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**May 25 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

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Case No.: 2018-CP-10-4083  
Appellate Tracking Number  
2022-001114

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Charleston Carriage Works, L.L.C.,

Appellant,

v.

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

Respondents.

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REPLY BRIEF TO CHARLESTON ANIMAL SOCIETY

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May 25, 2023

/s/Thomas R. Goldstein  
Thomas R. Goldstein, S. C. Bar No. 2186  
Belk, Cobb, Infinger & Goldstein, P.A.  
P. O. Box 71121  
N. Charleston, S. C. 29415-1121  
(843) 554 4291 (843) 554 5566 (fax)  
[tgoldstein@cobblaw.net](mailto:tgoldstein@cobblaw.net)  
Attorneys for Appellant)

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## **Reply to Respondent's Statement of the Case**

Respondent's statement of case tracks the Harley/Charleston Carriage Horse Advocate's statement, and just as the co-Respondents did on page 14 of their brief, the Charleston Animal Society blinks. As set forth in the companion Reply Brief, all Respondents finally concede that Big John "fell to the ground," which is a far different characterization of the event than the false, contribution-seeking description of "collapsed." Charleston Animal Society then conveniently repeats Dan Krosse's, Animal Society's "media specialist's, seven superimposed statements on the video—six of which are patently false and which were designed to whip up hysteria against the plaintiff and stimulate contributions. The record contains no evidence that eyewitnesses<sup>1</sup> were "intimidated" to stop taking video, and in fact, the record demonstrates that Ms. Harley interfered in the process of un-harnessing Big John as demonstrated by the screen grab of the raw video on page \_\_\_\_ of R.O.A. In the video released to the public, the defendants carefully edited out her interference. The record demonstrates that Krosse's edits are 86% false, and the Respondents knew they were false when they pushed them out.

The Charleston Animal Society admits the video went viral, but it falsely attributes the video as a creation of the Harley/Charleston Carriage Horse Advocates group when it is indisputable that: A) Charleston Carriage Horse Advocates is amalgamated with Charleston Animal Society, and B) Dan Krosse, Charleston Animal Society's "media specialist," edited it and inserted the false statements. The record contains substantial evidence of their joint enterprise. See the description of Harely's group as the "subcommittee group from the Animal Society" before the Charleston Tourism Commission on April 26, 2017. See R.O.A. pages \_\_\_\_ and \_\_\_\_ [April \_\_\_\_, 2017 Commission Minutes; aff. B. Christoff page 13, aff. J. Elmore ¶ 9 filed Sept. 11, 2021,

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<sup>1</sup> The "eyewitnesses" are Ellen Harley, Chair of the Charleston Animal Society's "Equine Cruelty Committee" (R.O.A. page \_\_\_\_ [Ex. 1 filed Aug. 19, 2021] and Elizabeth Fort, both directors of the Charleston Carriage Horse Advocates.

and Elmore e-mail filed Dec. 2, 2020, page 4: “Kudos to Charleston Carriage Horse Advocates. . .”],

The Animal Society also incorrectly dates its motion for summary judgment. It filed its initial application for summary judgment on October 19, 2018, also asking in the alternative for a court order requiring the plaintiff to plead with specificity. It then renewed its motion for summary judgment November 20, **2019**, the same day it filed its Answer, 15 months after the Summons and Complaint, setting forth 17 defenses, including, but not limited to, 12(b)(6), laches, intervening negligence, unconstitutionality of punitive damages, *etc.* (R.O.A. page \_\_\_\_ [Answer])

Finally, Charleston Animal Society tracks the Harley/Charleston Carriage Horse Advocates’ assertion that Appellant raised issues for the first time in its Motion for Reconsideration, which is refuted by the record. In denying reconsideration, the Master-in-Equity did not explain his reasons, so it is impossible to say that a putative “new” argument had any impact. Certainly, if any of the Respondents believed Appellant raised arguments for the first time on reconsideration, they could have asked the Master-in-Equity to address these, but no Respondent did.

### **Reply to Charleston Animal Society’s Standard of Review**

The Charleston Animal Society avoids any discussion of the usual summary judgment standard or review, instead misplacing reliance on the same cases the other Respondents cite: *Hancock v. md-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) and *Peeler v. Spartanburg Herald-Journal Div. of the New York Times, Co.*, 681 F.Supp 1144 (D.S.C. 1988) These are curious cases on which to rely. As to the first, the Supreme Court reversed the Court of Appeals’ upholding a summary judgment entered in favor of a shopping center owner on a slip-and-fall case. The trial judge granted summary judgment, holding that if there were a defect in the parking lot, it was “open.” The Supreme Court reversed holding: “Accordingly, we hold 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.” Civil Conspiracy, defamation, interference in business relations, and negligence all require preponderance of the evidence. The “heightened burden of proof” in this case applies only to “actual malice,” and actual malice applies only to public officials/ figures and punitive damages. *Erickson v. Jones Street Publishers*, 368 S.C. 444, 629 S.E.2d 653 (2006) As *Erickson* instructs, the Court does not determine a plaintiff’s status until all the evidence is in and the Court prepares jury instructions. The best the Respondents can say on this issue is that the plaintiff’s status is a highly disputed question of fact. (This principle is discussed thoroughly throughout Appellant’s Initial Brief as well as in the companion Reply Brief.)

Which brings the discussion to Respondent’s misplaced reliance on *Peeler v. Spartanburg Herald Journal*, *ibid*. There, the trial court dismissed a defamation case **brought against a government official**: “The plaintiff is a prominent Cherokee County businessman, who was successful in his bid for election to the Cherokee County School Board.” In analyzing the standard applied to “public officials” by a “media defendant,” the trial judge found the newspaper relied on information supplied the by the State Ethics Commission: “Here, Parris and the newspaper reasonably relied on the sources provided to them by the State Ethics Commission.” Here, the Appellant is a business, not a government official, and the defendants are not “media defendants”—they are charities. If the defendants were reporting from the City’s official reports, then, and only then, *Peeler* would be applicable. Instead, defendants fabricated their false narratives to exaggerate Big John’s fall to cast plaintiff in a false light as an animal abuser and to ask for donations. Almost immediately following release of the video, Charleston Animal Society boasted on its May 2, 2017, Facebook page of raising \$100,000.00 in one day. R.O.A. page \_\_\_\_ [Memo filed Aug. 19, 2021 at page 15] Respondents had no source for their misrepresentations other than their coordinated attack. The plaintiff here is **neither** a public official **nor** public figure,

and the defendants are not broadcasting or publishing companies operating under journalistic ethics. They knowingly disseminated false libel to boost donations, and they continued their attack by manipulating Google ads, and by blocking truthful corrective information to cast the plaintiff in a false light. The defendants pushed out false information to induce the public to contribute to their causes, something the South Carolina General Assembly specifically prohibits. See § 33-56-120, S. C. Code, ann., “Misrepresentations Prohibited,” *Gertz v. Welch*, 418 U.S. 323, 94 S.Ct. 2997 (1974).

Thus the Respondent, Charleston Animal Society, provides an incorrect standard of review.

### **Reply to Argument I**

**The plaintiff produced far more than a genuine issue of material fact as to defamation, conspiracy, intentional interference, and violation of the plaintiff’s civil rights.**

The parties reach common ground that *Erickson v. Jones Street Publishers*, 368 S.C. 444, 629 S.E.2d 653 (2006) controls the outcome of this case. As set forth in Appellant’s initial brief, Respondents drew Appellant into this controversy when the defendants libeled it by insinuating he is an animal abuser and unfit for his profession. Exactly like the plaintiff in *Erickson*, the Respondents drew the Appellant into a controversy against his will. Linda Erickson made inquiries of the Governor’s office as well as sent proxies to meetings to record them, but none of this transformed her into a “limited public figure.” The plaintiff’s conduct here is identical to Erickson’s—he reacted to the onslaught to try to mitigate his damages and save his business.

**I(A)(1) The plaintiff is not a “limited public figure,” and even if he were he has produced copious evidence of malice.**

Continued debate on the plaintiff’s status is needlessly repetitive and a burden on the Court.

As *Erickson, op. cit.*, instructs, the Court determines the plaintiff’s status at the close of evidence in order to know how to charge the jury. However, even if the plaintiff were required to provide “clear and convincing” evidence at summary judgment, the plaintiff has met that standard as laid out in its opening brief at pages \_\_\_\_-\_\_\_\_ and in its Reply Brief to Harley/Charleston Carriage Horse Advocates at pages \_\_\_\_-\_\_\_\_. Respondent misplaces reliance on *George v. Fabri* (a case

involving a government official), *New York Times v. Sullivan* (a case involving a government official), *Anonymous v. State Bd. Of Med. Exam'rs*, 329 S.C. 371, 496 S.E.2d 17 (1998) (disciplinary actions against physicians use the preponderance of the evidence standard), and *McClain v. Arnold*, 275 S.C. 282, 270 S.E.2d 124 (1980) ( a case involving a police officer who is a “public official.”) In addition, the publication in *McClain* was not disputed—a newspaper published an accurate story that plaintiff was a named party in a lawsuit. None of these cases support the Master-in-Equity’s decision to invoke the “drastic remedy” of summary judgment to end this case.

The Respondent’s entire theory for declaring the Appellant (a limited liability company) a “limited public figure” arises from two sources: one, that the principal attended public meetings affecting the operation of the business, and two, that the *Post & Courier* quoted him at public meetings. Leaving aside the obvious absurdity that the Charleston Animal Society’s standard transforms everyone who attends a public meeting into a “limited public figure,” the *Gertz*, *Milkovitz*, and *Firestone* cases all dispose of this argument. Respondents cannot cite a single case in American jurisprudence holding that a citizen is transformed into a “limited public figure” by attending a public meeting. More importantly, the *Erickson* holding, along with *Gertz*, demonstrates the Respondent’s legal position is not supported. Under the Respondent’s theory, a business under attack must absorb the attack, abstain from mitigating damages, and not attend public meetings that affect the business.

Charleston Animal Society then sets out several quotations when Appellant’s principal spoke at public meetings. Respondent makes Appellant’s case for him by pointing to two post defamatory interviews in which Appellant was struggling to combat the wave of terror unleashed on the business by the Charleston Animal Society and its co-conspirators, or, as Joe Elmore later described it: a campaign to “eliminate the inhumane treatment of horses”:

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 and \$95,000.

Elizabeth made the motion that the Board authorize Joe to spend the funds to go ahead with phase 1 and poll the populace. Ellen [Harley] seconded the motion. The motion passed unanimously. **Please keep this confidential.** R.O.A. page \_\_[Aug. 19, 2021, aff. B. Christoff, Ex. 3] emphasis added

Appellant's post defamatory conduct is exactly what Linda Erickson did in her case when she contacted the Governor's office and sent proxies to meetings to record conversations. She was fighting for her professional life just as Appellant was. The most astonishing thing about Charleston Animal Society's legal argument is that, notwithstanding Appellant's prior discussion of *Atlanta Humane Society v. Mills*, 274 Ga. App. 159, 618 S.E.2d 18 (Ga. Ct. App. 2005), Respondent returns to drink a second time from that poisoned well. *Atlanta Humane Society v. Mills* involved a defamation action **brought by the Humane Society!** The Georgia Court of Appeals turned them away because it is a taxpayer supported, government agency—**exactly like Charleston Animal Society.** The Respondent's brief inadvertently makes Appellant's point for it by, as Respondent says: "choosing a course of conduct that invites public attention." (Respondent's brief at page 14 citing *Reuber v. Food Chemical News, Inc.*, 925 F.2d 702 (4<sup>th</sup> Cir. 1991) The assertion that Appellant "chose" to be thrown into this controversy by running a business is ludicrous. In *Reuber*, a whistleblower plaintiff was a famous scientist who had testified before Congress and published extensively in the field of pesticides. Most importantly, he made no effort to ask for a correction or retraction:

The first of *Fitzgerald's* factors<sup>2</sup> asks whether "the plaintiff had access to channels of effective communication." 691 F.2d at 668. In *Hutchinson v. Proxmire*, the Supreme Court determined that a defamed behavioral scientist was not a public figure, in part, because his access to channels of communication was extremely limited. 443 U.S. 111, 135-36, 99 S.Ct. 2675, 2688-89, 61 L.Ed.2d 411 (1979). In contrast, Reuber had significant access to channels of effective communication before and during the time the News published the article on the letter of

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<sup>2</sup> The same five factors in *Erickson*.

reprimand. Reuber had testified before the Congress and the Environmental Protection Agency and had given lectures on the health threats associated with various pesticides. In addition, Reuber's findings on malathion were discussed in numerous television, newspaper, and radio reports. Reuber also gave at least one interview to a California paper on the perils of malathion at the very height of the controversy. Perhaps most significantly, Reuber had access to important public health and scientific sources of communication. For example, Reuber had thirty-five or more published papers to his credit. He had also been mentioned in eleven articles in the News prior to its publication of the article on the reprimand letter. These are the fora where Reuber's reputation was presumably tarnished and where it could be redeemed.

The inquiry into access to channels of communication proceeds on the assumption that public controversy can be aired without the need for litigation and that rebuttal of offending speech is preferable to recourse to the courts. *Gertz*, 418 U.S. at 344, 94 S.Ct. at 3009. **Reuber, however, attempted little or no rebuttal. He neither requested a retraction or correction of the News report nor sought to respond to the News' story in a subsequent issue; instead, he raced to court.** (emphasis added)

Here, the record demonstrates that not only did the Appellant ask for a correction/retraction on April 25, 2017 from Harley and Charleston Carriage Horse Advocates and Charleston Animal Society on May 11, 2017, long before it filed suit (R.O.A. page \_\_\_[Ex. 3 to 30(b)(6) deposition of Charleston Carriage Horse Advocates, Ex. 2, Jan. 26, 2022 Supp. Memo.]), Ellen Harley swore under oath that she never saw the letter at \_\_\_R.O.A. in her August 20, 2021 affidavit, but swore in her deposition testimony she said she received the letter and turned it over to her counsel. R.O.A. page \_\_\_[January 31, 2020, dep., page \_\_\_] When the Respondents interfered with Appellant's business, he took reasonable steps to mitigate his damages, and mitigation of damages never transforms a victim into a "limited public figure." *Erickson v. Jones Street Publishers, op. cit.* The Appellant wanted nothing more than to be left alone and run his business.

**Reply to argument I(a)(2)**

**The record is overflowing with evidence of malice.**

As set forth in the preceding paragraph, the Appellant wrote to Respondents on April 25, and May 11, 2017, and asked for a correction or retraction. See R.O.A. at page \_\_\_\_\_. It is undisputed that animal abuse is a crime in South Carolina and that if the Appellant overworked Big John to collapse, that is animal abuse. Many commentators asked the Respondents if they notified the police department—see R.O.A. page \_\_\_\_ [ \_\_\_\_\_ ] The Respondents **obviously** knew

their statements were false because they went to great lengths to suppress truthful comments about Big John, even threatening one of Appellant’s witnesses during the pendency of the case. R.O.A. page \_\_\_\_ [aff. of K. Vaughn, Ex. 2] Prior to publishing the video, all the Respondents had the public reports from the City Equine Manager and Dr. Little, and they knew that Big John suffered nothing more than a superficial abrasion. Instead of reporting investigative facts—as occurred in *Peeler v. Spartanburg Herald-Journal, op. cit.*—they were on a mission to manipulate the image to include demonstrably false statements to damage the Appellant while ginning up contributions. The Record shows that the Respondents, jointly, formed the Charleston Animal Society’s “Equine Cruelty Committee” in 2015, chaired by Ellen Harley. (R.O.A. page \_\_\_\_ [Minutes of Society’s April 21, 2015, Ex. 1 to Second Supp. affidavit of B. Christoff]) At the April 26, 2017, appearance before City Tourism Council, a Councilmember inquired of Respondents who the Charleston Carriage Horse Advocates were and Respondents disclosed that it is a “subcommittee group from the Animal Society.” R.O.A. page \_\_\_\_ [Minutes of City Tourism Meeting, April 26, 2017, page 4, 2015, Ex. 2 to third Supp. affidavit of B. Christoff filed Sept. 24, 2021. The record shows that the Respondents leapt at the chance to, as Joe Elmore says, “leverage” their presence on social media to foster hostility for carriage tours, something a taxpayer supported, quasi-governmental agency should not do. There is nothing “inferential” or “conclusory” about the Respondents’ actions, and not once did the Charleston Animal Society issue a statement calling for calm when Appellant disclosed the terror being visited on it by correspondence dated May 11, 2017. (R.O.A. page \_\_\_\_) See also April 26, 2017, Tourism Commission meeting, page 23. When asked why he used such inflammatory language, Joe Elmore explained that it was “the only way I get people to listen.” (R.O.A. page \_\_\_\_ [Miller Deposition tr. page 89, line 22]) Appellant sent to Charleston Animal Society on May 11, 2017, the same April 25, 2017, letter it sent to Harley/Charleston Carriage Horse Advocates (R.O.A. page \_\_\_\_). It is not easy to look at these letters and square

them with Respondent's assertion that Appellant "baldly claimed the Respondents knew the information was false":

You are aware that the horse that tripped, easily regained his feet as soon as he was unharnessed and walked back to the barn unassisted and was thoroughly checked by a Doctor of Veterinary Medicine who cleared Big John to return to work.

Please provide evidence that you have published a retraction and correction.

Finally, the Respondent criticizes Appellant's assertions as relying on inferences, a demonstrably meaningless criticism.<sup>3</sup> The entire scientific, logical, and legal worlds operate on inference, which is why in legal disputes, courts empanel a jury to determine who is believable and credible and who is not:

Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators, and other circumstances. *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 358 S.E.2d 150 (Ct.App.1987). "Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence. . . ." *Id.* at 601, 358 S.E.2d at 153.

*Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006)<sup>4</sup>

The Respondent does not get to make the call—and the Master-in-Equity erred—by ignoring the summary judgment standard:

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 59, 518 S.E.2d 301, 305 (Ct.App.1999). All ambiguities, conclusions, **and inferences** arising from the evidence must be construed most strongly against the moving party. *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct.App.2001). 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. See *Hall v. Fedor*, 349 S.C. 169, 173-74, 561 S.E.2d 654, 656 (Ct.App.2002). Moreover, summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Lanham v. Blue Cross and Blue Shield*, 349 S.C. 356, 363, 563 S.E.2d 331, 336 (2002); *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 558 S.E.2d 271 (Ct.App.2001). *Nelson v. CCPRC*, 362 S.C. 1, 605 S.E.2d 744 (S.C. App. 2004) (emphasis added).

## Reply to Argument IB

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<sup>3</sup> The two cases relied on by Respondent are not relevant. In *Whitner v. Duke Power Co.*, 268 S.E.2d 389 (1982), the Supreme Court held that a plaintiff cannot bring a suit for malicious prosecution where a grand jury returns an indictment because "a true bill of indictment is prima facie evidence of probable cause." Likewise, the Court of Appeals affirmed summary judgment in *Nelson v. Piggly Wiggly Cent., Inc.*, 701 S.E.2d 776 (Ct. App. 2010) because there was no evidence of a building code violation in a parking lot when plaintiff's great-grandmother ran over her.

<sup>4</sup>Seek none, conspiracy. Hide it in smiles and affability. *Julius Caesar*, II,Sc.1,lines 86-87

**The First Amendment is not a license to defame.<sup>5</sup>**

The Respondent raises two points in this argument: The first is that debate about carriage tours is a matter of public debate. Debate about carriages is public, but Appellant’s treatment of its horse is not. Once again, our Supreme Court previously answered this question. In *Erickson*, there was no dispute that the Guardian Ad Litem program was a matter of “public concern.” The false allegation that Linda Erickson was involved in a romantic relationship with the father of one of her child clients was not. That is precisely the issue here.

The Appellant has never challenged that debate about carriage tours is a matter of public concern. However, just as in *Erickson*, the Appellant’s treatment of his horses has never been a matter of public debate until the Respondents in this case, acting in coordination, repeatedly attacked him as an animal abuser. The United States Supreme Court previously made clear that the First Amendment is neither a license to lie nor an excuse to attack an individual. See footnote 8 in *Erickson*, 368 S.C. 444, 629 S.E.2d 653 (2006), quoting *Gertz v. Welch*, 418 U.S. 323 (1974):

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.”

It is shocking that a taxpayer supported, quasi-governmental entity believes it has a mandate to defame a business by intentionally publishing false statements to rile up anger and gin up contributions, a technique Respondent admits employing. The tone-deaf arrogance of the Charleston Animal Society in quoting Dan Riccio to support its argument is astonishing since Mr. Riccio testified of the same defamatory abuse he received at the hands of Respondents, quoted in

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<sup>5</sup> The Respondent cites *Garrard v. Charleston County School District*, 838 S.E.2d 698 (Ct. App. 2019). Since this case is under review by the South Carolina Supreme Court, reliance on it by any party at this time is premature.

Respondent's Reply Brief to Harley/Charleston Carriage Horse Advocates at page \_\_\_\_, which is incorporated here. No one has ever accused Charleston Carriage Works of abusing its horses until the Respondents, acting in concert, initiated a wave of attacks on Appellant by disseminating false information and making sure the corrections were suppressed.

### **Reply to Argument I(B)1**

**The statements of the Respondent were intended to portray Appellant as an animal abuser, which is libel *per se*.**

Neither the trial judge nor Respondent define what is "rhetorical hyperbole," so the parties must rely on ordinary dictionary meanings. "Hyperbole" means: "extravagant exaggeration used as a figure of speech." *Webster's Seventh New Collegiate Dictionary*. In *Parrish v. Allison*, 376 S.C. 308, 656 S.E.2d 382 (Ct. App. 2007), the plaintiff alleged the allegation he "conned" his mother out of property was actionable as defamation. This Court held a disagreement over how words were intended is always a jury question:

South Carolina law allows contemplation of the context and circumstances under which words are spoken when determining if the words have a defamatory meaning or are actionable *per se*. The resolution of conflicting meanings is reserved for the jury. In *Smith v. Smith*, 194 S.C. 247, 9 S.E.2d 584, 589 (1940), our supreme court instructed:

If words are susceptible of two meanings, one imputing a crime, and the other innocence, the latter is not to be adopted, and the other rejected, as a matter of course. In such a case, it must be left to the jury to decide in what sense defendant used them. Their conclusion must be formed from the whole of the circumstances attending the publication, including the sense in which the witnesses understood the words. *Id.* at 257, 72 S.E.2d at 589 (quoting *Jenkins v. Southern Ry. Co.*, 130 S.C. 180, 183, 125 S.E. 912, 913 (1924)); see also *Sandifer v. Electrolux Corp.*, 172 F.2d 548 (1949); *Jones v. Garner*, 250 S.C. 479, 485, 158 S.E.2d 909, 912 (1968) ([A]ll of the parts of the publication must be considered in order to ascertain the true meaning, and words are not to be given a meaning other than that which the context would show them to have.); *Leevy v. North Carolina Mut. Life Ins. Co.*, 184 S.C. 111, \_\_, 191 S.E.2d 811, 814 (1937); *Turner v. Montgomery Ward & Co.*, 165 S.C. 253, 261, 163 S.E. 796, 798-99 (1932) ([T]he evidence adduced by the plaintiff in the case at bar required the submission to the jury of the question whether the language used by [the defendant] charged the plaintiff with the commission of such crime.); *Goodwin v. Kennedy*, 347 S.C. 30, 552 S.E.2d 319 (Ct. App. 2001) (rejecting defendants argument that if context is considered then statement cannot, as a matter of law, be actionable *per se*; affirming submission to jury issue of whether defendant stating plaintiff acting like a house n\*\*\*\*\*r in his position as vice-principal actionable *per se*); *Wardlaw v. Peck*, 282 S.C. 199, 318 S.E.2d 270 (Ct. App. 1984) (How the words were to be understood in the circumstances in which they were uttered was a question for the jury, not the court, to decide.).

Respondent helpfully repeats the defamatory statements for the Court on pages 20-21, and as the affidavits on file with the Court demonstrate, the first six are demonstrably false as Appellant made clear in his June 23, 2020 Supplemental affidavit:

The CAS knew the horse had tripped, was not overworked/exhausted/overloaded, etc. as the City and the City's Police Department released reports about the incident the same day it occurred and prior to the CAS's publication of the video. The allegation about each carriage having to be weighed on each trip is completely false. Moreover, as the video demonstrates, the carriage was carrying school children, and thus weight could not have been a factor. Notwithstanding the fact that both CCHA and CAS were aware of these circumstances, CCHA's and CAS' "media specialist," Dan Krosse, an employee of CAS, edited and captioned the video published on each entity's Facebook and other media platforms. The limited evidence provided by the defendant CCHA and the more full evidence provide by CAS documenting that CAS directed Dan Krosse to assist the CCHA with video production the year before, and this assistance created the false video of the April 19<sup>th</sup> event that both defendants disseminated. (R.O.A. page \_\_\_\_)

Page limitations prevent a full discussion of the voluminous evidence of the Respondents' mendacity, but each statement is provably false, which means each one is actionable as set out in the case relied on by Respondent, *Smith v. Humane Society of U.S.* 519 S.W.3d 789 (Mo. 2017):<sup>6</sup>

The Supreme Court in *Milkovich* held that a statement labeled as an "opinion" can be the basis of an actionable defamation claim if the alleged "opinion" statement implies an assertion of objective facts. *Milkovich*, 497 U.S. at 18, 110 S.Ct. 2695. Accordingly, some statements about matters of public concern may not be protected "opinion" even if so labeled. *Id.* Respondent's Brief at page 21.

The false statements superimposed on the video cannot be read in isolation as the record is bursting with evidence of coordinated malice, conspiracy and interference directed at the plaintiff, summarized in his affidavits at page \_\_\_\_ and \_\_\_\_ R.O.A. Charleston Animal Society's assertion that the statements are mere "opinion" or "rhetorical hyperbole" is frivolous. Respondent cites 82 cases in its brief to hold on to summary judgment, but it omitted *Godwin v. Kennedy*, 347 S.C. 30, 552 S.E.2d 319 (Ct. App. 2001) where this Court held not only that allegedly defamatory

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<sup>6</sup> The alleged defamatory statement in *Smith* was that the plaintiff ran a "puppy mill," and it was in a "dirty dozen" of puppy mills cited by the State. The characterization of the plaintiff in *Smith* followed the Missouri legislature's debate over a bill called: "*The Puppy Mill Cruelty Prevention Act.*" Here, the only persons who paint Appellant as "inhumane" are the defendants.

statements must be evaluated **in context** by a jury, but also that defendants do not get a free pass on defamation hiding behind “opinion” or “rhetorical hyperbole.” (This Court also decided an assistant principal is not a public figure.) As this Court explained in *Goodwin v. Kennedy*, the meaning of alleged defamatory statements must be evaluated in the context and this determination is reserved for the jury:

In *Milkovitch*, a high school wrestling coach brought a defamation action against a newspaper and a report. The Supreme Court rejected the defendants’ argument that there is a First Amendment protection afforded defamatory statements which are categorized as “opinion” rather than “fact.” *Id.* at 17-23, 110 S.Ct. 2695. The Court held that couching a statement with a defamatory connotation in terms of an opinion does not grant an exemption for anything that might be said. The Court concluded:

[We] do not think the passage from [*Gertz*] was intended to create a wholesale defamation exemption for anything that might be labeled “opinion.” Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of ‘opinion’ may often imply an assertion of objective fact.

(It is not the words alone but the circumstances surrounding their publication which renders them susceptible of a [defamatory] construction. It is for the jury to determine whether they were used in a [defamatory] sense given the circumstances.”)

With *Goodwin* in mind, one particularly vivid example of a both demonstrable and provable false statement and malice is Krosse edit #1 viewed alongside the screen grab from the Big John video, which is in the R.O.A. at page \_\_\_\_ [color photo, Ex. 1 to Appellant’s May 20, 2022 Motion for Reconsideration] This screen grab is from the Krosse edited April 19<sup>th</sup> video. A comparison reveals that Dan Krosse deleted this scene from the version they released to the public. The photo demonstrates Ellen Harley pushing her way forward and interfering in the unharnessing of Big John. The Respondents deleted this scene from their published version because the truth conflicts with their intent to cast the Appellant in a false light. The unedited version also proves the lie about witnesses being intimidated because the video contains no evidence of “eyewitnesses [being] intimidated.” In other words, the Respondent’s statement “Why were eyewitnesses intimidated to

stop taking video when a horse collapsed” is doubly false.<sup>7</sup> There is not a *scintilla* of evidence in this voluminous record that anyone “intimidated” eyewitnesses—the statement is just another demonstrably false statement in a long list. Portraying Appellant an animal abuser fits no one’s definition of “rhetorical hyperbole,” and it is libel *per se*.

### **Reply to Argument I(B)2**

#### **None of the Respondents in this case are “media defendants.”**

The Respondent’s concession that Charleston Animal Society’s “primary function is not as a traditional newspaper” is an understatement. This issue has been repeatedly discussed in not only in Appellant’s opening brief at pages \_\_\_\_-\_\_\_\_, but also in Reply to Harley/Charleston Carriage Horse Advocates at pages \_\_\_\_-\_\_\_\_, which are incorporated here. The entire argument is a waste of the Court’s time because Ellen Harley is not a media defendant, and both Charleston Carriage Horse Advocates and the Charleston Animal Society are registered South Carolina, tax-exempt, non-profit charities, bringing them squarely within the rules governing charities. These rules prevent them from disseminating false or misleading information. Neither Harley nor Charleston Carriage Horse Advocates nor Charleston Animal Society are media defendants. They do not broadcast news; they only promulgate their views to generate donations. Anytime Joe Elmore wants to motivate contributions, he recycles a photo of an abused dog, cat, or in this case, a still photo of Big John on the ground, see R.O.A. page \_\_\_\_ [Ex. 1 to Third Supp. Affidavit filed September 24, 2021].

Finally, Respondent cites two cases for the proposition that Charleston Animal Society is a media defendant, *Branzburg v. Hayes*, 408 U.S. 665 (1972) and *Glik v. Cunniff*, 655 F.3d 78 (1<sup>st</sup> Cir. 2011). Neither case supports Respondent’s argument. *Branzburg* held that reporters do not have a reporters’ privilege shielding them from testifying before a grand jury. *Glik* allowed a

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<sup>7</sup> As noted above the “eyewitnesses” are Ellen Harley and Elizabeth Fort—directors of Charleston Carriage Horse Advocates. This record demonstrates Ms. Harley has a relaxed relationship with truth.

plaintiff to proceed on a claim for false arrest when police arrested him for videotaping police activity on his phone. Neither of these cases support Respondent in the slightest.

**Reply to Argument I(B)(2)(i)**

**The Record in this case is overflowing with evidence of malice.**

This issue has been thoroughly discussed in Appellant’s opening brief at pages \_\_\_\_ - \_\_\_\_ and in Appellant’s Reply to Harley/Charleston Carriage Horse Advocates. This record is full of compelling evidence of malice, which is summarized in the Record on Appeal at pages \_\_\_\_\_[Supp. Aff. June 23, 2020, page 10, Memo filed May 20, 2022, page 25, Second aff. Ex. 2, Memo May20, 2022] and discussed in Appellant’s initial brief at pages \_\_\_\_ - \_\_\_\_\_. The Respondent directed Harley to keep its activities secret: “FYI—Please do not share outside of the Animal Society.” R.O.A. page \_\_\_\_[Memo, Ex. 2 May 20, 2022] If what the Charleston Animal Society was up to was legitimate, there would be no motivation for secrecy. The question of malice is a question only a jury can answer:

Actual malice requires that at the time of the defendant's act or omission he was conscious or chargeable with consciousness of his wrongdoing. *Padgett v. Sun News*, 278 S.C. 26, 292 S.E.2d 30 (1982). Malice may be proved by direct or circumstantial evidence. *Hainer v. American Medical Int'l, Inc.*, 328 S.C. 128, 492 S.E.2d 103 (1997); *Smith v. Smith*, 194 S.C. 247, 9 S.E.2d 584 (1940).

Whether malice is the incentive for a publication is ordinarily for the jury to decide. See *Ponticelli v. Mine Safety Appliance Co.*, 104 R.I. 549, 247 A.2d 303 (1968) (citing *3 Restatement of Torts* § 619(2)). Proof that statements were published in an improper and unjustified manner is sufficient evidence to submit the issue of actual malice to a jury. *Hainer, supra*; *Mains v. K Mart Corp.*, 297 S.C. 142, 375 S.E.2d 311 (Ct.App.1988). See also *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 514 S.E.2d 126 (1999)(finding factual inquiries, such as whether the defendants acted in good faith in making the statement, questions for the jury).

We find genuine issues of fact exist regarding whether the statement was made with actual malice. The issue of actual malice is properly a question for the jury. *Murray v. Holnam, Inc.*, 542 S.E.2d 743, 344 S.C. 129 (S.C. App. 2001)

**Reply to Argument I(B)(2)(ii)**

**The Respondent’s statements are demonstrably and provably false.**

The Respondent’s argument here is repetitious. Appellant provided an abundance of evidence that the Respondents’ joint statements are demonstrably false. Respondent again ignores not only the summary judgment standard, but also the function of a jury to evaluate the words

published **in the context in which they were published** to arrive at which party is more credible and believable. The determination of the how the words are received and the context in why they were published is exclusively for a jury:

The general rule is that the testimony of readers or hearers in actions for libel or slander, as to what they understood the alleged defamatory words to mean, is inadmissible, at least where the words are unambiguous and plain and in the absence of peculiar circumstances, with as respects the language employed or the manner of its utterance or publication. However, such evidence is held to be admissible where the meaning of the words is doubtful or ambiguous . . . Where the meaning of the words is doubtful or ambiguous, witnesses who heard them may be examined as to the sense in which they understood them, but it is the province of the jury to construe words, and to determine in what sense the speaker used them. . . . the plaintiff may give evidence of surrounding circumstances from which a defamatory meaning can be inferred; he may call witnesses to state how they understood the libel; though the jury are not bound to adopt the opinions of such witnesses. *Holtzscheiter v. Thomson Newspapers, Inc.*, 306 S.C. 297, 411 S.E.2d 664, (1991), citing *Nettles v. MacMillan Petroleum Corp.*, 210 S.C. 200, 42 S.E.2d 57 (1947) (court affirmed directed verdict for outrage and reversed directed verdict for defamation)

On retrial, *Holtzscheiter II*, the Court hewed to the same standard but reversed an award of \$1,500,000.00 in punitive damages and remanded for a new trial. *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497 (1998) *Holtzscheiter II* further erodes Respondent's arguments holding

If a defamation is actionable *per se*, then under common law principles the law *presumes* the defendant acted with common law malice and that the plaintiff suffered general damages. If a defamation is not actionable *per se*, then at common law the plaintiff must plead and prove common law actual malice and special damages.

Since the Respondents accused the Appellant of working his horse to collapse and exhaustion and "intimidating" witnesses and interfered with his web presence and launched a multi-front attack summarized in the record on appeal at page \_\_\_\_\_, the Master-in-Equity erred in preventing the plaintiff from having his day in court by imposing the "drastic remedy" of summary judgment.

### **Reply to argument I(B)3**

**The Respondent changes its legal position, conceding that Charleston Animal Society is not a media defendant, but the distinction is immaterial.**

Respondent advances hubris to Homeric levels. Just as it did on page 14 when it blinked before this Court about using the word "collapsed" to describe Big John's fall, Respondent is, once again, changing its legal position and hedging its bets. The distinction between media and non-

media defendants is a red herring and wastes the Court's limited judicial resources on an unproductive discussion. Charleston Animal Society is a quasi-governmental entity that operates on property provided by the County in a building provided by the County and receives \$175,000.00 a month from the County as well as smaller amounts from other municipalities. This record demonstrates the Charleston Animal Society's statements are both demonstrably false and libel *per se*, and it can find no refuge in the United States Supreme Court's 8-1 *Phelps* decision. In that case the U. S. Supreme Court held the family of a service member killed in action could not maintain an action for infliction of mental distress against Westboro Baptist Church because Phelps and his odious religious fanatics picketed on public property about 1,000 feet from the Snyder funeral where they could not be seen. The Supreme Court held that the picketers holding up signs such as "God hates fags," and "Thank God for I.E.D.'s in a public place were disgusting expressions, but expressions of a non-specific nature and therefore insufficient to rise to the level of intentional infliction of mental distress on the Snyder family.

The Respondent's entire argument is both bogus and repetitive. The *Phelps* case sheds no light on the issues before the Court, and an argument over media vs. non-media defendants is likewise not relevant at summary judgment. None of the reasoning of either *Phelps* or *Citizens United* is remotely related to whether the Master-in-Equity erred in granting summary judgment, or erred in refusing to compel Respondents to comply with discovery,<sup>8</sup> or erred in refusing plaintiff's application to add parties, or whether refusing a single scheduling Order amendment is an abuse of discretion. Even media defendants do not get free passes on defamation. The Supreme Court has already provided the procedure in *Erickson*, which controls this case from the start to finish. The distinction between media defendants and internet trolls is decided at the end of the

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<sup>8</sup> As set forth in Appellant's initial brief, the decision to deny Plaintiff's motion for sanctions is obvious error. The Master-in-Equity first ruled that the motion had to go back to Judge Price and then denied it, an obvious contradiction.

case and prior to the jury receiving instructions and is not relevant or helpful in answering the question of whether the Appellant has or has not created genuine issues of material fact.

**Reply to Argument C**

**None of the Respondent's statements are true and must be viewed in the context in which they are made. Truth-as-defense is an affirmative defense and a jury question.**

Respondent rewrites the law of defamation in Argument C. It contends that all of the Respondent's statements might not be "of and about" the Appellant, but the record refutes this and demonstrates Respondent identified Appellant by name immediately after the publication. See Charleston Animal Society's Facebook page, commenting on Big John's fall:

Christoff's statement is a reaction to the fact that **more than 11 million people saw the video of his horse, "Big John,"** collapse on Meeting Street last week. R.O.A. page \_\_\_[Jan. 26, 2022] (emphasis added)

On May 11, 2017, after receiving Appellant's letter informing it of the terror raining down on Appellant, the Charleston Animal Society, the protector of animals, was content to stoke the hatred—it never did correct the record or urge its supporters to refrain from harassing Appellant. Respondent attempts to deflect from its dangerous program by producing a video of Appellant's carriages not coming to a complete stop at stop signs to justify open season on Appellant. The *Erickson* decision rejects such *post hoc* rationalization as a defense. Leaving aside the silliness of Respondent's ridiculous assertion, Respondent overlooks the controlling principle of law: the defense of truth is an affirmative defense that must be plead and proved, and the Appellant has forcefully, repeatedly, overwhelmingly demonstrated the Charleston Animal Society's statements are false. The Charleston Animal Society hallucinated its assertion that "loaded carriages are never weighed" out of whole cloth as part of its series of false statements to paint Appellant as an animal abuser. Respondent urges this Court to: (a) accept its characterization of its statements by ignoring the Appellant's evidence, (b) ignore the context in which the statements were made, and (c) invert the summary judgment standard. If Respondent wishes to rest on a truth-is-a-

defense, then that defense is for a jury to decide. *Parrish v. Allison*, 376 S.C. 308, 656 S.E.2d 382 (Ct. App. 2007), quoted above on page 11.

### **Reply to Argument II**

**The Appellant provided overwhelming evidence of a conspiracy including, but not limited to an exhortation to keep their actions confidential.**

The Respondent sets out the correct elements of conspiracy on page 32 and alleges a failure of Appellant to establish a genuine issue of material fact that the Respondents set out specifically to harm the Appellant. To do this at summary judgment, Respondent cannot cherry pick the evidence and ask the Court to invert the summary judgment standard. Likewise, Respondent cannot profit from the fact that neither Harley nor the Charleston Carriage Horse Advocates ever fully responded to discovery. Charleston Animal Society did, and there is page after page after page of coordination between the Respondents to attack the carriage tours in general and the Appellant specifically. Respondent cites to the March 30, 2017, e-mail as if it is the only evidence in a vacuum. As far back as August 18, 2015, the Respondents' jointly formed the "Carriage Horse Cruelty Committee." Joe Elmore suggested the Committee hire Forbes Tate to "leverage" their social media presence to, as Ms. Harley says in their March e-mail, "depress their income." The plan was "to effectively eliminate the inhumane treatment of horses." He estimated this "Phase 1" cost to be around \$95,000.00. (R.O.A. page \_\_\_\_.) Leaving aside the obvious—that ruining a business is a strange thing for a local government agency to be doing, the Respondent ignores Appellant's Fourth Supplemental Affidavit filed April 22, 2022, which demonstrates how the Respondents have specifically targeted him by purchasing Google keywords—on the taxpayer's dime—at an unknown cost to put him out of business. This affidavit demonstrates conclusively that the Respondents have not targeted competitors—only the Appellant. The affidavit demonstrates how Respondents redirect Appellant's potential customer searches to: "Solutions for Horse Carriages—Charleston Animal Society." (R.O.A. page \_\_\_\_, [fourth supplemental affidavit filed April 22, 2022, quoted below] This is as close to the proverbial "smoking gun" as

litigation gets. The only thing we do not know—because discovery is incomplete—is which words did they purchase and how much did they pay?

Moreover, the affidavit of Ms. Khaladi-Ghom is further falsified by the April 30, 2017, screen grab, Exhibit 6, which demonstrates the defendants were not merely “targeting” the words “Charleston” and “carriage.” As Exhibit 6 demonstrates, if Ms. Khaladi-Ghom’s affidavit were correct, then a Google search for “Charleston carriage” would have displayed the ad. This proves the defendants were specifically targeting the exact business name of “Charleston Carriage Works,” and the defendants are hoping to get away with this by suppressing the discovery material. In fact, we obtained a February 7, 2017, email from Ellen Harley to Dan Krosse and Joe Elmore discussing the strategy of “geotargeting” and exact match keywords that include specific carriage company names. See Exhibit 7. The defendants went even further and purchased variations of the domain name used by “Charleston CARES,” which is a carriage organization created to combat the defendants’ false narrative. In an email dated May 3, 2018 (Exhibit 8) Ellen Harley to Dan Krosse, he reports to her about completing this subterfuge and tells her: “They are going to s#!t their pants!” to which Ms. Harley replied: “DONE!!!” Remember: these are charities, and they are obviously conspiring.

Until the defendants are forced to make the discovery available to my expert, we will never know who paid, how much, for how long, and for which words. The monthly Google reports will reveal his information, and I believe I have a right to see them (along with the other requested discovery material the defendants have withheld) in order to prepare my case for trial.

R.O.A. page \_\_\_\_

The evidence of conspiracy in this case is overwhelming and certainly more than the scintilla required to create a genuine issue of material fact.

### **Reply to Argument III**

**The record demonstrates that Respondents have interfered in Respondent’s web presence to interfere in his efforts to gain customers and alleged that it is in violation of its franchise agreement with the City by disobeying road control signs.**

The analysis here is the same analysis in the preceding section. The Respondent asserts that because the City has not moved to terminate Appellant’s franchise agreement that Appellant cannot move forward on tortious interference, which is like saying an unsuccessful bank robbery is not a crime. As discussed on the previous page, the Respondents have jointly interfered in Appellant’s web presence not only causing the Appellant to lose income from cancelled tours and redirected potential passengers, but also to spend thousands and thousands of dollars combatting the Respondents painting Appellant as an animal abuser. The record bursts at the seams with Respondent’s interference. On page \_\_\_\_ of the R.O.A. [Second Supplemental Affidavit filed September 24, 2021] is the Charleston Animal Society’s repetition of Big John’s “exhaustion”

along with yet another completely bogus repetition of the animal rights lies under the heading “Demand Humane Carriage Tours.” Obviously, the implication is that the tours conducted at present are inhumane, *i.e.* Big John suffered animal abuse. It is not necessary to repeat the analysis set forth in the preceding argument, but it is indisputable that these demonstrably false statements are broadcast: to influence the City to terminate the franchise agreement and to interfere (and intimidate) prospective clients looking up “Charleston Carriage Works” on the Internet. Moreover, Exhibit 3, the Minutes of the April 26, 2017, Tourism Commission leave no doubt as to the Respondents’ intent. As the Charleston Animal Society stated: “The decision was made [in 2015] under the current system and questions about the enforcement that **the current system is not humane.**” R.O.A. page \_\_\_\_ [Minutes page 8] (emphasis added)

The Charleston Animal Society attempts to hide its malicious intent under cover of calling for a peer reviewed study. Leaving aside there are many such studies, every veterinarian who testified in this case testified that Appellant’s horses are well treated and not over-exerted (R.O.A. page \_\_\_\_ [Minutes page 2]. The veterinarian’s testimony highlights the Charleston Animal Society’s dishonesty (and unfamiliarity with horses). First, there are several peer reviewed studies of carriage horses that show that their cortisol levels are lower than horses at pasture:

And the conclusion [of the study on N. Y. carriage horses] was that when they’re going through their daily routine at work, that they’re comfortable with that routine. When they’re loose in a herd, they’re fighting over resources, fighting at each other, kicking at each other, swatting at flies, whatever it is that that lack of routine and possibly excessive energy leads to increased cortisol levels. (R.O.A. page \_\_\_\_ [Miller deposition at page 105] (cortisol is the stress hormone)

Charleston Animal Society has over 9 million dollars invested in speculative trading, so if it wanted to commission a study, it could do so at any time. The evidence in the case creates far more than a scintilla of evidence that the Respondents are attempting to interfere in the Appellant’s relationship with the City and with its passengers.

#### **Reply to Argument IV**

**The record demonstrates that the Charleston Animal Society is a quasi-governmental agency, and South Carolina law has long provided for actions against the government for violations of civil rights, including interference in citizens' Constitutional rights to be free from unlawful government interference.**

Even though the Respondent breaks its argument into 3 subparts (Respondent's Brief pages 36-38), they can all be treated as one. In reverse order, it is undisputed that the Charleston Animal Society provides animal control services to Charleston County and surrounding municipalities. It operates on parcels provided by Charleston County and North Charleston, and the County currently pays the Respondent \$175,000.00 a month to receive stray and injured dogs and cats: "The Society shall immediately place animals accepted at the shelter in a suitable enclosure and care for said animal at the expense of the County as set forth in Section 1.12. . ." (R.O.A. page \_\_\_) As set forth in Appellant's initial brief, injured or abandoned livestock go to L.E.A.R.N. in Megget, South Carolina, which is memorialized in the Charleston Animal Society's "Animal Shelter Agreement," dated July 1, 2014, attached as Exhibit 5 to the September 11, 2020 affidavit of Joe Elmore. (R.O.A. page \_\_\_) This agreement requires the Respondent to provide for dogs and cats and to send other animals to other subcontractors. The 2018 year end statement reveals that the County and other municipalities in 2018 paid to Respondent \$137,898.17 per month. According to the Elmore affidavit, in 2018, they had \$8,567,459.00 invested in the stock market. (The current publicly posted returns show \$15,903,203.00 in securities in 2021, down to \$14,284,738.00 in 2022, more than enough to do a study if they were really interested.) The question of whether an aggrieved plaintiff can sue the government is so commonly known that further discussion is unnecessary. South Carolina enacted a *State Tort Claims Act* to control suits against government agencies and charitable immunity for charities, but neither protects Charleston Animal Society for defamation, conspiracy, intentional interference, or violation of the plaintiff's civil rights. In his September 11<sup>th</sup> affidavit, Elmore admits that he directed the editing and dissemination of the video. See affidavit in R.O.A. at page \_\_\_ ¶ 9. He then makes a shocking

confession in the following paragraph that he “was not in possession of any information that would call into question the veracity of using the term ‘collapse’ to describe what occurred that left Big John lying there on the pavement.” Leaving aside that this statement is completely false—it is doubly shocking that on the one hand he admits he had no information about what happened while on the other, he was comfortable in describing Big John’s fall as collapse, and then for good measure, he deployed a few more false statements to go with what he admits he did not know!<sup>9</sup> This is a startling confession, and it is completely at variance with the statement in Respondent’s brief: “Appellant failed to produce evidence that the government was substantially, or even minimally, involved in the challenged activity.” (Respondent’s Brief at page 38, which must be a typographical error because Respondent is a quasi-governmental agency as described by the Georgia Court of Appeals in *Atlanta Humane Society v. Mills, op.cit.*) None of the veterinarians thought Big John “collapsed.” The City’s Equine manager did not think he “collapsed,” any more than a child falling down on the playground is described as collapsing. And finally, Joe Elmore demonstrates his ignorance of equines because he does not know that a fallen horse in a harness cannot stand up until unharnessed.

In *Dennis v. Sparks*, 449 U.S. 24 (1980), the plaintiff sued a mining company and a judge for conspiring to issue an unlawful injunction motivated by a bribe. The Supreme Court held that the judge who issued the injunction was not amenable to suit because he enjoyed judicial immunity, but the suit could go forward against the person who bribed him under 42 U.S.C. §1983. Because the *State Torts Claims Act* provides no immunity (or cap) for intentional constitutional violations, Charleston Animal Society is amenable to suit for the same reasons set forth above, the only difference being that unreasonable acts of government agencies make the agency subject to

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<sup>9</sup> As set forth above, now that the Respondent is before the Court of Appeals, they decided to be more judicious in their language and described Big John’s fall as a “fall.” Respondent’s Brief at page 14.

paying the prevailing party's attorney's fees under § 15-77-300, 310, S. C. Code, ann. Other than subject to a claim for attorney's fees, the analysis is the same as discussed above.

### **Reply to Argument V**

**The Respondent has not identified a scintilla of prejudice by allowing amendments to the complaint.**

This issue is fully addressed in Appellant's Initial Brief at pages \_\_\_ - \_\_\_ and in Reply to co-Respondent's Brief at pages \_\_\_ - \_\_\_\_. The only "legal prejudice" Respondent claims will follow from the proposed amendment is that they might engage in additional discovery. This is not "legal prejudice. In *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 369 S.E.2d 156 (Ct. App. 1986), this Court rejected this exact argument:

In addition to Forrester's delay in making application to amend, the city also claims prejudice because it will be required to file additional pleadings, engage in additional discovery, and incur additional costs. It also argues the amendment will prolong the litigation. Although several federal courts have found prejudice where motions were made to amend after extensive discovery, we have not been shown the extent of additional discovery the City claims in this case or how it will prejudice the City. The fact that the City will be "obliged to go to some additional time and expense in order to answer the amended complaint does not constitute such prejudice as will preclude the amendment." 35A C.J.S. Federal Civil Procedure Section 330, at 500 (1960). In *Thomas v. Medesco, Inc., Division of Harvard Industries, Inc.*, 67 F.R.D. 129 (E.D.Pa. 1974), the court permitted an amendment to add punitive damages in the face of the defendant's assertion the amendment would require it to file new pleadings, engage in new discovery, join new parties, and generally reopen the entire pretrial process. The court found the plaintiff was not introducing new facts and held "we will follow the spirit of Rule 15 and grant plaintiff's motion." *Thomas*, 67 F.R.D. at 131. These reasons, we hold, do not constitute legal prejudice.

The proposed amendments here do not prejudice the defendant in the least, and as Appellant's Initial Brief and Reply Brief to co-conspirators Harley and Charleston Carriage Horse Advocates demonstrate, discovery is far from over. The proposed amendments are only to address Defendants' contention that some of the claimed damages are "personal" and to flesh out who exactly is in charge at Charleston Carriage Horse Advocates. The Master-in-Equity gave all of this short shrift and did not treat it seriously, and therefore abused his discretion.

### **Reply to Argument VI**

**Between counsel’s health complication, the onset of COVID restrictions, and the refusal of co-conspirators to provide discovery, the Plaintiff was entitled to a single extension of a scheduling Order.**

This issue is fully briefed in Appellant’s Initial Brief at pages \_\_\_\_-\_\_\_\_ and Reply Brief to co-defendants at pages \_\_\_\_-\_\_\_\_. In brief reply, Appellant points out that the scheduling Order was never extended once despite a serious medical disability and the onset of COVID. Moreover, the Respondent conducted discovery beyond the closing of the Scheduling Order without objection from the Plaintiff. Finally, Harley and Charleston Carriage Horse Advocates never provided the necessary access to Plaintiff’s expert for a forensic examination as they promised to do. While the Charleston Animal Society provided discovery in good faith, its co-defendants did not as a quick review of Charleston Carriage Horse Advocates’ 30(b)(6) deposition, summarized at page \_\_\_\_\_ of the Record on Appeal will reveal. None of the defendants filed their answers to the complaint until 79 days prior to expiration of the Scheduling Order. One final note of clarification: if Respondent believes that open heart surgery is a temporary inconvenience, hard lessons lie ahead. It is unconscionable to argue that counsel was not entitled to a single extension of a Scheduling Order.

**Conclusion**

As set forth in Appellant’s companion Reply Brief, the analysis of this case starts and ends with the Supreme Court’s analysis in *Erickson v. Jones Street Publishers, op. cit.* This record makes clear the joint and intentional effort of the Respondents to put Appellant out of business by painting him as an animal abuser, libel *per se*, suppressing truthful information, and interfering with his Internet presence. It is solely for a jury—not a judge—to evaluate the evidence to determine if the Appellant has proved by a preponderance of the evidence the conspiracy to defame him and ruin his business by interfering in his ability to secure new passengers.

Respectfully submitted,

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/s/ Thomas R. Goldstein  
Belk, Cobb, Infinger & Goldstein, P.A  
P. O. Box 71121  
Charleston, S. C. 29415-1121  
(843) 554-4211  
[tgoldstein@cobblaw.net](mailto:tgoldstein@cobblaw.net)