THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2015-000778
C/A 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.

RESPONDENT'S FINAL BRIEF

Lane W. Davis
Timothy E. Madden
Reid T. Sherard
Nelson Mullins Riley & Scarborough, LLP
104 South Main Street
Poinsett Plaza, Suite 900
P.O. Box 10084 (29603)
Greenville, SC 29601
(864) 250-2300

Attorneys for Respondent
Frank A. Landgraff

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Attorneys for Respondent
Frank A. Landgraff

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STATEMENT OF THE CASE

The procedural posture of the instant case, while lengthy, supplies important details and context.

I. WITHOUT COURT AUTHORIZATION, APPELLANT'S ORIGINAL COMPLAINT USED PSEUDONYMS FOR ALL PARTIES' NAMES.

Appellant (also treated as "Simpson") first filed a Complaint ("Original Complaint") on March 27, 2013. (R. pp. 0027-0032) In highly irregular fashion, Appellant filed the Complaint under the name style: *Mary R. McCorvey v. Jane Roe, Detectives, Inc., and Joe Doe.* (Id.) The Court of Common Pleas assigned the lawsuit the Civil Action Number of: 2013-CP-23-01762. (Id.) The lower court did not previously authorize Appellant to substitute

fictional names for all named Parties, all of whose identities Appellant knew before filing. (See R. p. 0561)[1]

A. The Fictionally Named Plaintiff Asserted Tort Claims Against the Fictionally Named Defendants.

The Original Complaint alleged three (3) causes of action: wrongful intrusion into private affairs (treated as "Intrusion Claim"), intentional infliction of emotional distress (treated as "Outrage Claim"), and Civil Conspiracy (treated as "Conspiracy Claim"). (R. pp. 0027-0032) According to the Original Complaint, "Defendants installed a hidden camera in a bedroom to secretly videotape Plaintiff undressing and in the bed." (R. p. 0027, ¶ 4) Of note, however, the Original Complaint omitted the video's actual contents or location. (R. pp. 0027-0032)

B. Appellant's Counsel Files *Ex Parte* Motions On Behalf of Mary McCorvey Against the Fictionally Named Defendants.

On the same date of the Original Complaint's filing, Appellant's Counsel filed an *ex parte* Motion to Proceed Under Pseudonym ("Pseudonym Motion"). (R. pp. 0113) No affidavit or other evidentiary materials supported the Motion. (Id.) The Motion consisted of a mere three sentences asserting Appellant's desire to protect her anonymity. (Id.) While she later told the lower court, "Defendants will have an opportunity to be heard on the merits of the [Pseudonym] Motion," see R. p. 0117, ¶2, Appellant's *Ex Parte* Motion for a Temporary Restraining Order ("TRO Motion") (referencing Pseudonym Motion), Appellant failed to serve Respondent Frank Landgraff ("Respondent" or "Landgraff") with the Motion prior to the lower court's hearing on the same and actually withheld service until June 1, 2013, fifteen

[1] As explained below, Appellant's improper use of fictional party names, negated the Court's subject matter jurisdiction from the case's inception (*i.e.*, Civil Action Number 2013-CP-23-01762 failed to involve claims between real parties). See FN29, infra.

(15) days *after* the lower court ruled on May 17, 2013.[2] (See R. p. 0013 (Jan. 6, 2014 Order: "Plaintiff did not serve Landgraff with a Summons, Complaint, or the Subject Order Until June 1, 2013."))

On April 12, 2013, Appellant filed yet another *ex parte* motion—a TRO Motion. (R. pp. 0114-0122, App. TRO Mot.) Again in highly irregular fashion, Appellant supported the TRO Motion with an affidavit executed by her own counsel, William G. Mayer ("Mayer Affidavit"). (Compare R. pp. 247-248 *with* R. p. 0010, ¶1 & FN.1 (May 17, 2013 Order: "The only affidavit Plaintiff presents in support of her motion is one signed by her counsel."))[3] Mayer lacked personal knowledge concerning most of his Affidavit's contents, including the portions most material to the TRO Motion and this proceeding. (See, e.g., R. pp. 0247-0248, Mayer Affidavit, ¶¶4(a)-(f)) Like the Pseudonym Motion, Appellant filed the TRO Motion in a lawsuit captioned solely with fictional parties. (R. pp. 0114-0122, App. TRO Mot.) Like the Pseudonym Motion, Appellant likewise failed to serve Respondent with the TRO Motion and the Mayer Affidavit. (See R. p. 0455, ¶6; see also R. p. 0013 (Jan. 6, 2014 Order: Plaintiff concedes motion was "an *ex parte* application."))

C. Appellant Failed to Serve Respondent With Her Complaint & Motions, Despite Express Instructions To Do So From the Lower Court.

Before ever filing her Complaint, the Pseudonym Motion, or the TRO Motion, Appellant had attempted multiple *ex parte* contacts with the lower court who repeatedly

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[2] Of course, Respondent does not fully understand who Appellant could have served because: Appellant had not yet named Landgraff as a Defendant; Appellant had no permission to substitute a pseudonym for Landgraff; and Appellant did not have permission herself to proceed as "Mary McCorvey."

[3] For some reason, in the Record on Appeal, Appellant did not include the Mayer Affidavit with Appellant's Motion for a Temporary Restraining Order but inserted it in the Record approximately 125 pages later. (Compare R. p. 0114-0122 *with* R. pp. 247-248)

instructed her to serve Defendants with her Complaint and Motion.[4] (See R. p. 0466, Memo. to Set Aside Pseudonym Order, Ex. B (March 20, 2013 email: "Per Judge Hill's instructions, please file the Summons and Complaint and Motion for Temporary Injunction and serve Defendants in this matter."); see also R. p. 0465 (March 22, 2013 Post-It Note from Chambers: "I reiterated that both had to be served.")) Regrettably, Appellant ignored the lower court's directives.

D. On April 25, 2013, Appellant Amended Her Complaint to Use Landgraff's Real Name While Purporting to Continue Under Her Alias.

On April 25, 2013, before ever serving Respondent with a single piece of paper, Appellant amended her Complaint ("First Amended Complaint") to use Respondent's real name. (R. pp. 0030-0032, First Am. Compl.) Appellant continued to use the pseudonym Mary McCorvey. (Id.) Of note, as of April 25, 2013, Appellant had not received permission to proceed under a pseudonym, nor substitute pseudonyms for Defendants' names. (R. p. 0008)[5] Appellant presumably amended as a matter of right without obtaining leave of court or consent of the other parties, who did not yet know of the lawsuit's existence. (See R. p. 0561, Greenville County Case Docket (Indicating no Order granting leave.))

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[4] Pursuant to South Carolina Code §15-35-400, Respondent's Co-Defendants, Carol Sutton and Carol Sutton & Associates-Investigations, Inc. ("Sutton Defendants") served an Offer of Judgment on Appellant on September 28, 2015 in the amount of five thousand dollars and no cents ($5,000.00). Appellant accepted the Offer of Judgment and the Sutton Defendants no longer remain as parties to the case. (R. p. 0554 (Reflecting ensuing dismissal.))

[5] Respondent believes Appellant used pseudonyms for Defendants to prevent Landgraff's counsel from detecting the lawsuit *via* reporting services that monitor lawsuit filings, so she could pursue *ex parte* relief *sub rosa*. However, Appellant's usage of the pseudonyms is not trivial. As explained *infra*, at the time Appellant first amended her Complaint, no subject matter jurisdiction of the lower court embraced the lawsuit, as no real parties and no real claims existed before the Court.

E. The Lower Court Temporarily Granted Appellant's Pseudonym Motion But Denied Her TRO Motion Citing, In Part, Allegations Contained In Appellant Counsel's Affidavit, Which He Could Not Support.

On May 17, 2013, the lower court temporally granted Appellant's *ex parte* Pseudonym Motion. (See R. p. 0008, May 17, 2013 Pseudonym Order) Appellant nonetheless still continued to withhold service on Respondent—concealing her filings from Landgraff—despite the lower court's express instructions to the contrary. (See *supra*)

On May 17, 2013, the lower court denied Appellant's TRO Motion. (R. pp. 0009-0011, May 17, 2013 Order Denying TRO Motion ("TRO Order")) In its TRO Order, the lower court noted Mayer's sworn affidavit accused Respondent of "taking specific actions relating to the videotaping to embarrass and intimidate Plaintiff." (R. p. 0010, citing Mayer Aff. ¶4(e)) But, when questioned during the *ex parte* hearing, "Plaintiff's counsel could not supply concrete factual detail as to what 'specific actions' related to the taping Defendants have taken against Plaintiff in the past." (R. p. 0010, TRO Order, ¶2)[6]

Further, neither in the Mayer Affidavit nor during the TRO hearing[7] did Appellant disclose Respondent installed the video camera in *his* own master bedroom, not in a guest bedroom where Appellant might stay. (Compare R. pp. 0247-0248 (Mayer Affidavit) *with* R.

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[6] The lower court also noted: "It is highly unusual for a lawyer to sign an affidavit in support of a client's ex parte motion for TRO." (R. p. 0010, FN 1) Respondent, of course, could not attend the hearing on Appellant's TRO Motion since Appellant never served him nor gave notice of the hearing despite knowing who represented Respondent.

[7] The underlying court filings confirm serial attempted *ex parte* contacts with the lower court before Respondent's counsel was ever served. (R. pp. 0454-0466, Resp. Memo. Supp. Mot. to Set Aside Pseudonym Order, ¶¶1-2, 5-7, 11; R. pp. 0465-0466 (Ex. B)) However, Respondent in no way suggests the lower court acted improperly. To the contrary, the lower court repeatedly directed Appellant to serve Respondent. Appellant simply disobeyed the directive.

p. 0089, line 22-p. 0090, line 1 (Transcript: Lower Court indicating former belief video camera was in guest bedroom.)) Nor did Appellant, then or ever, disclose the reported video's actual contents. (R. p. 0002 (Feb. 27, 2015 Order: "Nowhere in the record do we learn precisely what is on the videotape...")) Nor did Appellant disclose the video had been gathered for and used as evidence in Respondent's divorce proceedings, in which Appellant was a voluntary affiant, who down-played her physical, extra-marital relationship with Respondent's wife. (Compare R. pp. 0247-0248, Mayer Aff. *with* R. pp. 0279-0284, Simpson Aff. *with* R. pp. 0014-0015 & FN 2 & 3 (Jan. 06, 2014 Order holding: "Finally, the Court has the inherent power to vacate the Subject Order due to the circumstances under which it was obtained."))[8]

F. Appellant Amends Again, Serves Landgraff With Her Latest Complaint & Pseudonym Order, But Withholds the TRO Filings & TRO Order.

On May 29, 2013, Appellant amended her Complaint ("Second Amended Complaint") a second time to use the pseudonym Jane Doe, in lieu of Mary McCorvey. (R. pp. 0033-0035, 2nd Am. Compl.) Then, evidencing she knew who represented Respondent all along, Appellant served Landgraff's counsel with the Pseudonym Order on or about the same day. (R. p. 0457, ¶11) Appellant then served Respondent with her Original Complaint, the First Amended Complaint, the Second Amended Complaint, the Pseudonym Motion, and the Pseudonym Order on June 1, 2013. (R. p. 0013 (Jan. 6, 2014 Order finding service on

[8] In fact, during Respondent's absence, the lower court somehow formed the misimpression that Respondent installed a video camera in a guest bedroom where Appellant stayed in Landgraff's house. Not until the hearing on Respondent's Motion for Summary Judgment, almost twenty (20) full months later, was this misimpression finally dispelled. (R. p. 0089, line 22-p. 0090, line 1 (Court: "Whose bedroom was it? Appellant's Counsel: "It was the bedroom of Mr. and Mrs. Landgraff, Your Honor." Court: "I thought there was some allegation that the camera was in like a guest bedroom where the Plaintiff would occasionally stay, but that's not correct?" Appellant's Counsel: "No.")) Of course, Respondent had no opportunity to clarify the issue because Appellant proceeded *ex parte* and concealed the TRO Motion and the TRO Order from Respondent.

Landgraff completed on June 1, 2013.)) Yet, Appellant withheld from serving Respondent with the TRO Motion, the Mayer Affidavit, and the TRO Order. In fact, Appellant never served Respondent with those filings and Respondent only serendipitously found them when reviewing Court filings.

G. Appellant Filed a Third Amended Complaint on June 14, 2013 Without Leave of Court or the Parties' Consent.

On June 14, 2013, Appellant amended her Complaint a third time. (R. pp. 0036-0038, 3rd Am. Compl.) The third amendment changed the damages alleged under Appellant's civil conspiracy claim. (Id. at ¶24.) Although Appellant had already amended as a matter of right, she did not obtain leave of Court or the other parties' consent before filing the Third Amended Complaint. (See, e.g., R. pp. 0560-0561)

II. RESPONDENT MOVES TO SET ASIDE THE ORDER ALLOWING APPELLANT TO USE A FICTITIOUS NAME.

After reviewing Appellant's Complaint, discovering the falsity of her accusations, and growing concerned about Simpson's *ex parte* contacts with the lower court, Respondent moved to set aside the Pseudonym Order. (R. p. 0129; R. pp. 0454-0466, Resp. Memo Supp. Mot. to Set Aside Pseudonym Order) Respondent based his motion on several grounds including the unfairness associated with allowing Appellant to assert wild allegations against him while hiding behind an alias obtained pursuant to an *ex parte* Order. (R. p. 0459, ¶¶20-21) Moreover, Respondent argued the *ex parte* Order, which the lower court granted under Rule 65, SCRCP, dissolved on May 28, 2014, ten (10) days after issuance, but prior to its service on Landgraff. (R. pp.0457-0458, ¶¶16-17) In addition, no basis supported Appellant's need to proceed under a false name since she previously aired her personal relationship with Respondent in an affidavit she voluntarily filed in the public record in Respondent's divorce.[9] (R. p. 18; R. pp. 0279-0284, Simpson Aff.; see also R. p. 0014, 1/6/2014 Order)

[9] At the time of its filing, the record of the divorce proceeding was not sealed in the Family Court. (Compare R. pp. 0279-0284, Aug. 4, 2010 Simpson Aff. *with* R. pp. 0351-0353, April 12, 2011 Order Sealing Family Court Record) Appellant's Affidavit was thereafter filed on November 2, 2010 in response to a separate Circuit Court action filed by Landgraff's ex-wife. Prior to April 2011, the Family Court record remained unsealed. By contrast, when Appellant filed suit in March of 2013, and all periods thereafter, the Family Court record was and remained sealed. (R. pp. 0351-0353, April 12, 2011 Order Sealing Family Court Record) Nonetheless, Appellant's counsel has filed numerous filings from Respondent's sealed divorce record, see, e.g., R. pp. 0417-0433, App. Memo. in Opp. S.J., Attach. Exhibits, which neither he nor his client should even possess. At all times when Appellant's counsel filed such materials, the Family Court's Order was (and remains to date) in full force and effect. Yet, he took them into his possession and filed them with the lower court without hesitation.

A. The Lower Court Set Aside Its Pseudonym Order, Found the Order Had Already Dissolved Before Service, & Ordered Appellant to Amend in 10 days.

The lower court granted ("Vacating Order") Respondent's Motion to Set Aside the Pseudonym Order. (R. p. 0013, Jan. 6, 2014 Order) The lower court found:

> Plaintiff did not serve Landgraff with a Summons, Complaint, or the Subject Order until June 1, 2013. Plaintiff concedes the Subject Order issued pursuant to an *ex parte* application under Rule 65, SCRCP. (*See* Pl. Opp. Memo. at 6) The Subject Order therefore expired on May 28, 2013, ten (10) days after its entry. Rule 65(b), SCRCP (Order "shall expire by its terms within such time after *entry*, not to exceed 10 days..."). **By operation of Rule 65(b), the Subject Order lapsed before Landgraff was ever served.**

(Id. (Emphasis added.))

Contrary to Mayer's Affidavit, the lower court also found: "No evidence exists that Plaintiff's mere identification poses a risk of retaliatory physical or mental harm to the requesting party, as reflected by the existence of the Prior Affidavit in the public record." (R. p. 0014, FN1) As a result, the lower court ruled: "[T]he May 17, 2013 Order is hereby vacated" and ordered Appellant "to amend her Complaint for the sole purpose of substituting her real name for the pseudonym Jane Doe" "within 10 days" (*i.e.,* January 18, 2014). (R. p. 0016) Appellant did not appeal the Vacating Order or any of its findings.

B. Appellant Ignored the Lower Court's Directive to Amend Her Complaint in 10 days.

Appellant once again ignored the lower court and failed to amend her Complaint by the court ordered deadline. Respondent thereafter sent correspondence to Appellant on January 24, 2014 and January 31, 2014 asking her to comply with the lower court's order. (See

Appendix A to Record ("App. A"), 0013-0014 & 0023-0024, Feb. 5, 2014 Resp. Rule to Show Cause, Ex. A & B Omitted by Appellant)[10] Appellant still failed to comply.

On February 5, 2014, Respondent filed a Rule to Show Cause ("RTC") hoping to prompt Appellant's compliance with the lower court's January 6, 2014 Order. (App. A, 0001-0030) Appellant still failed to comply. Facing an upcoming hearing on Respondent's RTC, on March 5, 2014, forty-six (46) days after the Court's deadline, Appellant filed a Motion to Amend the Vacating Order (from January 6, 2016) directing her to amend her Complaint. (R. p. 0136, Mar. 5, 2014, Pl. Mot. to Recon.)

C. Appellant Ignored the Vacating Order For Six Months and Then Filed an Amended Complaint Without the Lower Court's Leave or the Parties' Consent.

The lower court thereafter denied Appellant's Motion to Reconsider on March 31, 2014. (R. p. 0018, Mar. 31, 2014 Order) Appellant continued to ignore the lower court's Order for approximately another eighty (80) days. On June 20, 2014—over six (6) months after the Court's ordered deadline—Appellant purported to comply with the lower court's Order by unilaterally filing her Fourth Amended Complaint. (R. p. 0039-0041, 4th Am. Compl; see also R. p. 0045, Resp. July 1, 2013 Ans., ¶¶32-33 (pleading ineffective amendment); R. p. 0051, ¶¶30-31, Resp. July 10, 2014 Ans. to 4th Am. Compl. (pleading ineffective amendment.)) At the time she filed the Fourth Amended Complaint, Appellant did not obtain leave of Court, nor did she obtain the written consent of the other parties. (See R. p. 0557, Greenville Court of Common Pleas, Case Docket.)

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[10] Although Respondent specifically designated Exhibits A and B to his Rule to Show Cause, Appellant included only the Rule to Show Cause and omitted the attachments. Pursuant to SCACR 212, Respondent has filed a motion to supplement the Record and the citations herein are to the corresponding Appendix A. Appellant also omitted the February 27, 2015 Order Granting Plaintiff's Motion for Reconsideration in Part despite Respondent's designation of the same. That Order also appears in Appendix A.

D. Appellant Filed a 14 Page Memorandum Seeking Summary Judgment On the Same Day She Filed Her Fourth Amended Complaint.

On the same exact date she filed her Fourth Amended Complaint, Appellant filed a fourteen (14) page brief supporting summary judgment. (R. pp. 0473-0486, June 20, 2014 Pl. Mot. Summ. J.) In response, Respondent filed a Rule 56(f) affidavit noting, in part, that Appellant had only just provided responses to written discovery and her responses proved substantially incomplete and improper. (R. pp. 0251-0252, R. 56(f) Affidavit; R. p. 0098, lines 12-18 ("They're not dealing with me in good faith in discovery.")) Indeed, Appellant refused to provide even the most basic information in discovery such as itemized damage information and the factual bases supporting allegations set forth in Simpson's minimalistic Complaint. (R. p. 0096, line 25-0097, line 18)[11] Following two unanswered phone calls and one unanswered email to consult, Respondent filed a motion to compel discovery responses from Appellant on August 28, 2014. (R. p. 0095, lines 7-16; R. p. 0137-0139, Mot. to Compel) Over the two months following the filing of Respondent's Motion to Compel, Appellant did nothing to comply. The lower court scheduled a hearing on Respondent's Motion on November 17, 2014.

[11] Appellant similarly refused to respond to Respondent's repeated inquiries about scheduling a mediation to satisfy the court ordered mediation deadline which expired in January of 2014. (R. p. 0082, line 15-p. 0083, line 10, Nov. 17, 2014 Trans.; see also R. p. 0095, line 22-25 (Noting assertion of privileges and failure to supply a privilege log.))

III. Respondent Filed a Motion for Summary Judgment Twenty (20) Months After Appellant Filed Her Case.

Respondent filed a motion for summary judgment as to Plaintiff's claims in November of 2014. (R. pp. 0209-0211, Resp. Mot. for Summ. J.)[12] The lower court scheduled the hearing on Respondent's motion for summary judgment on the same day it was slated to hear Respondent's motion to compel. The hearing on both motions went forward on November 17, 2014. (R. pp. 0069-0111, Nov. 17, 2014 Trans.)

In opposition to Respondent's Summary Judgment Motion, Appellant filed a memorandum along with attached affidavits on Friday November 14, 2014. (R. pp. 0253-0297, App. Memo. in Opp.) However, in transmitting her Opposition Memorandum to Landgraff *via* email on November 14, 2014, Appellant transmitted only her Opposition Memorandum and omitted the attached affidavits (i.e., R. pp. 0259-0297). (R. pp. 0092, lines 2-12; see also R. pp. 0518-0524 (App. Memo. in Opp. with cover email and omitting attachments) As a result, the Court allowed Respondent to submit a Supplemental Memorandum, which he did, on November 24, 2014. (R. pp. 0508-0516, Resp. Suppl. Memo.)

The lower court issued a Form 4 Order on December 5, 2014 and instructed Respondent to prepare the initial draft of an Order. (R. p. 0020, Form 4) Respondent submitted the proposed Order by December 10, 2014 as directed. (Id.) After significant revision, the lower court issued an Order granting summary judgment on February 3, 2015. (R. pp. 0021-0026, Feb. 03, 2015 Order)

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[12] Respondent treats his Motion for Summary Judgment more fully in the Statement of Facts. (See *infra*.)

Appellant then filed a motion for reconsideration on February 12, 2015. (R. pp. 0213-0246, Feb. 12, 2015 App. Mot. for Recon.) As discussed below, Appellant's motion for reconsideration purported to interject a litany of brand new arguments and cited copious materials Simpson filed with the lower court over two and half months *after*: the November 17, 2014 hearing on Landgraff's Motion, the lower court issued its Form 4 Order, and Landgraff submitted his proposed Order. (See R. p. 0555, Greenville County Public Filing Index (reflecting submittal of new materials on January 27, 2015.))

The lower court issued an Order partly granting Appellant's Motion on February 27, 2015. (App. A, 0031-0039, Feb. 27, 2015 Recon. Order.)[13] On the same day, the lower court also issued an amended Order granting summary judgment to Respondent. (R. pp. 0001-0007, Feb. 27, 2015 Summ. J. Order.) Appellant filed another Motion for Reconsideration on March 16, 2015, which the lower court denied on March 24, 2015. (R. p. 0554, Greenville Public Index reflecting filing of March 16, 2015 Mot. to Recon.; Id. (Reflecting March 23, 2015 Order Denying Second Mot. to Recon.) Appellant filed the instant appeal on April 13, 2015. (Id. (Reflecting Filing of Notice of Appeal on April 13, 2015.))

STATEMENT OF FACTS

As noted *supra*, Respondent filed a Motion for Summary Judgment ("Motion") in November of 2014. (R. pp. 0209-0211, Resp. Mot. for Summ. J.)

[13] As noted above, Appellant similarly omitted the Feb. 27, 2015 Reconsideration Order from the Record on Appeal. Respondent has included the Order in Appendix A and submits the same by way of supplemental record. This Order is highly relevant in that it reflects the lower court's findings about the "disturbing pattern of Plaintiff's counsel's questionable filings in this matter." (App. A, p. 0033)

Grounds Supporting Respondent's Summary Judgment Motion:

Five grounds supported Respondent's Motion: (1) no issue of material fact existed as to any element of any claim asserted by Plaintiff; (2) even if Appellant could otherwise demonstrate an "intrusion" into her privacy, her allegations fail to constitute "a substantial and unreasonable intrusion," which is a threshold legal determination for the trial court; (3) Plaintiff's Outrage claim fails because any conduct attributed to Landgraff fails to constitute "extreme and outrageous conduct" sufficient to support recovery, which is likewise a threshold legal determination for the trial court; (4) Plaintiff's Conspiracy Claim lacks evidence supporting a combination to injure Plaintiff or her claim for special damages; and (5) Plaintiff's wrongful conduct barred her claims. (R. pp. 0209-0211, Resp. Mot. for Summ. J.)

The Materials Appellant Filed in Opposition:

Appellant filed a memorandum opposing Respondent's Motion on November 14, 2014. (R. pp. 0518-0524, Memo. in Opp.) Appellant's memorandum attached ten (10) affidavits. (Id.) However, when Appellant transmitted the memorandum to Respondent *via* email, she omitted the affidavits. (See, e.g., R. pp. 0518-0524 (App. Memo. in Opp. with cover email and omitting attachments); R. pp. 0092, lines 2-12, 11/17/14 Trans.) The Court similarly did not have Appellant's submittal. (R. p. 0091, lines 2-13, Nov. 17, 2014 Trans. (Outlining contents of Court's file) As a result, the lower court permitted Respondent to submit a supplemental filing addressing the same. (R. p. 0093, lines 7-11, Nov. 17, 2014 Trans.)

During the hearing and in response to Respondent's motion for summary judgment, Appellant gave a factual narrative nowhere supported by competent evidence of record. (R. pp. 0084, line 1-0091, line 1) Because Respondent knew such materials nowhere appeared in the Court's Record, in part, and because they were untrue, Landgraff specifically asked for

Appellant to identify in the Record the evidence supporting his factual recitations. (R. p. 0090, lines 20-23 ("[C]ould we identify where in the record any of this stuff is located? Sure.") In response, Appellant identified: "the paperwork that [she] filed with the Court" on November 14, 2014 (i.e., the affidavits she failed to transmit to Respondent before the hearing). (R. p. 0090, line 24-0091, line 1)

As noted in Respondent's supplemental memorandum (dated November 24, 2014), none of the affidavits "submitted" by Appellant before the hearing ("Pre-hearing Affidavits) had anything to do with Respondent's summary judgment motion. (R. pp. 0508-0516, Resp. Supp. Memo.)[14] Nor could they. None of affiants knew the video footage existed at the time they executed their affidavits. As reflected by their dates and content, Appellant recycled affidavits collected by Landgraff's wife in preparation for an August 4, 2010 hearing in their divorce case. (See R. pp. 0260-0284, App. Memo. in Opp., Attach. Aff.)[15] The existence of video footage had not yet been disclosed by Landgraff at the time the affidavits were executed.[16]

For this reason, none of the Pre-hearing Affidavits even mention video footage. (Id.) Nor do they establish a video existed. (Id.) Nor do they supply evidence supporting any

[14] The affidavits submitted by Plaintiff included the affidavits of: Jann Faiga, Bobby Thompson, William K. Haney, Suzanne Haney, Hester Billings, Sarepta Wilson, Van Wilson, Harold Lefkowitz, Andrea Gum, Lynn Mulligan, and Carol Simpson.

[15] Of note, these are exactly the materials Appellant should not possess.

[16] Throughout her Brief, Appellant falsely states—over and over—that the Family Court found Respondent guilty of connivance. The statement is utterly false and just another example of what the lower court witnessed in relation to Appellant's attempts to distort the record. The Family Court ruled exactly opposite to what Appellant contends. The Family Court held "insufficient evidence" existed "to make a ruling as to the issue of connivance, a defense asserted by Wife's counsel." (See also App. Reply Br. p. 10 ("Admittedly, the Family Court held insufficient evidence existed...to make a ruling on connivance...")

prima facie element of Appellant's claims. (Id.)[17] And, it is for this *very* reason why—in the entirety of her thirty-two (32) page brief—Appellant fails to cite to any of the Pre-hearing Affidavits a single time. (See App. Br., passim) Yet, at the time, these were the only evidentiary materials in the record responsive to Respondent's Motion for Summary Judgment.[18]

The Lower Court's Rulings:

The lower court issued a Form 4 Order on December 5, 2014 indicating it intended to grant Respondent's summary judgment motion and requesting a proposed order. (R. p. 0020, Form 4 Order.) The lower court then issued an Order granting summary judgment ("First S.J. Order") on February 3, 2015. (R. pp. 0021-0026, Feb. 3, 2015 Order Granting Summ. J.) The lower court then issued an amended Order granting summary judgment ("Second S.J. Order") on February 27, 2015. (R. pp. 0001-0007, Order Granting Summ. J.)

All of Appellant's claims hinge upon allegations of Respondent's wrongful conduct in connection with video footage taken from Landgraff's own master bedroom. (See e.g., R. pp. 39-41, 4th Am. Compl., ¶¶4, 10, 11, 12, 13, 17, 19, 22, 24.) Yet, as the lower court found as its initial basis for granting summary judgment: "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." (R. p. 2, 2/27/15 Order Granting Summ. J.) In

[17] From Respondent's standpoint, this also seems to be the most likely reason she did not transmit the affidavits in advance of the hearing and why she did not deliver a copy to chambers as is customary.

[18] At one point Appellant suggested other evidentiary materials were filed with Respondent's Motion to Compel. This is not correct. The only materials filed with the Respondent's Motion to Compel were Appellant's unverified responses to the written requests, most of which contained improper answers and objections.

furtherance of this finding, the lower court concluded: "[T]here 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." (R. p. 0005, FN 2, Feb. 27, 2015 Order Granting Summ. J.)

The lack of proof similarly defeated Appellant's outrage claim as well: "Her outrage cause of action claim must be dismissed as well, given there is insufficient proof of extreme and outrageous conduct by Defendants." (Id.) And in relation to Appellant's civil conspiracy claim, the lower court found: "there can be no civil conspiracy without proof of special damages or an agreement to injure Plaintiff." (Id.) For these reasons, *inter alia*, the lower court found: "There [was] no genuine issue of material fact as to Plaintiff's claims against Defendant." (R. p. 0007, 2/27/15 Order Granting Summ. J.)

Having submitted no evidence establishing the video's content, Appellant tried (and continues to date) to rely upon evidence she hoped—in a *sub rosa* manner—to slip into the record after the Court already announced its ruling. (See R. p. 0003, 2/27/15 Order Granting Summ. J.) Specifically, Appellant attempted to augment the record with law enforcement records, Greenville County Sheriff's Department records, and 13th Circuit Solicitor reports (treated as "Incident Report") *after* the fact causing the lower court to note such records were: "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." (Id.)[19]

[19]Just for clarification and as noted below, Landgraff was never prosecuted for any of Appellant's unfounded accusations. And, the primary source of the hearsay materials (i.e., the Incident Report) Appellant relies upon is the *Appellant*. In this way, Appellant cites herself *via* the unauthenticated notations of a third-party.

The lower court made additional findings regarding Appellant's attempted misuse of the Incident Report in its February 27, 2015 Order addressing Appellant's First Motion to Reconsider. Appellant's Motion to Reconsider speciously contended the lower court missed the Incident Report when ruling in Respondent's favor. In addressing the issue, the lower court wrote: "Plaintiff is correct that the court missed the Incident Report..." (App. A, p. 0036, Feb. 27, 2015 Order Granting Mot. to Recon. in Part) The Court continued:

> 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.

(Id. (Emphasis added.)) The lower court added:

> The conduct of Plaintiff's counsel in filing documents for 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 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.

(Id. (Emphasis added.))[20] Just like below, Appellant again attempts to resuscitate her claims through sleight of hand factual distortions and misstatement of the record. Just like below,

[20] The lower court also addressed Appellant's arguments concerning discovery, many of which she repeats on appeal noting they were "egregiously misleading." (Id. p. 0034) Unfortunately, this pattern has continued. Throughout her Brief, Appellant makes a large number of factually untrue statements, most of which lack any citation. This is abusive to Respondent and expressly disallowed. Pursuant to Rule 208(E)(4), SCACR Appellant was required to provide record citations supporting all salient facts alleged. (Id.) Moreover, Rule 210(h), SCACR states: "the appellate court will not consider any fact which does not appear in the Record on Appeal." (Id.) By operation of Rule, then, Respondent asks the Court to

absent any real evidence, Appellant weaves a bizarre and elaborate narrative, blaming Respondent for her extra-marital affair with his wife, and justifying her presence in his marital bed, in his bedroom, in his house, while he was out of town. Just like the Court below, this Court should end this lawsuit by affirming its dismissal.[21]

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS CASE WARRANTING ITS IMMEDIATE DISMISSAL.

The Seventh Circuit Court of Appeals once noted: "[l]awyers and litigants who decide to play by rules of their own invention will find that the game cannot be won." See United States v. Golden Elevator, Inc., 27 F.3d 301, 302 (7th Cir. 1994). This adage applies here. Appellant proved so intent on playing by rules of her own invention, her case slipped into jurisdictional non-existence.

A. The Lower Court Disallowed Appellant From Using a Pseudonym And Ordered Her to Amend Within Ten Days.

Pursuant to Rule 15, SCRCP, a litigant can: "amend his pleading only by leave of court or by written consent of the adverse part[ies]." Rule 15(a), SCRCP.[22] After setting aside its prior Order authorizing Appellant to proceed under a pseudonym, the lower court granted

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discount from consideration each and every factual statement in Appellant's Brief where she has not identified her source in the record.

[21] Just like the Solicitor's Office and Greenville County Sheriff's Office as well, this Court should reject Appellant's unfounded statements.

[22] "In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes. If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." Maxwell v. Genez, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003). Here, Appellant can offer no explanation justifying her outright refusal to abide by court rules and court orders. To borrow a phrase Appellant hackneys in this case: "Her silence [in this regard] is deafening."

Appellant leave to amend her Complaint for a period of ten (10) days, which expired on January 18, 2014. (See R. p. 4, 1/6/2014 Order ("Within ten (10) days of the receipt of this Order, Plaintiff is ordered to amend her Complaint...") But, Appellant actively chose to disobey the lower court's order for over six (6) months.

B. Appellant Failed to Amend For Six (6) Months and When She Did Amend She Obtained Neither Leave of Court Nor Written Consent of the Other Parties.

When, on June 20, 2014, Simpson decided she would file her Fourth Amended Complaint, the ten (10) day period wherein the lower court's order authorized Appellant to amend had expired over six (6) months earlier. (Compare R. pp. 0039-0041, 4th Am. Compl. *with* (See R. p. 4, 1/6/2014 Order) Even though no Court Order authorized the amendment in June of 2014, Appellant proceeded to file and serve a Fourth Amended Complaint. (R. pp. 0039-0041, 4th Am. Compl.) She did not file a Motion under Rule 15(a), SCRCP first obtaining the required Order granting leave to amend. And, Appellant did not obtain Landgraff's written consent or the consent of the two other parties.

C. When a Party's Amendment Fails to Follow Rule 15(a), SCRCP, It Has No Legal Effect.

It is axiomatic: "if an amendment that cannot be made as of right is served without obtaining the court's leave or the opposing party's consent, it is without legal effect and any new matter it contains will not be considered" unless approved by the trial court. 6 Wright & Miller, Federal Practice & Procedure §1484 at 421 (1971); Stanley v. Kirkpatrick, 357 S.C. 169, 174, 592 S.E.2d 296 (2004) ("[I]f more than thirty days have elapsed from the time a responsive pleading is served, a party may amend his pleading only by leave of court or by written consent of the adverse party."); United States ex rel. Mathews v. HealthSouth Corp., 332 F.3d 293, 296 (5th Cir. 2003) ("[F]ailing to request leave from the court when leave is

required makes a pleading more than technically deficient. The failure to obtain leave results in an amended complaint having no legal effect. Without legal effect, it cannot toll the statute of limitations period."); Murray v. Archambo, 132 F.3d 609, 612 (10th Cir. Okla. 1997) ("Because Murray's amended complaint was not properly filed pursuant to Rule 15, it had no legal effect and did not supersede his original complaint.")[23]

Here, for the reasons set forth above, Appellant's Fourth Amended Complaint constitutes a legal nullity, void from its inception. Id.[24] Even if so inclined, the Court of Appeals cannot now confer operative legal effect upon Appellant's Fourth Amended Complaint when none ever existed. By necessity, then, Simpson must revert to her last operative pleading (i.e., Appellant's Third Amended Complaint). (See R. p. 0036-0038, 3d Am. Compl.)

D. Because Appellant's Last Amendment Has No Legal Effect, the Named Plaintiff Remains "Jane Doe"—an Imaginary Claimant With Fictional Claims.

The Third Amended Complaint lists Jane Doe as the Plaintiff, not Carol Simpson. (Id.) In turn, the lower court ruled—in an unappealed order—that Appellant could not proceed under a pseudonym. (R. pp. 0013-0016, Jan. 6, 2014 Order.) The lower court vacated the Pseudonym Order, which Appellant obtained in questionable fashion on an *ex parte* basis, but

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[23] See also Baxter v. Strickland, 381 F. Supp. 487, 491 (N.D. Ga. 1974) (When "[A]n amendment to the complaint...is served without obtaining such leave or the opposing party's consent is served, it is without legal effect and will not be considered."); Gaumont v. Warner Bros. Pictures, 2 F.R.D. 45, 46 (D.N.Y. 1941) ("Although amendments are "freely given when justice so requires" F.R.C.P. 15(a), the rule is specific that leave of the court must be obtained. That has not been sought here and the pleading, therefore, is without legal effect.")

[24] While true, the lower court had discretion to grant Appellant leave to amend, Appellant never moved the Court and the Court never granted the same. To hold otherwise would deprive Respondent and his then Co-Defendants of the opportunity to oppose the amendment and create a Record regarding the same.

found it had *otherwise* dissolved ten (10) days after its issuance and "before Landgraff was ever served." (Id. at 1.) Appellant never appealed this Order and it thereafter became the law of the case. Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 734, 573 S.E.2d 778 (2013) ("An unappealed ruling is the law of the case.") Thus, from inception, a fake name—beneath which Appellant lacked authority to assert her claims—served as the prosecuting party in this lawsuit. Carol Simpson never jurisdictionally darkened the threshold of this or the lower court.[25]

E. Virtually Identical Facts Arose in the Case of W.N.J. v. Yocom and the Tenth Circuit Court of Appeals Adopted Landgraff's Same Analysis.

Respondent's arguments directly implicate the organic subject matter jurisdiction of the lower court and, derivatively, this Court.[26] The exact scenario, as that *sub judice*, arose in the decision of W.N.J. v. Yocom, 257 F.3d 1171, 1172 (10th Cir. Utah 2001). In W.N.J., Plaintiffs failed to obtain permission to proceed anonymously before proceeding as such. After the District Court granted summary judgment on substantive grounds, Plaintiffs appealed the dismissal to the Tenth Circuit Court of Appeals. Id. While on appeal, Plaintiffs first realized

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[25] Of note, Respondent does not believe subject matter jurisdiction ever existed in this case. As noted above, see Statement of Case, the case commenced with all fictional parties. At the time Respondent was served, Appellant lacked the authority to proceed anonymously. Thus, a fictional party served Respondent with a summons and complaint. Then, in January of 2014, the lower court ordered Appellant to amend in ten days. She disobeyed by waiting six months. *Then*, when she did amend, she never sought leave to amend or the consent of the other parties. Any prior leave of Court necessarily expired by that time. From inception and, to date, a real Plaintiff never existed in this case. South Carolina Courts clearly have plenary powers to adjudicate real disputes between real parties. No question exists about the same. But, South Carolina Courts have no jurisdiction to hear fictional claims of fake parties. Nor would they want such jurisdiction.

[26] "The question of lack of subject matter jurisdiction may be raised at anytime during the action and cannot be waived..." Gnoc Corp. v. Estate of Rhyne, 312 S.C. 86, 88, 439 S.E.2d 274 (1994).

their failure to obtain permission to proceed anonymously deprived the District Court and Tenth Circuit of subject matter jurisdiction. Id.

The W.N.J. Plaintiffs sought to correct the defect by obtaining a *nunc pro tunc* Order from the District Court Magistrate granting leave to use pseudonyms. Id. The Tenth Circuit rejected Plaintiffs' efforts to restore jurisdiction holding:

> When a party wishes to file a case anonymously or under a pseudonym, it must first petition the district court for permission to do so. Nat'l Commodity & Barter Ass'n, 886 F.2d 1240, 1245 (10th Cir. 1989) [When] no permission is granted, "the federal courts lack jurisdiction over the unnamed parties, as a case has not been commenced with respect to them." Id.
>
> In this case, plaintiffs failed to request permission from the district court before proceeding anonymously. At our request, two plaintiffs filed sealed affidavits giving their true names to this court. They also secured an order by the original magistrate judge granting leave to proceed using pseudonyms, filed after the start of this appeal but dated *nunc pro tunc* to the filing of the action. Those acts cannot cure the failure to secure permission at filing. We raised this issue *sua sponte* because the defect affects our fundamental jurisdiction to hear the appeal. See id. at 1245 n.3.
>
> A lack of jurisdiction cannot be corrected by an order *nunc pro tunc*. Central Laborers' Pension, Welfare & Annuity Funds v. Griffee, 198 F.3d 642, 644 (7th Cir. 1999). As noted in that case, "the only proper office of a *nunc pro tunc* order is to correct a mistake in the records; it cannot be used to rewrite history." Id. The lack of original jurisdiction in the district court likewise cannot be cured after an appeal has been filed since, as a general matter, a district court loses jurisdiction over a case once a notice of appeal has been filed.

(Id.)[27]

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[27] See also M.M. v. Zavaras, 139 F.3d 798, 801 (10th Cir. 1998) (holding that "absent permission by the district court to proceed anonymously . . . the federal courts lack jurisdiction over the unnamed parties."); Doe v. Husband, 2004 U.S. Dist. LEXIS 28345 (E.D. Va. Aug. 16, 2004) ("Where, as here, the plaintiff has not filed a request to proceed anonymously and the plaintiff has not argued that she should be allowed to proceed anonymously, the plaintiff's complaint should be dismissed."); Estate of Rodriquez v. Drummond Co., 256 F. Supp. 2d 1250, 1256 (N.D. Ala. 2003) ("[T]he plaintiffs in this case failed to seek leave to proceed anonymously. Thus, this court does not have jurisdiction over the unnamed plaintiffs because of this procedural error."); Doe v. Megless, 654 F.3d 404, 406 (3d Cir. 2011) (affirming district court's dismissal of action in which plaintiff failed to proceed using real name after denial of his motion to proceed anonymously).

The facts at bar prove even starker than in W.N.J.. Here, Appellant did not simply neglect to obtain permission to proceed anonymously. The lower court affirmatively refused the same and further ruled Simpson's failure to renew her *ex parte* motion resulted in the dissolution of the Pseudonym Order before Appellant ever served Respondent. (R. p. 0013, Jan. 6, 2014 Order.) The lower court also vacated the Pseudonym Order removing any question about the issue. (Id.)

Unlike in W.N.J., the lower court did not automatically dismiss Appellant's claims for want of jurisdiction, although it arguably should have. The lower court instead granted Appellant leave of court for ten days to amend her Third Amended Complaint to substitute her real name. (Id.) But, intent on playing by her own rules, Appellant simply ignored the lower court's order.

Even assuming the lower court had organic jurisdiction to grant Appellant leave to amend as it did in its January 2014 Order, see FN 25 & 27 above, no case, controversy, or real claims existed between *actual* parties for the next six (6) months. Then, even further assuming subject matter jurisdiction somehow persisted in June of 2014, Appellant purported to amend her pleading by interposing her Fourth Amended Complaint, without leave of Court or the consent of the other parties. Now, just like the W.N.J. Plaintiffs, Appellant finds herself on appeal incapable of remedying jurisdictional defects only curable at the trial court level. Now, just like the W.N.J. Plaintiffs' claims, this Court should dismiss Appellant's claims for lack of subject matter jurisdiction.

F. South Carolina Law Accords With the Tenth Circuit's Analysis.

Both the analysis of Respondent and the Tenth Circuit wholly mirror South Carolina law and procedure. This is true for several reasons. First, "A civil action may be maintained

only in the name of a person...capable of possessing and asserting a right of action. A suit brought in a name which is not a legal entity is a nullity and the action fails." Glenn v. E. I. Du Pont de Nemours & Co., 254 S.C. 128, 133, 170 S.E.2d 155 (1970). Moreover, "A complaint brought in the name of a plaintiff which is not a legal entity is a nullity and there is no foundation upon which to base an amendment." Id. at 134.[28]

First, without permission, Appellant brought suit in the name of a non-existent person. The lower court refused permission to use a pseudonym and Appellant failed to fix it in a timely manner or in accordance with the Rules of Civil Procedure. Her case and claims proved a nullity from the start and no foundation existed upon which to base her amendments.

Second, "South Carolina courts, like the federal courts, require a justiciable case or controversy before any decision on the merits can be reached." Lennon v. S. Carolina Coastal Council, 330 S.C. 414, 417-18, 498 S.E.2d 906, 908 (Ct. App. 1998); Power v. McNair, 255 S.C. 150, 153, 177 S.E.2d 551, 552 (1970); see also Tourism Expenditure Review Comm. v. City of Myrtle Beach, 403 S.C. 76, 81, 742 S.E.2d 371, 373 (2013) ("[P]arties cannot by consent or agreement confer jurisdiction on the court...in the absence of an actual justiciable controversy.") Thus, "A threshold inquiry for any court is a determination of justiciability, *i.e.,* whether the litigation presents an active case or controversy." Lennon v. S.C. Coastal Council, 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct.App.1998). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." Byrd v. Irmo High Sch., 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996); see also Holden

[28] For this reason, "It is well settled that where an action is brought in the name of a non-existing plaintiff, an amendment of complaint by substituting the proper party to the action as plaintiff will be regarded as the institution of a new action as regards the statute of limitations." Glenn v. E. I. Du Pont de Nemours & Co., 254 S.C. 128, 135 (1970).

v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002). Here, no justiciable controversy can exist with a fake Plaintiff. Because Plaintiff's 4th Amended Complaint was submitted without leave of court, in contravention of Rule 15, SCRCP, an unauthorized Jane Doe Plaintiff impermissibly remains as the suing litigant.

Third, Rule 10(a), SCRCP states: "The summons and complaint...shall include the names of all parties..." Substantially the same as its federal counterpart, Rule 10(a), SCRCP does not impose a mere formality but directly implicates the court's subject matter jurisdiction. It is axiomatic: "Failure to name a party denies a court jurisdiction over that party." Loa-Herrera v. Trominski, 231 F.3d 984, 991 (5th Cir. 2000); M.M. v. Zavaras, 139 F.3d 798, 801 (10th Cir. 1998) (holding that "absent permission by the district court to proceed anonymously . . . the federal courts lack jurisdiction over the unnamed parties."); see also Discussion, supra.

Where, as here, Appellant lacked permission from the lower court to assert claims through a pseudonym, South Carolina Courts lack jurisdiction over Simpson and the subject matter of her claims. Stated differently, no actual case or controversy, wherein real claims have been asserted, exist before the Court for adjudication. This proves necessarily true because the named Plaintiff does not exist.[29] Trexler v. Associated Press, 2015 WL 1681002,

[29] Moreover, Appellant's unauthorized use of a pseudonym violates Rule 17(a) & 17(b), SCRCP, as the fictitious Plaintiff does not constitute the real party in interest and lacks the capacity to sue. Rule 17(a) & (b), SCRCP; see also Town of Sullivan's Island v. Felger, 318 S.C. 340, 346, 457 S.E.2d 626 (Ct. App. 1995) ("A real party in interest is one who has a real, material, or substantial interest in the subject matter of the litigation, as opposed to one who has only a nominal or technical interest in the action."); Hughey v. Mooney, 282 S.C. 597, 602, 320 S.E.2d 475 (Ct. App. 1984) ("Unless a real party in interest or one who falls within statutory exception institutes suit, the court is without jurisdiction."); Wilson v. Gibbes Machinery Co., 189 S.C. 426, 430, 1 S.E.2d 490 (1939); Ex parte Allstate Ins. Co., 248 S.C. 550, 562 (S.C. 1966) ("Unless the real party in interest institutes the suit and is before the Court, the Court is without jurisdiction.")

at *1 (Ct. App. 2015) (Unpub.) (affirming grant of summary judgment where Plaintiff sued parties unknown under SCRCP 10(a) and failed to timely amend to identify the defendants.); 24 S.C. Jur. Rules of Civil Procedure § 10.1 ("This Rule 10(a) is substantially the same as the Federal Rule and conforms to present State practice.") For these reasons, this Court should simply dismiss Appellant's case for want of jurisdiction.

II. APPELLANT'S SUMMARY JUDGMENT ARGUMENTS LACK MERIT.

Facing a March 2015 trial date and managing a recalcitrant Plaintiff who refused to provide even the most basic information in discovery, ignored letters, and refused to return phone calls, Respondent moved for summary judgment in November of 2014. (See R. p. 0095, line 17-0106, line 14; see also R. p. 0098, lines 12-18) (Cannot receive "basic damage information, and part of the reason for summary judgment was because: "They're not dealing with me in good faith in discovery.") At the time Respondent filed his motion, Appellant had exhibited no interest whatsoever in preparing her case for trial.

A. For Twenty Months, Appellant Served: No Interrogatories, No Production Requests, No Admission Requests, No Deposition Notices, and No Subpoenas.

By the time of the Summary Judgment hearing, almost twenty (20) months had lapsed since Appellant filed her Complaint. During that time, Appellant served no interrogatories, production requests, or request for admissions on Respondent. Nor did she do so until November 18, 2014, the day *after* the Summary Judgment hearing. (See e.g. R. p. 0085, lines 12-14 (During the November 14, 2014 hearing: "We have prepared our discovery...I don't believe we've sent it out yet. We're going to request what it is that we need.") Appellant failed to issue a single subpoena. And, she did not even try to schedule a deposition, let alone take one. Yet, Appellant now claims the lower court deprived her of a full and fair chance to conduct discovery.

Appellant cannot deny her lack of prior effort to pursue discovery. Her lawyer confirmed Appellant's lack of diligence. (R. p. 0085, lines 12-14 (As of the summary judgment hearing: "I don't believe we've sent it [written discovery] out yet.") As noted above, Plaintiff did not even serve discovery until November 18, 2014, nor does Appellant deny the same. Although Appellant now suggests she was "not dilatory," as noted above, Appellant delayed for six (6) months just to add her own name on the Complaint. (See *supra.*)

B. Before the Court Ruled, Appellant Never Once Argued Summary Judgment Was Premature.

Appellant's portrayal of summary judgment as premature strains credibility. Appellant is right. Under South Carolina law, a trial court should not grant summary judgment "until the opposing party has had a 'full and fair opportunity to complete discovery." Dawkins v. Fields, 354 S.C. 58, 59, 580 S.E.2d 433, 439 (2003) (Emphasis added). "Opportunity" is the operative term. Here, Appellant had twenty (20) months of opportunity.[30] She squandered her opportunity. And, Appellant now blames the lower court for not affording her a new one. South Carolina Courts require more out of parties and their lawyers.

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.[31] Compare Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 54055, 677 S.E.2d 32, 36 (Ct. App. 2009) ("A party claiming summary judgment is

[30] In many of the serial filings recently interposed by Appellant, she chronicles a long laundry list of lawsuit-related tasks, which, as she suggests, handcuffed her from completing any meaningful trial preparations.

[31] Page 8 of Appellant's Brief provides yet another example of Appellant distorting the record. Appellant states: "Appellant argued repeatedly before the trial court that she should be given an opportunity to complete discovery." Hoping no one would notice, Appellant then cites to filings she made only after the lower court indicated its ruling. (App. Br. p. 8)

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.") *with* R. p. 0084, line 8-0085, line 16) Moreover, if her claims were legitimate, Appellant should have easily been able to oppose summary judgment because the facts and evidence were largely, if not solely, within her own control.

C. Appellant Claims She Needed More Time But She Filed an Opposing Memorandum Attaching Ten Affidavits.

Appellant likewise never explained to the lower court why the time she had was insufficient. Nor did Appellant articulate how more discovery could uncover evidence potentially creating a genuine issue of material fact. To the contrary, Appellant filed a memorandum opposing Respondent's motion, which attached ten (10) separate affidavits. (R. pp. 0253-0284, App. Opp. Memo. & Attach. Ex.)

Then, after learning of the Court's ruling, Appellant managed to amass a variety of other materials, used in her efforts to distort the lower court's record. (See, e.g., R. pp. 0555, Simpson's responses to Sutton's Production Requests filed on January 27, 2015; App. A, p. 0036, Feb. 27, 2015 Order)[32] Although Appellant's submittals proved untimely and deficient, the materials Simpson gathered demonstrate her possession of significant evidentiary materials.

[32] Of note, on page 26 of the November 17, 2014 Transcript, Appellant did make the following statement: "And, that's all we're asking for, Your Honor, is a chance to be heard, a chance to finish discovery, and have a trial." (R. p. 0094, lines 13-15) That was the extent of her argument in this regard. Appellant did not argue, as she suggests over and over, that summary judgment was premature or that she needed more time to conduct discovery to respond. And, Appellant certainly did not specify what discovery she needed so as to make summary judgment premature or why she had insufficient time to conduct the same.

And nowhere does Appellant specify or explain what discovery she needed to respond to Landgraff's motion, as required.

D. Although She Now Claims Summary Judgment Was Premature, Appellant Filed Her Own Motion Indicating She Had Enough Evidence.

As the lower court pointed out, Appellant filed her own Motion for Partial Summary Judgment on November 4, 2013. (Compare App. A, p. 0035, Feb. 27, 2015 Recon. Order) *with* R. p. 0019) Under Rule 11(a), SCRCP, then, Appellant certified to the lower court she had a good faith basis to contend: (1) no issues of material fact existed for a jury to decide; and (2) Appellant was entitled to a judgment as a matter of law. (Compare Rule 11(a), SCRCP *with* Rule 56(c), SCRCP.) Appellant's Motion related to a claim she had to prove at trial. Thus, by filing the Motion, Appellant certified she reasonably believed she possessed strong enough evidence to obtain summary judgment on every element of her claim.[33] (Id.; see also, James F. Flanagan, South Carolina Civil Procedure 649-50 (2d ed. 1996))[34] This flatly contradicts her present arguments wherein she claims she needed more discovery to prove her claims.

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[33] Appellant only partially moved for summary judgment as to her Intrusion Claim. However, Appellant supports all three of her causes of action with the same initial seven (7) paragraphs. (R. p. 0039-0041, 4th Am. Compl.) The claims themselves simply plead the bare elements of the cause of action.

[34] Appellant's position concedes, at least tacitly, the deficiency of the materials she cited in her brief opposing Respondent's Motion for Summary Judgment. This necessarily follows as the positions prove mutually exclusive. If Appellant indeed possessed competent evidence sufficient to rebut Summary Judgment, she could not satisfy her obligation to indicate why she needed additional discovery to establish the elements of her claim. Conversely, if Appellant truly needs additional discovery, her responsive showing must prove deficient, despite her stated position. Appellant cannot have it both ways, as she now attempts.

E. Appellant's Brief Demonstrates an Overall Misunderstanding Concerning Rule 56's Burdens and Showings.

Respondent's Motion challenged whether evidence existed to support the basic elements of Appellant's claims. (See R. pp. 0072, line 6-0073, line 18) (Under Baughman v. AT&T, 306 S.C. 101, 410 S.E.2d 537 (1991), "a defendant can file a motion [and simply] point to the absence of evidence to support his adversaries' claims.") As to issues for which Appellant bears the burden of proof at trial, Respondent need only point to an absence of evidence to discharge his obligation as the summary judgment movant. Baughman v. AT&T, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Contrary to the suggestions in Appellant's Brief, Respondent did not have a burden to negate Appellant's claims. (See e.g., App. Br. p. 11.) Appellant had a burden to demonstrate issues of material fact existed as to all of the elements of her claims. Baughman v. AT&T, 306 S.C. at 115. The basic evidence of Appellant's claims should have been within her control. Yet, Appellant failed to satisfy her burden on summary judgment and the lower court properly dismissed her claims.

F. If Appellant Needed More Time, As a Lawyer, She Knew How To File A Rule 56(f) Affidavit; She Chose Not to File One.

Assuming Appellant truly needed additional time (which Respondent denies), Appellant should have, but did not, submit a Rule 56(f) Affidavit. Pursuant to Rule 56(f), the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just." John Doe v. Batson, 345 S.C. 316, 321, 548 S.E.2d 854 (2001).[35] "Thus, Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why [s]he needs more time for discovery." Id. Here, Appellant failed to do so providing yet another reason why the lower court properly dismissed her claims.

G. Appellant Distorts Respondent Counsel's Statements About Discovery, Just Like She Distorted the Record Below.

To support her claims of prematurity, Appellant cites a Rule 56(f) Affidavit submitted by Respondent's counsel in June of 2014. (See App. Br. p. 7.) In addition, Appellant cuts and pastes certain passages from the November 17, 2014 hearing in support of her arguments. (Id. at 9.) As she attempted in the Court below, Appellant again distorts the Record.

As an initial matter, unlike Respondent's motion, Appellant's motion sought summary judgment on issues for which she shouldered the burden of proof (i.e., her claims).[36] By contrast, Respondent's motion sought summary judgment on Appellant's claims, for which she shouldered the burden of proof. (Compare App.'s Mtn. for Summ. J. with Resp.'s Mtn. for

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[35] Savannah Bank, N.A. v. Stalliard, 400 S.C. 246, 253, 734 S.E.2d 161 (2012) ("If the party opposing the motion for summary judgment cannot provide affidavits to justify his opposition, he must submit an affidavit providing reasons why such affidavit cannot be obtained. Rule 56(f), SCRCP")

[36] Appellant appears confused about the operation of burdens of proof under Rule 56, SCRCP.

Summ. J.) Thus, the materials required to respond to Respondent's Motion existed in Appellant's possession.

Second, Appellant artfully omits the actual import of the Rule 56(f) affidavit and passages cited: Appellant's bad faith retarded the discovery process. As reflected by Respondent Counsel's Rule 56(f) affidavit, Appellant's discovery responses were "substantially incomplete, improper, and [required] amended responses..." (R. pp. 0251-0252, ¶¶7-9, Davis Rule 56(f) Aff.) Five (5) months later, Plaintiff still could not (or would not) answer "basic fact discovery." (R. pp. 0098, lines 12-24) Omitted by Appellant, during the November 17, 2014 hearing, Respondent specifically noted Appellant's bad faith constituted in discovery: "[P]art of the reason [Respondent sought] summary judgment." (R. p. 0098, lines 12-19, Nov. 17, 2014 Trans.)

And, while Respondent did acknowledge depositions had not occurred, Appellant yet again omits the reason—she would not participate in good faith discovery. (See R. p. 0100, lines 19-21 (Respondent's Counsel: "[H]ow am I supposed to take Plaintiff's deposition when I don't know what her damage claim is?"); see also R. p. 0085, lines 4-5 (Appellant's Counsel: "The dollar figure is the exact opposite of what she's looking for.")

Despite such discovery deficiencies, however, the grounds underlying Respondent's motion did not require further discovery on Plaintiff's part, as they related to: (1) an absence of the evidence Plaintiff needed to bring her claims from the start (i.e., evidence supporting *prima facie* elements); (2) evidence uniquely in Appellant's control (i.e., damages, etc.); or (3) issues of law for the trial court to decide. (See R. pp. 0209-0211, Resp. Mot. for Summ. J.) Appellant strains all credibility by contending she could not submit an affidavit establishing the video-tape's content or demonstrating her own damages unless she obtained more discovery.

III. APPELLANT CANNOT INTERJECT ISSUES INTO HER APPEAL WHICH SHE RAISED FOR THE FIRST TIME IN HER MOTIONS TO RECONSIDER.

Appellant made virtually none of the arguments raised by her appeal in response to Respondent's Summary Judgment Motion. Prior to the November 17, 2014 hearing on Landgraff's Motion, Appellant had submitted a Memorandum in Opposition ("Opposition Memorandum") dated November 14, 2014. (R. pp. 0404-0408, App. Opp. Memo.)[37] Appellant's arguments during the November 17th hearing added nothing beyond what she stated in her Opposition Memorandum, which Respondent addresses fully below. (R. pp. 0084-0092, Nov. 17, 2014 Trans.)[38]

A. At the Time of the Hearing, the Only Evidence Filed by Appellant Had Been the Affidavits Attached to Her Memorandum.

The only evidence cited by Appellant consisted of the affidavits attached to the Opposition Memorandum. (R. p. 0090, line 24-0091, line 1) And, the affidavits Appellant did file came directly from the sealed record in Respondent's divorce proceeding—from a time when the video footage's existence had not yet been disclosed. As set forth in Respondent's Supplemental Memorandum, see R. pp. 0508-0516, Resp. Supp. Memo., none of the affidavits established any of the factual elements of Respondent's claims because they all related to issues

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[37] As noted *supra*, Appellant transmitted her Opposition Memorandum to Respondent *via* email on the Friday before the Court's Monday Hearing. In her transmittal, Appellant failed to supply any of the affidavits attached. (R. p. 0092, lines 8-12)

[38] Appellant frequently characterizes her Opposition Memorandum as "verified" presumably to equate the same to an opposing affidavit. In truth, the Opposition Memorandum contains hardly any (if any) factual content whatsoever. (R. pp. 0404-0408, App. Opp. Memo.) Appellant's Opposition Memorandum primarily consists of legal conclusions, valueless rhetorical questions, and conclusory allegations. Such a verified filing is "simply not an appropriate substitute for an affidavit." Dawkins v. Fields, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003); see also Hansen v. DHL Labs, Inc., 319 S.C. 79, 80, 459 S.E.2d 850, 851 (Ct. App. 1995).

in Landgraff's divorce. (Compare R. pp. 0508-0516 *with* R. pp. 0411-0435, App. Opp. Memo., Attach. Affs.)

B. Appellant Filed All Other Materials—After the Fact—To Distort the Record Below.

Indeed, contrary to Appellant's serial misrepresentations, Simpson had not filed any other evidentiary materials in the Record before the hearing. (See App. A, pp. 0031, 0036, 2/27/2014 Order (Finding Plaintiff's counsel filed discovery materials *after* the November 17, 2014 Hearing for "The clear purpose of...introduc[ing] new matter to avoid summary judgment," "for the purpose of distorting the record," and in attempt "to manipulate the record and the judicial process...") And, Appellant's repeated suggestions that she did—even after the lower court's stern reprimand—proves highly disturbing.

"[Appellant] cannot use a motion to reconsider...to present an issue that could have been raised prior to the judgment but was not so raised." Anonymous v. State Board of Medical Examiners, 323 S.C. 260, 473 S.E.2d 870, 880 (Ct. App. 1996); see also Commercial Credit Loans, Inc. v. Riddle, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App.1999). The Court should limit Appellant to the arguments raised in her Opposition Memorandum and during the November 17, 2014 hearing. Id. The Court should also bar Appellant from relying upon any evidentiary materials, not in the lower court's record, at the time of the Summary Judgment hearing. Rule 56, SCRCP. To hold otherwise allows Appellant to continue flouting the rules of Court and prejudices Respondent from having a full and fair opportunity to respond in the lower court.

C. Appellant Failed to Submit Any Evidence of the Videotape's Contents, Which Proves Fatal to Her Claims.

Both prior to and after the Order granting Respondent summary judgment, Appellant failed to introduce any evidence whatsoever into the lower court's record establishing "what [was] on the videotape, if it still exist[ed], or whether its contents were shared with a third party outside of the judicial process." (R. p. 0002, Feb. 27, 2014 Order Granting S.J.) Appellant's failure to introduce any competent evidence in this regard proved fatal to each of her claims.

1. The Lack of Evidence About the Videotape Proves Fatal to Plaintiff's Intrusion Claim.

As an initial matter, the evidentiary deficits of record, prove fatal to Appellant's claim for intrusion of privacy. As the lower court correctly found: "[T]here 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." (R. p. 0005, FN.2) Nor could there be as Appellant failed to establish what was even on the video—a fact she tellingly continues to skirt.

To establish a claim for invasion of privacy, Appellant was required, but did not, factually demonstrate the existence of an intrusion: "substantial and unreasonable enough to be legally cognizable." Snakenberg v. Hartford Casualty Ins. Co., 299 S.C. 164, 171-172, 383 S.E.2d 2 (Ct. App. 1989). Such facts must demonstrate an intrusion "that would cause mental injury to a person of ordinary feelings and intelligence in the same circumstances." Id. "[W]hether the conduct in question meets this test is, in the first instance, a question of law for the court." Id.

Importantly, Appellant raises no meaningful assignment of error regarding the lower court's legal findings regarding the lack of proof establishing "a substantial and unreasonable

intrusion into Plaintiff's privacy." (App. Br., pp. 25-28.) First, Appellant does not question the lower court's obligation to make a legal determination of substantiality under the holding in Snakenberg. (Id.) Second, Appellant advances the non-sequitur argument that the lower court's order failed to "set out facts accompanying [its] legal analysis," when the lower court ruled Appellant failed to introduce "[P]roof of a substantial and unreasonable intrusion."[39] (Compare Id. at 28 *with* R. p. 0005, FN 2; see also Rule 52(a), SCRCP (findings of fact and conclusions of law are unnecessary for summary judgment.))[40] Last, Appellant randomly cites cases having no actual application to the case at bar. (See App. Br., pp. 17-18, 26-27)[41]

Appellant cites no cases actually applying South Carolina law. Three of the cases cited by Appellant involve criminal statutes in other jurisdictions.[42] Two of the cases (one criminal)

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[39] Appellant also advances the argument that if she were merely caught on video walking on front of camera, such intrusion would be actionable. Not so. Appellant's arguments would read the overlay of substantiality and unreasonableness out of the *prima facie* showing for an intrusion claim. Of course, Appellant urges the same because she realizes she has no "reasonable" privacy rights in Landgraff's master bedroom where she did not belong.

[40] Respondent would note for the record that Appellant's initial brief, as served upon him, was missing a page. To the extent the discussion herein misses a case cited by Appellant, the omission of the page is the likely cause.

[41] Appellant first cites the decision of State of Wisconsin v. Jahnke, 762 N.W.2d 696, 699 (Wis. App. 2008). Jahnke pled guilty to videotaping his girlfriend surreptitiously and later attempted to set aside the guilty plea. Jahnke has no application whatsoever. Appellant next cites the decision of In re Marriage of Tigges, 758 N.W.2d 824, 825 (Iowa 2008). Applying Iowa law, the Tigges Court found that a spouse (not a paramour) had a reasonable expectation of privacy compensable in a divorce proceeding. Appellant also cites United States v. Torres, 751 F.2d 875, 878 (7th Cir. 1984). Torres likewise has no application whatsoever. Torres involved a Fourth Amendment challenge to videotaping terrorists in a private building. Last, Appellant cites State v. Perez, 779 N.W.2d 105, 109-110 (Minn. App. 2010). Perez involved the criminal prosecution of a husband for secretly videoing his wife in the bathroom.

[42] Appellant's continual references to the wiretapping statute have no bearing in this case. Despite Appellant's attempts, no charges were found as proper against Landgraff. The wiretapping statute has no private right of action. The wiretapping statute does not establish any of the elements of Plaintiff's claims, which Plaintiff has the burden to prove. Indeed,

involve privacy expectations of spouses in the marital home. The only civil case arises in a divorce proceeding. No case cited by Appellant recognizes a reasonable expectation of privacy by an interloping paramour in a marital bedroom. Appellant cites none because no court recognizes such a right.[43]

The decision of Colon v. Colon, 2006 N.J. Super. Unpub. LEXIS 1795, *12-14 (N.J. App. 2006) (Unpub.) proves instructive to the instant facts. Colon arose out of a divorce proceeding in the New Jersey Chancery Court. The Chancery Court awarded monetary damages to the husband due to an intrusion claim resulting from his wife's installation of video footage in his home office.[44] The Colon Court reversed the award because no evidence established Defendant had a reasonable expectation of privacy in his home office. Id. Like the husband in Colon, no evidence of record established Appellant had a reasonable expectation of privacy in Respondent's master bedroom, nor could it. Accordingly, the same result should obtain here as in Colon.

Ignored by Appellant, the decision of Plaxico v. Michael, 735 So.2d 1036 (Miss. 1999) proves factually analogous to the case *sub judice*. In Plaxico, following their divorce, Glen

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Appellant has adopted a peculiar analysis to this case, which the Court should summarily reject.

[43] Of course, Respondent could have answered such issues in the lower court had Appellant actually raised them in response to his Motion for Summary Judgment. Instead, Appellant raised none of the authority and virtually none of the legal arguments she now presses until *after* the lower court issued its Order granting Summary Judgment. Unfortunately, such conduct has become Appellant's *modus operandi* in this case. Appellant consistently failed to follow any Court rules whatsoever, created a mess of the record below, and then relied (and continues to rely) upon the mess created as an escape-hatch to avoid the consequences of her non-compliance.

[44] Colon also involved video footage installed in a bedroom located in a New York apartment. However, the Colon Court found New York law did not recognize a claim for intrusion of privacy.

Michael's ("Michael") ex-wife lived in a former marital cabin with his daughter. (Id.) Michael sought a modification of Family Court child custody order. (Id.) Michael had suspicions his ex-wife was having sexual relations with Rita Plaxico. (Id.) Through a window, Michael observed his ex-wife and Plaxico having sexual relations and captured pictures of Plaxico in a state of undress. (Id.) Michael gave the photos to his attorney, who used them in the Family Court proceeding. (Id.) The Mississippi Supreme Court affirmed the lower court's dismissal finding Michael's conduct failed to constitute a intrusion of sufficient substantiality to support Plaxico's claim.

The case at bar proves clearer than the facts in *Plaxico*. No legitimate, reasonable basis existed for Appellant to expect privacy in Landgraff's bed, in Landgraff's bedroom, in Landgraff's absence, with Landgraff's then wife, and during his marriage. Despite significant research, Respondent cannot even find a single reported decision where a paramour proved so audacious as to claim one. Appellant would have this Court endorse a financial recovery for being somewhere she had no lawful right to be, engaging in unlawful acts.

2. The Lack of Evidence Concerning the Video Proves Fatal to Appellant's Outrage Claim.

The lower court also held Appellant's "[O]utrage cause of action must be dismissed as well, given there is insufficient proof of extreme and outrageous conduct by Defendants."[45] (See R. p. 0005, FN 2) "[W]hether the conduct alleged by [Appellant] constitute[d] extreme and outrageous conduct [was] a threshold legal issue for the [lower] Court to decide." Hainer v. Am. Med. Int'l., 320 S.C. 316, 324, 465 S.E.2d 112 (Ct. App. 1995); see also Hubbard & Felix, The S.C. Law of Torts at 468-69 (4th ed. 2011). Appellant does not dispute the issue constituted a legal issue for determination by the lower court. (App. Br., passim) Like her claim for intrusion, Appellant's claim for outrage failed as a matter of law because she did not introduce evidence establishing the content of the video about which she complains.

The lower court correctly ruled Appellant's outrage claim failed as a matter of law for another reason.[46] Appellant improperly supports her outrage claim based upon the exact delicts supporting her other two claims. (See R. pp. 0039-0041, 4th Am. Compl., ¶¶1-7) South Carolina law disallows outrage claims based upon wrongs for which remedies otherwise exist. Todd v. South Carolina Farm Bureau Mut. Ins. Co., 283 S.C. 155, 321 S.E.2d 602, 613 (Ct.

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[45] The lower court's analysis proves especially true in light of the heightened burden of proof applicable to outrage claims where, as here, Appellant only alleges mental anguish damages in the absence of bodily injury. (See R. pp. 0039-0041, ¶¶17-18, 4th Am. Compl.) To discharge her burden on summary judgment, then, Appellant was required, but did not, introduce a heightened showing demonstrating "the conduct on the part of the defendant was 'extreme and outrageous,' and that the conduct caused distress of an 'extreme or severe nature.'" Hansson v. Scalise Builders of S.C., 374 S.C. 352, 356, 650 S.E.2d 68 (2007); see also Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766 (2011) (Heightened evidentiary standard requires higher showing in response to summary judgment motion).

[46] See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420-22, 526 S.E.2d 716, 723-24 (2000) (Respondent may raise additional supporting grounds on appeal).

App. 1984), rev'd on other ground, 287 S.C. 190, 336 S.E.2d 587 (2004); Frazier v. Badger, 361 S.C. 94, 603 S.E.2d 587 (2004); DeCecco v. University of South Carolina, 918 F. Supp. 2d 471, 520 FN. 53 (D.S.C. 2013).

Finally, the lower court ruled: "[T]here can be no civil conspiracy without proof of special damages or an agreement to injure Plaintiff." (R. p. 0005, FN.2, Feb. 27, 2014 Order) No competent evidence of record supported either of these elements of Appellant's conspiracy claim. While Appellant could have submitted her own affidavit to satisfy these elements, she failed to do so. The lower court found the claim should be dismissed.[47]

D. The Untimely Evidence Submitted By Appellant Fails to Discharge Her Duty in Responding to a Summary Judgment Motion.

Evidence constituting inadmissible hearsay cannot be used to rebut a motion for summary judgment. See Baughman v. AT&T, 306 S.C. 101, 111, 410 S.E.2d 537, 543 (1991); Hall v. Fedor, 349 S.C. 169, 175-76 561 S.E.2d 654, 657 (Ct. App. 2002). Almost all, if not all, of the evidence Appellant attempted—after the fact--to enter surreptitiously into the lower Court's record constitutes inadmissible evidence. Thus, this Court should disallow Appellant from relying upon such evidence because: (1) it was untimely submitted; and (2) it constitutes inadmissible hearsay.

In relation to the most obvious example, Appellant attempts to cite to law enforcement records as evidence of the video tape's content. However, the documents constitute unsworn, out-of-court statements referencing a non-party's out-of-court impressions about the videotape

[47] Like her Fourth Amended Complaint, Appellant also improperly pled her Third Amended Complaint. With respect to that amendment, Appellant similarly failed to obtain court leave or the written consent of the other parties. Accordingly, the Third Amended Complaint also proves ineffective and, as a consequence, fails to plead special damages with sufficient specificity. (See Rule 9(g), SCRCP)

-which is another out-of-court statement. No less than two to three layers of hearsay exist implicating Rule 805, SCRE. And, in fact, all of the documents relied upon by Appellant prove rife with double, triple, and even quadruple hearsay.[48]

The new documents relied upon by Appellant suffer from major hearsay problems throughout. For example, the Solicitor's Memorandum constitutes an out of court document reflecting what an unidentified staff member for the Solicitor's Office recorded about what Appellant told her.[49] In numerous instances, Appellant reported what someone else told her or what certain documents reflected (i.e., letters, orders, Landgraff's divorce settlement).[50] The Solicitor's Report and Sheriff's Report likewise prove inadmissible pursuant to Rule 803(9), SCRE. The Court should disallow Appellant from using flagrantly inadmissible documents to oppose summary judgment.

IV. THE LOWER COURT CORRECTLY FOUND THE WRONGFUL CONDUCT BAR FORECLOSED APPELLANT'S CLAIMS.

Even if the video recordings showed what Appellant contended, the lower court alternatively found the wrongful conduct bar disallowed her recovery of damages. Appellant appears to question the existence of evidence supporting such claims. However, assuming it showed what she contended, Appellant's own (unsworn, hearsay) evidence establishes she had extra-marital, sexual relations with Respondent's then wife, in Landgraff's bed, in Landgraff's

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[48] Moreover, Appellant failed to authenticate any of the documents. Neither Respondent nor the Court has any way of knowing whether the submitted, hearsay documents have been manipulated, altered, or whether they prove complete.

[49] It should not be lost on the Court that Appellant could have simply submitted an Affidavit addressing these issues if they were true.

[50] Of course, none of the documents relied upon by Plaintiff are authenticated.

master bedroom, while Respondent was out of town. (See R. p. 0378; R. p. 0003) The lower court properly found this supported a wrongful conduct bar or *ex turpi causa/in pari delicto.*

A. The Wrongful Conduct Bar Foreclosed Appellant's Damage Claims.

South Carolina Courts refer to the wrongful conduct bar in different ways. On occasion, they reference the bar as *ex turpi causa.* Other times they call the doctrine *in pari delicto.*

Here, the lower court correctly held the wrongful conduct bar barred Appellant from recovering damages arising out of her own unlawful actions.[51] Under the South Carolina Court of Appeals' holding in Jackson v. BI-LO Stores, Inc., the doctrine of *ex turpi causa* forecloses damages arising out of a Plaintiff's unlawful conduct regardless of the claims' underlying nature. The Jackson Court correctly held:

> It 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. 86 C.J.S. Torts § 12 (1954). This rule applies at both law and in equity and whether the cause of action is in contract or in tort. 1A C.J.S. Actions § 29 (1985). See also Graham v. Graham, 276 S.C. 341, 278 S.E.2d 345 (1981); Nelson v. Bryant, 265 S.C. 558, 220 S.E.2d 647 (1975); Roundtree v. Ingle, 94 S.C. 231, 77 S.E. 931 (1913) ; Restatement (Second) of Torts § 774 (1977).

Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 276, 437 S.E.2d 168, 170 (Ct. App. 1993); see also Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), aff'd as modified, 404 S.C. 421, 746 S.E.2d 35 (2013)(Court of Appeals affirmed dismissal of

[51] Appellant's Brief misstates the holding in Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 437S.E.2d 168 (Ct. App. 1993). (App. Br. p. 21 ("Appellant and Respondent did not enter into a contract. Thus, the illegality defense is not applicable to this case.") As noted above, the Jackson Court correctly held: "This rule applies at both law and in equity and whether the cause of action is in contract or in tort." Id. at 276. In addition, Appellant simply ignores the Jackson Court also affirmed the lower court's dismissal of Appellant's tort claims for civil conspiracy and intentional interference with contract.

equitable claim and cited Jackson: "This rule applies at both law and in equity and whether the cause of action is in contract or in tort.")

B. Appellant Draws Unfounded Distinctions Between the Doctrines of *Ex Turpi Causa* and *In Pari Delicto.*

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*. (App. Br., p. 13-14, 21-24.) Contrary to Appellant's analysis, the doctrines are the same. Compare Jackson v. Bi-Lo Stores, Inc., 313 S.C. at 272 ("[O]ne who participates in an unlawful act cannot recover damages for the consequence of that act.") *with* Myatt v. RHBT Fin. Corp., 370 S.C. 391, 395, 635 S.E.2d 545, 547 (Ct. App. 2006) ("The doctrine of in *pari delicto* is the principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing.")[52] Regardless of the nomenclature used, the doctrines all provide that: "no court shall lend its aid to a [wo]man who founds h[er] cause of action upon an immoral or an illegal act." In re AlphaStar Ins. Grp. Ltd., 383 B.R. 231, 274 (Bankr. S.D.N.Y. 2008) (Analyzing doctrines and noting *ex turpi causa* and *in pari delicto* doctrines as fundamentally "the same.") Or, as the lower court held, "*Ex dolo malo non oritur actio.*" (R. p. 0003, Feb. 27, 2015 Order Granting S.J.)[53]

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[52] Of note, despite her arguments to the contrary, Appellant appears to understand the doctrines are, in fact, the same. In her brief, Appellant purports to cite the *ex turpi causa* cases from South Carolina. (App. Br. p. 21.) A review of the decision of Milhous v. Sally, 43 S.C. 318, 21 S.E.2d 268, 270 (1895) discusses the axiom of *Ex dolo malo non oritur action* and addresses the doctrine as *in pari delicto*. Appellant's brief also includes an errant citation. The correct citation is contained herein.

[53] *See also* Pierce v. Cobb, 161 N.C. 300, 77 S.E. 350, 350-51 (1913) ("The maxim is, '*Ex dolo malo (or ex turpi causa) non oritur actio*,' and the kindred one is, '*In pari delicto potior est conditio defendentis*.'"); Martin v. Wade, 37 Cal. 168, 174 (1869) (same).

According to Appellant, Respondent failed to plead *in pari delicto* as a defense in his Answer. (App. Br., p. 23) Appellant's claim proves implausible since she simultaneously admits Respondent's Answer specifically pled: "[O]ne who participates in an unlawful act cannot recover damages for the consequences of that act." (See App. Br. p. 23) As noted *supra*, *ex turpi causa* and *in pari delicto* have the same factual predicate and prove fundamentally the same.

Appellant also misrepresents the Record below. According to Appellant, Respondent failed to raise *in pari delicto* as a defense until it filed "a Supplemental Memorandum in which he mentioned the *in pari* delicto defense for the first time." (App. Br. p. 23.) Not so. During the November 17th hearing, Respondent clearly raised both the doctrines of *in pari delicto* and *ex turpi causa* together. (R. p. 0079, lines 15-17 ("The fourth issue relates to the doctrine of *ex turpi causa* and/or is sometimes called in *pari delicto*."); Id. at 12:18-19 ("*Ex turpi causa*, also referred sometimes as *in pari delicto*."))

During the Summary Judgment hearing, Respondent even cited Myatt v. RHBT Fin. Corp., 370 S.C. 391, 395, 635 S.E.2d 545, 547 (Ct. App. 2006), a decision Appellant miscites in her brief. (See infra; App. Br. p. 23.) Appellant never objected. (R. p. 0081, lines 15-24) During the hearing, Appellant never argued the doctrines as somehow different. Appellant never argued Respondent failed to plead the same. All such arguments arose as *post-facto* attempts to undo the Court's ruling, which Appellant disliked. (Compare R. pp. 0084-0094 *with* R. pp. 0213-0246, App. Memo. Supp. Mot. to Recons.) And, none were factually or legally true.

C. *In Pari Delicto* Bars More Than Indemnity Claims.

Appellant misapprehends the scope of *in pari delicto* when arguing the doctrine solely bars indemnity claims between joint tortfeasors. (App. Br. p. 23 ("Obviously, Appellant and Respondent are not joint tortfeasors so this doctrine does not apply.") Although *in pari delicto* does bar such indemnity claims, the doctrine likewise bars first-party claims for equitable relief and monetary damages in tort and contract. See e.g., *Ex parte* Nimmer, 212 S.C. 311, 319-20, 47 S.E.2d 716, 719 (1948) (Barring affirmative relief from divorce decree); Myatt v. RHBT Fin. Corp., 370 S.C. 391, 395, 635 S.E.2d 545, 547 (Ct.App. 2006) (Barring tort claims of receiver against Bank); White v. Comm. & Farmers Bank, 66 S.C. 491, 511-12, 45 S.E. 94, 102 (1903) (Barring contract claim arising from stock purchase); see also S.C. Jur. §21 (*In pari delicto* disallows party "to profit by [her] own wrong" and disallows "affirmative relief."); 1 Am.Jur.2d §39 ("Neither law nor equity may be invoked to redress a wrong that has resulted from the injured party's own wrongful conduct.")[54] Thus, Appellant's analysis is wrong and her arguments lack merit.

[54] Indeed, the South Carolina Supreme Court recently analyzed the application of *in pari delicto* in the decision of Proctor v. Whitlark & Whitlark, Inc., 414 S.C. 318, 326-327, 778 S.E.2d 888 (2015). In relation to the doctrine, the Proctor Court held: "The doctrine of in *pari delicto* is grounded in the general principle that a person cannot base a cause of action upon an illegal or immoral act, transaction or contract." 4 S.C. Jur. Action § 21 (1991 & Supp. 2015). "It has been succinctly stated that no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." Id. (internal quotation marks and alterations omitted). The Proctor Court held South Carolina statutes specifically abrogated the doctrine of *in pari delicto* in connection with recovering gambling losses. Obviously, such claims do not constitute indemnity claims between joint tortfeasors, as Appellant suggests. Chief Justice Toal authored a separate concurrence to emphasize (in part) that *in pari delicto* otherwise remained the law of South Carolina. Id. at 335-36.

D. Appellant Omits the Operative Language From the Olmstead Decision.

Appellant next cites the United States Supreme Court's decision in Olmstead v. United States, 277 U.S. 438, 484, 48 S.Ct. 564, 72, L.Ed. 944 (1928). According to Appellant, the lower court should not have dismissed her claims because, under Olmstead, "The Court is open to criminals." (App. Br. p. 24) But, Appellant omits the operative language from Olmstead. Courts deny their aid, when as here, the wrongful conduct arises from "the very transaction as to which [s]he seeks legal redress." Id.

Appellant's entire case fails and all of her arguments (to the extent they were actually made) fail unless this Court accepts Appellant's invitation to turn a blind eye to the facts and law. Appellant asks the Court to ignore the actual holding in Olmstead. Appellant asks the Court to ignore her wrongful conduct. Appellant asks the Court to ignore her wrongful conduct took place in the marital bed of Respondent's own master bedroom, where she had no expectation of privacy nor established one. And, Appellant asks the Court to ignore her conduct took place while Respondent was lawfully married.

E. South Carolina Law and Public Policy Strongly Favors Marriage and Disfavors Adultery.

Appellant's arguments contending that her conduct did not contravene South Carolina law and public policy similarly lack merit. Adultery plainly contravenes the public policy of South Carolina. Adultery remains a crime in South Carolina. S.C. Code §16-15-60. Adultery constitutes a ground for divorce. S.C. Code §20-3-10(1); S.C. Constit., Art. XVII, §3. And, contrary to Appellant's arguments, South Carolina law does deem same-sex extra-marital affairs as constituting adultery. See RGM v. DEM, 306 S.C. 145, 149, 410 S.E.2d 564 (1991) ("Homosexual activity between persons, at least one of whom is married to someone other than the sexual partner, constitutes adultery.") By contrast, South Carolina's public policy strongly favors the institution of marriage.

CONCLUSION

The instant case suffers from serious jurisdictional defects warranting its immediate dismissal. However, even if such defects did not exist, the lower court did not err when granting summary judgment in this case. Appellant failed to discharge her burden on summary judgment and, to date, still has not demonstrated the content of the disputed video footage through competent evidence. Appellant's claims hinge on such facts.

At the end of the day, however, one cold, hard fact remains. None of the "injuries" Appellant claims could have occurred had she not been somewhere she ought not have been, doing something she ought not have been doing, with someone she ought not have been with. Consequences flow from wrongful conduct and South Carolina law has never countenanced granting a right of financial recovery for injuries resulting from one's own wrongful conduct. To rule otherwise, this Court must accept a paramour--having an extra-marital affair with a

married woman--possesses a privacy right in the non-present, non-consenting spouse's marital bed and bedroom. No court in the country has extended intrusion claims to such a far-fetched extreme. This Court should affirm the lower court and end a lawsuit that should never have been brought by Appellant or her lawyer.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Timothy E Madden

Lane W. Davis, SC Bar No. 68796
E-Mail: lane.davis@nelsonmullins.com
Timothy E. Madden, SC Bar No. 11786
E-Mail: tim.madden@nelsonmullins.com
Reid T. Sherard, SC Bar No. 72536
E-Mail: reid.sherard@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Attorneys for Respondent Frank A. Landgraff

Greenville, South Carolina

June 7, 2016

CERTIFICATE OF COUNSEL

The undersigned certifies that the Respondent's Final Brief complies with the requirements of Rule 211(b), SCACR.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Lane W. Davis, SC Bar No. 68796
E-Mail: lane.davis@nelsonmullins.com
Timothy E. Madden, SC Bar No. 11786
E-Mail: tim.madden@nelsonmullins.com
Reid T. Sherard, SC Bar No. 72536
E-Mail: reid.sherard@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Attorneys for Respondent Frank A. Landgraff

Greenville, South Carolina

June 7, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2015-000778
C/A 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.

PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, 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 by United States Mail, postage prepaid, to the following address(es):

Pleadings:

RESPONDENT'S FINAL BRIEF

Counsel Served:

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

Timmy E Madden

June 7, 2016