THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
Aug 15 2024
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price

Court of Appeals Case No. 2022-000775
Civil Court Case No. 2021-CP-10-2682

Pet Helpers, Inc. ..... Respondent,

v.

Janet L. Frisco ..... Appellant,

v.

Melissa Susko ..... Third-Party Respondent.

FINAL BRIEF OF RESPONDENTS

Stephan V. Futeral
Futeral & Nelson, LLC
SC Bar ID 66427
534 Johnnie Dodds Blvd., Suite 202
Mount Pleasant, South Carolina 29464
(843) 284-5500 Phone (843) 284-5501 Fax
sfuteral@charlestonlaw.net
Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATEMENT OF ISSUES ON APPEAL

I. DID THE LOWER COURT ERR IN DENYING APPELLANT'S SECOND AND THIRD MOTIONS TO AMEND WHERE APPELLANT FAILED TO PAY SANCTIONS REGARDING HER FIRST MOTION TO AMEND, SHE FAILED TO PROVIDE AN AMENDED PLEADING FOR THE LOWER COURT'S REVIEW, AND SHE SOUGHT FRIVOLOUS RELIEF SUCH AS $50,000.00 IN DAMAGES?

II. DID THE LOWER COURT ERR IN GRANTING PARTIAL SUMMARY JUDGMENT TO RESPONDENTS WHERE APPELLANT ADMITTED THAT HER STATEMENTS REGARDING RESPONDENTS WERE FALSE AND WHERE APPELLANT FAILED TO SHOW A GENUINE ISSUE OF MATERIAL FACT REGARDING EITHER PARTIES' CLAIMS OR DEFENSES?

III. DID THE LOWER COURT ERR IN ORDERING APPELLANT TO PAY SANCTIONS AND GRANTING JUDGMENT BY DEFAULT TO RESPONDENTS FOR MALICIOUS PROSECUTION AND A PERMANENT INJUNCTION WHERE APPELLANT ACTED IN BAD FAITH AND WILLFULLY DEFIED THE LOWER COURT'S ORDER COMPELLING DISCOVERY?

STATEMENT OF THE CASE

On June 9, 2021, Respondent Pet Helpers, Inc. initiated this action by filing a Summons, Complaint, and Motion for Emergency *Ex Parte* Restraining Order in Pet Helpers, Inc. v. Janet Frisco, 21-CP-10-02682. In its Complaint, Respondent Pet Helpers asserted causes of action for slander, libel, and a permanent and temporary injunction against Appellant. (R. p. 174)

On June 11, 2021, the lower court issued an *Ex Parte* Restraining Order and Injunction enjoining Appellant from making defamatory statements regarding Respondents. (R. pp. 2-5) Thereafter, on June 17, 2021, the lower court issued a Temporary Restraining Order and Injunction. (R. pp. 6-7)

On June 16, 2021, Respondent Pet Helpers filed a Motion for Partial Summary Judgment. (R. ppp. 40-46) On June 17, 2021, Appellant filed a Summons and Complaint, Janet Frisco v. Pet Helpers, Inc., Case Number 2021-CP-10-2848, against Respondent Pet Helpers and its executive director, Third-Party Respondent Melissa Susko. (R. pp. 191-192) The gravamen of Appellant's

claims can be summed up by the following allegation - "[Appellant] suffered severe depression and grief and am [sic] still suffering due to the separation [Respondents] needlessly created by not returning the dog to [Appellant]." (R. p. 192) Respondents answered and counterclaimed for malicious prosecution. (R. pp. 193-195) On January 6, 2022, the lower court consolidated Frisco v. Pet Helpers, Inc. with Pet Helpers, Inc. v. Janet Frisco, 21-CP-10-02682. (R. pp. 39-40; 47-49)

On October 12, 2021, the lower court issued a second Order for Injunction and Temporary Restraining Order, expanding the prohibitions listed in the first Order for Injunction and Temporary Restraining Order. (R. pp. 10-13) Thereafter, on January 14, 2022, Appellant filed an appeal to this Court seeking to overturn the second Order for Injunction and Temporary Restraining Order issued on October 12, 2021. (R. pp. 372-377) On March 2, 2022, this Court dismissed Appellant's first appeal because Appellant did not timely serve the appeal (R. p. 20)

On November 5, 2021, the lower court held Appellant in contempt for willfully violating the Injunction and Restraining Orders more than 80 times and sentenced Appellant to 30 days in jail purgeable upon payment of $5,434.32 to Respondents' counsel. (R. pp. 14-15) Appellant served four days in jail before paying the sanction. Appellant did not appeal the Order of Contempt.

On October 19, 2021, Appellant filed her first motion to amend. (R. pp. 61-67) On January 11, 2022, the lower court denied Appellant's motion to amend because Appellant failed to submit a proposed amended pleading for the court's review and because Appellant sought relief such as the dismissal of Respondent Pet Helper's lawsuit. (R. pp. 16-19) Additionally, the court ordered Appellant to pay $560.00 in sanctions to Respondent Pet Helpers. (R. pp. 16-19) Appellant did not appeal this order, and she has not paid the sanctions to Respondent Pet Helpers.

Appellant failed to answer Respondents' Interrogatories and Requests for Production that were due by July 23, 2021. On January 11, 2022, the lower court ordered Appellant to respond to Respondents' discovery by January 17, 2022, and sanctioned Appellant in the amount of $1,214.24. (R. pp. 16-19) Appellant did not appeal this order, she has not answered discovery, and she has not paid the sanctions. Thereafter, on January 21, 2022, Respondent Pet Helpers filed a Motion for Sanctions for Appellant's failure to Comply with the Order Compelling Discovery. (R. p. 62-67, 73-76)

On February 28, 2022, Appellant filed her second motion to amend. (R. pp. 77-92) Like Appellant's first Motion to Amend, Appellant failed to submit to the lower court a proposed amendment for the court's review. Moreover, Appellant sought relief including reimbursement of the sanctions from the lower court's Order of Contempt, return of the dog that Appellant relinquished to Respondent Pet Helpers, and an award of $50,000.00. (R. pp. 77-92)

On March 24, 2022, Appellant filed her third motion to amend. (R. pp. 106-125) Like Appellant's first and second Motions to Amend, Appellant failed to submit to the lower court a proposed amendment for the court's review and sought relief such as the return of the dog and an award of $50,000.00. (R. pp. 106-125)

As previously stated, on June 16, 2021, Respondent Pet Helpers filed its Motion for Partial Summary Judgment that was initially scheduled to be heard by the lower court on December 17, 2021. (R. pp. 40-46) In her return to Respondent's Motion for Summary Judgment, Appellant claimed she needed additional time to complete discovery. Specifically, Appellant wrote "I have not . . . had the opportunity to pose interrogatories to the plaintiff. . . . The court should not grant a partial summary judgement [sic] to the plaintiffs when all the facts of this case have not been investigated . . . ." (R. p. 233) In her supplemental return to Respondents' Motion for Summary

Judgment, Appellant again claimed she needed additional time to conduct discovery and wrote "I have not been able to file a request [sic] interrogatories or production from [Respondents] so it would be premature for the court to reach a judgement [sic] in the [Respondents'] favor . . . ." (R. p. 229, ¶ 1) At that time, Appellant had not submitted interrogatories or requests for production since the initiation of either Respondents' or Appellant's lawsuit. Nevertheless, to give Appellant extra time to engage in discovery, Respondent Pet Helpers voluntarily moved to continue the summary judgment motion. Appellant opposed Respondent's motion to continue the summary judgment hearing, but the lower court granted Respondent's continuance request. (R. pp. 16-19)

On April 22, 2022, the lower court conducted a hearing regarding Respondent Pet Helpers' Motion for Partial Summary Judgment, Respondent's Motion for Sanctions for failure to comply with the Order Compelling Discovery filed on December 17, 2021, Appellant's second Motion to Amend, and Appellant's third Motion to Amend. On May 5, 2022, the lower court granted Respondents Partial Summary Judgment, sanctioned Appellant for failing to comply with court-ordered discovery, and denied Appellant's second and third Motions to Amend. (R. pp. 21-38) This appeal followed.

STANDARD OF REVIEW

Regarding motions to amend pleadings pursuant to Rule 15, SCRCP, a lower court's ruling is within its discretion. *See, e.g.*, Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry, 403 S.C. 623, 632, 743 S.E.2d 808, 812 (2013) ("A motion to amend is within the sound discretion of the trial judge. . . .") (citing Foggie v. CSX Transp., Inc., 315 S.C. 17, 431 S.E.2d 587 (1993)).

Regarding summary judgment, "the appellate court applies the same standard of review as the trial court under Rule 56, SCRCP." Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005) (citation omitted). Summary judgment is appropriate "if the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

Regarding sanctions under Rule 37, SCRCP, "[t]he imposition of sanctions is generally entrusted to the sound discretion of the [lower court]." Downey v. Dixon, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987). "The burden is upon the party appealing from the order to demonstrate that the [lower court] abused its discretion." Id. (citation omitted).

Regarding requests for a continuance, a motion for continuance is addressed to the sound discretion of the lower court. Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997). Our appellate courts will not reverse a lower court without a clear showing of an abuse of discretion. Id.

FACTS

Respondent Pet Helpers is a non-profit "no-kill" pet adoption center and spay/neuter clinic. (R. p. 21) On April 13, 2021, Appellant relinquished ownership of a dog to Respondent Pet Helpers. (R. pp. 21, 251 ¶ 1, 365) On May 8, 2021, a third party adopted the dog. (R. pp. 21, 63-65, 363 ¶ 4)

After relinquishing ownership of the dog to Respondent Pet Helpers, Appellant demanded the dog's return. (R. p. 21) When Respondent Pet Helpers declined to return the dog to Appellant, Appellant threatened to bring "God's Army" to Respondent Pet Helpers' business location. (R. pp. 21-22) Appellant also threatened that she would "light up the internet" regarding Appellant's grievances. (R. p. 22) Thereafter, Appellant engaged in an extensive campaign of publishing numerous defamatory social media posts and videos, protesting in front of Respondent Pet Helpers' business, and claiming that, as a matter of fact:

a) Respondent Pet Helpers killed the dog;

b) Respondent Pet Helpers cruelly euthanizes other animals in its shelter;

c) Respondent Pet Helpers was cruel to the dog;

d) Respondent Pet Helpers is cruel to other animals in its shelter; and

e) Respondent Pet Helpers "staged" the dog's adoption.

(R. p. 22) Additionally, after the dog's adoption and during this litigation, Appellant sent numerous emails to third parties, including the Post & Courier, making the same defamatory statements regarding Respondents. (R. p. 22) For example, Appellant stated:

a) "[Respondents], they're just cruel. And they're dishonest, and they're deceptive."

b) "[Respondents are] despicable, just horrible, horrible human beings… . They didn't help [the dog]. They hurt [the dog]. They made him suffer. And I'm sure he's not the only one."

c) "[Third-Pary Respondent Melissa Susko], she has licensed euthanize and she has euthanized other dogs are ordered that they be euthanized even though they were not sick, or aggressive. But she's all about corporate greed."

d) "I think they're killing other dogs, because I've heard people who are former employees here, and they told me that they, they're killing dogs."

e) "I think they had, you know, a plan for him a death plan for him the whole time… I'm talking about [Third-Party Respondent Melissa Susko because she's got a certification to kill dogs. And she's done it herself. And she's ordered dogs killed too . . . . I'm sure that's just the tip of the iceberg here."

f) "[My] sign says, corporate greed kills my dog, Toby. Corporate greed. And the other side says [Respondents] killed [the dog] May 11th … And I'm not going to

stop until first of all these people, a bunch of people here, [Third-Party Respondent Melissa Susko] . . . and anybody else that knew and the guy that killed him, anybody else, they'll all be fired. If this company cares, this place will be shut down and reopened by somebody who really cares about animals. . . . But it's really a kill shelter."

g) "And most of these dogs will not make it out of here alive. They really won't. [The dog] did not make it out of this place alive… And then they killed him. They killed [the dog]. They killed my dog."

h) "I'm here to tell you it's not so quick giving them money. Don't give them any more money. You don't ever surrender a dog to any shelter. And if they claim to be no kill, don't believe them."

i) "But my sign, I'm protesting Janet Frisco is protesting [Respondents] in their cruelty to my dog and probably too many other dogs. But my sign says [Respondents] killed [the dog] May 11th."

j) "[Respondents] killed him because they didn't adopt him to anyone. They killed him. And I know they did."

k) "[Respondents] just let him suffer and then they, you know, we're taking a lot of pictures of him and you know, and they just let him suffer here for a whole month."

l) "[Respondents] used [the dog] as a marketing tool to solicit donations and then euthanized him after they staged an adoption the weekend of May 7-11, 2021."

(R. pp. 19-21, 177 ¶ 25, 251, Supp. R. pp. 183-187)

ARGUMENTS

Albeit Appellant is acting *pro se*, she must be held to the same standards as an attorney. *See* State v. Burton, 356 S.C. 259, 265 n.5, 589 S.E.2d 6, 9 n.5 (2003) ("A pro se litigant who knowingly elects to represent himself assumes full responsibility for complying with substantive and procedural requirements of the law."). Here, this Court should not consider various arguments made by Appellant because some of her arguments concern lower court orders that were not appealed, arguments that Appellant did not raise to the lower court, or arguments the lower court did not rule upon. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Appellant's arguments that are not preserved for appellate review are as follows:

1. Argument I - "[The court] neglected to state the motions that were scheduled to be heard when he commenced the hearing." (Appellant's Amended Initial Brief p. 7)
2. Argument I - "[T]he lower court allowed the Respondent's attorney to take control of the proceedings and would not allow the Appellant to state arguments concerning her own filed motions." (Appellant's Amended Initial Brief p. 7)
3. Argument II – "[The court] wouldn't let Appellant object to its submission as evidence when she stated it could be a forgery . . . ." (Appellant's Amended Initial Brief p. 8)
4. Argument II – "The Respondent did not include a form of identification with the adoption application to prove that the person listed as the adopter on the application is the legitimate adopter and the person that the Respondent's attorney provided a picture of in October 2021 and claimed was the actual adopter." (Appellant's Amended Initial Brief p. 8)

5. Argument II – "The court abused the standard of discretion by accepting evidence that is not admissible in a court of law, and could not be verified as authentic by itself." (Appellant's Amended Initial Brief p. 8)

6. Arguments III & IV - "Judge Cothran in the same order said that because I sought the relief of the dismissal of [Respondents'] complaint it was without merit and therefore denied. This is also an abuse of discretion because since the [Respondents'] lawsuit was based on fraud as the supplemental answer stated, the dismissal would have been right and proper."[1] (Appellant's Amended Initial Brief p. 8)

7. Argument VII – "[Respondents' attorney] abused civil process because he implemented the lawsuit against [Appellant] for (1) an ulterior purpose, that being to conceal the criminal fraud of his ciients [sic] who had staged an adoption of my dog Toby in order to collect donations and subsidies on the basis of finding him a new home. . . . The Respondent's attorney did (2) willfully conduct the litigation against the Appellant with full knowledge that the adoption was not legitimate and for that same purpose, manufactured evidence in a form of an alleged adoption application and presented it to the court at the hearing April 22, 2022." (Appellant's Amended Initial Brief p. 10)

8. Argument VII – "[Respondents] also presented an affidavit from Blaine John stating he had not adopted Toby. Neither document is admissible as evidence in court . . . ." (Appellant's Amended Initial Brief p. 10)

9. Argument VII – "[A]t earlier hearings the court would not consider my photo exhibits that showed the original adoption picture matched the employee Blaine John and subsequent photographs [Respondents' counsel] provided to the Appellate [sic] of another individual,

[1] As previously mentioned, Appellant did not appeal the Order on Motions filed January 11, 2022.

he claimed was actually the adopter in an attempt to discredit the Appellant's claim that the adoption was staged."[2] (Appellant's Amended Initial Brief p. 10)

10. Argument VII – "In the course of his abuse of civil process, [Respondents' attorney] also made false statements on court documents he filed in order to obtain restraining orders stating that the Appellant had violated a trespass notice and threatened Pet Helper's employees."[3] (Appellant's Amended Initial Brief p. 10)
11. Argument VII – "The discovery requests were totally unnecessary because [Respondents] had already obtained the public verbal and written statements, he claimed were slander and libel. The discovery requests, especially the production, were overly burdensome, impossible for anyone to complete and solely requested to occupy all the Appellant's time so she wouldn't be able to defend herself and also to enable the Respondent to collect sanctions when they couldn't be completed. This type of lawsuit is often referred to a [sic] 'Strategic Lawsuit Against Public Participation' (S.L.A.P.P.) because it is implemented to silence public discourse through use of a preponderance of legal actions which makes it impossible for the person to defend themselves and they eventually concede due to the sheer volume and intensity of the number of legal actions employed against them. It is an affront on free speech and another example of abuse of civil process."[4] (Appellant's Amended Initial Brief pp. 10 - 11)

---

[2] Appellant's arguments concern prior court hearings and orders that are not the subject of this appeal.
[3] Appellant's arguments concern court orders that are not the subject of this appeal.
[4] Appellant's arguments regarding discovery requests relate to Judge Cothran's Order on Motions filed January 11, 2022 from which Appellant did not appeal.

I. THE LOWER COURT PROPERLY DENIED APPELLANT'S SECOND AND THIRD MOTIONS TO AMEND BECAUSE APPELLANT DEFIED THE COURT'S ORDER TO PAY SANCTIONS REGARDING HER FIRST MOTION TO AMEND, SHE FAILED TO PROVIDE AN AMENDED PLEADING FOR THE LOWER COURT'S REVIEW, AND SHE SOUGHT FRIVOLOUS RELIEF SUCH AS PAYMENT OF $50,000.00.

It is well established that a motion to amend is addressed to the lower court's sound discretion, and the party opposing the motion has the burden of establishing prejudice. Foggie v. CSX Transp., Inc., 313 S.C 98, 431 S.E.2d 587 (1993). Our Supreme Court has ruled that some of the justifications for denying a motion to amend pursuant to Rule 15, SCRCP include "'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, [and] futility of amendment, etc. . . . .'" Patton v. Miller, 804 S.E.2d 252, 262, 420 S.C. 471, 489-90 (2017) (quoting Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 226 (1962)).

Here, the lower court the lower court previously denied Appellant's first Motion to Amend because she failed to submit a proposed amended pleading to the lower court for its review. (R. pp. 16-19) Without a proposed amended pleading, the lower court could not determine the merits of Appellant's motion, and Respondents were prejudiced in their ability to respond meaningfully to Appellant's motion. Also, the lower court denied Appellant's first Motion to Amend because Appellant sought frivolous relief and sanctioned Appellant in the amount of $560.00. (R. pp. 16-19) Nevertheless, Appellant defied the lower court's order to pay $560.00 in sanctions, she filed two more Motions to Amend without a proposed amended pleading, and she requested frivolous relief beyond the scope of Rule 15, SCRCP, such as the dog's return and $50,000.00 in damages. (R. pp. 77-92, 106-125)

Additionally, Appellant's second Motion to Amend was based on Rule 15(b), SCRCP that provides "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." (emphasis added). Since there has been no trial in this case, Appellant's second Motion to Amend was without merit.

Appellant argues that the lower court erred because it would not allow her to argue her Motions to Amend.[5] Appellant's arguments are without merit because the court allowed Appellant to present arguments regarding her Motions to Amend. (R. pp. 164-165, 170-171) The lower court did not abuse its discretion by denying Appellant's Motions to Amend where Appellant failed to submit a proposed amendment and sought frivolous relief such as the dog's return and $50,000.00 in damages. Also, when the lower court granted Respondents summary judgment, it properly held that Appellant's Motions to Amend were moot:

> All right. Here's what I'm gonna do. . . . I'm gonna grant [Respondents'] motion for partial summary judgment. I'm going to grant [Respondents'] motion for sanctions for [Appellant's] failure to comply with Judge Cothran's order. She was, I just read it into the record, she was to comply within 30 days, she has not complied within those 30 days with his order and, therefore, I am striking or dismissing her complaint altogether. Therefore, making any other motions that would need to go forward moot.

(R. p. 170, line 16 – p. 171, line 25). Overall, the lower court heard Appellant's arguments regarding her motions to amend and properly granted Respondents judgment based on Appellant's willful failure to comply with the lower court's order compelling discovery and thereby rendered Appellant's Motions to Amend moot.

II. THE LOWER COURT PROPERLY GRANTED PARTIAL SUMMARY JUDGMENT TO RESPONDENTS WHERE APPELLANT ADMITTED THAT HER STATEMENTS REGARDING RESPONDENTS WERE FALSE AND WHERE APPELLANT FAILED TO SHOW A GENUINE ISSUE OF

[5] Appellant repeats this argument in sections I, III, and IV of her appellate brief.

MATERIAL FACT REGARDING EITHER PARTIES' CLAIMS OR DEFENSES.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "[T]he evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). To oppose a motion for summary judgment, "the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is 'not merely engaged in a fishing expedition.'" Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (quoting Baughman v. AT&T, 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991)). Moreover, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). Regarding Appellant's affidavit wherein she sought "additional time to submit discovery requests" to Respondents, Rule 56(g), SCRCP provides:

> Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Here, Appellant did not submit anything to the court to create a genuine issue of material fact regarding any of the parties' claims or defenses. Instead, Appellant sought a continuance of the April 2022 summary judgment hearing claiming that she needed "additional time to submit discovery requests to [Respondents] which is essential to justify my opposition to their Motion for Partial Summary Judgement [sic]." (R. pp. 370-371) Appellant's request for a continuance was

disingenuous. As previously stated, since this case began in June 2021, Appellant did not serve discovery before the summary judgment motion in December 2021. Nevertheless, Appellant sought a continuance of the initially scheduled summary judgment hearing on December 17, 2021 but, paradoxically, she later opposed the continuance of that hearing. (R. pp. 16-19, 232-233)

After the lower court continued the summary judgment hearing in December 2021 to give Appellant more time to conduct discovery, Appellant did not do so. Instead, at the summary judgment hearing in April 2022, Appellant attempted to mislead the lower court into denying Respondents' motion by falsely asserting that she had never "claimed on any filed document I needed more time for discovery." (R. pp. 236-239) As the lower court found, Appellant twice claimed she needed more time for discovery. Specifically, Appellant filed two memoranda in opposition to Respondents' motion for partial summary judgment claiming "I have not . . . had the opportunity to pose interrogatories to the [Respondents]," and "I have not been able . . . to request interrogatories or production from the [Respondents]. . . ." (R. pp. 27-28, 229 ¶ 1, 232)

In addition to failing to serve discovery for approximately 11 months,[6] attempting to mislead the court about discovery, and attempting to delay this lawsuit, Appellant sent numerous malicious emails to Respondents' counsel and his staff instead of engaging in discovery. For example, Appellant wrote:

> 1) I realize that your wife wouldn't hang around with an old fart that wasn't loaded so you have to bleed people who earn their money honestly. As for [the paralegal of Respondents' counsel] maybe she and your wife and can start a bordello. It's a lot more honest than what they're doing now for money.
>
> 2) [Y]ou [the paralegal of Respondents' counsel] are guilty of trying to cover up Pet Helpers fraud. The longer you perpetuate the lie and the malicious prosecution, the greater the repercussions will be when the truth comes out. As

[6] Since the underlying lawsuit was filed on June 9, 2021 until the summary judgment hearing on April 22, 2022, Appellant failed to conduct discovery.

> I said previously, you're going to need to get an honest job once Mr. Futeral loses his license to practice law.

(R. p. 28, Supp. R. p. 63) Accordingly, the lower court did not err in denying Appellant's mendacious request for more time to conduct discovery before granting summary judgment to Respondents.

Regarding the lower court's summary judgment order regarding defamation, our courts have held that the "publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). "The tort of defamation allows a plaintiff to recover for injury to her reputation as the result of the defendant's communication to others of a false message about the plaintiff. Slander is a spoken defamation while libel is a written defamation or one accomplished by actions or conduct." Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 508, 506 S.E.2d 497, 501 (1998). "If a defamation is actionable *per se*, then under common law principles the law presumes the defendant acted with common law malice and that the plaintiff suffered general damages." Id. at 510, 506 S.E.2d at 502.

> 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 . . . . In other words, if the trial judge can legally presume, because of the nature of the statement, that the plaintiff's reputation was hurt as a consequence of its publication, then the libel is actionable *per se*. Essentially, all libel is actionable *per se*.

Id. at 510-11, 506 S.E.2d at 502 (quoting Lesesne v. Willingham, 83 F. Supp. 918, 921 (E.D.S.C. 1949)) (citation omitted).

Slander is actionable *per se* if the defendant "charges the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession." Holtzscheiter, 332 S.C. 502, 511, 506 S.E.2d at 502.

Here, Appellant made numerous defamatory statements on social media via text and video, during Appellant's in-person protests regarding Respondents, and in emails to third persons and organizations such as the Post & Courier. (R. pp. 21-22) Appellant's statements included false allegations that Respondents killed the dog, Respondents engaged in the criminal offense of animal cruelty, and Respondents were unfit for their profession. (R. pp. 21-22) Additionally, Appellant falsely claimed that Respondents "staged" the dog's adoption. (R. pp. 22, 251, ¶ 8)

While Appellant submitted neither evidence nor factual affidavits opposing summary judgment, Appellant conceded that she transferred ownership of the dog to Respondent Pet Helpers and that her claims that Respondents killed the dog were untrue. (R. pp. 19, 251 ¶ 1) Respondents, however, submitted affidavits and exhibits to the court to show that there was no genuine issue of material fact that Appellant's statements that Respondents killed the dog were false and that Appellant's statements that Respondents "staged" the dog's adoption were also false. (R. p. 356, ¶ 16, Supp. R. pp. 11, 363 ¶ 3-4)

Based on the aforementioned circumstances, the lower court properly held there was not a "scintilla of evidence to substantiate [Appellant's] allegations," and that there was no genuine issue of material fact that Appellant published to third parties defamatory statements regarding Respondents, that Appellant acted with common law malice, and that Respondents suffered general damages. (R. pp. 21-38) In other words, the lower court did not err in granting partial summary judgment to Respondents for its claims for defamation and for a permanent injunction.

III. THE LOWER COURT PROPERLY ORDERED APPELLANT TO PAY SANCTIONS UNDER RULES 37 AND 56, SCRCP AND PROPERLY GRANTED JUDGMENT BY DEFAULT TO RESPONDENTS FOR MALICIOUS PROSECUTION AND A PERMANENT INJUNCTION WHERE APPELLANT ACTED IN BAD FAITH AND WILLFULLY DEFIED THE LOWER COURT'S ORDER COMPELLING DISCOVERY.

Rule 37(b)(2), SCRCP provides:

> If a party . . . party fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> > (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
> >
> > (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
> >
> > (C) An order . . . or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> * * *
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

"Where the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction." Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 198 - 199, 511 S.E.2d 716, 718 - 719 (Ct. App.1999) (citations omitted). "The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." Downey v. Dixon, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App.1987). Accordingly, our appellate courts will not interfere

with a lower court's "exercise of its discretionary powers with respect to sanctions imposed in discovery matters" unless the lower court abuses its discretion. Karppi v. Greenville Terrazzo Co., Inc., 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App.1997) (citation omitted). "An 'abuse of discretion' may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law." Dunn v. Dunn, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) (citation omitted). The appellant bears the burden of showing the lower court abused its discretion. Id. (citation omitted).

Here, Appellant's responses to Respondents' interrogatories and requests for production were due on or before July 23, 2021. (R. pp. 16-17) Upon Appellant's request, Respondents gave Appellant an extension of time to respond to discovery by July 30, 2021. (R. p. 17) However, instead of answering discovery by July 30, 2021, on July 26, 2021, Appellant wrote that Respondents' counsel should seek mental health treatment and "Don't hold your breath for the discoveries." (R. pp. 17, 33)

Because Appellant acted in bad faith and refused to answer discovery, Respondents moved to compel Appellant's discovery responses. On December 17, 2021, the lower court ordered Appellant to "fully respond" to Respondents' interrogatories and requests to produce within thirty days from the hearing regarding Respondents' motion to compel and to pay Respondents' attorney's fees and costs of $1,214.24. (R. p. 17) However, after the hearing on December 17, 2021, as previously stated, Appellant defied the lower court's order and, instead, sent numerous derogatory emails to Respondents' counsel such as suggesting counsel's paralegal and wife should become prostitutes. (R. pp. 18, 28)

Instead of complying with the lower court's order compelling discovery, Appellant acted in bad faith, with gross indifference to Respondents' rights in this lawsuit, and with disdain towards the court. Specifically, Appellant wrote "I'm willing to lose everything I own to expose the evil of corporations like Pet Helpers, lawyers, law enforcement and the courts if need be." (R. p. 34) Considering Appellant's purposeful efforts to delay this lawsuit, her attempts to mislead the court, her mockery of court procedures and the lower court's authority, and her repeated and willful disobedience of the lower court's orders such as the order compelling discovery, the lower court did not abuse its discretion when it granted judgment by default against Appellant for malicious prosecution, a permanent injunction, and additional sanctions of $9,638.48.

CONCLUSION

The lower court properly denied Appellant's motions to amend because Appellant failed to pay sanctions regarding her first motion to amend, she failed to provide an amended pleading for the lower court's review, and she sought frivolous relief such as payment of $50,000.00. Additionally, the lower court properly granted partial summary judgment to Respondents where Appellant admitted that her statements regarding Respondents were false and where Appellant failed to show a genuine issue of material fact regarding the parties' claims or defenses. Lastly, the lower court properly ordered Appellant to pay sanctions and properly granted judgment by default to Respondents for malicious prosecution and a permanent injunction where Appellant acted in bad faith and willfully defied the lower court's order compelling discovery. Therefore, for the reasons stated herein, this Court should deny the appeal.

Attorney Signature on Following Page.

Respectfully submitted,

FUTERAL & NELSON, LLC

Stephan V. Futeral
SC Bar ID 66427
534 Johnnie Dodds Blvd., Suite 202
Mount Pleasant, South Carolina 29464
(843) 284-5500 Phone (843) 284-5501 Fax
sfuteral@charlestonlaw.net
Attorney for Respondents

Dated: 8/15, 2024