THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2015-002524
Case No. 2014-CP-29-00442

Josh Hammond ..... Respondent,

v.

Richard Tod Hammond.....Appellant,

v.

Titan Logging, LLC.....Third-Party Defendant.

INITIAL BRIEF OF RESPONDENT

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3. Appellant's "agent" contention on appeal is not an argument, is not preserved for appeal, and is without merit.

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COUNTER-STATEMENT OF THE CASE

The Appellant's Statement of the Case is replete with improper contested matters contrary to Rule 208(b)(1)(C), SCACR. (Init. App. Br. 2). Accordingly, Respondent hereby submits this Counter-Statement of the Case.

On April 10, 2014, the Respondent sued the Appellant for his conversion of, in relevant part, three items of logging equipment. In turn, Appellant counterclaimed alleging Respondent converted those same three items of equipment and two checks. All parties served written discovery along with responses and production thereto. Subsequently, on May 6, 2015, more than one year after initiation of the action, Respondent filed a motion seeking partial summary judgment as to the Respondent's ownership of these specific items.

One-hundred and ten days later, on August 24, 2015, the lower court heard the Respondent's motion for partial summary judgment. At the hearing, the lower court ruled that the record would be held open for 15 days—through September 8, 2015—during which time any party could supplement the record before the court. (Tr. 39-41, 45-47; Order at 1). The lower court took the motion under advisement, and issued a Form 4 Order that same day to that effect. (Tr. 46; Form 4 Order, Aug. 24, 2015).

During the 15 days the record was held open, both the Appellant and the Respondent filed and submitted affidavits with exhibits thereto. After this period ended, on September 28, 2015, the lower court issued its Form 4 Order granting the Respondent's motion for partial summary judgment

finding that there is no genuine issue of material fact as to the Respondent's ownership interest in the equipment and checks in question. (Form 4 Order, Sept. 28, 2015). The lower court's formal Order was entered on November 16, 2015 and provided as follows:

> [I]t is hereby ordered that Plaintiff's motion for partial summary judgment is granted in its entirety as there is no genuine issue of any material fact as to the: (1) existence of Plaintiff's title to or right to possession of the 2004 Tigercat 720D Timber Cutter (S/N 7203890), 2004 Tigercat 724D Timber Cutter (S/N 724065), and 2004 Tigercat 620C Skidder (S/N 6200569); (2) complete absence and lack of Defendant's title to and right to possession of the 2004 Tigercat 720D Timber Cutter (S/N 7203890), 2004 Tigercat 724D Timber Cutter (S/N 724065), and 2004 Tigercat 620C Skidder (S/N 6200569); (3) existence of Plaintiff's title to or right to possession of Check #2927 and Check #2933; and (4) complete absence and lack of Defendant's title to and right to possession of Check #2927 and Check #2933.

(Order at 1, 5).

Appellant never filed any motion to reconsider nor any other motion seeking to alter or amend the lower court's order granting partial summary judgment. Instead, the Appellant filed a Notice of Appeal on December 8, 2015 appealing the lower court's grant of partial summary judgment in favor of Respondent. (Notice of Appeal).

STATEMENT OF THE FACTS

Respondent filed the instant civil action against his father—the Appellant—seeking recovery of certain logging equipment that Appellant converted. The only relevant items of equipment involved in the lower court's order from which Appellant appealed is as follows: (1) 2004 Tigercat 720D Timber Cutter, bearing serial number 7203890; (2) 2004 Tigercat 724D

Timber Cutter, bearing serial number 724065; and (3) 2004 Tigercat 620C Skidder, bearing serial number 6200569.

First, the 2004 Tigercat 720D Timber Cutter ("720D") at issue was purchased from Tidewater Equipment Company on June 11, 2009 for the price of $70,000.00. The 720D was "Sold to Josh Hammond Land Clearing." (Affidavit of Josh Hammond, Exhibit 3 – 720D Contract of Sale). In order to purchase the 720D, a promissory note and loan in the amount of $50,000.00 was obtained personally by the Respondent in his personal name. (Affidavit of Josh Hammond, Exhibit 4 – Loan #325105353). The Respondent's personal loan was collateralized by certificates of deposit held by Respondent and Respondent's grandmother, Nancy Hinson. Respondent obtained the loan proceeds in the form of a $50,000.00 cashier check which was paid to the order of Tidewater Equipment Company, listing solely "Josh Hammond" as remitter. (Affidavit of Josh Hammond, Exhibit 5 – Check #4332510). This was applied toward the purchase price. Subsequently, the Respondent paid to Tidewater the remaining $20,000.00 of the purchase price with three checks. (Affidavit of Josh Hammond, Exhibit 6 – Check #1777, #1778, and #1779). All three checks were drafted and signed by the Respondent, and paid from a checking account of which the Respondent is the undisputed sole owner. (Affidavit of Josh Hammond, Exhibit 7 – Account Agreement, BB&T account ending in #1633). The 720D does not require motor vehicle title and the parties acknowledge there is no such title document.

Second, the 2004 Tigercat 724D Timber Cutter ("724D") at issue was purchased from Tidewater Equipment Company on December 6, 2011 for the price of $65,000.00. (Affidavit of Josh Hammond, Exhibit 8 – 724D Purchase Form). In order to purchase the 724D, a promissory note and loan in the amount of $50,000.00 was obtained personally by the Respondent in his personal name, "Josh T Hammond." (Affidavit of Josh Hammond, Exhibit 9 – Loan #325355774). The Respondent's personal loan was collateralized by the Respondent's own personal savings account. Respondent obtained the loan proceeds in the form of a cashier check, payable to "Josh Hammond," in the amount of $50,000.00. (Affidavit of Josh Hammond, Exhibit 10 – Check #4752039). Respondent assigned the cashier check to Tidewater as an initial $50,000.00 payment towards the purchase price. Subsequently, the Respondent paid to Tidewater the remaining $15,000.00 of the purchase price with two checks (Affidavit of Josh Hammond, Exhibit 11 – Check #2596 and #2597). Both Check #2596 and #2597 were drafted and signed by the Respondent, and paid from a checking account of which the Respondent is the undisputed sole owner. (Affidavit of Josh Hammond, Exhibit 12 – Account Agreement, Carolina First account ending in #5105). The 724D does not require motor vehicle title and none of the parties allege to hold any such title document.

Third, the 2004 Tigercat 620C Skidder ("620C") at issue was purchased from Tidewater Equipment Company on June 18, 2010 for the price of

$70,000.00. The Contract of Sale lists Respondent, "Joshua Tod Hammond," as the "Purchaser" of the 620C. (Affidavit of Josh Hammond, Exhibit 13 – 620C Contract of Sale). The 620C does not require motor vehicle title and none of the parties allege to hold any such title document. In order to buy the 620C, Respondent personally obtained a loan from High Tide Two, LLC in the amount of $50,500.00 applied to the purchase price. (Affidavit of Josh Hammond, Exhibit 14 – Promissory Note). Significantly, that Promissory Note identified the Respondent, "Joshua Hammond," as the sole borrower, which he signed as the sole borrower. Further, the Promissory Note identified the 620C as collateral. Along with the Respondent's personal loan, Respondent also submitted a down payment to Tidewater for the remainder of the purchase price, which was drawn from a checking account of which the Respondent is the sole owner. (Affidavit of Josh Hammond, Exhibit 12 – Account Agreements). Through a series of periodic check payments drawn from that same checking account owned solely by the Respondent, the Respondent paid his personal loan in full. (Affidavit of Josh Hammond, Exhibit 15 – Checks paid to High Tide Two).

As noted in the affidavits submitted by the Appellant to the lower court, the Respondent lived during the time in question at the same address as Appellant.

Thus, coalescing these above-stated undisputed facts, Respondent Josh Hammond, personally, signed each of the purchase documents for all three at

issue items of equipment. (Affidavit of Josh Hammond, Exhibits 3, 8, and 13). The Respondent personally obtained, in his own name as Josh Hammond, loans for his purchase of all three at issue items of equipment. (Affidavit of Josh Hammond, Exhibits 4, 9, and 14). The Respondent personally made down-payments for his purchase of all three at issue items of equipment. (Affidavit of Josh Hammond, Exhibits 5 and 10). The Respondent personally paid the remaining amount of the purchase price for each of the three at issue items of equipment. (Affidavit of Josh Hammond, Exhibits 6, 11, and 15). Additionally, all said payments were made from checking accounts which the Respondent personally opened and of which the Respondent was the sole owner. (Affidavit of Josh Hammond, Exhibits 7 and 12).

In spite of these facts, Appellant contends that the Respondent does not have a legal right to possession of these three items of equipment.

ARGUMENT

On appeal from an order granting a motion for partial summary judgment, this Court applies the same standard applied by the lower court under Rule 56, SCRCP. *See Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 425, 746 S.E.2d 35, 37 (2013). Partial summary judgment must be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

The movant must initially show that there is no genuine issue of material fact, which "may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case, and it is not necessary for the moving party to supports its motion with affidavits or other similar materials negating the opponent's claim." *D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 542, 730 S.E.2d 340, 347 (Ct. App. 2012), *aff'd as modified in other part*, 410 S.C. 319, 764 S.E.2d 701 (2014). Once the moving party carries its initial burden, the non-moving party "must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial." *Id.*

"The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." *CEL Products, LLC v. Rozelle*, 357 S.C. 125, 129, 591 S.E.2d 643, 645 (2004). Summary judgment is completely appropriate when a properly supported motion puts forth facts that remain undisputed or are contested in a deficient manner. *See David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 616 S.E.2d 1, 5 (2006).

The cause of action at issue here is conversion. Conversion is a tortious act, and may arise either by wrongful taking of chatter or by some other

illegal assumption of ownership, by illegally using or misusing it, or by wrongful detention. *See Castell v. Stephenson Finance Co.*, 244 S.C. 45, 135 S.E.2d 311 (1964). Of course, the party claiming conversion must establish either title to or right to the possession of the personal property. *See Moseley v. Oswald*, 376 S.C. 251, 656 S.E.2d 380 (2008). Thus, there can be no conversion claim where the claimant cannot establish ownership by either title to or right to possession. *See Jones v. Equicredit Corp.*, 347 S.C. 535, 556 S.E.2d 713 (Ct. App. 2001). Additionally, a claimant's "claim for conversion fails where the [opposing party] proves a legal right to the property." *Mackela v. Bentley*, 365 S.C. 44, 48, 614 S.E.2d 648, 650 (2005).

On appeal, Appellant attempts to raise essentially three contentions. First, Appellant contends the Respondent violated the Rules 1, 6(d), and 56 of the South Carolina Rules of Civil Procedure. (Init. App. Br. 6-11). Second, Appellant contends the lower court erred in hearing the Respondent's motion for partial summary judgment. (Init. App. Br. 10-11). Third, Appellant contends that the lower court erroneously granted partial summary judgment on the issue of who owned the equipment in question or the Hammond Land Clearing business. (Init. App. Br. 12-20).

Tellingly, Appellant omits that the lower court granted partial summary judgment to Respondent on multiple independent grounds finding no genuine issue of any material fact as to: (1) the existence of Respondent's title or right to possession of the three items of equipment and two checks;

and (2) the complete absence and lack of Appellant's title or right to possession of the three items of equipment and two checks. (Order at 5).

Under the two-issue rule, the lower court must be affirmed if any one of these grounds is correct, regardless of any presumed error in any of the other grounds. *See Dropkin v. Beachwalk Villas Condo. Ass'n, Inc.*, 373 S.C. 360, 365-66, 644 S.E.2d 808, 811 (Ct. App. 2007); *see also Weeks v. McMillan*, 291 S.C. 287, 292, 353 S.E.2d 289, 292 (Ct. App. 1987).

I. The lower court correctly granted Respondent's motion for partial summary judgment as to the existence of Respondent's title to or right to possession of the three items of equipment and two checks.

The trial court properly granted partial summary judgment as to the Respondent's title to or right to possession of the three at issue items of equipment and two at issue checks.

Respondent established that there was no genuine issue of material fact as to whether Respondent had ownership interest by title to or right to possession of the three items of equipment and two checks. Respondent further established that there was no genuine issue of material fact as to the absence of Appellant's ownership interest by title to or right to possession of those same items or equipment and same checks. While Appellant disputed that Respondent was the owner of these specific three items of equipment and these specific two checks, he offered no evidence to support this contention. Significantly, Appellant is only disputing the three items of equipment on appeal.

While Appellant is long on hyperbole, he is short on actual evidence establishing any claim of title to or right to possession of the at-issue items of equipment. Similarly, while he has submitted voluminous exhibits, he has failed to point out a single *material* fact in dispute. Rather, Appellant relied on the general allegation contained in the Appellant's affidavits stating that the Appellant "always owned and operated Hammond Land Clearing **and there has never been another Hammond Land Clearing operating**." (2nd Affidavit of Tod Hammond) (emphasis added). He also relied on two identical affidavits, submitted by others on his behalf, in an attempt to manufacture an issue of fact by merely stating that they have only had dealings with a Hammond Land Clearing owned by Tod Hammond. (Affidavit of Timothy Griggs; Affidavit of Danny McKittrick). These general statements are not genuine, are not material, and are not specific to the actual matter that was before the lower court.

These generic statement was simply not enough to refute the fact that the Respondent was the owner and entitled to possession of these *specific* items of equipment and checks. *See Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) ("When opposing a summary judgment motion, the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial."); *see also David*, 367 S.C. at 250, 616 S.E.2d at 5 (summary judgment appropriate when

movant sets forth facts that remain undisputed or are contested in a deficient manner). Accordingly, the lower court properly granted Respondent partial summary judgment as to the issue of Respondent's establishment of his title to or right to possession of these three items of equipment and two checks.

A. Equipment and Checks

1. 2004 Tigercat 720D Timber Cutter (S/N 7203890)

The Appellant appeared to contend below that he owns the 720D because Nancy Hinson, the Appellant's mother and Respondent's grandmother, was a co-borrower along with the Respondent on Loan #325105353 the proceeds of which were paid toward the purchase price. Inexplicably, Appellant essentially appeared to claim ownership through his mother because she was personally listed as a co-borrower on Respondent's personal loan. Verging on absurdity, the Appellant's position is wholly unfounded and void of any legal basis which would support any such claim of ownership and, therefore, failed as a matter of law.

In light of the foregoing facts set forth herein, the inescapable truth is that the Respondent Josh Hammond personally purchased the 720D, indebted himself personally to do so, personally repaid that debt, and did all of these actions with monies from bank accounts of which he personally was the sole owner.

2. 2004 Tigercat 724D Timber Cutter (S/N 724065)

Just as set forth above as to the 720D, the inescapable truth again is that the Respondent Josh Hammond personally purchased the 724D,

indebted himself personally to do so, personally repaid that debt, and did all of these actions with monies from bank accounts of which he personally was the sole owner.

3. 2004 Tigercat 620C Skidder (S/N 6200569)

Again, just as set forth above as to the 720D and 724D, the inescapable truth once more is that the Respondent Josh Hammond personally purchased the 620C, indebted himself personally to do so, personally repaid that debt, and did all of these actions with monies from bank accounts of which he personally was the sole owner.

4. Check #2927 and #2933

Appellant presented no argument below at the lower court nor here on appeal concerning the Appellant's title to or right to possession of Check #2927 nor Check #2933. Appellant never challenges this ruling on appeal. It is therefore the law of this case. *See First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998). Even still, the lower court was manifestly correct – there was no genuine issue of material fact as to the existence of Respondent's title to or right to possession of these checks, nor was there any genuine issue of material fact as to the complete absence and lack of Appellant's title to or right to possession of these checks.

Below, Appellant counterclaimed that the Respondent converted these checks that are not his, that they are Appellant's, and that the Appellant is entitled to possession of two checks: Checks #2927 and #2933. (Def. Answer

¶22-24; Resp.'s Memorandum, Exhibit 16 – Def. Answer to Interrogatory 4(a), Pl. 1st Interrogatories).

As argued by Respondent below, because Appellant's conversion counterclaim is regarding checks, his counterclaim is governed by the law of negotiable instruments set forth in the Uniform Commercial Code, and specifically in S.C. Code Section 36-3-420. Section 36-3-420 provides:

> (a) The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument . . . An action for conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument or (ii) a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee.

S.C. Code Ann. § 36-3-420(a). Therefore, because the law applicable to conversion of personal property applies, for the Appellant to maintain his counterclaim he must have established his title to or right to the possession of the checks. "Since conversion is a wrongful act, it cannot arise from the exercise of a legal right." *Castell v. Stephenson Finance Co.*, 244 S.C. 45, 51, 135 S.E.2d 311, 313 (1964). Respondent was named as the payee and, therefore, the Respondent exercised his legal right as the checks' payee. Therefore, Appellant's counterclaim failed as a matter of law. Appellant's counterclaim additionally failed, as a matter of law, because Appellant could not establish a title to or right to possession of either of the checks. (Order at 5). Appellant presented no argument below as to either of these issues concerning these two checks. Appellant never pursues this issue on appeal

and never argues it on appeal. Thus, Appellant has abandoned this issue and any argument relating thereto. This Court should affirm the lower court's grant of partial summary judgment to Respondent.

B. Appellant's "agent" contention is not an argument, is not preserved for appeal, and is without merit.

On appeal, Appellant contends that "Respondent was involved in that business, but to what degree is a question for a jury." (Init. App. Br. 13). Appellant also contends that "Respondent signing the contracts simply means that he as an agent for Hammond Land Clearing is purchasing equipment." (Init. App. Br. 16). As a threshold matter, the Appellant's "agent" contention is, in no way, an issue included in Appellant's statement of issues on appeal. Pursuant to Rule 208(b)(1)(B), SCACR, "no point will be considered which is not set forth in the statement of the issues on appeal." Accordingly, this Court respectfully should not consider this point, or any argument thereto, as an issue on appeal. This Court should affirm the lower court's grant of partial summary judgment to Respondent.

Even if this Court were to disregard the fact that Appellant never includes this an issue on appeal, it is still not properly before this Court for appellate review for numerous reasons. First, it is axiomatic that appellate courts will not reverse on a ground not raised to the trial court. *See McClurg v. Deaton*, 395 S.C. 85, 716 S.E.2d 887 (2011). Appellant never made the above-quoted "arguments" to the trial court during the motion hearing proceedings. Thus, the issue and these arguments are not preserved for

appeal and this Court may not consider them on appeal. Second, the trial court's order did not mention, let alone rule on, the "agent" issue. (Order at 1-6). *See Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991) (where trial court does not explicitly rule on a question and appellant fails to make a Rule 59(e), SCRCP, motion on that ground, the issue is not properly before the Court of Appeals and should not be addressed). Third, Appellant did not file a motion to reconsider in order to obtain a ruling. *See Elam*, 361 S.C. at 24, 602 S.E.2d at 780 ("A party *must* file [a Rule 59(e)] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review). Fourth, even aside from those preservation issues, the Appellant's contention is not an argument because it is merely short, conclusory statements without any supporting authority and, therefore, it is abandoned on appeal and not presented for appellate review before this Court. *See Bean v. S.C. Cent. R.R. Co.*, 392 S.C. 532, 560, 709 S.E.2d 99, 113 (Ct. App. 2011).

This single statement is the very first instance—and, in fact, the sole instance—that the Appellant comes close to arguing that the Respondent was somehow an agent of the Appellant. It is the first and only time the Appellant or Appellant's counsel has even mentioned the word "agent," which was never mentioned below to the lower court. Additionally, the Appellant's use of these two sentences are simply too conclusory to present any issue on appeal and is, therefore, an abandonment of this issue and arguments thereto. *See Bean*,

392 S.C. at 560, 709 S.E.2d at 113 (Ct. App. 2011). This Court should affirm the lower court's grant of partial summary judgment to Respondent.

C. The lower court did not grant summary judgment as to who owned the Hammond Land Clearing business and, therefore, this issue is not properly on appeal before this Court, and is without merit.

Appellant's fourth issue on appeal states that "the lower court erred in granting summary judgment on the issue of there was no genuine issue of material fact of who owned. . . the Hammond Land Clearing business." (Init. App. Br. Issue IV, 12-20). Contrary to the Appellant's contention, the lower court never ruled on "who owned the Hammond Land Clearing business" nor was that even the issue before the lower court as part of the Respondent's motion for partial summary judgment. (Respondent's Mtn.). Instead, the lower court solely ruled on the narrow issues brought before it concerning an element of the Respondent's conversion claim and an element of the Appellant's conversion claim. (Order). Not only does the lower court's order not rule on this issue, Appellant never sought a ruling on this issue either and, as stated above, never filed any motion to request a ruling nor a motion for reconsideration. Therefore, this issue and Appellant's "argument" as to this issue are not preserved for appellate review. Accordingly, the Appellant's argument is procedurally barred, and respectfully this Court should not address it. *See Metts v. Mims*, 384 S.C. 491, 499, 682 S.E.2d 813, 817-18 (citing *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party *must* file [a Rule 59(e)] motion when an issue or argument

has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original)); *see also Bean*, 392 S.C. at 560, 709 S.E.2d at 113-14 (Ct. App. 2011) (holding an issue unpreserved for appellate review when the trial court failed to address issue in its order granting summary judgment and appellant did not file a motion under Rule 59(e), SCRCP).

By raising this now on appeal, Appellant attempts to re-cast the entire scope of the Respondent's motion for partial summary judgment into something it never entailed. Additionally, Appellant attempts to re-cast the lower court's order in ways that the lower court never ruled. Appellant cannot now seek to modify the lower court's order on appeal in ways that he never sought to have the lower court consider and rule on in the first instance. *See Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 117, 410 S.E.2d 537, 546 (1991)(holding an issue was not preserved for appellate review because the appellants failed to raise it to the trial court in opposition to the respondent's summary judgment motion); *see also I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("[A] losing party must first try to convince the lower court is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."). This Court should affirm the lower court's grant of partial summary judgment to Respondent.

II. Appellant's myriad issues that the partial summary judgment motion hearing procedure as defective are frivolous, and are not preserved for appeal.

Appellant appears to raise at least half a dozen intertwined, muddled statements parading as arguments relating to the procedure of the Court's

hearing of the Respondent's motion for partial summary judgment. In addition to being unpreserved and meritless, several of these "arguments" are inscrutable. For brevity's sake, Respondent has attempted to summarize those arguments and will address each in turn to the extent it is possible.[1] Particularly applicable to each of Appellant's myriad issues is the commonly repeated manta by our appellate courts that "whatever doesn't make any difference, doesn't matter." *See Jennings v. Jennings*, 401 S.C. 1, 6, 736 S.E.2d 242, 244 (2012). At the end of the day, the Appellant never once even indicates why or how any of these unpreserved contentions make any difference. Appellant never mentions that these unpreserved issues and contentions are governed by an abuse of discretion standard, let alone shows how the lower court abused its discretion nor any prejudice that actually resulted. This Court should, therefore, affirm the lower court's grant of partial summary judgment to Respondent.

A. Appellant's entire "document dump" or "trial by ambush" issues are not preserved for appellate review, and without relevant legal authority.

Appellant's Amended Initial Brief is replete with conclusive statements that Respondent performed a "document dump" and committed "trial by ambush." Essentially, Appellant contends that he was ambushed with documents at the hearing, and that this was somehow violative of the SCRCP. (Init. App. Br. 6-8). In substance, the Appellant's entire contention is

[1] Importantly, Respondent notes that this Court will ordinarily not consider any point of the Appellant's brief which is not set forth in the statement of the issues on appeal, as required by Rule 208(b)(1)(B), SCACR.

that a supporting memorandum of law and material thereto must be served with the underlying motion "in the interest of justice." (Init. App. Br. 8). Appellant cites Rule 1, Rule 6(d), and Rule 56, SCRCP, as purported support for his contention. (Init. App. Br. 6-8). Appellant cites no relevant case law for this position. Appellant cites no rule which actually support his position. And, in fact, Appellant cannot do so because, in South Carolina's state courts, there is no rule or other authority which even requires a supporting memorandum of law or other material. Appellant's counsel even conceded as much below during the lower court's motion hearing:

> THE COURT: He filed a motion for summary judgment. And then there is a memorandum of law.
>
> . . .
>
> Mr. Bell, the rules, unlike in federal court, don't require him to – I know they have looked at it and talked about it, but the rules don't require him to turn over the memorandum of law in any particular time.
>
> MR. BELL: I'm not disagreeing with that, Your Honor.

(Tr. 6, ll. 5-13). However, the Appellant cannot concede an issue below and then challenge that issue on appeal. *See State v. Bailey*, 377 S.E.2d 581, 584 (1989) (cannot make one argument at trial and a different argument on appeal). This Court should, therefore, affirm the lower court's grant of partial summary judgment to Respondent.

B. Appellant's contention that the Respondent used a memorandum of law, instead of an affidavit, to introduce evidence is frivolous and is not preserved for appellate review.

On appeal, Appellant contends that Respondent used a memorandum of law—instead of an affidavit—to introduce evidence to the lower court which the lower court relied upon in rendering the order granting partial summary judgment to Respondent. (Init. App. Br. 8-11). Candidly, this contention is frivolous given that the Appellant's own Amended Initial Brief is replete with references that the Respondent, in fact, submitted both a supporting memorandum and an Affidavit of Josh Hammond. And, further confounding Appellant's contention, is the fact that the Appellant himself put before the lower court the *very* same pieces of evidence. (1st and 2nd Affidavits of Tod Hammond). This Court should affirm the lower court's grant of partial summary judgment to Respondent.

1. Respondent submitted both a supporting memorandum and an Affidavit of Josh Hammond—as stated in the Appellant's own Statement of the Case, Statement of Facts, and Argument sections—before the lower court granted partial summary judgment.

The Appellant's own Statement of the Case states that *before* the lower court judge granted Respondent's motion for partial summary judgment, that the Respondent submitted an "affidavit with the same exhibits." (Init. App. Br. 2). Further, Appellant's own Statement of Facts states that the "Respondent also submitted documents including an affidavit of the Respondent." (Init. App. Br. 6). And, once more, the Appellant's own

Argument section states that the "Respondent also filed their first affidavit and attached the same documents that were previously introduced at the hearing." (Init. App. Br. 18). It is, of course, elementary that "[a]ny matters stated or alleged in [the] appellant's statement [of the case] shall be binding on appellant." Rule 208(b)(1)(C), SCACR. In light of the foregoing, Respondent submits that it is frivolous and disingenuous for Appellant to now say that the Respondent did not submit evidence to the lower court by way of affidavit.

2. Appellant filed and submitted into evidence the same exhibits as were attached to Respondent's supporting memorandum and Respondent's Affidavit of Josh Hammond for which Appellant now complains.

A review of the Appellant's two affidavits filed before the Court reveals that the Appellant himself put before the lower court the very same exhibits that the Respondent did in the Respondent's supporting memorandum and Affidavit of Josh Hammond. Thus, once again, the lower court's order was made after the exhibits were entered into the record, whether by Respondent's affidavit or by Appellant's affidavit. And yet, once more, "whatever doesn't make any difference, doesn't matter." *See Jennings v. Jennings*, 401 S.C. 1, 6, 736 S.E.2d 242, 244 (2012). This Court should affirm the lower court's grant of partial summary judgment to Respondent.

C. Appellant's contention that the lower court erred by hearing the Respondent's motion for partial summary judgment is not preserved for appellate review, is not an argument, and is patently frivolous.

Appellant appears to contend that summary judgment on the issue of ownership was premature because discovery had not yet been completed or that Respondent did not produce certain documents. (Init. App. Br. 2, 7). Appellant's contention is not an argument, is not preserved for appellate review, and is wholly meritless. *See Bean*, 392 S.C. at 560, 709 S.E.2d at 113 (Ct. App. 2011).

"The rulings of a trial [court] in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001). An abuse of discretion occurs when the trial court's ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support. *Id.*

As a threshold matter, the Appellant's statements as to prematurity of the hearing is, in no way, an issue included in Appellant's statement of issues on appeal. Pursuant to Rule 208(b)(1)(B), SCACR, "no point will be considered which is not set forth in the statement of the issues on appeal." Accordingly, this Court respectfully should not consider this point, or any argument thereto, as an issue on appeal. This Court should affirm the lower court's grant of partial summary judgment to Respondent.

Even still, the Appellant never moved for a continuance in which to pursue further discovery at the summary judgment hearing. Appellant never submitted an affidavit pursuant to Rule 56(f), SCRCP. Therefore, this is not preserved for review on appeal and should not be entertained by this Court. *See Pryor v. Northwest Apartments, Ltd.*, 321 S.C. 524, 529, 469 S.E.2d 630, 633 (Ct. App. 1996) (holding that issue as to whether the trial court erred in granting summary judgment because discovery requests were outstanding was not preserved where appellant did not specifically request court to continue the case so discovery could be completed).

Additionally, even if this issue were preserved, Appellant has wholly failed to present any argument as to this issue. *See Bean,* 392 S.C. at 560, 709 S.E.2d at 113 (Ct. App. 2011). Even if this issue were preserved, and even if Appellant has presented an argument preserved as to that issue, it is still without merit. There was no discovery outstanding at the time of the partial summary judgment hearing. The record does not establish that further discovery would uncover any evidence to refute the irrefutable conclusion that Respondent is the owner entitled to possession of these three specific items of equipment and two specific checks.

Appellant appears to contend, in passing, that partial summary judgment was premature because he did not have the opportunity to conduct

depositions.[2] However, Appellant did not demonstrate, in any way, that there was any likelihood that any depositions would uncover evidence to refute the irrefutable conclusion that Respondent is the owner entitled to possession of these three specific items of equipment and two specific checks. *See Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659, 660 (Ct. App. 1994) (affirming grant of summary judgment when appellant did not demonstrate to lower court the likelihood that further discovery would produce additional relevant evidence). Accordingly, the lower court properly considered partial summary judgment and did not abuse its discretion. *See Bayle*, 344 S.C. at 128, 542 S.E.2d at 742. This Court should affirm the lower court's grant of partial summary judgment to Respondent.

CONCLUSION

The Appellant has appealed from the lower court's grant of partial summary judgment to Respondent, but Appellant has not demonstrated any reversible error and has not demonstrated the presence of any genuine issue of material fact concerning the existence of Respondent's title to or right to possession of the three items of equipment and two checks nor the complete absence or lack of Appellant's title to or right to possession of those same items of equipment and checks. The Appellant's Amended Initial Brief is largely devoid of any supporting legal authorities or citations to the record,

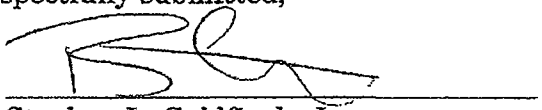
[2] At the time of the partial summary judgment hearing, Appellant had not noticed any depositions in this case.

and it does not present any justifiable basis for this Court to disturb the result below.

To be clear, the Respondent Josh Hammond, personally, signed each of the purchase documents for all three at issue items of equipment. The Respondent personally obtained, in his own name as Josh Hammond, loans for his purchase of all three at issue items of equipment. The Respondent personally made down-payments for his purchase of all three at issue items of equipment. The Respondent personally paid the remaining amount of the purchase price for each of the three at issue items of equipment. Additionally, all said payments were made from checking accounts which the Respondent personally opened and of which the Respondent was the sole owner. In spite of these undisputed facts, Appellant contends that the Respondent does not have a legal right to possession of these three items of equipment. Appellant's contention has no basis in reality let alone finds any legal authority to support his contention.

For these reasons and any other reasons in the record, this Court should affirm the decision of the circuit court. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). This Court should affirm the lower court's grant of partial summary judgment to Respondent.

Respectfully submitted,



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November 16, 2016
Murrells Inlet, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2015-002524
Case No. 2014-CP-29-00442

Josh Hammond.....Respondent,

v.

Richard Tod Hammond .....Appellant,

v.

Titan Logging, LLC.....Third-Party Defendant.

PROOF OF SERVICE

The undersigned certifies that, on the below-indicated date, the Initial Brief of Respondent and Respondent's Designation of Matter to be Included in Record on Appeal was served on counsel for the Appellant by mailing a copy of the same by United States Mail, with first class postage prepaid to the following address for counsel of record:

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November 16, 2016

VIA FACSIMILE AND FEDERAL EXPRESS
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Re: *Josh Hammond v. Richard Tod Hammond v. Titan Logging, LLC*
Appellate Case No. 2015-002524
GW File: 13.072

Dear Ms. Kitchings:

Pursuant to Rule 262(a)(2), SCACR, I am enclosing for filing one (1) original of the Initial Brief of Respondent and Respondent's Designation of Matter to be Included in Record on Appeal, via facsimile copy for filing and am also immediately sending same by Federal Express. I have also enclosed a proof of service of these documents upon counsel for Appellant.

I am providing a copy of the enclosed to opposing counsel by copy of this letter via U.S. Mail and e-mail. Thank you for your attention to this matter. If you have any questions or need any information, please do not hesitate to contact me.

Respectfully yours,

GOLDFINCH WINSLOW, LLC

Ryan P. Compton (SC Bar No. 101152)
Stephen L. Goldfinch, Jr. (SC Bar No. 77665)

Enclosures
cc: Francis L. Bell, Jr.
(via U.S. Mail and e-mail)