

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

Carol Simpson, Appellant,

v.

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

Of Whom Frank A. Landgraff is the Respondent.

FINAL ~~REPLY~~ BRIEF OF APPELLANT

William G. Mayer
118 West Main Street
Laurens, SC 29360
864-984-9202 Telephone
864-715-0496 Facsimile
Attorney for the Appellant

TABLE OF CONTENTS

Table of Authorities.....	ii
Argument in Reply.....	1
I. Respondent’s Jurisdictional Argument Has the Deceptive Appearance of Being Determinative, But Ignores That the Issue Is One of Discretion.....	1
II. Respondent’s Rendition about Appellant’s Full and Fair Opportunity for Discovery is Specious at Best.....	3
III. Respondent Needs to Accept the Record as Approved by the Courts.....	6
IV. Respondent’s Claim that The Lack of Evidence About the Videotape’s Contents is Fatal to His Motion for Summary Judgment, not to Appellant’s Claims.....	9
V. The Pre-hearing Affidavits Establish the Real Reason Respondent Recorded the Videotape.....	10
VI. The Trial Court’s Order Usurped the Jury’s Function.....	11
VII. The Record is Devoid of Any Wrongful Conduct That Serves to Deny Appellant Her Day in Court.....	20
VIII. Let’s Talk Policy.....	22
Conclusion.....	25

TABLE OF AUTHORITIES

CASES

<u>Anderson v. Liberty Lobby</u> , 477 U.S. 242 (1986).....	15
<u>Baughman v. AT&T</u> , 306 S.C. 101, 410 S.E. 2d 537 (1991).....	3
<u>Celotex Corp. v. Catrett</u> , 477 U.S. 317 (1986).....	8
<u>Citizens' Bank v. Heyward</u> , 135 S.C. 190, 133 S.E. 709 (1925).....	22
<u>Clayton v. Richards</u> , 47 S.W.3d 149 (Tex.App.2001).....	18
<u>Colon v. Colon</u> , 2006 WL 2318250 (New Jersey Superior Court 2006).....	16
<u>Doe v. Howe</u> , 607 S.E. 2d 354 (S.C.App. 2004).....	2
<u>Froneberger v. Kirkland Dale Smith</u> , 406 S.C. 37, 748 S.E.2d 625 (S.C. App. 2013).....	7, 12
<u>Fulk v. Fulk</u> , 827 So.2d 736 (Miss. App. 2002).....	19
<u>Gilmore v. Ivey</u> , 290 S.C. 53, 348 S.E.2d 180 (S.C. App., 1986).....	7
<u>Guinan v. Tenet Healthsystems of Hilton Head, Inc.</u> , 677 S.E.2d 32, 383 S.C. 48 (S.C. App., 2009).....	4
<u>Hall v. Fedor</u> , 349 S.C. 169, 175, 561 S.E.2d 654, (S.C. App. 2002).....	8
<u>Harrod Ltd. v. Sixty Internet Domain Names</u> , 302 F.3d 214 (Fed. 4 th Cir. 2002).....	4
<u>Hernandez v. Hillsides, Inc.</u> 211 P.3d 1063, 1077, 97 Cal.Rptr. 3d 274, 47 Cal. 4 th 272 (Cal. 2009).....	19
<u>Hernandez v. Yoon</u> , 661 N.Y.S.2d 753, 173 Misc.2d 429 (N.Y.Sup., 1997).....	21
<u>In re the Marriage of Tigges</u> , 758 N.W.2d 824 (Iowa 2008).....	18
<u>James v. Jacobson</u> , 6 F.3d 233 (4 th Cir. 1993).....	2
<u>Lewis v. Legrow</u> , 258 Mich.App. 175, 670 N.W. 2d 675 (Mich. App. 2003).....	17, 23

<u>M.M. v. Zavaras</u> , 139 F.3 rd 798 (10 th Cir. 1998).....	2
<u>McManus v. Bank of Greenwood Et.Al.</u> , 171 S.C. 84, 171 S.E. 473 (S.C. 1933).....	10
<u>Middelborough Horizontal Property Regime Council of Co-Owners v. Montedison S.p.A.</u> , 320 S.C. 470, 465 S.E. 2d 765 (Ct.App.1995).....	4
<u>Miller v. Brooks</u> , 123 N.C.App. 20, 472 S.E.2d 350 (1996).....	17
<u>Nimmer v. Nimmer</u> , 212 S.C. 311, 47 S.E. 2d 716 (S.C. 1948).....	22
<u>Oneal v. Carolina Farm Supply</u> , 279 S.C. 490, 309 S.E.2d 776 (S.C. App. 1983).....	6
<u>Plaxico v. Michael</u> , 735 So.2d 1036 (Miss. 1999).....	14, 19
<u>RoTec Services, Inc. v. Encompass Services, Inc.</u> , 597 S.E.2d 881, 359 S.C. 467 (S.C.App. 2004).....	5
<u>Russo v. Sutton</u> , 422 S.E.2d 750, 310 S.C. 200 (S.C. 1992).....	21
<u>Rycroft v. Gaddy</u> , 281 S.C. 119, 314 S.E.2d 39 (S.C. App. 1984).....	15
<u>Snakenberg v. Hartford Casualty Ins. Co.</u> , 383 S.E.2d 2, 299 S.C. 164 (S.C. App. 1989).....	13, 15
<u>State v. Missouri</u> , 603 S.E.2d 594 (S.C. 2004).....	14
<u>State of Minnesota v. Perez</u> , 779 N.W.2d 105 (Minn. App. 2010).....	18
<u>State of Wisconsin v. Jahnke</u> , 762 N.W.2d 696 (Wis. App. 2008).....	17
<u>United States v. Torres</u> , 751 F.2d 875 (7 th Cir. 1984).....	20
<u>W.N.J. & J.A.S. v. Yocom</u> , 257 F.3d 1171 (10 th Cir., 2001).....	2
<u>West v. Gladney</u> , 533 S.E.2d 334, 341 S.C. 127 (S.C. App. 2000).....	10

STATUTES

S.C. Code § 16- 17-470(B).....	24
S.C. Code § 16- 17-470(C).....	25
S.C. Code § 16- 17-470(D).....	14

OTHER AUTHORITIES

Online article by Nick Madigan, New York Times, March 18, 2016.....25

Online article by Robert W. Wood, Forbes, March 21, 2016.....25

SC Digest, 1783-1886 Vol. 1, West Publishing Co. summarizing
State v. Brunson, 2 Bailey 149.....21

ARGUMENT IN REPLY

Appellant offers the following points of clarification and rebuttal to the arguments raised by Respondent. In sum, his arguments appear to a train wreck of non-sequiturs and *ad hominem* attacks that attempt to prove the ends justify the means.

I. Respondent's Jurisdictional Argument Has the Deceptive Appearance of Being Determinative, But Ignores That the Issue Is One of Discretion.

Respondent's argues that this court does not have jurisdiction over this appeal, because Appellant did not file a complaint with an amended caption within 10 days as the trial court ordered so she no longer had leave of the trial court to amend it. (Resp. Brief, p. 17-24). If non-compliance with orders deprives a court of jurisdiction, there would be no motions to compel. This is the court's arena, not a jurisdictional issue.

Appellant did file four amended complaints – three pursuant to court orders and one as a matter of course. First, the Court ordered Appellant to amend her complaint to identify the defendants. (R. pp. 30-32). Second, in his Order Granting Plaintiff Right to Proceed Anonymously, the Court ordered that Appellant “may proceed under the name ‘Jane Doe’, and all filings by the parties shall be so captioned.” (R. p. 8). Third, Appellant amended her complaint as a matter of right before any defendant had filed an answer. (R. pp. 36-38).

Fourth, Appellant amended her complaint pursuant to comply with the Court's order “to amend her Complaint for the sole purpose of substituting her real name for the pseudonym Jane Doe.” (R. pp. 13-16). Before doing so, she filed a Motion to Amend Order asking that the Court to hold its order in abeyance until it held a hearing on the Motion to Proceed Under Pseudonym. The Court denied Appellant's motion with a Form 4 Order. (R. p. 18).

When Appellant did not file the Amended Complaint within 10 days, Respondent filed a Motion for Involuntary Dismissal and a Motion for Entry of Rule to Show Cause. (R. pp. 132-

135). The Court denied both motions with a Form 4 Order on July 1, 2014 which allowed the Appellant continue to prosecute her case. (R. p. 19).

Respondent's remaining arguments amount to a frivolous indictment of pseudonym filings. "This use of pseudonyms concealing plaintiffs' real names has no explicit sanction in the federal rules. Indeed it seems contrary to Fed.R.Civ.P. 10(a) which requires the names of all parties to appear in the complaint. Such use obviously may cause problems to defendants engaging in discovery and establishing their defenses, and in fixing res judicata effects of judgments. Yet the Supreme Court has given the practice implicit recognition in the abortion cases ... with minimal discussion." M.M. v. Zavaras, 139 F.3rd 798, 802 (10th Cir. 1998).

The Fourth Circuit has held that trial courts have the discretion to decide whether to allow Plaintiff to proceed using a pseudonym and has set out factors for the trial court's consideration. James v. Jacobson, 6 F.3d 233, 238 (4th Cir. 1993). The South Carolina Court of Appeals adopted the same factors to guide trial courts in determining who can proceed under pseudonym. Doe v. Howe , 607 S.E. 2d 354 (S.C.App. 2004).

Respondent cites W.N.J. & J.A.S. v. Yocom, 257 F.3d 1171 (10th Cir., 2001) in which "plaintiffs failed to request permission from the district court before proceeding anonymously "as being virtually identical to this case." (Resp. Brief, p. 20). To the contrary, Appellant fought hard to proceed under pseudonym. Once the court denied her that option, she had to decide whether to continue. She decided to and resumed her therapy 10 days after filing the Amended Complaint. (R. p. 401-402).

II. Respondent's Rendition about Appellant's Full and Fair Opportunity for Discovery is Specious at Best

Respondent boldly states that "More importantly, before the lower court granted Summary Judgment, Appellant never once argued she could not respond to Respondent's Motion

because full and fair discovery had not been afforded.” (Resp. Brief, p. 25). This is an astonishing misstatement since Respondent objected to Appellant’s letter to the judge two weeks prior to his ruling that plainly stated otherwise. (R. p. 553).

From the hearing on [Appellant’s] Motion to Strike, the Court is fully aware that we have not even been able to narrow the issues in this case, much less have a “full and fair opportunity to complete discovery.” Even so, [Respondent] was served, but has ignored, the Request to Enter that was served on him on October 13th. He was also served with Requests for Production on November 13th.

Respondent also complains that, if Appellant needed more time she should have filed a Rule 56(f) affidavit. (Resp. Brief, p. 29). Filing a 56(f) affidavit is not necessary in South Carolina if, as in this case, the trial court knows that further discovery is necessary. “Although Plaintiffs did not file an affidavit invoking this provision, other courts have not mandated strict compliance with the technical requirements of Rule 56(f) where, as here, the need for further discovery is otherwise made known to the trial court.” Baughman v. AT&T, 306 S.C. 101, 410 S.E. 2d 537, FN 4 (1991).

Respondent’s counsel also told the judge that discovery was not complete.

[W]e’re asking Your Honor to require the [Appellant] to participate in full and fair discovery in this case. It is imperative that discovery be full and fair in order to my client to have a fair shake. And we are asking the Court to require that.

(R. p. 106, Lines 15-19)

In addition, Appellant’s Motion to Strike that was before the Court on the same day as the Motion for Summary Judgment. Appellant was, for the second time, asking the Court to dismiss virtually all of the 23 boilerplate defenses propounded by the three defendants so she could conduct meaningful discovery. (R. p. 198). In these circumstances, “the purposes of Rule 56(f) were served. As a result, it would be unfair to penalize [Appellant] for failing to file the

formal affidavit called for by the rule.” Harrod Ltd. v. Sixty Internet Domain Names, 302 F.3d 214, 246 (Fed. 4th Cir. 2002).

The trial court cited the Middleborough case as standing for the proposition that “four months a ‘full and fair opportunity’ to conduct discovery.” In that case, 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. 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). The same time period in this case was 10 days, not 4 months.

Guinan v. Tenet Healthsystems of Hilton Head, Inc., 677 S.E.2d 32, 36, 383 S.C. 48 (S.C. App., 2009) sets out the legal standard for a full and fair opportunity.

A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact.

Under the facts of this case, twenty months was insufficient time to conduct discovery. Appellant fought for 12 months to get the trial court to hear this case under pseudonym. The trial court found that [Respondent’s] ability to conduct discovery was impaired during this time – so Plaintiff’s was logically also impaired. (R. pp. 13-16).

Without permission to proceed under pseudonym, Appellant could only serve discovery during the first year by revealing her identity. Without this constraint, Respondent served extensive shotgun discovery on Jane Doe which she fully answered. (R. pp. 140-164).

The case was about 16 months old when Appellant received Respondent’s Amended Answer. Regrettably, Respondent’s Amended Answer repeated his boilerplate affirmative defenses which Appellant believed in good faith the Court had a duty dismiss. (R. pp. 49-54).

For example, the entire defense of privilege stated “Some or all of Plaintiff’s claims are barred by the doctrine of privilege.” In RoTec Services, Inc. v. Encompass Services, Inc., 597 S.E.2d 881, 884, 359 S.C. 467 (S.C.App. 2004), Court of Appeals upheld a trial court’s striking of a similarly worded defense.

In asserting the defense of privilege, Encompass's allegation in its answer reads in its entirety: "Defendant pleads the affirmative defense of privilege." This statement alone is purely a legal conclusion and clearly falls below the standard mandated by Rule 8. Therefore, we find no abuse of discretion in the trial court's striking this defense.

Similarly, [Respondent’s] justification defense simply said “Some or all of [Appellant’s] claims are barred by the doctrine of justification.” Sutton also just alleges that Appellant “failed to join parties who are indispensable to the just resolution of this matter.” (R. p. 58, ¶33). Since only Sutton knows the identity of said parties, the Court should order Sutton to reveal their identity and then order their joinder.

Appellant filed her first Motion to Strike on June 20, 2014. At the hearing -- five months later -- on November 17, 2014, Respondent said, “[I]f he wants me to amend my answer to provide more factual information for each affirmative defense that he’s identified in his filing, I’m glad to do so.” (R. pp. 109, Lines 1-4). He could have done that 5 months earlier. If anyone were trying to delay discovery, it was Respondent.

Further discovery could uncover additional relevant evidence and create a genuine issue of material fact. For instance, the trial court stated “the wrongful conduct rule likely would not apply” if Defendant has disclosed the recorded images to anyone. (R. p. 6). If Respondent answered the discovery served on him before the hearing, Appellant may learn that he has – erasing the basis of denying her a right to be heard on the merits.

In addition, once Appellant learned the identity of all those with whom Respondent discussed the videotape and other aspects of the case, she would likely garner more support for the outrageousness of his conduct.

Respondent goes off on the tangent of Appellant filing a Motion for Partial Summary Judgment as evidence that she did not need to more time to conduct discovery. (Resp. Brief, p. 27). The evidence viewed most favorably to Appellant shows that Respondent intentionally and substantially intruded into that which is private about Appellant with a covert video camera. Of course, Plaintiff believed that she had carried her burden of proof for this one cause of action. At this point, the burden shifted to Respondent to prove any affirmative defenses to preclude recovery.¹

III. Respondent Needs to Accept the Record as Approved by the Courts

Respondent complains that Appellant raised issues and evidence for the first time in her Motion for Reconsideration. (Resp. Brief, p. 31). Appellant spent countless hours examining the record and pointed to parts of the record that the trial court was considering *for the first time*. However, she raised no new issues and filed no inappropriate evidence.

When ruling on a motion for summary judgment, the trial 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.” Froneberger v. Kirkland Dale Smith 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,

¹ “An affirmative defense conditionally admits the allegations of the complaint, but asserts new matter to bar the action. In other words, it assumes all elements of the plaintiff’s case have been established. Because the plaintiff is taken to have proved a good cause of action, the burden of proof shifts to the defendant to show he is not liable.” Oneal v. Carolina Farm Supply, 279 S.C. 490, 494, 309 S.E.2d 776 (S.C. App. 1983)

290 S.C. 53, 348 S.E.2d 180, 183-4 (S.C. App., 1986).

In short, the *trial court* had a duty to determine if there is a genuine issue as to any material fact – analogous to deciding a Motion for Directed Verdict. The trial court initially failed miserably to make a full analysis and obviously considered only that evidence that was “singled out” and apparently performed no “if appropriate” analysis.

In reality, excluding Motions to Reconsider and related documents, the only documents that Appellant filed after the summary judgment hearing involved the continuing prosecution of the case with the other two Defendants (“Sutton”) who did not file for summary judgment. Sutton served Appellant with discovery. Appellant served Sutton with her discovery and served her responses to Sutton’s discovery. Reviewing the docket proves this is true. (R. pp. 554-555).

Plaintiff had no way to know when the trial court would serve its order granting Respondent’s summary judgment motion. Thus, she could not plan for the filing of these documents to affect the court’s trial decision.

This court’s own order defined what materials properly compose the record, “As to Appellant’s designation of the matter, any matter that was not filed with the lower court or otherwise presented to the lower court shall be stricken.” (App. Ct. Order, Dec. 4, 2015). “All matters must have been presented to the lower court or filed with the court prior to the date of the final order on appeal, February 27, 2015.” *Id.*

Respondent argues out of both sides of his mouth when he raises his hearsay argument. He first argues that law enforcement records are hearsay. “Appellant attempts to cite to law enforcement records as evidence of the video-tape’s content. However, the documents constitute out of court statements referencing an individual’s out of court impressions about the videotape – another out-of-court statement.” (Resp. Brief, p 38). He then cites to the same law enforcement

records as evidence of Appellant's wrongdoing. (Resp. Brief, p. 39).

"Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be those which *would* be admissible in evidence." Hall v. Fedor, 349 S.C. 169, 175, 561 S.E.2d 654, (S.C. App. 2002) (Emphasis added). The key is that the evidence must be admissible at trial, but it does not have to be in admissible form when presented. In Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986), the Supreme Court stated:

We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the non-moving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(e), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

An out-of-court statement made in a police report or affidavit may contain hearsay that would be inadmissible in its current form. However, the same testimony would not be inadmissible when offered at trial by that witness. Similarly, orders, letters, pictures, reports, etc. would be admissible with a proper foundation.

IV. Respondent's Claim that The Lack of Evidence About the Videotape's Contents is Fatal to His Motion for Summary Judgment, not to Appellant's Claims.

Respondent misquotes the trial court to support his fierce, but false, assertion that Appellant did not establish what was on the videotape. The trial court actually stated that "[n]owhere on the record do we learn *precisely* what is on the videotape." (Emphasis added.) Respondent insists that Appellant "did not introduce evidence establishing the content of the video about which she complains." (Resp. Brief, p.37).

Respondent contends that “Appellant’s failure to introduce any competent evidence in this regard proved fatal to each of her claims.” (Resp. Brief, p. 33). To the contrary, properly viewed, the alleged oversight defeats his summary judgment motion.

Respondent’s Statement of the Facts contains no facts. (Resp. Brief, pp. 11-16). Instead, it details the grounds for summary judgment, delineates some of the materials filed by Appellant, and describes the lower court’s rulings. Significantly, it also identifies no citation to any evidence in the record of Appellant’s alleged wrongdoing or being a paramour.

Consequently, if the record truly contains no evidence of what is on the videotape, the trial court could review the entire record and glean no evidence of any conduct by Appellant – wrongful or otherwise. Yet, the trial court believed that Appellant is a paramour who committed adultery with Respondent’s then-wife. (R. p. 5-6).

Repeated insistence that every unicorn has a horn on its forehead does not prove that unicorns exist. Similarly, despite their prolific appearance in every motion, memorandum, argument, and draft order, Respondent’s *ad hominem* attacks on Appellant through his lawyers’ arguments are not evidence. The Supreme Court “has repeatedly held that statements of fact appearing only in argument of counsel will not be considered. . . .” 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).

The trial court not only considered them, but improperly drew an inference in Respondent’s favor and barred Appellant’s claims based on them. More remarkably, the trial court used the unsworn statements of Respondent’s counsel to completely discount the incident report from Greenville County Sheriff’s Office, the letter from the State Office of Victim Assistance, and the Solicitor’s Inter. Pros. Memo so it could find that “[t]here is no genuine issue

of material fact as to [Appellant's] claims against [Respondent]." (R. p. 7).

V. The Pre-hearing Affidavits Establish the Real Reason Respondent Recorded the Videotape

Respondent erroneously claims that "none of the affidavits submitted by Appellant before the hearing (Pre-hearing Affidavits) had anything to do with Respondent's summary judgment motion." (Resp. Brief, p.13). To the contrary, they establish Respondent's true motive for installing the covert camera – giving a wholly different account of what happened than the trial court inferred.

The Pre-hearing Affidavits were presented to the Family court to support "the issue of connivance, a defense asserted by Wife's counsel." (Resp. Brief, p.13). Admittedly, the Family Court held that insufficient evidence existed at the Temporary Hearing to make a ruling on connivance, but it also refused to deny Wife's alimony claim after reviewing the Pre-hearing Affidavits, the videotape, and still shots from the videotape. (R. p. 385). Significantly, the trial court granted summary judgment due to Appellant's wrongful conduct without knowing the content of the videotape, but the family court did not bar Respondent's wife from receiving alimony based on adultery knowing the content of the videotape.

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. Respondent made the videotape to satisfy his own sexual desire. Taken together, the Pre-hearing Affidavits support her position.

The Greenville County Sheriff's Office investigated this account thoroughly. The Incident Report reports that the investigator reviewed the videotape and the Pre-hearing Affidavits. After a full investigation, Appellant's account was not contradicted. (R. p. 389).

Respondent has also 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.

VI. The Trial Court's Order Usurped the Jury's Function

In a conclusory statement, the trial court found that "there is no proof of a substantial and unreasonable intrusion into Plaintiff's privacy and therefore her invasion of privacy fails as a matter of law." (R. p. 5, fn 2). Arguably, most people would think that a hidden, motion-sensitive camera recording their activity in any bedroom is substantial and unreasonable. However, the trial court disagreed, but failed to provide its rationale.

"[A trial] 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 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.'" Froneburger, at p. 634.

Since the trial court gave no support for its statement and this an issue of first impression in South Carolina, Appellant is forced to review how other courts have addressed when an intrusion is substantial and unreasonable. The first step is to identify the intrusion.

The trial court found that "Defendant set up a motion-activated video camera in [his] master bedroom for the purpose of recording Appellant." (R. p. 1). Respondent states that he installed the "covert" camera "to document the activities of my wife" (R. p. 249). His attorney confirms this "Your honor, as you recall, this is an instance where my client had a video camera installed in his own master bedroom." (R. p. 76, Lines 15-17).

Respondent makes the *ex post facto* argument that he installed the camera to gather evidence for his family law case. However, there was no family court case and, as discovery will confirm, he had not even hired an attorney at the time of the intrusion.

THE COURT: Mr. Davis, let me ask you a question. At the time [of the videotaping], what was the status of Mr. Landgraff's marriage?

MR. DAVIS: They were still married residing under the same roof. . . .

THE COURT: But there was no court order or anything related to their marriage? Nobody had filed a complaint, or motion, or anything in Family Court?

MR. DAVIS: No sir. That all came later.

(R. p. 78, Lines 17-23; R. p. 79, Lines 10-13)

“Even so, Respondent could have accomplished his stated purpose of documented his suspicions of adultery in less intrusive ways. He only needed to capture affection. Since he orchestrated the time and place of the events videotaped, he could have simply walked into the bedroom with a camera or the private investigator.” (R. p. 397).

“Defendant knew the habits of Wife and Victim well. He often sat in a chair in the master bedroom to watch television. He knew that when they entered the master bedroom that they went into the dressing room to change clothes or to disrobe to get in the hot tub. He also knew that they sat by the fireplace in the chairs when in the bedroom. He could have easily placed the camera in the hallway or other parts of the bedroom or focused it on the hot tub.” (R. p. 396).

“Instead, he focused the camera directly on the bed in hopes of capturing the activity that he encouraged and connived to produce. After carefully orchestrating what should happen, when

it should happen, and where it should happen, he was able to videotape his fantasy.” (R. p. 396).

The next step is to determine if the intrusion is “into that which is private” about Appellant. Snakenberg v. Hartford Casualty Ins. Co., 383 S.E.2d 2, 299 S.C. 164, 171 (S.C. App. 1989). The intrusion “must concern those aspects of [her]self, [her] home, [her] family, [her] personal relationships, and [her] communications which one normally expects will be free from exposure to [Respondent].” *Id.* It is axiomatic that, if Respondent had to resort to the extreme measure of setting up a covert camera to film Appellant, she probably expected to be free from exposure to him.

Significantly, the intrusion must be “into that which is private” about Appellant, not into a place where Appellant would have a reasonable expectation of privacy. Even so, the Appellant had a reasonable expectation in Respondent’s bedroom.

“Plaxico was in a state of solitude or seclusion in the privacy of her bedroom where she had an expectation of privacy.” Plaxico v. Michael, 735 So.2d 1036, 1039 (Miss. 1999). Admittedly, Appellant was not in her bedroom.

However, the trial court found that “Appellant had been a frequent houseguest of [Respondent] and believed she had a right to privacy in [his] bedroom.” (R. pp. 1-2). The South Carolina Supreme Court has held her belief was reasonable. “By choosing to share the privacy of their home with [Appellant] on several occasions in the past and on the occasion in question, both the [Respondent] and [Appellant] 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).

The South Carolina video voyeurism statute defines Respondent’s bedroom as a place “where [Appellant] would have a reasonable expectation of privacy” if she “would believe that

[she] could disrobe in privacy, without being concerned that [her]undressing was being photographed, filmed, or videotaped by another.” (S.C. Code § 16-17-470(D))

In her affidavit, Appellant unequivocally states that she not only expected to be private in [Respondent’s] house, but also that [Respondent] assured her that she would be. (R. p. 280). By their own admission, the Defendants were not anywhere in the residence at the time of the intrusion so Appellant could logically expect she would be free from exposure to them. (R. pp. 249-250). For months, Appellant had disrobed in that bedroom with the expectation that she was in a private place and had no concern that she would be videotaped. (R. p. 386).

Finally, the intrusion into that which is private must be “substantial and unreasonable enough to be legally cognizable.” “Whether the conduct in question meets this test is, in the first instance, a question of law for the court.” Snakenberg, at p. 171. Where reasonable minds may differ, whether Respondent’s conduct is substantial and unreasonable enough to be legally cognizable is a question for the jury. The trial court is bound by the traditional allocation of functions between judge and jury. Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986) (“Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . .”)²

Certainly, a trial court judge and a sheriff are reasonable minds. In this case, a trial court judge concluded that Appellant was having an adulterous affair. On the other hand, a sheriff concluded that Respondent orchestrated the encounter for his own sexual gratification. (R. p. 389). The trial judge should have let the issue go to a jury.

Snakenberg is the only reported case in South Carolina that even contains the phrase “substantial and unreasonable enough.” The phrase does appear in four cases in the South

² The trial court made this same error in summarily denying Appellant’s outrage claim because “there is insufficient proof of extreme and outrageous conduct by Defendants.” (R. p. 5).

Carolina District Court, but only because they recite the Snakenberg elements without defining them. Two cases in other states use the phrase in nuisance cases.

Snakenberg does, however, cite Rycroft v. Gaddy, 281 S.C. 119, 125, 314 S.E.2d 39 (S.C. App. 1984) which gives definitive guidance.

When a plaintiff bases an action for invasion of privacy on "intrusion" alone, bringing forth no evidence of public disclosure, it is incumbent upon him to show a blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom.

Appellant outlined some of Respondent's actions regarding the videotape in her Initial Brief that show his disregard of her rights as a third party. (App. Init. Br. pp. 29-31). The record is clear that Appellant has been to counseling. (R. pp. 294-297). Synonyms for humiliation are embarrassment, mortification, shame, blow to one's pride, slap in the face, and kick in the teeth.

Every personal sensibility of the trial court judge was offended by what is on the videotape, but he could not translate his disgust into the possibility that Appellant being humiliated by Respondent making a permanent video recording that could be – and was – shown to others. A jury could so find.

Appellant's humiliation should be self-evident even to those who have never been secretly videotaped in the nude. Having that videotape become part of a court record is obviously embarrassing to Appellant – especially since she still argues before the same judge in the same court.

Respondent alleges that "Appellant randomly cites cases having no actual application to the case at bar." (Resp. Brief, p. 34). The cases were not at all random – they all that involve covert videotaping in a private residence.

Respondent cites one unpublished case that involves a covert camera in a home office, not the bedroom. In Colon v. Colon, 2006 WL 2318250 (New Jersey Superior Court 2006), the *Colon* court found that the husband had no reasonable expectation in a home office even though it was next to the master bedroom because it “was used not only by defendant but by plaintiff and the children, who freely entered the room.”

One group of cases demonstrates that Respondent would have invaded Appellant’s privacy if he had secretly videotaped her if he were in the bedroom with her.

The Lewis case involves the surreptitious, nonconsensual videotaping of intimate acts between a man and his girlfriends in his bedroom. Lewis v. Legrow, 258 Mich.App. 175, 670 N.W. 2d 675, 689 (Mich. App. 2003). The court noted that “It is settled that sexual intimacy is a private subject matter that plaintiffs have a right to keep private.” *Id.* at 688. The court found that LeGrow had invaded his girlfriend’s privacy stating that a “a jury could find that the surreptitious, nonconsensual videotaping of intimate acts is objectionable to a reasonable person.” *Id.* at 689. Regarding the emotional distress claim, the court found that “The act of secretly videotaping plaintiffs, aside from considerations of distribution, is deceptive and a significant breach of trust. A reasonable person could conclude that such an act would cause emotional distress.” *Id.* at 690.

The Jahnke case also involves boyfriend being convicted of secretly videotaping his girlfriend, without her consent, while she was nude. State of Wisconsin v. Jahnke, 762 N.W.2d 696, 696 (Wis. App. 2008), review denied, 765 N.W.2d 578 (Wis. 2009). Jahnke argued that “his girlfriend had no reasonable expectation of privacy because she knowingly and consensually exposed her nude body to him while he was secretly videotaping her.” *Id.* at 698. The court disagreed and found that she “had a reasonable expectation that she would not be *recorded* in the

nude.” *Id.* at 702. (Emphasis added)

Another group of cases demonstrates that Respondent would have invaded Appellant’s privacy if he had secretly videotaped her while she was alone.

In Miller v. Brooks, 123 N.C.App. 20, 472 S.E.2d 350 (1996), a wife hired private investigators to install a hidden camera in the bedroom of her estranged husband's separate residence to gather evidence in their domestic case. The Court found that the “acts of installing the hidden video camera and the interception of plaintiff’s mail as alleged and forecasted are sufficient to sustain plaintiff’s claims for invasion of privacy by intrusion on his seclusion, solitude, or private affairs.” *Id.* at 27. In addition, a “jury could reasonably find that the conduct of defendants in breaking into plaintiff’s house and installing a hidden video camera was “extreme and outrageous conduct.” *Id.* at 30.

In Clayton v. Richards, 47 S.W.3d 149, 155 (Tex.App.2001), a wife hired a private investigator to install a hidden camera in a bedroom in the marital residence. The court reversed the summary judgment finding an invasion of privacy.

When a person goes into the privacy of the bedroom, he or she has a right to the expectation of privacy in his or her seclusion. A video recording surreptitiously made in that place of privacy at a time when the individual believes that he or she is in a state of complete privacy could be highly offensive to the ordinary reasonable person. The video recording of a person without consent in the privacy of his or her bedroom even when done by the other spouse could be found to violate his or her rights of privacy.

The Tigges case involved a husband surreptitiously installing a camera in the parties shared residence that recorded his wife’s “comings and goings’ from the bedroom she regularly used. In re the Marriage of Tigges, 758 N.W.2d 824, 826 (Iowa 2008). The court found that the content of the video is not determinative of the invasion.

The intentional, intrusive, and wrongful nature of Jeffrey's conduct is not excused by the fact that the surreptitious taping recorded no scurrilous or compromising behavior. The wrongfulness of the conduct springs not from the specific nature of the recorded activities, but instead from the fact that Cathy's activities were recorded without her knowledge and consent at a time and place and under circumstances in which she had a reasonable expectation of privacy. *Id.* at 830.

In State of Minnesota v. Perez, 779 N.W.2d 105 (Minn. App. 2010), the issue presented was, “Does a spouse have a reasonable expectation of privacy from being videotaped surreptitiously by the other spouse while alone in a shared, residential bathroom?” The court found that she did and explained.

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 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. *Id.* at 110.

In sum, “recording denies the actor a key feature of privacy – the right to control the dissemination of his image and actions. “ Hernandez v. Hillsides, Inc. 211 P.3d 1063, 1077, 97 Cal.Rptr. 3d 274, 47 Cal. 4th 272 (Cal. 2009).

This case at hand is truly one of first impression. All the cases involving secretly videotaping more than one person are in places other than the bedroom. One case involves the bedroom and a person present taking pictures, but not secretly videotaping.

In Plaxico, supra, a man took a picture of his ex-wife’s girlfriend through an open window to gain an advantage in his custody case. “The trial court, after hearing all of the evidence, ruled on June 25, 1996, that Michael had a qualified privilege when he obtained the

evidence of the relationship between Plaxico and his former wife in order to protect his child.” *Id.* at p. 1037. Four things are of great import. First, the still shots were taken through and open window, not with a covert video camera. Second, a jury – not a judge -- determined that a privilege existed “after hearing all the evidence”. Third, the privilege was qualified and not absolute.

Finally, unlike Plaxico, this case involves a relationship between Appellant, Respondent, and his then-wife. In another Mississippi custody case, Fulk v. Fulk, 827 So.2d 736, 741 (Miss. App. 2002), the court found that “Apparently, Chancellor Weathersby forgot that the father was the instigator in the triangle relationship, not the mother. . . Therefore, it was error for the chancellor to have relied so heavily on the affair, as it was not just [the then-wife’s] affair due to [Respondent’s] willingness to be an eager participant.” The facts show that the trial court judge made the same error.

In the developing jurisprudence of video wiretapping, many started with United States v. Torres, 751 F.2d 875 (7th Cir. 1984) which decided whether the federal government had a right to videotape suspected terrorists in a federal building. The Seventh Circuit stated that “An individual's right of privacy is compromised no less from being secretly videotaped than from being secretly recorded. A secret videotape of an individual who presumes to be in a private place is an even greater intrusion of privacy than secretly recording conversations.” *Id.* at 878.

Logically, if Respondent would not be justified to put tape recorder in his own bedroom to record Appellant’s conversations with this then-wife without violating federal wiretapping law, he should not be able hide a camera to record their actions without violating her privacy. Similarly, if the government had no privilege to secretly videotape terrorists making a bomb in a

building it owned to protect American lives, Respondent has no privilege to record Appellant in a bedroom he owned for his personal interests.

VII. The Record is Devoid of Any Wrongful Conduct That Serves to Deny Appellant Her Day in Court

Respondent argues that “Appellant draws unfounded and non-existent distinctions between the illegality doctrine, wrongful conduct bar, doctrine of *ex turpi causa*, and the doctrine of *in pari delicto*. Contrary to Appellant’s analysis, the doctrines are the same.” (Resp. Brief, p. 40)

Solely for argument’s sake, Appellant adopts Respondent assertion that that *ex turpi causa*, *in pari delicto*, and the illegality doctrine are all the same forming a wrongful conduct bar that South Carolina courts recognize. Unlike the case at hand, every case cited by Respondent or the trial court involved a crime, tort, or illegal contract. Because no contract is involved in this case, Appellant’s conduct must be criminal or tortious to bar her recovery under case law. It is neither.

It is true, but irrelevant that “[a]dultery is a criminal offense” and that South Carolina domestic law “recognizes adultery as a ground for divorce.” (R. p. 6). The record is clear that Appellant did not commit the crime of adultery.

While no case supports the trial court’s position, a New York case supports Appellant’s position that her claims should not be barred. In Hernandez v. Yoon, 661 N.Y.S.2d 753, 173 Misc.2d 429 (N.Y.Sup., 1997), a doctor brought a summary judgment motion “on the premise that the plaintiff should not be permitted to recover for injuries that arose from adultery.” In denying the summary judgment motion, the Court stated, “Research has not disclosed any cases which hold adultery to be so serious a crime that recovery is precluded in a civil suit.” *Id.*

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

While adultery is a ground for divorce, South Carolina has abolished the torts of criminal conversation and alienation of affection as being against the public policy. Russo v. Sutton, 422 S.E.2d 750, 310 S.C. 200, 204-205 (S.C. 1992). (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.”)

The trial court bars Appellant’s claims not for a crime, tort, or breach of contract, but for her “adulterous conduct.” (R. p. 6). Some could agree that Appellant should not have been engaging in the conduct on the videotape. That is a value judgment, not a legal transgression.

“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.” Citizens’ Bank v. Heyward, 135 S.C. 190, 133 S.E. 709, 713 (1925). The trial court stated that S.C. Code § 16-15-60 “represents our state’s express public policy.” According to the S.C. Legislature website, by a vote of 94-0, the South Carolina House of Representatives disagreed and passed H. 4535 to repeal that section. As of today, the bill is in the Senate.

VIII. Let’s Talk Policy

Respondent erroneously cites Nimmer v. Nimmer, 212 S.C. 311, 47 S.E. 2d 716 (S.C. 1948) for the proposition that *in pari delicto* bars first-party claims. The real import of the Nimmer case is its exception to the doctrine:

[T]he general rule where the parties are *in pari delicto* no affirmative relief will be given to one as against the other is

regarded by courts of equity in most jurisdictions as without controlling force in all cases in which public policy is considered as advanced by allowing either party to sue for relief against the transaction. *Id.* at 719.

Appellant is adamant in her belief that neither this doctrine nor any other similar doctrine applies in this case. Should this Court decide otherwise, Appellant urges the Court follow the Nimmer exception and allow Appellant to pursue her claims against Respondent. To do otherwise presents objectionable unintended consequences.

If the trial court's ruling stands, Appellant will not be made whole. However, Respondent, pornography users, private investigators, and family court practitioners will reap a windfall.

When asked how much money it would take to settle this case, Appellant's counsel replied, "what my client is looking for is to make her argument to a jury and get vindication that this – that this happened. The dollar figure is the exact opposite of what she's looking for." (R. p. 85, Lines 2-5). Respondent has consistently criticized Appellant for not being able to definitively define her damages. The victim of video wiretapping in the Lewis case attempted to describe the harm she suffered.

I was very hurt. I think that was what was [sic] my initial reactions ... that somebody that loved me could do this kind of thing to me ... and I had a lot of anxiety ... because this had happened. It was something that I couldn't fix.... I was scared about what was going on with this tape.... I didn't know how many people had seen it, how many tapes there were ... if there were other copies, if he had shown it to anybody, whether people had a tape, anything... it could have been out on the Internet, you know, I was just very ... humiliated.

Lewis, at p. 681.

Since the video and still shots were presented to the Family Court in August 2010, Appellant has lived waiting for the other shoe to drop. Every time someone says "I heard

something about you,” her heart sinks much like receiving a letter from the IRS. She has lived with the fear of what she would find it on the internet. Thanks to the Clerk of Court and electronic filing, the facts are.

The trial court bars Appellant’s relief due to her “adulterous conduct” even though the record is clear that Appellant did not commit the crime of adultery. Even if she had, do we really want access to South Carolina courts to be closed to adulterers? If Mark Sanford is qualified to serve in Congress as an admitted criminal adulterer, surely the jury should be allowed to decide this case.

South Carolina has no video wiretapping statutes and its video voyeurism statute is apparently too weak to motivate solicitors to prosecute. S.C. Code § 16-17-470(B) provides that

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 Greenville County Sheriff recommended prosecution, but, as of now, the Greenville County Solicitor has elected not to expend resources to prosecute. Even with Respondent’s sexual history, Respondent is apparently getting a pass because he says he made the video to document his wife’s adultery. One only need say, “I thought my spouse was cheating” – no violation of the statute and open season on video wiretapping.

Think of the consequences of this interpretation. Family practitioners all over South Carolina must use video wiretapping in divorce cases or risk a malpractice action for failing to zealously defend their clients. Hopefully, they will not name the person, introduce still shots, or show the video in an open courtroom. If so, the third party will hopefully be strong enough to

deal with the aftereffects. Maybe, he or she could try filing a claim for wrongful appropriation of personality. After all, using one's likeness to avoid paying alimony or getting a better property settlement is a financial benefit.

Tragically, the trial court found that if disclosure outside the judicial system ever occurs, "other state and federal remedies may be available." (R. p. 6). Maybe, the court is referring to a claim for wrongful publicizing of private affairs. However, with its disgust at the adulterous conduct, one could only fear that it would rule the conduct was not a private affair.

S.C. Code § 16-17-470(C) provides that a person only 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 the video voyeurism statute. If Respondent's actions do not violate that statute, it would seem he is free to distribute the video with impunity.

These consequences should surely be against public policy.

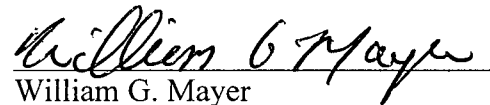
CONCLUSION

Respondent apparently does not follow the news. He states that "No court in the country has extended Intrusion claims to such a far-fetched level" as to provide relief to Appellant. (Resp. Brief, p. 44). To the contrary, the Pinellas County Circuit Court awarded Hulk Hogan \$115 million in his privacy suit against Gawker. At issue in the case "was a grainy black-and-white tape made in the mid-2000s, which showed Mr. Bollea [Hulk Hogan] having sex with the wife of a friend of his at the time" (Online article by Nick Madigan, New York Times, March 18, 2016) The jury then awarded an additional \$25.1 million in punitive damages. (Online article by Robert W. Wood, Forbes, March 21, 2016).

Based on the foregoing, this Court should reverse the judgment of the circuit court and, at least, allow Appellant to be heard.

Respectfully submitted

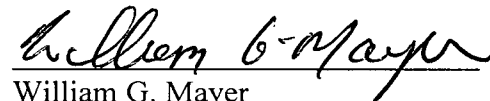
May 30, 2016



William G. Mayer
118 West Main Street
Laurens, SC 29360
864-984-9202 Telephone
864-715-0496 Facsimile
Attorney for the Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Reply Brief of Appellant complies with the requirements of Rule 211(b), SCACR.



William G. Mayer
S.C. Bar No. 13340
Attorney for the Appellant
118 West Main Street
Laurens, SC 29360
864-984-9202 Telephone
864-715-0496 Facsimile

Greenville, SC
May 30, 2016

RECEIVED
JUN 03 2016
SC Court of Appeals

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

JUN 03 2016

SC Court of Appeals

Carol Simpson, Appellant,

v.

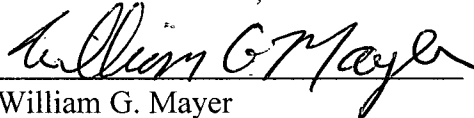
Frank A. Landgraff, Carol Sutton, Sutton & Associates
Investigations, Inc., Defendants,

Of Whom Frank A. Landgraff is the Respondent.

PROOF OF SERVICE

I HEREBY CERTIFY that hereby certify that I have served a copy of Final Reply Brief upon the individuals named below, by hand delivering a copy to the addresses below on this 2nd day of June, 2016:

Attorneys for Frank A. Landgraff
Lane Davis, Timothy E. Madden, Reid T. Sherard
Nelson Mullins Riley & Scarborough, LLP
Poinsett Plaza, 9th Floor
104 S. Main Street
Greenville, SC 29601



William G. Mayer
S.C. Bar No. 13340
Attorney for the Appellant
118 West Main Street
Laurens, SC 29360
864-984-9202 Telephone
864-715-0496 Facsimile