THE STATE OF SOUTH CAROLINA
In The 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 FINAL BRIEF

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STATEMENT OF THE CASE

Appellant simultaneously filed its Summons and Complaint along with a Motion and Memorandum for a Temporary Restraining Order on September 22, 2017. The Complaint alleged that Respondent, a customer of its service department and body shop, disputed whether his insurance carrier properly covered all the damages to his vehicle. He also refused to return his rental car and was upset that his check for his deductible was unnegotiable. He then demanded payment to "go away."

Respondent has continuously picketed, making defamatory statements about the Appellant through written signs and oral statements, and has published the defamatory statements to potential customers outside of Appellant's business almost daily. The Temporary Restraining Order sought to restore matters to the status quo pending the outcome of the libel and slander case.

Appellant filed an Amended Motion for Temporary Restraining Order and/or Preliminary Injunction on October 6, 2017 adding a request for attorney's fees and costs.

Respondent answered on October 23, 2017, *pro se*, by filing a document numbering 128 pages, that was not served on Appellant until after the hearing. The Answer essentially admitted that the initial dispute was between the third parties and Respondent.

The hearing was held on October 24, 2017. Appellant examined one of its witnesses and the lower court allowed the pro se Respondent to cross examine the witness. After only a few questions, the lower court entered into lengthy discussions with Respondent, and then announced that the time for the hearing had ended. No other evidence or testimony was allowed.

The lower court issued its order denying the Motion on October 31, 2017. Appellant filed a Motion to Alter or Amend on November 9, 2017 which was denied on December 6, 2017.

Respondent filed a response to Appellant's Motion on November 15, 2017. Notice of Appeal was filed on December 11, 2017.

STATEMENT OF THE FACTS

"Glass, china, and reputations, are easily cracked, and never well mended."
Benjamin Franklin

Hilton Head Hyundai has been a model corporate citizen in Jasper County for over 15 years. They have invested over $500,000 in local charities, and spent over $70,000 a month in advertising. (R. 181-182) They have achieved outstanding customer service reviews. (R. 183, 226-227) Their reputation has been outstanding prior to the blemish that is daily inflicted by Respondent, and his complaints stem from issues he admits he had with third parties. (R.202-203) Now, Respondent stands outside Appellant's business on an almost daily basis with signs that accuse the Appellant of unethical and deceptive business practices and potential customers have refused to do business with Appellant as a result.

Respondent, an Atlanta, Georgia resident, brought his five-year-old Hyundai to Appellant stating that it had been damaged in an incident with a pothole. (R. 205) The damage to Respondent's car required both body shop and service department work. Appellant also identified a potentially serious engine recall, which was repaired under warranty. (R. 118, 189)

Respondent obtained a rental car from the Hertz office located on Appellant's property. Respondent insisted that his insurance company, GEICO, pay for the damages and rental car. Appellant wrote an estimate, and there were four items that GEICO would not approve. (R. 187) Rather than showing his contempt with GEICO, Respondent has taken it out on Appellant.

When the authorized repairs were completed, a problem arose out of the check Respondent tendered attempting to pay for his deductible. It was in such bad physical condition

that Appellant's check machine would not recognize it. (R. 189) Respondent finally got his sister to pay the deductible by use of her credit card. (R. 207) Respondent refused to return the Hertz rental when his car repair was completed. In fact, Respondent called the police, who ordered him to return the rental car. (R. 209)

Respondent demanded a payment in an amount to give Appellant a "gut punch" to "go away" (R. 192) and made physical threats against Appellant's employees.[1] When his demands were not met, he began picketing Appellant, and has continued to do so on an almost daily since August of 2017. He freely admits that his signs say under Appellant's name: "FRAUD, FRAUD, LIES, LIES." (R. 212), and "UNPROFESSIONAL UNETHICAL HARASSMENT INTIMIDATION." (R. 37, 212)

Hilton Head Hyundai sought a preliminary injunction to preserve the status quo while the underlying facts show that Respondent's actions were the reasons several customers would not do business with Appellant. (R. 24) Respondent continues, almost on a daily basis, to libel and slander Appellant in his admitted attempt to ruin its reputation, by holding up signs and stopping and making oral statements to potential customers. (R. 212) The customers must use a deceleration lane to enter the dealership, and this is where Respondent stands.

ARGUMENT

I. THE LOWER COURT ERRED IN REQUIRING A BALANCING TEST IN ORDER TO GRANT A PRELIMINARY INJUNCTION (ISSUES I & V)

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. The lower court judge held that "...courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief," citing a United States Supreme

[1] Respondent threatened to kill one of Appellant's employees (R. 191) and threatened to wrap a golf club around the head of another employee. (R. 27, Affidavit of David Salzmann, R. 214)

Court Opinion. (R. 2). The lower court also stated that the "balance of harms would still weigh in favor of denial as [Respondent] has demonstrated he would suffer damages of the most serious kind if the injunction was issued..." (R. 3)

The South Carolina Supreme Court has rejected the application of a balancing test as a requirement for a preliminary injunction. *Compton v South Carolina Dept. of Corrections*, 392 S.C. 361, 366, 709 S.E.2d 639, 642, n. 4 (2011) (citing *Poynter Inves., Inc, v. Sentry Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010). Therefore, it was an error of law for the lower court to apply a balancing test.[2]

The granting or denial of an injunction is reviewed for abuse of discretion. *Strategic Resources Co., v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). "An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law." *Peak v. Spartanburg Reg'l Health Care Sys.*, 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct. App. 2005). The trial court abused its discretion in applying the balancing test. Appellant respectfully requests the denial of its preliminary injunction be reversed.

II. THE LOWER COURT ERRED IN REQUIRING APPELLANT TO MAKE A "CLEAR SHOWING" THAT IT IS LIKELY TO SUFFER IRREPARABLE HARM IF THE PRELIMINARY INJUNCTION IS DENIED (ISSUES II AND IV)

The lower court applied the incorrect standard requiring Respondent to make a "clear showing" of irreparable harm. In evaluating whether a plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether plaintiff has made a sufficient prima facie showing of entitlement of relief.

[2] Even under a balancing test, a preliminary injunction should be granted. The lower court recognized at the hearing that Respondent's issue was with the insurance company, and not the Appellant (R. 202).

Compton, supra, 392, S.Ct. at 367, 709 S.Ed.2d at 642; *Helsel v. City of North Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.d2d 826 (1992).

The standard cited in the lower court's Order comes from the Fourth Circuit Court of Appeals, and not the Supreme Court of South Carolina. As then Chief Justice Toal said in the case of *Scratch Golf v. Dunes West,* 361 S.C. 117, 121, 603 S.E.2d 905 (2004):

> [A federal court] decision limiting a federal court's equitable powers is not dispositive of whether a state court judge may restrain a defendant's assets prior to the attachment of a money judgment. There is no federal question here that would cause the [*Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999)] decision to be binding in this state court proceeding, thus we decline to apply the *Grupo* analysis to this matter.

Likewise, this case is not based on a federal question, but rather the common law protection of well-earned property rights and restoring the status quo from continuing conduct that is causing harm to the Appellant. Therefore, the case relied upon by the lower court, *Hodges v. Abraham,*[3] should not be controlling.

Instead of requiring a "clear showing" of irreparable harm, the South Carolina standard is an injunction should be granted if a sufficient prima facie showing of facts demonstrate that relief is reasonably necessary to preserve the rights of the parties during the litigation:

> The purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Emanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that his relief is **reasonably necessary** to preserve the rights of the parties during the litigation. *County of Ridgeland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). Accordingly, the applicant must establish three elements to receive this relief: 1) he will suffer immediate, irreparable harm without the injunction; 2) he has a likelihood of success on the merits; and 3) he has no adequate remedy at law. *Scratch Golf Company v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004).

Compton v. South Carolina Department of Corrections, 392 S.C. 361-366, 709 S.E.d2d 639, 642

[3] 253 F.Supp.2d 846, 864 (D.S.C. 2002), citing *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551 (4th Cir. 1994).

(2011). (emphasis added)

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). Accordingly, the lower court's analysis should have been limited to only whether Appellant's Motion stated a prima facie case that Respondent's slanderous and libelous actions will cause irreparable harm and it was an abuse of the trial court's discretion to require a "clear showing" of irreparable harm.

III. 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 (ISSUES II AND III)

The lower court erred in failing to grant the injunction because it will preserve the status quo and avoid potential irreparable harm to the Appellant while the litigation is pending. See *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 601, 553 S.E. 2d 110, 121 (2001); *MailSource LLC v. MA Bailey & Assoc.*, 356 S.C. 363, 368, 588 S.E.2d 635 638 (Ct. App. 2003). Again, the burden is to make a prima facie showing of entitlement to relief, *Compton,* supra, 392 S.C. 367, 709 S.E.2d at 642.

Actions for injunctive relief are equitable in nature. *See Grosshuesch v. Cramer*, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005). In equitable actions, an appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence. *Denman v. City of Columbia,* 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010).

The unopposed evidence at the hearing established all three elements: 1) the Appellant presented evidence of lost sales impossible to measure due to the slanderous and libelous comments of Respondent (R. 176); 2) Respondent's statements regarding the Appellant are

defamatory[4] and Respondent agreed his complaints center around the actions of third parties thus showing Appellant's likelihood of success, (R. 202); and 3) there is no adequate remedy at law to protect the loss of reputation.

The lower court erred in not finding that the Appellant will suffer irreparable harm as its reputation is damaged daily. "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). Respondent did not dispute that his actions are causing damage to the Appellant.

Appellant presented prima facie evidence that Respondent's actions will cause it irreparable harm and that its business was already being negatively impacted:

> 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).

Appellant presented affidavit evidence that customers were calling about Respondent's actions and that two consumers stated explicitly that they based their decision not to do business

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[4] 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) unchastity; or (5) 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). Defendant is accusing Hilton Head Hyundai of being unfit in its business, therefore, his statements are actionable *per se.*

Libel is actionable per se if it involved 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 (1998) (*Holtzscheiter II*). Essentially, all libel is actionable *per se.*

on Respondent's actions. (R. 24) The only actions of the Respondent are the defamatory actions. The Court's requirement that these customers verbally link their decision not to do business with Appellant to the slanderous and libelous statements of the Respondent imposes an improper standard.[5]

Appellant has established a prima facie case of irreparable harm. The South Carolina standard for an injunction is to preserve the status quo to avoid potential irreparable injury, and not to prove actual irreparable injury. *See Zabinski, supra.*

IV. THE LOWER COURT ERRED IN CONCLUDING THE INJUNCTION WOULD BE PRIOR RESTRAINT (ISSUES VII, VIII AND IX)

The lower court concluded that defamation could never be enjoined. This conclusion was based on a misreading of the United States Supreme Court opinions. The court cited *Elrod v. Burns*, 427 U.S. 346 (1976) for the proposition that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constituted irreparable injury. (R. 3) However, the *Elrod* decision was a plurality opinion, and while two of the Justices joined the result, "they cannot join in the plurality's wide-ranging opinion." *Elrod*, 427 U.S. at 374. Therefore, the quotations cited by the lower court was from only three of the Justices, and is therefore not controlling authority.

The lower court also misapplied the holding in *Tory v. Cochran*, 544 U.S. 734 (2005). That case involved a preliminary injunction against a trial attorney, Johnnie Cochran, who represented O.J. Simpson in his criminal case. His office was being picketed, but during the pendency of the case, Johnnie Cochran died. Since he died, the Supreme Court concluded:

> Since picketing Cochran and his law offices while engaging in injunction-forbidden speech could no longer achieve the objectives that the trial court had in mind (i.e., coercing Cochran to pay a "tribute" for desisting in this activity), the

[5] Time constraints caused the hearing to be ended before re-direct of the Appellant's witness could be conducted, or Respondent could be cross examined.

> grounds for the injunction are much diminished, if they have not disappeared all-together. Consequently, the injunction, as written, now amounts to an overly broad prior restraint upon speech, lacking plausible justification.

Tory, 544 U.S. at 738.

Respondent is also attempting to coerce Appellant to pay a "tribute" for desisting in his activity. (R. 192) However, Appellant's business is alive and continuing, and therefore the "grounds for the injunction" are not diminished.

Finally, the Supreme Court in *Tory* remanded the case and stated:

> We express no view on the constitutional validity of any such new relief, tailored to the changing circumstances should it be entered.

Tory, 544 at 738 – 739.

The idea that a preliminary injunction can never be used in a libel and slander matter has been criticized, as eloquently stated by Judge Posner in *McCarthy v. Fuller*, 810 F.3d 456, 462, (7th Cir. 2015):

> This has led to the belief in some quarters that defamation, which is a type of speech, can never be enjoined. The problem with such rule is that it would make an impecunious defamer undeterrable.

Respondent admitted in the hearing that he is "in between things." (R.211) He also admitted during the hearing that his issues were with the insurance company, (R. 202-203) yet he continues to picket the Appellant. If no injunction is allowed, this would allow Respondent to continue forever, undeterred.

The United States Supreme Court has made it clear that there are exceptions to prohibiting injunctions as the lower court recognized in its Order (R. 4). As Chief Justice Frankfurter has stated in *Kingsley Books Inc. v. Brown* 354 US 436, 441 (1957):

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

Courts in other jurisdictions have granted numerous injunctions directed at allegedly defamatory statements and statements designed to injure business reputation.[6]

There are well recognized exceptions to a First Amendment privilege: 1) when the speech impugns the Appellant's property interest,[7] and 2) when Respondent is engaged in a continuing course of conduct causing the Appellant harm.[8] 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. 194, 213)

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[6] *See San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1238 (9th Cir. 1997) (affirming a preliminary injunction prohibiting display of a banner stating, "This medical facility is full of rats"); *Emack v. Kane*, 34 F. 46, 50-51 (C.C.N.D. Ill. 1888) (enjoining defendant from making statements aimed at scaring plaintiff's customers away and ruining his reputation); *Frontier Mgmt. Co. v. Balboa Ins. Co.*, 622 F. Supp. 1016, 1021 (D. Mass. 1985) (issuing a preliminary injunction directed at statements that "the program was unprofitable"); *Martin v. Reynolds Metals Co.*, 224 F. Supp. 978, 984 (D. Or. 1963) (ordering removal of signs pending completion of case), *aff'd*, 337 F.2d 780 (9th Cir. 1964); *In re Davis*, 334 B.R. 874, 888 (Bankr. W.D. Ky. 2005) (ordering removal of website and enjoining defendant from creating another similar website), *aff'd in part and rev'd in part*, 347 B.R. 607 (W.D. Ky. 2006); *Glassman v. Feldman*, No. 102988 (N.Y. Sup. Ct. Oct. 2, 2012) (granting a temporary restraining order ordering removal of allegedly defamatory statements from the Internet); *Amalgamated Acme Affiliates, Inc. v. Minton*, 33 S.W.3d 387, 393, 398-99 (Tex. App. 2000) (affirming the lower court's injunction prohibiting enumerated communications); *Bat World Sanctuary v. Cummins*, No. 352-248169-10, 2012 WL 4050469 (Tex. Dist. Ct. Aug. 27, 2012) (prohibiting the defendant from posting anywhere on the Internet or publishing in any way any of the statements and photographs listed in plaintiff's complaint).

[7] *See Barlow v. Sipes*, 744 N.E.2d 1 (Ind. Ct. App. 2001)(recognizing that a business' reputation and goodwill are property rights and enjoining the Barlows from making defamatory statements against Sipes Body Shop because the speech enjoined by the preliminary injunction was of little constitutional import and that the injunction primarily operates to address alleged private wrongs committed by the Barlows against Sipes Body Shop, imputing dishonest business practices and discouraging individuals from patronizing the automobile repair business). *See also Carter et al. v. Knapp Motor Co.*, 243 Ala. 600, 11 So.2d 383 (1943) (holding that an automobile dealer was entitled to an injunction to restrain a defendant who, for the purpose of coercing the complainant to give him another car, exhibited in the street a sign disparaging the quality of the cars sold by him.); *See also Guion v. Terra Marketing of Nevada, Inc.*, 523 P.2d 847 (Nev. 1974) (enjoining Guion from displaying signs in from 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.").

[8] See *Lothschuetz v. Carpenter*, 898 F.2d 1200 (6th Cir. 1990) (finding an injunction was necessary given Carpenter's frequent and continuing defamatory statements).

CONCLUSION

Respondent is damaging Appellant's business through defamatory statements because Appellant would not give in to his demand that Appellant pay him money to go away. The trial court abused its discretion by applying a balancing test as a requirement for a preliminary injunction, which has been rejected by the South Carolina Supreme Court, and by requiring a "clear showing" of irreparable harm rather than a prima facie showing. Finally, the lower court misconstrued the law to say that an injunction is never available for defamation when it is clear that numerous courts have found otherwise.

Appellant therefore, respectfully requests that this Court reverse the finding of the lower court and issue a preliminary injunction against the Respondent.

Respectfully submitted,

Date 31 July 2018

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CERTIFICATE OF COUNSEL

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

31 July, 2018

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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 Final Brief, Appellant's Final Reply Brief, and copy of the Record on Appeal by depositing a copy in the U.S. Mail, sufficient first class postage prepaid, on July 31, 2018, addressed to Greg S. Hackney, 30 Old Vermont Place, Sandy Springs, GA 30328.

July 31, 2018

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