THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Circuit Court Judge

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SC Court of Appeals

Lower Case No. 2011-CP-40-07432
Appellate Case No. 2014-000398

William E. DeLoache, III
and Allison H. DeLoache. . . . . Appellants,

vs.

William Dixon Robertson, III; W. Jefferson Leath, Jr.;
Michael S. Seekings; LEATH, BOUCH & CRAWFORD, LLP;
Francis E. Grimball; MULLEN WYLIE, LLC formerly
MULLEN, WYLIE & SEEKINGS, LLC; William M. Bowen;
WILLIAM M. BOWEN, PA; and John D. Kassel . . . . . Respondents.

REPLY BRIEF OF APPELLANTS

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ARGUMENTS IN REPLY

Appellants, William E. DeLoache, III and Allison H. DeLoache, wish to brief the Court further and/or respond further to several of the issues raised by Respondents, William Dixon Robertson, III, W. Jefferson Leath, Jr., Michael S. Seekings, LEATH, BOUCH & CRAWFORD, LLP, Francis E. Grimball, MULLEN WYLIE, LLC formerly MULLEN, WYLIE & SEEKINGS, LLC, William M. Bowen, WILLIAM M. BOWEN, PA and also by Respondent, John D. Kassel.

I. THE DELOACHES' ARGUMENT AGAINST THE CIRCUIT COURT'S FINDING OF LACK OF STANDING WAS PROPERLY PRESERVED AND THE DELOACHES HAVE STANDING TO PURSUE THEIR CLAIMS.

It is remarkable that Respondents have the temerity to argue that the DeLoaches "failed to preserve their objection to the circuit court's finding that they lacked standing," (Brief of Respondents at 6-9), when the DeLoaches' specifically made that objection several times to the circuit court in the DeLoaches' Motion to Alter or Amend. (Appellants' Motion to Alter or Amend at 7, ¶ 2(d) and (e); ROA 266) ("Plaintiffs have suffered an injury in fact *and therefore have standing to bring claims against the Defendants*.") and ("Defendants' use of the Plaintiffs' names and identity for their own benefit was the injury in fact. Taking the Plaintiffs' allegations in their Complaint as true pursuant to 12(b), SCRCP, Plaintiffs have suffered an injury in fact and *have standing to bring the claim stated in their Complaint*.") (emphasis added). In addition, the Respondents also are asking this Court to ignore the DeLoaches' very first argument in their Brief of Appellants: "The DeLoaches *have standing to sue* because they suffered an injury-in-fact based on their loss of their right to control the use of their identity." (Brief of Appellants at 16) (emphasis added). *See I'On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716,

724 (2000) (discussing issue preservation requirements with reference to motions to alter or amend). This Court should reject Respondents' arguments that the DeLoaches failed to preserve their objections to the circuit court's rulings on the lack of standing issue.

The DeLoaches' Verified Complaint specifically alleges facts necessary to satisfy all three of the "standing to sue" requirements established by the South Carolina Supreme Court in *Sea Pines Ass'n for Protection of Wildlife, Inc. v. South Carolina Dept. of Natural Resources*, 345 S.C. 594, 550 S.E.2d 287 (2001), and the DeLoaches' objections to the circuit court's erroneous rulings on standing were specifically preserved for this appeal. (Appellants' Motion to Alter or Amend, p. 5-8, ¶ 2(a), (c), (d), (e), (h), ROA 264-267 and p. 11, ¶3(d), ROA 270).

To have standing to sue,

> . . ., the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Sea Pines Ass'n for Prot. of Wildlife, Inc. v. South Carolina Dept. of Natural Res., 345 S.C. at 601, 550 S.E.2d at 291(citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992).

In their brief, the DeLoaches also argued that "[t]he obvious conclusion is that the allegations in the Verified Complaint concerning the DeLoaches' loss of their right to control the use of their identity are and should have been sufficient to establish injury-in-fact

providing constitutional standing." (Brief of Appellants at 17) (emphasis added). And "[t]aken in the light most favorable to the DeLoaches, the Verified Complaint easily establishes the '*constitutional minimum of standing*' to assert the host of claims arising from the Respondent class action lawyers and law firms' unauthorized." (Brief of Appellants at 17) (emphasis added). The issue of standing was preserved for appeal in the arguments before the circuit court and in the Brief of Appellants submitted to this Court.

Further, the issue of standing is intertwined with the issue of damages such that the circuit court found that the DeLoaches "have not suffered any injury-in-fact and therefore lack standing at this time to bring the asserted claims against [Respondents]." (Order II at 8; ROA 20). The DeLoaches devoted several pages of their Motion to Alter or Amend urging the circuit court to correct its rulings on damages, in doing so, further preserved the issue on appeal of the circuit court's erroneous finding of lack of standing. (Appellants' Motion to Alter or Amend, p. 5-8, ¶ 2(a), (c), (d), (e), (h), ROA 264-267 and p. 11, ¶3(d); ROA 270). The allegations in the Verified Complaint and the DeLoaches' arguments in their Motion to Alter or Amend establish that they "suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical'" demonstrates an actual "injury in fact" that is "trace[able] to the challenged action of the" Respondents, and recovery for that "invasion" "will be 'redressed by a favorable decision.'" *Compare Sea Pines Ass'n*, 345 S.C. at 601, 550 S.E.2d at 291 *with* (Appellants' Verified Complaint, ¶¶ Summary of the Case, ROA 31-33; 33-49, ROA 39-42; 60-71, ROA 43-44; and 115-118, ROA 51-52) *and* (Appellants' Motion to Alter or Amend, p. 5-8, ¶ 2(a), (c), (d), (e), (h), ROA 264-267 and p. 11, ¶3(d), ROA 270). The Respondent class action lawyers' actual and unauthorized "invasion" of

the DeLoaches' "protected interests" in their surname constitutes an injury in fact, or in other words, "a particularized harm" sufficient to provide standing. Furthermore, the DeLoaches' recovery for Respondents' wrongful appropriation of personality and other companion torts would be redressed by a favorable decision in this case.

Finally, the circuit court's orders were sufficient to preserve the argument regarding the DeLoaches' standing to sue. Both of the Orders granting the motions to dismiss found that the DeLoaches' lacked standing to sue for wrongful appropriation of personality because, according to the circuit court, they did not suffer an injury-in-fact. (Order II at 8, ROA 20); (Order I at 12, ROA 12). As this Court found in *Spence v. Wingate*, 381 S.C. 487, 488, 674 S.E.2d 169, 170 (2009), an issue is properly preserved when that precise issue is argued before the circuit court and the circuit court's "order explicitly addresses that argument." Such a ruling, in and of itself, is sufficient to preserve the argument for appellate review. *See id.*

The allegations in the DeLoaches' Verified Complaint, their arguments to the circuit court, and to this Court in the Brief of Appellants sufficiently preserved their objections to the circuit court's ruling that they lacked standing to sue the Respondents. The DeLoaches had and continue to have standing to bring a claim against Respondents for wrongful appropriation of personality, therefore the circuit court's orders finding otherwise should be reversed and this matter should be remanded for a trial on the merits.

II. THE FACTS PLED IN THE VERIFIED COMPLAINT STATE A CAUSE OF ACTION FOR WRONGFUL APPROPRIATION OF PERSONALITY.

A. Injury-in-Fact Is Assumed For the Wrongful Appropriation of Personality Tort.

"In South Carolina, there are three separate and distinct causes of action for

invasion of privacy: 1) wrongful appropriation of personality; 2) wrongful publicizing of public affairs; and 3) wrongful intrusion into private affairs." *Gignilliat v. Gignilliat, Savits and Bettis, L.L.P.*, 385 S.C. 452, 458-59, 684 S.E.2d 756, 759 (2009), citing *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 514 S.E.2d 126 (1999); *see also Holloman v. Life Ins. Co. of Virginia*, 192 S.C. 454, 7 S.E2d 169, 171 (1940); *Hinish v. Meier & Frank Co.*, 166 Or. 482, 504, 113 P.2d 438, 447 (Oregon 1941). The wrongful appropriation of personality subset of the invasion of privacy tort has three elements: 1) intentional use of plaintiff's name, identity or likeness; 2) without the consent of plaintiff; 3) for the benefit of the defendant. *See Gignilliat*, 385 S.C. at 459, 684 S.E.2d at 759; *see also Sloan v. South Carolina Dept. of Public Safety*, 355 S.C. 321, 326, 586 S.E.2d 108, 110 (2003); *Snakenberg v. Hartford Cas. Ins. Co. Inc.*, 299 S.C. 164, 170, 383 S.E.2d 2, 5 (Ct. App. 1989).

Proving damages or injury-in-fact simply is not an element of the tort of wrongful appropriation of personality; the circuit court's ruling otherwise was plain error. In South Carolina, "[a] claimant alleging appropriation of identity *need not prove actual damages, because the court will presume damages if someone infringes another's right to control his identity.*" *Gignilliat,* 385 S.C. at 463 (emphasis in original), citing *Petty v. Chrysler Corp.*, 343 Ill. App.3d 815, 799 N.E.2d 432, 441-42 (2003); *see also Ainsworth v. Century Supply Co.*, 295 Ill.App.3d. 644, 693 N.E.2d 510, 514 (1998) (holding the trial court erred in granting summary judgment to the defendant on the basis the plaintiff could not establish actual damages for his claim of misappropriation of his likeness; the Appellate Court of Illinois held the law presumes nominal damages in such an instance and noted that to hold otherwise "overlooks . . . the venerable principle that the law will presume that damages

exist for every infringement of a right."); *James v. Bob Ross Buick Inc.*, 167 Ohio App.3d 338, 855 N.E.2d 119, 124 (2006) (concluding the trial court erred in granting summary judgment on the plaintiff's claim of misappropriation of his name, stating, "a plaintiff need not establish actual damages in order to prevail on a misappropriation of name claim" and that "a plaintiff may seek to recover nominal damages for claims of misappropriation of the plaintiff's name or likeness.").

Because the tort of wrongful appropriation of personality was recognized by our Supreme Court as an available tort claim, it is illogical to conclude that a tort can exist under any circumstances without any potential for compensation. *See Holloman v. Life Ins. Co. of Virginia*, 192 S.C. 454, 7 S.E2d 169, 171 (1940); *Gignilliat*, 385 S.C. at 464 fn 4, 684 S.E.2d at 762 fn. 4; s*ee also Ainsworth v. Century Supply Co.*, 295 Ill. App.3d. 644, 693 N.E.2d 510, 514 (1998) (holding the trial court erred in granting summary judgment to the defendant on the basis the plaintiff could not establish actual damages for his claim of misappropriation of his likeness; the Illinois appellate court held the law presumes nominal damages in such an instance and noted that to hold otherwise "overlooks . . . the venerable principle that the law will presume that damages exist for every infringement of a right.").

In *Snakenberg*, this Court analyzed the wrongful intrusion subset of the invasion of privacy tort and found that

> [i]n an action for wrongful intrusion into private affairs, the damages consist of the unwanted exposure resulting from the intrusion. Thus, if the plaintiff proves the four elements needed to establish his cause of action, the fact of damage is established as a matter of law. The amount of damage is then to be assessed by the trier of fact. In assessing the damage, the trier of fact may consider the shame, humiliation, and emotional distress suffered by the plaintiff as compensable elements of damages.

299 S.C. at 172, 383 S.E2d at 6.

Because in an action for wrongful intrusion the damages are the unwanted exposure from the intrusion, it follows then that in an action for wrongful appropriation of personality, the damages are the misappropriation of personality.

Having properly pled facts sufficient to show that Respondents intentionally used the DeLoaches' surname without consent or permission and benefitted from this improper use of the DeLoaches' surname, the Deloaches' damages are then presumed for the purpose of showing their standing to bring suit for the tort of wrongful appropriation of personality. The circuit court's orders finding otherwise were in error and this Court should reverse the circuit court's findings and remand this matter for trial on the merits.

B. The Tort of Wrongful Appropriation Of Personality Does Not Require An Allegation That The DeLoaches' Name Had Commercial Value.

The circuit court improperly found that the DeLoaches' were required, but failed, to assert a claim that there is an "inherent commercial value" in their surname. (Order II at 9, ROA 21). Similarly, Respondents, citing *Gignilliat*, argue that South Carolina law requires a plaintiff claiming wrongful appropriation of personality to "identify some commercial value associated with his/her name." (Brief of Respondents at 16-19). However, there is no such requirement of showing commercial value in the plaintiff's name in order to state a claim for wrongful appropriation of personality.

Gignilliat involved the use of a late-law partner's surname in the law firm's name after his death. *See* 385 S.C. at 455, 684 S.E.2d at 758. The lawyer's widow argued that the law firm was profiting on the commercial value associated with her late-husband's surname without consent. *See id.* The Supreme Court's discussion on the value in the

publicity or use of the late-lawyer's surname was expressly limited to addressing the nature of damages available, and had no bearing whatsoever on what is required to assert a claim for violation of a right of publicity / wrongful appropriation of personality. *Compare Gignilliat*, 385 S.C. at 461-465, 684 S.E.2d at 761-63 (discussion of damages under "(3) Nature of Damages" heading) *with* 385 S.C. at 457-461, 684 S.E.2d at 758-60 (discussion of the classification and elements of the causes of action under "A. Right of Publicity / Wrongful Appropriation, (1) Classification of Tort" heading). The Supreme Court in *Gignilliat* specifically recognized "the unfettered right" to the use of someone's name "without compensation" was "a distinguishable property right." *Gignilliat,* 385 S.C. at 462, 684 S.E.2d at 761; *see also* (Brief of Appellants at 19-21). Finally, while the Supreme Court found that there was at least "presumed nominal damages" available, it affirmed that the law firm was entitled to summary judgment because Mrs. Gignilliant had not presented any evidence that the law firm's use of Mr. Gignilliant's surname was without consent, which is a required element for the wrongful appropriation claim. *See Gignilliat*, 385 S.C. at 463-64, 684 S.E.2d at 762.

In this case, the circuit erred and the Respondents' briefs join in that error in concluding the DeLoaches were required to allege commercial value to the use of their surname as a requirement or element in the cause of action for wrongful appropriation of personality.

The DeLoaches were not required to allege that their surname has commercial value to state a claim for wrongful appropriation of personality. What the DeLoaches' Verify Complaint does allege, however, is that their surname had value for the Respondent class action lawyers and law firm's purposes, and in fact had at least $600,000 in value. (Verified

Complaint, ¶¶ Summary of the Case, ROA 31-33; 42 and 44, ROA 41; and 49, ROA 42). By example, in *Nemani v. St. Louis University,* 33 S.W.3d 184, 185 (Missouri 2000), a research professor sued his university for misappropriating his name when the university used his name without his express permission on a grant application, which included a request to fund his research salary.[1] *Id.* ("Name appropriation occurs where a defendant 'makes use of the name to pirate plaintiff's identity for some advantage.'"). The value of the research professor's surname was not in its inherent commercial value but in the value of having a qualified researcher's surname for use in making the funding requesting. Similarly, the value of the DeLoaches' surname was not in the inherent commercial value but in its value as the surname belonging to owners of a home clad with Dryvit's EIFS with standing to serve as an objector in the *Posey* matter. The tort of misappropriation of personality does not require the surname to have a commercial value and the Respondents' citation to unreported federal cases is simply not relevant to the application of *Gignilliat* and related South Carolina reported authority on wrongful appropriation claims. To so hold would mean that only celebrities or similar individuals would have a right to this type of cause of action. The circuit court's orders finding a requirement to allege commercial value in the DeLoaches' surname were in error and this Court should reverse the circuit court's findings and remand this matter for trial on the merits.

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[1] The Supreme Court of Missouri ultimately found that by signing a Memorandum of Agreement to assist with research projects, the research professor gave his implied consent for the use of his name in applications for research grants. *Nemani,* 33 S.W.3d at 186.

C. The Economic Benefits Respondents Received Solely Based On Their Unconsented Use of The DeLoaches' Personality Belong to the DeLoaches.

1. The Circuit Court Misconstrued the DeLoaches' Allegations Concerning Damages.

The circuit court's orders and the Respondent class action lawyers and law firms' briefs grossly misconstrue allegations and omit other allegations in the Verified Complaint, specifically ¶ 42, to support a finding that the Respondent class action lawyers and law firms' received at least $600,000 as what was found to be fees appropriately earned in the *Posey* class action in Tennessee as "an attorney fee to the objector's attorney(s)" and "paid to **their attorneys** . . .." (Order II at 6-7; ROA 18-19); (Brief of Respondents at 18-19). The findings and conclusions in the circuit court's Order II were essentially that the DeLoaches' Verified Complaint failed to allege any injury-in-fact because "[p]ayment of attorneys' fees in connection with an objection to the terms of a class settlement is appropriate under certain circumstances," that such payments are made to counsel for the objectors and not the objectors themselves because the objectors are "in line to receive the benefits of any improvement to the terms of the class settlement", and therefore the DeLoaches "would not have been entitled to any monetary recovery as a result of their status as objectors to the *Posey* class action. Accordingly, their claim of entitlement to amounts paid to ***their attorneys*** lacks merit." (Order II, p. 6-7; ROA 18-19) (emphasis added). Those findings by the circuit court concluding that the Respondent class action lawyers were ever "their attorneys", that is that they were ever attorneys for the DeLoaches, are clearly erroneous and should be reversed.

The essence of the allegations in the DeLoaches' Verified Complaint is that the

Respondent lawyers and law firms never were counsel for the DeLoaches in any capacity on any matter. The allegations in the Verified Complaint do not contend that the DeLoaches were somehow entitled to the $825,000 / $600,000 funds from *Posey* as objectors to the class action settlement or as claimants against DRYVIT SYSTEMS, INC. or even that the Respondents were somehow negligent in the representation of the DeLoaches. Those allegations, instead, seek to recover the funds Respondents wrongfully obtained through the use of the DeLoaches' surnames / personality without their consent, permission, or knowledge. Those economic benefits belong exclusively to the DeLoaches.

The circuit court's Order II finds that "[a]ccording to the Complaint, the alleged payment to Defendant Attorneys was from 'Class Counsel in *Posey* from the funds Dryvit Systems paid to Class Counsel for attorney's fees that the *Posey* court had approved . . ..' (Compl. ¶ 42.)" (Order II at p. 6). What the Verified Complaint actually alleges in ¶ 42 with emphasis on what the circuit court omitted is as follows:

> **The first $600,000 of the $825,000 was to be paid by** Class Counsel in *Posey* from the funds DRYVIT SYSTEMS paid to Class Counsel for attorney's fees that the *Posey* court had approved **to be paid to the *Posey* Class Counsel, even though the *Posey* court never specifically approved of or acknowledged the payments to Defendant class action lawyers and Defendant law firms.**

The circuit court's findings in Order II omit and misconstrue the actual allegations in the Verified Complaint and should be reversed.

The Respondent class action lawyers took actions without the DeLoaches' knowledge or consent to become admitted *pro hoc vice* in Tennessee to act as counsel for the DeLoaches in the *Posey* action. (Verified Complaint, ¶¶ 34, 36, and 40; ROA 39-40). The Respondent class action lawyers obtained funds exclusively through their *pro hac vice*

admission and related activities in the Tennessee court solely as counsel for the DeLoaches. (Verified Complaint, ¶¶ 34-49; ROA 39-42). If it were not for the Respondents representing to the *Posey* court, Dryvit's counsel, and the other parties that they were lawyers for the DeLoaches, Respondents would not have been able to appear and participate in *Posey* and would not have otherwise been in a position to obtain the $600,000. (Verified Complaint, ¶¶ Summary of the Case, ROA 31-33; 69, ROA 44). The Respondent class action lawyers and law firms had to have a client or clients in order to make an appearance in *Posey.* In other words, Respondents' use of the DeLoaches' surname was the key to the *Posey* door to substantial fees of at least $600,000 and possibly even $825,000. The value of the DeLoache surname for use as objectors in *Posey* to Respondent class action lawyers was magnified by their dual role as class counsel in *Cardamone* class action case they had filed in South Carolina, and the "blood money" condition that $225,000 of the total $825,000 was to be paid after the final dismissal of the *Cardamone* suit. (Verified Complaint, ¶¶ Summary of the Case, ROA 31-33; 24, ROA 36-37; 43, ROA 41). Such unjust enrichment to the Respondents cannot be allowed to stand.

2. Restitution-Based Damages Are Available For the DeLoaches' Wrongful Appropriation of Personality Claims.

The principles underlying South Carolina's wrongful appropriation of personality tort undergird a restitution-based damages award, as pled in this case, where the tortious appropriators are required to disgorge the benefits unjustly derived from their wrongful publicity exploitation. Applying this measure of damages would deter unauthorized appropriation by denying the appropriators any economic or other benefits of such an

intrusion into the publicity rights of South Carolina's citizens.

THE RESTATEMENT (SECOND) OF TORTS, § 652C - Appropriation of Name or Likeness governs misappropriation claims:

> One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.

Id.; see also Joe Dickerson & Associates, LLC v. Dittmar, 34 P.3d 995, 1001 (Colo. 2001) (in order for liability to exist, defendant must have appropriated to his or her own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of plaintiff's name or likeness.); *Remsburg v. Docusearch, Inc.*, 816 A.2d 1001 (N.H. 2003) (recognizing tort of invasion of privacy by appropriation of an individual's name or likeness).

The DeLoaches' wrongful appropriation of personality claims could be characterized as wrongful endorsement claims. To the unsuspecting participants in the *Posey* case, especially to the Tennessee court and to *Dryvit Systems, Inc.*, it would appear that the DeLoaches had "endorsed" the Respondent class action lawyers' use of their names in the proceedings and submitted to the jurisdiction of that court. The value of the "endorsement" is the value the tortious appropriators obtained through the improper use of the "endorsement."

For example, an employer, without an employee's consent, ran an advertisement in a newspaper displaying the employee's photograph and text falsely attributing statements to the employee praising the employer. *See Staruski v. Continental Tel. Co. of Vermont*, 154 Vt. 568, 581 A.2d 266 (1990). After the jury awarded a verdict with actual and punitive damages, the trial court granted the employer's motion for a judgment

notwithstanding the verdict "on the ground that plaintiff, not being famous, was unable to prove that her name and identity had commercial value. *See Staruski,* 154 Vt. at 570, 581 A.2d at 267. The Supreme Court of Vermont reversed, finding among other things that "a damage remedy for invasion of privacy by the appropriation of a person's identity, at least when done for commercial purposes, should be available in appropriate circumstances in Vermont as in other states. *See Staruski,* 154 Vt. at 573, 581 A.2d at 268. The *Staruski* court noted rulings in other courts, such as *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 217, 50 S.E. 68, 79 (1905) and *Tellado v. Time-Life Books*, 643 F. Supp. 904, 909 (D.N.J. 1986), where wrongful appropriation plaintiffs were permitted to recover, even though they were "not famous." What better measure of the true value of the plaintiffs' personality than the specific value of the benefit actually gained by the tortious appropriators?

In many instances the specific value of the benefit gained by the tortious appropriators will not be available to the plaintiff or, even if available, very difficult to quantify. Here, the commercial value of the Deloaches' surname was not in the inherent value of their celebrity or notoriety, but in the value of having the surname itself and resulted in at least a $600,000 benefit to the Respondent class action lawyers and law firms. The DeLoache surname represented–for the Respondent class action lawyers and law firms purposes–a South Carolina couple whose house was clad in Dryvit synthetic stucco and who agreed to serve as objectors to the proposed settlement in the *Posey* matter. The Deloaches own the right to benefit from the commercials value, if any, of their surname and Respondents had no right to exploit the DeLoaches' surname for the benefit of Respondents. *See Presley's Estate v. Russen*, 513 F. Supp. 1339, 1353 (D.N.J. 1981)

(holding that an individual holds the right "to control the commercial value and exploitation of his name and picture or likeness and prevent others from unfairly appropriating this value for their commercial benefit."). Put simply, money made from the use of the Deloaches' surname without their consent is money belonging to the DeLoaches' and not to lawyers who used their names without permission or consent to receive $600,000 in "legal fees." "Restitution and disgorgement are equitable remedies." *Verenes v. Alvanos*, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (2010) (*citing Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 215-16, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002); *Wallace v. Milliken & Co.*, 305 S.C. 118, 120, 406 S.E.2d 358, 359 (1991) (stating restitution is an equitable remedy)). A restitution-based remedy should be available to prevent Respondents from being unjustly enriched by their tortious appropriation of the DeLoache surname.[2]

The circuit court's orders finding otherwise were in error and this Court should reverse the circuit court's findings and remand this matter for trial on the merits.

D. The DeLoaches Properly Pled That The Respondents Acted With The Requisite Intent In Wrongfully Appropriating The DeLoaches' Personality.

Out of whole cloth, Respondents' brief ask this Court to rewrite and reconfigure the necessary elements of proof for wrongful appropriation claim to now require an additional "intent to misappropriate" element never before required in South Carolina. (Brief of Respondents at 19).

Respondents' intentionally used the DeLoaches' surname in their motion to be

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[2] The DeLoache's' Verified Complaint also states claims for unjust enrichment and for the imposition of a constructive trust. *See* (Verified Complaint, ¶¶ 90-96; ROA 47-48).

admitted into the *Posey* Tennessee court and in their representations to the *Posey* court that the DeLoaches' wished to intervene as objectors in the *Posey* case. Respondents intentionally used the DeLoaches' surname to object in the *Posey* case and profit as a result therefrom. This meets the requisite intent necessary for the element of intent in the tort of wrongful appropriation of personality. To state a claim for wrongful appropriation of personality, the DeLoaches' Verified Complaint did not need to allege that Respondents acted with malice or with a specific "intent to misappropriate" the DeLoaches' surname. *See Snakenberg*, 299 S.C. at 173, 383 S.E.2d at 7. "Neither purpose nor motive must be proven to show intent." *Id.* at 174. In this matter, it is "irrelevant whether [Respondents] 'meant naughty' or had motives 'as pure as the naked heavens.'" *Id.*

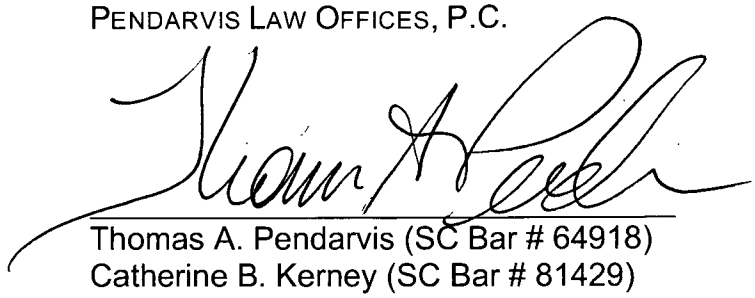
In this case, it matters that Respondents intend to use the DeLoaches' surname in their *pro hac* vice motion and in their representations to the *Posey* court. The Deloaches' Verified Complaint properly pled the element of intent necessary to meet the standard for wrongful appropriation. The circuit court's orders finding otherwise were in error and this Court should reverse the circuit court's findings and remand this matter for trial on the merits.

CONCLUSION

For all of the above reasons, the trial court should be reversed and this matter should be remanded for a trial on the merits.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



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August 25, 2014

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