THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cordell Maddox, Circuit Court Judge
Benjamin Culbertson, Circuit Court Judge

C/A No. 2021CP2601096
Appellate Case No. 2025-01317

John Gallman, ……Appellant,

vs.

Waccamaw Publishers, Inc. and Christian Boschultz, ……Respondents.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules/Statutes

Other Materials

STATEMENT OF ISSUES ON APPEAL

I. DID THE LOWER COURT ERRED IN DISMISSING THE SECOND AMENDED COMPLAINT
II. DID THE LOWER COURT ERR IN GRANTING SUMMARY JUDGMENT
III. DID THE LOWER COURT ERR IN GRANTING RELIEF PURSUANT TO THE SOUTH CAROLINA FIRIVOLOUS PROCEEDINGS ACT

STATEMENT OF THE CASE

Appellant filed its complaint on February 24, 2021. [Complaint]. Respondent filed a motion to dismiss on April 9, 2021. Thereafter and in response to the motion to dismiss, Appellant filed an Amended Complaint on June 2, 2021. [Amended complaint]. Respondent filed a motion to strike portions of the Amended Complaint and to cure misjoinder. [Motion to Strike]. A hearing for both motions was held via Webex on July 21, 2021 before Judge William Keesley. Judge Keesley denied the motion to dismiss and the motion to cure misjoinder but required Appellant to amend the pleadings to make specific allegations of civil conspiracy within 30 days from August 3, 2021. [Keesley Order]. On August 31, 2021, Counsel for Appellant suffered a break-in at his office during which vandals destroyed much of the interior of the building, including all of his paper files. [TSP Affidavit]. This break in occurred 2 days before the Amended Pleadings were due. Respondent filed a new motion to dismiss based on the missed deadline on September 3, 2021. [Motion to Dismiss]. Appellant filed the Second Amended Complaint on September 22, 2021. [Second Amended Complaint]. Counsel for Appellant filed a full detailed explanation of the break in and the aftermath with the Court. [Affidavit of Tucker Player]. A hearing was held before Judge Benjamin Culbertson on December 6, 2021 regarding the motion to dismiss. Judge Culbertson granted the motion and struck the Second Amended Complaint. [Form 4 Culbertson Order; Final Culbertson Order.] Respondents filed a motion for summary judgment on June 6, 2022. [Motion for summary judgment]. A hearing was held on September 29, 2022 and was taken under advisement. [Maddox Form 4 Order]. The motion was granted on April 3, 2023. [Maddox Order granting summary judgment]. Respondent filed its motion for sanctions the same day. [Motion for sanctions]. The motion was granted on December 16, 2024. [Order on Sanctions]. Appellants

filed a motion to reconsider on December 26, 2024. [Motion to reconsider sanctions] The court denied the motion to reconsider on June 4, 2025. [Order denying sanctions]. Appellants filed their notice of appeal on July 1, 2025. [notice of appeal].

STATEMENT OF THE FACTS

Appellant ran for public office in the republican primary in 2020. After the initial primary, Appellant was placed in a runoff to be the republican candidate for Senate District 33 in Horry County South Carolina. On or about June 2, 2020, a dossier purportedly containing documents selected from Appellant's divorce file [hereinafter the "Dossier"] were distributed to numerous media organizations across the state. [Amended Complaint, 26-28].

Within these documents, the mental health records of Appellant's 10 year old daughter were included. More specifically, the Dossier purported to contain forensic interview notes from the Children's Recovery Center in Horry County. Those interview notes were from an investigation concerning possible abuse by a third-party against the 10 year old daughter of Appellant. The Children's Recovery Center (CRC) is a nonprofit 501(c)(3) organization offering child advocacy center programs in Horry and Georgetown Counties in South Carolina. It provides forensic interviews, medical examinations, and caring advocacy for children suspected of having suffered abuse. These records are statutorily protected and prohibited from being disseminated pursuant to S.C. Code § 19-11-95, S.C. Code § 44-22-100, S.C. Code § 63-7-940 and S.C. Code §63-7-1990. [Amended Complaint, 30-33].

Respondents published their first article on June 16, 2020, seven days before the runoff election. Respondents refused to review the evidence possessed and offered by Appellant that demonstrated that the incomplete and misleading information in the family court documents was false. [Affidavit of John Gallman]. Respondents refused Appellant's invitation to review the entire Family Court file to obtain the truth of the allegations. Respondents refused a plea from Appellant to not drag his 10 year old daughter into a political mudslinging contest. [Id.] The news article published by Respondents actually states: "*Notes from a Children's Recovery*

Center interview show that Gallman's minor daughter alleged he had hit mom on more than one occasion, and that he would frequently yell at her." [Amended Complaint 39]

Respondents published an unambiguously false statement by a biased witness, Amanda Loehr. In the June 19, 2020 article, Respondent Boschultz provided the following quote with no qualification or correction:

> *Once everything was presented in court, [Appellant] was deemed unfit to have rights to his children,' Loehr said. 'He has had all visitation revoked, related to his aggressive and reckless behavior toward his children and their mother. Is this the kind of man we want to represent us?*

[Appellant's Memo in Opposition to Summary Judgment; Exhibit 2 of Respondent's Motion for Summary Judgment]. The Order issued by family court is very clear as to why Appellant was forbidden from speaking to his children for almost a year. Respondents possessed a copy of that Order as it was referenced it in the next paragraph of the article. The family court Order was clear: Appellant had his children taken away because (1) he took his daughter to MUSC after he found suspicious bruising on her upper-inner thighs and (2) he filed a claim with the SCLLR against his daughter's counselor. At no point did the Order state that John Gallman was an unfit father. [Id.]

Appellant filed suit in February 2021 with an amended complaint filed in June 2021. As described above, Judge Keesley required Plaintiff to amend his pleadings by September 2, 2021, but Counsel for Appellant experienced vandalism at his office that caused him to miss the deadline. Judge Culbertson granted the motion to dismiss without considering or addressing the issue of prejudice to Respondents, striking the Second Amended Complaint on December 6, 2021. Respondents filed their motion for summary judgment on June 6, 2022. Appellant argued that he was entitled to complete discovery before summary judgment was considered. Due to the number of parties and the fact that parties and attorneys were legislators, Appellant did not receive Answers from all Respondents until April of 2024. Appellant argued that he was not required to conduct

discovery until he received responsive pleadings from all parties. With respect to the unambiguously false statement made by Amanda Loehr, Respondents argued that the only article in the pleadings was published on June 16, 2020 and the June 19, 2020 article was not part of the case. [Transcript, p.23-24, Maddox Hearing on September 26, 2022]. Appellants argued that the claim was included in the Amended Complaint and had been disclosed to Respondents in discovery seven months before the motion for summary judgment was filed. [Transcript, p.33-34, Maddox Hearing on September 26, 2022]. Moreover, Appellants sought to amend the pleadings to conform to the evidence as there was no prejudice to Respondents as they knew of the allegations since December 2021. Id. These arguments were simply ignored by the lower court in its order granting summary judgment. A subsequent judge did follow the law, in March 2023, when she denied the summary judgment motions of other Respondents to allow discovery to be completed before considering a motion for summary judgment. [Jefferson Order].

Since the first motions to dismiss were filed in 2021, Appellant has cited the case of *Erickson v. Jones St. Publrs., LLC*, 368 S.C. 444, 629 S.E.2d 653 (2006) in support of his claims against Respondents. Neither counsel for Respondents nor the lower court have ever addressed how the findings in *Erickson* are inapplicable to this case.

ARGUMENTS

Standard of Review

With regard to the dismissal of the Second Amended Complaint, the appellate court applies the same standard of review as the trial court. *Doe v. Marion,*373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Id.* If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Brazell v. Windsor,*384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009). In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *Id.* "The trial court and this [C]ourt on appeal must presume all well pled facts to be true." *Morrow Crane Co. v. T.R. Tucker Constr. Co.,*296 S.C. 427, 429, 373 S.E.2d 701, 702 (Ct. App. 1988). "[P]leadings in a case should be construed liberally so that substantial justice is done between the parties. Further, a judgment on the pleadings is considered to be a drastic procedure by our courts." *Russell v. City of Columbia,*305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). The court should not dismiss the complaint merely because there exists doubt that the plaintiff will prevail in the action. *Doe,*373 S.C. at 395, 645 S.E.2d at 248.

With regard to the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP when reviewing the grant of summary judgment. *Peterson v. West Am. Ins. Co.,*336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999)). "Summary judgment is appropriate when there is no genuine issue of material fact

such that the moving party must prevail as a matter of law." *Id.* In order to withstand a motion for summary judgment "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." *Hancock v. Mid-South Mgmt. Co., Inc.,*381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

With regard to the award of sanctions, Pursuant to the South Carolina Constitution, an appellate court reviews findings of fact in an equity matter taking its own view of the evidence. *Father v. South Carolina Dep't of Soc. Servs*., 353 S.C. 254, 578 S.E.2d 11 (2003). However, the abuse of discretion standard plays a role in the appellate review of a sanctions award. *Id.* An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions. *Id.* For example, where the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard. *Id. See also Runyon v. Wright*, 322 S.C. 15, 471 S.E.2d 160 (1996) (the imposition of sanctions will not be disturbed on appeal absent a clear abuse of discretion by the lower court)

I. THE LOWER COURT ERRED IN DISMISSING THE AMENDED COMPLAINT

The lower court erred dismissing the Second Amended Complaint for missing the September 2, 2021 deadline. Counsel for Appellant has always conceded that the September 2, deadline for the amended conspiracy pleadings was not met. The motion to dismiss was akin to an attempt to place a party into default as a Appellant missed a deadline. The lower court did not reference, review or cite the Second Amended Complaint in the hearing or it Order as is required under the standard or review for Motions pursuant to SCRCP Rule 12(b)(6). Rule 55(c), SCRCP provides that a court may set aside an entry of default "[f]or good cause shown." The good cause standard requires the party seeking relief from entry of default to (1) establish a satisfactory

explanation for the default and (2) give reasons why the vacation of the default entry would serve the interests of justice. *Sundown v. lntedge Industries*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). If the defaulting party is able to "put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." *Id.* at 607-608, 681 S.E.2d at 888. The Affidavit of counsel demonstrated the issues caused by the office break-in and the memorandum to the court in opposition specifically argued that the error should be excused. The lower court never considered the argument and, more importantly, never addressed or considered the issue of prejudice or justifiable excuse. Therefore, the Order must be reversed and remanded.

II. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT

The lower court erred in granting summary judgment in several ways.

a. Appellant was not allowed to conduct discovery in violation of South Carolina law

At the time of Respondents' motion for summary judgment, eleven defendants had yet to file an answer the Amended Complaint. In fact, Appellant was not even sure what parties were actually remaining as Respondents as there was a motion to reconsider the grant of a rule 12(b)6) to several individual Respondents. As such, discovery was far from complete. Moreover, Appellant did not know what pleadings he would be able to pursue until a mere seven months before the motion was made. The law in South Carolina is unambiguous on this point. Summary Judgment is inappropriate until Appellant is given a reasonable opportunity to conduct discovery. "Since it is a drastic remedy, summary judgment 'should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.' *Watson v. Southern Ry. Co.*, 420 F. Supp. 483, 486 (D.S.C. 1975); *see also Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) ('an extreme

remedy to be cautiously invoked'). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. 10A Wright & Miller, Federal Practice and Procedure § 2741, p. 543 (1983); 6 Moore's Federal Practice para. 56.02[6], p. 56-39 (2d. ed. 1990)"(Emphasis added) *Baughman v. AT&T*, 306 S.C. 101, 410 S.E.2d 537 (1991).

The exact same issue arose nearly two years later once Appellant finally received the answers from the remaining defendants. Two defendants who filed answers to the Amended Complaint in 2021filed motions for summary judgment in 2024. Those motions were denied because Appellant had yet to complete discovery. [Jefferson Order]. Thus, more than a year after Judge Maddox ignored these arguments without comment, another judge in the same case followed the law and allowed Appellant to conduct discovery prior to consideration of the motion for summary judgment. These orders cannot be reconciled and only one complies with South Carolina law. Therefore, the order granting summary judgment must be reversed and remanded.

b. The lower court erred in failing to address or recognize that Appellant properly pled that Respondents published clear and unambiguous false statements by a witness

Appellant answered the second interrogatories presented by Respondents in December 2021 which included a detailed explanation of the most egregious misrepresentation by Respondents. [Exhibit 2 to Respondents motion for summary judgment].

Respondents provided the following quote with no qualification or correction:

> *Once everything was presented in court, John was deemed unfit to have rights to his children,' Loehr said. 'He has had all visitation revoked, related to his aggressive and reckless behavior toward his children and their mother. Is this the kind of man we want to represent us?*

This statement is unambiguously false. The Order issued by Judge Holmes was very clear as to why John Gallman was forbidden from speaking to his children for almost a year. It was not the reason proposed by Ms. Loehr and published by the Waccamaw Respondents. Boschultz possessed a copy of that Order as he referenced it in the next paragraph. The Holmes Order was clear: John Gallman had his children taken away because (1) he took his daughter to MUSC after he found suspicious bruising on her upper-inner thighs and (2) he filed a claim with the SCLLR against his daughter's counselor, Roberta Bogle. At no point did the Order state that John Gallman was an unfit father. The first ground cited by the family court was that a father took his daughter to a hospital to evaluate bruising on his child's legs. The actual records from MUSC clearly demonstrate that John Gallman did not accuse anyone of child abuse, nor did he have his daughter referred to the Children's Recovery Center. There is a statutory protocol specifically detailing the steps followed by mandatory reporters of child abuse. MUSC reported the incident to law enforcement and DSS, then made the referral to CRC. Not John Gallman. Any person who possessed the family court file, as these Respondents claim, would know that the Loehr quote was false and defamatory. The second reason offered by Judge Holmes is based on a disclosure made in violation of South Carolina law. S.C. Code § 40-75-90(D) states:

> No person connected with any complaint, investigation, or other proceeding before the board, including, but not limited to, any witness, counsel, counsel's secretary, board member, board employee, court reporter, or investigator may mention the existence of the complaint, investigation, or other proceeding or disclose any information pertaining to the complaint, investigation, or proceeding, except to persons involved and having a direct interest in the complaint, investigation, or other proceeding and then only to the extent necessary for the proper disposition of the complaint, investigation, or other proceeding. However, if the board receives information in any complaint, investigation, or other proceeding before it indicating a violation of a state or federal law, the board may provide that information, to the extent the board considers necessary, to the appropriate state or federal law enforcement agency or regulatory body. Nothing contained in this section may be construed so as to

> prevent the board from making public a copy of its final order in any proceeding, as authorized or required by law.

Thus, the statements made by Loehr were clearly false and, if Respondents possessed the family court file as they claim, they knew it was false when they published it. This is not only clear and convincing evidence of defamation, it is clear and convincing evidence of actual malice. There can be no claim of the "fair reporting privilege" as this was a direct quote from a Ms. Loehr, not a public document. In fact, what the inclusion of the quote demonstrates is that the media Respondents either published a quote from an obviously hostile witness without doing any investigation of whether it was true, or they knew it was untrue and published it regardless of the truth. Their assertion to this Court that the article was based on the family court file is an admission that these Respondents were in possession of the actual order that contradicts their publication.

Respondents claimed that since Appellants did not actually cite the June 19, 2020 article, it was not part of the case. Appellants argue that the initial pleadings were specific enough to include the June 19, 2020 article. More importantly, Respondents were made aware of this allegation in December of 2021. No objection was made to the interrogatory response and opposing counsel knew it was part of the claims in the litigation. Respondents placed the response into the record of this case when they filed the motion for summary judgment. At a minimum, Respondent should have been allowed to amend the pleadings to conform with the record as was requested at the hearing. Again, the lower court did not address this issue or the argument made by Appellants in its final order. This constitutes an error of law and an abuse of discretion and the grant of summary judgment must be reversed.

In addition, actual malice is a subjective standard testing the publisher's good faith belief in the truth of his or her statements. The constitutional actual malice standard requires a public official to prove by clear and convincing evidence that the defamatory falsehood was made with

the knowledge of its falsity or with reckless disregard for its truth. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. There must be evidence the defendant had a high degree of awareness of probable falsity. Actual malice may be present, where one fails to investigate and there are obvious reasons to doubt the veracity of the informant. *Elder*, 341 S.C. at 114, 533 S.E.2d at 902. "A subjective awareness of probable falsity can be shown if there are obvious reasons to doubt the veracity of the informant or accuracy of his report." *Anderson v. Augusta Chronicle*, 365 S.C. 589, 596, 619 S.E.2d 428, 432 (2005) (*citing Harte-Hanks Commun*., 491 U.S. at 688, 109 S.Ct. at 2696, 105 L.Ed.2d at 589). "The right of a free press is not absolute in a society that demands social responsibility and personal integrity. . . . In the interests of justice, we will not allow a publication to go so unchecked as to promote the tyrannical imposition of false and misleading information - the very concern our forefathers sought to eliminate in demanding the press be free." *Anderson*, 365 S.C. at 599-600, 619 S.E.2d at 433.

Respondents possessed the actual order referred to by Amanda Loehr that clearly and unambiguously proved her quote was false and defamatory, yet they still published the quote. The family court file from Appellant's divorce contained the final order in which the presiding court, and his ex-wife, approved of Appellant sharing equal time with the kids he was alleged to have abused. That fact, in and of itself, should have put the reporter on notice that some additional digging was necessary and prevented the lower court from finding that there is no material issue of fact on this issue. The law demands that some social responsibility and personal integrity be implemented by the media. If there is reason to doubt the veracity of a statement, even if it is a public document, the law requires the media defendant conduct a reasonable investigation. *Erickson v. Jones St. Publrs., LLC*, 368 S.C. 444, 629 S.E.2d 653 (2006). That didn't happen in

this case. Therefore, there was a jury issue as to whether the evidence constituted clear and convincing evidence of malice and summary judgment is improper.

Finally, even if this Court were to rule that the June 19, 2020 article were not part of the pleadings AND there was insufficient basis for the lower court to allow Appellant to amend to include the allegation provided to Respondents 7 months prior to the hearing, it still constitutes evidence of malice and evidence that respondents abused the privilege, if it ever applied. In either situation, summary judgment was improper and the order must be reversed.

c. The lower court erred as it completely ignored the repeated citations to *Erickson v. Jones St. Publrs., LLC*, 368 S.C. 444, 629 S.E.2d 653 (2006) cited by Appellant throughout the entirety of the litigation

Respondents filed numerous motions to dismiss in addition to the motion for summary judgment and the subsequent motion for sanctions. In every response filed by Appellants, *Erickson v. Jones St. Publrs., LLC*, 368 S.C. 444, 629 S.E.2d 653 (2006) was cited as controlling authority. Respondents never submitted any argument or memorandum addressing *Erickson*, much less explaining how it was inapplicable. Even after Appellant specifically raised *Erickson* again and pointed out that Appellant's arguments based on *Erickson* have never been addressed, the final order denying the request for reconsideration makes no mention of the case.

Erickson dealt with whether the reporter's failure to investigate allegations of a grandmother against a guardian ad litem before publishing an article constituted evidence of actual malice. The Court held that while mere evidence of a failure to investigate cannot support a claim of actual malice, when there are obvious reasons to doubt the veracity of the informant, such a failure can create a jury issue as to malice. In *Erickson*, a journalist spoke with an interested party in a custody action who made numerous allegations against a guardian ad litem. The journalist did very little, if any, further investigation into the allegations before publishing. The South

Carolina Supreme Court ruled that the following failures of the journalist were evidence of constitutional malice: (1) the fact that the portion of the article pertaining to Appellant was based solely on a fifteen-to thirty-minute telephone conversation with Pat Beal, an admittedly "incensed" person; (2) the fact Newspaper purportedly failed to even try to contact Appellant to discuss the matter with her; (3) the fact Newspaper failed to contact attorneys or others involved in the underlying case; and (4) the fact Newspaper failed to even try to obtain the publicly recorded divorce decree in the underlying case, a reading of which would have called into question or refuted the witnesses allegations.

In this case, the evidence was clear. These defendants published an article based on the allegations of Plaintiff's ex-wife in a prior divorce that intentionally made him appear to the public as a spouse abuser and child abuser. While Defendant tries to hide behind the "court file", the documents within that file cited by Defendant were submitted on behalf of Plaintiff's ex-wife. No pleading from Appellant was ever cited. While Respondents did agree to interview Appellant about the article, they did not publish or follow up on the evidence Appellant provided in the interview. A perfunctory interview to create a disingenuous attempt to be "impartial" is essentially the same as refusing to interview in the first place, as was done in *Erickson*. Appellant begged Respondents to speak to the attorneys involved in the case, specifically his ex-wife's lawyers, to verify the claims of abuse were false, respondents refused and published the hit piece in the same manner as the defendant in *Erickson*. At the conclusion of the divorce matter, this alleged domestic abuser was granted full joint custody over his children by the consent of all parties and the approval of the family court. This fact, in and of itself, calls into question the veracity of every allegation made in that divorce file as the Order would have caused Respondents to doubt the veracity of the other allegations. Moreover, when the matter was renewed as a custody battle, the presiding judge

declared that there was "no credible evidence" that any party committed abuse. In this case, respondents relied on the pleadings of the opposing party in a divorce and custody matter without a single citation to a pleading submitted by Appellant. Pursuant to the precedent in *Erickson*, there was more than sufficient evidence to support the claim of actual constitutional malice on behalf of Respondents.

Finally, every case regarding defamation and the fair reporting privilege cited by the lower court was decided before the *Erickson* opinion. Thus, there can be no caselaw cited by the lower court that overrules or changes the law established in *Erickson.* Yet *Erickson* can and does change the prior precedent of our Supreme Court which is why the failure to address Erickson in this matter is a substantial error of law and requires a reversal of the lower court.

d. Respondents demonstrated actual malice by violating South Carolina law in disseminating the mental health records of a 10 year old girl,

The South Carolina Children's Code (Title 63) is very clear: it is unlawful to disseminate the mental health records of a child or any records pertaining to a claim of abuse investigated by SCDSS. S.C. Code § 63-7-1990 states that:

> All reports made and information collected pursuant to this article maintained by the Department of Social Services and the Central Registry of Child Abuse and Neglect are confidential. **A person who disseminates or permits the dissemination of these records and the information contained in these records except as authorized in this section, is guilty of a misdemeanor** and, upon conviction, must be fined not more than one thousand five hundred dollars or imprisoned not more than one year, or both. [Emphasis added]

There is no exception for documents filed in a family court matter. The law is clear and ambiguous. It applies to all persons and makes no exception for media defendants. More importantly, the CRC records cited by Respondents was an initial interview arising from a mandatory report of possible abuse, which is protected in the exact same manner by S.C. Code § 63-7-920:

> (B) Except as authorized in this section, **no person may disseminate or permit dissemination of information maintained pursuant to subsection (A). A person who disseminates or permits dissemination in violation of this subsection is guilty of a misdemeanor** and, upon conviction, must be fined not more than one thousand five hundred dollars or imprisoned not more than one year, or both. A person aggrieved by an unlawful dissemination in violation of this subsection may bring a civil action to recover damages incurred as a result of the unlawful act and to enjoin its dissemination or use. [Emphasis added]

No defendant in this matter has ever justified how the intake interview at a Child Recovery Center could be disseminated by any of them. Yet, this claim made in the initial pleadings and in every response to the various motions to dismiss, the motion for summary judgment, and the motion for sanctions has never been addressed. The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Id.* at 233, 509 S.E.2d at 262 (citing *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992).

There is nothing ambiguous about S.C. Code § 63-7-1990 or S.C. Code § 63-7-920. It prevents dissemination and does not allow dissemination even if the records are part of a family court proceeding. Every single defendant committed a crime when they published and republished the mental health records of a 10 year old girl with absolutely nothing to do with the

politics shaping this litigation. This is direct and indisputable evidence of malice by all defendants, especially these Respondents who provided the imprimatur of propriety to the other defendants through their publication.

e. The lower court erred in finding the fair reporting privilege protected the defamatory actions of Respondents

"Under the law of defamation, . . . certain communications give rise to qualified privileges, including the privilege to publish fair and substantially accurate reports of judicial and other governmental proceedings without incurring liability." *West v. Morehead*, 396 S.C. 1, 7, 720 S.E.2d 495, 498 (Ct. App. 2011). "Fair and impartial reports in newspapers o[n] matters of public interest are qualifiedly privileged." Id. (citation and internal quotation marks omitted). Under the defense of qualified privilege, "one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it [qualifiedly or] conditionally privileged, and (2) the privilege is not abused." *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999) (citing Restatement (Second) of Torts § 593 (1977)). Generally, whether a publication gives rise to a qualified privilege is a question of law for the courts. *Id.* at 485, 514 S.E.2d at 134 (citation omitted). However, "[t]he privilege extends only to a report of the contents of the public record and any matter added to the report by the publisher, which is defamatory of the person named in the public records, is not privileged." *Jones v. Garner*, 250 S.C. 479, 487, 158 S.E.2d 909, 913 (1968). When conflicting evidence exists, "the question [of] whether [a qualified] privilege has been abused is one for the jury." *Swinton Creek*, 334 S.C. at 485, 514 S.E.2d at 134 (citation omitted).

For Respondents to properly assert the fair reporting privilege, the publications at issue must be based on "the contents of the public record." *See Jones*, 250 S.C. at 487, 158 S.E.2d at

First, Respondents did not present "fair" or "accurate" reporting on the public records. Respondents examined the family court file and cherry picked everything negative about Appellant to quote in the news article. Respondents did not quote any briefs, affidavits, or other materials offered in defense of the claims cited by Respondents. Respondents published the mental health records of a 10 year old girl in violation of South Carolina law to insinuate Appellant an abuser, even though the very report they relied upon to make that claim declared that no abuse occurred. Respondents refused to include many of Appellant's rebuttals that were communicated directly to Boschultz at their face to face meeting. However, Appellant is convinced the article was already written and Boschult was merely trying to give an illusion of fairness. But those are not the only records in the family court file that assert that Appellant was not an abuser.

Second, the presiding judge in the family court matter made it very clear how much evidence in the family court file supported a claim of abuse. **None**. Judge Timothy Pogue issued the final order in the family court proceeding in which he considered the entirety of the file and was the sole factfinder in the case. This is how Judge Pogue viewed the evidence:

> "(there was) **no actual data** to confirm any type of abuse against either parent" and "there was **no verifiable data of domestic abuse by one party against the other, or child abuse**" Emphasis Added.

Thus, the lower court ruled that Respondents' report based on the family court file was fair and unbiased while the presiding judge found, as a matter of fact and law, that there was no verifiable data that any abuse occurred. This is truly absurd and leads us to the third basis for demonstrating the Fair Reporting Privilege is not applicable.

Finally, a large portion of the Boscultz article's source material is from the initial divorce of Appellant. The guardian report, the catholic diocese issues, and many of the quoted documents in the article were presented in the initial divorce in 2017. The family court record demonstrates

that the final order in that case was a consent order, signed by all the attorneys and approved by the presiding judge, Judge Holmes. That order gave Appellant equal time with his children. How does a mother, who is being abused herself and claiming that Appellant abuses the children agree to give the abuser equal time? How does a sitting family court judge allow an abusive father to obtain equal time with his kids and go so far as to approve the order allowing such? The easy answer, for anyone with a modicum of intelligence, is that the allegations were not true. At the very least, the Judge could not have believed Appellant was an abuser when she approved the order. As stated in Appellant's affidavit, he made this very argument to Boschultz at their in person meeting, and Boschultz ignored it. All of this qualifies as evidence that, if the privilege is applicable, there are sufficient evidentiary issues to allow the jury to determine if that privilege was abused. Under South Carolina law cited above, such an issue prevents the grant of summary judgment.

III. THE LOWER COURT ERRED IN GRANTING RELIEF PURSUANT TO THE SOUTH CAROLINA FIRIVOLOUS PROCEEDINGS ACT

S.C. Code Ann. § 15-36-40 (2005). "Section 15-36-20 creates a presumption that a person taking part in the initiation or continuation of proceedings acted with a proper purpose 'if he reasonably believes in the existence of facts upon which his claim is based' and . . reasonably believes under the facts that his claim may be valid under existing or developing law." *Hanahan*, 326 S.C. at 156, 485 S.E.2d at 912 (quoting S.C. Code Ann. § 15-36-20(1)(Supp. 1995)). As stated in previous memorandums, Respondent failed to provide any evidence of an improper purpose and the motion should have been denied. As stated above in Section II, Subsection c, Appellant primarily relied on the case of *Erickson v. Jones St. Publrs., LLC*, 368 S.C. 444, 629 S.E.2d 653 (2006) to support its legal position regarding libel throughout this case. Despite granting summary judgement and now awarding sanctions against Appellant and his counsel, the lower court and

Respondents steadfastly refused to address Appellant's arguments under *Erickson*. Appellant finds it exceedingly difficult to understand how his claims are frivolous when neither the lower court nor Respondents cannot explain how the most recent ruling by our Supreme Court on this issue is inapplicable to the facts of this case. Appellant outlined his arguments concerning Erickson above and will not duplicate the argument here. However, Appellant prays the Court consider Section II, Subsection c in totality with regard to the propriety of the sanctions award.

Another important fact that the lower Court ignored is the Loehr statement, discussed in Section II, Subsection b. The arguments on this error by the lower court is set forth in Section II , Subsection b but will not be repeated here. Appellant prays the Court consider Section II, Subsection c in totality with regard to the propriety of the sanctions award.

At the summary judgment hearing, Appellant argued that this statement was part of his original allegations and constituted the false statement required for libel actions. When Defendant claimed that false statement was not part of the original pleadings, Appellant moved this Court to allow an amendment of the pleadings to include that false statement. This Court refused to allow that amendment. Yet, in its order awarding sanctions, the lower court claimed there was no basis for a libel claim despite the fact that the Defendant unambiguously published a false statement about Appellant. A ruling under the frivolous proceedings act requires analysis of what evidence formed the basis of good faith belief that the claim was valid, not what evidence the court decided was admissible. The lower court clearly committed error in finding that the claims of libel were frivolous when there was an unambiguously false statement published in the news article about Appellant. The is no "fair reporting privilege" for an unambiguously false statement, especially when the reporter claims that privilege for the exact document that proves the published statement is categorically false.

All allegations in the original divorce proceedings should have been disregarded as Appellant received equal time with his children in the final divorce settlement. All allegations in the custody matter following the original divorce should have been disregarded as the judge found no credible evidence of abuse by any party. These issues were presented to these Respondents and ignored completely in the article. Appellant and his counsel still believe, and that belief is more than reasonable, that the judge's ruling on summary judgment will be reversed via this appeal. The lower court, through at least two separate rulings, refused to address *Erickson* in any way or explain how counsel's reliance on that opinion is in bad faith. There is no precedent cited by the lower court in either its grant of summary judgement or its award of sanctions that was issued after *Erickson*. None. This, in and of itself, requires a reversal of the lower court's order and award of sanctions.

The lower court found that Appellant refused to engage in discovery despite the responses to both Respondent's First and Second interrogatories being placed in the record by Respondents. The only discovery request unanswered by Appellant were the requests for admission, which Appellant admitted by not serving responses. Appellant accepted that result and, as pointed out by the lower court, never tried to set aside those admissions. That is not an abuse of discovery, it was a decision to prevent costs and fees from writing "Admitted" to over 50 requests for production. More importantly, Appellant explicitly argued in response to summary judgment that he was not done with discovery as numerous Respondents had not answered the original complaint. The lower court effectively punished Appellant and his attorney for refusing to engage in discovery, despite their specific request to engage in discovery after it received actual responses to the pleadings. It is difficult to understand how Appellant and his counsel engaged in bad behavior when that bad

behavior was the result of this Court's refusal to allow them to do what it says should have been done.

The only other allegation of bad faith pertains to Counsel's request for the identity of the person who provided the dossier to Respondents. The lower court found that this was evidence of a bad faith motive in bring the lawsuit. This is absolutely false. As explained to the lower court in both the response to the motion for sanctions and the motion to reconsider, the inquiry was based on the South Carolina statutes dealing with the disclosure of confidential records. As cited above, these records are statutorily protected and confidential pursuant to S.C. Code § 19-11-95, S.C. Code § 44-22-100, and S.C. Code § 62-11-310. S.C. Code § 62-11-310 establishes that the CRC is a Children's Advocacy Center as defined under South Carolina law and requires confidentiality under both S.C. Code § 19-11-95 and S.C. Code § 44-22-100. The only exception allowed under this statute is if the patient signs a written authorization for the release of the information. S.C. Code Section 44-22-100 states:

> (A) Certificates, applications, records, and reports made for the purpose of this chapter or Chapter 9, Chapter 11, Chapter 13, Chapter 15, Chapter 17, Chapter 20, Chapter 23, Chapter 24, Chapter 25, Chapter 27, or Chapter 52, and directly or indirectly identifying a mentally ill or alcohol and drug abuse patient or former patient or individual whose commitment has been sought, must be kept confidential, and must not be disclosed unless:
>
> (1**) the individual identified or the individual's guardian consents;**
>
> (2) a court directs that disclosure is necessary for the conduct of proceedings before the court and that failure to make the disclosure is contrary to public interest;
>
> (3) disclosure is required for research conducted or authorized by the department or the Department of Alcohol and Other Drug Abuse Services and with the patient's consent;
>
> (4) disclosure is necessary to cooperate with law enforcement, health, welfare, and other state or federal agencies, or when furthering the welfare of the patient or the patient's family;
>
> (5) disclosure to a court of competent jurisdiction is necessary for the limited purpose of providing a court order to SLED in order to submit information to the federal National Instant Criminal Background Check System (NICS), established pursuant to the Brady Handgun Violence

> Prevention Act of 1993, Pub.L. 103-159, and in accordance with Article 10, Chapter 31, Title 23; or
> (6) disclosure is necessary to carry out the provisions of this chapter or Chapter 9, Chapter 11, Chapter 13, Chapter 15, Chapter 17, Chapter 20, Chapter 23, Chapter 24, Chapter 25, Chapter 27, or Chapter 52. [Emphasis Added].

Appellant suspected his ex-wife may have been involved in the production or dissemination of the Dossier and, if that were the case, Appellant's claim that the disclosure was made in bad faith because it violated South Carolina law would be invalid. If the mother of the child intentionally provided the information to a media source, such disclosure would not be prohibited since the child's guardian consented. Respondents denied they received anything from the child's guardian, proving the publication violated the protections of the Children's Code. Thus, the lower court legitimized this open and brazen violation of South Carolina law and punished the parent who filed a lawsuit to try and stop the violation.

Another reason for counsel's inquiry was to determine if the source was another Defendant in the case. Such a situation could enhance the claims against those Respondents. Offering the possibility of a release in exchange for potentially beneficial information against another co-defendant is standard negotiating procedure for any plaintiff's lawyer. Yet, the lower Cout found such behavior to be bad faith without any justification. Finally, Appellant argues that such discussions constitute settlement negotiations which are not proper for the lower court to consider pursuant to Rule 408, SCRE.

Finally, the history of this litigation demonstrates there was no bad faith on behalf of counsel or his client. When Respondents filed their first motion to dismiss, Appellant removed several causes of action based on the arguments of Respondents as their viability were in doubt. At the hearing for summary judgment, Appellant voluntarily dismissed his claim for intentional infliction of emotional distress as the evidence and law at the time of the hearing made counsel

doubt its viability. If Appellant and his counsel brought this lawsuit in bad faith for an ulterior and improper purpose, then why are they dismissing claims when presented with arguments that call the claims into question? More importantly, if the case was frivolous *in toto*, then why didn't respondents or the lower court ever address those arguments to distinguish the case at the bar and demonstrate claims based on *Erickson* were without merit? Because they can't. Respondents' entire defense is the "fair" reporting privilege protects them. There was nothing fair about the reporting by these Respondents.

Th lower court's order of sanctions will have a substantial chilling effect on future litigation. The area of defamation law has been a struggle for the appellate courts in this state for nearly 4 decades, with multiple conflicting decisions being issued in the same case. *See Holtzscheiter v. Thomson Newspapers*, 332 S.C. 502, 506 S.E.2d 497 (1998). Considering the complexity of the legal issues, it is difficult to understand how the complaint filed by Appellant was devoid of merit. It certainly was not filed for an improper purpose. Issuing a sanction against an attorney for incorrectly interpreting S.C. defamation law [which is disputed by Appellant] will only insure that lawyers refuse to bring cases of merit for fear of being similarly punished. Especially since Appellant cited a single case (*Erickson*) in response to every and the lower court never explained how that case is inapplicable to the facts of this case. Never. This court must reverse the lower court's grant of sanctions.

CONCLUSION

The lower court erred in dismissing the Second Amended Complaint. The lower court erred in (1) failing to allow Plaintiff to complete discovery before the summary judgment motion was considered; (2) failing to recognize the unambiguous evidence of malice through the publication of Amanda Loehr's false statement about the family court proceeding; (3) failing to

apply or even address Erickson; (4) failing to find malice through Respondents' unlawful dissemination of the mental health records of a minor child in violation of South Carolina law; and (5) finding that the fair reporting privilege protected Respondents and there was no evidence of abusing the privilege. Finally the lower court erred in awarding sanctions as there was no evidence of any improper motive or bad faith on behalf of either counsel or Appellant. The underlying case was brought for legitimate purposes and was based on a reasonable interpretation of South Carolina law. Therefore, Appellant prays the orders of the lower court be reversed and this matter be remanded for further proceedings.

RESPECTFULLY SUBMITTED

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