THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the
COURT OF COMMON PLEAS, RICHLAND COUNTY
The Honorable Jean H. Toal, Circuit Judge

Appellate Case No. 2023-000145
Case No. 2022-CP-40-001364

Kenneth B. Loveless.....Appellant,

v.

Lesley Ann Stiles a/k/a Leslie Lou Stiles.....Respondent.

BRIEF OF RESPONDENT

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December 15, 2023
Columbia, South Carolina.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

INTRODUCTION

This is a frivolous lawsuit that threatens the core of what it means to be an American. It seeks to punish and chill speech by private citizens on a social media website where members of the public share information and opinions about their local school district. Speech about public officials, public bodies, and public concerns has long been protected by the First Amendment to the U.S. Constitution to ensure that threat of suits like this one will not dampen the vigor or limit the variety of public debate. New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

Criticism of public officials is rarely welcomed, yet the overwhelming number of those who offer themselves for public service understand such criticism is part and parcel to holding elected office. Appellant Kenneth B. Loveless, a former[1] elected member of the board of trustees for Lexington-Richland School District 5 (District 5), is the rare exception. He sued Respondent Leslie Stiles,[2] a mother with three children in District 5 schools, for statements *other people made* on a Facebook page she created to share information about District 5.[3]

The circuit court granted Stiles judgment on the pleadings, reasoning she was immune from suit under § 230(c)(1) of the Communications Decency Act of 1934 (CDA), 47 U.S.C. § 230, for statements made by other people and, alternatively, that the claim was barred by the First Amendment because Stiles had no duty to censor third-party statements on a social media site. R. App. 12–22. The circuit court also sanctioned Loveless for discovery abuse, finding it was "not acceptable" to make the allegations levied against Stiles and "then refuse to answer questions and disclose documents to the opposing party." R. App. 5. Indeed, the purpose of this lawsuit is to

[1] Loveless lost his reelection bid while this suit was pending in the November 2022 general election, but, at all times relevant to this action, was an elected member of the school board.
[2] Misidentified in the caption as Lesley Ann Stiles a/k/a Leslie Lou Stiles.
[3] In a separate lawsuit, styled Loveless v. Scully, 2022-CP-40-01307 (the "Scully action"), Loveless sued another parent who purportedly made statements on Stiles' Facebook page.

silence Loveless's critics, investigate perceived enemies, and intimidate others from participating in civic life. The orders below are correct; they should be affirmed, and this matter should be returned to the circuit court for trial on Stiles' abuse of process claim.

STATEMENT OF THE ISSUES

I. Whether a circuit court decided a motion for judgment on the pleadings based solely on those pleadings when the order's reasoning relies solely on the pleadings and the judge confirms the court has not considered extraneous materials?

II. Whether a social media page administrator is immune from liability under Section 230 of the CDA from a state law claim alleging she is liable for content other users posted?

III. Whether the First Amendment's actual malice standard forecloses a defamation claim by a public official that sounds in negligence and seeks to hold the defendant liable for other people's opinions?

IV. Whether sanctions are warranted to punish a litigant who violates Rules 26, 33, 34, 36, and 37 of the South Carolina Rules of Civil Procedure and refuses to cooperate with discovery in a case he filed?

STATEMENT OF THE CASE

On March 16, 2022, Loveless sued Stiles for libel alleging that, as the administrator of the Facebook group "Deep Dive Into D5" (Deep Dive), Stiles "published" defamatory statements other people on the internet made about Loveless. See R. App. 36–43. The purportedly defamatory statements in the Complaint include statements that make *no mention* of Loveless, like:

- "If you are against government conspiracy, if you are against the appearance of corruption, if you are against the appearance of rewarding friends, if you are against back room deals and public business conducted in private – then you should be interested in the way your current school board or [sic] Trustees is doing business." R. App. 38 at ¶ 15.a.

- "What do you get when you elect the dumbest people in the district to be in charge of education? If you're tired of these incompetent imbeciles embarrassing our district and wasting our time and money. . ." R. App. 39 at ¶ 16.c.

Other statements refer to Loveless' performance as a board member, such as:

- "Mr. Loveless had an EC opinion requiring his recusal from certain matters and refused for a length of time." R. App. 38 at ¶ 15.b.

- "Loveless says he will no longer recuse himself from topics related to construction. Likely bc (*sic*) his financial relationship with Contract Construction has ended, although he makes it appear that he has just decided to end it be he wants to." R. App. 39 at ¶ 15.d.

- "This SEC Ethics Opinion . . . further states that Mr. Loveless may not in any way attempt to use his position to influence decisions. Has Trustee Loveless complied with these requirements? Sadly, he has not." R. App. 39 at ¶ 15.g.

- "Be it Ken's ethics violations, waffle house quorums or other FOIA violations, this board isn't much for following rules." R. App. 40 at ¶ 16.e.

Some of the statements express opinions about Loveless:

- "Crooked Ken is an unethical hypocrite and a liar." R. App. 39 at ¶ 16.a.

- ". . . Don't let it be lost that as per usual, Crooked Ken goes after a woman. He continues to demonstrate contempt and disrespect for women." R. App. 39 at ¶ 16.b.

- "Wow, he is a loser." R. App. 40 at ¶ 16.d.

On April 13, 2022, Stiles filed an Answer and a Counterclaim for abuse of legal process, and served 30 interrogatories, 25 document requests, and 18 requests to admit (RTAs). R. App. 45–54; 138–53. On April 26, 2022, Loveless filed a Reply and moved to dismiss or bifurcate. R. App. 55–58.

On May 10, 2022, Stiles moved for judgment on the pleadings arguing she is immune from suit under the CDA, the statements are not actionable, and the statements are privileged by the

First Amendment to the U.S. Constitution. R. App. 59–60. Also on May 10, 2022, Loveless requested an extension to answer discovery; Stiles declined.

On May 13, 2022, Loveless served discovery responses that failed to respond to the substance and were replete with non-specific, boilerplate objections; he also refused to produce a single document. See R. App. 155–76.

On May 27, 2022, Stiles moved to compel, deem matters admitted, and for sanctions. R. App. 124–76. Also on May 27, 2022, Loveless moved for a protective or confidentiality order claiming this lawsuit was "a private matter" and seeking "an order strictly limiting discovery" or "to prevent Stiles and her counsel from disseminating the information they obtain in discovery…." R. App. 98–123. Aside from some outlandish, unsupported claims, the motion offered no explanation why Stiles' discovery was not relevant to Loveless's reputation, the statements, and the defenses (including the truth).

December 2, 2022, Motions' Hearing

On November 23, 2022, Stiles filed an omnibus memorandum addressing all outstanding motions (R. App. 242–603); Loveless never filed a memorandum.

On December 2, 2022, the circuit court held a hearing on all 15 pending motions in this case and the Scully action. R. App. 776–905. The court denied Loveless's motion to dismiss Stiles' counterclaim and granted his motion to bifurcate trial. See R. App. 25, 829, 857. The circuit court granted in part a motion to overrule District 5's claim of the attorney-client privilege concerning communications with the school district's former lawyer that included Loveless's wife, who was not a board member, on the email, destroying any attorney-client privilege. See R. App. 25, 838–42. The court also required two recalcitrant school board members to respond to Stiles' subpoena for correspondence with and about Loveless. R. App. 856–57.

Loveless's motion for a protective order was denied (R. App. 25, 806), notwithstanding his counsel's urging that discovery should be limited because "I don't think [Loveless] should be required to answer questions about school board actions since they're irrelevant to this case." R. App. 785–86.

* * *

To the contrary, Loveless's conduct as a school board member is central to this case and the purportedly defamatory statements.

Secret meetings and violations of the S.C. Freedom of Information Act's (FOIA's) open meetings law (S.C. Code Ann. §§ 30-4-60 et seq.) were a persistent public concern during Loveless's tenure. In March 2021, quorum of the board, including Loveless, met at a Waffle House after a board meeting, prompting criticism the board was conducting an illegal meeting.[4]

In June 2021, Loveless and three other members shocked the District 5 community by abruptly announcing the departure of a popular superintendent, Christina Melton (who had won S.C. Superintendent of the Year just months earlier), and approving $226,000 in severance pay during a secret public meeting that prompted a dissenting board member, Ed White,[5] to resign in protest.[6] In a detailed 18-page affidavit filed in a FOIA action styled Osmundson v. District 5, No. 2021-CP-40-03694 (Feb. 11, 2022), White describes how Loveless and other members

[4] Bristow Marchant, "SC school board members accused of illegally meeting at Waffle House," THE STATE (March 30, 2021), available at: https://www.thestate.com/news/local/education/article250285620.html.

[5] White is a member of the S.C. Bar and partner at Nelson Mullins in Columbia.

[6] See Marchant, "The State files lawsuit against Lexington-Richland 5 over superintendent resignation," THE STATE (Aug. 6, 2021), available at: https://www.thestate.com/news/local/crime/article252983218.html.

orchestrated Melton's ouster and the hostile and tense working relationships that preceded the secret public meeting that pushed her out. See R. App. 285–303.[7]

* * *

Returning to the hearing, after the S.C. Press Association was allowed to intervene, it explained the law "is silent on any obligation by any public official attending an executive session to restrict post-meeting comments" and blasted Loveless's effort to limit discovery based on an "absurd" claim that this is a private lawsuit: "No. It's a lawsuit brought because he was criticized as a public official, and he's using the public resources of South Carolina, the judicial system, to seek redress for criticism about him in his public capacity." R. App. 787–88. The Press Association explained Loveless was asking for a "classic" prior restraint of speech by citizens, explaining that "if Mr. Loveless doesn't want to be required to speak about his actions as a board member, dismissal of the case would solve his problem." R. App. 787–88.

Loveless also moved to quash a third-party subpoena to Contract Construction seeking emails sent to or received from Loveless, claiming it was "beyond the pale" and an effort to "do discovery regarding the State Ethics Commission charges [against Loveless] in this case[.]" R. App. 831. The referenced Commission matter ultimately resulted in a trial, conviction, and seven-page order reprimanding and fining Loveless for three counts of violating Section 8-13-700(B) of the S.C. Ethics Act—i.e., use of public office for private gain; disclosure of potential conflict of interest. See In re Kenneth B. Loveless, No. 2021-016 (S.C. Ethics Comm'n March 24, 2023).[8]

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[7] See also, Marchant, "Why did LR5 superintendent Melton resign? New affidavit provides behind-the-scenes details," THE STATE (Feb. 19, 2022), available at: https://www.thestate.com/news/local/education/article258545733.html.

[8] See also Holly Poag, "Former LR5 school board member found guilty of violating ethics laws," THE STATE (March 25, 2023), available at: https://www.thestate.com/news/local/education/article273571255.html.

The Commission found Loveless illegally participated in public meetings and discussions regarding the construction of a new Piney Woods Elementary School (PWES) by the school district when he had an economic relationship with the company building the school (i.e., Contract Construction) that required his recusal. See id. Before the ethics complaint was ever filed, the Commission advised Loveless that Section 8-13-700 required his recusal. R. App. 362–64.

Notably, Loveless's ethical lapses were not revealed by the Ethics Commission; they had long been a subject of public discussion and debate *before* the ethics matter, or this case were filed. In September 2020, Loveless was confronted by a board colleague about his company, Loveless Commercial Contracting, being awarded a $1 million subcontract by Contract Construction: "He has turned his board seat into a money-making enterprise by submitting a bid to work for a contractor already doing business with the school district for which he serves as a board trustee," White is reported to have said.[9] In response to the charge, Loveless claimed he had spoken about the project with the Ethics Commission which assured him his conduct did not raise legal issues.[10] As evidenced by the Commission order sanctioning him, this is false. Another (then-)board member, Beth Hutchinson, accused Loveless of lying to colleagues and the public by concocting a fictitious story that he anonymously received concrete delivery receipts he then used to press his construction defect claims when, in fact, Contract Construction president reported to the board that the concrete supplier provided the tickets at Loveless's request.[11]

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[9] See Bristow Marchant, "Feud over new Midlands school leads to ethics accusations against school board member," THE STATE (Sept. 18, 2020) (reporting that "long-simmering feud" over PWES construction "boiled over into accusations of unethical conduct against" Loveless), available at: https://www.thestate.com/news/local/education/article245771720.html.
[10] See id.
[11] See id.

Loveless objected to the Contract Construction subpoena, but Contract Construction did not, and the circuit court denied the motion. See R. App. 25, 833–34.

When the circuit court considered Stiles' motion to compel discovery, it was troubled by Loveless's failure to produce even a single document and his snide, sarcastic responses to interrogatories. See, e.g., R. App. 843–45 ("THE COURT: Some of them he answers by saying he objects to everything, but it would be a good idea. MR. KENNEY: Yeah. Nice, nice try. THE COURT: Nice try. … Things of that nature. I've read all these."). When it was his turn to defend his responses, Loveless effectively conceded wrongdoing by immediately requesting 30 days to supplement his responses and acknowledging "a sarcastic comment" in response to RTAs. R. App. 845. Nevertheless, he also attempted to defend his response to the RTAs by claiming they were "poorly written." R. App. 846. The circuit court disagreed and ordered Loveless to produce supplemental responses to interrogatories and document requests within 10 days, deemed the RTAs admitted, and retained jurisdiction to ensure compliance with the court's order. R. App. 848–50.

Finally, the circuit court heard Stiles' motion for judgment on the pleadings. Loveless repeatedly confirmed he was seeking to hold Stiles liable for failing to censor statements made by other social media users. He argued that, as administrator, Stiles "had full control and authority to monitor the posts," and "undertook" and "warranted to the public" that the statements were the product of research and analysis. R. App. 878, 885. In Loveless's view, Stiles was obligated to delete or block posts Loveless finds (or could find) objectionable. See also R. App. 880–81 ("She just let people run wild on the Facebook page."). Loveless's counsel described the theory as "a common-law ratification argument." R. App. 878. Loveless argued Stiles was obligated to delete the statements, but his counsel conceded they were matters of opinion concerning a public official's performance. R. App. 886–87.

THE COURT: So, in that context, you're saying that each one of these things was demonstrably false and done with actual malice.

MS. BALLARD: When she republished it, yes.

THE COURT: Through republishing, okay.

MS. BALLARD: Yes, Your Honor, yes.

THE COURT: Okay, and that was because, first of all, they were demonstrably false because if they weren't false, then the rest of this really doesn't matter.

MS. BALLARD: Right.

THE COURT: They were demonstrably false and she undertook the duty to verify the truth of them.

MS. BALLARD: She did.

THE COURT: And she didn't do that and, therefore, she had defamed him, right?

MS. BALLARD: Correct. She has republished, and the federal act does not preempt state law about the voluntary undertaking of a duty that does not otherwise exist.

R. App. 887–88. In Loveless's view, Stiles "voluntarily put her rubber stamp of approval on anything that was posted or commented on on that page." R. App. 889. The circuit court confirmed, and Loveless agreed, that this common-law undertaking theory was "the fulcrum point for addressing [Stiles'] actual malice[.]" R. App. 890–91.

Orders Granting Stiles' Motions

On December 21, 2022, the circuit court granted Stiles' motion to compel, deemed the RTAs admitted, and ordered Loveless to supplement his interrogatory responses and document production consistent with the "Discovery Order." R. App. 3–11.

On December 22, 2022, the court granted Stiles' motion for judgment on the pleadings. R. App. 12–22. The "JOTP Order" concludes that Section 230 of the CDA "controls" and "require[d]

dismissal of this case." R. App. 18. Alternatively, the court reasoned, Loveless's claim was barred by the First Amendment because "[t]he essence of the statements in the Complaint are opinions are criticism of [Loveless's] performance of his duties as a member of the school board." R. App. 21.

On January 3, 2023, Loveless moved the circuit court to reconsider the JOTP Order (R. App. 604–07), and the motion was denied on January 10, 2023. R. App. 23–24.

On January 12, 2023, the court issued a Form 4 Order memorializing its decision on the motion to quash, motion to overrule District 5 claims of attorney-client privilege, motion for a protective order or confidentiality order, motion for a rule to show cause, motion to dismiss, motion to bifurcate, and motion to intervene. R. App. 25–28.

On January 27, 2023, Loveless noticed this appeal. R. App. 697–724.

Subsequent Motions, Hearings, and Orders to Enforce the Discovery Order

Loveless failed to comply with the Discovery Order and, on January 5, 2023, Stiles moved for a rule to show cause as to why Loveless should not be held in contempt, observing that Loveless had "still failed to produce a single responsive document" and sought to "renew[ ]" and "expressly reserve[ ]" the non-specific, boilerplate objections the circuit court overruled. R. App. 611–12, 625 at n.1. Notably, Loveless continued to resist providing substantive answers to interrogatories that pressed him for specific facts and legal authority that supported his contention Stiles was liable for other's speech. Some of these supplemental responses failed to advance anything other than an argumentative non-responsive diatribe. See, e.g., R. App. 628–33 at INT Resp. Nos. 7, 9 & 15. Some supplemental responses doubled down on prior objections, defied the Discovery Order, and refused to disclose. See, e.g., R. App. 627–28 at INT Resp. No. 6. Others simply failed to answer the question. See, e.g., R. App. 633, 637–38 at INT Resp. No. 12, 28.

On January 27, 2023, the circuit court held a hearing on Stiles' motion for a rule to show cause and gave Loveless until February 28, 2023, to comply with the Discovery Order. See R. App. 657.

On March 27, 2023, Stiles filed a status report, reporting Loveless did not meet the February 28 deadline, was unwilling to furnish electronic or "native" versions of voluminous text message reports, persisted in interposing non-specific, boilerplate objections overruled by the Discovery Order, and that document requests and interrogatories were not supplemented as ordered. R. App. 725–49. Loveless also filed a status report incorrectly suggesting the circuit court was "expediting" the matter which was "illogical and abusive" because Loveless had appealed the JOTP Order. R. App. 754.

On April 19, 2023, the circuit court held its *third* hearing to address Loveless's discovery responses—the same set served more than one year earlier on April 13, 2022. On April 25, 2023, the court filed an order memorializing an oral order requiring Loveless to provide an interrogatory verification, provide full disclosure without objection and in a non-argumentative manner to 13 interrogatories, and furnish electronic versions of cellphone data. R. App. 29–30.

Loveless's Supplemental Interrogatory Responses

On May 3, 2023, Loveless served his third supplemental responses to Stiles' interrogatories that make damning admissions. See R. App. 906–19. Specifically, the responses fail to identify a single defamatory statement alleged in the Complaint that was made by Stiles. Compare R. App. 38–41 at ¶¶ 15–16), with R. App. 907–14 at 3rd Supp. INT Resps. Nos. 9 & 16.

On May 8, 2023, Stiles' counsel sent filed correspondence to the circuit court reporting Loveless had provided a verification, supplemental interrogatories responses, and the cellphone records in an electronic format. R. App. 920.

STANDARD OF REVIEW

Judgment on the pleadings is proper where there is no issue of fact raised by the complaint that would entitle plaintiff to judgment if resolved in plaintiff's favor. Sapp v. Ford Motor Co., 386 S.C. 143, 146, 687 S.E.2d 47, 49 (2009) (citing Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991)). All well-pleaded factual allegations are deemed admitted for the purpose of the motion. Russell, 305 S.C. at 89, 406 S.E.2d at 339. The motion will be denied only if there is a controverted material fact which, if decided in favor of the non-moving party, would entitle him to judgment in his favor. Id. Judgment on the pleadings should also be granted when a pleading is so defective that no cause of action is stated, and the plaintiff is not entitled to any relief whatsoever. See Pope v. Wilson, 427 S.C. 377, 384, 831 S.E.2d 442, 445 (Ct. App. 2019); Diminich v. 2001 Enters., Inc., 292 S.C. 141, 355 S.E.2d 275 (Ct. App. 1987).

A trial court's exercise of discretion in resolving discovery disputes will not be disturbed so long as it is not based on an error of law or factual conclusions that lack evidentiary support. Arthur v. Sexton Dental Clinic, 368 S.C. 326, 333, 628 S.E.2d 894, 898 (Ct. App. 2006).

ARGUMENT

Longstanding federal law protecting speech prohibits a public official from harassing a constituent with a defamation claim, such as this, that attacks the private citizen for convening an internet forum for the airing of views on matters of public concern. This action is an affront to the First Amendment's objectives of preserving individual liberty and fostering self-government by protecting the right to debate public issues and attack, sometimes "viciously," opposing views. See Sullivan, 376 U.S. at 270. To that end, Congress sought to preserve the internet's "vibrant and competitive free market … unfettered by Federal or State regulation[,]" 47 U.S.C. § 230(b)(2), by barring claims that would have "an obvious chilling effect" and would render internet speech too

"impossible" to last. See Zeran v. America Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997). That chilling effect is the purpose of Loveless's claim here and one of many reasons it must fail. "The freedom to criticize government and its officials is essential to a self-governing people." N.Y. Times Co. v. United States, 403 U.S. 713, 724–25 (1971). Nothing less than that is at stake here.

Loveless advances four arguments that should be rejected. However, at the outset, the Court should reexamine the Complaint because Loveless should not be permitted to misrepresent the record and reimagine his claim on appeal. Rule 210(c), SCACR. Loveless brought a publication claim that seeks to hold Stiles responsible for publishing other people's speech—a frivolous claim, the bad-faith nature of which is only underscored by his discovery misconduct. The circuit court was well within the rules of civil procedure and its discretion in punishing that conduct. Stiles first addresses Loveless's attempt to re-plead his claim here (§ I, infra) before turning to Loveless's arguments (§§ II–V).

I. Loveless's claim seeks to hold Stiles liable for publishing third-party speech.

Before the circuit court, Loveless proceeded solely under a publication/undertaking theory—i.e., the claim rests entirely on the proposition that Stiles had a legal duty to censor *other people's* speech on the Facebook forum she convened. Before this Court, Loveless seeks to change position, contending the posts at issue "not only included statements and posts from third parties, but also included defamatory posts which were authored by the Respondent herself." Appellant's Br. 5–6; see also id. at 12 (same). This is demonstrably false for three reasons.

First, the Complaint alleges liability based on statements of others. Two paragraphs purport to list defamatory statements: Paragraphs 15 and 16. See R. App. 38–41. Paragraph 15 alleges Stiles acted with actual malice in "publishing, ratifying, and/or endorsing false and defamatory statements about Loveless" and lists seven statements. R. App. 38. Paragraph 16 alleges Stiles

acted with actual malice "in undertaking the responsibility for monitoring the Page, which imposed upon her the obligation to delete defamatory posts on the Page." R. App. 39. Loveless complains further that, by not censoring posts, "Stiles republished, thus ratifying and endorsing, statements of others…." R. App. 39. He then lists 26 statements he maintains Stiles was obliged to censor. Nowhere in the Complaint does Loveless allege any of these 33 statements were made by Stiles. Instead, the Complaint's theory of liability is that Stiles "published, approved, and endorsed" other people's posts because she had "authority and responsibility" to delete posts or ban people from her page. See R. App. 37–38 at ¶¶ 10, 12 (Compl.).

Second, this conclusion—that Loveless was proceeding under a publication/undertaking theory—was repeatedly confirmed by Loveless's counsel during oral argument. Counsel argued:

> And as I said, we carefully drafted this complaint to incorporate all the powers that Ms. Stiles voluntarily undertook when she became the administrator of D5. *I didn't include it in the complaint, but there's a specific listing on Facebook of what powers an administrator has over a page that she creates.* And she can delete things. She can flag things. She can mark things as not endorsed by the administrator of the page. There's a number of things that she can do and undertook to do when she declared herself to be the administrator of the page of: All information is the result of much research and analysis.
>
> Not only is that not true, but that's what she represented that it is. So, even the statement itself, that all information posted is the result of much research and analysis, is false. I mean, that's false. It's not defamatory to Mr. Loveless, but that's false, too.

R. App. 880 (emphasis added). When the circuit court pressed Loveless's counsel about the CDA, Loveless argued, "If she undertakes the duty, she has to exercise due care, and the CDA doesn't exempt that." R. App. 882. The circuit court pressed a hypothetical, and Loveless again dug in on the undertaking theory. See R. App. 884–85. Then the court directed counsel back to the list of statement in Paragraph 16:

> The Court: … Which of those statements should have been deleted because they were false?

Ms. Ballard: All of them.

…

THE COURT: And does that context include any attention to fair comment, express of opinion because we are talking about an area in which you are dealing with a public official.

MS. BALLARD: Correct.

THE COURT: And you're dealing with comment about a public official's performance.

MS. BALLARD: Correct.

THE COURT: So, in that context, you're saying that each one of these things was demonstrably false and done with actual malice.

MS. BALLARD: When she republished it, yes.

…

THE COURT: They were demonstrably false and she undertook the duty to verify the truth of them.

MS. BALLARD: She did.

THE COURT: And she didn't do that and, therefore, she had defamed him, right?

MS. BALLARD: Correct. She has republished, and the federal act does not preempt state law about the voluntary undertaking of a duty that does not otherwise exist.

R. App. 886–88; see also R. App. 18 ("Plaintiff's counsel repeatedly confirmed this during the hearing when arguing Plaintiff's claim is predicated on an undertaking theory."). Thus, Loveless's argument turns entirely on the proposition that Stiles undertook the responsibility to censor others' speech—not that she was the speaker.

Third, this conclusion is underscored further still based on discovery responses in which Loveless has not identified a single statement in the Complaint—not one—attributable to Stiles as

the speaker. Interrogatory No. 9 states, "[w]ith respect to Paragraph Nos. 9, 12, 13, and 15 in the Complaint, state the account name, identity of the speaker, date, time, and a complete quotation of every statement you allege Stiles made that was defamatory or libelous." When Loveless finally answered this interrogatory under threat of further sanction by the circuit court, he repeated the contention that Stiles was responsible for "all posts" because she was the page administrator, but then identified 14 statements that Loveless claims "Stiles personally posted[.]" R. App. 907–10. Not one of these statements is in the Complaint. Cf. R. App. 38–41. According to dates Loveless provided, three of the statements were made *after* the Complaint was filed. Six of the statements are not even about Loveless—they are about other board members, the superintendent, or the school district/board generally. The statements in the interrogatory response that reference Loveless are protected speech; however, here, what matters is that *none* of these statements allegedly made by Stiles are in the Complaint.

The Complaint, Loveless's counsel, and his discovery responses all confirm Loveless is suing Stiles for statements other people made. The circuit court correctly concluded that "based on the Court's review of the Complaint, there are no statements specifically attributed to the Defendant herself" and "[t]he Complaint is clear that [Loveless] seeks to hold [Stiles] liable for third-party statements based on the notion [Stiles] was responsible for censoring statements that [Loveless] finds offensive." R. App. 17–18. That claim has long been barred by the CDA and the First Amendment, which is why Loveless now seeks to change his position and argue the case is about statements Stiles made. The Court should reject Loveless's attempt to modify his position on appeal.

II. The JOTP Order does not consider anything outside the pleadings.

Loveless argues the circuit court "relied on" factual and legal arguments raised by Stiles' omnibus memorandum and therefore improperly considered matters outside the pleadings. Appellant's Br. 8. Loveless is incorrect. The JOTP Order applies the appropriate standard to the contentions in the pleadings—nothing more. The order explains that, for the purpose of the motion, well-pleaded facts are deemed admitted and the court's role is to discern whether the pleading is so defective that the plaintiff is not entitled to any relief whatsoever. R. App. 13. The court then concluded:

> Having reviewed the pleadings and applicable law, and having considered the arguments of the parties, the Court concludes the Complaint is irreparably flawed as a matter of law and should be dismissed. Plaintiff's claim is barred by the CDA, and he has not and cannot pled a cognizable claim considering his status as a public official and the actual malice standard required by the Constitution.

R. App. 14. The circuit court's analysis repeatedly looks to the Complaint when explaining why his claims must fail. See, e.g., R. App. 15 ("The Complaint alleges…"), 17 ("…based on the Court's review of the Complaint…"), 21 ("The essence of the statements in the Complaint…").

Loveless claims it is "clear" from the JOTP Order that the circuit court considered information beyond the pleadings and "extensively relied" on Stiles' omnibus memorandum, which included matters beyond the pleadings. Appellant's Br. 9. This is not true or supported by the record. Nowhere in the JOTP Order does the circuit court credit any fact outside the pleadings and Loveless's brief fails to point to any part of the record to support this assertion. Instead, Loveless's argument turns on the assumption that because Stiles' omnibus memorandum discusses matters outside the pleadings, the circuit court must have considered those extraneous matters when deciding the Rule 12(c) motion. Recall there were numerous motions before the circuit court, including discovery motions, and the omnibus memorandum addressed seven motions in total. See

R. App. 243. Loveless's argument simply assumes the circuit judge was unable to set the other matters aside and decide the Rule 12(c) motion based solely on the pleadings. This speculative assertion is not only belied by the order, but also by the circuit judge's own statements on the record.

> MS. BALLARD: And the only other thing I want to make for the record, Your Honor, is that the -- I object to the omnibus memorandum that was submitted being considered in any way because it, it includes matters outside the complaint, and a motion for judgment on the pleadings has to be based on the complaint and the answer.
>
> THE COURT: *Well, I haven't looked it in that way, but I think I can sort through what's pertinent for* ---
>
> MS. BALLARD: Thank you, Your Honor.
>
> THE COURT: --- *these proceedings*.

R. App. 891–92 (emphasis added). Notably, Loveless places great emphasis on the fact that counsel "explicitly objected to the trial court considering the memorandum in any way" (Appellant's Br. 9) but then ignores the circuit court's response on that very issue.

Trial courts routinely hear motions that require them to put aside other litigable facts and decide a motion based on the four corners of a pleading. There is nothing in the JOTP Order or the record to suggest the circuit court here did anything different here. Loveless's assertions to the contrary are unsupported and should be rejected.

III. Section 230 of the CDA law immunizes Stiles from liability over statements other people made in a social media group she administers.

Section 230 of the CDA, immunizes Stiles from civil liability for the statements of others in a Facebook group she administers because the CDA forbids publisher liability on the internet. Accordingly, the JOTP Order is correct in concluding Section 230 controls and required dismissal of Loveless's claim. See R. App. 18.

Loveless maintains his claim is not based on the statements of others and, even if it is (and it is), Stiles is liable because she extended a "common law warranty as to the truth of the statements" that distinguishes this claim from those barred by the CDA. See Appellant's Br. 11. Loveless's first contention is wrong for the reasons explained above (see § I, supra). His effort to distinguish his undertaking theory should also fail. This section considers the text of the CDA before addressing Loveless's argument.

A. The CDA bars claims that treat social media users like Stiles as "publishers" of third-party statements.

Section 230 of the CDA requires that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." Id. § 230(f)(2). An "interactive computer service" is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server…." Id. § 230(f)(2). "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." Id. § 230(e)(3).

Thus, the CDA grants immunity when a defendant can establish (1) she is a provider or user of an interactive computer service, (2) the plaintiff seeks to hold her responsible as the publisher or speaker of information, and (3) the information was provided by another information content provider. Henderson v. Source for Pub. Data, L.P., 53 F.4th 110, 119–20 (4th Cir. 2022). This three-part test looks first to the defendant's status as a provider or user of an interactive computer service, then to the type of claim brought—i.e., whether the plaintiff treats the defendant as a publisher or speaker—and finally to the source of the underlying information. See id. Stated

in the parlance of this case, Subsection 230(c)(1) provides: Stiles, a Facebook user, shall not be treated as the publisher or speaker of any information provided by another Facebook user. Subsection 230(e)(3) gives this rule effect by barring liability. The circuit court agreed and concluded Stiles was immune under the CDA. R. App. 14–18.

The circuit court's application of Section 230 is consistent with how it has been applied by federal courts for the last 25 years. See, e.g., Monsarrat v. Newman, 28 F.4th 314 (1st Cir. 2022) (online neighborhood forum moderator who copied and reposed anonymous comments accusing plaintiff of being a "child predator" immune from suit); Bennett v. Google, LLC, 882 F.3d 1163 (D.C. Cir. 2018) (Google immune from defamation claim predicated on failure to remove third-party post); Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250 (4th Cir. 2009) (consumer affairs website immune from suit over statements made in consumer reviews); Zeran, 129 F.3d 327 (negligence action for delay in removing defamatory post barred). It is also consistent with the purpose of the Act.

The CDA "is something of a misnomer; the Act does not promote decency so much as it acts as a bulwark against 'intrusive government regulation of speech.'" Bennett, 882 F.3d at 1165 (quoting Zeran, 129 F.3d at 330). It explicitly recognizes that the internet is a forum for diverse political discourse, cultural development, and intellectual activity. 47 U.S.C. § 230(a)(3). Twenty-five years ago, the U.S. Court of Appeals for the Fourth Circuit expounded on the critical role the CDA plays in internet speech when rejecting a negligence claim alleging America Online (AOL) unreasonably delayed in removing defamatory messages posted by an unknown third party:

> The amount of information communicated via interactive computer services is ... staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages

> posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Zeran, 129 F.3d at 331. The same rationale holds true for users like Stiles who create or host a forum where others gather to speak. Section 230 immunity extends to Stiles no differently than to AOL, Twitter, Reddit, Facebook, or any other social media site. See 47 U.S.C. § 230(c)(1) ("No provider *or* user…" (emphasis added)).

Federal courts routinely apply Section 230 to dismiss social media defamation claims like this one. For example, in Monsarrat, "a moderator of a neighborhood's online forum, copied the forum's discussion threads and then reposted them to a new online platform[,]" which included defamatory comments by anonymous users accusing the plaintiff of being a "sexual predator" and "child predator." 28 F.4th at 316–17. The district court granted a motion to dismiss, and the court of appeals affirmed, explaining the defendant was shielded from state law liability. Id. at 318. Looking to the second prong, the appeals court reasoned the key to Section 230 immunity was that the information in question was created by another user. See id. at 318–19. Unlike Stiles (who is alleged to have failed to censor comments), the Monsarrat defendant copied content generated by another user on another website and re-posted it on the neighborhood forum. The court reasoned that this did not matter for the purpose of determining whether the claim was based on information provided by another content provider because the defendant "did nothing to contribute to the posts' unlawfulness beyond displaying them on the new Dreamwidth website." Id. at 319. Similarly with the third prong—whether the claim sought to treat the defendant as the publisher of the information—the answer was plainly "yes." Id.

In Nemet Chevrolet, the court rejected car dealers' arguments that a consumer affairs website could be sued for defamation where the car dealers alleged the website "contacted the consumer to ask questions about the complaint and to help her draft or revise her complaint." 591

F.3d at 258 (quotations omitted). Like Loveless's bald claim that third-party statements were published with Stiles "consent, ratification, and endorsement" (R. App. 36 at ¶ 5), the car dealers alleged "upon information and belief" that the website "participated in the preparation" of the offensive consumer complaints posted to the website. Nemet Chevrolet, 591 F.3d at 256. After noting that no facts were pled to support this conclusion, the court reasoned that, even if true, the website contacting the consumer would not render the website the information content provider within the meaning of the CDA. Id. at 258. Instead, precedent required the car dealer "to plead facts to show any alleged drafting or revision by [the website] was something more than a website operator performs as part of its traditional editorial function." Id. (citing Zeran, 129 F.3d at 330).

In Bennett, the plaintiff sued Google for defamation (among other claims) for failing to remove a third-party blog post. 882 F.3d at 1164. Relying on Section 230, the district court granted the motion to dismiss, and the D.C. Circuit affirmed, applying the three-part test. See id. 1166–68. The circuit court summarized Google's immunity by explaining, "the decision to print or retract is fundamentally a publishing decision for which the CDA provides explicit immunity." Id. at 1168.

B. A "warranty" statement purporting to vouch for the accuracy of information does not displace the immunity conferred by the CDA.

Loveless argues the circuit court's ruling on the CDA is "flawed" because liability "is not solely based on statements by other parties that she republished and specifically includes her own common law warranty as to the truth of the statement which appeared on the page, as 'result of much research and analysis[.]'" Appellant's Br. 11. Loveless is mistaken and his undertaking theory fails for two reasons.

First, the circuit court found as a matter of law that no reasonable person could read Stiles' statement concerning "research and analysis" and conclude she undertook to ensure every posting made on the Facebook page, including the postings of others, were factual, verified, and endorsed

by her. R. App. 16. Whereas the trial court makes an initial determination whether statements are capable of a defamatory meaning, White v. Wilkerson, 328 S.C. 179, 183, 493 S.E.2d 345, 347 (1997), Loveless offers no authority for the proposition that the circuit court's finding is incorrect.

Second, even if that statement could be reasonably be read as an "undertaking" of sorts, this is not a legally meaningful distinction under Section 230 and caselaw applying it.

For instance, in Zeran the plaintiff brought a negligence claim for failing to timely remove an offending third party post and argued AOL was not a "publisher," but a "distributor" that was exempt from the CDA. See 129 F.3d at 331–32. The Fourth Circuit found the distinction meaningless and "foreclosed by § 230." Id. at 332. In Nemet, the plaintiff argued Section 230 did not apply because the website contacted the consumer and helped her draft or revise her complaint, but this was still held an insufficient distinction to avoid CDA immunity. 591 F.3d at 258.

Loveless's theory here is similarly defective. Even crediting his bald assertion that the statements were published with Stiles' consent, ratification, and endorsement, his allegations are indistinguishable from the theories rejected in Zeran and Nemet. Loveless's undertaking theory argues Stiles undertook a duty to vet the content of the Facebook page and failed to perform that duty. Cf. Appellant's Br. 13 ("It is well established under South Carolina common law doctrine that once a person voluntarily undertakes an act, he or she must act with due care."). That is a negligence claim; however, Zeran is clear that styling a claim as one that sounds in negligence does not circumvent Section 230 when the factual allegations that purportedly give rise to liability attempt to hold one content provider responsible for statements of another.

Likewise, statements on a website suggesting review or control over third party content do not render one content provider liable for the statements of another. Cf. Nemet, 591 F.3d at 258 ("Moreover, in view of our decision in Zeran, [the car dealer] was required to plead facts to show

any alleged drafting or revision by [the website] was something more than a website operator performs as part of its traditional editorial function."); Barrett v. Rosenthal, 40 Cal. 4th 33, 63, 146 P.3d 510, 529 (2006) (Section 230 "does not permit Internet service providers or users to be sued as 'distributors,' nor does it expose 'active users' to liability."). Thus, while no reasonable person would assume Stiles' statement about research and analysis constituted an undertaking to validate the accuracy of every other user's statements, that argument also fails because it amounts to nothing more than negligence by another name, which is barred by the CDA.

Loveless's attempt to distinguish Zeran and Nemet simply repeats the empty assertions that he alleged statements by Stiles (he did not) and that "undertaking" is somehow a viable exception to the CDA's bar against liability based on third-party statements (it is not). See Appellant's Br. 13–14. There is no substantive analysis or legal rationale. Like the threadbare allegations in Nemet, there are no well-pled facts in the Complaint to suggest Stiles was anything other than a publisher entitled to CDA immunity. Artful pleading that attempts to hold her responsible through an undertaking theory fails to change the result—it places her squarely within the ambit of Bennett. And Monsarrat demonstrates the immunity is even broad enough to reach a forum moderator who copies and re-posts statements of another. Indeed, the leading case relied on by Loveless, Henderson, applies Zeran to conclude that certain Fair Credit Reporting Act (FCRA) claims were not barred by the CDA because, under prong two, some of the underlying claims did not treat the defendants as speakers or publishers. See id. at 120–26. A claim treats the defendant as the publisher or speaker of information when it seeks to hold the defendant liable for publishing information to third parties based on the information's "improper content." See id. at 120–21. This offers Loveless no comfort here where, by its express terms, the Complaint seeks to hold Stiles'

liable as a publisher of purportedly improper content—precisely what Henderson posits the CDA is designed to safeguard.

There is no precedent that draws the distinction Loveless asks the Court to make; to the contrary precedent plainly forecloses it. Loveless's argument here is nothing more than an *ipse dixit* assertion that should be rejected.

* * *

The purpose of the CDA is to act as a bulwark against intrusive government regulation of speech and to keep the specter of tort liability from chilling internet discourse. Bennett, 882 F.3d at 1165; Zeran, 129 F.3d at 331. This case is no exception, and the circuit court was correct to grant judgment on this basis.

IV. The First Amendment protects Stiles from suit by a public official claiming Stiles had a duty to censor third-party speech on a social media site.

Speech concerning public officials "must be protected with special vigilance" because electing members of the government and debating their qualifications therefore touches on "the essence of a free and responsible government." George v. Fabri, 345 S.C. 440, 455, 548 S.E.2d 868, 875 (2001) (quoting Harte–Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 686 (1989) (quoting James Madison, 4 J. Elliot, Debates on the Federal Constitution 575 (1861))). Those who choose public life must reasonably expect that our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" will at times "include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Sullivan, 376 U.S. at 270. The First Amendment's actual malice standard forecloses Loveless's defamation claim because, accepting well-pled allegations as true, Loveless has not pled actual malice. As explained, his undertaking theory is simply negligence by another name, and negligence is *never* actual malice within the meaning of the First Amendment.

As alternative grounds for dismissal, the circuit court held Stiles was entitled to judgment on the pleadings because Sullivan and its progeny protect her from suit by a public official seeing to hold her responsible for the veracity of statements by others on Facebook. Loveless disagrees. He claims (1) he is *not* a public official for the purpose of this claim and (2) he cognizably pled actual malice. See Appellant's Br. 15–16. Neither assertion is correct.

A. The First Amendment's actual malice standard displaces the common law for public officials.

Defamation is the unprivileged publication of a false statement to a third party with fault resulting in presumptive or special harm (depending on the nature of the statement).[12] Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 464–65, 629 S.E.2d 653, 664 (2006). At common law, a statement is presumed false, while truth is an affirmative defense. Fountain v. First Reliance Bank, 398 S.C. 434, 442, 730 S.E.2d 305, 309 (2012); accord Haulbrooks v. Overton, 295 S.C. 380, 383, 368 S.E.2d 676, 678 (Ct. App. 1988). However, when the statement involves a public figure or public official, the Free Speech Clause of the First Amendment abrogates the common law presumption of falsity and the plaintiff must prove by clear and convincing evidence that the statement was false *and* that it was made with knowledge of falsity or reckless disregard of whether it was false or not—i.e., with constitutional or actual malice. Sullivan, 376 U.S. at 279–80; Beckham v. Sun News, 289 S.C. 28, 30–31, 344 S.E.2d 603, 604–05 (1986); Parker v. Evening Post Pub. Co., 317 S.C. 236, 243, 452 S.E.2d 640, 644 (Ct. App. 1994).

[12] Under the common law, "libel is actionable *per se* if it involves written or printed words which tend to degrade a person, that is, to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, or to disgrace him, or to render him odious, contemptible, or ridiculous." Id. at 465–66, 629 S.E.2d at 664 (quoting Holtzscheiter v. Thomson Newspapers, Inc. (Holtzscheiter II), 332 S.C. 502, 510–11, 506 S.E.2d 497, 502 (1998)).

B. Loveless has admitted (and the circuit court correctly found) he is a public official.

In cases involving defamation of a public official, the plaintiff must allege and prove actual malice. Sanders v. Prince, 304 S.C. 236, 239, 403 S.E.2d 640, 643 (1991) (citing Sullivan, 376 U.S. 254 at 279–80). That means "an important initial step in analyzing any defamation case is determining whether a particular plaintiff is a public official, public figure, or private figure." Erickson, 368 S.C. at 468, 629 S.E.2d at 666. Loveless now disputes that he is a public-official plaintiff subject to the actual malice standard. This is an absurd and frivolous contention.

Loveless has already *admitted* he is a public official in his Reply to Stiles' counterclaim. Compare R. App. 51 at ¶ 45 (alleging "Loveless is a public figure."), with R. App. 56 at ¶ 5 (stating the allegation "is admitted."). Accordingly, that fact is established by the pleadings and cannot be contested here.

Even if it were not an established fact, determining whether a plaintiff is a public official is a matter of law to be decided by the court. Erickson, 368 S.C. at 468, 629 S.E.2d at 666. The JOTP Order finds Loveless is a public-official plaintiff because he was elected to the school board by voters and "he had the sort of power and responsibility over governmental affairs that invites public scrutiny and discussion separate and apart from the controversy giving rise to this action." R. App. 19 (citing Erickson, supra). That is the appropriate legal standard. Cf. Erickson, 368 S.C. at 469, 629 S.E.2d at 666. Loveless seeks to dispute this conclusion arguing "service on the school board was part-time and should be judged on a different standard." Appellant's Br. 15. Were that the standard, then *most* of this state's elected officials would fall outside the public-official plaintiff category, including members of the legislature and members of county and city councils. That novel standard makes no sense and there is no authority for it.

C. Negligence never constitutes actual malice.

Loveless argues he pled actual malice. See Appellant's Br. 15–16. Stiles agrees the Complaint contains the words "actual malice;" however, what Loveless has actually pled is negligence based on an undertaking theory. See § I, supra.

Liability based on an undertaking theory can never, as a matter of law, constitute actual malice. An undertaking is one way an individual can come to have a legal duty, the breach of which might cause damages that might be recoverable. See, e.g., Wright v. PRG Real Est. Mgmt., Inc., 426 S.C. 202, 213, 826 S.E.2d 285, 290–91 (2019) (quoting Restatement (Second) of Torts (1965) to explain voluntary undertaking for consideration can be liable for failure to exercise reasonable care). A libel claim never sounds in negligence because "[a] claim that a statement constitutes libel or slander must be brought in a defamation cause of action, which is grounded in and affected by both common and constitutional law." Erickson, 368 S.C. at 482–83, 629 S.E.2d at 673–74 (affirming dismissal of negligence claim).

Loveless must allege not only that the statements are false, but that Stiles *knew* they were false or that she "entertained serious doubt" as to the truth but disregarded the concern of that falsity. See St. Amant v. Thompson, 390 U.S. 727, 731 (1968) ("reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing."). This extremely high standard cannot ever be met with an undertaking theory. At most, Loveless alleged negligent performance of a duty, but mere errors fall well short of what he must plead. See Erickson, 368 S.C. at 467, 629 S.E.2d at 665 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)). Thus, even assuming an undertaking allegation could suffice as the predicate for a libel claim (it does not under Erickson), it never satisfies the actual malice standard—it is just simple negligence.

As the JOTP Order explains, the essence of the statements in the Complaint are "opinions and criticism" of Loveless's performance of his duties as a member of the school board. R. App. 21. For example, Loveless believes Stiles is responsible for other peoples' views that he is an "unethical hypocrite," a "liar," and a "loser," among other things. See R. App. 39–41 at ¶ 16. Even crediting Loveless' defective undertaking theory, Stiles' failure to censor these views also cannot be actual malice because they are mere opinions.

Some statements—such as opinions, satire, epithets, or rhetorical hyperbole—cannot reasonably be interpreted as stating facts about an individual and therefore cannot constitute the basis for defamation. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990). This is because there is no such thing as a false idea under the First Amendment, Gertz, 418 U.S. at 339–40, and the First Amendment protection thereby "provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." Milkovich, supra. Opinions are not actionable unless they assert a provable falsehood. Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1093 (4th Cir. 1993) (citing Milkovich, 497 U.S. at 19). "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Id.

For example, a federal appeals court held a tweet suggesting the plaintiff's claims of intimidation were a "con job" would not be understood by a reasonable reader as an accusation that the plaintiff literally committed the crime of fraud and that, even though it *could* be read to accuse her of lying, it was still non-actionable opinion. Clifford v. Trump, 818 F. App'x 746, 749–50 (9th Cir. 2020). Likewise, the statement a charity was charging a "hefty markup" was non-actionable opinion because "hefty" was just "too subjective a word to be proved false." Chapin, 993 F.2d at 1093. Similarly, pointed questions, even those designed to arouse suspicion, are not

defamatory unless reasonably read to assert a falsehood because "inquiry itself, however embarrassing or unpleasant to its subject, is not accusation." Id. at 1094. Accordingly, where an article questioned who would benefit more from a charitable endeavor—the soldier-beneficiaries or the charity's organizer—the Fourth Circuit reasoned the question could not reasonably be read to imply the defamatory fact (pocket-lining) it simply provoked public scrutiny of the plaintiff's activities: "Voluntary public figures must tolerate such examination." Id.

The Complaint is replete with statements that are mere opinions or rhetorical hyperbole. See R. App. 38–39 at ¶¶ 15(a), (d); 16(a), (b), (c), (d), (e), (f), (g), (j), (k), (m), (n), (p), (q), (r), (s), (t), (u), (v), (w), (x), (z). Courts look to rhetorical indicators like "appeared to be," "might well be," "could well happen," and "should be" to signal presumptions and predictions rather than facts. Bellavia Blatt & Crossett, P.C. v. Kel & Partners LLC, 151 F. Supp. 3d 287, 293 (E.D.N.Y. 2015), aff'd, 670 F. App'x 731 (2d Cir. 2016); see also Levin v. McPhee, 119 F.3d 189, 197 (2d Cir. 1997) (statements, read in context, understood as conjecture, hypothesis, or speculation signal what is said is opinion, not fact). These signals are present throughout the statements in the Complaint and the failure by Stiles to censor these non-actionable opinions cannot support an allegation she acted with actual malice. The circuit court was correct to conclude this is protected discourse and Stiles was under "no obligation to censor the speech of others to protect [Loveless] from criticism." R. App. 21.

V. Sanctions were appropriate and necessary to punish flagrant, bad-faith discovery conduct that permeated all Loveless's discovery responses.

The courts of this state are cluttered with discovery motions made necessary solely because one side or the other refuses to follow longstanding and well-understood rules governing what a litigant must disclose and how objections should be interposed. Rules 33, 34, and 36 of the South Carolina Rules of Civil Procedure require *specific* objections, the purpose of which is to apprise

the requesting party of the basis for the objection and what information, if any, is being withheld. When this procedure is followed, it minimizes the need for court intervention by allowing the requesting party to evaluate the merit of the objection and respond accordingly. Too often, the rules are not strictly followed, prompting the requesting party to press for clarification or further disclosure that may require judicial oversight. Sometimes reasonable minds can differ on whether certain discovery should be had. This is *not* such a dispute.

Here, the Court is asked to excuse intentional wrongdoing. The Discovery Order punishes Loveless for failing to substantively respond, objecting to virtually every discovery procedure, refusing to produce a single document, and interposing snide, sarcastic comments. As the Discovery Order aptly explains, Loveless's responses "reflect a lack of seriousness and are an intentional departure from the discovery rules[.]" R. App. 5. Loveless urges the Court to ignore his bad faith conduct and focuses narrowly on the RTAs, which the circuit court deemed admitted as a sanction. R. App. 843–51. He complains they were "erroneously" deemed admitted and that he provided "complete answers[,]" "clearly stated the reasons for his objections[,]" and "provided detailed denials" that addressed the substance. Appellant's Br. 16. These claims are false. Whether considering his conduct broadly or the RTAs specifically, Loveless intentionally broke the rules and the circuit court acted within its discretion in deeming the RTAs admitted.

A. The discovery rules require disclosure or specific objections that fairly apprise the requesting party of the basis for the objection and what is being withheld.

The key to appropriate discovery responses and objections is *specificity* that allows the requesting party to evaluate the response, any withholding, and the basis for it.

RTAs require a written response or, if objected to, objections that state the reasons. Rule 36(a), SCRCP. Denials must fairly meet the substance of the requested admission and specifically

deny the matter or provide reasons why the responding party cannot truthfully admit or deny. Id. When good faith requires it, the responding party must specify any portion admitted and deny the rest. Id. Lack of information or knowledge is not a basis to deny a request unless a reasonable inquiry is made beforehand. Id.

Interrogatories and document request responses also require specificity. Interrogatories must be answered fully unless objected to, in which case the reasons for objection must be stated in lieu of an answer. Rule 33(a), SCRCP. An interrogatory is not objectionable merely because an answer involves an opinion or contention that relates to fact or the application of law to fact. Rule 33(d), SCRCP. A party's response to document requests must either state that inspection and copying will be permitted or specifically give the reasons for any objection. Rule 34(b), SCRCP; see also Liguria Foods, Inc. v. Griffith Labs., Inc., 320 F.R.D. 168, 184–85 (N.D. Iowa 2017) ("The key requirement in both Rules 33 and 34 is that objections require 'specificity.'"); Gowan v. Mid Century Ins. Co., 309 F.R.D. 503, 509 (D.S.D. 2015) (same, collecting cases).

In all cases, objections based on privilege must expressly make the claim and describe the nature of the information withheld in a manner that will allow the requesting party to assess the applicability of the privilege or protection. Rule 26(b)(5)(A), SCRCP. "[E]vasive or incomplete answer [are] to be treated as a failure to answer." Rule 37(a)(3), SCRCP.

General, non-specific, and boilerplate objections are improper because they purport to disclose "subject to" an objection. They fail to alert the requesting party of the nature of the objections and whether responsive information is being withheld. As one court explained:

> General objections such as the ones asserted by Defendant are meaningless and constitute a waste of time for opposing counsel and the court. In the face of such objections, it is impossible to know whether information has been withheld and, if so, why. This is particularly true in cases like this where multiple "general objections" are incorporated into many of the responses with no attempt to show the application of each objection to the particular request.

Heller v. City of Dallas, 303 F.R.D. 466, 483 (N.D. Tex. 2014) (brackets and quotations omitted). While our courts have not published much guidance on this issue, the weight of federal authority is clear: such objections are tantamount to making no objection at all and should be deemed waived. See, e.g., Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 363–64 (D. M.d. 2008); Guzman v. Irmadan, Inc., 249 F.R.D. 399, 400 (S.D. Fla. 2008); Frontier-Kemper Constructors, Inc. v. Elk Run Coal Co., 246 F.R.D. 522, 528 (S.D.W. Va. 2007); A. Farber & Partners, Inc. v. Garber, 234 F.R.D. 186, 188 (C.D. Cal. 2006); Hall v. Sullivan, 231 F.R.D. 468, 473-74 (D. Md. 2005); St. Paul Reinsurance Co. v. Commercial Fin. Corp., 198 F.R.D. 508, 514 (N.D. Iowa 2000).

B. Loveless's discovery misconduct was an intentional departure from the discovery rules.

Stiles' interrogatories, document requests, and RTAs were specific, tailored to the claims and defenses joined, and included detailed instructions concerning the information sought and the need for specific objections. See R. App. 139–41. Loveless's responses were a blanket refusal to participate. They failed to fairly respond to the substance, were replete with boilerplate and frivolous objections, and refused to produce a single document. Loveless's violations of the civil rules are voluminous, unprofessional, and cannot be read as a good-faith effort to cooperate in a lawsuit *he filed*. Consider a few examples from Loveless's responses and objections to interrogatories and document requests:

- He refused to produce a single document, including documents or items he intends to introduce at trial. See R. App. 166–70.
- He refused to identify any legal authority that supports specific complaint allegations about what he claims is "controlling legal authority in the State of South Carolina and the United States of America." R. App. 158 at Interrog. Resp. No. 6.

- He refused to identify a single speaker, date, time, or complete quotation of the statements he alleged were defamatory. R. App. 159–60 at Interrog. Resp. Nos. 9 (but claiming, "There are likely many others…") & 13.

- He refused to state the terms of Facebook he alleges Stiles violated ("if she can't find it, she can look at [hyperlink]"), or to identify legal authority establishing that a violation of Facebook's terms gives rise to civil liability. R. App. 159–60 at Interrog. Resp. Nos. 10–12.

- He refused to identify a person described in his Complaint and made the bizarre assertion he "will update [his] response when circumstances exist that will eliminate the ability of Defendant or others to harm that person, his family or his reputation." R. App. 160 at Interrog. Resp. Nos. 13.

- In response to 13 interrogatories and 17 document requests, Loveless simply interposes sarcastic claims like, "Objection. Irrelevant. Abusive. Made in bad faith. Manipulative. Sanctionable. But what a good idea." See R. App. 160–63 at Interrog. Resp. Nos. 17–30; R. App. 167–70 at RFP Resp. Nos. 6–8, 10–16 & 19–25.

Likewise, Loveless's responses to RTAs are preceded by general objections claiming all 18 RTAs "exceed the scope of allowable and appropriate discovery" and make vague, paranoid, and argumentative claims that the requests are "improper and unlawful malice" toward Loveless. See R. App. 172. The responses to specific RTAs fare no better. For example:

- Loveless disputed he was a public official (see R. App. 172 at Resp. RTA No. 1), even though he was an elected member of the District 5 school board and admitted the same in his Reply. Cf. R. App. 56 at ¶ 5.

- He offered argumentative, non-responses to requests seeking to establish key legal elements like an admission that posts and comments on Deep Dive are "of and concerning District 5." R. App. 172 at Resp. RTA No. 2.

- Loveless refused to answer specific questions about public votes, official action, and what he knew as a member of the school board and instead relies on his "general objections" to resist answering. R. App. 173–75 at Resp. RTA Nos. 6–13.

- While objecting, Loveless denied facts that were well-established in the public record and not reasonably in dispute, like that he was critical of the PWES construction project and that his company had a $1 million contract with Contract Construction. R. App. 175 at Resp. RTA Nos. 14–15.

These requests, seeking admissions about matters of public controversy, were an important part of Stiles' effort to prepare her defense. Stiles urged the circuit court to simply review Loveless's discovery responses, which it did (see R. App. 844–45) and the court was rightly troubled by the conduct.

C. The circuit court's reasoning for sanctioning Loveless was sound.

A discovery order is reviewed for a clear abuse of discretion (cf. Appellant's Br. 7), meaning the order must be "without reasonable factual support[.]".[13] Dunn v. Dunn, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989). Here, the circuit court applied sound reasoning based on a clear record. After finding "intentional" violations of the discovery rules, the circuit court explained,

> A litigant may not bring a defamation claim like the allegations [Loveless] made here and then refuse to answer questions and disclose documents to the opposing party. Nevertheless, more than six months after [Stiles] served discovery, [Loveless] is yet to offer substantive responses or produce any documents. This is not acceptable under the discovery rules.

R. App. 5. The court offered three justifications for imposing sanctions.

First, the circuit court found that Stiles' discovery fell within the scope authorized under Rule 26(b)(1), SCRCP. R. App. 6–7. Second, the court reasoned that, if Loveless had legitimate concerns about the scope of discovery, he failed to raise those concerns in the manner contemplated by the civil rules. R. App. 7. This means making an affirmative showing of a particularized harm so the requesting party can respond with a showing of relevance and necessity, and (if necessary) the court can balance the competing claims. App. 7–8 (citing Rule 26(c), SCRCP; Hollman, 384 S.C. at 578, 683 S.E.2d at 498).

> When non-specific, unsupported objections are made, it unnecessarily burdens litigants and the court with discovery matters that should either be worked out

[13] For example, ordering discovery that is not relevant to the claims and defenses, is an abuse of discretion. E.g., Hollman v. Woolfson, 384 S.C. 571, 581, 683 S.E.2d 495, 500 (2009).

> between the parties or worked out to the greatest extent possible leaving the court to handle truly difficult questions over which reasonable minds might disagree.

R. App. 8. The circuit court agreed these objections merely waste time and resources, create unnecessary uncertainty, and should be deemed waived. R. App. 8.[14] Notably, the circuit court was unable to find *any* justification or showing by Loveless to support his refusal to substantively respond. R. App. 9. Third, the circuit court was clearly troubled by Loveless's refusal to participate in discovery notwithstanding the fact that, as plaintiff, he chose to bring this case. See R. App. 9.

Based on this reasoning, the circuit court ordered two types of relief. First, it overruled all Loveless's objections to interrogatories and document requests and ordered him to submit full responses within 10 days. R. App. 10. Loveless failed to heed this order, requiring a motion for a rule to show cause (R. App. 608–56) and two more hearings. Second, the court overruled Loveless's objections to Stiles' RTAs and deemed them admitted "due to the evasive responses initially submitted." R. App. 10. In doing so, the circuit court was simply giving Rule 37(a)(3) its intended effect.

Here, the totality of Loveless's argument in support of setting aside the sanction deeming the RTAs admitted is a naked assertion the circuit court's decision is "in error" and "without reasonable factual support" because the responses were purportedly complete. Appellant's Br. 17. Loveless makes no effort to explain and points to no specific finding or principle of law in the Discovery Order that is flawed. The appealing party carries the burden of proving an abuse of discretion occurred, McNair v. Fairfield Cty., 379 S.C. 462, 465–66, 665 S.E.2d 830, 832 (Ct. App. 2008), and Loveless badly fails that test. Consider two additional points.

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[14] Quoting Curtis v. Time Warner Ent.-Advance/Newhouse P'ship, No. 3:12-CV-2370-JFA, 2013 WL 2099496, at *3 (D.S.C. May 14, 2013) (Anderson, J.) (ordering litigant to submit all new responses); citing State Farm Fire & Cas. Co. v. Admiral Ins. Co., 225 F. Supp. 3d 474, 485 (D.S.C. 2016) (Gergel, J.) (deeming objections waived).

First, here, Loveless challenges only the RTA sanction—he is silent on the remainder of the Discovery Order. However, his approach to interrogatories and document requests were no different than the objections to the RTAs. Put differently, if the circuit court was wrong about the RTAs, it must also be wrong about his interrogatories and document requests. However, Loveless is silent on those issues here because, what he really seeks from this Court in asking it to reverse the RTA sanction is the ability dispute *everything*, even facts that must, in good faith, be admitted.

Second, Loveless's strategy was to stonewall until a court appeared ready to order disclosure, then to offer to supplement his responses to avoid any consequences. This strategy was on full display during the motions hearing as Loveless's counsel expressed surprise by the circuit court's displeasure with her client's discovery responses:

> THE COURT: All right. I find this conduct in violation of the discovery rules. It cannot be that you simply don't answer interrogatories and requests for admissions that you don't like. These three kinds of discovery are required in every civil case. This is the plaintiff in the case. The defense's -- I have read all of these interrogatories. They asked very targeted and specific questions, and they cannot be done by just saying they're irrelevant and then saying -- making a sarcastic comment. I am not going to permit that.
>
> MS. BALLARD: *I already agreed to supplement our responses on that*, Your Honor.
>
> THE COURT: Supplemental responses after they've been pending since March.
>
> MS. BALLARD: *This is the first hearing we've had.*

R. App. 848 (emphasis added). Recall, Loveless never filed a memorandum contesting Stiles' arguments on the merits. Instead, the exchange above illustrates Loveless's strategy; he planned to interpose improper objections, promise to supplement them if the court took exception, and kick

the proverbial can down the road to successive court hearings. It is bad faith intentional misconduct, and the circuit court was correct to punish it accordingly.

CONCLUSION

For the reasons set forth above, the Court should affirm.

Respectfully submitted,

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December 15, 2023
Columbia, South Carolina.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the
COURT OF COMMON PLEAS, RICHLAND COUNTY
The Honorable Jean H. Toal, Circuit Judge

Appellate Case No. 2023-000145
Case No. 2022-CP-40-001364

Kenneth B. Loveless……Appellant,

v.

Lesley Ann Stiles a/k/a Leslie Lou Stiles……Respondent.

CERTIFICATION OF COUNSEL

The undersigned certifies that the Final Brief of Respondent Leslie Stiles, filed on December 15, 2023, complies with Rule 211(b), SCACR.

Respectfully, submitted,

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