

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Judge

Appellate Case No. 2015-000778
Case No. 2013-CP-23-01762

RECEIVED

AUG 19 2015

SC Court of Appeals

Carol Simpson,

Appellant,

v.

Frank A. Landgraff, Carol Sutton, Sutton & Associates
Investigations, Inc., Defendants,

Of Whom Frank A. Landgraff is the

Respondent.

APPELLANT'S RETURN TO FRANK A. LANDGRAFF'S MOTION TO DISMISS

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Attorney for the Appellant

When the law is on your side, argue the law. When the facts are on your side, argue the facts. When neither the facts nor the law are on your side, make an ad hominem attack.

-- Old Adage

Frank A. Landgraff (“Landgraff”) may not have written this adage, but he certainly lives by it. His motion lacks any meritorious reason to dismiss this appeal. Instead, it is replete with adjectives such as poisonous, flagrant, and outrageous rather than facts and legal arguments. Few allegations he propounds are accurate and his claims do not warrant dismissal.

Designation of the Record on Appeal

Landgraff complains about Appellant’s designation of the record. Interestingly, the trial court designated the record in this case in its Order filed on February 3, 2015 – “The court has considered all filings made by the parties, even those that may have been untimely. . . . The court prefers to resolve this dispute on the entire record.” (Order, page 1 attached as Exhibit A). The trial court repeated its designation of the record in its Amended Order filed on February 27, 2015 – “The court has considered all filings made by the parties, even those that may have been untimely . . . The court prefers to resolve the dispute on the entire record.” (Amended Order, page 1 attached as Exhibit B). The trial court clearly reviewed everything filed before February 27, 2015 before issuing its order – that is the record.

Landgraff erroneously alleges that “Rule 210(c), SCACR requires presentation to the lower court, not merely filing. The rationale for this is simple -- it prevents a party from unscrupulously interfering with judicial economy and fairness, for example by filing a document but never providing or calling attention to that document to opposing counsel

or the trial court, and then later attempting to rely on that document.” The law provides otherwise. When ruling on a motion for summary judgment, the circuit court should examine the “pleadings, depositions, answers to interrogatories, and admissions on file, together with [any] affidavits” to determine if “there is no genuine issue as to any material fact.” *Froneberger v. Kirkland Dale Smith, et al*, 406 S.C. 37, 748 S.E.2d 625, 631 (S.C. App. 2013). Rule 56 does not, “distinguish between documents merely filed and those singled out by counsel for special attention--the court must consider both before granting a summary judgment.” *Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180, 183-4 (S.C. App., 1986), *quoting Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir. 1980).

Landgraff also erroneously argues that after December 4, 2014, “submissions of new filings or ‘evidence’ to the lower court became improper.” (Motion ¶ 15). If Landgraff had an issue with the trial court’s decision to consider “all filings made by the parties” he should have raised the issue before the trial court.

As Landgraff correctly states that “[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Simply put, even if this argument had merit, raising this issue for the first time on appeal is improper.

The appellate court reviews the Court’s grant of summary judgment under the same standard as the trial court. *Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005) (“An appellate court reviews the grant of summary judgment under the same standard applied by the trial court.”). It has a “duty to

undertake a thorough and meaningful review of the trial court's order and the entire record on appeal." *Bowen v. Lee Process Systems Co.*, 342 S.C. 232, 236, 536 S.E.2d 86 (S.C. App. 2000). Logically, the appellate court cannot properly review the trial court's order without considering the same record that the trial court did – "all filings made by the parties, even those that may have been untimely."

Landgraff's Inaccurate and Misleading Statements

Landgraff inaccurate and misleading statements are riddled throughout his motion. For example, he alleges that Appellant failed to order the transcript in a timely matter based on a letter from the Court. The truth is that the transcript was ordered in a timely matter and the initial brief was filed well within the prescribed time.

For clarity sake, Appellant's responses do not correspond to Landgraff's numbered paragraphs since he repeats some allegations and includes multiple allegations in some paragraphs. However, Appellant has essentially addressed the issues in the same general order as Landgraff raises them.

1. Landgraff complains of Appellant's record citations. (Motion ¶¶ 2, 4). SCACR 208(b)(4) provides that "In the initial briefs, these references should be to the page and line number of the transcript prepared by the court reporter or by the page of the material to be referenced: e.g., Answer, p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. After the Record on Appeal is prepared, these references shall be revised as provided by Rule 211(b)(1)." Appellant's record citations are proper for the initial brief and will be revised when appropriate.

2. Landgraff objects to Appellant's reference to the "Case Statement" and alleges it was not before the lower court. (Motion ¶ 1). To the contrary, the trial court referenced the Case Statement in its Order filed on February 27, 2015, but called it a "Solicitor's Internal Prosecution Memo." (Case Statement attached as Exhibit C, and Recon. Order, page 2 attached as Exhibit D) The trial court noted that the document and the Incident Report became part of the record as an attachment to Appellant's Response to Defendant Sutton's First Request for Production. Appellant used the citation of Case Statement because that is the actual title of the statement, but could have used the trial court's citation of "Solicitor's Internal Prosecution Memo" or used either citation with the addition "attached to Appellant's Response to Defendant Sutton's First Request for Production."
3. Landgraff erroneously alleges that Appellant's Responses to Landgraff's Request to Admit "was not before the lower court" (Motion ¶ 3). This statement is extraordinary since Landgraff himself attached them to the motion that he filed with the Court on August 28, 2014. (Motion to Compel attached as Exhibit E).
4. Landgraff erroneously alleges that Appellant cannot "cite her own discovery responses to provide any fact to the Court" (Motion ¶ 3). To the contrary, Rule 56(c) states the exact opposite – "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ."

5. Landgraff erroneously alleges that the Incident Report was never “properly before the lower court, let alone properly authenticated or admissible as evidence.” (Motion ¶ 6). To the contrary, the trial court mentioned the “Incident Report” at least 8 times in the two orders that it filed on February 27, 2015. (Amended Order, page 2 attached as Exhibit B and Recon Order, pp 2, 4, and 5 attached as Exhibit D).
6. Landgraff erroneously alleges that the letter from the State Office of Victim Assistance was never “properly before the lower court, let alone properly authenticated or admissible as evidence.” (Motion ¶ 6). This letter was an exhibit to the same filing that contained the Incident Report referenced in the trial court’s orders. (Award Letter attached as Exhibit F). Landgraff errs in focusing on whether the letter was authenticated. The legal standard at the summary judgment stage is whether the letter is capable of being presented in a form that would be admissible in evidence.
7. Landgraff protests too much in paragraphs 7 and 8 regarding the “veil of government approval.” Appellant alleges that the Greenville County Sheriff’s Office fully investigated and did not contradict her claims. The Incident Report and the Solicitor’s Internal Prosecutor Memo substantiate this claim. Appellant correctly stated that the State Office of Victim’s Assistance (SOVA) determined she was a victim of a crime. The payment of benefits substantiates this claim since being a crime victim is a prerequisite to receiving payments from SOVA for being a crime victim. Finally, the Solicitor’s Internal Prosecution Memo concludes with “Based on the above analysis, warrants should issue for Suspect

[Landgraff] and Private Investigator [Sutton] for two counts of aggravated voyeurism.” (Case Statement, p. 7 attached as Exhibit C). Aggravated voyeurism is a felony. S.C. Code § 16-17-470.

8. Amazingly, Landgraff makes the argument that “there is not a single piece of evidence regarding any criminal conduct by Landgraff because it is uncontested that not only has he never been convicted for such crime, he has never even been charged with such a crime.” (Motion ¶ 9). In the trial court, Appellant repeatedly stated that she has never been convicted or charged with a crime and even produced a certified criminal records search attached to sworn affidavit entitled Plaintiff’s Memorandum in Opposition to Defendant Frank A. Landgraff’s Motion for Summary Judgment. Yet, without citing “a single piece of evidence regarding any criminal conduct” by Appellant or one law she had broken, Landgraff followed Carl Sandberg’s advice to repeatedly “pound the table and yell like hell” that Appellant should be barred from all recovery due to her crime of adultery. The lower court bought his unsupported argument. “Adultery is a criminal offense. S.C. Code § 16-15-60. While this statute is rarely enforced and regularly violated, it still represents our state’s express public policy. Consequently, Plaintiff’s adulterous conduct bars her claims.” (Amended Order, p. 6 attached as Exhibit B). Appellant is encouraged by Landgraff’s change of heart and can only hope the appellate court will agree that the trial court erred in granting summary judgment on this ground.
9. Landgraff erroneously alleges (a) that Appellant “further and improperly references findings of the Family Court appearing nowhere in the record below”

(Motion ¶ 10); (b) that “there is no citation to any document and no Family Court document is part of the Designation” (Motion ¶ 10); (c) that Appellant includes the false accusations of connivance and distorted references to what occurred in the Family Court proceedings without any corresponding evidence to support the same (Motion ¶ 11); (d) that Appellant “cites Family Court materials nowhere appearing in the Record” (Motion ¶ 12); and (e) that Appellant “once again cites Family Court materials nowhere appearing in the Record” (Motion ¶ 12). To the contrary, as the Appellant’s citation indicates Family Court documents were attached as Exhibit A to Plaintiff’s Response to Sutton’s First Request for Production to Plaintiff. The trial court acknowledged this discovery filing. (Recon. Order, page 2 attached as Exhibit D).

10. Landgraff erroneously alleges that referencing Landgraff’s sexual “fantasies” is outlandish and without support in the record. (Motion ¶ 11). His now ex-wife addressed his “fantasies” with great clarity on pages 2 and 3 of her affidavit (Affidavit attached as Exhibit H) :

Although he is 22 years older than I, Frank has always been very active sexually. He directed our sex life to include new positions and various activities. He encouraged me to buy sex toys and use them on him. While some things seemed a little kinky, he was my husband and I was eager to please him.

Frank also uses pornography extensively. He has a very large library of pornographic videos which he kept in the cabinet in our bedroom. We had cable and satellite television in our house which gave him access to all adult programming. In addition, he had a shelf in his private bathroom for all his adult magazines. When we traveled overseas, he regularly wanted to visit exotic places of adult entertainment.

Virtually every year, he insisted that we visit the Hedonism resorts in Jamaica whose motto is “The Pleasure Seekers Ultimate Super-

Inclusive Playground.” We stayed in the all nude part of the resort. Frank pushed me to participate in the adult games with total strangers. He also encouraged me to have sexual contact with the other women there, but I refused. Frank participated fully and won the toga contest.

I had never been sexually active with another woman. Frank seemed to have a fantasy about bringing another woman into our marriage. In the past, I tolerated a then-single woman performing oral sex on him at our beach house, but I refused to touch her or participate in a threesome. On another occasion, another then-single woman, Frank, and I got in our hot tub naked. Frank then suggested that she and I take a shower together. We both refused.

If any of the allegations were false, why has Landgraff never filed an affidavit contradicting them? Significantly, he has not filed one affidavit in this case, the Family Court case, or the prior civil case referenced in the Court’s Jan. 8, 2014 Order to deny that he orchestrated the evening or that it was for his own sexual gratification. He has not contradicted one fact presented by Appellant. His silence is deafening.

11. In Footnote 4, Landgraff complains that “Of the 49 entries on her Designation, 47 do not have any filing date whatsoever, including all discovery entries.” So what? Nothing in SCACR 209 requires filing dates to be included. In fact, SCACR Form 14 DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL contains no filing dates.
12. Landgraff erroneously alleges that the accusation that his counsel drafted a “‘footnote’ for the trial judge’s signature” was not raised below and “nowhere do they appear in the record.” (Motion ¶ 13). To the contrary, a more complete discussion of this issue was raised in the Second Motion for Recon., p. 15 (Attached as Exhibit H).

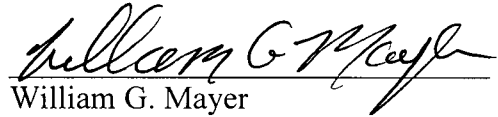
13. Landgraff complains that Appellant included citations to her Motions for Reconsideration. (Motion ¶¶ 17 and 18). This is true. However, Appellant made references to where the arguments or quoted material appeared in the record, not to support facts or evidence.
14. In his conclusion, Landgraff requests that Appellant delete all arguments that she “did not make to the trial court prior to her first motion for reconsideration.” Besides the fact that the request has no basis other than Landgraff’s preference and he did not raise the issue before the trial court, the request is disingenuous for two reasons. One is that the first motion for reconsideration addressed the trial court’s order entered on February 3, 2015 (First Motion for Recon attached as Exhibit I) and the second motion for reconsideration addressed a different order entered by the trial court on February 27, 2015 (Second Motion for Recon. attached as Exhibit H) . More importantly, Appellant had to file the motion if she wanted to preserve the issues raised in the Second Motion for Reconsideration for appeal. “[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(c) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” Elam v. SC Dept. of Transp., 361 S.C. 9, 21-24, 602 S.E. 2d 772 (S.C. 2004) (Emphasis added).

CONCLUSION

For the reasons stated, this Court should deny Frank A. Landgraff's Motion to Dismiss.

Respectfully submitted

August 19, 2015

A handwritten signature in cursive script, appearing to read "William G. Mayer", written over a horizontal line.

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Exhibit

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SC Court of Appeals

A

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSTEIN
THIRTEENTH JUDICIAL CIRCUIT

Carol Simpson,

2015 FEB 3

PM 12 10 A. NO.: 2013-CP-23-01762

Plaintiff,

v.

Frank A. Landgraff, Carol Sutton, Carol
Sutton & Associates-Investigations, Inc.,

Defendants.

ORDER

Plaintiff brought this action claiming Defendant Frank A. Landgraff hired Defendant Carol Sutton and her private investigative agency to place a video camera in Landgraff's bedroom for the purpose of capturing evidence of her adultery with Landgraff's then-wife. Her complaint alleges causes of action for invasion of privacy, outrage, and civil conspiracy. Defendants now move for summary judgment.

The court has considered all filings made by the parties, even those that may have been untimely. This includes Plaintiff's lengthy affidavit filed in Defendant Landgraff's divorce case. Both sides have presented this affidavit to the court at different stages of this case, and both have indignantly criticized the other for disclosing it, contending it was "sealed" by Family Court order, even though no such order has been presented. The court prefers to resolve this dispute on the entire record.

Defendants claim there is no genuine material factual dispute concerning any of Plaintiff's claims. Construing the record in the light most favorable to Plaintiff, there are factual allegations that Defendants set up a motion-activated video camera in Landgraff's master bedroom for the purpose of recording Plaintiff. Plaintiff had been a frequent houseguest of

HN

Landgraff and believed she had a right to privacy in Landgraff's bedroom. According to Plaintiff, the record also requires the following inference:

Inference—Landgraff attempted to have an affair with Plaintiff. When she refused, he encouraged a friendship with his Wife. He then pushed for a threesome. When that ended, he orchestrated an evening between Plaintiff and his Wife. He set up a camera to record his fantasy. He then attempted to rekindle the threesome. When his efforts ultimately failed, he portrayed himself as the victim and ended his already troubled marriage. He showed no remorse for Plaintiff for using her in his scheme.

See Plaintiff's Memorandum in Opposition to the Defendants' Proposed Order at 20.

While the court is required to draw inferences and ambiguities in Plaintiff's favor at the summary judgment stage, it is not required to indulge a party's selective accounts of events and turn them kaleidoscope-like until some illusory factual dispute faintly appears. Inference need not produce ignorance. While in the above excerpt Plaintiff declares she refused to have an affair with Landgraff, her previous sworn Affidavit to the Family court flatly admits she did.

But that is neither here nor there. Nowhere in the record do we learn what is actually on the videotape, if it still exists, or whether its contents were shared with a third party. The absence of this evidence entitles Defendants to summary judgment. There is not a scintilla of proof that the recordings contain any images of Plaintiff, a condition all of her tort claims hinge upon.¹ For all we know, even if the recordings exist, they may be blank, or contain images that neither depict Plaintiff nor infringe upon her privacy interests.

Even if the court stacks inference upon inference to find that recordings exist and show Plaintiff with Landgraff's then-wife, summary judgment is still proper for another reason.

¹ Specifically, the court finds that due to this lack of evidence there is no proof of a substantial and unreasonable intrusion into Plaintiff's privacy and therefore her invasion of privacy claim fails as a matter of law. Snakenberg v. Hartford Casualty Ins. Co., Inc., 299 S.C. 164, 383 S.E.2d 2 (Cl. App. 1989). Her outrage cause of action claim must be dismissed as well, given there is insufficient proof of extreme and outrageous conduct by Defendants. See Hubbard & Felix, The S.C. Law of Torts at 468-69 (4th ed. 2011) (whether Defendant's conduct is sufficiently extreme and outrageous is initially question of law for court). Finally, there can be no civil conspiracy without proof of special damages or an agreement to injure Plaintiff.

Accepting the slant Plaintiff pushes for, Landgraff was videotaping her while she was in his bedroom having sexual contact with his wife. South Carolina law recognizes "[i]t is a well founded policy of law that no person be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act. This rule applies at both law and in equity and whether the cause of action is in contract or in tort." Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 276, 437 S.E.2d 168 (Ct. App. 1993) (citations omitted). This defense has been known as in pari delicto, which translates as "in cases of equal or mutual fault, the position of the defending party is the better one," Proctor v. Whitlark & Whitlark, Inc., 406 S.C. 225, 228, 750 S.E.2d 93, 94 (Ct. App. 2013) (cert. granted Aug. 22, 2014), although our supreme court long ago appeared to prefer Lord Mansfield's rendering: "The principle of public policy is this. 'Ex dolo malo non oritur actio.' No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act." White v. Commercial & Farmers' Bank, 66 S.C. 491, 45 S.E. 94, 102 (1903); see generally 4 S.C. Jur. Action § 21.

Other states recognize the principle, sometimes calling it the "wrongful conduct" bar, the unlawful acts doctrine, or ex turpi causa. Long part of American law, it is kin to the discredited "outlaw" doctrine that appeared in early English society. See Davis, The Plaintiff's Illegal Act as a Defense in Actions of Tort, 18 Harv. L. Rev. 505 (1905); King, Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law, 43 Wm. & Mary L. Rev. 1011 (2002). It was applied in the famous "Highwayman" case, Everett v. Williams (Ex. 1725), where two robbers sought an accounting. The case did not end well: the solicitors were fined for contempt for bringing it to court, and the robbers were hanged. Still robust, the principle reminds that "the law leaves the

quarreling accomplices where it finds them.” Thomas v. UBS AG, 706 F.3d 846, 857 (7th Cir. 2013) (Posner, J.).

A Plaintiff's wrongful conduct will bar his right to claim damages caused by the conduct. The misconduct must be immoral, criminal or otherwise prohibited. And it must have been at least a concurring cause of the injury. See Restatement (Second) of Torts § 889 (1979) (one injured not barred from recovery merely because at time of injury he was committing a tort or crime).

The wrongful conduct rule has arisen in numerous contexts. It has been used to bar a Plaintiff convicted of possessing child pornography from suing his social worker for failure to effectively treat his sexual addiction, Greenwald v. Van Handel, 311 Conn. 370, 88 A.3d 467 (2014), an action for recovery of injuries from a gunshot wound that occurred when decedent attempted to steal a handgun, Ryan v. Hughes-Ortiz, 959 N.E.2d 1000 (Mass. App. 2012), a claim for injuries due to Oxycontin addiction when the Plaintiff had unlawfully obtained multiple prescriptions, Price v. Purdue Pharma Co., 920 So.2d. 479 (Miss. 2006), a lawsuit by a patient at a substance abuse treatment center against his counselor with whom he had an adulterous affair and used illegal drugs, Correll v. St. John's Hospital-Macomb Center, 2002 WL 226935 (Mich. App. 2002), and a claim by a teenager against a boy who sold him fireworks from which he extracted gunpowder to make a pipe bomb that exploded in his hands, Barker v. Kallash, 63 N.Y.2d 19, 468 N.E.2d 39 (1984).

Cardozo noted that "the principle that no man should profit from his own inequity or take advantage of his own wrong" had "its roots deeply fastened in universal sentiments of justice." Cardozo, The Nature of the Judicial Process at 41 (Yale Univ. Press 1921). In a different context, Justice Brandeis explained the driving rationale:

The court's aid is denied only when [the plaintiff] has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination.

Olmstead v. United States, 277 U.S. 438, 483-484 (1928) (Brandeis, J., dissenting); see also Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 306 (1985) ("The defense is grounded on two premises: first, that courts should not lend their good offices to mediating disputes among wrongdoers; and second, that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality.")(footnotes omitted).

If Defendant Landgraff had stormed into his bedroom and caught Plaintiff and his then-wife in flagrante delicto, no court would countenance Plaintiff later suing him-- the husband and homeowner-- for invasion of privacy, emotional distress and outrage. Or, if Defendant husband had stationed a private investigator in his bedroom or outside its window to collect evidence of his wife's suspected infidelity with Plaintiff, it would be remarkable if Plaintiff as the paramour could then mulct the husband and the private investigator in damages for conspiring to invade her privacy.

Adultery is a criminal offense. S.C. Code § 16-15-60. While this statute is rarely enforced and regularly violated, it still represents our state's express public policy. Consequently, Plaintiff's adulterous conduct bars her claims. Her wrongful conduct is directly connected to her injury, and her claims fundamentally depend on proof of that conduct.

Plaintiff appears to contend she was entrapped by Landgraff, who through a long, lecherous and manipulative scheme made her think his home was a haven when in reality he was building evidence that would be helpful when he sought a divorce. But the wrongful conduct rule is not reserved for puritan Defendants; as Lord Mansfield noted the defense "sounds at all

times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff..." White v. Commercial & Farmers' Bank, 66 S.C. 491, 45 S.E. 94, 102 (1903) (quoting Holman v. Johnson, 98 Eng. Rep. 1120, 1121 (K.B. 1775)); see also Coppel v Hall, 74 U.S. 542, 559 (1868) ("The defence is allowed, not for the sake of the defendant, but of the law itself.").

In this digital age our important privacy interests are especially threatened by recorded images. That the images may, as Plaintiff speculates, persist on some relatively permanent medium does not alter the analysis or the result required by the wrongful conduct bar. Even if the images still exist, there is no evidence any Defendant has disclosed them to non-parties, and if there was such evidence the wrongful conduct rule likely would not apply. If such disclosure ever occurs, other state and federal remedies may be available.

IT IS THEREFORE ORDERED that Defendants are granted summary judgment pursuant to Rule 56, SCRPC because:

1. There is no genuine issue of material fact as to Plaintiff's claims against Defendants, as there is no proof that any images of Plaintiff exist due to Defendants' conduct;
2. Even if there is a scintilla of such evidence, Plaintiff's claims are barred as a matter of law due to the wrongful conduct bar and the in pari delicto doctrine.

IT IS SO ORDERED.

February 3, 2015
Greenville, South Carolina

D. Garrison Hill

D. Garrison Hill
Circuit Judge

Exhibit

B

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE 2015 FEB 27 PM 4 35 THIRTEENTH JUDICIAL CIRCUIT

Carol Simpson,)
Plaintiff,)
)
v.)
)
Frank A. Landgraff, Carol Sutton, Carol)
Sutton & Associates-Investigations, Inc.,)
)
Defendants.)

C.A. NO.: 2013-CP-23-01762

**AMENDED ORDER GRANTING
SUMMARY JUDGMENT TO
DEFENDANT LANDGRAFF**

Plaintiff brought this action claiming Defendant Frank A. Landgraff hired Defendant Carol Sutton and her private investigative agency to place a video camera in Landgraff's bedroom for the purpose of capturing evidence of her adultery with Landgraff's then-wife. Her complaint alleges causes of action for invasion of privacy, outrage, and civil conspiracy. Defendant Landgraff now moves for summary judgment.

The court has considered all filings made by the parties, even those that may have been untimely. This includes Plaintiff's lengthy affidavit filed in Defendant Landgraff's divorce case. Both sides have presented this affidavit to the court at different stages of this case, and both have indignantly criticized the other for disclosing it, contending it was "sealed" by Family Court order, even though no such order has been presented. The court prefers to resolve this dispute on the entire record.

Defendant claims there is no genuine material factual dispute concerning any of Plaintiff's claims. Construing the record in the light most favorable to Plaintiff, there are factual allegations that Defendant set up a motion-activated video camera in Landgraff's master bedroom for the purpose of recording Plaintiff. Plaintiff had been a frequent houseguest of Landgraff and

believed she had a right to privacy in Landgraff's bedroom. According to Plaintiff, the record also requires the following inference:

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While the court is required to draw inferences and ambiguities in Plaintiff's favor at the summary judgment stage, it is not required to indulge a party's selective accounts of events and turn them kaleidoscope-like until some illusory factual dispute faintly appears. Inference need not produce ignorance. While in the above excerpt Plaintiff declares she refused to have an affair with Landgraff, her previous sworn Affidavit to the Family court flatly admits she did.

But that is neither here nor there. Nowhere in the record do we learn precisely what is on the videotape, if it still exists, or whether its contents were shared with a third party outside of the judicial process.¹

Plaintiff argues that a Greenville County Sheriff's Office Incident Report raises an inference that the video contains images of sexual activity between her and Landgraff's then-wife, and references "still shots" that Defendant Sutton provided to investigators. The Incident Report also states that the investigator had "a copy of the digital recording itself," and mentions that a certain sex toy appears in the video.

The Incident Report was generated in the course of investigating Defendants for potential prosecution for voyeurism and, as noted in the Order on Plaintiff's Motion for Reconsideration,

¹ There is evidence Defendant Landgraff submitted a copy of the tape to counsel and the court during the Family Court litigation, and someone gave it to law enforcement.

was not furnished to the court or made part of the record until over two months after the summary judgment hearing, 54 days after the court issued a Form 4 granting Defendant summary judgment, and a month after Defendant had submitted a proposed order noting the lack of any evidence regarding the recording.

Assuming the recordings show Plaintiff with Landgraff's then-wife, summary judgment is still warranted. Accepting the slant Plaintiff pushes for and presuming her credibility, Landgraff was videotaping her while she was in his bedroom having sexual contact with his wife. South Carolina law recognizes "[i]t is a well founded policy of law that no person be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act. This rule applies at both law and in equity and whether the cause of action is in contract or in tort." Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 276, 437 S.E.2d 168 (Ct. App. 1993) (citations omitted). This defense has been known as in pari delicto, which translates as "in cases of equal or mutual fault, the position of the defending party is the better one," Proctor v. Whitlark & Whitlark, Inc., 406 S.C. 225, 228, 750 S.E.2d 93, 94 (Ct. App. 2013) (cert. granted Aug. 22, 2014), although our supreme court long ago appeared to prefer Lord Mansfield's rendering: "The principle of public policy is this. 'Ex dolo malo non oritur actio.' No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act." White v. Commercial & Farmers' Bank, 66 S.C. 491, 45 S.E. 94, 102 (1903); see generally 4 S.C. Jur. Action § 21.

Other states recognize the principle, sometimes calling it the "wrongful conduct" bar, the unlawful acts doctrine, or ex turpi causa. Long part of American law, it is kin to the discredited "outlaw" doctrine that appeared in early English society. See Davis, The Plaintiff's Illegal Act as a Defense in Actions of Tort, 18 Harv. L. Rev. 505 (1905); King, Outlaws and Outlier Doctrines:

The Serious Misconduct Bar in Tort Law, 43 Wm. & Mary L. Rev. 1011 (2002). It was applied in the famous "Highwayman" case, Everett v. Williams (Ex. 1725), where two robbers sought an accounting. The case did not end well: the solicitors were fined for contempt for bringing it to court, and the robbers were hanged. Still robust, the principle reminds that "the law leaves the quarreling accomplices where it finds them." Thomas v. UBS AG, 706 F.3d 846, 857 (7th Cir. 2013) (Posner, J.).

A Plaintiff's wrongful conduct will bar his right to claim damages caused by the conduct. The misconduct must be immoral, criminal or otherwise prohibited. And it must have been at least a concurring cause of the injury. See Restatement (Second) of Torts § 889 (1979) (one injured not barred from recovery merely because at time of injury he was committing a tort or crime).

The wrongful conduct rule has arisen in numerous contexts. It has been used to bar a Plaintiff convicted of possessing child pornography from suing his social worker for failure to effectively treat his sexual addiction, Greenwald v. Van Handel, 311 Conn. 370, 88 A.3d 467 (2014), an action for recovery of injuries from a gunshot wound that occurred when decedent attempted to steal a handgun, Ryan v. Hughes-Ortiz, 959 N.E.2d 1000 (Mass. App. 2012), a claim for injuries due to Oxycontin addiction when the Plaintiff had unlawfully obtained multiple prescriptions, Price v. Purdue Pharma Co., 920 So.2d. 479 (Miss. 2006), a lawsuit by a patient at a substance abuse treatment center against his counselor with whom he had an adulterous affair and used illegal drugs, Correll v. St. John's Hospital-Macomb Center, 2002 WL 226935 (Mich. App. 2002), and a claim by a teenager against a boy who sold him fireworks from which he extracted gunpowder to make a pipe bomb that exploded in his hands, Barker v. Kallash, 63 N.Y.2d 19, 468 N.E.2d 39 (1984).

Cardozo noted that "the principle that no man should profit from his own inequity or take advantage of his own wrong" had "its roots deeply fastened in universal sentiments of justice." Cardozo, The Nature of the Judicial Process at 41 (Yale Univ. Press 1921). In a different context, Justice Brandeis explained the driving rationale:

The court's aid is denied only when [the plaintiff] has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination.

Olmstead v. United States, 277 U.S. 438, 483-484 (1928) (Brandeis, J., dissenting); see also Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 306 (1985) ("The defense is grounded on two premises: first, that courts should not lend their good offices to mediating disputes among wrongdoers; and second, that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality.")(footnotes omitted).

If Defendant Landgraff had stormed into his bedroom and caught Plaintiff and his then-wife in flagrante delicto, no court would countenance Plaintiff later suing him-- the husband and homeowner-- for invasion of privacy, emotional distress and outrage, even if he had a photographic memory. Or, if Defendant husband had stationed a private investigator in his bedroom or outside its window to collect evidence of his wife's suspected infidelity with Plaintiff, it would be remarkable if Plaintiff as the paramour could then mulct the husband and the private investigator in damages for conspiring to invade her privacy.²

² This forms an alternative basis for granting Defendant Landgraff summary judgment. Specifically, the court finds there is no proof of a substantial and unreasonable intrusion into Plaintiff's privacy and therefore her invasion of privacy claim fails as a matter of law. Snakenberg v. Hartford Casualty Ins. Co., Inc., 299 S.C. 164, 383 S.E.2d 2 (Cl. App. 1989). Her outrage cause of action claim must be dismissed as well, given there is insufficient proof of extreme and outrageous conduct by Defendants. See Hubbard & Felix, The S.C. Law of Torts at 468-69 (4th ed. 2011) (whether Defendant's conduct is sufficiently extreme and outrageous is initially question of law for court). Finally, there can be no civil conspiracy without proof of special damages or an agreement to injure Plaintiff.

Adultery is a criminal offense. S.C. Code § 16-15-60. While this statute is rarely enforced and regularly violated, it still represents our state's express public policy. This policy is deafeningly echoed in South Carolina domestic law, which recognizes adultery as a ground for divorce, § 20-3-10(1), and our Constitution. S.C. Const. Art. XVII, § 3. Consequently, Plaintiff's adulterous conduct bars her claims. Her wrongful conduct is directly connected to her injury, and her claims fundamentally depend on proof of that conduct.

Plaintiff appears to contend she was entrapped by Landgraff, who through a long, lecherous and manipulative scheme made her think his home was a haven when in reality he was building evidence that would be helpful when he sought a divorce. But the wrongful conduct rule is not reserved for puritan Defendants; as Lord Mansfield noted the defense "sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff..." White v. Commercial & Farmers' Bank, 66 S.C. 491, 45 S.E. 94, 102 (1903) (quoting Holman v. Johnson, 98 Eng. Rep. 1120, 1121 (K.B. 1775)); see also Coppell v Hall, 74 U.S. 542, 559 (1868) ("The defence is allowed, not for the sake of the defendant, but of the law itself.").

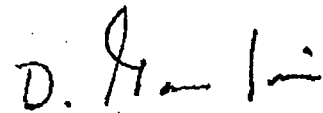
In this digital age our important privacy interests are especially threatened by recorded images. That the images may persist on some relatively permanent medium does not alter the analysis or the result required by the wrongful conduct bar. There is no evidence Defendant has disclosed them to non-parties outside of the judicial process, and if there was such evidence the wrongful conduct rule likely would not apply. If such disclosure ever occurs, other state and federal remedies may be available.

IT IS THEREFORE ORDERED that Defendant Landgraff is granted summary judgment pursuant to Rule 56, SCRPC because:

1. There is no genuine issue of material fact as to Plaintiff's claims against Defendant;
2. Even if there is a scintilla of such evidence, Plaintiff's claims are barred as a matter of law due to the wrongful conduct bar and the in pari delicto doctrine.

IT IS SO ORDERED.

February 27, 2015
Greenville, South Carolina



D. Garrison Hill
Circuit Judge

Exhibit

C

Case Statement
Incident Type: Voyeurism
Case #10-170454

Summary of the Facts

Suspect is married to Wife and had a personal relationship with Victim. Suspect introduced Victim to Wife and encouraged a friendship between them. Suspect then promoted a personal and physical relationship between himself, Wife, and Victim. Suspect became hostile when Suspect and Wife refused to continue a physical relationship with him.

Suspect hired Private Investigator to, in his words, "document the activities of my Wife." Private Investigator documented approximately 185 hours of activity between Victim and Wife with no indication of any improper relationship.

Suspect with cooperation of Private Investigator installed a covert camera in the marital residence. Suspect represented to Private Investigator that he wanted to install the covert camera to document Wife's affair. The camera was motion-activated and focused solely on the bed in the master bedroom.

Private Investigator's notes indicate that the camera was first installed in November. Private Investigator denies that the camera captured any activity of any kind. After this event, Suspect was once solicitous of time with Wife and Victim. All three socialized together and even had Christmas dinner together with their families. Suspect continuously commented on how much he missed physical contact with Wife and Friend. Suspect planned a trip and made clear to Wife that she should plan to spend the night at the house due to construction workers building a house next door. Suspect suggested that Victim stay with Wife while he was gone.

Before leaving town, Suspect and Private Investigator re-installed the covert camera. This time camera filmed Wife and Victim. Suspect did not confront Wife and continued to cohabit and have sexual contact with her. Suspect also attempted to renew a physical relationship between himself, Wife, and Victim.

Two months after having the video, Suspect demanded that Wife leave the marital home. Suspect, nor Wife, filed for divorce. However, Suspect did allege adultery in answer to Wife's action for separate maintenance and support. Thus, Suspect did not use the videotape offensively as he alleged.

Offense of Voyeurism

Section 16-17-470(B) provides a person commits the crime of voyeurism as follows:

A person commits the crime of voyeurism if, for the purpose of arousing or gratifying sexual desire of any person, he or she

knowingly views, photographs, audio records, video records, produces, or creates a digital electronic file, or films another person, without that person's knowledge and consent, while the person is in a place where he or she would have a reasonable expectation of privacy.

Legislative History

Voyeurism and related cases have surged only in recent years with the growth of miniature cameras and other "spyware." Many victims are either unaware that they have been a victim of voyeurism or too embarrassed and/or humiliated to reported the incident. In addition, many prosecutors fail to fully understand the damage to the victim or the importance of deterring such activity. Thus, not much history exists for prosecutions around the country and the learning curve is very steep.

Analysis

At first glance, the actions of Suspect and Private Investigator may not appear to violate the statute. However, a thoughtful analysis shows that Suspect and Private Investigator violated Section B on at least two counts and aggravated the offense by distributed the video to his attorney, opposing counsel, and the court with no necessity of doing so.

Element: "he or she knowingly views, photographs, audio records, video records, produces, or creates a digital electronic file, or films another person"

Suspect signed an affidavit that he was present during and approved the installation of the camera in the master bedroom. Private Investigator signed an affidavit that she and Suspect placed the camera in the master bedroom. Both, not only knew they were, but intended to, videotape or film Wife and Victim.

Suspect and Private Investigator have also signed affidavits describing the contents of videotape. Affiants must have personal knowledge of the information their affidavits contain. In addition, Private Investigator attached still shots made from the videotape as an exhibit to her affidavit. Thus, both have also viewed the video.

Element: "for the purpose of arousing or gratifying sexual desire of any person"

Suspect has stated that he installed the camera to document his Wife's adultery. While this may be one reason for the videotaping, the evidence shows that it is not the only reason. Suspect may have numerous purposes, but, if one of them is for sexual arousal or gratification, He violated the statute.

Suspect placed the camera in such a position that it captured only the bed in the master bedroom. Thus, if it captured anything, it would capture nudity and sexual activity. Neither

nudity, nor sexual activity is necessary to prove adultery in South Carolina, only opportunity and inclination.

As a result, Suspect only needed to capture some show of affection between Wife and Victim to prove adultery. He could have done that by much less invasive means such as placing the camera in the hallway or even other parts of the bedroom. Better yet, he could have merely come home early to witness the behavior himself. Instead, he chose an extreme measure, arguably for his own gratification.

Even with the videotape, the Judge at the Temporary Hearing did not deny alimony to the Wife. He stated that Wife may have a defense of connivance. While the Judge did not mention the defense of condonation, Suspect's sexual conduct and cohabitation with Wife for two months after his knowledge of the videotape arguably constitute condonation. Thus, his actions prior to and after recording the videotape belie his stated purpose of making the videotape to document adultery.

Suspect's own sexual gratification is a more plausible explanation of his making of the videotape. Wife signed an affidavit with the following description of her sexual relationship with Suspect:

Although he is 22 years older than I, Frank has always been very active sexually. He directed our sex life to include new positions and various activities. He encouraged me to buy sex toys and use them on him. While some things seemed a little kinky, he was my husband and I was eager to please him.

Frank also uses pornography extensively. He has a very large library of pornographic videos which he kept in the cabinet in our bedroom. We had cable and satellite television in our house which gave him access to all adult programming. In addition, he had a shelf in his private bathroom for all his adult magazines. When we traveled overseas, he regularly wanted to visit exotic places of adult entertainment.

Virtually every year, he insisted that we visit the Hedonism resorts in Jamaica whose motto is "The Pleasure Seekers Ultimate Super-Inclusive Playground." We stayed in the all nude part of the resort. Frank pushed me to participate in the adult games with total strangers. He also encouraged me to have sexual contact with the other women there, but I refused. Frank participated fully and won the toga contest.

I had never been sexually active with another woman. Frank seemed to have a fantasy about bringing another woman into our marriage. In the past, I tolerated a then-single woman performing oral sex on him at our beach house, but I refused to touch her or

participate in a threesome. On another occasion, another then-single woman, Frank, and I got in our hot tub naked. Frank then suggested that she and I take a shower together. We both refused.

With his sexual history and encouragement of a threesome between himself, Wife, and Victim, Suspect announced another motivation for making the videotape. When they refused to fully participate in his fantasy, he orchestrated events to capture it on videotape – for his own sexual desire.

Element: “without that person's knowledge and consent”

Victim and Wife state that they did not know the camera had been installed and did not consent to the videotaping. Suspect's affidavit refers to the camera as “covert” and never alleges that he had consent to videotape Victim and/or Wife. Wife confirms that she has never given Suspect permission to videotape her in any similar situation or while she was alone with Suspect. In any event, consent can hardly be given without some awareness that the videotaping was occurring.

Element: “while the person is in a place where he or she would have a reasonable expectation of privacy”

Section 16-17-470(D) provides the following definition:

(1) "Place where a person would have a reasonable expectation of privacy" means:

(a) a place where a reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed, filmed, or videotaped by another; or

(b) a place where one would reasonably expect to be safe from hostile intrusion or surveillance.

Victim had been to the Suspect's house on many occasions. She and Wife often went into Wife's dressing room to change clothes. Suspect assured Victim that the area was secluded. The residence has an alarm that chimes if any door is opened. On the evening of the videotaping, Victim and Wife believed Suspect was not at home. No one else was believed to be in the home and no security cameras were in the home. Victim states that she believed that she could disrobe in private without being seen by anyone but Wife and without being videotaped by anyone.

Does Suspect have a right to set up covert camera in his own home?

The statute provides no exception for Suspect to set up a covert camera in his own home, making the question irrelevant to the crime of voyeurism. However, it arose several times in discussion and seemed to be at least initially relevant to some. While no South Carolina case addresses this issue, cases from other jurisdictions find that Suspect had no right to place the covert camera in the master bedroom in his own home.

In a Wisconsin criminal case,¹ a boyfriend was convicted for secretly videotaping his girlfriend, without her consent, while she was nude. The Court stated that

By placing limits of the ability of others to record, the statute protects a person's interest in limiting, as to time, place, and persons, the viewing of his or her nude body.

and

It is one thing to be viewed in the nude by a person at some point in time, but quite another to be recorded in the nude so that a recording exists that can be saved or distributed and viewed at a later time.

In a domestic case in Iowa,² a husband installed a motion-activated camera in the parties master bedroom. It only captured the "comings and goings" of the wife, but the court held that the wife "did not forfeit through marriage her expectation of privacy." In doing so, the Court stated that

... the videotaping of a person without consent or awareness when there is an expectation of privacy goes beyond the rights of a spouse because it may record private matters which could later be exposed to the public eye.

In deciding whether the federal government had a right to videotape suspected terrorists in a federal building, the Court in a Seventh Circuit case³ followed in six other federal circuits observed that

It is true that secretly televising people (or taking still or moving pictures of them) while they are in what they think is a private place is an even greater intrusion on privacy than secretly recording their conversations.

¹ *State of Wisconsin v. Jahnke*, 762 N.W.2d 696, 699 (Wis. App. 2008), review denied, 765 N.W.2d 578 (Wis. 2009)

² *In re the Marriage of Tigges*, 758 N.W.2d 824, 828 (Iowa 2008)

³ *United States v. Torres*, 751 F.2d 875, 878 (7th Cir. 1984)

A 2010 Minnesota case,⁴⁴ a husband videotaped his wife, without her knowledge while she was undressed in their shared residential bathroom. The court used the wiretapping prohibition in observing that

If marriage does not erase a spouse's reasonable expectation of privacy in his or her phone calls, it surely cannot erase his or her reasonable expectation of privacy from being videotaped while undressed without his or her knowledge or consent.

Wife has a reasonable expectation of privacy that prohibits Suspect from covertly videotaping her in their master bedroom even though she sacrifices some right to privacy by sharing that bedroom with him. As a third party, Victim has even more of an expectation.

Culpability of Private Investigator

Private Investigator is also culpable. She knowingly video recorded and filmed Victim and Wife, without their knowledge and consent, while they were in a place where they had a reasonable expectation of privacy. She did not have to do this for her own gratification – only for the “sexual desire of any person.” Thus, the sexual desire of Suspect fulfills this final element of the crime.

Private Investigator is a licensed professional who advertises that she has more than 20 years experience. She is charged with knowing the law. By participating in installing and focusing the camera directly on the bed, she also knew that, if it captured anything, it would capture nudity and sexual activity.

Private Investigator also knows that she only needed to capture affection to provide evidence of adultery. Knowing that she would only capture nudity and sexual activity, she should have known that one purpose could have been sexual arousal or gratification. Thus, she violated the statute in her own right and as a co-conspirator with Suspect.

Aggravated Voyeurism

Section 16-17-470(C) provides a person commits the crime of aggravated voyeurism as follows:

A person commits the crime of aggravated voyeurism if he or she knowingly sells or distributes any photograph, audio recording, video recording, digital electronic file, or film of another person taken or made in violation of this section. A person who violates the provisions of this subsection is guilty of a felony and, upon conviction, must be fined not less than five hundred dollars or more than five thousand dollars or imprisoned not more than ten years, or both.

⁴⁴ *State of Minnesota v. Perez*, 779 N.W.2d 105, 110 (Minn. App. 2010)

Without further investigation, it is unknown to whom Suspect or Private Investigator has distributed the videotape. However, at a minimum, Suspect and/or Private Investigator has given a copy to Suspect's attorneys, Wife's attorneys, and the Family Court.

Due to the defenses of connivance and condonation and the excessive nature of this evidence, courts could find that no legitimate reason existed to give the videotape of the Wife to the attorneys or the Court. Suspect had no right to videotape Victim to further his domestic case. Barring such a ruling, evidence gathered from Suspect and Private Investigator may document other distribution.

Sources of Additional Evidence

Wife stated that Suspect has a large library of pornographic videos and adult magazines. Records of his visits to the Hedonism resort should be available. He reportedly acquired a laptop computer which may contain evidence of his viewing of the videotape and/or pornography. The viewing of the videotape is also voyeurism and viewing of pornography confirms his prurient interest in the videotape.

Information in Private Investigator's files may give more evidence of the purpose of making the videotape. The files should also contain information regarding distribution. At the very least, they should contain complete information regarding the videotaping. For instance, Private Investigator responded to a subpoena by alleging that nothing was recorded during the first installation of the covert camera. In addition, the files should explain the irregular gaps in a videotape made by a motion-activated device that was recording continuous activity. Of course, once indicted, Private Investigator may agree to testify against Suspect, compounding the evidence against him.

Conclusion

Based on the above analysis, warrants should issue for Suspect and Private Investigator for two counts of aggravated voyeurism.

SECTION 16-17-470. Eavesdropping, peeping, voyeurism.

(A) It is unlawful for a person to be an eavesdropper or a peeping tom on or about the premises of another or to go upon the premises of another for the purpose of becoming an eavesdropper or a peeping tom. The term "peeping tom", as used in this section, is defined as a person who peeps through windows, doors, or other like places, on or about the premises of another, for the purpose of spying upon or invading the privacy of the persons spied upon and any other conduct of a similar nature, that tends to invade the privacy of others. The term " peeping tom" also includes any person who employs the use of video or audio equipment for the purposes set forth in this section. A person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned not more than three years, or both.

(B) A person commits the crime of voyeurism if, for the purpose of arousing or gratifying sexual desire of any person, he or she knowingly views, photographs, audio records, video records, produces, or creates a digital electronic file, or films another person, without that person's knowledge and consent, while the person is in a place where he or she would have a reasonable expectation of privacy. A person who violates the provisions of this subsection:

(1) for a first offense, is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned not more than three years, or both; or

(2) for a second or subsequent offense, is guilty of a felony and, upon conviction, must be fined not less than five hundred dollars or more than five thousand dollars or imprisoned not more than five years, or both.

(C) A person commits the crime of aggravated voyeurism if he or she knowingly sells or distributes any photograph, audio recording, video recording, digital electronic file, or film of another person taken or made in violation of this section. A person who violates the provisions of this subsection is guilty of a felony and, upon conviction, must be fined not less than five hundred dollars or more than five thousand dollars or imprisoned not more than ten years, or both.

(D) As used in this section:

(1) "Place where a person would have a reasonable expectation of privacy" means:

(a) a place where a reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed, filmed, or videotaped by another; or

(b) a place where one would reasonably expect to be safe from hostile intrusion or surveillance.

(2) "Surveillance" means secret observation of the activities of another person for the purpose of spying upon and invading the privacy of the person.

(3) "View" means the intentional looking upon of another person for more than a brief period of time, in other than a casual or cursory manner, with the unaided eye or with a device designed or intended to improve visual acuity.

(E) The provisions of subsection (A) do not apply to:

(1) viewing, photographing, videotaping, or filming by personnel of the Department of Corrections or of a county, municipal, or local jail or detention center or correctional facility for security purposes or during investigation of alleged misconduct by a person in the custody of the Department of Corrections or a county, municipal, or local jail or detention center or correctional facility;

(2) security surveillance for the purposes of decreasing or prosecuting theft, shoplifting, or other security surveillance measures in bona fide business establishments;

(3) any official law enforcement activities conducted pursuant to Section 16-17-480;

(4) private detectives and investigators conducting surveillance in the ordinary course of business; or

(5) any bona fide news gathering activities.

(F) In addition to any other punishment prescribed by this section or other provision of law, a person procuring photographs, audio recordings, video recordings, digital electronic files, or films in violation of this section shall immediately forfeit all items. These items must be destroyed when no longer required for evidentiary purposes.

Exhibit

D

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

2015 FEB 27 PM 4 34

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Carol Simpson,)

Plaintiff,)

v.)

Frank A. Landgraff, Carol Sutton, Carol
Sutton & Associates-Investigations, Inc.,)

Defendants.)

IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT

C.A. NO.: 2013-CP-23-01762

**ORDER GRANTING PLAINTIFF'S
MOTION TO RECONSIDER IN PART
AND DENYING IT IN PART AND
DENYING PLAINTIFF'S MOTIONS TO
STRIKE**

I. Motion to Reconsider

Plaintiff is correct that summary judgment should have been limited to Defendant Landgraff, and the Court has issued an Amended Order rectifying this mistake. The remainder of the Motion is denied, and several issues Plaintiff raises are discussed below.

(a) Inadequate time for discovery

Plaintiff claims summary judgment should not have been granted because she has not had a "full and fair opportunity" to complete discovery. Defendant's Motion for Summary Judgment was heard on November 7, 2014. Plaintiff contends summary judgment was premature because Defendants had not answered the 6 sets of discovery she had served upon them.

The chronology of this litigation is revealing. On December 5, 2014, the court notified all counsel by Form 4 that it was granting summary judgment to Defendant. Defendant, as requested, submitted a proposed order. On December 22, 2014, Plaintiff's counsel filed a "Memorandum in Opposition" to the proposed order, which presented for the first time various answers to Defendant's discovery. The clear purpose of the filing was to introduce new matter to avoid summary judgment.

Then, on January 27, 2015, Plaintiff filed some of her 6 discovery requests mentioned above with the Clerk of Court. These requests had the perfect alibi for being previously absent from the record: they did not exist before January 26, 2015, the date Mr. Mayer certified he served them on defense counsel. Also on January 27, 2015, Plaintiff filed her Response to Defendant Sutton's First Request for Production, which contained two documents also making their debut in the record: a copy of an Incident Report and what is evidently a portion of the Solicitor's internal Prosecution Memo.¹

On February 3, 2015 the court filed its summary judgment order. On February 12, 2015, Plaintiff filed her Motion to Reconsider, alluding to the "outstanding discovery" it had pending against Defendant. The Motion did not explain that the discovery was outstanding because (1) it had just been served and the answers were not yet due, and (2) the discovery was propounded well after the court's December 2014 Form 4 had granted Defendant summary judgment, which by any reasonable measure would close discovery.

Plaintiff even implied that her discovery requests had been outstanding since July 2014. The amazing (and alarming) nature of Plaintiff's argument can be best seen from the following excerpt from her Motion to Reconsider:

Plaintiff responded to Landgraff's discovery. She then filed a Motion to Strike and Summary Judgment Motion. With a Form 4 Order, the Court denied Plaintiff's Motion for Summary Judgment on July 1, 2014 based on Defendant Landgraff's 56(f) affidavit. After the holiday, Landgraff filed his Answer to the Amended Complaint. Sutton did not file an Answer until after the hearing on Landgraff's motion.

Plaintiff re-filed her Motion to Strike to narrow the issues so she could begin discovery. The Court heard that motion on the same day as this Motion for Summary Judgment. The following discovery had been served on Defendants, but remain unanswered.

¹ It is important to note that these documents were filed in the Clerk's Office, and Plaintiff's counsel did not send copies to the judge. Nor did the court ever see them before reviewing the file upon receipt of this Motion to Reconsider.

1. Request for Entry Upon Land for Inspection and Other Purposes;
2. Plaintiff's First Requests for Production to Defendant Frank A. Landgraff;
3. Plaintiff's First Set of Interrogatories to Defendant Frank A. Landgraff;
4. Plaintiff's First Set of Interrogatories to Defendant Carol Sutton and Carol Sutton & Associates—Investigations, Inc.;
5. Plaintiff's First Requests for Admissions to Defendant Carol Sutton and Carol Sutton & Associates—Investigations, Inc.; and
6. Plaintiff's First Requests for Production to Defendant Carol Sutton and Carol Sutton & Associates—Investigations, Inc.

In short, the Court ruled pursuant to Landgraff's 56(f) affidavit that summary judgment was premature. Since that time, Defendants have not answered Plaintiff's discovery and no depositions have been taken.

Motion at 23-24. This is egregiously misleading. As noted above we know from Mr. Mayer's own sworn certificate of service that these discovery requests did not exist before January 27, 2015, yet Plaintiff is now claiming that Defendants have not answered the discovery since July 2014.

While this is troubling enough, it tracks the disturbing pattern of Plaintiff's counsel's questionable filings in this matter. Indeed, the case commenced with Mr. Mayer filing his own affidavit as the sole support for an ex parte temporary restraining order, an anomaly this court addressed in its May 17, 2013 Order. See Order Denying Plaintiff's Motion for Temporary Restraining Order.

This case has been pending two years. If there is any immutable truth, it is that lawyers have known that for decades cases on the Common Pleas docket of this circuit are subject to being called for trial within 12-18 months of filing, as Rule 40, SCRCP provides. In this particular case, Plaintiff's window to pursue discovery from March 2013 to November 7, 2014 was limitless. Middleborough Horiz. Property Regime Council of Co-Owners v. Montedison S.p.A., 320 S.C. 470, 479-80, 465 S.E.2d 765, 771 (Ct. App. 1995) (four months a "full and fair opportunity" to conduct discovery).

Plaintiff claims she was awaiting disposition of her Motion to Strike before embarking on discovery. Rarely granted, Motions to Strike are notorious time-wasters, Cobell v. Norton, 2003 WL 721477, 1 (D.D.C. 2003) (citing 5A Wright & Miller, Federal Practice and Procedure § 1382), viewed with disfavor because they squander resources by "requiring judges to engage in busy work and judicial editing without addressing the merits of a party's claim," U.S. Bank Nat'l Ass'n v. Alliant Energy Res., Inc., 2009 WL 1850813, at *3 (W.D. Wis. 2009). They are designed to remove "redundant, immaterial, impertinent or scandalous matter" or insufficient defenses from a pleading. Rule 12(f), SCRCF. Delaying discovery for over a year until a motion to strike defenses is resolved is a novel strategy for a plaintiff, and not a reasonable ground for a court to forestall ruling on a defendant's motion for summary judgment on a plaintiff's claims.

Finally, it is curious why Plaintiff now believes she needs further time for discovery when she moved for partial summary judgment in November 2013, an action that necessarily meant she had a good faith belief that there were no genuine issues of material fact. See Rules 11 and 56, SCRCF.

(b) Plaintiff's claim that the court overlooked evidence

Plaintiff contends the court "missed the evidence and inferences that the recordings contain images of Plaintiff." Motion for Reconsideration at 7. The Motion also deems several portions of the court's order as "false," including the finding that there was no "proof that the recordings contain any images of Plaintiff." Order at 2. Plaintiff states "[t]he Court has obviously missed the copious proof in the record showing that this statement is false. The most conclusive is found in the Greenville County Sheriff's Incident Report..." Motion at 7.

Plaintiff is correct that the court missed the Incident Report. This oversight may have been caused by the fundamental law of time: the Incident Report had never been mentioned or referred to, much less made a part of the record, in this litigation before January 27, 2015, some 54 days after the court had announced its intent to grant Defendant summary judgment, and over a month after Defendant had submitted a proposed order highlighting Plaintiff's failure to produce evidence concerning the existence or contents of the videotape. Nevertheless, the court has considered the Incident Report as discussed in the amended summary judgment order.

The conduct of Plaintiff's counsel in filing documents for the purpose of distorting the record may be most charitably described as reckless. The drafters of the rules of civil procedure, knowing nothing is ever new under the sun, anticipated that misguided counsel may attempt to abuse the summary judgment process, which is why Rule 56(g) sanctions filing affidavits in bad faith or for delay and mentions contempt. It is regrettable that the court must expend the energy to expose such tactics for what they are: attempts to manipulate the record and the judicial process, which the court may later deal with pursuant to its inherent power.

II. Plaintiff's Motion to Strike Certain Defenses of Sutton

The motion to strike is denied. In determining whether the defenses are sufficient, the court may not venture beyond the pleading. The motion must be denied where, as here, the defenses when viewed in the light most favorable to Defendant would entitle Defendant to relief on any theory of the case. Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 567, 703 S.E.2d 197 (2010). As alleged, Sutton's defenses state valid legal principles; whether they are likely to succeed is not an inquiry permitted by Rule 12(f). Motions to Strike are to be dealt with by dispatch and "should be denied unless the challenged allegations have no possible

relation or logical connection to the subject matter of the controversy and may cause some form of significant prejudice to one or more of the parties to the action... Modern litigation is too protracted and expensive for the litigants and the court to expend time and effort pruning or polishing the pleadings." 5A Wright & Miller, Federal Practice and Procedure § 1382.

IT IS SO ORDERED.

February 27, 2015
Greenville, South Carolina



D. Garrison Hill
Circuit Judge

Exhibit

E

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2013-CP-23-01762

Carol Simpson,)
)
Plaintiff,)

vs.)

Frank A. Landgraff, Carol Sutton,)
)
Carol Sutton & Associates-)
Investigations, Inc.,)
)
Defendants.)

MOTION TO COMPEL

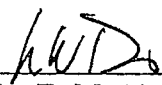
TO: PLAINTIFF, THROUGH COUNSEL OF RECORD WILLIAM G. MAYER

Pursuant to Rule 37, SCRCP, Defendant Frank A. Landgraff ("Landgraff") moves the Court for an Order compelling Plaintiff Carol Simpson ("Simpson") to respond fully to certain discovery requests propounded upon them on May 8, 2014. Simpson's responses to those requests were deficient as follows:

- (1) Simpson asserted various privileges and protections against responding to certain discovery requests but supplied no privilege log as required by Rule 26(b)(5), SCRCP;
- (2) Simpson interposed improper objections or failed to fully respond to Requests for Production Nos. 5, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 31, 33, 37, 39, 41.
- (3) Simpson interposed improper objections or failed to fully respond to Requests for Admission Nos. 1, 4, 12, 15.
- (4) Simpson interposed improper objections or failed to fully respond to Interrogatory Nos. 3, 6, 9, 10, 11, 12, 14, 15, 17, 18, 19.

Copies of the discovery requests served on Simpson are attached as Exhibit 1. Copies of Simpson's responses are attached as Exhibit 2. Accordingly, Landgraff asks the Court to issue an Order compelling Simpson to supply complete discovery responses to the aforementioned requests.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Timothy E. Madden, SC Bar No. 11786
E-Mail Address: tim.madden@nelsonmullins.com
Lane W. Davis, SC Bar No. 68796
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104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Attorneys for Frank A. Landgraff

August 28, 2014

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Frank A. Landgraff, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same via first-class U.S. mail to the following address(es):

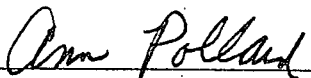
Pleadings:

Motion to Compel

Counsel Served:

William G. Mayer
118 West Main Street
Laurens, SC 29360

Joe Mooneyham
Mooneyham, Berry & Pope, LLC
1225 South Church Street
Greenville, SC 29605

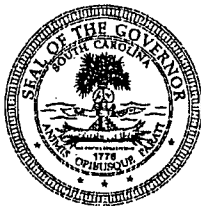


Ann Pollard
Administrative Assistant

Aug. 28, 2014

Exhibit

F



State of South Carolina
Office of the Governor

NIKKI R. HALEY
GOVERNOR

OFFICE OF EXECUTIVE
POLICY AND PROGRAMS

May 23, 2012

Ms. Carol Anne Simpson
47 Greenland Drive
Suite A
Greenville, SC 29615

RE: Claim #: C2012-092381
Carol Simpson

Dear Ms. Simpson:

The State Office of Victim Assistance (SOVA) has deemed that your claim meets the eligibility standards pursuant to South Carolina Laws governing the Crime Victim's Compensation Fund.

This is neither a notice of award or a payment letter. Before your claim can be processed for consideration, some important information regarding payment is listed below:

- The treatment/service must be directly related to the crime related injury or incident.
- SOVA is the payer of last resort; therefore, all potential collateral sources such as restitution/subrogation recovery issues, and medical health insurance (public or private), will be addressed prior to reviewing your claim for payment consideration.
- Documents from your health insurance company (EOB - Explanation of Benefits) will be required, if applicable.
- The following are a list of some processable documents that will be accepted when considering payment: Medical Claim Forms, Invoices and Itemized Detailed Bills. These documents can be obtained from your doctor, dentist, counselor, hospital or funeral home.
- For lost wages, information from your Employer and your treating Physician will be required.

Pursuant to Section 16-3-1170(4) of the South Carolina Code of Laws, the claimant or award recipient must fully cooperate with all law enforcement agencies and with SOVA. In order for us to continue to provide financial assistance, the compensation fund must be replenished through the process of restitution recovery; therefore, it is important for you to attend your court proceedings and request restitution. It is also very important for you to inform the courts that you have been approved for SOVA services and that restitution should be ordered to SOVA. Please know that the recovery of restitution makes the offender pay for their crimes and it also assists in securing funding for future victims.

Should you have any questions regarding your claim, please contact our office at 1-800-220-5370 or locally at (803)734-1900. Please provide your claim number when calling, sending letters or documents.

Sincerely,


Genita L. Snipes
Eligibility Services Manager

VICTIMS' COMPENSATION • VICTIM/WITNESS ASSISTANCE • TRAINING • INFORMATION • REFERRALS

STATE OFFICE OF VICTIM ASSISTANCE
1205 PENDLETON STREET, EDGAR A. BROWN BUILDING, ROOM 401
COLUMBIA, SC 29201 (803) 734-1900
WWW.SOVA.SC.GOV

Exhibit

G

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Lynn W Mulligan,)

Plaintiff.)

v.)

Frank A. Landgraff)

Defendant.)

IN THE FAMILY COURT FOR THE
THIRTEENTH JUDICIAL CIRCUIT

C.A. No. 2010-DR-23-1359

AFFIDAVIT OF LYNN W MULLIGAN

BEFORE ME, an Officer authorized to administer oaths in the State of South Carolina, personally appeared LYNN W MULLIGAN, who being first duly sworn, deposes and says the following is true and correct based on her personal knowledge.

Frank Landgraff and I have been in a relationship for almost 20 years – the last 13 as husband and wife. I promised Frank that I would never leave him. About 5 months ago, Frank handed me a letter telling me to get out of his house in 6 days with just my clothes. He also said that if I continued to do my “job” in the family business that he would continue to pay my salary.

Frank and I dated for about a year before we began living together. In 1995, moved into the new home we built together and got married in Las Vegas, NV in 1996. Until two years ago, we were happy together – running the family business, entertaining in our home, socializing with friends, and traveling extensively overseas.

Frank is the majority owner of one of our companies that now owns two McDonald’s restaurants. In 2001, the company owned 8 restaurants, but McDonald’s “encouraged” Frank to sell 6 of them due to differences of opinion regarding how they should be managed. I am the majority owner of another company that owns one McDonald’s restaurant. In addition, I am an equal partner with a third party in two corporations that own Mutt’s restaurants and real estate.

Our marital problems started in 2008 when two things happened -- Frank pushed me to get approved as an owner/operator with McDonald’s and Frank got unexplainably ill.

At the time, I was managing our two restaurants and enjoying my life with Frank. When we met, I was just a crew person in one of his stores. Over time, I became a shift manager then a store manager and began running the day-to-day operations in 2001. For our entire relationship and even now, I put on a McDonald’s uniform almost every day and go to work in the stores.

Becoming an owner/operator is the highest level in McDonald’s. I had to go through rigorous education and training to ensure that I could handle every aspect of a McDonald’s

franchise. Once approved by McDonald's as an operator, I was approved as a partial owner of our two stores.

Shortly thereafter, we learned that McDonald's was going to build a new store in Taylors. Frank encouraged me to pitch for the store. I put together a comprehensive presentation of my plans to build, finance, staff, and manage the store. McDonald's granted me the franchise and we started building in 2008. I spent every day supervising all aspects of the store opening, including construction of the building, designing the interior with equipment and furniture, hiring the staff, and preparing for the grand opening in October 2008.

My becoming an owner/operator fundamentally changed our relationship. I was young and insecure when I married Frank. I was content to literally stand behind Frank and allow him to dictate all we did. He decided everything and I was perfectly happy to let him. I became more confident during our marriage, but believed that Frank's total control of our finances and time was normal. I trusted him completely and had no reason to believe he wasn't looking out for my best interest.

As I became a more confident as a businesswoman and matured as a woman, I started making some decisions for myself. The more I showed any sign of independence the unhappier Frank became. Even little decisions like what I ordered for dinner became points of contention. I was no longer willing to be totally controlled and Frank was not willing to give up control.

This impasse was alleviated by Frank's unexplained illness. For some reason, Frank lost a lot of weight. Having been Chairman of the Board of the Greenville Hospital System, he had access to the best of medical care. Even so, our main focus over the next months was his health. After a battery of tests, there seemed to be no medical reason for his weight loss and over time he began to feel good again.

While his illness slowed our struggle over control, it took a toll on our sex life. For the 16 months prior to June 2009, Frank showed no interest in touching me sexually. This was a huge change for us.

Although he is 22 years older than I, Frank has always been very active sexually. He directed our sex life to include new positions and various activities. He encouraged me to buy sex toys and use them on him. While some things seemed a little kinky, he was my husband and I was eager to please him.

Frank also uses pornography extensively. He has a very large library of pornographic videos which he kept in the cabinet in our bedroom. We had cable and satellite television in our house which gave him access to all adult programming. In addition, he had a shelf in his private bathroom for all his adult magazines. When we traveled overseas, he regularly wanted to visit exotic places of adult entertainment.

Virtually every year, he insisted that we visit the Hedonism resorts in Jamaica whose motto is "The Pleasure Seekers Ultimate Super-Inclusive Playground." We stayed in the all nude part of the resort. Frank pushed me to participate in the adult games with total strangers.

He also encouraged me to have sexual contact with the other women there, but I refused. Frank participated fully and won the toga contest. See the picture attached as Exhibit A.

I had never been sexually active with another woman. Frank seemed to have a fantasy about bringing another woman into our marriage. In the past, I tolerated a then-single woman named Nancy Sedlarz performing oral sex on him at our beach house, but I refused to touch her or participate in a threesome. On another occasion, another then-single woman, Frank, and I got in our hot tub naked. Frank then suggested that she and I take a shower together. We both refused.

In December 2008, Frank introduced me to a single, female acquaintance of his named Carol Simpson. Over the next several months, we talked to Carol at the Commerce Club. Frank seemed enchanted with her. I already knew he was intent on bringing someone else into our relationship. Even so, I did not pay much attention to Carol.

In May 2009, Frank strongly encouraged me to spend time with Carol. Then, the first weekend in June, he suggested that I take her to our beach house while he was at a football fantasy camp in Pennsylvania. Carol and I went to the beach. We had a great time and learned that we had the same values of being healthy, working hard, and taking care of our families. We started a walking routine that then that continues to be a big part of my life.

When Frank returned from Pittsburgh, he invited Carol to dinner. She met us at our house and we all went to dinner. When we returned home, Frank suggested that we all get in the hot tub nude. I was hesitant because I really liked Carol and thought she could be just my friend. In fact, I had asked Frank not to ask her to get in the hot tub. Carol was very hesitant, too. Frank assured her that our hot tub was completely private and no one would see us. She agreed. After the hot tub, we sat and talked.

Several days later on June 10th, Frank and I went to Italy. The trip was pleasant, but we talked about Carol every day. I texted her, but Frank insisted that I call her. When we came home, Carol came to our house for dinner.

Once again, Frank insisted that we get in the hot tub. We all laughed and talked. Frank and I left for a family reunion over the July 4th weekend and Carol went to see friends in Washington, DC. On July 8th, I threw a party for Frank at a local restaurant. Carol rode to the party with us and returned to our house. Frank suggested we get in the hot tub, but this time, he also suggested that we all give each other massages.

On July 9th, Frank finally got his wish of me being with him and another woman. We invited Carol over and Frank suggested we do the hot tub. Afterwards, he again suggested that we give each other massages. That evening began four days of Frank having two women, something he had wanted for a long time and I had always been hesitant to give him.

Carol got caught up in our problems. She was having some serious problems of her own, but Frank and I promised her we would be there for her. She and I were becoming friends and Frank seemed happy to have us both with him.

Frank did not realize that my brother and I had some serious conversations over the July 4th holiday. My brother had encouraged me to make some friends my own age or warned me that I would be alone if Frank died first. Carol happened to come along at that time. In addition, Frank seemed to want Carol in our life. I thought I had the best of both worlds. I did not realize that Frank was thinking the same thing.

Frank and I began having more and more problems. I told him I felt smothered. I told him that I felt like a baby bird that he was holding tightly in his hands. The more I wanted to fly the more he squeezed his hands. I begged him to go to counseling with me. When he refused, I told him that I would do what I needed to do to make myself whole. I also told him that no matter what, I would never leave him so he would have to divorce me to get rid of me.

The next six months were different parties and situations at different times, but all come down to the same thing. I wanted to be the person I am and Frank wanted me to be the person he wanted me to be. The more I tried to be me, the more he tried to control me and make me be who he wanted me to be.

By his own admission, Frank started to lay the groundwork for this divorce in October 2009. Before then, I had not worried about money for the 20 years we have been together. However, Frank decided that we would both draw \$65,000 each year from the family business for spending money. He continued to pay all our living expenses and other bills. While we were theoretically equal, Frank had his retirement and social security.

In addition, Frank controls all the business checking accounts. I am the majority owner and sole managing partner of Franko, LLC. On the advice of my first attorney, I went to the Bank of Travelers Rest to ensure that I could sign checks. The bank refused to add my name to the checking account and froze a credit line when it discovered that Frank has fraudulently signed to open the account by representing himself as the managing partner. See Exhibit B attached.

Frank's lawyer accused me of trying to withdraw money from the credit line. I didn't even know that the company had a credit line. However, since then I have learned that last year Frank borrowed money on the line and also withdrew money from the company for personal reasons. According to the accountant he withdrew \$15,665 for part of the more than \$400,000 he spent on renovations at the beach house. Also, he withdrew \$15,531 to pay part of the \$78,000 it paid to have a 500 square foot closet added to our house for his clothes. Since he started moving funds in preparation the separation, he drew another \$84,000 off the line. See Exhibit C.

Frank also started laying the groundwork for his accusations of adultery. He asked me every day whether Carol was coming over. For the most part, he would be very nice to Carol, but hateful to me when she wasn't around. He said I treated him the same way. In a strange way, I think we were both using Carol to keep things somewhat civil between us.

I was in the marriage for the long run and welcomed Carol's friendship. For part of October and virtually all of November, he refused to get in the hot tub with us. Carol and I were

on a vigorous exercise routine that included walking 5 miles a day, lifting weights with a personal trainer, and abdominal exercises with a video. So, a 15-minute stint in the hot tub was a welcome end to most days.

At the same time, Frank was making hateful remarks about me always being with Carol. He told all our friends that we were always together. Much later, I learned that he was asking them to watch us to see if they thought we were having an affair. I guess we played right into his hands, because we started to meet early in the morning at Carol's house to exercise or walk. We tried to meet the personal trainer in the middle of the day. As a result, I could be home with Frank alone at night. Then, Frank kept asking where Carol was.

Carol liked to cook so she and I started cooking for Frank. Then, we started cooking for our friends. After Thanksgiving, Frank was being nice again. He seemed to want Carol around all the time, but he was also being nice to me. He and Carol helped me put up our 13-foot Christmas tree in the living room and the smaller one in our bedroom. We went to dinner, movies, and parties together. He invited Carol to the McDonald's Gala, to the Ronald McDonald House Christmas party, and to Christmas Dinner with our family (and her father) at the Poinsett Hotel.

Frank also started getting in the hot tub again in mid-December. He even asked for massages. For several nights, he insisted that Carol come over after we had returned home from Christmas drop-ins. However, he stopped again when Carol and I both told him we were not interested in a sexual threesome. He said being around us was "like being in a candy store and not being able to eat the candy."

On February 7, 2010, Frank and I hosted our annual Super Bowl party. We had over 100 people at the house. We also had out-of-town guests. Carol and I cooked and set up for the party. Frank seemed to be happy entertaining.

Things were still strained, but I had hopes that Frank and I could work through our issues or at the very least learn to co-exist. I repeatedly told him that he would have to divorce me. I thought by removing divorce as an option, we would eventually focus on our problems. Little did I know what Frank had already planned.

Four days after the party, on February 11, 2010, Carol had a trial in federal court while her mother was having major surgery. I came home after spending 11 hours in the hospital with her mother. Frank greeted me with a letter from his lawyer that said I had to leave our house in 6 days. I asked Frank where I was supposed to live and what furniture I was to use. He told me to move in with my parents who live in a one-bedroom apartment on Bob Jones property. Bottom line, leave in 6 days with just my clothes.

That night, I went online and found an apartment. The next morning, I rented the apartment, but had to go to our Cannon Drive McDonald's to meet Bob Kitterman, our McDonald's representative for an operations review. Frank was at the store talking to Bob when I arrived. After they finished talking, Frank left me alone to handle the operations review with Bob.

Bob told me that Frank had told him that we were separated. A short time later, we had a meeting with the other owner/operators in our region. Several people there told me that Frank told them about the separation. Not surprisingly, word of our separation made its way up the corporate chain.

While I was at the store, a friend rented truck. In one of the worse snow storms Greenville has seen in years, I started moving. My sister and brother-in-law drove up from Florida and arrived at 3:30 am. We got up the next morning and went back to the house. My brother-in-law took a video of the entire house to show the condition I left it in. We then went to my apartment to unload the truck.

I had no furniture or furnishings. I used the same credit cards I used for years to buy furniture, dishes, sheets, towels, lamps, pots and pans, etc. On Sunday evening, I was unpacking boxes while Frank was at a Valentine's Day party telling more people that I left him.

On Monday, I got a return call from the attorney I had called on Friday morning. I made an appointment for Thursday and began collecting information. This is where the real nightmare began.

Frank continued to tell friends and business associates that I had left him for a woman. Within days, I got calls from McDonald's people from Atlanta to Raleigh telling me they heard about our separation and my affair. Frank told his sons and former wife. He told our friends and acquaintances. I was even approached in a local store with a barrage of questions from a casual acquaintance.

I soon learned that our business holdings, specifically relating to the Mutt's companies, violate the Franchise Agreement that we have with McDonald's. So did McDonald's. Jeff Wilfong, our regional representative requested a meeting with Frank and me. He informed us that their routine investigation initiated upon their learning about our separation had revealed what appeared to be a violation of our Franchise Agreement.

Frank responded by saying that he only had an investment interest in the Mutt's companies and that the companies were in my name. After that meeting, Jeff requested additional information which I provided within the requested 7 days. Frank delayed his response for three weeks or more. The correspondence attached as Exhibit D tell the entire story.

Frank tried to take my interest in the Mutt's companies. He had the co-owner call me and ask me to sign over my interest the company to Frank. Despite this, at a follow up meeting, Frank told Jeff that he had no interest at all in the Mutt's companies.

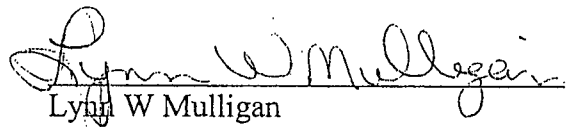
Based on their investigation, McDonald's found us in violation of the Franchise Agreement for owning Mutt's. Based on the violation, McDonald's denying the rewrite to the Cannon Drive store. In addition, they made Frank and I both ineligible for growth and rewrite until we divest ourselves of Mutt's.

McDonald's and I now know the extent of my ownership of Mutt's. While I am ineligible for growth and rewrite with McDonald's, Jeff and Marty both know that I may have to look to the Mutt's companies for income. I was forced to explain to them that Frank has refused to increase my draw from our companies and refused to pay my attorney's fees. Thus, I may have to draw funds from the Mutt's companies simply to pay my day-to-day expenses and attorney's fees.

Frank has been moving and hiding money. He moved a large sum of money out of one bank account into a newly created account that only he controls. He closed our joint checking account. See Exhibit E attached. He forged my name to a document at Merrill Lynch to remove my name from one of our joint accounts. See Exhibit F attached. He also signed our tax returns and kept all the refunds.

Frank brought Carol into our lives and into our home. He is now lying to garner sympathy and create the impression of the wronged party. After all that, he couldn't even wait until after our first court date before committing adultery yet again with a woman named Janet Cancilla.

FURTHER AFFIANT SAYETH NOT.


Lynn W Mulligan

Sworn to before me this 4th day of
August, 2010.


Notary Public for South Carolina

My Commission Expires: June 21, 2017



Exhibit

H

STATE OF SOUTH CAROLINA FILED-CLERK OF THE COURT OF COMMON PLEAS
GREENVILLE C.C.A. 2013-CP-23-01762
COUNTY OF GREENVILLE PAUL B. WICKENSIMER

Carol Simpson,

2015 MAR 16 PM 4 49

Plaintiff,

**PLAINTIFF'S MOTION FOR
RECONSIDERATION OF ORDERS
ENTERED FEB. 27, 2015**

v.

Frank A. Landgraff, Carol Sutton, Carol
Sutton & Associates - Investigations, Inc.,

Defendants.

Plaintiff hereby moves pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure for reconsideration of the above-references Orders.

South Carolina Supreme Court articulated its standard for the propriety of a Rule 59(e):¹

[A] party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of any argument previously presented.

...

“[T]he wisdom of giving district courts the opportunity promptly to correct their own alleged errors is all the justification needed” for the practice of freely allowing a motion for reconsideration.

...

[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(c) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

¹ *Elam v. SC Dept. of Transp.*, 361 S.C. 9, 21-24, 602 S.E. 2d 772 (S.C. 2004)

The Court appears to have misunderstood Plaintiff's facts and arguments that have arguably have led the Court to draw distorted conclusions. Under the *Elam* standard, Plaintiff offers the following information in hopes that the Court will reconsider its position. If not, Plaintiff still must raise the issues for the inevitable appellate review.

Discovery and the Chronology of the Case

The Court states that the "chronology of this litigation is revealing." This case has been pending for almost 2 years, but, as in a case pending for more than 3 years, not because Plaintiff has been dilatory in its prosecution.² In finding that Plaintiff had adequate time to complete discovery, the Court states that "Plaintiff's window to pursue discovery from March 2013 to November 7, 2014 was limitless". Analyzing what transpired during these 19 ½ months tells a somewhat different story.

The first 12 months were spent determining if Plaintiff had the right to proceed anonymously.³ The Court found that Landgraff's ability to conduct discovery was impaired during this time – so Plaintiff's was logically also impaired.⁴ Unless the Court granted Plaintiff permission to proceed under pseudonym, she could only proceed by revealing her identity which would render her motion moot. The Court settled the issue on March 31, 2014 and ordered

² "Under the circumstances, we agree with Plaintiffs that the grant of partial summary judgment on the personal injury claims was premature. . . . We acknowledge that more than three years elapsed between the filing of these actions and the final granting of partial summary judgment as to personal injury. The delays in completing discovery, however, may not fairly be attributed solely to Plaintiff's inaction." *Baughman v. Amer. Tel. and Tel Co.*, 306 S.C. 101, 112, 410 S.E.2d 537 (S.C. 1990).

³ Plaintiff filed a Complaint and Motion to Proceed Anonymously on March 27, 2013. The Court granted Plaintiff's motion *sua sponte* on May 17, 2013. On Defendant's motion filed 4 months later, the Court vacated its Order and denied Plaintiff's motion *sua sponte* on January 8, 2014.³ Plaintiff filed a motion asking the Court to vacate its January 8th Order or hold it in abeyance until a hearing could be held on her original Motion to Proceed Anonymously.

⁴ See, Order filed January 8, 2014, p. 3.

Plaintiff to file an Amended Complaint identifying herself.⁵

During the next four months, Plaintiff received and answered extensive discovery from Landgraff.⁶ Plaintiff filed the Amended Complaint which only changed the name of the Plaintiff from Jane Doe on June 20, 2014⁷ Defendant Landgraff answered on July 10, 2014.

As a result, after the case was approximately 16 months old, Plaintiff had a final Answer from Landgraff.⁸ The next 3 ½ months were busy. As outlined below, Plaintiff was simultaneously drafting discovery and supplemental responses, preparing to defend against Landgraff's Motion to Compel, preparing to prosecute the Motion to Strike, and preparing to defend against an 11th hour Motion for Summary Judgment as outlined below.

Plaintiff did not await "disposition of her Motion to Strike before embarking on discovery." On October 13, 2014, she served Landgraff with a the Request for Entry Upon Land for Inspection and Other Purposes. Before the hearing on his Summary Judgment motion, Plaintiff served Landgraff with Interrogatories on November 13, 2015 and Requests for Production on Landgraff on November 12, 2015.

Landgraff filed a Motion to Compel claiming that Plaintiff's responses to his requests were "deficient." Plaintiff responded by preparing her first supplemental response to Landgraff's interrogatories, request for admissions, and request for production. She also filed an Answer to Motion to Compel explaining why she had no other discoverable information to

⁵ The Court denied Plaintiff's motion to reconsider its order with a Form 4 order on March 31, 2014.

⁶ Landgraff served 22 Interrogatories with multiple subparts, 16 Request for Admission, and 46 Request to Produce with multiple subparts to Plaintiff Jane Doe on May 8, 2014.

⁷ Admittedly, Plaintiff's counsel did not file the Amended Complaint identifying Plaintiff in a timely manner. However, as he argued to the Court, this was his error and should not be imputed to Plaintiff who could not file the Complaint without his signature. SCRCP 11(a) provides that "[e]very pleading, motion, or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record who is an active member of the South Carolina Bar, and whose address and telephone number shall be stated."

⁸ Defendants Carol Sutton and Carol Sutton & Associates - Investigations, Inc. ("Sutton") did not file their Amended Complaint until after the summary judgment hearing. In short, Plaintiff did not have answers from all three Defendants until more than 20 months after the initial filing.

produce.

Regrettably, Landgraff's Amended Answer repeated 11 affirmative defenses with little, if any, factual allegations.⁹ Relying on Judge Herlong's opinion in the *Monster* case,¹⁰ Rule 12(f), and Rule 8(b),¹¹ Plaintiff believed in good faith the Court had a duty dismiss the boilerplate defenses. So, she refiled an amended Motion to Strike. This motion was to be heard on the same day as Landgraff's Motion to Compel. Thus, she was not attempting to waste anyone's time, but to require the Defendants to clarify their pleadings to reduce the time for discovery.

Although it is only 15 pages, drafting the Memorandum in Support of Plaintiff's Motion to Strike was exceptionally time-consuming. For example, Landgraff Amended Answer avers that Plaintiff had committed some unidentified unlawful act. In his meeting with Plaintiff, the Greenville County Solicitor suggested, but quickly rejected, the idea that Plaintiff had committed the crime of adultery. Assuming Landgraff would make the same unfounded argument, Plaintiff correctly determined that she could not treat this defense lightly.

As a result, Plaintiff spent several weeks researching English common and ecclesiastical law, South Carolina common and statutory law since 1712, and federal law to determine if she committed the crime of adultery under any definition in statutory or common law. Plaintiff also researched Offenses Against Public Policy in South Carolina. The unequivocal conclusion is that Plaintiff has not committed adultery or violated public decency.¹² To the contrary, before it became a statutory offense, adultery was "not an indictable offense in this state: nor can an indictment be maintained for living in adultery by charging it as an offense against public

⁹ Sutton had not yet amended their complaint so Plaintiff was facing 23 what she judged to be improper boilerplate defenses.

¹⁰ *Monster Daddy LLC v. Monster Cable Products*, C.A. No. 6:10-1170-HMH.

¹¹ Conclusory assertions cannot satisfy the relevant pleading standard under SCRCp 8(b) which states that a "party shall state in short and plain terms the facts constituting his defenses to each cause of action asserted" *RoTec Services, Inc. v. Encompass Services, Inc.*, 597 S.E.2d 881, 884, 359 S.C. 467 (S.C.App. 2004).

¹² See, Memorandum in Support of Plaintiff's Motion to Strike, pp. 7-12.

decency.”¹³

For the week before the hearing, Plaintiff had to focus on the Landgraff’s 11th Hour Motion for Summary Judgment. Landgraff knew that the hearing had been set for quite some time, but waited until the last possible day (a Friday) to file and serve his Motion. He was well within the rules to do so. However, the timetable leans in support of Plaintiff’s position that she did not have an opportunity for full and fair discovery.

The Court cites the *Middleborough* case as standing for the proposition that “four months a ‘full and fair opportunity’ to conduct discovery.” To the contrary, that case provides that “[Appellant] advances no good reason why four months was insufficient time under the facts of this case to develop documentation in opposition to the motion for summary judgment.”¹⁴

In *Middleborough*, the relevant four months was the time between the filing of the summary judgment motion on February 8, 1993 and the hearing on the motion on June 14, 1993.¹⁵ Landgraff filed his Motion on November 7, 2014 for a hearing only 10 days later on November 17, 2014. Significantly, if the clock starts running when Landgraff filed his final answer, Plaintiff did not even have four months to conduct the discovery.

¹³ SC Digest, 1783-1886 Vol. 1, West Publishing Co. summarizing *State v. Brunson*, 2 Bailey 149.

¹⁴ *Middelborough Horizontal Property Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 479-480, 465 S.E. 2d 765, 771 (Ct. App. 1995).

¹⁵ In addition, one of the facts of the case is that Appellant “had been a party to other suits involving Flagon roofs that addressed most of the same issues involved in this case.” *Id.* at 480.

Memorandum in Opposition to the Defendant's Proposed Order

"On December 22, 2014, Plaintiff's counsel filed a 'Memorandum in Opposition' to the proposed order, which presented for the first time various answers to Defendant's discovery." The clear purpose of the filing was to introduce new matter to avoid summary judgment."

The Court's responsibility when ruling on a motion for summary judgment is clear in South Carolina. The circuit court must examine the "pleadings, depositions, answers to interrogatories, and admissions on file, together with [any] affidavits" to determine if "there is no genuine issue as to any material fact."¹⁶ Rule 56 does not, "distinguish between documents merely filed and those singled out by counsel for special attention--the court must consider both before granting a summary judgment."¹⁷ In short, the *Court* has a duty to determine if there is a genuine issue as to any material fact – analogous to deciding a Motion for Directed Verdict.

The Proposed Order indicates that the Court considered only that evidence that was "singled out". Admittedly, Plaintiff spent countless hours examining the record and, evidently, pointed out to the Court parts of the record that it was considering "for the first time."

However, she introduced no new matter. Every answer referenced in the Memorandum had been filed prior to the hearing on Landgraff's Motion for Summary Judgment. Plaintiff initial responses were filed on August 28, 2014 and her Supplemental Responses were filed on November 14, 2014. She introduced no new material.

¹⁶ *Froneberger v. Kirkland Dale Smith, et al*, 406 S.C. 37, 748 S.E.2d 625, 631 (S.C. App. 2013).

¹⁷ *Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180, 183-4 (S.C. App., 1986), quoting *Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir. 1980).

Plaintiff Obviously Presented a Poorly Articulated Argument.

“Plaintiff contends summary judgment was premature because Defendants had not answered the 6 sets of discovery she had served upon them. . . . This is egregiously misleading. As noted above we know from Mr. Mayer’s own sworn certificate of service that these discovery Requests did not exist before January 27, 2015.”

What Plaintiff actually asked is for the court to deny Landgraff’s motion “since granting it is **still** premature because Plaintiff ‘has [not] had a full and fair opportunity to complete discovery.’” (Emphasis added). On June 23, 2014, Landgraff’s counsel filed a 56(f) affidavit in which he stated the following:

1. Due to delays caused by issues relating to Plaintiff’s pleadings, discovery remains in its infancy in this case.
2. Landgraff has served written discovery upon Plaintiff but we only just recently received Plaintiff’s responses. In my legal opinion, Plaintiff’s responses are substantially incomplete, improper, and will require amended responses, either voluntarily or pursuant to a court order.
3. No depositions have been taken. No third-party subpoenas have been issued.
4. Plaintiff has alleged an intrusion of privacy claim against Landgraff. Until Plaintiff amended her Complaint, which in our view she still technically has not, Landgraff could not issue third-party subpoenas out of fear that Plaintiff would claim Landgraff had further intruded upon her privacy. No meaningful subpoenas could issue without using Plaintiff’s real name.
5. At a minimum, Landgraff will need to depose Plaintiff and no less than (4) fact witnesses.
6. Before Landgraff has the opportunity to complete such discovery, he cannot fully and fairly respond to Plaintiff’s motion for partial summary judgment.

Since the Court only issued a Form 4 Order, Plaintiff makes the reasonable inference that it did so based on this affidavit. The Court found that summary judgment was premature on July 1, 2014.

A Motion to Compel was heard on the same day as the Court heard the summary judgment motion. A reasonable inference would be that it concerned the responses Landgraff mentioned in his affidavit. The record contains no indication that any subpoenas have issued or depositions have been scheduled. Plaintiff was simply attempting to demonstrate that discovery had not progressed significantly since July 2014 so summary judgment was still premature.

Plaintiff lists 6 sets of discovery that were outstanding at the time of the Order issued on February 3, 2015 to show that discovery had been served on Defendants. The statement that Defendants have not answered Plaintiff's discovery was to show that she had no responses, nothing more. Plaintiff also points out that "no depositions have been taken." This is a recitation of facts to demonstrate what is absolutely true – discovery had not progressed. Thus, nothing had changed since the Court thought summary judgment was premature, so that it still is.

The Court concludes that these statement are "egregiously misleading." This is understandable if the following statements made by the Court were completely accurate, but they are not:

1. "they did not exist before January 26, 2015 . . ."
2. "we know from Mr. Mayer's own sworn certificate of service that these discovery requests did not exist before January 27, 2015"
3. "it had just served and the answers were not yet due . . ."
4. "the discovery was propounded well after the court's December 2014 Form 4 . . ."

A careful examination clearly proves that the sworn certificate of service applies only to the Interrogatories, Requests for Admission, and Requests for Production served on Sutton.

As mentioned above, items 1, 2, and 3 on Plaintiff's list were served on October 13, 2014, November 12, 2014, and November 13, 2014 respectively. Plaintiff was reporting the

state of affairs. Even though the 30 days have expired for Landgraff to comply with the Request to Enter Land, he was not egregiously tardy.

Plaintiff reminds the Court it was informed of the service of the discovery on Landgraff by a letter that it added to the record with a note attached that reads, “received in fax 12/10 – other counsel objected to the communication.” The curious question is why opposing counsel did not want the Court to know the truth.

Plaintiff did not file this discovery because SCRCP 26(g)(1) provides that “Except as provided in Rule 30(h), the party requesting discovery shall serve the request on other counsel or parties, but not file the notice or materials or matters discovered. The requesting party shall retain the originals and shall file the originals with the clerk or court when the same are to be used at a hearing or at trial.”

All three defendants can confirm to the Court that they received copies of the discovery with a Certificate of Service with the dates given. In addition, Plaintiff will file copies of the discovery with the Court to settle the issue.

Based on the information presented above, Plaintiff again asks the Court to reconsider its order and deny Landgraff’s summary judgment motion since granting it is still premature because Plaintiff “has [not] had a full and fair opportunity to complete discovery.” If the Court denies this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale for its denial.

Mr. Mayer’s Affidavit Was His Only Alternative

The Court points out for the second time that Mr. Mayer filed an affidavit in support of Mary R. McCorvey’s (Jane Doe’s) Motion for Temporary Restraining Order. However, it never

gives an available alternative or explains why it is so disturbed by the affidavit. The SCRCPP 65(b) requires that the motion be accompanied by an affidavit or verified complaint.¹⁸ Plaintiff could not verify the complaint or sign an affidavit without revealing her identity. That only left Mr. Mayer to sign an affidavit. While unusual, under these circumstances, Plaintiff asks the Court to consider that the affidavit was not only proper, but the only alternative available to Plaintiff as she sought to proceed under pseudonym.

Plaintiff Still Believes She is Entitled to Partial Summary Judgment.

“Finally, it is curious why Plaintiff now believes she needs further time for discovery when she moved for partial summary judgment in November 2013, an action that necessarily meant she had a good faith belief that there were no genuine issues of material fact.”

Wrongful intrusion into private affairs consists of an (1) Intrusion, (2) Into that which is private, (3) Substantial and unreasonable enough to be legally cognizable; (4) Intentional.

The Court has recognized that a videotape exists. Landgraff and Sutton signed a sworn affidavit that they installed a hidden, motion-activated camera. They spied on Plaintiff and produced a videotape to prove it.

In her affidavit, Plaintiff unequivocally states that she not only expected to be private in Landgraff’s house, but also that Landgraff assured her that she would be.¹⁹ By their own admission, the Defendants were not anywhere in the residence at the time of the intrusion so Plaintiff could logically expect she would be free from exposure to them. For months, Plaintiff had disrobed in that bedroom with the expectation that she was in a private place and had no

¹⁸ “(b) Temporary Restraining Order; Notice; Hearing; Duration. No temporary restraining order shall be granted without notice of motion for the order to the adverse party unless it clearly appears from **specific facts shown by affidavit or by a verified complaint** that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon.” (Emphasis added.)

¹⁹ See , page 2, Affidavit of Carol A. Simpson.

concern that she would be videotaped.²⁰

Numerous other courts have ruled that this type intrusion is legally cognizable.²¹

The affidavits of Landgraff and Sutton in the public record definitively prove that they willingly installed a motion-activate hidden camera on two occasions. The camera was connected to a recorder that would make a videotape. Their actions were clearly intentional.

Viewed in this light, it doesn't seem so curious that Plaintiff still believes that she has carried her burden of proof for this cause of action. If Defendants have any legitimate defenses, the burden shifts to prove them. However, their defenses, if any, do not negate the undisputed facts that they have intruded upon Plaintiff's private affairs.

Thus, Plaintiff asks the Court to reconsider its order and deny Landgraff's summary judgment motion since granting it is still premature because Plaintiff "has [not] had a full and fair opportunity to complete discovery." If the Court denies this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale for its denial.

²⁰ "By choosing to share the privacy of their home with [Plaintiff] on several occasions in the past and on the occasion in question, both the [Defendants] and [Plaintiff] demonstrated a subjective expectation of privacy, and that expectation, we hold, is one that society is prepared to recognize as reasonable." *State v. Missouri*, 603 S.E.2d 594, 597-98 (S.C. 2004).

²¹ *State of Wisconsin v. Jahnke*, 762 N.W.2d 696, 699 (Wis. App. 2008), review denied, 765 N.W.2d 578 (Wis. 2009) ("By placing limits of the ability of others to record, the statute protects a person's interest in limiting, as to time, place, and persons, the viewing of his or her nude body." and "It is one thing to be viewed in the nude by a person at some point in time, but quite another to be recorded in the nude so that a recording exists that can be saved or distributed and viewed at a later time."); *In re the Marriage of Tigges*, 758 N.W.2d 824, 828 (Iowa 2008) (. . . the videotaping of a person without consent or awareness when there is an expectation of privacy goes beyond the rights of a spouse because it may record private matters which could later be exposed to the public eye.); *United States v. Torres*, 751 F.2d 875, 878 (7th Cir. 1984) (It is true that secretly televising people (or taking still or moving pictures of them) while they are in what they think is a private place is an even greater intrusion on privacy than secretly recording their conversations.); *State of Minnesota v. Perez*, 779 N.W.2d 105, 110 (Minn. App. 2010) (If marriage does not erase a spouse's reasonable expectation of privacy in his or her phone calls, it surely cannot erase his or her reasonable expectation of privacy from being videotaped while undressed without his or her knowledge or consent.)

Plaintiff Had No Intent to Distort the Record

“The conduct of Plaintiff’s counsel in filing documents for the purpose of distorting the record may be most charitably described as reckless.”

The only documents that Plaintiff filed after the summary judgment hearing were her responses to Sutton’s discovery. On November 19, 2014, Sutton served Plaintiff with Interrogatories and Requests for Production. Rather than answer Sutton’s discovery, Plaintiff spent the next month drafting her very detailed Memorandum in Opposition to the Defendant’s Proposed Order which she filed on December 22, 2014.

On November 26, Sutton served Plaintiff with their Amended Answers. The Court had already denied Plaintiff’s Motion to Strike. Thus, Plaintiff spent the month of January drafting Interrogatories, Requests to Admit, and Requests for Production for Sutton and answering Sutton’s discovery. Plaintiff served her discovery on Sutton and her responses to Sutton’s discovery. By that time, Plaintiff’s responses were seriously delinquent so she filed them as soon as they were complete.

Plaintiff had no way to know when the Court would serve its Order granting Landgraff’s summary judgment motion. Thus, she could not plan for the filing of these responses accordingly. In reality, she was just playing catchup.

The Court’s Focus on Adultery

The Court states that “[a]dultery is a criminal offense.” This is absolutely true, but irrelevant to this case, because Plaintiff is physically incapable of committing the crime. Curiously, the Court makes no finding that Plaintiff committed the crime.

For some unexplained reason, the Court, like Landgraff’s counsel, simply states that adultery is a criminal offense. The Court does label Plaintiff’s conduct as “adulterous.” How

can her behavior be adulterous – “relating to, characterized by, or given to adultery”²² -- when she is incapable of committing adultery.²³

In its Amended Order, the Court adds that this “policy is deafeningly echoed in South Carolina domestic law, which recognizes adultery as a ground for divorce. This is also absolutely true, but irrelevant to this case. As Plaintiff has stated, the Family Court did not deny alimony to Landgraff’s wife (even though he admitted the videotape) due to a connivance defense. In addition, Plaintiff’s affidavit indicates that Landgraff condoned the conduct.”²⁴

The Court Improperly Has Made a Crucial Inference in Landgraff’s Favor

As this case has progressed, Plaintiff continues to not understand the basis of Court’s rulings. Plaintiff’s perception of attributions of improper motives to her and what at times have felt disdain is troubling. Why did the Court not address the Motion to Compel and the Motion to Strike and give the parties 60 days to complete discovery?

It seemed to all start with the hearing on November 12, 2013. Before that hearing, the Court had issued an Order Granting Plaintiff Right to Proceed Anonymously in which it made the following findings:

1. “The court finds that the subject matter of this lawsuit relates to Plaintiff’s private affairs and has no significant interest.”
2. “Identifying the Plaintiff poses a risk to Plaintiff’s legitimate privacy interests and that could chill her rights to the judicial process.”
3. “The court can discern no unfairness or other prejudice to Defendants.”
4. “The court finds Plaintiff should be identified as “Jane Doe” to preserve her

²² Citing Webster’s dictionary.

²³ This seems analogous of describing someone’s activity as “murderous” when the alleged victim is still alive.

²⁴ See , page 4, Affidavit of Carol A. Simpson

privacy interests regarding the sensitive issues involved in this case.”

5. “No one shall reveal the true identity of “Jane Doe” without further written order of this court.”

During oral argument on Landgraff’s Motion Regarding Order, Landgraff’s counsel presented the Court with an affidavit. Based on that affidavit, the Court found “that Plaintiff’s privacy interest are substantially diminished, if not entirely absent, given **her** voluntary filing of an affidavit (“Prior Affidavit”) in another lawsuit.” (Emphasis added) The Court’s footnote provides that “The Prior Affidavit can be found attached as Exhibit 2 to the Motion to Strike in the Circuit Court’s record in *Mulligan v. Landgraff*, C.A. No. 2010-CP-23-6024.” The Court’s own order reveals the deception. Plaintiff did not file, much less voluntarily file, the affidavit. Landgraff attached the affidavit as Exhibit 2 to his Motion to Strike in another lawsuit.

The Court has never expressed any concern that it may have been misled even though Plaintiff has pointed out on numerous occasions that it had. In fact, Landgraff’s counsel stated “none of the affidavits discuss the video or anything relevant to this case”²⁵ To ensure the Court did not miss the point, his counsel that the affidavits “do not support or even relate to any of the elements of the claims alleged by Plaintiff.”²⁶

Nevertheless, the Court vacated its prior order and ordered Plaintiff “to amend her Complaint for the sole purpose of substituting her real name for the pseudonym Jane Doe.” In her Memorandum in Support of Plaintiff’s Motion to Amend Order, Plaintiff requested the following of the Court:

The Court should not be placed in a position where its decisions are made on limited facts and not a complete story to be considered. Plaintiff believes that in light of the true nature of the

²⁵ See, Landgraff’s Supplemental Memorandum Supporting Summary Judgment, p.2.

²⁶ See, email for Landgraff’s Supplemental Memorandum Supporting Summary Judgment transmittal to Judge Hill dated November 21, 2014.

affidavit and how it may have come to be in the Common Pleas file the Court will not reverse its original decision and asks the Court to take whatever action it deems are in the interest of justice in the matters before it whether that be vacating the December Order entirely, holding its execution in abeyance until the original motion filed by the Plaintiff can be heard, or applying any other modification the Court deems suitable.

The Court summarily dismissed Plaintiff's request with a Form 4 order. By doing so, the Court denied Plaintiff's Motion to Proceed under Pseudonym without ever giving her the right to be heard. Why did the Court take this unusual posture?

Why did the Court cite out-of-state cases to formulate a wrongful conduct bar rather than relying on South Carolina cases? Why did the Court rely on a Wisconsin case to address Plaintiff's Motion to Strike rather than a case written by Greenville's own Judge Herlong?

A footnote in the Court's Order granting Landgraff's summary judgment motion that is repeated in the Amended Order Granting Summary Judgment to Defendant Landgraff sheds light on the questions. The content of the footnote is not as important as its placement. In the original Order, the footnote supports the Court's statement that [t]here is not a scintilla of proof that the recordings contain any images of Plaintiff, a condition all of her tort claims hinge upon." Upon reconsideration, the Court had to amend this statement because proof does exist.

In both Orders, the Court proposes two hypotheticals. The Court proposes that, if Landgraff had not hidden a camera to secretly photograph Plaintiff, but, instead, "stormed into his bedroom and caught Plaintiff . . . no court would countenance Plaintiff later suing him" More significantly, Plaintiff would not have sued him – there would be no intrusion which requires a spying, prying, etc. Plaintiff would be aware that Landgraff entered the room.²⁷

²⁷ "The basic question we must answer here is not whether appellant had a right to enter the bathroom while K.P. was there. If he had entered, K.P. would have been aware of that entry, and she might have acquiesced in appellant's presence or she might have asked him to leave. Her expectation of privacy might have been intruded upon, but she would have been aware of that intrusion and been able to address it. While knowledge of appellant's presence in the bathroom might have temporarily lessened

The Court then proposes that “if Defendant husband had station a private investigator in his bedroom or outside its window to collect evidence of his wife’s suspected infidelity with Plaintiff, it would be remarkable if Plaintiff as the paramour could then mulct the husband and the private investigator in damages for conspiring to invade her privacy.” Again, Plaintiff would not have sued him under these circumstances because there would be no intrusion.

Remarkably, the Court then begins the footnote to the two hypotheticals with the statement, “This forms an alternative basis for granting Defendant Landgraff [sic] summary judgment.” Landgraff filed his Motion for Summary based on “the lack of evidence supporting each element of Plaintiff’s claim.”²⁸ Thus, he chose carry his burden by pointing out “that there is an absence of evidence to support the non-moving party’s case,” not by demonstrating that no genuine issue of material fact exists.

In other words, Landgraff entered not one fact from the pleadings, answers to interrogatories, admissions on file, affidavits, prior court orders, and other documents on file to support his case. He has established NO fact. Thus, the ONLY facts in the record are those supporting Plaintiff’s position. In short, the Court finds that Landgraff is entitled to Summary Judgment based on two hypotheticals.

Landgraff’s counsel has incessantly harped on Plaintiff’s wrongful conduct and adulterous affair, but has offered no proof of an ongoing affair. Considering the arguments of Landgraff’s counsel is improper. The Supreme Court “has repeatedly held that statements of fact appearing only in argument of counsel will not be considered. . . .”²⁹ Consequently, “factual

or frustrated K.P.’s reasonable expectation of privacy, his surreptitious videotaping of her violated both her reasonable expectation and the provisions of the statute.” *State v. Perez*, 779 N.W.2d 105, 109-110 (Minn.App. 2010).

²⁸ Supplemental Memorandum Supporting Summary Judgment, page 1.

²⁹ *McManus v. Bank of Greenwood Et.Al.*, 171 S.C. 84, 171 S.E. 473, 475 (S.C. 1933); *West v. Gladney*, 533 S.E.2d 334, 341 S.C. 127, 135 (S.C. App. 2000) ([T]his court ordinarily will not consider statements of fact presented only in an attorney’s argument in determining whether a genuine issue of material facts exists sufficient to preclude summary judgment.”).

statements of counsel, whether made during oral argument or in written briefs or memoranda, ordinarily may not be considered.”³⁰ Clearly, “where there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record.”³¹

The words “caught”, “suspected infidelity”, and “paramour” used in the hypotheticals demonstrate the Court’s error. “Caught” connotes that the Court has inferred that Landgraff was a passive bystander rather than the director of the events. “Suspected infidelity” connotes that the Court has inferred Landgraff was not involved in any of the activities described in the “Prior Affidavit” it used to deny Plaintiff the right to proceed under pseudonym. “Paramour” connotes that the Court has inferred that Plaintiff was having an affair with Landgraff’s then-wife.

The standard the Court must use is well-settled -- “In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party.”³² In this case, the Court has drawn inferences that directly contradict to all the facts in the record.

From November 3, 2010, when Plaintiff met with the Sex Crimes Unit of the Greenville County Sheriff’s Office until today, her account of the facts has not changed. Landgraff orchestrated the evening for his own sexual gratification. This account has been considered by three unrelated entities.

First, the judge in the Greenville County Family Court refused to deny alimony to Landgraff’s then-wife based on the same affidavits this Court has considered – indicating that at

³⁰ *Gilmore*, 348 S.E.2d at 183; *Higgins v. Medical Univ. of SC*, 486 S.E.2d 269, 272, 326 S.C. 592 (S.C. App. 1997) (“However, factual statements of the attorneys, whether made during argument or in written briefs or memoranda, ordinarily may not be considered by the court in determining whether a genuine issue of material fact exists.”).

³¹ *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (S.C. App., 1996), FN 2 (“However, where there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record.”).

³² *Lord v. D&J Enters., Inc.* (S.C. 2014), quoting *David v. McLeod Reg’l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006).

least some evidence of connivance existed.

Second, the Greenville County Sheriff's Office investigated the account thoroughly. From the Incident Report, we know the following were reviewed: (1) Affidavits from Sutton; (2) Sutton's PI report; (3) the videotape and still shots from it; (4) All the affidavits filed in the Family Court case (including Landgraff's); and (5) case statements. The investigator talked to witness and various others in law enforcement and the solicitor's office. After a full investigation, Plaintiff's account was not contradicted.

Third, the State Office of Victim Assistance (part of the Office of the Governor) conducted an investigation of Plaintiff's application for compensation from Crime Victim's Compensation Fund. It too found Plaintiff account credible and awarded her benefits.³³

Landgraff has never contradicted Plaintiff's account. He has not filed one affidavit in this case, the Family Court case, or the prior civil case referenced in the Court's Jan. 8, 2014 Order to deny that he orchestrated the evening or that it was for his own sexual gratification. His silence is deafening.

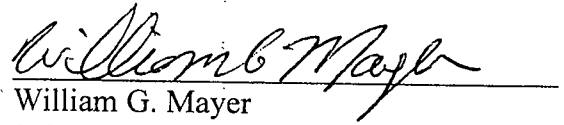
Even so, the Court has adopted his counsel's contention – one totally unsupported by the record -- that Plaintiff was having an affair with Landgraff's then-wife.³⁴ Other than the one evening orchestrated by Landgraff, the record is void of any evidence of an affair. It is replete with times that Landgraff, his then-wife, and Plaintiff spent together. The three being together does not constitute wrongful conduct that should bar Plaintiff from having her day in Court.

³³ See evidence of payment produced in discovery responses.

³⁴ Landgraff even admitted that he overstated the relationship between Plaintiff and his wife – “To set the record straight, Lynn did not leave me but rather I asked her to leave. Further, I have no reason to believe that Lynn lived with another woman.” See Landgraff's letter attached as Exhibit A to the Settlement Terms Sheet attached as part of Exhibit A to Plaintiff's Response to Sutton's First Request for Production to Plaintiff.

Conclusion

Based on the foregoing, the Court should reconsider its Order and deny Landgraff's Motion for Summary Judgment; grant Summary Judgment to Plaintiff to *sua sponte*; and allow a jury to decide if Landgraff has put facts into the record to constitute a valid defense.



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February 16, 2015

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Carol Simpson,

Plaintiff,

v.

Frank A. Landgraff, Carol Sutton, Sutton
& Associates Investigations, Inc.

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. 2013-CP-23-1762

FILED-CLERK OF COURT

GREENVILLE CO. S.C.

PAUL B. WICKENSIMER

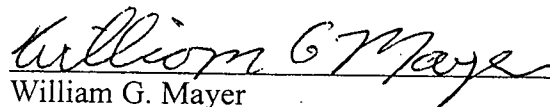
2015 MAR 16 8 49 AM
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that hereby certify that I have served a copy of **Plaintiff's Motion for Reconsideration of Orders Entered on Feb. 27, 2015** upon the individuals named below, by placing a copy in the United States Mail, postage prepaid and return address clearly indicated to the addresses below on this 16th day of February, 2015:

The Honorable D. Garrison Hill
305 E. North St., Suite 213
Greenville, SC 29601

Attorneys for Frank A. Landgraff
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Exhibit

I

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Carol Simpson,

Plaintiff,

v.

Frank A. Landgraff, Carol Sutton, Carol
Sutton & Associates - Investigations, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. 2013-CP-23-01762

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

2015 FEB 12 PM 4 30

**PLAINTIFF'S MOTION FOR
RECONSIDERATION**

Plaintiff hereby moves pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure for reconsideration of the Order granting Defendant Landgraff's Motion for Summary Judgment and, by its silence, denying Plaintiff's Motion to Strike.

South Carolina Supreme Court articulated its standard for the propriety of a Rule 59(e):¹

[I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. A motion under Rule 59(e) long has been viewed as "motion for reconsideration" despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented.

There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity.

¹ *Elam v. SC Dept. of Transp.*, 361 S.C. 9, 21-22, 602 S.E. 2d 772 (S.C. 2004); *See, e.g., Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) ("purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the judge to reconsider matters properly encompassed in a decision on the merits"); *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 585 S.E.2d 272 (2003) (an example of the many cases in which trial and appellate courts describe a Rule 59(e) motion as a "motion to reconsider" or "motion for reconsideration"); James Flanagan, *South Carolina Civil Procedure* 474-475 (2d ed. 1996).

Based on the Court's statement that it "prefers to resolve this dispute on the entire record," Plaintiff has based this Motion on facts from the pleadings,² answers to interrogatories,³ admissions on file,⁴ affidavits,⁵ prior court orders, and other documents on file.⁶ Because the Court referred it, Plaintiff has also referenced Plaintiff's Memorandum in Opposition to the Defendant's Proposed Order.

The Court Misstates Plaintiff Claim

Factual Error -- "Plaintiff brought this action claiming Defendant Frank A. Landgraff hired Defendant Carol Sutton and her private investigative agency to place a video camera in Landgraff's bedroom for the purpose of capturing evidence of her adultery with Landgraff's then-wife"

This statement is completely false and has absolutely no support in the record. First, Plaintiff's Complaint does not even contain the word "adultery." Second, Plaintiff has repeatedly pointed out that the tort of wrongful intrusion into private affairs rests on the intrusion, not the content of

² The record contains an Amended Complaint filed June 14, 2013 with Answers filed by all three Defendants and a court-ordered Amended Complaint filed June 19, 2014 with an Answer filed by Frank A. Landgraff and an Answer filed by Sutton.

³ Plaintiff's Response to Frank A. Landgraff's First Interrogatories is in the file attached to Landgraff's Motion to Compel. Plaintiff's First Supplemental Response to Frank A. Landgraff's First Interrogatories was filed on November 14, 2014. Plaintiff's First Set of Interrogatories to Defendant Carol Sutton and Carol Sutton & Associates – Investigations, Inc. was filed on January 26, 2015.

⁴ Plaintiff's Response to Frank A. Landgraff's First Requests for Admission is in the file attached to Landgraff's Motion to Compel. Plaintiff's First Requests for Admissions to Defendant Carol Sutton and Carol Sutton & Associates – Investigations, Inc. was filed on January 26, 2015.

⁵ Affidavits on file include the following: (1) The Amended Affidavit of William G. Mayer ("Mayer Affidavit"); (2) Sutton Affidavit attached to the Mayer Affidavit and Memoranda filed with the Court; (3) Landgraff Affidavit attached to the Mayer Affidavit and Memoranda filed with the Court; (4) Simpson Affidavit incorporated into the file by Court's Order filed January 6, 2014; (5) Affidavits referenced in Footnote 2 of the Proposed Order and in Footnote 2 of Landgraff's Supplemental Memorandum; and (6) Plaintiff's [Verified] Memorandum in Opposition to Defendant Frank A. Landgraff's Motion for Summary Judgment.

⁶ Documents on file include the following: (1) Plaintiff's Response to Frank A. Landgraff's First Requests for Production; (2) Plaintiff's First Requests for Production to Defendant Carol Sutton and Carol Sutton & Associates – Investigations, Inc. filed on January 26, 2015; (3) Invoices from McCall Counseling & Therapy and Dr. Deborah Leporowski attached to Plaintiff's First Supplemental Response to Frank A. Landgraff's Requests for Production to Plaintiff; (4) Plaintiff's Motion to Seal File attached to Plaintiff's Memorandum in Support of Motion to Strike; and (5) prior orders of this Court.

the videotape. Third, Landgraff's condonation and, possible connivance, negates any value the evidence would have had in his Family Court case. Finally, Plaintiff has never wavered from her initial statement that Landgraff's actions were for his own sexual gratification.

Only One Defendant Moved for Summary Judgment

Court's Factual Error -- "Defendants now move for summary judgment."

Only one Defendant Frank A. Landgraff moved for summary judgment. The other two defendants, Carol Sutton, Carol Sutton & Associates - Investigations, Inc. (hereinafter collectively "Sutton") did not so move.

The United States Supreme Court has provided that a court can enter summary judgment *sua sponte*, "so long as the losing party was on notice that she had to come forward with all of her evidence."⁷ Sutton had not even filed their answers at the time of the hearing. Since the hearing, Plaintiff has answered part of Sutton's discovery requests and served Sutton with requests for admissions, requests for production, and interrogatories. In short, Plaintiff and Sutton have proceeded in this case as if they were going to trial in less than two months as scheduled. Plaintiff had no indication from the hearings in this case, the Form 4 order, or the Proposed Order that the Court, or anyone else, was considering granting summary judgment in favor of Sutton.

In conclusion, Plaintiff asks the Court amend its Order so that any decision only applies to Landgraff. If the Court does not grant this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale.⁸

⁷ *Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 106 S.Ct. 2548, 91 L.Ed. 2d 264 (1986):

⁸ *Froneberger v. Kirkland Dale Smith, et al*, 406 S.C. 37, 748 S.E.2d 625, 634 (S.C. App. 2013) ("[A circuit] court's order on summary judgment must set out facts and accompanying legal analysis sufficient to permit meaningful appellate review." "Such an order must include those facts which the circuit court finds relevant, determinative of

The Order Shows that the Court Misinterpreted Its Duty

The Court's statement that "Inference need not produce ignorance," demonstrates that the Court may have misinterpreted its duty.

It is the duty of the court, on motion for summary judgment, not to try issues of fact, but only to determine whether there are genuine issues to be tried; and once having found that triable issues exist, must leave those issues for determination at trial. We cannot say as a matter of law that respondents' defenses, if proven, would not constitute a legal defense. We find raised in them material issues rendering summary judgment inappropriate.

A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.⁹

On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.¹⁰

Regardless of how "selective" it thinks Plaintiff's account of the facts is, the Court is not to try the issue. The Court should not decide whether the facts are credible or whether it believes one party or the other. Rather, it is to leave the truth or falsity of the issue for determination at trial. The appellate court will view all ambiguities in a light most favorable to Plaintiff, the trial court should also.

Possibly, the Court did not review the Greenville County Sheriff's Incident Report ("the Incident Report") in the record that shows that the inference is not ignorant or illusory. To the contrary, it forms the basis for the Greenville County Sheriff himself asking the Solicitor to

the issues and undisputed."'). The order should also 'provide clear notice to all parties and the reviewing court as to the rationale applied in granting ... summary judgment.'").

⁹ *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

¹⁰ *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976).

prosecute Landgraff and Sutton. In addition, based on the same evidence, the Office of the Governor determines that Plaintiff was the victim of the crime and qualified for financial help from the Crime Victims' Compensation Fund.¹¹

**The Court Erroneously Concludes that the Content of the Videotape,
If it Still Exists or Who Has Seen It is Relevant**

Court's Factual Error – “Nowhere in the record do we learn what is actually on the videotape, if it still exists, or whether its contents were shared with a third party. The absence of this evidence entitles Defendants to summary judgment.

The Court gives Plaintiff no insight into its rationale that not knowing what is on the videotape entitles Landgraff to summary judgment. As demonstrated below, the record is clear that the videotape captured images of Plaintiff. What is actually captured on the videotape is not the gravamen of the offense -- the intrusion was the spying and making the videotape.¹² Any further knowledge of the content of the videotape is irrelevant.

Although the tape was not offered in evidence, we credit [Wife's] testimony that it recorded the 'comings and goings' from the bedroom she regularly used. Notwithstanding the unremarkable activities recorded on the tape, [Wife] suffered damage as a consequence of [Husband's] actions.” “The wrongfulness of the conduct springs not from the specific nature of the recorded activities, but instead from the fact that [Wife's] activities were recorded without her knowledge and consent at a time and place and under circumstances in which she has a reasonable expectation of privacy.”¹³

The Court gives Plaintiff no insight into its rationale that as to why not knowing the videotape still exists entitles Landgraff to summary judgment. Even so, the record clearly shows

¹¹ See award letter from the State of South Carolina, Office of the Governor dated May 23, 2012.

¹² Snakenburg

¹³ i.e., *In re Marriage of Tigges*, 758 N.W.2d 824 (Iowa 2008).

that two copies of the videotape exists – one is in the hands of law enforcement and the other one is the Family Court record which can be accessed by the attorneys in that case without a court order. In the discovery served on Defendants, but to date is unanswered, Plaintiff asks for the following:

Set forth an inventory of all originals or copies of the videotape, of all portions of the videotape, and/or of all screen grabs made from the videotape, identifying who has each item inventoried and whether it is possible to copy any of the items.

By granting Landgraff's motion, the Court destroys Plaintiff's ability to get an answer to this question. In short, the Court grants the summary judgment motion due to the absence of evidence that the Court's decision prevents her from obtaining.

The Court gives Plaintiff no insight into its rationale as to why "whether the contents were shared with a third party" or not entitles Landgraff to summary judgment. This is an action for wrongful intrusion into private affairs, not wrongful publication of private affairs. Interesting, in a North Carolina criminal case, the Court had no trouble finding that a Defendant had made a videotape for his sexual gratification when there was no evidence that he, much less a third party, had ever viewed it.¹⁴

Based on the foregoing, Plaintiff asks that Court reconsider its ruling and deny Landgraff's summary judgment motion. If the Court does not grant this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale.

¹⁴ "In *State v. McClees*, this Court held that the defendant's act of secretly videotaping an undressed child was for the purpose of arousing or gratifying sexual desire even though no evidence was presented showing that the defendant ever actually viewed the video." *State of North Carolina v McClary*, 679 S.E.2d 414, 418 (N.C. App. 2009)

**The Court Missed the Evidence and Inferences
that the Recordings Contain Images of Plaintiff**

Court's Factual Error -- There is not a scintilla of proof that the recordings contain any images of Plaintiff, a condition all of her tort claims hinge upon."

The Court has obviously missed the copious proof in the record showing that this statement is false. The most conclusive is found in the Greenville County Sheriff's Incident Report ("the Incident Report") which is part of the file resulting from the investigation of Landgraff for the crime of video voyeurism.¹⁵

I met with complainant (Simpson) and her attorney, Bill Mayer, in my office on 11/04/2010. Simpson advised me that suspect (Landgraff) had a hidden camera installed in the bedroom of the residence he shared with victim #2 (Mulligan) and did without knowledge or consent from either Simpson or Mulligan digitally video record Simpson and Mulligan . . . Simpson advised that the recording was done on 12/15/2009 and since that time Landgraff has caused the digital recording and still images from the digital recording to be distributed to attorneys and family and common pleas courts in private actions. . . . Since report date I have been provided with copies of affidavits from Private Investigator Carol Sutton, and a PI report from Sutton in reference to this incident . . .

I have been provided with copies of still shots from the digital recording, as well as a copy of the digital recording itself. . . .

Simpson prepared and provided me with a case statement. I provided Assistant Solicitor Howard Steinberg, and Sgt. S. Matheny with a copy of Simpson's case statement, and briefed them on our meeting. (Emphasis added).

The Court could also review the letter that the Office of the Governor of the State of South Carolina sent to Plaintiff. Based on the Incident Report, the letter informs Plaintiff that the "State Office of Victim Assistance (SOVA) has deemed that your claim [for assistance] meets

¹⁵ *Offense of Voyeurism* Section 16-17-470(B) provides a person commits the crime of voyeurism as follows: A person commits the crime of voyeurism if, for the purpose of arousing or gratifying sexual desire of any person, he or she knowingly views, photographs, audio records, video records, produces, or creates a digital electronic file, or films another person, without that person's knowledge and consent, while the person is in a place where he or she would have a reasonable expectation of privacy.

the eligibility standards pursuant to South Carolina Laws governing the Crime Victim's Compensation Fund."

The Court can certainly take judicial notice of the South Carolina Code of Laws:

SECTION 16-3-1170. Basis for award.

- (A) No award may be made unless:
 - (1) a crime was committed;
 - (2) the crime directly resulted in physical or psychic trauma to the victim;
 - (3) the crime was promptly reported to the proper authority and recorded in police records; and
 - (4) the claimant or other award recipient has fully cooperated with all law enforcement agencies and with the South Carolina Victim's Compensation Fund.
- (B) For the purposes of item (3) of subsection (A), a crime reported more than forty-eight hours after its occurrence is not "promptly reported", absent a showing of special circumstances or causes which justify the delay.

In other words, SOVA determined that Plaintiff had been a victim of the Defendants' crime of video voyeurism. Logically, this would be impossible if the tape were blank or contained no images of Plaintiff.

If the Court is not yet convinced, the Case Statement referenced in the Incident Report that is part of the record contains the following statements [Suspect is Landgraff]:

Case Statement
Incident Type: Voyeurism
Case #10-170454

Summary of the Facts

Suspect is married to Wife and had a personal relationship with Victim. Suspect introduced Victim to Wife and encouraged a friendship between them. Suspect then promoted a personal and physical relationship between himself, Wife, and Victim. Suspect became hostile when Suspect and Wife refused to continue a physical relationship with him.

Suspect hired Private Investigator to, in his words, "document the activities of my Wife." Private Investigator documented approximately 185 hours of activity between Victim and Wife with no indication of any improper relationship.

Suspect with cooperation of Private Investigator installed a covert camera in the marital residence. Suspect represented to Private Investigator that he wanted to install the covert camera to document Wife's affair. The camera was motion-activated and focused solely on the bed in the master bedroom.

Private Investigator's notes indicate that the camera was first installed in November. Private Investigator denies that the camera captured any activity of any kind. After this event, Suspect was once solicitous of time with Wife and Victim. All three socialized together and even had Christmas dinner together with their families. Suspect continuously commented on how much he missed physical contact with Wife and Friend. Suspect planned a trip and made clear to Wife that she should plan to spend the night at the house due to construction workers building a house next door. Suspect suggested that Victim stay with Wife while he was gone.

Before leaving town, Suspect and Private Investigator re-installed the covert camera. **This time camera filmed Wife and Victim.** Suspect did not confront Wife and continued to cohabit and have sexual contact with her. Suspect also attempted to renew a physical relationship between himself, Wife, and Victim.

Two months after having the video, Suspect demanded that Wife leave the marital home. Suspect, nor Wife, filed for divorce. However, Suspect did allege adultery in answer to Wife's action for separate maintenance and support. Thus, Suspect did not use the videotape offensively as he alleged.

Suspect and Private Investigator have also signed affidavits describing the contents of videotape. Affiants must have personal knowledge of the information their affidavits contain. In addition, Private Investigator attached still shots made from the videotape as an exhibit to her affidavit. Thus, both have also viewed the video.

Even with the videotape, the Judge at the Temporary Hearing did not deny alimony to the Wife. He stated that Wife may have a defense of connivance. While the Judge did not mention the defense of condonation, Suspect's sexual conduct and cohabitation with Wife for two months after his knowledge of the videotape arguably constitute condonation. Thus, his actions prior to and after recording the videotape belie his stated purpose of making the videotape to document adultery.

Victim had to be to the Suspect's house on many occasions. She and Wife often went into Wife's dressing room to change clothes. Suspect assured Victim that the area was secluded. The residence has an alarm that chimes if any door is opened. On the evening of the videotaping, Victim and Wife believed Suspect was not at home. No one else was believed to be in the home and no security cameras were in the home. Victim states that she believed that she could disrobe in private without being seen by anyone but Wife and without being videotaped by anyone.

Without further investigation, it is unknown to whom Suspect or Private Investigator has distributed the videotape. However, at a minimum, Suspect and/or Private Investigator has given a copy to Suspect's attorneys, Wife's attorneys, and the Family Court.

Due to the defenses of connivance and condonation and the excessive nature of this evidence, courts could find that no legitimate reason existed to give the videotape of the Wife to the attorneys or the Court. Suspect had no right to videotape Victim to further his domestic case. Barring such a ruling, evidence gathered from Suspect and Private Investigator may document other distribution.

Wife stated that Suspect has a large library of pornographic videos and adult magazines. Records of his visits to the Hedonism resort should be available. He reportedly acquired a laptop computer which may contain evidence of his viewing of the videotape and/or pornography. The viewing of the videotape is also voyeurism and viewing of pornography confirms his prurient interest in the videotape.

Information in Private Investigator's files may give more evidence of the purpose of making the videotape. The files should also contain information regarding distribution. At the very least,

they should contain complete information regarding the videotaping. For instance, Private Investigator responded to a subpoena by alleging that nothing was recorded during the first installation of the covert camera. In addition, the files should explain the irregular gaps in a videotape made by a motion-activated device that was recording continuous activity. . . . (Emphasis added).

Plaintiff also directs the Court's attention to Landgraff's ex-wife's Motion to Seal File in their Family Court case.¹⁶

Defendant Frank A. Landgraff ("Husband") has filed several motions and affidavits in this [family court] case alleging the Plaintiff's involvement with a third party [Plaintiff in this case] and mentioning the name of a third party ("the third party"). He has also secretly videotaped the Plaintiff [in the family court case] and the third party. **His filings have included still pictures and videotape of the Plaintiff and of the third party**

Recently, Wife attended a business meeting in Charlotte at which she was told that Husband has told so many people about the sensitive material that executives in the Raleigh corporate office have recently told executives in the Atlanta corporate office of the existence of the sensitive material. (Emphasis added).

Significantly, the Supplemental Order Sealing the File states that "Wife had previously moved for an order sealing the Court's file in this matter, and Husband joined in Wife's request."¹⁷

The wording of Landgraff's Requests for Admission assumes the existence of the videotape and that it contains images of Plaintiff.¹⁸ Surely, the Court can make the reasonable

¹⁶ Plaintiff attached this Motion to Seal File which was filed in Landgraff's family court case to her Motion to Strike in this lawsuit.

¹⁷ To use the Court's words, it "is neither here nor there," but this is the order that the court references when it states "even though no such order has been presented."

¹⁸ Request for Admission #4 -- Plaintiff never entered Landgraff's master bedroom at 122 Antigua Way, Greer, South Carolina to engage in the conduct identified in Admission No. 1 above, she would not have been captured on video footage as alleged in the Amended Complaint filed June 14, 2013.

Request to Admit #15 -- Plaintiff reported Landgraff to criminal justice authorities (law enforcement and/or prosecutorial) because she was recorded engaging in sexual activities with Mulligan in Landgraff's master bedroom at 122 Antigua Way, Greer, South Carolina.

inference that Plaintiff would not go through the ridicule, time, expense, and embarrassment to file and prosecute her claims if there were no videotape and she was not captured on it.

Based on this information in the record, Plaintiff asks that Court reconsider its finding that “no proof that any images of Plaintiff exist due to Defendant’s conduct” and deny Landgraff’s summary judgment motion. If the Court does not grant this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale.

The Court Erred in Finding that South Carolina Has Recognized a Wrongful Conduct Bar

The Court is urged to reconsider its ruling that the South Carolina recognizes the principle called a “wrongful conduct bar.” The Court cites three treatises and relies on cases from other states to define the principle. While the wrongful conduct bar may have been “long part of American law,” South Carolina and the Fourth Circuit have chosen to define and articulate three separate doctrines -- the illegality doctrine, the *ex turpi causa* doctrine, and the *in pari delicto* doctrine – all of which are inapplicable to this case, but discussed below.

The first treatise is The Plaintiff’s Illegal Act as a Defense in Actions of Tort.¹⁹ A careful search of the entire article and its footnotes reveals that the treatise cites no South Carolina or Fourth Circuit case.

The second treatise is Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law.²⁰ A careful search of the entire article and its footnotes reveals that the treatise cites no Fourth Circuit case. It does cite one South Carolina case that involves legal malpractice cases involving criminal prosecutions that is directly on point. “The Court recognized the applicability

¹⁹ Davis, 18 Harv. L. Rev. 505.

²⁰ King, 43 Wm. & Mary L. Rev. 1011 (2002).

of the serious conduct bar in principle, but refused to apply it on the merits in the instant case because it believed that adultery did not rise to the level of a 'serious crime.'"²¹

As in this case, the Defendant moved for summary judgment motion "on the premise that the plaintiff should not be permitted to recover for injuries that arose from adultery."²² The court found that adultery – which is a misdemeanor in South Carolina as it is in New York -- does not rise to the level of a "serious crime."²³ In addition, "[r]esearch has not disclosed any cases which hold adultery to be so serious a crime that recovery is precluded in a civil suit."²⁴

The third treatise is The Nature of the Judicial Process.²⁵ A careful search of the entire article and its footnotes also reveals that the treatise cites no South Carolina or Fourth Circuit case.

In addition, none of the cases cited by the Court from other jurisdictions are applicable to any of Plaintiff's conduct:

1. In the *Greenwald* case, the plaintiff "has admitted to conduct that constitutes a serious felony, and such conduct has a direct causal connection to his alleged injuries."²⁶ In the instant case, Plaintiff has not engaged in or admitted to any conduct that constitutes a crime, much less a felony.
2. The *Ryan* case involves a convicted felon.²⁷ The record is clear that Plaintiff has not been convicted (nor can she be) and the only crime alleged by Landgraff or the Court is a

²¹ *Id.* at 1030.

²² *Hernandez v. Yoon*, 661 N.Y.S. 753, 754, (Sup. Ct. 1997).

²³ *Id.*

²⁴ *Id.*, "Cases where recovery has been barred or would be barred because the plaintiff was engaged in criminal activity at the time of injury frequently involve conduct dangerous to physical well-being." (See, e.g., *Barker v. Kallash*, *supra* [plaintiff injured while constructing a pipe bomb]; *Symone T. v. Lieber*, 205 A.D.2d 609, 613 N.Y.S.2d 404 [plaintiff allegedly injured by malpractice committed during illegal late-term abortion]; *LaPage v. Smith*, 166 A.D.2d 831, 563 N.Y.S.2d 174 [estate of plaintiff's decedent who died as a consequence of operating his vehicle in excess of speed limit while intoxicated denied recovery].)

²⁵ Cardozo, 41 (Yale Univ. Press 1921).

²⁶ *Greenwald v. Van Handel*, 311 Conn. 370, 88 A.3d 467, 474.

²⁷ *Ryan v. Hughes-Ortiz*, 959 N.E.2d 1000 (Mass. App. 2012).

misdemeanor.

3. In the *Price* case, the Court failed to respond to summary judgment motions alleging crimes of fraud and subterfuge, so “the trial judge took these motions as confessed.”²⁸ Plaintiff has not engaged in or confessed to any crime.
4. The *Correll* case addressed the “culpability exception” to the wrongful conduct bar.²⁹ Thus, it doesn’t even address Plaintiff’s conduct.
5. In the *Barker* case, the Court found that “the Plaintiff’s grievous criminal conduct – the construction of a ‘pipe bomb’ was a proximate cause of the injuries suffered and was so plainly violative of paramount public safety concerns . . . “³⁰ Plaintiff has not engaged in any grievous criminal conduct that raises public safety concerns.
6. In the *Everet* case also known as *The Highwayman’s Case*, one accomplice sued the other accomplice demanding a bigger share of the profit from their crime.³¹ Plaintiff was not an accomplice of any defendant so the law leaving “the quarreling accomplices where it finds them” is inapplicable to this case.

More significantly, a search of the Fastcase database reveals that no case in South Carolina or the Fourth Circuit contains the words “wrongful conduct bar,” “wrongful conduct rule,” or “wrongful conduct exception.” Based on the foregoing, Plaintiff asks that the Court abandon its position that there is a wrongful conduct bar in South Carolina and focus on South Carolina jurisprudence. If the Court does not grant this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale as to why a principle not recognized by South Carolina courts should be controlling in this case.

²⁸ *Price v. Purdue Pharma Co.*, 920 So.2d 479 (Miss. 2006).

²⁹ *Correll v. St. John’s Hospital-Macomb Center*, 2002 WL 226935 (Mich. App. 2002).

³⁰ *Barker v. Kallash*, 63 N.Y.2d 19, 468 N.E.2d 39 (1984).

³¹ *Everet v. Williams*, 9 L.Q. Rev. 197 (1893).

The Court Erred in Barring Plaintiff's Claims Based on the Illegality Defense

While South Carolina does recognize the principle stated in *Jackson v. Bi-Lo Stores, Inc.*,³² the defense is not “known as *in pari delicto*.”³³

In the *Jackson* case, the parties entered into an illegal contract so they were obviously in privity. Because they then sought damages for lost profits pursuant to the illegal contract, the Court barred their recovery. This led to the Court’s discussion of the illegality doctrine, not the *in pari delicto* doctrine.³⁴

The illegality doctrine has also been recognized by the United States Supreme Court which, in *McMullen v. Hoffman*, 174 U.S. 639, 19 S.Ct. 839, 43 L.Ed. 1117 (1899), held illegality is a defense to a contract action:

The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, *nor will they enforce any alleged rights directly springing from such contract*.

In short, because the parties had entered into an illegal contract, the “well founded policy of law that no person be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act . . . The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract.”³⁵ Plaintiff and Landgraff did not enter into a contract. Thus, the illegality defense is not applicable to this case.

³² 313 S.C. 272, 437 S.E.2d 168, 170 (S.C. App. 1993).

³³ The Court cites two other cases that it incorrectly propounds the doctrine. *Proctor v. Whitlark & Whitlark, Inc.*³³ does not translate the *in pari delicto* doctrine, but the phrase “*in pari delicto potior est conditio defendentis*” as “in cases of equal or mutual fault, the position of the defending party is the better one.” In *White v. Commercial & Farmers’ Bank*,³³ Lord Mansfield was not addressing the *in pari delicto* doctrine, but, as the full text of his quotation shows, he was addressing an illegal contract and the *ex turpi causa* doctrine.

³⁴ The Court in this case erroneously labels the defense as the *in pari delicto* doctrine.

³⁵ *Jackson*, 313 S.C. at 170.

As a result, Plaintiff asks that Court reconsider its order, identify any part of its ruling that is based on this defense, and deny Landgraff's summary judgment motion accordingly. If the Court does not grant this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale.

The Court Erred in Barring Plaintiff's Claims Based on the *Ex Turpi Causa* Defense

Lord Mansfield's principle has formed the basis of seven South Carolina decisions, all of which concern illegal contracts -- a 1874 case involving an illegal bidding contract,³⁶ a 1895 case involving an illegal agreement between co-conspirators,³⁷ a 1902 case involving co-defendants in a tax scheme to defraud the government,³⁸ a 1903 case involving bank stock,³⁹ a 1913 case involving an illegal lottery ticket,⁴⁰ and a 1949 case involving a partnership to illegally operate a liquor store.⁴¹ The full text of the principle stated by Lord Mansfield in *Holman v. Johnson*, 1 Cow-per, 343, and universally recognized is as follows

The objection that a **contract is immoral or illegal**, as between the plaintiff and the defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *Ex dolo malo non oritur actio* [an action does not arise from a fraud]. No court will lend its aid to a man who founds his cause upon an immoral or illegal act. **If, from, the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted.** It is upon that ground the court goes; not for the

³⁶ *Dudley v. Odom*, 5 S.C. 131, 134 (S.C. 1874).

³⁷ *Milhous v. Sally*, 43 S.C. 218, 21 S.E.2d 268, 270 (S.C. 1895).

³⁸ *Brown v. Newell*, 64 S.C. 27, 41 S.E. 835, 839 (S.C. 1902).

³⁹ *White v. Bank*, 66 S.C. 419, 45 S.E. 94, 101-2 (S.C. 1903).

⁴⁰ *Rountree v. Ingle*, 94 S.C. 231, 77 S.E. 931, 932 (S.C. 1913).

⁴¹ *Pendarvis v. Berry*, 214 S.C. 363 52 S.E.2d 705, 707 (S.C. 1949).

sake of the defendant, but because they will not aid the plaintiff. So, if the plaintiff and the defendant were to change places, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for, **where both are equally in fault**, *potior est conditio defendentis* [Better is the condition of the defendant than that of the plaintiff].

The parties in all these cases were equally at fault because they were parties to the same illegal contract. Lord Mansfield's principle would apply if Plaintiff's causes arose "*ex turpi causa*, or the transgression of a positive law of this country

The "positive law"⁴² propounded by this Court appears to be adulterous conduct:

Adultery is a criminal offense. S.C. Code § 16-15-60. While this statute is rarely enforced and regularly violated, it still represents our state's express public policy. Consequently, Plaintiff's adulterous conduct bars her claims.

Rather than parse the statute and citing facts, the Court makes a bare legal conclusion. The Court refers Plaintiff's "adulterous conduct" rather than her alleged "adultery." This is understandable since there are no facts to support the elements of the crime.

S.C. Code § 16-15-60 which defines adultery as "the living together and carnal intercourse with each other or habitual carnal intercourse with each other without living together of a man and woman when either is lawfully married to some other person."⁴³ By definition (and Landgraff's admission), neither Plaintiff, nor Landgraff's ex-wife, is a man. As a result, any activity between them is not "adulterous."⁴⁴

Plaintiff's second affidavit presents the additional fact that "Plaintiff has discussed the issue of whether her behavior was criminal or in violation of the law with both the Greenville County Solicitor and a deputy in the Greenville County Sheriff's office. Both indicated it was

⁴² Black's "Law actually and specifically enacted or adopted by the proper authority for the government of an organized jural society."

⁴³ South Carolina Code of Laws § 16-15-70.

⁴⁴ Merriam-Webster dictionary defines adulterous as "relating to, characterized by, or given to adultery." So the alternate syntax does not change the elements of the crime.

not.”⁴⁵

Thus, the *ex turpi casua* defense is not applicable to this case. As a result, Plaintiff asks that Court reconsider its order, identify any part of its ruling that is based on this defense, and deny Landgraff’s summary judgment motion accordingly. If the Court does not grant this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale.

The Court Should Dismiss the In Pari Delicto Defense as Improperly Pled

In his Answer or Amended Answer, he raised the defense of *ex turpi causa* alleging that “[o]ne who participates in an unlawful act cannot recover damages for the consequences of that act.” Plaintiff filed her Memorandum in Support of Plaintiff’s Motion to Strike with a full analysis showing that she had not committed the statutory (or common law) crime of adultery. Afterwards, Landgraff filed a Supplemental Memorandum in which he pled the *in pari delicto* defense for this first time. This violates Rule 12(b).⁴⁶ Consequently, Plaintiff requests that the Court dismiss this defense and deny Landgraff’s motion for summary judgment. If the Court does not grant this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale as to how the defense was properly pled.

The Court Erred in Barring Plaintiff’s Claims Based on *In Pari Delicto* Defense

In South Carolina, the doctrine of *in pari delicto* is “[t]he principle that a plaintiff who

⁴⁵ Plaintiff Memorandum in Opposition, ¶ 12.

⁴⁶ “Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto” SCRCP 12(b).

has participated in wrongdoing may not recover damages resulting from the wrongdoing."⁴⁷ In South Carolina, this doctrine precludes one joint tort-feasor from seeking indemnity from another.⁴⁸ Obviously, Plaintiff and Landgraff are not joint tortfeasors.

That should end the question since the doctrine is inapplicable. As a result, Plaintiff asks that Court reconsider its order and deny Landgraff's summary judgment motion accordingly. If the Court does not grant this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale.

The Court Erred in Finding That Plaintiff and Defendant are Equally at Fault

The Court seems to think that *in pari delicto* doctrine is simply another way of saying "wrongdoers cannot recover." Not only is this an incorrect interpretation of the law, it is not true. The Court is open to criminals.

The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw. The court's aid is denied only when he who seeks it has violated the law *in connection with the very transaction as to which he seeks legal redress*.⁴⁹

One is not barred from recovery for an interference with his legally protected interests *merely* because at the time of the interference he was committing a tort or a crime.⁵⁰

⁴⁷ *Myatt v. RHBT Fin. Corp.*, 370 S.C. 391, 395, 635 S.E.2d 545, 547 (Ct. App. 2006) (quoting Black's Law Dictionary 794 (7th ed. 1999)).

⁴⁸ See *Rock Hill Tel. Co. v. Globe Commc'ns, Inc.*, 363 S.C. 385, 389 n. 2, 611 S.E.2d 235, 237 n. 2 (2005) ("In general, there is no right to indemnity between joint tortfeasors."); *Atlantic Coast Line R. Co. v. Whetstone*, 243 S.C. 61, 68, 132 S.E.2d 172, 176 (1963) (holding that there generally is no right to indemnity between joint tortfeasors).

⁴⁹ (Emphasis added; footnote omitted.) *Olmstead v. United States*, 277 U.S. 438, 484, 48 S.Ct. 564, 72 L.Ed. 944 (1928).

⁵⁰ (Emphasis added) 4 Restatement (Second), Torts § 889 (1979).

Even so, excluding criminal adultery, the Court fails to identify any unlawful act in which Plaintiff allegedly engaged. She has not entered into any illegal contract or other illegal endeavor. She has not committed a crime, violated any public policy, or been a party to a tort.

The record contains a certified copy of a criminal records search that shows Plaintiff has no convictions in Greenville County. Although Landgraff repeatedly said that Plaintiff had no “lawful right to be present” at the residence, he never explains why or alleges she broke in, was a trespasser, etc. She has not committed a crime.

A careful review of all the Offenses Against Public Policy in South Carolina confirm that she has not violated any of them under any reading of the facts of this case.⁵¹ In fact, before it became a statutory offense, adultery was “not an indictable offense in this state: nor can an indictment be maintained for living in adultery by charging it as an offense against public decency.”⁵²

“The primary source of the declaration of the public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration.”⁵³ A search of the S.C. Code of Laws for the words “public policy” reveals no prohibitions which

⁵¹ Chapter 17 of Title 16 of the South Carolina Code of Laws enumerates the “Offenses Against Public Policy” -- barratry; desecration or mutilation of flags; improper use of names; conspiracy; disturbing schools; unlawful communication; regulation of unsolicited consumer telephone calls; regulation of automatically dialed announcing device; refusal to relinquish party telephone line for emergency call; eavesdropping, peeping, voyeurism; contributing to the delinquency of a minor; custodial interference; sale or purchase of tobacco products or alternative nicotine products for minors; distribution of tobacco product or alternative nicotine product samples; cigarette packages violating certain federal laws; enticing enrolled child from attendance in school; disturbance of religious worship; wilfully, knowingly or maliciously disturbing funeral service; public disorderly conduct; bribery with respect to agents, servants or employees; bribery of athletes and athletic officials; assault or intimidation on account of political opinions or exercise of civil rights; interference with fire and police alarm boxes; removing State line marks; destruction or desecration of human remains or repositories thereof; soliciting emigrants without licenses; blackmail; cockfighting; using dry wells for sewerage in towns of 500 or over; record shall be kept by dealers in crossties; secondary metals recycler permits to purchase, transport or sell nonferrous materials; fortunetelling for purpose of promoting another business; tattooing; resale of ticket to event; impersonating law enforcement officer; filing of false police reports; charges for political advertisements in newspapers; and sale or possession of “cigarette load”.

⁵² SC Digest, 1783-1886 Vol. 1, West Publishing Co. summarizing *State v. Brunson*, 2 Bailey 149.

⁵³ *Citizens' Bank v. Heyward*, 135 S.C. 190, 133 S.E. 709, 713 (1925).

apply to any of Plaintiff's actions.⁵⁴

Plaintiff actions are not tortious. Significantly, South Carolina has abolished the torts of criminal conversation and alienation of affection as being against the public policy.⁵⁵

The public policy of this State is to foster and protect marriage, to make it a permanent and public institution, to encourage the parties to live together, and to prevent separation. We find, however, that the torts of criminal conversation and alienation of affections have outlived any usefulness they may have possessed in regard to preventing the dissolution of marriages. We discern that the public policy of this State is consistent with the modern course of the law moving away from "heart balm" causes of action. In fact, the legislature already has dispensed with causes of action for criminal conversation. S.C.Code Ann. § 15-3-150 (Supp.1991). We join the majority of states in abolishing the "heart balm" tort of alienation of affections for causes of action accruing after the date of filing of this opinion.

On the other hand, pursuant to the sheriff's investigation and SOVA inquiry, Landgraff has committed the crime of aggravated voyeurism which is a felony. In this action, he is a party to three torts. He is far more culpable than Plaintiff. In fact, his actions form the basis of culpability defense.

As a result, Plaintiff asks that Court reconsider its order and deny Landgraff's summary judgment motion accordingly. If the Court does not grant this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale.

⁵⁴ See Titles 1, 2, 5, 6, 8, 12, 15, 16, 17, 20, 26, 27, 29, 30, 33, 34, 38 39, 41, 43, 44, 48, 51, 56, 57, 58, 59, 62, and 63.

⁵⁵ Russo v. Sutton, 422 S.E.2d 750, 310 S.C. 200, 204-205 (S.C. 1992)

**Even If Plaintiff Had Engaged in Any Wrongful Conduct It Was Not a Cause,
Much Less a Concurring Cause of Her Injuries**

Landgraff describes the camera he installed as motion-sensitive. Consequently, Plaintiff would have appeared on the video when she walked in front of the camera's trigger and would have continued to be videotaped as long as she moved in front of the motion sensor. As a result, the intrusion occurred, the tort was complete, and the damage suffered.

As a result, Plaintiff asks that Court reconsider its order and deny Landgraff's summary judgment motion accordingly. If the Court does not grant this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale.

**Plaintiff is Seeking Compensation for Her Injuries
Not to Profit From Any Alleged Wrongdoing**

Plaintiff is not seeking to profit from her acts, unlawful or otherwise. Even if she committed a crime, she is not seeking damages for the legal consequences of the alleged criminal acts. She was not damaged by any of her actions, but by Landgraff and Sutton actions.

She is simply seeking to be made whole. The basic purpose of tort law is to restore an Plaintiff to the position she would have been in if the wrong had not been committed." compensated for the damages that. They intruded on her privacy not to be videotaped without her consent. As long as Landgraff and Sutton secretly videotaped a private aspect of Plaintiff, her relationships, or communications, the content of the videotape is irrelevant. Significantly, the damages from the intentional infliction of emotional distress and civil conspiracy are solely a result of Defendants' actions. For this reason alone, the *in pari delicto* defense fails.

As a result, Plaintiff asks that Court reconsider its order and deny Landgraff's summary

judgment motion. If the Court does not grant this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale.

The Court Failed to Rule on Discovery Issue Raised by Plaintiff

Numerous South Carolina courts have made it clear that because “summary judgment is a drastic remedy, it must not be granted until the opposing party has had a ‘full and fair opportunity to complete discovery.’”⁵⁶ In other words, “summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.”⁵⁷ An “if appropriate” analysis could have led the Court to find that Plaintiff should have been given the opportunity to complete written discovery and take depositions to uncover further evidence.

Plaintiff responded to Landgraff’s discovery. She then filed a Motion to Strike and Summary Judgment Motion. With a Form 4 Order, the Court denied Plaintiff’s Motion for Summary Judgment on July 1, 2014 based on Defendant Landgraff’s 56(f) affidavit. After the

⁵⁶ *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003); *Lanham*, 349 S.C. at 363; *Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001); *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999); *Baughman*, 306 S.C. at 112; *Schmidt*, 357 S.C. at 319.

⁵⁷ *Baughman*, 306 S.C. at 115 citing the following support: 10A Wright & Miller, *Federal Practice and Procedure* § 2741, p. 543 (1983); 6 Moore’s *Federal Practice* p 56.02, p. 56-39 (2d ed. 1990); *see, e.g., First Chicago Int’l v. United Exchange Co.*, 836 F.2d 1375 (D.C.Cir.1988) (“[O]ther circuits have excused the absence of a Rule 56(f) filing on the ground that other documents filed by the plaintiff—such as opposing motions and outstanding discovery requests—sufficed to alert the district court of the need for further discovery and thus served as the functional equivalent of an affidavit.”); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230 (2d Cir.1985) (“The harshness of the remedy is exacerbated when the trial court refuses to allow plaintiff to conduct discovery. Discovery serves important purposes, such as avoiding surprise, fully disclosing the nature and scope of the controversy, narrowing, simplifying, and framing the issues involved, and enabling parties to obtain the factual information needed to prepare for trial. . . . Dismissal of the case at that point, without further opportunity to conduct discovery, was an abuse of discretion.”); *Tyler v. City of Enterprise*, 521 So.2d 951 (Ala.1988) (“That case held that summary judgment was improper where discovery was incomplete. A party is entitled to complete his or her discovery in order to be able to counter a motion for summary judgment.”); *Gangadean v. Leumi Fin. Corp.*, 13 Ariz.App. 534, 478 P.2d 532 (1970) (“The trial judge should not order summary judgment until the opposing party has had time to discover essential facts.”); *Commercial Bank of Kendall v. Heiman*, 322 So.2d 564 (Fla.Dist.Ct.App.1975) (“We reverse on the state of the record, as it was premature for the trial court to award the defendant a summary judgment when the plaintiff, through no fault of its own, had not completed discovery.”); *Board of Education v. Van Buren & Firestone, Architects, Inc.*, 165 W.Va. 140, 267 S.E.2d 440 (1980) (“Thus, a decision for summary judgment before discovery has been completed must be viewed as precipitous.”); *See also, Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854 (S.C. 2001) (“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.”).

holiday, Landgraff filed his Answer to the Amended Complaint. Sutton did not file an Answer until after the hearing on Landgraff's motion.

Plaintiff re-filed her Motion to Strike to narrow the issues so she could begin discovery. The Court heard that motion on the same day as this Motion for Summary Judgment. The following discovery had been served on Defendants, but remain unanswered.

1. Request for Entry Upon Land for Inspection and Other Purposes;
2. Plaintiff's First Requests for Production to Defendant Frank A. Landgraff;
3. Plaintiff's First Set of Interrogatories to Defendant Frank A. Landgraff;
4. Plaintiff's First Set of Interrogatories to Defendant Carol Sutton and Carol Sutton & Associates – Investigations, Inc.;
5. Plaintiff's First Requests for Admissions to Defendant Carol Sutton and Carol Sutton & Associates – Investigations, Inc.; and
6. Plaintiff's First Requests for Production to Defendant Carol Sutton and Carol Sutton & Associates – Investigations, Inc.

In short, the Court ruled pursuant to Landgraff's 56(f) affidavit that summary judgment was premature. Since that time, Defendants have not answered Plaintiff's discovery and no depositions have been taken.

Thus, Plaintiff asks the Court to reconsider its order and deny Landgraff's summary judgment motion since granting it is still premature because Plaintiff "has [not] had a full and fair opportunity to complete discovery." If the Court denies this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale for its denial.

The Court Failed to Rule on Novel Issue Raised by Plaintiff

This case involves a motion-sensitive camera hidden to record a person who does not know she is being recorded. While several other states have found this to be an invasion of privacy, the issue is novel in South Carolina. This alone may make this case inappropriate for summary judgment. “We find it extremely troubling this case was resolved on a summary judgment basis, especially considering the injury to Schmidt and the *novel* issue involved in this case. No South Carolina cases discuss the issue of personal injury from the impact of errant golf shots.”⁵⁸

In a case involving errant golf shots, the Court was concerned about resolving the case on summary judgment. In this case, the issue involved whether it is an invasion of privacy to secretly make a video recording of someone in a private residence without the person’s knowledge or consent. The law is well-settled that secretly make an audio recording of someone under the same circumstances is a crime. “It is true that secretly televising people (or taking still or moving pictures of them) while they are in what they think is a private place is an even greater intrusion on privacy than secretly recording their conversations.”⁵⁹

The law is well-settled that wiretapping is illegal. Technology has outpaced jurisprudence when it comes to video recording. Thus, Plaintiff asks the Court to reconsider its order and deny Landgraff’s summary judgment motion by finding that granting the Summary Judgment is still not appropriate due to the novel issue presented in this case. If the Court denies

⁵⁸ *Schmidt v. Courtney*, 357 S.C. 310, 318, 592 S.E.2d 326 (S.C. App. 2003).

⁵⁹ *United States v. Torres*, 751 F.2d 875, 878 (7th Cir. 1984) (Deciding whether the federal government had a right to videotape suspected terrorists in a federal building. Six other federal circuits have followed the Seventh Circuit’s decision).

this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale for its denial.

**The Court Failed to Rule on the Issue
of Why a Fuller Record is Not a Better Course**

The United States Supreme Court recognized that there may be cases where there is no manifest material factual dispute, but the trial judge nevertheless "believe[s] that the better course would be to proceed to a full trial, presumably because in the circumstances of the case a fuller record might afford a more substantial basis for decision."⁶⁰ The Court's identification of facts that it doesn't know or, that may make a difference, indicate that a fuller record would be helpful.

The Court obviously has questions that need answers; so does Plaintiff. That is why she has served discovery asking, *inter alia*, for the following information:

1. Identify any and all persons and a summary of what Defendant told each person whom Defendant and/or his attorneys has told about the Videotape and/or its contents, that Plaintiff had an affair with Mulligan, and/or that Plaintiff and/or Mulligan is a lesbian.
2. Identify any and all persons with whom Defendant, Defendant's counsel or anyone else known by Defendant has discussed the existence and/or content of the videotape.
3. Set forth an inventory of all originals or copies of the Videotape, portions of the Videotape, and/or still shots made from the Videotape, including from whom Defendant received them, to whom he gave them, and the present location of each.
4. Any and all private investigator's report(s) or other surveillance logs, notes, and communications concerning Plaintiff, Defendant, Mulligan, and/or any allegations, claims, defenses or affirmative defense in this case.

⁶⁰ *Anderson* 477 U.S. at 255; See *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 567-71 (1987); *Anderson v. Hodel*, 899 F.2d 766, 770-71 19th Cir. 1990); *Veillon v. Exploration Servs*, 876 F.2d 1197, 1200 (5th Cir. 1989).

5. Admit that before you installed the camera in the bedroom at 122 Antigua Way, your surveillance produced no evidence of sexual activity or of more than a girlfriend, girlfriend relationship between Plaintiff and Mulligan.
6. Admit that you knew that installing the motion-activated camera and portable DVD player in the master bedroom at 122 Antigua Way could result in the recording of Plaintiff.
7. Describe, in detail and with specificity, all facts, theories, and supporting evidence and identify each document that you contend shows any incidents of affection between Plaintiff and Landgraff and between Plaintiff and Mulligan.
8. Set forth an inventory of all originals or copies of the videotape, of all portions of the videotape, and/or of all screen grabs made from the videotape, identifying who has each item inventoried and whether it is possible to copy any of the items.
9. Identify any and all persons with whom Defendant or anyone else known by Defendant has discussed the existence and/or content of the videotape or screen grabs, who has viewed the videotape or screen grabs, or to whom Defendant or anyone else known by Defendant has shown the videotape or screen grabs.
10. Describe, in detail and with specificity the substance of any and all communications concerning the camera installed at 122 Antigua Way, including why the camera was installed; who decided where and when the camera would be installed; all dates and times a camera was installed and removed; the content of any videotapes recorded in addition to the one that is the subject of this case; the legality of installing the camera; who was present when the camera was installed; who was present when the camera was removed; who knew the camera was going to be installed; who gave you permission to install the camera; and any other communications, discussion, and disagreements regarding any aspect of the installation.

Plaintiff asks the Court to reconsider its order and deny Landgraff's summary judgment motion based on this issue. If the Court denies this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale for its denial.

**The Court Failed to Rule on the Issue of Why a Further Inquiry
into The Facts of This Case is Not Desirable to Clarify the Law**

"Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." ⁶¹ The Court states that "the images may, as Plaintiff speculates, persist on some relatively permanent medium." Once Defendants answer the outstanding discovery, the Court will know. Similarly, the Court states "there is no evidence any Defendant has disclosed them to non-parties, and if there is such evidence the wrongful rule likely would not apply." By granting Landgraff's summary judgment, the Court cuts off further inquiry into the facts and Plaintiff's ability to gather such evidence that would likely eliminate the basis of the Court's decision.

Plaintiff asks the Court to reconsider its order and deny Landgraff's summary judgment motion based on this issue. If the Court denies this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale for its denial.

**The Court Failed to Rule on the Issue of Why Summary Judgment is Appropriate When a
Dispute Exists over the Conclusion to be Drawn from the Facts**

"Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts."⁶² The Court has clearly concluded that Plaintiff was having an ongoing affair with Landgraff's wife. On the other hand, the Greenville County Sheriff and SOVA have clearly concluded that Plaintiff was the victim of video voyeurism committed by the Defendants. The conclusions are obviously in dispute.

⁶¹ *Lanham*, 349 S.C. at 362.

⁶² *Gilliland v. Elmwood Properties, Inc.*, 301 S.C. 295, 391 S.E.2d 577, 579 (1990).

Plaintiff asks the Court to reconsider its order and deny Landgraff's summary judgment motion based on this issue. If the Court denies this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale for its denial.

**The Court Failed to Address the Issues
in Plaintiff's Motion to Strike Against Sutton**

The Form 4 entered by the Court indicated that Plaintiff's Motion to Strike was rendered moot by the Court's grant of Defendant's Summary Judgment Motion. In the Order in question, the Court apparently denies the motion, but does not even mention it. Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale for denying the motion in its entirety.

The Court Should Dismiss Sutton's Fourth Defense

Sutton alleges that Plaintiff "failed to join parties who are indispensable to the just resolution of this matter." Who? Plaintiff is left to guess. Sutton gets the remedy wrong by saying the "matter must be dismissed for failure to join those parties, pursuant to Rule 12(b)(7) and Rule 19(a)." To the contrary, the proper remedy is that "the court shall order that he be made a party."⁶³

Since only Sutton knows the identity of said parties, Plaintiff asks the Court should order Sutton to reveal their identity and then order their joinder. If the Court denies this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale for its denial.

The Court Should Dismiss Sutton's Sixth Defense

Sutton avers the defense of consent by alleging that Plaintiff "implicitly or explicitly

⁶³ SCRCP 19(a).

consented to the surveillance complained of” She makes the allegation with absolutely no factual support. What consent did Plaintiff give?

“Consent may be found where the evidence shows a voluntary agreement to do something proposed by another, and the party consenting possesses sufficient information and ability to make an intelligent choice.”⁶⁴ Sutton never proposed to Plaintiff that she voluntarily agree to allow them to intrude on her private affairs, damage her emotionally, or conspire to damage her. Needless to say, Plaintiff never consented to her actions.

Plaintiff asks the Court to strike this defense as insufficient under Rule 8 pleading standards. If the Court denies this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale for its denial.

The Court Should Dismiss Sutton’s Seventh Defense

Sutton truly baffles Plaintiff with this defense – “Insofar as the plaintiff’s complaint seeks punitive damages, such damages are violative of both the United States and South Carolina Constitutions and are therefore not recoverable in this cause.” That’s it -- no facts, no cases, no explanation.

Sutton offers no explanation of the specific provision for punitive damages in *Snakenburg*⁶⁵ case that recognized the claims for invasion of privacy in South Carolina. Sutton also ignores the chain of cases handed down by the U.S. Supreme Court that do not support this assertion. In addition, she ignores the statutory provision for punitive damages in SC Code of Laws §15-32-510.

Again, Sutton provides not one fact to inform Plaintiff what she did that precludes punitive damages “in this cause.” Because this defense is insufficient under Rule 8 pleading

⁶⁴ *Hawkins By and Through Hawkins v. Multimedia, Inc.*, 344 S.E.2d 145, 288 S.C. 569 (S.C. 1986).

⁶⁵ *Snakenberg v. Hartford Casualty Ins. Co., Inc.*, 383 S.E.2d 2, 299 S.C. 164 (S.C. App. 1989).

standards and erroneous, Plaintiff requests that the Court strike it. If the Court denies this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale for its denial.

The Court Should Dismiss Sutton's Eighth Defense

Sutton simply states that “by his or her conduct, the plaintiff assumed the risk of injury, if any” Sutton identifies no conduct or facts to support this statement. What risk did Plaintiff assume?

“Currently in South Carolina, there are four requirements to establishing the defense of assumption of risk: (1) the plaintiff must have knowledge of the facts constituting a dangerous condition; (2) the plaintiff must know the condition is dangerous; (3) the plaintiff must appreciate the nature and extent of the danger; and (4) the plaintiff must voluntarily expose himself to the danger.”⁶⁶

Sutton gives no fact that indicates that Plaintiff knew that the defendants were going to intrude on her private affairs, damage her emotionally, or conspire to damage her. Plaintiff could have no knowledge that Defendants were videotaping her. By their own admission, they installed a hidden, motion-activated camera. The concealment of which was their stated goal. Logically, Plaintiff cannot voluntarily expose herself to anything that she did not know about. This may explain Sutton's obvious omission of any facts supporting this defense.

Plaintiff has no notice of the facts constituting this defense. Because this Defense is implausible and insufficient under Rule 8(b) pleading standards, Plaintiff requests that the Court strike it. If the Court denies this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale for its denial.

⁶⁶ *Senn v. Sun Printing Co.*, 295 S.C. 169, 367 S.E.2d 456 (Ct.App.1988).

The Court Should Dismiss Sutton's Ninth Defense

Sutton avers that the damages “must be plead [sic] with specificity” and that Plaintiff “failed to plead the elements of civil conspiracy, including but not limited to damages arising from a conspiracy different in nature or character from those arising from other acts or omission plead [sic] in the complaint.” Sutton evidently missed Plaintiff’s claim for special damages for the civil conspiracy which are “specific” and “different in nature or character” from those pled for the other two causes of actions.

Plaintiff requests that the Court strike this defense as patently erroneous, without factual support, and insufficient under Rule 8(b). If the Court denies this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale for its denial.

The Court Should Dismiss Sutton's Tenth Defense

Sutton goes further to erroneously state that an “element of various causes of action alleged by the plaintiff is special damages [and] has failed to plead such damages.”

Looking solely to the Amended Complaint, Plaintiff only alleged special damages in one cause of action – civil conspiracy. In that cause of action, Plaintiff specifically identified the special damages: “Defendants’ combined actions caused Plaintiff to suffer special damages including, but not limited to loss of professional reputation, medical expenses, and future medical expenses.” Thus, Plaintiff requests that the Court strike this defense as patently erroneous. If the Court denies this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale for its denial.

The Court Should Dismiss Sutton's Eleventh Defense

Sutton alleges that Plaintiff “seeks to profit from his or her own unlawful acts” before

reciting her understanding of the doctrine of *ex turpi causa*. Sutton also does not identify any activities, the statutory or common law, or public policy. As discussed exhaustively above, Plaintiff has not committed any crime. Thus, requests that the Court strike this defense. If the Court denies this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale for its denial.

The Court Should Dismiss Sutton's Twelfth Defense

Sutton avers previous disclosure of "events or occurrences which give rise to his or her causes of action" Nothing could be further from the truth and Plaintiff urges Sutton to stop deceiving the Court about this issue.

This is an action for wrongful intrusion into private affairs, not wrongful publication of private affairs. The one affidavit that Plaintiff presented in a closed courtroom to a file that was sealed was presented before Plaintiff even knew a videotape existed. How could she disclose something of which she had no knowledge? The intrusion was the spying and making the videotape -- the content of the videotape is irrelevant.⁶⁷

Plaintiff requests that the Court strike this defense. If the Court denies this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale for its denial.

**The Court Should Address the Issues
in Plaintiff's Motion to Strike Against Landgraff**

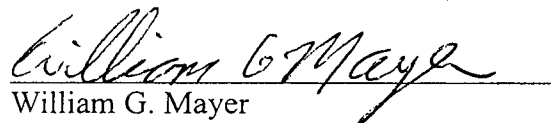
Should the Court reconsider and deny Landgraff's Motion of Summary judgment,

⁶⁷ i.e., *In re Marriage of Tigges*, 758 N.W.2d 824 (Iowa 2008) ("Although the tape was not offered in evidence, we credit [Wife's] testimony that it recorded the 'comings and goings' from the bedroom she regularly used. Notwithstanding the unremarkable activities recorded on the tape, [Wife] suffered damage as a consequence of [Husband's] actions." "The wrongfulness of the conduct springs not from the specific nature of the recorded activities, but instead from the fact that [Wife's] activities were recorded without her knowledge and consent at a time and place and under circumstances in which she has a reasonable expectation of privacy.")

Plaintiff requests that it also strike his affirmative defenses. If the Court denies this request, Plaintiff requests that the Court set out all relevant facts and its legal analysis sufficient to give clear notice as to its rationale for its denial.

Conclusion

Based on the foregoing, the Court should reconsider its Order, deny Landgraff's Motion for Summary Judgment, and strike the Defendant's defenses.

A handwritten signature in cursive script, reading "William G. Mayer", is written over a horizontal line.

William G. Mayer
S.C. Bar No. 13340
Attorney for the Plaintiff
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864-984-9202 Telephone
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Greenville, South Carolina
February 12, 2015

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Carol Simpson,

Plaintiff,

v.

Frank A. Landgraff, Carol Sutton, Sutton
& Associates Investigations, Inc.

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. 2013-CP-23-1762

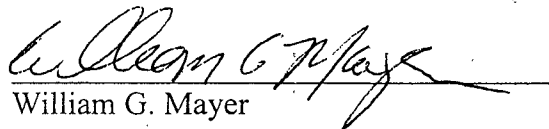
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that hereby certify that I have served a copy of **Plaintiff's Motion for Reconsideration** upon the individuals named below, by placing a copy in the United States Mail, postage prepaid and return address clearly indicated to the addresses below on this 12th day of February, 2015:

The Honorable D. Garrison Hill
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Judge

Appellate Case No. 2015-000778
Case No. 2013-CP-23-01762

RECEIVED

AUG 19 2015

SC Court of Appeals

Carol Simpson,

Appellant,

v.

Frank A. Landgraff, Carol Sutton, Sutton & Associates
Investigations, Inc., Defendants,

Of Whom Frank A. Landgraff is the

Respondent.

PROOF OF SERVICE

I HEREBY CERTIFY that I have served a copy of Appellant's Return to Frank A. Landgraff's Motion to Dismiss upon the individuals named below, by placing a copy in the United States Mail, postage prepaid and return address clearly indicated to the addresses below on this 19th day of August, 2015:

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