STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2018-CP-10-04083
	)	
Charleston Carriage Works, LLC,	)	
	)	
Plaintiff,	)	**ORDER GRANTING DEFENDANTS' SUMMARY JUDGMENT**
	)	
vs.	)	
	)	
Charleston Animal Society, Ellen Harley and Charleston Carriage Horse Advocates, Inc.,	)	
	)	
Defendants.	)	
	)	

This matter is before the Court on Defendants' Motions for Summary Judgment which were heard on September 29, 2021. The Court has carefully reviewed the memoranda, exhibits, affidavits, and deposition testimony submitted by the parties. For the reasons stated below, Defendants' Motions are GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Charleston Carriage Works owns and operates one of the carriage horse companies in downtown Charleston. On April 19, 2017, in the midst of years of public debate[1] concerning Charleston's carriage horse operations, one of Plaintiff's horses, Big John, fell during a tour. Defendant Charleston Animal Society (CAS) posted a video on its YouTube channel comprised of footage of the incident sent to it by bystanders and added in the following subtitles:

> *Why were eyewitnesses intimidated to stop taking video when a horse collapsed?*
>
> *Was Big John exhausted or did he just "trip"?*
>
> *By law, the horses are not supposed to pull more than three times their weight. However, loaded carriages are never weighed, and Charleston does not enforce this provision.*

[1] Depo. of Broderick Christoff, p. 302, lines 14-17; p. 303, lines 6-7.

Big John could not get up on his own. A team of people had to try and pull him up.

After several minutes of trying, finally some good news for Big John!

Charleston Animal Society and several local and national animal welfare groups want an independent, scientific, peer-reviewed study to answer questions (with research) on whether the working environment for horses like Big John is truly safe and humane.

Is this too much to ask for Big John and other working horses?

The video was reposted by Defendant Charleston Carriage Horse Advocates (CCHA), a local advocacy group founded by Defendant Ellen Harley (Harley), on its social media sites. Plaintiff alleges that the video went "viral", resulting in significant public backlash.

Plaintiff's lawsuit claims that the video of Big John, and specifically, the subtitles, are defamatory and imply Plaintiff abuses its animals and is inhumane. Plaintiff's Complaint also includes causes of action for civil conspiracy, "Violation of Plaintiff's Civil Rights under Art. I, § 3, South Carolina Constitution – Gross Negligence, Recklessness", and tortious interference with business relations.

Because there are no genuine issues as to any material fact, Defendants are entitled to judgment as a matter of law. Rule 56, SCRCP.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases [that] do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "[W]hen a party has moved for summary judgment[,] the opposing party may not rest upon the mere allegations or denials of his pleading to defeat it." Fowler v. Hunter, 380 S.C. 121, 125, 668 S.E.2d 803, 805 (Ct. App. 2008). "Rather, the non-moving party must set forth specific facts demonstrating to the court there is a genuine issue for trial." Id.

"A jury issue is created when there is material evidence tending to establish the issue in the mind of a reasonable juror." Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009). "However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury." Id. (quoting Small v. Pioneer Mach., Inc., 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997)); Hall v. Fedor, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) ("Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence.").

Furthermore, "where the federal standard applies or where a heightened burden of proof is required, there must be more than a scintilla of evidence in order to defeat a motion for summary judgment." Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "[T]he summary judgment device occupies a position of great importance in libel actions as compared with other civil actions, due to the possible chilling effect which can result from the defense of defamation claims." Peeler v. Spartanburg Herald-Journal Div. of The New York Times Co., 681 F. Supp. 1144, 1146 (D.S.C. 1988).

DISCUSSION

I. Defamation.

Plaintiff alleges it was defamed by Defendants CCHA and CAS's[2] publication of a video showing Plaintiff's horse, Big John, and describing the horse as having "collapsed." Plaintiff has also maintained that there are additional defamatory statements unrelated to the Big John incident/video. These other allegedly defamatory statements will be addressed separately below.

In order to prove defamation, a plaintiff must show: (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at

[2] Plaintiff has not and apparently cannot provide a single example of Harley even allegedly defaming it in her individual capacity. Depo. of Broderick Christoff, p. 245, lines 21-25 cont. p. 246, lines 1-25 cont. p. 247, lines 1-3.

fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006). Several presumptions accompany these elements. First, common law generally presumes that the statement is false. Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 519, 506 S.E.2d 497, 506 (1998). Additionally, when a statement is actionable *per se*, the defendant is presumed to have acted with common law malice, and the plaintiff is presumed to have suffered general damages. Erickson, supra. As the Supreme Court of South Carolina has explained, "libel is a written defamation" and "essentially all libel is actionable *per se*." Id. Therefore, in a defamation suit involving libel in which the plaintiff is a private figure, both common law malice and general damages are typically presumed.

However, although a plaintiff might be able to prove all of the elements of South Carolina common law defamation, the First Amendment places limitations on tort liability for defamation. See City of Columbia v. Pic-A-Flick Video, Inc., 340 S.C. 278, 531 S.E.2d 518 (2000) (when confronted with First Amendment issues, South Carolina courts are guided by precedence from the United States Supreme Court); see also Holtzscheiter, 332 S.C. at 508, 506 S.E.2d at 501 ("[T]his area of the law is constantly evolving, and consequently all prior decisions must be read in the context of the current state of the law.").

The First Amendment limitations, as well as the burden of proof at the summary judgment stage, differ based upon: 1) whether the defamed individual is a public figure, public official, or private figure; and 2) whether the subject matter of the alleged defamatory statement is a matter of public or private concern.

A. Public v. Private Figure.

"[A]n important initial step in analyzing any defamation case is determining whether a particular plaintiff is a public official, public figure, or private figure." Erickson, 368 S.C. at 468, 629 S.E.2d at 666. This determination is a matter of law which must be decided by the Court on a case-by-case basis after careful examination of the facts and circumstances. Id. Even a limited purpose public figure must show, by clear and convincing evidence, that defamatory statements were made with actual malice in publishing a false and defamatory statement about the Plaintiff. Id. at 467, 629 S.E.2d at 665; George v. Fabri, 345 S.C. 440, 456, 548 S.E.2d 868, 876 (2001). Actual malice exists when a statement is made "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times, 376 U.S. at 279–80; see also George, 345 S.C. at 456, 548 S.E.2d at 876 (actual malice is governed by a subjective standard which tests the defendant's good faith belief in the truth of her statements).

At the summary judgment phase, the appropriate standard "on the issue of constitutional actual malice is the clear and convincing standard." George, at 454, 548 S.E.2d at 875. Clear and convincing evidence is that "degree of proof which will produce in the [fact finder] a firm belief as to the allegations sought to be established. Such measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." Anonymous v. State Bd. of Med. Exam'rs, 329 S.C. 371, 374 n. 2, 496 S.E.2d 17, 18 n. 2 (1998). Furthermore, "where the federal standard applies or where a heightened burden of proof is required, there must be more than a scintilla of evidence in order to defeat a motion for summary judgment." Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

"Unless the [circuit] court finds, based on pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice, it should grant summary judgment for the defendant." McClain v. Arnold, 275 S.C. 282, 284, 270 S.E.2d 124, 125 (1980).

1. Plaintiff is a limited-purpose public figure in the context of the speech at issue.

The U.S. Supreme Court generally has defined a public figure as follows: "For the most part those who attain this status [of public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment." Gertz, 418 U.S. at 345; George, 345 S.C. 440, 548 S.E.2d 868 (2001) (plaintiff political candidate's engineering firm was a limited public figure under Gertz test in defamation action arising from statements candidate made during political campaign). In determining whether a claimant is a private or public figure, the court must focus on the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation." Gertz, 418 U.S. at 352; Parker v. Evening Post Pub. Co., 317 S.C. 236, 243 n. 3, 452 S.E.2d 640, 644 n. 3 (Ct. App. 1994) (automobile dealer invited public's attention through extensive media advertising and, as to statements regarding his dealership, was a public figure).

A limited public figure, the type more commonly found, is an individual who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." Gertz, 418 U.S. at 351. The U.S. Supreme Court has also identified

a third category of involuntary public figures who become public figures through no purposeful action of their own. Erickson, 368 S.C. at 473, 629 S.E.2d at 668.

All three types of public figures, just as public officials, must meet the New York Times standard of actual malice in order to recover damages for defamation. Erickson, 368 S.C. at 473, 629 S.E.2d at 668. Public figures and public officials are entitled to less protection from defamation than private figures because they enjoy greater media access and are less vulnerable to injury from defamatory statements due to their ability to publicly rebut such statements. Id.

To determine whether a plaintiff is a public figure for the limited purpose of comment on a particular public controversy, the Court considers whether: (1) the plaintiff has access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public-figure status at the time of the alleged defamation. Id. at 474, 629 S.E.2d at 669.

Plaintiff argues that "the defendants drug the plaintiff into the public arena against his will" and that its only "participation in the particular controversy" was operating a lawful business and taking steps to mitigate "his" damages. See Pltf. Supp. Memo. of Law (filed 1/26/22), pp. 6, 7. The evidence presented by Plaintiff, through the affidavits of its owner, Broderick Christoff, as to his public participation in this controversy suggests otherwise. See Aff. of Christoff (filed 2/25/20), p. 3 ("For the past two decades, [Harley] and I frequently opposed one another at Tourism Commission meetings…"); Supp. Aff. of Christoff (filed 12/2/20), p. 5 ("Because I stood up to them at Tourism Commission meetings, Harley and Elmore identified me as the impediment to their plan to shut down the carriage tours because our frequent conflict, my science background,

and my long history with horses prepared me to challenge their unscientific assertions to the City."); Second Supp. Aff. of Christoff (filed 8/19/21), p. 3 ("As I said above, in [Harley's] frequent appearances before City Council and the Tourism Commission, I often challenged her, pointing out that her information was not correct. I did the same thing with Charleston Animal Society.").

Moreover, Defendants presented evidence that Plaintiff, through the actions of its owner, Mr. Christoff, injected itself into the debate over the operations of the carriage industry in Charleston and that it did so prior to the Defendants' publication of the Big John video. In the years leading up to the Big John incident, Mr. Christoff, who was routinely identified as being affiliated with and/or owning Plaintiff, spoke at a number of City meetings concerning various carriage-related issues.[3]

Additionally, Plaintiff has also appeared in, and through Mr. Christoff, has been quoted by the media. An article published by the Post & Courier on August 23, 2016, concerning the carriage horse temperature ordinance, reports the following:

> Broderick Christoff, owner of Charleston Carriage Works, said carriage companies take horses' temperatures after every tour. If they are too high, the animals are allowed to rest.
>
> He also said that he thinks the media and the Charleston Animal Society have misled the public about the treatment of carriage horses. The tour companies take good care of them, he said.

(*Charleston Considering Lowering the Temperature for Pulling Carriage Horses From Street*, Post & Courier, 8/23/16) (Ex. 9 to Christoff Depo., Vol. II). Mr. Christoff testified that he made these statements, although he believes he did so at a City Council committee or subcommittee meeting. Christoff Depo., Vol. II, pp. 77:21-78:14.

[3] Defendants presented minutes from the 3/14/17 City Council meeting as well as the 11/23/15, 2/4/16, and 8/25/16 meetings of the City's Tourism Subcommittee.

A December 14, 2016, article titled "Charleston Panel Backs Lower Temperature Limits for Carriage Tours" reported on the study being proposed by CAS and states: "But Broderick Christoff of Charleston Carriage Works said the industry would be wary of participating in any study backed by an animal rights group." (*Charleston Panel Backs Lower Temperature Limits for Carriage Tours*, Post & Courier, 12/14/16) (Ex. 10 to Christoff Depo., Vol. II). Mr. Christoff testified that he believed these were comments he made while speaking at a city meeting. Christoff Depo., Vol. II, pp. 78:17-79:7.

A February 20, 2017, article, titled "Carriage Company Owner Responds After Minor Incident Over the Weekend," reported an incident in which one of Plaintiff's horses was spooked by a parade and included the following:

> We spoke with the owner of Charleston Carriage Works, Broderick Christoff, about the incident. He said a failure to follow city policy is what caused the minor incident with his carriage at the corner of King and Queen Streets.

(*Carriage Company Owner Responds After Minor Incident Over the Weekend*, https://abcnews4.com/news/local/carriage-company-owner-responds-after-minor-incident-over-the-weekend) (Ex. 12 to Christoff Depo., Vol. II). Mr. Christoff confirmed in his deposition that he made these comments. Christoff Depo., Vol. II, p. 84:17-25.

Finally, a February 21, 2017, article published by the Post & Courier on the same incident reported as follows:

> "The parade gets louder and louder," Charleston Carriage Works owner Broderick Christoff said Tuesday. "The driver is basically just sitting there watching the fuse burn, and it gets to the point where the people on the carriage are trying to get the police officer's attention to just move so they can go.
>
> "At that point, the driver tells the people on the carriage, 'Hold on, because we've done everything we can do and it's going to be what it's going to be at this point.'"

(*Communication Breakdown Led to Charleston Carriage Horse Accident*, Post & Courier, 2/21/07) (Ex. 11 to Christoff Depo., Vol. II). In both the article and in his deposition, Mr. Christoff stated that his intent was to make "an issue of" the incident to keep it from happening again, an incident he testified was caused by the intersection being blocked by Charleston police. Christoff Depo., Vol. II, p. 81:24-84:14.

All of these articles, and the meetings and incidents reported therein, occurred prior to the Big John incident. See Atlanta Humane Soc. v. Mills, 274 Ga.App. 159, 618 S.E.2d 18 (Ga. Ct. App. 2005) ("Even a single interview given to the media may be sufficient to establish a defamation plaintiff as a limited-purpose public figure.").

Mr. Christoff has also appeared in at least two online videos designed to affect the public controversy and in which he is identified as being the owner of Plaintiff.[4] The first is an interview by Quintin Washington posted on June 17, 2017, the second is an interview posted on October 10, 2017, by Charleston C.A.R.E.S. Plaintiff, along with two other carriage companies, founded Charleston C.A.R.E.S. (Carriage Association for Responsible Equine Safety), representing on its website that Plaintiff and the other founding companies are "committed to being advocates and educators for the often misunderstood and misrepresented horse carriage industry." Additionally, Plaintiff has published on its Facebook page a number of position statements addressing the various issues that are debated in relation to the carriage industry. While these events took place after the Big John video was published, they evidence Plaintiff's access to channels of communication and its attempts to assert influence in the controversy surrounding Charleston's carriage horse industry.

[4] https://www.youtube.com/watch?v=foIbs_6JmLA; https://www.youtube.com/watch?v=K7KWEiAFZsw.

In sum, Defendants presented evidence that Plaintiff has access to channels of effective communication, it has voluntarily assumed a role of prominence in the controversy concerning Charleston's carriage horse industry, and it has sought to influence the outcome of that controversy, which existed prior to the publication of the Big John video. At a minimum, Plaintiff chose a course of conduct, both before and after the Big John incident, that invited public attention. See Reuber v. Food Chemical News, Inc., 925 F.2d 702, 709 (4th Cir. 1991) ("Even 'involuntary' participants can be public figures when they choose a course of conduct that invites public attention.").

The Court finds that, both before and at the time the Big John video was published, Plaintiff had attained the status of a limited-purpose public figure in the context of the public debate surrounding the Charleston carriage horse industry.

2. Plaintiff cannot prove actual malice by clear and convincing evidence.

A limited-purpose public figure must prove by clear and convincing evidence that the defendant acted with actual malice in publishing a false and defamatory statement about the plaintiff to survive summary judgment. Erickson, 368 S.C. at 467–68, 629 S.E.2d at 665–66 (citations omitted). Actual malice exists when a statement is made "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times, 376 U.S. at 279–80; see also George v. Fabri, 345 S.C. at 456, 548 S.E.2d at 876 (actual malice is governed by a subjective standard which tests the defendant's good faith belief in the truth of her statements).

"[W]here the factual dispute concerns actual malice . . . the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." Anderson, 477 U.S. at 255–56; McClain v. Arnold, 275 S.C. 282, 284, 270 S.E.2d 124, 125

(1980) ("Unless the trial court finds, based on pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice, it should grant summary judgment for the defendant.").

"Actual malice under the New York Times standard should not be confused with the concept of [common law] malice as an evil intent or a motive arising from spite or ill will." Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510 (1991). It is black-letter law that failure to investigate does not constitute malice. St. Amant v. Thompson, 390 U. S. 727, 731 (1968). "The mere fact that a defamation defendant knows that the public figure has denied harmful allegations or offered an alternative explanation of events is not evidence that the defendant doubted the allegations. As the United States Supreme Court has noted, 'such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error.'" Carr v. Forbes, Inc., 121 F. Supp. 2d 485, 495 (D.S.C. 2000), aff'd, 259 F.3d 273 (4th Cir. 2001) (quoting Harte–Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 692 n. 37 (1989)).

When the First Amendment requires a plaintiff to prove actual malice, he must prove "that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." Bose Corp. v. Consumers Union of United States, Inc., 466 U. S. 485, 511 n. 30 (1984); accord, Peeler v. Spartanburg Herald-Journal Div. of New York Times Co., 681 F. Supp. 1144, 1147 (D.S.C. 1988). Thus, as long as the defendant believed in good faith that what he said was true, it does not matter whether he acted out of spite or ill will toward the plaintiff. See Scott v. McCain, 272 S. C. 198, 201-02, 250 S.E.2d 118, 120-21 (1978).

Moreover, recklessness under the constitutional standard is measured not by whether a reasonably prudent man would have published or investigated further before publishing, but rather

by evidence that the defendant actually had "serious doubts" in his mind as to the truth of the publication at the time it was published. St. Amant v. Thompson, 390 U. S. 727, 731 (1968). When a person makes a statement based on information received from elsewhere, recklessness may be found only "where there are obvious reasons to doubt the veracity of the informant or the accuracy of [its] reports." Horne v. WTVR, LLC, 893 F.3d 201, 211 (4th Cir. 2018), cert. denied, 139 S. Ct. 823 (2019); see also Church of Scientology Int'l v. Daniels, 992 F.2d 1329, 1333 (4th Cir. 1993) (indicating that "deliberate misrepresentation," "knowing fabrication," or "purposeful avoidance of the truth" are required to show actual malice). "Establishing actual malice is no easy task, because the defamation plaintiff bears the burden of proof by clear and convincing evidence." Carr, 259 F.3d at 282.

The question of whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law. Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 685 (1989). Central to that determination is the recognition of "the importance of the actual malice standard to a wide-open and vigorous discussion of critical public issues." CACI Premier Tech., Inc. v. Rhodes, 536 F.3d 280, 294 (4th Cir. 2008).

Plaintiff has not presented evidence sufficient to create a question of fact on the issue of actual malice. It presented no admissible evidence tending to show that Defendants knew that any statements made were false or that they subjectively entertained serious doubt as to the truth of any statement.

Charleston Animal Society

CAS submitted the affidavit of Joe Elmore, its CEO (filed on September 11, 2020), in which he states that, on April 19, 2017, CAS was contacted by members of the public who reported that a horse, which was identified as Big John, had collapsed to the pavement during a carriage

tour and was unable to get up without assistance. Elmore Aff., ¶ 8. At Mr. Elmore's direction, CAS took videos of Big John provided by eyewitnesses, added subtitles, and published the resulting video on CAS's social media sites and website. Elmore Aff., ¶ 9. At the time Mr. Elmore instructed that the video be published, he was not in possession of any information that would call into question the veracity of using the term "collapse" to describe what occurred that left Big John lying there on the pavement. Elmore Aff., ¶ 10. Mr. Elmore testified that even as of May 27, 2020, the date he signed his affidavit, he was still not in possession of any such information. Elmore Aff., ¶ 10. In fact, one of the eyewitnesses who sent CAS footage that was used in the Big John video testified in her deposition that she believed then, and continues to believe to this day, that what she witnessed was a horse that had "collapsed". Depo. of Elizabeth Fort, pp. 22-25; 49-50.

Mr. Elmore further explained that he directed that the video be published for the purpose of bringing awareness to the carriage horse issue and, specifically, CAS's push for an independent, prospective, science-based, peer-reviewed study of the Charleston carriage industry. Elmore Aff., ¶ 11. Mr. Elmore confirmed that in no way was it his intent to harm Plaintiff or injure its business. Elmore Aff., ¶ 11. See Dongguk Univ. v. Yale Univ., 734 F.3d 113, 123 (2d Cir. 2013) ("When there are multiple actors involved in an organizational defendant's publication of a defamatory statement, the plaintiff must identify the individual responsible for publication of a statement, and it is that individual the plaintiff must prove acted with actual malice.") (citing New York Times, 376 U.S. at 287 ("[T]he state of mind required for actual malice would have to be brought home to the persons in the [defendant's] organization having responsibility for the publication of the [statement].")).

Charleston Carriage Horse Advocate / Ellen Harley

Defendants CCHA and Harley likewise presented testimony that they neither shot the video that was posted regarding Big John's collapse on April 19, 2017, nor did they edit or delete footage of the scene that day. Aff. of Harley, ¶ 17 (filed on 8/20/21 as Ex. C to CCHA's Memo. in Supp. of MSJ). Further, Defendants CCHA and Harley presented uncontroverted testimony that they never posted that Big John "collapsed from heat and exhaustion", despite Plaintiff's unsupported claims to the contrary, and that they republished the Big John Video only to raise awareness and support for the need of an independent, prospective, science-based, peer-reviewed study of the Charleston carriage industry. Id. at ¶¶16 & 18. Finally, Defendants CCHA and Harley presented evidence that this Court finds to be uncontradicted that they did not publish the video with the malicious intent to harm the Plaintiff or injure its business and they were not in possession then or now of any information that would call into question the veracity of the assertion that Big John "collapsed" on April 19, 2017. Id. at ¶¶ 19&20.

While Plaintiff has submitted affidavits in which it baldly claims that Defendants knew that the statements in the Big John video were false, those claims are not supported by admissible evidence and are conclusory at best. They are insufficient to create a question of fact. See Whitner v. Duke Power Co., 277 S.C. 397, 288 S.E.2d 389 (1982) (a conclusory statement in an affidavit as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment); Nelson v. Piggly Wiggly Cent., Inc., 390 S.C. 382, 390, 701 S.E.2d 776, 780 (Ct. App. 2010) (holding one may not create a genuine issue of material fact by speculation or an "inferential leap"). Defendants are entitled to summary judgment because Plaintiff has failed to present evidence of actual malice.

B. Public v. Private Concern.

If Plaintiff was a private, and not a public, figure for purposes of the speech at issue, Defendants would still be entitled to summary judgment because the speech addresses a matter of public concern and is protected by the First Amendment.

At the heart of the First Amendment's protection is speech on matters of public concern. Garrard v. Charleston Cty. Sch. Dist., 429 S.C. 170, 195, 838 S.E.2d 698, 711 (Ct. App. 2019), reh'g denied (Mar. 18, 2020) (citing Snyder v. Phelps, 562 U.S. 443, 451–52 (2011)). "The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" Id. (quoting Snyder, 562 U.S. at 452; New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). Thus, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." Id. (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)) (citations and internal quotation marks omitted). "Every person has the right of fair comment and criticism in a matter of public interest; this stems from the constitutional guaranty of freedom of speech." Hospital Care Corp. v. Commercial Cas. Ins. Co., 194 S.C. 370, 9 S.E.2d 796, 798 (1940).

Whether speech addresses a matter of public concern is a matter of law for the Court. "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." Id. at 196, 838 S.E.2d at 712 (quoting Snyder, 562 U.S. at 453) (citations and internal quotation marks omitted). "Whether ... speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Id. (quoting Connick, 461 U.S. at 147–48). "In considering content, form, and context, no factor is dispositive,

and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said." Id. (quoting Snyder, 562 U.S. at 454); see Connick, 461 U.S. at 148 n.7 ("The inquiry into the protected status of speech is one of law, not fact."); McGill v. Parker, 179 A.D.2d 98, 107, 582 N.Y.S.2d 91, 96 (1992) ("While plaintiffs suggest that defendants are not entitled to the protection of the public concern privilege because of their 'extremist animal rights agenda', it is beyond dispute that it is the subject of the communication, not the particular viewpoint expressed, that determines whether a matter is of public concern.").

The Court finds, and the parties all agree, that the speech at issue here relates to a matter of public concern. The response to the Big John video alone shows that the carriage industry's operations are a matter of public concern. But beyond, and before, that video was published, carriage industry related news has consistently been widely reported by local and even state-wide media. Various committees of city council have been formed to address issues concerning the operation of carriage horses in Charleston. Dan Riccio, the City's Director of Tourism and Livability, the department charged with overseeing the carriage industry, testified that when he took over that position 10 years ago, he "learned quickly that [the health and welfare of the animals] was – it was an area of tourism that a lot of passionate people were concerned about" and that he "didn't realize it would be so controversial." Riccio Depo. Vol. I, pp. 8, 26, 27-28. In fact, Mr. Riccio testified that he ensures his department is doing everything they can do to let the public know they are looking out for the animals, and, when there is an incident involving one of the carriage horses, his department is typically first notified by the media. Riccio Depo. Vol. I, pp. 27, Vol. II, p. 56. Because the speech at issue addresses a matter of public concern, it is entitled to the "highest rung of the hierarchy of First Amendment values and is entitled to special protection." Connick, 461 U.S. at 145.

The Court will first analyze whether any of the speech at issue is non-actionable due to its rhetorical or hyperbolic nature. The Court will then analyze the remaining allegedly defamatory speech pursuant to the Erickson caveats.

1. The speech at issue is rhetorical hyperbole and not actionable.

There are certain statements that cannot reasonably be interpreted as stating actual facts about an individual. Garrard v. Chas. Cty. Sch. Dist., 429 S.C. 170, 199, 838 S.E.2d 698, 713 (Ct. App. 2019), reh'g denied (March 18, 2020); (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988)). Statements such as opinion, satire, epithets, or rhetorical hyperbole cannot be the subject of liability for defamation. Id. "This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990).

In determining whether a statement can be "reasonably interpreted as an actual fact," the Court considers the nature and purpose of the publication and whether the statement is "easily susceptible (if at all) to 'proof' one way or the other." Faltas v. State Newspaper, 928 F. Supp. 637, 649 (D.S.C. 1996). Whether the use of a term is a hyperbolic expression of ideas or whether it implies a fact also depends on the context in which the term is used. Id. at 648. "Where readers know that an author represents one side in a controversy, they are properly warned to expect that the opinions expressed may rest on passion rather than factual foundation." Milkovich, 497 U.S., at 21 n.8.

The crux of Plaintiff's lawsuit is its claim that the Big John video is defamatory and implies that Plaintiff treats its animals in an inhumane manner. CAS posted the video on its YouTube channel, which is found within the "Nonprofits & Activism" category, with the following description:

> On April 19, another working horse collapsed in the streets of Charleston. Was the load "Big John" carrying weighed, as it is suppose[d] to be by law? Was he exhausted or did he "trip?" Eyewitnesses documented Big John's ordeal despite those on the scene who wanted them to stop filming. It is time for an independent, scientific, peer-reviewed study to determine if Big John and other horses are truly working in a safe and humane environment. Visit: www.CharlestonAnimalSociety.org/humane-carriage-tours for more information.

In his deposition, Plaintiff's owner testified that it is the subtitles added by CAS, and the video's implication that Plaintiff is inhumane and/or abusive to its horses, that renders the video defamatory. Christoff Depo., Vol. II, pp. 35:19-43:19. The subtitles added by CAS are as follows:

1) *Why were eyewitnesses intimidated to stop taking video when a horse collapsed?*

2) *Was Big John exhausted or did he just "trip"?*

3) *By law, the horses are not supposed to pull more than three times their weight. However, loaded carriages are never weighed, and Charleston does not enforce this provision.*

4) *Big John could not get up on his own. A team of people had to try and pull him up.*

5) *After several minutes of trying, finally some good news for Big John!*

6) *Charleston Animal Society and several local and national animal welfare groups want an independent, scientific, peer-reviewed study to answer questions (with research) on whether the working environment for horses like Big John is truly safe and humane.*

7) *Is this too much to ask for Big John and other working horses?*

As an initial matter, to the extent that the video implies that Plaintiff abuses its horses or treats them in an inhumane manner, such an implication is not actionable. These are matters of opinion not capable of being proven to be false. Smith v. Humane Society of U.S., 519 S.E.3d 789, 801 (Mo. 2017) (finding that the term "puppy mill", although having a negative connotation, is not actionable because it was used as "rhetorical hyperbole" and a "lusty and imaginative

expression of the contempt" of political advocates and therefore cannot reasonably be interpreted as stating actual facts). Notably, in Smith, the court found:

> Likewise, the general statements that the kennels included in the report had "atrocious violations of basic humane standards," "unconscionable violations of minimal humane care standards," "major continuing problems," and an "undeniable record of flagrant disregard for even the most minimal humane care standards" are not objective facts and do not imply objective facts provable as false. What is an "atrocious," "unconscionable," "major," or "flagrant" violation is purely subjective.

Id. at 802. Here, Plaintiff's owner actually conceded that whether or not a practice is humane is a matter of opinion:

> Q: Do you agree that people can have different opinions as to what is and is not humane treatment of an animal?
>
> A: Yes.

Christoff Depo., Vol. II, p. 45:11-14.

The statements made, and questions posed, in the Big John video cannot be viewed as anything but opinion and/or rhetorical hyperbole. Moreover, the statements are not provable as false. CAS has advocated for the humane treatment of the carriage horses for years and its position as an advocate in this controversy is well-known. That this video was published as part of CAS's advocacy for the carriage horses is evident not only by the fact that it was published in YouTube's "Nonprofits & Activism" category but also due to CAS's request at the end of the video that an independent, scientific, peer-reviewed study be done to determine whether the working conditions of Charleston's carriage horses are safe and humane. Taken in its context, and with the immense public interest in Charleston's carriage horses and, specifically, the Big John incident, the video is a fundamental example of the type of public discourse protected by the First Amendment.

2. Plaintiff cannot prove the statements are false or that Defendants acted with common law malice.

Plaintiff argues that certain statements in the video are actionable because they can be interpreted as stating actual facts. As discussed below, even if that were the case, Defendants are still entitled to summary judgment because Plaintiff has failed to show that those statements are false or that Defendants acted with common law malice in publishing the statements.

In a defamation suit involving a private plaintiff on a private matter, both common law malice and general damages are presumed. However, three important caveats apply when the allegedly defamatory statement relates to a matter of public concern. First, the presumptions of common law malice and general damages do not apply, and instead the plaintiff must prove both common law malice and actual damages. Erickson, 368 S.C. at 466, 629 S.E.2d at 665 (citing Gertz, 418 U.S. at 346-50). Second, the presumption that the statement is false does not apply, and the plaintiff must prove that the statement is false. Id. Finally, the plaintiff cannot recover punitive damages unless it proves by clear and convincing evidence that the defendant acted with actual malice. Id.

The Erickson Court discussed these caveats in the context of defamation cases involving media defendants. Plaintiff disputes that Defendants are "media defendants" and Defendants, on the other hand, contend that it is the content of the speech, not the identity of the speaker, that determines whether the caveats apply.

It does not appear that the S.C. Supreme Court or the U.S. Supreme Court have had the opportunity to consider whether these caveats, rooted in the First Amendment of the U.S. Constitution, apply in defamation cases involving non-media defendants. This Court finds that they do.

In Snyder v. Phelps, 580 F.3d 206 (4th Cir. 2009), the Fourth Circuit found any distinction between media and non-media defendants to be meaningless in affording First Amendment protections to statements on matters of public concern that fail to contain a "provably false factual connotation":

> Neither the Supreme Court nor this Court has specifically addressed the question of whether the constitutional protections afforded to statements not provably false should apply with equal force to both media and nonmedia defendants. See Milkovich, 497 U.S. at 20 n. 6, 110 S.Ct. 2695. The Second and Eighth Circuits, however, have rejected any media/nonmedia distinction. See Flamm v. Am. Ass'n of Univ. Women, 201 F.3d 144, 149 (2d Cir. 2000); In re IBP Confidential Bus. Documents Litig., 797 F.2d 632, 642 (8th Cir. 1986); see also Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1563 n. 39 (4th Cir. 1994) (implying in dicta that Milkovich applies equally to media and nonmedia defendants). Like those two circuits, we believe that the First Amendment protects nonmedia speech on matters of public concern that does not contain provably false factual assertions. Any effort to justify a media/nonmedia distinction rests on unstable ground, given the difficulty of defining with precision who belongs to the "media." And, more importantly, the Supreme Court has concluded that the "inherent worth of speech ... does not depend upon the identity of its source, whether corporation, association, union, or individual." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). Thus, for our purposes, the status of the Defendants as media or nonmedia is immaterial.

Snyder, 580 F.3d at 219, n. 13, aff'd, 562 U.S. 443 (2011); see also McGlothlin v. Hennelly, No. 9:18-CV-00246-DCN, 2020 WL 1876275, *10 (D.S.C. April 15, 2020) (relying on Snyder and finding that the Erickson caveats apply to non-media defendant in defamation actions); aff'd 2021 WL 2935372, *2 (4th Cir. July 13, 2021) (noting that although Erickson drew a distinction between the publishing of a statement by media and nonmedia defendants, the Fourth Circuit has since held that distinction to be immaterial). In so deciding, the Fourth Circuit joined the Second, Third, Fourth, Eighth, Ninth, Tenth and DC Circuits. See Flamm v. Am. Ass'n of Univ. Women, 201 F.3d 144, 149 (2d Cir. 2000) (holding that "a distinction drawn according to whether the defendant is a member of the media or not is untenable"); Avins v. White, 627 F.2d 637, 649 (3d Cir.

1980); In re IBP Confidential Bus. Documents Litig., 797 F.2d 632, 642 (8th Cir. 1986); Obsidian Fin. Grp., LLC v. Cox, 740 F.3d 1284, 1290–91 (9th Cir. 2014) ("In defamation cases, the public-figure status of a plaintiff and the public importance of the statement at issue—not the identity of the speaker—provide the First Amendment touchstones.") cert. denied, 572 U.S. 1142 (2014); Garcia v. Bd. of Educ., 777 F.2d 1403, 1410 (10th Cir. 1985) Davis v. Schuchat, 510 F.2d 731, 734 n. 3 (D.C. Cir. 1975); see also Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 784 (1985) (Brennan, J., dissenting) ("in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals engaged in the same activities.").

The Court finds that the Erickson caveats apply to non-media defendants in defamation actions where the speech relates to a matter of public concern. Thus, Plaintiff must present evidence, sufficient to withstand summary judgment, that the statements at issue are false, that Defendants acted with common law malice, and that it sustained actual damages.

As to the use of the word "collapse", Plaintiff bears the burden of presenting admissible evidence that the horse did not collapse. It has failed to do so. Rather, as discussed below, the Court finds that Defendants are entitled to summary judgment on this claim on the basis that it is substantially true.

Plaintiff argues that even if some of the subtitles in the Big John video are not actionable because they are rhetorical or hyperbolic, that following statements contain actionable facts:[5]

> *By law, the horses are not supposed to pull more than three times their weight. However, loaded carriages are never weighed, and Charleston does not enforce this provision.*

[5] Because the Court finds that Plaintiff has failed to present any evidence that these statements are false, and therefore cannot defeat summary judgment, it is not necessary to reach the issue of whether these statements are "of and concerning" Plaintiff.

Big John could not get up on his own. A team of people had to try and pull him up.

As to the first statement, the City of Charleston's Ordinances do provide the following: "No carriage shall be operated having more passengers than what is permitted by its certificate of appropriateness or having a combined weight of carriage, passengers, and drivers that is more than three (3) times the weight of the animal(s) pulling the vehicle." City of Charleston Ordinance § 29-212(c)(5). Further, Plaintiff's owner testified that none of Plaintiff's loaded carriages had ever been weighed. Christoff Depo., Vol. II, p. 40:6-9. Plaintiff cannot prove this statement, even if it were "of and concerning" the Plaintiff, is false. As to the second, Mr. Christoff testified that "there were a number of people involved" that "assisted" and "helped" Big John to his feet. Christoff Depo., Vol. I, pp. 225:25-226:23. Additionally, there is no credible evidence that the statement is false, only speculation and conjecture. After all, it is not possible to ask Big John what caused him to fall, or whether or not he would have been able to stand without assistance. The video contains footage of individuals that were, in fact, trying to pull Big John up.

Because Plaintiff has failed to produce evidence that the statements at issue are false, Defendants are entitled to summary judgment.

3. Plaintiff has failed to present evidence that Defendants acted with common law malice.

Because the allegedly defamatory statements relate to a matter of public concern, Plaintiff cannot rely on the traditional presumption of common law malice. Rather, it is required to "plead and prove common law malice." Erickson, 368 S.C. at 466, 629 S.E.2d at 665.

Common law malice means that "the defendant was actuated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff; or that the statements were published with such recklessness as to show a conscious indifference towards plaintiff's rights."

Hainer v. Am. Med. Int'l, Inc., 328 S.C. 128, 134, 492 S.E.2d 103, 107 (1997) (quotation omitted). Accordingly, to survive summary judgment, Plaintiff must demonstrate that a jury could find that Defendants published the statements at issue "in an improper and unjustified manner." Tharp v. Media Gen., Inc., 987 F. Supp. 2d 673, 688 (D.S.C. 2013) (quoting Hainer, 492 S.E.2d at 107).

Plaintiff has produced no admissible evidence that Defendants published the Big John video, or any of the statements made therein, for the purpose of injuring Plaintiff. Likewise, Plaintiff has not shown that Defendants were reckless or that they showed a conscious indifference towards Plaintiff's rights.

Rather, the evidence presented by Defendants, through the affidavits of Joe Elmore and Ellen Harley, concerning the creation and publication of the video, as well as the Defendants' intentions in publishing the video, is summarized hereinabove. Plaintiff has failed to produce admissible evidence to challenge Defendants' testimony or to create a genuine issue of material fact. As such, even if there was a genuine issue of material fact as to whether the statements were false, Defendants would nonetheless be entitled to summary judgment. See Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010) ("To survive summary judgment, the evidence presented must amount to more than mere speculation and conjecture.").

4. Defendants are entitled to summary judgment on Plaintiff's claim for punitive damages.

Plaintiff has failed to present any evidence, let alone clear and convincing evidence, that Defendants acted with actual malice, i.e., that Defendants published a statement with knowledge that it was false or with reckless disregard of whether it was false or not. As such, Defendants are entitled to summary judgment on Plaintiff's claim for punitive damages. Erickson, 368 S.C. at 466-67, 629 S.E.2d at 665.

C. Defendants are entitled to summary judgment on Plaintiff's defamation claim because all remaining allegedly defamatory statements made by Defendants are not actionable were not "of and concerning" the Plaintiff.

Apart from the Big John video and the statements made therein, Plaintiff's identification of any additional allegedly defamatory statements made by these Defendants has been a moving target, but Plaintiff has alleged that there are "examples", certain files, showing screenshots of social media sites, news articles, websites, and the like, which it contends contain defamatory statements made by Defendants about Plaintiff. However, none of the identified publications contain actionable defamation. The publications and/or statements therein either are not actionable or are not "of and concerning" Plaintiff. Hospital Care Corp. v. Commercial Casualty Ins. Co., 194 S. C. 370, 9 S. E. 2d 796 (1940) ("If a group or class of individuals has been defamed, there is no cause of action for defamation on the part of a member of the group, unless it can be shown that the language specifically points to that particular individual."); Kendrick v. Citizens & S. Nat. Bank, 266 S.C. 450, 454, 223 S.E.2d 866, 868 (1976) (publication includes proof that the complaining party was the person with reference to whom the defamatory matter was spoken).

D. Defendants are entitled to summary judgment on Plaintiff's defamation claim because Defendants are media defendants.

Even if the status of a defendant as media v. non-media was relevant and the Erickson caveats were applicable only to media defendants, Defendants are still entitled to summary judgment because the Court finds that they are "media" defendants.

The U.S. Supreme Court has recognized that the "press" is not limited to "traditional" media. In explaining the purpose and scope of freedom of the press, the Court stated:

> Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. The informative function asserted by

> representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists.

Branzburg v. Hayes, 408 U.S. 665, 704–05 (1972) (internal citations omitted); see also Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011) ("changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw. The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper. Such developments make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status.").

The blurring of the line between traditional media and non-media defendants in the age of the internet is particularly evident when looking at these Defendants.

CAS presented evidence of the numerous forms of communication it uses to educate and inform the public about animal welfare, relevant legislative developments, its advocacy efforts, animal cruelty and its prevention, opportunities for community involvement, current events, and the services it provides, amongst other things. It has approximately 250,000 "followers" on its Facebook page, with most of its posts garnering hundreds, if not thousands, of "likes", "shares", and "comments." Supp. Aff. of Elmore, ¶ 4 (filed on 8/20/21 as Ex. 18 to CAS's Memo. in Supp. of MSJ). The subjects covered by CAS range from those related to its various advocacy efforts, to current news, to local events, to legislative initiatives, to requests for assistant and support, and more. Id. Some posts, such as those concerning the carriage horse industry, often spark spirited debates by commentors. Id. It publishes a quarterly newsletter, *Carolina Tails*, that has a circulation of approximately 25,000-30,000 per issue and is the largest pet magazine in South Carolina. Id. at 5. Additionally, CAS maintains an email list with approximately 60,000 users, it

maintains a blog of current events, it maintains three websites to which it posts articles on a weekly basis, and it has a YouTube channel with over 1200 subscribers. Id. at 6-8.

Defendant CCHA likewise presented evidence of the numerous forms of "media" communication it uses to educate and inform the public in furtherance of its advocacy efforts, including its website at https://www.charlestoncarriagehorseadvocates.com/, an online forum on Facebook https://www.facebook.com/ccha.join/ as well as accounts with Instagram and Twitter. Aff. of Harley, ¶ 8 (filed on 8/20/21 as Ex. C to CCHA's Memo. in Supp. of MSJ). CCHA further presented evidence that it has approximately 19,200 "followers" on its Facebook page and that some posts on its social media pages, such as those concerning the carriage horse industry, often spark spirited debates by commentors. Id. at ¶ 9 Finally, CCHA regularly sends out e-blasts via email to more than 1,000 users. Id. at ¶ 10.

Defendants are "media", even when viewed through the traditional lens of what constitutes media. As such, for the reasoning set forth above, even if the Erickson caveats only applied to media defendants, those caveats are applicable here and Defendants are entitled to summary judgment.

E. Defendants are entitled to summary judgment on Plaintiff's defamation claim because all statements made by Defendants were true, or at a minimum, substantially true.

Regardless of the status of the parties or the subject matter of the speech, the truth of the matter published is a complete defense to an action based on defamation. Ross v. Columbia Newspapers, Inc., 266 S.C. 75, 80, 221 S.E.2d 770, 772 (1976). A sufficient defense is made out where the evidence establishes that the statement was substantially true. Id.

To the extent the use of the word "collapse" to describe Big John is the basis of Plaintiff's defamation claim, that claim must fail because it is a true, or substantially true, statement.

Merriam-Webster defines "collapse" as "to fall or shrink together abruptly and completely".[6] In his deposition, Mr. Christoff, Plaintiff's sole-owner, testified that Big John fell suddenly and completely to the ground. Christoff Depo. Vol. II, p. 24. Defendants also presented the testimony of Plaintiff's vet, Dr. Nikki Byrd Little, who examined Big John shortly after his fall and, according to Mr. Christoff, "would know whether the horse collapsed or not". Christoff Depo., Vol. I, pp. 253:9-254:23. However, she testified that if Big John tripped and fell, which what Plaintiff claims, that it would still be accurate to classify the incident as a "collapse." Little Depo., pp. 22-25, 71. Specifically, Dr. Little agreed that the definition of "collapse" as it relates to equines is "partial or complete loss of posture that can occur either at rest and/or at exercise" and that tripping and falling would classify as collapsing.

Plaintiff also alleges that Defendants falsely accused it of violating the law. Even if Plaintiff presented evidence of any such statement(s) published by Defendants that are "of and concerning" Plaintiff, which it failed to do, Defendants would still be entitled to summary judgment because the evidence establishes that Plaintiff has, in fact, violated the law in its operations. Specifically, Dan Riccio, the City of Charleston's Director of Livability and Tourism, testified after viewing video footage of Plaintiff's carriages running stop signs that this practice violated the City's ordinances as well as state law. Riccio Depo., Vol. II, pp. 194-195; see also Christoff Depo., Vol. II, pp. 126-129 (Mr. Christoff was shown videos of Plaintiff's carriages running stop signs and conceded that they were required to stop).

In conclusion, Defendants' Motions for Summary Judgment as to Plaintiff's defamation cause of action are GRANTED.

[6] https://www.merriam-webster.com/dictionary/collapse (last accessed 5/11/22).

II. Civil Conspiracy

A plaintiff asserting a civil conspiracy claim must establish: (1) the combination or agreement of two or more persons; (2) to commit an unlawful act or a lawful act by unlawful means; (3) together with the commission of an overt act in furtherance of the agreement; and (4) damages proximately resulting to the plaintiff. Paradis v. Charleston Cty. Sch. Dist., 433 S.C. 562, 861 S.E.2d 774 (2021). In Paradis Court emphasized that intent to harm is an integral part of a civil conspiracy claim:

> Since civil conspiracy is an intentional tort, an intent to harm, which has also been discussed in our conspiracy law, remains an inherent part of the analysis. See 16 Am. Jur. 2d Conspiracy § 53 (2020) ("Since one cannot agree, expressly or tacitly, to commit a wrong about which they have no knowledge, in order for civil conspiracy to arise, the parties must be aware of the harm or wrongful conduct at the beginning of the combination or agreement. Thus, civil conspiracy is an intentional tort requiring a specific intent to accomplish the contemplated wrong." (footnotes omitted)).

Paradis, 433 S.C. at 574, 861 S.E.2d at 780, fn. 9.

To the extent Plaintiff's civil conspiracy claim is based upon the speech that this Court holds is protected by the First Amendment, Defendants are entitled to summary judgment. See Snyder, 562 U.S. at 460 (liability for civil conspiracy cannot be based on constitutionally protected speech).

Defendants have presented evidence that there was no intent to harm Plaintiff nor was there any agreement amongst them to commit an unlawful act or a lawful act by unlawful means. Defendants submitted affidavits averring that they published the Big John video not with the intent of harming the Plaintiff but instead to bring awareness to their push for a scientific study of Charleston's carriage industry, that they are not aware of any occasion in which the Defendants worked together for the purpose of harming Plaintiff, and that any actions taken by the Defendants, whether or not in concert or individually, have been for the singular purpose of advocating for the

carriage animals. Elmore Aff. (filed 9/11/20), ⁋⁋ 9, 11, 16, and 17; Harley Affidavit ⁋⁋ 5, 19, 23.

Plaintiff has failed to produce any admissible evidence that Defendants combined or had an agreement to commit an unlawful act or a lawful act by unlawful means. Plaintiff has also failed to produce any admissible evidence that Defendants, either individually or collectively, intended to harm it. As such, Defendants' Motions for Summary Judgment as to Plaintiff's civil conspiracy cause of action are GRANTED.

III. Intentional Interference with Business Relations

In order to prevail on a claim for intentional interference with a contractual relationship, a party must prove: (1) the contract; (2) the wrongdoer's knowledge of the contract; (3) its intentional procurement of the breach; (4) absence of justification; and (5) resulting damages. Todd v. South Carolina Farm Bureau Mut. Ins. Co., 287 S.C. 190, 336 S.E.2d 472, 473 (1985). Plaintiff's Complaint alleges that it has a contractual franchise relationship with the City of Charleston and that the "defendants have frequently and intentionally attempted to procure a breach of that franchise contract by publishing false and defamatory information about the plaintiff." Compl., ¶ 24. However, Mr. Christoff testified as follows:

> Q. Has any -- have you ever received any type of notice from anyone acting on behalf of the City of Charleston that your franchise contract was in jeopardy or anything related to your franchise contract?
>
> A. No.
>
> Q. Okay. So this is all hypothetical or potential that my franchise contract might someday in the future might be --
>
> A. Correct.

Q. Okay. So just to clarify, no threats to your franchise contract currently by the City?

A. Not that I'm aware of.

Christoff Depo., Vol. II, pp. 51:23-52:10; see also Christoff Depo., Vol. I, p. 342:20-23 (testifying that at no time has Plaintiff's franchise contract ever been terminated).

There has been no breach of the franchise contract, the subject of Plaintiff's "Tortious Interference with Business Relations" cause of action. See First Union Mortg. Corp. v. Thomas, 317 S.C. 63, 73, 451 S.E.2d 907, 913 (Ct. App. 1994) (interference with a contract is not enough, without a breach of the underlying contract, there can be no recovery).

Therefore, Defendants' Motions for Summary Judgment as to Plaintiff's intentional interference with a contractual relationship cause of action are GRANTED.

IV. "Violation of Plaintiff's Civil Rights under Art. I, § 3, South Carolina Constitution – Gross Negligence, Recklessness"

Plaintiff claims that CAS, acting under color of state law, knowingly published false information and, in so doing, deprived Plaintiff of its constitutionally guaranteed rights to conduct a lawful business and be free from threats of harm. Compl., ¶¶ 15-17. It further argues that, because CAS acted in conjunction with CCHA and Harley in doing so, all Defendants are liable for violating Plaintiff's civil rights. Id. Plaintiff seeks monetary damages for this alleged deprivation. Compl., ¶¶ 18-19.

A. South Carolina does not recognize a cause of action for monetary damages for constitutional violations.

Because the South Carolina Constitution does not provide for a private cause of action for state constitutional violations and because the General Assembly has not enacted a statute enabling this type of action, Plaintiff's claim seeking monetary damages for alleged violations of Article I, § 3 of the South Carolina Constitution fails. See Palmer v. State, 427 S.C. 36, 829 S.E.2d 255 (Ct.

App. 2019), reh'g denied, (July 12, 2019) and cert. denied, (S.C. May 28, 2021) (holding the S.C. Constitution does not provide for monetary damages for civil rights violations).

Defendants are entitled to summary judgment on this cause of action.

B. Defendants are entitled to summary judgment because Plaintiff has not shown any deprivation of a cognizable liberty or property interest.

In order to demonstrate a due process violation, Plaintiff must first show it was deprived of a constitutionally protected liberty or property interest. Am. Whitewater v. Tidwell, 959 F. Supp. 2d 839, 865 (D.S.C. 2013), aff'd, 770 F.3d 1108 (4th Cir. 2014); see also Tigrett v. Rector & Visitors of Univ. of Virginia, 290 F.3d 620, 628 (4th Cir. 2002) ("Whether a deprivation of constitutional rights has occurred is not dependent upon the subjective feelings or beliefs of a plaintiff. In order to properly maintain a due process claim, a plaintiff must have been, in fact, deprived of a constitutionally protected liberty or property interest.").

The right to hold specific employment and the right to follow a chosen profession free from unreasonable governmental interference come within the liberty and property interests protected by the Due Process Clause. Brown v. S.C. State Bd. of Educ., 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) (citing Greene v. McElroy, 360 U.S. 474 (1959)). The liberty interest at stake is the individual's freedom to practice his or her chosen profession; the property interest is the specific employment. Id.

Plaintiff has produced no evidence that it was deprived it of its liberty interest to practice its chosen profession or its property interest in any specific employment.

C. CAS is not a governmental entity and, even if a quasi-governmental entity, was not acting under the color of state law in making any of the statements at issue.

Alternatively, Defendants are entitled to summary judgment because Plaintiff has not presented evidence of any state action. Plaintiff alleges that CAS is a "quasi-governmental entity

as Charleston County taxpayers' money subsidizes its operations." Compl, ¶ 16. CAS is a private, charitable 501(c)(3) organization. Elmore Aff., ¶ 4. For many years, Charleston County has contracted with CAS to provide certain animal-related services. Elmore Aff., ¶ 14. The contract between the county and CAS provides that CAS "shall receive and provide for the humane disposition of dogs and cats running at-large, and such other animals as delivered into its custody…". See Animal Shelter Agreement, § 1.02 (attached as Ex. 5 to Elmore Aff.). The funding provided to CAS by the County under the contract fails to cover the cost incurred by CAS in performing its obligations under the contract. Elmore Aff., ¶ 15. Each year, CAS is required to use its reserves, donations, and grants to fund the shortfall. Elmore Aff., ¶ 15.

Even if CAS were a "quasi-governmental entity", Defendants are entitled to summary judgment because Plaintiff has failed to produce evidence that the government was substantially, or even minimally, involved in the challenged activity (i.e., Defendants' advocacy for the carriage horses and publication of the allegedly defamatory statements). Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) ("the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself"); Brentwood Academy v. Tennessee Secondary Sch. Athletic. Ass'n., 531 U.S. 288, 295 (2001) (state action may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself); New York City Jaycees, Inc. V. U.S. Jaycees, Inc., 512 F.2d 856, 858 (2nd Cir. 1975) ("The mere existence of government ties to a private organization is not sufficient to support a finding of state action…the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury") (internal citations omitted); Blum v. Yaretsky, 457 U.S. 991, 997 (1982)

(whether there is state action is an issue of law). The requisite connection between government and the actions complained of has not been shown. Plaintiff's constitutional challenge is addressed solely to the advocacy and speech of Defendants as it relates to the carriage industry, yet Plaintiff has made no showing that the government is substantially, or even minimally, involved in these activities. Defendants' Motions for Summary Judgment as to this claim are GRANTED.

IT IS THEREFORE ORDERED that Defendants' Motions for Summary Judgment are GRANTED.

AND IT IS SO ORDERED!

_____

Mikell R. Scarborough
Master-In-Equity

Charleston, South Carolina
May 11, 2022

Charleston Common Pleas

Case Caption: Charleston Carriage Works L L C VS Charleston Animal Society , defendant, et al

Case Number: 2018CP1004083

Type: Master/Order/Other

So Ordered

s/Mikell R. Scarborough 3062