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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No.: 2018-CP-10-4083

Appellate Case No.: 2022-001114

Charleston Carriage Works, L.L.C.,

Appellant,

v.

Charleston Animal Society, Ellen Harley and
Charleston Carriage Horse Advocates, Inc.,

Respondents.

INITIAL BRIEF OF APPELLANT

November 11, 2022

/s/Thomas R. Goldstein

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Statement of Issues on Appeal

1. DID THE MASTER-IN-EQUITY FAIL TO APPLY THE CORRECT SUMMARY JUDGMENT STANDARD TO THE FACTS AND FAIL TO APPLY THE CORRECT LAW?

A. THE MASTER-IN-EQUITY IMPROPERLY CONSTRUED THE EVIDENCE AGAINST THE PLAINTIFF.

B. THE MASTER-IN-EQUITY MISAPPLIED THE LAW IN FINDING THE PLAINTIFF IS A “LIMITED PUBLIC FIGURE” WHEN THE LAW DOES NOT PERMIT A TORTFEASER TO TRANSFORM A PRIVATE PERSON INVOLUNTARILY INTO A PUBLIC FIGURE BY ATTACKING HIM.

C. THE MASTER-IN-EQUITY ERRED IN REQUIRING PLAINTIFF TO PROVE MALICE, BUT IF MALICE IS REQUIRED, THE MASTER-IN-EQUITY IGNORED THE EXTENSIVE EVIDENCE OF MALICE.

2. DID THE MASTER-IN-EQUITY ERR IN REFUSING TO REQUIRE THE CHARLESTON CARRIAGE HORSE ADVOCATES AND ELLEN HARLEY PROVIDE REQUESTED DISCOVERY MATERIAL, INCLUDING, BUT NOT LIMITED TO, A FORENSIC EXAMINATION OF THEIR ELECTRONIC DEVICES?

3. DID THE MASTER-IN-EQUITY ERR IN REFUSING TO ALLOW THE PLAINTIFF TO ADD ADDITIONAL PARTIES DEFENDANT WHEN IT LEARNED THE DEFENDANTS IDENTIFIED THIRD PARTIES AS RESPONSIBLE FOR THE PUBLISHED DEFAMATION?

4. DID THE MASTER-IN-EQUITY ERR IN REFUSING TO ALLOW THE PLAINTIFF TO ADD PARTIES PLAINTIFF AFTER DEFENDANTS ALLEGED DAMAGES ACCRUED TO THE PRINCIPALS OF THE LIMITED LIABILITY COMPANY BUT NOT THE COMPANY?

5. DID THE MASTER-IN-EQUITY ERR IN REFUSING TO AMEND THE SCHEDULING ORDER WHEN THE EVIDENCE DEMONSTRATED:

A) THE DEFENDANTS, CHARLESTON CARRIAGE HORSE ADVOCATES AND HARLEY, REFUSED TO PROVIDE DISCOVERY;

B) PLAINTIFF’S ATTORNEY SUFFERED A HEART ATTACK IN APRIL 2019 WHICH LED TO OPEN HEART SURGERY IN AUGUST 2019, REQUIRING A LENGTHY RECUPERATION;

C) THE PROGRESS OF CASES ACROSS THE STATE WERE SLOWED BY COVID RESTRICTIONS BEGINNING IN 2020?

Statement of the Case

Charleston Carriage Works is one of four horse-drawn carriage companies in Charleston. The City of Charleston enacted comprehensive regulations that permit horse-drawn carriage tours over certain streets during certain hours. Under the regulations, the City assigns each carriage a randomly selected “medallion” at a City operated “gate,” and the City-issued medallion allows a carriage to travel over a City designated route. On April 19, 2017, the City assigned the plaintiff a medallion that takes the tour down Meeting Street. April 19th was a pleasant day, with temperatures in the low 70’s. An experienced driver, Gabby Byrd, carried 10 school children from North Carolina while Big John, a 22-year-old Belgian draft horse in new shoes pulled the carriage. As the carriage approached the intersection of Meeting Street and Hasell Street, Big John tripped over a new shoe, sat down, and then laid down. A horse in a harness usually will not stand up until the harness is removed, and Big John, consistent with his age, experience, and training, remained calm until he was unharnessed less than 11 minutes later.

As soon as Big John sat down and then laid down, a small crowd gathered, including two principals of the “Charleston Carriage Horse Advocates” (and also the Charleston Animal Society’s “Equine Cruelty Committee”), Ellen Harley and Elizabeth Fort. (R.O.A. page ____ [City Tourism Minutes _____, 2015, Supp. affidavit filed June 23, 2020, page 5, Ex. 1 and Second Supp. affidavit filed Aug. 19, 2021]) Even though the entire episode lasted approximately 11 minutes, Ellen Harley was on the scene in seconds. (The record reflects that Ms. Harley is a vociferous animal rights activist and frequently follows carriage tours. See R.O.A. page ____ [Christoff February 25, 2020, affidavit, page 4]. Video evidence demonstrates that Ms. Harley pushed her way forward and was interfering with the driver attempting to unharness Big John who asked her to step back. R.O.A. page ____ [screen shot of video filed May 20, 2022] After

approximately 11 minutes, barn hands had unharnessed Big John, helped him up, and were walking him back to the barn.

In accordance with City regulations, the City dispatched its Equine Manager, Shannon Tillman, to the scene to examine Big John and prepare a written report. She found him unharmed and pronounced him fit for work. In addition, a qualified Doctor of Veterinary Medicine, Dr. Byrd (now Little) examined Big John and also found him unharmed and fit for work. Both the City's Equine Manager and the veterinarian reduced their findings to writing, which the City immediately released to the public. These reports both agreed Big John was unharmed and are found in the Record on Appeal at pages ____ and ____ [Ex. 1 to deposition of Dr. Miller]. The defendants knew of these reports prior to their publishing their edited video containing false statements, which they then republished frequently. (R.O.A. page ____ [affidavit of B. Christoff filed Feb. 25, 2020, pages 6-7; filed June 23, 2020, page 7; September 24, 2021, page 11, page 15 "Demand Humane Carriage Tours," *etc.*])

Immediately following the April 19th incident, the defendants cobbled together a video comprised of footage shot by Ellen Harley and one or two others. As part of the editing, Dan Krosse, the Charleston Animal Society's "media specialist," inserted demonstrably false editorial comments in the form of insinuating questions and published it as "evidence" of Big John's "collapse" and "exhaustion." R.O.A. pages ____ - ____ [affidavit filed February 25, 2020, page 4]

On April 25, 2017 and May 11, 2017, the plaintiff sent letters to the defendants informing them that their misrepresentations were damaging the plaintiff and asking them to please correct the statement that Big John collapsed. R.O.A. page ____ [Supp. Memo. of Law filed January 6, 2022, Exhibits 1 and 2 and Ex. 3 to January 31, 2020 deposition of Ellen Harley]. When the request for retraction failed, and after a year of escalating damage, the plaintiff filed a suit in the

Charleston County Court of Common Pleas on May 29, 2018 at Case Number 2018-CP-10-2704. On July 19, 2018, the defendants filed a Notice of Removal to federal court, and on July 23, 2018, the plaintiff filed a motion to remand to state court. On August 15, 2018, the plaintiff took a voluntary nonsuit and refiled the action in state court (without the federal cause of action) on August 17, 2018 at Case Number 2018-CP-10-4083, alleging the five causes of action: civil conspiracy, intentional infliction of mental distress (outrage), violation of civil rights, tortious interference with business relations, and defamation. (R.O.A. page ____)

The defendants filed joint motions to dismiss on October 19, 2018. (R.O.A. page ____). Six months later, while the parties were waiting for a decision on the defendants' joint motion to dismiss, plaintiff's counsel suffered a heart attack in April 2019. This led to hospitalization and outpatient treatment, but counsel continued to work up to August, 2019, when M.U.S.C. performed an open heart procedure. Recovery from the open heart surgery progressed slowly due to the nature of the procedure and laryngeal nerve damage, reducing counsel's speaking voice to a whisper for approximately six months.

On July 15, 2019, the plaintiff filed its first motion to compel and amended this motion on September 27, 2019. R.O.A. pages _____. On July 16, 2019, the parties entered into a Consent Scheduling Order. (R.O.A. page ____). On July 22, 2019, the defendant, Charleston Animal Society, filed a motion to compel discovery. On September 27, 2019, the plaintiff amended its motion to compel. R.O.A. page _____.

On November 20, 2019, more than a year—461 days—after plaintiff filed its complaint, the defendants filed simultaneous motions for Summary Judgment and Answers. (R.O.A. pages _____ and _____) Charleston Carriages Horse Advocates and Ellen Harley also filed a Motion to Strike parts of the plaintiff's complaint. (R.O.A. page _____)

The discovery process was contentious resulting in two court appearances before Judge Price on July 16, 2019 and again on May 28, 2020. (R.O.A. pages ____ - ____ [transcripts] On January 30, 2020, the defendants, Carriage Horse Advocates and Harley, filed a motion for a protective Order, a motion to quash a discovery subpoena, and a motion to compel. R.O.A. pages ____, ____, and _____. Judge Bentley Price heard discovery motions on May 28, 2020 and June 6, 2020, and issued an Orders on June 17, 2020 and July 30, 2020. See R.O.A. page _____ for Order and pages ____ - ____ for the transcripts of the two hearings.

When the defendants, Harley and Charleston Carriage Horse Advocates, continued to thwart discovery, the plaintiff filed a motion for sanctions on October 2, 2020. On May 27, 2021, the parties agreed to refer all outstanding motions to the Master-in-Equity. Following the Order of Reference, the Master-in-Equity issued the following Orders:

May 5, 2022	Order denying sanctions for failure to provide discovery
May 12, 2022	Order denying amendments to add parties defendant and plaintiff
May 12, 2022	Order denying amended scheduling Order
May 12, 2022	Order granting summary judgment
August 2, 2022	Order denying motions for reconsideration
August 11, 2022	Notice of Appeal

For the Court's convenience an Index of each Order issued in this case is as follows:

June 2, 2020	Confidentiality Order
June 17, 2020	Plaintiff's Motion to Compel is Granted
July 30, 2020	Order Resolving Cross Motions to Compel
May 27, 2021	Order referring case to Master-in-Equity
July 8, 2021	Order referring case to Master-in-Equity (reference fee omitted)
May 5, 2022	Master-in-Equity Order denying sanctions
May 12, 2022	Master-in-Equity Order denying amendments
May 12, 2022	Master-in-Equity Order denying amended scheduling Order
May 12, 2022	Master-in-Equity Order granting summary judgment
August 2, 2022	Master-in-Equity Order denying motions for reconsideration

Facts

Many of the important material facts are included in the Statement of Case, without which the timeline is confusing. The pertinent facts briefly summarized are that the City of Charleston adopted comprehensive carriage tour regulations, to which each carriage company is required to adhere. These regulations include, among other things: an annual \$17,500.00 “franchise fee” to the City to use public streets,¹ a yearly business license, a fee of \$0.50 per passenger paid to the City, an \$8.00 per carriage sanitation contribution, a certificate of appropriateness including the weight of each carriage, maintenance of each horse’s medical records on site, including a requirement that the temperature of each horse after each tour be recorded and maintained, a requirement that all tours be suspended at a proscribed temperature/humidity formula, prescribed periods of work and rest, a 15 minute break after each tour, no more than 8 consecutive work hours, 1 day’s rest after every 6 days, 14 days pasture rest every 90 days, and an annual inspection by qualified veterinarian, and a limitation on the number of carriages operating only between the hours of 9:00 a.m. and 5:00 p.m. and only over streets selected by the City. Moreover, the City does not allow retired animals to be sold or disposed of “except in a humane manner in accordance with American Association of Equine Practitioners” Guidelines.” § 29-212 “General health care and management requirements.” (Chapter 29, City Code of Ordinances, Article V “Transportation by Animal-Drawn Vehicles”) The City maintains a full time equine manager, a Tourism Director, and numerous Tourism Enforcement Officers to enforce the City’s extensive regulations.

The defendant, Ellen Harley, is a part-time resident of Charleston and when she visits Charleston, she lives at 23 Wentworth Street, which is on the route for Zone 4 of the carriage tours.

¹ While it is beyond the scope of this appeal, the City’s ability to impose a “franchise” fee to use state owned streets may be an unsettled legal principle. See § 56-5-790, S. C. Code, ann. “Every person . . . driving any animal-drawn vehicle . . . upon a roadway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle by this chapter, except those provisions of this chapter which by their very nature can have no application.”

Until March of this year, her primary home was in Edgartown Massachusetts on Martha's Vineyard.

Charleston Animal Society is a quasi-governmental agency, animal welfare society heavily supported by Charleston County taxpayers as well as the municipalities of North Charleston and Mount Pleasant. It is also a prodigious fund raiser. As of the date of filing this Initial Brief, Charleston Animal Society's publicly disclosed financial statements reveal an institution with over 28 million dollars in assets. Charleston County provides taxpayer support currently at the rate of \$175,000.00 a month to fund the operation, and both the County of Charleston and the City of North Charleston donated the land and building upon which the Society operates. As recently as 2020, the Society's director, Joe Elmore along with "two teams," flew to rescue "almost a dozen" animals displaced by Hurricane Laura in the Virgin Islands, which coincidentally was his home from 2004 to 2006. (R.O.A. page ____ [Elmore affidavit, resume])

At the outset, it is important to draw a factual distinction between *animal welfare* and *animal rights* organizations. This crucial factual distinction casts a long shadow over the dispute currently before the Court. *Animal welfare* organizations provide humane relief for animals in distress or injured or abandoned and in need of care. *Animal rights* organizations advocate that animals should not be used in any fashion, not consumed for food, used for work, displayed in zoos, *etc.* The tension in this lawsuit springs from the animal rights agenda, and the evidence discussed in detail in the Argument section—especially in the Master-in-Equity's erroneous classification of defendants as "media defendants"—illuminates the defendants' program to eliminate the carriage tours as part of an animal rights agenda. Manufactured controversies over carriage tours not only stimulate prodigious fund raising, but also provide the rationalization for *ad hominem* attacks. It is this animal rights underpinning that gave rise to the defendants' intentional efforts to drive the

plaintiff out of business. It was no accident that within seconds of Big John lying on the ground, the defendant, Ellen Harley, was on the scene pushing her way forward, interfering in the effort to unharness him, in order to compile the video that she and the Charleston Animal Society could publish two days later with false captioning to whip up hysteria against Charleston Carriage and serve as their urgent requests for donations. The facts, as demonstrated by the record, are:

On April 19th, Big John slipped, sat down, laid down and within 11 minutes barn hands unharnessed him and were walking him back to the barn uninjured.

The City's Equine Manager and a qualified veterinarian examined him at the barn, and both found him uninjured, and pronounced him fit for work. Their written reports are contained in the R.O.A. at pages ____ and _____ and were immediately released to the public.

The defendants possessed this information the same day the City compiled it. Yet, despite **seeing him walk back to the barn uninjured**, and despite being aware that two independent equine experts examined Big John and concluded he was uninjured, they nonetheless knowingly disseminated social media carefully tailored to cast plaintiff in a false light and whip hysteria for the twin purposes of soliciting donations and destroying the plaintiff.

The still photos of the defendants' video with the Dan Krosse editorial comments are in the Record on Appeal at pages _____ and _____, and as any fair minded reader will conclude, the defendants' false statements added to the video created the false insinuation that Big John "collapsed" from abuse in the form of overwork, high temperature, or exhaustion.

Standard of Review

On review of an order granting summary judgement, the appellate court applies the same standard as that used by the trial court. *Joseph v. South Carolina Department of Labor, Licensing and Regulation*, 417 S.C. 436, 790 S.E.2d 763 (2016) Summary judgment is a drastic remedy

which should be cautiously invoked so that a litigant is not improperly deprived of a trial of the disputed factual issues. *Murphy v. Tyndall*, 384 S. C. 50, 681 S.E.2d 28 (Ct. App. 2009) When the evidence is susceptible to more than one reasonable inference, the issue should be submitted to the jury, rather than resolved at the summary judgment stage. *Murphy v. Tyndall*, *ibid.* In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonable be drawn therefrom must be viewed by the court considering a motion for summary judgment in the light most favorable to the nonmoving party; if triable issues exist, those issues must go to the jury. *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006) (The Master-in-Equity applied an inapplicable standard of review, best summarized by pointing out the erroneous reliance on *Peeler v. Spartanburg Herald-Journal*, 681 F. Supp. 1144 (1988) and *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 531 S.E.2d 518 (2000). The first case involved a **political candidate's**—public figure's—claim against a **newspaper**, and the second case, a zoning case, has nothing to do with the issues raised in this case. In *Pic-A-Flick*, the Supreme Court affirmed the trial court's grant of injunction against the City when it tried to classify Pic-A-Flick as an adult business because it carried a small selection of X-rated movies.)

A court cannot consider a motion for summary judgment until the plaintiff has had a “full and fair” opportunity to complete discovery. *Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2003):

The Court of Appeals held the trial court abused its discretion in granting summary judgment before Doe had a full and fair opportunity to complete discovery. We agree.

Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Id.*

In *Baughman*, we ruled summary judgment premature because (1) plaintiffs demonstrated a likelihood that further discovery would uncover additional relevant evidence, and (2) plaintiffs were not dilatory in seeking discovery. Although three years had elapsed between filing the action and summary judgment, the delay could not fairly be attributed solely to plaintiffs' inaction, and the delay was tempered by the complexity of the case. *Id.* at 112-114, 410 S.E.2d at 544.

The record here does not support a finding that Doe was dilatory in pursuing discovery. Depositions, including Donald's, were scheduled for the week following the hearing. Doe had noticed Batson's deposition on January 31, 1998, but postponed it at the request of defense counsel in two related cases, in order to consolidate the discovery process. Although the delay was in no way attributable to Batson, it was not solely attributable to Doe either. Doe should have been permitted to complete discovery. See *J.S. v. R.T.H.*, 714 A.2d 924, 936 (N.J. 1998) (summary judgment entered five months after defendant's answer was filed was premature; "plaintiffs should have been given the opportunity to depose [molester] and others to try to discover further evidence bearing on [defendant's] knowledge of [molester's] conduct or sexual proclivities").

Arguments

1. The Master-in-Equity failed to apply the proper summary judgment standard to the facts and failed to apply the correct legal standard.

The overarching factual legal error permeating the Order under review is the erroneous inversion of the summary judgment standard, and this error applies to the analysis of all of the plaintiff's causes of action, although the Master-in-Equity placed the emphasis on the cause of action for defamation. The Master-in-Equity improperly construed evidence against the plaintiff, improperly weighing evidence and making credibility determinations, and their inferences, against the plaintiff to prevent plaintiff from having his day in court. The Master-in Equity telegraphs this overarching error on the first page of the Order by giving great weight to one truncated, misconstrued comment out of the plaintiff's 13-hour deposition and emphasizes this isolated comment, in the face of overwhelming contrary evidence, to reach an erroneous conclusion.

The Master-in-Equity's reliance on an out-of-context snippet of deposition testimony on page 1 to frame the analysis that follows reveals the errors of both fact and the misapplication of the summary judgment standard. On page 1, footnote 1, the Master-in-Equity misconstrues two paragraphs lifted out of the plaintiff's 13-hour deposition to reach a foundational—but erroneous—conclusions that the plaintiff is a "limited public figure" and that his treatment of Big John was a "public controversy." First, the trial court erred in ignoring the five factors *Erickson* requires the Court to evaluate (discussed in detail below), and second inverts the summary judgment standard by contorting an out-of-context statement, which was the plaintiff's explanation

how the attacks on him affected him and his family, to fit the court's conclusion rather than testing the record for the existence of a genuine issue of material fact. The Master-in-Equity selected a small portion of the plaintiff's deposition in which he explained the harm to him that flowed from the defendants' characterization of him as an animal abuser. An accusation of animal abuse is an accusation of a felony in this State. § 16-11-510, S. C. Code, ann. When viewed in context, the colloquy reveals the plaintiff was explaining how "public" the attacks on him were. The Order manufactures a non-existent admission to support the existence of a "public controversy," when in fact, the plaintiff's testimony only spoke to the damaging effect of defendants' portraying him as an animal abuser. The Master-in-Equity erroneously equated public debate over carriage tours generally with the defendants' intentional misrepresentation of the plaintiff's treatment of his horse. How the plaintiff treats his horses has never been a matter of public debate until the defendants made it one. The two are not equivalent, and this error permeates the Order under review. The defendants' coordinated attacks, carefully explained in numerous affidavits, promulgated a false narrative that painted plaintiff as an animal abuser. How the plaintiff treats his horse has never been a matter of public concern or public discussion.

While the plaintiff never denied that the City's carriage regulations are a matter of public debate, his treatment of Big John has never been. The Court cannot decide the plaintiff's status as a putative public figure or conclude that his treatment of Big John was a matter of "public controversy" based on a snippet of testimony lifted out of a 13-hour deposition. The law directs the trial court to make the determination of status at the close of all the evidence in order to know how to charge a jury.

Thus, an important initial step in analyzing any defamation case is determining whether a particular plaintiff is a public official, public figure, or private figure. This determination is a matter of law which must be decided by the court, on a case by case basis after a careful examination of the facts and circumstances, **before the jury is charged on the law or asked to resolve a case.** This ruling

is needed in order for the court to determine whether to instruct the jury on law applicable to private-figure or public-figure and public-official plaintiffs.

Erickson v. Jones Street Publishers, LLC, 338 S.C. 444, 629 S.E.2d 653 (2006) (emphasis added) (footnote 9 adds that these decisions can be made pre-trial if the facts are “sufficiently known.” This record demonstrates that the facts are highly disputed.)

Instead of a “careful examination of the facts and circumstances,” the Order misconstrues plaintiff’s explanation of the effect defendants’ very public and very coordinated attacks had on him. When plaintiff explained how the defamation affected him, it does not make his reputation a “public controversy”:

Q. [By Elizabeth Palmer] This thing—you’ll concede I think maybe even in your lawsuit, this thing has become a very public fight between you and the defendants, correct?

A. Very public is an understatement.

Q. Okay.

A. Very public. That’s an understatement. I mean, this—this has consumed a giant portion of my life.

Q. Right.

A. To say that’s very public. Do you realize almost a hundred million people have watched this video?

Q. Right.

A. And you realize the backlash that has occurred as a result? And not only that, that continues to occur. So this went to bed a little bit by the end of 2017. All of sudden this year, in what, August, July or August comes up again? Starts all over again.

Q. Okay.

A. This is an all-consuming thing. I’ve been here all day.

Q. Un-huh.

A. I don’t think—I think when you look at the – at these files I don’t want you to get the impression that, you know, I’m trying to be some kind of smart guy and I’ve given you like all these thousand files because I’m trying to bury you in whatever. These are all things that I think are important and are connected. I’m not –

Q. That’s what we –

A. –I’m not here to waste your time.

Q. No.

A. So you can imagine the man-hours or person hours, if you want, that it takes and took for me to collect all his and to

Q. Uh-huh.

A. –somewhat organize it in such a fashion that I’m even able to bring things up for you now.

Deposition of Broderick Christoff, December 7, 2018, page 302, line 14—page 304, line 2, R.O.A. page _____ - _____[Ex. ____ to Motion for Summary Judgment]

First, as the comment in context demonstrates, the plaintiff was describing how the defendants unleashed the public's rage on him by painting him as an animal abuser. The hundred million views, generated death threats, arson threats, and continuous threats of violence, causing the plaintiff and his wife to hide their horses, set up surveillance equipment, arm themselves, and take turns sleeping to keep watch. R.O.A. page ____ [affidavit filed Feb. 25, 2020, page 4] Importantly, footnote 8 of the *Erickson* case demonstrates how the Master-in-Equity erred in putting weight on this factor:

The United States Supreme Court has explained that deciding whether a particular topic is a matter of public controversy or concern, while important in the analysis of a defamation action, is of lesser import than determining a plaintiff's status. 'Whatever their general validity, use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area. It was our recognition and rejection of this weakness in the *Rosenbloom* test which led us in *Gertz* to eschew a subject-matter test for one focusing upon the character of the defamation plaintiff.'" *Erickson* at footnote 8

The additional fact that the Master ignored the plaintiff's four affidavits, the affidavit of Katherine Vaughn, the affidavit of Steve Abrams, and the overwhelming evidence of malice and discovery obstruction (discussed separately) requires the Order under review be reversed.

The trial court both condoned the defendants' discovery abuses by ignoring the fact that the defendants obstructed discovery throughout the case (discussed separately in Argument 2). Ignoring plaintiff's evidence and misapplying the summary judgment standard are material errors of fact and law:

Summary judgment is inappropriate when further inquiry into the facts is desirable to clarify proper application of the law. *Id.* Summary judgment is not appropriate if facts are conflicting, or if the inferences to be drawn from the facts are doubtful. *Alston v. Blue Ridge Transfer Co.*, 308 S.C. 292, 417 S.E.2d 631 (Ct.App.1992). Summary judgment should not be granted even when the evidentiary facts are not in dispute, if there is dispute as to the conclusion to be drawn from those facts. *Carolina Prod. Maintenance, Inc. v. United States Fidelity and Guar. Co.*, 310 S.C. 32, 425 S.E.2d 39 (Ct.App.1992). In deciding a motion for summary judgment, the evidence and all of its inferences must be viewed in the light most favorable to the non-moving party. [330 S.C. 317] *Pryor v. Northwest Apts., Ltd.*, 321 S.C. 524, 469 S.E.2d 630 (Ct.App.1996)...

Wade v. Berkeley County, 330 S.C. 311, 498 S.E.2d 684 (S.C. App. 1998)

The Order under review erroneously adopts the defendants' argumentative view of the evidence, misconstrues actual evidence, and invades the quintessential jury function. In doing so, the trial court misapplied the standard of review, passed over the plaintiff's evidence, weighing competing affidavits to arrive at a misleading picture of the evidence. (As discussed in detail below, the Master-in-Equity also cites cases for principles completely opposite from their holding.) For example, the Court violates *Erickson* by accepting that the Plaintiff is a "limited public figure" because he runs a business and took steps to defend himself from public attacks, even though the case law on this issue unanimously holds that a person is not converted into a "limited public figure" by being involuntarily dragged into a controversy. This is an erroneous application of law. See *Gertz*: "It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." This record demonstrates that the plaintiff's only contact with these defendants was defensive in an attempt to protect his business and to mitigate his damages.

Even if there were a genuine dispute arising between the excerpt from the plaintiff's deposition and his four affidavits, the affidavits of Vaughn, and Abrams, the summary judgment standard requires this putative conflict to be resolved by a jury, and the Master-in-Equity erred in failing to construe the evidence in the light most favorable to the plaintiff. (See Affidavit filed February 25, 2020, Supplemental affidavit filed December 2, 2020, 2nd Supplemental affidavit filed August 19, 2021, 3rd Supplemental affidavit filed September 24, 2021, and 4th Supplemental affidavit filed April 22, 2022; Vaughn affidavit filed September 28, 2021; Abrams affidavit filed April 22, 2022;. (R.O.A. pages _____, _____, _____, _____))

In short, the trial court improperly weighed the plaintiff's evidence, improperly characterizing the defendants as "media defendants" while making believability and credibility judgments instead of testing the affidavits for the creation of genuine issues of material facts. This is legal error. Even the trial court's truncated recitation of its "Standard of Review," on pages 2-3 of its Order (R.O.A. pages ____ - ____), leaves out more than it puts in. The trial court neither acknowledges the correct standard, nor applies it. For example, on pages 7-8 of the Order under review (R.O.A. pages ____ - ____), the trial court takes great pains to construe the plaintiff's several affidavits **against** him, inverting the summary judgment standard by construing the facts (and the inferences to be drawn from them) **against the plaintiff**. In other words, the Master-in-Equity simply ignores plaintiff's evidence by finding him not credible or believable, which are jury functions. The Master-in-Equity's evaluation of the plaintiff's credibility and believability is legal error requiring reversal. In accepting the defendants' contested factual assertions as true, the Master-in-Equity commits a palpable legal error stating that in reaching his decision to end the case, he evaluated the believability of the plaintiff's evidence: "The evidence presented by Plaintiff, through the affidavits of its owner, Broderick Christoff, as to his public participation in this controversy suggests otherwise." (R.O.A. page ____ [Order page 7]) This is a conclusion reserved for a jury.

The trial court's application of the legal standard is discussed in the next section, but weighing the plaintiff's evidence is a clear legal error:

The Court should determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Id.* at 251-52. The Court should not grant summary judgment "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party . . . In ruling on a motion for summary judgment, the Court must not resolve disputed facts, weigh the evidence, *Russell v. Microdyne Corp.*, 55 F.3d 1229, 1239 (4th Cir. 1995) (citation omitted, or make determinations of credibility. *Sosebee v. Murphy*, 797 F.2d 179, 182 (4th Cir. 1986). Inferences "drawn from the underlying facts . . . must be viewed

in the light most favorable to the party opposing the motion.” *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)

Wood v. Fanslau, ____F.Supp.3d ____ 4:17-cv-02749-RBH (2018)

There is not a scintilla of evidence in this record to support the trial court’s factual “findings” that plaintiff’s affidavits “suggest otherwise,” or that Mr. Christoff assumed the role of a public figure by defending himself when all of the evidence demonstrates he did nothing more than attend public meetings that discussed the operation of carriage tours. The Master-in-Equity erroneously concluded, without evidence, that the plaintiff’s principal “gave interviews,” but the record shows that he never spoke to media. Rather, the media quoted plaintiff as a participant at public meetings. He never gave an interview to the *Post & Courier*. Following the defendants’ attacks on him, in an effort to mitigate his damages, he spoke to an independent journalist, Quentin Washington, but this conversation was **after** the defamatory attacks and was an effort to mitigate damages. Moreover, even if there were evidence that he transformed himself into a “limited public figure,” that evidence is hotly contested, and that contest cannot be resolved at the summary judgment stage. *Erickson, supra*. Even if he were a “limited public figure,” and he is not, the evidence of malice in this record, discussed in detail below, is overwhelming. Moreover, the case law, discussed in the next section, is universally consistent, that a person defending himself is not transformed into a public figure. Instead of construing these highly contested facts in the proper summary judgment standard, the Master-in-Equity circumnavigates the legal world searching for any slender reed of justification to throw the plaintiff out of court.

(A) The Defendants are not media defendants; they are fundraising charities supported by taxpayers and statutorily prohibited from publishing misleading information.

The defendants are not “media defendants.” They cannot be media defendants because they are: (1) creatures of statute—registered charities, (2) statutorily prohibited from misleading, and (3) not broadcast journalists. There is not a case in American jurisprudence equating a “charitable”

fundraising organization with newspaper, radio, or television broadcast media. See *Hotzschietter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497 (1998), citing *Gertz*, and many cases. The General Assembly defines “media defendants” as “a person, company, or entity engaged in or that has been engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, radio, television, news or wire service or other medium . . .” § 19-11-100, S. C. Code, ann. These defendants are not “engaged in the gathering and dissemination of news.” They are South Carolina taxpayer supported “charities” for whom the State grants favorable tax treatment and whose primary function is to fundraise. Because their primary function is raising money, the General Assembly regulates their communications, prohibiting them from making “misrepresentations.” See § 33-56-120, S. C. Code, ann. (quoted below). The defendant, Ellen Harley, is a political figure, a former member of the Pennsylvania House of Representatives, an unsuccessful candidate for the United States Congress, and an unsuccessful candidate for the City of Charleston City Council. She is obviously not a media defendant. The Order under review never explains how the Court concluded the defendants are “media defendants”; rather, it just assumed it without explanation, relying on an odd case, *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009). On page 22 of the Order under review, the Master-in-Equity cites the *Snyder* case for the dubious proposition that there is no distinction between media and non-media defendants. In *Snyder*, the Fourth Circuit reversed a jury verdict returned against the Fred Phelps and his Westboro Baptist Church family. Phelps and his followers travelled from Kansas to picket the military funeral of Snyder’s son, who was killed in the line of duty in Iraq. The Phelps clan carried handmade signs near the funeral site (but not within sight) described by the Fourth Circuit this way: “And, as heretofore explained, a reasonable reader would not interpret the signs that could be perceived as including verifiable facts, such as ‘Fag Troops’ and ‘Priests Rape Boys,’ as

asserting actual facts *about* Snyder or his son. To the contrary, these latter statements, as well as others in this category, consist of offensive and hyperbolic rhetoric designed to spark controversy and debate.” (emphasis in original) How the *Snyder* case supports the Master-in-Equity’s conclusion that the defendants are “media defendants” or otherwise immune from suit is left unexplained and an unnecessary detour from the issue before the Court because even if the defendants were “media defendants,” they are not permitted to defame the plaintiff by characterizing him—**by name**—as an animal abuser, and they cannot defame the plaintiff to gin up their demands for contributions.

More importantly, the evidence discussed throughout this Brief demonstrates that the defendants conspired with one another to harm the plaintiff and urged one another to keep their plans secret. Almost immediately following the publication of the video with Dan Krosse’s false statements superimposed, Catherine Poag, a paid principal of the Charleston Carriage Horse Advocates, wrote a letter to her fellow conspirators, Joe Elmore, Dan Krosse, Kurt Taylor and others:

Carriage Company owners now have backs to wall—Look at that letter from Broderick—And like any cornered animals, their natural actions will be desperate ones—The drivers will all be on edge about what if they are the next carriage with a runaway horse **or one that stumbles** and end [*sic.*] up in international views. (emphasis added) R.O.A. page ___, Motion for Reconsideration, Ex. 3 (emphasis added)

This is powerful evidence of not only defamation and conspiracy (especially since throughout their communications, they remind one another to keep silent—“FYI—please do not share outside the Animal Society. Thanks.” /s/ Joe Elmore July 18, 2016, Ex. 2 to May 20, 2022 Motion for Reconsideration), but also demonstrates the defendants knew Big John did not “collapse.” It proves the intent to mischaracterize a “stumble” into a false and damaging image that they released for world-wide viewing to damage the plaintiff. Poag’s single e-mail is sufficient evidence to prevent the entry of summary judgment on each cause of action and demonstrates the

defendants are motivated by malice and not “media defendants.” Following up on their initial misrepresentation, Ellen Harley told the *Post & Courier* on May 31, 2018, “Charleston Carriage Horse Advocates posted a video clip on their Facebook page showing the horse [Big John] lying in the street, claiming the animal had collapsed from exhaustion.” (R.O.A. page ____ [Motion for reconsideration filed May 20, 2022, page 21]) The day after the incident, Ellen Harley told a Channel 5 news reporter: “But Ellen Harley, a witness who sent video of the incident to the Charleston Animal Society, disputed that: ‘A horse that slipped would get up quickly,’ she said. ‘This horse could not get up immediately or for over 30 minutes.’” (R.O.A. page ____ [Motion for Reconsideration May 20, 2022, page 22]) Current events prove *passim* what damage flows from unprincipled social media posts manipulated to defame their targets, which has become a plague on the land. This evidence and more demonstrates that these defendants are as far from media defendants as they can be, and the Master-in-Equity erred in finding them such. This Court should reverse this finding and remand with instructions on what is and what is not a media defendant to prevent the appellate courts being overrun by the resulting damage caused by every malicious poster claiming to be a media defendant.

B. The Master-in-Equity misapplied the law in concluding that the defendants’ attacks upon the plaintiff transformed it into a “limited public figure.” The law does not permit a tortfeasor to transform unilaterally a plaintiff into a “limited public figure” by defaming him.

The Master-in-Equity’s misapplication of defamation law is material error permeating the Order under review and continues on in the Master-in-Equity’s erroneous conclusion that plaintiff is an involuntary “limited public figure,” relying on cases that stand for legal propositions exactly opposite for which he cites them. Nowhere is this more clearly demonstrated than in the Master-in-Equity’s erroneous reliance upon *Atlanta Humane Soc. v. Mills*, 274 Ga. App. 159, 618 S.E.2d 18 (Ga. Ct. App. 2005) which stands for a statement of law precisely opposite of how the Master-

in-Equity cites it. The Master-in-Equity cites the case for the proposition that a “single interview given to the media may be sufficient to establish a defamation plaintiff as a limited-purpose public figure.” (R.O.A. page ____ [Order page 10]) Leaving aside that the allegation of plaintiff giving a pre-defamation interview is not true, it is at a minimum a highly disputed fact. The Master-in-Equity simply accepts defendants’ characterization of the plaintiff’s attendance at public meetings as “interviews” thus making believability and credibility decisions reserved for a jury. The characterization of plaintiff’s principal speaking as a citizen at a public meeting cannot be transformed into an “interview.” This is a false equivalency, and no court has ever equated attending a public meeting as transforming a speaker into a “limited public figure.” This is the holding of *Gertz*. Moreover, at the summary judgment stage the Court is not permitted to decide disputed facts:

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333; *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000); *Mosteller v. County of Lexington*, 336 S.C. 360, 520 S.E.2d 620 (1999); *Redwend Ltd. P'ship*, 354 S.C. at 468, 581 S.E.2d at 501 ; *Baril*, 352 S.C. at 280, 573 S.E.2d at 835; *Trivelas*, 348 S.C. at 130, 558 S.E.2d at 273; *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002); *Hedgepath v. American Tel. & Tel. Co.*, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001); *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001); *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999); *Middleborough Horizontal Prop. Regime Council v. Montedison*, 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995). “Summary judgment is inappropriate when further development of the facts is desirable to clarify the application of the law.” *Lee v. Kelley*, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct. App. 1989). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Redwend Ltd. P'ship*, 354 S.C. at 468, 581 S.E.2d at 501; *Baril*, 352 S.C. at 280, 573 S.E.2d at 835; *Hall*, 349 S.C. at 173-74, 561 S.E.2d at 656; *Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001); *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000); see also *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003) (noting that summary judgment should not be granted even when there is no dispute as to evidentiary facts, if there is dispute as to conclusions to be drawn therefrom). Although the facts regarding Schmidt’s injury are not disputed, application of the law to the facts is disputed, and is a novel issue.

Schmidt v. Cortney and Kemper Sports, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003)

Thus, the glaring legal error is that, as the *Atlanta Humane Society* case makes clear, the plaintiff's status as a private vs. "limited public figure" is a highly disputed fact. As *Erickson* makes clear, the trial court's determination of plaintiff's status occurs after **all** the evidence is in, and here, the Master-in-Equity's summary decision ignores disputes as to conclusions to be drawn from the case facts, which he is not permitted to make. Furthermore, when the Master-in-Equity accepted *Atlanta Humane Society* as justification for throwing the plaintiff out of court, the trial court highlights its error. In *Atlanta Humane Society*, the **plaintiff claiming defamation was the government**, not a small business owner fighting to defend itself from public damage. It is impossible to confuse a small business owner with the Government, and the two are not fungible. It is an enormous irony that *Atlanta Humane Society* demonstrates how the Master-in-Equity reversed and misapplied the summary judgment standard:

As the trial court so aptly observed, the AHS [Atlanta Humane Society]:

Receives in excess of \$2,000,000.00 annually in public funds from Fulton county to carry out the County's animal control functions. . . . Indeed, as the contract between Atlanta Humane Society and Fulton County so clearly and plainly sets forth, Fulton County has even deputized employees of Atlanta Humane Society to assist in carrying out these laws and enforcing governmental regulations. If plaintiff Atlanta Humane Society were not subject to the same types of criticism that governmental entities would be subject to in the performance of these functions, it would frustrate the ability of the general public to complain and otherwise effectuate necessary and desirable change when those services fall below standards which the public demands.

Atlanta Humane Society v. Mills at pages 163-64

Equally glaring is the Master-in-Equity's contorted reasoning to ignore the Court's statement that a single interview "may be" sufficient to cast someone as a limited public figure. The formulation of "may be" is an expression of doubt, driving home the point that the question is reserved for the trier of fact, in this case, a jury.

The record establishes that the Charleston Animal Society is a quasi-governmental entity, circumscribed by statutory limitations, substantially subsidized by taxpayer support. The

defendants are charities, and in exchange for favorable tax treatment, the General Assembly places limitations upon their communications. § 33-56-120, S. C. Code, ann. (quoted below) While the trial court's reliance on this case is perplexing, it illuminates the overarching legal error permeating the decision to throw the plaintiff out of court. The decision under review stretches the facts and construes improper (and unsupported) inferences to favor the defendants, the precise opposite of the summary judgment standard. The Georgia Court of Appeals' decision dismissed the case because the government cannot be defamed. Not only does the case demonstrate how the facts of this case are completely opposite, but also explains why summary judgment is not appropriate in the present case. Charleston Animal Society, like the Atlanta Humane Society, is a quasi-governmental entity because Charleston Animal Society, like the Atlanta Humane Society, is funded by taxpayer donations. See ¶ 2 of the plaintiff's complaint (R.O.A. page ____): "The defendant, Charleston Animal Society, is a quasi-governmental entity of the County of Charleston and an eleemosynary corporation. . ." See affidavit of Joe Elmore, ¶ 15 (R.O.A. page ____): "The funding allotted to CAS by the County in any given year varies and is determined on a yearly basis in connection with the approval of the County's budget." See also exhibit 6, page 3 of Mr. Elmore's affidavit, listing Charleston County's 2018 taxpayer contributions at \$1,654,778.00 (R.O.A. page ____) (Charleston County currently pays Charleston Animal Society \$175,000.00 per month, or \$2,100,000.00 per year. R.O.A. page ____ [Christoff affidavit filed June 23, 2020, page 9; Elmore affidavit filed Sept. 11, 2020, page 3 of Exhibits] In addition Charleston County and the City of North Charleston provided the Charleston Animal Society with its land and building.

As discussed above relative to the Master-in-Equity's mischaracterization of the defendants as "media defendants," not only is Charleston Animal Society a quasi-governmental entity (and

even if it were not, this dispute is not something that the court can decide at summary judgment), but also—discussed in more detail in the next section—along with the Charleston Carriage Horse Advocates, a charity. Charities are statutorily prohibited from disseminating “false or misleading” information. See § 33-56-120, S. C. Code, ann.:

Misrepresentations prohibited.

(A) In connection with the solicitation of contributions or the sale of goods or services for charitable purposes, a person shall not misrepresent or mislead, knowingly and willfully, a person by any manner, means, practice, or device.
(B) A charitable organization, professional fundraising counsel, or professional solicitor shall not use or exploit the fact of registration so as to lead the public to believe that the registration in any way constitutes an endorsement or approval by the State. However, the use of the following statement is not considered a prohibited exploitation: "Registered with the Secretary of State as required by law". Registration does not imply endorsement of a public solicitation for contributions.

In emphasizing selected facts in isolation as more believable than the plaintiff’s affidavits while ignoring others favoring Appellant, the Master-in-Equity turned a blind eye to substantial evidence of the defendants’ deliberate misrepresentations characterizing the plaintiff as an animal abuser and their coordinated effort to promote a conspiracy specifically tailored to damage the plaintiff. See R.O.A. at page ____ [Christoff affidavit June 23, 2020, page 10 for bullet points] The evidence ignored by the Master-in-Equity includes, but is not limited to, the evidence of a deliberate conspiracy to “depress the carriage company’s income” (R.O.A. page ____ [affidavit of Broderick Christoff at page ____] and create maliciously a false narrative by suppressing truthful information—which is misrepresentation—to cast the plaintiff in a false light. The Master-in-Equity ignored the plaintiff’s evidence, including, for example, the affidavit of a witness, Katherine Vaughn, who explained to the Court how the defendants deleted her truthful information, banned her from posting, and sent her a threatening letter (R.O.A. page ____ [aff. K. Vaughn page ____], quoted below) to prevent her from further attempts to correct false information

and to intimidate a disclosed witness. (Plaintiff disclosed the witness on June 3, 2020 in its Third Supplement Answers to Interrogatories.) Nonetheless, Ellen Harley directed her lawyer to send the threatening letter on December 16, 2020. See R.O.A. at page ____ [Vaughn affidavit, Third Supplemental Answers to Interrogatories] and by doing so, added Ms. Vaughn to the list of Harley intimidation victims. See Christoff affidavit August 19, 2021, page 5 in the R.O.A. at page ____ for the current list of Harley dirty tricks victims, which, as discussed below, is powerful evidence of malice. The Order under review does not even give the Vaughn affidavit a mention, yet her affidavit (R.O.A. page ____) demonstrates what the defendants did to her when she attempted to post truthful information to counteract the false statements being pushed out by the defendants. Her entire affidavit is in the Record on Appeal on pages ____ - ____ and contains detailed testimony including:

As the Court can see from the above representative posts, I never used profanity. I never provided misinformation—in fact, I tried to correct the misinformation being disseminated by the Charleston Carriage Horse Advocates. I never promoted violence, *etc.* In short, all of my posts were short, correct, truthful, and respectful. By deleting my posts and banning me (and I am aware of others who have been likewise banned), the Charleston Carriage Horse Advocates is creating the false impression that a horse pulling a carriage is animal abuse.

Charleston Carriage Horse Advocates was not done with me by deleting my posts and banning me from being on the Facebook page. On December 16, 2020, the Charleston Carriage Horse Advocates' lawyer, Jenkins Mann, wrote to me and threatened to sue me for what Charleston Carriage Horse Advocates alleges is an unlawful use of their "trademark." The letter, which is attached to my affidavit as Exhibit 1, reads in part:

Please accept this letter as a final notice that you must immediately cease and desist from interfering with Charleston Carriage Horse Advocates' service mark. If you do not take all steps necessary to immediately cease and desist this conduct, including withdrawing any false statements that you published, please know that I will promptly proceed to take all necessary and legal steps on behalf of my clients to ensure your compliance with this demand and to recover all remedies and damages available to them at law, including the recovery of monetary damages and the issuance of an injunction and restraining order.

/s/ Jenkins Mann

I asked Mr. Goldstein to respond for me, and on December 30, 2020, he sent a letter to Charleston Carriage Horse Advocates on my behalf. This reply is attached here as Exhibit 2. I have

no firsthand knowledge of complaints against others (other than I know other people who Charleston Carriage Horse Advocates have banned), but I am informed that Ms. Harley has a pattern of filing complaints against persons who do not share her views. All I know firsthand is that I was shocked and intimidated by the letter written to me on December 16, 2020, which I assume was the intent. All of the comments I posted on the Charleston Carriage Horse Advocates' Facebook page that it banned were truthful, accurate and did not violate any of their published guidelines for participation.

It is impossible to square Ms. Vaughn's testimony, ignored by the trial court, with the findings in the Order under review that there is no genuine issue of material fact of defamation, conspiracy, and malice. Suppressing truthful information to cast plaintiff in a false light is just as defamatory as placing misleading, insinuating questions over the defendants' video. Intimidating a witness speaks for itself. The language superimposed on the Big John video insinuated plaintiff is an animal abuser (as well as contained outright lies detailed throughout the numerous affidavits), and when the defendants took the additional affirmative step of suppressing attempts to correct the false statements, that suppression to cast plaintiff in a false light is just as defamatory and as much a civil conspiracy as the knowing publication of false statements themselves. It is also powerful evidence of malice. When Dr. Miller asked Joe Elmore why he employed inflammatory language, Elmore explained that inflammatory language is "the only way I get people to listen." (R.O.A. page ____ [Miller Deposition tr. page 89, line 22]) Not to mention promoting prodigious fundraising in violation of § 33-56-120. R.O.A. page ____ [Christoff affidavit page 89, line 9- 92, line 10] As Joe Elmore admitted to Dr. Miller, manufacturing a scandal is rocket fuel for fundraising. Calling the plaintiff an animal abuser or cruel or inhumane directly or by insinuation is great for fund raising.

In short, the Master-in-Equity ignored all of plaintiff's evidence in order to reach a decision that the plaintiff failed to present a genuine issue of material fact, and thus failed to apply the correct standard of review to the plaintiff's evidence and erroneously ended plaintiff's case. For

this reason alone, the case should be reversed and remanded with instructions to require the defendants to provide appropriate discovery responses and allow the plaintiff to go forward on its proposed amended complaint.

C. The Court misapplied the *Erickson* factors. 368 S.C. 444, 629 S.E.2d 653 (2006)

While any discussion of the Master-in-Equity’s errors regarding the facts and the law necessarily overlap (as the discussion of *Atlanta Humane Society* demonstrates), the Order under review applies the wrong law to the facts presented. The six questions (drawn from *Erickson*) posed by the Master-in-Equity to the parties on September 29, 2021, at oral argument demonstrate the error. When the parties appeared before the Master-in-Equity, the Court posed the following six questions as to whether the record contained sufficient evidence to create a genuine issue of material. (R.O.A. page ____ [tr. page 21, line 13]):

1. Is the plaintiff a public figure? (He is not.)
2. Is the subject of the alleged defamatory statements a matter of public concern?

(The use of carriages is a public concern; the plaintiff’s treatment of his horses is not.)

3. Are the statements published by the defendants true? (They are false.)
4. Are the defendants “media defendants”? (They are charities, regulated by the

General Assembly.)

5. Are the alleged statements about the plaintiff or concerning the plaintiff? (The defendants identified the plaintiff by name, specifically targeting his company and specifically targeted his web presence.) R.O.A. page ____ [Supp. Memorandum of Law filed Jan. 26, 2022: “Today’s statement by Broderick Christoff . . .”, Ex.4, and Christoff Fourth Supp. Affidavit filed April 22, 2022]

6. Has the plaintiff produced evidence that the statements are made with malice? The plaintiff is not a public figure, and therefore malice is not necessary. However, the record contains overwhelming evidence of malice, including, but not limited to: knowingly making false statements, suppressing truthful information, banning truthful commentators, targeting the plaintiff's web presence, and intimidating plaintiff's veterinarian, plaintiff's lawyer, plaintiff's witness, and plaintiff's employees.) R.O.A. pages ____ - ____ [tr. of hearing pages 21, line 9-22, line 17, Christoff affidavit filed February 25, 2020. See pages 45-47 below.]

Prior to turning to a detailed examination of these six questions, it is important to note that even the Court's formulation of the six questions—before the parties had been heard—demonstrates the Master-in-Equity operated under a fundamental misunderstanding of the law of defamation in South Carolina, which is delineated in the seminal case on the issue, *Erickson v. Jones Street Publishers, L.L.C.* 368 S. C. 444, 629 S.E.2d 653 (2006). If there is one case that sums up the legal issues presented to this Court, the plaintiff's legal positions, and the Master-in-Equity's errors, it is *Erickson*, which is factually and legally similar to the present case.

The trial court's formulation of questions demonstrates how it strayed initially from the precedential path of established case law. The Master-in-Equity spent little time analyzing the severity of the incomplete discovery despite being apprised of *Doe v. Batson* and the presence of pending discovery motions. The analysis went straight to the "six questions" even though no one has suggested that the plaintiff's principal is a public figure, and the case law is unified that a person cannot be involuntarily transformed into a public figure by being attacked or defending his business.

1. The plaintiff has no access to "effective channels of communication."

The question of whether it is better to suffer in silence or “take arms against a sea of troubles”² is best left to the poets, but the case law is **unanimous** that one is not transformed into a “limited public figure” by defending himself. In order to be a “limited public figure,” the evidence must show that the plaintiff “thrust [himself] to the forefront of particular public controversies in order to influence the resolution of the issues involved.” *Erickson*, citing *Gertz*, *Milkovitch*, and *George*, discussed in detail below. Here, the evidence is undeniable that the defendants thrust the plaintiff against his will into a public controversy by forcing him to defend himself, and no matter how “public” the “controversy” over horse-drawn carriages may be, the plaintiff’s care of his horses is not. The Master-in-Equity’s Order self-refutes its conclusion on page 10 where he conflates the plaintiff’s post-defamation mitigation of damages with “evidence of plaintiff’s access to channels of communication and its attempts to assert influence in the controversy.” R.O.A. page ____ [Order page 10] This conclusion is clearly erroneous because a party’s attempt to mitigate damages is not inserting oneself into a public discussion. When a crime victim explains an attack, the narrative is does not “thrust [himself] to the forefront of particular public controversies in order to influence the resolution of the issues involved.”

The Master-in-Equity also erred when he placed South Carolina charities in the category of “media defendant.” Charities are the exact opposite: tax exempt, fundraising entities, statutorily prohibited from making false or misleading statements. It is their status as “charity” that provides them the “access to channels of effective communication” that the plaintiff lacks. Moreover, the Master-in-Equity’s finding that the plaintiff had an obligation to produce evidence of malice—although there is plenty he ignored—demonstrates the trial court never applied the law correctly especially as a justification to impose the “drastic remedy” of summary judgment. As discussed

² *Hamlet*, Act III, Sc. i, line 58

further below, the plaintiff produced copious amounts of evidence of malice, but a discussion of malice is an unnecessary detour at the summary judgment stage because no one contends that the plaintiff is a political figure, and the Order under review erroneously concludes that he is a “limited public figure.”

2. The plaintiff is not a “limited public figure” because he did not “assume a role of especial prominence in a public controversy.”

The United States Supreme Court established that a person is not transformed into a public figure because he is defamed. *Milkovich v. Lorain Journal Co.* 497 U.S. 1. 110 S. Ct. 2695, 111 L.Ed.2d 1 (1990), a holding reinforced by our Supreme Court 16 years later in *Erickson v. Jones Street Publishers, L.L.C.* 368 S. C. 444, 629 S.E.2d 653 (2006). The Master-in-Equity erred first in confusing the timeline by citing post defamation mitigation as evidence of the plaintiff voluntarily inserting himself in a public controversy. Second, the Master-in-Equity erred in concluding that the plaintiff must demonstrate malice and then compounded the legal error by ignoring the copious evidence of malice in the record. The Master-in-Equity found plaintiff’s efforts to defend his business against the defendants’ efforts to shut it down as equivalent to voluntarily entering into a public controversy, which is logically equivalent to blaming the victim of an attack for the attack. Proof of malice only arises in actions brought by a public figure.

The United States Supreme Court established the actual malice standard in cases of defamation of **public figures** in 1964 in *New York Times Company v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A.L.R.2d 1412 (1964) (Sullivan was the Montgomery police commissioner.)

The constitutional guarantees require, we think, a federal rule that prohibits a **public official** from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. (emphasis added)

The defendants concede—and the Master-in-Equity found—the plaintiff’s principal is not a public official. He never sought to influence the resolution or outcome of the controversy other than defending himself; the controversy over the insinuated abuse and death of Big John did not exist until the defendants cobbled together their misleading video emblazoned with demonstrably false statements and went to extraordinary lengths to suppress truthful information about the event and spent taxpayer money to interfere in plaintiff’s reservation page. Finally, the plaintiff has never retained public-figure status at the time of the alleged defamation because the record demonstrates he only defended himself. *Erickson, supra*. The plaintiff possesses no indicia of political power, and, as his affidavits make clear, the **only** reason he is drawn into this controversy is because of the defendants’ unrelenting, coordinated attacks on him painting him as an animal abuser. Here, the trial court erroneously concluded that he is a “limited public figure” on the basis that he took steps to defend his business from public attacks. Our Supreme Court specifically rejected the notion that a tortfeasor’s publication of a defamatory statement transforms the object of the statement into a public figure. See *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001), citing the United States Supreme Court in *Milkovich v. Lorain Journal Co.* discussed more fully below. In 2006, in *Erickson v. Jones Street Publishers*, 629 S.E.2d 653, 368 S.C. 444 (S.C. 2006), our Supreme Court carefully listed the five factors necessary to determine if a plaintiff is a “limited public figure”:

The United States 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, 94 S.Ct. at 3009, 41 L.Ed.2d at 808 (an attorney was not a public figure even though he voluntarily exposed himself in a case certain to receive extensive media exposure); *Time*, 424 U.S. 448, 452-55, 96 S.Ct. at 964-66, 47 L.Ed.2d at 161-63 (*New York Times* actual malice standard did not apply to wife of wealthy industrialist allegedly defamed by media defendant in

high-profile divorce case because she was not a public figure); *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001) (plaintiff candidate's engineering firm was a limited public figure under *Gertz* test in defamation action arising from statements made during political campaign); *Holtzscheiter II*, 332 S.C. at 523 n. 8, 506 S.E.2d at 508 n. 8 (1998) (Toal, J., concurring and discussing *Gertz*)

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, 94 S.Ct. at 3013, 41 L.Ed.2d at 812. 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, 94 S.Ct. at 3013, 41 L.Ed.2d at 812; *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157, 167, 99 S.Ct. 2701 2707, 61 L.Ed.2d 450, 460 (1979); *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).

The United States Supreme Court identified a third category of involuntary public figures who become public figures through no purposeful action of their own. However, "the instances of truly involuntary public figures must be exceedingly rare." *Gertz*, 418 U.S. at 345, 94 S.Ct. at 3009, 41 L.Ed.2d at 808.

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. 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. Furthermore, both public figures and public officials are less deserving of protection because they have voluntarily exposed themselves to the increased risk of defamation. *Foretich*, 37 F.3d at 1552 (discussing *Gertz*).

The court must focus on facts and circumstances relating to the claimant's status at the time the issue of public concern or controversy arose. "A private individual is not automatically transformed into a public [Page 669] figure just by becoming involved in or associated with a matter that attracts public attention." *Wolston*, 443 U.S. at 167, 99 S.Ct. at 2707, 61 L.Ed.2d at 460. "[T]hose charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson*, 443 U.S. at 134-135, 99 S.Ct. at 2687-88, 61 L.Ed.2d at 430-32 (focusing on whether plaintiff research professor was a public figure prior to controversy engendered by senator's awarding of "Golden Fleece" to claimant's research project). A defendant may not transform a private figure into a limited public figure by dragging an unwilling participant into the spotlight of a public controversy through the defendant's own words or actions. *Wolston*, 443 U.S. at 166, 99 S.Ct. at 2706-07, 61 L.Ed.2d at 459-60, 443 U.S. 157, 167 (claimant, by refusing to comply with grand jury subpoena in espionage case, did not voluntarily thrust himself into the public controversy; "It would be more accurate to say that petitioner was dragged unwillingly into the controversy."). These principles do not, of course, mean a private figure may never become a limited public figure; such a transformation may occur by virtue of a private figure's own actions or words during the course of a public controversy.

Appellant does not fall into the first category of public figure. Appellant did not occupy a position of such persuasive power and influence that she is a public figure for all purposes. It is equally obvious that hers is not one of the exceedingly rare cases in which Appellant somehow became an involuntary public figure through no purposeful action of her own.

We agree with the analysis set forth by the Fourth Circuit in *Foretich*, 37 F.3d 1541, to determine whether Appellant is a limited public figure which, **as we previously noted, is a matter of law for the court to decide before submitting a case to a jury**. In order for the court to properly hold that a plaintiff is a public figure for the limited purpose of comment on a particular public controversy, the defendant must show: (1) the plaintiff had 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. *Foretich*, 37 F.3d at 1553.

In the present case, Appellant had no more access to channels of effective communication, such as the media, than any ordinary, private person. Appellant did not voluntarily assume a role of special prominence in the controversy over reforming the guardian system, and she did not seek to influence the outcome of that controversy. In fact, the record shows Appellant tried to avoid the spotlight and the controversy. The private letters Appellant wrote to the Governor's Office were intended to correct misinformation about her alleged lack of education and training, and to express concern over false accusations made by people upset about particular family court cases. The public meetings which Appellant's friends secretly tape-recorded for her do not constitute attempts to thrust herself into the controversy. Appellant simply was trying to learn what admittedly angry participants in a divorce and custody dispute were saying about her. The public controversy regarding the guardian system existed before Newspaper published the article. But neither the person who made the statements (Pat Beal) nor the publisher (Newspaper) may, by their own words and actions, transform Appellant into a limited public figure by dragging her unwillingly into the controversy over reform of the guardian system.

The trial judge erred in ruling Appellant is a limited public figure. Appellant, under the facts and circumstances of this case, is a private-figure plaintiff as a matter of law. As such, she is entitled to recover under the common law defamation principles set forth above. (emphasis added)

Here the Order under review erroneously concluded that the plaintiff is a limited public figure based on nothing more than the defendants' characterization of him. As the numerous affidavits of Mr. Christoff, Katherine Vaughn, deposition testimony of Drs. Little and Miller, *etc.* make clear, he has no access to equal or effective communication because the defendants are taxpayer supported charities with millions of tax-free dollars at their disposal. In fact, his Supplemental

affidavit filed June 23, 2020, sets forth with great specificity the damages done to him by the defendants' coordinated attack, obligating him to spend up to \$5,000.00 per month to combat the defendants' destruction of his online reputation. See R.O.A. page ____ [April 22, 2022 Fourth Supplemental affidavit page 2]: "I do know they targeted me individually because the attached April 30, 2017 screen shot demonstrates this, and . . . I know I had to pay Google \$5,000.00 a month after April 19th to combat what the defendants were doing to me."

As to the second factor, this record presents an overwhelming body of evidence that the only reason this dispute exists is because of the defendants' coordination to drive down his income to put him out of business. The defendant, Harley, sent an e-mail to the defendant, Charleston Animal Society on March 30, 2017, boasting about their efforts to "depress their income." According to Ms. Harley and her correspondents, this is "the only way to defeat this City/Industry cartel," (R.O.A. page ____) and Ms. Harley is a seasoned political campaigner with a "taste for the jugular." R.O.A. page ____ [affidavit filed February 25, 2020, page 2 quoting Allen Raymond *How to Fix an Election*.])

3. The plaintiff sought only to mitigate damages, protect his business and had no influence on the resolution or outcome of the controversy at large.

The third factor is the same analysis. The plaintiff has no way to "influence the resolution or outcome of the controversy" other than by taking steps to protect his business from damaging attacks, which is no different from any litigant mitigating damages. Under the Master-in-Equity's reasoning, a person who is the subject of an attack cannot take steps to defend himself, mitigate his or her damages, or otherwise seek to correct the record without transforming into a "limited public figure." This erroneous conclusion is at variance with every case addressing this issue. Such a victim, in the eyes of the Master-in-Equity, must suffer in silence because speaking up transforms a victim into a "limited public figure." However, *Erickson* specifically rejects the trial

court's conclusion. The plaintiff's numerous affidavits demonstrate how the defendants' attacks upon him (and his "industry") drew him in to the controversy to defend himself. The Master-in-Equity erred when he conflated "attempting to control the outcome of a controversy" with fighting for one's economic existence:

As set forth in my previous affidavit, I have spent thousands of dollars, and incalculable hours, combatting this confusion. Setting up a website with a similar name to a target is well known in hacking strategy. Everyone who uses email is constantly on alert for receiving "phishing" scams in which hackers create facsimiles of well-known internet providers in hopes of tricking on an unsuspecting target to click on it.

Second Supplemental Affidavit of Broderick Christoff, August 19, 2021, R.O.A. page ____

In the June 23, 2020, Supplemental Affidavit, the witness averred:

Following the defendants' publications, many customers immediately cancelled tours after seeing the CAS and CCHA video of "the horse that died" on Facebook. I was under a tsunami of threats against me, my business, and the horses. My business and my life were in turmoil, and I had to spend thousands of dollars in purchasing and installing surveillance equipment and combatting the negative reviews generated by their false statements. Supplemental affidavit December 2, 2020 (R.O.A. ____)

Plaintiff's evidence demonstrates how he was trying solely to combat the knowingly false negative attacks the defendants were delivering to put him out of business. The defendants' consistent suppression of truthful corrective information demonstrates both "knowingly" and malice. The plaintiff's principal's affidavits describe what steps he took to keep his business afloat; Katherine Vaughn's affidavit explained how the defendants conspired to suppress truthful information to cast the plaintiff in a false light, and the plaintiff's computer expert, Steve Abram's, affidavit explains how the defendants are able to achieve this by purchasing keywords, domain names, deletion of corrective posts, and what access he needs to gather the proof of these efforts. A jury may find that the defendants' labeling Big John's incident a "collapse" combined with demonstrably false statements are both attacks on the plaintiff's livelihood and defamatory, but the Master-in-Equity weighed this evidence and decided questions of fact in favor of the

defendants. This is error. The defendants' impact of publishing the word "collapse" in the context in which they published it, in combination with other false statements, raises the quintessential jury question. It is the function of the jury, not the Master-in-Equity to decide how the defendants' false statements are perceived. It is for a jury, not a judge, especially at summary judgment to decide how these publications were received and whether the plaintiff suffered damages from their publication. The cases relied upon by the Master-in-Equity in throwing the plaintiff out of court discuss parties attempting to control the outcome of a controversy **in a political debate**. They identify political debates about which opinions can disagree, but the right to operate a business or the allegation that the plaintiff worked his horse to "collapse" are not political debates. There is no debate over animal abuse; it is a felony in South Carolina, but the defendants know that if they can characterize the plaintiff as an animal abuser or as cruel or inhumane—by vigilantly suppressing efforts by third parties to correct the misrepresentations—they can supercharge their donations. Their efforts to purchase Google keywords targeting **only** the plaintiff ruins his business and keeps him from fighting back. The right to exist and the right to not be defamed is neither political discourse nor political debate, and the Master-in-Equity erred in conflating political discourse with defamation. This error of law requires reversal of the decision to end the case.

4. The carriage horse debate existed prior to the publication of the defamatory statement, but the plaintiff's treatment of his animals did not and was never part of the "public controversy until the defendants thrust him in the public light.

The Master-in-Equity also erred in justifying the defendants' actions because the "controversy" existed prior to the publication of the defamatory statement, again confusing the debate over horse-drawn carriages and plaintiff's treatment of his horse. While the issue of horse drawn carriages in general may be a "controversy" pre-existing the defamatory statements made in this case, as set forth above, the allegation that plaintiff abused his horse is not. Plaintiff never

admitted the existence of any public controversy over **his** treatment of his horses. More importantly, while the use of animals in urban environments may be legitimately debated, the false allegation the plaintiff worked his horse to “collapse” is not. Charities cannot manufacture false “controversies” to promote fundraising. (The Alex Jones cases make this clear.) The favored tax treatment and taxpayer support provided by the State is not a license to libel. Even Charleston County’s Tourism Director, Dan Riccio, commented in his deposition on how the defendant, Harley, bullied him by promoting a false narrative on social media, and as her March 30, 2017 correspondence with the Charleston Animal Society demonstrates, they feel almost a religious justification for their imperious contempt for anyone who disagrees with them. (R.O.A. page ____) Thus the presence of a “controversy” is not a legal justification for what the defendants did, and the Master-in-Equity erred in applying the “drastic remedy” of summary judgment to end the plaintiff’s case prematurely.

5. The plaintiff never held public figure or limited public status at the time of the defamation.

Obviously, the plaintiff was never a public figure, and the Master-in-Equity agreed, so there is no need to brief the Supreme Court’s 5th factor—whether the plaintiff retained public-figure status at the time of the alleged defamation, but it is worth repeating that the plaintiff’s only contact with these defendants is in defense of his business.

Thus, the Master-in-Equity improperly weighed evidence and misapplied the law, and the decision below is controlled by multiple errors of law. Even if the plaintiff were required to provide evidence of malice, he produced copious evidence of malice, but because the plaintiff is a private figure, the actual malice standard has no application to this case: “The constitutional actual malice standard requires a **public official** to prove by clear and convincing evidence that the defamatory falsehood was made with the knowledge of its falsity or with reckless disregard for its

truth.” *Erickson* at 671 (emphasis added) The Master-in-Equity never considered that defamatory insinuations are just as actionable as direct statements despite plaintiff providing the law to the Court. See plaintiff’s August 19, 2021, Memorandum in opposition to summary judgment at page ____ of the R.O.A. There, starting on page 12 (R.O.A. page ____), the plaintiff provided standard jury charges on insinuation and a long discussion of this Court’s 2001 decision in *Murray v. Holnam*, 344 S.C. 129, 542 S.E.2d 753 (Ct. App. 2001), which held that: “The issue of actual malice is properly a question for the jury.” See also *Eubanks v. Smith*, 292 S.C. 57, 354 S.E.2d 898 (S.C. 1987), another case provided to the Master-in-Equity: “Defamation need not be accomplished in a direct manner. *Tyler v. Macks Stores*, 275 S.C. 456, 272 S.E.2d 633 (1980). A mere insinuation is actionable as a positive assertion if it is false and malicious and its meaning is plain. *Id.*” There is no mistaking the intent of the video—and if there is, then it becomes a genuine issue of material fact that only a jury can resolve—and the defendants’ efforts to hide behind the famous excuse of “I am just asking a question,” a defense to be sorted by a jury, evaporates when viewed in light of their behind-the-scenes coordination—a conspiracy—including manipulation of Google ads, the suppression and banishment of efforts to provide truthful information, and the “smoking gun” internal communications. The Order under review turned a blind eye to all this evidence. When the defendants jointly published a video emblazed with all capital letters (and emphasis on the quotation marks around ‘trip’): *Was Big John exhausted or did he just ‘trip’?* the insinuation is clear especially when viewed in the context of the defendants’ numerous false statements, some of which are quoted above on page ____ and below on pages 46-47. Not only is the insinuation clear, but also they knew the ambient temperature on April 19th was low, that a mature 2000lb. Belgian, like Big John, is a horse breed capable of pulling a carriage of school children over level ground almost effortlessly. They also knew that both the City Equine Manager,

Shannon Tillman, and a qualified veterinarian, Dr. Little (Byrd), examined Big John immediately following the incident and pronounced him fit with no restrictions and with no injury other than “superficial abrasion.” Her testimony is in the R.O.A. at page ____ [Supp. Memorandum of Law] and quoted below on page 40. It was the defendants’ carefully tailored joint enterprise that created the “tsunami” of social media hate speech and threats and which forced the plaintiff not only to defend his business from being destroyed, but also invest thousands of dollars in equipment and internet advertising to mitigate his damages. See affidavit of Broderick Christoff at R.O.A. pages ____ - ____ quoted above on page 31. The plaintiff wrote to the defendants on April 25, 2017 and asked them to correct their false statements. They responded by doubling down.

As set forth above, *Milkovich*, *George*, and most importantly, *Erickson* (and numerous cases cited therein) hold that a tortfeasor does not transform a plaintiff into a “limited public figure” by libeling him. By defending himself, as a matter of law, the defendants do not transform him into a public figure:

If an individual “voluntarily injects himself or is drawn into a particular public controversy,” he “becomes a public figure for a limited range of issues. . . and assume[s] special prominence in the resolution of public questions.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 94 S.Ct. 2297, 41 L.Ed.2d 789 (1974). In determining whether a plaintiff is a limited-purpose public figure, the court should look “to the nature and extent of an individual’s participation in the particular controversy giving rise to the defamation.” *Id.* at 352, 94 S.Ct. 2997.

George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001)

As the U. S. Supreme Court decided in *Gertz*, a case similar to the present matter, a lawyer did not become a public figure by attending meetings and could maintain a defamation action when the defendant, Robert Welch, Inc. (the John Birch Society) labeled him a “communist.” The Master-in-Equity ignored the *Gertz* precedent because, like the plaintiff in *Gertz*, the plaintiff here was (1) operating a lawful business in compliance with City regulations, and (2) taking steps **after** being attacked to mitigate the damages defendants caused by defaming him. Prior to the

defamation, he attended public City meetings only as a citizen attending a public meeting about an issue that affected him **and not about his care of his horses**, which is the particular controversy that gives rise to this action. The Master-in-Equity erroneously concluded that the plaintiff's right to attend public City meetings about matters unrelated to his care of his horses transformed him into a "limited public figure" and provided him with "equal access to channels of effective communication." *Erickson, supra*. This holding is error. While it may be up to the Court to determine the plaintiff's status for purposes of framing jury charges, under the holdings of the South Carolina and the United States Supreme Courts, it is a palpable error of law to elevate a private citizen defending his business from attacks launched by taxpayer supported public charities to the status of limited public figure. In footnote 10 of the *George* case, our Supreme Court carefully emphasized that commercial speech, as opposed to political speech, receives a different analysis, but here, the defendants' coordinated attacks are not "commercial speech," but rather an effort to gin up outrage to induce readers to make financial contributions to the defendants and boycott the plaintiff, or as Ms. Harley phrased it, "depress their income," which is compelling evidence of malice. This was the exact issue in *Gertz*.

As discussed throughout this brief, the defendants here are the opposite of "media defendants." They are fundraisers, and they are not self-governed by journalistic ethics. Instead, the State regulates charities, and, as a condition of their favorable tax treatment and taxpayer support, they are **statutorily prohibited** from disseminating false or misleading messages. § 33-56-120, S. C. Code, ann. When the defendants deposed plaintiff's veterinarian, Dr. Justin Miller, Dr. Miller quoted Charleston Animal Society's Joe Elmore explaining why he used "inflammatory" language. According to Charleston Animal Society's Director, Joe Elmore, it employs inflammatory language because it is the only way he can get people to listen:

Q. Now, you told us in response to a question from Ms. Palmer that you have had conversations with Joelle Moore [Joe Elmore] and Kurt Taylor on behalf of the Charleston Animal Society.

A. Yes.

Q. And you have spoken to them – I think in response to a question from her that you urged the two of them to quit using inflammatory language; is that correct?

A. Right.

. . .

At that time, we were hoping that everybody could come together and try to work towards something positive.

. . .

And I felt that that was important for that conversation to begin.

Q. . . . And did they explain to you why they chose inflammatory language?

A. Mr. Elmore did.

Q. . . . What was his explanation that he provided to you?

A. That that was how he was able to get people to listen.

R.O.A. page ____ [Dep. Dr. Justin Miller, February 11, 2020, Page 136, lines 20—137]

In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695, 111 L.Ed.2d 1 (1990), the Supreme Court found that a high school wrestling coach was not a public figure because he held a public position. (Interestingly, this issues is currently under review by our *Supreme Court in Garrard v. Charleston School Dist.*, Appellate Case No.: 2020-000605.) Moreover, after a jury awarded a California lawyer/businessperson 2.25 million dollars in damages for defamation, the Santa-Barbara News-Press asked the Supreme Court to review the award on the same ground alleged here—that the plaintiff was a public figure because he is a lawyer and the major stockholder of the Santa Barbara Savings and Loan. In June, 2004, the U.S. Supreme Court denied *certiorari* to review the 2003 California Court of Appeals’ unpublished opinion, allowing the verdict to stand. See *Santa Barbara News-Press v. Ross*, 541 U.S. 1073 (2004): “Ct. App. Cal., 2d App. Dist. *Certiorari* denied F2d.” (The newspaper reported that federal agencies had investigated Ross, which was not true and then refused to print a retraction.)

Here, the evidence demonstrates that the defendants forced the plaintiff into the public arena against his will. On April 19, 2017, after the plaintiff’s horse slipped and then sat down on Meeting

Street, City regulations required the City's Equine Manager and a qualified veterinarian examine him. Both Dr. Tara Little (Byrd), along with the City's Equine Manager, Shannon Tillman, immediately examined Big John and found him healthy, free from serious injury, and fit for work. The defendants deposed Dr. Little who confirmed that Big John was fine and that he did not "collapse" from any medical infirmity and certainly not from "exhaustion":

Q. . . . So if you had seen anything significant on April 19th, when you examined Big John, would you have written it down?

A. Yes.

Q. And did you write down everything that you saw that was significant?

A. Yes.

Q. Did you see anything significant about Big John that you thought constituted a threat to his health or impaired his ability to pull a carriage?

A. No.

. . .

Q. As a Doctor of Veterinary Medicine, not Big John, just the average Belgian draft horse of average height and weight—

A. Right.

Q. --in your mind, as a Doctor of Veterinary Medicine does that strike you as being animal abuse?

. . .

A. Draft horses pull carriages.

. . .

A. They're capable of doing that, and have done it, historically.

Q. . . . when you examined Big John on April 19th, did you see any signs of ill treatment or mistreatment to Big John?

A. No.

Q. If you had, would you have noted it?

A. Yes.

Q. . . . Does the word "collapse" have a medically significant term to you, as a Doctor of Veterinary Medicine?

A. The word, "collapse," in medicine, can mean something different than fall down.

Q. . . . how would you characterize that difference between fall down and collapse?

A. The horse could fall, could trip, and that would be fall down. Collapse could have many other etiologies.

. . .

Q. If Big John had collapsed on April the 19th from a medically significant condition, whatever, would you have expected to see other injuries on him than the ones you did see?

A. If—if he had collapsed due to an internal medical problem, I would expect to have some indication on his physical exam.

Q. Did you see any such indications?

A. I did not.

. . .
A. . . . I recorded what I saw, and those were the superficial abrasions. (R.O.A. page ____ quoted in Supp. Memorandum of Law filed January 26, 2022]

At the time of the defendants’ initial April 19th defamatory publication, which they followed up with an April 24th Facebook Post (Exhibit 4 to Jan. 26, 2022 Supp. Memorandum, R.O.A. page ____), **identifying the plaintiff and Brody by name and celebrating that 11 million viewers had seen their video**—complete with Dan Krosse’s edits—even though they knew Big John suffered no serious injury, did not “collapse” from any underlying medical condition or abuse because both defendants had the examining veterinarian’s findings and the City’s Equine Manager’s findings, which were reduced to writing and filed with the City and widely disseminated over media. As quoted above on page ____, the defendants knew that Big John “stumbled,” the entire incident took less than 11 minutes, and that he suffered no injury. Nonetheless, the defendants set out to damage the plaintiff, and their target audience responded exactly as the defendants intended. On May 21st, 2017, Natalie Powers posted on the plaintiff’s Facebook page: “Can’t wait to see what CAS does to keep destroying y’all. Y’all suck.” R.O.A. page ____ [Third supp. Affidavit filed September 24, 2021] This hostility whipped up by the defendants only accelerated from there resulting in terrifying conditions for the plaintiff, its principals and employees. See R.O.A. page ____ [Affidavit filed February 25, 2020, page 2 and 4]:

I cannot hope to capture in this affidavit the harm and terror inflicted on my wife and me by the defendants, Ellen Harley and Charleston Carriage Horse Advocates.” . . . When Ms. Harley’s false statements went out, I do not have the skill to describe fully what it was like. The public was predictably outraged after Ms. Harley led them to believe that I had worked Big John to an exhaustive death. In no time, there were over 12 million views of Big John, and we all became subject to a deluge of death threats, arson threats, and threats of violence. . . . when commenters would attempt to publish accurate facts, Ms. Harley and her group would delete the post and ban the commentator in order to preserve the smear.

The second prong of the public vs. private figure analysis involves the question of whether **the plaintiff holds public office or possesses power to make policy.** The Master-in-Equity ignored the holdings of caselaw to support a finding of public figure or limited public figure

requires that a person whom the Court regards as a “public” figure have “substantial responsibility for or control over the conduct of governmental affairs”:

b. Public officials. The question of who is a public official so as to come within the constitutional restriction is one on which Supreme Court rulings are controlling. The characterization of public official has been said by the Court to apply at least to those governmental employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs; and it has added that the “position must be one which would invite public scrutiny of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.”

Restatement of Torts 2d, § 580A “Defamation of Public Official or Public Figure”

As discussed above, the leading case on this precise issue is *Milkovich v. Lorain Journal Co.*, 497 U.S. 1. 110 S. Ct. 2695, 111 L.Ed.2d 1 (1990) where the U. S. Supreme Court remanded a wrestling coach’s claim for defamation for trial because a high school wrestling coach is not a public figure. See also *Garrard v. Charleston County School Dist.*, *op. cit.*, currently under review, a case cited by the Master-in-Equity on page 18 of his Order for the proposition that “hyperbole is not actionable.” As the evidence of threats of violence against the plaintiff poured in, it is impossible to characterize the defendants’ direct statements and insinuations plaintiff abused his horse as “hyperbole.” See *Snyder v. Phelps* above where the statement “Fag Troops” was not a statement about the plaintiff. This record does not support the Master-in-Equity’s unsympathetic characterization of such terror, but the defendants’ statements **about** the plaintiff are for a jury to evaluate. *Milkovitch* is also important because it further distinguishes between First Amendment freedom of speech and defamatory speech subject to claims for damages, and it rejects the defendants’ strategy to hide behind the spurious claim of “just asking questions”:

If a speaker says, “In my opinion John Jones is a liar,” he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, “in my opinion Jones is a liar,” can cause as much damage to reputation as the statement, “Jones is a liar.” As Judge Friendly aptly stated: “[It] would be destructive of the law of libel if a writer could

escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words, ‘I think.’” See *Cianci*, supra, at 64. It is worthy of note that at common law, even the privilege of fair comment did not extend to “a false statement of fact, whether it was expressly stated or implied from an expression of opinion.” Restatement (Second) of Torts § 566, Comment a (1977).

The same analysis applies to couching a defamatory statement in the guise of a question. “When did you stop beating your wife?” is a defamatory statement just as asking “Did Big John ‘trip’ or was he exhausted?” Moreover, the defendants’ statements must be evaluated by a jury in their totality—the “context”—including, but not limited to, the other demonstrably false statements published with the video and afterwards. Here, the evidence is uncontroverted that plaintiff occupies no position other than that of a private citizen trying to operate a business and protect it from defendants’ attacks labeling him an animal abuser, a felony in South Carolina. Whether the defendants’ attacks on the plaintiff as an animal abuser are “explicit” or “implicit” is of no consequence, especially at the summary judgment stage. Whether the defendants’ statements are or are not defamatory is a question that can only be answered by a jury. Finally, as a plaintiff, resisting the “drastic remedy” of summary judgment, the plaintiff is entitled for all of these inferences to be resolved in his favor.

As discussed above and more fully below in the next section, citing *Restatement of Torts 2d*, § 580, *George v. Fabri*, *Milkovitch v. Lorain Journal*, and *Erickson v. Jones Street Publishers*, there is no such thing as an involuntary public figure. In 1976, the United States Supreme Court in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), remanded an award of \$100,000.00 for recalculation after *Time* magazine published salacious, exaggerated story about Ms. Firestone’s divorce, and *Time* appealed arguing she was a public figure. The U. S. Supreme Court held, citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 418 U.S. 345 (1974):

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 418 U.S. 345 (1974), we have recently further defined the meaning of “public figure” for the purposes of the First and Fourteenth Amendments:

“For the most part, those who attain this status 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.” (emphasis added)

Here, the defendants used taxpayer money and their status as charities to demonize the plaintiff, or as Ms. Harley says, “depress their income.” In response, the plaintiff has done everything possible to avoid entanglement with the defendants. In defending himself, he is not transformed into a “limited public figure.” After the defendants launched their campaign on April 19th against the plaintiff (remember—they boasted about having 11 million views by April 24th, see Exhibit 4 at R.O.A. page ____), he wrote to Charleston Carriage Horse Advocates and to Charleston Animal Society on April 25, 2017 and May 11, 2017, ([Exhibits 1 and 2 Supplemental Memorandum of Law filed January 26, 2022, pages 35 and 37] in R.O.A. at pages ____ and ____), asking them to cease and desist creating the false impression that he was an animal abuser. The defendants’ response was to double down on their attacks. (Exhibit 3, Harley May 11, 2017 e-mail, R.O.A. page ____). In examining Exhibit 3, it is important to note that the e-mail is circulated between Harley, the principals of the Charleston Animal Society, and their counsel. There is not a *scintilla* of evidence in this record that the plaintiff has done anything to “assume the role of especial prominence in the affairs of society,” *Gertz, op. cit.*, or done anything other than try to prevent further damage to his company, and thus, by definition, is not a “public figure.”

2. The Master-In-Equity erred in requiring the plaintiff to prove malice to survive summary judgment, but even if malice is required, the record contains an abundance of evidence of malice.

Without unnecessarily burdening the Court with either a repetition of the summary judgment standard or the vast amount of evidence in this record, it is sufficient to point out that the Court erred in concluding that the plaintiff is required to prove malice to survive summary judgment. Even if he were required to prove malice, this record contains an unprecedented measure of malice

evidence, including several instances of what fairly can be described as “smoking guns.” “Malice may be proved by direct or circumstantial evidence . . . “Whether malice is the incentive for a publication is ordinarily for the jury to decide.” *Murray v. Holnan, Inc.*, 344 S.C. 129, 542 S.E.2d 909 (Ct. App. 2001) Only the page limitations on briefs prevents the Appellant from discussing **all** the overwhelming evidence of malice, which should be unnecessary at the summary judgment since the trial court decides the plaintiff’s status at the close of the evidence. However, even with page limitations and even with discovery incomplete, it is no heavy lift for Appellant to illustrate salient examples of malice ignored by the Master-in-Equity:

1. Distributed an email on March 31, 2017 discussing joint plan to depress income (R.O.A. page ____, Christoff affidavit page ____)
2. Misrepresentations to Tourism Commission R.O.A. page ____ [Christoff affidavit December 2, page 5, and Ex. 1], including the creation of the joint C.C.H.A./C.A.S. “Equine Cruelty Committee”: “Ellen Harley, Chair, Equine Cruelty Committee Internal Conversation: Does the carriage horse industry, as currently practiced in Charleston, overwork or overdrive horses, violating South Carolina cruelty law and the Five Freedoms.” See Ex. 3: “Joe Elmore made the recommendation tht we procure Forbes-Tate to assist in initiating strategy development, . . . and plan to affectively eliminate the inhumane treatment of horses used in Charleston’s carriage horse industry. He estimates that phase 1 of the project could cost between \$82,000 and \$95,000. . . . **Please keep this confidential.**” (emphasis added)
3. Coordination to “depress their income” R.O.A. page ____ [Harley March 30, 2017 e-mail, Ex. ____ Second Supplemental affidavit]
4. Labeling plaintiff an animal abuser R.O.A. page ____ [Christoff affidavit page ____]
5. Inserting demonstrably false assertions on video.
6. Making knowingly false statements to newspaper and broadcast journalists. (Big John could not get up for 30 minutes; Big John collapsed from exhaustion.)
7. Celebrating the damage done to the plaintiff. (Poag April 23, 2017 e-mail quoted above on page ____)
8. Acknowledging Big John “stumbled,” not “collapse.” R.O.A. page ____ [Poag email]
9. Reminders to keep the conversations “confidential.” *passim*

10. Suppressing and blocking truthful corrective information R.O.A. pages ____ and ____ [Christoff February 25, 2020, affidavit, page 4, Vaughn affidavit]
11. Refusing to issue a correction after being informed of attacks on the plaintiff R.O.A. page ____ [January 31, 2021 30(b)(6) deposition of Ellen Harley, page ____]
12. Refusing to urge followers not to issue threats or commit violent acts against the plaintiff
13. Using taxpayer and tax exempt money to disrupt the plaintiff's reservation page (R.O.A. page ____ [fourth supplemental affidavit of B. Christoff, page ____ and exhibits])
14. Formulated a common scheme to allocate \$95,000.00 in charitable contributions and taxpayer money to "leverage social media" to deflate plaintiff's income (R.O.A. page ____ [C.A.S. Minutes])
15. Executed joint plan to purchase domain names to divert customers away from plaintiff: "They'll s**t their pants." (R.O.A. page ____ [C.A.S. Minutes])
16. Entered into an unlawful conspiracy to keep "confidential" their joint efforts to attack carriage companies. (R.O.A. page ____)
17. Misrepresented "findings" of "Equine Cruelty Committee" to City of Charleston. (R.O.A. page ____)
18. Jointly disseminated a false video of Appellant's horse on April 19, 2017 containing demonstrably false assertions.
19. Four days after publishing the video, identifying Appellant by name. (R.O.A. page ____ [Supplemental Memorandum of Law, Ex. 4 affidavit of Broderick Christoff])
20. Using taxpayer funds, purchased Google ads specifically tailored to divert customers from Appellant's reservation page. (R.O.A. page ____ [4th Supplemental Affidavit of B. Christoff, Affidavit of Steve Abrams])
21. Deliberately and systematically suppressed truthful information to cast plaintiff in a false light. (R.O.A. page ____ [affidavit of Katherine Vaughn])
22. Banning anyone posting truthful information. (R.O.A. page ____ [affidavit of Katherine Vaughn])
23. Provided doctored putative "bank records." (R.O.A. pages ____ and ____ [defendants' motion to quash, plaintiff's motion to compel])
24. Intimidating a disclosed witness. R.O.A. page ____ [Affidavit of Katherine Vaughn]
25. Refusing any forensic exam of electronic media.

26. Filing complaints against plaintiff veterinarian, lawyer, and filing a spurious O.S.H.A. complaint. [R.O.A. page ____][Christoff affidavit]

Any one of these indisputable, verifiable facts is sufficient to create a genuine issue of material fact that the defendants conspired with one another intending to harm the plaintiff and any one of these facts allows each of plaintiff's causes of action to survive summary judgment. The evidence also provides overwhelming and indisputable evidence of malice. The Master-in-Equity either overlooked the entire body of evidence, or, more likely, weighed the evidence and decided he believed the defendants' evidence over the plaintiff's. Either way, this is an error of fact and law by applying the incorrect summary judgment standard requiring reversal.

Two years before Big John sat down on Meeting Street, at the April 21, 2015, meeting of the Charleston Animal Society's *Equine Cruelty Committee*, also two years before the creation of Charleston Carriage Horse Advocates, the Minutes reflect that after an "internal discussion" between Ellen Harley, Joe Elmore, and others:

After the presentation and discussion Matt Watson made a motion that "Based on the presentation today, the Board find the practice of the carriage horse industry cruel and that we should study the situation further." R.O.A. page ____[Second Supp. Affidavit filed August 19, 2021]

Three months later, the Charleston Animal Society Minutes of August 18, 2015 (R.O.A. page ____[Second Supplemental Affidavit filed August 19, 2021]) demonstrate that the Charleston Animal Society and Ellen Harley were fully amalgamated and fully committed in their malicious plan to interfere in plaintiff's business:

Joe Elmore made the recommendation that we procure Forbes-Tate to assist in initiating strategy development, polling with focus group(s) and plan **to effectively eliminate the inhumane treatment of horses used in Charleston's carriage horse industry**. He estimates that Phase 1 of the project could cost between \$82,000.00 and \$95,000.00. (emphasis added)

This is clear and convincing evidence of foundational malice succinctly summed up in Catherine Poag’s celebration of cornering plaintiff like an “animal.” This same amalgamated group appeared before the City of Charleston’s Tourism Commission on April 26, 2017, and after again maliciously providing false information to the Commission, a member of the Commission, the Mayor’s advisor, Rick Jerue, asked: “who the Charleston Carriage [Horse] Advocates were?” R.O.A. page ____ [Second Supp. Affidavit filed August 19, 2021]) Mr. Cooper, a Tourism Commission member, said they were “Ellen Harley’s subcommittee group from the Animal Society.” At this meeting the Charleston Animal Society’s *Committee on Animal Abuse*, chaired by Ellen Harley, made a presentation to Charleston City Council urging the City to take steps to shut down the carriage companies. This evidence forms the evidentiary foundational maxims from which the defendants’ construction of social media attacks are constructed and demonstrates the defendants’ commitment to a program of malice. The record demonstrates that the plaintiff has put forth sufficient evidence to establish genuine issues of material fact on all five of the causes of action alleged in the complaint.

Argument 3

The Master-in-Equity erred in dismissing the plaintiffs causes of action for conspiracy and intentional interference in business relations because there is overwhelming evidence to support both.

The Record on Appeal contains sufficient evidence to raise a genuine issue of material fact as to conspiracy and intentional inference (outrage). Since the two causes of action are similar—and also involve the same evidence establishing malice in the defamation claim—Appellant discusses them together briefly. It is also important to recall—discussed in the next argument—that the trial court denied the Appellant an opportunity to complete discovery, thwarted by the

defendants,' Harley and Charleston Carriage Horse Advocates,' obstructionist tactics. The elements of each cause of action are:

Conspiracy	Intentional Interference
1. a combination of two or more	1. existence of a contract
2. joining for the purpose of injuring the plaintiff	2. defendants' knowledge of contract
3. which causes damages	3. intentional procurement of breach
	4. absence of justification
	5. damages.

These defendants know the plaintiff operates under a franchise agreement with the City and that the City promulgates extensive regulations governing the operation of carriages, which is why the defendants' original strategy was to get a seat on City Council and the Tourism Commission. The record demonstrates that when the defendants failed to control the issue through the legislative/political process—which they have a right to do—they joined together to launch unlawful and malicious attacks on Plaintiff. See the list of 26 delicts listed above on pages 45-47. Because the City can suspend any carriage company for a violation of its regulations, and animal abuse is the worst, the attacks on the plaintiff were directed at interference in plaintiff's franchise agreement with the City and with inflicting so much fear in the plaintiff that it would go out of business, or, as Ms. Harley says, "depress their income."

Of course, as discussed in the next argument, the defendants' Harley and Charleston Carriage Horse Advocates have never allowed administrator access to their electronic media, which contains a reservoir of additional proof, but the record as it exists contains far more than a mere suggestion of a genuine issue of material fact, and the Master-in-Equity erred in dismissing the plaintiff's case on summary judgment.

Argument 4

The Master in Equity misapplied South Carolina law on plaintiff's application for relief for discovery violations by holding that the plaintiff was required to return to the initial judge to hear the motion for sanctions.

On May 22, 2022, the Master-in-Equity entered an Order turning away the plaintiff's prayer for relief for defendants', Charleston Carriage Horse Advocates and Harley's, continuous discovery violations on the erroneous grounds that the Defendants had complied with the previously issued discovery Orders, "Plaintiff received exactly what defendants said they would provide and what Plaintiff knew they would provide" R.O.A. page ____ [Order at page ____, quoted below] and on the erroneous legal conclusion, citing *Richardson*, that the plaintiff was required to seek relief only from the original judge who entered the original discovery Orders:

Perhaps realizing this, Plaintiff also asks the court in the alternative to order CCHA and Harley to turn over their computers for forensic inspection. Plaintiff has multiple problems here. First, "there must be an Order of the Court before sanctions are imposed under subdivision (b). . . *Richardson on Behalf of 15th Circuit Drugs Enf't Unit v. Twenty-one Thousand & no/100 Dollars, (\$21,000.00) U.S. Currency and Various Jewelry*, 430 S.C. 594, 599, 846 S.E.2d 15, 16 (citation omitted). As demonstrated, neither CCHA nor Harley violated Judge Price's June 17 Form 4 Order. Plaintiff received exactly what defendants said they would provide and what Plaintiff knew they would provide. Second, nothing in the Order requires production of computers or responsive documents to search terms. Third, physical access to the computers is unnecessary because CCHA and Harley have nonetheless run the proposed search and provided Plaintiff in excess of 10,000 responsive documents. The delay in running the search, moreover, is due Plaintiff's refusal to send search terms. Fourth and finally, the court indicated that Plaintiff to return for another motion to compel hearing if physical access to the computers could not be worked out. Rather than seek a court order via a motion to compel, Plaintiff is hoping the Court will bypass this step and award access as a sanction under Rule 37(b). Again this cannot be done. See *Richardson On Behalf of 15th Circuit Drugs Enf't Unit v. Twenty-one Thousand & no/100 Dollars, (\$21,000.00) U.S. Currency and Various Jewelry*, 430 S.C. 594, 598-600, 846 S.E.2d 14, 16-17 (discussing when sanctions are appropriate under Rule 37).

This decision is controlled by palpable errors of law, starting with the trial court's casual attitude toward discovery abuses and its ability to speak for the plaintiff's state of mind. When the parties were before the Court on September 29, 2021, plaintiff's counsel explained at the outset

that there remained material discovery disputes that had to be resolved **prior to taking up summary judgment**, but the Master-in-Equity ignored the discovery dispute, as well as plaintiff's application to amend and extend the scheduling Order, and proceeded directly to summary judgment. When it was plaintiff's turn to address the Court, plaintiff's counsel reminded the Court "that under *Doe v. Batson*, the court can't even entertain a motion for summary judgment until the party resisting it has had a full and fair opportunity to conduct discovery. That did not happen in this case." (R.O.A. page ____ [tr. page 53, lines 13-16 Here is Master-in-Equity's entire analysis in that colloquy: "All right. Got it." (R.O.A. page ____) Moreover, the Master-in-Equity's conclusion that the plaintiff received "10,000 documents" is painfully erroneous because the plaintiff's Third Supplemental affidavit filed September 24, 2021 (R.O.A. page ____) explained the defendants' putative discovery production and demonstrated it is almost entirely bogus: 2,913 pages of duplicated material, 1,604 pages of court filings, *etc.* What is not disclosed is the most important information of all; to wit, the Internet metadata and internal communications. In addition, the defendants, Harley and Charleston Carriage Horse Advocates, told Judge Price they would produce bank records "exactly as they come from the bank" (R.O.A. page ____ [June 16, 2020, tr. page 17, lines 16-22: "just as they would be delivered to the client from the bank."], and the Court can view the defendants' production at pages ____-____ of the Record on Appeal and see for itself that the meaningless documents they provided are not bank records "exactly as they come from the bank." When the plaintiff realized that the defendants were going to be nothing but obstructors, he sent a subpoena to South State Bank for the same records the defendants said they would produce "exactly as they come from the bank," and the defendants moved to quash the subpoena! R.O.A. page ____ [Motion to Quash Subpoena] The Court can also review the plaintiff's numerous efforts to resolve the outstanding discovery summarized plaintiff's motion for sanctions

filed September 27, 2019 and October 2, 2020 (R.O.A. pages ____ and _____) detailing Ellen Harley’s mendacity and obstruction and providing the applicable law to the Court, all of which the Master-in-Equity ignored.

The same misapprehension of the facts also extends to the Master-in-Equity’s misidentification and misapplication of controlling legal precedent. As discussed above, the Master-in-Equity’s reliance on the *Atlanta Humane Society* case illuminates the error because that case holds the exact opposite of the principle for which the Master cites it, and here again, the Master-in-Equity commits the same error. The Master-in-Equity’s avoiding the discovery issue by relying on the *Richardson* case is the same error the Master-in-Equity committed in relying on *Atlanta Humane Society* for a principle opposite from its holding. This *Richardson* Court summarized its holding this way:

White now appeals, asserting the trial court abused its discretion in failing to sanction the Solicitor for not responding to White’s discovery requests. We reverse the trial court’s order and remand for a new trial after adequate opportunity for discovery. *Richardson* at page ____

Richardson holds further—and again this is the exact opposite of the Master-in-Equity’s erroneous conclusion that plaintiff is required to return to Judge Price to entertain a motion for sanctions:

The text of Rule 37. SCRPC, therefore empowered White with the right to request sanctions against the Solicitor for failing to respond to White’s discovery requests **without first filing a motion to compel**. [citations omitted] (finding trial court has duty to delay trial to determine whether exclusion of an undisclosed witness is appropriate, “regardless of whether the proponent of the testimony is allegedly in violation of a pre-trial order or court rule.”) (emphasis added) *Richardson* at page ____

Thus, the Master-in-Equity’s decision to ignore the discovery deficiencies not only ignored the facts because the Appellant’s Motions to Compel and for Sanctions (R.O.A. pages ____ and _____) set out specific facts refuting the Master-in-Equity’s conclusion that “Plaintiff received exactly

what defendants said they would provide and what Plaintiff knew they would provide,” but also got the *Richardson* holding backwards. These errors require reversal. Moreover, if the Master-in-Equity believed, *arguendo*, that plaintiff is required to return to Judge Price for a ruling, then the proper action is to remand the question back to Judge Price. It is a logical absurdity to say to the plaintiff: “only the previous judge can pass on this motion, but since you are here, I will deny your motion.”

This record displays how the Master-in-Equity was careless with the facts and the law. As to the facts, the record does not support the Court’s findings, as it contains overwhelming evidence of the defendants’ consistent dilatory and obstructionist strategy, and the Master-in-Equity simply ignored the plaintiff’s evidence. The plaintiff filed detailed affidavits and extensive Memoranda on February 18, 2020, May 26, 2020, October 2, 2020, December 2, 2020, August 19, 2021, January 21, 2022, May 12, 2022, and May 20, 2022 and Abrams affidavit, April 22, 2022 (R.O.A. pages ____ [affidavit of Steve Abrams] and ____ [fourth supplemental affidavit of Broderick Christoff] detailing the Defendants’ repeated contumacious conduct regarding discovery. The plaintiff’s amended motion filed on September 27, 2019, drew the Master-in-Equity’s attention to five letters to defendants’ counsel, March 21, 2019, March 27, 2019, March 28, 2019, August 2, 2019, and August 4, 2019, (R.O.A. pages ____ - ____) carefully setting out the correct principles of law in undisputed detail and pleading for cooperation. These letters left no impression upon the Master-in-Equity, and the reason the Master skipped over the plaintiff’s evidence is because he erroneously concluded that only Judge Price could entertain a motion for sanctions for discovery abuse, and this erroneous conclusion is the foundation upon which the Master-in-Equity reached the further erroneous conclusion and provided a hall pass to both defendants to ignore the *Rules of Civil Procedure*. The Court of Appeals can view this evidence for itself (page limitations prohibit

discussing each one of the defendants' contumacious conduct spelled out in the five letters referenced above and in Harley's conduct during the 30(b)(6) deposition, quoted below) and draw its own conclusions, but the briefest, typical example of the defendants,' Charleston Carriage Horse Advocates and Ellen Harley's contumacious conduct is in the amended motion to compel filed September 27, 2019, page 5 (R.O.A. page ____):

On July 2, 2019, the Plaintiff served a single supplemental interrogatory on the Charleston Carriage Horse Advocates:

1. Give the names and addresses of employees, agents, internal auditors, accountants, Certified Public Accountants, bookkeepers, or other such persons, who compile and prepare the defendant's, Charleston Carriage Horse Advocates', financial and tax records, including, but not limited to, tax returns reported to the South Carolina Department of Revenue, the United States Internal Revenue Service, as well as documents provided to the South Carolina Secretary of State as a charitable organization.

. . .

ANSWER: Defendant objects to this Interrogatory as it is overly broad, unduly burdensome, and not calculated to lead to the discovery of admissible evidence.

This record does not support the Master-in-Equity's findings that the defendants either "turned over exactly what the plaintiff's asked for" (R.O.A. page ____ [Order page ____]) or even made a half-hearted effort to conform to the rules. There is not a scintilla of evidence in this record that the plaintiff expressed satisfaction with the material the defendants ultimately turned over, and in fact, the Record on Appeal demonstrates precisely that the defendants ultimately turned over practically nothing material, including, but not limited to 43 blank pages, hundreds of Martha's Vineyard sales notices, and 1,604 pages of the filings in the case. See plaintiff's Third Supplemental Affidavit at R.O.A. page ____ where the plaintiff details the "production" with exact precision. In fact, the conclusions reached by the Master-in-Equity should shock the conscience of the Court because they are at such variance with the record.

The record in this case demonstrates the defendants Harley and Charleston Carriage Horse Advocates are unapologetically nefarious and mendacious. The Plaintiff's Third Supplemental Affidavit filed September 24, 2021 (R.O.A. pages ____ - ____) contains a detailed explanation of Harley's contumacious conduct. Regarding her facility for lying under oath, consider comparing her sworn testimony presented in her deposition testimony on January 31, 2020 with the affidavit she filed on August 20, 2021 in support of her motion for summary judgment:

Ellen Harley 30(b)(6) deposition January 31, 2020, p. 26, line 4:

Q. Let me draw your attention to Exhibit 3, that's an April 25th, 2017, letter from me to you. Do you recall getting that letter?

A. I do.

Q. Okay. And what steps did the Charleston carriage Horse Advocates take as [a] result of receiving that letter.

Objection: "Okay. I'm going to object of the record,. At this time, Tommy, this is outside the scope of any of the topic you listed on your 30(b)(6) notice. I've also served notice to you that for the purposes of this deposition, any and all questions outside the bounds of the topics that you have presented are objectionable and will not be bound against Charleston Carriage Horse advocates today.

Q. Now, can you answer the question? What steps did Charleston Carriage Horse Advocates take as a result of receipt of the letter of April 25, 2017?

A. I consulted with two different attorneys. . .

Compare the foregoing answer **under oath** with Ms. Harley's sworn affidavit filed 20 months later in support of her motion for summary judgment:

21. Neither I nor CCHA ever received any April 25, 2017 letter from the Plaintiff or Mr. Christof.

22. Neither I nor CCHA ever received any request from the plaintiff that we "publish the correct information and stop misleading people that Big John 'collapsed' from exhaustion.

R.O.A. page ____ [third supplemental affidavit of B. Christof filed Sept. 24, 2021. See page ____ R.O.A. for a copy of the April 25, 2017 letter to Ms. Harley asking her to correct the false information.)

Ms. Harley also swore under oath that she did not shoot the video published of Big John even though the Plaintiff obtained video footage of her doing exactly that. See R.O.A. page ____ [screen

shot of video] She went on in her January 31, 2021 deposition testimony to admit she shot video and that she would be “happy to share that with you.” (R.O.A. page ____ [third supplemental affidavit filed September 24, 2021, at page 9]

She has never done so.

An examination of Ms. Harley’s 30(b)(6) deposition in the Record on Appeal at pages ____ - ____ reveal that it was an exercise in near futility due to her obdurate obstructionist strategy.

Consider these excerpts:

Q. Okay. Now, did you bring any other documents with you here today pursuant to the notice of the deposition and subpoena?

MR. THOMPSON: She did. I have them.

MR. GOLDSTEIN: Okay. Can you tell me what you brought?

MR. THOMPSON: I think you’ve asked the questions, and to the extent you ask the questions and we have documents that are relevant to those questions, we will present them.

BY MR. GOLDSTEIN:

Q. All right. Here’s my question: Did you bring any other documents with you here today, “yes,” or “no”?

A. Yes.

Q. Okay. Can you tell me what they are?

A. Can you tell me what you want?

Harley deposition, January 31, 2020, page 35, lines 4-21 R.O.A. page ____

This record demonstrates the 30(b)(6) deposition was punctuated by continuous coaching and speaking objections, which the Court can review for itself at pages ____ - ____ of the Record on Appeal. Most importantly Ms. Harley still refuses to allow access to her organization’s metadata or banking records, both of which go to the heart of this case. The defendants’ refusals explode the Master-in-Equity’s conclusion that the plaintiff “got exactly what it asked for.” The reason Harley and Charleston Carriage Horse Advocates are so resistant to handing over their financial records, their internal communications, and, most importantly, their meta-data is because they know it will reveal their real motives. This explains why they told Judge Price they were turning over their financial

records “exactly as they come from the bank” (R.O.A. page ____ [June 16, 2020, tr. page 13, line 2—page 17, lines 16-21, page 18, line 3-5] and provided something entirely different:

MR. THOMPSON: In fact, the way he ended his presentation this afternoon was quite simple; and that was all I need are the bank statements and Ms. Harley’s laptop. . . .

MR. THOMPSON: So, in short, Your Honor, when we talk about the two things that he has indicated that he is seeking at this point in time in seeking for an order of this Court, is bank statements from the CCHA, the monthly bank statements just as they would be delivered to the client from the bank. We are going to present those, Judge. . . .

THE COURT: So—so are y’all consenting to the bank statement?

MR. THOMPSON: Yes, your Honor.

When the defendant turned over self-generated financial records—but not bank records—which are contained in the R.O.A. at page ____ [exhibit to December 2, 2020, Memorandum in support of status conference], the plaintiff attempted to get past the defendants’ obstruction and obtain the records directly by subpoena. (R.O.A. page [Ex. ____ to Motion for Sanctions]. When the plaintiff issued its subpoena directly to South State Bank, the defendants responded to that by filing a motion to quash the subpoena to prevent the production of the same records they told the Court they would produce. (R.O.A. pages ____ and ____ [subpoena to South State Bank and defendant’s _____, 2020 Motion to Quash h]

The defendants have never provided the Administrator keys to plaintiff’s expert to allow him to conduct a forensic exam. Once the plaintiff’s expert, Steve Abrams gets access to their meta data, the plaintiff can prove: (1) how many times the defendants suppressed truthful information to cast the plaintiff in a bad light (see affidavit of Katherine Vaughn at page ____ R.O.A.), (2) how much they spent on purchasing Google key words to harm the plaintiff (see Broderick Christoff’s Fourth Supplemental affidavit at page ____ and Steve Abram’s affidavit at page ____ R.O.A.), and (3) their internal communications about how best to target the plaintiff. Some of this information has already

been turned over by the Charleston Animal Society. See R.O.A. pages ____ (“**depress their income**”), (“**they’ll s**t their pants**”)

The Master-in-Equity’s conclusion that the Plaintiff got what it asked for and the Defendant complied with discovery is not supported by this record. The Plaintiff’s Third Supplemental Affidavit filed September 24, 2021, points out in too much detail to repeat in an Appellant’s brief how the Defendants, Harley and Charleston Carriage Horse Advocates completely ignored their responsibilities. The Master-in-Equity simply assumed without examining the record that if the Defendants produced ten thousand pages, then the Plaintiff must have received what it asked for. However, the Plaintiff’s Third Supplemental Affidavit details how the Defendants skirted their responsibilities by substituting a volume of meaningless documents in place of a real response to discovery requests. For example, over 33.3% of the “ten thousand pages” were duplicates of material previously provided by the Charleston Animal Society. (R.O.A. page ____ [affidavit page 3]) The only possible explanations for the Master-in-Equity’s unsupported conclusions are either he was unaware of these filings or he did not review them. The Plaintiff has been trying for years to get access to the Administrator keys for the Defendants’ social media, and the record demonstrates how defendants obstructed. See affidavit of the Plaintiff’s expert, Steve Abrams, who filed April 22, 2022, and is found in the Record on Appeal at pages ____ - ____ and details what he must have to conduct a forensic examination and how the defendants have thwarted him from receiving the same access he has been provided in “1300 digital forensic examinations during my three decades in this field.” (R.O.A. page ____ [affidavit page 1]) This missing information, including the unedited video, is the same information Ellen Harley testified under oath that she would be “happy to provide.” (R.O.A. page ____ [deposition page ____])

In summary, because the *Rules of Appellate Procedure* proscribe a page limitation, the Plaintiff cannot detail each and every dilatory and contumacious act of the Defendants, Harley and Charleston Carriage Horse Advocates, so the Plaintiff closes this section by reminding the Court that since this dispute began, the Defendants have moved against Dr. Miller's license, Plaintiff's counsel's license, filed an OSHA complaint against the Plaintiff and even went so far as to attempt to intimidate a disclosed witness. One thing is certain: this record does not support the Master-in-Equity's conclusions that the Defendants, Harley and Charleston Carriage Horse Advocates, provided meaningful discovery or that Plaintiff was satisfied with their production.

Finally, the Master-in-Equity's conclusion of law that the Plaintiff was restricted to applying to Judge Price, and only Judge Price to address discovery issues, is without support in South Carolina jurisprudence. Parties do not select judges—except when they, as here, refer the case to a Master-in-Equity. Moreover, no defendant objected to the Master-in-Equity hearing the motion. There is no rule or case law in South Carolina that requires a judge resolving a motion to handle all successive motions (except for a Motion for Reconsideration). Even more troubling is the logical conclusion that if the Master-in-Equity really believed the Plaintiff was restricted to asking Judge Price, and only Judge Price, for relief, then the Master-in-Equity would have transferred the case to that judge and not proceeded to rule against the Plaintiff. The Master-in-Equity's decision to not address discovery deficiencies is not supported by the record and is controlled by an error of law and must be reversed.

Arguments 5 and 6

The Master-in-Equity erred in barring the plaintiff from amending its complaint to add the principals as party plaintiffs to address defendants' assertion that some of the plaintiff's damages are "personal," and to add party defendants identified by Ellen Harley on January 31, 2020 in her 30(b)(6) depositions.

Appellant combines arguments 5 and 6 into a single argument because the legal analysis of each question requires the application of the same law. The defendant, Harley, disclosed for the first time in her January 31, 2020, deposition that she blames others for the content plaintiff has identified as defamatory, an issue not raised in her responsive pleadings. In addition, since the defendants imply the plaintiff was dilatory in seeking the amendments made to address issues raised by the defendants, it is worth repeating that 459 days elapsed between filing of the complaint and the defendant's answers. See R.O.A. pages ___, ___, and ___ [complaint, answers]) The plaintiff filed his **first** motion to compel on July 5, 2019, containing specific evidence of the defendants' refusal to cooperate. R.O.A. page ___[motion to compel] It should be sufficient to say that the record does not explain how the Master-in-Equity derived from this record that the obstructionist tactics identified above are the plaintiff's fault, or how the defendants could be prejudiced by amendments to the complaint which are only made to address defendants' suggestion that the previously undisclosed parties were responsible for defendants' defamation or that damages claimed by the plaintiff belong to the plaintiff's principals and not the limited liability company. The Master-in-Equity does not explain how the defendants are prejudiced by these amendments or how the case would be delayed. Rule 15 governs motions to amend, and motions to amend can be made as late as the close of all the evidence. See *Soil and Material Engineers v. Folly Associates*, 293 S.C. 498, 361 S.E.2d 779 (Ct. App. 1987):

As our new rule makes manifest, amendments to conform to proof should be liberally allowed when no prejudice to the opposing party will result therefrom. H. LIGHTSEY & J. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE at 291 (1985); see *Campana v. Eller*, 755 F. (2d) 212 (1st Cir.1985) (construing F.R.Civ. P. 15(b)). In considering potential prejudice to the opposing party, the court should consider whether the opposing party "has had the opportunity to prepare for the issue now being raised formally." H. LIGHTSEY & J. FLANAGAN, *supra* at 291. The court should grant a continuance "[i]f prejudice can be eliminated or substantially minimized by a continuance so that the opposing party can meet the evidence." *id.* An amendment to conform to proof provides the opposing party with no just cause to complain if the opposing party "is afforded full opportunity to introduce testimony bearing on the subject of the amendment." 61A Am. Jur.

(2d) Pleading § 329 at 322 (1981). The question of allowing an amendment to pleadings to conform to proof, however, is addressed to the sound discretion of the trial judge whose decision will not be disturbed absent an abuse of discretion. *Crowley v. Spivey*, 285 S.C. 397, 329 S.E. (2d) 774 (Ct. App. 1985).

Here, there was an abuse of discretion. Simply because an amendment to conform to proof was made late in the trial affords no basis for holding that the amendment comes too late. Rather, as the rule makes clear, the question is one of prejudice to the opposing party.

The trial judge, however, made no finding of prejudice and Folly Associates made no showing of any. Indeed, prejudice could not properly have been found since Soil & Material plainly stated in its answers to Folly Associates' interrogatories that Soil & Material's duty was to "monitor the contractor's driving of piles on the job" and that it would offer at trial an expert witness to testify that "the course of practice in the industry is for the contractor to be responsible for . . . the driving of the piles." [Emphasis added.] This answer was enough to alert Folly Associates, notwithstanding the allegations contained in the reply, to prepare for the contention that Soil & Material sought to raise by an amendment to its pleadings.

Here, the Master-in-Equity's May 12, 2022 Order (R.O.A. page ____) simply concludes that the defendants would be prejudiced by amendments without identifying either how or why, and thus under Rule 15 and the cases construing it, the Master-in-Equity's Order is controlled by an abuse of discretion amounting to an error of law, relying on inapplicable rules in doing so. Moreover, the Master-in-Equity contradicts himself on page 4 of his Order, denying the motion to amend on the ground that the amendments assert new causes of action, while on page 6 of the same Order, he denies the motion on the ground that "there are no new substantive allegations." Logically, it cannot be both. If it is the former, then the defendants must identify how they are prejudiced by the amendments, which they cannot do. If it is the latter, then the newly added defendants can raise affirmative defenses if they believe they apply. If there is a Rule 18 impediment to adding two new defendants identified by Ellen Harley in her January 31, 2020 30(b)(6) deposition or in adding the principals of the plaintiff to address defendants' complaints that damages alleged are personal to them, these are objections either the new parties must raise, not the defendants in the case. The defendants cannot possibly complain that the plaintiff is adding its principals to address the defendants' assertion that some of the damages are personal. Defendants are not permitted to dictate plaintiff's choice of forum or defendants, and if a party

being added possesses a valid statute of limitations defense, that party can assert it as an affirmative defense as allowed by Rule 8(c) of the *South Carolina Rules of Civil Procedure*, and, as discussed in the Memorandum of Law filed with the Master-in-Equity in support of reconsideration discusses, even a statute of limitations defense is subject to equitable tolling. Inasmuch as the plaintiff alleges an ongoing conspiracy, it remains to be seen how potential new defendants can advance that claim successfully, but that question was not before the Master-in-Equity.

Argument 7.

The Master-in-Equity abused discretion in refusing to amend the scheduling Order a single time when the Record shows the defendants did not file Answers for 459 days, obstructed discovery, which remains unresolved, and plaintiff's counsel suffered a serious medical injury, and the administration of the Courts were slowed by COVID-19.

The parties entered into a single scheduling Order in this case filed on July 16, 2019. (R.O.A. page ____). The original—and only—scheduling Order contemplated discovery being completed by February 7, 2020, and trial not before May 11, 2020. In April, 2019, plaintiff's counsel suffered a heart attack requiring hospitalization, which led to open heart surgery in August 2019. Trauma during the surgical procedure damaged the laryngeal nerve, which reduced speaking to a whisper for many months. The defendants did not file their Answers until November 20, 2019, 459 days after the plaintiff filed the complaint and 79 days before the Scheduling Order expired. In February, 2020, the country began a series of governmental responses to the COVID-19 pandemic some of which continue to this day. For example, in March 2020, the Supreme Court cancelled all terms of Court until May—except for emergency hearings—and thereafter issued a series of modifying Orders restricting judicial travel and transitioning to a remote practice procedure. Through all of this, the defendants, Harley and Charleston Carriage Horse Advocates continued a process of obstruction as the motions to compel and for sanctions (discussed in detail above) demonstrate.

When plaintiff requested an extension to the scheduling Orders, the defendants saw an advantage, and as quoted above on page ____, the Master-in-Equity gave short shrift to the outstanding discovery issues. The Master-in-Equity had the obligation to allow the plaintiff an opportunity to be prepared for trial, and even without the defendants' dilatory conduct, the discretion to allow one amendment to a Scheduling Order in light of these circumstances should be automatic because the administration of justice is a search for the truth, not a framework for sharp practice to prevent justice. Moreover, the defendants took several depositions, such as Dr. Miller, beyond the expiration of the Scheduling Order but denied plaintiff the same courtesy. South Carolina law is well settled that the failure to use discretion is itself an abuse of discretion. *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990), quoted below.

More importantly, however, is that the Master-in-Equity's May 12, 2022, Order denying plaintiff's application for a first amendment is grounded upon palpable legal error and self-refuting. On page 2 of the Order denying an extension, the Master-in-Equity concludes: "Plaintiff has not established that additional discovery would serve any purpose." (R.O.A. page ____) Thus, the entire decision is based upon a self-refuting, logical impossibility of proving a negative. This is obvious error. The impossibility of proving the negative is as old as antiquity, once made famous by Bertrand Russell's statement that no one could prove that there is not a teapot orbiting Neptune. Rule 803(7) of the *South Carolina Rules of Evidence* permit a negative inference may be drawn from the absence of regularly kept business records just as a jury may draw a negative inference from a witness' refusal to answer questions in a civil trial. However, no court has ever permitted a party to withhold evidence and allow that suppression to give rise to a **positive** inference, a conclusion violating fundamental logic. *Modens Tollens* says: If p then q. Not q. Therefore not

p. The Master-in-Equity turns this infallible logical rule on its head to derive a positive inference from the failure to produce evidence—an absurd conclusion. In fact, South Carolina law has a well-developed body of law delineating permissible adverse, i.e. negative, inferences—the opposite of the positive inference reached by the Master-in-Equity here. Juries may draw negative inferences from certain circumstances such as a party’s refusal to provide evidence under its control. *Kershaw County Bd. of Educ. v. U. S. Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990) In affirming a jury verdict for actual and punitive damages on a cause of action for slander, the Supreme Court explained the adverse inference rule. In *Duckworth*, the plaintiff alleged a bank officer stated within earshot of several customers that the plaintiff was attempting to “swindle” First National Bank.” In affirming the jury’s verdict, the Court said: “It is a well-settled rule that if a party knows of the existence of an available witness on a material issue and such witness is within his control and if without satisfactory explanation he fails to call him, the jury may draw the inference that the testimony of the witness would not have been favorable to such party.” *Duckworth v. First National Bank of South Carolina*, 254 S. C. 563, 176 S.E.2d 297 (1970) (An interesting footnote to the *Duckworth* case is that the defamation arose out of the bank manager insinuating the plaintiff was attempting to swindle the bank, a comment overheard by several customers. Here, in the defendants’ video, Ellen Harley can be heard saying: “They’re killing these horses.”)

Clearly, a judge has an obligation to make sure that parties respond to discovery and that parties be given an opportunity to prepare for trial. *Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2003). When a trial judge refuses to use discretion, that refusal is an abuse of discretion. “It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly. *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202

(1981).” *Balloon Plantation Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990

In summary, scheduling Orders are routinely amended, and it is an abuse of discretion not to do so in this case. The Order under review does not identify a *scintilla* of prejudice to the defendants by extending it, grounds its decision on a logical fallacy, and compounds the erroneous abuse of discretion by rewarding the defendants for contumacious conduct in suppressing discovery to run out the clock on the plaintiff.

Conclusion

For the reasons set forth, the precedents of the Supreme Courts and South Carolina require that the Orders under review be reversed and remanded to the circuit court to allow the plaintiff to amend its complaint and with instructions to the defendants, Charleston Carriage Horse Advocates and Ellen Harley, either to provide the discovery plaintiff is entitled to receive, or, in the alternative, for this Court—or the Circuit Court on remand—to impose such sanctions as the Court deems proper for the defendants’ refusal to participate in discovery. The Master-in-Equity erred in requiring the plaintiff to demonstrate malice, but even if malice is required, this record contains overwhelming evidence malice and of the elements of defamation, conspiracy, and interference in business relations. The issues raised by the pleadings should be presented for a jury to return a verdict based on its view of the preponderance of evidence. The Master-in-Equity ignored the controlling precedent of *Erickson, supra*, *Gertz, supra*, and other cases. As social media defamation plagues our society with opportunities for malicious publications, it is important to remind the Court of the significance of the legal issues raised here. As the U. S. Supreme Court stated in *Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669 (1966) (Stewart, concurring):

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.

This case should be returned for a jury to decide.

Respectfully submitted,

November 11, 2022

/s/ Thomas R. Goldstein

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Nov 11 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No.: 2018-CP-10-4083

Appellate Case No.: 2022-001114

Charleston Carriage Works, L.L.C.,

Appellant,

v.

Charleston Animal Society, Ellen Harley and
Charleston Carriage Horse Advocates, Inc.,

Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief, Designation of Contents of Record on Appeal, and Motion to Exceed Page Limits upon the Charleston Animal Society, Charleston Carriage Horse Advocates and Ellen Harley by depositing a copy of it in the United States Mail (and by providing an electronic copy), postage prepaid on August 11, 2022, addressed to their attorneys of record, Elizabeth Palmer at her office Saxton & Stump at 151 Meeting Street, Suite 350, Charleston, South Carolina 29401 and to Joseph Thompson at his office Hall Booth Smith, P.C. at 111 Coleman Boulevard, Mt. Pleasant, S. C. 29464, and to Jenkins Mann at his office, Mann Blake & Jackson at 1901 Main Street, Suite 1205, Columbia, South Carolina 29201.

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