IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

G.D. Morgan, Jr., Circuit Court Judge

Appellate Case No.: 2021-001463

Anthony Wise …….…….....Appellant,

-v-

Kenneth E. Leap, Newberry Hospital, LLC d/b/a Newberry County Memorial Hospital, and West Fraser, Inc., Defendants,

Of Whom, West Fraser, Inc. is ……..…Respondent.

APPELLANT'S INITIAL REPLY BRIEF

John E. Parker
John E. Parker, Jr.
PETERS, MURDAUGH, PARKER,
ELTZROTH, & DETRICK, P.A.
101 Mulberry Street East
Hampton, SC 29924
Phone: (803) 943-2111

-AND-

John W. Carrigg, Jr.
CARRIGG LAW FIRM
120 North Lake Dr.
Lexington, SC 29072
jcarrigg@carrigglaw.com
ATTORNEYS FOR APPELLANT

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ARGUMENT

In its Initial Brief, Respondent West Fraser goes to considerable lengths to argue the specific facts surrounding what Appellant Anthony Wise has alleged were defamatory statements made by West Fraser's employee Keith Nelson within the course and scope of his employment. In doing so, West Fraser only reinforces Wise's position that the evidence in this case created jury issues as to whether Nelson's statements were false and defamatory, whether his statements were capable of a defamatory meaning, either facially or through innuendo, and whether the statements were qualifiedly privileged. Wise does not wish to rehash his previously made arguments to the Court. The record and arguments of Wise and West Fraser conclusively demonstrate that there is a genuine factual dispute as to the issues before the Court, establishing that the Circuit Court's grant of summary judgment was in error. Wise respectfully submits this Reply Brief for the Court's review to address certain arguments raised by West Fraser for the first time in its Brief.

I. Wise did not abandon his appeal of the Circuit Court's Order denying his Motion for Reconsideration.

West Fraser argues that Wise has abandoned his appeal of the Circuit Court's November 23, 2021 Order denying his Motion for Reconsideration by not making an argument in support of reversing the Order. As explained by both parties in their Initial Briefs, the Circuit Court issued a detailed, seventeen-page formal Order granting West Fraser's Motion for Summary Judgment on October 11, 2021. (Order, Oct. 11, 2021). On November 23, 2021, the Circuit Court denied Wise's Motion for Reconsideration in a perfunctory Form 4 Order, which read

> The Court has thoroughly reviewed the Plaintiff's Motion for Reconsideration and Memorandum in Support of Motion for Reconsideration, as well as all previously filed submissions and arguments of counsel. Based on that review, the Plaintiff's Motion for Reconsideration is denied.

(Order, Nov. 23, 2021). In his Notice of Appeal, Wise clearly stated that he was appealing both the October 11, 2021 Order and the November 23, 2021 Order. (Not. of Appeal).

Wise has not made any arguments in his Brief specifically addressing the need to reverse the November 23, 2021 Order because every argument he makes as to why the Circuit Court's formal Order granting summary judgment was in error is applicable to the Circuit Court's November 23 Order. The Circuit Court's Form 4 Order does not raise any unique reasons for denying Wise's Motion for Reconsideration and in fact does nothing to explain how the Circuit Court reached its decision. Thus, there are no unique or specific arguments as to why the Circuit Court's November 23 Order is also in error, as it could only have been granted on the same grounds as the Circuit Court's October 11 Order. The reasons Wise has provided for reversing the Circuit Court's October 11 Order are the exact same reasons why the Circuit Court's November 23 Form 4 Order should also be reversed. In order to accept West Fraser's argument that Wise has abandoned his appeal of the November 23 Form 4 Order, the Court would have to completely ignore the substance of Wise's arguments in his Brief, with the endgame of catching Wise in a gotcha moment based on hypertechnical readings of Wise's Brief and the South Carolina Appellate Court Rules. The issues underlying the November 23 Form 4 Order have been adequately raised by Wise on appeal and have been argued in his Brief, precluding West Fraser's argument that he has abandoned his appeal of the Form 4 Order.

II. Issue preservation rules do not require the Court to exclude the statement of Melody Jepson or the deposition transcript of Mike Shealy.

Under South Carolina issue preservation rules, the Court is free to consider the above the statement of Jepson and the deposition testimony Shealy if it wishes to do so. First, the evidence is applicable to issues that were raised to and ruled upon by the Circuit Court on West Fraser's

Motion for Summary Judgment and was "thoroughly" reviewed by the Circuit Court prior to issuing its final Order denying Wise's Motion for Reconsideration. Second, West Fraser raises the issue of whether Wise presented this evidence to the Circuit Court prior to his Motion for Reconsideration as an additional sustaining ground for affirming the Circuit Court's Orders, but it never raised the issue to the Circuit Court prior to Wise's Appeal. Thus, the evidence may be considered by the Court in its appellate capacity.

A. <u>The statement of Melody Jepson was presented to and thoroughly reviewed by the Circuit Court prior to its final decision.</u>

West Fraser argues that the statement of Melody Jepson should be excluded from consideration by the Court under issue preservation rules because it first appears in the record on Wise's Motion for Reconsideration. "Preservation rules are intended to ensure that appellate courts review considered decisions of our trial courts and that the issues are not being raised for the first time **on appeal**. Their purpose is not to sabotage attorneys' efforts to bring issues before the appellate courts . . . ." *State v. Jones*, 435 S.C. 138, 145, 866 S.E.2d 558, 561 (2021) (emphasis added).

> [A]n over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice . . . . As an appellate court, we sit to review decisions of lower courts for error. As such, "it is axiomatic that an issue cannot be raised **for the first time on appeal**." However, I do not believe it is our place to scour the records before us for the purpose of avoiding issues or, even worse, to play a "gotcha" game with attorneys by showcasing their alleged mistakes, at the expense of their clients. This practice ignores the fact that behind every party name on a caption is a life-blood litigant or criminal defendant that depends on the court system to protect their economic and liberty interests.

Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (2012) (Toal, C.J., dissenting) (emphasis added).

"At a minimum, issue preservation requires that an issue be raised to and ruled upon by the [circuit court]." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). An issue may be preserved for appellate review when it has been plead, raised to the circuit court, or argued in a Rule 59(e) motion. *Duncan v. CRS Sirrine Eng'rs, Inc.*, 337 S.C. 537, 543-44, 524 S.E.2d 115, 119 (Ct. App. 1999). The key is that the issue must have been presented to and passed upon by the trial court for it to be preserved for appeal.

While Defendant has cited numerous authorities for the proposition that an issue or evidence should not be presented for the first time on a motion for reconsideration, none of the cases explicitly state that a trial court does not have discretion to review newly made arguments or overlooked evidence on a motion for reconsideration, or that such issues or arguments are not preserved for appeal once they have been presented to and passed upon by a trial court on reconsideration. If anything, the cited cases only reinforce that an issue or evidence presented to and reviewed by a trial court is preserved for appeal, and that if a trial court refuses to consider evidence presented for the first time on reconsideration then it is not preserved for appeal.

In this case, the Circuit Court was presented with the statement of Jepson and the deposition testimony of Shealy and reviewed this evidence prior to denying Wise's Motion for Reconsideration. The Jepson statement was attached as an exhibit to Wise's September 2, 2021 Motion for Reconsideration, and the statement was referenced numerous times throughout the supporting memorandum. (Mem. in Supp. of Mot. for Reconsideration at 2, 3, 8, 15). The Circuit Court's November 23, 2021 Form 4 Order does not state that the evidence was precluded from review, or that the Circuit Court was refusing to consider the evidence. Instead, the Circuit Court stated it was denying Wise's motion after it had "thoroughly reviewed" Wise's memorandum and filed submissions. Since this evidence was clearly presented to, considered by, and ruled

upon by the Circuit Court, it is preserved for the Court's review and should not be excluded from appellate review. As to the deposition testimony of Mike Shealy, which West Fraser argues that the Court should also ignore, the relevant portions of his deposition testimony relied upon by Wise were also presented to the Circuit Court for its review by West Fraser on West Fraser's Motion for Summary Judgment. (Mot. for Summ. J., Ex. 5). Both items of evidence were presented to and considered by the Circuit Court in ruling upon West Fraser's Motion for Summary Judgment and Wise's Motion for Reconsideration, and both were encompassed by Wise's initially raised arguments on the issues of whether Nelson's statements were capable of a defamatory meaning, and whether the statements were qualifiedly privileged. Since the Circuit Court considered this evidence, it may also be considered by this Court on appeal.

B. West Fraser's issue preservation argument is an additional sustaining ground that was not presented to the Circuit Court.

The Circuit Court reviewed Wise's Motion for Reconsideration, including the statement of Melody Jepson, prior to filing its final Order denying Wise's motion. West Fraser did not file a memorandum in opposition or request a hearing on the motion, which was decided without argument. Consequently, West Fraser never argued to the Circuit Court that the Jepson statement could not be considered by the Circuit Court for the first time on a motion for reconsideration, and this proposition does not appear to have been embraced by the Circuit Court in formulating its Order.

While a respondent is free to argue any additional sustaining grounds that appear in the record as provided by Rule 220(c), SCACR, the Court is not required to entertain the additional sustaining ground. An appellate court may not rely on Rule 220(c) when the court believes it

would be "unwise or unjust" to do so in a particular case. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

> In clarifying the law, we do not mean to dilute the important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling. While the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court. In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal. Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it.

Id. at 421, 526 S.E.2d at 724. Since West Fraser never argued prior to appeal that the Circuit Court was precluded from considering the statement on reconsideration, the Court should ignore this argument and review the statement as it relates to Wise's arguments. Doing so would be fair and just, as the evidence was presented to and considered by the Circuit Court in ruling on Wise's Motion for Reconsideration.

III. The Jepson statement is an admission by party-opponent under Rule 801(d)(2)(D), SCRE, and not a prior inconsistent statement subject to the foundational requirements of Rule 613(b).

West Fraser also argues that the statement is not admissible as a prior inconsistent statement, and that Wise misinterprets the South Carolina Rules of Evidence in asserting that the statement was admissible evidence that could properly be considered by the Circuit Court on a motion for summary judgment. However, Wise does not assert that the statement is admissible non-hearsay as a prior inconsistent statement, which would impose a prerequisite on the statement's admissibility under Rule 613(b), SCRE. Instead, Wise asserts that the statement is admissible and was properly before the Circuit Court because it is an admission by party-opponent pursuant to Rule 801(d)(2)(D), SCRE. The statement would be admissible as offered

against West Fraser as a statement by West Fraser's agent concerning a matter within the scope of the agency or employment. This qualifies the statement as non-hearsay not subject to Rule 613's foundational requirements. The Advisory Committee's Note for Rule 801 specifically provides that "[s]ubsection (D) is consistent with South Carolina law that statements made by an agent in the scope of his authority were admissible." Rule 801(d)(2)(D), SCRE, Advisory Committee's Note (citing *Hunter v. Hyder*, 236 S.C. 378, 114 S.E.2d 493 (1960). The statement is not an exception to the hearsay rule, it is not hearsay, and therefore is only subject to the standard relevancy and authentication requirements for admissibility. Since West Fraser acknowledges that the notes are authentic, the evidence is admissible and could have been properly considered by the Circuit Court, and by this Court, in reviewing a motion for summary judgment.

IV. Nelson's defamatory statements could be both actionable *per se* and defamatory *per quod*, creating a presumption that he acted with common law malice and that Wise suffered general damages.

As an additional ground for affirming the Circuit Court's Orders, West Fraser argues that Nelson's statements to Wilson and Shealy were at best defamatory *per quod*, and not actionable *per se*, requiring Wise to have produced evidence of actual malice and special damages to survive summary judgment. West Fraser's position is based on a misunderstanding of South Carolina common law defamation principles. Since there is circumstantial evidence supporting that Nelson's statements, either facially or through innuendo, asserted that Wise had a sexually transmitted infection, they were actionable *per se*, and Wise was entitled to a presumption that they were spoken with malice, and that he suffered general damages, making summary judgment inappropriate on these elements of his defamation claim.

The determination of whether a statement is actionable *per se* or not, and whether the statement is defamatory *per se* or defamatory *per quod* are two separate and distinct legal issues. Slander is actionable *per se* when it charges the plaintiff, either facially or through innuendo, with "(1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession." *Parrish v. Allison*, 376 S.C. 308, 322, 656 S.E.2d 382, 389 (Ct. App. 2007). Therefore, if a defamatory statement charges the plaintiff with contracting a sexually transmitted infection, the law presumes that the defendant acted with common law malice and that the plaintiff suffered general damages. *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 510, 506 S.E.2d 497, 502 (1998). If a slanderous statement does not charge the plaintiff, through implication or otherwise, with conduct that falls into one of the five categories, the statement is not actionable *per se*, and plaintiff must prove common law actual malice and special damages. *Id.* Wise has alleged that Nelson either explicitly or by innuendo stated to Wilson and other West Fraser employees that Wise had contracted a sexually transmitted infection, which is supported by evidence in the record.

A determination of whether a statement is defamatory *per se* or defamatory *per quod* is a separate issue involving a legal distinction that has no bearing on plaintiff's burden of proof as to malice and damages. A statement is defamatory *per se* if it is obvious on the face of the statement. *Id.* at 321, 656 S.E.2d at 389. A statement is defamatory *per quod* if the statement's meaning is not clear unless the hearer knows facts or circumstances not contained in the statement itself. *Id.* The issue of whether a statement is one or the other makes no difference as far as the determination of whether the statement is actionable *per se* or not is concerned:

> Much confusion arises from defamation law's use of the term "*per se*" in two different senses. As noted above, there is the question whether the statement is

> defamatory *per se* or *per quod*. A separate issue is whether the statement is "actionable *per se"* or not. This issue is one of pleading and proof . . . ."

Holtzscheiter, 332 S.C. at 509-10, 506 S.E.2d at 501.

West Fraser's argument that the statements are defamatory *per quod*, and therefore Wise must establish the elements of actual malice and special damages, is not supported by South Carolina law. The question of whether Wise must prove actual malice and special damages is resolved by the question of whether the statements are actionable *per se* or not. A statement may be both defamatory *per quod* and actionable *per se* at the same time. Obviously, if Nelson explicitly communicated to West Fraser employees that Wise had a sexually transmitted infection, the statements were both actionable *per se* and defamatory *per se*. On the other hand, if Nelson conveyed to non-privileged West Fraser employees that Wise had a sexually transmitted infection through innuendo and implication, then the statement is still actionable *per se* while also being defamatory *per quod*, as the statement still charges Wise with having contracted a loathsome disease.

West Fraser's assertion that Wise was required on summary judgment to prove both actual malice and special damages is simply not in keeping with South Carolina law, which clearly states that only when a defamation is not actionable *per se* must a plaintiff prove actual malice and special damages. *Id.* Wise has alleged that Nelson published statements asserting that he had a sexually transmitted infection, and there is sufficient evidence in the record upon which a jury could reasonably infer that he did so. As such, the statements are actionable *per se*, and Wise was not required on summary judgment to produce evidence of actual malice or special damages.

V. The Circuit Court erred in relying on *Williams v. Lancaster County School District* to determine that Wise's claim that the rumors originated from Nelson were speculative.

The Circuit Court and West Fraser rely on this Court's decision in *Williams v. Lancaster Cty. Sch. Dist.*, 369 S.C. 293, 631 S.E.2d 286 (Ct. App. 2006), to support the argument that indirect evidence of defamation is too speculative for a plaintiff's claims to survive summary judgment. *Williams* is distinguishable from the facts of Wise's action, and as such should not have been relied on by the Circuit Court in granting summary judgment in this case.

In *Williams*, a high school coach brought a claim for slander against the school district after rumors concerning an alleged relationship he had with a secretary were spread throughout the school community. The facts of *Williams* to a certain extent are similar to those presented by this action, with one very important distinction. The plaintiff in *Williams* was discovered in a locked bathroom with the secretary by the principal and assistant principal of the high school. *Id.* at 297-99, 631 S.E.2d at 289-90. The plaintiff subsequently resigned from the school. *Id.* at 300. Prior to this incident, rumors had begun to circulate around the school that the plaintiff and the secretary were having an affair. *Id.* at 298, 631 S.E.2d at 289.

The plaintiff alleged that the rumors immediately spread throughout the community after the incident, and that the only individuals who had knowledge of the incident were the principal and assistant principal, and that this was indirect evidence of publication. *Id.* at 302, 631 S.E.2d at 291. The Court thought otherwise and affirmed the circuit court's summary judgment order. In doing so, the Court noted that there was no evidence that the principal or vice principal ever published any statements to anyone concerning the plaintiff. *Id.* at 303, 631 S.E.2d at 292. The plaintiff admitted that he had no idea of how the rumor leaked into the school community. *Id.*

The circumstances in this case differ from *Williams* in one key respect: Wise has alleged that Nelson told Wilson that he had a sexually transmitted infection, and evidence in the record not only confirms that Nelson spoke with Wilson, but that he also spoke with Shealy, another

non-privileged employee. Further, there is evidence in the record impeaching the credibility of Nelson's claims that he only told the employees that Wise had suffered an "infection", and that he had no idea how anyone could infer a sexual implication from that fact. These facts readily distinguish this action from *Williams*, and only illustrate why a jury, and not the Circuit Court, should have resolved these issues.

CONCLUSION

For the foregoing reasons, and those put forth by Appellant in his Brief, he respectfully requests that the Court reverse the October 11, 2021 and November 23, 2021 Orders of the Circuit Court.

Respectfully submitted,

PARKER LAW GROUP, LLP

By:_____

May 5, 2022
Hampton, South Carolina

John E. Parker, Jr. (SC Bar #104225)
John E. Parker (SC Bar #4442)
101 Mulberry Street, East
P.O. Box 487
Hampton, SC 29924
Phone: 803.903.1781
jayparker@parkerlawgroupsc.com
jparker@parkerlawgroupsc.com

-AND-
John W. Carrigg, Jr., Esquire
Carrigg Law Firm
120 North Lake Dr.
Lexington, SC 29072
jcarrigg@carrigglaw.com

Attorneys for Appellant

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-v-

Kenneth E. Leap, Newberry Hospital, LLC d/b/a Newberry County Memorial Hospital, and West Fraser, Inc., Defendants,

Of Whom, West Fraser, Inc. is ……..…Respondent.

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing Motion for Extension has been served upon the following counsel of record by emailing a copy of the same this 5th day of May, 2022.

Christopher B. Major, Esquire
HAYNSWORTH, SINKLER & BOYD
1 North Main Street, 2nd Floor
Greenville, SC 29601-2772
Telephone: (864) 240-3200
Email: cmajor@hsblawfirm.com

Anne Laurie McClurkin, Esquire
MAYNARD COOPER & GALE, P.C.
11 N. Water Street

Suite 24290
Mobile, AL 36602
Telephone: (251) 206-7448
Email: amcclurkin@maynardcooper.com
Attorneys for Respondent

PARKER LAW GROUP, LLP

By:_____*April E. Musser*_____
April E. Musser

May 5, 2022
Hampton, South Carolina.

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Via Email Only: ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
S.C. Court of Appeals Clerk of Court
Post Office Box 11629
Columbia, SC 29211-1629

Re: Anthony Wise v. Newberry Hospital, et al
Appellate Case No.: 2021-001463

Dear Ms. Kitchings:

Enclosed for filing, please find the original of Appellant's Initial Reply Brief in the above-referenced case. By copy of this letter, I am serving all counsel of record with a copy of the same by email only.

If you have any questions, please let us know.

With kind regards, I am

Sincerely,

John E. Parker Jr.

JAY/aem

CC: Christopher B. Major, Esquire (via E-mail only)
Anne Laurie McClurkin, Esquire (via E-mail only)