THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas
Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2022-001114
(Case No. 2018-CP-10-4083)

Charleston Carriage Works, LLC, ...Appellant,

v.

Charleston Animal Society, Ellen Harley, and
Charleston Carriage Horse Advocates, LLC .....Respondents.

RESPONDENTS' BRIEF

Jenkins M. Mann Jenkins Mann (SC Bar #74894)
Shaun Blake (SC Bar #76349)
Rogers Lewis Jackson Mann & Quinn LLC
1901 Main Street, Suite 1200
Columbia, SC 29201
P.O. Box 11803 (29211)
Tel: (803) 978-2832
Fax: (803 252-3653
Email: jmann@rogerlewis.com
sblake@rogerslewis.com

Attorneys for Respondents CCHA and Harley

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2. **The Master-in-Equity denied Appellant's motion for sanctions because no order of Court had been violated. Did the Master-in-Equity abuse its discretion?**

3. **Appellant only moved to amend the scheduling order on October 20, 2020—more than a year after the consent scheduling order had been entered, almost eight months after discovery had ended, and one month after Mediation had occurred. The Master-in-Equity denied the motion to amend the scheduling order because Appellant could have met the existing discovery deadline if it had made diligent efforts to do so. Did the Master err?**

4. **Appellant filed a motion to amend the complaint after the discovery period had ended. Appellant sought to add new plaintiffs, defendants, and causes of action. The Master-in-Equity denied the motion because Rule 15 does not allow the addition of new plaintiffs to assert new causes of action, and the addition of new plaintiffs, defendants, and causes of action resulted from undue delay and would have caused prejudice. Did the Master abuse his discretion?**

5. **Appellant did not advance good reasons that explained why the timeframe for discovery was insufficient under the facts of the case or why more discovery would uncover additional and relevant evidence that could create a genuine issue of material fact. Did the Master-in-Equity err when he determined that Appellant had had a full and fair opportunity to conduct discovery?**

6. **Appellant failed to present evidence that satisfied either the clear and convincing or preponderance of the evidence burdens of proof, both of which apply to different causes of action in this case. Consequently, the Master determined that no genuine issues of material fact were present; a fact finder was not needed for any one of Appellant's causes of action; and Respondents were entitled to judgment as a matter of law. Did the Master err?**

STATEMENT OF THE CASE

Appellant filed its initial action in Charleston County Court of Common Pleas on May 29, 2018. Because its complaint included claims under the Animal Enterprise Terrorism Act and 42 U.S.C. §1983, for violations of its substantive due process rights under the U.S. Constitution, Respondents removed the case to South Carolina District Court, and then they filed a motion to dismiss. Shortly before the hearing concerning Respondents' motion to dismiss, Appellant dismissed that action and filed the current action in Charleston County Court of Common Pleas, alleging causes of action under South Carolina law only.

In its complaint, Appellant alleged causes of action for (1) defamation (slander and libel per se), (2) conspiracy, (3) tortious interference with contractual relations, and (4) a violation of Plaintiff's civil rights under Article I, §3 of South Carolina's constitution. Record, Complaint. All these causes of action arise principally from an April 19, 2017 incident wherein Appellant's horse "Big John" indisputably "collapsed"[1] to the ground. Appellant contends Respondents defamed it while discussing this incident, particularly through the publication of a video which asked whether the animal was "exhausted" or whether he just "tripped". Respondents contend they were simply continuing their advocacy efforts on behalf of carriage animals and that their statements were not defamatory.

Appellant filed a motion to compel on July 12, 2019. Record, First Motion to Compel. Appellant and Respondents agreed upon a consent scheduling order, and then entered that order in the record on July 16, 2019. Record, Consent Scheduling Order. Soon thereafter Appellant filed

[1] Depos. of Justin Miller, p. 66, lines 5-8 ("[T]he word collapse…doesn't really tell you what happened…why the horse went down."); p. 69, lines 8-15 ("[I]n general, [the word collapse] would mean that the horse hit the ground."); p. 70, lines 5-6 (The word collapse is "the least descriptive term [to describe why a horse that hit the ground]."); Depos. of Little, pp. 22-25 and 71.

an amended motion to compel, on September 27, 2019. Record, Amended Motion to Compel. Per the consent scheduling order, discovery ended on *February 7, 2020*. Record, Consent Scheduling Order, ¶2. Appellant filed a motion to amend its complaint on April 6, 2020. Record, Motion to Amend.

The Honorable Judge Price heard the motion to compel on June 16, 2020. Record, Transcript of MTC hearing. During that hearing, Appellant's requests were reduced to (1) bank statements and (2) search terms for an electronic search of CCHA's and Harley's computer hard drives. Id., p. 17, lines 16-25 cont. p. 18, lines 1-12. Prior to the hearing, Charleston Carriage Horse Advocates (CCHA), Ellen Harley (Harley), and Appellant reached an agreement concerning a limited production of the bank statements, as well as an agreement to table any computer search dispute until Appellant provided the search terms it wanted used. Id. Judge Price ruled, both in the hearing and the Order, that Appellant could return if the search terms issue could not be agreed upon. Record, MTC Hearing, p. 19, lines 11-20; Record, Form Four Order ("As to the search terms issue[,] we will take this under advisement for thirty days."). Appellant did not return. CCHA and Harley produced the agreed-upon bank statements and the documents that were responsive to Appellant's search terms. CCHA and Harley filed motions for summary judgment on September 11, 2020. Record, Harley and CCHA Motions for MSJ. Mediation took place on September 14, 2020. Record, Proof of ADR.

Appellant filed a motion for sanctions on October 2, 2020. Record, Motion for Sanctions. Appellant submitted a motion to amend the scheduling order on October 20, 2020—more than eight months after the end of discovery. Charleston Animal Society (CAS) filed a motion for summary judgment on November 16, 2020. Record, CAS's MSJ. On May 27, 2021 all parties consented to an order of reference that referred to the following motions to the Master-in-Equity:

1. Plaintiff's Motion to Amend Complaint filed 4/20/20

2. Plaintiff's Motion for Sanctions against Defendants Charleston Carriage Horse Advocates and Ellen Harley filed 10/2/20

3. Plaintiff's Motion to Enlarge Time in Scheduling Order filed 10/20/20

4. Defendant Charleston Carriage Horse Advocates' Motion to Quash Plaintiff's Subpoena to South State Bank filed 8/19/20

5. Defendant Charleston Carriage Horse Advocates' Motion to Compel Discovery Responses from Plaintiff filed 8/17/20

6. Defendant Charleston Carriage Horse Advocates' Motion for Summary Judgment filed 9/11/20

7. Defendant Ellen Harley's Motion for Summary Judgment filed 9/11/20

8. Defendant Charleston Animal Society's Motion for Summary Judgment filed 11/16/20

Record, Order of Reference.

The Appellant filed a memorandum of law in opposition to the Harley and CCHA motions for summary judgment on August 19, 2021. Record, Appellant's Memo' in Opposition to Harley and CCHA MSJs. The Master-in-Equity, Mikell R. Scarborough, convened a hearing on September 29, 2021, concerning Appellant's motion to amend the complaint, motion to amend the scheduling order, motion for sanctions, and Respondents' respective motions for summary judgment.

On January 26, 2022, Appellant submitted, with the Master's permission, a supplemental memorandum in opposition to the motions for summary judgment. Record, Supplemental Memo' In Opposition. The Master denied Appellant's motion for sanctions on May 5, 2022. Record, Order Denying Sanctions. The Master denied Appellant's motion to amend its complaint and motion to amend the scheduling order on May 12, 2022. Record, Order Denying Amended Scheduling Order; Record, Order Denying Motion to Amend Complaint. That same day, the Master granted

Respondents' respective motions for summary judgment. Record, Order Granting MSJ. By granting the motions for summary judgment, the Master ended the case.

On May 12, 2022, Appellant submitted a motion to reconsider the order denying sanctions. Record, Rule 59(e) (sanctions). Appellant also submitted a memorandum in support. Record, Memorandum In Support of 59(e) (sanctions). On May 20, 2022, Appellant submitted a motion for reconsideration of the court's other orders concerning the motion to amend, motion to amend the scheduling order, and summary judgment. Record, Rule 59(e) (motions to amend and MSJs). Appellant also filed a memorandum. Record, Memorandum In Support of Rule 59(e) (motions to amend and MSJs). Appellant makes multiple new arguments in his Rule 59(e) motions, and these are not preserved for appellate review. First Citizens Bank & Tr. Co., Inc. v. Taylor, 431 S.C. 149, 162, 847 S.E.2d 249, 255–56 (Ct. App. 2020). The Master denied the motions for reconsideration on August 2, 2022. Record, Form Four Denying Reconsideration. Appellant filed its Notice of Appeal to this Court on August 11, 2022. Record, Notice of Appeal.

STANDARD OF REVIEW

As has been made clear by this Court, "[w]hen reviewing an action at law, referred to a master or special referee for final judgment with direct appeal to the supreme court or the court of appeals, the appellate court's jurisdiction is limited to correcting errors of law, and the appellate court will not disturb the master or special referee's findings of fact as long as they are reasonably supported by the evidence." Allen v. Pinnacle Healthcare Sys., LLC, 394 S.C. 268, 272, 715 S.E.2d 362, 364 (Ct. App. 2011). Questions of law may be decided without deference to the Master. Bluffton Towne Ctr., LLC v. Gilleland-Prince, 412 S.C. 554, 563, 772 S.E.2d 882, 887 (Ct. App. 2015). The Court of Appeals' "scope of review for a case heard by a Master-in-Equity who enters a final judgment is the same as that for review of a case heard by a circuit court without a jury." Miller v. Dillon, 432 S.C. 197, 205, 851 S.E.2d 462, 467 (Ct. App. 2020) (citation and quotation marks omitted). When reviewing the grant of a summary judgment, "the appellate court applies the same standard as the trial judge under Rule 56(c), SCRCP." Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 567, 743 S.E.2d 778, 782 (2013). The South Carolina Supreme Court has also held that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment[,] [whereas] *in cases requiring a heightened burden of proof or in cases applying federal law…the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment*." Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 330–31, 673 S.E.2d 801, 803 (2009) (emphasis added).

ARGUMENT

I. Many of Appellant's arguments are not preserved for Appellate review.

Appellant's arguments that are made for the first time in its Rule 59(e) motion to reconsider are not preserved for appellate review. First Citizens Bank & Tr. Co., Inc. v. Taylor, 431 S.C. 149, 162, 847 S.E.2d 249, 255–56. Appellant submitted a memorandum in support of its motion for sanctions. Record, Memo' In Support of Sanctions. Appellant did not submit a memorandum in support of its motion to amend the scheduling order. Appellant did submit a memorandum concerning its motion to amend the complaint. Record, Memorandum in Support of Motion to Amend. Appellant submitted an initial memorandum in opposition to the motion for summary judgment that Harley and CCHA submitted. Record, Initial Memo' In Opp. (CCHA and Harley). With the Master's permission, Appellant later submitted a Supplemental Memo' of Law in opposition to the motions for summary judgment, containing arguments that were not made at or before the hearing. Record, Supplemental Memo' of Law.

Prior to its Rule 59(e), Appellant did not make any arguments concerning its motion to amend the scheduling order. Record, Motion to Amend Scheduling Order; Record, Transcript of MSJ. Appellant is therefore limited to the reasons it listed in its motion to amend. Record, Motion to Amend Scheduling Order. Similarly, Appellant's arguments concerning its motion to amend the complaint are limited to those that were raised in the motion to amend and the memorandum in support. Record, Motion to Amend Complaint; Record, Memo' in Support of Motion to Amend Complaint. Finally, Appellant's initial memorandum in opposition concerned the summary judgment motion submitted by Harley and CCHA only. Record, Initial Memo' In Opp. (CCHA and Harley). Appelant's initial memorandum does not address First Amendment issues at all. Id. After the hearing before the Master, Appellant submitted a supplemental memorandum containing

at least some arguments concerning these issues. Record, Supplemental Memo' of Law. As will be shown below, in its brief to this Court, Appellant makes new arguments concerning these issues and others. But these arguments are not preserved for Appellate review. First Citizens Bank & Tr. Co., Inc. v. Taylor, 431 S.C. 149, 162, 847 S.E.2d 249, 255–56. This Court should disregard any argument that Appellant raised for the first time in its Rule 59(e) motions or in its brief to this Court.

II. The Master-in-Equity did not abuse his discretion when he denied Appellant's motion for sanctions.

Before turning to the motion and order concerning sanctions, background information would be helpful. After years of engaging in a bitter public debate[2] about the sufficiency of equine ordinances in the City of Charleston, Charleston Carriage Works LLC (Appellant) filed a lawsuit against members of the other side of the dispute—CCHA, Harley, and CAS. As discussed above, Appellant alleges four causes of action against these Respondents, (1) defamation (slander and libel per se), (2) conspiracy, (3) tortious interference with contractual relations, and (4) a violation of Plaintiff's civil rights under Article I, §3 of South Carolina's constitution.

Appellant has difficulty supporting its case. For example, Appellant cannot provide a single example of Ellen Harley defaming it. Record, Depo. of Broderick Christoff, p. 245, lines 21-25 cont. p. 246, lines 1-25 cont. p. 247, lines 1-3. Appellant mainly points to one video that allegedly defamed it. Record, Depo. of Broderick Christoff, p. 249, lines 20-25 cont. p. 250, lines 1-13. This video involved a horse, Big John, which fell to the ground on April 19, 2017. The superimposed video has text that indicates the animal "collapsed" to the ground and asks, "Was Big John exhausted or did he just 'trip?'" Record, Initial Memo' in Opp. to MSJ, p. 14 (listing captions on

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

video). CAS is said to have inserted the text. Record, Initial Memo' in Opp. to MSJ, p. 14. Appellant, a South Carolina limited liability company, does not know what civil rights were violated. Record, Depo. of Broderick Christoff, p. 348, lines 4-9. And Appellant's own complaint admits that no contract has been breached. Record, Appellant's Complaint, ¶¶20-27.

Based on these and other deficiencies, several of which form the bases of the Master's orders that have been appealed, Respondents have argued that Appellant is simply seeking to stop them from advocating for equine ordinances that provide better equine working conditions, as opposed to seeking legal remedies for legal wrongs; that is, Appellant's lawsuit is in effect a Strategic Lawsuit Against Public Participation, or SLAPP. Equilon Enterprises v. Consumer Cause, Inc., 29 Cal. 4th 53, 57 n. 1, 52 P.3d 685, 687 n.1 (2002) (providing the origins of the acronym). A Plaintiff uses a SLAPP "to silence and intimidate critics or opponents by overwhelming them with the cost of a legal defense until they abandon that criticism or opposition." Rogers v. Dupree, 340 Ga. App. 811, 814, 799 S.E.2d 1, 5 (2017), cert. granted, cause remanded (Apr. 16, 2018). Although South Carolina does not have anti-SLAPP legislation, "[a] number of states have passed statutes that provide defendants in civil cases a means of striking a cause of action that is aimed at chilling their exercise of privileged speech or other communication in a public process or issue of public concern." 64 A.L.R.6th 365 (Originally published in 2011) (collecting cases).

With this background in mind, Plaintiff's motion for sanctions can be properly understood. A few hours before the motion to compel hearing on June 16, 2020, the attorney for CCHA and Harley (Joseph "Trey" Thompson) sent the following email to Appellant, to confirm a telephone call that had just taken place between Appellant's counsel and Trey: "I am confirming that we will provide the CCHA monthly bank statements (to the extent that either CCHA physically possess

them or to the extent the bank can produce same) **to show cash in, cash out** of CCHA bank accounts." (emphasis added). Record, June 16, 2020 Email. In the subsequent hearing that same day, Mr. Thompson made the following statement: "So in short, Your Honor…[Plaintiff] is seeking at this point in time…bank statements from CCHA, the monthly bank statements just as they would be delivered to the client from the bank. We are going to present those, Judge." Record, Transcript of MTC Hearing, p. 17, lines 16-21. Judge Price then asked: "So -- so are y'all consenting to the bank statement?" Id., p. 18, lines 3-4. Mr. Thompson replied: "Yes, Your Honor." Id., p. 18, line 5. Mr. Thompson goes on to tell the court the following: "[O]bviously we can produce whatever we have. But to go to the bank [,] if we don't have those statements [,] we will have to request them from the bank to get them…[but] we will make it an expedited effort." Id., p. 18, lines 16-20. Appellant of course never objected to receiving "cash in, cash out" bank statements during the hearing, as he and Mr. Thompson had already previously agreed to the form in which these statements would be produced. In addition, during the motion to compel hearing, all the grounds for Appellant's motion were reduced to (1) bank statements, in the form which was agreed upon prior to the hearing, and (2) an electronic search of CCHA's and Harley's computer hard drives, which was tabled until Appellant provided the search terms to Respondents. Id., p. 17, lines 16-25 cont. p. 18, lines 1-12. As mentioned above, Judge Price also indicated, both in the hearing and in his subsequent Order, that Appellant could return if an agreement concerning the search terms did not occur. Id., p. 19, lines 11-20; Record, Form Four Order. His Order states:

> The Plaintiff's motion to compel discovery against Defendants is granted. The Defendants will produce the bank statements. As to the search terms issue[,] we will take this under advisement for thirty days. If a formal order is desired[,] the parties are free to submit one.

Record, Form Four Order (no party submitted a formal order).

Despite having received what it understood it would receive, and despite not having an order concerning the production of electronically stored information on CCHA's computer, Appellant submitted a motion for sanctions under Rule 37, which contains the provisions governing failure to comply with a court order. Rule 37(b)(1)-(2)(A)-(E), SCRCP. In its motion, Appellant asked the Court to strike both CCHA's Answer and Harley's Answer, because of the alleged failure to cooperate, and to set the case for a damages hearing. Appellant also sought to compel CCHA and Harley to produce their computers for forensic inspection. Finally, Appellant asked for an award of reasonable attorney's fees.

On December 2, 2020, Jenkins Mann (counsel for CCHA and Harley) and counsel for Appellant again agreed by telephone to resolve the dispute regarding the bank statements. Respondents would produce the bank statements in their entirety, redacting only the portion of the deposit tickets which could indicate the pledge source of the deposit. On December 12, 2020, Jenkins Mann produced the redacted bank statements as agreed. Record, December 11, 2020 Letter to Appellant's counsel with bank statement production.

Regarding the search terms, after the July hearing, counsel for the Respondents hired Rosen Litigation Technology and Consulting, Inc. (Rosen) to search CCHA's hard drive and email accounts for information responsive to the terms provided by Appellant's counsel. Shortly thereafter, counsel for CCHA began requesting search terms from Appellant. On October 6, 2020, after multiple previous discussions with Appellant's counsel, counsel for CCHA followed up by email and stated, "I just need search terms [that] you want our expert to search on CCHA's computer". Record, October 6, 2020 Email. After still not receiving search terms, counsel for CCHA followed up again with Appellant's counsel on October 26, 2020:

> Tommy,
>
> I'm following up again to see if you have a list of search terms that you want run through CCHA's computer. I cannot conduct a search unless and until have that. This is akin to a discovery request – it comes from the lawyer, not the expert. Certainly if you want to consult with your expert regarding the terms to be search [sic], I understand. If that's the case, please do so this week and get back to me.
>
> **I need to memorialize that I've been asking you for this list of search terms now for several months and repeatedly telling (as below) that I am prepared to respond to your request for information off of CCHA's computer (and any other databases you tell me you want us to search, if any) as soon as you tell me what it is to look for and where you want us to look.**
>
> I remain concerned that this is an issue you don't want to resolve because you want to argue that you don't have documents or information to defeat summary judgment 2+ years into this case because of a failure by CCHA and Harley to respond to your discovery requests. …

Record, October 26, 2020 Email (emphasis added).

After additional follow ups, by letter on November 4, 2020, Appellant provided CCHA with the terms it wanted searched. Rosen conducted a search, using Appellant's terms, and performed a de-duplication of the responses, a process that, taking place during the height of the COVID-19 pandemic and the holiday season, took approximately four months. CCHA thereafter reviewed the massive data compilation for privilege and work product, and then produced more than 10,000 responsive, non-privileged documents to the Plaintiff.

The issue of sanctions is a matter left to the sound discretion of the lower court. Skywaves I Corp. v. Branch Banking & Tr. Co., 423 S.C. 432, 456, 814 S.E.2d 643, 656 (Ct. App. 2018). The lower court's decision concerning the grant or denial of a request for sanctions will not be disturbed on appeal unless an abuse of discretion has occurred. Id. The Appellant has the burden of proof on appeal and must show that the lower court abused its discretion. Id. The Court of Appeals may

find an abuse of discretion when the Appellant shows that the lower court's decision was "without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." Skywaves I Corp. v. Branch Banking & Tr. Co., 423 S.C. 432, 456–57, 814 S.E.2d 643, 656 (citation and quotation marks omitted).

As the Court of Appeals has made clear, "[i]n determining the appropriateness of a sanction, [a] court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." Id., 423 S.C. 432, 457, 814 S.E.2d 643, 656 (citation omitted). Sanctions should punish the specific conduct of the party "and not go beyond the necessities of the situation to foreclose a decision on the merits of a case." Id., 423 S.C. 432, 457, 814 S.E.2d 643, 656-57 (citation omitted). When the sanctions essentially result in a judgment by default, "the moving party must show bad faith, willful disobedience [,] or gross indifference to its rights to justify the sanction." Id., 423 S.C. 432, 457, 814 S.E.2d 643, 657 (citation and quotation marks omitted). More fundamentally, in a situation wherein a party has not simply failed to respond to discovery but has instead submitted responses that a requesting party finds objectionable, "there must be an order of the Court before sanctions are imposed under subdivision (b) [of Rule 37] …." Richardson on Behalf of 15th Circuit Drug Enf't Unit v. Twenty-One Thousand & no/100 Dollars ($21,000.00) U.S. Currency & Various Jewelry, 430 S.C. 594, 599, 846 S.E.2d 14, 16 (Ct. App. 2020) (citation omitted). "The distinction between the two subdivisions is that there must be an order of the Court before sanctions are imposed under subdivision (b), while under subdivision (d) a party may move directly for the imposition of sanctions." Id. Rule 37(d) is reserved for parties that fail to respond to discovery entirely. Id. ("But if a party simply fails to respond to discovery, the discovering party need not proceed under Rule 37(a) and (b); instead a remedy awaits in Rule 37(d)….").

The Master found, based on the June 16, 2020 email confirmation from Mr. Thompson, that Appellant received what it understood it would receive from CCHA and Harley. Record, Order Denying Sanctions, p. 4. If Appellant objected to receiving "cash in, cash out" bank statements, it should have done so during the motion to compel hearing. Record, Order Denying Sanctions, p. 4. Appellant cannot allege, in the face of its previous understanding, the willful disobedience or bad faith necessary for the Court to strike the respective Answers of CCHA and Harley. Id., p. 5. (citing Skywaves I Corp. v. Branch Banking & Tr. Co., 423 S.C. 432, 457, 814 S.E.2d 643, 657).

Appellant also asked the Master, in the alternative, to order CCHA and Harley to turn over their computers for forensic inspection. The Master found "multiple problems" with this request. Id., p. 5. As already discussed, the discovery order at issue was not violated because Appellant received what CCHA and Harley said they would provide and what Appellant knew they would provide. Given this, ordering CCHA and Harley to turn over their computer hard drives as a sanction was unjustified. Judge Price's order did not concern, moreover, production of the computer hard drives. Record, Form Four Order. Therefore, the fact that these hard drives were not given to Appellant is not a basis for sanctions. Richardson on behalf of 15th Circuit Drug Enf't Unit v. Twenty-One Thousand & no/100 Dollars ($21,000.00) U.S. Currency & Various Jewelry, 430 S.C. 594, 599, 846 S.E.2d 14, 16 ("The distinction between the two subdivisions is that there must be an order of the Court before sanctions are imposed under subdivision (b), while under subdivision (d) a party may move directly for the imposition of sanctions.").

It should also be remembered that although Judge Price said Appellant could return to the court if the search terms issue could not be worked out, no return ever occurred or was needed. As the Master recognized, physical access to the computers was unnecessary because CCHA and Harley performed a search of their hard drives—using the search terms that Appellant provided

only belatedly and after much cajoling by Respondents. Record, Order Denying Sanctions, p. 5; Record, October 26, 2020 email.

Because no order had been violated, the Master would not—and could not—grant Appellant's request for sanctions. Richardson on behalf of 15th Circuit Drug Enf't Unit v. Twenty-One Thousand & no/100 Dollars ($21,000.00) U.S. Currency & Various Jewelry, 430 S.C. 594, 599, 846 S.E.2d 14, 16. The Master had more than reasonable factual and legal support for denying the motion for sanctions and, therefore, did not abuse his discretion when he did so. This Court should affirm. Respondents also ask this Court to affirm the denial of sanctions on any ground appearing in the record. Rule 208(b)(2), SCACR.

III. Appellant did not show "good cause" for amending the scheduling order.

Fed. R. Civ. P. 16(b) and Rule 16(b), SCRCP are substantially alike. "In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules." Maybank v. BB&T Corp., 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016).[3] "Rule 16 was drafted to prevent parties from disregarding the agreed-upon course of litigation[,] [and] [t]he Rule assures the court and the parties that 'at some point both the parties and the pleadings will be fixed.'" Dilmar Oil Co. v. Federated Mut. Ins. Co., 986 F. Supp. 959, 980 (D.S.C.) (citation omitted), aff'd sub nom. Dilmar Oil Co. v. Federated Mut. Ins. Co., 129 F.3d 116 (4th Cir. 1997). The standard for amending a scheduling order is "good cause". Dilmar Oil

[3] Fed. R. Civ. P. 16(b) ("A schedule may be modified for good cause and with the judge's consent."); Rule 16(b), SCRCP ("The court shall make a written order…and such order when entered controls the subsequent course of the action, unless modified on motion, or at the trial to prevent manifest injustice."); "The language of [Rule 16, SCRCP], particularly the 'manifest injustice' standard for modifying the order, suggests that good reason should be required for any changes…." Gillmann v. Gillmann, No. 2016-001829, 2019 WL 2151683, at *2 (S.C. Ct. App. May 15, 2019) (citing James F. Flanagan, *South Carolina Civil Procedure* 137 (2d ed. 1996))

Co. v. Federated Mut. Ins. Co., 986 F. Supp. 959, 980. The term "good cause" has nothing to do with bad faith of the movant or prejudice to the opposing party; rather, "[p]roperly construed, 'good cause' means that scheduling deadlines cannot be met despite a party's diligent efforts." Dilmar Oil Co. v. Federated Mut. Ins. Co., (citing 6A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Procedure § 1522.1 at 231 (2d ed. 1990)). Consequently, a "court may 'modify the schedule on a showing of good cause if [the deadline] cannot be met despite the diligence of the party seeking the extension.'" Id. (citing Advis. Comm. Notes for 1983 Amend.). An appellate court reviews the decision to grant or deny a motion to amend the scheduling order under an abuse of discretion standard. Dunn v. Dunn, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) ("A trial court judge's rulings on discovery matters will not be disturbed on appeal absent a clear abuse of discretion."); Am. Chiropractic Ass'n v. Trigon Healthcare, Inc., 367 F.3d 212, 235–36 (4th Cir. 2004) ("We afford substantial discretion to a district court in managing discovery and review discovery rulings only for abuse of that discretion.") (citation and quotation marks omitted).

Appellant gave three reasons for amending the scheduling order, not one of which constitutes "good cause". Record, Motion to Amend, ¶¶2-4. Appellant first blames its counsel's heart attack and open-heart surgery for the need to amend the scheduling order. Appellant filed this action in 2018. Appellant's counsel had a heart attack in April of 2019. A consent scheduling order was entered on July 16, 2019. Record, Consent Scheduling Order. Appellant's counsel had open-heart surgery in August of 2019. According to Appellant, its counsel missed half a year of work after the surgery, suggesting that he was only able to return to work in February of 2020. Record, Motion to Amend, ¶2. Although counsel for Respondents is extremely sensitive to these health concerns, the undeniable reality is that eight depositions were taken after counsel's heart attack and surgery

and prior to Appellant's motion to amend the scheduling order. Record, Memorandum Opposing Motion to Amend Scheduling Order, p. 1 n. 1.

Appellant contends the COVID-19 pandemic is another "good cause" for amending the scheduling order. Record, Motion to Amend, ¶3. The glaring issue with this contention is the fact that, per the consent scheduling order, discovery ended on February 7, 2020—which is *before* COVID-19 led to government shutdowns, etc. COVID-19 has affected many things; but when a list of all that has been affected negatively is made, the timeline for discovery in this case will not be on it.

Finally, Appellant tried to blame Harley and CCHA for the need to amend the scheduling order. Appellant states: "Ellen Harley and Charleston Carriage Horse Advocates, have intentionally delayed discovery interposing numerous delaying and dilatory tactics *for which several motions to compel are now pending*, preventing the plaintiff from meaningful discovery." Record, Motion to Amend, ¶4 (emphasis added). Appellant also claims that "[t]hese dilatory tactics are the subject of *three earlier motions*." Id. (emphasis added).

This case is so old Appellant misremembers what happened. Appellant filed a motion to compel on July 12, 2019. Appellant later filed an amended motion to compel, this time on September 27, 2019. Judge Price convened a hearing concerning the amended motion to compel on June 16, 2020. During that hearing, Appellant's requests were reduced to (1) bank statements and (2) search terms for an electronic search of CCHA's and Harley's computer hard drives. Record, Transcript of MTC hearing, p. 17, lines 16-25 cont. p. 18, lines 1-12. Therefore, at the time the Master heard the motions for summary judgment, Appellant had only its motion for sanctions pending against Harley and CCHA. Appellant did not have any motions to compel pending. Record, Order of Reference. Furthermore, as shown above, CCHA and Harley provided

the bank statements as agreed upon and performed the electronic search Appellant asked for, using the terms Appellant provided. Supra. Because of these facts (and other reasons enumerated above), the Master denied the motion for sanctions and did not abuse his discretion by doing so.

Again, per the consent scheduling order, discovery ended on February 7, 2020. Record, Consent Scheduling Order, p. 1. At the time it agreed to the consent scheduling order in July of 2019, along with the discovery cutoff therein, Appellant knew its counsel had scheduled open-heart surgery the following month. Yet Appellant only moved to amend the scheduling order on October 20, 2020—more than 15 months after the scheduling order had been entered, more than eight months after discovery had ended, and more than a month after Mediation had occurred. Record, Consent Scheduling Order; Record, Proof of ADR. Appellant should have—*and could have*—moved to amend the scheduling order before the discovery deadline approached, let alone passed. Appellant's "[c]arelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." Dilmar Oil Co. v. Federated Mut. Ins. Co., 986 F. Supp. 959, 980. This Court should affirm the Master's denial of the motion to amend the scheduling order. In addition to these arguments, Respondents ask this Court to affirm the Master's ruling on any ground appearing in the record. Rule 208(b)(2), SCACR.

IV. The Master did not abuse his discretion when he denied the motion to amend the complaint, because Appellant's motion was based on the wrong Rule, and the addition of new plaintiffs, defendants, and causes of action resulted from undue delay and would have caused prejudice.

"Courts have wide latitude in amending pleadings and '[w]hile this power should not be used indiscriminately or to prejudice or surprise another party, the decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal.'" Duncan v. CRS Sirrine Engineers, Inc., 337 S.C. 537, 542, 524 S.E.2d 115, 118 (Ct. App. 1999) (citation omitted). Denial of a motion to amend is reviewed under an abuse of discretion standard. "In the

absence of a proper reason, such as bad faith, undue delay, or prejudice, a denial of leave to amend is an abuse of discretion." Forrester v. Smith & Steele Builders, Inc., 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988). When performing the Rule 15 analysis, a court must consider "whether the defendants were prejudiced by the amendment, or whether there was some other substantial reason to deny [the motion to amend]." Patton v. Miller, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017). "…Rule 15 does not contemplate adding a new plaintiff to assert a new claim." Id. Rule 15 can be used, however, to add a new defendant, subject to the analysis above. See Intown Properties Mgmt., Inc. v. Wheaton Van Lines, Inc., 271 F.3d 164, 170 (4th Cir. 2001) (Rule 15 can be used to add a new defendant) (interpreting Fed R. Civ. P. 15); Maybank v. BB&T Corp., 416 S.C. 541, 565, 787 S.E.2d 498, 510 (South Carolina Courts look to federal caselaw for guidance when construing South Carolina Rules of Civil Procedure).

Appellant filed a motion to amend its complaint on April 6, 2020. Record, Motion to Amend. This was almost exactly two months after the discovery period had ended, per the consent scheduling order. Record, Consent Scheduling Order, ¶2. In its motion to amend, Appellant sought to add two parties as plaintiffs, Amber and Broderick Christoff, and have them assert new causes of action. Record, Motion to Amend, Exhibit (Proposed Amended Complaint). The Master denied this portion of the motion to amend, in part, because "Rule 15, SCRCP, does not allow an existing plaintiff to add a new plaintiff to the case to assert a claim against the defendant." Record, Order Denying Motion to Amend (citing Valentine v. Davis, 319 S.C. 169, 172, 460 S.E.2d 218, 219 (Ct. App. 1995)). In addition, the newly added plaintiffs would be asserting new causes of action after the close of discovery, which is the exact type of prejudice that warrants denial of a motion to amend. Duncan v. CRS Sirrine Engineers, Inc., 337 S.C. 537, 542, 524 S.E.2d 115, 117–18 (Ct. App. 1999) ("The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be

tried, and a lack of opportunity to refute it."). The Appellant submitted its motion after the close of discovery, too, despite having known since April 19, 2017 that the Christoffs' rights might have been invaded. Appellant's Brief, p. 38. Unreasonable delay coupled with prejudice will support the denial of a motion to amend. Forrester v. Smith & Steele Builders, Inc., 295 S.C. 504, 508, 369 S.E.2d 156, 159.

Appellant also sought to add five new defendants: Ellen Fort, Catherine Poag, Elizabeth Slagsvol, Domangue Consulting, and Digital Solutions, Inc. New causes of action are alleged against these new defendants. Appellant sought to allege new causes of action against Respondents as well. Adding new defendants and asserting new causes of action against them, along with adding new causes of action against Respondents, would cause prejudice, especially as the amendments would occur after the close of discovery. Duncan v. CRS Sirrine Engineers, Inc., 337 S.C. 537, 542, 524 S.E.2d 115, 117–18. Much if not all of the discovery that had occurred in this case over multiple years would have to be revisited and laboriously reduplicated in the event that the new defendants and claims were added. This prejudice, coupled with the unreasonable delay in moving to amend the complaint (not to mention the even more unreasonable delay in moving to amend the scheduling order) supports the Master's denial of Appellant's motion.

Finally, the statute of limitation bars the defamation causes of action that would be added to the amended complaint, making the amendment clearly futile. "[A] trial court may deny a motion to amend if the amendment would be clearly futile." Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 182, 826 S.E.2d 585, 589. Defamation claims are subject to a two-year statute of limitation; and the limitations period starts as soon as the defamatory statements are made, as opposed to when the plaintiff learns of them. Harris v. Tietex Int'l Ltd., 417 S.C. 533, 542, 790 S.E.2d 411, 416 (Ct. App. 2016).

The amended complaint is based on the same allegations as the original action. Record, Order Denying Motion to Amend, p. 6. Whatever defamation claims the Christoffs had as of April 19, 2017—they expired on April 19, 2019. That date is nearly a year before the motion to amend was filed on April 6, 2020. Therefore, the Christoffs' defamation claims are barred by the two-year statute of limitations. The defamation claims against the newly added defendants are also barred. The Master was right to deny the amendment, and in no event was his decision to do so an abuse of discretion. Coral Gables v. Palmetto Brick Co., 183 S.C. 478, 191 S.E. 337, 341 (1937) ("The court will not do a useless and a futile thing, by allowing an opportunity for setting up a new cause of action by amendment, which is barred by the statute of limitations."). This Court should affirm. Respondents also ask the Court to affirm the ruling on any ground appearing in the record. Rule 208(b)(2), SCACR.

V. The Master-in-Equity was right to rule that Appellant had a full and fair opportunity to conduct discovery, thereby enabling Respondents' motions for summary judgment to be considered.

Although it is generally correct to say that summary judgment should not be granted until the opposing party has had a full and fair opportunity to complete discovery, "[a] party claiming summary judgment is premature…must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact." Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 54–55, 677 S.E.2d 32, 36 (Ct. App. 2009). The nonmoving party must show that it is "not merely engaged in a 'fishing expedition.'" Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (citation omitted).

Appellant failed to meet its burden. As shown in the discussion of the Master's denial of the motion to amend the scheduling order, Appellant failed to show that the timeline for discovery in

this case was insufficient. Supra. Not only did the parties conduct exhaustive discovery—exchanging thousands and thousands of pages of documents and conducting nine depositions—but Appellant could have moved to amend the scheduling order well in advance of the discovery deadline. Appellant failed to do so and did not give any legitimate excuses for its failure. In short, Appellant cannot "advance a good reason why the time was insufficient under the facts of the case[.]" Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 54–55, 677 S.E.2d 32, 36.

Appellant also failed to show that additional discovery would uncover relevant evidence. As discussed, CCHA and Harley produced over 10,000 documents based on Appellant's search terms. (Although Appellant appears to be dissatisfied with what its search terms found, Appellant picked them.) Almost a dozen depositions were taken. Years have passed. Appellant filed its original complaint in May of 2018, more than **40 months** prior to the Master's hearing. Despite all this time and activity, Appellant says it is still looking for libelous statements. Record, MSJ Hearing Transcript, p. 78, lines 6-11. Putting aside the fact that Appellant had to have a basis for its defamation claims when it filed this lawsuit, the most Appellant can say about what it is looking for is this: "[W]ho knows what's in [the discovery] that can shed additional light on these six questions [related to First Amendment protections of defamatory speech]." Id., p. 61, lines 11-12.

Appellant also suggests that more discovery will produce relevant information concerning its conspiracy claim. Id., p. 79, lines 2-13. Appellant claims that forensic inspection of CCHA's and Harley's computer hard drives would show "substantial evidence…[of] coordination with Charleston Animal Society to attack Mr. Christoff and drive him out of business." Record, MSJ Hearing Transcript, p. 81, lines 23-25 cont. p. 82, line 1. First, Mr. Christoff is not a party in this action. Second, this "substantial evidence" of coordination between the Respondents would have

been revealed—if it in fact existed—by CAS's discovery responses. Appellant had no discovery issues with CAS at the time the Master took up the motions for summary judgment, indicating that Appellant does not have any missing communications involving CAS, CCHA, and Harley

Appellant did not give sufficient reasons that explained why the discovery timeline was insufficient and why additional discovery would result in something more than a fishing expedition. Therefore, Respondents' motions for summary judgment were not premature. The Master's decision to consider and rule upon these motions should be affirmed. The Respondents also ask the Court to affirm the Master's ruling on any ground appearing in the Record. Rule 208(b)(2), SCACR.

VI. The Master reviewed the entire record, and then correctly determined that no genuine issue of material fact was present. Respondents were therefore entitled to judgment as a matter of law.

i. Summary judgment Standard

The purpose of Rule 56 "is to expedite disposition of cases [that] do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). The motion for summary judgment "shall be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no *genuine* issue as to any *material* fact and that the moving party is entitled to a judgment as a matter of law.'" Id. (citing Rule 56(c), SCRCP) (emphasis added by Fabri Court). Although a Court must view all evidence and reasonable inferences in favor of the party opposing summary judgment, "the opposing party may not rest upon the mere allegations or denials of his pleading…[but instead] *must set forth specific facts* demonstrating to the court [that] there is a genuine issue for trial. Fowler v. Hunter, 380 S.C. 121, 125, 668 S.E.2d 803, 805 (Ct. App. 2008) (emphasis added), aff'd, 388 S.C. 355, 697 S.E.2d 531 (2010). A genuine issue of material fact is created "when there is material evidence

tending to establish the issue in the mind of a reasonable juror." Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009). A party opposing summary judgment does not meet its burden when nothing more than "speculative, theoretical, and hypothetical views [would be submitted] to the jury." Id. (citation and quotation marks omitted) (alteration added). The "assertions as to liability must be more than mere bald allegations made by the non-moving party in order to create a genuine issue of material fact." Id. Finally, as noted above, "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment[,] [whereas] in cases requiring a heightened burden of proof or in cases applying federal law…the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment." Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 330–31, 673 S.E.2d 801, 803.

ii. Defamation – Common Law

Two kinds of defamatory communications exist: "Slander is a spoken defamation while libel is a written defamation or one accomplished by actions or conduct." Kunst v. Loree, 424 S.C. 24, 39, 817 S.E.2d 295, 302 (Ct. App. 2018) (internal citation omitted), reh'g denied (Aug. 16, 2018), cert. granted in part (May 15, 2019), cert. dismissed as improvidently granted, 428 S.C. 423, 836 S.E.2d 351 (2019). A plaintiff must prove "(1) a false and defamatory statement was made; (2) the unprivileged publication of the statement was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement regardless of special harm or the publication of the statement caused special harm." Kunst v. Loree, 424 S.C. 24, 39, 817 S.E.2d 295, 302 (internal citation omitted).

Defamation is either actionable *per se* or not actionable *per se*. Id., 424 S.C. 24, 39, 817 S.E.2d 295, 302. Slander is actionable *per se*, for example, when the defendant allegedly charges the plaintiff with a crime, or unfitness in one's business or profession. Id., 424 S.C. 24, 39-40, 817 S.E.2d 295, 302-03 (listing statements that qualify). In contrast to slander, "[e]ssentially[] all libel is actionable *per se*." Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 511, 506 S.E.2d 497, 502 (1998) (explaining that libel is any written statements which "hurt" a plaintiff's reputation). The question concerning whether a statement, written or oral, is actionable *per se* or not actionable *per se* is a question of law for the court. Id., 332 S.C. 502, 510, 506 S.E.2d 497, 501.

The determination of that question is significant: "If the alleged defamatory statement is actionable *per se*, the law presumes that the defendant acted with common law malice and the plaintiff suffered general damages; however, if the alleged defamatory statement is not actionable *per se*, the plaintiff must then plead and prove both common law malice and special damages." Kunst v. Loree, 424 S.C. 24, 45–46, 817 S.E.2d 295, 306. Whereas general damages "include injury to reputation, mental suffering, hurt feelings, emotional distress, and similar types of injuries" which are not capable of monetary valuation, "[s]pecial damages are tangible losses or injuries to the Plaintiff's property, business, occupation, or profession in which it is possible to identify a specific amount of money as damages." Erickson v. Jonse Street Publishers, LLC, 368 S.C. 444, 465 n. 6, 629 S.E.2d 653, 664 n. 6 (2006) (internal citation omitted). Common law malice refers to "evil intent or a motive arising from spite or ill will." Erickson v. Jonse Street Publishers, LLC, 368 S.C. 444, 468, 629 S.E.2d 653, 666 (internal citations omitted).

iii. Defamation – First Amendment Considerations

The above analysis changes when the person allegedly defamed is a public figure or public official. In 1964, the U.S. Supreme Court decided that the First Amendment of the United States Constitution places limits on state defamation laws. Milkovich v. Lorain Journal Co., 497 U.S. 1, 14, 110 S. Ct. 2695, 2703, 111 L. Ed. 2d 1 (1990). In New York Times Co. v. Sullivan, "the Court recognized the need for '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.'" Milkovich v. Lorain Journal Co., 497 U.S. 1, 14, 110 S. Ct. 2695, 2703, 111 L. Ed. 2d 1 (internal citation omitted). Three years after New York Times Co. v. Sullivan, the Court extended the "actual malice" standard to "public figures", seeking "to protect defamatory criticism of nonpublic persons 'who are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.'" Id. (internal citation omitted). The standard of proof for "actual malice" is clear and convincing evidence. Id., 497 U.S. 1, 15, 110 S. Ct. 2695, 2703–04, 111 L. Ed. 2d 1.

The Court then extended lesser, though still significant, forms of First Amendment protection for defamatory criticism of private individuals, when the defamation involved matters of public concern. Id., 497 U.S. 1, 15, 110 S. Ct. 2695, 2704, 111 L. Ed. 2d 1. State defamation law could not impose liability without some showing of fault and could not allow recovery for presumed or punitive damages without satisfying the "actual malice" standard. Id., 497 U.S. 1, 15-16, 110 S. Ct. 2695, 2703, 111 L. Ed. 2d 1. Later, the Court added the requirement of proving falsity, as well as fault, before recovering damages. Milkovich v. Lorain Journal Co., 497 U.S. 1, 16, 110 S. Ct.

2695, 2704, 111 L. Ed. 2d 1. (referencing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986)).

The type of speech subject to state defamation actions has also been limited. "There are two subcategories of speech that cannot reasonably be interpreted as stating actual facts about an individual, and that thus constitute speech that is constitutionally protected." Snyder v. Phelps, 580 F.3d 206, 219 (4th Cir. 2009), aff'd, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011). What is generally referred to as "rhetorical hyperbole" is not actionable against any of the three categories of plaintiffs. Milkovich v. Lorain Journal Co., 497 U.S. 1, 17, 110 S. Ct. 2695, 2705, 111 L. Ed. 2d 1 (internal citation omitted). Statements on matters of public concern that fail to contain a "provably false factual connotation" are not actionable, either. Id., 497 U.S. 1, 20, 110 S. Ct. 2695, 2705, 111 L. Ed. 2d 1.

Although these First Amendment protections for defamatory criticism were created with media defendants in mind, and although the U.S. Supreme Court has not decided whether these apply to nonmedia defendants, allowing members of institutional media to defame someone while prohibiting nonmedia American citizens from doing the same thing seems untenable. Snyder v. Phelps, 580 F.3d 206, 219 n.13 (noting that the Second and Eighth Circuits have rejected any media/nonmedia distinction and stating that, "Like those two circuits, we believe that the First Amendment protects nonmedia speech on matters of public concern that does not contain provably false factual assertions."); McGill v. Parker, 179 A.D.2d 98, 108, 582 N.Y.S.2d 91, 97 (1992) ("There is no reason…why the Constitution should be construed to provide greater protection to the media in defamation suits than to others exercising their freedom of speech; 'it makes no sense to give the most protection to those publishers who reach the most readers and therefore pollute the channels of communication with the most misinformation and do the most damage to private

reputation.'") (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 773, 105 S.Ct. 2939, 2953, 86 L.Ed.2d 593 (1985) (White, J., concurring)).

Given all the above, an important analytical step involves "determining whether a particular plaintiff is a public official, public figure, or private figure." Garrard v. Charleston Cty. Sch. Dist., 429 S.C. 170, 208, 838 S.E.2d 698, 718 (Ct. App. 2019) (citation omitted), reh'g denied (Mar. 18, 2020). This determination is made by a court. Garrard v. Charleston Cty. Sch. Dist., 429 S.C. 170, 208, 838 S.E.2d 698, 718 (citation omitted). Three types of public figures exist, though only the second type, a limited public figure, is relevant in this appeal. Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 472–73, 629 S.E.2d 653, 668. A limited public figure, as the name implies, only has the status of a public figure for a limited range of issues. "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.'" Id., 368 S.C. 444, 472, 629 S.E.2d 653, 668. The South Carolina Supreme Court has adopted the Fourth Circuit's test for determining whether a Plaintiff is a limited public figure.

> 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.

Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 474, 629 S.E.2d 653, 669 (citing Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1553 (4th Cir. 1994)).

The question concerning whether a person is a limited public figure is a question of law. Id., 368 S.C. 444, 474, 629 S.E.2d 653, 669.

Another important step in analyzing a defamation case is determining whether the speech is a matter of public or private concern.

> [N]ot all speech is of equal First Amendment importance…and where matters of purely private significance are at issue, First Amendment protections are often less rigorous. That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: [T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas; and the threat of liability does not pose the risk of a reaction of self-censorship on matters of public import.

Snyder v. Phelps, 562 U.S. 443, 452, 131 S. Ct. 1207, 1215–16, 179 L. Ed. 2d 172 (2011) (internal citations and quotation marks omitted).

The U.S. Supreme Court has articulated some "guiding principles" to help determine whether speech concerns a matter of public or private concern. Id., 562 U.S. 443, 452, 131 S. Ct. 1207, 1216, 179 L. Ed. 2d 172. If a statement can "be fairly considered as relating to any matter of political, social, or other concern to the community" …or if "it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public", then the speech deals with matters of public concern. Id., 562 U.S. 443, 453, 131 S. Ct. 1207, 1216, 179 L. Ed. 2d 172 (internal citations omitted). The inappropriate or controversial character of a statement does not factor into the analysis; speech on matters of public concern can be inappropriate and controversial. Id. (citation omitted). The content, form, and context of the speech must be considered when determining whether speech is of a public or private concern. "In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said." Snyder v. Phelps, 562 U.S. 443, 454, 131 S. Ct. 1207, 1216, 179 L. Ed. 2d 172. The question

regarding whether speech is of a public or private concern "is one of law, not fact." Connick v. Myers, 461 U.S. 138, 148 n. 7, 103 S. Ct. 1684, 1691 n. 7, 75 L. Ed. 2d 708 (1983).

Although this discussion of First Amendment protections has taken place in the context of a defamation claim, these protections apply to other state law torts "when a plaintiff seeks damages for reputational, mental, or emotional injury allegedly resulting from the defendant's speech." Snyder v. Phelps, 580 F.3d 206, 218. First Amendment protections do not apply to other state law torts "when the plaintiff seeks damages for actual pecuniary loss, as opposed to injury to reputation or state of mind." Id., 580 F.3d 206, 218 n. 11. One final consideration that is relevant is this: in South Carolina, a corporation like Appellant can file a defamation action, "although it has no reputation or character in a personal sense and cannot suffer humiliation…[but] it should be borne in mind that the injury must be one to its business, resulting in pecuniary loss." Hosp. Care Corp. v. Commercial Cas. Ins. Co., 194 S.C. 370, 9 S.E.2d 796, 797 (1940).

iv. Defamation – Summary Judgment Standard (Public Official or Public Figure)

In the case of a defamation action involving a public official or public figure, the South Carolina Supreme Court has held:

> The presence or absence of actual malice is a constitutional issue and 'where a publication is protected by the *New York Times* immunity rule, summary judgment, rather than trial on the merits, is a proper vehicle for affording constitutional protection in the proper case.'
> ...
>
> Unless the trial court finds, based on pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice, it should grant summary judgment for the defendant.

George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (citing McClain v. Arnold, 275 S.C. 282, 270 S.E.2d 124 (1980)).

The South Carolina Supreme Court has also held "that the appropriate standard at the summary judgment phase on the issue of constitutional actual malice is the clear and convincing standard." Id., 345 S.C. 440, 454, 548 S.E.2d 868, 875. The determination of the existence of constitutional actual malice is "in the first instance, a question of law for the trial court." Anderson v. The Augusta Chron., 355 S.C. 461, 471, 585 S.E.2d 506, 511 (Ct. App. 2003), aff'd, 365 S.C. 589, 619 S.E.2d 428 (2005).

v. Defamation – Summary Judgment Standard (Private-figure but Public Concern)

As mentioned above, lesser though still significant First Amendment protections apply to private-figure plaintiffs—when the defamation involves matters of public concern. Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 475, 629 S.E.2d 653, 670 ("The statements were published…on an issue of public controversy or concern…[and,] [c]onsequently, even though she is a private figure, Appellant may not benefit from any of the common law presumptions."). A private-figure plaintiff is "required to plead and prove common law malice [as opposed to constitutional actual malice], demonstrate the falsity of the statements, and show actual injury in the form of general or special damages." Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 475, 629 S.E.2d 653, 670. The burden of proof for a private-figure plaintiff is "preponderance of the evidence." Id. As noted, however, a private-figure plaintiff may only recover punitive damages when he presents clear and convincing evidence that a defendant acted with constitutional actual malice. Id., 368 S.C. 444, 476-77, 629 S.E.2d 653, 670-71. The same is true for those general damages that would have been presumed but for First Amendment jurisprudence. Milkovich v. Lorain Journal Co., 497 U.S. 1, 15-16, 110 S. Ct. 2695, 2703, 111 L. Ed. 2d 1.

vi. Defamation – The Master's Ruling Should Be Affirmed

The Master ruled that Appellant is a limited public figure when it comes to the speech at issue in this appeal. Record, Order Granting Summary Judgment, pp. 6-11. Contrary to what Appellant alleges on page 15 of its brief, the Master did not ignore the limited public figure test. Id. p. 7 (discussing the test and listing the five factors). Appellant also tries to make a distinction between the controversy concerning treatment of carriage horses generally and Appellant's treatment of Big John, the horse that fell on April 19, 2017. Per Appellant, the "Master-in-Equity erroneously conflated public debate over carriage tours in general with the [Respondents'] intentional misrepresentation of the [Appellant] as an animal abuser." Appellant's Brief, p. 15. Contrary to this assertion, Appellant is the one who appears to be conflating issues. The five-part test for determining whether Appellant is a limited public figure does not include a factor involving the public or private concern of the speech. Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 474, 629 S.E.2d 653, 669. "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.'" George v. Fabri, 345 S.C. 440, 461, 548 S.E.2d 868, 879 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 351, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)). As the Master showed, prior to the incident involving Big John, Appellant injected itself into the resolution of the controversy involving the treatment of carriage horses in Charleston. Record, Order Granting Summary Judgment, pp. 7-11. Appellant's status as a limited public figure concerning the treatment of carriage horses remains when the treatment of its own carriage horses is discussed. Just as importantly, the distinction that Appellant is attempting to make is not preserved for appeal. Appellant did not make it during the summary judgment hearing or in its initial submissions to the Master. Record, Transcript of MSJ hearing; Record,

Memorandum Opposing Summary Judgement; Record, Supplemental Memorandum of Law, pp. 5-12. Although Appellant did advance this argument in its Rule 59(e) motion for reconsideration, an argument raised for the first time in a motion to reconsider is not preserved for appellate review. First Citizens Bank & Tr. Co., Inc. v. Taylor, 431 S.C. 149, 162, 847 S.E.2d 249, 255–56. Furthermore, although Appellant is conflating distinct issues, during the motion for summary judgment hearing and in its post hearing submission, Appellant conceded that the treatment of carriage horses—and by extension, treatment of its own carriage horses—is a matter of public concern. Record, Transcript of MSJ hearing, p. 73, lines 2-25 ("The carriage tours has [sic] been a matter of public concern for -- I mean, he's right. I told him I wasn't going to fuss about that."); Record, Supplemental Memorandum of Law, pp. 12-14.

To support its arguments against the limited-public figure ruling, Appellant relies almost exclusively on a misreading of Erickson v. Jones Street Publishers, LLC case. E.g., Appellant's Brief, pp. 23-27; pp. 30-34. In Erickson, the South Carolina Supreme Court determined that a guardian *ad litem* was not a limited public figure. The GAL in that case did not have access to channels of effective communication. Id., 368 S.C. 444, 474, 629 S.E.2d 653, 669. The GAL did not assume a role in the public controversy at issue in that case, id est, the reform of the guardian ad litem system in South Carolina. Id. "In fact, the record shows [the GAL] tried to avoid the spotlight and the controversy." Id. The GAL wrote letters to the Governor's office, but these were not intended to influence the outcome of the controversy involving reform of the guardian system; rather, these letters "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." Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 474, 629 S.E.2d 653, 669. The GAL's friends "secretly tape-recorded [public meetings for her,] [but these actions] do

not constitute attempts to thrust herself into the controversy[,] [because the GAL] simply was trying to learn what admittedly angry participants in a divorce and custody dispute were saying about her." Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 474–75, 629 S.E.2d 653, 669. Although the public controversy concerning reform of the guardian system existed before Jones St. Publishers, LLC published a libelous article about GAL, none of the other elements of a limited public figure were met. Id. Therefore, "neither the person who made the statements (Pat Beal) nor the publisher (Newspaper) may, by their own words and actions, transform [GAL] into a limited public figure by dragging her unwillingly into the controversy over reform of the guardian system." Id., 368 S.C. 444, 475, 629 S.E.2d 653, 669.

Unlike the GAL, Appellant does satisfy the test for limited public figure status. Record, Order Granting Summary Judgment, pp. 7-11. As shown by the Master, Appellant accessed effective channels of communication, voluntarily assumed a role of prominence in the public controversy concerning the treatment of carriage horses in Charleston and sought to influence the resolution of the controversy. Record, Order Granting Summary Judgment, pp. 7-11. The controversy existed for years before the incident with Big John, and Appellant[4] maintained its limited public figure status at the time of that incident. Id. Appellant remains a limited public figure even today. Although Appellant may be trying to suggest that it is only involved in the public controversy because of Respondents' advocacy, another's advocacy has no bearing on the five factors. Supra. Appellant made itself a public figure by its own actions and words. Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 474, 629 S.E.2d 653, 669 ("The[] principles [preventing a plaintiff from being dragged involuntarily into a controversy] do not, of course, mean a private figure may

[4] See George v. Fabri, 345 S.C. 440, 461–62, 548 S.E.2d 868, 879 (2001) (actions of owner and agent can render a commercial entity a public figure).

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."); George v. Fabri, 345 S.C. 440, 461, 548 S.E.2d 868, 879 ("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.'") (emphasis added) (citation omitted).

Because Appellant is a limited public figure, it must satisfy the constitutional actual malice standard. Appellant must show—by clear and convincing evidence—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.'" Milkovich v. Lorain Journal Co., 497 U.S. 1, 14, 110 S. Ct. 2695, 2703, 111 L. Ed. 2d 1 (internal citation omitted). What constitutes "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing[,] [but is instead measured by] sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731, 88 S. Ct. 1323, 1325, 20 L. Ed. 2d 262 (1968). It is "[p]ublishing with such doubts [that] shows reckless disregard for truth or falsity and demonstrates actual malice." Id.

Appellant gives its take on various communications involving Respondents. E.g., Appellant's Brief, pp. 22-23. But Appellant must do more than simply give its spin on actions and communications. Rather than show that Respondents knew their statements about Big John were false or that Respondents entertained serious doubts about the truth of their statements, what Appellant points to and talks about reveals only that Respondents thought Appellant and others were wrong about what caused Big John to fall to the ground. Consequently, Appellant did not

present sufficient evidence that could support a finding of constitutional actual malice. Record, Order Granting Summary Judgment, pp. 13-15. This same analysis and conclusion apply to each one of the statements that Appellant alleges are defamatory. Order Granting Summary Judgment, pp. 11-13; p. 26. In addition to affirming Appellant's status as a limited public figure and the absence of constitutional actual malice, Respondents ask this Court to affirm the grant of summary judgment on any ground appearing in the record. Rule 208(b)(2), SCACR.

Finally, in the alternative, the Master ruled that, if Appellant were a private figure, it failed to present a scintilla of evidence that could support a defamation action. As noted above, Appellant conceded that the treatment of carriage horses, which would include the treatment of Appellant's own carriage horses, is a matter of public concern. Record, Transcript of MSJ hearing, p. 73, lines 2-25 ("The carriage tours has [sic] been a matter of public concern for -- I mean, he's right. I told him I wasn't going to fuss about that."); Record, Supplemental Memorandum of Law, pp. 12-14. Therefore, if Appellant is a private figure, to survive summary judgment, Appellant must show common law malice, falsity, and actual injury in the form of general or special damages and do so by a preponderance of the evidence. Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 475, 629 S.E.2d 653, 670. Appellant failed. Record, Order Granting Summary Judgment, pp. 21-25. Appellant also failed to present clear and convincing evidence that shows Respondents published a statement with the knowledge that it was false or with a reckless disregard for whether the statement was false or not. Id., p. 25. Consequently, punitive damages are unavailable. Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 476-77, 629 S.E.2d 653, 670-71. Appellant also failed to set forth specific facts that show the statements complained about are anything other than rhetorical hyperbole or statements lacking a provably false factual connotation. Record, Order

Granting Summary Judgment, pp. 18-20. Therefore, the Master should be affirmed on this ground as well.

As shown, the Master Ruled that Appellant failed to present a scintilla of evidence that the statements complained about are false. The basis of Appellant's defamation claim is the use of the word "collapse," which the Master correctly ruled is either true or substantially true. Id., pp. 28-29. The truth or substantial truth of the matter published is a complete defense to an action based on defamation. Ross v. Columbia Newspapers, Inc., 266 S.C. 75, 80, 221 S.E.2d 770, 772 (1976). As shown by the testimony of Dr. Little, plaintiff's own veterinarian, the term "collapse," "as it relates to equines[,] is a 'partial or complete loss of posture that can occur either at rest and/or at exercise' and that tripping and falling would classify as collapsing." Order Granting Summary Judgment, p. 29; Depos. of Little, pp. 22-25 and 71; see also Depos. of Miller, p. 66, lines 5-8 ("[T]he word collapse…doesn't really tell you what happened…why the horse went down."); p. 69, lines 8-15 ("[I]n general, [the word collapse] would mean that the horse hit the ground."); p. 70, lines 5-6 (The word collapse is "the least descriptive term [to describe why a horse that hit the ground].").

Respondents again ask this Court to affirm, on any ground appearing in the record, the Master's rulings concerning defamation. Rule 208(b)(2), SCACR. In addition, CCHA and Harley adopt by reference all arguments concerning defamation that are in co-Respondent CAS's brief. Rule 208(b)(6), SCACR ("In cases involving more than one appellant or respondent, including cases consolidated for appeal, any number of parties may join in a single brief, and any party may adopt by reference all or any part of the brief of another.").[5]

[5] CCHA and Harley also adopt by reference all other arguments made in co-Respondent CAS's brief. Rule 208(b)(6), SCACR

vii. Appellant's other causes of action fail as a matter of law.

In addition to defamation, Appellant pled causes of action for "intentional interference with business relations", conspiracy, and "Violation of Plaintiff's Civil Rights under Art. I, § 3, South Carolina Constitution – Gross Negligence, Recklessness". Although Appellant claims in its brief to have filed five claims for "[1] civil conspiracy, [2] intentional infliction of mental distress (outrage), [3] violation of civil rights, [4] tortuous interference with business relations, and [5] defamation[]", Appellant's Complaint shows that it did not in fact include a claim for "intentional infliction of mental distress (outrage)" among its causes of action. Record, Appellant's Complaint. As the Master explained, summary judgment against the intentional interference with a contractual relationship claim was necessary as a matter of because no breach of any contract had occurred. Record, Hearing Transcript, p. 103, lines 2-9; Record, Order Granting Summary Judgment, pp. 31-32. Appellant does not dispute this fact. Appellant's Brief, pp. 44-45. If there is no breach of contract, then there can be no recovery under this tort. Eldeco, Inc. v. Charleston Cty. Sch. Dist., 372 S.C. 470, 481, 642 S.E.2d 726, 732 (2007) ('Where there is no breach of the contract, there can be no recovery."); First Union Mortg. Corp. v. Thomas, 317 S.C. 63, 73, 451 S.E.2d 907, 913 (Ct. App. 1994) ("Thus, without a breach of the underlying contract, there can be no recovery."). This Court should affirm the Master's ruling.

Summary judgment against Appellant's "Violation of Plaintiff's Civil Rights under Art. I, § 3, South Carolina Constitution – Gross Negligence, Recklessness" claim was required as a matter of law because Appellant sought monetary damages. Monetary damages are not recoverable for civil rights violations of South Carolina's constitution. Record, Order Granting Summary Judgment, pp. 32-33 (citing Palmer v. State, 427 S.C. 36, 829 S.E.2d 255 (Ct. App. 2019), reh'g denied, (July 12, 2019) and cert. denied, (S.C. May 28, 2021)). In addition, Appellant failed to produce

"evidence that it was deprived of its liberty interest to practice its chosen profession or its property interest in any specific employment." Record, Order Granting Summary Judgment, p. 33. Appellant failed to produce any evidence in the summary judgment hearing or in its post hearing submission. Record, Transcript of MSJ hearing; Record, Memorandum Opposing MSJ; Record, Supplemental Memorandum of Law. The Masters' factual determination should not be disturbed. Allen v. Pinnacle Healthcare Sys., LLC, 394 S.C. 268, 272, 715 S.E.2d 362, 364 ("[T]he appellate court will not disturb the master or special referee's findings of fact as long as they are reasonably supported by the evidence."). Summary judgment against this claim should be affirmed.

Finally, Appellant claims that the "Record on Appeal contains sufficient evidence to raise genuine issues of material fact as to conspiracy[.]" Appellant's Brief, p. 44. Appellant references documents that are within a section of its Brief that does not concern conspiracy directly. Appellant's Brief, p. 45 (referencing documents that are listed in a section about common law malice). Appellant does not cite any legal authority that supports its contentions about the documents it lists. Therefore, these arguments are abandoned. State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."). Notwithstanding, even if Appellant did not abandon its conspiracy claim on appeal, Appellant failed to preserve most of its arguments for appellate review. First Citizens Bank & Tr. Co., Inc. v. Taylor, 431 S.C. 149, 162, 847 S.E.2d 249, 255–56 (arguments raised for the first time in a motion to reconsider are not preserved for appellate review).

Prior to its Rule 59(e) motion, Appellant made only one specific argument about conspiracy. Record, Transcript of MSJ Hearing; Record, Memorandum In Opposition to MSJ; Record, Supplemental Memorandum of Law. Appellant argued that an email demonstrates a conspiracy

between the Respondents. Record, Supplemental Memorandum of Law, pp. 17-18. That email states: "Started today. Running 150k through next Wednesday. I am thinking the only way to defeat this City/Industry cartel is by depressing their income. The corruption is too great to fight and win." Id. (Exhibit 3). CCHA sent this email to Joe Elmore (President & CEO of CAS) and Dan Krosse (Editor in Chief of Carolina Tails, a CAS publication), along with Kurt Taylor (at the time, Director of Government Relations for CAS). This one email, sent from one individual about actions CCHA took and indicating this one individual's thoughts about carriage horse companies and the City of Charleston, does not establish that *Respondents* "*combined or had an agreement to commit* an unlawful act or a lawful act by unlawful means." Record, Order Granting Summary Judgment, p. 31 (emphasis added). Paradis v. Charleston Cnty. Sch. Dist., 433 S.C. 562, 574, 861 S.E.2d 774, 780 (2021) ("[A] plaintiff asserting a civil conspiracy claim must *establish (1) the combination or agreement of two or more persons,* (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff.") (emphasis added). This email does not show, moreover, that each one of the Respondents had a "a specific intent to accomplish [a] contemplated wrong." Paradis v. Charleston Cnty. Sch. Dist., 433 S.C. 562, 575 n. 9, 861 S.E.2d 774, 780 n.9; Record, Order Granting Summary Judgment, p. 31. Consequently, Appellant failed to set forth specific facts that demonstrate there is a genuine issue for trial. The Master's grant of summary judgment should be affirmed. Allen v. Pinnacle Healthcare Sys., LLC, 394 S.C. 268, 272, 715 S.E.2d 362, 364 ("[T]he appellate court will not disturb the master or special referee's findings of fact as long as they are reasonably supported by the evidence."). Respondents also ask this Court to affirm summary judgment, against each one of the causes of action in this subsection, on any ground appearing in the record. Rule 208(b)(2), SCACR.

CONCLUSION

Appellant has failed to "set forth specific facts demonstrating to the court [that] there is a genuine issue for trial." Fowler v. Hunter, 380 S.C. 121, 125, 668 S.E.2d 803, 805. Appellant has done nothing more than submit its own "speculative, theoretical, and hypothetical views" of the evidence. Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 17, 677 S.E.2d 612, 616 (citation and quotation marks omitted). This failure does not satisfy either the clear and convincing burden of proof or the preponderance of the evidence burden of proof.

The Court of Appeals should affirm the Master's rulings. This case should be over. In addition to the reasons give above, Respondents ask this Court to affirm, on any ground appearing in the record, the denial of sanctions, the denial of the motion to amend the complaint, the denial of the motion to amend the scheduling order, and the grant of summary judgment. Rule 208(b)(2), SCACR.

Respectfully submitted,

s/Jenkins M. Mann
Jenkins M. Mann (9986)
Shaun C. Blake (76349)
ROGERS LEWIS JACKSON MANN & QUINN, LLC
1901 Main Street, Suite 1200
Columbia, SC 29201
Tel: 803-978-2832
803-256-1268
Email:
jmann@rogerslewis.com
sblake@rogerslewis.com
ATTORNEYS FOR RESPONDENTS