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. 2018-002186

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

v.

Greg S. Hackney ..... Appellant

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF THE CASE[1]

Commencement of the Action

Respondent commenced this action by filing a Summons and Complaint along with a Motion and Memorandum for a Temporary Restraining Order on September 22, 2017. The Complaint alleged that Appellant, a customer of its service department, was damaging Respondent's reputation and business daily by making defamatory statements through picketing with written signs and oral statements.

Motion for Temporary Restraining Order

Respondent filed an Amended Motion on October 6, 2017, adding a request for attorney's fees and costs. Appellant answered on October 23, 2017.

The hearing was held on October 24, 2017. The lower court denied the TRO on October 31, 2017. Respondent filed a Motion to Alter or Amend on November 9, 2017 which was denied on December 6, 2017. Respondent filed an appeal on December 11, 2017. The appeal was dismissed on November 16, 2018 when the Honorable Carmen T. Mullen granted Respondent's Motion for Partial Summary Judgment and entered a permanent injunction against Appellant.

Appellant's Motions

Appellant filed an Amended Answer and Counterclaim on November 22, 2017. Respondent filed a Reply to Appellant's Counterclaims on December 20, 2017.

Appellant filed a Motion to Stay his duty to respond to discovery on June 14, 2018.[2] Respondent filed its Memorandum in Opposition on June 19, 2018. Appellant's Motion to Stay

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[1] Respondent respectfully asks that the Court disregard the contested matters argued in Appellant's Statement of the Case. Rule 208(b)(1)(C) of the South Carolina Rules of Appellate Procedure provides that the Statement of the Case shall not contain contested matters.

[2] Appellant's Motion was later rendered moot by the granting of partial summary judgment.

. was heard August 22, 2018 before the Honorable Carmen T. Mullen and an Order was issued October 17, 2018 requiring the parties to mediate by November 1, 2018. The parties had attempted mediation on October 4, 2018 but were unable to reach a resolution.

Motion for Partial Summary Judgment

Respondent filed a Motion for Partial Summary Judgment on August 23, 2018. Appellant filed a Motion on October 8, 2018 requesting that his late-served responses to Requests to Admit be considered timely. Respondent filed a Memorandum in Opposition on October 30, 2018.

A hearing was held October 31, 2018 before the Honorable Carmen T. Mullen. The lower court granted Respondent's Motion for Partial Summary Judgment by Order filed November 13, 2018. Appellant filed this appeal December 11, 2018.

STATEMENT OF THE FACTS

The automotive business is one depending upon reputation. Respondent has been a model corporate citizen in Jasper County for over 15 years and built an excellent reputation in the community. (R.). Appellant threatened this by standing outside Respondent's business on an almost daily basis for a year with signs accusing Respondent of unethical and fraudulent business practices.

Appellant, a resident of Atlanta, brought his Hyundai Sonata to Respondent's Service Department on May 24, 2017 after it was damaged by a pothole. (R.). He did not purchase the car from Respondent, and this was his first visit to the dealership. An engine recall with a free replacement was discovered. Thus, the repairs were performed in three phases: engine recall, repairs at the Service Department, and repairs at the separate Collision Center. Hyundai's recall information warned the car could stall creating a dangerous situation. (R.). Therefore, if a car failed the test, Respondent was to replace the engine. (R.). Appellant's engine failed the test,

requiring replacement. (R.). Respondent explained the cost-free required work and Appellant agreed without objection and signed the Repair Order. (R.).

Appellant delayed for weeks picking up his car and his behavior became increasingly erratic when he picked up the car. He first became upset that GEICO had not authorized all the repairs he wanted performed. Appellant's allegations that repairs were not completed is false. All repairs approved by GEICO were completed.[3] Appellant admits he never requested that Respondent make repairs subsequently approved by GEICO. (R. , p. 31, l. 14-p. 32, l. 9).

Appellant next became upset that Respondent's Telecheck machine was unable to read an old wrinkled check he attempted to use to pay his deductible. (R.). Then, when he returned with an alternative payment method, he refused to return his rental car, which had been kept well beyond the rental period. (R.). Instead, he called the police, who required him to return the rental. (R.).

Appellant then began to picket the dealership with signs that stated, under Respondent's name:

LIES LIES FRAUD FRAUD

(R. Amended Answer, p. 10)

Appellant rejected Respondent's attempts to resolve his concerns in a reasonable manner. (R. Transcript of TRO Hearing)[4]. Instead, he demanded money and threatened to kill one of Respondent's employees.[5] After he was placed on Trespass Notice (R.) he changed his sign to read under Respondent's name:

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[3] R. , Exhibit A.

[4] Appellant's unreasonable behavior is further demonstrated by the statements made on page 3 of his own Brief that he sent 98 pages of documents to the Jasper County Sheriffs Office requesting information. A review of these documents (R.) shows that they are primarily letters to the Sheriff's Office demanding explanations regarding the actions of its Officers.

[5] Appellant also physically threatened David Salzman, one of Respondent's security personnel who was concerned for the safety of Respondent's employees and customers and observed Appellant for several minutes when he returned to his car in the Wal-Mart parking lot. (R.).

UNPROFESSIONAL
UNETHICAL
HARASSMENT
INTIMIDATION.

(R. ,Amended Answer, p. 10)

Appellant's sign subsequently read under Respondent's name:

UNTRUSTWORTHY
LIES LIES
LIARS
UNETHICAL

(R.)

When those signs did not achieve the results he wanted, he published the following:

LIES
LIARS
BAIT N SWITCH

(R.)

Respondent continued picketing for almost a year. His activities damaged Respondent's reputation in the community and caused it to lose customers. (R. , Affidavit of Amanda Stewart)

ARGUMENTS

I. STANDARD OF REVIEW

Summary judgment is proper when 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.*, 353 S.C. 449, 455, 578 S.E.2d 711, 714 (2003) (citation omitted). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Bishop v. South Carolina Dep't of Mental Health*, 331 S.C. 79, 85, 502 S.E.2d 78, 81 (1998). "An appellate court

applies the same standard used by the trial court under Rule 56(c) when reviewing the grant of a motion for summary judgment." *Spence v. Wingate*, 395 S.C. 148, 156, 716 S.E.2d 920, 925 (2011).

"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. 204, 220, 616 S.E.2d 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.* "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *M & M Grp., Inc. v. Holmes*, 379 S.C. 468, 473, 666 S.E.2d 262, 264 (Ct. App. 2008) (quoting Rule 56(c), SCRCP).

II. APPELLANT HAS ABANDONED ANY ISSUES RAISED

Appellant's Brief fails to cite any law or authority in support of his argument and makes only conclusory arguments; therefore, he has abandoned any issues. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting an issue is deemed abandoned where appellant fails to provide arguments or supporting authority for his assertion); *Eaddy v. Smurfit–Stone Container Corp.*, 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct.App. 2003) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review.").

III. THE LOWER COURT PROPERLY FOUND THE APPELLANT'S STATEMENTS WERE DEFAMATORY

The right to carry on a lawful business without obstruction is a valuable property right.[6] The enjoyment of the good name and good will of a business is likewise a valuable property right.[7] The Supreme Court of the United States 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).

At the heart of this case is the fact that Appellant was attempting to destroy almost daily Respondent's hard-earned business reputation to satisfy a personal vendetta and coerce money from Respondent. 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 disparaging the quality of the car sold.) John Lyons testified for Respondent 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., Exhibit A)

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

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[6] *See,* e.g., *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) (finding that a "business ... is a property right, entitled to protection against unlawful injury or interference ..."); *United States v. Tropiano,* 418 F.2d 1069, 1076 (2d Cir.1969); *Small v. United States*, 333 F.2d 702, 704 (3d Cir.1964) ("The right to pursue a lawful business or occupation is a right of property which the law protects against intentional and unjustifiable interference.") (citations omitted).

[7] *Carter et al. v. Knapp Motor Co.*, 11 So.2d 383 (Ala. 1943).

harm caused by the publication. *Murray v. Holnam, Inc.*, 344 S.C. 129, 139, 542 S.E.2d 743, 748 (Ct.App. 2001).

A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. *Fleming v. Rose*, 338 S.C. 524, 526 S.E.2d 732 (Ct.App. 2000). It is undisputed that Appellant's statement attacked the essence of a car dealership's reputation – honesty in dealing with its customers. Respondent presented evidence that potential customers chose not to come to the dealership as a result of Appellant's statements. (R. , Affidavit of Amanda Stewart)

As set forth below, Appellant's statements were false, they were actionable *per se*, and their publication was unprivileged. Appellant admits that he made his first sign for the sole purpose of trying to goad Respondent's owner into speaking with him. (R. , Transcript, p. 35, ll. 16-19).

The lower court, therefore, properly granted summary judgment.

A. The Lower Court Properly Found the Term "Bait-N-Switch" was Defamatory

Appellant argues that the lower court incorrectly found his statement "Bait -N-Switch" to be false because he did not mean it in the traditional manner. The standard is not Appellant's peculiar interpretation of the phrase but what the average person would understand the words to mean. The average person would understand this term by its ordinary definition. 16 C.F.R. 238 defines "bait advertising" as follows:

> 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 Ninth Circuit affirmed a preliminary injunction prohibiting display of the Union's banner stating "[t]his medical facility is full of rats" finding the most natural reading of the statement to be that the Hospital had a rodent problem, not that it was engaged in labor dispute with the Union. *See San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1238 (9th Cir. 1997). In the present case, passers-by would not be aware of Appellant's particular issues with Respondent and would understand the statement "Bait-N-Switch" to mean that he was sold different goods or services from those he intended to buy. In fact, he never purchased a car from Respondent.

B. The Lower Court Properly Granted Summary Judgment Where Appellant Failed to Show Evidence of Fraud

Appellant falsely accused Respondent of fraud. The United States Supreme Court has recognized 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 (1988).

In order to prove fraud, the following elements must be shown: (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 its 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. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993).

Fraudulent conduct generally requires proof by clear and convincing evidence. *See Ardis v. Cox* , 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993) ("Fraud is not presumed, but must be shown by clear, cogent, and convincing evidence.") 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).

Appellant does not contend that he presented clear and convincing evidence of fraud before the lower court; rather he again states that he was prevented from doing so because the Jasper County Sheriff's office, SLED, and the Governor's office failed to respond to his letters[8]. Rule 56(e), SCRCP requires a party opposing summary judgment to come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial. *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001). Therefore, the lower court properly granted summary judgment to Respondent because Appellant's published statements were false.

1. Appellant failed to present evidence of fraud when Respondent informed him the car was dangerous to drive

It is undisputed that: (1) Appellant's car was subject to a recall (R.); (2) Hyundai indicated that the car could stall creating a dangerous situation (R.); (3) Hyundai instructed to test, and if it failed, to replace the engine (R.); and (4) the car failed and required engine replacement (R.). Respondent truthfully explained all of these facts to Appellant. *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, 557 S.E.2d 676, 680–81 (Ct. App. 2001)(noting that fraudulent misrepresentation "requires the conveyance of a known falsity"). Appellant, without objection, then signed the Repair Order agreeing to the repair. (R.).

Appellant now claims the fraud arose when Respondent failed to tell him that he could sign a waiver and drive the car home. Respondent had no such duty. The element of "false misrepresentation" cannot be premised upon silence when there is no duty to speak. See *Pitts v.*

[8] It is undisputed that Appellant never served any subpoenas upon any of these offices.

Jackson Nat'l Life Ins. Co., 352 S.C. 319, 334, 574 S.E.2d 502, 509 (Ct.App. 2002). Because Respondent had no duty to inform Appellant he could sign a waiver and drive a potentially unsafe car, the lower court properly found there was no fraud.

2. Appellant failed to present evidence of fraud when Respondent informed him that its employees were not involved in quotes to the insurance carrier

There is no evidence that Appellant was falsely told that Respondent does not get involved in insurance quotes as he claims in his Amended Answer. (R. , p. 3). The undisputed evidence was that Appellant was provided a quote by Respondent before a claim was opened with GEICO. (R.). There is no evidence that Respondent provided a quote to GEICO. Appellant appears to confuse the work performed by Respondent's Service Department with work performed at the Collision Center, which is a separate entity, at a separate location, with separate employees. (R.).

Respondent also submitted the Collision Center estimate dated July 21, 2017 (R.) and the GEICO estimate dated July 27, 2017 (R.) showing that GEICO prepared its own estimate in which it determined the repairs that were authorized.[9] Therefore, the lower court properly found that Respondent's employees did not make fraudulent statements when they stated they did not provide quotes to the insurance carrier.

3. Appellant failed to present evidence that Respondent made false statements regarding the return of the rental car

Appellant does not present any false statements in his Brief that he alleges were made by Respondent regarding the return of the rental car. He admitted in his Amended Answer that

[9] GEICO's claims adjuster inspected the car on June 28th, July 27th, September 6th, and September 27th, as shown by GEICO's claims summary (R.). These entries represent in-person inspections by the GEICO adjuster as shown by Appellant's statements that the adjuster physically viewed the car on September 6th and 27th (R. , Amended Answer p. 5). The Collision Center recommended an "undercover" costing $208. GEICO authorized a "front shield" costing $65.

GEICO told him the rental car had to be returned or it would be reported as stolen. (R. , Amended Answer, p. 18). Appellant also did not act in reliance upon any statements by Respondent. He admitted 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. (R. , Amended Answer 19-20). Appellant stated in his Amended Answer that he was informed by Deputy Dobson that Hertz requested the Deputy get the rental to make sure it was returned. (R. , Amended Answer, p. 20).

Appellant did not testify at the hearing that the Sheriff told him Respondent would not release the car until the rental was returned. Rather, he stated:

> So I called 911. Of course, the sheriff came out. He went in there and talked to them, and came out, and I showed him my receipt for $1,000 and all that, and he said, Well, there's a balance of $325. I said, So what? That's a -- you know, you can drop rental cars all the time. Who cares? It all settles up. He forced me. He said the only way you're going to get your car -- that car wasn't reported stolen. I could have driven the Hertz rental car away.

(R. ,Transcript, p. 35, 11. 1-11)

Therefore, as a matter, of law, there was no fraud by Respondent and Appellant's publication of fraud was false.

4. Appellant failed to present admissible evidence that Respondent made false statements regarding whether the dealership owned the Hertz rental location

Appellant did not present evidence that one of Respondent's managers told him they owned the Hertz agency as he now claims in his Brief. Rather, he claimed that an unknown representative or manager from either another dealership or the "Peacock Auto Mall" told him they owned Hertz on their premises. (R. , Amended Answer p. 8, 11)[10] This is hearsay and not admissible. Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion

[10] Appellant did not raise this issue at the summary judgment hearing.

for summary judgment must be those which would be admissible in evidence. *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct.App.2002). Additionally, Appellant does not deny the statement was made after he had returned the rental car; therefore, the statement was not material and could not have been made with the intent that Appellant rely upon it.

The lower court did not err in finding, as a matter of law, that none of the statements alleged by the Appellant were fraudulent and that his published statements that Respondent engaged in "Lies" and "Fraud" were defamatory.

C. The Lower Court Properly Granted Summary Judgment Where Appellant Failed To Present Evidence Respondent Acted Unethically

1. Appellant failed to present evidence that Respondent acted unethically by causing its security officer to follow him to a Wal-Mart parking lot

It was proper for the lower court to find that Appellant failed to present evidence to create a genuine issue of a material fact that Respondent acted unethically, and therefore, his statements to that effect were defamatory. The term "unethical" implies that Respondent was unethical in its business practices. It is not unethical for a business to have concern for the safety of its employees and customers, especially in the current social climate. Appellant presented no authority to the lower court that such behavior was "unethical."

One of Respondent's security employees stated in an Affidavit that he chose to observe Appellant for several minutes in the Wal-Mart parking lot because he was concerned about his erratic behavior at the Dealership. (Affidavit of David Salzman, R.). He did not approach the Appellant, nor did he follow him into any private areas. In fact, it was Appellant who approached him while sitting inside his parked car, and physically threatened to wrap a six iron around his neck. (R. Affidavit of Salzman, R). There is no evidence that any of Respondent's employees

harassed or intimidated Appellant. Appellant references statements by Officer Smith; however, any such statements or notes would be hearsay and inadmissible.

2. Appellant failed to present evidence that Respondent acted unethically when he demanded to speak to the owner or general manager

Appellant has cited no law indicating that it is unethical for a business to bring in an available manager to address a customer issue, even if that manager has a different title than the person requested. There is no evidence that the person to whom Appellant spoke pretended to be the General Manager; in fact, Appellant admits he was the New Car Sales Manager. (R.). Appellant presented no evidence that the New Car Sales Manager was incapable of addressing his concerns. The lower court did not err in finding Respondent did not act unethically.

3. Appellant failed to present evidence that Respondent acted unethically when Respondent's Telecheck machine could not read his check

Appellant argues that he said Respondent's actions regarding the Telecheck machine were "unprofessional" and not "unethical." However, Appellant stated on page 17 of his Amended Answer and Counterclaim that Respondent acted unethically when it was unable to process the check through its Telecheck machine. (R.).

Appellant stated at the Summary Judgment Hearing:

> I misplaced my debit card, so I had this old check, so I thought it would work. Now, the machine said it didn't work. I was a step ahead. The next day, when I came back, I went to Wal-Mart and I went to Publix, and that check went through their machines just fine.

(R. , Transcript p. 33, 11. 17-23). The inability of the Telecheck machine to read Appellant's admittedly old check is not unethical behavior by Respondent. Appellant presented no admissible evidence that the check could be verified by Telecheck through a method other than the use of its equipment. Appellant presented no evidence that Respondent routinely experienced problems

with its Telecheck equipment such that it would expect that a machine at another dealership would be able to read the check.

The lower court properly found that Appellant had not presented evidence of a genuine issue of material fact of unethical behavior by Respondent.

D. The Lower Court Properly Granted Summary Judgment as to Defamation Where Appellant Failed to Present Evidence Respondent Harassed or Intimidated Him

The lower court properly found there was no evidence of a genuine issue of material fact that one of Respondent's employees harassed or intimidated him and therefore, his published statements were false. Appellant denies in his Brief that he accused Respondent's employees of taking his keys or briefcase, or of opening his car doors and windows. Appellant alleges only that he saw an unknown person take his sign and run into the "Peacock Auto Mall". (R.). Appellant has presented no evidence that the individual was an employee of Respondent.

Appellant does not claim he was intimidated by this action. This single act does not constitute a pattern of activity required for harassment. *See* S.C. Code 16-3-1700. Finally, no evidence was presented that this was done at Respondent's direction and such conduct, if true, would fall outside the scope of the employee's conduct. See *Hancock v. Aiken Mills*, 180 S.C. 93, 185 S.E. 188 (1936).

E. The Lower Court Properly Found Appellant's Defamatory Statements Actionable *Per Se*

Appellant does not deny that his signs accused Respondent of fraud (R. , Amended Answer, p. 10), unethical behavior (R. , Amended Answer, p. 10) and bait and switch tactics (R.). Statements that a car dealership is engaged in such behavior would be understood by the reasonable person as statements that Respondent was unfit in its business.

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).

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*. Therefore, the lower court properly found the statements were actionable *per se*.

IV. THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT WHERE APPELLANT FAILED TO PRESENT EVIDENCE OF A VIOLATION OF HIS CONSTITUTIONAL CIVIL RIGHTS

Appellant does not have a constitutional right to publish defamatory statements and he presented no evidence at the summary judgment hearing that his constitutional rights were violated. Even if Appellant has a right to publish defamatory statements, he has exercised those rights. Appellant protested with his signs over the course of a year and was interviewed by a local newspaper, resulting in the publication of several damaging articles.

Appellant's claims that some unknown persons harassed him are unrelated to any constitutional rights he may have. His claim that an unknown person stole his sign cannot be a violation of his constitutional rights because there is no evidence those alleged actions 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.)

Even if Appellant had shown his statements were privileged, they were well recognized exceptions to a First Amendment privilege: 1) when the speech impugns the Respondent's property interest,[11] and 2) when Appellant is engaged in a continuing course of conduct causing the Respondent harm.[12] Respondent presented uncontradicted evidence that its reputation had been injured (R.) and Appellant admittedly engaged in a continuing course of conduct. Courts in other jurisdictions have granted numerous injunctions directed at allegedly defamatory statements and statements designed to injure business reputation.[13]

Therefore, the lower court properly granted summary judgment in favor of Respondent.

V. THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENT AS TO APPELLANT'S COUNTERCLAIM FOR CONVERSION

There is no dispute that Appellant received his car. (R.). Appellant claims that he had a ten-minute conversation with a Dealership employee regarding whether he was required to turn in the rental car prior to receiving the car. (R. , Transcript p. 41, ll. 16-17). Appellant called the

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[11] *See Carter et al. v. Knapp Motor Co.*, 243 Ala. 600, 11 So.2d 383 (1943). *See also 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 claiming he was threatened and that doing business with Terra introduced him to "a new low in ethics.").

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

[13] *See 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); *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); *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).

police and admits that it was the Jasper County Deputy who required him to leave the keys to the rental car. (R. , Transcript p. 42, ll. 4-7).

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. Therefore, the lower court properly found there was no evidence to create a genuine issue of material fact that Respondent did not convert Appellant's car for its own use.

VI. THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENT AS TO APPELLANT'S ALLEGATION OF DECEPTIVE SERVICE TACTICS

Because there is no specific cause of action for "deceptive service tactics" the lower court interpreted this cause of action as one for violation of the Unfair Trade Practice Act. In order to maintain a cause of action under the South Carolina Unfair Trade Practice Act, Appellant 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 § 39-5-10-560 (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).

The lower court properly found that disclosing the manufacturer's safety and recall information to a customer is not a deceptive service tactic when Appellant does not dispute that

his vehicle was subject to the recall, that his car failed the recall inspection, that his engine needed to be replaced, or that he authorized the repair. Nor was the failure of Respondent's Telecheck machine to read his check a "deceptive service-payment tactic." Additionally, Appellant failed to show that he suffered any damages as a result of having Respondent perform the factory recall or from the failure of the Telecheck machine to read his check.

VII. THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT WHERE APPELLANT FAILED TO STATE A CAUSE OF ACTION FOR VIOLATION OF STANDARD BUSINESS GUIDELINES AND PRACTICES

The lower court properly found that Appellant failed to identify any "standard business guidelines and practices" that Respondent had a duty to follow, especially when Appellant identified only himself as the authority on what should constitute these business practices. (R. , Defendant's Supplemental Answers to Interrogatories No. 5, Ex. T) He may have been unhappy with his experience with Respondent, but that is not actionable as a matter of law.

The practices noted by Appellant, such as the need for supplemental service orders, are standard in the industry. Vehicle repair orders often require supplementation as repairs are performed. A portion of the repair work was completed in the Dealership's service department (R. -) and separate repair orders were necessary for the work performed under the manufacturer's recall and the repairs covered by GEICO (R.).

Appellant does not specify what he alleges in his pleadings as "deceptive security personnel tactics to resolve customer issues." He does suggest in his pleadings that it was deceptive for a Jasper County Sheriff's Deputy not to inform Appellant that he provided security for Respondent when he was off-duty. This is a complaint regarding the actions of individual officers and not Respondent.

VIII. THE LOWER COURT DID NOT ERR IN STATING THE BACKGROUND OF THE CASE

The lower court did not incorrectly state the facts of the case as presented. Appellant does not deny that the wording of his signs changed. (R.). Neither does he disagree that it is his contention that his statements were protected by the First Amendment. (R.).

IX. THE LOWER COURT PROPERLY FOUND THAT APPELLANT WAS NOT ENTITLED TO ADDITIONAL TIME FOR DISCOVERY

The lower court did not abuse its discretion in denying Appellant's request for additional time for discovery. "The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion." *Hook v. Rothstein*, 281 S.C. 541, 555, 316 S.E.2d 690, 699 (Ct.App.1984). "The appellate court will generally make all reasonable presumptions to the effect that the discretionary powers of the trial court have been exercised properly, correctly, or without abuse, and will not presume, or assume, that there has been an abuse of discretion." *Osborne v. Adams*, 338 S.C. 82, 90, 525 S.E.2d 268 (Ct. App. 1999) quoting 5 C.J.S. Appeal and Error § 773 (1993). Great weight is given to the judgment of the trial court on discretionary matters. *Id.* § 772(a).

Appellant had more than adequate time to complete any needed discovery. The subject action was commenced November 20, 2017. The hearing on Respondent's Motion for Partial Summary Judgment was not held until October 31, 2018, almost a year later, and more than a month after the Motion for Partial Summary Judgment was filed. Appellant did not move for a continuance of the hearing. *See Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct.App.2001) (holding incomplete discovery issue unpreserved because appellant did not "move for a continuance in which to pursue further discovery").

Appellant argues that summary judgment should have been denied because the Jasper County Sheriff's Office did not respond to his certified letters; however, the Sheriff's Office was not required to do so. There is no evidence that Appellant subpoenaed the deposition of anyone at SLED, the Governor's Office, or the Jasper County Sheriff's office or requested documents through a subpoena duces tecum. Rules 34(c) and 45, SCRCP ("a person not a party may be compelled to produce documents of things or submit to an inspection only as provided in Rule 45.") Additionally, Appellant has not shown that additional information from the Sheriff's office would be relevant to the issues before the lower court. *See Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (stating in order to delay a summary judgment ruling, "the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence").

Therefore, this Court should find the lower court did not err in granting summary judgment on the basis of discovery.

CONCLUSION

Appellant has made it clear that he takes issue with the way he was treated by Respondent, the Jasper County Sheriff's Office, SLED, the Governor's office and the lower court. His own statements indicate that he picketed Respondent because he did not receive the responses he wanted and because he felt disrespected. This does not give him the right to continue to disparage Respondent's reputation.

Appellant failed to present evidence to the lower court that Respondent committed fraud, acting unethically, or engaged in bait and switch tactics. It was therefore defamatory for Appellant to publish statements to the public to that effect on his signs.

Appellant's counterclaims also fail, as a matter of law.

Respectfully submitted,

Date November 25, 2019

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November 25, 2019

The Hon. Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *First Team Hyundai, LLC dba Hilton Head Hyundai v. Greg Hackney*
C.A. No. 2017-CP-27-0386
Appellate Case No. 2018-002186

Dear Ms. Kitchings:

Enclosed for filing is an original and one copy of Respondent's Initial Brief, Respondent's Designation of Matter to Be Included in the Record on Appeal, and a Proof of Service in the above captioned matter. Please file the original with your Court and return a clocked copy 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,

Laura W.H. Teer

LWHT/pm
Enclosures
cc: Greg Hackney

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. 2018-002186

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

v.

Greg S. Hackney .....Appellant

PROOF OF SERVICE

I, Peggy McComb, Legal Assistant to attorneys for Respondent, First Team Hyundai, LLC d/b/a Hilton Head Hyundai, certify that I have served a copy of Respondent's Initial Brief and Designation of Matter by depositing a copy in the U.S. Mail, sufficient first class postage prepaid, on November 25, 2019, addressed to Greg S. Hackney, 6125 Roswell Road, #503, Sandy Springs, GA 30328.

November 25, 2019

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