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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No.: 2018-CP-10-4083

Appellate Case No.: 2022-001114

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

v.

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

REPLY BRIEF TO CHARLESTON CARRIAGE HORSE ADVOCATES & ELLEN HARLEY

August 9, 2023

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Reply to Respondent's Statement of the Case

Respondent's counter statement of case contains some procedural and some factual errors requiring correction. Respondents assert on page 8: "**Shortly before the hearing** concerning Respondents' motion to dismiss, Appellant dismissed that action and filed the current action. . ." (emphasis added) Respondent removed the action on July 19, 2018, and Appellant dismissed the federal court action four days later on July 13, 2018.[1] R.O.A. Vol. 4, page 1731.

The second paragraph contains two material and serious factual misstatements. The first is that it is "indisputable" that Big John "collapsed." First, Big John's "collapse" is a highly disputed question of fact. When Respondents seek to raise money, they describe Big John's fall as a "collapse" from "exhaustion" and over work. Their confidence lapses now that they are before the Court of Appeals. Now, like their co-defendant, they say, on page 14, Big John "fell." After Appellant wrote to all the Defendants on April 25 and May 11, 2017, asking them to correct their misstatements, they instead intensified their campaign against Appellant by targeting his business on social media and used geotargeting of search terms to interfere with his reservation process. It is a jury question of how the meaning of "collapse from exhaustion" differs from "fell," in combination with the other overwhelming evidence of malice. An insinuation is just as actionable as a direct statement as discussed on page 35 of Appellant's initial brief: "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*."

The Respondents' evidence of conduct—the context—is sufficient for a jury to find Respondents intended the term "collapsed" from "exhaustion"—as part of its strategy to harm the Plaintiff. Both deposed veterinarians were clear that "collapse" connotes an underlying medical

[1] The procedure is so tortured, Respondents misremember what happened.

condition such as "exhaustion." The Appellant provided the Master-in-Equity with standard jury charges on defamation, which make clear that an insinuation is just as actionable as a direct defamatory statement. Likewise, proof of conspiracy is always covert and usually not susceptible to proof by direct evidence. *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006). See Appellant's Memorandum of Law to the Master-in-Equity at Vol. 2, page 574 of the R.O.A.. Second, and more troubling, is Respondents attempt to mislead the Court about all the other evidence such as the willful suppression of truthful information designed to promote the false narrative of Appellant as an animal abuser. See, for example, the affidavit of Katherine Vaughn filed September 28, 2021 at Vol. 1, R.O.A. page 434 where she details how the Charleston Carriage Horse Advocates "charity" deleted her truthful and accurate comments and banned her. See also the February 25, 2020 affidavit of Broderick Christoff Vol. 1, page 352 R.O.A. [page 4]. In the affidavit, Mr. Christoff explains how Harley and Charleston Carriage Horse Advocates perpetrate frauds in order to raise money, a strategy much in the news at the present time. The point is: The Respondents mislead this Court to suggest that the Appellant's entire basis of defamation is the defendants' use of a single word, "collapsed." The law leaves it to a jury to decide if that word is used in an inflammatory or defamatory way.

Page 9 of the Respondents' statement of case contains additional factual errors. Judge Price heard motions to compel on May 28, 2020 and June 16, 2020. The Orders from both hearings are Form Orders found in the Record on Appeal at pages 65 and 68. Respondents argue that they complied with Judge Price's Orders: "Harley produced the agreed-upon bank statements and the documents that were responsive to Appellant's search terms." (Respondents' brief at page 9) The putative bank statements are in the R.O.A. at Vol. 2, page 559, and the Court can view them and draw its own conclusions. Whatever those documents are, they are not "bank statements just as they come from the bank" as counsel represented to the Court. See R.O.A. Vol. 4, page 1583 [June

16, 2020,page 17] As to the other meaningless production, Appellant's Third Supplemental Affidavit filed September 24, 2021, analyzed the Respondent's production request page by page, and the Court can see that it was not only bogus, but also Appellant demonstrated time and time again that the **only** way to get to the truth was to provide Appellant's expert with the administrator keys so he could analyze how the Respondents have "leveraged" social media to damage the Appellant. See July 17, 2020, corr. at R.O.A. Vol 2, page 557, filed Dec. 2, 2020 and affidavit of Steve Abrams at Vol. 1, page 440.

Respondents also provide an incomplete picture of important dates in the procedural timeline. Some of the operative dates are:

DATE	EVENT	DAYS ELAPSED
August 17, 2018	Complaint filed	1
April 20, 2019	Heart Attack	246
July 16, 2019	Scheduling Order	333
August 20, 2019	Open Heart Surgery	368
November 20, 2019	Harley and C.C.H.A. Answer	460
November 20, 2019	Charleston Animal Society Answers	460
February 7, 2020	Discovery closes per Scheduling Order	539
March 13, 2020	Executive Order Declaring State of Emergency Order 2020-08	572
April 3, 2020	Supreme Court's COVID Order (2020-04-03-01)	593

Discovery closed 79 days after the defendants filed their Answers! The following month the Governor declared the first of a number of State of Emergency declarations in response to COVID, and in April, the Supreme Court began restricting court appearances. Plaintiff's discovery efforts were hampered not only by serious health setbacks and COVID restrictions, but also by the Respondents, Harley and Charleston Carriage Horse Advocates', dilatory and obstructionist tactics. (The transcript of the May 28, 2020 appearance before Judge Price demonstrates the impossibility of effectively presenting a motion to compel over Zoom.) The defendants cannot

identify any lack of diligence in plaintiff, especially when they forget to mention post-surgical laryngeal nerve damage, which reduced speaking to a whisper for months.

Finally, the Respondents assert a spurious suggestion that the Appellant raised issues for the first time in a Rule 59(e) Motion for Reconsideration. Appellant's Rule 59(e) motions addressed themselves to the reasoning set forth in the Orders under review and nothing more as set forth in the Statement of Issues on Appeal. All are properly before the Court.

Reply to Respondents' Standard of Review

Respondents' Standard of Review deploys misdirection. This case is before the Court on the grant of summary judgment (and a refusal to allow/compel discovery and allow amendments). As set forth in Respondent's brief, Appellant raised four causes of action all of which require the ordinary preponderance of evidence to succeed. (Libel is, of course *per se* defamation for which no proof of damages is required: "Essentially, all libel is actionable *per se*, while only certain categories of slander are actionable *per se*." *Erickson* at page 664.) The clear and convincing standard does not arise until the case is to be submitted to a jury and is only applied if the Court declares the plaintiff a public figure or public official and/or plaintiff seeks punitive damages. The clear and convincing standard elevates a plaintiff's burden if, and only if:

- Defendants are media defendants, *i.e*. broadcasters or publishers;
- Plaintiff is a public official and or a public figure
- Plaintiff seeks punitive damages. See *Erickson v. Jones Street Publishers, LLC*, 338 S.C. 444, 629 S.E.2d 653 (2006) (The Plaintiff is, of course, a limited liability company.)

At the summary judgment stage, the Plaintiff is not held to a clear and convincing standard of proof. The Supreme Court explains this procedure in *Erickson v. Jones Street Publishers*, 338 S.C. 444, 629 S.E.2d 653 (2006), discussed fully in Appellant's opening brief at pages 16-18 and 27-40:

> 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 careful examination of the facts and circumstances, before the jury 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* at page 666 (emphasis added)

The Respondents erroneously assert that the clear and convincing standard applies in a summary judgment case. The record, incomplete as it is, overflows with evidence of actual malice. Neither actual malice nor the clear and convincing standard applies here because none of the defendants are "broadcasters" or "publishers," and because the appellant is not a public figure. See *Erickson, op. cit*. As tax exempt charities, Respondents are statutorily prohibited from disseminating false information to induce contributions. According to their publicly filed financial disclosures, Charleston Animal Society has over 19 million dollars, not including the millions of dollars in real estate provided them from Charleston County and the City of North Charleston. Joe Elmore's base salary went from $90,000.00 in 2012 to $243,123.00 in 2019 . See Record on Appeal Vol. 2, page 545 [memo filed Dec. 2, 2020] for Elmore's salary and Vol. 1, pg. 266 for the financial holdings of the Charleston Animal Society. Because of discovery obstruction, the Plaintiff has never learned either the extent of the other defendants' holdings or the financial relationship between the defendants. The false information they have disseminated includes:

- Pushed out a video falsely implying Big John "collapsed" from overwork or exhaustion
- Pushed out false accusations that Appellant is supposed to weigh each carriage tour
- Deleted and blocked truthful information on their home pages
- Barred comments and commentators who furnish truthful information
- Formed an "equine cruelty committee"
- Created a putative charity with a name so close to Appellant to confuse customers
- Used charitable contributions to mislead the public
- Interfered in the Appellant's web presence (R.O.A. Vol. 1, pg. 416 [Christoff 4th Supp. Aff.]
- Filed licensing complaints with O.S.H.A. the South Carolina Bar against Appellant's lawyer, the medical board against Appellant's veterinarian
- Followed Appellant's tours and harassed drivers and passengers (R.O.A. Vol. 1, page 352)
- Obstructed discovery (R.O.A. Vol. 3, page 1231 [30(b)(6) deposition]
- Intimidated Appellant's witnesses (R.O.A. Vol. 1, page 438 [corr. J. Mann to K. Vaughn])

This is substantial evidence of both defamation and actual malice and more than sufficient to survive the entry of summary judgment.

Reply to Respondents' Argument 1

The Appellant set forth 12 specific statements of issues on appeal, and Appellant presented them all to the trial court, and the trial court ruled on them all. There are no issues raised for the first time on appeal.

The Appellant presents 12 Statements of Issues on Appeal in five separate questions. Question 1 has three subparts and Question 5 has three subparts. The Statement of Issues on Appeal contain nothing that Appellant did not either brief to the Master-in-Equity or discuss in colloquy with the trial court or both. The assertion that the Appellant raised a new issue for the first time on appeal is refuted by the voluminous record. The Master-in-Equity corralled the discussion to his six questions drawn from *Erickson*. As argued fully in Appellant's opening brief at pages 6-10, 29 & 49, Appellant's attempt to call the Court's attention to the discovery deficiencies under *Doe v. Batson*, 345 S.C. 278 S.E.2d 854 (2003), resulted in a four-word dismissal, "All right, got it," (R.O.A. Vol. 4, page 1639), leaving Appellant no choice but to move on as required by Rule 43(i), *South Carolina Rules of Civil Procedure*. The caselaw demonstrates the Master-in-Equity did not get it because he erroneously relied on *Richardson*, 430 S.C. 594, 846 S.E.2d 14 (Ct. App. 2014) for the proposition that Appellant can only seek relief from the judge who heard the original motion to compel, a case that stands for the precise opposite holding! Moreover, the Master-in-Equity's action is self-refuting because if he really thought only Judge Price could hear it, then he would not have decided it.

Reply to Argument 2

The Master-in-Equity never reached Appellant's arguments on discovery abuses because he ruled that Appellant was required to present them to Judge Price and because he concluded Appellant "got everything he asked for," which is not supported by the record.

The Respondents mischaracterize this case, calling it a "bitter debate of the sufficiency of equine ordinances." (Respondents' brief at page 14) This misdirection recalls Baudelaire's statement, "The cleverest ruse of the Devil is to persuade you he does not exist."[2] It is undisputed that a small, extremely vocal, group led by Ellen Harley and Joe Elmore have lobbied hard for the

[2] "The Generous Gambler" (trans. Arthur Symons)

eradication of carriage tours. However, through all the so-called "bitter debate," the Appellant's treatment of his horses has never been either called into question or made the subject of public debate. The "spirited debate" of the G.A.L. program was the **exact issue** in *Erickson*, but when a newspaper insinuated that Linda Erickson had a sexual relationship with the father of one of her G.A.L. clients, Erickson not only sued them, but also when the trial judge directed a verdict for the same reasons here, the Supreme Court reversed and sent the case back for a jury to determine damages. The "bitter debate" about the G.A.L. program is equivalent to the "bitter debate" about carriage tours, and when the defendants paint Appellant as an animal abuser who overworked his horse to "collapse," they went too far and must now answer to a jury. As mentioned above, now that they are before the Court of Appeals, the Respondents blink. On page 14, after four years of litigation, the Respondents finally admit Big John "fell to the ground." The next sentence drives home the Respondents' malice, because the "collapse" and "exhausted" language superimposed upon the video included quotation marks on the word "trip," mocking the publicly filed City reports. These quotation marks are significant because they demonstrate the Respondents were in possession of the reports prior to conspiring with Dan Krosse to put out the defamatory message. The inference of the quotation marks is clear, a sophomoric rhetorical device, to disguise libel under the pretext of "just asking questions." The case-law is clear they cannot escape a defamation trial because they claim to be asking questions. It is for a jury to decide the meaning of their statements in the context in which they make them, and insinuation is just as actionable as a direct statements. This record demonstrates there is more than a genuine issue of material fact that the Respondents intended their statements to be defamatory and conspired with one another to ruin Appellant's business.

None of Respondents' arguments shed light on the Master-in-Equity's refusal to take up or rule correctly on the Respondents' dilatory and contumacious discovery conduct. Argument 2 is

supposed to be a discussion of the Master-in-Equity's analysis of Appellant's October 2, 2020, Motion for Sanctions (R.O.A. Vol. 1, page 334), but Respondents dodge the legal issue that the Order under review is obviously erroneous:

First, the Master-in-Equity gave short analysis to the issue summarized as: "All right. Got it." (R.O.A. Vol. 4, page 1639 [tr. page 53] Second, and stranger, the Master-in-Equity ruled the parties had to return to Judge Price (a legal error) and then proceeded to deny the request after he just said only Judge Price could decide it! As *Richardson* makes clear, a plaintiff can move for sanctions before filing a motion to compel. The Master-in-Equity's decision that the parties had to return to Judge Price is clearly erroneous, and moreover, by his own logic, he would send the parties back to Judge Price to decide it.

As for the Respondents' dilatory and contumacious conduct, the Court need look no further than Respondents' brief at page 16, quoting their promise to produce "the monthly bank statements just as they would be delivered to the client from the bank." (Respondent's brief at page 16, quoting transcript at page Vol. 4, 1583 R.O.A.) The Court can look at what they produced on Vol. 2, pages 559-562 of the R.O.A. and see at a glance that whatever they are, they are not "bank statements just as they would be delivered to the client form the bank." After the defendants failed to adhere to their representations to the Court, the plaintiff attempted to cut through the wasteful posturing and sent a subpoena to South State Bank to get the documents Respondents said they would produce voluntarily. They responded to this by filing a motion to quash the subpoena and directed the Bank not to produce the documents! (It is important to remember the Court issued a mutual Confidential Order filed June 2, 2020, Vol. 1, R.O.A. page 71)

The Respondents' final argument is spurious. They assert they provided "10,000 responsive, non-privileged documents to the Plaintiff." (Respondent's brief at page 18) First, as set forth in the third supplemental affidavit, a detailed analysis of Respondents' production of 10,000 (actually

8,258) documents provided almost nothing material. Second, they rely upon a self-serving, inaccurate e-mail dated October 26, 2020, to gaslight the Appellant.[3] As referenced in footnote 1, Respondents team of lawyers deploy the magician's strategy of misdirection where one set presents a patina of cooperation while the other team continuously obstructs. Appellant attempted to summarize this misdirection for the Master-in-Equity in its Memorandum of Law filed December 2, 2020, which contained not only the bogus "bank statements exactly as they come from the bank," but also counsel's July 17, 2020, correspondence that laid bare the Respondent's contumacious scheme. (R.O.A. Vol. 2, pages 543-562) This correspondence detailed Harley's utter refusal to provide a look inside her putative charity and explained that the only solution was to provide Administrator keys to plaintiff's expert:

> [Harley] thumbs her nose at discovery, and when you identify our answer to interrogatory number 12 as being "incomplete," you highlight her intransigence. How in the world do we know what your client was up to either before January 3, 2017 (date of incorporation) or after when she has produced nothing more substantial than a single e-mail? . . . Ellen Harley stepped out of her protection as a private citizen when she chose to create a South Carolina charity called the Charleston Carriage Horse Advocates. Running a tax exempt charity comes with the responsibility to be open and transparent. In all her filings, she identifies herself as the repository of the charity's records, and yet, we have a single e-mail from her and not a single financial record other than her publicly filed tax returns." (Exhibit 2 to December 2, 2020 Memorandum of Law, R.O.A. Vol. 2, page 558)

The Master-in-Equity considered none of this, and the December 2, 2020 memorandum is only a sliver of the record establishing the plaintiff's efforts to force the Respondents to obey the rules of discovery. While a third of Respondents' legal cadre creates a façade of reasonableness by providing 8,258 useless documents, the Record demonstrates what the Respondents were really doing. Appellant's September 27, 2019, amended motion to compel lays out the Respondents' dilatory and contumacious conduct, R.O.A. pages 143-176, including letters dated March 21, 2019,

[3] Respondents have so many lawyers, including one who claims a $975.00 billing rate, they create a wall between cooperation and obstruction as the following discussion of correspondence reveals.

March 28, 2019, August 2, 2019, August 4, 2019, pointing out multiple specific instances of Ellen Harley's false statements including false statements under oath. Page limitations on briefs prevent discussing all of these prevarications, but one example should be sufficient. On July 2, 2019, the plaintiff sent to Respondents a single interrogatory asking a single question: "who has the financial records of Charleston Carriage Horse Advocates?" Here is the Respondents' answer in full: "Defendant objects to this interrogatory as it is overly broad, unduly burdensome, and not calculated to lead to the discovery of admissible evidence."

The Master-in-Equity never reached Appellant's arguments on discovery abuses because he preempted analysis on the ground that only Judge Price could do so, and because he concluded Appellant "got everything he asked for," which the record refutes. The record demonstrates all that plaintiff received were meaningless records, 8,258 pages of junk, and never received the Administrator key it has been seeking for over four years. Appellant agrees with the Respondents that the assessment of sanctions is a matter of discretion, and this record demonstrates not only did the Master-in-Equity fail to apply discretion but also reached a contradictory self-refuting conclusion by applying an erroneous reading of controlling case law.

Reply to Argument 3

The Appellant showed good cause for amending a Scheduling Order that had never been amended once.

Respondents' argue the Master-in-Equity committed no error in refusing to extend the scheduling Order a single time because none of Appellants' three reasons constitute "good grounds." Appellant's three grounds are: (1) a serious medical event that required multiple hospitalizations including open heart surgery in August 2019, the (2) the various impediments caused by the State's response to COVID beginning in February 2020, and (3) the Respondents' dilatory and contumacious conduct obstructing discovery.

As to the first, Respondents point out that counsel's first heart attack occurred on April 19, 2019, after the case had been pending since August 2018 or 8 months. In April 2019, the

Respondents' Answers to the Complaint were still 7 months away from being filed. The Respondents filed simultaneous Answers on November 20, 2019, 16 months after the complaint! (R.O.A. Vol. 1, pages 182 and 189 [Answers]) As the record demonstrates, Appellant vigorously pursued discovery at every possible moment, and Respondents thwarted Appellant every step of the way, refusing to answer standard interrogatories (R.O.A. page 543), interfering in Appellant's 30(b)(6) deposition (R.O.A. page 536), moving to quash Appellant's subpoena for the very records they promised to produce (R.O.A. page 206), and even launching licensing challenges on everyone associated with the plaintiff (R.O.A. page Vol. 1, pg. 376). In light of the Respondents' contumacious conduct, it is astonishing Respondents seek to exploit a series of medical setbacks and COVID restrictions. Respondents mock counsel for knowing about an August 2019 procedure as far back as April, demonstrating a lucky unfamiliarity with the heart failure process. Unlike Respondents' teams of lawyers, Appellant is limited to a single lawyer from start to finish. During the open heart procedure in August, 2019, surgeons nicked the laryngeal nerve, impairing counsel's speaking voice to a whisper for months. The suggestion, if there is one, that counsel failed to attend case duties diligently—see Respondent's Brief at page 24: "This case is so old Appellant misremembers what happened"—is not accurate.[4] As the December 2, 2020, Memorandum of Law discussed above demonstrates, what the Appellant does or does not remember is irrelevant because the record establishes the procedural record in the case, and the procedural record proves beyond a reasonable doubt that the Respondents have successfully thwarted Appellant's discovery to date.

The Respondents follow up their analysis with what they consider to be the death blow that the parties entered into a discovery Order on July 5, 2019, when counsel knew he was headed for

[4] To be fair to Respondents' counsel, a trip through open heart surgery and I.C.U. requires the administration of drugs that induce an amnesic state. Fortunately, memory fills in over time.

open heart surgery the following month. The Scheduling Order calls for discovery to close on February 7, 2020, and mediation to be completed by March 9, 2020. The Respondents believe this is a "gotcha" moment, inferring that Appellant is foreclosed because it failed to anticipate the Respondents' continuing contumaciousness about discovery and/or that an August open-heart procedure might lead to complications. Leaving this aside, it is something close to gall to call time on Appellant: "Appellant's 'carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief.'" (Respondent's brief at page 24, citing *Dilmar Oil Co. v. Federated Mutual Ins. Co.*, 986 F.Supp. 959 (1997). The Respondents completed at least two depositions after February 7, 2020 closing date, without objection from the Appellant. On February 11, 2020, Respondents deposed Dr. Justin Miller and on March 11, 2020, the Respondents deposed Dan Riccio without objection from the plaintiff. Thereafter the parties attended mediation sessions on November 5, 2020 and October 25, 2021 long after the initial (and only) Scheduling Order expired. The Court must keep in mind that the plaintiff provided full discovery production to the Respondents allowing them to move forward with discovery. By contrast, Harley and Charleston Carriage Horse Advocates have produced nothing material and steadfastly refused plaintiff's expert the necessary access to conduct a forensic examination necessary to prepare properly.

In an effort to break through the obstruction and inform the Court of the status of discovery, as discussed above, Appellant filed a Status Conference Memorandum with the Court on December 2, 2020, providing a detailed explanation of the Respondents' refusal to cooperate in discovery. Instead of addressing these facts, Respondents misplace reliance on a District Court case construing a very different Rule 16 in *Dilmar v. Federated Mut. Ins. Co.*, 986 F. Supp. 2959 (1997). In *Dilmar*, the plaintiff filed suit on January 25, 1996, and on March 25, 1997, the District Court granted the defendant's motion for summary judgment, primarily on the statute of limitations and also holding that the plaintiff's efforts to add D.H.E.C. to the suit involved claims

"too different to be appropriately addressed in this lawsuit." In holding further that the application to amend came too late, the District Court applied the Federal Rule 16(b), which requires a scheduling Order after receiving the parties' reports under Rule 26(f) and after "consulting with the parties' attorneys." The Federal Rule further provides that the Scheduling Order can be modified for "good cause" with the judge's consent. The opinion cites *6A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Procedure* § 1522.1 at 231 (2d ed. 1990) for the standard: a "showing of good cause if [the deadline] cannot be met despite the diligence of the party seeking the extension." What the District Court—and the Respondents—leave out is Wright & Miller's discussion of the purpose of the rule—which is to prevent exactly what the Respondents are trying to achieve here:

One of the vital, if not the outstanding, advantages of pretrial procedure is to take the trials of cases out of the realm of surprise and maneuvering, whereby an unwary counsel might see the just case of his client lost. It may be romantic and charming to watch the skillful trial lawyer as he lies in wait to pounce upon an uninformed and less skillful counsel, but the results are frequently not just.
Wright & Miller, § 1522

The federal rule is, of course, different from the state rule, and the federal rule requires a "pre-trial conference on trial." As Wright & Miller, § 1527 explain:

The pretrial conference should not be viewed as merely an informal meeting at which those involved can act without concern for future consequences. If the conference is to be a useful tool, all participants must be fully aware of the possible effects the pretrial hearing may have on the trial. When the final conference is held **after the discovery process is completed**, shortly before trial, counsel presumably have identified virtually all of the evidence relating to their cases. Thus, it would not be unreasonable to hold them to the statements they make and the agreements they entered into at the conference or restrict their proof at trial to the issues set forth in the pretrial order. (emphasis added)

The state rule is more informal. Under Rule 16(b) "Pre-trial Orders," "such orders when entered, control the subsequent course of the action, unless modified on motion, **or at the trial to prevent manifest injustice**." (emphasis added)

In short, there can be no question that counsel's serious health impediments, the imposition of COVID restrictions, and the Respondents' steadfast refusal to participate in discovery creates a

surplus of "good cause." In March, 2020, the Supreme Court began issuing Orders restricting access to the Court for obvious reasons, and the deficiencies in the system were equally obvious. The May 28th, 2020, Zoom appearance before Judge Price on plaintiff's second motion to compel demonstrates how routine court appearances became nearly impossible, preventing any meaningful presentation of discovery disputes involving the complex procedure of this case:

THE COURT: Yes, sir, I will be happy to hear from you.
MR. GOLDSTEIN: Okay. This is a motion to compel. And I have to . . .
(WHEREUPON, audio of Mr. Goldstein temporarily frozen.)
THE COURT: Yeah, he froze.
(WHEREUPON, pause while audio frozen.)
MR. GOLDSTEIN: . . . and have worked well together in this case.
THE COURT: All right, Mr. Goldstein, hold on. You froze. We have heard nothing that you have said other than okay.
R.O.A. Vol. 4, page 1569 [tr. June 16, 2020, pages 3-4]

There is not a lawyer or a judge in this State who has not experienced the frustration of trying to work around the obstacles created by pandemic restrictions. The reason the parties referred the case to the Master-in-Equity was an effort to work around the disruption of the Courts wrought by COVID. It is astonishing the Respondents suggest Appellant's counsel exercised something less than diligence in pursuing this case, and while "good cause" is not required for a single extension of a state scheduling Order, the Appellant has showed far more than the requisite good cause. In short, the Respondents seek to profit from their own wrongdoing by calling time on Appellant, denying Appellant the considerations they claimed for themselves.

Reply to Argument 4
The Master-in-Equity erred in not allowing amendments to the complaint.

The Respondent's Fourth argument is easily refuted. The proposal to add the principals of the plaintiff was only to meet Respondents' allegations that some of the plaintiff's damages are "personal" to the principals of the limited liability company. In an effort to quiet a manufactured controversy, the plaintiff asked to add the plaintiff's principals as additional parties for the same claims and damages alleged by Charleston Carriage Works. Neither the allegations nor the

damages change; rather, the proposed amendment is only to address the Respondents' assertions that some of the damages are "personal." The proposed amendment only prevents the Respondents assertion the suit is brought by the wrong party, and since the principals are asserting the same claims on the same facts based on the same evidence, their addition does not add a new claim or defense and therefore is not barred by the statute of limitations:[5] "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading." Because there is clearly no statute of limitations issue invoked, the Master-in-Equity erred in denying the amendment.

As to the proposal to add defendants, the first glimmer that Respondents may be shifting responsibility occurred on January 31, 2020, when plaintiff learned, for the first time, that the defendants were blaming others. When the plaintiff deposed who he thought was a Director of Charleston Carriage Horse Advocates, Elizabeth Fort, on May 3, 2019, she described Charleston Carriage Horse Advocates an informal group who "gathered" at Ellen's house:

> A. We had like—we gathered, the four of us at Ellen's house. And so, if that was like a formalized meeting, yes, but it was nothing like a board tht I've been on in the past in terms of like we had a space. We'd just go to Ellen's. It was probably, I mean, if I remember correctly, I was over there maybe twice. (May 6, deposition, page 14, lines 16-23 in R.O.A. at Vol. 2, page 524 [May 26, 2020 Supporting Memorandum])

When Charleston Carriage Horse Advocates finally appeared for its 30(b)(6) deposition on January 31, 2020, it identified for the first time that a public relations firm, Domangue Consulting, might be responsible for Charleston Carriage Horse Advocates' libelous conduct. For the Court to comprehend how obstructionist Ms. Harley has been, consider this excerpt from her deposition:

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

---

[5] While composing this brief, Ellen Harley and her group launched another defamatory attack on the Appellant. She usually does so just before a big holiday weekend, displaying Appellant's business underneath banner headlines implying he is an animal abuser. Her tortuous activity continues right through to the present.

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 tht 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?[6]

(Jan. 31, 2020 deposition, pg. 35, lines 4-21, R.O.A. Vol. 2, page 525[May 25, 2020 memorandum])[7]

Under these facts, the Respondents demonstrate nothing that prevents the amendment. Plaintiff moved with alacrity after wedging what small amount of information it could from Ms. Harley, and the proposed amendments change nothing about the claims asserted or the defenses interposed. The Respondents claim prejudice without identifying any, and it is their burden to establish prejudice to defeat a motion to amend. On a motion to amend a pleading, the burden is on the party opposing the motion to show how it is prejudiced. *Patton v. Miller*, 420 S.C. 471, 804 S.E.2d 252 (2017)

Instead, Respondents misplace their reliance on a 1995 Court of Appeals case, *Valentine v. Davis*, 319 S.C. 169, 480 S.E.2d 218 (Ct. App. 1995) where the Court of Appeals refused to allow the Valentines to enter a case through another party. The Court denied their motion to amend for the obvious reason that they lacked standing to make the motion. In other words, the Valentines attempted to intervene in a state case that had already been decided against them in federal court: "Rule 15, SCRCP, does not allow an existing plaintiff to add a **new plaintiff to the case** to assert a claim against the defendant." *Valentine ibid.* Here the plaintiff is attempting merely to correct a caption to answer the Respondents allegations that some of the damages are personal to the

[6] In the same deposition, Ms. Harley claimed all the financial records were with "A-1 Bookkeeping." When asked where "A-1 Bookkeeping" is located, she answered: "In the State of South Carolina." R.O.A. Vol. 2, page 458, Memorandum filed February 25, 2020 at page 3. All the records are in her home.

[7] This memorandum identifies the difficulties Appellant encountered scheduling and completing the deposition.

principles of Charleston Carriage Works, an objection the Respondents raise under Argument V iii on page 36 of their brief where they alleged that the Appellant can only recover "actual pecuniary loss" but not loss to reputation. Leaving aside that this is an incomplete statement of law, it was the plaintiff's effort to head off this assertion by adding the principals, which did not add new causes of action or new theories of recovery. It was an abuse of discretion to disallow such a minor amendment.

It is also an abuse of discretion to prevent the addition of defendants 3 months after plaintiff discovered their relationship to the claims, well within the period to allow such amendments. First, the statute of limitations is an affirmative defense that must be plead and proved. Rule 8 (c), *South Carolina Rules of Civil Procedure*. Second, a statute of limitations defense does not begin to run until a plaintiff either discovers it or had a reasonable opportunity to discover it with reasonable diligence, and this record bursts at the seams with Respondents' obstruction.

"The exercise of reasonable diligence means simply that the injured party must act with some promptness where facts and circumstances of injury would put person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exists; statute of limitations begins to run from this point and not when advice of counsel is sought or full-blown theory of recovery is developed." *Young v. S. C. Dept. of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (1999), quoting *Wiggins v. Edwards*, 314 S.C. 126, 442 S.E.2d 169 (1994)

Because the plaintiff acted promptly and because the amendments do not change any claims, and because the Respondents have not identified any prejudice, the Master-in-Equity abused his discretion in refusing to allow the amendments.

Reply to Argument 5

The Master-in-Equity never reached Appellant's arguments on discovery abuses because he ruled that Appellant was required to present them to Judge Price and because he concluded Appellant "got everything he asked for," which is not supported by the record, and South Carolina law is clear that 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*****, S.C. S.E.2d**

As set forth above, the Master-in-Equity never analyzed Appellant's arguments on discovery abuses. Respondents' argument is a repetition of the argument advanced in its previous arguments

2 and 3, alleging "Appellant failed to [move to amend the scheduling Order] and did not give any legitimate excuses for its failure. It is needlessly repetitious to point out the obvious: counsel went down with a cardiac event that consumed a good part of 2019, COVID shuttered the Courts beginning in February 2020, and Appellant's counsel was pursuing discovery with all his might trying to overcome the Respondents' contempt for the process. These all meet the test of "legitimate excuses."

What follows next in Respondents' brief is the rhetorical trick of demanding an opponent prove a negative. Harley and her group provided 8,258 documents, and the Appellant went through them page by page and filed an Affidavit with the Court on September 24, 2021, demonstrating that the production is almost entirely bogus. R.O.A. Vol. 1, page 390[Third Supp. Affidavit of B. Christoff, pages 3-5]:

> 2913 pages (35.3%) are duplicate pages.
> 1604 pages (19.4%) copies of filed pleadings in this case
> 1192 pages (14.4%) are signatures of people calling for the ban of carriages, and so on, including 44 blank pages.

With the exception of 15 pages of Schedule B's and 37 e-mails, the Respondents provided nothing relevant to this case. Respondents assert on page 28 of their brief that Appellant failed to demonstrate how undisclosed evidence supports its case, the same proving the negative fallacy in the Order under review. Respondent also suggests that Appellant was dilatory in waiting 40 months to file a motion to extend the scheduling Order when the record demonstrates the extraordinary lengths Appellant deployed to try to work around the Respondents' intransigence and seems to forget that it took Appellants 19 months to file an Answer!

Respondent's obstructionist strategies are exactly why plaintiff hired a forensic computer expert whom Harley said could have access to the defendants' electronic devices:

> Q. Do you have an objection to making the devices owned and operated by Charleston Carriage Horse Advocates available to Mr. Abrams for imaging?
> A. No, I don't.

January 31, 2020 deposition of Ellen Harley in Vol. 1, R.O.A. at pages 388-389 [Third Supp. Affidavit of B. Christoff filed September 21, 2021]

Finally, the Respondent asserts on page 28 of its Brief that the evidence sought by the Appellants relates to Mr. Christoff who "is not a party in this action." Aside from substituting chutzpah for reason, Respondents are, again, advancing the logical impossibility of demanding Appellant prove what it does not have will help them. These Respondents have been obstructionist since the start of the case, and nothing has changed. The Master-in-Equity abused discretion by letting them profit from their own wrongdoing, and the case should be remanded with instructions to grant access to Appellant's forensic expert to put an end to obstruction.

Reply to Argument 6(i)&(ii)

The Master-in-Equity erred in imposing the "drastic remedy" of summary judgment where Appellant produced copious evidence of genuine issues of material fact, and Respondents concede that statements about a plaintiff's unfitness for a business are libel *per se.*

Leaving aside the issue that a court can only entertain summary judgment when discovery is complete, *Doe v. Batson*, 345 S.C. 278 S.E.2d 854 (2003), the Master-in-Equity's grant of summary judgment is clearly erroneous under the 2006 analysis of the Supreme Court in *Erickson v. Jones Street Publishers*, LLC, 368 S.C. 444, 629 S.E.2d 653 (2003). The Respondents erroneously assert the Appellant is required to prove a "heightened burden of proof" at summary judgment. As *Erickson* makes clear, the "heightened burden of proof" applies only to the requirement to prove "actual malice" when a "media defendant" broadcasts false information about a "public official or public figure." "Consequently, to prove fault in a defamation action, a plaintiff who is a public official or public figure must prove by clear and convincing evidence that the defendant acted with actual malice in publishing a false and defamatory statement about the plaintiff." *Erickson* at page 665. The existence of actual malice is a jury question. As set forth above, the Court determines the plaintiff's status before charging the jury because it is for a jury to decide if the plaintiff has proved actual malice if, and only if, plaintiff is a public figure. Also

importantly, *Erickson* decided that "all libel is actionable *per se*." *Erickson* at page 664. The Respondents concede that an allegation that one is unfit in one's business or profession is actionable libel and accusing a carriage operator of abusing his horse is undeniably libelous *per se*. (Respondent's Brief at page 31) Because the heightened standard of proof only applies to actual malice and punitive damages, "The issue of actual malice is properly a question for the jury." *Murray v. Holnam*, 344 S.C. 129, 542 S.E.2d 753 (Ct. App. 2001)

Reply to 6(iii)
The First Amendment is not a license to libel.

The Respondent here makes two gross mischaracterizations and one legal error. The first mischaracterization is that because there is public debate over the propriety of carriage tours, the defendants are given leave to characterize the plaintiff as an animal abuser and attack his web presence and whip up hysteria with potential to lead to violence. A simple observation illustrates Respondents' error. The recent worldwide attention on South Carolina's legal system does not give license to attack a particular lawyer. In fact, during the deposition of Dan Riccio on March 11, 2020, he testified he deactivated his Facebook account in part because of Respondents' "bullying." Ellen Harley and the Charleston Carriage Horse Advocates libeled him in the same manner as Appellant—by posting a photo of him and labeling it with libelous accusations of impropriety. See. R.O.A. Vol. 3, page 1222[Riccio dep., page 200]

The second mischaracterization is misapplying *Erickson* (which is the case that controls the outcome here) to assert that the plaintiff is a "limited public figure." The Appellant is, of course, a limited liability company, not a "figure," but more importantly, the Appellant's principal, Mr. Christoff, occupies the same relationship to the Respondents that Linda Erickson did to the defendants in her case. She was a Guardian ad Litem, and she participated in the Governor's task force on G.A.L.'s exactly like Christoff attends Tourism Commission meetings. Neither makes either one of them a "limited public figure":

> Appellant was not famous, had no special access to the media, never sought the public's attention, did not thrust herself voluntarily into a public controversy, and did not assume any special prominence in the resolution of an issue of public concern. Whether debate about the potential reform of the guardian system was a public controversy, Appellant contends she was a private figure who must prove by a preponderance of the evidence that Newspaper acted negligently in publishing false and defamatory statements about her in order to recover damages. We agree in part. *Erickson* at page 664

This record shows that aside from attending public meetings and taking steps to mitigate his damages, the Appellant did nothing to convert himself into a "limited public figure." While the *Post & Courier* occasionally quoted him speaking at Tourism Commission public meetings, he never thrust himself into the public eye until he gave a single interview to Quentin Washington, **after the libel** to try to mitigate his damages.

A second, salient, overarching, error permeating the Master-in-Equity's grant of summary judgment is the myth that Respondents are "media defendants." "Media defendants" are broadcasters and publishers who operate under a standard of journalistic ethics. These journalistic ethics require them to verify sources, print corrections, and above all, publish truthful information. "Media Defendants" who do not are subject to suit. See *Dominion Inc. v. Fox News Network, L.L.C.*, N21C-03-257-EMD (2021), resulting in a settlement of 787.5 million dollars for broadcasting false allegations.[8] The record here shows that the plaintiff wrote Respondents on April 25, 2017, asking for a retraction or correction. (R.O.A. Vol. 4, page 1342) Instead of correcting their false statements, the Respondents doubled down on their allegations, stepping up their attacks—the opposite of a "media defendant." The First Amendment does not protect Internet trolls, and the Respondents are exactly that. Their "publications" are designed to do exactly one thing: motivate people to send money. South Carolina charities, receiving tax exempt status, are statutorily prohibited from disseminating false or misleading information to promote fundraising.

Reply to Argument 6(iv)&(v)
The plaintiff is a private figure

[8] The Court in Dominion swept away the same argument advanced here: "But a speaker cannot 'purposefully avoid' the truth and claim ignorance," citing *N. Y. Times v. Sullivan*, 376 U.S. 254, 280 (1964)

The plaintiff's status in this case mirrors the status of the plaintiff in *Erickson*. The Respondents' entire argument that the Plaintiff is a public figure or a public official is because their attacks on him elevated him to public figure status. This facile argument lacks either facts or law to support it. Our Supreme Court in *Erickson* decided this issue, and reversed the trial court's conclusion that Linda Erickson was a limited public figure. First, a trial court does not make the determination at summary judgment:

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)

Reply to Argument 6(vi)
The Order under review is controlled by palpable errors of law

The Respondent's argument here is not only repetitive but also repeats the error of the Master-in-Equity that the Court can decide the "truth" of the Respondents' statements. First, Respondents' pretend that the "collapse" allegation is Appellant's entire case when the Appellant laid out for the Master-in-Equity a detailed list of defamatory/conspiratorial actions perpetrated by the Respondents. See R.O.A. at Vol. 1, page 369 [June 23, 2020 Supp. Aff. B. Christoff, page 10] Respondents argue that Plaintiff "voluntarily injects himself . . . into a public controversy" by attending public meetings affecting his business and mitigating his damages. *Erickson* rejects this reasoning and requires a jury to decide disputed assertions. While tourism issues are a matter of "public controversy," the Appellant's treatment of Big John is not. The Appellant's involvement in the "controversy" is limited to protecting his business against the attacks of animal rights fanatics who seek to exploit a minor mishap into a call for action and to generate financial contributions. Surprisingly, the Respondents acknowledge that the Appellant is a private figure on page 40 of their Brief, quoting *Erickson*:

"Therefore, neither the person who made the statements (Pat Beal) nor the publisher (Newspaper) may, by their own words and actions, transform [GAL] into a limited public figure by dragging her unwillingly into the controversy over reform of the guardian system." (emphasis added)

This is exactly the case before the Court! The Master-in-Equity compounded his error by assuming, without a scintilla of evidence to support it, that the Appellant had "effective channels of communication," "voluntarily assumed a role of prominence in the public controversy," and "sought to influence the resolution of the controversy." (Respondent's brief at page 40) All of the evidence demonstrates that the Appellant was reactive to Respondents' attacks. This entire controversy arises from the Respondents' characterization of the Appellant as an animal abuser and nothing else, demonstrating the Order under review is constructed on a foundation of error.

This record proves Respondents' statements are not only false but also malicious. Respondents have sufficiently unmitigated gall to assert that their labeling Appellant an animal

abuser is rhetorical hyperbole! Animal abuse is not only a crime but also the most serious allegation against a business operating horse carriage tours—that it is unfit. The issue of how Respondents' statements and conduct are received in public is the quintessential jury question, and the Master-in-Equity erred when he erroneously concluded he could decide issues of fact instead of a jury. It is not for a judge on summary judgment to determine if Respondents' statements are true or false or how the public received them: "Thus truth is an affirmative defense as to which the defendant has the burden of pleading and proof, unless the statement involves a constitutional issue. See Hubbard and Felix, *The South Carolina Law of Torts* 468, 478 (2d ed. 1997)." *Parrish v. Allison*, 376 S.C. 308, 656 S.E.2d 382 (Ct. App. 2007) (Court reversed jury verdict for defendant and remanded for new trial because defendant did not plead affirmative defense of truth.) The same case also makes clear that a jury must determine the impact of the words, not a judge, because it is a question of fact, so the Master-in-Equity's view that the publication is "rhetorical hyperbole" invades the province of the jury. "If the question is one on which reasonable minds might differ, then it is for the jury to determine which of the two permissible views they will take." *Parrish* at page 389 quoting *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497 (1998).

Reply to Argument 6(vii)

The plaintiff produced extensive evidence of conspiracy and interference with contract and violation of his fundamental constitutional right to privacy.

The final three pages of Respondents' brief assert that Appellant has failed to produce evidence of conspiracy, interference with contractual relations, and violation of the Appellant's rights, relying on a solitary straw man argument that Appellant produced a single e-mail to support its claims. Leaving aside that a single e-mail is sufficient, as set forth on above pages, the Appellant produced numerous incidents of conspiracy and an effort to "depress his income." Appellant's Fourth Supplemental Affidavit (R.O.A. Vol. 1, page 416, Vol. 3, page 1240) demonstrates how the Respondents' dirty tricks manipulated Google to drive away his customers,

and once Appellant gets access to the Respondents' bank records and administrator keys, it will be able to prove exactly how much money Harley and her putative charity have spent purchasing Google keywords, including his exact name, to target him. For purposes of summary judgment, it is more than sufficient that Appellant demonstrates how their plan works. Clearly, all the Respondents have joined together to commit unlawful acts—and lawful acts in an unlawful manner—to damage the plaintiff. His initial affidavit dated February 25, 2020, and his Supp. Affidavit filed June 23, 2020, lay out the falsehoods and the coordination between the Respondents to damage Appellant. Because the page limitations on Reply briefs prevent quotation from these documents, the Appellant craves reference to pages 44-50 of its Initial Brief for more detailed discussion of the existence of genuine issues of material facts on conspiracy, intentional interference in business relations, and violation of Appellant's civil rights.

Conclusion

The analysis of this case starts and ends with the Supreme Court's analysis in *Erickson v. Jones Street Publishers, op. cit*. No one can look at this record and not see the joint effort of the Respondents to put Appellant out of business, and it is for a jury—not a judge—to evaluate the evidence to determine if the Appellant has proved by a preponderance of the evidence the conspiracy to defame him and ruin his business.

Respectfully submitted,

August 9, 2023

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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

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