

RECEIVED

Aug 21 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

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

Charleston Carriage Works, LLC,Appellant,

v.

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

AMENDED THIRD SUPPLEMENTAL RECORD ON APPEAL

All counsel of record gave consent to the submission of this Third Supplemental Record on Appeal.

August 21, 2023

RECEIVED
Aug 21 2023
SC Court of Appeals

s/Jenkins Mann
Jenkins M. Mann (9986)
ROGERS LEWIS JACKSON & MANN LLC
1901 Main Street, Suite 1200
Columbia, SC 29201
Tel: 803-978-2832
803-256-1268
kmaroney@rogerslewis.com
jmann@rogerslewis.com
Attorneys for Respondent

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

Elizabeth J. Palmer
Saxton & Stump
151 Meeting Street
Charleston, S. C. 29401
(843)
EP@saxtonstump.com
Attorneys for Charleston Animal Society

Joseph Thompson
Spencer C. Gill
Hall, Booth & Smith, P.C.
111 Coleman Boulevard
Suite 301
Mt. Pleasant, S. C. 29464
(843) 720 3460
jthompson@hallboothsmith.com
sgill@hallboothsmith.com
Attorneys for Charleston Carriage Horse Advocates and Ellen Harley

MOTIONS

May 26, 2020 Reply Memorandum in Support of Motion to Amend 2107-2115

TRANSCRIPTS

December 7, 2018 Excerpts of Transcript of Broderick Christoff 2099-2106

1 Q. Okay. Well, I need to know what the statements are in
2 the interview replies if you think they're defamatory.

3 A. I don't -- there's nothing that is in the front of my
4 mind right now.

5 Q. Okay. And do you understand what defamation is?

6 A. I think so.

7 Q. Okay. And is your understanding of defamation that
8 there has to be something factually false that she
9 says about the plaintiff in order for the plaintiff to
10 be able to bring a defamation lawsuit?

11 A. Yes.

12 Q. Okay. To your knowledge, has Ellen Harley, again,
13 pointing to her off camera sitting behind me so we're
14 clear as to who we're talking about, a defendant in a
15 lawsuit that you have brought or your company has
16 brought, are you aware of any false statement that
17 Ellen Harley has made about Charleston Carriage Works,
18 your company?

19 A. And you mean like specifically mentioning our company
20 name? That's what you mean?

21 Q. It -- first, yes, and then we'll talk beyond that.
22 First, yes. I mean a single time she's ever said
23 Charleston Carriage Works, LLC and something false
24 about the company that defamed it, that lowered its
25 esteem in the community of its peers.

1 A. I don't recall a time that she mentioned us by name.

2 Q. Okay. All right. A single time that Ellen Harley
3 individually said -- made a statement of any type.
4 The statement can be any -- anything that you want to
5 call a statement -- a statement of any type that
6 implied something false and defamatory about the
7 plaintiff. It doesn't have to call you by name. I
8 just want to know what she said individually about
9 Charleston Carriage Works that was both false and
10 defamatory.

11 A. She's made statements about our industry in published
12 statements, photographs of our carriages and -- and
13 other people in the industry's carriages and about our
14 industry in general that we do or don't do certain
15 things that were false.

16 Q. But she's never made those statements about Charleston
17 Carriage Works, correct?

18 A. Not mentioning us -- not that I'm aware of mentioning
19 us specifically by name.

20 Q. And is it fair to say that the statements you're
21 talking about -- and we'll get to them here in a
22 second because I want to hear how they're false and
23 defamatory -- but is it fair to say that the
24 statements you're talking about were statements that
25 she made about the industry, the carriage horse

1 industry, in general, and not about your company,
2 Charleston Carriage Works, LLC individually?

3 A. Yes.

4 Q. Okay. So the universe of statements that you're aware
5 of and the lawsuit that you've brought and that so
6 many people are in this room to talk about today, the
7 universe of statements that you're aware of by Ellen
8 Harley solely consist of statements that you contend
9 she's made about the carriage horse industry, correct?

10 A. I wouldn't say that.

11 Q. Okay.

12 A. I don't have the -- I don't have the evidence that I
13 have memorized, so I can answer your questions to the
14 best of my ability.

15 Q. Sure.

16 A. I can't tell you that I don't have -- you know, I've
17 given you all of the documents and -- and whatever
18 screen shots that I have, and I can't tell you for
19 certain that there isn't something in there that
20 doesn't meet or violates your qualifications on your
21 question, so --

22 Q. Okay. But as we sit here today, after --

23 A. There -- right.

24 Q. -- you cannot come with this --

25 A. There is nothing right here on the front of my mind or

1 A. That's correct.

2 Q. All right. So what we're talking about here today are
3 the statements made at the time of the inception of
4 this lawsuit, correct?

5 A. Correct.

6 Q. Okay. Tell me the name of one person whose opinion, a
7 conversation that you've had with them -- I'm looking
8 for your evidence -- one person you've ever talked to
9 who said their opinion of Charleston Carriage Works --
10 Charleston Carriage Works had been lessened because of
11 a statement made by Ellen Harley. And I need to know
12 their full name, and if you've got their contact
13 information, I'll get that from you as well.

14 A. I don't think there is a person.

15 Q. Okay. So to your knowledge, you've never heard from
16 anyone who said that their opinion of Charleston
17 Carriage Works has been in any way affected by a
18 statement made by Ellen Harley, correct?

19 A. Correct.

20 Q. Okay. Let's talk about Charleston Carriage Horse
21 Advocates, Inc. Tell me every defamatory statement
22 that's ever been made by Charleston Carriage Horse
23 Advocates, Inc. regarding your LLC, Charleston
24 Carriage Works, LLC.

25 A. Okay. So the primary one being the video.

1 Q. Okay. I'm going to write down video.

2 A. Okay.

3 Q. And that's going to be the Big John video. We're
4 going to come back and talk about that in a minute.

5 A. Okay.

6 Q. I want to know what the other ones are.

7 A. Okay. That's the -- the primary one, and then --
8 let's see -- I think the video and the -- the video
9 and the distribution of the video is the -- is the --
10 I think the only thing I can think of where she
11 actually -- or they, I'm sorry -- actually mentioned
12 us by name and/or in, you know, describing the video
13 to other people.

14 Q. Okay. Tell me everything about the video that was
15 defamatory by Charleston Carriage Horse Advocates,
16 Inc. Tell me everything that Charleston -- Charleston
17 Horse -- Carriage Horse Advocates, Inc. did in
18 association with that video that defamed you.

19 A. They published with the -- with the subtitles that the
20 horse had collapsed.

21 Q. Collapsed. What else?

22 A. The -- it was also published to -- to lead people to
23 believe that the horse had a -- was exhausted.

24 Q. Okay.

25 A. Or had some heat problem.

1 Q Okay. What else you got?

2 A Okay. Here's a - this is - this is an example of the
3 - the kind of posts that made that - we end up having
4 to deal with. This would be Number 392.

5 Q 392? Okay. All right. First of all, is that your
6 horse?

7 A No, that's not my horse.

8 Q Okay. And does anywhere on this page, does it
9 reference Charleston Carriage Works, LLC?

10 A It does not.

11 Q Okay. What else you got? Let me ask you this while
12 you're going through this?

13 A Sure.

14 Q This thing - you'll concede I think maybe even in your
15 lawsuit, this thing has become a very public fight
16 between you and the defendants, correct?

17 A Very public is an understatement.

18 Q Okay.

19 A Very public. That's an understatement. I mean, this
20 - this has consumed a giant portion of my life.

21 Q Right.

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

24 Q Right.

25 A And you realize the backlash that has occurred as a

1 result? And not only that, that continues to occur.
2 So this went to bed a little bit by the end of 2017?
3 All of sudden this year, in what, August, July or
4 August comes up again? Starts all over again.

5 **Q No question, it's an issue that playing -**

6 A It's a nightmare. To say that we have some sort of
7 public whatever you said is a complete understatement.

8 **Q Okay.**

9 A This is an all consuming thing. I've been here all
10 day.

11 **Q Uh-huh.**

12 A I don't think - I think when you look at the - at
13 these files I don't want you to get the impression
14 that, you know, I'm trying to be some kind of a smart
15 guy and I've given you like all these thousand files
16 because I'm trying to bury you in whatever. These are
17 all things that I think are important and are
18 connected. I'm not -

19 **Q That's what we -**

20 A -I'm not here to waste your time.

21 **Q No.**

22 A So you can imagine the manhours or person hours, if
23 you want, that it takes and took for me to collect all
24 this and to -

25 **Q Uh-huh.**

1 Q Okay. So you -

2 A So I guess those are my reasons. What's listed under
3 that.

4 Q Okay. As we sit here today, you're not aware of what
5 civil rights of yours were violated? And by yours I
6 mean, I'm sorry, I mean, Charleston Carriage Works,
7 LLC.

8 A No, I would defer to what's written in that section of
9 the complaint.

10 Q Okay. Tell me about - there is a pain and suffering
11 damage by your managers and your employees. Were any
12 of your managers or employees physically injured as a
13 result of conduct you allege was perpetrated by the
14 defendants in this lawsuit?

15 A Physically, no, I don't think so.

16 Q Okay.

17 A Not that I'm -- not that they shared with me.

18 Q All right. So this lawsuit, you're not making any
19 claim for physical injury to any - to Charleston
20 Carriage Works, LLC or any of its officers, directors,
21 employees or agents, correct? Physical injury?

22 A Physical injury? I think that's correct.

23 Q Okay. Injury to body? You're not alleging that the
24 defendants have of any -- in any way have caused
25 injury to the body of any person -

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2018-CP-10-04083

Charleston Carriage Works, L.L.C.,)
)
Plaintiff,)

vs.)

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

**REPLY MEMORANDUM
SUPPORTING MOTION TO AMEND**

The defendants oppose plaintiff’s motion to amend on three grounds:

1. Alleged prejudice and timeliness.
2. Rule 15 does not allow adding new parties.
3. An amendment would be “futile.”

In evaluating these objections, it may be convenient to have a succinct timeline of the procedural history and pertinent events of the case:

August 17, 2018 Plaintiff files summons and complaint

October 19, 2018 Defendants file a joint motion to dismiss

April 22, 2019 Plaintiff’s counsel suffers heart attack.

May 3, 2019, Plaintiff takes the deposition of Elizabeth Fort

July 5, 2019 Plaintiff moves for an Order compelling defendants to answer discovery

July 16, 2019 Consent Scheduling Order

July 22, 2019 Defendant, Charleston Animal Society moves for an Order compelling discovery

August 25, 2019 Plaintiff's counsel undergoes open heart surgery (The procedure, while a success, damages the laryngeal nerve, paralyzing vocal cords for approximately six months.)

September 27, 2019 Plaintiff files amended request to compel responses to discovery

November 20, 2019 Defendants file their Answers to the Complaint and move for summary judgment

January 30, 2020 Defendant, Charleston Carriage Horse Advocates, moves for an Order compelling discovery.

January 31, 2020, Charleston Carriage Horse Advocates submits to a 30(b)(6) deposition.

April 6, 2020 Plaintiff moves to amend complaint

This timeline demonstrates the slow progress of this case toward trial has been hampered by (1) a life-changing medical event and (2) the defendants', Charleston Carriage Horse Advocates and Ellen Harley's, steadfast refusal to engage in minimal or meaningful discovery. At the beginning of the case, before the defendants filed their Answers, the plaintiff took the deposition of Elizabeth Fort, a putative director of Charleston Carriage Horse Advocates on May 3, 2019. During this deposition, Ms. Fort testified that the Charleston Carriage Horse Advocates is run by Ellen Harley:

Q. Did y'all have regular meetings?

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 that 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. (Fort Deposition, page 14, lines 16-23)

During this early part of the case, the plaintiff served specific discovery questions on Charleston Carriage Horse Advocates and Ellen Harley, almost all of which the defendants have to this day ignored and refused to answer on the grounds of relevancy, in the public domain, and/or burdensome. (See plaintiff's motions to compel.) The Carriage Horse Advocates' and Ellen Harley's deliberate disregard of their responsibilities under the *Rules of Civil Procedure* is blatant contempt for court process and unjustified. However, because their unjustified and dilatory conduct is fully addressed in the pending motions to compel, those facts do not require repetition here. However, by complaining about timeliness of plaintiffs' proposed amendments, the defendants seek to profit from their own dilatory conduct.

The closest the plaintiff has been able to come to extracting meaningful information from the defendants, Carriage Horse Advocates and Ellen Harley, was during a 30(b)(6) deposition taken on January 31, 2020, when the Carriage Horse Advocates produced Ellen Harley as the witness most knowledgeable about the corporate structure and operation of the charitable organization. (The completion of this deposition was extraordinarily difficult. Plaintiff noticed it on November 13, 2019 for December 6th. Two days prior the 6th, defendants indicated they were not appearing. After much back and forth, the defendants agreed to produce a witness on January 31, 2020.). There, **for the first time**, Ms. Harley denied being responsible for the defamatory content on her

putative charity's home page and also asserted for the first time that the defamatory editing, which will expose her fraudulent activities, was done by someone else. For the first time, the defendants asserted that the offensive publication was done by two other corporate entities and/or by her directors on their personal electronic devices. The transcript of the 30(b)(6) deposition reveals the obfuscation that Ms. Harley has adopted from the beginning:

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 your 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

The 30(b)(6) deposition was an exercise in almost entire futility as it was punctuated by continuous coaching and speaking objections. Most importantly Ms. Harley is still refusing to allow access to her organization's meta data or banking records, both of which are important to plaintiff's case especially because the defendant, Harley, disclosed for the first time in her January 31, 2020 deposition that she now blames others for the content plaintiff has identified as defamatory. Importantly, there is no mention of these allegations in the defendants' Answers filed November 20, 2019. Having obtained this new information, the plaintiff consulted immediately with opposing counsel as to whether they would or would not consent to an amendment, and when they failed to respond, filed the motion to amend on April 6th. (The addition of the principals of the plaintiff are only to meet the allegations of the defendants that some of the damages pertain to the principals individually and not their limited liability company, but their claims are based on the original identification of defamatory publications.).

As to the defendants' allegations that they will be prejudiced by an amendment, they merely state the conclusion without providing evidence. (They also say that Rule 15 does not permit the addition of new parties. Rule 20 does so long as the allegations arise out of the same transaction or occurrence, and there is no objection raised that the allegations of the amended complaint allege anything other than the original claims; to wit, the defamatory attacks on plaintiff.) "Prejudice" in the context of pleading amendments means a defending party is deprived of a defense or a witness, neither of which is implicated or alleged here. The proposed amendments involve merely the addition of the "directors" of Charleston Carriage Horse Advocates, a putative organization that, as far as plaintiff has been able to determine from the limited discovery allowed by the defendants on January 31st, disregards the responsibilities of operating as a proper charitable organization with alarming insouciance.

Moreover, the proposed amendments arise out of the same transaction, the same occurrences, and the same allegations of defamation and add nothing other than to address the fact that, based on Ms. Harley's January 31st deposition, she identified for the first time two additional corporate entities that she claims are responsible for her defamatory content. The proposed amendments do nothing but follow up on the information provided by her on January 31st that the Charleston Carriage Horse Advocates does not observe corporate formalities and to address the defendants' criticisms that some of the damages claimed by the plaintiff inure to the benefit of the principals of Charleston Carriage Works individually and not the limited liability company. The proposed amendments do not alter the theory of the case or require additional defenses not already plead.

Rule 15 of the *South Carolina Rules of Civil Procedure* requires that amendments be liberally granted in the interests of justice. (The addition of new parties is the same standard under Rule 20. New parties can be added if the claims arise out of the same transaction or occurrence. *Chan v. Thompson*, 302 S.C. 285, 395 S.E.2d 731 (Ct. App. 1990: "We affirm the decision of the master to add the other companies owned by the Chans o the litigation on the breach of contract claim. There is some evidence these companies were set up by the Chans and utilized to channel sales away from Lisa Floral in such a way as to deprive the Thompsons of sales commissions.") The wellspring of commentary on the rule allowing amendments stems from the discussion of the rule in the United States Supreme Court case of *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962):

The Court of Appeals also erred in affirming the District Court's denial of petitioner's motion to vacate the judgment in order to allow amendment of the complaint. As appears from the record, the amendment would have done no more than state an alternative theory for recovery.

Rule 15(a) declares that leave to amend ‘shall be freely given when justice so requires’; this mandate is to be heeded. See generally 3 Moore, Federal Practice (2d ed. 1948), 15.08, 15-10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, *etc.*—the leave should, as the rules require, be ‘freely given.’ Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Here, the plaintiff is not changing the legal issues of the case and is really not adding “new” parties since the “new” parties are, according to Ms. Harley, another embodiment of the same amalgamated entity whom she now says is responsible for the content that is the subject of this lawsuit. After testifying that the putative “directors” of the Carriage Horse Advocates publish information via their smart phones and personal computers, Ms. Harley made clear that they are necessary parties and their addition to the case do not change the theory of the case or require additional defenses or witnesses than those already plead and/or identified. Rather, the addition of the principals of Charleston Carriage Works does nothing more but address the defendants’ contention that some of the damages claimed by the plaintiff are suffered by the principals individually. As set forth above, the addition of the defendants’ directors does not change anything about the case other than address the defendants’, Charleston Carriage Horse Advocates and Ellen Harley’s, failure to adhere to minimum corporate requirements for a charitable organization, deficiencies which the plaintiff only recently discovered. She can hardly point to others as responsible for the challenged content and simultaneously object to them being brought in the case.

The final objection interposed to an amendment is that the defendants contend such an amendment would be “futile.” Since the defendants, Charleston Carriage Horse Advocates and Ellen Harley have engaged in a pattern of dilatory tactics to prevent the disclosure of the most basic

information, they can hardly complain that an amendment is futile when the amendment simply tracks the testimony she provided on January 31st and addresses Carriage Horse Advocates' loose observation of the rules regulating the operation of a charitable organization and its identification of putative deficiencies in plaintiff's claim for damages. In *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2019), the trial court refused to allow an amended complaint, which the Court of Appeals affirmed in an unpublished opinion. The Supreme Court reversed, instructing trial courts that ordinarily an allegation of futility is insufficient to defeat an application to amend:

A trial court has discretion to deny a motion to amend if the party opposing the amendment can show a valid reason for denying the motion. See Rule 15(a) (stating "leave shall be freely given when justice so requires and does not prejudice any other party." *Forman*, 371 U.S. at 182, 83 S.Ct. at 230, 9 L.Ed2d at 226 (listing valid reasons for denying a motion to amend) *Patton*, 420 S.C. at 490, 804 S.E.2d at 262 (stating "the circuit court should have considered whether the defendants were prejudiced by the amendment, or whether there was some other substantial reason to deny it.) 420 S.C. at 491 n. 9, 804 S.E.2d at 262 n. 9 (stating the burden of establishing a reason for denying the motion is on the party opposing the amendment); *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504 507, 369 S.E.2d 156, 158 (Ct. App. 1988) (stating "a proper reason" for to deny a motion to amend could be "bad faith, undue delay, or prejudice"); *Id.* ("In the absence of a proper reason, . . . a denial of leave to amend is an abuse of discretion.").

A court's decision to deny a motion to amend should not be based on the court's perception of the merits of an amended complaint. *Patton*, 420 S.C. at 490-91, 804 S.E.2d at 262 (citing *Tanner v. Florence City Treasurer*, 336 S.C. 552, 558-60, 521 S.E.2d 153, 156-57 (1999)). In rare cases, however, a trial court may deny a motion to amend if the amendment would be clearly futile. See *Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) ("Although leave to amend should generally be 'freely given,' . . . it may be denied where the proposed amendment would be futile."

The Supreme Court went on to explain that the trial court must examine the amended complaint and explain why such amendment would be "futile." Here, the defendants simply assert the amendment would be futile without shouldering their burden of explaining how. At its core, the defendants' response is nothing more than the latest iteration of defendants' insistence that they are above the law and not responsible for the tsunami of hate mail, death and arson threats and destruction of the plaintiffs' business by labeling them animal abusers. The defendants' interference

with discovery is blatantly contumacious conduct, and consistent with Ms. Harley's view of herself as above the rules. The plaintiffs' proposed amendments do nothing other than address the defendants' recent identification of other pertinent parties and their repeated allegations of deficiencies in the pleading, and the *Rules of Civil Procedure* clearly allow them.

In short, the plaintiff's proposed amendments do nothing more than address Ms. Harley's January 31st disclosures and address alleged technical deficiencies concerning damages. The amended complaint alleges nothing new other than responding to Ms. Harley's January 31st identification of who is responsible for the allegations arising out of the original transaction and occurrence. They require no new defenses or witnesses other than those previously disclosed. Obviously the plaintiff is entitled to an amended scheduling Order to address the amendments, counsel's lost year in 2019, and the delays occasioned by the effect of a worldwide pandemic, but the defendants have not identified any fact or conduct that would deny the plaintiff the right to amend under Rule 15. The plaintiff's proposed amendments do nothing more "than state an alternative theory for recovery," *Foman v. Davis, supra.* and address technical objections made by the defendants regarding damages.

Respectfully submitted,

May 25, 2020

/s/ Thomas R. Goldstein
Thomas R. Goldstein, S. C. Bar #2186
Belk, Cobb, Infinger & Goldstein, P.A.
P. O. Box 71121
N. Charleston, S. C. 29405
(843) 554-4291; (843) 554-5566 (fax)
tgoldstein@cobblaw.net