

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas  
The Honorable R. Lawton McIntosh

Case No. 2020-CP-04-00085  
Appellate Case No. 2024-001911

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Moats Construction, Inc. and Russell Moats,

Appellants,

v.

Anderson County, Rusty Burns, Matt Schell, and Holt Hopkins,

Respondents.

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FINAL BRIEF OF APPELLANTS

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## STATEMENT OF ISSUES ON APPEAL

- I. Moats Construction proved that Anderson County breached the parties' Mediated Settlement Agreement and the jury awarded Moats \$412,105 in damages. Moats presented evidence that as part of Anderson County's breach of contract it unjustifiably placed Moat's bonding company on notice of a potential claim with no backup and sent a misleading update on a second bond, which prevented Moats from obtaining new bonds and effectively put Moats out of business. Did the lower court err in invading the jury's province and ruling that the evidence did not support the jury's damages award?
- II. Did the lower court err in not allowing Moats to amend its pleadings to conform to the evidence and send its defamation claim against Anderson County to the jury, where the court did not make a finding that the amendment would prejudice Anderson County?
- III. Anderson County Administrator Rusty Burns told the press that delays in the East-West Project were due in part to conflicts with Moats Construction but did not explain the County's role in those disputes. Evidence showed that Anderson County weeks later agreed to pay Moats Construction for delay damages. Based on this evidence, a jury could have concluded that such statements were defamatory. Did the lower court err in directing a verdict on Moats' defamation claim?

## INTRODUCTION AND STATEMENT OF THE CASE

Moats Construction, Inc. (“Moats”) successfully bid and was awarded contracts on two projects for Anderson County—the East-West Parkway (2016) (hereinafter, “East-West” or “East-West Project”), and Toxaway Mill Cleanup and Remediation (2017) (hereinafter, “Toxaway Mill” or “Toxaway Mill Project”). Both projects began well, but each reached a point where the project stalled because of various disagreements. In March 2018, the parties mediated their disputes on both projects and entered into a Mediated Settlement Agreement. (Mediated Settlement Agreement, R. p. 1143).

For the East-West Project, the Mediated Settlement Agreement required Anderson County to pay Moats \$50,000 in delay damages, plus make a \$26,155.89 outstanding payment before the start date of a new notice to proceed, and eventually pay \$15,000 for additional work to be completed after the new notice to proceed. (R. pp. 1143-44 (Mediated Settlement Agreement at 2)). Moats was to complete the additional work and the entire project within thirty (30) days. (*Id.*). Moats’ work was required to comply with the Americans with Disabilities Act (ADA) standards. (*Id.*) Anderson County paid the \$26,155.89, issued the new notice to proceed, but never paid the \$50,000 in delay damages. Ultimately, Moats and the County could not agree on whether the project designs made ADA compliance possible, the County would not approve Moats’ concrete forms before concrete was poured to prevent a redo, and as a result Moats was unable to finish the project.

For the Toxaway Mill Project, the Mediated Settlement Agreement provided that once Anderson County Council approved the agreement on the East-West Project, Anderson County would rescind its termination letter, reinstate Moats’ contract, and issue a new notice to proceed along with additional change orders necessary to complete the project. (R. pp.

1143-44, Mediated Settlement Agreement at 2). Anderson County never completed any of these steps.

Moats filed suit in January 2020 for breach of the Mediated Settlement Agreement, breach of the East-West and Toxaway Mill contracts, and defamation stemming from public statements made by Anderson County employees.<sup>1</sup> (R. p. 16). Anderson County counterclaimed for damages incurred in finishing the East-West Project. (R. p. 28, Counterclaim ¶¶ 40-41). Prior to the jury trial, Moats filed a motion for change of venue to avoid potential jury bias, but this motion was denied. (R. p. 32, Motion Change Venue (April 10, 2024)).

A jury trial in this matter took place in Anderson County over five days on April 15-19, 2024. At the end of Moats' case, the court heard motions for directed verdict. The court granted Defendant Anderson County's motion for directed verdict as to the breach of the East-West Contract and breach of the Toxaway Mill Contract upon the parties' agreement that the essence of the dispute was a breach of the Mediated Settlement Agreement with a stipulation that outstanding retainage on either contract could be argued to the jury. (R. p. 767, line 24-p. 771, line 15, p. 795, line 23-p. 796, line 22). The parties agreed that outstanding retainage only existed on the East-West Contract, and this amount was argued to the jury. (R. p. 796, lines 8-19). The court also granted a directed verdict as to future lost profit damages based on bid bond applications, (R. p. 782, line 19-p. 784, line 12), but denied Anderson County's request that a verdict be directed that its actions did not cause Moats to lose bonding capacity, which the court ruled was a jury question, (R. p. 784, lines 13-25).

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<sup>1</sup> The Complaint includes additional causes of action that are not at issue here, including a claim that Anderson County failed to fulfill its FOIA obligations. This claim has not been tried. (R. p. 302, lines 14-21, p. 883, lines 24-p. 884, line 3).

The court also granted the individual defendants' motion for directed verdict on Plaintiffs' claim for defamation. (R. p. 795, lines 13-18). As to Matt Schell, the court granted directed verdict based on the two-year statute of limitations and a finding of no defamation. (R. p. 786, line 20-p. 789, line 9). As to Holt Hopkins, the court granted directed verdict based on its ruling that there was no evidence that he was involved in painting over Moats' logo on the on-site project sign. (R. p. 790, line 7-p. 791, line 4). As to Rusty Burns, the court ruled that the news story quoting Burns did not reflect a false statement or actual malice. (R. p. 793, line 14-p. 794, line 12). Finally, the court declined to substitute Anderson County as the defendant for the defamation claim and denied Moats' request to amend the complaint to conform to the evidence to assert a claim of defamation against Anderson County. (R. p. 795, lines 11-18, p. 797, line 2-p. 800, line 19).

At the conclusion of Defendant Anderson County's case, Plaintiff moved for directed verdict on its breach of the Mediated Settlement Agreement as to the \$50,000 delay damages payment. (R. p. 823, line 23-p. 824, line 10). The court granted directed verdict based on its conclusion that the Mediated Settlement Agreement had no conditions on this payment, Anderson County had a reasonable time to pay the \$50,000, and its failure to pay the delay damages as of the trial date (six years after the agreement) was unreasonable as a matter of law. (R. p. 829, line 16-p. 830, line 1, p. 834, lines 6-7). All other directed verdict motions for both sides were denied.

The only claims that went to the jury were Moats' claim for breach of the Mediated Settlement Agreement and Anderson County's counterclaim for set off. (R. p. 892, line 12-p. 893, line 13, p. 965, line 2-p. 966, line 8; R. p. 13 (Verdict Form)). The jury returned a unanimous verdict in favor of Plaintiff and awarded damages of \$412,105, and also awarded

damages on Defendant's counterclaim of \$1,900. (R. p. 969, lines 1-21; R. pp. 13-14 (Verdict Form)).

Anderson County filed post-trial motions asking for judgment notwithstanding the verdict, or in the alternative a new trial absolute, or new trial pursuant to the thirteenth juror doctrine, new trial nisi additur, or new trial nisi remittitur. (R. p. 36). The court granted Anderson County's motion for new trial absolute based on its conclusion that the verdict was "grossly excessive and was clearly the result of passion, caprice, prejudice, partiality, corruption or other considerations not reflected by the evidence such as confusion and/or misunderstanding of the evidence." (R. p. 8). The court also alternately granted Anderson County's motion for a new trial based on the thirteenth juror doctrine, finding that the evidence did not justify the verdict. (R. p. 9). All other post-trial motions were denied. This appeal followed.

### **STATEMENT OF THE FACTS**

In 2002, Russell Moats started his own construction business with his father, known today as Moats Construction, Inc. (R. p. 129, line 12-p. 130, line 7, p. 130, line 22-p. 131, line 8 (Russell Moats)). His father continued in the business until retiring in 2008 during the Great Recession. (R. p. 132, lines 8-24 (Russell Moats)). Russell Moats continued the business on his own, downsizing staff and limping along through the Great Recession. (R. p. 132, lines 7-25 (Russell Moats)). The business struggled until work started to pick up again in 2010 and 2011, and Russell began slowly adding employees and rebuilding a new construction crew. (R. p. 132, lines 20-25 (Russell Moats)).

In 2013, Russell Moats steered the company into public projects, hoping the work would be more consistent and have a lower risk of the project owner running out of money. (R. p. 133, line 2-p. 134, line 1 (Russell Moats)). The company began working for counties, schools, and state

agencies all over South Carolina working on smaller projects to gain experience and exposure in the public sector, which typically requires bonding for projects over \$50,000 or \$100,000. (R. p. 134, lines 7-23 (Russell Moats)). To obtain a bond, bonding companies want to see sufficient years in business, prior successful completion of similar types of jobs, and similar sized projects. (R. p. 135, line 10-p. 136, line 12 (Russell Moats)). Moats eventually built up its business to have bonding capacity to carry the two Anderson County jobs totaling over \$500,000, which was provided through Direct Surety. (R. p. 136, line 25-p. 137, line 13 (Russell Moats)).

### **East-West Project**

Moats first began working with Anderson County on small demolition projects in 2013 and 2014, and established a good working relationship with the County. (R. p. 137, line 19-p. 138, line 17 (Russell Moats)). In 2015, Moats decided to bid on the East-West Parkway Park project because its crew had previously completed several hardscape projects for the City of Anderson and had developed a specialization in ADA construction and was familiar with ADA rules and compliance. (R. p. 139, line 13-p. 141, line 13 (Russell Moats)). Moats was awarded phase I of the East-West Project in August 2016 at a contract value of \$159,604. (R. p. 1124 (Notice of Award); R. p. 141, line 19-p. 142, line 6, p. 149, lines 13-16 (Russell Moats)). The scope of the project changed from the start, as evidenced by a number of change orders increasing scope and awarding subsequent phases of the project. By the time of the Mediated Settlement Agreement in March 2018, the East-West contract had grown to \$324,761.28. (R. p. 1143 (Mediated Settlement Agreement); p. 1163 (Change Orders); p. 148, line 22-p. 150, line 6, p. 158, line 5-p. 160, line 5 (Russell Moats)).

Throughout construction of the East-West Project, issues arose over whether the sidewalk designs were ADA compliant to meet federal slope requirements and whether the designs were sufficient for Moats to follow in construction, which became an issue after certain sections of the

sidewalk had to be torn out and redone. (R. p. 164, line 9-165, line 19, p. 166, line 3-p. 167, line 16, p. 169, line 1-p. 170, line 3 (Russell Moats)). During phase 2, Moats was directed to stop work so that designs could be redone and because the County did not have its DOT encroachment permit—ultimately, designs were redone three or four times on phase 2 resulting in delay damages to Moats. (R. p. 170, line 22-p. 171, line 13, p. 172, line 23-p. 173, line 15 (Russell Moats)). Such delays included, for example, the fact that plans were being redone to address ADA compliance issues five months after Moats began its work. (R. p. 204, line 7-p. 207, line 12 (Russell Moats); p. 1082 (Pl. Ex. 11)). Moats also ran into additional problems with excavating soils for the project, including finding rock that needed to be excavated at a significant cost that was not included in the original estimate. In August 2017, Moats submitted a change order for delays caused by redesigns resulting in company equipment sitting on site unused, downtime for crew, as well as the additional excavation costs and delays due to missing DOT permitting. (R. p. 171, line 17-173, line 15 (Russell Moats), p. 1172 (Change Order No. 09)). The County never approved this change order and these issues were ultimately addressed in the Mediated Settlement Agreement.

### **Toxaway Mill Project**

On June 7, 2017, while the East-West Project was ongoing, Anderson County hired Moats for the Toxaway Mill Cleanup and Remediation project for \$223,000. (R. p. 1110 (Toxaway Mill Contract)). Anderson County wanted to finish cleanup of an old textile mill site and wanted the project completed within thirty to forty-five days. (Id.) Moats had experience in demolition and asbestos abatement, though it was not hired for asbestos abatement on this project. (R. p. 177, line 15-p. 178, line 22; p. 195, line 12-p. 196, line 12; p. 337, lines 6-14 (Russell Moats)). Anderson County informed Moats that it had to use grant funds by June 30<sup>th</sup> so it pressed Moats to begin as soon as possible, which Moats did. (R. p. 183, line 3-p. 185, line 11 (Russell Moats)). However,

less than two weeks later, on June 19, 2017, the County directed Moats to stop work because the County did not have the proper asbestos and stormwater permits in place and on June 21, 2017, the County terminated Moats for allegedly working outside of limited parameters. (R. pp. 1011, 1014 (Pl. Ex. 1, 4); R. p. 181, line 12-p. 182, line 24, p. 185, line 19-p. 186, line 14 (Russell Moats)). County emails show that the County did not expect Moats to obtain these permits. (R. pp. 1095-1099 (Pl. Ex. 21-23); R. p. 418, line 17-p. 421, line 9, p. 423, lines 5-25 (Russell Moats)). Moats disputed that any materials it hauled off at the County's direction were asbestos containing or done in any manner that violated the contract. (R. p. 196, line 3-p. 197, line 25; p. 338, line 21-p. 340, line 13 (Russell Moats)).

Disputes over both projects prompted the parties' mediation in March 2018 and culminated in the Mediated Settlement Agreement. (R. p. 190, line 17-p. 191, line 19 (Russell Moats); p. 1143 (Def. Ex. Tab 4)).

### **Mediated Settlement Agreement**

Moats and Anderson County mediated their disputes on March 29, 2018. (R. p. 1143 (Mediated Settlement Agreement)). As part of this agreement, Moats compromised its \$198,232 requested change order for delay and excavation. (R. p. 211, line 17-p. 212, line 6 (Russell Moats); R. p. 1172 (Change Order 09)). In pertinent part for the East-West Project, the parties agreed that: (1) Moats would be paid \$15,000 to adjust a previously installed pipe to accommodate a design change; (2) Moats would be paid \$50,000 in delay damages; (3) Moats would be paid \$26,155.89 for work already owed and completed before the restart date in a newly issued notice to proceed; and (4) Moats' work would comply with ADA requirements provided the designs complied with the ADA requirements. (R. p. 1143 (Mediated Settlement Agreement); p. 213, line 22-p. 215, line 3 (Russell Moats)).

For the Toxaway Mill Project, Anderson County agreed that after County Council approved the East-West settlement, the County would rescind its termination letter, reinstate Moats, issue a new notice to proceed, and issue a change orders to implement stormwater permit requirements and asbestos abatement work. (R. p. 1144 (Mediated Settlement Agreement at 2)). Moats provided pricing for the stormwater work but Anderson County failed to fulfill any of its obligations. (R. p. 231, line 1-p. 235, line 3 (Russell Moats)). The termination letter was never rescinded, and Moats was never given a notice to proceed to finish this project.

### **East-West Work Post-Mediated Settlement Agreement**

After Moats was given its notice to proceed on the East-West Project, as part of the agreed \$15,000 in changes, it removed and lowered the 80 to 100-foot section of concrete pipe. (R. p. 220, lines 1-24 (Russell Moats)). Moats then reformed the remaining section of sidewalk and sought County approval of the forms prior to pouring concrete to avoid any potential dispute as to ADA or design compliance and having to redo work. (R. p. 215, lines 4-21 (Russell Moats)). Russell Moats informed the County that pouring the concrete according to the design would not be in ADA compliance. (R. p. 216, lines 1-17; p. 228, lines 12-20 (Russell Moats)). After the County's investigation, Russell Moats understood that the County agreed with his conclusion; however, the County would not approve his concrete forms nor address the issue by approving the installation of handrails on this section, and so Moats was unable to complete the project because of this impasse. (R. p. 216, line 18-p. 219, line 25; p. 364, lines 2-17 (Russell Moats)). The County gave no indication that they would accept Moats' work if it was not ADA compliant, and in fact the County Administrator testified at trial that if the work was not ADA compliant the County would have made Moats tear it out and redo. (R. p. 416, lines 5-21 (Russell Moats); p. 692, lines 14-22 (Burns)). Additionally, the County had not paid the \$50,000 in delay damages owed under

the Mediated Settlement Agreement. (R. p. 221, lines 1-24 (Russell Moats)). For these reasons, Moats was unable to complete the project. Even after Moats left, the project continued to have design changes including adding a retaining wall on a section of the walking path. (R. p. 238, line 9-p. 239, line 2 (Russell Moats), p. 1021 (Pl. Ex. 9 at Photo 3)). In addition, Moats' logo on the project sign was painted over by someone, which Russell Moats testified injured his business reputation. (R. p. 242, line 20-p. 244, line 21; p. 313, line 17-p. 315, line 3 (Russell Moats), pp. 1035-1036 (Pl. Ex. 9 compare Photos 12 and 13)).

After another contractor finished the East-West Project, Moats hired Sandy Hanebrink with Touch the Future Inc. to inspect the project for ADA compliance. Ms. Hanebrink has been an ADA accessibility consultant since 1990. (R. p. 442, line 25-p. 443, line 12 (Hanebrink)). In her April 30, 2019 report, Ms. Hanebrink concluded that sections of the project not completed by Moats did not comply with the ADA and she was aware that sections of the sidewalk had to be torn up and redone at least once. (R. p. 263, line 11-p. 265, line 18 (Russell Moats); pp. 1017-1081 (Pl. Ex. 9, 10); p. 446, line 22-p. 451, line 14 (Hanebrink)). Ms. Hanebrink's inspection report was dated after Anderson County finished and paid for the completion of phase II, and the Anderson County Administrator testified that he was not aware of any later work done to correct the sidewalk. (R. p. 701, line 1-p. 704, line 13, p. 710, lines 16-25 (Burns), p. 1109 (Pl. Ex. 44)). Ms. Hanebrink testified that one solution to slopes outside of ADA guidelines is to install handrails, similar to what Moats had suggested. (R. p. 454, lines 5-14 (Hanebrink); p. 219, lines 11-22 (Russell Moats)). Moats took photos of the new section of sidewalk constructed by the substitute contractor being torn out. (R. p. 416, line 22-p. 417, line 10 (Russell Moats), p. 1017 (Pl. Ex. 9)). Natascha Sexton designed the East-West Project and she testified that as in a typical project, the East-West designs were changed multiple times during construction. (R. p. 475, lines 4-14, p. 476, line 11-

477, line 15 (Sexton)). After Moats left the East-West Project, Ms. Sexton testified that she approved concrete forms for the substitute contractor—just like Moats had requested before having to leave the job because the County wouldn't approve its forms—and she testified that the County still wanted the sidewalk to be ADA compliant. (R. p. 501, line 19-p. 505, line 2 (Sexton); p. 1103 (Pl. Ex. 28)).

In February 2018, Rusty Barnes, Anderson County Administrator, in speaking with news media about delays in the East-West Project, pointed the finger at Moats, saying in response to a question about delays that “There have been disputes with the contractor, which are being resolved.” (R. p. 677, lines 4-7 (Burns), p. 1204 (Def. Ex. 2)). Moats believed this statement was false and defamatory, the falsity of which was evidenced by the Mediated Settlement Agreement where Anderson County accepted responsibility for delays and agreed to pay Moats delay damages. (R. p. 291, line 12-p. 292, line 24 (Russell Moats); p. 1143 (Mediated Settlement Agreement)). Moats further believed that Anderson County's statements to its bonding company were false and defamatory and injured its business because in those communications Anderson County blamed Moats for issues that were disputed or that the County itself had failed to perform. (R. p. 683, line 16-p. 685, line 15 (Burns); pp. 1106-08 (Pl. Ex. 42, 43)).

### **Impact on Moats Construction Post Mediated Settlement**

After Moats was unable to complete East-West because of the dispute over ADA compliance and the missing \$50,000 delay payment, and after Anderson County refused to withdraw its termination of Toxaway Mill Project and instead filed a notice of claim on Moats' bond for East-West, Moats was unable to secure bonds for future work and it was put out of business. (R. p. 265, line 24-p. 266, line 11 (Russell Moats)). On July 20, 2018, after Moats was unable complete East-West, Anderson County sent a notice to Moats' bonding company making a

claim on its performance bond in the event retainage was insufficient to complete the job. (R. p. 1106 (Pl. Ex. 42)). In this communication, Anderson County mischaracterized the dispute over completing the East-West Project, stating misleadingly that Moats is “now refus[ing] to complete the project and has abandoned the project,” but the County failed to mention that it did not provide ADA compliant designs and failed to pay the \$50,000 delay damages it had agreed to in the Mediated Settlement Agreement. (R. p. 1106 (Pl. Ex. 42)). Then, on April 8, 2019, in response to Moats’ bonding company’s request for a status update on the Toxaway Mill Project, Anderson County submitted another misleading and false statement stating that “Contractor failed to meet their obligations as required by Mediation.” (R. p. 1108 (Pl. Ex. 43)). Anderson County did not provide any further explanation, did not explain its mediation obligations, and did not explain that the County failed to take its required steps after mediation, including rescinding the termination letter and restarting the project. (R. p. 663, line 13-p. 666, line 9 (Harman); p. 1108 (Pl. Ex. 43), p. 1143 (Mediated Settlement Agreement)). Russell Moats testified that these communications to Moats’ bonding company resulted in the company not being able to get future bonds and essentially put Moats out of business. (R. p. 737, lines 6-25, p. 741, line 13-p. 742, line 6 (Russell Moats), p. 1108 (Pl. Ex. 43)). Anderson County’s communications to the bonding company tied up over \$500,000 in Moats’ bonding capacity indefinitely until there was a resolution of these projects. (R. p. 738, line 25-p. 740, line 5 (Russell Moats), pp. 1106-08 (Pl. Ex. 42, 43)). Russell Moats continued to communicate with his bonding company and after two years when Anderson County had not submitted any backup for the East-West Project, the bonding company finally released Moats’ East-West bond. (R. p. 740, line 9-p. 741, line 10 (Russell Moats)). The Toxaway Mill bond had never been released to Moats’ knowledge. (R. p. 741, lines 11-12 (Russell Moats)).

Moats continued trying to bid on public jobs after East-West but its ability to get bid bonding was compromised due to Anderson County's July 2018 bond claim and what Moats' bonding company identified as a Uniform Commercial Code filing related to the Toxaway Mill Project. (R. p. 1085 (Pl. Ex. 12)). As Moats' bonding agent explained on April 15, 2019 (after the County's April 8<sup>th</sup> communication), he had presented Moats' financial information to "many surety companies" and the "answer from the surety companies is: will consider once the UCC-1 is removed." (R. p. 1085 (Pl. Ex. 12)). The bonding agent explained that the UCC appeared related to the Toxaway Mill Project. (R. p. 1085 (Pl. Ex. 12)). Moats could not bid on public jobs without a bid bond, which after Anderson County's actions it was prevented from obtaining. (R. p. 269, line 16-p. 271, line 13 (Russell Moats)). After East-West and Toxaway Mill fell through, and Anderson County filed its bond claim, Moats was actively looking for work to keep its highly skilled employees busy and employed. (R. p. 272, line 13-p. 273, line 23 (Russell Moats); pp. 1087-94 (Pl. Exhibits 14-17 (Bid bond applications))). Having worked years to build the company and its bonding capacity, it all fell through in one instant because of Anderson County's actions. (R. p. 272, lines 13-16 (Russell Moats)). Moats continued to bid on various jobs but could not get bonded. (R. p. 290, lines 4-14 (Russell Moats)). One bid bond application in particular showed that Moats was planning to bid \$490,000 on a Clemson University job that was eventually awarded to a different contractor for \$596,219. (R. p. 1087 (Pl. Ex. 14, compare 1 to 5)).

Moats was only able to complete one or two small jobs after its bonding capacity was compromised. (R. p. 742, line 4-p. 743, line 15 (Russell Moats)). Because Moats was unable to secure sizeable jobs, its ability to demonstrate creditworthiness and bonding capacity was further compromised. (R. p. 743, line 16-p. 744, line 2 (Russell Moats)). Eventually Moats had to sell equipment to pay bills and let its employees go.

## STANDARD OF REVIEW

“The trial court has sound discretion when addressing questions of excessiveness or inadequacy of verdicts, and its decision will not be disturbed absent an abuse of discretion.” *Dillon v. Frazer*, 383 S.C. 59, 63, 678 S.E.2d 251, 253 (2009) (citing *Toole v. Toole*, 260 S.C. 235, 239, 195 S.E.2d 389, 390 (1973)).

“A trial court's order granting or denying a new trial upon the [thirteenth juror doctrine] will not be disturbed unless the decision is wholly unsupported by the evidence or the conclusion reached is controlled by an error of law.” *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 334, 732 S.E.2d 166, 172 (2012) (citing *Folkens v. Hunt*, 300 S.C. 251, 254-55, 387 S.E.2d 265, 267 (1990)).

“The decision whether to allow a party to amend a pleading to conform to the evidence is left to the sound discretion of the trial judge.” *Elam v. S.C. DOT*, 361 S.C. 9, 27, 602 S.E.2d 772, 782 (2004) (citing *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 431 S.E.2d 587 (1993)).

A motion for directed verdict must be denied “when the evidence yields more than one inference, or its inference is in doubt.” *LeFont v. City of Myrtle Beach*, 430 S.C. 534, 539, 846 S.E.2d 355, 357 (Ct. App. 2020). The court must view “the evidence and all reasonable inferences in the light most favorable to the nonmoving party.” *Id.* When considering a directed verdict motion, the court does not have the “authority to decide credibility issues or resolve conflicts in the testimony or evidence.” *Id.* at 358, 846 S.E.2d at 539. If any evidence tends to prove the non-

moving party's allegations, the directed verdict motion must be refused. *Milhouse v. Food Lion, Inc.*, 289 S.C. 203, 345 S.E.2d 739 (Ct. App. 1986).

## ARGUMENT

### **I. The Court Erred in Concluding that the Jury's Verdict was Excessive and Based on Passion, Caprice, Prejudice, Partiality, Corruption, Confusion, or a Misunderstanding of the Evidence.**

The lower court erred in concluding that the Jury's \$412,105 verdict was grossly excessive, unsupported by the evidence, and was instead "the result of passion, prejudice, partiality, corruption or other considerations not reflected by the evidence such as confusion and/or misunderstanding of the evidence." (R. p. 8). On the contrary, Moats presented ample evidence to support the jury's verdict.

The lower court also erroneously concluded that "[t]here is no trial evidence supporting any verdict over \$33,105.91, which would have been the maximum contractual damages recoverable by the Plaintiffs based on the evidence presented because evidence of the Court's directed verdict of \$50,000 on delay damages was not submitted to the jury." (R. p. 8). In reaching this conclusion, the court ignored substantial evidence of damage to Moats' goodwill and business reputation as a result of Anderson County's misleading and harmful communications to Moats' bonding company, which resulted in Moats being unable to secure bonds for new work and drove the company out of business.

Because the court's invasion of the jury's province is not supported by compelling reasons and is controlled by an error of law, the jury's verdict should be reinstated.

#### **a. A Jury's Verdict is Given Substantial Deference and Finding a Verdict Excessive Requires Compelling Reasons.**

"When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or

conservative and awards that are actuated by passion, caprice, or prejudice.” *Jolly v. Fisher Controls Int’l, LLC*, 443 S.C. 511, 523, 905 S.E.2d 380, 386-387 (2024) (quoting *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015)). “In determining whether any verdict is inadequate or excessive, however, the court must give ‘substantial deference’ to the jury’s determination of damages,” *id.* at 523, 905 S.E.2d at 387 (quoting *Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993)), and offer “‘compelling reasons’ for invading the jury’s province,” *id.* at 524, 905 S.E.2d at 387. “[E]very party to a civil jury trial ‘is entitled to the constitutional privilege of the fair judgment of a jury’ and a court must ‘not interfere with the verdict of a jury simply because it is greater [or less] than its own estimate.’” *Id.* (quoting *Brabham v. S. Asphalt Haulers, Inc.*, 223 S.C. 421, 430, 76 S.E.2d 301, 306 (1953) (second alternation in original)).

“The trial court should grant a new trial based on the excessiveness of the verdict only if the amount is not merely different from that which he would have awarded, but is so grossly excessive so as to shock the conscience of the court and clearly indicates that the figure reached was the result of caprice, passion, prejudice, partiality, corruption, or other improper motives. *Rush*, 310 S.C. at 379-380, 426 S.E.2d at 805 (emphasis added).

The trial court “must honor the sanctity of the jury’s verdict,” *Jolly*, 443 S.C. at 525, 905 S.E.2d 15 387, giving it substantial deference and offering compelling reasons for determining that it is excessive. Here, the court failed to offer such compelling reasons to set aside the jury’s verdict.

#### **b. Damages to Goodwill Are Recoverable.**

During trial, the court initially took the position that Moats could not argue for consequential damages to its business reputation and goodwill as a result of Anderson County’s

actions and breach of contract and the loss of bonding capacity. (R. p. 280, line 23-p. 282, line 9, p. 287, lines 4-14 (“And loss of future work does not fall under any recognizable damages for any of those breach of contract cases.”)). It was only after additional research that the court recognized its error and allowed Moats to offer additional testimony on the negative impacts to his business as a result of Anderson County’s beach of contract and loss of bonding capacity. (R. p. 316, line 23-p. 317, line 3, p. 737, line 4-p. 744, line 2 (Russell Moats)). The court acknowledged that whether Anderson County’s action caused Moats to lose bonding capacity was a jury question. (R. p. 784, lines 13-25). However, in its Order overturning the jury’s verdict, the lower court effectively reverted to its prior erroneous position, concluding that the maximum contractual damages recoverable were \$33,105.91 and that there was no evidence upon which a jury could award damages to goodwill. (R. p. 8). The court erred in ignoring goodwill damages and/or requiring certain mathematical precision for damages that are inherently difficult to quantify.

A claimant for breach of contract is entitled to recover damages to business goodwill and reputation. *E.g., Foreign Academic & Cultural Exch. Servs. v. Tripon*, 394 S.C. 197, 205, 715 S.E.2d 331, 335 (2011) (recognizing damages to goodwill as an appropriate category of damages from breach of contract); *Petty v. Weyerhaeuser Co.*, 288 S.C. 349, 357, 342 S.E.2d 611, 616 (Ct. App. 1986) (recognizing damages to business goodwill and reputation); South Carolina Damages § II.5.A.5 (2017). These damages are recoverable even though not calculable with precision. Restatement 2d Contracts § 352, cmt. a. (“Damages need not be calculable with mathematical accuracy and are often at best approximate. This is especially true for items such as loss of goodwill as to which great precision cannot be expected.”).

**c. Moats Proved Damages to Business Reputation & Goodwill.**

Moats presented evidence that it was damaged well beyond the \$83,105 in monies improperly withheld by Anderson County for the East-West Project.

Russell Moats testified that he built his company from the ground up, weathered the 2008 Great Recession, and in 2013 began focusing exclusively on public jobs, which require bonds throughout the entire job, from bidding, performance, and payment to subcontractors. (R. p. 129, line 12-p. 130, line 7, p. 130, line 22-p. 131, line 8, p. 132, lines 7-25; p. 133, line 2-p. 134, line 1; p. 269, line 16-p. 270, line 3 (Russell Moats)). Moats' bonding capacity was well over \$500,000 at the time of the Anderson County jobs. (R. p. 738, line 25-p. 740, line 5 (Russell Moats)).

The evidence presented to the jury showed that Anderson County's actions impacted Moats' ability to secure bid bonds. The evidence showed:

- Anderson County refused to rescind termination of the Toxaway Mill Project, as it agreed to do in the Mediated Settlement Agreement (R. p. 1144 (Mediated Settlement Agreement at 2); p. 231, lines 6-9 (Russell Moats));
- On July 20, 2018, Anderson County wrote a letter to Moats' bonding company placing full blame on Moats for incompleteness of the East-West Project despite Anderson County's own breach of the Mediated Settlement Agreement, and placing Moats' bonding company on notice of a potential claim on the East-West Project, (R. p. 1106 (Pl. Ex. 42));
- On April 8, 2019, Anderson County responded to Moats' bonding company's request for update on Toxaway Mill Project and blamed the project's incompleteness on Moats for supposedly having breached the Mediated Settlement Agreement when in fact it was the County that breached the agreement by never restarting the Toxaway Mill Project, (R. p. 1108 (Pl. Ex. 43)).
- Anderson County never provided an update to Moats' bonding company or backup for a potential claim on East-West Project and it took Moats two years to finally get its bonding company to release this bond after the County provided no backup information, (R. p. 740, line 9-p. 741, line 10 (Russell Moats)).

Moats' bonding company told it on April 15, 2019, after Anderson County's misleading communications, that in response to Moats' request for bonds the "answer from the surety

companies is: will consider once the UCC-1 is removed.” (R. p. 1085 (Pl. Ex. 12)). At least one juror expressed concern over this UCC filing and bonding restriction in a question submitted to the court during trial, asking “Has the UCC-1 been released or expired from Toxaway?”. (R. p. 851, lines 15-18, p. 853, line 19-p. 854, line 15, p. 1010 (Court’s Ex. 5)). This shows that the jury was not mistaken or confused about the evidence but understood the negative impact to Moats’ business.

The evidence showed that these actions taken by Anderson County resulted in Moats no longer being able to secure bid bonds to obtain new work, despite its best efforts to do so. (R. p. 290, lines 4-14 (Russell Moats); pp. 1087-94 (Pl. Exs. 14-17 (Bid bond applications))).

**d. The Jury Verdict Was Not Excessive.**

The jury’s \$412,105 verdict was not excessive. The jury clearly determined that these actions taken by Anderson County harmed Moats’ ability to obtain bid bonds for new public work and to stay in business, which resulted in damages beyond simply the East-West Project alone. While goodwill is difficult to measure, the evidence showed that Moats had spent years building up its bonding capacity only to have it vanish in one instant from Anderson County’s decision to report biased one-sided information to Moats’ bonding company and to make an unfounded claim on its bond, for which the County never submitted backup and which tied up Moats’ bonding capacity for two years. Ultimately, Moats’ loss of bonding capacity resulted in a loss of goodwill, employees, and its business. At least one bid bond application entered into evidence showed Moats planning to bid \$490,000 on a job at Clemson University that ultimately was awarded to a different contractor for \$596,219, and for which Moats had estimated a profit at \$180,000. (R. p. 1087 (Pl. Ex. 14, compare 1 to 5)). The two Anderson County jobs totaled approximately \$550,000 (East-

West \$324,761<sup>2</sup>; Toxaway Mill \$223,000<sup>3</sup>), and the Toxaway Mill job was a thirty-day contract, (R. p. 1110 (Def. Ex. 1, Tab 1)). All of these facts support damages in excess of \$300,000 related to the loss of bonding capacity and goodwill.

The two cases cited by the lower court as supporting its finding of an excessive verdict in fact support Moats' position that the verdict was not excessive. In *Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640 (1991), the South Carolina Supreme Court described an excessive verdict as one "shockingly disproportionate to the injuries." *Id.* at 238, 403 S.E.3d 642. The *Sanders* Court overturned a jury's verdict, finding that the jury was motivated by passion, prejudice and caprice when it asked the judge if it could force a public figure to resign from the school board as part of its verdict on a defamation case, clearly outside of its authority, and then awarded defamation damages in excess of \$1 million to a plaintiff whose reputation, though impacted, did not prevent her reelection to the same public body. These unusual circumstances made the jury's verdict excessive. There are no similar findings by the trial court here that would indicate the jury was motivated by any external factors in reaching its verdict.

In *Small v. Springs Industries, Inc.*, the jury found that the employee-plaintiff was wrongfully terminated from her job and awarded \$300,000 in damages. *Small v. Springs Industries, Inc.*, 292 S.C. 481, 486, 357 S.E.2d 452, 455 (1987). The South Carolina Supreme Court concluded that this damages award was excessive because the award "is more than actual compensation at present value for the income Small could have received for the rest of her reasonable work life at the hourly wage she was receiving." *Id.* Here, the jury's verdict for Moats

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<sup>2</sup> (R. p. 1143 (Mediated Settlement Agreement at 1)).

<sup>3</sup> (R. p. 1110 (Def. Ex. 1, Tab 1 (Toxaway Mill Contract))).

is roughly equivalent to the East-West Project contract and nowhere near such an outsized verdict as the jury awarded in *Small*.

What was the appropriate amount of damages to award for Moats' loss of business reputation, goodwill, and ability to continue in business? The jury could have determined that above the \$83,105 in monies improperly withheld by Anderson County for the East-West Project (or \$33,105 if the jury deducted the \$50,000 delay payment), that Moats was damaged by an amount similar to the East-West contract sum of \$324,000. If the jury subtracted the \$83,105 from the \$412,105 jury verdict, that is \$329,000 (or \$379,000 if the delay payment is not included). The jury was also aware that the Toxaway Mill Project was a \$223,000 30-day project. As such, damages in the three hundred thousand dollar range hardly seem excessive based on the size of projects that Moats was handling (\$550,000 for Anderson County at one time), and its journey from small start-up company to an experienced public works contractor.

Without a special verdict form it is impossible to tell with mathematical precision how the jury came to its verdict. But such precision is not required from a jury and does not justify invading the jury's province and throwing out its verdict.

The court committed legal error by failing to consider lost business reputation and lost goodwill as elements of Moats' damages and erred in not identifying and considering the evidence in the record supporting this element of damages. For these reasons, the Court should reinstate the jury's verdict.

## **II. The Lower's Court Granting of a New Trial Based on Thirteenth Juror Doctrine Should be Overturned.**

The lower court granted a new trial based on the thirteenth juror doctrine for the same reasons that it granted a new trial absolute. (R. p. 9). Here, the court's ruling is wholly unsupported by the evidence or based upon a controlling error of law and should be overturned.

The thirteenth juror doctrine is appropriate where the evidence in favor of the jury's verdict is "so outweighed by the countervailing evidence that, in the exercise of its discretion, a trial court could choose to set aside the verdict under the thirteenth juror doctrine. *RFT Mgmt. Co., L.L.C.*, 399 S.C. at 334, 732 S.E.2d at 172 (finding no abuse of discretion in denying motion for new trial based on thirteenth juror doctrine). That is not the case here.

As shown in Section I, the court erroneously concluded that "[t]here is no trial evidence supporting any verdict over \$33,105.91, which would have been the maximum contractual damages recoverable by the Plaintiffs based on the evidence presented because evidence of the Court's directed verdict of \$50,000 on delay damages was not submitted to the jury." (R. p. 8). The court's finding that there is no trial evidence supporting any verdict over \$33,105.91 is wholly unsupported by the evidence, as explained above where Moats presented evidence that Anderson County's actions in breaching the Mediated Settlement Agreement damaged its ability to get bonding and continue as a going concern, negatively impacting its business reputation and goodwill. (Section I(c)). In fact, there is no evidence to conflict Moats' position that it went out of business because it could not secure bonds to bid on new public work.

Further, the court heard additional proffered testimony from Russell Moats explaining that Moats had a competitive advantage over its competitors in its bidding because it had all labor in-house and other general contractors had to add overhead to their bids for subcontracting labor. Based on historical experience, Moats was confident that it would have won the bids entered into evidence for which it could not get bonding. (R. p. 721, line 17-p. 724, line 15 (Russell Moats Proffer)). Russell Moats also testified that Moats' bonding capacity at the time it lost bonding was close to a million dollars. (R. p. 726, lines 6-16 (Russell Moats Proffer)). If anything, the court

had more reasons than the jury to let the verdict stand. Therefore, the court's ruling is unsupported by the evidence.

Additionally, the court's ruling is based on a controlling error of law that damages to goodwill were not recoverable, (Section I(b)). The court at first ruled that goodwill could not be part of damages, (R. p. 280, line 23-p. 283, line 14), but later allowed these damages to be argued to the jury, (R. p. 784, lines 13-25). However, its ruling shows that the court ultimately excluded this element of damages. This was error.

This Court has previously overturned a lower court's decision to grant a new trial based on the thirteenth juror doctrine where it was not supported by the evidence. In *Youmans v. S.C. DOT*, 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2008), the lower court granted a new trial under the thirteenth juror doctrine in part based on its finding that no evidence supported the jury's finding that the plaintiff was not negligent in any manner in the underlying car accident. *Id.* at 280, 670 S.E.2d at 10. After reviewing the evidence, the Court concluded that this finding was contrary to the evidence and did not support such a finding. *Id.* at 288, 670 S.E.2d at 13. The court overturned the new trial and reinstated the jury's verdict. *Id.* The same should be done here.

### **III. The Court Erred in Not Allowing Plaintiff to Amend Its Complaint to Conform to the Evidence.**

Motions under Rule 15(b), SCRPC, "to conform to proof should be liberally allowed when no prejudice to the opposing party will result therefrom." *Soil & Material Engineers, Inc. v. Folly Associates*, 293 S.C. 498, 501, 361 S.E.2d 779 (Ct. App. 1987). "The focal inquiry in allowing amendment of pleadings is whether doing so will prejudice the opposing party." *Pool v. Pool*, 329 S.C. 324, 328, 494 S.E.2d 820, 822 (1998).

Moats presented evidence that Anderson County committed defamation in (1) writing its one-sided notice of claim letter to Moats' bonding company, (R. p. 1106 (Pl. Ex. 42)), and (2)

responding to Moats' bonding company request for status on Toxaway Mill Project and stating that the project had not progressed because Moats breached the Mediated Settlement Agreement, (R. p. 1108 (Pl. Ex. 43)).

In the first letter, Anderson County mischaracterized the dispute over completing the East-West Project, stating that Moats is "now refus[ing] to complete the project and has abandoned the project," but then failed to mention that Anderson County did not provide ADA compliant designs and failed to pay the \$50,000 delay damages it agreed to in the Mediated Settlement Agreement. (R. p. 1106 (Pl. Ex. 42)).

In the second communication to the bonding company, Anderson County told the bonding company that the "Contractor failed to meet their obligations as required by Mediation," (R. p. 1108 (Pl. Ex. 43)), but failed to mention that it had never taken steps to fulfill its obligations, including rescinding the termination letter and restarting the project. (R. p. 663, line 13-p. 666, line 9 (Harman); p. 1108 (Pl. Ex. 43), pp. 1143-44 (Mediated Settlement Agreement)).

Moats moved to conform the pleadings to the evidence to assert a defamation claim against Anderson County, but the court refused. (R. p. 797, line 2-p. 799, line 14). The record is devoid of any showing of prejudice to Anderson County or a showing that Anderson County would have presented any other evidence during trial to refute these allegations because it was already attempting to refute these two communications and their negative impact on Moats. Accordingly, there was sufficient evidence to support sending the claim for defamation against Anderson County to the jury and the court abused its discretion in denying this motion.

#### **IV. The Court Erred in Directing a Verdict on Defamation Against Rusty Burns.**

Moats presented evidence that In February 2018, Rusty Burns, Anderson County Administrator, in speaking with news media about delays in the East-West project, pointed the

finger at Moats, saying in response to a question about delays that “There have been disputes with the contractor, which are being resolved.” (R. p. 677, lines 4-7 (Burns), p. 1204 (Def. Ex. 2)). Mr. Burns testified that he was familiar with the designs having to be changed and the parties’ dispute over whether the designs were correct and whether the sidewalk could be poured in such a manner to meet ADA standards. (R. p. 679, line 21-p. 681, line 9 (Burns)). Moats testified that this statement was false and defamatory, the falsity of which is evidence by the Mediated Settlement Agreement where Anderson County accepted responsibility for delays and agreed to pay Moats delay damages. (R. p. 291, line 12-p. 292, line 24 (Russell Moats); p. 1143 (Mediated Settlement Agreement)).

A motion for directed verdict must be denied “when the evidence yields more than one inference, or its inference is in doubt.” *LeFont v. City of Myrtle Beach*, 430 S.C. 534, 539, 846 S.E.2d 355, 357 (S.C. Ct. App. 2020). The court must view “the evidence and all reasonable inferences in the light most favorable to the nonmoving party.” *Id.* When considering a directed verdict motion, the court does not have the “authority to decide credibility issues or resolve conflicts in the testimony or evidence.” *Id.* at 358, 846 S.E.2d at 539. If any evidence tends to prove the non-moving party’s allegations, the directed verdict motion must be refused. *Milhouse v. Food Lion, Inc.*, 289 S.C. 203, 345 S.E.2d 739 (S.C. Ct. App. 1986).

Rusty Burns admitted to making these statements about Moats. (R. p. 704, line 20-p. 705, line 14 (Rusty Burns)). There is no dispute that weeks after Burns made these public comments that Anderson County agreed to pay Moats for delay damages, accepting certain responsibility for delays. (R. p. 1143 (Mediated Settlement Agreement)). Rusty Burns did not qualify his statement about Moats by explaining Anderson County’s role in the identified disputes. Viewing this

evidence in a light most favorable to Moats, a jury could have found Burn's comments defamatory. For this reason, the court erred in granting a directed verdict on this claim.

If the jury's verdict is not restored, Moats should be granted a new trial on its defamation claim against Rusty Burns.

### **CONCLUSION**

The court erred in invading the province of the jury and setting aside the jury's verdict and in ruling that the jury's verdict was excessive and based on passion, caprice, or prejudice, or confusion or misunderstanding of the evidence. The court did not offer compelling reasons to set aside the jury's verdict. The court's ruling was driven by a misunderstanding of consequential damages and its failure to recognize that Moats could be awarded damages for lost goodwill and lost bonding capacity that ultimately drove the company out of business. The jury's verdict of \$412,105 was not excessive based on evidence that Anderson County owed Moats \$83,105, Moats' lost its bonding capacity that was over \$550,000, and based on jobs that Moats would have bid on had it had the capacity to do so. For these reasons, the court erred in granting a new trial absolute and the jury's verdict should be restored.

The court also erred in granting a new trial based on the thirteenth juror doctrine. This doctrine is only appropriate where the jury's verdict is so outweighed by countervailing evidence that the court should set aside the verdict. Here, the uncontroverted evidence showed that Anderson County's misleading and erroneous communications to Moats' bonding company prevented Moats from getting future public jobs and staying in business. Additionally, the court committed legal error in ruling that the jury could not have awarded damages beyond \$33,105, meaning that it could not have awarded any damages for Moats' lost business and goodwill. This was error.

Moats presented evidence that Anderson County committed defamation in its false and misleading communications to Moats' bonding company. However, the court denied Moats the ability to conform its pleading to the evidence and did so without any finding of prejudice to Anderson County. This was error.

Finally, the court erred in directing a verdict on Moats' defamation claim against Rusty Burns. The evidence showed that Burns was aware that ongoing disputes between the County and Moats were not driven solely by Moats, and yet, his comments to the newspaper did not disclose the County's role in these disputes. Weeks after Burns' public comments, Anderson County agreed to pay Moats for delay damages, evidencing the misleading nature of Burns comments. Viewed in a light most favorable to Moats, a jury could have found Burns' comments defamatory. As such, the court erred in directing a verdict on this cause of action.

Respectfully submitted,

s/ David L. Paavola

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