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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM THE BEAUFORT COUNTY  
COURT OF COMMON PLEAS

HONORABLE BROOKS P. GOLDSMITH

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CASE NO.: 2018-CP-07-00409  
APPELLATE NO.: 2020-000128

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Gary Victory,

Appellant,

Vs.

Wells Fargo Bank, NA and  
Mortgage Contracting Services, LLC,

Defendants.

Of Whom Mortgage Contracting Services, LLC is

Respondent.

And

Mortgage Contracting Services, LLC

Respondent,

Vs.

Ryan Davis d/b/a/ Davis Home Preservation,

Defendant.

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INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Appellant fail to preserve, or did he waive, the issue of whether the circuit court erred by refusing to continue the hearing on MCS' Summary Judgment Motion to allow for more discovery?
- II. Did the circuit court abuse its discretion by conducting a hearing on MCS' Summary Judgment Motion rather than allowing for more discovery, assuming the issue was preserved and not waived?
- III. Did the circuit court err by conducting a hearing on MCS' Summary Judgment Motion without ruling on Appellant's pending Motion to Amend his Complaint?

## STATEMENT OF THE CASE

Appellant commenced this action by filing a Summons and Complaint in the State of South Carolina, Beaufort County Court of Common Pleas on February 26, 2018. The allegations against Mortgage Contracting Services, LLC (hereinafter “MCS”) are conversion and defamation. On March 30, 2018, MCS served its answer.

On November 1, 2018, MCS filed a Third-Party Summons and Complaint adding Ryan Davis d/b/a Davis Home Preservation (hereinafter “Davis”) as a Third-Party Defendant. Davis served his Answer to the Third-Party Complaint on December 27, 2018. On June 21, 2019, MCS served a Motion for Summary Judgment and a Motion to Dismiss Appellant’s defamation claims. On July 23, 2019, Appellant filed a Motion to Amend his Complaint to allege more clearly Appellant’s damages with regard to the defamation claims.

The circuit court set motions hearings for July 30, 2019. On July 29, 2019, all parties agreed in a written Consent Order entered by the circuit court to continue all motions until the next available motions roster.

The circuit court granted MCS’ motion for summary judgment after a full hearing on October 16, 2019. The written order was entered on October 29, 2019 and found that Davis is an independent contractor and therefore MCS cannot be held liable for his actions. Appellant filed a Motion for Reconsideration on November 7, 2019. The circuit court denied that motion on January 10, 2020. Appellant served a Notice of appeal on January 24, 2020.

Appellant seeks review of the circuit court’s failure to permit further discovery before entertaining MCS’ motion for summary judgment, and he asserts that his Motion to Amend his complaint should have been granted.

## ARGUMENTS

- I. APPELLANT FAILED TO PRESERVE OR WAIVED THE PRIMARY ISSUE HE SEEKS TO APPEAL: THAT THE COURT SHOULD HAVE CONTINUED THE HEARING ON MCS' SUMMARY JUDGMENT MOTION UNTIL DISCOVERY WAS COMPLETE.

Appellant argues the circuit court erred at the hearing on October 16, 2019 by failing to grant the proposed amendment to the complaint, and “should have continued any additional motions scheduled regarding this matter until after the amendment was filed, the parties answered the amended pleadings and discovery was concluded.” (Initial Brief of Appellant, p. 6). Appellant does not reveal (1) the motions for summary judgment had been continued once already, (2) Appellant consented via an order for the motions to be set for hearing at the next available motions roster, (3) Appellant never moved for a continuance of the October 16, 2019 hearing, and (4) Appellant failed to contemporaneously object to the hearing once it commenced.

“In order to preserve an issue for appellate review, a party must both raise that issue to the trial court and obtain a ruling.” Foster v. Foster, 393 S.C. 95, 99, 711 S.E.2d 878, 880 (2011). Appellant did neither.

MCS filed its Motion for Summary Judgment on June 21, 2019. Wells Fargo had already filed a Motion for Summary Judgment. On July 9, the clerk issued an electronic Notice of Motions Roster Publication setting the motions for hearing on July 30, 2019. On July 23, Appellant filed a Return in which he argued for a continuance so he could conduct further discovery, but made no formal motion for an order of continuance. In the end, the July 30, 2019 hearing was continued by consent of the parties upon request of counsel to Wells Fargo, who had a scheduling conflict. (July 29, 2019 Consent Order of Continuance). Although the Consent Order for Continuance gave relief as to Wells Fargo's motion only, MCS consented to continue its motion too, so no hearing was held on July 30.

Significantly, the Appellant consented to have the July hearing continued “**until the next available motions roster.**” (Consent Order for Continuance p. 2 (emphasis added)). The Consent Order of Continuance constitutes a binding agreement among counsel entered on the record pursuant to Rule 43(k), SCRCF. The parties’ motions were re-set for hearing two and a half months later on October 16, 2019. There is no indication in the Record on Appeal that Appellant pursued discovery during the interim.<sup>1</sup>

As the October hearing date approached, Appellant neither moved for a continuance nor filed a new return asserting a need to conduct additional discovery. The circuit court proceeded with the hearing without any objection by Appellant, and in a manner consistent with the Consent Order of Continuance entered two and a half months earlier.

On the record at the hearing, counsel to Wells Fargo represented to the circuit court that the parties had agreed for the summary judgment motions to be heard. (Hearing Transcript p. 5, line 2 – p. 6 line 5.) Again, Appellant made no objection. Agreements of counsel shall be binding when made in open court and noted upon the record. Rule 43(j), SCRCF.

Appellant’s oral argument in response to movants’ presentations included references to conducting further discovery, but no motion to continue or objection to proceeding with the hearing. Appellant was provided a full opportunity to be heard after which the circuit court entered summary judgment in favor of MCS. (Order Granting Summary Judgment to MCS). Not surprisingly, the circuit court made no specific ruling concerning a second continuance for purposes of more discovery since none was required.

In his November 7, 2019 “Motion for Reconsideration of Summary Judgments,” Appellant argued that “this matter should be continued until depositions and discovery have been

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<sup>1</sup>In the discovery period between the initial hearing date of July 30, 2019 and the next available motions roster two and one-half months later, no new facts were developed by the Appellant.

completed and produced.” (Motion For Reconsideration). While Appellant mentions his July 23, 2019 Return in which he argued for more time to conduct discovery, he failed to address the Consent Order entered on July 29, 2019 in which he agreed to a continuance “until the next available motions roster.” (Consent Order of Continuance, page 2.) The circuit court denied the Motion for Reconsideration without any substantive findings. (Order Denying Motion for Reconsideration).

In summary, Appellant had already obtained the relief he argued for in his July 23, 2019 Return, but did not develop any new evidence in the interim which might have created a genuine issue for trial. When the motions were re-set for hearing, Appellant made no new return and filed no motion for continuance. He did not object to proceeding with the hearing, and made no response to opposing counsel’s statement that the parties had agreed for the motions to be heard then and there. Any arguments made in the Motion for Reconsideration cannot raise new issues and do not change the fact that the Appellant consented to a hearing at the next available motions roster, failed to object at the hearing, and participated fully before the motion was granted. See Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C., 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (finding the issue was not preserved because a party may not raise an issue in a motion to reconsider, alter, or amend a judgment that could have been presented prior to the judgment); Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct.App.1990) (“A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.”). Therefore, this issue is not preserved. Bayle v. South Carolina Dep’t of Trans, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001). See also Degenhart v. Knights of Columbus, 309 S.C. 114, 420 S.E.2d 495 (1992) (stating whether court erred in granting summary judgment while appellants had motion to compel outstanding was not preserved when

appellants failed to move for a continuance and did not request motion for summary judgment be held in abeyance until after ruling on discovery motion); Pryor v. Northwest Apartments, Ltd., 321 S.C. 524, 469 S.E.2d 630 (Ct.App.1996) (holding that issue as to whether judge erred in granting summary judgment because discovery requests were outstanding was not preserved where appellant did not ask court to continue case so discovery could be completed).

Alternatively, Appellant should be deemed to have waived any right to a continuance because he failed to either make a motion for a continuance or contemporaneously object to the hearing before it began. A party should not be permitted to proceed to a hearing with full opportunities to brief, argue, and persuade, only to later assert an objection to the timing of events when faced with an adverse outcome.

These circumstances are analogous to those found in Paschal v. Causey, 309 S.C. 206, 420 S.E. 2d 863 (Ct. App. 1992), which interpreted Rule 40(b)(2), SCRPC. The Rule provides protection from trial until 120 days after the later of the original complaint or the last pleading which adds a new party to the action, unless counsel for all parties certify in writing to the court that all issues are joined and the action is ready for trial. In Paschal, the case was called to trial inside the 120 day period without the parties giving the required written certification. At the same time, no party made a motion for continuance or called the court's attention to the Rule during the trial. Id., at 208, 420 S.E. 2d at 865.

The court observed that Rule 40(b)(2), SCRPC provides a procedural right which may be waived. The Court further held that the Appellants waived the procedural protection provided by the Rule when they failed to object or seek a continuance. Id. In support of its decision, the court relied upon Faith Holiness Church v. Church of God, 282 S.C. 487, 391 S.E. 2d 348 (Ct. App. 1984) and its holding that "a party who fails to object to the trial of the case and

affirmatively agrees to its trial at a designated time cannot later assert that the trial court erred in trying the case before the close of the statutory period.” Id. citing Windham v. Honeycutt, 279 S.C. 109, 302 S.E.2d 856 (1983)).

This Court should reach the same conclusion where, as here, something less than a procedural or statutory right is involved. Appellant had no procedural or statutory right to a continuance to avoid the hearing in October, 2019. Moreover, the Appellant agreed to and participated in the hearing rather than objecting or filing a motion for continuance in advance. If the appellants in Paschal and Faith Holiness Church can be deemed to have waived more substantial rights via the same conduct, then Appellant should be deemed to have waived a supposed right to a continuance here.

II. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY GRANTING MCS SUMMARY JUDGMENT EVEN IF DISCOVERY WAS NOT COMPLETE.

Standard of Review

The primary issue on appeal involves a discovery matter. “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). An abuse of discretion occurs when the trial judge's ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support. Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987).

Discussion

Appellant’s initial brief does not identify any unsupported factual conclusions reached by the circuit court in its consideration of any request for continuance. Appellant also fails to identify an error of law committed by the circuit court when it determined to hold the hearing rather than continue it until after discovery was concluded. Without any support, Appellant

merely asserts that the circuit court denied him the opportunity to discover facts that might have revealed a genuine issue for trial.

MCS observes that the circuit court's legal bases for awarding MCS' summary judgment are not on appeal, so Appellant clearly concedes that the circuit court made the correct decision pursuant to Rule 56, SCRPC based on the record presented. Appellant makes no argument that there are material issues of fact to be drawn in his favor. Appellant simply argues for more discovery time to look for information that might help him avoid a grant of summary judgment once discovery is "concluded."

While there is no specific ruling for the Court to review with regard to any motion or request for a continuance on the basis of needed discovery, the circuit court was aware of certain facts regarding the status of discovery. The case was twenty months old at the time of hearing. (Appellant's Complaint). Third-Party Defendant Ryan Davis (hereinafter "Davis") had been added. (MCS Answer and Third Party Complaint). All parties had exchanged written discovery, which included Davis' written statement describing how he made a wrong turn and went to Appellant's property even though he had the correct address of his intended destination. (Exhibit A to MCS' Motion for Summary Judgment).

The parties had taken depositions, including testimony of Third-Party Defendant Davis, during which he again fell on his sword, admitting the mistake was his and his alone. Davis also described his role as an independent contractor retained by PPP to achieve a certain result for a set price, using his own tools and equipment. (Deposition of Davis 33:8-36:6; 38:5-21; 40:24-41:13; 53:16-54:3, a portion of MCS Exhibit D to its Motion for Summary Judgment.)

In short, all facts surrounding the incident were known early in the case. These facts were never controverted by Appellant's investigation or discovery efforts at any point leading up

to the hearing, despite having ample time to conduct discovery and three months' notice of MCS' bases for summary judgment. (MCS Memo in Support of Motion for Summary Judgment).

In the summary judgment context, “[a] complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.” Gauld v. O’Shaughnessy Realty Co., 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008). Therefore, “The nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition.” Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003).

Although Appellant argued at the hearing about taking one particular deposition, he offered no reason why he needed it or explanation of where it might lead. The circuit court entertained the presentation and was not persuaded. In fact, Appellant has not indicated to the circuit court, the parties, or even this Court, what evidence he expects to be adduced in any further discovery. (Transcript of Hearing, all pages.) The Motion to Reconsider is likewise silent even on the issues to be investigated if more time were permitted for discovery. (Appellant’s Motion to Reconsider).

Appellant, as non-moving party at the hearing, did not meet his burden to the circuit court, and the circuit court was obligated to enter summary judgment in favor of MCS. The Record on Appeal does not demonstrate further discovery would have contributed to the resolution of the issue at hand—namely, whether Davis was anything more than a remote independent contractor to MCS. There was no abuse of discretion.

III. THE CIRCUIT COURT DID NOT ERR BY CONDUCTING THE SUMMARY JUDGMENT HEARING NO MATTER WHETHER APPELLANT’S MOTION TO AMEND HAD BEEN GRANTED FIRST.

Appellant may be suggesting that new allegations in the proposed amended complaint would open the door to new information in the discovery process. This is not the case.

The proposed amended complaint was offered in response to parties' motions to dismiss the defamation claims as insufficiently pled. (MCS Motion to Dismiss). New language in the proposed amended complaint may cure those deficiencies which concern damages allegedly suffered by Appellant. The proposed amended complaint does nothing to address the legal and factual bases which support the circuit court's decision to grant MCS summary judgment. Again, the Order Granting Summary Judgment is not on appeal.

Proceeding with, rather than continuing, the summary judgment hearing was appropriate regardless if the defamation claim was properly pled. This is so because MCS cannot be held vicariously liable for libel or slander even if Davis' mistake might satisfy the definition of common law malice and Appellant can prove special damages arising from his mistake. It remains uncontroverted that Davis was not employed by MCS or otherwise contracted by MCS to perform work at 5614 Frederick Drive. MCS contracted with PPP, which in turn contracted with its independent contractor Davis, who mistakenly performed work at the wrong address. The circuit court correctly held there can be no imposition of vicarious liability against MCS for any claimed libel or slander by Davis, who is a remote independent contractor to MCS. Duane v. Presley Constr. Co., 270 S.C. 682, 244 S.E.2d 509 (1978); Cherry v. Myers Timber Co., 404 S.C. 596, 745 S.E.2d 405 (Ct. App. 2013). (Order Granting Summary Judgment).

The record reflects that the parties consented to the proposed amended complaint. The circuit court never had to rule. Nevertheless, had the court ruled against the amendment, it would not have abused its discretion. The circuit court may deny any amendment if in its discretion it finds the amendment would be futile. For example, it has been held that the circuit

court properly denied a motion to amend a complaint on the grounds that any amendment would be futile where the defendant was immune from suit for those claims. See Health Promotion Specialists, L.L.C. v. S.C. Bd. of Dentistry, 403 S.C. 623, 632, 743 S.E.2d 808, 812–13 (2013) (affirming the circuit court's denial of a party's motion to amend its complaint when the amendment would be futile).

The grant or denial of the Motion to Amend is immaterial to the legal analysis of independent contractor. That is one reason why MCS consented to the amended pleading. In the end, Appellant suffered from a complete failure of proof concerning an essential element of his case against MCS. The most well pled allegations of any complaint would not affect the circuit court's analysis, which is not under review. MCS was entitled to summary judgment, and Appellant has failed to demonstrate how further discovery would have contributed to a different resolution of the independent contractor issue. The circuit court applied appropriate discretion by not ruling on the motion to amend and, instead, proceeding to hold a hearing and rule on the dispositive issue.

#### IV. THE COURT SHOULD AFFIRM ON ANY GROUND APPEARING ON THE RECORD ON APPEAL.

Alternatively, MCS asks the Court to affirm the circuit court on any ground appearing on the Record as provided by Rule 220(c), SCAR.

#### CONCLUSION

By not appealing the grant of summary judgment, Appellant concedes that the circuit court was correct on the law and the facts when summary judgment was granted to MCS. Appellant simply argues he should have been afforded more discovery time in which to overcome those facts. But Appellant offers no reason to believe that any amount of discovery would change the facts known at the time of the hearing. Therefore, the circuit court did not

abuse its discretion by proceeding to hear the motion and ruling in favor of MCS. For these reasons and any other appearing in the Record on Appeal, this Court should affirm the circuit court.

Respectfully Submitted,

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