

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Jennifer B. McCoy, Judge

Case No. 2019-000507

Melvina RobinsonAppellant,

v.

Wal-Mart Stores, Inc.;
Wal-Mart Neighborhood Market;
Wal-Mart Stores East, LP; and
Wal-Mart Supercenter.....Respondents,

INITIAL BRIEF OF RESPONDENTS

RECEIVED
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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. Appellant failed to raise a motion to strike before the trial court and, thus, failed to preserve any argument as to a motion to strike.
- II. The trial court did not err in denying Appellant's motion to exclude fact witness Heather Ganiere where it properly evaluated Ms. Ganiere's proffered testimony.
- III. The trial court did not err in charging the jury regarding the preponderance of the evidence standard where Appellant did not raise an objection to that particular jury charge.
- IV. Appellant failed to raise any constitutional claims to the trial and, thus, failed to preserve any constitutional claims.
- V. The trial court did not err in denying Appellant the opportunity to rebut Respondents' witnesses' testimony where it was in the trial court's discretion to permit reply testimony.

STATEMENT OF THE CASE

This case arises from allegations of Appellant Melvina Robinson (hereinafter “Appellant”) that on various occasions at two retail stores operated by Defendants, located at 1317 North Main Street, Summerville, South Carolina, and 3685 Ladson Road, Summerville, South Carolina, she “felt detained and under suspicion,” when persons whom she believed to be Walmart “Loss Prevention” personnel looked into her shopping basket/cart and made various comments to her regarding the contents of her basket/cart. *See* Trial Tr. 79:2-14. Appellant filed her Complaint on June 6, 2017, in the Berkeley County Court of Common Pleas, in which she alleged causes of action against Respondents Walmart, East, L.P., Walmart Stores, Inc., Walmart Neighborhood Market, and Walmart Supercenter (herein after “Respondents”) for (1) defamation and (2) false imprisonment. Pl.’s Compl.

A jury trial was held on February 25th and 26th, 2019. During the course of trial, Respondents called Heather Ganiere as a fact witness. *See* Trial Tr. 116:7 – 118:7. Appellant’s counsel objected on the basis that Ms. Ganiere was not identified as a fact witness during discovery. *See* Trial Tr. 118:11-15. Respondents’ counsel informed the court that in contrast to Appellant’s deposition testimony, Appellant testified at trial in a manner that magnified Ms. Ganiere’s involvement in the incidents alleged in Appellant’s Complaint; thus, Respondents requested that the trial court permit her to testify in response to Appellant’s trial testimony. *See* Trial Tr. 116:24 – 117:16. The trial court permitted Ms. Ganiere to proffer her testimony, during which time opposing counsel cross-examined her. *See* Trial Tr. 117:20 – 118:7. Following Ms. Ganiere’s proffered testimony, Appellant’s counsel moved to exclude the testimony of Ms. Ganiere on the basis of extreme delay. *See* Trial Tr. 126:22 – 127:2. The trial court denied Appellant’s motion to exclude Ms. Ganiere but set limitations on Ms. Ganiere’s testimony. *See* Trial Tr. 129:12 – 130:23.

At the conclusion of the Respondents' case, Appellant's counsel requested to call Appellant as a rebuttal witness. *See* Trial Tr. 154:3-25. After hearing arguments from both parties on the issue, the trial court declined to permit Appellant to testify as a rebuttal witness. *See* Trial Tr. 155:2 – 156:11.

At the conclusion of the evidence, the trial court discussed the jury instructions with Respondents' counsel and Appellant's counsel. *See* Trial Tr. 163:21 – 171:24. Appellant's counsel requested specific language with regard to the jury instruction for defamation, which the trial court partially granted and partially denied. *See* Trial Tr. 171:3 – 176:1. Additionally, Appellant's counsel requested specific language with regard to the charge of special damages. *See* Trial Tr. 176:2 – 178:2. Following those two requests, Appellant's counsel informed the Court that Appellant had no further objections to the jury instructions. *See* Trial Tr. 178:3-4. The Court concluded its instructions to the jury, and after the jury retired to deliberate, both parties confirmed to the Court that they did not have any exceptions or objections to the jury instructions as read. *See* Trial Tr. 214:22 – 215:13.

The jury ultimately entered a verdict for Respondents on both causes of action. *See* Form 4 Order, filed Feb. 26, 2019. Appellant filed a Motion for New Trial or Amendment of Judgment on March 7, 2019, in which Appellant argued that, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, the trial court should grant a new trial based on the following grounds: (1) the "thirteenth juror doctrine"; (2) the failure to exclude Respondents' witness Heather Ganiere; (3) the failure to allow Appellant to testify in rebuttal to Respondents' witnesses; (4) failure to charge certain language for defamation; and (5) newly discovered evidence. *See* Pl.'s Mot. For New Trial, dated Mar. 7, 2019. On March 18, 2019, the Court denied Appellant's Motion for New Trial or Amendment of Judgment. *See* Order, dated Mar. 18, 2019. On March 26, 2019, Appellant

filed a Notice of Appeal, appealing from the Order of the trial court dated March 18, 2019. Thereafter, Appellant's counsel filed a Motion to Withdraw, which was granted. *See Order*, dated April 10, 2019.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO EXCLUDE FACT WITNESS HEATHER GANIERE.

a. Standard of Review

While Appellant's Statement of Issues on Appeal No. 1 references a motion to strike, Respondents believe Appellant intended to reference the trial court's denial of her Motion to Exclude as raised in her post-trial Motion for New Trial or Amendment of Judgment. *See* App. Br., Statement of Issues on Appeal; *see also* Pl.'s Mot. For New Trial, dated Mar. 7, 2019. As to the trial court's denial of Appellant's motion to exclude a fact witness, "[t]he decision of whether or not to allow a witness to testify who was not previously listed on answers to interrogatories rests within the sound discretion of the trial [court]." *Jumper v. Hawkins*, 348 S.C. 142, 150, 558 S.E.2d 911, 915 (Ct. App. 2001) (citation omitted). "Exclusion of a witness is a sanction which should never be lightly invoked." *Id.* at 149, 558 S.E.2d at 915 (citation omitted). Before imposing the sanction of excluding a witness, a trial court is required to consider and evaluate several factors: (1) the type of witness involved; (2) the content of the evidence emanating from the proffered witness; (3) the nature of the failure or neglect or refusal to furnish the witness' name; (4) the degree of surprise to the other party, including the prior knowledge of the name of the witness; and (5) the prejudice to the opposing party. *Id.* at 152, 558 S.E.2d at 916.

b. Appellant failed to preserve and/or abandoned her argument regarding any Motion to Strike and/or Motion to Exclude the testimony fact witnesses at trial.

As a threshold matter, Appellant did not raise a motion to strike at any time before the trial court. Thus, to the extent she attempts to raise such a motion or issue for the first time before this Court, it is not preserved. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must be raised and

ruled upon to be preserved for appellate review.”). Accordingly, this Court must affirm the trial court’s ruling.

To the extent that Appellant argues that the trial court erred in denying Appellant’s motion to exclude fact witness Heather Ganiere, she fails to provide any supporting authority for her position and makes only conclusory statements. Thus, Appellant abandoned the issue, and this Honorable Court need not address it. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating Appellant was deemed to have abandoned issue for which he failed to provide any argument or supporting authority); *R & G Constr., Inc. v. Lowcountry Reg’l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (ruling that an issue is deemed abandoned if argument in appellate brief is only conclusory); *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) (providing an issue listed in the statement of issues on appeal but not addressed in briefs is abandoned).

c. The trial court did not err in permitting testimony from fact witness Heather Ganiere at trial.

To the extent that this Honorable Court is inclined to address the merits of Appellant’s statements, Appellant argued in her Motion for New Trial or Amendment of Judgment that the trial court erred in allowing Heather Ganiere to testify as a fact witness because she was not identified in discovery by Respondents prior to trial. *See* Pl.’s Mot. For New Tr. However, the trial court correctly evaluated the proffered testimony of the fact witness, allowed opposing counsel to cross-examine the fact witness during the proffered testimony, and determined that the value of the fact witness’s testimony outweighed any prejudice to Appellant. *See Bramlette v. Charter Medical-Columbia*, 302 S.C. 68, 74, 393 S.E.2d 914, 917 (1990) (finding it was error to exclude witness's testimony where witness called to rebut unanticipated trial testimony, which was not revealed to other side despite specific inquiries during discovery). Additionally, the trial court

limited Ms. Garniere's testimony such that she could only respond to Appellant's testimony regarding Ms. Garniere's knowledge of the incidents alleged in Appellant's Complaint. Thus, Appellant fails to establish any error by the trial court in allowing Ms. Ganiere to testify, and this Honorable Court must affirm the trial court's ruling.

II. THE TRIAL COURT DID NOT ERR IN CHARGING THE JURY REGARDING THE PREPONDERANCE OF THE EVIDENCE STANDARD.

a. Standard of Review

An appellate court will not reverse any alleged error in the circuit court's jury instructions absent an abuse of discretion. *See Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (applying an abuse of discretion standard of review to an alleged error in jury instructions). If the charges are reasonably free from error, isolated portions that might be misleading do not constitute reversible error. *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999).

b. Appellant failed to preserve and/or abandoned her argument regarding the trial court's jury charge pertaining to the preponderance of the evidence standard.

Appellant's Statement of Issues on Appeal No. 2 raises an argument regarding the trial court's jury instructions in regard to the preponderance of the evidence standard. *See App.'s Br., Statement of Issues on Appeal*. However, Appellant fails to provide any supporting authority for her position. Indeed, Appellant's Brief is devoid of any further reference to any alleged error in the trial court's jury instructions. Thus, Appellant abandoned this issue, and this Honorable Court need not address it. *See Rule 208(b)(B), SCAR* ("Broad general statements may be disregarded by the appellate court."); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating Appellant was deemed to have abandoned issue for which he failed to provide any argument or supporting authority); *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343

S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (ruling that an issue is deemed abandoned if argument in appellate brief is only conclusory); *Wright v. Craft*, 372 S.C. 1, 20,640 S.E.2d 486, 497 (Ct. App. 2006) (providing an issue listed in the statement of issues on appeal but not addressed in briefs is abandoned).

To the extent that this Court is inclined to find that Appellant did not abandon the issue of the trial court's jury instructions as it pertains to the preponderance of the evidence standard, Appellant did not preserve her argument on appeal as the Appellant failed to designate any proposed jury charges for the record. *See Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs.*, 347 S.C. 545, 556, 556 S.E.2d 718, 724 (Ct. App. 2001) (ruling that if the record does not contain any proposed jury charges, the issue is not preserved). Thus, Appellant's argument pertaining to error in the trial court's jury instructions is not preserved. Additionally, the record reflects that Appellant's counsel did not raise any objection to the trial court's jury instruction pertaining to the preponderance of the evidence standard. *See Dixon v. Ford*, 362 S.C. 614, 625, 608 S.E.2d 879, 885 (Ct. App. 2005) (stating to preserve an objection to a jury charge, there must be "an objection on the record, opportunity for discussion, and a specific ruling by the trial court on the jury charge issue"); Rule 51, SCRPC ("No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection."). Accordingly, Appellant cannot raise this objection for the first time on appeal, and this Court must affirm the trial court.

III. APPELLANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED

Appellant argues her constitutional rights were violated. *See* App. Br., Statement of Issues on Appeal. However, Appellant neither identifies the constitutional right that was violated nor references this issue in the body of her brief. Thus, Appellant abandoned this argument, and this

Honorable Court need not address it. *See* Rule 208(b)(B), SCAR (“Broad general statements may be disregarded by the appellate court.”); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating Appellant was deemed to have abandoned issue for which he failed to provide any argument or supporting authority); *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (ruling that an issue is deemed abandoned if argument in appellate brief is only conclusory). *Wright v. Craft*, 372 S.C. 1, 20,640 S.E.2d 486; 497 (Ct. App. 2006) (providing an issue listed in the statement of issues on appeal but not addressed in briefs is abandoned).

To the extent that this Court is inclined to find that Appellant did not abandon any issue related to her constitutional rights, Appellant failed to raise any constitutional claims to the trial court and thus, cannot raise those claims for the first time on appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must be raised and ruled upon to be preserved for appellate review.”); *State v. Varvil*, 338 S.C. 335, 339, 526 S.E.2d 248, 250 (Ct. App. 2000) (“[C]onstitutional arguments are no exception to the [error preservation] rule, and if not raised to the trial court are deemed waived on appeal.”); *State v. Byram*, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997) (“[A] constitutional argument is not preserved for appeal where appellant failed to argue the constitutional basis for his request at trial.”). Accordingly, this Court must affirm the trial court’s ruling.

IV. THE TRIAL COURT DID NOT ERR IN DECLINING TO PERMIT APPELLANT TO TESTIFY AS A REBUTTAL WITNESS.

a. Standard of Review

Appellant’s Statement of Issues on Appeal No. 4 raises an argument regarding the trial court’s denial of Appellant’s request to testify in rebuttal to the witnesses of the Respondents. *See*

App.'s Br., Statement of Issues on Appeal. "Ordinarily, the admission of reply testimony is within the sound discretion of the trial court." *State v. Farrow*, 332 S.C. 190, 194, 504 S.E.2d 131, 133 (Ct. App. 1998).

b. Appellant abandoned her argument regarding testifying as a rebuttal witness.

Appellant argues the trial court erred in denying her the opportunity to rebut Respondents' witnesses' testimony. App. Br., Statement of Issues on Appeal. However, Appellant fails to present any evidence that supports this statement. In fact, she does not reference this issue at any point in the body of her brief. Thus, Appellant abandoned this issue, and this Honorable Court need not address it. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating Appellant was deemed to have abandoned issue for which he failed to provide any argument or supporting authority); *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (ruling that an issue is deemed abandoned if argument in appellate brief is only conclusory); *Wright v. Craft*, 372 S.C. 1, 20,640 S.E.2d 486, 497 (Ct. App. 2006) (providing an issue listed in the statement of issues on appeal but not addressed in briefs is abandoned).


c. The trial court did not abuse its discretion in determining that rebuttal testimony from Appellant was not warranted.

To the extent this Court finds Appellant did not abandon her argument, the trial court did not abuse its discretion in determining that rebuttal testimony from Appellant was not warranted based on the testimony from Respondents' witnesses. *See McGaha v. Mosley*, 283 S.C. 268, 276, 322 S.E.2d 461, 466 (Ct. App. 1984) ("Reply testimony should be limited to rebuttal of matters raised in defense; it should not be used to complete plaintiff's case in chief."). Accordingly, this Court must affirm the trial court's ruling.

CONCLUSION

For the reasons set forth herein, Respondents respectfully request that this Honorable Court affirm the trial court's rulings and the jury's verdict in their favor.¹

Respectfully submitted,



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¹ In the section titled "Arguments" in Appellant's Brief, Appellant sets forth the elements of defamation and false imprisonment and cites to case law supporting same. It is unclear to Respondents as to which issue on appeal these statements pertain, and, thus, the Respondents submit that these issues are abandoned. *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (ruling that an issue is deemed abandoned if argument in appellate brief is only conclusory).

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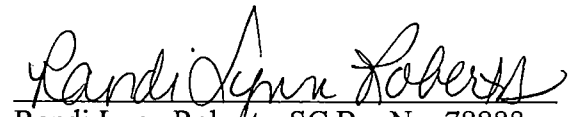
Melvina RobinsonAppellant,

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PROOF OF SERVICE

I certify that on December 19, 2019, a copy of the foregoing **Initial Brief of Respondents and Respondents' Designation of Matter to be Included on the Record of Appeal** on Appellant Melvina Robinson were served by depositing a copy of same in the United States Mail, first-class, postage prepaid, addressed to: Melvina Robinson, 110 Gatehouse Drive, Summerville, South Carolina 29486.



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