ELECTRONICALLY FILED - 2018 Nov 13 4:44 PM - JASPER - COMMON PLEAS - CASE#2017CP2700386

IN THE STATE OF SOUTH CAROLINA) **IN THE COURT OF COMMON PLEAS**

COUNTY OF JASPER) **FOR THE FOURTEENTH JUDICIAL CIRCUIT**

First Team Hyundai, LLC dba Hilton Head Hyundai,

Plaintiff,

v.

Greg S. Hackney,

Defendant.

C. A. No. 2017-CP-27-0386

ORDER GRANTING PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT AND DISMISSAL OF COUNTERCLAIMS

RECEIVED
DEC 12 2018
SC Court of Appeals

THIS MATTER came before the Court on Plaintiff's Partial Motion for Summary Judgment and dismissal of Defendant's Counterclaims filed on August 23, 2018. A hearing was held on October 31, 2018. Present at the hearing were Bradford N. Martin representing Plaintiff, First Team Hyundai ("Dealership"), and Defendant, Greg S. Hackney, appearing *pro se*.[1] Defendant handed to the Court a 220 page response to the Motion. I have reviewed the pleadings in this matter, the relevant case law, the memoranda and exhibits filed, and have heard the arguments of the parties. For the following reasons, Plaintiff's Motion for Partial Summary Judgment is GRANTED, and Defendant's Counterclaims are DISMISSED.

BACKGROUND

Plaintiff is engaged in the business of automotive sales and repair and claims a good reputation in the community is crucial to its business. Defendant, is a dissatisfied customer, has been appearing for more than a year outside of Plaintiff's place of business, and admits to accusing the Dealership of

[1] A pro se litigant who knowingly elects to represent himself assumes full responsibility for complying with the substantive and procedural requirements of the law. *State v. Burton*, 356 S.C. 259, 265 n.5, 589 S.E.2d 6, 9 n.5 (2003)

lying and committing fraud by way of written signs and oral statements to passersby. On September 4, 2017, Plaintiff issued a Temporary Trespass Notice to the Defendant, at which time he moved to the right-of-way in the highway adjacent to the Plaintiff's business. Plaintiff filed a Summons and Complaint on September 17, 2017 for injunction and defamation and claims Defendant is engaged in both libel and slander.

Defendant filed his 125 page "Response to Complaint" on October 23, 2017. Defendant then filed an Amended Answer and "Counter Complaint" on November 22, 2017, which Plaintiff answered on December 20, 2017. I previously denied the Dealership's Motion for a Temporary Restraining Order. Plaintiff now seeks a Partial Motion for Summary Judgment based on the evidence along with a permanent injunction to keep the Defendant, as well as any other person or entity, in like manner, who are in active concert or participation with the Defendant, from publishing allegedly defamatory statements about the Plaintiff, whether in writing or orally. Plaintiff also seeks dismissal of Defendant's Counterclaims.

Defendant has had at least four iterations of his signs. His first stated, under the Dealership's name:

LIES LIES FRAUD FRAUD

After Defendant was placed on Trespass Notice, he changed the sign to read under the Dealership's Name:

UNPROFESSIONAL

UNETHICAL

HARRASSMENT

INTIMIDATION

ELECTRONICALLY FILED - 2018 Nov 13 4:44 PM - JASPER - COMMON PLEAS - CASE#2017CP2700386

His next sign read:

UNTRUSTWORTHY

LIES LIES

LIARS

UNETHICAL

Finally, Defendant produced a sign under the Dealership's name that stated:

LIES

LIAR

BAIT N SWITCH

Defendant contends his signs and comments are protected by the First Amendment of the United States Constitution.

SUMMARY JUDGMENT STANDARD

Summary Judgment is proper where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *R.J. Hendricks II v. Clemson Univ.,* 553 S.C. 449, 445,578 S.E. 2d 711, 714 (2003). "In determining whether any triable issues of fact exist, the evidence and all inferences which can reasonably be drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Bishop v. South Carolina Department of Mental Health*, 331 S.C. 79, 85, 502 S.E. 2d 78, 81 (1998).

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. *Miller v. Blumenthal Mills Inc.*, 365 S.C. 2d. 204, 220, 616 S.E. 722, 730 (Ct. App. 2005). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case... the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Id.*

ELECTRONICALLY FILED - 2018 Nov 13 4:44 PM - JASPER - COMMON PLEAS - CASE#2017CP2700386

ELECTRONICALLY FILED - 2018 Nov 13 4:44 PM - JASPER - COMMON PLEAS - CASE#2017CP2700386

LAW/ANALYSIS

I. Summary Judgment as to Plaintiff's Defamation Cause of Action

The elements of defamation include: 1) a false and defamatory statement concerning another; 2) an unprivileged publication to a third-party; 3) fault on the part of the publisher; and 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Murray v. Holnam, Inc.*, 344 S.C. 129, 139, 542 S.E.2d 743, 748 (Ct.App 2001). I will address each of Defendant's statements separately.

A. Are Defendant's Statements Actionable *Per Se*?

Slander "is actionable *per se* when the Defendant's alleged defamatory statements charge the Plaintiff with one of five types of acts or characteristics: 1) commission of a crime of moral turpitude; 2) contraction of a loathsome disease; 3) adultery; 4) chastity; or 5) unfitness in one's business or profession." *Goodwin v. Kennedy,* S.C. 30, 36, 552 S.E. 2d. 319, 322–23 (Ct. App. 2001). Defendant's actions fall into the fifth category.

Libel is actionable 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. *Holtzscheiter v. Thomson Newspapers, Inc.* 332 S.C. 502, 506 S.E. 2d 497 (Holtzscheiter II). Essentially, libel is actionable *per se.* Defendant's signs meet this definition if the statements are untrue.

Defendant is accusing the Dealership of being unfit in its business; therefore, his statements are actionable *per se* and it is unnecessary for Plaintiff to prove special damages.

B. Are Defendant's Statements False as a Matter of Law?

1. Evidence of bait and switch

Defendant accuses the Dealership of a specific type of unethical business practice: "the bait and switch." 16 C.F.R. § 238 defines "bait advertising":

ELECTRONICALLY FILED - 2018 Nov 13 4:44 PM - JASPER - COMMON PLEAS - CASE#2017CP2700386

> Bait advertising is an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is to switch consumers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser.

The allegation that a car dealership engages in tactics such as "bait and switch" advertising has the potential to be particularly harmful.

Defendant presents no evidence that the Dealership was involved in bait and switch tactics. When asked to specify any evidence of bait and switch, Defendant claimed the following: 1) he asked to speak to the "Boss and/or General Manager" but was referred to the New Car Sales Manager; 2) he was asked to return the Hertz rental car prior to receiving his car; and 3) an employee told him the Dealership owned the Hertz rental location near the store.

Defendant does not allege that he came to the Dealership to purchase one product only to be switched to another. Instead, he came to the Dealership because he hit a pothole and needed bodywork and mechanical work to repair his car. Therefore, by definition, his claims do not constitute a "bait and switch." Therefore, Defendant's accusing the Dealership of "bait and switch" are false and defamatory as a matter of law.

2. Evidence of Fraud

Defendant's statements accuse the Dealership of "lies" and "fraud." In order to prove fraud, Defendant must present admissible evidence of a material fact supporting each of the following elements: 1) a representation; 2) its falsity; 3) its materiality; 4) either knowledge of its falsity or a reckless disregard of its truth or falsity; 5) intent that the representation be acted upon; 6) the hearer's ignorance of the falsity; 7) the hearer's reliance on its truth; 8) the hearer's right to rely thereon; and 9) the hearer's consequent and proximate injury. *Ardis v. Cox* 314 S.C. 415, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). Fraud is not presumed but must be shown by clear and convincing evidence. *Id.* The failure to prove any element of fraud or misrepresentation is fatal to the claim. *Austin v. Stokes–*

Craven Holding Corp., 387 S.C. 22, 50, 691 S.E.2d 135, 149 (2010).

a. Defendant's claims of false statements by the Dealership.

i. The vehicle had to be repaired at the Dealership because it was too dangerous to drive to Atlanta

The Dealership was alerted to the engine recall in the course of inspecting the damage caused by the pothole. As a dealer of Hyundai automobiles, it checks vehicles in its Service Department for applicable recalls. It is undisputed that Defendant's car was subject to a recall. Hyundai's recall information indicated that the car could stall while being driven. The Dealership was instructed by the manufacturer to test all cars within the recall and, if they failed, to replace the engine.

A test performed by the Dealership showed that the engine failed the recall test and had to be replaced. The Dealership truthfully explained all of these facts to the Defendant. *See Armstrong v. Collins* 366 S.C. 204, 621 S.E. 2d 368, 375-76 (Ct. App. 2005) (citing *Brown v. Stewart*, 348 S. C. 33, 42, 557 S. E 2d 676, 680-81 (Ct. App. 2001) (noting that fraudulent misrepresentation "requires the conveyance of a known falsity.") As a matter of law, I find there is nothing false about the Dealership informing Defendant of the failed engine, and the obvious danger if it stalls while being driven on the interstate. It was also not a lie to mention the danger of a potential stall.

After being provided with the information regarding the recall, Defendant signed the Repair Order, agreeing that the car would be repaired. The Dealership did not have a duty to inform Defendant that he could take the risk to drive back to Atlanta. The element of "false misrepresentation" cannot be premised upon silence when there is no duty to speak. *See Pitts v. Jackson National Mutual Life Insurance Company,* 352 S.C. 319, 334, 574 S.E. 2d 502, 509 (Ct. App. 2002). Therefore, there is no admissible evidence to support Defendant's allegation that the Dealership committed fraud by replacing the engine without informing him of the option to take the risk on the drive back to Atlanta.

ELECTRONICALLY FILED - 2018 Nov 13 4:44 PM - JASPER - COMMON PLEAS - CASE#2017CP2700386

ELECTRONICALLY FILED - 2018 Nov 13 4:44 PM - JASPER - COMMON PLEAS - CASE#2017CP2700386

ii. The engine was not replaced with a new engine

Defendant now states that he is not claiming that the Dealership failed to install a new engine. Further, the evidence in the record shows that the recall repair was performed by the installation of a new engine. Therefore, there can be no fraud based on this allegation.

iii. The Dealership employees never get involved in a quote related to any accident

The undisputed evidence, in the light most favorable to the Defendant, shows that he expected GEICO to pay for the repairs, less his deductible. Therefore, GEICO had the sole and final authority to authorize payment for repairs to the Hyundai.

The undisputed evidence shows that GEICO's claims adjuster authorized replacement of different underbody shields than those included in the Collision Center's estimate and approved additional repairs after Defendant picked up the car from the Dealership. Therefore, it cannot be false that the Dealership's employees would state they do not get involved with the insurance company's quotes and what they will or will not approve. Therefore, this cannot be a basis for a fraud claim, and alleging fraud would be slanderous.

iv. The requirement that the Defendant had to return the rental car

Defendant does not claim the Dealership made a false statement to him regarding the return of the rental, only that he was required to return the rental to retrieve his car. It is undisputed that the rental car was delivered to Defendant at the Dealership and eventually had to be returned to Hertz. Rental cars are routinely provided while repairs are performed and are usually returned when the car is ready. Defendant admits that Hertz told him the rental car had to be returned or it would be reported as stolen. Defendant further admits that he attempted to return the rental car to the Hertz location at the Hilton Head Airport and was informed that he could not do so. Defendant also admits that he was told by two Jasper County Sheriff's deputies that he needed to return the Hertz rental car prior to

receiving his car.

Finally, Defendant admits that he did not act in reliance upon any statements by the Dealership. Defendant did not return the rental car until he was instructed to do so by the Jasper County Sheriff's Office. Defendant admits that he was informed by Deputy Dobson that Hertz requested the Deputy to get the rental to make sure it was returned. Therefore, as a matter of law, there is no fraud by the Dealership with respect to obtaining the rental car before returning the Hyundai.

v. The Dealership owned the Hertz Office on their premises

Defendant claims that a representative or manager from the Dealership told him they owned the Hertz on their premises. Defendant admits that the statement was made after he returned the rental car; therefore, it is not material: it could not have been made with the intent for the Defendant to rely upon it. Therefore, it is not a fraudulent as a matter of law.

In conclusion, as a matter of law, none of the statements alleged by the Defendant were fraudulent. Thus, his publishing statements almost daily for over a year that the Dealership engaged in "lies" and "fraud" were defamatory as a matter of law.

3. Evidence the Dealership Acted Unethically

Defendant claims the Dealership acted unethically in the following manner:

a. When its security officer followed him into the Walmart parking lot

A Dealership employee did observe Defendant for several minutes in the Walmart parking lot because he was concerned about Defendant's previous erratic behavior at the Dealership. I find that it is not unethical for a business to express concern for the safety of its employees and customers: this is a legitimate business purpose[2].

[2] Defendant cites a criminal statute, S.C. Code 16-3-1700 that requires 'a pattern of intentional, substantial and unreasonable intrusion into the private life of a targeted person that serves no legitimate purpose..." Defendant has failed

ELECTRONICALLY FILED - 2018 Nov 13 4:44 PM - JASPER - COMMON PLEAS - CASE#2017CP2700386

ELECTRONICALLY FILED - 2018 Nov 13 4:44 PM - JASPER - COMMON PLEAS - CASE#2017CP2700386

Defendant admits the employee did not approach him, nor did he follow him into any private areas. Defendant admits that he approached the employee while he was inside his parked car in the parking lot. Defendant admits he threatened the Dealership employee that he would use a six-iron if followed again. There is nothing unethical in having a security person follow a customer who exhibited erratic behavior into an adjacent parking lot in close proximity to the Dealership. Further, the matter was investigated, and no charges were brought. As a matter of law, the Dealership did not act unethically when its security officer observed Defendant at the Walmart on this one occasion.

b. The New Car Sales Manager addressed his concerns when he asked to speak with the owner or General Manager

On its face there is no evidence of unethical behavior related to this encounter. Defendant admits that the individual identified himself as the New Car Sales Manager. There is no possible claim of unethical behavior on the Dealership's account based on these undisputed facts. The Dealership does not act unethically by asking a manager to help, even from another department, in an attempt to deal with a customer's complaint.

c. The TeleCheck machine could not read his check.

TeleCheck is a service in which the authenticity of checks are examined in order for that company to guarantee the check. Defendant admits that the check was old and admits that the TeleCheck machine was unable to read it. It is a common business practice to use a check verification machine, especially for a check as large as $1,000. Defendant's claim that a different machine at a different location was able to read the check later is not evidence of unethical or unprofessional behavior on the part of the Dealership.

---

to present sufficient evidence to support such a charge.

ELECTRONICALLY FILED - 2018 Nov 13 4:44 PM - JASPER - COMMON PLEAS - CASE#2017CP2700386

4. Evidence of Harassment or Intimidation

a. Defendant claims he placed his personal belongings along the side of the road and that unknown persons stole his items while he was standing some distance away

b. Defendant claims that while he was standing on the roadway he left his car in the Walmart parking lot, only to return to find the doors and windows were open

c. Defendant claims an employee of the Dealership stole his sign

Defendant presented no admissible evidence that any of these acts were committed by the Dealership or at its direction. The Jasper County Sheriff's Office's investigated Defendant's claims that his keys and briefcase were stolen. The Sheriff's office did not find sufficient evidence to bring charges related to any of Defendants' claims. Defendant admitted that he placed his keys and briefcase alongside a busy highway while he was picketing.

Defendant claims that on one occasion he saw an unknown person who was dressed in a similar manner to a Dealership salesman take his sign. Defendant has presented no evidence that the unknown person was acting at the direction of the Dealership. If a servant acts for some independent purpose of his own, wholly disconnected with the furtherance of his masters' business, his conduct falls outside the scope of his employment. *Hancock v. Aiken Mills*, 180 S.C. 93, 185 S.E. 188 (1936).

Plaintiff is in the business of selling and servicing automobiles. None of the acts alleged by the Defendant can be said to be in furtherance of Plaintiff's business. Defendant may have issues with the reaction of one or more individuals in response to his publications; however, there is no evidence that these activities were at the direction of the Dealership or in furtherance of its business. Therefore, I conclude that it is defamatory to accuse the Dealership of acting unethically.

C. Unprivileged Publication

It is well established that tort liability under state law, even in the context of litigation between

private parties, is circumscribed by the First Amendment. *See New York Times v. Sullivan*, 376 U.S. 254, 264-65, 84 S.Ct. 710,11 L.Ed 2d 686 (1964). Where, as here, the First Amendment is implicated by the assertion of tort claims arising from speech, this Court has the obligation "to make an independent examination of the whole record" in order to make sure that my decision "does not constitute forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of U.S. Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, L.Ed. 2d 502 (1984).

United States Supreme Court opinions must be considered in conjunction with any state court decisions:

> Since the 1960s, the Supreme Court has attempted "to define the proper accommodation between the law of defamation and the freedom of speech... protected by the First Amendment. *Gertz v. Robert Welch Inc.* 418 U.S. 323, 338 (1974). The effect of these decisions has been the interweaving of federal constitutional principles into the fabric of state defamation law. Because state defamation rules have become inextricably tied to these constitutional principles, it is not possible to review defamation issues in a state law vacuum.

Holtzscheiter II, 332 S.C. 502, 517, 506 S.E. 2d 497, 505 (Toal, J. concurring in result in separate opinions.)

The United States Supreme Court has held that there is "no constitutional value in false statements of fact" *Gertz v. Robert Welch Inc.* 418 U.S. 323, 338 (1974). Such false statements do not materially advance society's interest in "uninhibited, robust, and wide-open" debate on public issues and "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." *Jablonski v. New Hampshire*, 315 U.S. 568, 572 (1942). The Supreme Court has 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 counter speech, however persuasive or effective." *Hustler Magazine*

ELECTRONICALLY FILED - 2018 Nov 13 4:44 PM - JASPER - COMMON PLEAS - CASE#2017CP2700386

v. Falwell, 485 U.S. 46, 51 (1988).

Therefore, the Supreme Court has recognized that the type of speech to which state tort liability may attach is relevant. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16, 110 S.Ct. 2695, 111 L.Ed. 2d (1990) is instructive. In *Milkovich*, the Supreme Court assessed whether a newspaper enjoyed First Amendment protections for a column that referred to a wrestling coach as a "liar," based on his allegedly deceitful testimony before a state athletics council. 497 U.S. at 4-5. The newspaper maintained that the column merely stated its author's opinion, and thus was subject to categorical First Amendment protection. *Id.* at17-18. The Supreme Court rejected this contention, ruling instead that the "dispositive question" was "whether a reasonable fact finder could conclude that the statements in the [newspaper] column imply an assertion that [the coach] perjured himself in a judicial proceeding." *Id.* at 21. Concluding that the column's assertions were "susceptible of being proved true or false," the Court determined that they were not protected by the First Amendment. *Id.*

Although there is no categorical constitutional defense for statements of "opinion," the First Amendment protects "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." *Milkovich*, 497 U.S. at 20. As to the Defendant's signs and statements, I find the only reasonable interpretation is that they are stating actual facts that are defamatory. In light of *Milkovich*, I find that the Defendant's statements were "susceptible of being proved true or false," and are likewise not protected by the First Amendment.

Further, Defendant's grievances are of a purely private concern. He has other remedies available to him and should not be allowed to damage the Dealership's reputation with his false statements. Defendant's false claims that he was treated unprofessionally, intimidated, and harassed are based on the Dealership's alleged treatment of him after he began picketing. Defendant's signs do not inform the public that his unsubstantiated claims are based on the manner in which he was

ELECTRONICALLY FILED - 2018 Nov 13 4:44 PM - JASPER - COMMON PLEAS - CASE#2017CP2700386

treated while protesting; instead, the signs imply that the Dealership 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 an injunction. *San Antonio Comm. Hosp. v. Southern Cal. Dist. Council of Carpenters*, 125 F.3d 1230 (9th Cir. 1997). The Carpenters Union argued that the term "rat" had an 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. Statements made by Defendant likewise imply that the Dealership is dishonest in its business dealings and are designed to deter customers from doing business with the Dealership.

D. Publishing Statements to Third Parties

Defendant admits he published the statements by standing with his signs on a public roadway for over a year and speaking to passersby regarding his statements about the Dealership.

E. Damages

The Dealership has established a good reputation in the community and had high customer satisfaction ratings. The Dealership has experienced a reduction in sales during the period of Defendant's defamatory action. Customers informed the Dealership that they were not purchasing cars because of the Defendant's statements.

Therefore, this Court finds that Defendant's statements that the Dealership is acting fraudulently, unprofessionally, untrustworthily, dishonestly, unethically, or has engaged in bait and switch activities are defamatory as a matter of law. This Court further finds the speech is not protected by the First Amendment. Plaintiff's Partial Motion for Summary Judgment is therefore GRANTED

ELECTRONICALLY FILED - 2018 Nov 13 4:44 PM - JASPER - COMMON PLEAS - CASE#2017CP2700386

as to its defamation cause of action.

II. PERMANENT INJUNCTION

The United States Supreme Court has made it clear that defamatory speech is not protected by the First Amendment. See *Beauharnais v. Illinois*, 343 U.S. 250 (1951) (Frankfurter, J) (libelous utterances are not...within the area of constitutionally protected speech.) United States Supreme Court authority is binding on courts in South Carolina when it deals with constitutional rights.

As set forth above, Defendant's signs and statements are defamatory as a matter of law. In addressing unprotected pornographic speech, the Supreme Court stated:

> ...liberty of speech... is not an absolute right, and that "the protection even as to previous restraint is not absolutely unlimited."

Kingsley Books Inc. v. Brown 354 U.S. 436, 441 (1957) (Frankfurter, J)

The rule has been stated as follows:

> [T]he prohibition [against enjoining defamation] is not absolute, as there are exceptional cases in which a prior restraint is acceptable. For instance, an injunction would issue to prohibit a defendant from reiterating statements which had been found in current and prior proceedings to be false and libelous to prevent future injury to the libel plaintiff's personal reputation and business relations. An injunction restraining the publication of matter defaming a plaintiff personally [is] proper where there [is] no adequate remedy at law because of the recurrent nature of the defendant's invasions of the plaintiff's rights, the need for a multiplicity of actions to assert the plaintiff's rights, the imminent threat of continued emotional and physical trauma, and the difficulty of evaluating the injuries in monetary terms.

42 Am.Jur.2d, Injunctions, § 97 (2010) (footnotes omitted)

The Pittsburgh Commission on Human Relations held that petitioner had violated a city ordinance by using an advertising system in its daily newspaper whereby employment opportunities were published under headings designating job preferences by sex. *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations,* 413 U.S. 376, 390 (1973). The United States Supreme Court affirmed the lower court's bar to referring to sex in employment headings, unless the want ads placed beneath them related to employment opportunities not subject to the ordinance's prohibition against sex

ELECTRONICALLY FILED - 2018 Nov 13 4:44 PM - JASPER - COMMON PLEAS - CASE#2017CP2700386

discrimination. The Supreme Court recognized that where an order is based on a continuing course of repetitive conduct, the court is not asked to speculate as to the effect of publication. In the present case, Defendant has engaged in a continuing course of conduct for over a year and it is known to have a detrimental effect on the Dealership. Therefore, an injunction would be appropriate.

The First Circuit likewise has stated that an "injunction that is narrowly tailored, based on a continuing course of repetitive speech, granted only after a final adjudication on the merits that the speech is unprotected, does not constitute an unlawful prior restraint." *Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993). *See also McCarthy v. Fuller*, 810 F.3d 456, 462 (7th Cir. 2015) (stating that, although the Supreme Court "has not yet addressed the issue," "[m]ost courts would agree . . . that defamatory statements can be enjoined . . . provided that the injunction is no 'broader than necessary to provide relief to plaintiff while minimizing the restriction of expression.'" (quoting *Balboa v. Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 352 (Cal. 2007)). Therefore, this Court finds that a permanent injunction preventing Defendant from publishing the defamatory statements that the Dealership acted fraudulently, unprofessionally, untrustworthily, dishonestly, unethically, or has engaged in bait and switch activities is hereby GRANTED.

III. SUMMARY JUDGMENT REGARDING DEFENDANT'S COUNTERCLAIMS

A. Conversion

Conversion is an unauthorized assumption and exercise of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights. *Steele v. Victory Savings Bank*, 295 S.C. 290, 368 S.E.2d 91 (Ct. App.1988). A claim of conversion is inapplicable where the "[i]ntention [is] good, the duration brief, the event harmless." W. Page Keeton, et. al., *Prosser and Keeton on the Law of Torts* § 15.

The Dealership has a long-standing relationship with the Hertz rental office located nearby.

ELECTRONICALLY FILED - 2018 Nov 13 4:44 PM - JASPER - COMMON PLEAS - CASE#2017CP2700386

The Dealership originally arranged for the rental car while the engine recall was being performed and it is standard procedure for customers to return the rental when they pick up their vehicles. There is no dispute that the Defendant received his Hyundai after the rental was returned.

Defendant's claim is that he had a ten-minute conversation with an employee of the Dealership regarding whether he was required to return the rental car prior to receiving the Hyundai. Defendant refused to return the rental, and then called 911 to resolve the issue. Defendant admits that the Jasper County Deputy required him to leave the keys to the rental car before he obtained his Hyundai. This is standard operating procedure between rental companies and repair facilities, and therefore it does not meet the definition of conversion. The intention of the Dealership was to retrieve the Hertz car, the duration of keeping the Hyundai was brief, and it certainly was harmless as Defendant suffered no damages when the police required him to return the car. Therefore, summary judgment should be granted in the Dealership's favor as to Defendant's conversion cause of action.

B. Deceptive Service Tactics

Defendant brings a cause of action for "deceptive service tactics." The Court assumes he is suing for unfair trade practices. In order to maintain a cause of action under the South Carolina Unfair Trade Practice Act, Plaintiff must show:

> (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected the public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s).

S.C.Code § 39-5-10 *et seq*. (Supp.2007).

Negligence alone is insufficient to establish an unfair or deceptive practice sufficient to support a claim under the SCUTPA. *See Clarkson v. Orkin Exterminating Co.*, 761 F.2d 189, 190-91 (4th Cir. 1985).

Defendant claims that the Dealership's statement that it was unsafe to drive the Hyundai back

ELECTRONICALLY FILED - 2018 Nov 13 4:44 PM - JASPER - COMMON PLEAS - CASE#2017CP2700386

to Atlanta when it failed the engine recall test was a "deceptive service tactic." The undisputed evidence is that the manufacturer identified the risk of a stall while operating the vehicle that failed the recall engine test. A stall on the interstate could create a dangerous driving condition.

The manufacturer further instructed the Dealership to replace any engine that failed the test. Defendant does not present any evidence that his vehicle was not subject to the recall, that his car did not fail the recall inspection, that his engine did not need to be replaced, or that he did not authorize the repair. Therefore, as a matter of law, disclosing the manufacturer's safety and recall information to a customer is not a deceptive service tactic or an unfair trade practice.

Defendant also claims the failure of the Dealership's TeleCheck machine to read his check was a "deceptive service – payment tactic." It is common practice for businesses to use companies that guarantee checks in case they bounce. It is a common practice that these companies have their own machines that are able to verify a check. Defendant admits the check was old and that he observed that it was unable to be read by the machine. I find is a matter of law that there's nothing deceptive in using a check verification system. Further, Defendant did not suffer any loss as a result of the inability of the TeleCheck machine to process this check. He admits that he returned the next day and used his sister's credit card to pay his deductible. Therefore, I find as a matter of law that Defendant has not made a claim for a deceptive service or trade practice.

C. Violation of Constitutional Civil Rights

Defendant has presented no evidence that his constitutional rights have been violated. Defendant does not have a constitutional right to publish defamatory statements. If Defendant had a right to publish defamatory statements, he has exceeded those rights. He has protested with his signs over the course of a year and has been interviewed by the local newspaper. Any further protesting would not serve any useful purpose in educating the public about the Dealership.

ELECTRONICALLY FILED - 2018 Nov 13 4:44 PM - JASPER - COMMON PLEAS - CASE#2017CP2700386

Defendant's claims that a Dealership employee stole his car keys, opened his windows, and stole his signs are all unrelated to any constitutional rights he may have. Defendant does not claim that these activities were done under color of law. *See Cousins v. Higgins*, Civil No. 1:14-CV-515-DBH (D. Me., June 15, 2015) (finding that volunteer firefighters did not violate Plaintiffs' freedom of speech by stealing a sign Plaintiffs erected in front of their burned buildings after a fire where the firefighters were not acting under color of law.)

D. Standard Business Guidelines and Practices Not Followed

Defendant alleges the Dealership failed to follow standard business guidelines and practices. However, he has presented no evidence as to which "standard business guidelines and practices" that the Dealership has a duty to follow. He has identified himself as an authority in what should constitute these business practices, but this does not rise to the level of a cause of action.

Furthermore, the evidence is not in dispute that the practices noted by Defendant are standard in the industry. Defendant notes that multiple supplemental service orders were created during the course of the service work on his vehicle. Vehicle repair orders often require supplementation as repairs are performed. A portion of the repair work was completed in the Dealership's service department. Separate repair orders were necessary for the work performed under the manufacturer's recall and the repairs covered by GEICO. Repair estimates were supplemented once additional information was provided to GEICO after its initial approval. These standard procedures are not deceptive.

ELECTRONICALLY FILED - 2018 Nov 13 4:44 PM - JASPER - COMMON PLEAS - CASE#2017CP2700386

Plaintiff's Motion for Summary Judgment as to Defendant's Counterclaims is, therefore, GRANTED.

AND IT IS SO ORDERED.

____
The Honorable Carmen T. Mullen
Presiding Judge

____________________, South Carolina

This ______ day of _________________, 2018.

ELECTRONICALLY FILED - 2018 Nov 13 4:44 PM - JASPER - COMMON PLEAS - CASE#2017CP2700386

ELECTRONICALLY FILED - 2018 Nov 13 4:44 PM - JASPER - COMMON PLEAS - CASE#2017CP2700386

Jasper Common Pleas

Case Caption:	First Team Hyundai, Llc Dba Hilton Head Hyundai VS Gregory Hackney
Case Number:	2017CP2700386
Type:	Order/Summary Judgment

So Ordered

s/Carmen T Mullen 2142