]t is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence." *Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006). Accordingly, Appellant's counsel's unsupported allegations and arguments concerning Respondent's alleged

breaches of contract are incompetent, inadmissible evidence of breach that could not withstand Respondent's motion for summary judgment.

On the other hand, the only potentially admissible evidence before the circuit court relating to whether Respondent complied with or breached the alleged agreement between counsel was the email from Knox's counsel to Appellant's counsel asserting Respondent had negotiated between its reserve and the policy limit. (R. 60) Appellant never submitted an affidavit of a competent witness or any admissible evidence creating a genuine issue of material fact as to Respondent's compliance with the alleged agreement. Thus, under this record, the circuit court did not improperly weigh evidence as argued by Appellant—there simply was no probative evidence to weigh. (Appellant Br. 7.) For these reasons, the circuit court's March 20 Order granting summary judgment in favor of Respondent on Appellant's breach of contract accompanied by a fraudulent act claim should be affirmed.[3]

C. Summary judgment was appropriate because there was no probative, admissible evidence of a fraudulent act.

The circuit court ruled there was no evidence of a fraudulent act. (Order 4, R. p. 7.) In his brief, Appellant argues a fraudulent act accompanied Respondent's alleged breach of contract in that "State Farm was dishonest in fact when the company, by and through its agents, agreed to the claim reserves as a contract term and then willfully and intentionally breached the contract by failing to disclose those terms." (Appellant's Br. 13.) As an initial matter, this was not presented to the circuit court as an alleged fraudulent act. Instead, Appellant argued to the circuit court a fraudulent act accompanied Respondent's alleged breach of contract in that Respondent violated

[3] Negotiation is a two-way street. Where only one party attempts to compromise there can be no negotiation. The record is absent of any reference to compromise by Appellant; rather, the record only references Appellant's unwillingness to compromise. (Sept. 10, 2021 Email, Ex. B to Respondent's Mot. for Summary J., R. p. 60 (referencing Knox's counsel's understanding that Appellant's only demand was the policy limit).)

South Carolina's rules governing Alternative Dispute Resolution processes (the "ADR Rules") by not having Knox present at the mediation in the Underlying Action.[4] (Appellant's Mot. for Summary Judgment 3-4, R. p. 84.) Thus, Appellant's argument is not preserved for appellate review. Additionally, there is no probative evidence of either allegation of a fraudulent act; there is only Appellant's counsel's assertions, which are not evidence. Thus, the circuit court correctly held there was no probative evidence of a fraudulent act, and this Court should affirm summary judgment on Appellant's cause of action for breach of contract accompanied by a fraudulent act.

II. The circuit court's March 20 Order granting summary judgment on Appellant's claims should also be affirmed because the circuit court correctly determined Appellant's damages were speculative.

As the circuit court correctly held, independent of the grounds discussed above, Respondent was entitled to summary judgment on all of Appellant's claims because the amount of Appellant's damages, if any, was speculative. (Order 6, R. p. 8, 9.) According to Appellant, the circuit court's ruling "ignores the applicability of *Shores v. Weaver*," 315 S.C. 347, 348, 433 S.E.2d 913, 913 (Ct. App. 1993). (Appellant's Br 18.) *Shores* does not relieve Appellant from his obligation to prove damages with reasonable certainty, nor does any holding in *Shores* change the fact that Appellant's alleged damages are inherently speculative and incapable of being proven with reasonable certainty.

As a preliminary matter, to prevail on any of his causes of action, Appellant must prove damages with reasonable certainty or accuracy, and the existence, causation, and amount of those

[4] For purposes of his brief, violation of ADR Rules is now Appellant's argument there was a breach of the alleged agreement. (Appellant's Br. 6 ("After entering into this binding agreement, State Farm refused to bring its insured to the mediation as required by SCADR Rule 6(b)(2). . . . In doing so, it breached its agreement to mediate.").) While Appellant may view a breach and a fraudulent act as interchangeable, the law does not. Rather, the alleged fraudulent act must be separate and distinct from the act constituting the breach. *Smith v. Canal Ins. Co.*, 275 S.C. 256, 260, 269 S.E.2d 348, 350 (1980).

damages cannot be based upon or left to conjecture, guesswork, or speculation. *See Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981); *S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co.*, 303 S.C. 74, 78, 399 S.E.2d 8, 11 (Ct. App. 1990) ("The estimation of damages, however, cannot be based on conjecture or speculation; it must pass the realm of opinion not founded on facts and must rest on evidence from which a reasonably accurate conclusion regarding the amount of loss can be logically and rationally drawn."), *aff'd*, 423 S.E.2d 114 (1992).

Appellant argues he has articulable damages as a result of the alleged breach, including mediation costs, the continued costs of litigation after an unsuccessful mediation, and the cost of motion hearings. (Appellant's Br. 18-19.) In order for these damages to be proximately caused by Respondent allegedly negotiating under its reserve, it must be presumed the Underlying Action would have settled at mediation if Respondent had negotiated between its reserve and the policy limit. But the presumption is nothing more than speculative causation. It is impossible to say whether a different outcome, *i.e.*, settlement, would have occurred if Respondent had negotiated differently than it did. It is also impossible to determine what amount, if any, Appellant would have recovered and what other expenses, if any, would have been avoided if Respondent had done what Appellant claims it failed to do—negotiate between two figures at the mediation in the Underlying Action. It is even possible Appellant may receive more in damages from a trial against Knox than the unknown amount for which Appellant would have settled the case at mediation. In fact, there is no evidence of what Appellant would have settled for at mediation other than the liability limits.

The speculative basis of Appellant's damages is further demonstrated by Appellant's argument that, "for purposes of determining damages, it does not matter whether the mediation would have been successful and resulted in the settlement of the case." (Appellant's Br. 11.) In

other words, it is Appellant's position he would be entitled to damages even if the mediation had been successful and settled his case against Knox. This new position asserted on appeal is contradicted by Appellant's arguments at the hearing, during which his counsel stated, "the actual damages lie between what the reserve rate is and what the policy limits are." (Tr. 10:2-17, R. p. 162.) Of course, only guesswork, speculation, or conjecture could determine what that amount is.[5]

Appellant seeks to avoid the requirement of proving damages to a reasonable certainty through a misapplication of *Shores*. Appellant argues under *Shores* he would "not have been precluded from collecting minimum financial responsibility limits from the Respondent" and he "gave up his right to have a judgment of up to $25,000…" (Appellant's Br. 19.) In other words, it is Appellant's position a trial of the Underlying Action is unnecessary and Appellant need not prove any amount of damages caused by Knox, because *Shores* automatically entitles him to damages of $25,000. *Shores* does not, however, give Appellant an automatic verdict against Knox of $25,000. Appellant's argument misapprehends the holding of *Shores* and is simply nonsensical.

To accept Appellant's application of *Shores* is to ignore Appellant's duty to prove liability and damages. *Shores* merely held that if a lawsuit against an insured goes into default through the fault of the insured, the insured's liability insurance carrier cannot avoid liability coverage up to the minimum liability limits mandated by law. *Shores*, 315 S.C. at 356, 433 S.E.2d at 917. In other words, *Shores* simply addressed the issue of coverage and in no way relieves a claimant from an obligation to prove liability and damages.

[5] On appeal, Appellant references an unspecified amount of "attorney's fees and consequential damages" because of the unsuccessful mediation. (Appellant's Br.19-20.) However, Appellant does not allege any statute or contract that would entitle him to recover attorney's fees as consequential damages and "[t]he general rule is that attorney's fees are not recoverable unless authorized by contract or statute," *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993).

Thus, even assuming an enforceable agreement existed between Appellant and Respondent, and even assuming a breach could be based upon bald assertions of Appellant's counsel or confidential mediation communications, summary judgment was nonetheless proper because Appellant, to prevail, must prove something inherently speculative, the amount at which the case would have settled for at mediation. Thus, the lower court correctly concluded summary judgment was appropriate because Appellant's damages were inherently speculative, and this court should affirm.

III. It was not error for the circuit court to rule on the parties' motions for summary judgment without discovery.

Appellant argues it was improper for the circuit court to grant summary judgment "when the parties had not had an opportunity to engage in discovery." (Appellant's Br. 7.) This cannot be reconciled with the fact he filed his own motion for summary judgment which presumes no discovery was necessary for the circuit court to rule as a matter of law. In any event, missing from Appellant's brief is any explanation of what discovery would have created a question of fact on Respondent's motion for summary judgment.[6] Furthermore, where a party claims the need to conduct further discovery before argument of a motion for summary judgment, the party opposing summary judgment must move for a continuance to preserve the issue for appellate review. *Bayle v. South Carolina Dept. of Transp.*, 344 S.C. 115, 128, 542 S.E. 2d 736, 742 (Ct. App. 2001). Appellant did not seek a continuance of the hearing on the motions for summary judgment, did not raise the need for discovery in his filed opposition to Respondent's summary judgment motion,

[6] Appellant cannot offer any such explanation for the first time in a reply brief, as an appellant may not "use a reply brief to argue issues not argued in the initial brief." *Continental Company v. Shives*, 328 S.C. 470, 474, 492 S.E. 2d 808, 811, n. 2 (Ct. App. 1997).

and did not submit any affidavit that he could not present facts essential to justify his opposition to Respondent's motion for summary judgment.

While Appellant's counsel, at the hearing on the motions for summary judgment, stated the summary judgment motions were premature because no discovery had been conducted, he further stated only "very minimal" discovery was required, specifically, discovery as to the amount of Respondent's reserve. (Tr. 30:21-31:4, R. pp. 182-183.) Discovery as to the amount of Respondent's reserve, however, puts the cart before the horse. It would be relevant only to whether Respondent complied with an agreement to negotiate between its reserve and the applicable policy limits. Discovery of the amount of Respondent's reserve has no relevance to whether a valid contract existed between Appellant and Respondent. Because there is no valid contract upon which Appellant can assert breach of contract accompanied by a fraudulent act, and the record reveals no need for discovery relevant to the issue of the existence of a contract, the circuit court did not err in granting Respondent's motion for summary judgment without discovery.

Furthermore, assuming arguendo there was a valid contract, discovery as to Respondent's reserve amount would not create a genuine issue of material fact to overcome Respondent's motion for summary judgment and, therefore, the March 20 Order should nonetheless be affirmed. In this regard, the circuit court correctly held Appellant was unable to prove his case given ADR Rules. Specifically, even with discovery of Respondent's reserve, to establish breach of the agreement Appellant would need to present evidence of confidential communications during mediation to show Respondent did not negotiate between the reserve amount and the applicable liability limits. Under the ADR Rules, "[a]ny mediation communication disclosed during a mediation … shall be confidential, and shall not be divulged by anyone in attendance at the mediation or participating in the mediation . . .." Rule 8(a), SCADR. The ADR Rules further require all participants "maintain

the confidentiality of the mediation and shall not rely on, or introduce evidence in any … proceeding, any mediation communication disclosed in the course of a mediation…." *Id.* None of the limited exceptions to confidentiality are applicable here, *see* Rule 8, SCADR, and Appellant has not argued otherwise.[7] In fact, Appellant has abandoned this issue on appeal given his failure to address it anywhere in his brief and his inability to address it for the first time on reply. *See, e.g., Jinks v. Richland Cnty.*, 355 S.C. 341, 344, 585 S.E. 2d 281, 283 n. 3 (2003). The circuit court's unchallenged determination as to the preclusive effect of the ADR rules on Appellant's ability to prove his case alone requires affirmance of the March 20 Order granting summary judgment.

In sum, given there is no valid and enforceable contract, and, in any event, breach could only be demonstrated by prohibited evidence, an issue conceded by Appellant's failure to address it in his brief, Appellant cannot prove his case with or without discovery of Respondent's reserve amount. Accordingly, the circuit court did not err in granting summary judgment without the "very limited" discovery Appellant's counsel stated during the hearing was necessary.

IV. The circuit court's March 20 Order does not violate Appellant's constitutional right to a jury trial.

For the first time on appeal, Appellant argues that "[b]y granting summary judgment, the circuit court prevented the appellant from exercising his constitutionally protected right to a jury trial." (Appellant's Br. 15.) The Court should reject this argument, which is accompanied by no explanation or application of legal analysis. To do otherwise would abrogate Rule 56. The reality of and the reason for Rule 56 is that some cases, such as this case, are not deserving of a jury trial.

[7] The ADR Rules further provide for sanctions if any person violates any provision of the ADR rules without good cause and allows the court on its own motion to impose sanctions. Rule 10(c), SCADR.

In any event, this argument was never raised to the trial court and is not preserved for appeal. *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000).

V. The at-issue doctrine is inapplicable to the issues on appeal.

Appellant devotes a section of his brief discussing "at-issue doctrine or in-issue waiver," upon which Appellant argues Respondent's reserves were discoverable even if contained in privileged documents. (Appellant's Br. 15-16.) Whether a claim of privilege over a document with reserve information in it could be overcome by application of the "at-issue doctrine or in-issue waiver" is not relevant to any issue on appeal and has no bearing on whether the circuit court correctly granted summary judgment. As discussed above, summary judgment is proper even if Appellant had discovery on reserves. (Argument *supra* § III, at 14.) In any event, the "at-issue doctrine or in-issue waiver" was not an issue raised to the circuit court and ruled on in the March 20 Order and, therefore, it is not preserved for appellate review. *See Staubes*, 339 S.C. at 412, 529 S.E. 2d at 546.

VI. Knox's counsel did not "testify" at the hearing on the cross motions for summary judgment.

Appellant argues the circuit court granted summary judgment "based, in part, on" the testimony of Ms. JeanMarie Tankersley, Knox's counsel in the Underlying Action, during the hearing on the parties' motions for summary judgment, and doing so was reversible error because Appellant "was neither given notice that a witness would testify at the hearing nor was he given a chance to cross-examine the witness." (Appellant's Br. 17-18.) Appellant does not identify how the circuit court did or could have relied on any statement made by Tankersley at the hearing. In any event, the argument fails because the hearing transcript reveals Ms. Tankersley did not "testify," she attended the hearing remotely and provided information concerning the status of the Underlying Action.

Given Appellant's case is based on an alleged agreement made between his counsel and Knox's counsel in the Underlying Action, Ms. Tankersley remotely attended the hearing on Appellant's and Respondent's motions for summary judgment. At the inception of the hearing, Respondent's counsel referenced Ms. Tankersley's remote attendance and stated, "she may have something to say, and she may be able to answer any questions the court has about the status of [the Underlying Action]." (Tr. 4:8-15, R. p. 156.) In that regard, at two points in the hearing—both before arguments began on Respondent's motion for summary judgment—Tankersley informed the court of the status of the Underlying Action. (Tr. 8:10-9:4, R. pp. 160-161; Tr. 16:8-22, R. p. 168.) Ms. Tankersley made no statement to the circuit court thereafter. (*See gen.* Tr., R. pp. 153-206.) Ms. Tankersley was never sworn in to testify.

Near the end of the hearing, Appellant's counsel stated, "if State Farm's position is that Ms. Tankersley is a witness in this case, then I certainly would object to her participation in this hearing and speaking on the record as an attorney for State Farm's insured." (Tr. p. 51:7-12, R. p. 203.) The circuit court agreed it would not hear from her as a witness, Ms. Tankersley confirmed she had nothing to say by way of the motions for summary judgment, and Respondent's counsel agreed it would be improper for her to make any argument on the merits of the motions being heard. (Tr. 51:13-52:20, R. pp. 203-204.) This exchange confirms Ms. Tankersley, an unsworn remote participant, did not testify at the hearing and the circuit court's unwillingness to allow her to do so. The fact Appellant's counsel never requested an opportunity to cross-examine Ms. Tankersley belies Appellant's argument she was impermissibly permitted to testify in support of Respondent's motion for summary judgment.

In short, Ms. Tankersley, who was never sworn in and merely provided information about the Underlying Action's status, was not asked questions related to the merits of Respondent's

motion for summary judgment, she did not make any statements or remarks related to the merits of Respondent's motion for summary judgment, she did not argue in support of Respondent's motion for summary judgment, and no part of the March 20 Order reflects or relies upon a statement by Ms. Tankersley during the hearing. (*See gen.* Tr., R. pp. 153-206; *compare with*, March 20 Order, R. pp. 4-11.)

CONCLUSION

There are numerous reasons the circuit court properly granted Respondent's motion for summary judgment. Among these reasons, there was no enforceable agreement, Appellant is unable to prove breach, and Appellant's damages are speculative. Furthermore, a number of arguments were not preserved for appeal either by not raising these issues to the circuit court or not arguing these issues in Appellant's brief. For all these reasons, the March 20 Order should be affirmed.

Respectfully submitted,

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