RECEIVED
Aug 09 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No.: 2018-CP-10-4083

Appellate Case No.: 2022-001114

Charleston Carriage Works, L.L.C., Appellant,

v.

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

FINAL BRIEF OF APPELLANT

August 9, 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
Attorneys for Appellant)

TABLE OF CONTENTS

Table of Authorities

Cases:

Other authorities:

Statement of Issues on Appeal

1. DID THE MASTER-IN-EQUITY ERR IN REFUSING TO REQUIRE THE CHARLESTON CARRIAGE HORSE ADVOCATES AND ELLEN HARLEY PROVIDE REQUESTED DISCOVERY MATERIAL, INCLUDING, BUT NOT LIMITED TO, A FORENSIC EXAMINATION OF THEIR ELECTRONIC DEVICES AND PROCEED TO SUMMARY JUDGMENT WHEN THE PLAINTIFF HAD NOT BEEN PROVIDED A FULL AND FAIR OPPORTUNITY TO COMPLETE DISCOVERY?

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

A. THE MASTER-IN-EQUITY IMPROPERLY CONSTRUED THE EVIDENCE AGAINST THE PLAINTIFF AS TO ALL CAUSES OF ACTION.

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

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

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

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

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

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

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

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

Statement of the Case

Charleston Carriage Works is one of four horse-drawn carriage companies in Charleston operating under the City's Tourism Regulations. (R.O.A. Vol. 4, page 1707) On April 19, 2017, the City assigned the plaintiff a route that takes the tour down Meeting Street. April 19th was a pleasant day, with temperatures in the low 70's. An experienced driver, Gabby Byrd, carried 10 school children from North Carolina behind Big John, a 22-year-old Belgian draft horse in new shoes. As the carriage approached the intersection of Meeting Street and Hasell Street, Big John slipped, sat and then laid down until he was unharnessed and walked back to the barn 11 minutes later.

Immediately, a small crowd gathered, including two principals of the "Charleston Carriage Horse Advocates" (and also the Charleston Animal Society's "Equine Cruelty Committee"), Ellen Harley and Elizabeth Fort. (Vol. 1, 364, 386, Vol. 2, 567, 585, Vol. 3, 1059 R.O.A. [City Tourism Minutes Aug. 18, 2015, Supp. affidavit filed June 23, 2020, page 5, Ex. 1 and Second Supp. affidavit filed Aug. 19, 2021; Ex. 1 May 20, 2022 Motion[photo]) Video evidence demonstrates that Ms. Harley pushed her way forward and was interfering with the driver attempting to unharness Big John who asked her to step back. R.O.A. Vol 3, page 972 [screen shot of video filed May 20, 2022]

In accordance with City regulations (R.O.A. pages 1707-1716), the City dispatched its Equine Manager, Shannon Tillman, to the scene to examine Big John and prepare a written report. She found him unharmed and pronounced him fit for work. In addition, a qualified Doctor of Veterinary Medicine, Dr. Byrd (now Dr. Little) examined Big John and also found him unharmed and fit for work. Both the City's Equine Manager and the veterinarian reduced their findings to writing, which the City immediately released to the public. Both reports are found in the R.O.A. at Vol. 2, 567, Vol. 3, 1059 [Ex. 1 to dep. of Dr. Miller; Dr. Little quoted page 22 of Jan. 26, 2022

Supp. Memo, R.O.A. Vol. 3, pages 851-854. The defendants knew of these reports prior to disseminating their edited video containing false statements.

Immediately following the April 19th incident, the defendants cobbled together a video comprised of footage shot by Ellen Harley and one or two others. Dan Krosse, the Charleston Animal Society's "media specialist," edited and inserted demonstrably false editorial comments in the form of insinuating questions and published it as "evidence" of Big John's "collapse" from "exhaustion." R.O.A. Vol. 2, pages 352, 353-355, 366, 398 [affidavits filed February 25, 2020, page 4, pages 6-7; filed Dec. 2, 2020, page 7; September 24, 2021, page 11, page 15 "Demand Humane Carriage Tours," *etc*.; note quotation marks on "trip" on defendants' video labeling)]

On April 25, 2017 and May 11, 2017, the plaintiff sent letters to the defendants informing them that their misrepresentations were damaging the plaintiff and asking them to please correct the statement that Big John collapsed. R.O.A. Vol. 2, page 867 [Supp. Memo. of Law filed January 6, 2022, Exhibits 1 and 2 and Ex. 3 to January 31, 2020 deposition of Ellen Harley]. When the request for retraction failed, and after a year of escalating damage resulting from the defendants' continuing social media statements labeling him as an animal abuser, the plaintiff filed a suit in the Charleston County Court of Common Pleas on May 29, 2018 at Case Number 2018-CP-10-2704. On July 19, 2018, the defendants filed a Notice of Removal to federal court, and on July 23, 2018, the plaintiff filed a motion to remand to state court. On August 15, 2018, the plaintiff took a voluntary nonsuit and refiled the action in state court omitting the federal cause of action on August 17, 2018 at Case Number 2018-CP-10-4083, alleging the five causes of action: civil conspiracy, intentional infliction of mental distress (outrage), violation of civil rights, tortuous interference with business relations, and defamation. (R.O.A. Vol. 1, page 77)

The defendants filed joint motions to dismiss on October 19, 2018. (R.O.A. Vol. 1, page 87) Six months later, while the parties were waiting for a decision on the defendants' joint motion to

dismiss, plaintiff's counsel suffered a heart attack in April 2019. This led to hospitalization and outpatient treatment, but counsel worked up to August, 2019, when M.U.S.C. performed an open heart procedure. Recovery progressed slowly, including damage to the laryngeal nerve, reducing counsel's speaking voice to a whisper for approximately six months.

On July 5, 2019, the plaintiff filed its first motion to compel and amended this motion on September 27, 2019. Vol. 1, R.O.A. pages 89 and 143. On July 16, 2019, the parties entered into a Consent Scheduling Order. (R.O.A. Vol. 1, page 75) On July 22, 2019, the defendant, Charleston Animal Society, filed a motion to compel discovery. R.O.A. Vol 1, page 101.

On November 20, 2019, more than a year—461 days—after plaintiff filed its complaint, 79 days before the expiration of the Scheduling Order, the defendants filed simultaneous motions for Summary Judgment and Answers. (R.O.A. Vol. 1, pages 177 and 182) Charleston Carriage Horse Advocates and Ellen Harley also filed a Motion to Strike parts of the plaintiff's complaint. (R.O.A. Vol. 1, page 204)

The discovery process was contentious resulting in two court appearances before Judge Price. On January 30, 2020, the defendants, Carriage Horse Advocates and Harley, filed a motion for a protective Order, a motion to quash a discovery subpoena, and a motion to compel. R.O.A. Vol 1, pages 206-240. Judge Bentley Price heard discovery motions on May 28, 2020 and June 6, 2020, and issued an Orders on June 17, 2020 and July 30, 2020. See R.O.A. Vol. 1, pages 65 and 68 for Orders and Vol. 4, pages 1546-1585 for the transcripts of the two hearings.

When the defendants, Harley and Charleston Carriage Horse Advocates, continued to thwart discovery, the plaintiff filed a motion for sanctions on October 2, 2020. R.O.A. Vol. 1, page 334. On May 27, 2021, the parties agreed to refer all outstanding motions to the Master-in-Equity. Following the Order of Reference, the Master-in-Equity issued the following Orders:

May 5, 2022	Order denying sanctions for failure to provide discovery
May 12, 2022	Order denying amendments to add parties defendant and plaintiff

May 12, 2022	Order denying amended scheduling Order
May 12, 2022	Order granting summary judgment
August 2, 2022	Order denying motions for reconsideration

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

June 2, 2020	Confidentiality Order
June 17, 2020	Plaintiff's Motion to Compel is Granted
July 30, 2020	Order Resolving Cross Motions to Compel
May 27, 2021	Order referring case to Master-in-Equity
July 8, 2021	Order referring case to Master-in-Equity (reference fee omitted)
May 5, 2022	Master-in-Equity Order denying sanctions
May 12, 2022	Master-in-Equity Order denying amendments
May 12, 2022	Master-in-Equity Order denying amended scheduling Order
May 12, 2022	Master-in-Equity Order granting summary judgment
August 2, 2022	Master-in-Equity Order denying motions for reconsideration
August 11, 2022	Notice of Appeal

Facts

The City of Charleston has adopted comprehensive carriage tour regulations, to which each carriage company is required to adhere. (R.O.A. Vol. 4, pages 1707-1716) All defendants participated in the creation of these ordinances. These regulations include, among other things: a requirement that the temperature of each horse after each tour be recorded and maintained, a requirement that all tours be suspended at a proscribed temperature/humidity formula, prescribed periods of work and rest, a 15 minute break after each tour, no more than 8 consecutive work hours, 1 day's rest after every 6 days, 14 days pasture rest every 120 days, and an annual inspection by qualified veterinarian. See § 29-212, "General Health care and management requirements" R.O.A. Vol. 4, pages 1711-1715 (Chapter 29, City Code of Ordinances, Article V "Transportation by Animal-Drawn Vehicles") The City maintains a full time equine manager, a Tourism Director, and numerous Tourism Enforcement Officers to enforce the City's comprehensive regulations.

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

Charleston Animal Society is a quasi-governmental agency, animal welfare society heavily supported by Charleston County taxpayers as well as the municipalities of North Charleston and

Mount Pleasant. It is also a prodigious fund raiser. As of the date of filing this Initial Brief, Charleston Animal Society's publicly disclosed financial statements reveal an institution with over 28 million dollars in assets. Charleston County provides direct taxpayer support currently at the rate of $175,000.00 a month to fund the operation, and both the County of Charleston and the City of North Charleston donated the land and building upon which the Society operates.

On April 19th, 2017, Big John slipped, sat down, laid down and within 11 minutes barn hands unharnessed him and were walking him back to the barn uninjured.

The City's Equine Manager and a qualified veterinarian examined him at the barn, and both found him uninjured, and pronounced him fit for work. Their written reports are read into the R.O.A. at Vol. 4, pages 1538-39 [Ex. 2 Dr. Miller dep.] and 841 854 [Dr. Little testimony, pages 9 and 22 of Jan. 26, 2022 Supp. Memo.] and were immediately released to the public.

The defendants possessed this information the same day the City compiled it, and acknowledged it by putting "trip" in quotation marks on the Krosse video edits. Yet, despite **seeing him walk back to the barn uninjured**, and despite being aware that two independent equine experts examined Big John and concluded he was uninjured, they nonetheless knowingly disseminated social media carefully tailored to cast plaintiff in a false light. They made no effort to gather information or interview independent sources for confirmation or otherwise display professional standards of a media defendant. The still photos of the defendants' video with the Dan Krosse editorial comments are in the Record on Appeal at Vol. 2, pages 774 and 775 alone create a genuine issue of material fact that the defendants misled the public to damage the plaintiff and generate fundraising by creating a false insinuation that Big John "collapsed" due to abuse and overwork, high temperature, or exhaustion. What they knowingly did is evidence of malice.

Standard of Review

On review of an order granting summary judgement, the appellate court applies the same standard as that used by the trial court. *Joseph v. South Carolina Department of Labor, Licensing*

and Regulation, 417 S.C. 436, 790 S.E.2d 763 (2016) Summary judgment is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial of the disputed factual issues. *Murphy v. Tyndall*, 384 S. C. 50, 681 S.E.22d 28 (Ct. App. 2009) A court cannot entertain a motion for summary judgment until the plaintiff has had a "full and fair" opportunity to complete discovery. *Doe v. Batson*, 345 S.C. 278 S.E.2d 854 (2003):

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

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

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

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

When the evidence is susceptible to more than one reasonable inference, the issue should be submitted to the jury, rather than resolved at the summary judgment stage. *Murphy v. Tyndall, ibid*. In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonable be drawn therefrom must be viewed by the court considering a motion for summary judgment in the light most favorable to the nonmoving party; if triable issues exist, those issues must go to the jury. *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006) (The Master-in-Equity applied an erroneous standard of review, best summarized by pointing out the erroneous reliance on *Peeler v. Spartanburg Herald-Journal*, 681 F. Supp. 1144 (1988) and *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 531 S.E.2d 518 (2000). The first case involved a **political candidate's**—public **official's**—claim against a **newspaper**, and the second case, a zoning case, has nothing to do with the issues raised in this case. In *Pic-A-Flick*, the Supreme Court affirmed the trial court's grant of injunction against the City when it tried to classify Pic-A-Flick as an adult business because it carried a small selection of X-rated movies.)

The Master-in-Equity also erroneously applied a "clear and convincing" standard, a standard that only applies to public **official** plaintiffs and to the application of punitive damages. *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001), *Erickson v. Jones Street Publishers, LLC*, 338 S.C. 444, 629 S.E.2d 653 (2006)

Argument 1: The Master in Equity improperly took up summary judgment while important discovery deficiencies remained unresolved and misapplied South Carolina law on plaintiff's application for relief for discovery violations by holding that the plaintiff was required to return to the initial judge to hear the motion for sanctions.

On May 22, 2022, the Master-in-Equity entered an Order turning away the plaintiff's prayer for relief for defendants', Charleston Carriage Horse Advocates and Harley's, continuous discovery violations on the erroneous grounds that the Defendants had complied with the previously issued discovery Orders, "Plaintiff received exactly what defendants said they would provide and what Plaintiff knew they would provide " R.O.A. Vol. 1, page 55 [Order at page 5, quoted below] and on the erroneous legal conclusion, citing *Richardson*, that the plaintiff was required to seek relief only from the original judge who entered the original discovery Orders:

Perhaps realizing this, Plaintiff also asks the court in the alternative to order CCHA and Harley to turn over their computers for forensic inspection. Plaintiff has multiple problems here. First, "there must be an Order of the Court before sanctions are imposed under subdivision (b). . . "*Richardson on Behalf of 15th Circuit Drugs Enf't Unit v. Twenty-one Thousand & no/100 Dollars, ($21,000.00) U.S. Currency and Various Jewelry*, 430 S.C. 594, 599, 846 S.E.2d 15, 16 (citation omitted). As demonstrated, neither CCHA nor Harley violated Judge Price's June 17 Form 4 Order. Plaintiff received exactly what defendants said they would provide **and what Plaintiff knew they would provide.** Second, nothing in the Order requires production of computers or responsive documents to search terms. Third, physical access to the computers is unnecessary because CCHA and Harley have nonetheless run the proposed search and provided Plaintiff in excess of 10,000 responsive documents. The delay in running the search, moreover, is due Plaintiff's refusal to send search terms. Fourth and finally, the court indicated that Plaintiff to return for another motion to compel hearing if physical access to the computers could not be worked out. Rather than seek a court order via a motion to compel, Plaintiff is hoping the Court will bypass this step and award access as a sanction under Rule 37(b). Again this cannot be done. See *Richardson On Behalf of 15th Circuit Drugs Enf't Unit v. Twenty-one Thousand & no/100 Dollars, ($21,000.00) U.S. Currency and Various Jewelry*, 430 S.C. 594, 598-600, 846 S.E.2d 14, 16-17 (discussing when sanctions are appropriate under Rule 37). (emphasis added) (R.O.A. page 55 [Order under review page 5]

This decision is controlled by multiple, palpable errors of law, starting with the trial court's casual attitude toward discovery abuses and its ability to speak for the plaintiff's state of mind. Before the Court on September 29, 2021, plaintiff's counsel explained at the outset that there remained material discovery disputes that had to be resolved **prior to taking up summary judgment**. The Master-in-Equity ignored the discovery issues, as well as plaintiff's application to amend and extend the scheduling Order, and proceeded directly to summary judgment. Plaintiff reminded the Court "that under *Doe v. Batson*, the court can't even entertain a motion for summary

judgment until the party resisting it has had a full and fair opportunity to conduct discovery. That did not happen in this case." (R.O.A. Vol. 4, page 1639 [tr. page 53, lines 13-16] The Master-in-Equity's entire statement on this fundamental issue was: "All right. Got it." (R.O.A. page 1639)

Moreover, the Master-in-Equity's conclusion that the plaintiff received "10,000 documents" is painfully erroneous because the plaintiff's Third Supplemental affidavit filed September 24, 2021 (R.O.A. Vol. 1, page 388) explained how the defendants' 10,000 page putative discovery production is entirely bogus: 2,913 pages of duplicated material, 1,604 pages of court filings, *etc*. What is not produced is the most important information of all; to wit, the Internet metadata, internal communications, or any ordinary business records. In addition, the defendants, Harley and Charleston Carriage Horse Advocates, told Judge Price they would produce bank records "exactly as they come from the bank" (R.O.A. Vol. 4, page 1583 [June 16, 2020, tr. page 17, lines 16-22: "just as they would be delivered to the client from the bank."], and the Court can view the defendants' production at Vol. 2, pages 559-562 of the Record on Appeal and see for itself that the meaningless documents they provided are not bank records "exactly as they come from the bank." When the plaintiff realized that the defendants were obstructing, he sent a subpoena to South State Bank for the same records the defendants said they would produce "exactly as they come from the bank," and the defendants moved to quash the subpoena! R.O.A. Vol. 1, page 327 [Motion to Quash Subpoena] The Court can also review the plaintiff's numerous efforts to resolve the outstanding discovery summarized in plaintiff's motion for sanctions filed September 27, 2019 and October 2, 2020 (R.O.A. Vol. 1, pages 89 and143 and Vol. 2, page 531) detailing Ellen Harley's mendacity and obstruction and providing the applicable law to the Court, all of which the Master-in-Equity ignored. See also 3d Supp. Affidavit of B. Christoff R.O.A. Vol. 3, page 388.

The same misapprehension of the facts also extends to the Master-in-Equity's misidentification and misapplication of controlling legal precedent. As with his misplaced reliance

on the *Atlanta Humane Society* (discussed below on page 29), the Master-in-Equity commits legal error in relying on a case that holds the exact opposite of the principle for which he cites it. The *Richardson* Court summarized its holding this way:

> White now appeals, asserting the trial court abused its discretion in failing to sanction the Solicitor for not responding to White's discovery requests. We reverse the trial court's order and remand for a new trial after adequate opportunity for discovery. *Richardson* at page 597

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

> The text of Rule 37. SCRCP, therefore empowered White with the right to request sanctions against the Solicitor for failing to respond to White's discovery requests **without first filing a motion to compel**. [citations omitted] (finding trial court has duty to delay trial to determine whether exclusion of an undisclosed witness is appropriate, "regardless of whether the proponent of the testimony is allegedly in violation of a pre-trial order or court rule.") (emphasis added) *Richardson* at page 599

Thus, the Master-in-Equity's overlooking the discovery deficiencies not only ignored the facts because the Appellant's Motions to Compel and for Sanctions (R.O.A. Vol. 1, pages 89 and 143) set out specific facts refuting the Master-in-Equity's conclusion that "Plaintiff received exactly what defendants said they would provide and what Plaintiff knew they would provide," but also got the *Richardson* holding backwards. These errors require reversal. Moreover, if the Master-in-Equity believed, *arguendo*, that plaintiff is required to return to Judge Price for a ruling, then the proper action is to remand the question back to Judge Price.

The facts do not support the Court's findings, and the record contains overwhelming evidence of the defendants' consistent dilatory and obstructionist strategy, which page limitations on briefs prevent being specifically discussed. The Master-in-Equity simply ignored the plaintiff's evidence. The plaintiff filed detailed affidavits and extensive Memoranda on February 18, 2020, May 26, 2020, October 2, 2020, December 2, 2020, August 19, 2021, January 21, 2022, May 12, 2022, and May 20, 2022 and Abrams affidavit, April 22, 2022 (R.O.A. Vol. 1, pages 416 and 440

[4th Supp. affidavit of Christoff and affidavit of Steve Abrams] detailing the Defendants' repeated contumacious conduct regarding discovery. The plaintiff's amended motion filed on September 27, 2019, drew the Master-in-Equity's attention to five letters to defendants' counsel, March 21, 2019, March 27, 2019, March 28, 2019, August 2, 2019, and August 4, 2019, (R.O.A. Vol. 1, pages 143-176) carefully setting out the correct principles of law in undisputed detail and pleading for cooperation. The Master-in-Equity not only ignored the plaintiff's evidence, but also committed an error of law ignoring *Doe v. Batson* and holding erroneously that only Judge Price could entertain plaintiff's motion for sanctions for discovery abuse, and this erroneous presupposition is self-refuting. For example, in the amended motion to compel filed September 27, 2019, page 5 (R.O.A. Vol. 1, page 147), the plaintiff provided an example of the defendants' contumacious conduct. On July 2, 2019, the Plaintiff served a single supplemental interrogatory on the Charleston Carriage Horse Advocates:

> 1. Give the names and addresses of employees, agents, internal auditors, accountants, Certified Public Accountants, bookkeepers, or other such persons, who compile and prepare the defendant's, Charleston Carriage Horse Advocates', financial and tax records, including, but not limited to, tax returns reported to the South Carolina Department of Revenue, the United States Internal Revenue Service, as well as documents provided to the South Carolina Secretary of State as a charitable organization.
>
> . . .
>
> ANSWER: Defendant objects to this Interrogatory as it is overly broad, unduly burdensome, and not calculated to lead to the discovery of admissible evidence.

This standard interrogatory asked for nothing more than the identity of the person(s) who maintain(s) the defendant's financial records. This record does not support the Master-in-Equity's findings that the defendants either provided Plaintiff with responses the Plaintiff expected (R.O.A. page Vol. 1, page 55 [Order page 5]) or even made a half-hearted effort to conform to the rules. There is no evidence in this record that the plaintiff expressed satisfaction with the material the defendants ultimately turned over. The Record on Appeal demonstrates precisely that the defendants turned over practically nothing, obstructing the plaintiff by providing things like 43

blank pages, hundreds of Martha's Vineyard sales notices, and 1,604 pages of the filings in the case. See plaintiff's Third Supplemental Affidavit at R.O.A. Vol. 1, page 390 where the plaintiff details the "production" with precision to demonstrate how bogus it was. In fact, the conclusions reached by the Master-in-Equity should shock the conscience of the Court because they are at such variance with the record.

The Plaintiff's Third Supplemental Affidavit filed September 24, 2021 (R.O.A. Vol. 1, pages 388-415) contains a detailed explanation of Harley's contumacious conduct. Regarding her facility for lying under oath, consider comparing her sworn testimony presented in her deposition testimony on January 31, 2020 with the affidavit she filed on August 20, 2021 in support of her motion for summary judgment:

Ellen Harley 30(b)(6) deposition January 31, 2020, p. 26, line 4 (R.O.A. Vol. 3, page 1255):

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

A. I do.

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

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

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

A. I consulted with two different attorneys. . .

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

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

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

R.O.A. Vol. 1, page 394 [third supplemental affidavit of B. Christof filed Sept. 24, 2021. See Vol. 2, page 814 R.O.A. for a copy of the April 25, 2017 letter to Ms. Harley asking her to correct the false information.)

Ms. Harley also swore under oath that she did not shoot the video published of Big John even though the Plaintiff obtained video footage of her doing exactly that. See R.O.A. Vol. 3, page 972 [screen shot of video] She went on in her January 31, 2021 deposition testimony to admit she shot video and that she would be "happy to share that with you." (R.O.A. Vol. 1, page 396 [third supplemental affidavit filed September 24, 2021, page 9] She has never done so.

An examination of Ms. Harley's 30(b)(6) deposition in the Record on Appeal at pages 1230-1317 reveals it was an exercise in near futility due to her obdurate obstructionist strategy. Consider these excerpts:

Q. Okay. Now, did you bring any other documents with you here today pursuant to the notice of the deposition and subpoena?
MR. THOMPSON: She did. I have them.
MR. GOLDSTEIN: Okay. Can you tell me what you brought?
MR. THOMPSON: I think you've asked the questions, and to the extent you ask the questions and we have documents that are relevant to those questions, we will present them.
BY MR. GOLDSTEIN:
Q. All right. Here's my question: Did you bring any other documents with you here today, "yes," or "no"?
A. Yes.
Q. Okay. Can you tell me what they are?
A. Can you tell me what you want?
Harley deposition, January 31, 2020, page 35, lines 4-21 R.O.A. Vol. 3, page 1264

This record also demonstrates the 30(b)(6) deposition was punctuated by continuous coaching and speaking objections, which the Court can review for itself at pages 1230-1317 of the Record on Appeal. Most importantly Ms. Harley still refuses to allow access to her organization's metadata or banking records, both of which go to the heart of this case. The defendants' refusals, laid out in counsel's repeated correspondence and motions seeking to compel the defendants to obey the rules of discovery explode the Master-in-Equity's conclusion that the plaintiff "got exactly what it asked

for." Harley and Charleston Carriage Horse Advocates have successfully prevented the plaintiff from gaining access to routine discovery material such as their social media metadata, their financial records, and their internal communications. They know this information will prove how they have targeted the plaintiff's web presence to interfere in his ability to gain customers, and their financial disclosures will demonstrate how much they have spent toward disrupting the plaintiff's operation. They told Judge Price they were turning over their financial records "exactly as they come from the bank" (R.O.A. Vol. 4, pages 1579-1583 [June 16, 2020, tr. page 13, line 2—page 17, lines 16-21, page 18, line 3-5], but the Record demonstrates they provided something entirely different and entirely meaningless. R.O.A. Vol. 2, page 559 [Ex. 2 to December 2, 2020 Memorandum in support of status conference] The Court can view the production at pages 559-562 and see that the self-generated documents are not "monthly bank statements just as they would be delivered to the client from the bank."

The defendants have never provided the Administrator keys to plaintiff's expert to allow him to conduct a routine forensic exam. The defendants' metadata will demonstrate: (1) how many times the defendants suppressed truthful information to cast the plaintiff in a bad light (see affidavit of Katherine Vaughn at Vol. 2, page 434 R.O.A.), (2) how much they spent on purchasing Google key words to harm the plaintiff (see Broderick Christoff's Fourth Supplemental affidavit at Vol. 2, page 416 and Steve Abram's affidavit at page 440 R.O.A.), and (3) reveal their internal communications about how best to destroy the plaintiff. Some of this information has already been turned over by the Charleston Animal Society. See R.O.A. Vol. 1, pages 387 and 429 ("**depress their income"**), ("**they'll s**t their pants"**)

In summary, because the *Rules of Appellate Procedure* prescribe a page limitation, the Plaintiff cannot detail each and every dilatory and contumacious act of the Defendants, Harley and

Charleston Carriage Horse Advocates, so the Plaintiff closes this section by reminding the Court that since this dispute began, the Defendants have demonstrated a pattern of unethical conduct unworthy of registered charities. They moved against Dr. Miller's license, Plaintiff's counsel's license, filed an OSHA complaint against the Plaintiff and even went as far as to intimidate a disclosed witness. Vol. 1, R.O.A. pages 376 and 438 [Aff. B. Christoff and K. Vaughn] One thing is certain: this record does not support the Master-in-Equity's conclusions that the Defendants, Harley and Charleston Carriage Horse Advocates, provided meaningful discovery or Plaintiff was satisfied with their production. The Master-in-Equity compounded this error by holding that only a specific judge could address discovery deficiencies. The Master-in-Equity's decision to ignore serious discovery deficiencies and proceed to summary judgment without resolving them is not supported by the record or the law and must be reversed.

Argument 2: The Master-in-Equity failed to apply the proper summary judgment standard to the facts and failed to apply the correct legal standard to all causes of action.

The overarching factual legal error permeating the Order under review is the erroneous inversion of the summary judgment standard, and this error applies to the analysis of all of the plaintiff's causes of action, although the Master-in-Equity placed the emphasis on defamation. The Master-in-Equity improperly construed evidence against the plaintiff, improperly weighed evidence and improperly made credibility determinations, and their inferences, against the plaintiff. As set forth above, the Master also misapplied the clear and convincing standard. The Master-in Equity telegraphs this overarching error on the first page of the Order by giving great weight to one truncated, out-of-context comment lifted out of the plaintiff's 13-hour deposition and emphasizes this isolated comment, in the face of overwhelming contrary evidence, to support an erroneous conclusion.

The Master-in-Equity's reliance on the out-of-context snippet of deposition testimony on page 1 to frame the analysis that follows reveals the errors of both fact and law, turning the summary judgment standard on its head. On page 1, footnote 1, the Master-in-Equity misconstrues two paragraphs lifted out of the plaintiff's 13-hour deposition to reach foundational—but erroneous—conclusions that the plaintiff is a "limited public figure" and that his treatment of Big John was a "public controversy," when the quoted testimony related to plaintiff's explanation of how public the attacks were on him! First, the trial court erred in ignoring the five *Erickson* factors (discussed in detail below), and second inverted the summary judgment standard by contorting an out-of-context snippet, which was the plaintiff's explanation how the attacks on him affected him and his family, to fit the court's conclusion rather than testing the record for the existence of a genuine issue of material fact. The Master-in-Equity isolated a tiny out-of-context portion of the plaintiff's deposition where he explained the very public attacks on him and the harm to him that flowed from the defendants' characterization of him as an animal abuser. An accusation of animal abuse is an accusation of a felony in this State. § 16-11-510, S. C. Code, ann. When viewed in context, the colloquy reveals the plaintiff was explaining how "public" the attacks on him were, which the Order under review contorts into a non-existent admission to support the finding of a "public controversy." The Master-in-Equity erroneously conflated public debate over carriage tours in general with the defendants' intentional misrepresentation of the plaintiff as an animal abuser. The plaintiff's treatment of his horses has never been a matter of public debate until the defendants made it one. The two are not equivalent, and this error permeates the Order under review. The defendants' false and coordinated attacks, carefully explained in numerous affidavits, promulgated a false narrative that painted plaintiff as an animal abuser. See deposition of Broderick Christoff, Dec. 7, 2018, page 301, line 14—page 304, line 2 at R.O.A. Vol. 2, page 768

In a trial for defamation, the Court does not address the question of plaintiff's status as a "limited public figure" until the Court takes up jury charges. The trial court makes the determination of status at the close of all the evidence in order to know how to charge a jury.

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

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

Instead of a "careful examination of the facts and circumstances," the Order misconstrues plaintiff's explanation of the effect defendants' very public and very coordinated attacks had on him. The Order under review never explains (because it cannot) how the defendants, registered charities, transform him into a "limited public figure" by launching attacks on him, a principle rejected by every court taking it up.

First, as the comment in context demonstrates, the plaintiff was describing how the defendants unleashed the public's rage on him by painting him as an animal abuser. The hundred million views generated death threats, arson threats, and continuous threats of violence, causing the plaintiff and his wife to hide their horses, set up surveillance equipment, arm themselves, and take turns sleeping to keep watch. R.O.A. Vol. 1, page 352 [affidavit filed Feb. 25, 2020, page 4] Importantly, footnote 8 of the *Erickson* case demonstrates how the Master-in-Equity erred in confusing public defamatory attacks with the plaintiff's status:

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

Gertz to eschew a subject-matter test for one focusing upon the character of the defamation plaintiff'." *Erickson* at footnote 8

The Master-in-Equity's error is compounded because the record demonstrates he ignored the plaintiff's four affidavits, the affidavit of Katherine Vaughn, the affidavit of Steve Abrams, and the overwhelming evidence of malice and discovery obstruction (discussed above). Any one of these errors requires the Order under review be reversed.

The trial court ignored the defendants' discovery abuses and obstruction (discussed separately in Argument 1) and proceeded improperly to summary judgment. Ignoring plaintiff's evidence and misapplying the summary judgment standard are material errors of fact and law:

> Summary judgment is inappropriate when further inquiry into the facts is desirable to clarify proper application of the law. *Id*. Summary judgment is not appropriate if facts are conflicting, or if the inferences to be drawn from the facts are doubtful. *Alston v. Blue Ridge Transfer Co.*, 308 S.C. 292, 417 S.E.2d 631 (Ct.App.1992). Summary judgment should not be granted even when the evidentiary facts are not in dispute, if there is dispute as to the conclusion to be drawn from those facts. *Carolina Prod. Maintenance, Inc. v. United States Fidelity and Guar. Co*., 310 S.C. 32, 425 S.E.2d 39 (Ct.App.1992). In deciding a motion for summary judgment, the evidence and all of its inferences must be viewed in the light most favorable to the non-moving party. [330 S.C. 317] *Pryor v. Northwest Apts., Ltd.*, 321 S.C. 524, 469 S.E.2d 630 (Ct.App.1996)...
>
> *Wade v. Berkeley County*, 330 S.C. 311, 498 S.E.2d 684 (S.C. App. 1998)

The Order under review erroneously adopts the defendants' argumentative view of the evidence, ignores or misconstrues actual evidence, and invades the quintessential jury function. The Master-in-Equity also cites cases for principles completely opposite from their holding. For example, the Court violates the controlling *Erickson* standard by accepting the defendants' contention that the Plaintiff is a "limited public figure" because he runs a business and took steps to defend himself from public attacks, even though the case law on this issue unanimously holds that a person is not converted into a "limited public figure" by being involuntarily dragged into a controversy. See *Gertz*: "It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." This record demonstrates that the plaintiff's only

contact with these defendants was defensive in an attempt to protect himself and his business and to mitigate his damages.

The plaintiff's four affidavits, supporting documents, the affidavits of Vaughn, and Abrams, the copious evidence presented clear issues of fact, and the summary judgment standard require this conflict to be resolved by a jury. The Master-in-Equity erred in failing to construe the evidence in the light most favorable to the plaintiff. (See Affidavits filed February 25, 2020, Supp. affidavit filed December 2, 2020, 2nd Supp. affidavit filed August 19,2021, 3rd Supp. affidavit filed September 24, 2021, and 4th Supp. affidavit filed April 22, 2022; Vaughn affidavit filed September 28, 2021; Abrams affidavit filed April 22, 2022. (R.O.A. Vol. 1, pages 349, 360, 372, 388, 416, 434, 440) "When there is conflicting evidence, the question of whether the [fair reporting] privilege has been abused is a jury question." *West v. Moreland,* 396 S.C. 1, 720 S.E.2d 495 (Ct. App. 2011)

In short, the trial court ignored the plaintiff's evidence, improperly classified plaintiff as a "limited public figure," improperly characterized the defendants as "media defendants" when they are not, and made believability and credibility judgments instead of testing the affidavits for the creation of genuine issues of material facts. This is legal error. Even the trial court's truncated recitation of its "Standard of Review," on pages 2-3 of its Order (R.O.A. pages 5-6), leaves out more than it puts in. The trial court neither acknowledges the correct standard, nor applies it. For example, on pages 7-8 of the Order under review (R.O.A. pages 10-11), the trial court takes great pains to construe the plaintiff's several affidavits **against** him, inverting the summary judgment standard by construing the facts (and the inferences to be drawn from them) **against the plaintiff,** and erroneously applied the "clear and convincing" standard**.** The "clear and convincing" standard does not arise in a case unless: (1) the plaintiff is a public official, or (2) the Court is evaluating punitive damages. *Erickson, op. cit*. In other words, the Master-in-Equity simply ignores

plaintiff's evidence by finding him not credible or believable, which are jury functions. In accepting the defendants' contested factual assertions as true, the Master-in-Equity commits a palpable legal error stating that in reaching his decision to end the case, he evaluated the believability of the plaintiff's evidence: "The evidence presented by Plaintiff, through the affidavits of its owner, Broderick Christoff, as to his public participation in this controversy suggests otherwise." (R.O.A. page 10 [Order page 7]) This is an erroneous legal conclusion based on improperly deciding disputed questions of fact reserved for a jury.

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

> The Court should determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Id*. at 251-52. The Court should not grant summary judgment "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." In ruling on a motion for summary judgment, the Court must not resolve disputed facts, weigh the evidence, *Russell v. Microdyne Corp*., 55 F.3d 1229, 1239 (4th Cir. 1995) (citation omitted), or make determinations of credibility. *Sosebee v. Murphy*, 797 F.2d 179, 182 (4th Cir. 1986). Inferences "drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)
>
> *Wood v. Fanslau*, __F.Supp.3d __ 4:17-cv-02749-RBH (2018)

There is not a scintilla of evidence in this record to support the trial court's factual "finding" that plaintiff's affidavits "suggest otherwise," or that Mr. Christoff assumed the role of a public figure because he defended himself when all of the evidence demonstrates he did nothing more than attend public meetings that discussed regulations affecting his business. The Master-in-Equity erroneously concluded, without evidence, that the plaintiff's principal "gave interviews," but the record shows that he never spoke to media. Rather, the media quoted plaintiff as a participant at public meetings. He never gave an interview to the *Post & Courier*. Following the defendants' attacks on him, in an effort to mitigate his damages, he spoke to an independent journalist, Quintin Washington, but this conversation was **after** the defamatory attacks and was an

effort to mitigate damages, and these disputed facts are reserved for a jury. Moreover, even if there were evidence that he transformed himself into a "limited public figure," that evidence is hotly contested, and that contest cannot be resolved at the summary judgment stage. *Erickson, supra*. Instead of evaluating these highly contested facts in the proper summary judgment standard, the Master-in-Equity circumnavigates the legal world searching for any slender reed of justification to throw the plaintiff out of court.

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

The defendants are not "media defendants." They cannot be media defendants because they are: (1) creatures of statute—registered charities, (2) statutorily prohibited from disseminating misleading assertions, and (3) not broadcast journalists. Their primary purpose is fundraising. There is not a case in American jurisprudence equating a "charitable" fundraising organization with newspaper, radio, or television broadcast media. See *Hotzschieter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497 (1998), citing *Gertz*, *Milkovich*, and many cases, noting "media defendants" are journalists with "professional standards." See also *Jones v. Sun Publishing Co*., 278 S.C. 12, 292 S.E.2d 23 (1982) where the Supreme Court reinstated a jury verdict because the newspaper violated professional standards in failing to verify information before publication. The General Assembly defines "media defendants" as "a person, company, or entity engaged in or that has been engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, radio, television, news or wire service or other medium . . ." § 19-11-100, S. C. Code, ann. This section provides a qualified privilege for media defendants, and these defendants do not possess a "fair reporting privilege." These defendants are not "engaged in the gathering and dissemination of news."[1] They are taxpayer supported "charities" granted favorable tax

[1] Every Journalism degree in the nation requires undergraduates to complete numerous courses on journalistic ethics. For example, Journalism 303 at U.S.C. is a course titled: "Law and Ethics of Mass Communication."

treatment and whose primary function is to fundraise. Because their primary function is raising money, the General Assembly regulates communications of charities, prohibiting them from making "misrepresentations." See § 33-56-120, S. C. Code, ann. (quoted below on page 25). The defendant, Ellen Harley, is a political figure, a former member of the Pennsylvania House of Representatives, an unsuccessful candidate for the United States Congress, and an unsuccessful candidate for the City of Charleston City Council. She is obviously not a media defendant. The Order under review never explains how the Court concluded the defendants are "media defendants;" rather, it just assumes it without explanation, relying on an odd case, *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009). On page 22 of the Order under review, the Master-in-Equity cites the *Snyder* case for the erroneous proposition that there is no distinction between media and non-media defendants. In *Snyder*, the Fourth Circuit reversed a jury verdict returned against the Fred Phelps and his Westboro Baptist Church family. Phelps and his followers travelled from Kansas to picket the military funeral of Snyder's son, who was killed in the line of duty in Iraq. The Phelps clan carried handmade signs near the funeral site (but not within sight) described by the Fourth Circuit this way: "And, as heretofore explained, a reasonable reader would not interpret the signs that could be perceived as including verifiable facts, such as 'Fag Troops' and 'Priests Rape Boys,' as asserting actual facts *about* Snyder or his son. To the contrary, these latter statements, as well as others in this category, consist of offensive and hyperbolic rhetoric designed to spark controversy and debate." (emphasis in original) The Order under review never explains how the *Snyder* case supports the Master-in-Equity's classification of charities as "media defendants" or how they are otherwise immune from suit under a "fair reporting privilege." The lower court's classification is an unnecessary detour from the issues before the Court because even if the defendants were "media defendants," they are not permitted to defame the plaintiff by characterizing him—**by name**—as an animal abuser, and they cannot defame the plaintiff to gin

up their demands for contributions. If they were "media defendants," they would verify their sources and conform to journalistic ethics, and they certainly would not conspire to put him out of business.

More importantly, the evidence discussed in this brief will demonstrate that the defendants conspired with one another to harm the plaintiff and urged one another to keep their plans secret. Four days after the incident, on April 23, 2017, Catherine Poag, a paid principal of the Charleston Carriage Horse Advocates, wrote a letter to her fellow conspirators, Joe Elmore, Dan Krosse, Kurt Taylor and others:

> Carriage Company owners now have backs to wall—Look at that letter from Broderick—And like any cornered animals, their natural actions will be desperate ones—The drivers will all be on edge about what if they are the next carriage with a runaway horse **or one that stumbles** and end [*sic*.] up in international views. (emphasis added) R.O.A. Vol. 3, page 953, Motion for Reconsideration, Ex. 3, quoted on page 22

This is powerful evidence of defamation, malice, and conspiracy (especially since throughout their communications, they remind one another to keep silent—"FYI—please do not share outside the Animal Society. Thanks." /s/ Joe Elmore July 18, 2016, Ex. 2 to May 20, 2022 Motion for Reconsideration (R.O.A. Vol. 3, page 976), but also demonstrates the defendants knew Big John did not "collapse." It proves the defendants intended to mischaracterize a "stumble" ("trip" on the video) into a false and damaging image that they released for world-wide viewing to damage the plaintiff. Poag's single e-mail is sufficient evidence to prevent the entry of summary judgment on each cause of action and demonstrates the defendants are motivated by malice. They are not "media defendants." Following up on their initial misrepresentation, Ellen Harley told the *Post & Courier* on May 31, 2018, "Charleston Carriage Horse Advocates posted a video clip on their Facebook page showing the horse [Big John] lying in the street, claiming the animal had collapsed from exhaustion." (R.O.A. Vol. 3, page 952 [Motion for reconsideration filed May 20, 2022, page 21]) The day after the incident, Ellen Harley told a Channel 5 news reporter: "But Ellen Harley,

a witness who sent video of the incident to the Charleston Animal Society, disputed that: 'A horse that slipped would get up quickly,' she said. 'This horse could not get up immediately or for over 30 minutes.'" (R.O.A. Vol. 3, page 953 [Motion for Reconsideration May 20, 2022, page 22]) Current events prove *passim* what damage flows from unprincipled social media posts unleashed to defame targets and whip up hostility, which has become a plague on the land. The copious evidence laid out in the numerous affidavits and supporting documents demonstrates that these defendants are motivated by malice and as far from media defendants as they can be, and the Master-in-Equity erred in finding them such. This Court should reverse this finding and remand with instructions on what is and what is not a media defendant to prevent the appellate courts being overrun by the resulting damage caused by every malicious poster claiming to be a media defendant.

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

The Master-in-Equity erroneously concluded that plaintiff is an involuntary "limited public figure," relying on cases that stand for legal propositions exactly opposite for which he cites them. Nowhere is this more clearly demonstrated than in the Master-in-Equity's erroneous reliance upon *Atlanta Humane Soc. v. Mills*, 274 Ga. App. 159, 618 S.E.2d 18 (Ga. Ct. App. 2005) which stands for a statement of law precisely opposite of how the Master-in-Equity cites it. The Master-in-Equity cites the case for the proposition that a "single interview given to the media may be sufficient to establish a defamation plaintiff as a limited-purpose public figure." (R.O.A. Vol. 1, page 13 [Order page 10]) The plaintiff never gave a pre-defamation interview and thus the defendants' allegation is a highly disputed fact that only a jury can resolve. The Master-in-Equity simply accepts defendants' mischaracterization of plaintiff's attendance at public meetings as "interviews" thus making believability and credibility decisions reserved for a jury. The

characterization of plaintiff's principal speaking as a citizen at a public meeting does not translate to an "interview." No court has ever equated attending a public meeting as transforming a speaker into a "limited public figure." This is the holding of *Gertz*: "such persons assume special prominence in the resolution of public questions is exceedingly rare." *Gertz* at page 345. Moreover, at the summary judgment stage the Court is not permitted to decide disputed facts:

> "Summary judgment is inappropriate when further development of the facts is desirable to clarify the application of the law." *Lee v. Kelley*, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct. App. 1989). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. [numerous citations omitted] . . . (noting that summary judgment should not be granted even when there is no dispute as to evidentiary facts, if there is dispute as to conclusions to be drawn therefrom). Although the facts regarding Schmidt's injury are not disputed, application of the law to the facts is disputed, and is a novel issue.
>
> *Schmidt v. Cortney and Kemper Sports*, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003)

Thus, the glaring legal error is that, as the *Atlanta Humane Society* case makes clear, the plaintiff's status as a private vs. "limited public figure" is at least a highly disputed issue of fact. As *Erickson* makes clear, the trial court can only determine the plaintiff's status after **all** the evidence is in. Here, the Master-in-Equity's summary decision ignores disputes of fact and draws conclusions which are reserved for a jury. Furthermore, when the Master-in-Equity accepted *Atlanta Humane Society* as justification for throwing the plaintiff out of court, the trial court's misplaced reliance illuminates the error. In *Atlanta Humane Society*, the **plaintiff claiming defamation was the government**, not a small business owner fighting to defend itself from public attacks. It is impossible to confuse a small business owner with the Government, and the two are not fungible. It is an enormous irony that *Atlanta Humane Society* demonstrates how the Master-in-Equity reversed and misapplied the summary judgment standard:

> As the trial court so aptly observed, the AHS [Atlanta Humane Society]:
>
> Receives in excess of $2,000,000.00 annually in public funds from Fulton county to carry out the County's animal control functions. . . . Indeed, as the contract between Atlanta Humane Society and Fulton County so clearly and plainly sets forth, Fulton County has even deputized employees of Atlanta Humane Society to assist in carrying out these laws and enforcing

governmental regulations. If plaintiff Atlanta Humane Society were not subject to the same types of criticism that governmental entities would be subject to in the performance of these functions, it would frustrate the ability of the general public to complain and otherwise effectuate necessary and desirable change when those services fall below standards which the public demands.

Atlanta Humane Society v. Mills at pages 163-64

The Master-in-Equity's hedging that a single interview "**may be**" sufficient to cast someone as a limited public figure is itself an expression of doubt, driving home the point that the question is reserved for the trier of fact, a jury.

The record establishes that Charleston Animal Society, like the Atlanta Humane Society, is a quasi-governmental entity because Charleston Animal Society, like Atlanta Humane Society, is funded by taxpayer support. See ¶ 2 of the plaintiff's complaint (R.O.A. Vol. 1, page 78): "The defendant, Charleston Animal Society, is a quasi-governmental entity of the County of Charleston and an eleemosynary corporation. . ." See affidavit of Joe Elmore, ¶ 15 (R.O.A. Vol. 1, page 248): "The funding allotted to CAS by the County in any given year varies and is determined on a yearly basis in connection with the approval of the County's budget." See also exhibit 6, page 3 of Mr. Elmore's affidavit, listing Charleston County's 2018 taxpayer contributions at $1,654,778.00 (R.O.A. Vol. 1, page 266) (Charleston County currently pays Charleston Animal Society $175,000.00 per month, or $2,100,000.00 per year. R.O.A. Vol. 1, page 368 [Christoff affidavit filed June 23, 2020, page 9; Elmore affidavit filed Sept. 11, 2020, page 3 of Exhibits] In addition Charleston County and the City of North Charleston provided the Charleston Animal Society with its land and building.

Charities are statutorily prohibited from disseminating "false or misleading" information. See § 33-56-120, S. C. Code, ann.:

Misrepresentations prohibited.

(A) In connection with the solicitation of contributions or the sale of goods or services for charitable purposes, a person shall not misrepresent or mislead, knowingly and willfully, a person by any manner, means, practice, or device.

In emphasizing selected facts in isolation as more believable than the plaintiff's affidavits while ignoring others favoring Appellant, the Master-in-Equity turned a blind eye to substantial evidence of the defendants' intentional misrepresentation characterizing the plaintiff as an animal abuser and their coordinated effort to promote a conspiracy specifically tailored to damage the plaintiff's reservations and relationship with the City. See R.O.A. Vol. 1, page 369 [Christoff affidavit June 23, 2020, page 10 for bullet points] The evidence ignored by the Master-in-Equity includes, but is not limited to, evidence of a deliberate conspiracy to "depress the carriage company's income" (R.O.A. Vol. 1, page 375 [affidavit of Broderick Christoff at page 4] and maliciously create a false narrative by suppressing truthful information—which is misrepresentation—to cast the plaintiff in a false light. The Master-in-Equity ignored the plaintiff's evidence, including, for example, the affidavit of a witness, Katherine Vaughn, who explained to the Court how the defendants deleted her truthful information, banned her from posting, and sent her a threatening letter (R.O.A. Vol. 1, page 434 [aff. K. Vaughn]) to prevent her from further attempts to correct false information and to intimidate a disclosed witness in pending litigation. (Plaintiff disclosed the witness on June 3, 2020 in its Third Supplemental Answers to Interrogatories.) Nonetheless, Ellen Harley directed her lawyer to send the threatening letter on December 16, 2020. See Vol. 1, R.O.A. at page 438 [Vaughn affidavit, Third Supplemental Answers to Interrogatories]. See also Christoff affidavit August 19, 2021, page 5 in the R.O.A. Vol. 1 at page 376 for a current list of Harley dirty tricks victims, powerful evidence of malice. The Order under review does not even give the Vaughn affidavit a mention, yet her affidavit (R.O.A. page 434) demonstrates what the defendants did to her when she attempted to post truthful information to counteract the false statements being pushed out by the defendants. Her entire affidavit is in the Record on Appeal Vol. 1 on pages 434-439 and contains detailed testimony of the defendants' coordinated defamation, interference intimidation, and conspiracy.

It is impossible to square Ms. Vaughn's testimony, ignored by the trial court, with the findings in the Order under review that there is not a single genuine issue of material fact of defamation, conspiracy, malice, and interference in plaintiff's business operations. Suppressing truthful information to cast plaintiff in a false light is just as defamatory as placing misleading, insinuating questions over the defendants' video. Intimidating a witness speaks for itself. The language superimposed on the Big John video insinuated plaintiff is an animal abuser (as well as contained outright lies detailed throughout the numerous affidavits), and when the defendants took the additional affirmative step of suppressing attempts to correct the false statements, that suppression to cast plaintiff in a false light is just as defamatory and as much a civil conspiracy as the knowing publication of false statements themselves. It is also powerful evidence of malice. When Dr. Miller asked Joe Elmore why he employed inflammatory language, Elmore explained that inflammatory language is "the only way I get people to listen." (R.O.A. page 1529 [Miller Deposition tr. page 89, line 22]) Not to mention promoting prodigious fundraising in violation of § 33-56-120. R.O.A. Vol. 2, page 577 [Memorandum] Calling the plaintiff an animal abuser or cruel or inhumane directly or by insinuation is great for fund raising.

In short, the Master-in-Equity ignored all of plaintiff's evidence in order to reach a decision that the plaintiff failed to present a genuine issue of material fact, and thus failed to apply the correct standard of review to the plaintiff's evidence and erroneously ended plaintiff's case. For this reason alone, the case should be reversed and remanded with instructions to require the defendants to provide appropriate discovery responses and allow the plaintiff to go forward on its proposed amended complaint.

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

While any discussion of the Master-in-Equity's errors misconstruing the facts and misapplying the law necessarily overlap (as the earlier discussion of *Atlanta Humane Society*

demonstrates), the Order under review applies the wrong law to the facts presented. The six questions (drawn from *Erickson*) posed by the Master-in-Equity to the parties on September 29, 2021, at oral argument demonstrate the error. After ignoring plaintiff's request to take up the pending discovery motion, the Master-in-Equity posed the following six questions as to whether the record contained sufficient evidence to create a genuine issue of material. (R.O.A. Vol. 4, page 1607 [tr. page 21, line 13]):

1. Is the plaintiff a public figure? (He is not.)

2. Is the subject of the alleged defamatory statements a matter of public concern? (The use of carriages is a public concern; the plaintiff's treatment of his horses is not.)

3. Are the statements published by the defendants true? (They are false.)

4. Are the defendants "media defendants"? (They are charities, regulated by the General Assembly.)

5. Are the alleged statements of or about the plaintiff or concerning the plaintiff? (The defendants identified the plaintiff by name, specifically targeting his company and specifically targeted his web presence.) R.O.A. Vol. 1, page 416, Vol. 2, page 872 [Supp. Memorandum of Law filed Jan. 26, 2022: "Today's statement by Broderick Christoff . . .", Ex.4, and Christoff Fourth Supp. Affidavit filed April 22, 2022] Even if the defendants had not specifically identified the plaintiff (and they did), South Carolina law has never required precise identification to actionable. *Erickson, supra*. *Restatement (Second) of Torts* § 564A. See *Holtzschier*, 325 S.C. 502, 506 S.E.2d 497 (1998). The question of whether statement is "of or concerning" a plaintiff is a jury question.

6. Has the plaintiff produced evidence that the statements are made with malice? The plaintiff is not a public official, and therefore malice is not necessary (except for punitive damages). However, the record contains overwhelming evidence of malice, including, but not

limited to knowingly making false statements, suppressing truthful information, banning truthful commentators, specifically targeting the plaintiff's web presence, and intimidating plaintiff's veterinarian, plaintiff's lawyer, plaintiff's witness, and plaintiff's employees.) R.O.A. pages V0l. 1, page 369 [Christoff affidavit filed December 2, 2020. See pages 45-47 below.]

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

As set forth above, The Master-in-Equity erred in taking up summary judgment before addressing the *Doe v. Batson* issues (unresolved discovery questions), and also spent little time analyzing the "six questions."

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

Case law is **unanimous** that one is not transformed into a "limited public figure" by defending himself. In order to be a "limited public figure," the evidence must show that the plaintiff "thrust [himself] to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Erickson*, citing *Gertz*, *Milkovitch*, and *George*, discussed in detail below. Here, the evidence is undeniable that the defendants thrust the plaintiff against his will into a public controversy by forcing him to defend himself against being labeled an animal abuser, and no matter how "public" the "controversy" over horse-drawn carriages may be, the plaintiff's care of his horses has never been a public controversy. The evidence shows that the defendants manipulated a minor incident as pretext to misrepresent the plaintiff as an animal abuser. The Master-in-Equity's Order self-refutes its conclusion on page 10 where he conflates

the plaintiff's post-defamation mitigation of damages with "evidence of plaintiff's access to channels of communication and its attempts to assert influence in the controversy." R.O.A. page 13 [Order page 10] This conclusion is clearly erroneous because a party's attempt to mitigate damages is not "assuming special prominence in the resolution of a public controversy." When a crime victim reports an attack, the disclosure does not "thrust [himself] to the forefront of particular public controversies," *Gertz, op. cit*., "in order to influence the resolution of the issues involved."

(2.) Charities are not "media defendants."

As discussed in Section 2(A) above, the Master-in-Equity erred when he placed South Carolina charities in the category of "media defendant." Charities are the exact opposite: tax exempt, fundraising entities, statutorily prohibited from making false or misleading statements. It is their status as "charity" that provides them the "access to channels of effective communication" that the plaintiff lacks. They lack the "professional standards" or "journalistic ethics" that define "media defendants." Because they are not "broadcast media" with stated journalistic ethics and because they are in the business of fundraising, the General Assembly imposes restrictions on charities' communications, and they are not anywhere close to "media defendants."

(3). The plaintiff did not voluntarily assume a role of special prominence in the public controversy by taking steps to mitigate his damages, and the court's decision on plaintiff's status occurs at the close of the evidence prior to charging the jury.

The United States Supreme Court established that a person is not transformed into a public figure because he is defamed. *Milkovich v. Lorain Journal Co.* 497 U.S. 1. 110 S. Ct. 2695, 111 L.Ed.2d 1 (1990), a holding reinforced by our Supreme Court 16 years later in *Erickson v. Jones Street Publishers, L.L.C.* 368 S. C. 444, 629 S.E.2d 653 (2006). The Master-in-Equity erred first in confusing the timeline by citing post defamation mitigation as evidence of the plaintiff voluntarily inserting himself in a public controversy, and everyone agrees that a citizen attending a public meeting is not transformed into a "limited public figure." Second, the Master-in-Equity erred in concluding that the plaintiff must demonstrate malice and then compounded the legal error

by ignoring the copious evidence of malice in the record. The Master-in-Equity found plaintiff's efforts to defend his business against the defendants' efforts to shut it down as equivalent to voluntarily entering into a public controversy, which is logically equivalent to blaming the victim of an attack. No one disputes that the subject of carriage tours in general is a matter of public interest, but likewise no one has suggested that the plaintiff's care of his horses is a matter of public controversy. Proof of malice is required only in actions brought by a public official (or to consider punitive damages), and plaintiffs care of his animals has never been the subject of public inquiry.

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

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

The defendants concede—and the Master-in-Equity found—the plaintiff's principal is not a public official. Here, the trial court erroneously concluded that he is a "limited public figure" on the basis that he attended public meetings and took steps to defend his business from public attacks. Our Supreme Court specifically rejected the notion that a tortfeasor's publication of a defamatory statement transforms the object of the statement into a public figure. See *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001), citing the United States Supreme Court in *Milkovich v. Lorain Journal Co.* discussed more fully below. In 2006, in *Erickson v. Jones Street Publishers*, 629 S.E.2d 653, 368 S.C. 444 (S.C. 2006), our Supreme Court carefully listed the five factors necessary to determine if a plaintiff is a "limited public figure" and reminded trial judges that they make the determination at the close of all the evidence in order to determine which standard to charge to a jury:

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

We agree with the analysis set forth by the Fourth Circuit in *Foretich*, 37 F.3d 1541, to determine whether Appellant is a limited public figure which, **as we previously noted, is a matter of law for the court to decide before submitting a case to a jury**. In order for the court to properly hold that a plaintiff is a public figure for the limited purpose of comment on a particular public controversy, the defendant must show: (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public-figure status at the time of the alleged defamation. *Foretich,* 37 F.3d at 1553.

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

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

Here, the Order under review erroneously concluded that the plaintiff is a limited public figure based on nothing more than the defendants' characterization of him. This record presents overwhelming evidence that the only reason this dispute exists is because of the defendants' coordination to drive down plaintiff's income to put him out of business. The plaintiff took no actions other than to attend public meetings about proposed ordinances affecting his business and taking steps to mitigate his damages after the defendants launched their social media smear campaign. The evidence demonstrates the defendants hatched their conspiracy plan before the Big

John incident, after which they targeted the plaintiff. The defendant, Harley, sent an e-mail to the defendant, Charleston Animal Society, on March 30, 2017, boasting about their efforts to "depress their income." According to Ms. Harley and her co-conspirators, this is "the only way to defeat this City/Industry cartel." (R.O.A. Vol. 2, page 548 & 871 [affidavit filed February 25, 2020, page 2]) Plaintiff's Supplemental affidavit filed June 23, 2020, sets forth with great specificity the damages done to him by the defendants' coordinated attack, obligating him to spend up to $5,000.00 per month to combat the defendants' destruction of his online reputation. See R.O.A. Vol. 2, page 417 [April 22, 2022 Fourth Supplemental affidavit page 2]: "I do know they targeted me individually because the attached April 30, 2017 screen shot demonstrates this, and . . . I know I had to pay Google $5,000.00 a month after April 19th to combat what the defendants were doing to me."

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

The plaintiff has no way to "influence the resolution or outcome of the controversy" other than by taking steps to defend himself from damaging attacks, which is merely mitigating damages. Under the Master-in-Equity's reasoning, a person who is the subject of an attack cannot take steps to defend himself, mitigate his or her damages, or otherwise seek to correct the record without transforming into a "limited public figure." This erroneous conclusion is at variance with every case addressing this issue. Such a victim, in the eyes of the Master-in-Equity, must suffer in silence because speaking up transforms a victim into a "limited public figure." However, *Erickson* specifically rejects the trial court's conclusion. The Master-in-Equity erred when he conflated "attempting to control the outcome of a controversy" with fighting for one's economic existence:

As set forth in my previous affidavit, I have spent thousands of dollars, and incalculable hours, combatting this confusion. Setting up a website with a similar name to a target is well known in hacking strategy. Everyone who uses email is constantly on alert for receiving "phishing" scams

in which hackers create facsimiles of well-known internet providers in hopes of tricking on an unsuspecting target to click on it.

Second Supp. Affidavit of Broderick Christoff, August 19, 2021, R.O.A. Vol. 1, page 375

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

> Following the defendants' publications, many customers immediately cancelled tours after seeing the CAS and CCHA video of "the horse that died" on Facebook. I was under a tsunami of threats against me, my business, and the horses. My business and my life were in turmoil, and I had to spend thousands of dollars in purchasing and installing surveillance equipment and combatting the negative reviews generated by their false statements. Supplemental affidavit December 2, 2020 (Vol. 1, R.O.A. 367)

Plaintiff's evidence demonstrates how he was trying desperately to combat the knowingly false negative attacks the defendants were delivering to put him out of business. The defendants' consistent suppression of truthful corrective information demonstrates both "knowingly" and malice. The plaintiff's affidavits describe what steps he took to keep his business afloat; Katherine Vaughn's affidavit explains how the defendants conspired to suppress truthful information to cast the plaintiff in a false light and maintain the false assertion that he abuses his animals, and the plaintiff's computer expert, Steve Abrams,' affidavit explains how the defendants are able to achieve this by purchasing keywords, domain names, deletion of corrective posts, and what access he needs to gather additional proof of these efforts. A jury may find that the defendants' labeling Big John's incident a "collapse" defamed plaintiff. A jury may find demonstrably false statements and suppression of truthful corrections are attacks on the plaintiff's livelihood are not only defamatory but also conspiracy and tortuous interference. The Master-in-Equity weighed this evidence and decided questions of fact in favor of the defendants on every cause of action. This is error. The defendants' impact of publishing the word "collapse" in the context in which they published it, in combination with other false statements, raises the quintessential jury question. It is the function of the jury (especially at summary judgment), not the Master-in-Equity to decide

how the defendants' false statements are perceived and whether the plaintiff's actions to save his business transformed him into a "limited public figure."

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

The Master-in-Equity also erred in justifying the defendants' actions because the "controversy" existed prior to the publication of the defamatory statements, again confusing a debate over horse-drawn carriages with allegations of plaintiff's treatment of his horse. While the issue of horse drawn carriages in general may be a "controversy" pre-existing the defamatory statements made in this case, the allegation that plaintiff abused his horse is not. Plaintiff never admitted the existence of any public controversy over **his** treatment of **his** horses. More importantly, while the use of animals in urban environments may be legitimately debated, the false allegation the plaintiff worked his horse to "collapse" is not.

(6.) The plaintiff never held public figure or limited public figure status at the time of the defamation.

Obviously, the plaintiff was never a public official, and the Master-in-Equity agreed. Thus, the Master-in-Equity improperly weighed evidence and misapplied the law, and the decision below is controlled by multiple errors of law. Even if the plaintiff were a public official and required to provide evidence of malice, he produced copious evidence of malice, but because the plaintiff is a private figure, the actual malice standard has no application to this case: "The constitutional actual malice standard requires a **public official** to prove by clear and convincing evidence that the defamatory falsehood was made with the knowledge of its falsity or with reckless disregard for its truth." *Erickson* at 671 (emphasis added)

Moreover, the Master-in-Equity never considered that defamatory insinuations are just as actionable as direct statements despite plaintiff providing the law to the Court. See plaintiff's August 19, 2021, Memorandum in opposition to summary judgment at Vol. 2, page 563 of the R.O.A. There, starting on page 12 (R.O.A. Vol. 2, page 574), the plaintiff provided standard jury

charges on insinuation and a long discussion of this Court's 2001 decision in *Murray v. Holnam*, 344 S.C. 129, 542 S.E.2d 753 (Ct. App. 2001), which held that: "The issue of actual malice is properly a question for the jury." See also *Eubanks v. Smith*, 292 S.C. 57, 354 S.E.2d 898 (S.C. 1987), another case provided to the Master-in-Equity: "Defamation need not be accomplished in a direct manner. *Tyler v. Macks Stores*, 275 S.C. 456, 272 S.E.2d 633 (1980). A mere insinuation is actionable as a positive assertion if it is false and malicious and its meaning is plain. *Id*." There is no mistaking the intent of the video—and if there is, then it becomes a genuine issue of material fact that only a jury can resolve.

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

> If an individual "voluntarily injects himself or is drawn into a particular public controversy," he "becomes a public figure for a limited range of issues. . . and assume[s] special prominence in the resolution of public questions." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 94 S.Ct. 2297, 41 L.Ed.2d 789 (1974). In determining whether a plaintiff is a limited-purpose public figure, the court should look "to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id*. at 352, 94 S.Ct. 2997.
>
> *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001)

As the U. S. Supreme Court decided in *Gertz*, a case similar to the present matter, a lawyer did not become a public figure by attending meetings and could maintain a defamation action when the defendant, Robert Welch, Inc. (the John Birch Society) labeled him a "communist." The Master-in-Equity ignored the *Gertz* precedent because, like the plaintiff in *Gertz*, the plaintiff here was (1) operating a lawful business in compliance with City regulations, and (2) taking steps **after** being attacked to mitigate the damages defendants caused by defaming him. Prior to the defamation, he attended public City meetings only as a citizen monitoring issues that affected him; they were not meetings **about his care of his horses,** which is the particular controversy that gives

rise to this action. The Master-in-Equity erroneously concluded that the plaintiff's right to attend public City meetings about matters unrelated to his care of his horses transformed him into a "limited public figure" and provided him with "equal access to channels of effective communication." These are reversible errors under *Erickson, supra*. See also *Gertz, supra*.

Here, the evidence demonstrates that the defendants forced the plaintiff into the public arena against his will. On April 19, 2017, after the plaintiff's horse slipped and then sat down on Meeting Street, City regulations required the City's Equine Manager and a qualified veterinarian examine him. Both Dr. Tara Little (Byrd), along with the City's Equine Manager, Shannon Tillman, immediately examined Big John and found him healthy, free from serious injury, and fit for work. The defendants deposed Dr. Little who confirmed that Big John was fine and that he did not "collapse" from any medical infirmity and certainly not from "exhaustion.: See deposition of Dr. Little quoted in Supp. Memorandum of Law filed January 26, 2022. Her medical records are recited in both veterinarian's depositions and Supp. Memo. R.O.A. Vol. 2, 840, Vol. 3 page 1075.

At the time of the defendants' initial April 19th defamatory publication, which they followed up with an April 24th Facebook Post (Ex. 4 to Jan. 26, 2022 Supp. Memorandum, R.O.A. Vol. 2, pages 860 and 872), **identifying the plaintiff and Brody by name and celebrating that 11 million viewers had seen their video**—complete with Dan Krosse's edits—they knew Big John suffered no serious injury, did not "collapse" from any underlying medical condition or abuse because both defendants had the examining veterinarian's findings and the City's Equine Manager's findings, which were reduced to writing and filed with the City and widely disseminated over media. (That is why the defendants put "trip" in quotation marks.) As quoted above on page 1 (and R.O.A. Vol. 1, page 402), the defendants knew that Big John "stumbled," the entire incident took less than 11 minutes, and that he suffered no injury. Nonetheless, the defendants set out to damage the plaintiff, and their target audience responded exactly as the

defendants intended. On May 21st, 2017, Natalie Powers posted on the plaintiff's Facebook page: "Can't wait to see what CAS does to keep destroying y'all. Y'all suck." R.O.A. Vol. 1, page 403 [Third supp. Affidavit filed September 24, 2021] This hostility whipped up by the defendants only accelerated from there resulting in terrifying conditions for the plaintiff, its principals and employees. See Vol. 1, R.O.A. page 350 and 352 [Feb. 25, 2020 aff. page 2 and 4]:

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

The second prong of the public vs. private figure analysis involves the question of whether **the plaintiff holds public office or possesses power to make policy.** The Master-in-Equity ignored the case law eliminating the plaintiff as public figure because he lacks "substantial responsibility for or control over the conduct of governmental affairs":

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

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

As discussed above, the leading case on this precise issue is *Milkovich v. Lorain Journal Co.*, 497 U.S. 1. 110 S. Ct. 2695, 111 L.Ed.2d 1 (1990) where the U. S. Supreme Court remanded a wrestling coach's claim for defamation for trial because a high school wrestling coach is not a public figure. See also *Garrard v. Charleston County School Dist., op. cit*., currently under review, a case cited by the Master-in-Equity on page 18 of his Order for the proposition that "hyperbole is not actionable." As the evidence of threats of violence against the plaintiff poured in, it is impossible to characterize the defendants' direct statements and insinuations plaintiff abused his

horse as "hyperbole."[2] See *Snyder v. Phelps* above where the statement "Fag Troops" was not a statement about the plaintiff. This record does not support the Master-in-Equity's unsympathetic characterization of such terror, but whether the defendants' statements are "of or concerning" the plaintiff are for a jury to decide. *Wilhoit v. WCSC, Inc.*, 293 S.C. 34, 358 S.E.2d 397 (Ct. App. 1987) *Milkovich* is also important because it further distinguishes between First Amendment freedom of speech and defamatory speech subject to claims for damages, and it rejects the defendants' strategy to hide behind the spurious claim of "just asking questions":

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "in my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words, 'I think.'" See *Cianci*, supra, at 64. It is worthy of note that at common law, even the privilege of fair comment did not extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion." Restatement (Second) of Torts § 566, Comment a (1977).

"Did Big John 'trip' or was he exhausted?" is a clear insinuation that must be viewed in the context of the defendants attacks on multiple fronts. These statements must be evaluated by a jury in their totality—in their "context"—including, but not limited to, the other demonstrably false statements published with the video and afterwards. Here, the evidence is uncontroverted that plaintiff occupies no position other than that of a private citizen trying to operate a business and protect it from defendants' attacks labeling him an animal abuser, an allegation of felony in South Carolina. Whether the defendants' attacks on the plaintiff as an animal abuser are "explicit" or "implicit" is of no consequence, especially at the summary judgment stage. Whether the defendants' statements are or are not defamatory is a question that can only be answered by a jury.

[2] In *Garrard*, the defamation was that Coach Garrard was a "racist," which is less specific than animal abuse, which is a crime.

Finally, as a plaintiff, resisting the "drastic remedy" of summary judgment, the plaintiff is entitled for all of these inferences to be resolved in his favor.

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

> In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 418 U.S. 345 (1974), we have recently further defined the meaning of "public figure" for the purposes of the First and Fourteenth Amendments:
>
> "For the most part, those who attain this status have assumed roles of **especial prominence** in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." (emphasis added)

Here, the defendants used taxpayer money and their status as charities to demonize the plaintiff, or as Ms. Harley says, "depress their income." In response, the plaintiff has done everything possible to avoid entanglement with the defendants. In defending himself, he is not transformed into a "limited public figure." After the defendants launched their campaign on April 19th against the plaintiff (remember—they boasted about having 11 million views by April 24th, see Exhibit 4 at R.O.A. Vol. 2, page 872), he wrote to Charleston Carriage Horse Advocates and to Charleston Animal Society on April 25, 2017 and May 11, 2017, ([Ex. 1 and 2 Supp. Memorandum of Law filed January 26, 2022, pages 35 and 37] in R.O.A. Vol. 2 at pages 867 and 869), asking them to cease and desist creating the false impression that he was an animal abuser. The defendants' response was to double down on their attacks. (Exhibit 3, Harley May 11, 2017 e-mail, R.O.A. Vol. 2, page 871). In examining Exhibit 3, it is important to note that the e-mail is

circulated between Harley, the principals of the Charleston Animal Society, and their counsel. There is not a *scintilla* of evidence in this record that the plaintiff has done anything to "assume the role of especial prominence in the affairs of society," *Gertz, op. cit*., or done anything other than try to prevent further damage to his company, and thus, by definition, is not a "public figure."

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

Without unnecessarily burdening the Court with either a repetition of the summary judgment standard or the vast amount of evidence in this record, it is sufficient to point out that the Court erred in concluding that the plaintiff is required to prove malice to survive summary judgment. Even if he were required to prove malice, this record contains an unprecedented measure of malice evidence, including several instances of what fairly can be described as "smoking guns." "Malice may be proved by direct or circumstantial evidence . . . "Whether malice is the incentive for a publication is ordinarily for the jury to decide." *Murray v. Holnam, Inc*., 344 S.C. 129, 542 S.E.2d 909 (Ct. App. 2001) Only the page limitations on briefs prevents the Appellant from discussing **all** the overwhelming evidence of malice, which should be unnecessary at the summary judgment since the trial court decides the plaintiff's status at the close of the evidence. However, even with page limitations and even with discovery incomplete, it is no heavy lift for Appellant to illustrate salient examples of malice ignored by the Master-in-Equity:

1. Distributed an email on March 30, 2017 coordinating a joint plan to "depress their income." R.O.A. Vol. 1 page 387 [Harley March 30, 2017 e-mail, Ex. 3, 2d Supp. affidavit]

2. Misrepresentations to Tourism Commission and formulating a common plan of attack. See R.O.A. Vol. 1, page 364 [Christoff affidavit December 2, page 5, and Ex. 1], including the creation of the joint C.C.H.A./C.A.S. "Equine Cruelty Committee": "Ellen Harley, Chair, Equine Cruelty Committee Internal Conversation: Does the carriage horse industry, as currently practiced in Charleston, overwork or overdrive horses, violating South Carolina cruelty law and the Five Freedoms." Coordinated a plan to use contributions and taxpayer money to "leverage social media" See Ex. 3: "Joe Elmore made the recommendation that we procure Forbes-Tate to assist in initiating strategy development, . . . 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. . . . **Please keep this confidential**." (emphasis added); Misrepresented "findings" of "Equine Cruelty Committee" to City of Charleston. (R.O.A. Vol. 1,

page 364 and 384 [Supp. Affidavit, page 5, page 10, Elmore Affidavit, Ex. 6]) (R.O.A. Vol. 1, page 383) (See also C.A.S. August 18, 2015 Minutes quoted below.)

3. Labeling plaintiff an animal abuser. R.O.A. Vol. 1, page 455 [Christoff affidavit page 7]

4. Inserting demonstrably false assertions on video.

5. Making knowingly false statements to newspaper and broadcast journalists. (Big John could not get up for 30 minutes; Big John collapsed from exhaustion.)

6. Jointly celebrating the damage done to the plaintiff. (Poag April 23, 2017 e-mail quoted above on page 22; Elmore e-mail: "Kudos" to 11 million views.)

7. Acknowledging Big John "stumbled," not "collapsed." R.O.A. Vol. 3, page 953[Poag email]

8. Reminders to keep the conversations "confidential." *Passim*

9. Suppressing and blocking truthful corrective information R.O.A. Vol. 1, pages 352 and 434 [Christoff February 25, 2020, affidavit, page 4, Vaughn affidavit]

10. Refusing to issue a correction after being informed of attacks on the plaintiff R.O.A. Vol. 3, page 1255 [January 31, 2021 30(b)(6) deposition of Ellen Harley, page 26]

11. Refusing to urge followers not to issue threats or commit violent acts against the plaintiff. (R.O.A. Vol. 3, page 1255, Vol. 2, pages 814-816 and 867-868, April 25, and May 11, 2017 correspondence to defendants)

12. Using taxpayer and tax exempt money to disrupt the plaintiff's reservation page (R.O.A. Vol. 1, page 416 [4th sup. Affidavit of B. Christoff and exhibits]

13. Using taxpayer funds, purchased Google ads specifically tailored to divert customers from Appellant's reservation page. (R.O.A. Vol. 1, pages 416 and 440) [4th Supplemental Affidavit of B. Christoff, Affidavit of Steve Abrams])

14. Executed joint plan to purchase domain names to divert customers away from plaintiff: "They'll s**t their pants." (R.O.A. Vol. 1, pages 387 and 429 ("depress their income"), ("they'll s**t their pants") [C.A.S. Minutes, 4th Supp. Affidavit, Ex. 8])

15. Entered into an unlawful conspiracy to keep "confidential" their joint efforts to attack carriage companies. (R.O.A. Vol. 3, page 973 [Ex. 2 Motion for Reconsideration])

16. Jointly disseminated a false video of Appellant's horse on April 19, 2017 containing demonstrably false assertions.

17. Four days after publishing the video, identifying Appellant by name. (R.O.A. Vol. 2, page 860 [Supplemental Memorandum of Law, Ex. 4 affidavit of Broderick Christoff])

18. Deliberately and systematically suppressed truthful information to cast plaintiff in a false light. (R.O.A. Vol. 1, page 434 [affidavit of Katherine Vaughn])

19. Banning anyone posting truthful information. (R.O.A. Vol. 1, page 434 [affidavit of Katherine Vaughn])

20. Provided doctored putative "bank records." (R.O.A. Vol. 2, pages 559-562; see defendants' motion to quash at 327, plaintiff's motion to compel at 143)

21. Intimidating a disclosed witness. R.O.A. Vol. 1, page 438 [Affidavit of K. Vaughn]

22. Preventing any forensic exam of electronic media.

23. Filing licensing complaints against plaintiff's veterinarian, lawyer, and filing a spurious O.S.H.A. complaint. [R.O.A. Vol. 1, page 376 [Christoff 2d Supp. affidavit]

Any one of these indisputable, verifiable facts is sufficient to create a genuine issue of material fact that the defendants maliciously conspired with one another intending to harm the plaintiff. Any one of these facts allows each of plaintiff's causes of action to survive summary

judgment. The evidence also provides overwhelming and indisputable evidence of malice. The Master-in-Equity either overlooked the entire body of evidence, or, more likely, weighed the evidence and decided he believed the defendants' explanations over the plaintiff's evidence. Either way, this is an error of fact and law by applying the incorrect summary judgment standard requiring reversal.

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

> After the presentation and discussion Matt Watson made a motion that "Based on the presentation today, the Board find the practice of the carriage horse industry cruel and that we should study the situation further." R.O.A. Vol. 1, page 386 [2d Supp. Affidavit Aug. 19, 2021]

Three months later, the Charleston Animal Society Minutes of August 18, 2015 (R.O.A. Vol. 1, page 384 [2d Supp. Affidavit filed August 19, 2021]) demonstrate that the Charleston Animal Society and Ellen Harley were fully amalgamated and fully committed in their malicious plan to interfere in plaintiff's business:

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

This is clear and convincing evidence of foundational malice succinctly summed up in Catherine Poag's post video celebration describing cornering plaintiff like an "animal." This same amalgamated group appeared before the City of Charleston's Tourism Commission on April 26, 2017, and after again maliciously providing false information to the Commission, a member of the Commission, the Mayor's advisor, Rick Jerue, asked: "who the Charleston Carriage [Horse] Advocates were?" R.O.A. Vol. 1, page 407 [3d Supp. Affidavit filed Sep. 24, 2021]) Mr. Cooper, a Tourism Commission member, said they were "Ellen Harley's subcommittee group from the

Animal Society." At this meeting, the Charleston Animal Society's *Equine Cruelty Committee* chaired by Ellen Harley, made a presentation to Charleston City Council urging the City to take steps to shut down the carriage companies. This evidence forms the evidentiary foundational maxims from which the defendants' deployment of social media attacks are constructed and demonstrates the defendants' commitment to a program born of malice. The record demonstrates that the plaintiff demonstrated sufficient malice evidence to establish genuine issues of material fact on all five of the causes of action alleged in the complaint.

4. The Master-in-Equity erred in dismissing the plaintiffs causes of action for conspiracy, intentional interference in business relations, and violation of the plaintiff's civil rights because there is overwhelming evidence to support a coordinated conspiracy to damage plaintiff.

The Record on Appeal contains sufficient evidence to raise genuine issues of material fact as to conspiracy and intentional inference (outrage) and a violation of the plaintiff's civil rights. Since all non-defamation causes of action are similar—and predicated on the same evidence establishing malice in the defamation claim—Appellant discusses them together because of page limitations. It is important to recall—discussed in the first argument—that the trial court denied the Appellant an opportunity to complete discovery, thwarted by the defendants,' Harley and Charleston Carriage Horse Advocates,' obstruction. The elements of each cause of action are:

Conspiracy

1. a combination of two or more
2. joining for the purpose of injuring the plaintiff
3. which causes damages[3]

Intentional Interference

1. existence of a contract
2. defendants' knowledge of contract
3. intentional procurement of breach
4. absence of justification
5. damages.

These defendants know the plaintiff operates under a franchise agreement with the City and that the City promulgates extensive regulations governing the operation of carriages, which is why the defendants' original strategy was to get seats on City Council and the Tourism Commission.

[3] These elements are indistinguishable from the civil rights claim—see *Dennis v. Sparks*, 449 U.S. 241.

The record demonstrates that when the defendants failed to control the issue through the legislative/political process—which they have a right to do—they joined together to launch unlawful and malicious attacks on Plaintiff. See the list of 23 delicts listed above on pages 41-42. Because the City can suspend any carriage company for a violation of its regulations, and animal abuse, a felony, is the worst, the attacks on the plaintiff were directed at interference in plaintiff's franchise agreement with the City and with, as Ms. Harley says, "depress their income," by driving away customers by manufacturing bad reviews, interfering with the plaintiff's web presence, and characterizing the plaintiff as an animal abuser. The same evidence supports the plaintiff's claim that the defendants violated his civil rights since all defendants derive benefits from the government, and Charleston Animal Society is a quasi-governmental agency and individuals can be sued for violation of rights when they conspire with the government. *Dennis v. Sparks*, 449 U.S. 241

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

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

Appellant combines arguments 5 and 6 into a single argument because the legal analysis of each question requires the application of the same law. The defendant, Harley, disclosed for the first time in her January 31, 2020, deposition that she blames others for the content plaintiff has identified as defamatory, an issue not raised in her responsive pleadings. In addition, since the

defendants imply the plaintiff was dilatory in seeking the amendments made to address issues raised by the defendants, it is worth repeating that 461 days elapsed between filing of the complaint and the defendant's answers. See R.O.A. pages 77 and 182 [complaint, answers]) The plaintiff filed his **first** motion to compel on July 5, 2019, containing specific evidence of the defendants' refusal to cooperate. R.O.A. Vol. 1, page 89 It should be sufficient to say that the record does not explain how the Master-in-Equity derived from this record that the obstructionist tactics identified above are the plaintiff's fault, or how the defendants could be prejudiced by amendments to the complaint which are only made to address defendants' suggestion that the previously undisclosed parties were responsible for defendants' defamation or that damages claimed by the plaintiff belong to the plaintiff's principals and not the limited liability company. The Master-in-Equity does not explain how the defendants are prejudiced by these amendments or how the case would be delayed. Rule 15 governs motions to amend, and motions to amend can be made as late as the close of all the evidence. See *Soil and Material Engineers v. Folly Associates*, 293 S.C. 498, 361 S.E.2d 779 (Ct. App. 1987).

Here, the Master-in-Equity's May 12, 2022 Order (R.O.A. page 43) simply concludes that the defendants would be prejudiced by amendments without identifying either how or why, and thus under Rule 15 and the cases construing it, the Master-in-Equity's Order is controlled by an abuse of discretion amounting to an error of law, relying on inapplicable rules in doing so. Moreover, the Master-in-Equity contradicts himself on page 4 of his Order, denying the motion to amend on the ground that the amendments assert new causes of action, while on page 6 of the same Order, he denies the motion on the ground that "there are no new substantive allegations." Logically, it cannot be both. If it is the former, then the defendants must identify how they are prejudiced by the amendments, which they cannot do. If it is the latter, then the newly added defendants can raise affirmative defenses if they believe they apply. If there is a Rule 18 impediment to adding two new defendants identified by Ellen Harley in her January 31, 2020

30(b)(6) deposition or in adding the principals of the plaintiff to address defendants' complaints that damages alleged are personal to them, these are objections the new parties must raise, not the defendants in the case. The defendants cannot possibly complain that the plaintiff is adding its principals to address the defendants' assertion that some of the damages are personal. Defendants are not permitted to dictate plaintiff's choice of forum or defendants, and if a party being added possesses a valid statute of limitations defense, that party can assert it as an affirmative defense as allowed by Rule 8(c) of the *South Carolina Rules of Civil Procedure*, and, as discussed in the Memorandum of Law filed with the Master-in-Equity in support of reconsideration discusses, even a statute of limitations defense is subject to equitable tolling. Inasmuch as the plaintiff alleges an ongoing conspiracy, it remains to be seen how potential new defendants can advance that claim successfully, but that question was not before the Master-in-Equity.

7. The Master-in-Equity abused discretion in refusing to amend the scheduling Order a single time when the Record shows the defendants did not file Answers for 461 days, obstructed discovery, which remains unresolved, and plaintiff's counsel suffered a serious medical injury, and the administration of the Courts were slowed by COVID-19.

The parties entered into a single scheduling Order in this case filed on July 16, 2019. (R.O.A. page 75) The original—and only—scheduling Order contemplated discovery being completed by February 7, 2020, and trial not before May 11, 2020, 79 days after defendants filed their answers and motions for summary judgment. In April, 2019, plaintiff's counsel suffered a heart attack requiring hospitalization, which led to open heart surgery in August 2019. Trauma during the surgical procedure damaged the laryngeal nerve, which reduced speaking to a whisper for many months. The defendants did not file their Answers until November 20, 2019, 461 days after the plaintiff filed the complaint and 79 days before the Scheduling Order expired. In February, 2020, the State began a series of responses to the COVID-19 pandemic some of which continue to this day. For example, in March 2020, the Supreme Court cancelled all terms of Court until May—except for emergency hearings—and thereafter issued a series of modifying Orders restricting

judicial travel and transitioning to a remote practice procedure. Through all of this, the defendants, Harley and Charleston Carriage Horse Advocates continued a process of obstruction as the motions to compel and for sanctions (discussed in Argument 1 above) demonstrate.

When plaintiff requested a single extension to the scheduling Order, the defendants saw an advantage, and as quoted above on page 8, the Master-in-Equity gave short shrift to the outstanding discovery issues—"got it." The Master-in-Equity had the obligation to allow the plaintiff an opportunity to be prepared for trial, and even without the defendants' dilatory conduct, the discretion to allow a single amendment to a Scheduling Order in light of these circumstances should be automatic because the administration of justice is a search for the truth, not a framework for sharp practice to prevent justice. Moreover, the defendants took depositions, such as Dr. Miller, beyond the expiration of the Scheduling Order but denied plaintiff the same courtesy. South Carolina law is well settled that the failure to use discretion is itself an abuse of discretion. *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990), quoted below.

More importantly, however, is that the Master-in-Equity's May 12, 2022, Order denying plaintiff's application for a first amendment is grounded upon palpable legal error and self-refuting. On page 2 of the Order denying an extension, the Master-in-Equity concludes: "Plaintiff has not established that additional discovery would serve any purpose." (R.O.A. Vol. 1, page 41) Thus, the entire decision is based upon a self-refuting, logical impossibility of proving a negative. This is obvious error. The impossibility of proving the negative is as old as antiquity. No court has ever permitted a party to withhold evidence and allow that suppression to give rise to a **positive** inference, a conclusion violating the fundamental rule of logic, *Modens Tollens*. The Master-in-Equity turns this infallible logical rule on its head to derive a positive inference from the failure to produce evidence—an absurd conclusion. In fact, South Carolina law has a well-developed body

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

Clearly, a judge has an obligation to make sure that parties respond to discovery and that parties be given an opportunity to prepare for trial. *Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2003). When a trial judge refuses to use discretion, that refusal is an abuse of discretion. "It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly. *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981)." *Balloon Plantation Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990

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

abuse of discretion by rewarding the defendants for contumacious conduct in suppressing discovery to run out the clock on the plaintiff.

Conclusion

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

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

This case should be returned for a jury to decide. Respectfully submitted,

August 9, 2023

/s/ Thomas R. Goldstein
Thomas R. Goldstein, S. C. Bar No. 2186
Belk, Cobb, Infinger & Goldstein, P.A.
P. O. Box 71121
Charleston, S. C. 29415-1121
(843) 554 4291; (843) 554 5566 (fax)

RECEIVED
Aug 09 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

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

Charleston Carriage Works, L.L.C., Appellant,

v.

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

CERTFICATE OF COUNSEL

I certify that this Final Brief complies with Rule 211(b), *South Carolina Appellate Court Rules*.

August 9, 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
Attorneys for Appellant