

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

MAR 30 2017

SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable D. Craig Brown, Presiding Judge

Case No. 2015-CP-26-902

Appellate Case No. 2016-001701

Harold F. Jones d/b/a Butch Jones Body Shop,..... Appellant,

v.

State Farm Mutual Automobile Insurance Company and
Clint Cudd,..... Respondents.

FINAL BRIEF OF RESPONDENTS

NELSON MULLINS RILEY & SCARBOROUGH
LLP

Charles R. Norris

E-Mail Address:

charles.norris@nelsonmullins.com

Matthew W. Orville

E-Mail Address: matt.orville@nelsonmullins.com

151 Meeting Street / Sixth Floor

Post Office Box 1806 (29402)

Charleston, SC 29401-2239

(843) 853-5200

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 2

ARGUMENT 4

 I. THE APPELLANT HAS NOT PRESERVED THE APPEAL OF THE TRIAL COURT'S ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THE APPELLANT'S NOTICE OF APPEAL ONLY APPEALS THE COURT'S DENIAL OF THE MOTION FOR RECONSIDERATION AND NOT THE ORDER GRANTING SUMMARY JUDGMENT 4

 II. EVEN IF APPELLANT HAS PROPERLY RAISED ANY APPEALABLE ISSUE, BY CITING NO AUTHORITY TO SUPPORT THE ARGUMENT PORTION OF HIS BRIEF, APPELLANT HAS FAILED TO COMPLY WITH THE REQUIREMENTS OF THE APPELLATE RULES AND HAS ABANDONED HIS ARGUMENT SUCH THAT HIS APPEAL SHOULD BE DISMISSED 4

 III. APPELLANT'S SOLE ARGUMENT FOR WHY THE LOWER COURT'S DECISION SHOULD BE REVERSED IS NOT SUPPORTED BY THE LAW 5

 IV. APPELLANT HAS FAILED TO REFUTE THE TRIAL COURT'S DISPOSITIVE REASONS FOR GRANTING RESPONDENTS' SUMMARY JUDGMENT MOTION 7

 V. THE TRIAL COURT CORRECTLY GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT IN THE FIRST INSTANCE AND ITS ORDER SHOULD THEREFORE BE AFFIRMED 8

CONCLUSION 11

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Armstrong v. Food Lion</i> , 371 S.C. 271, 639 S.E.2d 50 (2006).....	9
<i>Boone v. Sunbelt Newspapers</i> , 347 S.C. 571, 556 S.E.2d 732 (Ct. App. 2001).....	8
<i>Brock v. Town of Mt. Pleasant</i> , 411 S.C. 106, 767 S.E.2d 203 (Ct. App. 2014).....	9
<i>Castine v. Castine</i> , 403 S.C. 259, 743 S.E.2d 93 (Ct. App. 2013).....	8
<i>CEL Products v. Rozelle</i> , 357 S.C. 125, 591 S.E.2d 643 (Ct. App. 2004).....	4
<i>Constant v. Spartanburg Steel Products</i> , 316 S.C. 86, 447 S.E.2d 194 (1994).....	8
<i>Dawkins v. Fields</i> , 354 S.C. 58, 580 S.E.2d 433 (2003).....	5
<i>Fountain v. First Reliance Bank</i> , 398 S.C. 434, 730 S.E.2d 305 (2012).....	8
<i>Glasscock Inc. v. U.S. Fid. & Guar. Co.</i> , 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).....	4
<i>Guinan v. Tenet Health Systems</i> , 383 S.C. 48, 677 S.E.2d 32 (Ct. App. 2009).....	4
<i>Hook Pointe v. Branch Banking and Trust</i> , 397 S.C. 507, 725 S.E.2d 681 (2012).....	9
<i>In re: Estate of Eris Singletary Smith</i> , App. Case No. 2013-002810 (S.C. Ct. App. December 21, 2016) (Few, J., concurring).....	5
<i>Jones v. City of Folly Beach</i> , 326 S.C. 360, 483 S.E.2d 770 (Ct. App. 1997).....	7
<i>McClanahan v. Richland Cnty. Council</i> , 350 S.C. 433, 567 S.E.2d 240 (2002).....	4
<i>Mead v. Beaufort Cnty. Assessor</i> , App. Case No. 2014-02355 (S.C. Ct. App. December 21, 2016).....	3, 4

<i>Middleborough Property Regime v. Montedison</i> , 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1996)	4
<i>Rawlinson Road Homeowner's Association v. Jackson</i> , 395 S.C. 25, 716 S.E.2d 337 (Ct. App. 2011).....	9
<i>Sellers v. Pinedale Residential Center</i> , 350 S.C. 183, 564 S.E.2d 694 (Ct. App. 2002)	7
<i>State v. Lindsey</i> , 394 S.C. 354, 714 S.E.2d 554 (Ct. App. 2011)	4
<i>Wade v. Berkeley County</i> , 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998)	9
Rules	
SCACR 260	3
SCACR Rule 208(b)(1)(D)	3
SCRCP 59(g)	2
Statutes	
S.C. Code Ann. § 15-3-550.....	7

STATEMENT OF ISSUES ON APPEAL

- I. DID APPELLANT PRESERVE FOR APPEAL THE ORDER GRANTING SUMMARY JUDGMENT WHEN THIS ORDER WAS NOT MENTIONED IN THE NOTICE OF APPEAL?
- II. DID APPELLANT FAIL TO COMPLY WITH THE APPELLATE RULES AND ABANDON HIS ARGUMENT BY PROVIDING NO AUTHORITY TO SUPPORT HIS POSITION?
- III. DID THE TRIAL COURT ERR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BECAUSE IT DID SO WITHOUT ADDRESSING APPELLANT'S MOTION TO COMPEL OR ALLOWING TIME FOR ADDITIONAL DISCOVERY?
- IV. SHOULD APPELLANT'S APPEAL BE DISMISSED FOR FAILURE TO REFUTE THE TRIAL COURT'S REASONS FOR GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT?
- V. DID THE TRIAL COURT CORRECTLY GRANT RESPONDENTS' MOTION FOR SUMMARY JUDGMENT?

STATEMENT OF THE CASE

This lawsuit was commenced on February 6, 2015, asserting causes of action for defamation per se, *respondeat superior*, and injunctive relief. On April 26, 2016 Judge D. Craig Brown granted summary judgment to the Respondents on all three causes of action in the Appellant's Complaint. (R. pp. 4-10) The order granting the motion for summary judgment was filed on May 5, 2016. On May 16, 2016 Appellant filed a motion for reconsideration and/or to alter or amend the order granting summary judgment.¹ On July 20, 2016 Judge Brown denied Appellant's motion for reconsideration and/or to alter or amend the order granting summary judgment. The order denying the motion for reconsideration was filed with the court on July 26, 2016. (R. pp. 1-3) On August 15, 2016 Appellant filed his Notice of Appeal with this Court indicating his intent to appeal "the Order of the Honorable Judge D. Craig Brown, dated July 20, 2016, and filed July 26, 2016." (R. p. 109) Appellant filed his Initial Brief with this Court on December 14, 2016, to which Respondent now responds.

STATEMENT OF FACTS

This lawsuit arose from Appellant's operation of an automobile body repair shop and his claims arose out of his dealings with Respondent State Farm as an insurer of vehicles requiring body repair and with Respondent Clint Cudd as an adjuster and employee of State Farm handling such claims.

Appellant served interrogatories and requests for production on January 29, 2016 and Respondent responded to both on March 3, 2016. (R. pp. 16-18, 23-28) On March 18, 2016,

¹ Harold Jones' Motion for Reconsideration, filed May 16, 2017, was included in Respondents Designation of Matters to be Included in the Record on Appeal but Appellant failed to include this document in the Record on Appeal.

Appellant filed a motion to compel Respondents to respond further to the interrogatories and requests to produce. (R. pp. 29-30)

Before being served discovery, on February 12, 2016, Respondents filed a motion for summary judgment and on April 6, 2016 Respondents filed a memo in support of that motion. (R. pp. 54-102) On April 18, 2016 the court heard Respondents' motion for summary judgment and on April 26, 2016 issued an order granting the motion. (R. pp. 31-51, 4-10)

On May 16, 2016, Appellant filed a motion for reconsideration and/or to alter or amend the order granting summary judgment, which was considered pursuant to SCRCPC 59(e).² The trial court denied that motion based on findings that, 1) the correct statute of limitations for defamation was applied and the argument that the trial court applied the incorrect statute of limitations was not preserved for appeal because it was argued for the first time in the motion for reconsideration; 2) the Appellant failed to challenge two additional grounds for the court granting the Respondents' motion for summary judgment (that the alleged defamatory statements were subject to qualified or conditional immunity and that Appellant failed to establish a connection between the alleged defamatory statements and his damages); 3) Appellant failed to establish good cause for a continuance of the hearing on the Respondents' motion for summary judgment; and 4) by failing to provide a copy of the motion for reconsideration to the judge within ten (10) days of filing the motion, Appellant failed to comply with SCRCPC 59(g). (R. pp. 4-10)

² Harold Jones' Motion for Reconsideration, filed May 16, 2017, was included in Respondents Designation of Matters to be Included in the Record on Appeal but Appellant failed to include this document in the Record on Appeal. Respondent has moved the Court to supplement the Record on Appeal to include this document.

ARGUMENT

I. THE APPELLANT HAS NOT PRESERVED THE APPEAL OF THE TRIAL COURT'S ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THE APPELLANT'S NOTICE OF APPEAL ONLY APPEALS THE COURT'S DENIAL OF THE MOTION FOR RECONSIDERATION AND NOT THE ORDER GRANTING SUMMARY JUDGMENT.

The Appellant filed his Notice of Intent to Appeal on August 15, 2016 (the "Notice"). (R. p. 109) This Notice stated the Appellant "appeals the Order of the Honorable D. Craig Brown, dated July 20, 2016, and filed July 26, 2016." (*Id.*) That order was the order denying the Appellant's motion for reconsideration. (R. p. 1) The Notice did not reference the order granting Respondents' motion for summary judgment. (R. p. 109) Because that order has not been appealed, this appeal should be dismissed.

II. EVEN IF APPELLANT HAS PROPERLY RAISED ANY APPEALABLE ISSUE, BY CITING NO AUTHORITY TO SUPPORT THE ARGUMENT PORTION OF HIS BRIEF, APPELLANT HAS FAILED TO COMPLY WITH THE REQUIREMENTS OF THE APPELLATE RULES AND HAS ABANDONED HIS ARGUMENT SUCH THAT HIS APPEAL SHOULD BE DISMISSED.

Appellant's Initial Brief dedicates only one short paragraph to his argument as to why the trial court's order granting summary judgment should be reversed on appeal. Appellant does so by making conclusory statements such as, "the [discovery] responses of the Respondents were wholly inadequate and not done in good faith[.]" (Appellant's Initial Brief, p. 8) Further, Appellant alleges that, had the lower court considered his motion to compel before granting Respondents' motion for summary judgment, he could have brought forth evidence supporting his claims. (*Id.*) In making these assertions, Appellant cites no authority supporting his position. This argument is wholly inadequate to support a reversal on appeal.

First, SCACR 208 requires the Argument section of the Appellant's Initial Brief to include the particular issue to be addressed, "followed by discussion *and citations of authority*." Rule 208(b)(1)(D) SCACR (emphasis added). By not including any authority to support his argument, Appellant has failed to comply with the Appellate Rules and, therefore, his appeal should be dismissed pursuant to SCACR 260.

Further, "short conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Mead v. Beaufort Cnty. Assessor*, App. Case No. 2014-02355 (S.C. Ct. App. December 21, 2016) (quoting *Glasscock Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001)) (internal quotations omitted). Accordingly, "[w]hen an appellant provides no legal authority regarding a particular argument, the argument is abandoned and the court can decline to address the merits of the issue." *Id.* (citing *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011)). Because Appellant has provided no legal authority to support his proposition that the lower court should have addressed his motion to compel prior to granting Respondents' motion for summary judgment, he has abandoned this argument and it is not presented for review. Thus, this Court need not address the merits of the issue.

III. APPELLANT'S SOLE ARGUMENT FOR WHY THE LOWER COURT'S DECISION SHOULD BE REVERSED IS NOT SUPPORTED BY THE LAW.

Appellant makes only one argument why this Court should reverse the decision of the lower court. Appellant claims the trial court erred by granting Respondents' motion for summary judgment because the court did so without addressing his motion to compel or allowing him time for additional discovery. (Appellant's Initial Brief, p. 8)

However, to avoid summary judgment because further discovery is needed to defend the motion, the non-moving party must both make a formal motion for continuance, including a good reason why the time for discovery was insufficient, and point out in a specific manner how the non-moving party will be prejudiced if summary judgment is granted. *McClanahan v. Richland Cnty. Council*, 350 S.C. 433, 441, 567 S.E.2d 240, 244 (2002); *Guinan v. Tenet Health Systems*, 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009); *CEL Products v. Rozelle*, 357 S.C. 125, 130-31, 591 S.E.2d 643, 645-46 (Ct. App. 2004); *Middleborough Property Regime v. Montedison*, 320 S.C. 470, 479-80, 465 S.E.2d 765, 771-72 (Ct. App. 1996). Further, the non-moving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). The Appellant did none of these things.

In a recent concurrence where the Court of Appeals found that the lower court acted within its discretion in refusing to continue a summary judgment hearing to allow for additional discovery, Justice Few specifically noted that "[w]hen a party seeks additional time, but fails to comply with the Rule setting forth the procedure for requesting additional time, an appellate court should be very hesitant to say the trial court abused its discretion in denying the request." *In re: Estate of Eris Singletary Smith*, 796 S.E.2d 158, 163 (S.C. Ct. App. 2016) (Few, J., concurring).

The Appellant never made a formal motion to continue the hearing on summary judgment, he never specified how he would be prejudiced if summary judgment was granted, nor did he demonstrate that further discovery would uncover additional relevant evidence. (R. pp. 9, 44-50) Accordingly, the lower court had no reason to delay hearing the motion for summary

judgment, it properly granted the motion, and it properly denied Appellant's motion to reconsider its ruling.

IV. APPELLANT HAS FAILED TO REFUTE THE TRIAL COURT'S DISPOSITIVE REASONS FOR GRANTING RESPONDENTS' SUMMARY JUDGMENT MOTION.

The trial court's order granting Respondents' motion for summary judgment enumerated multiple reasons for doing so. First, the lower court dismissed the Appellant's defamation claim because both of the alleged defamatory statements that form the basis of Appellant's claim occurred more than two years prior to the filing of Appellant's lawsuit, and were thus barred by the statute of limitations. (R. pp. 4-5) While Appellant did address this issue in his motion for reconsideration, he has failed to do so in his appellate brief. Appellant has also declined to address the trial court's holding that Appellant's claim for defamation should be dismissed because the alleged defamatory statements were subject to a qualified or conditional privilege and Appellant failed to show actual malice on Respondents' part. (R. pp. 5-6) Additionally, Appellant has not addressed his failure to show any connection between the alleged defamatory statements and his damages. (R. p. 6) Because any of these three are proper grounds for dismissing the defamation claim and Appellant has failed to dispute any of them, Appellant has provided insufficient justification to warrant reversal of the trial court's order granting Respondents' motion for summary judgment.

Likewise, regarding his cause of action for *respondeat superior*, Appellant has raised no argument on appeal that this constitutes a cause of action and this Court need not address this issue.

Finally, Appellant's third cause of action sought injunctive relief. In this appeal he has not addressed the trial court's ruling that, because he has an adequate remedy at law and will not

suffer irreparable harm, his claim for injunctive relief should be denied. As such, this Court need not determine whether this ruling by the lower court was proper.

When a trial court makes a ruling not contested by a party in its Initial Brief, the issue is not preserved for appellate review. *Sellers v. Pinedale-Residential Center*, 350 S.C. 183, 189 n.1, 564 S.E.2d 694, 697 n.1 (Ct. App. 2002) (an issue not argued in the brief will be deemed abandoned and will not be considered on appeal). Even if Appellant has somehow properly preserved these issues on appeal, the lower court based its decision granting Respondents' motion for summary judgment on multiple findings that are dispositive of each of the Appellant's claims. Appellant has failed to address, much less refute, multiple parts of the trial court's order that must necessarily be reversed for Appellant to be successful in his claims. Thus, even if all of the Appellant's assertions are accepted (although they should not be), there are independent reasons left unaddressed that are, on their own, dispositive of each of the Appellant's claims.

V. THE TRIAL COURT CORRECTLY GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT IN THE FIRST INSTANCE AND ITS ORDER SHOULD THEREFORE BE AFFIRMED.

The trial court provided substantial justification for dismissing each of Appellant's causes of action, justifying dismissal of the entire lawsuit, and did not abuse its discretion in doing so.

First, the trial court correctly held that the Appellant's claim for defamation should be dismissed because Appellant could not identify any alleged defamatory statements that occurred after 2012 (R. p. 4). The Statute of Limitations for libel or slander is two years. S.C. Code Ann. § 15-3-550; *Jones v. City of Folly Beach*, 326 S.C. 360, 368, 483 S.E.2d 770, 774 (Ct. App. 1997). Because Appellant's lawsuit was filed on February 6, 2015, the applicable statute of limitations had expired. (R. pp. 4-5)

The trial court was also correct in granting summary judgment as to the defamation cause of action because the alleged defamatory statements were subject to a qualified or conditional privilege. (R. pp. 5-6) One who publishes defamatory matter concerning another is not liable for the publication if the matter is published upon an occasion that makes it conditionally privileged and the privilege is not abused. *Fountain v. First Reliance Bank*, 398 S.C. 434, 444, 730 S.E.2d 305, 310 (2012). Whether an occasion gives rise to a qualified or conditional privilege is a matter of law for the court. *Boone v. Sunbelt Newspapers*, 347 S.C. 571, 582, 556 S.E.2d 732, 738 (Ct. App. 2001). One who has an interest in the subject matter of a communication and the person to whom it is made has a corresponding interest; every communication honestly made in order to protect such common interests is privileged by reason of the occasion. *Castine v. Castine*, 403 S.C. 259, 267, 743 S.E.2d 93, 97 (Ct. App. 2013).

Here, the alleged defamatory statements concerned the repair by Appellant's body shop of damage to a car insured by Respondent State Farm and the statements were made to an insured of Respondent State Farm. (R. p. 5) Therefore, as a matter of law, there existed a qualified or conditional privilege. One publishing under a qualified privilege is liable only upon proof of actual malice. *Constant v. Spartanburg Steel Products*, 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994). Appellant has provided no proof of any statement made recklessly or wantonly or with conscious disregard of Appellant's rights, as required to show actual malice. (R. pp. 5-6) Accordingly, the trial court correctly ruled that the defamation cause of action fails as a matter of law due to this privilege. Finally, for a number of reasons, the trial court found no causation between the alleged defamatory statements and any damages alleged by Appellant. (R. p. 6) For all of these reasons, none of which Appellant has refuted in this appeal, the trial court properly granted summary judgment as to Appellant's defamation claim.

Second, *respondeat superior* is not a cause of action, rather, it is a theory for imposing liability upon a master for injuries to third parties caused by the tort of a servant committed within the scope of the servant's employment. *Armstrong v. Food Lion*, 371 S.C. 271, 276, 639 S.E.2d 50, 52 (2006); *Wade v. Berkeley County*, 330 S.C. 311, 318, 498 S.E.2d 684, 688 (Ct. App. 1998). For this reason, Respondents were properly entitled to summary judgment as to Appellant's second cause of action alleging *respondeat superior*.


Finally, Respondents were properly entitled to summary judgment on Appellant's cause of action for injunctive relieve because Appellant does have an adequate remedy at law and he provided no proof the alleged wrongful acts are ongoing and continuing. (R. p. 7) An injunction is a drastic remedy issued by a court in its discretion to prevent irreparable harm suffered by the plaintiff. *Brock v. Town of Mt. Pleasant*, 411 S.C. 106, 114-15, 767 S.E.2d 203, 207 (Ct. App. 2014). An injunction is available only when there is no adequate remedy at law. *Rawlinson Road Homeowner's Association v. Jackson*, 395 S.C. 25, 35, 716 S.E.2d 337, 343 (Ct. App. 2011). Further, a preliminary injunction, as requested by the Appellant, is issued only to preserve the status quo. *Hook Pointe v. Branch Banking and Trust*, 397 S.C. 507, 511, 725 S.E.2d 681, 683 (2012).

Appellant could not establish the absence of an adequate remedy at law because his defamation cause of action seeks damages for the very act he sought to enjoin. (R. p. 15) Additionally, the purpose of Appellant's request for injunctive relief was not to preserve the status quo, but to stop something that was allegedly occurring. Nonetheless, Appellant provided no proof the alleged defamation was even continuing. (R. pp. 7-8) Therefore, Appellant could not prove any of the elements of a claim for injunctive relief. As such, the trial court properly granted summary judgment as to Appellant's cause of action seeking injunctive relief as well.

CONCLUSION

The trial court's order granting Respondent's motion for summary judgment should be dismissed without even addressing its merits because Appellant has failed to properly preserve any issue that has been presented on appeal and all of the causes of action that were dismissed were done so for reasons that have been left unaddressed by the Appellant. Even if this Court considers the merits, Appellant's position is not supported by the law. Finally, if this Court considers other holdings by the trial court that Appellant has failed to address, the trial court's order shows that it properly ruled on every issue. For these reasons, and the many others cited in this brief, the trial court's order granting summary judgment to the Respondents and denying the Appellant's motion for reconsideration should be affirmed.

NELSON MULLINS RILEY & SCARBOROUGH
LLP

By: 
Charles R. Norris
SC Bar No. 004238
Matthew W. Orville
SC Bar No. 102339
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402)
Charleston, SC 29401-2239
(843) 853-5200

Attorneys for Respondents

Charleston, South Carolina

March 28, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM Horry COUNTY
Court of Common Pleas

MAR 30 2017

SC Court of Appeals

Honorable D. Craig Brown, Presiding Judge

Case No. 2015-CP-26-902

Appellate Case No. 2016-001701

Harold F. Jones d/b/a Butch Jones Body Shop, Appellant,

v.

State Farm Mutual Automobile Insurance Company and
Clint Cudd, Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

By: 

Charles R. Norris
SC Bar No. 004238
Matthew W. Orville
SC Bar No. 102339
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402)
Charleston, SC 29401-2239
(843) 853-5200

Attorneys for Respondents

Charleston, South Carolina

March 28, 2017