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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge
Trial Case No. 2015-CP-07-02937

Appellant Case No. 2020-001126

Kim Likins, ...Respondent/Appellant,

v.

C.C. "Skip" Hoagland,.....Appellant/Respondent.

APPELLANT'S REPLY BRIEF OF RESPONDENT/APPELLANT KIM LIKINS

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I. Appellant/Respondent's failure to substantively respond to the issues raised in Kim Likins' initial brief in his response brief is a concession that the circuit court ruled incorrectly as to those issues and should be reversed.

Appellant/Respondent C.C. "Skip" Hoagland ("Hoagland") did not address or advance any arguments in opposition to most of the arguments Respondent/Appellant Kim Likins ("Likins") raised in her opening appellant's brief. Hoagland's failure to address these issues is a concession that this Court should reverse the circuit court. See First Union Nat. Bank v. FCVS Commc'ns, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) rev'd in part on other grounds, 328 S.C. 290, 494 S.E.2d 429 (1997) ("We note initially First Union's failure to respond to this argument in its brief could amount to a concession that the trial court ruled incorrectly."); Turner v. S.C. Dep't of Health & Env't Control, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008).

Hoagland's response brief fails to address the following issues which were fully briefed in Likins' appellant's brief:

- The circuit court erred in finding that Likins is a public official when she holds no public office and counsel for Hoagland agreed on the record that she was not a public official. **(Resp./App.'s App. Br. at pp. 18-20).**
- The circuit court erred in treating Likins as a limited public figure when there was no evidence at trial that she voluntarily assumed a role of special prominence in a public controversy, sought to influence the outcome of the controversy, the controversy existed prior to the publication of the statement, or that Likins retained public figure status at the time of the statement. **(Resp./App.'s App. Br. at pp. 20-21).**
- Having incorrectly determined that Likins was either a public official or limited public figure, the circuit court further erred in failing to find that the evidence at trial satisfied the

actual malice standard when the clear and convincing evidence at trial was that Hoagland plans to continue to harass Likins and seek to have her fired for no legitimate reason. **(Resp./App.'s App. Br. at pp. 21-23).**

- Hoagland's harassment is unjustified interference with Likins' employment from which she should be protected by an injunction. **(Resp./App.'s App. Br. at p. 26).**

Because Hoagland has conceded these issues, the Court should rule in Likins' favor, and reverse the circuit court as to those issues.

II. The circuit court should be reversed, because Hoagland's suggested adequate remedy of filing repeated lawsuits when he states that he will continue his harmful conduct is not full and practical.

In his response brief, Hoagland argues that the circuit court correctly determined that Likins has an adequate remedy at law even though the undisputed evidence at trial was that there is no remedy at law which is as certain, practical, complete, and efficient to attain the ends of justice and its administration. Hoagland does not dispute that only a remedy that is "certain, practical, complete, and efficient" is an "adequate" remedy at law. **(App./Resp.'s App. Br. at p. 12)**. However, he claims that despite his stated intention to continue harassing Likins and attempting to get her fired, an adequate remedy exists at law because she could conceivably "analyze all statements made by Hoagland about Likins since this action commenced . . . [and bring] a new action against Hoagland, seeking a temporary restraining order and preliminary injunction just like she did in this matter." **(Id).** Hoagland also asserts Likins could "bring suit based on nuisance." **(Id).** Hoagland concedes these suggested remedies will not be adequate at some point but claims he should get to harass Likins a little more before these remedies eventually become inadequate. **(App./Resp.'s App. Br. at p. 13)** ("the record of appeal reveals that Likins just isn't at that point yet.").

Contrary to Hoagland's argument, the circuit court commented at trial that no adequate remedy exists if the harassment is so persistent that filing successive lawsuits becomes impractical and impossible. See **(Trial Tr., R. p. 1093, ll. 5-12)** ("But at the same time, it kind of falls along the lines of nuisance cases when it keeps happening, happening, and happening, and happening. There is no adequate remedy of law because of the excessiveness and the vexatiousness of the conduct in that you're being required to bring a slander defamation invasion of privacy type suit just after some point just doesn't work.")

While Hoagland asserts that his continued harassment has not YET become so pervasive that there is no adequate remedy at law, at trial, clear and convincing evidence showed that he intended to continue his harassment regardless of the outcome of any litigation. See generally **(Trial Tr., R. p. 949, ll. 13-19); (Trial Tr., R. p. 964, ll. 5-7); (Trial Tr., R. p. 898, ll. 4-7)**; **(Pl. Ex. 37, R. p. 1444, l. 6- p. 1445, l. 3); (Pl. Ex. 37, R. p. 1431, l. 18-1432, l. 10); (Pl. Ex. 37, R. p. 1433, ll. 20-25)** (" . . . After this lawsuit, it will continue. Today after the town council, it will continue. I might have to call Kim a liar and I might have to call her the same thing after this lawsuit is over. It's not going to stop until it is cleaned up and it ends.").

Furthermore, filing repeated lawsuits is not an adequate remedy because Hoagland has divested himself of all assets and rendered himself judgment proof, which is an additional basis upon which to find there is no adequate remedy at law against him. **(Resp./App.'s App. Br. at p. 18)**. Parties often render themselves judgment proof to avoid legal consequences and this Court should not encourage that behavior by affirming the circuit court's decision that there is an adequate remedy at law in filing successive lawsuits against a bad actor who claims to have made himself judgment proof. See, e.g., In re Vereen, No. 98-80262-W, 1999 WL 33485639, at *1 (Bankr. D.S.C. Apr. 16, 1999).

Hoagland does not cite any authority to support the proposition that filing successive lawsuits in response to repetitive behavior is an adequate remedy. Notably, "issues raised in a brief but not supported by authority may be deemed abandoned and not considered on appeal." Broom v. Jennifer J., 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013); see also Bluffton Towne Center, LLC v. Gilleland-Prince, 412 S.C. 554, 772 S.E.2d 882 (Ct. App. 2015); Teeter v. Teeter, 408 S.C. 485, 759 S.E.2d 144 (Ct. App. 2014).

Contrary to Hoagland's argument and the circuit court's decision, this Court has held that an injunction is the proper remedy to prevent recurring conduct. See Mack v. Edens, 306 S.C. 433, 412 S.E.2d 431 (Ct. App. 1991). In Mack v. Evans, this Court upheld an injunction in a trespass case, stating that "[i]njunction is a proper remedy for a continuous trespass to land . . . [b]ecause of the permanent and **recurring nature** of the injury, which cannot otherwise be prevented, the courts should enjoin the continuous trespasser to protect the landowner's property rights from hurt or destruction." Id. at 437, 434 (double emphasis added). The harassment in this case is recurring, just as the trespass was in that case. Hoagland himself has made it clear that his harassment will be recurring.

There is no evidence in the record even remotely suggesting that Hoagland will stop harassing Likins, and Hoagland's suggested remedies even concede the possibility that Likins will have to file lawsuits to stop Hoagland.

Hoagland cites Strategic Res. Co. v. BCS Life Ins. Co., 367 S.C. 540, 543, 627 S.E.2d 687, 688 (2006) for the proposition that the right to appeal provides litigants an adequate remedy at law. **(App./Resp.'s Resp. Br. at p. 11)**. That case is inapposite. In Strategic Resources, the South Carolina Supreme Court evaluated an injunction directing parties to follow certain rules during arbitration proceedings. Id. at 543, 688. The South Carolina Supreme Court held that the parties

had an adequate remedy at law because any damage done by following or not following certain arbitration rules could be resolved on an appeal of the ultimate arbitration award. Id. at 545, 689-90 ("[t]he right to appeal provides respondents with an adequate remedy at law, a protection of their rights, and an opportunity to repair any prejudice caused by the alleged improper selection of the neutral arbitrator. Accordingly, we hold that the trial court erred by granting the injunction."). Strategic Resources did not involve argument from either side as to whether filing successive lawsuits would constitute a full and adequate remedy at law, because a full and final remedy existed within the parameters of the arbitration and appeal. However, in the present case, without an injunction, according to Hoagland's own sworn testimony, Likins can have no finality, and is left only with the prospect of never ending litigation against an intentionally judgment proof defendant.

For these reasons, and those stated in Likins' appellant's brief, the circuit court erred in finding that an adequate remedy exists at law and should be reversed on this ground.

III. A permanent injunction prohibiting Hoagland from harassing Likins and interfering with her employment would not violate Hoagland's First Amendment right to free speech, because the injunction would only prevent Hoagland from engaging in that unprotected conduct.

At trial, Likins sought an injunction barring Hoagland from continuing in his harassment of Likins and defaming her, specifically in relation to her job with the Boys & Girls Club. **(Resp./App.'s App. Br. at pp. 23-24).** In his response brief, Hoagland argues any injunction on Hoagland's conduct is a prior restraint. Hoagland argues that Likins proposed that the circuit court make the December 11, 2015 preliminary injunction (to which Hoagland consented) permanent, and that injunction was not narrowly tailored, nor was it the least restrictive means to accomplish the goal of curtailing Hoagland's harmful conduct. **(App./Resp.' Resp. Br. at pp. 16-17).**

As an initial matter, Hoagland mischaracterized Likins' counsel's remarks at trial. Counsel did not assert that Likins sought an order converting the December 11, 2015 preliminary injunction into an identical permanent one. Rather, counsel stated that Likins wanted "essentially" the consent[1] injunction made permanent. **(Trial Tr., R. p. 900, ll. 23-24).** Likins did not and does not seek a broad, permanent injunction curtailing Hoagland's First Amendment right to speak publicly, nor does she seek to have the circuit court covert (or convert) the exact wording of the December 11, 2015 preliminary injunction to a permanent one. At the trial, when queried about the injunction, Likins and counsel for Likins made it clear that she did not seek an injunction barring Hoagland from asserting his First Amendment rights, she sought only an injunction barring Hoagland from harassing her and interfering with her job by contacting her employer. See **(Trial Tr., R. p. 906, ll. 11-21)** ("And it's really not about the First Amendment, it's about interfering with her job and whether -- and it doesn't have to be with -- we aren't talking about the First Amendment. He can go out on the street corner still and do whatever he wants to do and we're trying to give her peace of mind at her job . . . and he can still send his emails from his desk in Argentina and do whatever he's doing harassing people.") (emphasis added); see also **(Trial Tr., R. p. 901, ll. 2-8)** ("If he wants to go out in a public domain and say what he wants to say, he can

[1] It is worth mentioning that Hoagland consented to the December 11, 2015 preliminary injunction. After expressing concerns regarding the First Amendment and injunctions in general, counsel for Hoagland agreed to work with counsel for Likins to create a narrowly tailored preliminary injunction to satisfy both parties. **(Hr'g Tr. 12-11-15, R. p. 841).** After creating that consent agreement, counsel for Hoagland stated on the record that he agreed to it and raised no First Amendment concerns whatsoever pertaining to that consent order. **(Hr'g Tr. 12-11-15, R. p. 841, l.20-p. 842, l. 7)** ("the Defendant in this matter . . . has come to an agreement with the Plaintiff in this case that for the pendency of this matter the Defendant will not do the three following things. One, he will not publish any statement to any third party about the Plaintiff's employment at the Boys and Girls Club. Second, he will not refer to the Plaintiff's fitness in her job at the Boys and Girls Club or her fitness to be around children. And third, the Defendant will not refer to the Plaintiff's employment at the Boys and Girls Club in any statement to a third party. That is the extent of the agreement.").

do that in our estimation. It's just to prevent him from interfering with her job and her life. Basically what would be, I guess, in the domestic world, the restraining order sometime specifically focused on these two things, Your Honor.") (emphasis added); see also **(Trial Tr., R. p. 965, ll. 9-17)** (Mr. Walker: "What is your objective in having us seek an injunction on your behalf moving forward? What is it that you are asking for?", Likins: "I'm asking for peace of mind. I'm asking you for the ability to please be able to go to my job and not ever have to worry about Mr. Hoagland doing anything to harm that organization or me within the context of my work . . . ."); see also **(Trial Tr., R. p. 965, ll. 18-22)** (Mr. Walker: "are you seeking to enjoin [Hoagland] from speaking or sending emails?", Likins: "No. Never. And I have never ever tried to shut Mr. Hoagland down from speaking about anything associated with council."). The injunction sought was narrowly tailored injunction to prevent harassment and protect her job.

Furthermore, while arguing that a permanent injunction may improperly restrict "protected speech," Hoagland failed to address Likins' arguments that harassment does not constitute protected speech. Hoagland asserts, without citing any cases or authority, that "harassment of the kind described would be protected First Amendment activity in any other context." **(App./Resp.'s Resp. Br. at p. 17).** However, that harassment is not protected speech, and thereby an injunction limiting harassment would not invoke the First Amendment. See generally, Thorne v. Bailey, 846 F.2d 241, 243 (4th Cir. 1988) ("[P]rohibiting harassment is not prohibiting speech, because harassment is not a protected speech. Harassment is not communication, although it may take the form of speech.") (citation omitted)); Davidson v. Seneca Crossing Section II Homeowner's Ass'n, Inc., 979 A.2d 260, 282, 187 Md. App. 601, 638 (Md. App. 2009) (affirming an injunction precluding, among other things, continued harassment, finding that an injunction precluding harassment does not implicate First Amendment concerns); Whitaker v. Warden, 2017 WL

2547241, at *2 (Ariz.App. Div. 2, 2017) ("Although an injunction against harassment can impermissibly infringe on a defendant's free speech rights, the protection of citizens from harassment is a legitimate and laudable goal that is not incompatible with the protection and exercise of free speech." (internal quotation, alterations and citation omitted)); Cantwell v. State of Connecticut, 60 S.Ct. 900, 906, 310 U.S. 296, 309–10 (1940) ("Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."); Metro Enterprises, Inc. v. United Farm Workers Union, AFL-CIO, 324 N.E.2d 805, 808, 41 Ohio Misc. 171, 174 (Ohio Com.Pl. 1974) (holding that boycotting and picketing of store not involved in labor dispute conducted in such a way as to harass, intimidate, coerce and embarrass customers and employees of such business, and diminish its general business may be enjoined and that order enjoining such illegal act does not impair constitutional right of free speech.). Because harassment is not protected speech, Hoagland cannot say that an injunction proscribing harassment would violate his Constitutional rights.

Hoagland also ignores Likins' argument that his speech would result in unjustified interference with her job. As discussed supra, this amounts to a concession as to those aspects of Likins' arguments. Likins discussed this issue extensively in her opening brief, arguing that courts regularly uphold injunctions designed to protect parties from job interference. See generally, American Malting Co. v. Keitel, 209 F. 351, 361 (2d Cir. 1913) (affirming the district court's grant of injunctive relief to plaintiff malt company and against defendant individual because an equitable remedy was appropriate to prevent defendant's malicious interference with plaintiff's contracts and defendant was not harmed by the injunction. The circuit court modified the injunction so that the injunction only restrained defendant from referring to plaintiff in the circulars it published.);

Trojan Elec. & Mach. Co. v Heusinger, 162 A.D.2d 859, 860, 557 N.Y.S.2d 756, (N.Y.A.D. 3 Dept., June 21, 1990); May Furnace Co. v. Conaway, 352 S.W.2d 40 (Mo. App. 1961) (affirming injunction precluding discharged employee's contacts with the customers of the employer in order to tell them that his former employer had done the work improperly and had overcharged them); Carter v. Knapp Motor Co., 11 So.2d 383, 385, 243 Ala. 600, 604 (Ala. 1943) (concluding that there is an exception to the rule against injunction of speech where the party was engaged in wrongful conduct, irreparably harmful to complainant's business).

Hoagland spends considerable time in his brief discussing Sindi v. El-Moslimany, 896 F.3d 1 (1st Cir. 2018). In that case, the First Circuit Court of Appeals vacated an injunction that precluded certain defamatory statements to third parties, regardless of the context in which the statements were made, because "the injunction is so wide-ranging and devoid of safeguards that it plainly contravenes the First Amendment's limitation of liability for speech about public figures to false assertions of fact made with actual malice." Id. Here, the requested injunction was not a wide ranging prohibition on speech. As explained above, the evidence at trial was that the requested injunction was a narrowly tailored injunction precluding Hoagland's efforts to harass her and get Likins fired

Therefore, because Likins only seeks an injunction to prevent Hoagland from harassing her and interfering with her job, and because speech that constitutes harassment and interference with job performance is not protected speech the circuit court should be reversed.

CONCLUSION

For the reasons stated above, as well as the reasons stated in the opening brief of Likins, the circuit court abused its discretion in denying a permanent injunction, should be reversed, and a permanent injunction issued.

Respectfully Submitted,

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Certificate of Counsel

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

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