THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court Of Common Pleas

The Honorable George C. James, Jr., Judicial Circuit Court Judge
Case No.: 2012-CP-08-1801

Appellate Case No. 2015-002481

Charles Taylor ..... Appellant,

v.

Stop "N' Save, Inc., d/b/a El Cheapo Plus #7 and
Roy Rahal. ..... Respondents.

FINAL BRIEF OF RESPONDENTS

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INTRODUCTION

Unfortunately, this case centers upon one "argument" that Appellant asserts time and time again, in which he asks circuit courts and now this Court to accept his unsupported statements and allegations as true, while simultaneously asking the Court to deem all of the actual evidence submitted by Respondents Stop "N' Save, Inc., d/b/a El Cheapo Plus #7 and Roy Rahal ("Respondents") as false. Each of Appellant's motions before this Court consists of conclusory allegations and are entirely unsubstantiated by any evidence.

Appellant alleges he has suffered property damages, bodily injury and emotional distress damages associated with allegations of Respondents' improper rental of the subject U-Haul rental truck ("U-Haul Truck") to non-parties without driver's licenses. However, the record evidence establishes that there is no genuine issue of material fact concerning Respondents' actions in renting the U-Haul Truck. Moreover, the evidence and discovery history in this matter demonstrate a pattern of disregard for the circuit court's instructions, abusive litigation tactics, and self-serving and evasive words and actions that have no basis in law or fact.

The circuit court's order granting Respondents' Motion for Summary Judgment, denying Appellant's Motion for Summary Judgment, denying Appellant's Motion to Amend, denying Appellant's Motions for Sanctions, and holding in abeyance Respondents' Motion to Dismiss for Vexatious Litigation should be affirmed. Initially, the grant of Respondents' Motion for Summary Judgment and denial of Appellant's Motion for Summary Judgment should be affirmed because Appellant's claims are preempted and thus barred by the Federal Transportation Equity Act, specifically 49

U.S.C. § 30106 (2015), otherwise known as the Graves Amendment. Moreover, Appellant's claims otherwise fail as a matter of law as the proper record on appeal is devoid of any evidence to support Appellant's causes of action. There is no genuine issue of material fact demonstrating support for the elements of Appellant's causes of action, whether they are couched in terms of negligence, negligent entrustment, or intentional infliction of emotional distress.

Furthermore, the circuit court properly denied Appellant's Motion to Amend, as there is no basis to add U-Haul International, Inc. and any amendment would be futile. Additionally, the circuit court's denial of Plaintiff's Motion for Sanction was proper, as Appellant's Motion is unsupported by the facts, discovery and testimony to date. Finally, the circuit court's decision to hold its ruling on Respondents' Motion to Dismiss for Vexatious Litigation and Sanctions was not improper.[1] While Appellant has tried to raise a host of issues on appeal and insert improper and irrelevant assertions and documentation into the record, the only real question to be considered by this Court is whether the circuit court's order, which accurately and succinctly reflects the proper issues at hand, was correct.

Because Appellant has failed to demonstrate any legal or factual error by the circuit court's order, the circuit court's decision should be affirmed in its entirety.

[1] Although the circuit court held its ruling in abeyance, in light of Appellant raising the issue on appeal, Respondents certainly support a grant of the Motion to Dismiss or other remedies deemed just and necessary by this Court.

STATEMENT OF THE CASE

On October 9, 2013, Appellant filed a Summons and Complaint against U-Haul Co. of South Carolina, Inc. ("UHSC"), an unnamed U-Haul dealer, and two individual defendants, Reginald Morton and Dana Goins, alleging Reginald Morton and/or Dana Goins backed into Appellant's rental property with a U-Haul Truck rented from Respondent Stop "N' Save, Inc., d/b/a El Cheapo Plus #7 ("Respondent El Cheapo"). At a hearing on June 2, 2014, the circuit court dismissed UHSC. On December 4, 2013, Appellant filed an Amended Complaint naming Respondent El Cheapo as the previously unnamed "U-Haul Local Dealer" and adding allegations relating to Respondent El Cheapo. Thereafter, on June 9, 2014, Appellant filed an Amended Complaint naming Respondent El Cheapo's manager, Respondent Roy Rahal ("Respondent Rahal"), as a defendant. The Amended Complaint alleged gross negligence and intentional infliction of emotion distress and claimed various personal injuries associated with Respondents' failure to compensate Appellant for the property damage allegedly caused by the driver of the U-Haul Truck.

On April 27, 2015, Respondents filed a Motion for Summary Judgment. (R. pp. 88-89). On May 13, 2015, Respondent Rahal filed an Amended Motion for Summary Judgment. (R. pp. 90-91). On June 15, 2015, Appellant filed a Motion for Summary Judgment. (R. pp. 159-164). On August 3, 2015, Appellant filed a Motion for Sanctions. (R. pp. 92-93). On August 21, 2015, Appellant filed a Motion for Leave to Amend his complaint to name U-Haul International, Inc. ("UHI"). (R. pp. 132-133). On September 18, 2015, Respondents filed their Motion to Dismiss for Vexatious Litigation Conduct. (R. pp. 146-147).

A hearing was held on October 14, 2015 on the various motions, and by Order dated November 20, 2015, the circuit court denied Appellant's motions and granted Respondents' Motion for Summary Judgment. The court also held in abeyance its ruling on Respondents' Motion to Dismiss for Vexatious Litigation and Sanctions.

Appellant did not file a motion for reconsideration pursuant to Rule 59(e), SCRCP. Rather, Appellant filed a Notice of Appeal as to the Order in its entirety.

STATEMENT OF FACTS[2]

On October 9, 2013, Appellant filed a Summons and Complaint against UHSC, an unnamed U-Haul dealer, and two individual defendants, Reginald Morton and Dana Goins." (R. pp. 72-75). On December 4, 2013, Appellant filed an Amended Complaint, naming Respondent El Cheapo as the previously-unnamed "U-Haul Local Dealer" and adding allegations relating to Respondent El Cheapo. (R. pp. 85-86). At a hearing on June 2, 2014, the Court dismissed UHSC from this case.[3] (R. p. 28).

On June 9, 2014, Appellant filed an Amended Complaint against Respondent El Cheapo and Respondent Rahal, alleging causes of action for gross negligence and

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[2] Appellant's brief on appeal is replete with bald assertions disguised as "facts." These purported "facts" find no support in the record, were not presented to the circuit court, and were not considered by the circuit court in any context. *See Becker v. Uhe*, 221 S.C. 334, 339, 70 S.E.2d 346 (1952) ("[F]acts improperly stated in the brief will not be considered."); *see also* Rule 267(b), SCACR ("The signature of a party or attorney constitutes a certificate by him that he has read the document or paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay."). In addition, Appellant fails to include proper reference to the materials from which the statements are included. *See* Rule 208(b)(4), SCACR ("The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal . . . to support the salient facts alleged. References shall also be made to where relevant objections and rulings occurred in the transcript."); *see also First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) ("Mere allegations of error are not sufficient to demonstrate an abuse of discretion. On appeal, the burden of showing abuse of discretion is on the party challenging the trial court's ruling." (citation omitted)). Moreover, Appellant's use of bold, italics, and underlining, in addition to his confusing paragraph delineation, is improper.

These blatant errors have impeded Respondents' ability to properly respond to Appellant's brief. However, for brevity, these issues and other deficiencies are more thoroughly addressed in Respondents' Motion to Strike, which will be filed contemporaneously herewith. Further, Respondents expressly incorporate the Motion to Strike into this brief as if stated verbatim herein.

[3] In addition to the U-Haul entities, Reginald Morton and Dana Goins have since been dismissed from the litigation.

intentional infliction of emotional distress ("IIED") and claiming various personal injuries associated with Respondents' failure to compensate Appellant for the property damage allegedly caused by the driver of the U-Haul Truck. (R. pp. 27-55). Respondent Rahal was the manager of Respondent El Cheapo at the time of the rental transaction and was the employee at Respondent El Cheapo who completed the rental transaction. (R. p. 728). Appellant based both of the claims in his Amended Complaint on allegations that Respondents' rented a U-Haul Truck to Reginald Morton, despite the fact that Reginald Morton did not have a valid driver's license at the time of the subject rental transaction. (R. p. 28). Appellant further alleged that neither Reginald Morton, Dana Goins, nor Morton's father, Odell Morton, possessed a driver's license at the time of the rental transaction. (R. p. 28). According to the Amended Complaint, the U-Haul Truck struck Appellant's rental property and caused property damage. (R. p. 29). Appellant alleged he was not in the rental home at the time but was instead in his home next door where he allegedly witnessed the incident. (R. p. 29).

The record evidence, however, establishes that it was Odell Morton, Reginald Morton's father, who rented the U-Haul Truck from Respondent El Cheapo. (R. pp. 748; 764-68; 1009-1013; 1017; 1021; 1034; 1180-82). Further, the record evidence demonstrates that Odell Morton possessed a valid Maryland driver's license at the time of the rental transaction. (R. pp. 747; 1000; 1012-13; 1034). Both Reginald Morton and Respondent Rahal testified that while Reginald Morton paid for the rental of the U-Haul Truck, it was Odell Morton who rented the U-Haul Truck and agreed therein to drive the

U-Haul Truck. (R. pp. 767-68; 1009-1010).[4] It is undisputed that Appellant was not present at Respondent El Cheapo when the rental transaction took place. (R. pp. 28; 1010; 1014).

Moreover, other than Appellant's unsupported allegations, there is no evidence in the record, whether in the form of pictures, estimates, or other supporting documentation, that the U-Haul Truck validly rented by Odell Morton ever made contact with Appellant's rental property. (R. pp. 1019; 1021).

ARGUMENT

For the reasons outlined below, the circuit court's order was proper and should be affirmed.

I. Appellant Cannot Rely Upon Facts And Arguments That Were Never Presented To, Nor Considered By, The Circuit Court.

Before delving into the merits of the circuit court's decision, it is important to note that Appellant's appeal and the issues raised therein are not properly before this

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[4] Appellant contends that the circuit court's reliance on Odell Morton's deposition testimony was prejudicial error because Appellant was denied the right to cross-examine Morton. (*See* App. Br. p. 18). This argument is without merit for several reasons. First, it is not preserved for appellate review, as it was never raised to or ruled upon by the circuit court, and Appellant did not file a motion to alter or amend. *See* Section I, *infra*. Moreover, Appellant was properly served with the notice of deposition and subpoena and chose to not attend the deposition, neither in person, via telephone, nor by any other means, and any assertion that he was precluded from attending and/or participating in the deposition is patently false.

Appellant also attempts to imply that lack of deposition testimony from Odell Morton indicates forgery, deceit, and a failure of proof supporting the Respondents' defense. (*See* App. Br. p. 20). While this assertion has no basis in law or fact, Respondents simply note that Appellant, not Respondents, has the burden of proof establishing his claims. Further, at his April 24, 2015 deposition, Reginald Morton testified that Odell Morton was unwell, unable to sit for a deposition and recently suffering from dementia since moving back to Maryland. (R. pp. 999-1000).

court and the appeal should therefore be dismissed. Appellant cannot rely upon "facts" and "arguments" that were never presented to, nor considered by, the circuit court.

The majority of arguments raised in Appellant's brief on appeal present new arguments that were not previously raised to the circuit court. In his brief, Appellant has referenced so-called "facts" that were not previously before the circuit court. Additionally, Appellant raises new legal issues that were not raised to and/or ruled upon by the circuit court. Therefore, these issues should not be considered on appeal.

The law is clear that only issues "fairly and properly raised to the lower court and passed upon by that court" can be appealed. *State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) (internal quotations omitted). *See also Pye v. Estate of Fox*, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006). For this Court to have "a platform for meaningful appellate review," *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011), the circuit court must have had the opportunity *for each theory advanced by Appellant* "to rule properly after it has considered all relevant facts, law, and arguments," *I'On, LLC v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Where a party raises an issue, but the issue is never ruled on by the trial court, and the party fails to file a motion to alter or amend, the issue is not preserved. *S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group*, 347 S.C. 333, 544 S.E.2d 870 (Ct. App. 2001).

Appellant cannot keep "ace card[s] up [its] sleeve - intentionally or by chance - in the hope that an appellate court will accept th[ose] ace card[s] and, via a reversal, give [it] another opportunity to prove [its] case." *I'On,* 338 S.C. at 422, 526 S.E.2d at 724. However, that is exactly what Appellant attempts to do in this appeal. Because these new

arguments are outside the scope of arguments presented to and considered by the circuit court, they are not on appeal.[5]

II. Appellant's Arguments Alleging Respondents Made Judicial Admissions and the Preclusive Effect Thereof Must Fail as a Matter of Law.

Throughout his brief and throughout the record below, Appellant repeatedly refers to Respondent Rahal's cherry-picked deposition testimony and an interrogatory response which was later clarified as "judicial admissions." Essentially, Appellant argues such "admissions" bar Respondents from defending their case or explaining the statements made therein and represent the main thrust for each of Appellant's motions. However, Appellant's arguments in this regard are unavailing for several reasons.

First, the circuit court did not rule on whether the statements were "judicial admissions." Thus, the argument Appellant attempts to make is not even properly before this Court. *See* Section 1, *supra.*

More importantly, neither deposition testimony nor answers to interrogatories are considered "judicial admissions," such that the party is barred from explaining or disproving said statements. A judicial admission is "[a] formal waiver of proof that [3] relieves an opposing party from having to prove the admitted fact and bars the party who made the admission from disputing." Black's Law Dictionary 54 (10th ed. 2014) (cited with approval by *McCray v. Valle*, Unpub. Op. No. 2014-UP-313, 2014 WL 3845087 (Ct. App. Aug. 6, 2014)). The Fourth Circuit has indicated a "judicial admission" is a representation that "'unless allowed by the court to be withdrawn, is

[5] Respondents will note where arguments are not preserved below each issue discussed *infra.*

conclusive in the case.'" *Meyer v. Berkshire Life Ins. Co.*, 372 F.3d 261, 264 (4th Cir. 2004) (citing *Keller* v. *United States*, 58 F.3d 1194, 1199 n. 8 (7th Cir. 1995)). In *Keller*, cited by the Fourth Circuit Court of Appeals, the Seventh Circuit Court of Appeals stated:

> Judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them. They may not be controverted at trial or on appeal. Indeed, they are "not evidence at all but rather have the effect of withdrawing a fact from contention." Michael H. Graham, *Federal Practice and Procedure:* Evidence § 6726 (Interim Edition); see also John William Strong, *McCormick on Evidence* § 254, at 142 (1992). A judicial admission is conclusive, unless the court allows it to be withdrawn; ordinary evidentiary admissions, in contrast, may be controverted or explained by the party. *Id.* When a party testifying at trial or during a deposition admits a fact which is adverse to his claim or defense, it is generally preferable to treat that testimony as solely an evidentiary admission. *Federal Practice and Procedure* § 6726, at 536-37.

Furthermore, in *Wright v. Hiester Construction Co.*, 389 S.C. 504, 698 S.E.2d 822 (Ct. App. 2010), this Court distinguished between answers to interrogatories and answers to requests to admit:

> The written admission during discovery was in response to interrogatories, rather than a request to admit. As such, it was correctly construed by the trial judge "as seeking current information as of the time the question is asked and answered." *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 108, 410 S.E.2d 537, 541 (1991); *see also* Rule 33, SCRCP (concerning interrogatories to parties); Rule 36(b), SCRCP (concerning requests for admission and stating "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission").

Likewise, discovery deposition testimony of this nature is treated as evidentiary testimony, not judicial admissions. *See Managed Care Prof'ls v. Medlantic Healthcare Group*, No. 97-2158, 1998 U.S. App. WL 704458 (4th Cir. Oct. 1, 1998) (stating that "when a party testifying at trial or during a deposition admits a fact which is adverse to his claim or defense, it is generally preferable to treat the testimony as solely an

evidentiary admission") (citing *Keller v. United States*, 58 F.3d 1194, 1198 n.8 (7th Cir. 1995) (citing Michael H. Graham, Federal Practice and Procedure, § 6726 (Interim Ed. 1992)).[6]

Here, Appellant's repeated citation to Respondent Rahal's isolated deposition testimony and Respondents' answer to an interrogatory,[7] which was subsequently clarified and further explained, are simply not judicial admissions and certainly do not

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[6] Appellant relies on several cases from other jurisdictions to support his position that Respondent Rahal's testimony and the interrogatory response were judicial admissions by which Respondents are bound. These cases are inapplicable for several reasons. First, Appellant's reliance on *Zegarowicz for Ripati*, 77 A.D.3d 650 (N.Y. 2009), *Knauerhaze v. Nelson*, 836 N.E.2d 640 (Ill. Ct. App. 2005), *Underhill v. Jefferson County Appraisal District*, 725 S.W.2d 301 (Tex. App. 1987) is misplaced, as those cases address facts admitted in pleadings—at no time did Respondents admit the truck was rented to Reginald Morton in their pleadings. Moreover, Illinois law is not persuasive and even if it were, the statements made in Respondent Rahal's deposition are not of the nature to be considered a judicial admission, even under Illinois law. *Compare Burns v. Michelotti*, 604 N.E.2d 1144 (Ill. Ct. App. 1992) (holding "a judicial admission is a clear and unequivocal statement which is made without reasonable chance of mistake about a matter within the speaker's personal knowledge and finding party's discovery deposition testimony not judicial admissions where the statements were not unequivocal and expressed a measure of uncertainty) *with Caponi v. Larry's 66*, 601 N.E.2d 1347 (Ill. Ct. App. 1992) ("Although statements made during a discovery deposition are normally treated only as evidentiary admissions, which may be contradicted, such statements may be 'so deliberate, detailed, and unequivocal, as to matter with the party's personal knowledge' that the statements will be held to be judicial admissions" and finding party repeatedly testified, *without equivocation*, about the condition of a brake pedal before an automobile collision) (internal citations omitted). Here, as evidenced by a reading of the entire Respondent Rahal deposition, Respondent Rahal repeatedly attempted to explain, despite Appellant's attempts to limit his response, the Rental Agreement and the fact that although Reginald Morton paid for the rental, Odell Morton entered into the Rental Agreement as the authorized driver of the U-Haul Truck. Appellant's assertions that Respondents are bound by isolated testimony purposefully contrived by Appellant's questions are wholly unavailing.

[7] The interrogatory answer was supplemented to explain that Respondent Rahal rented the U-Haul Truck to Odell Morton. Furthermore, in an answer to a request to admit, which Appellant has failed to cite, Respondents explained that Respondent Rahal rented the U-Haul Truck to Odell Morton. (R. pp. 1145-49).

have the preclusive effect Appellant seeks to impose. Thus, Appellant's arguments are wholly misplaced on this matter.

III. The Circuit Court Properly Granted Respondents' Motion for Summary Judgment and Properly Denied Appellant's Motion for Summary Judgment

The circuit court properly granted Respondents' Motion for Summary Judgment, while simultaneously denying Appellant's Motion for Summary Judgment, finding there was no basis in law or fact to support Appellant's claims. This holding should be affirmed.

A. Standard of Review

Summary judgment is appropriate where, as here, "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." Rule 56(e), SCRCP *and Baughman v. Am. Tele. & Tel. Co.*, 306 S.C. 101, 111, 410 S.E.2d 537, 545 (1991). In determining the appropriateness of granting summary judgment, the circuit court is not "required to single out some one morsel of evidence...to create an issue of fact that is not genuine." *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993) (quoting *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984)).

Moreover, "[a] party opposing summary judgment must do more than rely on mere allegations." *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d 67, 70 (Ct. App. 2008) (citing *Dyer v. Moss*, 208 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985)). Where a defendant establishes entitlement to judgment as a matter of law, the court must grant summary judgment. *Humana Hosp. Bayside v. Lightle*, 305 S.C. 214,

216, 407 S.E.2d 637, 638 (1991) *and Dyer*, 284 S.C. at 211, 325 S.E.2d at 70. "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493-494, 567 S.E.2d 857, 860 (2002) (citing *Peterson v. West Am. Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999)).

B. Summary Judgment in Favor of Respondents was Proper and the Circuit Court Should be Affirmed.[8]

The circuit court correctly determined that the Graves Amendment, 49 U.S.C. § 30106 (2015), bars Appellant's claims under the theory of vicarious liability. Further, the circuit court properly held that Appellant's claims of gross negligence against Respondents fail as a matter of law. The circuit court's alternative ruling; holding that to the extent Appellant's gross negligence claim could be interpreted as a negligent entrustment claim, the claim nevertheless failed as a matter of law, was correct. Finally, the circuit court's ruling granting Respondents' summary judgment as to Appellant's IIED claim was proper.

Here, the Respondents' demonstrated that they were entitled to judgment as a matter of law, and Appellant failed to present any law or *evidence* demonstrating the existence of a genuine issue of material fact that would defeat a grant of summary judgment on Respondents' behalf. Despite his assertions to the contrary, none of the evidence that Appellant relies on in attempting to create a genuine issue of material fact demonstrates that Respondents are liable to him on any cause of action, whether for

[8] To avoid redundancy, this section encompasses arguments related to the grant of summary judgment in favor of Respondents and the denial of Appellant's motion for summary judgment.

vicarious liability, gross/negligence, negligent entrustment, or IIED. In contending that the circuit court incorrectly granted Respondents' motion, Appellant erroneously relies on facts and so-called evidence that still do not demonstrate that any of Respondents' actions were actionable and support a valid cause of action against them. The failure to present such evidence is fatal to Appellant's case. Therefore, because the circuit court properly entered summary judgment on behalf of Respondents as a matter of law and properly denied Appellant's Motion for Summary Judgment, this Court should affirm its rulings.[9]

i. The Circuit Court Properly Held That The Graves Amendment Bars Appellant's Claims For Vicarious Liability

The circuit court properly held that Appellant's claims against Respondents fail as a matter of law because the claims are claims of vicarious liability, which are barred by

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[9] Appellant argues in his brief that Respondents' memorandum in support of their summary judgment was untimely and that he failed to receive them prior to the hearing, such that the circuit court's reliance on them was prejudicial and reversible error. This argument fails for several reasons. Initially, Appellant never objected to the affidavit as untimely and never filed a motion to alter or amend the circuit court's order relying on the affidavit. Thus, the argument is not preserved for this Court's review. *See S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group*, 347 S.C. 333, 544 S.E.2d 870 (Ct. App. 2001) (holding that where a party raises an issue, but the issue is never ruled on by the trial court, and the party fails to file a motion to alter or amend, the issue is not preserved).

In any event, Respondents sent a letter with supporting memorandums on October 9, 2015, to both the circuit court and Appellant. (R. pp. 612-13; 628; 631). Moreover, at the October 14, 2015 hearing, Appellant stated he had received the memorandums filed by Respondents at least the night before via an October 9, 2015 letter serving the same. (R. pp. 612-13). Furthermore, Rule 56(c), SCRCP imposes no requirement that memorandums be filed at all, let alone prior to the hearing. Finally, at the hearing, Respondents' counsel addressed in detail all of the arguments contained in the supporting memorandum, sufficiently permitting the circuit court to consider the memorialized arguments accordingly. Thus, Appellant's arguments regarding the memorandum are wholly without merit.

the Graves Amendment.[10]

The Graves Amendment, a section of the Federal Public Transportation Act of 2005, provides in relevant part as follows:

> (a) In general – An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if--
>
> > (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and
> >
> > (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner). . . .
>
> . . . .
>
> (c) Applicability and effective Date – Notwithstanding any other provision of law, this section shall apply with respect to any action commenced on or after the date of enactment of this section without regard to whether the harm that is the subject of the action, or the conduct that caused the harm, occurred before such date of enactment.

49 U.S.C. § 30106 (2015).

Congress enacted the Graves Amendment for the explicit purpose of abolishing vicarious liability for those engaged in the business of renting and leasing motor vehicles based on mere ownership or leasing of a vehicle. The Congressional mandate of 49 U.S.C. § 30106 is clear and unambiguous. The affiliate of the owner of a leased vehicle

[10] Appellant's assertion that the Graves Amendment is an affirmative defense is both unpreserved and without merit. *See* Section 1, *supra* (arguments must be raised to and ruled upon by the circuit court to be preserved for appellate review); *see also* Rule 8(c), SCRCP (delineating affirmative defenses that must be raised in a pleading).

"shall not be liable under the law of any state . . . by reason of being the owner of the vehicle for harm to persons or property that arises out of the use, operation or possession of the vehicle during the period of the rental or the lease..." 49 U.S.C. § 30106(c). By its express terms, 49 U.S.C. § 30106 "shall apply with respect to any action commenced on or after the date of enactment of this section without regard to whether the harm that is the subject of the action, or the conduct that caused the harm, occurred before such date of enactment." 49 U.S.C. § 30106(c).

Although South Carolina's appellate courts have not addressed the precise issue, other state courts across the country have affirmed that the Graves Amendment abolishes vicarious liability for vehicle rental companies. *See Vargas v. Enter. Leasing Co.*, 60 So. 3d 1037, 1041 (Fla. 2011) *cert. denied*, 132 S. Ct. 769 (U.S. 2011) ("[W]e conclude that the present case falls into the third category [where a state law conflicts with a federal law] and agree with the district court that section 324.021(9)(b) 2, Florida Statutes (2007) conflicts with and thus is preempted by the Graves Amendment"); *Lazaridis v. Progressive N. Ins. Co.*, FSTCV116011100S, 2012 WL 5936218 (Conn. Super. Ct. Nov. 7, 2012) (holding that Graves Amendment precluded Hertz Corporation from being vicariously liable for the alleged negligence of driver); *Fuller v. Enter. Rent-a-Car Co. of Kentucky, LLC*, 2011-CA-001301-MR, 2012 WL 4839550 (Ky. Ct. App. Oct. 12, 2012), review denied (Aug. 21, 2013) (acknowledging that "Congress in 2005 enacted a law (the Graves Amendment) which exempts car rental companies from tort liability"); *Esposito v. Kiessling Transit, Inc.*, 060883A, 2007 WL 3014703 (Mass. Super. Sept. 6, 2007) ("The clear language of this Federal statute indicates that, when applicable, it expressly preempts State law that imposes liability on owners of motor vehicles engaged in

business of leasing or renting such vehicles simply due to ownership."); *Meyer v. Nwokedi*, 777 N.W.2d 218, 223 (Minn. 2010) ("It is undisputed that's vicarious liability claim fits within the scope of the express preemption clause of the Graves Amendment. Specifically, Enterprise is engaged in the business of renting motor vehicles, and did not engage in negligence or criminal wrongdoing").

Initially, it should be noted that it does not appear South Carolina has ever imposed vicarious liability on vehicle rental companies. Respondents are unable to find a reported South Carolina case or statute that existed prior to the passage of the Graves Amendment that imposed vicariously liability on vehicle rental companies. Thus, it appears South Carolina preceded the Graves Amendment in refusing to recognize vicarious liability in these circumstances.

Furthermore, even assuming South Carolina at one time recognized vicarious lability in this context, the Graves Amendment extinguishes any doubt and expressly preempts the imposition of vicarious liability on vehicle rental companies. Although South Carolina courts have yet to address the Graves Amendment, perhaps for the reasons set forth above, South Carolina recognizes the doctrine of preemption, which is exactly what the Graves Amendment does. *See Priester v. Cromer*, 401 S.C. 38, 43, 736 S.E.2d 249, 252 (2012) ("The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution and provides that any state law that conflicts with federal law is "without effect."). The Graves Amendment expressly eliminates and preempts vicarious liability for vehicle rental companies during the period of the vehicle's lease.

Thus, Appellant's claims against Respondents are barred by federal law. Appellant's claims are, at their core, claims of vicarious liability founded upon the

alleged negligence (or intentional acts) of former defendants Reginald Morton and Dana Goins. Indeed, even Appellant refers to his claim as "[Appellant's] (Vicarious Liability) Gross Negligence Claim" and admits he sued Respondents "vicariously." (*See* App. Br. p. 4).[11]

It is beyond dispute that Respondent El Cheapo was merely the renter of the U-Haul Truck, and Respondent Rahal was an employee of Respondent El Cheapo, working in the scope of his employment at the time that the rental transaction was completed. Appellant clearly alleges in his pleadings and improper "testimonial affidavits"[12] that Reginald Morton and Dana Goins rented the U-Haul Truck without a valid driver's license, were operating the U-Haul Truck at the time of the incident, and Reginald

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[11] Appellant accuses Respondents, Reginald Morton, and seemingly Respondents' counsel of committing forgery with respect to Odell Morton's signature on the Rental Agreement, thereby satisfying the criminal wrongdoing exception to the Graves Amendment. Again, this purported "fact" finds no support in the record and was not considered by the circuit court in any context. *See Becker v. Uhe*, 221 S.C. 334, 339, 70 S.E.2d 346 (1952) ("[F]acts improperly stated in the brief will not be considered."); *see also* Rule 267(b), SCACR ("The signature of a party or attorney constitutes a certificate by him that he has read the document or paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.").

Moreover, the circuit court failed to rule on Appellant's forgery claim, therefore requiring Appellant to file a motion to alter or amend to preserve the issue for appellate review. Appellate failed to do so and the matter of forgery, a completely unsupported allegation, is not properly before this Court. *See S.E.C.U.R.E.*, 347 S.C. 333, 544 S.E.2d 870 (holding that where trial court did not rule on an issue, a party is required to file a motion to alter or amend to properly preserve issue for appellate review).

[12] Appellant was not present during the rental transaction of the U-Haul Truck from Respondent El Cheapo, which is the central issue in this case. In light of this, he cannot present bald assertions regarding the rental transaction under the guise of a "testimonial affidavit" for purposes of surviving a summary judgment motion. *See* Rule 56(e), SCRCP ("Supporting and opposing affidavits *shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence*, and *shall show affirmatively that the affiant is competent to testify to the matters stated therein.*") (emphasis added)).

Morton and Dana Goins negligently hit the house with the U-Haul Truck, thereby causing damage. (R. p. 28). Even if such allegations were true, which the record clearly refutes,[13] Appellant has not made any allegations in his Amended Complaint asserting that Respondents were negligent in the repair, maintenance, or inspection of the U-Haul Truck or that the U-Haul Truck was unfit for rental. Furthermore, the record is devoid of any competent and admissible evidence supporting the same. Appellant seeks to impose vicarious liability on Respondents for the action of others during the lease of the U-Haul Truck—this is exactly the type of liability which the Graves Amendment expressly forbids and South Carolina has heretofore never recognized.

Thus, the circuit court properly held that because claims for vicarious liability are barred by the Graves Amendment, Appellant's vicarious negligence claims against Respondents fail. The circuit court's holding should be affirmed.

ii. The Circuit Court Properly Held that Appellant's Claim of Gross Negligence Fails as a Matter of Law.

Because the Graves Amendment preempts any alleged vicarious lability on the part of Respondents, Appellant must prove that Respondents were independently negligent in causing his damages. As discussed in section a, *infra*, Appellant's newfound arguments regarding a direct negligence claim are not preserved for appellate review. In any event, the circuit court properly held that Appellant's claim for gross negligence fails as a matter of law. To the extent these claims are even before this Court, this holding

[13] The competent evidence in the record refutes the assertions that Reginald Morton or Dana Goins drove the U-Haul Truck and that the U-Haul Truck hit Appellant's rental house, causing damage. However, even if such allegations were actually in dispute, the veracity of such is not necessary to resolve the issue, as the Graves Amendment clearly preempts vicarious liability in such situations.

should be affirmed.

a. Appellant's Arguments Regarding Respondents' Negligence are Not Preserved.

As discussed in Section I, *supra*, Appellant's arguments regarding his gross negligence claim are not preserved. Appellant raises arguments regarding Respondents' independent negligence, including reference to the four required elements, for the first time on Appeal. In his memorandums to the circuit court, Appellant failed to argue with any specificity that Respondents were negligent. Instead, Appellant focused on his "vicarious liability" negligence claim. In an abundance of caution, Respondents' briefed arguments in opposition to a negligence claim, and the circuit court ruled on the issue. However, Appellant was required to file a motion to alter or amend the circuit court's ruling in order to preserve his arguments regarding negligence. For this Court to have "a platform for meaningful appellate review," *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011), the circuit court must have had the opportunity *for each theory advanced by Appellant* "to rule properly after it has considered all relevant facts, law, and arguments," *I'On, LLC v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Where a party raises an issue, but the issue is never ruled on by the trial court, and the party fails to file a motion to alter or amend, the issue is not preserved. *S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group*, 347 S.C. 333, 544 S.E.2d 870 (Ct. App. 2001).

Appellant's failure to raise these newly formulated arguments is fatal to his appeal on the issue, and as such, the arguments regarding negligence are not preserved and the circuit court's order should be affirmed.

b. The Circuit Court Properly Found that Appellant's Gross Negligence Claim was Barred as a Matter of Law.

"To establish a negligence cause of action under South Carolina law, the plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty." *J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 368-69, 635 S.E.2d 97, 101 (2006) (citations omitted). Gross negligence has been defined as "the failure to exercise a slight degree of care" and "when a person is so indifferent to the consequences of his conduct as not to give slight care as to what he is doing." *Clark v. South Carolina Dept. of Public Safety*, 362 S.C. 377, 382, 608 S.E.2d 573, 576 (2005) (citations omitted).

"In a negligence action, the court must determine, as a matter of law, whether the defendant owed a duty of care to the plaintiff." *Huggins v. Citibank, N.A.*, 355 S.C. 329, 332 585 S.E.2d 275, 277 (2003) (citing *Faile v. South Carolina Dept. of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536 (2002)). "If there is no duty, the defendant is entitled to judgment as a matter of law." *Id.* (citing *Simmons v. Tuomey Regional Med. Ctr.*, 341 S.C. 32, 533 S.E.2d 312 (2000)). "'A tortfeasor's duty arises from his relationship to the injured party.'" *Ravan v. Greenville Cnty.*, 315 S.C. 447, 434 S.E.2d 296 (1993) (quoting *South Carolina State Ports Authority v. Booz–Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E.2d 324, 325–26 (1986)). "Where this relationship is 'too attenuated,' a duty will not arise." *Id.* (citing *South Carolina State Ports Authority*, 289 S.C. at 377, 346 S.E.2d at 326.)

The only reasonable inference from the evidence presented is that Respondents

owed no duty to Appellant in these circumstances. The Amended Complaint does not allege and Appellant has not proven or set forth any evidence tending to prove that any special relationship existed between Appellant and Respondents either through contract, statute, or otherwise that would give rise to a duty owed to Appellant under these circumstances. Rather, Appellant's entire case is based upon his bald assertions, unsupported by any evidence, that Respondents rented a U-Haul rental truck to Reginald Morton, an individual without a driver's license. (R. p. 28). Thus, there is absolutely no evidence in the record demonstrating a duty owed by Respondents to Appellant.

Moreover, even assuming *arguendo* such a duty existed, which is denied, the circuit court properly found that Appellant's gross negligence claim nevertheless fails because Appellant failed to produce any evidence that Respondents breached any duty owed to Appellant. (R. pp. 16-17).

The record is devoid of any credible, admissible, and competent evidence demonstrating Respondents rented a U-Haul rental truck to an individual without a driver's license. The Rental Agreement and official records of the Maryland Department of Motor Vehicles demonstrate Respondents rented the U-Haul Truck to Odell Morton, who possessed and presented a facially valid driver's license. In fact, the license numbers on both documents are the same. (R. pp. 1034; 1180-82). Moreover, Respondent Rahal testified that he rented the U-Haul Truck to Odell Morton as the licensed driver. (R. pp. 748; 764-68). While Appellant harps on the fact that the Rental Agreement lists Reginald Morton as a party to the Rental Agreement, the Rental Agreement also shows, just as Respondent Rahal's testimony confirms, Odell Morton signed the Rental Agreement and presented a facially valid Maryland driver's license to

Respondent Rahal at the time of the rental transaction, while Reginald Morton paid for the rental. (R. pp. 748; 764-68). Furthermore, it is undisputed that Appellant was not present at Respondent El Cheapo when the rental transaction took place. Appellant presented no evidence that the procedure followed by Respondents violated any law, and more importantly, no evidence that Respondent breached any duty owed to Appellant, to the extent he hypothetically proved one existed. Furthermore, even assuming *arguendo* that Appellant could prove that Respondents rented a U-Haul rental truck to an unlicensed driver, which he cannot, he failed to introduce any evidence below demonstrating how Respondents' alleged actions violated any duty owed to Appellant.

In light of the utter lack of evidence to support Appellant's claims of the existence of a duty or breach thereof, the circuit court properly found that no genuine issue of material fact exists as to Appellant's gross negligence claim. Thus, Respondents were entitled to summary judgment on the gross negligence claim and the circuit court should be affirmed.

iii. To the Extent Appellant's Claim is Considered a Negligent Entrustment Claim, the Circuit Court Properly Granted Respondents Summary Judgment.

In an abundance of caution, Respondents argued that even if Appellant's gross negligence claim was a misguided attempt to bring a negligent entrustment action, the claim nevertheless failed. As discussed in section a, *infra*, Appellant disclaimed this cause of action for negligent entrustment at the hearing and in his initial brief. In any event, the circuit court properly held that Appellant's claim for gross negligence failed because there was no evidence in the record to support the claim, and thus no genuine issue of material fact. To the extent this claim is even before this Court, this holding

should be affirmed.

a. Appellant has Abandoned and/or Conceded the Circuit Court's Grant of Summary Judgment as to the Negligent Entrustment Interpretation of the Gross Negligence Claim.

Initially, Appellant has abandoned any argument related to circuit court's alternative ruling granting summary judgment to Respondents even if Appellant's gross negligence claim was determined to be a negligent entrustment claim. An issue is not preserved for appellate consideration if it has been conceded in the trial court. *State v. Benton*, 338 S.C. 151, 526 S.E.2d 228 (2000); *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 3311 S.C. 611, 503 S.E.2d 471 (1998) (an issue conceded in the trial court cannot be argued on appeal).

At the summary judgment hearing, Appellant stated "I didn't bring entrustment because I don't know how the law [sic] they pushed that in there because I hear and keep talking about negligent entrustment, but that's not the charge I brought. I brought gross negligence. (R. p. 694, lines 17–22). Further, Appellant reinforces his abandonment of the negligent entrustment claim in his brief, stating "Appellant has made it clear all along and in his amended complaint and at the hearing, that he brought no [negligent entrustment] cause of action." (App. Br. p. 28). Thus, it is clear Appellant has abandoned this claim. In light of the clear application of the Graves Amendment and the failure of Appellant's common law gross negligence claim, his abandonment of the direct liability claim of negligent entrustment is fatal to his entire lawsuit. *See Judy v. Judy*, 384 S.C. 634, 682 S.E.2d 836 (Ct. App. 2009) (refusing to address conclusory arguments which are considered abandoned).

b. The Circuit Court Properly Found the Negligent Entrustment Claim Failed and Should be Affirmed.

To the extent the Court wishes to address the merits of the circuit court's holding regarding negligent entrustment, the holding was proper and should be affirmed. In order to prove a negligent entrustment claim in South Carolina, a party must prove: "(1) knowledge of or knowledge imputable to the owner that the driver was either addicted to intoxicants or had the habit of drinking, (2) that the owner knew or had imputable knowledge that the driver was likely to drive while intoxicated and (3) under these circumstances, the entrustment of a vehicle by the owner to such a driver." *Jones ex rel. Jones v. Enterprise Leasing Company-Southeast*, 383 S.C. 259, 264, 678 S.E.2d 819, 822 (Ct. App. 2009) (citing *McAllister v. Graham*, 287 S.C. 455, 458, 339 S.E.2d 154, 156 (Ct. App. 1986)).

Appellant submitted no evidence to support any of the essential elements of a negligent entrustment claim. Specifically, Appellant produced no evidence regarding the actual ownership of the vehicle, no evidence tending to indicate that Respondents possessed knowledge that the driver of the U-Haul Truck was addicted to intoxicants or had a habit of drinking, and no evidence that the Respondents knew or should have known that the driver was likely to drive while intoxicated. Moreover, Appellant failed to submit any evidence to show that Reginald Morton was the lessee of the U-Haul Truck. Instead, the record evidence demonstrates that Respondent El Cheapo actually rented the U-Haul Truck to Odell Morton as the driver, not Reginald Morton or Dana Goins. Reginald Morton merely paid for the rental of the U-Haul Truck. The evidence also shows that Odell Morton possessed a valid driver's license at the time of the rental

transaction.

As the circuit court found, Appellant simply failed to present evidence to create a disputed material fact. (R. p. 18). Moreover, though the circuit court refused to unequivocally rule on the scope of a negligent entrustment claim, the Supreme Court has expressly declined to expand the cause of action to circumstances beyond intoxicants and/or drinking. *See Gadson v. ECO Servs. of S.C., Inc.*, 374 S.C. 171, 176-177, 648 S.E.2d 585, 2007 (2007) ("We decline to adopt sections 308 and 390 of the Restatement [which extend liability to other circumstances]."). Thus, this Court should find that Appellant's allegations, even if taken as true, do not support a claim of negligent entrustment as a matter of law. *See Upchurch v. New York Times*, 314 S.C. 531, 538, 431 S.E.2d 558, 562 (1993) ("We may affirm the trial judge for any reason appearing in the record.") (citing Rule 220(c), SCACR)). No allegation is even suggested that the driver of the U-Haul Truck (Odell Morton) or anybody else for that matter, used intoxicants and/or was using alcohol at the time of the rental transaction of the U-Haul Truck (the only relevant time for a claim of this nature); instead the allegations solely relate to Reginald Morton not having a driver's license at the time of the rental transaction.

Therefore, the circuit court's grant of summary judgment to Respondents on this claim, to the extent it can be construed as negligent entrustment, was proper and should be affirmed.

iv. The Circuit Court Properly Granted Respondents Summary Judgment Regarding Appellant's IIED Claim.

The circuit court properly held that Appellant's claim for IIED failed as there was no evidence creating a genuine issue of material fact. Moreover, Appellant's new

arguments regarding the IIED claim are not preserved for review. To the extent this claim is even before this Court, this holding should be affirmed.

a. Appellant's Arguments Regarding IIED are Not Preserved for Appeal.

Seemingly for the first time on appeal, Appellant attempts to couch his IIED claim in terms of vicarious lability, essentially arguing that Respondents are vicariously liable for the actions of non-employee customer Reginald Morton. While this attempt is unsupported by the law or facts of this case, it is also not preserved for this Court's review. Furthermore, at no point below did Appellant address the elements of an IIED cause of action with the circuit court. As discussed in section I, *supra*, matters not raised to and ruled upon are not preserved for this Court's review. *See State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (holding that only issues "fairly and properly raised to the lower court and passed upon by that court" can be appealed) (internal quotations omitted)).

The circuit court did not have the opportunity to rule on each theory advanced by Appellant, and "to rule properly after it has considered all relevant facts, law, and arguments." *I'On, LLC v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (noting a party cannot hold "ace card[s] up [his] sleeve - intentionally or by chance - in the hope that an appellate court will accept th[ose] ace card[s] and, via a reversal, give [his] another opportunity to prove [his] case"); *see also State v. McCray*, 332 S.C. 536, 506 S.E.2d 301 (1998) (noting where the appellate argument differs from the ground for a party's trial objection, the issue is not preserved for review).

b. The Circuit Court's Holding That Appellant's IIED Claim Fails As a Matter of Law Was Proper And Should Be Affirmed.

To the extent the Court finds Appellant's arguments appropriate, the circuit court's holding that Appellant's IIED claim failed as a matter of law was proper and should be affirmed. In order to recover for IIED under South Carolina law, a plaintiff must establish that:

> (1) the defendant intentionally or recklessly inflicted emotional distress, or was certain, or substantially certain, that such distress would result from his conduct;
>
> (2) the conduct was so "extreme and outrageous" so as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;"
>
> (3) the actions of the defendant caused plaintiff's emotional distress; and
>
> (4) the emotional distress suffered by the plaintiff was "severe" such that "no reasonable man could be expected to endure it."

Hansson v. Scalise Builders of South Carolina, 374 S.C. 352, 650 S.E.2d 68 (2007) (quoting *Ford v. Hutson*, 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981) (citations omitted). In order to survive a motion for summary judgment, a plaintiff must establish a prima facie case as to each element of a cause of action for IIED. *Hansson*, 374 S.C. at 358, 650 S.E.2d at 71. Importantly, the *Ford* court emphasized the heightened burden of proof included in the second and fourth elements of the tort. *Ford*, 276 S.C. at 166, 276 S.E.2d at 780 (citations omitted). "It is for the court to determine in the first instance whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, and only where reasonable persons may differ is the question one for the jury." *Todd v. S.C. Farm Bur. Mut. Ins. Co.*, 283 S.C. 155, 321

S.E.2d 602 (Ct. App. 1984), *portion of opinion quashed on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985).

As to the resulting emotional distress, "a party cannot establish a prima facie claim for damages resulting from a defendant's tortious conduct with mere bald assertions." *Hansson*, 374 S.C. at 358, 650 S.E.2d at 72. "To permit a plaintiff to legitimately state a cause of action by simply alleging 'I suffered emotional distress' would be irreconcilable with [the] Court's development of the law in this area." *Id.* In addition, the *Ford* court noted, "where physical harm is lacking, the courts should look initially for more in the way of extreme outrage as an assurance that the mental disturbance claim is not fictitious." *Ford*, 276 S.C. at 166, 276 S.E.2d at 780 (citations omitted).

In *Todd*, this Court reversed a jury verdict in favor of the plaintiff on his outrage claim against the defendants despite evidence that could have been interpreted to show the defendants violated the State's Polygraph Examiner's Act by requiring the plaintiff to submit to numerous polygraph tests in the course of his employment as an insurance agent. *Todd*, 283 S.C. at 173, 321 S.E.2d at 612 (Ct. App. 1984). The plaintiff also presented evidence that the court conceded could have led to the inference that one defendant lied about the plaintiff's performance on the polygraph examinations. *Id.* Importantly, this Court held that violation of a statute does not import moral turpitude or outrageousness so to give rise to an outrage or IIED cause of action. *Id.* The court also held that lying, in and of itself, is not outrageous conduct. *Id.* (citing *Jones v. Nissenbaum, Rudolph & Seidner*, 244 Pa.Super. 377, 368 A.2d 770 (1976); *Public Finance Corp. v. Davis*, 66 Ill.2d 85, 4 Ill.Dec. 652, 360 N.E.2d 765 (1976)).

Even assuming Appellant is able to prove his allegations that Respondents rented a U-Haul rental truck to an individual without a license, such act does not come close to rising to the level of outrageous, extreme or severe conduct that is necessary to support an IIED claim. This shortcoming is only made clearer when compared with other South Carolina cases where, despite more egregious conduct, the courts refused to find that the conduct at issue gave rise to an IIED cause of action. *See, e.g., Todd; Horton, supra.* Viewing the evidence in the light most favorable to Appellant and even assuming evidence exists to support Appellant's allegations, the conduct as alleged is not outrageous, extreme or severe. As the circuit court observed, these allegations "pale[] in comparison" to the conduct found insufficient in *TNS.* (R. p. 20). Under South Carolina jurisprudence, the only reasonable inference that can be drawn is that Respondents' alleged conduct was not so extreme and outrageous to exceed all possible bounds of decency. To hold otherwise ignores theupchr heightened standard of proof established by *Ford.*

Finally, the circuit court properly held that the record is devoid of evidence demonstrating Respondents' actions caused any emotional distress to Appellant or that the distress suffered by Appellant was so severe that no reasonable man would be expected to endure it.[14] (R. p. 21). While Appellant takes issue with the circuit court's

[14] Appellant repeatedly pleads and states that he is entitled to damages because Respondents refused to pay his multi-million demands and have "forc[ed] tortuous and continuing litigation upon disabled [Appellant]." (R. p. 32). Such damages are not recoverable under South Carolina law. Although no South Carolina appellate court has addressed the issue, as stated in *Charles v. Bilson*, 186 Cal.App.3d 954, 231 Cal.Rptr. 155 (Ct. App. 1986), "[t]hese types of damages are not normally compensable. It has always been understood in our system that attorney's fees and the mental stress of litigation are burdens which the parties must ordinarily bear themselves."

use of the term "bald assertions" to describe his claims, the Supreme Court has held that "damages cannot be recovered for mental suffering the absence of bodily injury." *See Padgett v. Colonial Wholesale Distrib. Co.*, 232 S.C. 593, 103 S.E.2d 265, 270 (1958) ("It is conceded by the respondent that under the law of this State damages cannot be recovered for mental suffering in the absence of bodily injury."); *see also Doe v. Greenville Cnty. Sch. Dist.*, 274 S.C. 63, 68, 651 S.E.2d 305,307 (2007) (holding that, for an NEID claim, "the plaintiff's emotional distress manifests itself by physical symptoms capable of objective diagnosis and be established by expert testimony"). Thus, the circuit court properly held that the record is devoid of evidence demonstrating Respondents' actions caused any recoverable emotional distress.[15]

In light of the foregoing, the circuit court's order granting summary judgment to Respondents on Appellant's IIED claim should be affirmed.

IV. The Circuit Court Did Not Abuse its Discretion in Denying Appellant's Motion for Leave to Amend Pleadings.

The circuit court properly denied Appellant's Motion for Leave to Amend Pleadings, finding there was no basis in law or fact to support the naming of UHI in this lawsuit as a party defendant. This holding should be affirmed.

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[15] Appellant string cites numerous federal court cases for the proposition that expert testimony is not needed and a plaintiff's own testimony regarding his emotional distress is sufficient. However, each of these cases cited by Appellant concern federal discrimination cases, including wrongful termination actions under the Americans with Disabilities Act and §1983, which contain their own, unique body of law. These cases are highly distinguishable from the present matter and have no bearing on South Carolina's clear proof requirement for emotional distress.

A. Standard of Review

"It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice." *City of N. Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 232, 599 S.E.2d 462, 465 (Ct. App. 2004). "The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997). On appeal, the burden of showing abuse of discretion is on the party challenging the trial court's ruling." *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (citation omitted)). An abuse of discretion occurs when the decision of the trial judge is based upon an error of law or upon factual findings that are without evidentiary support. *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 264 (2006).

First, it should be noted that Appellant has referenced the incorrect standard of review. Appellant's assertion that this Court's standard of review is "De Novo / Independent," without any citation to law or authority supporting such assertion, is in error and another example of the myriad of legal, factual, and practical errors with Appellant's appeal.

B. The Circuit Court Did Not Abuse Its Discretion in Denying Appellant's Motion for Leave to Amend Pleadings.

Rule 15(a), of the South Carolina Rules of Civil Procedure states in part, "[A] party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party."

In interpreting Rule 15(a), South Carolina courts have noted that, "[a]lthough leave to amend should generally be freely given, leave may be properly denied "where the proposed amendment would be futile." *See Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) *rev'd on other grounds*, 401 S.C. 1, 736 S.E.2d 242 (2012) (holding that circuit court did not err in refusing to grant leave to amend complaint to add party defendant where amendment would be futile); *Higgins v. Med. Univ. of S. Carolina*, 326 S.C. 592, 604, 486 S.E.2d 269, 275 (Ct. App. 1997) ("any amendment of the Higginses' complaint which alleges the doctors were paid by UMA ultimately would be futile . . . .").

Here, Appellant's claims are based solely upon allegations that Respondents rented a U-Haul rental truck to Reginald Morton, who did not possess a valid driver's license at the time of the rental transaction. (R. pp. 27-55). Even assuming arguendo that this allegation is true, which Respondents deny, there is no basis for adding UHI to this lawsuit as a party defendant. Appellant's claims relate solely to the rental of the U-Haul Truck. The undisputed evidence in the record confirms, as the circuit court properly found, that UHI provides accounting, technical, and purchasing services to the U-Haul rental companies and does not engage in the rental of vehicles. (R. pp. 10; 375-76). UHI does not rent trucks or any other U-Haul rental equipment as part of its business. (R. p. 375). Instead, rentals of U-Haul trucks and trailers are made by U-Haul Rental

Companies, such as UHSC, or dealers, like Respondent El Cheapo, pursuant to contracts with those rental companies and/or dealers.[16] (R. pp. 375-76).

The circuit court previously dismissed UHSC (a separate and distinct legal entity from UHI) from this litigation, finding that UHSC had no connection to the rental transaction at issue, as the rental was made by Respondent El Cheapo, an independent U-Haul dealer, and not UHSC. UHI is even further removed from this rental transaction than UHSC, and as such, Appellant cannot state a claim for relief against UHI. Thus, the circuit court did not abuse its discretion in finding that any amendment adding UHI as a party defendant would be futile, denying Appellant's Motion for Leave to Amend.

V. The Circuit Court Properly Denied Appellant's Motion for Sanctions and Should be Affirmed.

The circuit court properly denied Appellant's Motion Sanctions, finding there was no basis in law or fact to support Appellant's claims. This holding should be affirmed.

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[16] Appellant's assertion that the Winkelman affidavit was untimely and should not be considered in opposition to his motion because it was served the day of the October 14, 2015 hearing fails for several reasons. First, at the October 14, 2015 hearing, Appellant stated he had received the memorandums filed by Respondents at least the night before via an October 9, 2015 letter serving the same. (R. 612-13). Furthermore, Rule 56(c), SCRCP deals strictly with summary judgment motions. The Winkelman affidavit was submitted in opposition to Appellant's Motion for Leave to Amend Pleadings, and therefore Rule 56's timing requirements are not applicable. Nevertheless, to the extent it is applicable, it is clear the affidavit was *served* October 9, at least two days before the hearing and in compliance with the rule. Moreover, Appellant never objected to the affidavit as untimely and never filed a motion to alter or amend the circuit court's order relying on the affidavit. Thus, the argument is not preserved for this Court's review. *See S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group*, 347 S.C. 333, 544 S.E.2d 870 (Ct. App. 2001) (holding that where a party raises an issue, but the issue is never ruled on by the trial court, and the party fails to file a motion to alter or amend, the issue is not preserved).

A. Standard of Review

The decision whether to impose sanctions under Rule 11 of the South Carolina Rules of Civil Procedure of the Frivolous Proceedings Act is treated as one in equity. *In re Beard*, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004) (applying an equitable standard of review of factual findings in action for sanctions under Rule 11 and the Act); *see also Father v. S.C. Dep't of Soc. Servs.*, 353 S.C. 254, 260, 578 S.E.2d 11, 14 (2003). (holding decision whether to impose sanctions under FCPSA "is a decision for the judge, not the jury, it sounds in equity rather than at law"). In an action in equity tried by the judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Beard*, 359 S.C. at 357, 597 S.E.2d at 838.

B. The Circuit Court Properly Denied Appellant's Motion for Sanctions.

Attempting to decipher Appellant's argument, Appellant appears to contend that defending a case in the face of out-of-context, isolated deposition testimony and a later supplemented interrogatory response can form the basis of a motion for sanctions.

As the circuit court properly found, Appellant has not and cannot show that he is entitled to sanctions against Respondents, pursuant to Rule 11 of the South Carolina Rules of Civil Procedure or the South Carolina Frivolous Civil Proceedings Sanctions Act. (R. p. 22).

Rule 11(a), SCRCP provides:

> Every pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record who is admitted to practice law in South Carolina, and whose address and telephone number shall be stated. . . . The written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge,

> information and belief there is good ground to support it; and that it is not interposed for delay.

Under Rule 11, a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments. *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996). Similarly, the South Carolina Frivolous Civil Proceedings Sanctions Act provides that an attorney may be sanctioned for "filing a frivolous pleading, motion, or document" or a pleading "interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings." S.C. Code Ann. § 15-36-10 (Supp. 2011). Section 15-36-10(J) provides that the Act "shall not apply where an attorney or pro se litigant establishes a basis to proceed with litigation, or to assert or controvert an issue therein, that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of the existing law." Furthermore, a motion for sanctions pursuant to the Act may only be made if the party seeking sanctions prevailed at trial or in the case. *See* S.C. Code Ann. § 15-36-10(C) (providing the court shall determine if a claim or defense is frivolous under the Act at the conclusion of a trial or a case that has been dismissed upon the motion of the prevailing party)

Appellant woefully failed to demonstrate any valid grounds for the imposition of sanctions against Respondents under Rule 11 or S.C. Code Ann. § 15-36-10. First, the grant of summary judgment in Respondents' favor extinguishes any claim, however unsubstantiated, of sanctions under the Frivolous Proceedings Act. Moreover, Appellant continually contorted and mischaracterized the evidence below and continues to do so in his appellate brief. Essentially, Appellant has repeatedly taken the position that

Respondents improperly and illegally rented the U-Haul Truck to Reginald Morton, an individual without a driver's license, who then damaged Plaintiff's property with the U-Haul Truck, and that any assertions or facts to the contrary are untrue and improper. Appellant has continuously taken this position, despite that overwhelming evidence in the record that clearly shows that the U-Haul Truck was rented to Odell Morton, Reginald Morton's father, who presented a facially valid driver's license and signed for the U-Haul Truck.

The evidence actually presented to the circuit court not only supports summary judgment for Respondents, it also demonstrates Appellant's contortion of the record. Appellant harps on Respondent Rahal's statement, taken out of the context of the entirety of Respondent Rahal's deposition testimony, that he rented the U-Haul Truck to Reginal Morton. However, Appellant fails to acknowledge Respondent Rahal's testimony clarifying that it was actually Reginald's father, Odell Morton, who presented his driver's license for the rental of the U-Haul Truck, signed the Rental Agreement, and drove the U-Haul Truck from the premises following completion of the rental transaction, while Reginald Morton merely paid for the rental charges. (R. pp. 746-47; 763; 765-66). Appellant also continues to overlook the fact that Respondent has since supplemented its previous, imprecisely worded discovery responses, and clarified that, in fact, it was Odell Morton that presented his driver's license and signed for the rental of the U-Haul Truck. (R. pp. 1145-49). Respondents have never denied that the competent evidence shows that Reginald Morton paid for the rental charges but the U-Haul Truck was entrusted to and driven by Odell Morton, who had a facially valid driver's license at the time of the rental transaction.

Appellant improperly fails to accurately recount the facts, discovery, and testimony in the record, while simultaneously requesting that a court sanction Respondents for presenting a meritorious defense that necessarily disputes and refutes his bald allegations. The circuit court properly found that Appellant's motion for sanctions cannot pass muster and this Court should affirm.

IV. Appellant's Vexatious Litigation Conduct Entitles Respondents' to Appropriate Relief.

The circuit court held its ruling on Respondents' Motion to Dismiss for Vexatious Litigation and Sanctions in abeyance. However, because Appellant has raised the issue to this Court, and in light of the serious and continuing nature of Appellant's abusive and vexatious litigation tactics, Respondents briefly address their Motion, as the appellate court may affirm for any reason appearing in the record. *See Upchurch v. New York Times*, 314 S.C. 531, 538, 431 S.E.2d 558, 562 (1993) ("We may affirm the trial judge for any reason appearing in the record.") (citing Rule 220(c), SCACR).

For brevity, Respondents direct the Court to their Memorandum in Support of the Motion and accompanying exhibits, which were properly filed with and before the circuit court. (R. pp. 377-574). Further, despite repeated admonitions by the circuit court regarding Appellant's behavior, including at the October 14, 2015 hearing, Appellant's brief to this Court is full of more vitriol, abusive and offensive language, and not-so-subtle allegations of forgery, dishonesty, and unethical behavior on the part of both Respondents and the undersigned counsel. For example, Appellant repeatedly refers to Respondent Rahal and the owner of Respondent El Cheapo, Zaher Mohammad, as "Palestinian/Jordanian/Syranian" and implies that they have fled to the Middle East to

avoid a judgment. (App. Br. pp. 6;. 35). He also references "false defense" and "false statements" made and signed by Respondents' defense counsel, and implies that the undersigned have pursued false and frivolous defenses that the previous, "reasonable" attorneys refused to do. (App. Br. pp. 29-30; 33). Furthermore, he spends three pages associating Reginald Morton[17] with murder, shootings, Federal ATF Agents, drugs, and guns, among others. (App. Br. pp. 23-25).

"A pro se litigant who knowingly elects to represent himself assumes full responsibility for complying with substantive and procedural requirements of the law." *State v. Burton*, 356 S.C. 259, 589 S.E.2d 6, 9 n.5 (2003) (emphasis added). Furthermore, "pro se filings do not serve as an 'impenetrable shield, for one acting pro se has no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets." *Patterson v. Aiken*, 841 F.2d 386, 387 (11th Cir. 1988) (internal quotations omitted). While Respondents respect the circuit court's decision to hold the decision on its Motion in abeyance, Respondents also urge this Court to examine the judicial, economical, and ethical consequences of Appellant's vexatious litigation. Pro se litigations are not above the laws of civility and the rules of court. Appellant has abused and misused the judicial system and his privilege of appearing pro se as a license to harass Respondents and their counsel and clog the judicial machinery. Respondents respectfully request this Court take whatever action it deems necessary to address Appellant's continued vexatious litigation conduct.

[17] While Reginald Morton is not a party to this action, the offensive language used to describe him is beyond the bounds of decency and wholly unsupported by anything other than Appellant's assertions.

CONCLUSION

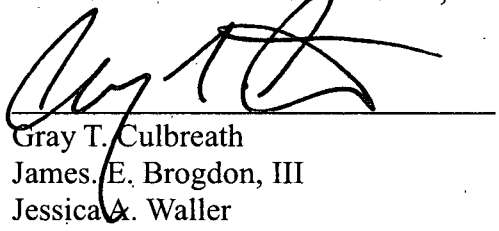
Most, if not all, of Appellant's arguments on appeal or not preserved for appellate review for a variety of reasons and the appeal should be dismissed. Should the Court find the issues properly before it, the circuit court's order should nevertheless be affirmed in full. The circuit court properly granted Respondents' motion and entered summary judgment in their favor while simultaneously denying Appellant's motion for summary judgment. Viewing the record evidence in the light most favorable to Appellant reveals that he has failed to set forth a cognizable cause of action against Respondents and that even if he did, there is no evidence in the record to create a genuine issue of material fact in support of the claims.

Furthermore, the circuit court did not abuse its discretion in denying Appellant's motion for leave to amend pleadings, as there is no basis in law or fact to support the naming of UHI in this lawsuit as a party defendant. Additionally, the circuit court properly denied Appellant's motion for sanctions, finding neither the record nor South Carolina law supports imposition of sanctions against Respondents. Finally, with respect to Respondents' motion to dismiss for vexatious litigation, Respondents request the Court examine Appellant's abusive and offensive litigation tactics and take whatever action it deems necessary to prevent Appellant and other pro se litigants from abusing the court system, parties, and attorneys.

Therefore, Respondents respectfully request this Court affirm the circuit court's order in full.

Respectfully submitted,

GALLIVAN WHITE & BOYD, P.A.

By: 

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June 13, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court Of Common Pleas

The Honorable George C. James, Jr., Judicial Circuit Court Judge
Case No.: 2012-CP-08-1801

Appellate Case No. 2015-002481

Charles Taylor.....Appellant,

v.

Stop "N' Save, Inc., d/b/a El Cheapo Plus #7 and Roy Rahal. .....Respondents.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief of Respondents, Stop "N" Save, Inc., d/b/a El Cheapo Plus #7 and Roy Rahal, complies with Rule 211(b), SCACR.

Signature page to follow

Respectfully submitted,

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PROOF OF SERVICE

I, Laura Sabo, the undersigned employee of Gallivan, White & Boyd, P.A., attorneys for Respondents, hereby certify that on June 13, 2016, I served a copy of FINAL BRIEF OF RESPONDENTS, United States Mail, postage prepaid to the following:

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June 13, 2016

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