THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Circuit Court Judge

Case No.: 2013-CP-10-6019

Jack Powell, ...Appellant,

v.

Knology of Charleston, Inc.,.....Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant Jack Powell filed a Complaint with the Charleston County Court of Common Pleas on October 28, 2013 alleging he suffered physical injuries when he tripped over an unburied cable line while walking along Folly Road, in Charleston, South Carolina, after dark on June 21, 2012. He alleged three causes of action: 1) Gross Negligence; 2) Negligent Supervision of Employees & Sub-Contractors; and 3) Breach of Duty. Appellant sought damages in the amount of "$150,000 for the emotional harm and his pain & suffering," as well as other financial losses claimed because he alleged he could not work due to his injuries. (Complaint, filed Oct. 28, 2013 and served on Respondent Nov. 14, 2013, R. pp. 131-138).

Respondent Knology of Charleston Inc. filed its Answer on December 16, 2013, denying Appellant's claims. (Answer of Defendant, filed Dec. 16, 2013, R. pp. 147-150). Among other defenses, Respondent argued that Appellant's injuries were caused either by his own actions or those of a third party over which Respondent had no control. (Answer, R. pp. 148-149).

The parties engaged in discovery for over a year. (Order Granting Defendant's Motion for Summary Judgment, filed April 6, 2016, R. p. 92) ("Summary Judgment Order"). Dissatisfied with Respondent's discovery responses, Appellant filed two motions: 1) Plaintiff's Motion to Compel responses to his Request for Admissions, and 2) Plaintiff's Motion to Compel (Priority Matter) responses to his Production Request. (Appellant's Motions to Compel, dated June 10, 2014 and June 16, 2014, R. pp. 160-165). Appellant's motions were heard by Judge Markley Dennis on July 30, 2014. Without objection, defense counsel informed Judge Dennis at the hearing that the parties

had reached "an agreement as to [Mr. Powell's] motion to compel, request for production. He has agreed to submit some revised requests for production as to a couple of his requests and make them a little more specific." Appellant agreed with Judge Dennis' suggestion that Appellant withdraw his pending motion to compel without prejudice and then, if necessary, submit another one. (R. p. 167, lines 12-21). With regard to Appellant's Requests to Admit, Judge Dennis held that Respondent's responses were sufficient. (R. p. 167, line 24 – p. 173, line 20). Respondent supplemented its response to Appellant's requests for production on August 19, 2014 and again on September 5, 2014, producing 225 pages of material as well as a radiology film.

On November 18, 2014, Appellant filed a motion for summary judgment, (Plaintiff's Notice for Motion Summary Judgment, filed Nov. 18, 2014, R. p. 153), and a Memorandum in Support on December 9, 2014. (Plaintiff's Memorandum in Support of Motion for Summary Judgment, filed Dec. 9, 2014, R. pp. 5-23). Plaintiff's motion was heard by Judge Deadra Jefferson on January 8, 2015. Judge Jefferson denied Appellant's summary judgment motion in a Form 4 Order, filed January 9, 2015. (Form 4 Judgment in a Civil Case, filed Jan. 9, 2015, R. p. 156).

In response to a series of emails from Appellant, Respondent explained that Judge Dennis had ruled that Respondent's discovery responses were adequate and that Respondent had not obtained new information that would require it to supplement its responses further. Respondent also explained that the parties had agreed that Appellant's Request for Production #15 was overly broad and that Appellant would "prepare more narrowly tailored requests and serve them as Supplemental Requests for Production." (Letter from B. Davis to J. Powell, dated Jan. 21, 2015, R. p. 46 attached as Exh. F to

Plaintiff's Informal Request to the Court for Second Motion for Summary Judgment, filed March 2, 2015, R. pp. 34-51) ("Appellant's Second MSJ").

Appellant served Supplemental Requests to Admit on Respondent, asserting that "Judge Dennis ordered during Plaintiff's Compel hearing for Evasive and Incomplete on July 30, 2914 [sic]." (Exh. E, R. p. 66, to Plaintiff's Motion for Reconsideration, filed April 13, 2015, R. pp. 52-86) ("Motion for Reconsideration"). Respondent replied, explaining its position that Appellant's supplemental requests to admit and for production were "simply reasserted selections from your original RFA's and RFP's." (Letter from B. Davis to J. Powell, dated March 23, 2015, R. p. 65, attached as Exh. D to Motion for Reconsideration).

In March 2015, Appellant filed a second motion for summary judgment. (Appellant's Second MSJ, R. pp. 34-51). Respondent also moved for summary judgment, (Defendant Knology of Charleston Inc.'s Notice of Motion and Motion for Summary Judgment, filed March 16, 2015, R. pp. 151-152), and filed a memorandum in support of its motion with supporting documentation. (Memorandum in Support of Defendant Knology's Motion for Summary Judgment/in Opposition to Plaintiff's Second Motion for Summary Judgment, filed April 2, 2015, R. pp. 123-146) ("Defendant's Memorandum in Support").

The parties were heard by Judge Dennis on April 2, 2015. In two separate Form 4 Orders, Judge Dennis denied Appellant's Second Motion for Summary Judgment and granted Respondent's Motion for Summary Judgment. (Form 4 Judgment in a Civil Case, filed April 8, 2015, denying "Plaintiff's 2nd Motion for Summary Judgment", R. p.

159) (Form 4 Judgment in a Civil Case, filed April 8, 2015, granting "Defendant's Motion for Summary Judgment ... Formal order to follow", R. p. 154).

Appellant moved for reconsideration, (Motion for Reconsideration, R. pp. 52-86), which the Circuit Court denied. Judge Dennis explained that the Motion to Reconsider was premature because the full order granting Respondent's motion for summary judgment had not yet been filed, adding that Appellant "can refile his Motion to Reconsider once a formal order has been filed." (Order, filed May 6, 2015, R. p. 155).

Appellant also moved to recuse Judge Dennis. (Plaintiff's Motion to Recuse Judge Dennis For Cause, filed May 6, 2015, R. pp. 24-33) ("Motion to Recuse"). Included in his Motion to Recuse, Appellant listed the numerous cases he has or had pending against various defendants, all arising out of his June 21, 2012 fall. (Motion to Recuse, R. p. 28). Judge Dennis denied the Motion to Recuse. (Order, filed June 8, 2015, R. p. 158).

On April 6, 2016, the Circuit Court filed its formal Order Granting Defendant's Motion for Summary Judgment. (Summary Judgment Order, R. pp. 89-93). In particular, the Circuit Court held that Respondent owed Appellant no duty because there was no evidence that it "owned, installed, controlled, or otherwise had any connection to the cables sufficient to give rise to any duty owed" to Appellant. (Summary Judgment Order, R. p. 91). In fact, Appellant could not specify which of the three cables depicted in photographs attached to his Complaint caused his fall. (R. p. 91). Citing the standard for summary judgment, the Circuit Court held that, despite the fact that the parties had engaged in discovery for over a year, Appellant failed to come forward with any evidence to oppose Respondent's summary judgment motion. (R. pp. 91-92). Furthermore,

Appellant's prior discovery objections previously had been decided in favor of Respondent and his current objections were not properly before the Circuit Court, as Appellant had not filed another motion to compel. In addition, Appellant failed to demonstrate that additional discovery would "uncover additional relevant evidence," and that he was "not merely engaged in a 'fishing expedition.'" (Summary Judgment Order, R. p. 92; *quoting* Baughman v. American Tel & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991)).

Appellant did not file a motion to reconsider the Summary Judgment Order. Instead, Appellant appealed directly to this Court.

FACTUAL BACKGROUND

Appellant alleges that, on June 21, 2012, he tripped on "an unburied cable line in the dark," while "walking up the right a way beside Folly road" at 930 Folly Road. (Complaint, R. p. 134).[1] He was taken by EMS to the Medical University of South Carolina ("MUSC") where he was examined, treated and released. He later sued Knology, among other entities,[2] for damages arising out of his alleged fall.

At the April 2, 2015 summary judgment hearing, Appellant argued that he had not received discovery from Respondent "that would have verified ... that Knology owned the cable lines." (R. p. 96, lines 9-20). Judge Dennis explained repeatedly that Appellant

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[1] Appellant's Statement of the Case alleges that he "tripped over Knology's unburied cable lines," (App. Br. p. 4), in violation of Rule 208(b)(1)(C), SCACR, which provides that "[t]he statement shall not contain contested matters ..." The key dispute in this case is whether whatever Appellant allegedly tripped over was a cable line belonging to Knology.

[2] Pursuant to Appellant's Motion to Recuse, Appellant also sued MUSC, the Carolina Center for Occupational Health LLC, Charleston County Detention Center (two cases), Charleston County EMS, Marshland Communities LLC, and Folly Oaks Center Condominium Unit Owners Association Inc. (Motion to Recuse, R. p. 28).

did not have any discovery motion pending and, therefore, that his discovery issues were not before the Circuit Court. (R. p. 98, line 21 – p. 104, line 16).

Respondent argued that both Appellant's negligence and negligent supervision claims failed because "Knology did not owe [Appellant] any duty," and because "Knology does not own either what he's calling the right-of-way or the property at 930 Folly Road." (R. p. 106, lines 11-25). Although Knology installed cable services at Units A and B of 930 Folly Road in August 2006, those services were disconnected in 2009 and 2008 respectively. Appellant's accident occurred in June 2012. Respondent argued that, "[t]here is no evidence that these cables [that Appellant allegedly tripped over] were placed there by Knology. The only chance that they potentially could belong to Knology is this 2006 installation that our records show was performed properly." (R. p. 107, lines 2-25).

After Judge Dennis questioned Respondent's counsel regarding the 2006 installation of the Knology cables, (R. p. 108, lines 1-17), he then asked Appellant the key question, *i.e.*, what proof did Appellant have that Knology "installed the cables that caused the fall ... other than *res ipsa*, which we don't recognize." (R. p. 109 lines 6-13) (R p. 111, lines 5-7). Although Appellant argued that he had proven Knology owned the cables over which he tripped based on assertions made in his Complaint that someone at Knology (presumably Lee Endicott) had offered to pay him a settlement amount, Appellant admitted he had no evidence or sworn affidavit to support his argument. (R. p. 112, line 9 – p. 116, line 1). In fact, Appellant admitted he could not say "for one hundred percent" that Knology owned the cable lines over which he allegedly tripped.

(R. p. 113, lines 17-19) (R. p. 114, lines 10-12). As a result, the Circuit Court granted Knology's Motion for Summary Judgment. (R. p. 116, lines 20-22).

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment under the same standard applied by the lower court. Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 392, 593 S.E.2d 183, 186 (Ct. App. 2004). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP." Doe v. Wal-Mart Stores, Inc., 393 S.C. 240, 244, 711 S.E.2d 908, 910 (2011).

Once the moving party meets its burden of going forward, "the opponent cannot simply rest on mere allegations or denials contained in the pleadings," but instead "must come forward with specific facts showing there is a genuine issue for trial." Rumpf, 357 S.C. at 393, 593 S.E.2d at 186. "Where the plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law." Humana Hospital-Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991). In other words, a party opposing summary judgment cannot merely rest on his pleadings, but must "come forward with affidavits or other supporting documents" that "affirmatively demonstrat[e] the presence of a genuine issue of material fact." Hoard v. Roper Hosp., Inc., 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010).

"For purposes of summary judgment, an issue is 'material' if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the

action." Nelson v. Piggly Wiggly Cent., Inc., 390 S.C. 382, 388, 701 S.E.2d 776, 779 (Ct. App. 2010). Although the court makes no factual determinations and does not resolve competing testimony on summary judgment, "summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *Id.*, 701 S.E.2d at 779.

ARGUMENTS

The Circuit Court properly granted summary judgment in Respondent's favor on both of Appellant's claims, "gross negligence" and "negligent supervision of employees & sub-contractors."[3] Appellant presented no affidavits or other supporting documents in support of his opposition to Respondent's Motion for Summary Judgment and failed demonstrate that there were any material issues in dispute that needed to be resolved by a fact finder.

I. The Circuit Court properly granted summary judgment on Appellant's negligence claim.

In order to prove his negligence claim, Appellant had to show that: 1) Respondent owed him a duty of care, 2) Respondent breached that duty by a negligent act or omission, 3) Respondent's breach proximately caused Appellant's injuries, and 4) Appellant suffered injury or damages. Doe v. Wal-Mart, 393 S.C. at 246, 711 S.E.2d at 911. "First, the court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, the defendant is entitled to a judgment as a matter of

[3] Although Appellant's Complaint purported to list three causes of action, no separate cause of action exists for "breach of duty." Instead, whether a duty exists and, if so, whether it has been breached are elements of a negligence cause of action. Doe v. Wal-Mart, 393 S.C. at 246, 711 S.E.2d at 911.

law." Id. Where a defendant has no control, there is no duty. Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997).

The Circuit Court correctly held that, there was no evidence presented that Knology owned, installed, controlled or otherwise had "any connection to the cables sufficient to give rise to any duty owed to the Plaintiff." In addition, Knology did not own or control the right-of-way where Appellant fell. (Summary Judgment Order, R. p. 91). Thus, as a matter of law, Knology did not owe Appellant any duty.

The Circuit Court properly rejected Appellant's various arguments that he somehow had proven, or that Respondent somehow had admitted, that what caused him to fall was a Knology cable lying across his path. First, photographs produced by the parties indicate multiple cables lying across the path where Appellant fell. (Defendant's Memorandum in Support, Exh. D, R. p. 146) (Plaintiff's Memorandum in Support, Exh. K, R. p. 23) (Motion for Reconsideration, Exh. R, R. p. 79). Appellant has never identified which of the cables caused him to fall, or shown that he did not trip over extruding tree roots in the same location.[4] Contrary to Appellant's unsupported assertions, the fact that Respondent attached a photograph of the area where Appellant claims he fell, (Defendant's Memorandum in Support, Exh. D, R. p. 146), does not "prove" that any of the depicted cables belong to Knology. Appellant also speculates that Knology "removed their unburied lines ... just minutes before they took the photo they submitted in their memorandum for MSJ." (App. Br. p. 19). There is no evidence whatsoever to support this assertion. Unsupported speculation is insufficient to withstand a properly supported motion for summary judgment. Nelson, 390 S.C. at 390, 701 S.E.2d

[4] In fact, it is just as likely that he fell over one of the extruding tree roots as one of the cables shown in the various pictures submitted to the Circuit Court.

at 780 (an "inferential leap does not create a genuine issue of material fact"); Kolton v. Halpern, 260 F.2d 590, 519 (3rd Cir. 1958) (affidavit in opposition to summary judgment was incompetent to raise an issue of fact where it stated "only speculations and conclusions"). Even at this stage, Appellant can only state, without any evidence to support his claim, that Knology was "the most probable owner of the lines and most likely caused the accident." (App. Br. p. 10). Such unsupported speculation is insufficient to overcome a properly pled motion for summary judgment.

Throughout his Brief, Appellant misconstrues evidence and Respondent's discovery responses. For example, Appellant asserts that the photo attached to Respondent's Memo in Support (Exh. D, R. p. 146) is a "photo of their 2 unburied cable lines [which] proved they were in the right of way." (*E.g.*, App. Br. pp. 19, 26, 28). The photo shows three unburied cable lines, none of which are identified as belonging to Respondent, as well as natural features such as roots, bushes and undulations in the right of way, any of which could have been the cause of Appellant's alleged trip and fall.

Second, Appellant argues that a work order from 2006 proves that the unburied cable he allegedly tripped over in 2012 was Knology's cable line. (App. Br. pp. 8, 22, 24, 25, 36). However, Appellant's theory is no more than speculation. In fact, the work order note, dated August 14, 2006, indicates that a customer needed "a **Drop Bury**. They are being installed today due to an expedite request from sales. Please work this ASAP. NOTE: Pete Smith is concerned about a sprinkler system, etc. RE: Stasmayer Inc @ 930- Folly Rd Ste A Chas 29412 = RG11 / 1 Drop / From Pole to Meter." (Defendant's Memorandum in Support, Exh. C, R. p. 144) (emphasis added). A subsequent note on the following day indicates, "Sent to Locate service 15 Aug 06. Locate service has by

state law 3 business days from date of entry to complete area marking for all utilities. Currently **Drop Bury** w/o completion dates are approximately 10 business days from date it was sent to Locate service. If a driveway bore is required additional days are needed. – **Drop Bury**." (Defendant's Memorandum in Support, Exh. C, R. p. 145) (emphasis added). On August 22, 2006, the service notes that the case was closed: "Complete 21 Aug – **Drop bury**." (Defendant's Memorandum in Support, Exh. C, R. p. 145) (emphasis added). There is no proof that substantiates Appellant's claim that, because there was a concern about a sprinkler system, the lines were left unburied. Instead, the work order consistently describes this as a "drop bury."

Appellant also suggests that Knology's cable lines were "just left trespassing across the adjacent Charleston County property." (*See* App. Br. pp. 8, 10, 23). However, this is nothing more than speculation. Appellant is unable to point to a single piece of evidence demonstrating that the cable lines lying across the path along Folly Road belonged to Respondent. *See* Cobb v. Benjamin, 325 S.C. 573, 582 n.2, 482 S.E.2d 589, 593 n.2 (Ct. App. 1997) (where, as here, "there is no stipulation, a representation of fact by counsel in written briefs ... may not be considered by the court where it is unsupported by the record"). Respondent notes that Charleston County did not acquire title to the property until just days before Appellant's fall. (Defendant's Memorandum in Support, Exh. B, R. pp. 139-143).

Third, Appellant argued to the Circuit Court that, because he had set forth in his Complaint the allegation that he and his wife spoke with a Knology representative who offered to settle their claim for a sum of money, he did not need to submit an affidavit to

establish this fact. (*See* App. Br. pp. 12, 27-29, 32-35).[5] Although a verified complaint can serve the same purpose as a sworn affidavit for purposes of summary judgment, Dawkins v. Fields, 354 S.C. 58, 67-68, 580 S.E.2d 433, 438 (2003) (explaining that "a verified complaint is an acceptable substitute for an affidavit at the summary judgment phase," but that few pleadings satisfy the requirements of Rule 56(e), SCRCP, "even when verified"), Appellant's argument fails for the simple fact that his Complaint is not verified. Pursuant to Rule 11(c), verified pleadings "shall be written statements or declarations by a party ... sworn to or affirmed before an officer authorized to administer oaths, that the affiant knows the facts stated to be true of his own knowledge, except as to those matters stated on information and belief and as to those matters that he believes them to be true." Rule 11(c), SCRCP. Appellant's Complaint was not verified in any way but simply signed by him on October 14, 2013. (Complaint, R. pp. 131-138).[6] Because Appellant did not present a sworn affidavit or any other evidence in opposition to Respondent's Motion for Summary Judgment, the Circuit Court properly granted Respondent's motion.

As a result, this Court should affirm the Circuit Court's grant of summary judgment on Appellant's negligence claim.

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[5] Appellant's apparent misunderstanding of Respondent's reference to the "amount in controversy," in a discovery response has misled him to believe Respondent somehow acknowledged an alleged meeting took place between Appellant and a former employee. However, the phrase "amount in controversy" in Respondent's discovery response is nothing more than a reference to the damages amount claimed in Appellant's Complaint. (Complaint, R. pp. 131-138). It is not an admission or stipulation of any fact(s) that would support Appellant's claim.

[6] Appellant's reliance on 28 U.S.C. § 1746, (App. Br. p. 32), also is misplaced. That provision, even if it applied in this case, provides for declarations made under penalty of perjury. Neither Appellant's Complaint nor any of his other filings contains language substantially similar to that required under Section 1746.

II. Discovery issues raised by Appellant are meritless and summary judgment was not premature.

Appellant argued at the April 2, 2015 hearing and argues throughout his Brief that Respondent failed to provide him with certain discovery responses and, as a result, summary judgment was premature. He also argues that the Circuit Court "failed to continue the hearing because of the unanswered ordered supplemental request ..." (*See* App. Br. pp. 5-6, 12, 14-18, 20, 24, 26, 29, 32-36, 38, 39). His arguments fail for a number of reasons.

First, this issue is not preserved because Appellant did not seek a continuance of the hearing or ask the Circuit Court to hold its decision in abeyance. Degenhart v. Knights of Columbus, 309 S.C. 114, 118, 420 S.E.2d 495, 497 (1992) (holding claim that summary judgment was premature not preserved where the plaintiffs failed to move for a continuance or ask the decision-maker to hold his decision in abeyance until a pending motion to compel was decided); Bayle v. South Carolina Dept. of Transp., 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001) (claim that summary judgment was premature because discovery was allegedly outstanding not preserved for appeal because the plaintiff did not move for a continuance).

Second, although Appellant argued that Respondent had not produced certain discovery responses to which he believed he was entitled, Judge Dennis explained that Appellant did not have any pending motions to compel discovery. (R. p. 98, line 21 – p. 104, line 16). At the time of the April 2, 2015 summary judgment hearing, this case had been pending for over a year. During that time, Appellant did not notice a single deposition. Although he previously had filed two motions to compel, both were resolved at the July 30, 2014 motions hearing. Thereafter, Respondent provided additional

discovery responses, and Appellant filed no further motions to compel. Therefore, the discovery issues Appellant attempted to raise at the April 2, 2015 hearing were not properly before the Circuit Court. (R. p. 100, line 4 – p. 104, line 16).

Appellant incorrectly asserts that, at the July 30, 2014 discovery hearing, he was "ordered by Judge Dennis to submit a supplemental request for Admit and Production." (App. Br. pp. 14-15, 18). However, as noted above, the parties resolved the discovery issue concerning production prior to the hearing and explained that agreement to Judge Dennis on the record.

> Mr. Davis: Mr. Powell and I did reach an agreement as to his motion to compel, request for production. He has agreed to submit some revised requests for production as to a couple of his requests and make them a little more specific.
>
> The Court: All right. So why don't we just say this, the present motion to compel is withdrawn without prejudice, and then you can submit another one, Mr. Powell.
>
> Mr. Powell: Okay.
>
> The Court: Okay?
>
> Mr. Powell: Yes, sir.

(R. p. 167, lines 10-21). As to Appellant's Requests to Admit, Judge Dennis ruled that Respondent's prior responses were adequate. (R. pp. 168-173).

Finally, because Appellant had his own motion for summary judgment pending, (Appellant's Second MSJ, R. pp. 34-51) (R. p. 95, lines 16-18), he "cannot now be heard to assert that summary judgment was premature." Clarendon County v. Tykat, Inc., 394 S.C. 21, 26 n.2, 714 S.E.2d 305, 308 n.2 (2011). Not only did Appellant not withdraw his motion for summary judgment, but he cites to it no fewer than 26 times in his Brief to this Court.

As a result, this Court should affirm the Circuit Court's rulings that summary judgment was not premature and that Appellant failed to demonstrate that additional discovery would likely uncover relevant evidence.

III. Appellant's Negligent Supervision claim was properly dismissed on summary judgment.

Summary judgment was likewise proper as to Appellant's negligent supervision claim.[7] Negligent supervision claims arise when an employee is acting outside his or her scope of employment. In order to prove negligent supervision, the plaintiff must prove:

> (a) [the employee]
>
> i. is upon the premises in possession of the [employer] or upon which the [employee] is privileged to enter only as his [employee], or
>
> ii. is using a chattel of the [employer], and
>
> (b) [the employer]
>
> i. knows or has reason to know that he has the ability to control his [employee], and
>
> ii. knows or should know of the necessity and opportunity for exercising such control.

Degenhart, 309 S.C. at 116-117, 420 S.E.2d at 496, *citing Restatement (Second) of Torts* § 317 (1965); Kase v. Ebert, 392 S.C. 57, 64, 707 S.E.2d 456, 460 (Ct. App. 2011)

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[7] Although the Summary Judgment Order did not address separately the resolution of Appellant's negligent supervision claim, Respondent's Motion for Summary Judgment addressed all of Appellant's pending claims. The Circuit Court granted Respondent's motion in its entirety, and Appellant did not file any motion for reconsideration of the Summary Judgment Order. Therefore, to the extent Appellant is attempting to raise it in his Brief, he has not preserved this issue for appeal. *See, e.g.,* Degenhart, 309 S.C. at 118, 420 S.E.2d at 497 (issue that was not ruled on by the lower court and not raised in a motion for reconsideration not preserved for appeal); Spur at Williams Brice Owners Ass'n, Inc. v. Lalla, 415 S.C. 72, 85, 781 S.E.2d 115, 122 (Ct. App. 2015) (issue not raised to and ruled on by lower court, nor raised in a Rule 59(e), SCRCP, motion is not preserved for appellate review). Respondent addresses this issue solely out of an abundance of caution, to the extent that Appellant's arguments regarding the initial installation of cable at this location in 2006 could be construed as argument supporting his negligent supervision cause of action.

(summary judgment upheld where undisputed facts showed the incident did not occur on the defendant employer's property and did not involve the employee's use of the employer's chattel). Here, Appellant has not named the employees he alleges were negligently supervised, and has produced no evidence whatsoever that the unnamed employees committed any tort on Knology's premises or using Knology's chattel. It is undisputed that the property on which Appellant alleges he tripped over unburied cable lines does not and has never belonged to Knology. (Defendant's Memorandum in Support, Exh. B, R. pp. 139-143). Further, for the same reasons Appellant failed to raise a question about ownership of the cable line he alleged tripped over, he cannot show any alleged tort was committed using chattel belonging to Knology.

As a result, this Court should affirm the Circuit Court's grant of summary judgment as to all of Appellant's claims.

IV. Other issues raised by Appellant are without merit and provide no basis to overturn the Circuit Court.

Appellant raises a number of other issues, none of which have merit or warrant overturning the Circuit Court. For example, Appellant argues in a number of places that the Defendant's Memorandum in Support was not provided to him prior to the April 2, 2015 hearing. (App. Br. pp. 5, 12-14, 20-21, 26, 28, 38). However, there is no rule that a memorandum in support of a motion has to be filed or served prior to the hearing considering that motion. Neither Rule 7(b), SCRCP, Motions and Other Papers, nor Rule 56, SCRCP, Summary Judgment, provides any deadline for filing a memorandum in support of a motion for summary judgment. Rule 56(c) requires that a summary judgment motion be "served at least 10 days before the time fixed for the hearing," and that the "adverse party may serve opposing affidavits not later than two days before the

hearing," Rule 56(c), SCRCP; however, there is no provision for when a memorandum in support must be filed. As a result, Appellant's reliance on Black v. Lexington Sch. Dist. No. 2, 327 S.C. 55, 488 S.E.2d 327 (1997), is misplaced, as that case only dealt with the timeliness of an affidavit.[8]

Appellant also alleges Respondent was in violation of "state, county and city ordinances," citing several sections of the South Carolina Competitive Cable Services Act in support of his arguments. (App. Br. pp. 9, 10, 23-24, 36). The gist of Appellant's argument appears to be that, in response to his FOIA request, the South Carolina Department of Transportation ("SC DOT") confirmed it had not issued an encroachment permit to Knology to install cable lines at 930 Folly Road in August 2006 and that, as a result, Knology is somehow guilty of a statutory violation. The sections of the Cable Act that Appellant cites do not provide him the relief he seeks. First, the Cable Act, and any alleged violations of it, are irrelevant to this appeal. Whether Knology obtained a required permit to install the cable lines in 2006, or complied with the other cable installation statutes and ordinances he cites, has no bearing on Appellant's tort claims. The dispute Appellant has attempted to fabricate regarding whether Knology had the appropriate permit to install the cables it installed in 2006 is not a material fact because there is no evidence whatsoever that: 1) any alleged violation of the Cable Act caused or contributed to Appellant's injury; or 2) Knology had any connection to whatever caused Appellant to fall on June 21, 2012.[9] Disputes over facts that are not material to the

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[8] Appellant's reliance on Haines v. Kerner, 404 U.S. 519 (1972), also is misplaced. Haines dealt with the standard for dismissal of a complaint under Rule 12(b)(6), FRCP, not the standard for summary judgment.

[9] Appellant suggests that, "Judge Dennis recognize[d] this case is about whether Knology installed the lines properly." (App. Br. p. 22). However, whether the lines Knology

motion under consideration do not preclude summary judgment. Nelson, 390 S.C. at 388, 701 S.E.2d at 779 ("[f]or purposes of summary judgment, an issue is 'material' if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action"). There is no rational link between Knology's compliance or non-compliance with the Cable Act and Appellant's injuries.[10] As noted above, the property was conveyed to Charleston County only days before Appellant's alleged fall. (Defendant's Memorandum in Support, Exh. B, R. pp. 139-143).

Second, Appellant fails to note that Section 58-12-130(A) (Supp. 2016) provides that SC DOT "may issue a general continuing permit to each cable television company operating in this State ... This authorization eliminates the necessity of the issuance of a permit for each extension." S.C. Code Ann. § 58-12-130(A). Thus, the fact that SC DOT may not have approved a permit for Knology in August 2006 proves nothing. Third, even if Knology somehow violated one of the SC DOT statutes cited by Appellant, which Respondent does not concede, any recovery of a penalty based on that violation would be "paid into the treasury of the county in which the violation occurred," S.C. Code Ann. § 58-12-50, and not to Appellant.

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installed in 2006 were installed properly and/or in compliance with all state, county and city laws, is not at issue in this case. Instead, Respondent was granted summary judgment in this case because Appellant could point to no evidence showing that the cable line he alleges he tripped over belonged to Knology. (R. p. 111, line 5 – p. 116, line 22).

[10] Similarly, Appellant's conjecture that, since it was in a hurry, Knology neither obtained the required permits nor properly buried its cable lines in 2006 is simply that – conjecture and speculation – which, as noted above, is insufficient to withstand a properly pled motion for summary judgment. Nelson, 390 S.C. at 390, 701 S.E.2d at 780; Kolton, 260 F.2d at 519 (affidavit in opposition to summary judgment was incompetent to raise an issue of fact where it stated "only speculations and conclusions").

Appellant alleges various conversations that were had in person or over the telephone. (See App. Br. pp. 11, 12-13, 17, 20, 27, 32, 33, 35). There are no records of these conversations and his self-serving recollections do not constitute reliable evidence. *See*, Fesmire v. Digh, 385 S.C. 296, 312, 683 S.E.2d 803, 812 (Ct. App. 2009) (rejecting self-serving testimony regarding alleged conversations as suspect and unreliable). As such, they should be disregarded.

Appellant asserts that Respondent stated they had not been to the 930 Folly Road property since 2009, (App. Br. pp. 26, 27, 28); however, Appellant can point to no place in the record where Respondent made such an assertion. In its discovery responses, Respondent indicated that, "[n]o Defendant employees visited the property between 1/1/12 and 6/21/12." (Motion for Reconsideration, Exh. U, R. p. 82).[11] Although Appellant argues that Respondent's response was misleading or untruthful, (App. Br. pp. 27, 39), he did not file any motion with the Circuit Court regarding this response, which was straightforward and truthful. As noted above, there were no motions regarding incomplete or inaccurate discovery responses pending before the Circuit Court at the April 2, 2015 hearing.

The attachments to Appellant's motions filed with the Circuit Court consist in large part of his "cut and paste" versions of responses, along with his own subjective commentary, and are, therefore, inherently unreliable. For example, Exhs. H to both Appellant's Second MSJ and his Motion for Reconsideration, (R. pp. 48, 69), contain

[11] Although, as noted below, much of Appellant's commentary on or "cut and paste" of Respondent's discovery responses are either incomplete or mischaracterized (in particular, Appellant's "summary" of Respondent's responses to various discovery requests on pages 30-31 of his Brief are particularly inaccurate and misleading), this response is accurately depicted in the referenced document.

partial responses to an edited list of his original Requests for Production. Similarly, Exh. J to Appellant's Second MSJ, (R. p. 50), and Exhs. F, I-M to his Motion for Reconsideration, (R. pp. 67, 70-74), purport to be Respondent's response to his Requests to Admit. However, both exhibits omit certain Requests to Admit and contain only parts of Respondent's responses to other Requests to Admit, all of which Appellant erroneously argues consist of an admission that the cable he allegedly tripped over belonged to Knology. (App. Br. pp. 6, 22). Because Appellant has failed to include complete and accurate copies of Respondent's responses to his discovery requests, this Court should view them with caution.

Finally, Respondent notes that Appellant has repeatedly and unfairly attacked defense counsel in his Brief. Appellant accuses Respondent of "improper misconduct, misrepresentation," intentionally failing to return discovery, submitting evidence in "bad faith," and committing "intentional fraudulent tactic," lying to the court, "intentionally submitted an untruth," and withholding relevant evidence from the court. (App. Br. pp. 11, 18, 20, 21, 26, 27, 28, 38-40). Appellant also accuses Judge Dennis of "misrepresentation," "misconduct," and bias. (App. Br. pp. 13, 40). Appellant's accusations against both counsel and the Circuit Court are unsubstantiated and unwarranted, and should be disregarded.

CONCLUSION

For all the reasons stated herein, this Court should affirm the Circuit Court's Summary Judgment Order.

Respectfully submitted,

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July 14, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable R. Markley Dennis, Circuit Court Judge

Case No.: 2013-CP-10-6019

Jack Powell, ... Appellant,

v.

Knology of Charleston, Inc.,..... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent Knology of Charleston, Inc. complies with Rule 211(b), SCACR. The undersigned also certifies that this Brief of Respondent complies with the South Carolina Supreme Court's April 15, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

July 14, 2017

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