No. 8:14-cv-3147

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

IN RE STEWART ALDWYNE DUNN, IV

CHRISTOPHER TERMEER,

Appellant,

v.

STEWART ALDWYNE DUNN, IV,

Appellee.

On Appeal from the United States Bankruptcy Court
for the Middle District of Florida, Tampa Division
Case Nos. 8:13-bk-6334 & 8:13-ap-414, Hon. Catherine Peek McEwen

APPELLEE'S BRIEF OF STEWART ALDWYNE DUNN, IV

Thomas A. Burns
BURNS, P.A.
301 West Platt Street, Suite 137
Tampa, FL 33606
(813) 642-6350 T
(813) 642-6350 F
tburns@burnslawpa.com

Counsel for Appellee

STATEMENT REGARDING ORAL ARGUMENT

Appellee Stewart Aldwyne Dunn, IV does not request oral argument. The legal issues involve straightforward application of existing law to simple facts.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

Rules **Page(s)**

Other Authorities **Page(s)**

JURISDICTIONAL STATEMENT

The Bankruptcy Court had subject-matter jurisdiction under 28 U.S.C. § 157(a), § 157(b)(1), and § 1334 because Appellee Stewart Aldwyne Dunn, IV filed a Chapter 13 bankruptcy in which Appellant Christopher Termeer commenced an adversary proceeding. *See* Docs. 1.2, 1.6, 1.46. This Court has appellate jurisdiction under 28 U.S.C. § 158(a)(1) because the Bankruptcy Court entered a final judgment on November 4, 2014 (Doc. 1.2), which Mr. Termeer timely appealed on November 13, 2014 (Doc. 1.1). *See* Fed. R. Bankr. P. 8002(a)(1) (14 days to appeal).

STATEMENT OF THE ISSUES AND STANDARD OF APPELLATE REVIEW

1. Did Mr. Termeer waive his sole appellate argument that the exclusion of his trial evidence was contrary to Federal Rule of Evidence 807 when he did not list it in his statement of the issues in the Bankruptcy Court (Doc. 1.3 at 6) as required by Federal Rule of Bankruptcy Procedure 8009(a)(1)(A)?

2. Did Mr. Termeer waive his sole appellate argument that the exclusion of his trial evidence was contrary to Federal Rule of Evidence 807 when he never raised that argument in the Bankruptcy Court during trial?

3. Did Mr. Termeer abandon on appeal any arguments regarding the Bankruptcy Court's alternative bases for excluding his evidence not only as hearsay but also as irrelevant, lacking authentication, and belatedly disclosed when his brief omits those arguments?

4. Can Mr. Termeer prevail on appeal when the record on appeal does not include any copies of the exhibits that were excluded?

5. Did the Bankruptcy Court abuse its discretion when it excluded the trial evidence Mr. Termeer attempted to introduce despite his belated Rule 807 concerns?

Issues Nos. 1, 2, 3, and 4 concern appellate error preservation and are reviewed de novo. *See, e.g.*, *United States* v. *Schlei*, 122 F.3d 944, 983 (11th Cir. 1997). Issue No. 5 concerns evidentiary rulings and is therefore reviewed for abuse of discretion. *Travelers Ins. Co.* v. *Bullington*, 878 F.2d 354, 358 (11th Cir. 1989) ("Evidentiary questions such as this are left to the discretion of the bankruptcy court."). On second-tier bankruptcy review, the Eleventh Circuit would review all of this Court's rulings, including error-preservation rulings, de novo. *Capital Factors* v. *Empire for Him (In re Empire for Him)*, 1 F.3d 1156, 1159 (11th Cir. 1993) ("Because the district court (as an appellate court) makes no factual findings, our review of its decision is entirely de novo.").

STATEMENT OF THE CASE

Procedural History

Mr. Dunn filed a Chapter 13 bankruptcy petition in *In re Stewart Aldwyne Dunn, IV*, No. 8:13-bk-6334 (M.D. Fla. Bankr. filed Jan. 9, 2013). Thereafter, Mr. Termeer commenced an adversary proceeding to determine whether his defamation cause of action against Mr. Dunn was dischargeable pursuant to 11 U.S.C. § 523(a)(6) in *Termeer* v. *Dunn*, No. 8:13-ap-414 (M.D. Fla. Bankr. filed Mar. 25, 2013); Doc. 1.6.

Mr. Termeer then amended his complaint and clarified he meant to proceed under 11 U.S.C. § 1328(a)(4). Doc. 1.46.

Mr. Dunn moved to dismiss. Doc. 1.9. The Bankruptcy Court denied the motion to dismiss. Docs. 1.8 at 24, 1.21 at 1. Thereafter, Mr. Dunn answered the amended complaint and asserted affirmative defenses (Doc. 1.19), then amended his answer and defenses (Doc. 1.23).

After discovery, Mr. Termeer moved for summary judgment. Doc. 1.49. Mr. Dunn opposed (Doc. 1.10), and Mr. Termeer replied (Doc. 1.11). During the summary judgment hearing, the Bankruptcy Court orally denied summary judgment and informed the parties "we will see you all at trial." Doc. 1.12 at 41.

During a two-day trial, Mr. Termeer called no witnesses other than himself and repeatedly failed to overcome hearsay, relevance, authentication, and belated-disclosure objections that prevented him from introducing certain documents as evidence.[1] Docs. 1.16, 1.17. In opposing these objections, Mr. Termeer never directed the Bankruptcy Court's attention to Federal Rule of Evidence 807. *See* Docs. 1.16, 1.17. When Mr. Termeer rested, Mr. Dunn moved for a directed verdict. Doc.

[1] "The Federal Rules of Evidence . . . apply in cases under the [Bankruptcy] Code." Fed. R. Bankr. P. 9017.

1.17 at 30-31. The Bankruptcy Court granted the motion, orally rendered judgment in favor of Mr. Dunn, and subsequently entered a written final judgment. Docs. 1.17 at 54-69, 1.2.

Mr. Termeer timely appealed. Doc. 1.1.

Statement Of Facts

A. The Operative Pleadings

The amended complaint alleged Mr. Dunn defamed Mr. Termeer on a website called Ripoff Report by asserting Mr. Termeer was "a fraudulent business broker," "steals people's deposits," and was a "crook" and "scammer."[2] Doc. 1.46 at 3. The amended complaint did not attach any web post (*see* Doc. 1.46), although the original complaint had

[2] Even acting in its appellate capacity, this Court can take judicial notice of the undisputable fact that the Commissioner of Securities for the State of Georgia entered a cease-and-desist order against Mr. Termeer for selling unregistered securities and acting as an unregistered broker-dealer and agent in *In re JKV Mgmt. Consulting, LLC*, No. ENSC-130195 (Ga. Comm'r Sec. filed Apr. 19, 2013), *available at* https://secure.sos.state.ga.us/SBROrders/orders/2013-04JKV.pdf. *See* Fed. R. Evid. 201(b)(2) (courts "may judicially notice a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); *In re Delta Resources*, 54 F.3d 722, 725 (11th Cir. 1995) (appellate courts may take judicial notice of facts).

attached a web post and assorted e-mails (Doc. 1.6 at 8-21).[3] The amended complaint ultimately sought a judgment that this debt was nondischargeable pursuant to 11 U.S.C. § 1328(a)(4) and a nondischargeable judgment itself "in an amount to be determined." Doc. 1.46 at 7.

The amended answer denied Mr. Termeer's substantive allegations. Doc. 1.23 at 1-3. Additionally, the amended answer raised two affirmative defenses: (1) truth is an absolute defense to defamation; and (2) the alleged statements were opinions protected by the First Amendment. Doc. 1.23 at 3.

B. The Trial

Because Mr. Termeer is a *pro se* litigant, the narrative structure of his trial presentation was and remains difficult to follow. Accordingly, rather than summarizing the trial in chronological order, it is easier use his exhibit list as a roadmap to summarize his testimony, the exhibits admitted, and the exhibits excluded. *See* Addendum at 1-5.

[3] "An amended complaint supersedes an original complaint." *Malowney* v. *Fed. Collection Deposit Group*, 193 F.3d 1342, 1345 n.1 (11th Cir. 1999).

Mr. Termeer brought no witnesses to trial other than himself. Docs. 1.16, 1.17. Through his own testimony, Mr. Termeer attempted to introduce numerous exhibits.

Mr. Termeer attempted to introduce the Ripoff Report itself. Doc. 1.16 at 106-07, 157-59; Ex. BLU-A. The Bankruptcy Court excluded it as hearsay and for lack of authentication. Doc. 1.16 at 107, 158-59.

Mr. Termeer attempted to introduce web traffic reports for the Ripoff Report website. Doc. 1.16 at 138-39, 180-81; Exs. BLU-E, F, G. The Bankruptcy Court excluded them as hearsay and for lack of authentication. Doc. 1.16 at 139-40, 180-81.

Mr. Termeer attempted to introduce a compilation of Internet searches for "Chris Termeer Ripoff," and the like. Doc. 1.16 at 140-43; Ex. BLU-C. The Bankruptcy Court excluded it as hearsay and for lack of authentication. Doc. 1.16 at 140, 143.

Mr. Termeer attempted to introduce engagement letters with the law firms of Quarles & Brady and Johnson, Pope, Bokor, Ruppel & Burns regarding "a potentially defamatory posting at ripoffreport.com." Doc. 1.16 at 143-46, 189; Exs. BLU-I, J, BLA-G. The Bankruptcy Court

admitted the engagement letters over a hearsay objection. Doc. 1.16 at 143, 189.

Mr. Termeer attempted to introduce medical receipts. Doc. 1.16 at 146-47; Ex. BLU-T. The Bankruptcy Court excluded them due to late disclosures. Doc. 1.16 at 149.

Mr. Termeer attempted to introduce Mr. Dunn's supposed criminal records. Doc. 1.16 at 150; Ex. BLU-U. The Bankruptcy Court excluded them as irrelevant, for lack of authentication, and pursuant to Federal Rule of Evidence 609(b) (10-year-old conviction rule).

Mr. Termeer attempted to introduce a book he published. Doc. 1.16 at 151-53; Ex. BLU-V. The Bankruptcy Court admitted it without objection. Doc. 1.16 at 153.

Mr. Termeer attempted to introduce an e-mail from Jim Baker. Doc. 1.16 at 166-68; Ex. BLU-Q. The Bankruptcy Court excluded it as hearsay, but not for lack of authentication. Doc. 1.16 at 168.

Mr. Termeer attempted to introduce screenshots of lists of e-mails received (but not the e-mails themselves) from Matchmaker Business. Doc. 1.16 at 48-51, 186-87; Exs. BLU-N, O, BLA-D. The Bankruptcy Court admitted them. Doc. 1.16 at 51, 186-87.

Mr. Termeer attempted to introduce subpoenas to Matchmaker Business, Sandra Dunn (Mr. Dunn's mother), and Mr. Baker, and their responses. Doc. 1.16 at 168-74; Exs. BLU-W, X. The Bankruptcy Court excluded them as irrelevant. Doc. 1.16 at 174.

Mr. Termeer attempted to introduce a Texas oil production non-disclosure agreement. Doc. 1.16 at 175; Ex. BLU-R. The Bankruptcy Court admitted it without objection. Doc. 1.16 at 175.

Mr. Termeer attempted to introduce an e-mail chain between Mr. Dunn and David Gingras of Ripoff Report. Doc. 1.16 at 175-79, 190; Exs. BLU-S, BLA-J. The Bankruptcy Court excluded Mr. Gingras's e-mails as hearsay, but admitted Mr. Dunn's e-mail. Doc. 1.16 at 178-79, 190.

Mr. Termeer attempted to introduce affidavits from two individuals employed by Mr. Termeer (Joe Robertson and Mike Rutz), his mother (Gail Termeer), and his sister (Leigha Termeer). Doc. 1.16 at 182; Ex. BLU-K. The Bankruptcy Court excluded the affidavits as hearsay. Doc. 1.16 at 182.

Mr. Termeer attempted to introduce a Better Business Bureau report of Suncoast Marine Management, Inc. Doc. 1.16 at 184; Ex. BLA-A.

The Bankruptcy Court excluded it as irrelevant, for lack of authentication, and as hearsay. Doc. 1.16 at 184.

Mr. Termeer attempted to introduce a Ripoff Report on Suncoast Marine Management, Inc. Doc. 1.16 at 184; Ex. BLA-B. The Bankruptcy Court excluded it for lack of authentication and as hearsay. Doc. 1.16 at 185.

Mr. Termeer attempted to introduce a SunBiz report on Boat America, Inc. Doc. 1.16 at 184; Ex. BLA-C. The Bankruptcy Court admitted it over objection. Doc. 1.16 at 185.

Mr. Termeer attempted to introduce an e-mail from Mr. Adams to Mr. Termeer. Doc. 1.16 at 187; Ex. BLA-E. The Bankruptcy Court excluded it as hearsay. Doc. 1.16 at 187-88.

Mr. Termeer attempted to introduce an e-mail from Mr. Baker to Mr. Termeer. Doc. 1.16 at 188; Ex. BLA-F. The Bankruptcy Court excluded it as hearsay. Doc. 1.16 at 188.

Mr. Termeer attempted to introduce an e-mail from Mr. Gingras regarding Ripoff Report's compliance with a subpoena. Doc. 1.16 at 190; Ex. BLA-K. The Bankruptcy Court excluded it as hearsay. Doc. 1.16 at 191.

Mr. Termeer attempted to introduce his deposition from a Texas litigation. Doc. 1.16 at 193-95; Ex. BLU-Z. The Bankruptcy Court admitted it over a relevancy objection. Doc. 1.16 at 195.

Mr. Termeer attempted to introduce court records from an Arizona case. Docs. 1.16 at 160-61, 1.17 at 6-7; Exs. BLU-D, BLA-I. The Bankruptcy Court excluded them as hearsay and for lack of authentication. Docs. 1.16 at 161, 1.17 at 7.

Mr. Termeer attempted to introduce invoices from professionals to Chris Termeer, LLC. Doc. 1.17 at 12-17; Ex. BLU-H. The Bankruptcy Court excluded them because they were not originals, hearsay, and irrelevant. Doc. 1.17 at 15-17.

Mr. Termeer attempted to introduce two request for production and responses thereto, which he claimed showed Mr. Dunn had no documents that indicated Mr. Termeer was a thief, sold people dry wells, or committed other acts. Doc. 1.17 at 18-19; BLA-T. The Bankruptcy Court admitted them over relevancy objections. Doc. 1.17 at 19.

Mr. Termeer attempted to introduce into evidence an excerpt of Mr. Dunn's deposition, in which he admitted authoring an unidentified

article, which was not attached. Doc. 1.17 at 20-; Ex. "Depo." The Bankruptcy Court admitted it. Doc. 1.17 at 27-28.

At the conclusion of the first day of trial, Mr. Termeer announced his intention to call additional witnesses, Mr. Robertson and Mr. Rutz. Doc. 1.16 at 197. On the second and final day of trial, however, Mr. Termeer did not explain why they were not present, and he did not request additional time to call them. *See* Doc. 1.17. Accordingly, Mr. Termeer rested without calling any other witnesses. Doc. 1.17 at 30.

Mr. Dunn then moved for directed verdict. Doc. 1.17 at 31-35. Mr. Dunn's motion rested on five grounds:

> No. 1. No proof of publication to a third party, meaning that there's no proof that a third party actually accessed the publication.
>
> No. 2. No proof of willfulness, as required as one of two of alternative bases in 1328(a)(4).
>
> No. 3. No proof of maliciousness as the second of the second of the two alternatives as required by 1328(a)(4).
>
> No. 4. No proof of injury.
>
> No. 5. No proof as to certain of the statements that you contend amount to slander or defamation.

Doc. 1.17 at 43.

Before ruling, the Bankruptcy Court heard further argument from Mr. Termeer, during which he repeatedly accused the Bankruptcy Court of "bias," asserted it had deprived him of "a fair trial," and in fact claimed his "trial never happened," all of which caused the Bankruptcy Court "to call the Marshal in here because I feel like people are getting agitated." Doc. 1.17 at 43-53.

Thereafter, the Bankruptcy Court granted judgment in favor of Mr. Dunn. Doc. 1.17 at 54-69. In particular, the Bankruptcy Court found "Mr. Dunn made statements that could form the basis of a defamation claim" when "he admit[ted]" he "said" and "wrote" Mr. Termeer "is a fraudulent business broker" and "a crook," concluded he had sufficient evidence of willfulness, and proved sufficient injury. Doc. 1.17 at 54-69. Nevertheless, the Bankruptcy Court ruled Mr. Termeer had failed to introduce evidence of publication (ground one) or maliciousness (ground three) and that some of Mr. Dunn's statements did not amount to defamation (ground five).[4] Doc. 1.17 at 54-69. Accordingly, it granted

[4] Lack of maliciousness (ground three) alone does not support the judgment, because 11 U.S.C. § 1328(a)(4) provides a creditor may prove a debtor's conduct was "willful *or* malicious." 11 U.S.C. § 1328(a)(4) (emphasis added). The Bankruptcy Court concluded Mr. Termeer introduced sufficient evidence of willfulness. Doc. 1.17 at 63-64.

the motion for directed verdict. Doc. 1.17 at 69. Although not captured by the trial transcript, the Marshals then forcibly removed Mr. Termeer from the courtroom because he became disruptive.

Thereafter, the Bankruptcy Court reduced its oral ruling to writing and entered a final judgment. Doc. 1.2. In the final judgment, the Bankruptcy Court explained it "finds that Plaintiff failed to prove that the Defendant authored the article referred to the complaint, which article the Plaintiff was unable to successfully admit into evidence due to his inability to lay a proper foundation. Furthermore, the Court finds that the Plaintiff failed to prove that the referenced article was accessed by a third party." Doc. 1.2 at 1 (footnote omitted). In a footnote, the Bankruptcy Court further noted, "Although the Plaintiff had the opportunity to call the Defendant (who was present at the trial) as a witness and question the Defendant under oath as to authorship, the Plaintiff did not do so, despite the Court's asking the Plaintiff several times whether he wanted to call any other witness to the stand." Doc. 1.2 at 1 n.1.

C. The Appeal

Mr. Termeer timely appealed. Doc. 1.1. In his statement of the issues pursuant to Federal Rule of Bankruptcy Procedure 8009(a)(1)(A), he listed four issues: First, "Did the Bankruptcy Court err in determining that Termeer's debt should be discharged?" Doc. 1.3 at 6. Second, "Did the Bankruptcy Court err in denying Termeer the ability to present evidence of damages?" Doc. 1.3 at 6. Third, "Did the Bankruptcy Court err in failing to determine whether or not this was a case of defamation per se?" Doc. 1.3 at 6. And fourth, "Did the Bankruptcy Court err in failing to determine whether or not Termeer was a public figure?" Doc. 1.3 at 6. Mr. Termeer's statement of the issues made no reference to the exclusion of the Ripoff Report or evidence of its publication, hearsay in general (or Federal Rule of Evidence 807 in particular), relevance, authentication, or belated disclosures. *See* Doc. 1.3 at 6.

On appeal, Mr. Termeer now raises only one argument: i.e., that the Bankruptcy Court abused its discretion when it ruled his evidence was inadmissible hearsay despite Federal Rule of Evidence 807's catch-all exception. *See* Termeer Br. at 11-13. His brief does not dispute that the evidence actually admitted was insufficient, nor does it raise argu-

ments regarding relevance, authentication, or belated disclosures. *See* Termeer Br. at iii-13.

SUMMARY OF THE ARGUMENT

1. Mr. Termeer waived his sole appellate argument that the exclusion of his trial evidence was contrary to Federal Rule of Evidence 807 when he did not list it in his statement of the issues in the Bankruptcy Court (Doc. 1.3 at 6) as required by Federal Rule of Bankruptcy Procedure 8009(a)(1)(A). Accordingly, Mr. Termeer's sole appellate argument is deemed waived and cannot be considered on appeal, and the Court must therefore the judgment.

2. Mr. Termeer waived his Rule 807 argument when he failed to raise it in the Bankruptcy Court during trial, and he cannot demonstrate civil plain error now.

3. The Court must affirm the judgment as to most excluded exhibits because Mr. Termeer's brief abandoned any arguments regarding the Bankruptcy Court's alternative bases for excluding his evidence as lacking authentication, irrelevant, and belatedly disclosed.

4. Mr. Termeer cannot prevail on appeal because he did not perfect the record on appeal. Currently, none of his excluded exhibits

are part of the record on appeal, except for an unauthenticated Ripoff Report article (Doc. 1.6 at 8-10) and affidavits (Ex. BLU-K) that the clerk accidentally included with the admitted trial exhibits. It is therefore impossible for Mr. Termeer to reconstruct what happened at trial and to demonstrate any abuse of discretion occurred.

5. It was not an abuse of discretion when the Bankruptcy Court excluded Mr. Termeer's evidence despite his belated Rule 807 concerns. Mr. Termeer abandoned any challenge to the exclusion of the Ripoff Report (Ex. BLU-A), *see infra* Argument III, and most of Mr. Termeer's exhibits did not concern publication to a third person, so their exclusion was harmless. And Rule 807's residual exception cannot save Mr. Termeer's affidavits and e-mails from exclusion because (1) they lack exceptional circumstantial guarantees of trustworthiness, (2) they are not more probative than any other evidence Mr. Termeer could have obtained through reasonable efforts, and (3) their admission would not serve the purposes of the rules of evidence or the interests of justice.

ARGUMENT

I. MR. TERMEER WAIVED HIS SOLE APPELLATE ARGUMENT WHEN HE FAILED TO LIST IT IN HIS STATEMENT OF THE ISSUES AS REQUIRED BY BANKRUPTCY RULE 8009(A)(1)(A)

Mr. Termeer waived his sole appellate argument that the exclusion of his trial evidence was contrary to Federal Rule of Evidence 807 when he did not list it in his statement of the issues in the Bankruptcy Court (Doc. 1.3 at 6) as required by Federal Rule of Bankruptcy Procedure 8009(a)(1)(A).

Rule 8009(a)(1)(A) "directs an appellant to file with the clerk and serve on the appellee 'a designation of the items to be included in the record on appeal and a statement of the issues to be presented.'" *In re Freeman*, 956 F.2d 252, 255 (11th Cir. 1992) (quoting former Fed. R. Bankr. 8006). Accordingly, "[a]n issue that is not listed pursuant to this rule and is not inferable from the issues that are listed is deemed waived and will not be considered on appeal." *Id.*[5] In this regard, pro se

[5] Other circuits have reached the same result. *E.g.*, *City Sanitation, LLC* v. *Allied Waste Servs. of Mass., LLC (In re Am. Cartage, Inc.)*, 656 F.3d 82, 91 (1st Cir. 2011) (absent "exceptional circumstances, failure to comply with [former] Rule 8006 waives the omitted issue on appeal"); *Zimmermann* v. *Jenkins (In re GGM, P.C.)*, 165 F.3d 1026, 1032 (5th Cir. 1999) ("even if an issue is argued in the bankruptcy court and ruled on by that court, it is not preserved for appeal under [former]

litigants are "not entitled to special treatment on appeal." *United States* v. *Chaney*, 662 F.2d 1148, 1151 n.4 (5th Cir. 1981);[6] *accord McDaniel* v. *Fannie Mae*, 2015 U.S. Dist. LEXIS 43392, *6-7 (D. Md. Mar. 31, 2015) (dismissing pro se appeal for failure to file statement of the issues as required by Rule 8009). The Eleventh Circuit would review this Court's error-preservation ruling de novo. *Capital Factors*, 1 F.3d at 1159.

Here, Mr. Termeer's statement of the issues (Doc. 1.3 at 6) in the Bankruptcy Court had four issues. First, "Did the Bankruptcy Court err in determining that Termeer's debt should be discharged?" Second, "Did the Bankruptcy Court err in denying Termeer the ability to present evidence of damages?" Third, "Did the Bankruptcy Court err in failing to determine whether or not this was a case of defamation per se?" Fourth, "Did the Bankruptcy Court err in failing to determine whether or not Termeer was a public figure?"

On appeal, however, Mr. Termeer raises a quite different argument: i.e., that the Bankruptcy Court abused its discretion when it sus-

---

Bankruptcy Rule 8006 unless the appellant includes the issue in its statement of issues on appeal").

[6] In *Bonner* v. *City of Prichard*, the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down by close of business on September 30, 1981. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

tained objections to admission of "the subject article, and evidence of publication" despite Federal Rule of Evidence 807. Termeer Br. at 11-13. But this issue was neither "listed" in nor "inferable" from Mr. Termeer's statement of the issues. *In re Freeman*, 956 F.2d at 255. Instead, his putative issues concerned sufficiency of the evidence (issue one), evidence of damages (issue two), whether the evidence actually admitted established defamation per se (issue three), and whether the evidence actually admitted established Mr. Termeer was a public figure (issue four). None of those issues concerned (1) the subject article and its publication, (2) hearsay in general, or (3) Rule 807's catch-all exception in particular. Accordingly, Mr. Termeer's sole appellate argument is "deemed waived and will not be considered on appeal." *Id.* The Court must therefore affirm the judgment.

II. MR. TERMEER WAIVED HIS SOLE APPELLATE ARGUMENT WHEN HE NEVER RAISED IT IN THE BANKRUPTCY COURT DURING TRIAL

Mr. Termeer waived his Rule 807 argument when he failed to raise it in the Bankruptcy Court during trial.

"'Ordinarily an appellate court does not give consideration to issues not raised below.'" *Ala. Dep't of Econ. & Cmty. Affairs* v. *Ball*

Healthcare-Dall., LLC (In re Lett), 632 F.3d 1216, 1226 (11th Cir. 2011) (citation omitted). Put otherwise, litigants do not preserve issues for appellate review unless they "clearly present" them to the trial court "in such a way as to afford [it] an opportunity to recognize and rule on it." *Juris* v. *Inamed Corp.*, 685 F.3d 1294, 1324 (11th Cir. 2012) (citation and punctuation omitted). Nevertheless, under the "civil plain error rule," "'we will consider an issue not raised in the [trial] court if it involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice.'" *Id.* at 1227 (citation omitted).

Importantly, with respect to error preservation, pro se litigants are "not entitled to special treatment on appeal." *Chaney*, 662 F.2d at 1151 n.4.[7] Rather, "[i]f a pro se [litigant] fails to properly preserve an issue for appeal, we will [grant appellate relief] only if the trial court committed plain error." *Id.* Additionally, the Eleventh Circuit would review this Court's error-preservation ruling de novo. *Capital Factors*, 1 F.3d at 1159.

At trial, Mr. Termeer never raised the issue of Rule 807, so the Bankruptcy Court never had an opportunity to consider it. *Juris*, 685

[7] *See supra* note 6.

F.3d at 1324; *Ala. Dep't of Econ. & Cmty. Affairs*, 632 F.3d at 1226. Accordingly, this Court cannot consider Mr. Termeer's Rule 807 argument unless he shows civil plain error by demonstrating (1) "'it involves a pure question of law,'" and (2) "'refusal to consider it would result in a miscarriage of justice.'" *Ala. Dep't of Econ. & Cmty. Affairs*, 632 F.3d at 1227 (citation omitted); *see also* Fed. R. Civ. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."); Fed. R. Bankr. P. 7052 (Rule 52 "applies in adversary proceedings"). Mr. Termeer cannot satisfy either condition, never mind both.

First, evidentiary rulings are not "pure questions of law," such as "construction and application of . . . statutes." *Wright* v. *Hanna Steel Corp.*, 270 F.3d 1336, 1342 (11th Cir. 2001). Rather, such evidentiary rulings are the quintessential kind of judgment call committed to the sound discretion of bankruptcy courts.[8] *Travelers Ins. Co.*, 878 F.2d at 358. As such, the first waiver exception does not apply.

[8] Appellate courts defer to trial courts' evidentiary rulings for several reasons. "One is that the [trial] court's role in presiding over trial proceedings means the [trial] court is in the best position to decide the matter." *United States* v. *Brown*, 415 F.3d 1257, 1265 (11th Cir. 2005). Put otherwise, "'[i]nherent in this [abuse of discretion] standard is the

Second, Mr. Termeer cannot show the exclusion of his evidence was an abuse of discretion, never mind a miscarriage of justice. *See infra* Arguments IV-V. "A 'miscarriage of justice' is a 'decision or outcome of [a] legal proceeding that is prejudicial or inconsistent with [the] substantial rights of [a] party.'" *Wright*, 270 F.3d at 1342 n.8 (quoting BLACK'S LAW DICTIONARY at 999 (6th ed. 1990)). Civil plain-error review "is an extremely stringent form of review. Only in rare cases will a trial court be reversed for plain error." *Farley* v. *Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1329 (11th Cir. 1999). To establish civil plain error, Mr. Termeer would need to establish "four requirements": "first, an error occurred; second, the error was plain; third, it affected substantial rights;

---

firm recognition that there are difficult evidentiary rulings that turn on matters uniquely within the purview of the [trial] court, which has first-hand access to documentary evidence and is physically proximate to testifying witnesses." *Id.* (citation omitted). "Being at the trial as the proceedings occur and the evidence unfolds, a trial judge has an advantageous familiarity with the proceedings and 'may have insights not conveyed by the record' about the evidence and the issues relating to it." *Id.* (citation omitted). "Duplicating that familiarity and those insights at the appellate level is impractical and often impossible." *Id.* "A second reason we give considerable deference to the trial court on evidentiary issues is that it is often not possible to precisely calibrate rules for the many different circumstances that can arise." *Id.* Rather, "they almost always present a question that 'grows out of, and is bounded by, case-specific detailed factual circumstances. And the fact-bound nature of the decision limits the value of appellate court precedent.'" *Id.* (citation omitted).

and finally, not correcting the error would seriously affect the fairness of the judicial proceeding." *Id.* Mr. Termeer cannot meet any of these requirements. *See infra* Arguments III-V. Accordingly, the second waiver exception does not apply.

Because neither waiver exception applies, this Court cannot consider Mr. Termeer's Rule 807 appellate argument and must affirm.

III. Mr. Termeer's Brief Abandoned Any Arguments Regarding The Bankruptcy Court's Alternative Bases For Excluding His Evidence As Lacking Authentication, Irrelevant, And Belatedly Disclosed

The Court must affirm the judgment as to most excluded exhibits because Mr. Termeer's brief abandoned any arguments regarding the Bankruptcy Court's alternative bases for excluding his evidence as lacking authentication, irrelevant, and belatedly disclosed.

To prevail on appeal from a "judgment that is based on multiple, independent grounds, an appellant must convince us that every stated ground for the judgment against him is incorrect." *Sapuppo* v. *Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014). "When an appellant fails to challenge properly on appeal one of the grounds on which the district court based its judgment, he is deemed to have abandoned any challenge of that ground, and it follows that the judgment is due to

be affirmed." *Id.* "While we read briefs filed by pro se litigants liberally, issues not briefed on appeal by a pro se litigant are deemed abandoned." *Timson* v. *Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) (citations omitted). And "we do not address arguments raised for the first time in a pro se litigant's reply brief." *Id.* (citation omitted). Additionally, the Eleventh Circuit would review this Court's error-preservation ruling de novo. *Capital Factors*, 1 F.3d at 1159.

Only a few of Mr. Termeer's exhibits were excluded based on hearsay objections alone: an e-mail from Jim Baker (Ex. BLU-Q); an e-mail chain between Mr. Dunn and Mr. Gingras (Exs. BLU-S, BLA-J); affidavits (Ex. BLU-K); an e-mail from Mr. Adams to Mr. Termeer (Ex. BLA-E); an e-mail from Mr. Baker to Mr. Termeer (Ex. BLA-F); and an e-mail from Mr. Gingras regarding Ripoff Report's compliance with a subpoena (Ex. BLA-K). All other exhibits were excluded on multiple bases, which Mr. Termeer's brief does not address. And even if Mr. Termeer addresses those rulings in his reply brief, his arguments would "come too late." *Sapuppo*, 739 F.3d at 683 (declining to address new arguments raised in reply brief); *accord Timson*, 518 F.3d at 874. Accord-

ingly, Mr. Termeer has abandoned any challenge to the exclusion of those other exhibits, including the Ripoff Report (BLU-A) itself.[9]

IV. MR. TERMEER CANNOT DEMONSTRATE ANY ABUSE OF DISCRETION BECAUSE THE RECORD ON APPEAL DOES NOT INCLUDE ANY COPIES OF THE EXHIBITS THAT WERE EXCLUDED

Mr. Termeer cannot prevail on appeal because he did not perfect the record on appeal. Currently, none of his excluded exhibits are part of the record on appeal, except for an unauthenticated Ripoff Report article (Doc. 1.6 at 8-10) and affidavits (Ex. BLU-K) that the clerk accidentally included with the admitted trial exhibits. Additionally, it is possible that the e-mail chain between Mr. Gingras to Mr. Termeer (Ex. BLA-K) that Mr. Termeer attempted to introduce was the same as that attached to the original complaint. Doc. 1.6 at 13-14. In any event, without these missing exhibits, it is therefore impossible for Mr. Termeer to reconstruct what happened at trial and to demonstrate any abuse of discretion occurred.

---

[9] Even if Mr. Termeer had argued (*see* Termeer Br. at 11-12) Mr. Dunn admitted during his deposition that he had authored the Ripoff Report, which therefore authenticated it for its admission at trial, he is wrong. The Bankruptcy Court carefully read Mr. Dunn's deposition, Doc. 1.17 at 58, and even Mr. Termeer conceded at trial that he had not attached the Ripoff Report itself to Mr. Dunn's deposition transcript, Doc. 1.17 at 22 ("I wish the actual exhibit was attached to it but unfortunately, due to financial difficulties, I wasn't able to procure that.").

It is an appellant's "responsibility to perfect the appellate record." *United States* v. *Razz*, 240 Fed. App'x 844, 848 (11th Cir. 2007).[10] This is true even when the appellant proceeds pro se. *Cf. Chaney*, 662 F.2d at 1151 n.4 (pro se litigants are "not entitled to special treatment on appeal").[11] And the Eleventh Circuit would review this Court's error-preservation ruling de novo. *Capital Factors*, 1 F.3d at 1159. When an appellant fails in his obligation to perfect the record on appeal, as Mr. Termeer has here, the appellate court must "review[] the issue in light of the representations made in the briefs and the [trial] court's statements in open court." *Razz*, 240 Fed. App'x at 848. On this limited record, Mr. Termeer cannot show any abuse of discretion because it is impossible to determine whether the excluded exhibits were in fact hearsay. *See id.* ("[o]n the record before us, we are satisfied that the district court did not abuse its discretion"). The Court must therefore affirm.

[10] Unpublished Eleventh Circuit opinions are "not binding precedent," *Bravo* v. *United States*, 532 F.3d 1154, 1164 n.5 (11th Cir. 2008), but "may be cited as persuasive authority," 11th Cir. R. 36-2.

[11] *See supra* note 6.

V. THE BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCLUDED MR. TERMEER'S EVIDENCE DESPITE HIS BELATED RULE 807 CONCERNS

It was not an abuse of discretion when the Bankruptcy Court excluded Mr. Termeer's evidence despite his belated Rule 807 concerns.

A. The Exclusion Of Most Exhibits Was Harmless Because They Had Nothing To Do With Publication To A Third Person

The Bankruptcy Court entered judgment against Mr. Termeer because he failed to admit the Ripoff Report (Ex. BLU-A) itself and prove one of the elements of defamation: publication to a third person. Docs. 1.17 at 54-69 (citing *Internet Solutions Corp.* v. *Marshall*, 39 So. 3d 1201 (Fla. 2010)), 1.2 at 1 & n.1; *see also Thomas* v. *Jacksonville Television, Inc.*, 699 So. 2d 800, 803 (Fla. 1st DCA 1997).

The vast majority of Mr. Termeer's excluded exhibits did not pertain to the Ripoff Report or its publication to any third person. Indeed, the only excluded exhibits that theoretically could have shown publication were the web traffic reports (Exs. BLU-E, F, G), the affidavits (Ex. BLU-K), an e-mail from Mr. Adams to Mr. Termeer (Ex. BLA-E), invoices (Ex. BLU-H), an e-mail chain between Mr. Dunn and Mr. Gingras (Exs. BLU-S, BLA-J), and an e-mail chain between Mr. Gingras

and Mr. Termeer (Ex. BLA-K).[12] Accordingly, the exclusion of any other exhibits was necessarily harmless. *See* Fed. R. Civ. P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."); Fed. R. Bankr. P. 9005 (Rule 61 "applies in cases under the [Bankruptcy] Code").

B. The Bankruptcy Court Did Not Abuse Its Discretion When It Excluded The Remaining Exhibits Despite Rule 807

As for the remaining exhibits that potentially related to the Ripoff Report and its publication to a third person (i.e., the affidavits and e-mails), the District Court did not abuse its discretion in excluding them despite Mr. Termeer's belated Rule 807 concerns.

---

[12] Mr. Termeer already abandoned any challenge to the exclusion of the web traffic reports (Exs. BLU-E, F, G) and invoices (Ex. BLU-H) when he failed to brief the alternative bases for their exclusion. *See supra* Argument III. And none of these exhibits is actually part of the record on appeal except for the affidavits (Ex. BLU-K) and the e-mail chain between Mr. Dunn and Mr. Gingras (Exs. BLU-S, BLA-J). *See supra* Argument IV. It is possible that the e-mail chain between Mr. Gingras to Mr. Termeer that Mr. Termeer attempted to introduce was the same as that attached to the original complaint. Doc. 1.6 at 13-14. If so, that e-mail chain did not demonstrate publication to a third person, so its exclusion was harmless. *See* Fed. R. Civ. P. 61; Fed. R. Bankr. P. 9005. As for the other exhibits, it is pure speculation whether they would in fact have demonstrated publication to a third person. But speculation does not amount to an abuse of discretion. *See infra* Argument IV.

Rule 807(a) provides "a hearsay statement is not excluded by the rule against hearsay" if (1) it "has equivalent circumstantial guarantees of trustworthiness," (2) it "is offered as evidence of a material fact," (3) it "is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts," and (4) "admitting it will best serve the purposes of these rules and the interests of justice." Fed. R. Evid. 807(a). Although some of Mr. Termeer's excluded evidence was offered as evidence of a material fact, it lacks circumstantial guarantees of trustworthiness, it is not more probative than other evidence Mr. Termeer could have obtained through reasonable efforts, and its admission would not best serve the purposes of the rules of evidence and the interests of justice.

"'Congress intended [Rule 807's] residual hearsay exception to be used very rarely, and only in exceptional circumstances.'" *Rivers* v. *United States*, 777 F.3d 1306, 1312 (11th Cir. 2015) (citation omitted). On abuse-of-discretion appellate review, appellate courts are "'particularly hesitant to overturn a trial court's admissibility ruling under the residual hearsay exception absent a 'definite and firm conviction that

the court made a clear error of judgment in the conclusion it reached based upon a weighing of the relevant factors."" *Id.* (citations omitted).

Moreover, Rule 807 "'appl[ies] only when certain exceptional guarantees of trustworthiness exist and when high degrees of probativeness and necessity are present.'" *Id.* at 1314 (citation omitted). Such exceptional guarantees of trustworthiness must be "equivalent in significance to the specific hearsay exceptions enumerated in Federal Rules of Evidence 803 and 804." *Id.* That is, they "must be 'equivalent to cross-examined former testimony, statements under a belief of impending death, statements against interest, and statements of personal or family history.'" *Id.* (citation omitted). The enumerated hearsay exceptions are "considered sufficiently trustworthy not because of the credibility of the witness reporting them in court, but because of the circumstances under which they were originally made." *Id.* In short, "Rule 807 is clearly concerned, first and foremost, about whether the declarant originally made the statements under circumstances that render the statements more trustworthy." *Id.* at 1315.

1. The Affidavits And E-Mails Lack Exceptional Circumstantial Guarantees Of Trustworthiness

The affidavits and e-mails lack exceptional circumstantial guarantees of trustworthiness. *See* Ex. BLU-K. They were sworn to by individuals employed by Mr. Termeer (i.e., Joe Robertson and Mike Rutz), Mr. Termeer's mother (Gail Termeer), and Mr. Termeer's sister (Leigha Termeer). Ex. BLU-K. The affidavits do not reveal any exceptional trustworthy circumstances in which the affiants originally made their averments; rather, they reveal that these witnesses may have had incentives to testify favorably to Mr. Termeer because he had employed them, he was related to them, and they were not subjected to cross-examination.

Nor is there any basis on this record to conclude the e-mails reveal any exceptional trustworthy circumstances in which the supposed declarants (Mr. Gingras and Mr. Adams) made their statements. In fact, on this record, it is not even clear who Mr. Adams is.

2. The Affidavits And E-Mails Are Not More Probative Than Any Other Evidence Mr. Termeer Could Have Obtained Through Reasonable Efforts

The affidavits and e-mails are not more probative than any other evidence Mr. Termeer could have obtained through reasonable efforts. *E.g.*, *SEC* v. *Kramer*, 778 F. Supp. 2d 1320, 1325-26 (M.D. Fla. 2011). Mr. Termeer could have subpoenaed these witnesses for trial, deposed them, simply asked them to testify, had a friend or colleague testify about the Ripoff Report and Mr. Termeer's injuries, or called Mr. Dunn to testify.[13]

---

[13] Mr. Termeer cannot argue the Bankruptcy Court should have provided him further assistance beyond the extraordinary assistance it did provide him in presenting his case by advising him to take these additional steps, because "even in the case of pro se litigants this leniency does not give a court license to serve as de facto counsel for a party." *GJR Invs.* v. *County of Escambia*, 132 F.3d 1359, 1369 (11th Cir. 1998) (citing *Hall* v. *Bellmon*, 935 F.2d 1106, 1109 (10th Cir.1991), and *Pontier* v. *City of Clearwater*, 881 F. Supp. 1565, 1568 (M.D. Fla. 1995)), *overruled on other grounds by Ashcroft* v. *Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009); *see also Mikell* v. *United States*, 2009 U.S. Dist. LEXIS 93429, at *2 (S.D. Ga. Sept. 17, 2009) ("Federal courts may not provide legal advice to a pro se litigant, just as they may not provide legal advice to a party represented by an attorney." (citation and punctuation omitted)); *Turner* v. *Cunningham*, 2008 U.S. Dist. LEXIS 43677, at *5 (S.D. Ala. May 20, 2008) ("Because plaintiffs are proceeding pro se, the Court stresses that it cannot provide them with legal advice or correct errors or omissions in their pleadings."). And "[a] plaintiff in a

For example, Mr. Robertson and Mr. Rutz both live in Florida (Ex. BLU-K) and could have been subpoenaed for trial. *See* Fed. R. Civ. P. 45(c)(1). In fact, Mr. Termeer recognized as much when he asked the Bankruptcy Court whether they could testify during the second day of trial:

> MR. TERMEER: One thing is, Your Honor, if—is it all right, if I am able to bring in a witness, is that something that we can do?
>
> THE COURT: Depends on who it is and whether there's going to be prejudice argued.
>
> MR. TERMEER: It would only be Joe Robertson and Mike Rutz.

Doc. 1.16 at 197. Similarly, Mrs. Termeer and Ms. Termeer both live in Michigan (Ex. BLU-K), and Mr. Gingras lives in Arizona, and they all could have testified at trial had Mr. Termeer asked them.

It should go without saying that Mr. Termeer could have deposed any or all of these witnesses. *See* Fed. R. Civ. P 30(a)(1); Fed. R. Bankr. P. 7030 (Rule 30 "applies in adversary proceedings"). Had he done so, Mr. Dunn would have had an opportunity to cross-examine them, and if Mr. Termeer demonstrated they were unavailable for trial, *see* Fed. R.

---

civil case has no constitutional right to counsel." *Bass* v. *Perrin*, 170 F.3d 1312, 1320 (11th Cir. 1999).

Evid. 804(a), he could have introduced their deposition testimony pursuant to Rule 804(b)(1) (former testimony).

If all of those possibilities proved unworkable, Mr. Termeer could also have asked a friend or colleague testify that he or she had read the Ripoff Report and was familiar with Mr. Termeer's injuries.

Lastly, at all times during trial, Mr. Dunn was in the courtroom and available to testify. In fact, the Bankruptcy Court even suggested to Mr. Termeer that he could call Mr. Dunn as a witness. Doc. 1.16 at 10-11; Doc. 1.17 at 30, 55 ("I flat out tipped [Mr. Termeer] off that maybe he could call Mr. Dunn as a witness"); Doc. 1.2 at 1 n.1 ("Although the Plaintiff had the opportunity to call the Defendant (who was present at the trial) as a witness and question the Defendant under oath as to authorship, the Plaintiff did not do so, despite the Court's asking the Plaintiff several times whether he wanted to call any other witness to the stand."). Had Mr. Termeer done so, he could have asked Mr. Dunn about the Ripoff Report and its publication. But Mr. Termeer did not do any of this.

Due to Mr. Termeer's repeated failures to undertake these minimal efforts, the affidavits and e-mails are not more probative than evidence he could have obtained through reasonable efforts.

3. Admitting The Affidavits And E-Mails Would Not Have Served The Purposes Of The Rules Of Evidence Or The Interests Of Justice

Admission of the affidavits and e-mails would not serve the purposes of the rules of evidence or the interests of justice. The hearsay rules, developed and refined through centuries of experience with trial practice, serve a very important purpose in the law of evidence: to ensure reliable factfinding by subjecting testimony to "the normal credibility safeguards of oath, presence at trial, and cross-examination." *United States* v. *Parry*, 649 F.2d 292, 294 (5th Cir. 1981).[14] Otherwise, the factfinder "has no basis for evaluating the declarant's trustworthiness and thus his statement is considered unreliable." *Id.*

In short, the Bankruptcy Court's hearsay rulings were both supported by sound policies and entirely correct. Accordingly, Mr. Termeer cannot demonstrate any abuse of discretion, and the Court should affirm the judgment.

---

[14] *See supra* note 6.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment.

Respectfully submitted,

/s/ Thomas Burns
Thomas A. Burns
BURNS, P.A.
301 West Platt Street, Suite 137
Tampa, FL 33606
(813) 642-6350 T
(813) 642-6350 F
tburns@burnslawpa.com

Counsel for Appellee

CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Bankruptcy Procedure 8015(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 8015(a)(7)(B)(iii), this brief contains 7,260 words.

2. This brief further complies with Federal Rule of Bankruptcy Procedure 8015(a)(5)'s typeface requirements and with Federal Rule of Bankruptcy Procedure 8015(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century font.

July 2, 2015

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the foregoing brief via U.S. mail and e-mail on this 2d day of July, 2015, to:

Christopher Termeer
P.O. Box 4913
Seminole, FL 33775
chris@christermeer.com

July 2, 2015

/s/ Thomas Burns
Thomas A. Burns