THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge

Case No. 2017-CP-27-0386
Appellate Case No. 2017-002548

First Team Hyundai, LLC d/b/a Hilton Head Hyundai . . . . Appellant

v.

Greg S. Hackney . . . . Respondent

APPELLANT'S INITIAL REPLY BRIEF

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STATEMENT OF THE CASE REPLYING TO RESPONDENT'S COUNTERSTATEMENT

Rule 208(b)(1)(C) of the South Carolina Rules of Civil Procedure provides that the Statement of the Case shall not contain contested matters. Rule 210(c) prohibits any matter in the Record which was not presented to the lower court. Respondent's Counter Statement of the Case contains both contested matters and matters not in the Record.[1]

STATEMENT OF THE FACTS REPLYING TO RESPONDENT'S COUNTERSTATEMENT

Respondent's Counter Statement of Facts is rife with information not relevant to the issues on appeal and not presented to the lower court.

Respondent would have this Court ignore the fact that defamatory speech is not protected by the First Amendment. *See Beauharnais v. Illinois,* 343 U.S. 250 (1951) (libelous utterances [are] not … within the area of constitutionally protected speech. *Frankfurter, J.*)[2] He is interfering with Appellant's valuable property right in its business to satisfy a personal vendetta.

At the heart of this case is the fact that Respondent is not attempting to exercise his First Amendment Rights but is trying to coerce money from Appellant. See *Carter et al. v. Knapp Motor Co.*, 11 So.2d 383 (Ala. 1943) (automobile dealer entitled to preliminary injunction to restrain defendant who, seeking to coerce plaintiff to give him another car, picketed with a sign

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[1] Respondent gives a running commentary which includes contested facts such as the condition of his vehicle after it was repaired, whether he was required to return the rental car at the time he received his vehicle, and what would constitute an "acceptable" outcome of his meetings with Appellant. Respondent includes hearsay statements regarding how he learned about the hearing on the Preliminary Injunction. Respondent claims Appellant harassed and intimidated him but there is no support for this claim in the Record.

[2] Although subsequent cases have narrowed constitutional limits on defamation law such that a blanket rule prohibiting group defamation may no longer be valid, libelous speech remains a category of speech that may be proscribed without offending the Constitution. *See United States v. Alvarez*, 557 U.S. 709 (2012).

disparaging the quality of the car sold.) Respondent erroneously claims that this issue was raised for the first time on appeal; however, John Lyons testified at the October 24, 2017 hearing:

> . . . . And then at the end of it, I said, "Okay. So I'll get these documents together for you." And he says, "Well," he says, "now, the last thing I need is," you know, "I want to give you a little gut punch. You're going to know that who I am and where I'm from. And I want you to go to your attorneys and tell your attorneys, they'll know the number, and ask your attorneys what the number is to write me a check. Then I'll go away."

(R. , ll. 12-19)

Respondent is attempting to try the merits of the case and to quibble over word choice instead of addressing the central issues of a Motion for Preliminary Injunction.[3] The lower court recognized that Respondent's real complaint was with his insurance company for not authorizing the repairs he claimed were related to his accident:

> THE COURT: The problem is, your issue is with GEICO, Mr. Hackney, not with Hyundai.

(R. , ll. 18-19)

Respondent failed to introduce any evidence before the lower court that his defamatory statements were true. Respondent baldly claimed that he was harassed and intimidated by Appellant's employees; however, there is no supporting evidence in the Record.[4] There is no evidence that Appellant's management acted inappropriately towards respondent when he began picketing with his defamatory sign. Nor was the "Wal-Mart video," referenced several times by

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[3] For example, the "repair" authorized by the manufacturer under the engine recall included the replacement of the engine assembly. Respondent's check could not be verified by Appellant's Telecheck system, therefore, it was "declined." The statements Respondent makes regarding his employment are not in the Record. The Court asked Respondent how he was able to picket the dealership on an almost daily basis. (R.) Respondent replied that he was a consultant and was "in between things;" therefore, he was "unemployed" at that time. (R.)

[4] It is improper for Respondent to state that he filed charges of harassment against Appellant when there is no support for that statement in the Record. There is also no evidence in the Record that Appellant's management acted inappropriately towards Respondent when he began picketing outside with his defamatory signs.

Respondent in his Brief, presented to the lower court. Respondent admitted at the hearing that the copy of the video he had at the time didn't work. (R.)

Respondent does not claim that he objected to having Appellant perform any repairs related to his driving into the pothole. Neither does he claim that he objected to Appellant performing the engine recall work. There is no evidence that the work was not properly performed, including the replacement of any and all engine components identified in the repair. The lower court ended the hearing before Appellant was allowed to respond to any claims that he was not properly advised about the safety of driving the car approximately 250 miles after it failed the engine recall test.

There is no evidence in the Record that Appellant acted improperly when its check verification system could not verify his check. Respondent admits that his check could not be verified by Appellant's Telecheck machine. There is no evidence in the Record that the check was confirmed by another vendor.

ARGUMENTS

I. THE LOWER COURT ERRED IN CONCLUDING THE INJUNCTION WOULD BE PRIOR RESTRAINT

The sole purpose of a temporary injunction is to preserve the status quo and thus avoid possible irreparable injury to a party pending litigation. *Powell v. Immanuel Baptist Church,* 261 S.C. 219, 199 S.E.2d 60 (1973). As stated by the Nevada Supreme Court:

> The right to carry on a lawful business without obstruction is a property right, and acts committed without just cause or excuse which interfere with the carrying of on [sic] plaintiff's business or destroy its custom, its credit or its profits, do an irreparable injury and thus authorize the issuance of an injunction.

Guion v. Terra Marketing of Nevada, Inc., 523 P.2d 847, 848 (Nev. 1974). Preventing Respondent from damaging Appellant's business by publishing defamatory statements day in

and day out while the underlying case is litigated is necessary to preserve the status quo and stop the irreparable injury.

Respondent does not address Appellant's argument that liberty of speech is not an absolute right, *Kingsley Books Inc. v. Brown,* 354 US 436, 441 (1957), or the exceptions to a First Amendment privilege: 1) when the speech impugns the Appellant's property interest;[5] and 2) when Respondent is engaged in a continuing course of conduct causing the Appellant harm.[6] Respondent fails to respond stating only that he defers to the lower court's Orders and that he has no issue with GEICO. *See Turner v. Dept. of Health and Env.*, 377 S.C. 540, 661 S.E.2d 118, 121, (Ct. App., 2008) (if respondent fails to respond to an issue in his brief, the appellate court may treat the failure as a confession that the appellant's position is correct).

Other jurisdictions have found injunctions in similar circumstances permissible and not restraints of free speech. In *Barlow v. Sipes,* 744 N.E.2d 1 (Ind. Ct. App. 2001), the trial court enjoined the Barlows, who operated an insurance agency. The Barlows discouraged their policyholders from using Sipes Body and Glass by making derogatory statements and steering their policyholders to Mitchell Body Shop by misrepresenting that the insurers require an estimate from Mitchell. The Preliminary Injunction was affirmed by the Indiana Court of Appeals.

The Barlows argued the preliminary injunction violated the First Amendment. The Indiana Court of Appeals disagreed, finding that the injunction passed constitutional muster as it prevented the Barlows from "making slanderous statements and defamatory falsehoods of a

[5] *See Guion v. Terra Marketing of Nevada, Inc.*, 523 P.2d 847 (Nev. 1974) (enjoining Guion from displaying signs in front of Terra Marketing's business that stated that a Terra representative threatened to kill him and that doing business with Terra introduced him to "a new low in ethics.").
[6] See *Lothschuetz v. Carpenter*, 898 F.2d 1200 (6th Cir. 1990) (finding an injunction was necessary given Carpenter's frequent and continuing defamatory statements).

primarily private concern that are on the lowest rung of the protection of the First Amendment."

Id. at 10. The Indiana Court of Appeals further noted:

> The United States Supreme Court has stated that there is "no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.,*418 U.S. 323, 338, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). The intentional lie does not materially advance society's interest in "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co. v. Sullivan,* 376 U.S. [254] at 265, 84 S.Ct. 710 [1964]. Falsehoods belong to that category of utterances that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). The Court has further stated that "[f]alse statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective." *Hustler Magazine v. Falwell,* 485 U.S. 46, 51, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988).

Id. In the present case, Respondent's grievances are of a purely private concern. He has other remedies available to him and should not be allowed to damage Appellant's reputation with his false statements.

Respondent's false claims that he was treated unprofessionally, intimidated, and harassed are based on Appellant's treatment of him after he began protesting.[7] Respondent's signs do not inform the public that his unsubstantiated claims are based on the manner in which he was treated while protesting, but instead implies that Appellant is unethical in its business practices.

The Court of Appeals for the Ninth Circuit found that the phrase "THIS MEDICAL FACILITY IS FULL OF RATS" was defamatory and affirmed the granting of a preliminary injunction. *San Antonio Community Hosp. v. Southern California Dist. Council of Carpenters,*

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[7] Respondent claimed that he would return from protesting to find his car doors open but presented no evidence that Appellant was involved. He also made the general unsupported claim that two of his signs were stolen. Respondent claimed that he was intimidated and harassed because one of Appellant's employees followed him into the Wal-Mart parking lot. Respondent does not present any evidence of this but does admit that he threatened physical harm against the person he believed to be one of Appellant's security officers. (R.)

125 F.3d 1230 (9th Cir., 1997). The Carpenters Union argued that the term "rat" had a historical meaning in the context of labor disputes and that it was merely publicizing the facts of its labor dispute. The Ninth Circuit disagreed finding that the most natural reading of the term was that the hospital had a rodent problem; thus deterring patients from using the hospital. The statements made by Respondent likewise imply that Appellant is dishonest in its business dealings and are designed to deter customers from doing business with Appellant.

Appellant has presented uncontradicted evidence to raise a fair question that its reputation (a property right) has been injured, and that Respondent admittedly is engaged in a continuing course of conduct by daily slandering and libeling Appellant (R.). As set forth above, Respondent's actions are an effort to extort money from Appellant and not a proper exercise of his First Amendment rights. (R.)[8]

II. THE COURT ERRED IN REQUIRING A BALANCING TEST IN ORDER TO GRANT A PRELIMINARY INJUNCTION

The lower court erred in applying a balancing test in favor of Respondent when it is no longer a requirement for a preliminary injunction in South Carolina. *Compton v South Carolina Dept. of Corrections*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011) (citing *Poynter Inves., Inc, v. Sentry Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010). Respondent fails to respond to this issue stating only that he defers to the lower court's Orders and that he does not have an issue with GEICO. *See Turner v. Dept. of Health and Env.*, 377 S.C. 540, 661 S.E.2d 118, 121, (Ct. App., 2008).

The lower court abused its discretion in applying the balancing test, therefore, Appellant respectfully requests the denial of its preliminary injunction be reversed.

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[8] Respondent states that he did not include a counterclaim with his Response to Summons and Complaint, but omits the fact that he did file a Counterclaim dated November 22, 2017.

III. THE LOWER COURT ERRED IN REQUIRING APPELLANT TO MAKE A CLEAR SHOWING THAT IT IS LIKELY TO SUFFER IRREPARABLE HARM IF PRELIMINARY INJUNCTION IS DENIED

Appellant has suffered, and is continuing to suffer, irreparable harm as a result of Respondent's actions. Instead of requiring a "clear showing" as ruled by the lower court, the South Carolina standard is whether a sufficient prima facie showing demonstrates that relief is reasonably necessary to preserve the rights of the parties during the litigation. *Compton v. South Carolina Department of Corrections*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). When seeking an injunction, the Appellant need not prove an absolute legal right; the Appellant need only present a fair question to raise as to the existence of such right. *Williams v. Jones*, 92 S.C. 342, 347, 75 S.E.2d 705, 710, (1912).

Respondent again fails to respond to this issue stating only that he defers to the lower court's Orders. Because the lower court's analysis should have been limited to only whether Appellant's Motion stated a prima facie case, it was an abuse of the lower court's discretion to require a "clear showing" of irreparable harm and the denial of Appellant's Motion for Preliminary Injunction should be reversed.

IV. THE LOWER COURT ERRED IN FINDING THAT APPELLANT FAILED TO SATISFY ITS BURDEN THAT IT WAS LIKELY TO SUFFER IRREPARABLE INJURY IF THE MOTION WAS NOT GRANTED

"Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." *Helsel v. City of North Myrtle Beach,* 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992). Prima facie facts are those that are presumed to be true unless disproved by some evidence to the contrary. See *Black's Law Dictionary*, Sixth Edition (1990).

The unopposed evidence at the hearing established that Appellant had lost sales due to the slanderous and libelous comments of Respondent (R.). Respondent does not respond to the issue of whether Appellant satisfied its burden that it was likely to suffer irreparable injury if the Temporary Restraining Order was not granted. Respondent does not suggest that Appellant is not suffering irreparable injury and remarks only that the evidence before the lower court was in the form of an Affidavit from Appellant's employee regarding customers who called in to say that they would not purchase a car from Appellant based on Respondent's actions. It is reasonable to infer that other customers also have been influenced by Respondent's statements not to shop with the Appellant. Appellant additionally presented testimony that its sales were down from the previous year in the same months for the time that Respondent had been displaying his defamatory signs. (R. , ll. 17-19)

Respondent's statements regarding the Appellant were defamatory thus showing Appellant's likelihood of success.[9]

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[9] Respondent's first sign read:

Lies Lies
Fraud Fraud

(R.)

His next sign read:

Hilton Head Hyundai
Unprofessional
Unethical
Harassment
Intimidation

Slander "is actionable per se when the defendant's alleged defamatory statements charge the plaintiff with . . . unfitness in one's business or profession." *Goodwin v. Kennedy,* 347 S.C. 30, 36, 552 S.E.2d 319, 322-23 (Ct. App. 2001). Respondent is accusing Appellant of being unfit in its business; therefore, his statements are actionable *per se*. Libel is actionable per se if it involves written or printed words that tend to degrade the person in the estimation of his friends or acquaintances or the public or to disgrace him.

Respondent presented no evidence as to the truth of any of his defamatory statements. His arguments are either unsupported by the Record[10] or they represent frustration by Respondent at events beyond the control of the Appellant.[11] In either case, they do not rise to the level of evidence required to prevent Appellant from making the required prima facie showing. Respondent does not dispute that there is no adequate remedy at law to protect the loss of

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Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 506 S.E.2d 497 (1998) (*Holtzscheiter II*). Essentially, all libel is actionable *per se*.

[10] Respondent's complaint that Appellant told him his car was unsafe to drive does not reflect false, unprofessional, or unethical behavior. Respondent admitted that there was a recall issued for his car. (R.) He does not dispute that his car failed the engine test. (R.) There is no evidence that Appellant lied to him about the recall or the danger in driving. It certainly was not fraudulent, unethical, or unprofessional for Appellant to inform him of the need for the engine repair. Respondent presented only vague, hearsay testimony that someone with Hertz in Atlanta told him he could have driven the car back to Atlanta. (R.)

Respondent testified he was frustrated because he did not get the proof he wanted that his engine had been replaced. (R__) Respondent did not present any evidence that Appellant failed to replace any required parts. Further, the testimony made it clear that Respondent's own actions in threatening to kill John Lyons and picketing the dealership resulted in his being placed on Trespass Notice and prevented him from receiving the documentation he was seeking. (R.)

[11] Respondent attempts to argue that Appellant is at fault for failing to make all the required repairs to his car but admitted that GEICO determined the repairs that it would pay for under Respondent's policy. (R.) He also admitted that when he later received additional authorization for repairs from GEICO he did not provide Appellant with the opportunity to make the repairs. (R.) The only evidence in the Record is that Appellant made all authorized repairs. There is no evidence that Appellant lied to him or acted in a fraudulent, unprofessional, or unethical manner related to the authorized repairs.

Respondent also testified he was frustrated because Appellant's Telecheck machine could not read his check for the deductible owed for the repairs. (R.) He did not present any evidence that Appellant's machine could in fact read his check. Respondent admitted that he was provided the opportunity to present another form of payment, which he did the following day. (R.) There is no evidence that Appellant acted in a fraudulent, unethical or unprofessional manner.

Respondent testified that he was upset that he was required to return the Hertz rental to get his car back. Respondent came to the dealership alone and could only leave in either the rental car or his car. In his Brief, Respondent states both that he intended to return the rental car to the Savannah International Airport and that he intended to drive back to Atlanta upon the return of his car. (Respondent's Brief, p. 2) A glimpse of the underlying facts came out when Respondent admitted that he owed money to Hertz for the rental and that Hertz had already threatened to take the car. (R.) Respondent also admitted that the Officer who responded to his 911 call agreed with Appellant and required him to leave the rental car and deposit the keys in the drop-box. (R.)

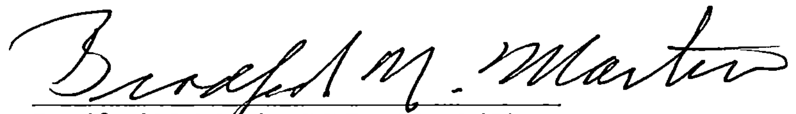
reputation. Therefore, Appellant respectfully requests the denial of its Preliminary Injunction be reversed.

CONCLUSION

Respondent has provided no response to Appellant's arguments that the lower court: 1) abused its discretion by applying a balancing test as a requirement for a preliminary injunction; (2) abused its discretion by requiring a "clear showing" of irreparable harm rather than a prima facie showing; and (3) misconstrued the law to say that an injunction is never available for defamation when it is clear that numerous courts have found otherwise. Respondent further failed to place evidence in the Record that would prevent Appellant from making the necessary prima facie showing.

Appellant respectfully requests that this Court reverse the finding of the lower court and issue a Preliminary Injunction against the Respondent.

Respectfully submitted,



Date 11 June 2018

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v.

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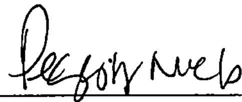
PROOF OF SERVICE

I, Peggy McComb, Legal Assistant to attorney for Appellant, certify that I have served a copy of Appellant's Initial Reply Brief and Objection to Respondent's Motion to Include Proposed Designation of Matter by depositing a copy in the U.S. Mail, postage prepaid, on June 11, 2018, addressed to Greg S. Hackney, 30 Old Vermont Place, Sandy Springs, GA 30328.

June 11, 2018



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June 11, 2018

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Re: *First Team Hyundai, LLC dba Hilton Head Hyundai v. Greg S. Hackney*
C.A. No. 2017-CP-27-0386
Appellate Case No. 2017-002548

Dear Ms. Kitchings:

Enclosed for filing is an original and one copy of Appellant's Initial Reply Brief and Objection to Respondent's Motion to Include Proposed Designation of Matter and a Proof of Service in the above captioned matter. Please file the originals with your Court and return clocked copies to me in the enclosed envelope.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Bradford N. Martin

BNM/pm
Enclosures
cc: Greg S. Hackney

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