THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2019-001054

Kevin Ralph Richard .....Appellant,

v.

Facebook, Inc., a Delaware Corporation, and
Maleko Kirk Malepeai, individually, ...Defendants,

Of which Facebook, Inc., a Delaware Corporation, is the .....Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Appellant brought this action on the basis of allegedly defamatory social media posts made by Defendant Maleko Kirk Malepeai. It is undisputed that Respondent Facebook, Inc. ("Facebook") had absolutely nothing to do with those posts, other than the mere fact that Facebook was the internet platform on which Malepeai published them. Appellant alleged that Facebook should be liable for Malepeai's posts and for failing to remove Malepeai's posts in response to a complaint made, not by Appellant himself, but by an acquaintance of his. The issues on appeal are as follows:

1. Should the Circuit Court's unappealed ruling dismissing Appellant's Complaint for failure to state any claim be affirmed as law of the case or, alternatively, on the ground that the court correctly found the Complaint failed to sufficiently allege a plausible claim for relief?

2. Did the Circuit Court correctly determine that Appellant failed to present sufficient grounds to establish personal jurisdiction over Facebook, when it is undisputed that Facebook is neither incorporated in South Carolina nor has its principal place of business in South Carolina, committed no act or omission in South Carolina that relates to Appellant or his allegations, and did not direct activities toward residents of South Carolina from which Appellant's causes of action arose?

3. Did the Circuit Court correctly determine that Facebook is immune from liability under section 230(c)(1) of the Communications Decency Act, 47 U.S.C. § 230(c)(1), which precludes liability for internet platforms like Facebook for content posted by other information content providers?

STATEMENT OF THE CASE

Appellant filed this action on October 31, 2018, alleging causes of action for defamation, civil conspiracy, and outrage / intentional infliction of emotional distress[1] based on alleged posts made by Defendant Maleko Kirk Malepeai. (Complaint) (R. pp. 27-34). The Complaint says absolutely nothing about the content of the allegedly defamatory posts, other than that they were "false and defamatory," had "the tendency to harm [Appellant's] reputation," and were "vulgar [and] salacious." (*Id.* ¶¶ 15-16) (R. p. 29).

Facebook moved under rules 12(b)(2) and 12(b)(6), SCRCP, to dismiss the case against it on three grounds: (i) The court lacked personal jurisdiction over Facebook; (ii) Appellant's claims against Facebook were barred by section 230 of the Communications Decency Act ("CDA"); and (iii) Appellant failed to allege facts constituting a plausible claim for relief against Facebook. (Motion to Dismiss and Memorandum) (R. pp. 58-76).

Appellant filed a Memorandum in Opposition to Facebook's motion. (Memorandum in Opposition) (R. pp. 77-83). Notably, the Memorandum in Opposition does not address Facebook's argument that the Complaint fails to state facts sufficient to constitute a cause of action as to any of the three torts pleaded. With respect to jurisdiction, Appellant's Memorandum in Opposition addresses only specific jurisdiction under S.C. Code § 36-2-803. (*Id.* at 3-4) (R. pp. 79-80). As to section 230(c)(1) of the CDA, Appellant contended that the statute was unconstitutional, but argued that if the statute were held to be constitutional, it would not apply to his claim for outrage. (*Id.* at 4-5) (R. pp. 80-81).

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[1] While Appellant pleads outrage and intentional infliction of emotional distress as separate causes of action, they are the same tort. *See, e.g.*, *Melton v. Medtronic, Inc.*, 389 S.C. 641, 651, 698 S.E.2d 886, 891 (Ct. App. 2010).

Appellant's Memorandum in Opposition includes as an exhibit an affidavit of William Riggs, who claimed to be a friend of the Appellant. In the affidavit, Mr. Riggs asserted that he "observed several vile, upsetting and false statements about the [Appellant] that had been posted on Defendant Facebook by Defendant Maleko Malepeai." (Affidavit ¶ 3) (R. p. 87). The affidavit says nothing further about the content of the allegedly defamatory posts. The affidavit goes on to state that Riggs contacted Facebook about the posts and that Facebook responded by saying that, if Riggs found the posts to be offensive, he could block, unfriend or unfollow Malepeai. (*Id.* ¶¶ 5-6) (R. p. 87). That is the entire substance of the affidavit.

Appellant's Memorandum in Opposition also purports to quote some of the posts made by Malepeai, (Memorandum in Opposition at 2) (R. p. 78), but those statements do not appear anywhere in the record at all – they are simply unsupported assertions of fact made by counsel. The statements quoted are not in the Riggs affidavit, in any exhibit to the memorandum, or in any other record evidence. They were never put in the record.

The Circuit Court heard the motion on April 2, 2019. At the hearing, counsel for Facebook argued all three of its grounds for dismissal: (i) lack of personal jurisdiction; (ii) immunity under section 230 of the CDA; and (iii) failure to allege facts constituting a plausible cause of action. In response, Appellant's counsel characterized one of the Malepeai posts in a similar fashion to what was quoted in the Memorandum in Opposition, but did not introduce or proffer any evidence of the actual content of any of the posts. (Transcript of Hearing at 8) (R. p. 42). Appellant's counsel also contended that section 230 of the CDA was unconstitutional, but did not cite any legal authority for that argument and did not address the merits of the application of section 230 to the allegations of the Complaint. (*Id.* at 8-9, 15-16) (R. pp. 42-43, 49-50). As for the issue of jurisdiction, Appellant asserted only that "jurisdiction in South Carolina ... is

obvious." (*Id.* at 12, lines 10-11) (R. p. 46, ll. 10-11). Appellant's counsel also suggested that he should be allowed to pursue discovery. (*Id.* at 11-12) (R. pp. 45-46). The remainder of Appellant's argument consisted of a lengthy harangue about the evils of social media, Facebook, and Mark Zuckerberg, and the contention that section 230 was a bad law. (*Id.* at 8-16) (R. pp. 42-50).

On May 22, 2019, the Court issued its Order Granting Facebook's Motion to Dismiss. (Order) (R. pp. 2-23). The Order adopts all three of Facebook's grounds for dismissal: lack of personal jurisdiction; section 230 immunity; and failure to state a cause of action. (*Id.*).

Appellant moved for reconsideration, simply reiterating the arguments he had made in opposition to the motion. (Motion to Reconsider) (R. pp. 84-85). The Circuit Court denied the Motion to Reconsider on June 4, 2019, and Appellant served his Notice of Appeal on June 25, 2019.

Appellant filed his opening brief and matter designation on September 16, 2019. The sole issues raised in his brief are the Circuit Court's rulings with respect to personal jurisdiction and the Communications Decency Act.[2] Appellant does not assert any error on appeal as to the Circuit Court's dismissal of his Complaint against Facebook for failure to state a claim.

STATEMENT OF FACTS

Because this appeal comes from the granting of a rule 12 motion to dismiss, the operative facts are those set forth in the Complaint. This point is important, as Appellant makes numerous

[2] Appellant challenges the Circuit Court's determination that CDA section 230 bars his claim for outrage / intentional infliction of emotional distress. Appellant's Brief at 15-16. He does not challenge the Circuit Court's determination that the CDA bars his claims for defamation and civil conspiracy. *Id.*

factual assertions in his appellate brief that do not appear in the Complaint and are not properly in the record.

The Complaint acknowledges that Facebook is a Delaware corporation with its principal place of business in Menlo Park, California. (Complaint ¶ 2) (R. p. 28). The Complaint alleges that "[j]urisdiction and venue are proper and appropriate in this Horry County Court of Common Pleas," (*id.* ¶ 12) (R. p. 29), but does not state any basis for personal jurisdiction as to Facebook.

The Complaint alleges that Appellant is the owner of Filet's restaurant in North Myrtle Beach, and that Defendant Malepeai is a former employee of Filet's. (*Id.* ¶¶ 13-14) (R. p. 29). The Complaint alleges that in December 2016, Malepeai published on his Facebook account "false and defamatory statements concerning the Plaintiff," (*id.* ¶ 15) (R. p. 29); that the statements had "the tendency to harm the reputation of the Plaintiff as to lower him in the estimation of the community and deter third persons from associating or dealing with him," (*id.*); and that the statements were "vulgar, salacious, and defamed Plaintiff's daughter, as well." (*Id.* ¶ 16) (R. p. 29). Nothing further is alleged as to the substance of the allegedly defamatory posts made by Malepeai.

As to Facebook, the Complaint simply asserts that Facebook allegedly "fail[ed] to provide an effective remedy such as removing the publication or deleting/suspending [Malepeai's] account." (*Id.* ¶ 21) (R. p. 30). Appellant does not allege that Facebook had any role in creating or developing the content of the posts by Malepeai. Rather, the crux of the Complaint against Facebook is that it allegedly "tolerated" and "consented to" Malepeai's publication of false information about Appellant, and that it allegedly "provid[ed] inadequate options to rectify the gross injustices faced by the Plaintiff." (*Id.* ¶¶ 20, 24, 26, 31, 32, 38, 42, 45) (R. pp. 30-33).

The Complaint asserts a cause of action for defamation but, as noted above, says nothing of the actual content of Malepeai's posts. The Complaint also asserts a cause of action for civil conspiracy based on the allegation that "[t]he Defendants acting in concert with one another, have published materially false information about the plaintiff." (*Id.* ¶ 32) (R. p. 31) (emphasis added). Finally, the Complaint alleges the tort of outrage as to Facebook and of intentional infliction of emotional distress as to both defendants. This cause of action, like the others, is predicated on displaying Malepeai's posts, the content of which Facebook had no role in creating. (*Id.* ¶¶ 38-40, 42, 45) (R. pp. 32-33).

STANDARD OF REVIEW

"The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR. "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." *Atl. Coast Builders & Contractors, LLC v. Lewis,* 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (citations omitted).

The appellate court's review of "personal jurisdiction over a nonresident defendant ... must be resolved upon the facts of each particular case. The circuit court's decision should be affirmed unless unsupported by the evidence or influenced by an error of law." *Cribb v. Spatholt*, 382 S.C. 490, 496, 676 S.E.2d 714, 717 (Ct. App. 2009) (citations omitted).

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Freemantle v. Preston*, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012) (quoting *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433

(2009)). That standard requires the appellate court to base its decision upon the allegations set forth in the complaint. *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004). Thus, the court should not "write into the pleadings allegations and defenses that are not presented." *Unisun Ins. v. Hawkins*, 342 S.C. 537, 541-42, 537 S.E.2d 559, 561 (Ct. App. 2000).

Further, the South Carolina Rules of Civil Procedure require fact pleading. *See* Rule 8(a)(2), SCRCP ("A pleading which sets forth a cause of action ... shall contain ... a short and plain statement of the facts showing that the pleader is entitled to relief.") (emphasis added). Accordingly, while the court addressing a rule 12(b)(6) motion to dismiss considers the facts alleged in the pleading in the light most favorable to the nonmoving party, a plaintiff cannot rely on legal conclusions to support his claims. Rather, he must allege facts that support those legal conclusions. *See Jensen v. S.C. Dep't of Soc. Servs.*, 297 S.C. 323, 326, 377 S.E.2d 102, 104 (Ct. App. 1988) (holding that "well pleaded facts are admitted, but inferences drawn by the plaintiff from such facts and conclusions of law are not admitted").

ARGUMENT

Summary of Argument

Appellant seeks to hold Facebook liable for defamatory posts made by someone else, not Facebook, and for Facebook's alleged failure to remove the posts in response to a complaint allegedly made by someone else, not Appellant. The Circuit Court correctly dismissed the action for three independent reasons, any one of which justifies affirmance in this appeal.

First, the Circuit Court correctly found that the allegations of the Complaint were insufficient to state a plausible claim against Facebook — a determination that Appellant does

not challenge on appeal. Under the two-issue rule, Appellant's failure to contest that finding on appeal, in and of itself, requires affirmance of the judgment below. In addition to Appellant's failure to preserve the issue on appeal, the Circuit Court's ruling is correct on the merits.

Second, the Circuit Court correctly found that it lacked personal jurisdiction over Facebook under the facts alleged. As numerous courts have held, personal jurisdiction does not exist simply because "a user avails himself of Facebook's services in a state other than the states in which Facebook is incorporated and has its principal place of business." *Georgalis v. Facebook, Inc.*, 324 F. Supp. 3d 955, 960-61 (N.D. Ohio 2018) (quoting *Ralls v. Facebook*, 221 F. Supp. 3d 1237, 1244 (W.D. Wash. 2016)). The Complaint acknowledges that Facebook is a Delaware corporation with its principal place of business in California. The Complaint does not allege that Facebook engaged in any conduct in South Carolina with respect to Appellant's claims. On these facts, personal jurisdiction does not attach.

Third, the Circuit Court correctly determined that Facebook is immune from Appellant's claims as a matter of federal statutory law. Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230, expressly preempts any cause of action that would hold an internet platform, like Facebook, liable for content posted by a third party, such as Malepeai. Courts have consistently held that the CDA bars claims exactly like those Appellant asserts here.

For any or all of these reasons, this Court should affirm the Circuit Court's Order.

I. The Circuit Court Correctly Found that the Complaint Fails To Allege Facts Sufficient To Constitute a Cause of Action, and Appellant's Failure To Appeal that Ruling Mandates Affirmance on this Ground.

Law of the Case

On appeal, Appellant challenges the Circuit Court's personal jurisdiction and CDA rulings. However, he has elected not to assert any error in the Circuit Court's holding that the

Complaint fails to state a claim. Under the "two issue rule," which is well established in South Carolina, when the decision of the lower court is based upon more than one ground, the appellate court will automatically affirm if the appellant fails to appeal all of the grounds. *Atl. Coast Builders & Contractors, LLC v. Lewis,* 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012); *see also Buckner v. Preferred Mutual Ins. Co.*, 255 S.C. 159, 160-61, 177 S.E.2d 544, 544 (1970) (per curiam) ("The appellant excepted to the court's first conclusion, but has not excepted to its second ground of decision nor argued against it in the brief. Therefore, the [second] finding ... , right or wrong, is the law of this case and requires affirmance."); *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 398, 593 S.E.2d 183, 189 (Ct. App. 2004) ("Any unappealed portion of the trial court's judgment is the law of the case, and must therefore be affirmed."); *State v. Sampson*, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (same).

Having failed to preserve this ground for appeal in his initial brief, Appellant cannot now raise the issue in his reply brief. *McClurg v. Deaton*, 395 S.C. 85, 87 n.2, 716 S.E.2d 887, 888 n.2 (2011) ("It is axiomatic that an issue cannot be raised for the first time in a reply brief."). Because failure to state a claim is an independent basis on which to affirm the Circuit Court's holding, this Court need not proceed any further and should affirm the Circuit Court's holding on this ground alone. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (finding it unnecessary to address remaining issues when determination of a prior issue is dispositive).

Nevertheless, should Appellant contend otherwise, Facebook addresses Appellant's failure to allege facts sufficient to state a viable claim for any of the torts asserted in his Complaint.

Defamation

In order to plead defamation adequately, the plaintiff must allege "specific defamatory comments [including] 'the time, place, content, speaker, and listener of the alleged defamatory matter.'" *Doe v. McGowan*, 2017 WL 573619, at *3 (D.S.C. Jan. 5, 2017) (quoting *Caudle v. Thomason*, 942 F. Supp. 635, 638 (D.D.C. 1996)). For example, in *McKay v. Medical Univ.*, 2017 WL 9250345 (D.S.C. July 19, 2017), the court dismissed the complaint on the ground that it failed to allege "to whom allegedly defamatory statements were made, or what the actual contents of these statements were." *Id.* at *6. Similarly, the court dismissed a defamation complaint where the pleading "fail[ed] to provide facts establishing how the information was published, when the information was published, or what information specifically was published by the Defendants." *Grim v. Low Country Health Care Sys.*, 2018 WL 3328993, at *3 (D.S.C. July 6, 2018). These decisions, rendered under the more liberal pleading standards of the Federal Rules, apply *a fortiori* to the stricter pleading requirements of the South Carolina Rules. *See also McNeil v. S.C. Dept. of Corrections*, 404 S.C. 186, 195, 743 S.E.2d 843, 848 (Ct. App. 2013) (affirming dismissal of defamation claim where the complaint failed to "set forth with any specificity what the alleged false statements were").

Thus, in *Paradis v. Charleston County School Dist.*, 424 S.C. 603, 819 S.E.2d 147 (Ct. App. 2018), the complaint alleged that the defendant defamed the plaintiff with "false accusations that Plaintiff could not effectively teach her students and manage her classroom." *Id.* at 613-14, 819 S.E.2d at 153. This Court found those allegations insufficient to support a defamation claim because, among other reasons, the pleading failed to describe what was said: "Rule 12(b)(6) requires the plaintiff to allege facts. [Plaintiff] failed to do so." *Id.* at 614, 819 S.E.2d at 153.

In this action, the Complaint merely alleges that the statements at issue were false and defamatory and had the tendency to injure Appellant's reputation. (Complaint ¶¶ 15-16) (R. p. 29. This, of course, is simply the definition of defamation, and a very conclusory one at that. Appellant's Complaint says nothing about "what the actual content of [the defamatory] statements were," or "what information specifically was published," or "what the alleged false statements were."

While Appellant purported to quote some statements in his Memorandum in Opposition to the motion to dismiss, the statements quoted there do not appear in the Complaint or, for that matter, in the affidavit or exhibits submitted with the memorandum, or anywhere else in the record. They are, rather, bald factual assertions of counsel with no record support whatsoever. Accordingly, they should be disregarded. *See McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This [c]ourt has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.").

For these reasons, Appellant's defamation claim is deficient on its face.

Civil Conspiracy

Appellant's claim for civil conspiracy against Facebook is fatally defective because it fails to show that: (1) Facebook and the other defendant had an agreement with the intent to injure Appellant; (2) there were any wrongful acts by the supposed co-conspirators other than the acts already alleged in the remaining claims of the Complaint; and (3) there exists any particularized harm or special damages resulting from the alleged conspiracy itself apart from the other alleged wrongful actions.

Under South Carolina law, "[a] civil conspiracy ... consists of three elements: (1) a

combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage." *Lee v. Chesterfield Gen. Hosp., Inc.*, 289 S.C. 6, 10, 344 S.E.2d 379, 382 (1986). If any of these elements fail, so too does the claim. *Pye v. Estate of Fox*, 369 S.C. 555, 567-68, 633 S.E.2d 505, 511 (2006). Additionally, a "claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint." *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (2009). Moreover, because the essence of a civil conspiracy claim is the special damage resulting to the plaintiff, the alleged damages must differ from and exceed the damages alleged for the plaintiff's other claims. *Id.*

To sufficiently plead his civil conspiracy claim, Appellant must "plead with particularity the conspiracy as well as the overt acts within the forum taken in furtherance of the conspiracy." *Unspam Technologies, Inc. Chernuk*, 716 F.3d 322, 329 (4th Cir. 2013) (quoting *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1031 (D.C. Cir. 1997)). In this case, Appellant's allegations of civil conspiracy could not be more conclusory. In his Complaint he speculates that "Defendants act[ed] in concert with one another," (Complaint ¶ 32) but he does not allege any facts to support that assertion. Because the pleading "amounts to no more than a bare allegation or logical possibility," it "does not suffice to allege a plausible claim of the existence of a conspiracy." *Unspam, supra*, 716 F.3d at 330.

Further, it is incumbent upon Appellant to demonstrate through non-conclusory factual allegations that Facebook acted with the primary "purpose" or "intent" to injure Appellant. *Pye v. Estate of Fox, supra,* 369 S.C. at 567, 633 S.E.2d at 511. Appellant has not pleaded, and cannot plead, that Facebook's primary purpose had anything to do with injuring Appellant. Because Appellant has failed to show that Facebook conspired with the specific intent to cause

injury to him, he cannot meet a necessary element of civil conspiracy, and his claim was properly dismissed as a matter of law.

In addition, restating or incorporating prior allegations of a complaint is not sufficient to plead a claim for civil conspiracy. *Hackworth*, 385 S.C. at 115-16, 682 S.E.2d at 875. Put another way, Appellant cannot plead the same set of facts for the actionable wrong and the civil conspiracy, then expect to make cognizable claims for both. *See id.* Yet that is exactly what Appellant has attempted to do here. In Appellant's causes of action for defamation and outrage, he alleges that the defendants "acted jointly to publish false information" about him, that Facebook "published and consented to the unlawful acts of Defendant Malepeai," and that the defendants "entered a course of conduct to publish materially false information" about him. (Complaint ¶¶ 27, 38, 42) (R. pp. 31-33). Yet in his cause of action for civil conspiracy, Appellant merely incorporates by reference and restates the other allegations. (*See, e.g., id.* ¶ 31 ("the defendants published and tolerated false information about the plaintiff"), ¶ 32 ("Defendants acting in concert with one another, have published materially false information about the plaintiff")) (R. p. 31).

This is insufficient to plead a claim for civil conspiracy. *See Kuznik v. Bees Ferry Assocs*, 342 S.C. 579, 611, 538 S.E.2d 15, 31 (Ct. App. 2000) (holding that a pleading of civil conspiracy should be dismissed as a matter of law when the plaintiff "merely reallege[s] the prior acts complained of in his other causes of action as [his] conspiracy action but fail[s] to plead additional acts in furtherance of the conspiracy").

Finally, to state a valid civil conspiracy claim, the Appellant must allege special damages that are not duplicative of the damages claimed as a result of other alleged wrongdoing. *Hackworth, supra,* 385 S.C. at 117, 682 S.E.2d at 875. Here again, the Complaint does not

allege any special damages that are in any way different from or in addition to the damages sought by the Appellant in his other causes of action. Rather, the injury alleged to have been suffered from the civil conspiracy is "injury to reputation and standing in the community, embarrassment, humiliation, diminishment of earnings, and loss of goodwill." (Complaint ¶ 35) (R. p. 32). These are exactly the same elements of damage as Appellant alleges in his defamation claim. (*Id.* ¶ 27) (R. p. 31).

For all of the above reasons, the conspiracy cause of action fails as a matter of law and was properly dismissed by the Circuit Court.

Outrage / Intentional Infliction of Emotional Distress

South Carolina law sets forth four elements of the cause of action known as "outrage" or "intentional infliction of emotional distress":[3]

> To state a claim for outrage, the plaintiff must allege: (1) conduct by the defendant which is atrocious, utterly intolerable in a civilized community, and so extreme and outrageous as to exceed all possible bounds of decency; (2) the defendant acted with intent to inflict emotional distress or acted recklessly when it was certain or substantially certain such distress would result from his conduct; (3) the actions of the defendant caused the plaintiff to suffer emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable man could be expected to endure it.

Corder v. Champion Road Machinery International Corp., 283 S.C. 520, 522-23, 324 S.E.2d 79, 80 (Ct. App. 1984), *cert denied*, 286 S.C. 126, 332 S.E.2d 533 (1985); *accord, e.g.*, *Ford v. Hutson*, 276 S.C. 157, 162, 276 S.E.2d 776, 778-79 (1981).

Under both South Carolina common law and, when the alleged wrongdoing involves an act of speech, the U.S. Constitution, trial courts have the obligation to determine in the first

[3] While Appellant pleads outrage and intentional infliction of emotional distress as separate causes of action, they are the same tort. *See, e.g., Melton v. Medtronic, Inc.*, 389 S.C. 641, 651, 698 S.E.2d 886, 891 (Ct. App. 2010).

instance whether the alleged conduct of the defendant was so extreme and outrageous as to be utterly intolerable and exceed all possible bounds of decency.

> [T]rial courts play a vital role in making a threshold determination of whether a valid claim for intentional infliction of emotional distress has been stated.

Reaves v. Westinghouse Electric Corp., 683 F. Supp. 521, 527 (D. Md. 1988).

> It is the legal responsibility of the court to determine, on the evidence before it, the defendant's conduct may reasonably constitute outrageous conduct.

Todd v. South Carolina Farm Bureau Mutual Insurance Co., 283 S.C. 155, 167-68, 321 S.E.2d 602, 609 (Ct. App. 1984), *quashed in part on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985); *accord Patel v. McIntyre*, 667 F. Supp. 1131, 1145 (D.S.C. 1987) (applying S.C. law), *aff'd mem.*, 848 F.2d 185 (4th Cir. 1988); *Andrews v. Piedmont Air Lines*, 297 S.C. 367, 371, 377 S.E.2d 127, 129 (Ct. App. 1989) (*per curiam*).

Under the allegations of Appellant's Complaint, even viewed in the light most favorable to Appellant, the Circuit Court acted properly in exercising this gate-keeping role, and ruled correctly in dismissing this cause of action at the Rule 12(b)(6) stage.

It is well established that where, as here, the gravamen of a claim for reputational or emotional injury arises from speech, a plaintiff may not "plead around" the stringent pleading requirements for defamation claims by re-characterizing the claim as one for outrage or intentional infliction of emotional distress. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (dismissing emotional distress claim because plaintiff could not prove the elements of a cause of action for defamation); *Todd v. South Carolina Farm Bureau Mut. Ins. Co., supra,* 283 S.C. at 173, 321 S.E.2d at 613 ("The tort of outrage was designed not as a replacement for the existing tort actions. Rather, it was conceived as a remedy for tortuous [sic] conduct where no remedy previously existed."). Under this accepted principle, Appellant may not pursue an emotional distress claim seeking redress for the same injuries under the same set of facts as his

failed defamation claim. Yet that is exactly what the Complaint alleges – liability for the publication of Malepeai's posts. (Complaint ¶¶ 38-40, 42, 45) (R. pp. 32-33).

Apart from this inherent infirmity in Appellant's attempt to recast his defamation cause of action as one for intentional infliction of emotional distress, his claim also fails as a matter of law because Appellant has not adequately alleged that Facebook's "conduct was so extreme and outrageous that it exceeded all possible bounds of decency and was furthermore atrocious, and utterly intolerable in a civilized community." *Hainer v. American Medical Intern., Inc.*, 320 S.C. 316, 324, 465 S.E.2d 112, 116 (Ct. App. 1995), *aff'd as modified*, 328 S.C. 128 (1997). "Extreme insensitivity" does not meet this standard. *Roberts v. Dunbar Funeral Home*, 288 S.C. 48, 51, 339 S.E.2d 517, 519 (Ct. App. 1986). Similarly, "reprehensible conduct" does not constitute extreme and outrageous conduct. *Corder v. Champion Road Machinery International Corp.*, 283 S.C. 520, 523, 324 S.E.2d 79, 81 (Ct. App. 1984), *cert. denied*, 286 S.C. 126, 332 S.E.2d 533 (1985). The standard here is deliberately set high, as this tort is a disfavored one:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice" or a degree of aggravation which would entitle to the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965).

In those cases where the elements of the intentional infliction of emotional distress tort have been satisfied, this Court has explained:

> the common thread has been the existence of three factors. First, a pre-existing legal relationship between the parties has existed, typically a debtor creditor, insured-insurer, landlord-tenant, physician patient or employer-employee relationship. Second, the defendant's conduct has involved excessive self-help in asserting a legal right or avoiding a legal obligation flowing out of the

> relationship or coercive and oppressive abuse of an employee by the employer. Third, the evidence has clearly shown that the defendant calculatedly inflicted suffering or heedlessly and contemptuously disregarded the plaintiff's present emotional suffering either to force the plaintiff to accede to the defendant's wishes or to punish the plaintiff for prior failure to comply.

Todd, 283 S.C. at 169-70, 321 S.E.2d at 610-11.

None of these factors are present here, and Appellant does not (and cannot) contend otherwise. Therefore, the dismissal of Appellant's claim for intentional infliction of emotional distress should be affirmed for this independent reason.

II. The Circuit Court Correctly Applied South Carolina's Long-Arm Statute in Dismissing Appellant's Claims against Facebook for Lack of Personal Jurisdiction.

The Circuit Court's dismissal for lack of personal jurisdiction over Facebook is consistent with and, indeed, compelled by South Carolina and federal jurisprudence limiting a court's jurisdiction over a nonresident defendant. Appellant asks this Court to set precedent aside to allow his case to move forward against Facebook in South Carolina. The Court should decline to do so.

It is well-established that a court's exercise of personal jurisdiction over a defendant "must comport with due process." *Coggeshall v. Reproductive Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007) (citation omitted); *see also Bristol-Myers Squibb Co.* v. *Superior Court of California, San Francisco City*, 137 S. Ct. 1773, 1779 (2017) ("Because a state court's assertion of jurisdiction exposes defendants to the State's coercive power, it is subject to review for compatibility with the Fourteenth Amendment's Due Process Clause ...."). "Due process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and

substantial justice." *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005) (citation omitted).

There are two paths to personal jurisdiction that satisfy due process. *See, e.g.*, *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478. The first path is general jurisdiction. For general jurisdiction to exist, the defendant must have contacts so substantial, continuous, and systematic with the forum that it may be sued there for any cause of action, whether or not the claim has any connection with the forum. *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014). The second path is specific jurisdiction. For specific jurisdiction to exist, "the defendant's suit-related conduct must create a substantial connection with the forum state." *Walden v. Fiore*, 571 U.S. 277, 284 (2014). Appellant has presented this Court with nothing to support the exercise of either general or specific jurisdiction over Facebook in this case.

General Jurisdiction

For the first time on appeal, Appellant asserts that the Circuit Court could exercise general personal jurisdiction over Facebook. Because Appellant did not advance this position below, it has not been preserved for appellate review and has been waived. *See, e.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (explaining that it is "axiomatic that an issue cannot be raised for the first time on appeal"); *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997) (appellant must be the party to raise issue in trial court to preserve it for appeal). Even if this Court confronts Appellant's new general jurisdiction theory, however, it should find that no such jurisdiction exists.

General jurisdiction is "the State's right to exercise personal jurisdiction over a defendant even though the suit does not arise out of or relate to the defendant's contact with the forum."

Coggeshall, 376 S.C. at 16, 655 S.E.2d at 478 (citation omitted). Generally, with respect to a corporation, the "paradigm bases for general jurisdiction" are "the place of incorporation and principal place of business." *Daimler AG v. Bauman*, *supra*, 571 U.S. at 137 (citations and quotation marks omitted). A corporation may be subject to general jurisdiction in places beyond those "paradigm all-purpose forums" only in the exceptional case, where the corporation's "affiliations with the State are so continuous and systematic as to render [the defendant] essentially at home in the forum State." *Id.* at 761 (quotation and citation omitted); *see also BNSF Ry. Co.* v. *Tyrrell*, 137 S. Ct. 1549, 1558 (2017). In such an exceptional case, the "inquiry does not focus solely on the magnitude of the defendant's in-state contacts. General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them." *Daimler AG v. Bauman*, 571 U.S. at 139 n.20 (quotation marks, citations, and ellipsis omitted).

Here, South Carolina is not a "paradigm" forum for purposes of asserting general jurisdiction over Facebook. In his Complaint and on brief, Appellant concedes that Facebook is not organized under the laws of South Carolina and does not maintain its principal place of business in this State. *See* Appellant's Brief at 8 (acknowledging Facebook "is a corporation existing in the state of Delaware, with a headquarters in the state of California. It does not have an office in the State of South Carolina.").

Because the paradigm bases for general jurisdiction are not applicable here, Appellant must rely on arguments of exceptional circumstances. To this end, Appellant goes beyond the allegations of his Complaint in an attempt to convince the Court that Facebook is subject to general jurisdiction in South Carolina. He contends that Facebook's social media platform is

accessible to and used by residents in South Carolina to create personal and business pages that market and sell products within the State. He also contends that Facebook engages in advertising that specifically targets South Carolina residents.

These factual assertions are not in the record and should not be considered by this Court. *See* Rule 210(h), SCACR ("Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal."). Even if these newly submitted allegations were properly before the Court, however, they fall woefully short of the exceptional circumstances required for a finding of general jurisdiction beyond the paradigm forums.

The Supreme Court of the United States recently found general jurisdiction to be lacking in circumstances where the defendant's contacts with the forum state were much more substantial than those alleged by Appellant here. In *BNSF Ry. Co. v. Tyrrell, supra*, the Supreme Court examined whether a Montana court could exert general jurisdiction over a national railroad company with over 2,000 miles of track in Montana and employing more than 2,000 of the State's residents. 137 S. Ct. at 1554. The Supreme Court rejected arguments that the railroad's physical presence and employment of residents in Montana was so "continuous and systemic" and "so substantial and of such nature as to render the corporation at home," because the contacts were a relatively small portion of the company's total activities. *Id.* at 1558.

In the instant case, Appellant does not contend that Facebook owns any physical property or maintains any offices in South Carolina – a stark contrast to the in-state property ownership and employment of the defendant in *BNSF Ry. Co. v. Tyrrell.* If the railroad company in that case was not "at home" in Montana, there is no way that Facebook can be said to be "at home" in

South Carolina here. Consequently, under the authority of *BNSF Ry. Co. v. Tyrrell,* the exercise of general jurisdiction by our courts would not comport with the requirements of due process.

Appellant next argues that the court may exercise general jurisdiction over Facebook by imputing to it alleged acts of a different and separate company, Facebook Payments, Inc. Appellant's Brief at 9. This argument was not raised to the lower court and, therefore, is not properly before this Court on appeal. In any event, Facebook Payments, Inc.'s purported activities are legally irrelevant to whether Facebook, Inc. is subject to general jurisdiction in South Carolina.

Courts have consistently "declined to extend jurisdiction to the parent based solely on the activities of a related entity where those activities are unrelated to the cause of action and do not bear a substantial connection to the case at hand." *Builder Mart of Am., Inc. v. First Union Corp.*, 349 S.C. 500, 511, 563 S.E.2d 352, 358 (Ct. App. 2002), *overruled on other grounds by Farmer v. Monsanto Corp.*, 353 S.C. 553, 579 S.E.2d 325 (2003); *see also Wright v. Waste Pro USA, Inc.*, No. 2:17-cv-02654, 2019 WL 3344040, *5 (D.S.C. July 25, 2019) ("the mere presence of a [related entity] within the court's personal jurisdiction does not subject a foreign corporation to the court's reach"). Moreover, "courts that have addressed the issue have found unified marketing and advertising and holding out to the public as a single entity, without more, insufficient to confer jurisdiction." *Builder Mart of Am., Inc.*, 349 S.C. at 512-13, 563 S.E.2d 352 at 358-59.

Here, Appellant readily concedes that Facebook Payments, Inc. and Facebook, Inc. are legally distinct entities. *See* Appellant's Brief at 9. Yet, Appellant provides no support for his argument that Facebook Payments, Inc.'s activities should be imputed to Facebook for purposes of general jurisdiction. Accordingly, this Court should decline to extend general jurisdiction to

Facebook based on the activities of Facebook Payments, Inc. Holding otherwise would expand general jurisdiction beyond the limits of due process in a manner which the Supreme Court has rejected as "unacceptably grasping." *Daimler*, 571 U.S. at 138.

Specific Jurisdiction

Appellant has likewise failed to articulate any error in the lower court's dismissal of the claims against Facebook for lack of specific jurisdiction.

Specific jurisdiction is "the State's right to exercise personal jurisdiction because the cause of action arises specifically from a defendant's contacts with the forum." *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478 (citation omitted). In order to exercise "specific" personal jurisdiction over a defendant, a plaintiff must show that such jurisdiction is authorized by S.C. Code Ann. § 36-2-803, South Carolina's long-arm statute. *White v. Stephens*, 300 S.C. 241, 245, 387 S.E.2d 260, 262 (1990). "Because we treat our long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction in this case would violate the strictures of due process." *Moosally v. W.W. Norton & Co., Inc.*, 358 S.C. 320, 329, 594 S.E.2d 878, 883 (Ct. App. 2004).

The due process clause sets limits upon a state court's power to exert personal jurisdiction over any defendant not a resident of the forum state. *Asahi Metal Ind. Co. v. Superior Court*, 480 U.S. 102 (1987). For a forum to exercise specific jurisdiction over a defendant, a plaintiff must demonstrate that the court has both the power to assert jurisdiction over the defendant and that the extension of such jurisdiction would be fair. *Builder Mart of America, Inc.*, 349 S.C. at 506, 563 S.E.2d at 356 (discussing "(1) the power prong and (2) the fairness prong") (citations omitted), *overruled on other grounds by Farmer v. Monsanto Corp.*,

353 S.C. 553, 579 S.E.2d 325 (2003). The plaintiff has the burden of satisfying both of these tests. "If either prong fails, the exercise of personal jurisdiction over the defendant fails to comport with the requirements of due process." *Southern Plastics Co. v. Southern Commerce Bank,* 310 S.C. 256, 260, 423 S.E.2d 128, 131 (1992).

This Court has previously explained:

> Under the power prong, a minimum contacts analysis requires a court to find that the defendant directed its activities to residents of South Carolina and that the cause of action arises out of or relates to those activities. Without minimum contacts, the court does not have the "power" to adjudicate the action. It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts.

Moosally, 358 S.C. at 331-32, 594 S.E.2d at 884-85 (citations omitted) (emphasis added).

In addition to demonstrating that the court has the requisite power over the defendant, the plaintiff must also show that the court's exercise of its power would be reasonable and fair. The fairness prong of the test requires the court to "examine such factors as the burden on the defendant, the extent of the plaintiff's interest, South Carolina's interest, efficiency of adjudication, and the several states' interest in substantive social policies." *Id.* (citations omitted). However, "[d]ue process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant – not the convenience of plaintiffs or third parties." *Walden*, 571 U.S. at 284.

Appellant argues that specific jurisdiction is appropriate in South Carolina based on his allegation of injury in the State, purportedly as a result of Facebook's alleged failure to remove a user's allegedly defamatory postings, and his allegation of conspiracy between Facebook and the third party poster. These arguments are meritless. "[M]ere injury to a forum resident is not

sufficient connection to the forum." *Id.* at 290. Rather, "[t]he inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation. For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." *Id.* at 284 (emphasis added; citations and quotation marks omitted).

Consequently, "[c]ourts generally agree that the ability of forum residents to access a defendant's website, standing alone, does not suffice to establish minimum contacts with the forum state." *Smarter Every Day, LLC v. Nunez*, No. 2:15-cv-01358-RDP, 2017 WL 1247500, at *3 (N.D. Ala. Apr. 5, 2017); *see also, e.g., Hidria, USA, Inc. v. Delo,* 415 S.C. 533, 544-45, 783 S.E.2d 845 (Ct. App. 2016) (holding trial court lacked jurisdiction over defamation claim against defendant who posted allegedly defamatory material on website accessible by South Carolina residents); *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 434, 665 S.E. 2d 660, 666 (Ct. App. 2008) (noting plaintiff "failed to make any allegations or produce any evidence that a South Carolina resident purchased any product from or because of [defendant's] website, or that the website was particularly directed at South Carolinians").

Appellant alleges in his brief that Facebook regularly transacts business in the State through South Carolina residents' use of its website. He further alleges that a South Carolina resident, Defendant Malepeai, "published" via Facebook "false and defamatory statements concerning the Plaintiff." (Complaint ¶¶ 15-17) (R. pp. 29-30). However, he does not allege any actions by Facebook that took place in South Carolina and that relate in any way to those postings, and Appellant's conclusory allegations of conspiratorial conduct do not cure this defect. (*See* Complaint ¶ 32) (R. p. 31) (stating without specificity or factual support that

Defendants Facebook and Malepeai "act[ed] in concert with one another" to "publish[] materially false information about the plaintiff.").

To establish personal jurisdiction on a conspiracy theory, the "plaintiff must plead with particularity the conspiracy as well as the overt acts within the forum taken in furtherance of the conspiracy." *Unspam Techs., Inc. v. Chernuk*, 716 F.3d 322, 329 (4th Cir. 2013) (quoting *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1031 (D.C. Cir. 1997)). Without a connection between Facebook's alleged contacts with South Carolina and the injury at issue in the suit, there is no basis for specific jurisdiction. *See Walden*, 571 U.S. at 290 ("mere injury to a forum resident is not sufficient connection to the forum").

Appellant also contends that Facebook is subject to specific jurisdiction in this case because its website is accessible to and used by South Carolina residents and because Facebook supposedly profits from South Carolina residents by facilitating targeted advertising. Aside from the fact that these arguments are not properly before the Court in this appeal, they miss the fundamental premise of specific jurisdiction – that it derives from the defendant's suit-related conduct. Nothing in the Complaint, or even in Appellant's brief, provides the Court with any basis to find that the alleged advertising conduct is connected to Appellant's alleged injury, much less to warrant the exercise of specific jurisdiction over Facebook in this case.

Other courts have addressed arguments similar to those advanced by Appellant and have repeatedly found such attenuated claims of contact with the forum state insufficient to extend jurisdictional reach to Facebook. In *Georgalis v. Facebook, Inc.*, the plaintiff argued that it was appropriate for a court in Ohio to exercise personal jurisdiction over Facebook because millions of Ohio residents used the website and Facebook directed advertising to users in Ohio. 324 F. Supp. 3d 955, 959 (N.D. Ohio 2018). The *Georgalis* court dismissed the claims against

Facebook, finding no basis to assert specific jurisdiction because the plaintiff's claims were "unrelated to and [did] not arise from [Facebook's] claimed sale of targeted marketing to Ohio residents." *Id.* at 961.

This conclusion is consistent with the decision in *Ralls v. Facebook* 221 F. Supp. 3d 1237 (W.D. Wash. 2016). There, a plaintiff sued Facebook for removing his posts from the social media site, allegedly violating his constitutional rights of free speech. *Id.* In granting Facebook's motion to dismiss, the *Ralls* court noted "that personal jurisdiction over Facebook may not exist simply because a user avails himself of Facebook's services in a state other than the states in which Facebook is incorporated and has its principal place of business." *Id.* at 1244. *Accord Gullen v. Facebook.com,* No. 15 C 7681, 2016 WL 245910, *1-3 (N.D. Ill. Jan. 21, 2016) (dismissing action against Facebook for lack of personal jurisdiction where Facebook's alleged activities in the state were unrelated to the cause of action); *Facebook, Inc. v. K.G.S. et al.*, C.A. Nos. 1170244, 1170294 and 1170336, 2019 WL 2710235, *13 (Ala. June 28, 2019) ("Facebook's contacts with Alabama that were made merely in response to [plaintiff's] or her attorney's contact with Facebook are precisely the sort of unilateral activity of a third party that cannot satisfy the requirement of contact with the forum State.") (citations and quotation marks omitted).

The Court should affirm the Circuit Court's dismissal of Appellant's claims against Facebook for lack of personal jurisdiction consistent with these well-reasoned opinions.

III. The Circuit Court Correctly Found that Section 230 of the Communications Decency Act Immunizes Facebook from Any Liability for Malepeai's Posts.

Congress enacted the CDA in 1996 to foster the development of the internet and to encourage free speech by shielding online service providers from lawsuits arising out of user-

generated content. *See Zeran v. America Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997). Under CDA section 230(c)(1), "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The CDA expressly preempts any cause of action that would hold an internet platform liable as a speaker or publisher of third-party speech: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with" the CDA. 47 U.S.C. § 230(e)(3); *Zeran*, 129 F.3d at 330 ("By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.").

In *Zeran v. America Online, Inc.*, the Fourth Circuit explained that CDA section 230 protects the exercise of a "publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter [third-party] content." 129 F.3d at 330. "State-law plaintiffs may hold liable the person who creates or develops unlawful content, but not the interactive computer service provider who merely enables that content to be posted online." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009); *see also, e.g., Doe v. MySpace, Inc.*, 528 F.3d 413, 419 (5th Cir. 2008) ("Parties complaining that they were harmed by a Web site's publication of user-generated content have recourse; they may sue the third-party user who generated the content, but not the interactive computer service that enabled them to publish the content online.").[4]

[4] The policy underlying this rule is evident. As the Fourth Circuit explained in *Zeran*, "[i]nteractive computer services have millions of users," and Congress has recognized that "the specter of tort liability in an area of such prolific speech would have an obvious chilling effect." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). "Faced with potential liability for each message republished by their services," for instance, "interactive computer service providers might choose to severely restrict the number and type of messages posted."

CDA section 230(c)(1) warrants dismissal if three conditions are met: (1) Facebook is a provider of an "interactive computer service," (2) the content at issue was "provided by another information content provider," and (3) the claims at issue treat Facebook as the "publisher or speaker" of that content. 47 U.S.C. § 230(c)(1); *Nemet*, 591 F.3d at 254.[5]

Appellant does not challenge the Circuit Court's determination that CDA section 230(c)(1) bars his claims for defamation and civil conspiracy. Appellant's Brief at 15-16. Nor does he contest the Circuit Court's determination that the first and second conditions for CDA immunity are satisfied as to his remaining claim for outrage / intentional infliction of emotional distress. *Id.* at 15-16.

Rather, Appellant argues that the Circuit Court improperly applied CDA section 230 to his claim for outrage / intentional infliction of emotional distress because the third requirement for CDA immunity is not met. In particular, Appellant argues that: (1) "[t]hose causes of action do not require Appellant to establish Facebook as the publisher of the vulgar and false statements"; and (2) Facebook was notified of Malepeai's "vulgar, vile, and repulsive statements posted about him" but allegedly "refus[ed] to remove those posts and delete Defendant Malepeai's account." *Id.* at 15-16. Both arguments fail.

Appellant's Claims Seek to Hold Facebook Liable as the "Publisher or Speaker" of Content Posted by Malepeai.

CDA section 230(c)(1) "precludes courts from entertaining claims that would place a computer service provider in a publisher's role." *Zeran*, 129 F.3d at 330. "Thus, lawsuits

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Id. "Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect." *Id.*

[5] *See also, e.g., Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 409 (6th Cir. 2014); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014); *Green v. Am. Online (AOL)*, 318 F.3d 465, 470 (3d Cir. 2003).

seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred." *Id.*[6]

Here, all of Appellant's claims are predicated on allegations that Facebook "published," and failed to block or remove, allegedly defamatory statements posted by Malepeai.[7] Editorial decisions of this kind "fall[] squarely within th[e] traditional definition of a publisher and, therefore, [are] clearly protected by [section] 230's immunity." *Zeran*, 129 F.3d at 332; *see also, e.g., Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) ("[P]ublication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." (emphasis added)).

To the extent Appellant contends that claims for intentional infliction of emotional distress / outrage[8] are somehow outside the scope of CDA section 230, he is wrong. "[W]hat matters is not the name of the cause of action – defamation versus negligence versus intentional infliction of emotional distress – what matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Barnes*, 570 F.3d at 1101-02 (emphasis added).

Not surprisingly, courts have applied CDA immunity to all manner of tort claims, including claims for intentional infliction of emotional distress/outrage predicated on the posting

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[6] *See also, e.g., Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009); *Jones*, 755 F.3d at 416; *Green*, 318 F.3d at 471; *Klayman,* 753 F.3d at 1359.

[7] *See, e.g.,* (Complaint ¶ 38) (R. p. 32) ("That Facebook published and consented to the unlawful acts of Defendant Malepeai ..." (emphasis added)); (*id.* ¶ 42) (R. p. 33) ("The Defendants entered a course of conduct to publish materially false information about the Plaintiff ...." (emphasis added)).

[8] As noted, *supra*, outrage and intentional infliction of emotional distress are two names for the same cause of action.

of allegedly defamatory content. *See, e.g.*, *Winter v. Bassett*, 2003 WL 27382038, at *7 (M.D.N.C. Aug. 22, 2003) (applying CDA immunity to claim for intentional infliction of emotional distress; "The Fourth Circuit has clearly held that § 230 creates a federal immunity to any cause of action that would make ISPs liable for information originating with a third-party user of the service."), *aff'd*, 157 F. App'x 653 (4th Cir. 2005) ("we affirm on the basis of the well-reasoned opinions of the district court").[9] This Court should do the same.

Alleged Notice Does Not Deprive Facebook of CDA Immunity.

Appellant's allegation that Facebook was "notified of Defendant Malepeai's posts," Appellant's Brief at 15, does not change the fact that his claims seek to treat Facebook as the "publisher of speaker" of Malepeai's statements. "It is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider's own speech." *Universal Comm'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007); *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1269 (D.C. Cir. 2019) (holding that CDA immunity applied despite allegations that the defendants had "actual notice" that third parties were publishing "fraudulent" content on their platforms); *Zeran*, 129 F.3d at 330-31.[10]

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[9] *See also, e.g.*, *Bennett v. Google, LLC*, 882 F.3d 1163, 1165-68 (D.C. Cir. 2018); *Caraccioli v. Facebook, Inc.*, 700 F. App'x 588 (9th Cir. 2017); *Kabbaj v. Google Inc.*, 592 F. App'x 74 (3d Cir. 2015); *Jones*, 755 F.3d at 407; *Getachew v. Google, Inc.*, 491 F. App'x 923, 925-26 (10th Cir. 2012); *Cohen v. Facebook, Inc.*, 2017 WL 2192621, at *3 (E.D.N.Y. May 18, 2017); *Neeley v. NameMedia, Inc.*, 2010 WL 5677069, at *4 (W.D. Ark. Dec. 16, 2010), *report and recommendation adopted*, 2011 WL 336174 (W.D. Ark. Jan. 31, 2011).

[10] *See also, e.g., Jones,* 755 F.3d at 407 (explaining that the CDA bars "notice-liability defamation claims lodged against the interactive computer service providers"); *J.S. v. Vill. Voice Media Holdings, L.L.C.*, 184 Wash. 2d 95, 140 (2015) ("despite Backpage's alleged knowledge that its users post illegal content, its failure to intervene is immunized" (internal quotations omitted)).

In *Zeran*, for example, the plaintiff was allegedly subjected to defamatory and harassing messages wrongfully associating him with the Oklahoma City bombing. 129 F.3d at 330-31. America Online, the online service provider, was notified of the messages, but allegedly delayed in removing them, refused to post retractions, and failed to screen for similar postings, thus allowing the messages to reappear. *Id.* In concluding that section 230(c)(1) barred the plaintiff's claims, the Fourth Circuit specifically held that notice of offending content does not preclude CDA immunity. As the court explained:

> The simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law. To the contrary, once a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher. The computer service provider must decide whether to publish, edit, or withdraw the posting. In this respect, Zeran seeks to impose liability on AOL for assuming the role for which § 230 specifically proscribes liability—the publisher role.

Id. at 332-33. The *Zeran* court also noted that subjecting internet platforms to tort liability under these circumstances would defeat "the dual purposes" of section 230, by encouraging providers to restrict speech and abstain from self-regulation. *Id.* at 333.

"The *Zeran* court's views have been broadly accepted, in both federal and state courts." *Barrett v. Rosenthal*, 40 Cal. 4th 33, 46 (2006) (citing cases). Indeed, Appellant was unable to cite a single case holding that an interactive computer service provider loses CDA immunity when it receives notice of offending content and refuses to remove or delete it.

Accordingly, the Circuit Court correctly concluded that all of Appellant's claims are barred by CDA section 230(c)(1).

CONCLUSION

For the foregoing reasons, this Court should affirm the Circuit Court's decision dismissing Appellant's claims.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2019-001054

Kevin Ralph Richard .....Appellant,

v.

Facebook, Inc., a Delaware Corporation, and
Maleko Kirk Malepeai, individually, ...Defendants,

Of which Facebook, Inc., a Delaware Corporation, is the .....Respondent.

CERTIFICATE OF COUNSEL

I certify that the FINAL BRIEF OF RESPONDENT is in compliance with South Carolina Rule of Appellate Practice 211(b).

Meliah Bowers Jefferson
Meliah Bowers Jefferson

Dated: February 3, 2020