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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Allison Renee Lee, Circuit Court Judge

Case No. 2012-CP-40-4652  
S.C. Appellate Tracking No. 2014-000663

James W. Trexler.....Appellant,

v.

The Humane Society for the Prevention of Cruelty  
To Animals, and Wayne Brennessel, individually and  
As Executive Director of the Humane Society for the  
Prevention of Cruelty to Animals.....Respondents.

**FINAL BRIEF OF RESPONDENTS**

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## **STATEMENT OF ISSUES ON APPEAL**

- I. Whether the trial court erred in granting Respondents' Motion for Summary Judgment as to Appellant's claim for Malicious Prosecution.
- II. Whether the trial court erred in granting Respondents' Motion for Summary Judgment as to Appellant's claim for Defamation.
- III. Whether the trial court erred in holding that S.C. CODE ANN. § 33-56-180 shields Respondent Brennessel from judgment.

## **STATEMENT OF THE CASE**

Respondent the Humane Society for the Prevention of Cruelty to Animals (hereinafter "HSPCA") is a 501(c)(3) non-profit entity which investigates reports of animal cruelty, operates a low-cost spay/neuter clinic, provides programming for sterilizing feral cats, and provides educational programs. Respondent Wayne Brennessel is the Executive Director for the HSPCA.

In February of 2008 and before Wayne Brennessel was with the HSPCA, the HSPCA responded to a complaint that horses owned by Appellant's family and located on property on Zeigler Road in Richland County, South Carolina, may be being mistreated. The HSPCA investigated the complaint and ultimately determined that the horses were being mistreated. In cooperation with local authorities, the HSPCA effected the removal of the horses from the Zeigler Road property. Subsequent investigations revealed additional mistreated horses located at Misty Meadows Road in Richland County. Investigation also revealed approximately five mistreated horses on Appellant's property located at 412 Derby Lane in Richland County. As with the Ziegler Road property, the HSPCA, in cooperation with local authorities, effected the removal of the mistreated horses from these locations.

Finally, an investigation of property in Sumter County owned or occupied by the Appellant's family revealed several horse burial sites. Approximately 50 horses were seized from the three properties.

The Appellant, his brother Terry Trexler, and his mother Hazelene Trexler were subsequently charged with numerous criminal counts of animal cruelty. In March 2008, a Richland County Grand Jury issued a True Bill of Indictment for five separate counts of animal cruelty. R. 103-115. Ultimately, the Attorney General of South Carolina consummated a deal with the Appellant, his mother, and brother, where Terry Trexler pled no contest to ill treatment of animals, the family relinquished all ownership interest in the horses that were seized, and the criminal actions against Appellant and Appellant's mother were nol prossed.

During the pendency of the criminal charges, Terry Trexler and Hazelene Trexler brought four civil lawsuits against the HSPCA, the Richland County Sheriff's Department, Solicitor Barney Giese, and other entities. They made claims for malicious prosecution, defamation, civil conspiracy, and other claims. They filed an action in Calhoun County, Case No.: 2009-CP-09-16. They filed suit in the United States District Court, District of South Carolina, Case No. 0:09-0144-RBH-PJG. They also filed two State actions in Richland County: Case No.: 2009-CP-40-419 and Case No.: 2009-CP-40-420. Terry Trexler and Hazelene Trexler dismissed these cases via stipulations of dismissal which were filed in all of the respective courts.

Much like his mother and brother, Appellant James Trexler has filed multiple actions in Richland County with allegations of defamation and malicious prosecution

against many different defendants<sup>1</sup>. In the action at hand, Appellant brought one claim for malicious prosecution related to the criminal charges referenced above and one claim for defamation related to a WLTX website article posted on February 1, 2011. R. 116.

As mentioned *supra*, a Richland County Grand Jury issued True Bills indicting Appellant James Trexler for five counts of cruelty to animals. R. 103-116. In addition to on-site inspections of multiple properties revealing malnourished horses and dogs on property owned by the Appellant, the HSPCA searched horse ownership records and property ownership records linking Appellant James Trexler to some of the horses in question and to the property where some of those horses were stabled. Supp. R. 2-20. This was performed prior to the date of the issuance of the True Bills of Indictment. R. 103-115; Supp. R. 19-20. The Appellant admitted that he had owned the 412 Derby Lane property and that he was still paying for the utilities and taxes at the time of the underlying events. R. 6.

Subsequent to the indictments, the investigation continued which included forensic examination of multiple dead horses. R. 120. Subsequent investigation also revealed a witness, Connie Dickman, informing the HSPCA that she sold a horse to James Trexler. R. 120; Supp. R. 2-9, 13-18. The prosecuting authority relied on this information to prosecute Terry Trexler, Hazelene Trexler, and Appellant James Trexler.

On or about July 15, 2010, Terry Trexler, as mentioned above, pled no contest to charges of animal cruelty and all ownership rights of the Trexler family to the subject horses were relinquished. During the pending criminal charges, the HSPCA spent over \$200,000 to care for the 50 horses that were seized. They took malnourished, sick animals and

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<sup>1</sup> See Appellate Case No. 2013-001581 resulting from Civil Action No.: 2010-CP-40-1249; see also Appellate Case No. 2014-002032 resulting from Civil Action No.: 2010-CP-40-01343.

nourished them back to health through providing proper feed, pasture, stable, and veterinary care. As soon as the Trexler family relinquished their ownership right to the horses, the HSPCA began to offer the horses for adoption. In an effort to promote the adoption of these horses, WLTX published an article on February 1, 2011 entitled “Neglected Horses Still up for Adoption” R. 116. This article is the complete basis for the Appellant’s defamation claim. It states, as follows:

Some horses seized three years ago still need permanent homes. In 2008, the Humane Society began taking horses from Richland County properties owned by the Trexler family, saying the animals were neglected and malnourished. In court, the Trexlers pleaded no contest and gave up rights to the horses, Humane Society director Wayne Brennessel said... “When they were removed, they were in really terrible shape – halters were grown into their skin, their hooves were splayed,” Brennessel said.

R. 116.

The article does not mention James Trexler. Consistent with the article, the horses in-question were owned by the Trexler family. The HSPCA has produced documentation, veterinary records, and photographs that show the conditions in which the horses were found. Rather than publishing that Terry Trexler pleaded no contest, WLTX published that “the Trexlers pleaded no contest and gave up rights to the horses.” However, the article does not mention Appellant’s name and contains comments which the trial court found to be substantially true regarding events that transpired several years ago.

In a case that Appellant has brought against several press agencies, Civil Action No.: 2010-CP-40-1249, the Circuit Court granted summary judgment in favor of the Defendants. Mr. Trexler’s appeal of that judgment is currently pending before this Court, Appellate Case No. 2013-001581. Similar to this case, the other case contained allegations of libel, slander,

and/or defamation against the news agencies for their reporting regarding the mistreatment of horses and the ensuing criminal proceedings against James Trexler. Prior to the underlying circumstances giving rise to this action, Appellant served as the state's Assistant Commissioner of Agriculture. Though he contended in the other case that he was a private figure, the Circuit Court by Order dated October 25, 2012, held as follows:

It seems clear beyond doubt that plaintiff is a public official in the context of this litigation. He acknowledged in his letter of resignation... that he was an Assistant Commissioner of Agriculture, and that he helped to lead the agency. Plaintiff testified in his deposition, and the Commissioner of Agriculture testified in his deposition, that plaintiff was the department's liaison with the General Assembly, the State Budget and Control Board and the Board of Trustees of the University of South Carolina as project manager for the relocation of the State Farmer's Market... Had plaintiff's title been "head bookkeeper" or something similarly limited, he might be considered a private figure for *some cases*, ***but in the context of publications concerning his arrest and indictment for mistreatment of horses, public interest in his activity in this particular context, apart from his title, makes him a public official.***

See pp. 13-14 of Order of Joseph M. Strickland Granting Summary Judgment in C.A. No. 2010-CP-40-1249, James W. Trexler v. The Associated Press, Barrington Broadcasting S.C Corp., Raycon TV Broadcasting, Inc., The Spartanburg Herald Journal, Inc., and the Pacific & Southern Co., Inc., R. 136-137, (emphasis added). The Circuit Court in this case deferred to the above-referenced ruling because the two actions arise "out of the same facts and circumstances." R. 7.

## **ARGUMENT**

### **I. THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT AS TO THE MALICIOUS PROSECUTION CAUSE OF ACTION SHOULD BE AFFIRMED.**

**A. The Trial Court did not Err in holding that Appellant Trexler Failed to Establish that Respondents lacked Probable Cause to initiate the investigation of the Ill Treatment of Horses which led to Appellant's Arrest.**

South Carolina cases have addressed the role of probable cause in cases for malicious prosecution as follows:

While actions for malicious prosecution may be maintained in the courts, they have never been regarded with favor and are not encouraged as it is in the interest of good order that criminals be brought to justice; and it is generally held that the prosecutor is free from damage if there be probable cause of the accusation, the burden being upon the plaintiff to show the absence of probable cause as a part of the cause of action. Fulmer v. Harmon, 3 Stro. 576; Hogg v. Pinckney, 16 S.C. 387.

Prosser v. Parsons, 245 S.C. 493, 502, 141 S.E. 2d 342, 347 (1965) (Emphasis added) (additional citation omitted).

[T]he elements of malicious prosecution are (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in institution such proceedings; (5) lack of probable cause; and (6) resulting injury or damage. Law [v. South Carolina Dept. of Corrections], 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006)...

Probable cause means "the extent of such facts and circumstances as would excite the belief in a reasonable mind acting on the facts within the knowledge of the prosecutor that the person charged was guilty of a crime for which he has been charged, and only those facts and circumstances which were or should have been known to the prosecutor at the time he instituted the prosecution should be considered." In determining the existence of probable cause, the facts must be "regarded from the point of view of the party prosecuting; the question is not what the actual facts were, but what he honestly believed them to be." *South Carolina has long embraced the rule that a true bill of indictment is prima facie evidence of probable cause in an action for malicious prosecution.* Although the question of whether probable cause exists is ordinarily a jury question, it may be decided as a matter of law when the evidence yields but one conclusion. Id. at 436, 629 S.E.2d at 649 (citations omitted) (emphasis added).

McBride v. School District of Greenville County, 389 S.C. 546, 566-67, 698 S.E.2d 845, 855-56 (Ct. App. 2010).

In McBride, the plaintiff was indicted for a felony by the grand jury, and that indictment “is prima facie evidence of probable cause as to that charge.” Id. at 567, 698 S.E.2d at 856.

The same thing is true in this case. The grand jury returned, on March 12, 2008, indictments as to five charges of Ill Treatment of Animals against James W. Trexler. R. 103-115. These multiple indictments of Mr. Trexler are substantial evidence of probable cause as to his felony violation of S.C. CODE ANN. §47-1-40. Appellant has the burden of proving the *lack* of probable cause and has failed to do so. Any supposed technical errors in the affidavits presented to the magistrate do not trump the evidence presented to the grand jury, which must remain secret.

Regarding the alleged errors, James Trexler gave every indication that he lived, and kept horses at, 412 Derby Lane in Hopkins, S.C. Mr. Trexler was certainly at 412 Derby Lane – with horses present – a sufficient amount of time for neighbors and others to consider that he resided there and was involved with horses, both individually and through his mother and brother. His testimony relevant to his current claims regarding 412 Derby Lane and horses there is as follows:

- He lived at that residence. R. 6, 13, 94.
- He left the house and moved back into the house March 2008. He was not living in the house in January and February, 2008. R. 94.
- Throughout, James Trexler continued to pay the utility and tax bills. Circuit Court Order p. 3; R. 6.
- His mother placed four horses in stalls at 412 Derby Lane. R. 12.
- While he claims he was absent from the house at 412 Derby Lane, he took his son back there every other weekend. R. 94.

- He transferred the property to an LLC in which his mother had interests. R. 94.
- The LLC to which he transferred his interest in the house was a horse-related entity, Carolina Arabian Show Horses, LLC. R. 12, 94.
- His mother, Hazelene, was the owner of Carolina Arabian Show Horses, LLC. R. 12.
- On February 13, 2008, HSPCA agent Michele Hart was accosted by Hazelene and Terry Trexler as she tried to photograph Trexler horses and her vehicle was blocked in by Terry Trexler, who was driving James Trexler's truck. R. 94, 118. The presence of James Trexler's truck at the Ziegler Road horse operation linked James Trexler with his mother and brother in that horse-related operation.
- After the 2/13 incident between the Trexlers and Ms. Hart, the Richland County Sheriff's Office partnered with the HSPCA to investigate the treatment of horses reported to be malnourished. R. 14.
- On February 25, 2008, all 23 of the horses at the Trexler's property on Zeigler Road in Eastover, S.C. were confiscated by the Richland County Sheriff's Department. R. 15.
- While the action of February 25 was ongoing on the Zeigler Road property, the HSPCA received a report from an informant, whose name has not been revealed, that other malnourished horses were seen at the 412 Derby Road property. R. 16.

Thereafter, the RCSD and HSPCA obtained a search warrant and searched the premises at 412 Derby Road where five more malnourished horses were found and James Trexler, Hazelene Trexler, and Terry Trexler were arrested by the RCSD.

The sequence of events related above makes plain that the RCSD, based on information it and HSPCA had accumulated, had probable cause to investigate conditions at 412 Derby Road and, based on what was found, to arrest James Trexler. Appellant Trexler was there with sufficient frequency to be known as a possessor of the property – and as a custodian of the animals. He knew that horses were being kept on the property over which he exercised control. He had an obligation under S.C. CODE ANN. § 47-1-

40 to ensure that the animals of which he was aware were adequately cared for, and RCSD and HSPCA had probable cause to investigate whether Trexler was fulfilling that statutory duty. Furthermore, the records that the HSCPA obtained from the Arabian Horse Association prior to the issuance of the True Bills of Indictment indicate James Trexler's ownership of multiple horses. Supp. R. 19-20.

Therefore, both because the grand jury's returning of true bills as to all five of the charges of ill-treatment of animals is *prima facie* evidence of probable cause and because the events related in the record reflect actual probable cause, the Court should affirm the trial court's grant of summary judgment as to the Appellant's malicious prosecution claim. James Trexler has certainly *not* met his burden of showing the absence of probable cause.

**B. Appellant has Failed to Establish a Second Element of his Claim of Malicious Prosecution: that the Proceedings were Terminated in His Favor.**

Appellant Trexler has asserted that the proceedings against him were resolved in his favor because the claims against him were dismissed. R. 19. That, however, does not end the inquiry, as that dismissal was part of a plea agreement with the Attorney General's Office. R. 5. The agreement was that Terry Trexler would plead no contest to animal cruelty; the charges against James Trexler and his mother would not be prosecuted; and the Trexlers' ownership rights to the horses would all be transferred to HSPCA.

The transfer of ownership of the horses fully accomplished the purposes of the HSPCA, *id.*, and Richland County Sheriff's Department. S.C. CODE ANN. § 47-1-150, in the chapter regarding cruelty to animals, states that, "[t]he purpose of this section is to provide a means by which a neglected or mistreated animal can be: (1) removed from its

present custody.” S.C. CODE ANN. § 47-1-150(b)(1). That is exactly what happened, so HSPCA fully achieved its objective and Appellant and his mother and brother have lost possession of the horses. To the extent that Appellant asserts that he owned no horses, that is contrary to evidence of record, which is that a Connie Dickman from Indiana made a claim that she had sold James Trexler a horse two to three years previously, with an agreed price of Ten Thousand Dollars (\$10,000.00). She provided a copy of the contract and stated that she had been paid only \$5,000 by James Trexler. R. 120; Supp. R. 4-9.

In any event, the result of the General Sessions proceedings was more favorable to HSPCA than to Appellant. This provides an additional sustaining ground to affirm the trial court’s grant of summary judgment as to the malicious prosecution claim.

**C. Appellant has Failed Adequately to Establish a Third Essential Element of his Malicious Prosecution Claim: that Malice Motivated the Institution of the Proceedings.**

Appellant has failed to establish that either of the Respondents were motivated by malice in investigating the conditions of horses kept at 412 Derby Lane in Hopkins.

Appellant Trexler has provided no evidence that anyone at HSPCA was motivated by malice in starting the investigation of horse mistreatment that resulted in his indictment.

Mr. Trexler’s claim for malicious prosecution; therefore, fails adequately to establish three of its essential elements: lack of probable cause; termination of the proceedings in Appellant’s favor; and malice in the institution of proceedings. The failure of any *one* of these elements dooms that claim. Paine Gayle Properties, LLC v. CSX Transp., Inc., 400 S.C. 568, 575, 735 S.E.2d 528, 532 (Ct. App. 2012) (affirming circuit

court's holding that, "due to Landowner's failure to establish at least one essential element of each of its causes of action, [Defendant] was entitled to judgment as a matter of law"). The circuit court should similarly be affirmed in this case regarding the malicious prosecution cause of action.

## **II. THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT AS TO DEFAMATION SHOULD BE AFFIRMED.**

The essential elements of a defamation claim are as follows:

To prove defamation, a plaintiff must show "(1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 464, 629 S.E.2d 653, 664 (2006).

*Banks v. St. Matthew Baptist Church*, 406 S.C. 156, 161, 750 S.E.2d 605, 607 (2013)

"[A] sufficient defense is made out where the evidence establishes that the statement was substantially true. *Dauterman v. State-Record Co.*, 249 S.C. 512, 154, S.E.2d 919 (1967)."

*Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 80, 221 S.E.2d 770, 772 (1976)

### **A. This Court should Affirm the Circuit Court's grant of Summary Judgment as to the Appellant's Defamation claim because the allegedly defamatory words were substantially true.**

The words that Appellant Trexler alleges to have been defamatory are contained in an internet post written by Sydney Cummins entitled "Neglected Horses Still Up for Adoption." R. 116.

The obvious intention and purpose of the article is to encourage people to adopt the horses that had previously been neglected on "properties owned by the Trexler family." R. 116. The article is based on the reporter's discussion with Wayne

Brennessel, the director of the HSPCA, and includes some words quoted by him, none of which offer even a hint of malice.

The words alleged to be defamatory by Appellant James Trexler, however, are *not* quoted from Mr. Brennessel, but are apparently a paraphrase of what he might have said. The alleged defamation is ostensibly conveyed in the words, “the Trexlers pleaded no contest.” R. 116.

The trial court was correct in granting summary judgment as to the defamation claim on the ground the offending words were substantially true. R. 7. The Trexlers were collectively involved in a plea negotiation regarding the criminal charges for the ill treatment of animals brought against all three of them.

The plea agreement was an oral agreement between the Trexler family and the attorney general’s office. As a quid pro quo for Terry Trexler pleading no contest to charges against him and the Trexler family relinquishing custody of all the horses that had been confiscated, the prosecuting Attorney General agreed not to prosecute the indictments against Mrs. Trexler and her son James. The plea of “no contest” by a member of the Trexler family appears to have been an essential element of the overall plea agreement between the *family* and the Attorney General’s office.

It is unequivocal that Brennessel did *not* say “James Trexler pleaded no contest.” If he said, “the Trexlers pleaded no contest” – which is *not* admitted by Mr. Brennessel – it would be the likely understanding of a non-attorney sitting in an unfamiliar courtroom in which the adversaries appeared to be the Trexler family versus The Attorney General

and HSPCA.<sup>2</sup> Given the circumstances, the statement that “the Trexlers pleaded no contest” is substantially true. *All of them* were released from further prosecution by that action and their surrender of the family horses. The Circuit Court correctly held that the statement in question was substantially true. R. 7.

**B. The Circuit Court’s Awarding Summary Judgment to the Respondents on the Defamation Claim Should be Affirmed also because there is no Evidence that Mr. Brennessel was at fault.**

The words alleged to be defamatory are not, as pointed out above, enclosed in quotation marks. The author of the article thereby indicates the disputed words are not the specific words of Mr. Brennessel. The author does, however, include several direct quotations from Mr. Brennessel, but the words, “the Trexlers pleaded no contest,” are not among them. The allegedly offending words, therefore, are the words of the author, not of Brennessel. If they are not the words of Brennessel, neither he nor the HSPCA are at fault for their publication. If Appellant cannot show fault on the part of Respondents he has failed adequately to establish an essential element of his cause of action, rendering correct and appropriate the Circuit Court’s grant of summary judgment as to defamation.

Appellant Trexler has provided no evidence of what Brennessel’s exact words were. Appellant’s claim is essentially a claim for defamation based on speculation as to what Mr. Brennessel actually said. Appellant’s speculation falls even further short of the clear and convincing standard for the of evidence that a “public figure” – as Mr. Trexler has judicially been deemed to be – must provide to establish the falsity of a statement made about him. R. 7, citing the Order Granting Summary Judgment in C.A. No. 2010-

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<sup>2</sup> Our Supreme Court has held, as recited by the Circuit Court, that, “requiring a strict adherence to legal terminology is unreasonable.” R. 7, citing Ross v. Columbia Newspapers, Inc. 266 S.C. 75, 80, 221 S.E.2d 770, 773 (1976)

CP-40-1249, James W. Trexler v. The Associated Press, Barrington Broadcasting S.C Corp., Raycon TV Broadcasting, Inc., The Spartanburg Herald Journal, Inc., and the Pacific & Southern Co., Inc.

If summary judgment for the actual publisher of the allegedly defamatory words was appropriate, as it was, certainly summary judgment for someone for whom there is no evidence of publication of the alleged offending words, is even more appropriate. The Circuit Court's ruling to that effect should be affirmed.

Appellant has, in fact, failed to establish adequately two essential elements of a claim for defamation—that it was false (because it was substantially true) and that the publisher was at fault. Our law mandates that summary judgment be granted to a defendant in such a situation. The trial court should be affirmed on this issue.

### **III. S.C. CODE ANN. § 33-56-180 SHIELDS MR. BRENNESSEL FROM JUDGMENT**

S.C. CODE ANN. § 33-56-180 provides, in pertinent part as follows:

#### **33-56-180. Limitation of liability for injury or death caused by employee of charitable organization.**

(A)...An action against the charitable organization pursuant to this section constitutes a complete bar to any recovery by claimant, by reason of the same subject matter, against the employee of the charitable organization whose act or omission gave rise to the claim unless it is alleged and proved in the action that the employee acted in a reckless, wilful, or grossly negligent manner, and the employee must be joined properly as a party defendant. A judgment against an employee of a charitable organization may not be returned unless a specific finding is made that the employee acted in a reckless, wilful, or grossly negligent manner.

As the Circuit Court held, “[i]t is undisputed that the HSPCA is a 501(c)(3) tax exempt organization and Wayne Brennessel is its Executive Director. [Appellant] has alleged insufficient facts to support a charge that Brennessel’s statement was made

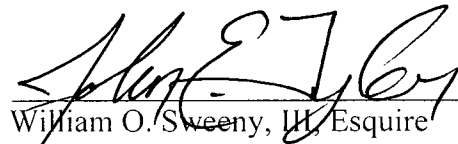
recklessly, willfully, or with gross negligence...” R. 8. On this additional ground the Circuit Court’s Order of February 10, 2014 should be affirmed.

**CONCLUSION**

The Court’s award of summary judgment to Respondents should be affirmed on all grounds.

Respectfully submitted,

**SWEENEY, WINGATE & BARROW, P.A.**

A handwritten signature in black ink, appearing to read "John E. Tyler", is written over a horizontal line.

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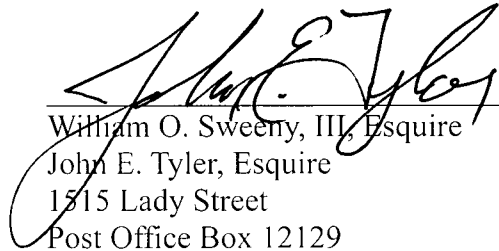
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July 7, 2015

**CERTIFICATE OF COUNSEL**

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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**PROOF OF SERVICE**

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I certify that I have served the Final Brief of Respondents, The Humane Society for the Prevention of Cruelty To Animals, and Wayne Brennessel, individually and As Executive Director of the Humane Society for the Prevention of Cruelty to Animals, by depositing a copy of it in the United States Mail, postage prepaid, on July 7, 2015, addressed to all counsel of record, listed as follows:

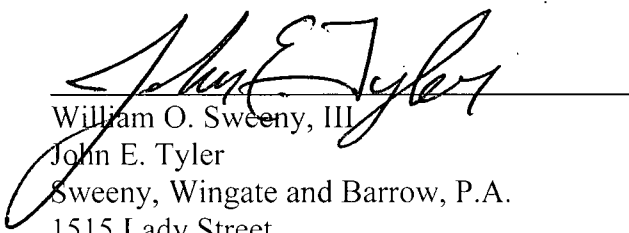
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