

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Judge

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

RECEIVED
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SC Court of Appeals

Carol Simpson, Appellant,

v.

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

Of Whom Frank A. Landgraff is the Respondent.

RECORD ON APPEAL – VOLUME TWO

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

Lane Whittaker Davis
Timothy E. Madden
Reid T. Sherard
Nelson Mullins Riley & Scarborough, LLP
P. O. Box 10084
Greenville, SC 29603
Attorneys for Frank A. Landgraff
864-250-2300

Joseph A. Mooneyham
1225 South Church Street
Greenville, SC 29605
864-421-0036

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STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2013-CP-23-01762

Jane Doe,)
)
Plaintiff,)

vs.)

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

MEMORANDUM SUPPORTING
PLAINTIFF'S MOTION TO SET ASIDE
OR MODIFY, ORDER

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
JUL 8 3 41 PM '13
JUL 8 3 41 PM '13
JUL 8 3 41 PM '13

Defendant, Frank A. Landgraff ("Landgraff") respectfully submits the instant memorandum supporting his motion to set aside, or alternatively, to modify its Order dated May 17, 2013 ("Subject Order") (attached hereto as Exhibit A).

FACTUAL BACKGROUND

1. Contrary to the express directives of this Court, Plaintiff pursued great lengths to obtain the Subject Order in *ex parte* fashion, so as to deprive Landgraff the opportunity to be heard and defend himself.¹

2. Plaintiff did so all while knowing the lawyers who represented Landgraff.

3. The Court's record confirms the following facts. Even before filing any civil action, Plaintiff initiated an improper *ex parte* contact with the Court seeking injunctive relief against defendants. The Court, in response, expressly instructed Plaintiff's counsel on two

¹ It is noteworthy that the opportunity to be heard is a right that is procedurally, statutorily, and constitutionally protected.

separate occasions to file a civil action and serve² the defendants before seeking such relief. (See Exhibit B.) Ignoring the Court, Plaintiff did not do so.

4. On March 27, 2013, Plaintiff filed this action under the pseudonym "Mary R. McCorvey"³ by filing a Summons and Complaint. The Summons and Complaint named Jane Roe, Detectives, Inc., and John Doe as defendants, and pressed claims for: wrongful intrusion into private affairs, intentional infliction of emotional distress, and civil conspiracy.

5. Also on March 27, 2013, Plaintiff filed a Motion to Proceed Under a Pseudonym. Despite the Court's express directives, Plaintiff failed to serve defendants, or their counsel (even though known to Plaintiff), with *any* filings from March 27, 2013 or after until the end of May.

6. On April 12, 2013, Plaintiff filed an *Ex Parte* Motion for a Temporary Restraining Order and Rule to Show Cause Why a Preliminary Injunction Should Not Issue (the "TRO Motion"). The TRO Motion purported to detail facts showing Plaintiff would *inter alia* likely succeed "on the merits."⁴ (Motion p. 4). Despite the Court's express directives, Plaintiff again failed to serve defendants, or their counsel (even though known to Plaintiff), with any filings.

² "Per Judge Hill's instructions, please file the Summons and Complaint and Motion for Temporary Injunction and serve the Defendants in this matter . . . I reiterated that both [Summons and Complaint, and motion] had to be served." (Ex. B pp. 1 and 2).

³ This name is believed to be a pseudonym.

⁴ In the TRO Motion, Plaintiff cites to *Snakenberg v. Hartford Cas. Ins. Co., Inc.*, 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989) as having a fact pattern "very similar" to the facts of the instant case. Yet, had Plaintiff actually provided notice to Defendants allowing them to be heard, as is their protected right, Landgraaf would have explained the facts of the instant case prove starkly different to those in the *Snakenberg* case, Plaintiff's *ex parte* representations notwithstanding.

7. On April 19, 2013, Plaintiff moved for “for reconsideration of the denial of her *Ex Parte* Motion for a Temporary Restraining Order and Rule to Show Cause Why a Permanent Injunction Should Not Issue.” (Motion p. 1).⁵ Despite the Court's express directives, Plaintiff yet again failed to serve defendants, or their counsel (even though known to Plaintiff), with any filings.

8. On the morning of April 25, 2013, Plaintiff appeared in Court *ex parte* and argued the Motion to Proceed Anonymously and the TRO Motion. Having received no notice of the motions or hearing, Defendants did not appear.

9. Within hours of the conclusion of the April 25, 2013 hearing, Plaintiff amended her filings, with an amended complaint as well as amended versions of the TRO Motion and the Pseudonym Motion. These amended filings from the afternoon of April 25, 2013 prove identical to the original filings except they replace the pseudonyms for the defendants with the real names of the defendants.⁶

10. On May 17, 2013, the Court issued two Orders: one granting Plaintiff's request to proceed anonymously and another denying Plaintiff's Motion for Temporary Restraining Order.⁷

⁵ It is unclear, at this time, what the purpose of this filing was.

⁶ Plaintiff's counsel signed an affidavit supporting the motion on April 25, 2013 (the Amended Affidavit of William G. Mayer To Further Identify Defendants). Regarding an exhibit, this affidavit strangely stated “[t]he identifying information has been redacted to preserve Defendants' anonymity until the Court rules on their qualification to proceed under pseudonym.” So, in a filing in which Plaintiff decided to arbitrarily and unilaterally use the defendants' real names but not her own, her own lawyer swore that he was redacting information to preserve the defendants' anonymity, when he, in fact, did not.

⁷ The May 17, 2013 Pseudonym Order requires Plaintiff to proceed under “Jane Doe” and not “Mary R. McCorvey” to avoid confusion.

11. On May 28, 2013, for the first time, Plaintiff mailed to Landgraff's counsel (Nelson Mullins) a copy of her filings. The mailing demonstrates Plaintiff knew who Landgraff's attorneys were, while failing to notify them in connection with her pending motions before the Court.

12. On May 29, 2013, without leave of Court (as required by Rule 15(a), SCRCPP),⁸ Plaintiff filed her third Amended Complaint.

13. On June 1, 2013, Plaintiff personally served Landgraff with various filings.

14. Then, on June 14, 2013, without leave of Court (as required by Rule 15(a), SCRCPP), Plaintiff filed her fourth Amended Complaint.

ARGUMENT

The Court should set aside the Subject Order for the following reasons:

15. Landgraff never had an opportunity to be heard as to the Subject Order or its merits. Issuance of an order, purporting to bind a party, in the absence of notice and opportunity to be heard comports neither with due process or fair play. In addition, the facts and circumstances surrounding Plaintiff's filings appear highly irregular and give rise to the need to review the Subject Order.

16. No procedural basis exists to issue an order, in *ex parte* fashion, allowing a party to proceed anonymously. For example, if the *ex parte* Subject Order is bottomed on Rule 65, SCRCPP, it expired on March 27, 2013 before Plaintiff ever served it. Rule 65 contains a ten (10) day limit, for *ex parte* filings, so as to protect litigants from orders issued without notice.

⁸ By rule, Plaintiff could only amend her pleading once as a matter of right prior to serving it, and thereafter may amend only by leave of court or written consent of the defendants.

17. If the Subject Order, in fact, issued under Rule 65, SCRCP, then Landgraff could never have been bound by the same. Landgraff was not personally served with a summons (the procedurally vehicle conferring personal jurisdiction) until June 1, 2013.⁹ By then, the Order would have expired if issued under Rule 65, SCRCP. The Court should, therefore, set aside the Subject Order because--if issued under Rule 65, SCRCP--it has lapsed but, on its face, does not so specify.¹⁰

18. From a substantive standpoint, the Court was duped into issuing the Subject Order. The Subject Order references Plaintiff's "privacy interests" in this matter. Yet, it does not appear Plaintiff ever disclosed to this Court that in prior related proceedings she *voluntarily* filed an affidavit placing into the public record in abundant (yet, unsolicited and unnecessary) detail the "private affairs" which she represented to this Court warranted her proceeding anonymously. Indeed, a copy of that affidavit presently exists in the Circuit Court's public records.¹¹ So, no privacy interests exist in matters Plaintiff has already aired publicly in the court system.

⁹ Landgraff also notes that the Subject Order similarly fails to meet several other procedural requirements set forth in Rule 65, SCRCP. For example, The one page May 17, 2013 Pseudonym Order does not comply with procedural rules requiring detailed findings of fact supporting conclusions of law to be enumerated in the Order, requiring specific reasons for an injunction, and preventing the entry of a temporary injunction without notice. *See, e.g.*, Rule 52(a), SCRCP; Rule 65(d), SCRCP; *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 568 S.E.2d 338 (2002) (The Supreme Court noted "the findings must be sufficient to allow this Court, sitting in its appellate capacity, to ensure the law is faithfully executed below. The absence of factual findings makes our task of reviewing the court order impossible because 'the reasons underlying the decision [are] left to speculation.'" *Id.* at 133, 343 (quotation omitted).

¹⁰ If the Subject Order was issued under some other procedural mechanism permitting *ex parte* orders and *ex parte* contacts by the Plaintiff, then Landgraff asks the Court to re-issue the Subject Order and specify the same, as it is a provision about which Landgraff is not familiar.

¹¹ So as to ensure compliance with the Court's Order, Landgraff will provide Plaintiff's affidavit to the Court *en camera* during the hearing on this matter. Plaintiff's prior affidavit

19. Simultaneously, the Subject Order proves unworkable and unfair to Landgraff's defense. The Subject Order prohibits Landgraff (and by its terms everyone else) from identifying "Jane Doe" without reference to how such constraint would actually operate in practice inside of this lawsuit. For example, the Subject Order fails to account for how Landgraff is supposed to issue third-party subpoenas or take third-party depositions if prohibited from identifying Plaintiff. In addition, Landgraff anticipates several Freedom of Information Act requests which he will issue. Landgraff is entitled to defend himself from Plaintiff's spurious claims. The Subject Order affords no consideration to Landgraff's right to develop facts in his defense.

20. The Subject Order proves one-sided, unfair, and impairs the *public* truth-finding function of the Court. In this action, "Jane Doe" has leveled both distorted and untrue allegations against Landgraff. While Jane Doe has publicly impugned Landgraff, the Subject Order permits her to sidestep the true facts, unbecoming to her reputation, which belie her allegations. The public nature of the court system provides a check and balance on litigants, which has been impaired in this case, because Plaintiff has license to cast stones from the shadows.

21. The underlying facts concern an extra-marital relationship involving Plaintiff and Landgraff's spouse.¹² Thus, Plaintiff seeks to assert anonymous claims arising out of her

furnishes a highly-spun version of events wherein she relates how she became the paramour of Landgraff. Landgraff denies the accuracy of many of the self-serving statements in the affidavit but would point out to the Court that Plaintiff has, before now, shown little hesitation in broadcasting her personal matters.

¹² Plaintiff has unclean hands. Plaintiff cannot invoke the Court's equitable relief, when the facts and circumstances about which she complains, arose out of her own adulterous acts. It is curious on an *ex parte* application—one where the moving party has a heightened duty of disclosure—that Plaintiff would not have both disclosed the true nature of her relationship with Landgraff's former spouse and also the fact that she previously submitted an affidavit which

own misconduct, while casting false aspersions against Landgraff publicly. The Subject Order removes a level playing-field in this matter and does so unfairly and without basis.

22. There exists a "general presumption of public identification of parties" in litigation. *Doe v. Howe*, 362 S.C. 212, 219, 607 S.E.2d 354, 357 (Ct. App. 2004). To overcome the presumption, the Court of Appeals outlined several factors (in contested hearings) to be considered, including, including *inter alia*:

- (1) whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personal nature;
- (2) whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent non-parties;
- (3) the ages of the persons whose privacy interests are sought to be protected;
- (4) whether the action is against a governmental or private party; and
- (5) the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously.

Doe, 362 S.C. at 217-218, 607 S.E.2d at 356-357. The Subject Order fails to provide adequate factual treatment of these factors. Moreover, the Subject Order fails to take into account Landgraff's response to such factors, which, of course, were never presented because the Subject Order issued *ex parte*.

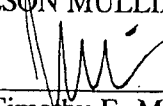
23. In her Motion, Plaintiff made the following misstatement: "Plaintiff has filed her Complaint along with a Motion to Proceed under Pseudonym. Defendants will have an opportunity to be *fully heard* on the merits of that Motion." (Motion p. 4) (emphasis added). Had Plaintiff actually done what she represented, no need would exist for Landgraff to file the instant Motion. But, she did not and fairness now requires the Court to set the Order aside.

exists in the public domain.

CONCLUSION

24. "Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Buckley v. Shealy*, 370 S.C. 317, 323-24, 635 S.E.2d 76, 79 (2006) (citing *Ex Parte Dibble*, 279 S.C. 592, 595-96, 310 S.E.2d 440, 442 (Ct. App. 1983)). The Court should set aside the Subject Order for the reasons set forth above.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Timothy E. Madden, SC Bar No. 11786

E-Mail Address: tim.madden@nelsonmullins.com

Lane W. Davis, SC Bar No. 68796

E-Mail: lane.davis@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 Frank A. Landgraff

Greenville, South Carolina

Nov. 8th, 2013

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

THIRTEENTH JUDICIAL CIRCUIT
IN THE COURT OF COMMON PLEAS

Jane Doe,

Plaintiff,

CA. No. 2013-CP-23-1762

**ORDER GRANTING PLAINTIFF RIGHT
TO PROCEED ANONYMOUSLY**

vs.

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

Defendants.

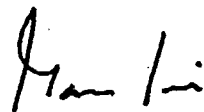
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CLERK OF COURT
GREENVILLE, S.C.
MAY 17 PM 3:47
WLS

The Plaintiff in this case seeks to proceed under a pseudonym. The court finds that the subject matter of this lawsuit relates to Plaintiff's private affairs, and has no significant public interest. Identifying the Plaintiff poses a risk to Plaintiff's legitimate privacy interests and that could chill her rights to the judicial process. The court can discern no unfairness or other prejudice to Defendants. The court finds Plaintiff should be identified as "Jane Doe"¹ to preserve her privacy interests regarding the sensitive issues involved in this case.

IS IT THEREFORE ORDERED that Plaintiff may proceed under the name "Jane Doe", and all filings by the parties shall be so captioned. No one shall reveal the true identity of "Jane Doe" without further written order of this court.

IT IS SO ORDERED.

May 17, 2013
Greenville, South Carolina


D. Garrison Hill
Circuit Judge

¹ For reasons unknown, Plaintiff proposes to use the pseudonym "Mary R. McCorvey." The court finds the traditional fictitious name "Jane Doe" is less likely to cause confusion.

SCANNED

Copy mailed to
Attorney William G. Mayer
on May 17, 2013

EXHIBIT B

Hill, D. Garrison Law Clerk (Parker A. Baxley)

From: Hill, D. Garrison Law Clerk (Parker A. Baxley)
Sent: Friday, March 22, 2013 10:13 AM
To: mrmayersoffice@aol.com
Cc: Judge Hill
Subject: McCorvey vs. Jane Roe

Good morning,

Please find the message below from Judge Hill:

If an action is commenced, you may move for a TRO per Rule 65 (which includes mandatory posting of bond, if granted). A party cannot have a motion heard without there being an underlying filed action. In this circuit, it is extremely rare to have a TRO issued ex parte.

Thank you,
Parker

Parker Ann Baxley
Law Clerk to the Honorable D. Garrison Hill
305 E. North Street, Suite 213
Greenville, SC 29601
Office: (864) 467-8490
Fax: (864) 467-8595

and I said I sent
Mayer which he
called (again)
eventually to know
what you had
decided all the
TRO

Mayer then filed the
TRO and not for TRO,
Steve was going to
call and tell him BOTH
had to be served but
Mayer called me before
Steve got to him
reiterated that BOTH
had to be served.

Hill, D. Garrison Law Clerk (Parker A. Baxley)

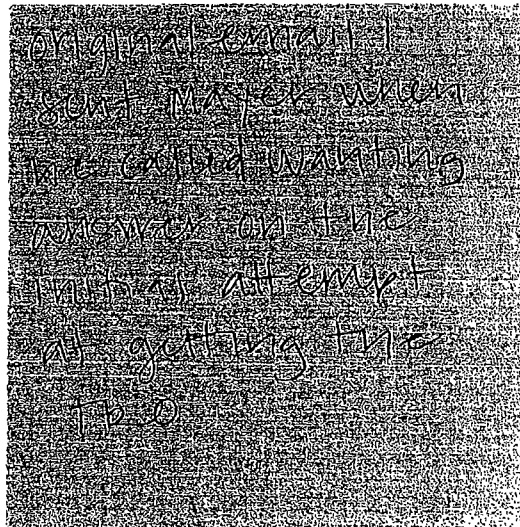
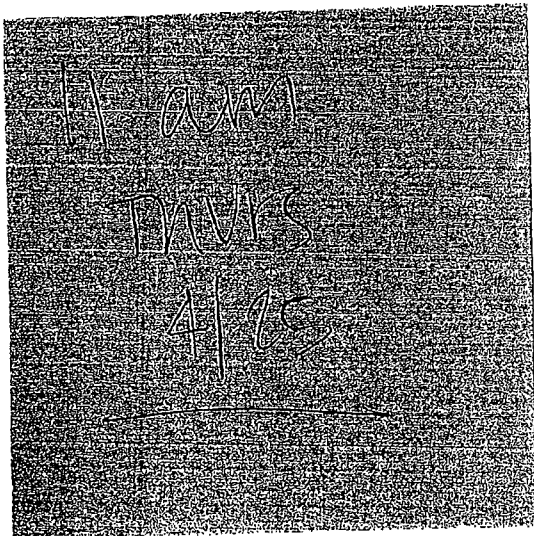
From: Hill, D. Garrison Law Clerk (Parker A. Baxley)
Sent: Wednesday, March 20, 2013 10:11 AM
To: 'mrmayersoffice@aol.com'
Cc: Judge Hill
Subject: Request for TRO

Good morning,

Per Judge Hill's instructions, please file the Summons and Complaint and Motion for Temporary Injunction and serve the Defendants in this matter. Once proof of service has been received by the Court, we will schedule a hearing, allowing for 10 day's notice to the Defendants.

Thank you,
Parker

Parker Ann Baxley
Law Clerk to the Honorable D. Garrison Hill
305 E. North Street, Suite 213
Greenville, SC 29601
Office: (864) 467-8490
Fax: (864) 467-8595



STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Jane Doe,

Plaintiff,

vs.

Frank A. Landgraff, Carol Sutton,

Carol Sutton & Associates

Investigations, Inc.,

Defendants

IN THE COURT OF COMMON PLEAS

Civil Action 2013-CP-23-01762

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION TO AMEND
ORDER

FILED
CLERK OF COURT
SOUTH CAROLINA
2014 MAR 28 PM 11 57

Plaintiff moves to amend the Order of the Court issued December 23, 2013 vacating its previous Order issued May 17, 2013 by having the Court take whatever action it deems are in the interest of justice in the matters before it whether that be vacating the December Order entirely holding its execution in abeyance until the original motion filed by the Plaintiff can be heard, or applying any suitable modification.

Plaintiff incorporates by reference her MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE OR MODIFY ORDER filed November 8, 2013

PROCEDURAL HISTORY

On March 18, 2013 using the pseudonym Mary R. McCorvey, Plaintiff sent the following documents to the trial court: (1) a Complaint for Wrongful Intrusion into Private Affairs, Intentional Infliction of Emotional Distress, and Civil Conspiracy along with a Summons, (2) a Motion to Proceed Under Pseudonym along with a Proposed Order, (3) an *ex Parte* Motion for Temporary Restraining Order and rule TO Show Cause Why a Permanent Injunction Should Not Issue ("TRO") along with an Affidavit and Proposed Order. The TRO simply sought the enjoining the disclosure of Appellant's identity until a timely hearing could be held.

On March 20, 2013 and at other times, the Court instructed Plaintiff to "file the Summons and Complaint and Motion for Temporary Injunction and serve the Defendants in this matter. Once proof of service has been received by the Court, we will schedule a hearing allowing for 10 days notice to the Defendants."

On March 22, 2013, The Court instructed that “A party can not have a motion heard without there being an underlying filed action”. On March 27, 2013, Appellant filed, but did not serve, the Summons, Complaint, and Motion to Proceed under Pseudonym.

Without a hearing or conference, Judge Garrison D. Hill returned the pleadings to Plaintiff with a post-it note that read “May schedule for hearing after S&C and Motion for TRO served and proof of service filed with the Clerk of Court per Judge Hill”. Plaintiff interpreted this as a denial of her Motion for Temporary Restraining Order and filed a Motion for Reconsideration.

On April 25, 2013, Judge Hill requested an explanation from the Plaintiff’s counsel as to why he filed a Motion for Reconsideration when Judge Hill had not ruled on the Motion for Temporary Restraining Order. Plaintiff’s counsel explained his interpretation of the post-it note. Judge Hill accepted the explanation and ordered Plaintiff to amend the pleadings to “Further Identify the Defendant”. Pursuant to that order, Plaintiff amended the Complaint to identify the Defendants and changed the caption to further identify the Defendants.

Without further conference or hearing, this Court filed its Order Denying Plaintiff’s Motion for Temporary Restraining Order on May 17, 2013. Also without a hearing, conference or request from the Plaintiff, the Court issued an Order Granting Plaintiff’s Right to Proceed Anonymously.

Both orders were drafted by Judge Hill and sent to the Plaintiff after they were filed.

Plaintiff served the Orders on all Defendants, all attorneys who had previously represented Defendants, and other individuals who may know Plaintiff’s identity. Plaintiff served the Orders in a timely manner so those receiving them would be bound by the Orders and so that the 10-day period to file a Rule 59 motion and the thirty day period for appeal would begin to run.

Due to the Court’s order that Plaintiff be identified as Jane Doe rather than Mary R. McCorvey, Plaintiff amended the pleadings to amend the caption on May 29, 2013. After considering the Court’s orders, Plaintiff amended her pleadings as a matter of course pursuant to Rule 15(a) on June 17, 2013.

In September 24, 2013 Defendant Landgraff filed a motion requesting the Court set aside the May 17, 2013 Order allowing the Plaintiff to proceed under pseudonym. A hearing was held by Judge Hill on November 12, 2013 from which an Order was issued on December 23, 2013

ordering the Plaintiff to “amend her Complaint for the sole purpose of substituting her real name for the pseudonym Jane Doe. All prior restrictions related to identifying the Plaintiff as found in the Subject Order are hereby removed.”

**The Court’s Ruling pursuant to the November 12, 2013 Hearing is
Based upon an Incomplete and Inaccurate Presentation by Defendant Landgraff**

The Subject Order, on its face, declares that “the record as it now stands” does not support a finding of the Court that the Plaintiff has met her burden to proceed anonymously. That record, created at the November 12, 2103 hearing was dominated by a presentation by Defendant Landgraff’s counsel which were in varying degrees, incomplete, misleading or false. Plaintiff does not believe that the record ‘as it should stand’, once the misrepresentation of the affidavit issue is corrected, will fail in that analysis.

After entertaining Defendant Landgraff’s counsel’s presentation the Court found that the “Plaintiff’s privacy interests are substantially diminished, if not entirely absent, given her voluntary filing of an affidavit (“Prior Affidavit”) in another lawsuit” and thus putting it into public record. The Order specifically refers by footnote to Mulligan v. Landgraff, 2010-CP-23-6024 which is a civil suit between the Defendant Landgraff of this action and his former wife. A copy of the affidavit was passed up to the Court. The effect on the Court of this affidavit was immediate and palpable. The Court questioned Plaintiff’s counsel if he was aware of the affidavit and counsel said he was not.

The existence of that affidavit and the manner in which it was presented to the Court has clouded a multitude of issues in this matter and they are reflected in the Subject Order. A cloud which has taken Plaintiff’s counsel months to sort through and to obtain the documents necessary to demonstrate where the presentation of defense counsel varies from the accurate record. Plaintiff now comes before the Court to explain that Defendant Landgraff’s assertions are, in varying degrees, incomplete, misleading or false.

The affidavit which was submitted to the Court at this hearing was not voluntarily filed by the Plaintiff in the Common Pleas lawsuit as cited by Defendant Landgraff’s counsel nor did she put it into any other public forum. The affidavit was filed with the Family Court during Defendant Landgraff’s divorce case (Mulligan v. Landgraff, 2010-DR-23-1359). It was

submitted in a closed courtroom with the door locked. The case file in that matter was not placed in the file room but retained on Honorable Alex Kinlaw's desk until resolution. Never did the Plaintiff put that affidavit into any other potentially public record nor was she aware that it was there.

At the conclusion of the Family Court matter the Plaintiff in that matter, Defendant Landgraff's former wife, filed a motion with the Court on March 9, 2011 to have the record sealed so that none of its contents would be made public. The Order issued by Honorable Rochelle Conits filed April 12, 2012 in that matter indicates that Defendant Landgraff JOINED in the motion to seal that file. The motion was granted and the file sealed with the exception of allowing the attorneys in that case access to the file in the future if they desired without further Order of the Court. The findings agreed to in that Order include findings in paragraph D that "the public interests . . . is best served by sealing the documents". Defendant Landgraff, having joined in that motion then ingenuously claims to this Court that it is in the public interest that these matters be brought out into the open now that he feels it suits his needs.

The Plaintiff in in this lawsuit was not a party to the Common Pleas suit referenced by Defendant Landgraff's counsel in this matter and had no interest in it. It is the simplest of explanations that the appearance of Plaintiff's Family Court affidavit from a closed Family Court proceeding into the record of a Common Pleas case with which she has no contact must have been placed there by, or through, one of the attorneys in the Family court matter as they were the only ones with common access to the document. In either case, an attorney not directly connected with the Plaintiff placing an affidavit from a restricted Family Court file into a different case file in a different court could not possibly be construed as a voluntary act on the part of my the Plaintiff in this case.

However, once the assertion of a voluntary publication of this private matter was submitted to the Court Defendant Landgraff's counsel has used this bogus claim to pervert every element of the Subject Order.

The Court made a finding in it's May 17, 2013 Order Granting Plaintiff Right To Proceed Anonymously that the "subject matter of this lawsuit relates to private affairs, and has no significant public interest". Absent the production of the affidavit and Defendant Landgraff's Counsel's version of its origin no substantial evidence or claim was submitted to the court which

could reasonably be believed to sway the Court from its original determination. The findings in the Subject Order that the *Howe* factors have not been satisfied may be defensible under the umbrella of the referenced “the record as it now stands” limitation but should not stand as the circumstances of the affidavit are fully known.

This accusation of a prior voluntary publication of private fact on the part of the Plaintiff was further referenced in the closing passage of the Order claiming “the Court has the inherent power to vacate the Subject Order due to circumstances under which it was obtained”. The inference being that the Plaintiff obtained the subject order by subterfuge in hiding from the Court her prior publication and as such is not entitled to the Court’s protection. Again, there is absolutely no indication that the Plaintiff hid anything from the Court or was even aware of the existence of affidavit being placed in a lawsuit unrelated to her.

These arguments and clarifications could not be made at the November 12, 2013 hearing as Plaintiff had no idea this affidavit had been placed, by some third party, into another active case. Plaintiff’s counsel learned the story of the affidavit after the November hearing but had only come into actual possession of the Mulligan v. Landgraff documents within the last week.

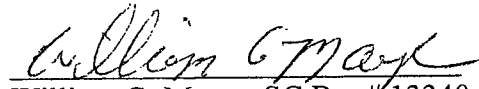
The Subject Order Mischaracterizes the Nature of the Relief in the Subject Order

Finally the only issue addressed in the Order not specifically effected by the misrepresentation of the character of the Plaintiff’s Family Court affidavit is the claim that he Subject Order was the result of an *ex parte* application for relief. The procedural history of this case demonstrates that the Order issued by Judge Hill DENIED Plaintiff’s *ex parte* motion for relief. Plaintiff’s Motion to Proceed Under Pseudonym was filed as a regular motion and was not a petition for *ex parte* relief. To date that motion is still pending and has not been before the Court.

In Conclusion

The Court should not be placed in a position where its decisions are made on limited facts and not a complete story to be considered. Plaintiff believes that in light of the true nature of the affidavit and how it may have come to be in the Common Pleas file the Court will not reverse

it's original decision and asks the Court to take whatever actions it deems are in the interest of justice in the matters before it whether that be vacating the December Order entirely, holding its execution in abeyance until the original motion filed by the Plaintiff can be heard, or applying any other modification the Court deems suitable.



William G. Mayer, SC Bar # 13340

Attorney for the Plaintiff

118 West Main Street

Laurens, SC 29360

864-984-9202

FAX 864-715-0496

MrMayersOffice@AOL.com

March 27, 2014
Laurens, SC

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

Jane Doe,

2014 JUN 20 PM 4 05

Plaintiff,

v.

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

Defendants.

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION TO STRIKE
and MOTION FOR PARTIAL
SUMMARY JUDGMENT**

INTRODUCTION

Pursuant to SCRCR Rules 12(f), and 56, Plaintiff Jane Doe moved for this Court to strike various portions of Defendants' Defenses and for Summary Judgment on her claim for Wrongful Intrusion into Private Affairs.

Defendant Frank A. Landgraff ("Landgraff") "answered" Plaintiff's complaint by objecting to the circumstances of Plaintiff's request to proceed under a pseudonym and responding that "allegations are denied as a result." After alleging, *inter alia*, that Plaintiff didn't exist and that he had no formal disclosure of her identity, Landgraff proceeds to aver no less than 11 affirmative defenses.¹

Defendants Carol Sutton and Carol Sutton & Associates - Investigations, Inc. ("Sutton") took Landgraff's travesty even further by actually affirmatively representing to the Court that they were "unaware of the identity of the fictitious person who may be the plaintiff." Sutton's denial of each allegation except that Plaintiff is a resident of Greenville County is truly ironic.

¹ An affirmative defense conditionally admits the allegations of the complaint, but asserts new matter to bar the action. *Lawrence v. Southern Railway-Carolina Division*, 169 S.C. 1, 167 S.E. 839 (1933). In other words, it assumes all elements of the plaintiff's case have been established. Because the plaintiff is taken to have proved a good cause of action, the burden of proof shifts to the defendant to show he is not liable.

ENTERED COMPUTER

Sutton proceeds to aver no less than 12 defenses.

Landgraff and Sutton point to few actions by Plaintiff. However, by affidavits already in the court record, they have provided undisputed proof of their wrongful intrusion into plaintiff's private affairs.

ARGUMENT – MOTION TO STRIKE

Plaintiff now moves to strike Defendants' defenses, pursuant to SCRCP 12(f). Rule 12(f) provides that

Upon motion pointing out the defects complained of, and made by a party before responding to a pleading or, if no responsive pleading is required within 30 days after the service of the pleading upon him or upon the court's own initiative, at any time the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

This provides a mechanism to clean up the pleadings, streamline litigation, and avoid unnecessary forays into immaterial matters.

Plaintiff will be conducting targeted discovery over the next several months. It will dramatically increase Plaintiff's discovery burden – and costs for all parties – if Plaintiff is forced, through interrogatories, depositions, and document discovery to “unearth” each of the factual theories – if any – on which Defendants' boilerplate affirmative defenses rely. Plaintiff is entitled to adequate advance notice of Defendants' theories of defense. Without such, Defendants' conclusory assertions must be stricken.

Moreover, increased time and expense of trial constitutes sufficient prejudice to warrant granting Plaintiff's motion. Defendants' inclusion of 23 boilerplate, redundant, and/or legally baseless defenses (against someone whose identity they don't know) creates palpable prejudice to Plaintiff, requiring significant resources, time, and discovery. Plaintiff should not have to respond to defenses that lack factual support.

Defendants' defenses contain virtually no factual support or context, much less any explanation. Instead, they are formulaic recitations of generic legal doctrines. These conclusory assertions cannot satisfy the relevant pleading standard under SCRCP 8(b) which states that a "party shall state in short and plain terms the facts constituting his defenses to each cause of action asserted"

The traditional standard for compliance with 8(b) has been "fair notice." In *Bell Atlantic Corp. v. Twombly*² and *Ashcroft v. Iqbal*³, the U.S. Supreme Court changed the game.

Twombly raised the standard to pleading facts sufficient "to raise a right to relief above the speculative level."⁴ This standard requires more than labels and conclusions," such that "a formulaic recitation of the elements of a cause of action will not do."⁵

Iqbal clarified this heightened pleading standard by stating that the "complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'"⁶

Granted, *Twombly* and *Iqbal* address sufficiency of complaints, not defenses. However, Judge Herlong held that affirmative defenses are subject to *Twombly* and *Iqbal* requirements.⁷ In doing so, he rejected numerous arguments and recognized that the plausibility standard "preserves judicial economy and efficiency by discouraging defendants from raising a myriad of boilerplate affirmative defenses."⁸

Significantly, all Fourth Circuit district courts have adopted Judge Herlong's view. Applying the plausibility standard in state court seems only reasonable in light of the *Monster*

² 550 U.S. 544 (2007).

³ 556 U.S. 662 (2009).

⁴ 550 U.S. at 555.

⁵ *Id.* at 556.

⁶ 556 U.S. at 1949.

⁷ *Monster Daddy LLC v. Monster Cable Products*, C.A. No. 6:10-1170-HMH

⁸ *Id.* at *7.

case logic that it does not . . .⁹

make [] sense nor is it fair to require a plaintiff to provide the defendant with enough notice that there is a plausible, factual basis for her claim under one pleading standard and then permit the defendant under another pleading standard simply to suggest that some defense may possibly apply in the case.

Fortunately, this Court will have little trouble determining if Landgraff and Sutton have provided a plausible, factual basis for their defenses. For the most part, neither provide any factual basis for their boilerplate defenses presented against a Plaintiff that they claim is unidentified or non-existent.

Admittedly, Landgraff and Sutton incorporate “all prior responses” and “the allegations of the preceding paragraphs” into each of their defenses. However, this adds nothing to the analysis since neither Landgraff nor Sutton recite any facts in those responses/paragraphs except that they deny Plaintiff’s allegations and don’t know who she is. As a result, each sufficiency of each defense rests on the facts contained in its pleading with the exceptions noted below.

A. Failure to State a Claim (Landgraff’s First and Sutton’s Third Defense)

Landgraff states “Plaintiff failed to state a claim upon which relief can be granted.”

Sutton states “These defendants allege that the plaintiff’s complaint fails to state facts sufficient to constitute a cause of action against them.”

Neither gives a clue what is lacking in Plaintiff’s complaint. No matter how carefully she reads the defense, Plaintiff cannot glean any notice as to what element of her claims she failed to state and how she failed to provide plausible factual support.

Because the First and Third Defenses are insufficient under Rule 8 pleading standards, they should be stricken.

B. Real Party in Interest (Landgraff’s Second and Sutton’s Second Defense)

⁹ *Id.*

Landgraff and Sutton ask for dismissal of Plaintiff's Complaint for violating Rule 17.

Sutton presents that Plaintiff is a fictitious person and has not been identified. Ignoring the case law that allows pseudonym filing, all defendants have evidently misinterpreted Rule 17 which provides

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification . . . and such ratification . . . shall have the same effect as if the action had been commenced in the name of the real party in interest.

In short, assuming the defendants are correct, the remedy is clearly not dismissal.

Plaintiff has amended her complaint so that she is in compliance with Rule 17 making these defenses moot. Because the Second and Second Defenses are insufficient under Rule 8 pleading standards and moot, they should be stricken.

C. *Failure to Plead Special Damages with Specificity (Landgraff's Third and Sutton's Ninth Defense)*

Landgraff erroneously states that "Plaintiff alleges special damages without pleading the same with specificity." Sutton goes further to erroneously state that an "element of various causes of action alleged by the plaintiff is special damages . . . [and] has failed to plead such damages."

Looking solely to the Amended Complaint, Plaintiff only alleged special damages in one cause of action – civil conspiracy. In that cause of action, Plaintiff specifically identified the special damages: "Defendants' combined actions caused Plaintiff to suffer special damages including, but not limited to loss of professional reputation, medical expenses, and future medical expenses."

This defense should be stricken as patently erroneous.

D. *Ineffective Amendment (Landgraff's Fourth Defense)*

Landgraff does attempt to give some factual basis for this defense. The problem is that it is all false. The Court ordered Plaintiff to amend the pleadings to "Further Identify Defendants." After that, the Court ordered that Plaintiff be identified as Jane Doe rather than Mary R. McCorvey, Plaintiff amended the pleadings to amend the caption. After considering the Court's orders, Plaintiff amended her pleadings once as a matter of course in compliance with Rule 15(a). As a result, this defense should be stricken.

E. Improper Allegations of Civil Conspiracy (Landgraff's Fifth and Sutton's Tenth Defense)

Landgraff claims that Plaintiff "improperly attempts to recover damages for an alleged civil conspiracy"; that the law "disallows Plaintiff from recovering damages for the same delicts"; and that "civil conspiracy claims require allegations of special damages" Landgraff gives no factual support for his allegations. He states nothing Plaintiff did that was improper. He ignores Plaintiff's allegation the Defendants used the videotape for their benefit. He also ignores Plaintiff averment of special damages.

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

In essence, these defenses are the same as those in Landgraff's Third and Sutton's Ninth Defense. Like them, they should be stricken as patently erroneous and without factual support.

F. Privilege (Landgraff's Sixth Defense)

Landgraff's total defense is "Some or all of Plaintiff's claims are barred by the doctrine

of privilege.” What claims? What privilege? Regardless of the answers, this defense as pled is conclusory, without any factual support, legally insufficient, and should be stricken.

On a side note, Plaintiff suspects that Landgraff is propounding the privilege defense that applies to defamation cases.¹⁰ Again, this is a case for wrongful intrusion into private affairs.

G. *Ex Turpi Causa (Landgraff's Eighth and Sutton's Eleventh Defense)*

Landgraff gives us a legal lesson in that it “is a well-founded principle of law that no person [even those who have not formally disclosed her identity to him] can acquire a right of action from their own unlawful act. One who participates in an unlawful act cannot recover damages for the consequences of that act.”

Landgraff continues by stating that “Plaintiff enjoyed no lawful right to be present” in some undisclosed location. Further, Plaintiff was “engaging in activities contrary to the law and public policy of the State of South Carolina.” Problematically, Landgraff does not identify the activities, the law, or the public policy.

Sutton adds that Plaintiff “seeks to profit from his or her own unlawful acts” before reciting her understanding of the doctrine of *ex turpi causa*. Sutton also does not identify any acts, the statute, the case, or public policy.

The doctrine requires a violation of a positive law which means one that has actually and specifically been enacted. Plaintiff knows of no such law. Neither Landgraff nor Sutton identifies such a positive law or what Plaintiff has done that is unlawful.

More importantly, Plaintiff is not seeking to profit from her acts, unlawful or otherwise. She is seeking to be compensated for the damages that Landgraff and Sutton caused her.

Because the Eighth and Eleventh Defenses are insufficient under Rule 8 pleading

¹⁰ *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469 (S.C. 1999); *Murray v. Honam, Inc.*, 344 S.C. 129 (S.C. App. 2001); *Fulton v. Atlantic Coast Line R. Co.*, 220 S.C. 287 (S.C. 1951).

standards, they should be stricken.

H. Willful Publication/Consent (Landgraff's Ninth and Sutton's Sixth and Twelfth Defenses)

Landgraff avers willful publication claiming that "Plaintiff voluntarily submitted an affidavit in prior court filings wherein she divulged detailed information about the private affairs she now claims supports her claim for intrusion." Sutton avers previous disclosure of "events or occurrences which give rise to his or her causes of action" Nothing could be further from the truth and Plaintiff urges Landgraff and Sutton to stop deceiving the Court about this issue.

This is an action for wrongful intrusion into private affairs, not wrongful publication of private affairs. The one affidavit that Plaintiff presented into a closed courtroom to a file that was sealed was presented before Plaintiff even knew a videotape existed. How could she disclose something of which she had no knowledge? These assertions confirm that Defendants evidently misunderstand the intrusion claim. More likely, they are purposely trying to shift the focus away from their actions. The intrusion was the spying and making the videotape -- the content of the videotape is irrelevant.¹¹

Both Landgraff and Sutton aver the defense of consent. Sutton includes that Plaintiff "implicitly or explicitly consented to the surveillance complained of" Fatal to their defense, both just make the allegation without absolutely no factual support.

"Consent may be found where the evidence shows a voluntary agreement to do something proposed by another, and the party consenting possesses sufficient information and

¹¹ i.e., *In re Marriage of Tigges*, 758 N.W.2d 824 (Iowa 2008) ("Although the tape was not offered in evidence, we credit [Wife's] testimony that it recorded the 'comings and goings' from the bedroom she regularly used. Notwithstanding the unremarkable activities recorded on the tape, [Wife] suffered damage as a consequence of [Husband's] actions." "The wrongfulness of the conduct springs not from the specific nature of the recorded activities, but instead from the fact that [Wife's] activities were recorded without her knowledge and consent at a time and place and under circumstances in which she has a reasonable expectation of privacy.")

ability to make an intelligent choice.”¹² Landgraff and Sutton never proposed to Plaintiff that she voluntarily agree to allow them to intrude on her private affairs, damage her emotionally, or conspire to damage her. Needless to say, Plaintiff never consented to their actions.

Because the Ninth and Sixth Defenses are insufficient under Rule 8 pleading standards, they should be stricken.

I. Improper Remedies (Landgraff's Eleventh Defense)

Landgraff's total defense is that "Plaintiff's Prayer for Relief seeks remedies unavailable under the claims alleged." He fails to give even a passing effort to identifying what remedies are unavailable to which claim. This Defense gives Plaintiff no statement of facts so that it is insufficient under Rule 8 pleading standards and should be stricken.

J. Failure to Join Indispensible Party (Sutton's Fourth Defense)

Sutton alleges that Plaintiff "failed to join parties who are indispensable to the just resolution of this matter." Who? Plaintiff is left to guess. This defense should be stricken for improper pleading.

Sutton also gets the remedy wrong by saying the "matter must be dismissed for failure to join those parties, pursuant to Rule 12(b)(7) and Rule 19(a)." To the contrary, the proper remedy is that "the court shall order that he be made a party."¹³ Since only Sutton knows the identity of said parties, the Court should order Sutton to reveal their identity and then order their joinder.

K. Punitive Damages (Sutton's Seventh Defense)

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

¹² *Hawkins By and Through Hawkins v. Multimedia, Inc.*, 344 S.E.2d 145, 288 S.C. 569 (S.C. 1986).

¹³ SCRCF 19(a).

explanation.

Sutton offers no explanation of the specific provision for punitive damages in *Snakenburg*¹⁴ case that recognized the claims for invasion of privacy in South Carolina. Sutton also ignores the chain of cases handed down by the U.S. Supreme Court that do not support this assertion.

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

L. Assumed the Risk (Sutton's Eighth Defense)

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

“Currently in South Carolina, there are four requirements to establishing the defense of assumption of risk: (1) the plaintiff must have knowledge of the facts constituting a dangerous condition; (2) the plaintiff must know the condition is dangerous; (3) the plaintiff must appreciate the nature and extent of the danger; and (4) the plaintiff must voluntarily expose himself to the danger.”¹⁵

Sutton gives no fact that indicates that Plaintiff knew that the defendants were going to intrude on her private affairs, damage her emotionally, or conspire to damage her. She could have no knowledge that Defendants were videotaping her – they hid the camera. Logically, Plaintiff cannot voluntarily expose herself to anything that she did not know about. This may explain Sutton's obvious omission of any facts supporting this defense.

Plaintiff has no notice of the facts constituting this defense. Because this Defense is

¹⁴ *Snakenburg v. Hartford Casualty Ins. Co., Inc.*, 383 S.E.2d 2, 299 S.C. 164 (S.C. App. 1989).

¹⁵ *Senn v. Sun Printing Co.*, 295 S.C. 169, 367 S.E.2d 456 (Ct.App.1988).

insufficient under Rule 8 pleading standards, it should be stricken.

ARGUMENT – MOTION FOR PARTIAL SUMMARY JUDGMENT

"Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law."¹⁶ "To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party."¹⁷ Plaintiff has the "burden of clearly establishing the absence of a genuine issue of material fact."¹⁸

Significantly, Defendants have admitted to the facts in this case. Wrongful intrusion into private affairs, consists of the following elements, which Plaintiff has pled:¹⁹

"(1) Intrusion. An intrusion may consist of watching, spying, prying, besetting, overhearing, or other similar conduct." Landgraff and Sutton signed a sworn affidavit that they installed a hidden, motion-activated camera. They spied on Plaintiff and produced a videotape to prove it.

"(2) Into that which is private. The intrusion on the plaintiff must concern those aspects of himself, his home, his family, his personal relationships, and his communications which one normally expects will be free from exposure to the defendant." In her affidavit,²⁰ Plaintiff unequivocally states that she not only expected to be private in Landgraff's house, but also that Landgraff assured her that she would be. By their own admission, the Defendants were not anywhere in the residence at the time of the intrusion so Plaintiff could logically expect she

¹⁶ *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011).

¹⁷ *McLaughlin v. Williams*, 379 S.C. 451, 455-56, 665 S.E.2d 667, 670 (Ct.App.2008).

¹⁸ *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct.App.2005).

¹⁹ All elements are from quotations from the *Snakenberg* case, *supra*.

²⁰ Landgraff has already presented this affidavit to the Court.

would be free from exposure to them.

The S.C. Code Section 16-17-470 provides that a "Place where a person would have a reasonable expectation of privacy" means:

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

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

Typically, there is a reasonable expectation of privacy in a bedroom, assuming the blinds and drapes are closed and no one standing in a public place like a sidewalk by the house could see into the bedroom. Most people do not expect that there is a video camera watching them in their own bedroom or in the bedroom of another. For months, Plaintiff had disrobed in that bedroom with the expectation that she was in a private place and had no concern that she would be videotaped.²¹

Most significant is Landgraff's own admission that Plaintiff had an expectation of privacy in the bedroom. He joined in the attached motion to seal the file in his domestic case without objecting to any of its allegations.²² The motion was granted in an Emergency Hearing.

"(3) Substantial and unreasonable enough to be legally cognizable. . . . Whether the conduct in question meets this test is, in the first instance, a question of law for the court."

Numerous other courts have ruled that this type intrusion is legally cognizable, but this court

²¹ "By choosing to share the privacy of their home with [Plaintiff] on several occasions in the past and on the occasion in question, both the [Defendants] and [Plaintiff] demonstrated a subjective expectation of privacy, and that expectation, we hold, is one that society is prepared to recognize as reasonable." *State v. Missouri*, 603 S.E.2d 594, 597-98 (S.C. 2004).

²² The Supplemental Order Sealing File provides that "Wife had previously moved for an order sealing the Court's file in this matter, and Husband joined in Wife's request.

may feel differently.²³ However, that is a conclusion of law and not a genuine issue of material fact.

“(4) Intentional. The defendant's act or course of conduct must be intentional. For purposes of civil liability, an act is intentional if (1) it is done willingly; and either (2) the actor desires the result of his conduct, whatever the likelihood of that result happening; or (3) the actor knows or ought to know the result will follow from his conduct, whatever his desire may be as to that result.” Again, the affidavits of Landgraff and Sutton in the public record definitively prove that they willingly installed a motion-activate hidden camera on two occasions. The camera was connected to a recorder that would make a videotape. Their actions were clearly intentional.

Plaintiff has carried her burden of proof for this cause of action. If Defendants' have any legitimate defenses, the burden shifts to prove them. However, their defenses, if any, do not negate the undisputed facts that they have committed intruded upon Plaintiff's private affairs.

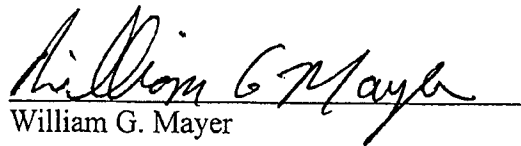
CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court strike the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Affirmative Defenses of Defendant Landgraff and the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and Twelfth Defenses of Defendants Carol Sutton and Carol Sutton & Associates-

²³ *State of Wisconsin v. Jahnke*, 762 N.W.2d 696, 699 (Wis. App. 2008), review denied, 765 N.W.2d 578 (Wis. 2009) (“By placing limits of the ability of others to record, the statute protects a person’s interest in limiting, as to time, place, and persons, the viewing of his or her nude body.” and “It is one thing to be viewed in the nude by a person at some point in time, but quite another to be recorded in the nude so that a recording exists that can be saved or distributed and viewed at a later time.”); *In re the Marriage of Tigges*, 758 N.W.2d 824, 828 (Iowa 2008) (“... the videotaping of a person without consent or awareness when there is an expectation of privacy goes beyond the rights of a spouse because it may record private matters which could later be exposed to the public eye.”); *United States v. Torres*, 751 F.2d 875, 878 (7th Cir. 1984) (It is true that secretly televising people (or taking still or moving pictures of them) while they are in what they think is a private place is an even greater intrusion on privacy than secretly recording their conversations.); *State of Minnesota v. Perez*, 779 N.W.2d 105, 110 (Minn. App. 2010) (If marriage does not erase a spouse’s reasonable expectation of privacy in his or her phone calls, it surely cannot erase his or her reasonable expectation of privacy from being videotaped while undressed without his or her knowledge or consent.)

Investigations, Inc. In addition, Plaintiff requests that the Court should grant Plaintiff's partial motion for summary judgment.

Respectfully submitted,

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

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

June 19, 2014
Greenville, SC

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Lynn W Mulligan,

Plaintiff.

v.

Frank A. Landgraff

Defendant.

IN THE FAMILY COURT
THIRTEENTH JUDICIAL CIRCUIT

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

PLAINTIFF'S MOTION
TO SEAL FILE

R. Conits

Plaintiff Lynn W. Mulligan ("Wife"), by and through her undersigned counsel, respectfully moves this court under the authority of Rule 41 of the SCRCP for *ex parte* relief in the form of requesting that the Court temporarily segregate the file pending an order to seal the file and for an order sealing portions of the record in this case which reference or have still pictures and videotape of a third party and requiring all future references to the third party to be filed under seal or redacted and for a emergency hearing to be set regarding the permanent sealing and redacting of the file.

BASIS FOR EMERGENCY RELIEF

Defendant Frank A. Landgraff ("Husband") has filed several motions and affidavits in this case alleging the Plaintiff's involvement with a third party and mentioning the name of a third party ("the third party"). He has also secretly videotaped the Plaintiff and the third party. His filings have included still pictures and videotape of the Plaintiff and of the third party in the nude ("the sensitive material"). Husband made no attempt to introduce the sensitive material under seal.

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

Until recently, the file has been in the office of the Honorable Alex Kinlaw, Jr. However, now that he has ruled on a motion, the file is back in the file room. Time is of the essence to prevent review and/or dissemination of the sensitive material to the detriment of the third party.

LEGAL ARGUMENT

The United States Supreme Court has stated that "the courts of this county recognize a general right to inspect and copy public records and documents, including judicial records and

documents."¹ The Court has also stated that "the right to inspect and copy judicial records is not absolute."²

Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not used to gratify public spite or promote public scandal Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption.³

As discussed below, the interests served by sealing the court records override the rights of public access. The sealing proposed in this Motion is narrowly tailored so that no less restrictive means exist to achieve the purposes of this Motion. "The decision as to access is best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."⁴

In South Carolina, the issuance of a protective order sealing court records is governed by Rule 41, SCRPC and the Supreme Court's decision in *Davis v. Jennings*:

Hereafter, when a protective order sealing the record is sought, the trial court shall make specific factual findings, on the record, which weigh the need for secrecy against the right of access. Factors to be considered may not be limited to, but should include: the ensuring of a fair trial; the need for witness cooperation; the reliance of the parties upon confidentiality; the public or professional significance of the lawsuit; and the harm to parties from disclosure.⁵

Under the auspices of protecting his rights, Husband presented argument to this Court making numerous sexual allegations and misrepresenting the nature and origin of the sensitive materials. Rather than protect the rights of the Plaintiff and the rights of the third party, the rights of these two have arguably been violated in acquiring⁶ and in presenting the sensitive

¹ *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed. 2d 570 (1978).

² *Id.* At 598.

³ *Id.* (Internal citations and quotations omitted.)

⁴ *Id.* At 599.

⁵ 304 S.C. 502, 506, 405 S.E.2d 601, 604 (S.C. 1991).

⁶ "The law recognizes that each person has an interest in keeping certain facets of personal life from exposure to others. . . . In South Carolina, three separate and distinct causes of action can arise under the rubric of invasion of privacy: (1) wrongful appropriation of personality; (2) wrongful publicizing of private affairs; and (3) wrongful intrusion into private affairs." *Snakenberg v. Hartford Casualty Ins.*, 299 S.C. 164, 170, 383 S.E.2d 2, 5 (S.C. App. 1989)

material.⁷ Apparently, Husband has added insult to injury by spreading the word that the sensitive information exists and is part of the court record.

To say that disclosure of the sensitive material will bring harm is a gross understatement. Husband could have no lawful purpose for opposing this motion except to gain some advantage over Wife in this litigation. In fact, Greenville County court records show that the entire file of his second divorce was sealed. He can have a fair and complete trial of all issues at hand without harming the Plaintiff and the third party.

The Plaintiff had an expectation of privacy in her own home. In all her interactions with Husband, Husband assured third party that she was in a secluded and private area. The third party had every expectation of privacy in Husband's house. Husband should not gain this advantage by "blackmailing" a third party and/or Wife by publically disclosing sensitive material about a third party, especially, before any hearing on Husband's participation in the events depicted in the sensitive material is fully litigated.

Due to the possible further disclosure of sensitive information, there is no other tailoring that will adequately protect the Plaintiff's and third party's rights and interests. The Plaintiff only seeks to have the parts of the record containing sensitive information sealed. Absent sealing of the sensitive information, access to and disclosure of the sensitive information, and possible improper use thereof, cannot be controlled.

CONCLUSION

This Court has the authority to control its docket so that the filings made are not put to an improper use. The Plaintiff respectfully asks for this relief both *ex parte* and permanently so that any misuse of sensitive information will be halted before it is unstoppable.

Wherefore, the Plaintiff asks the Court

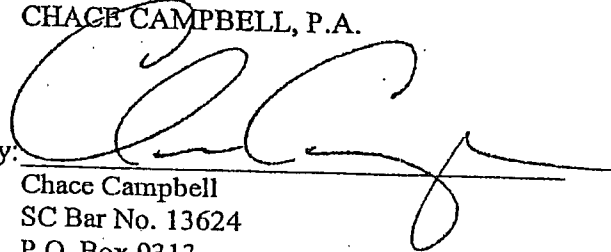
1. To seal *nunc pro tunc* all portions of the record that contain or refer to the sensitive material;
2. To order all future references to the third party to be filed under seal or redacted;
3. To order all parties to replace any references to the third party with the name "T.P." for third party;
4. To hold a hearing to determine if the *ex parte* sealing should be made permanent;
5. For an award of attorney's fees and costs to Wife; and
6. For such other relief as the Court deems just and proper.

⁷ Rule 4.4(a) of the Rules of Professional Conduct provides that "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."

FILED IN COURT
GREENVILLE, S.C.

201 MAR 11 P 3:22

CHACE CAMPBELL, P.A.

By: 

Chace Campbell
SC Bar No. 13624
P.O. Box 9313
Greenville, SC 29615
864-268-8244 Telephone
864-239-3815 Facsimile

Attorney for the Plaintiff

Greenville, South Carolina
February 28, 2011

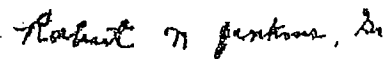
NOW THEREFORE, BASED UPON THE FOREGOING:

____ Plaintiff's Motion for Ex Parte Relief and Motion for Emergency Hearing is hereby denied and all pertinent issues are reserved for a temporary hearing to be scheduled.

____ Plaintiff's Motion for Ex Parte Relief is hereby granted and the file shall be sealed as requested above.

✓ Plaintiff's Motion for an Emergency Hearing is hereby granted and shall be heard on the 4th day of ~~March~~ ^{April}, 2011 at 3:15 o'clock ~~am~~ ^{pm}.

AND IT IS SO ORDERED:



Family Court Judge
Thirteenth Judicial Circuit

March 10, 2011
Greenville, South Carolina



A Total Security Company

SUTTON & ASSOCIATES INVESTIGATIONS, INC.
1 CHICK SPRINGS ROAD – SUITE 201
GREENVILLE, SOUTH CAROLINA 29609
Phone: 864-232-9007/Fax 864-271-3898

Memo:

Re: Landgraff vs. Landgraff

To Who It May Concern,

As requested – The camera was installed in Mr. Landgraff's home, in his presence on Monday, December 14th, 2009 and it was removed on Wednesday, December 16th, 2009.

Carol Sutton
Sutton & Associates Investigations, Inc.

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

LYNN LANDRAFF

AFFIDAVIT OF SERVICE

VS

FRANK LANDRAFF

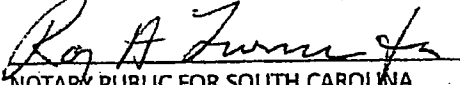
I FRANK LANDRAFF HAVE CONTRACTED WITH SUTTON AND ASSOCIATES TO PERFORM AN INVESTIGATION TO DOCUMENT THE ACTIVITIES OF MY WIFE LYNN LANDRAFF. AS PART OF THIS INVESTIGATION, I HAVE REQUESTED THAT A COVERT CAMERA BE INSTALLED IN THE MARITAL HOME THAT IS LOCATED AT 122 ANTIGUA WAY. THE LOCATION I REQUESTED THIS CAMERA TO BE INSTALLED WAS IN THE MARITAL BEDROOM THAT IS SHARED BY ME AND MY WIFE.

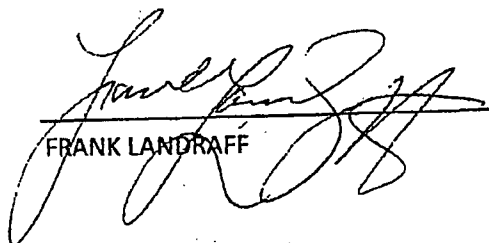
I FURTHER STATE THAT THERE ARE NOT COURT ORDERS THAT PREVENT ME FROM RESIDING AT THIS LOCATION AND THAT THERE IS NO AGREEMENT BETWEEN MY WIFE AND I THAT WOULD LIMIT MY ACCESS TO THE MARITAL HOME OR THE MARITAL BEDROOM.

I WAS PRESENT AND APPROVED THE INSTALLATION OF THE COVERT CAMERA AND I AM RESPONSIBLE FOR ITS PRESENTS IN THE MARITAL BEDROOM.

SWORN TO BEFORE ME THIS THE

10TH DAY OF DECEMBER 2009


NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 12/13/2012


FRANK LANDRAFF

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Carol Simpson,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
C.A. 2013-CP-23-01762

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION TO STRIKE**

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL R. WICKENS, CLERK
24 OCT 30 PM 4 44

Pursuant to SCRCF Rules 12(f), Plaintiff moved for this Court to strike Defendants' purported defenses. Defendant Frank A. Landgraff ("Landgraff") avers 10 affirmative defenses and Defendants Carol Sutton and Carol Sutton & Associates - Investigations, Inc. ("Sutton") Sutton aver 12 defenses. Rule 12(f) provides that

Upon motion pointing out the defects complained of, and made by a party before responding to a pleading or, if no responsive pleading is required within 30 days after the service of the pleading upon him or upon the court's own initiative, at any time the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

This provides a mechanism to clean up the pleadings, streamline litigation, and avoid unnecessary forays into immaterial matters.

Plaintiff will be conducting targeted discovery over the next several months. Plaintiff's discovery burden – and costs for all parties – will dramatically increase if Plaintiff is forced, through interrogatories, depositions, and document discovery to "unearth" each of the factual theories – if any – on which Defendants' boilerplate defenses rely. Plaintiff is entitled to adequate advance notice of Defendants' theories of defense. Without such, Defendants' conclusory assertions must be stricken.

Moreover, increased time and expense of trial constitutes sufficient prejudice to warrant granting Plaintiff's motion. Defendants' inclusion of 22 boilerplate, redundant, and/or legally baseless defenses creates palpable prejudice to Plaintiff, requiring significant resources, time, and discovery. Plaintiff should not have to respond to defenses that lack factual support.

Defendants' defenses contain virtually no factual support or context, much less any explanation. Instead, they are formulaic recitations of generic legal doctrines. These conclusory assertions cannot satisfy the relevant pleading standard under SCRCP 8(b) which states that a "party shall state in short and plain terms the facts constituting his defenses to each cause of action asserted"¹ "The Rule further mandates that a pleading contain 'ultimate facts'"² The trial court's decision to strike a defense as insufficiently pled will not be disturbed absent an abuse of discretion.³

The traditional standard for compliance with 8(b) has been "fair notice." In *Bell Atlantic Corp. v. Twombly*⁴ and *Ashcroft v. Iqbal*⁵, the U.S. Supreme Court changed the game.⁶

Twombly raised the standard to pleading facts sufficient "to raise a right to relief above the speculative level."⁷ This standard requires more than labels and conclusions," such that "a

¹ *RoTec Services, Inc. v. Encompass Services, Inc.*, 597 S.E.2d 881, 884, 359 S.C. 467 (S.C.App. 2004).

² *Watts v. Metro Sec. Agency*, 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct.App.2001).

³ *Slack v. James*, 356 S.C. 479, 482, 589 S.E.2d 772, 774 (Ct.App.2003).

⁴ 550 U.S. 544 (2007).

⁵ 556 U.S. 662 (2009).

⁶ Granted, *Twombly* and *Iqbal* address sufficiency of complaints, not defenses. However, Judge Herlong held that affirmative defenses are subject to *Twombly* and *Iqbal* requirements. *Monster Daddy LLC v. Monster Cable Products*, C.A. No. 6:10-1170-HMH. In doing so, he rejected numerous arguments and recognized that the plausibility standard "preserves judicial economy and efficiency by discouraging defendants from raising a myriad of boilerplate affirmative defenses." *Id.* at *7

Significantly, all Fourth Circuit district courts have adopted Judge Herlong's view. Applying the plausibility standard in state court seems only reasonable in light of the *Monster* case logic that it does not "make [] sense nor is it fair to require a plaintiff to provide the defendant with enough notice that there is a plausible, factual basis for her claim under one pleading standard and then permit the defendant under another pleading standard simply to suggest that some defense may possibly apply in the case." *Id.*

⁷ 550 U.S. at 555.

formulaic recitation of the elements of a cause of action will not do.”⁸ *Iqbal* clarified that the pleading “must contain sufficient factual matter, accepted as true, ‘to state a claim to relief that is plausible on its face.’”⁹

Fortunately, this Court will have little trouble determining if Landgraff and Sutton have provided a plausible, factual basis for their defenses. For the most part, neither provide ANY factual basis for their boilerplate defenses.

Admittedly, Landgraff and Sutton incorporate “all prior responses” and “the allegations of the preceding paragraphs” into each of their defenses. However, this adds nothing to the analysis since Landgraff and Sutton recite NO facts in those responses/paragraphs. As a result, each sufficiency of each defense rests on the facts contained in its pleading with the exceptions noted below.

As a practical reality, all Landgraff’s affirmative defenses and Sutton’s “affirmative defenses”, even though not so labelled, must fail. A properly pled affirmative defense must, at least conditionally, admit the allegations of the complaint, and then assert new matter to bar the action.¹⁰ In other words, it assumes all elements of Plaintiff’s case have been established. Because Plaintiff is taken to have proved a good cause of action, the burden of proof shifts to Defendants to show they are not liable.

To the contrary, Landgraff and Sutton deny all Plaintiff’s claims. Consequently, they fail to plead sufficient facts if taken as true would establish the defense or reasonably provide Plaintiff with a fair opportunity to prepare evidence in rebuttal. Plaintiff is entitled to no less.

A. *Failure to State a Claim (Landgraff’s First and Sutton’s Third Defense)*

Landgraff states “Plaintiff failed to state a claim upon which relief can be granted.”

⁸ *Id.* at 556.

⁹ 556 U.S. at 1949.

¹⁰ *Lawrence v. Southern Railway-Carolina Division*, 169 S.C. 1, 167 S.E. 839 (1933).

Sutton states “These defendants allege that the plaintiff’s complaint fails to state facts sufficient to constitute a cause of action against them.”

Neither gives a clue what is lacking in Plaintiff’s complaint. No matter how carefully she reads the defense, Plaintiff cannot glean any notice as to what element of her claims she failed to state and how she failed to provide plausible factual support.

Because the First and Third Defenses are insufficient under Rule 8(b) pleading standards, they should be stricken.

B. Real Party in Interest (Sutton’s Second Defense)

Sutton asks for dismissal of Plaintiff’s Complaint for violating Rule 17. Sutton presents that Plaintiff is a fictitious person and has not been identified. Ignoring the case law that allows pseudonym filing, Sutton has evidently misinterpreted Rule 17 which provides

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification . . . and such ratification . . . shall have the same effect as if the action had been commenced in the name of the real party in interest.

In short, assuming Sutton is correct; the remedy is clearly not dismissal. Plaintiff has amended her complaint so that she is in compliance with Rule 17 making this defense moot and immaterial so it should be stricken.

C. Failure to Plead Special Damages with Specificity (Landgraff’s Second and Sutton’s Ninth Defense)

Landgraff erroneously states that “Plaintiff alleges special damages without pleading the same with specificity.” Sutton goes further to erroneously state that an “element of various causes of action alleged by the plaintiff is special damages . . . [and] has failed to plead such damages.”

Looking solely to the Amended Complaint, Plaintiff only alleged special damages in one

cause of action – civil conspiracy. In that cause of action, Plaintiff specifically identified the special damages: “Defendants’ combined actions caused Plaintiff to suffer special damages including, but not limited to loss of professional reputation, medical expenses, and future medical expenses.” Thus, this defense should be stricken as patently erroneous.

D. Ineffective Amendment (Landgraff’s Third Defense)

Landgraff does attempt to give some factual basis for this defense. The problem is that it is all false. The Court ordered Plaintiff to amend the pleadings to “Further Identify Defendants.” After that, the Court ordered that Plaintiff be identified as Jane Doe rather than Mary R. McCorvey, Plaintiff amended the pleadings to amend the caption. After considering the Court’s orders, Plaintiff amended her pleadings once as a matter of course in compliance with Rule 15(a). She then further amended her complaint as ordered by the Court. The Court has already ruled on this defense so it should be stricken.

E. Improper Allegations of Civil Conspiracy (Landgraff’s Fourth and Sutton’s Tenth Defense)

Landgraff claims that Plaintiff “improperly attempts to recover damages for an alleged civil conspiracy”; that the law “disallows Plaintiff from recovering damages for the same delicts”; and that “civil conspiracy claims require allegations of special damages” Landgraff gives no factual support for his allegations. He states nothing Plaintiff did that was improper. He ignores Plaintiff’s allegation the Defendants used the videotape for their benefit. He also ignores Plaintiff averment of special damages.

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

the civil conspiracy which are “specific” and “different in nature or character” from those pled for the other two causes of actions.

In essence, these defenses are the same as those in Landgraff’s Second and Sutton’s Ninth Defense. Like them, they should be stricken as patently erroneous, without factual support, and insufficient under Rule 8(b).

F. Privilege (Landgraff’s Fifth Defense)

Landgraff’s total defense is “Some or all of Plaintiff’s claims are barred by the doctrine of privilege.” What claims are barred? What does Landgraff claim he was privileged to do? Clearly, this defense as pled is conclusory, without any factual support, legally insufficient, and should be stricken. The Court of Appeals upheld a trial court’s striking of a similarly worded defense.

In asserting the defense of privilege, Encompass’s allegation in its answer reads in its entirety: “Defendant pleads the affirmative defense of privilege.” This statement alone is purely a legal conclusion and clearly falls below the standard mandated by Rule 8. Therefore, we find no abuse of discretion in the trial court’s striking this defense.¹¹

This Court should do the same.

G. Justification (Landgraff’s Sixth Defense)

Landgraff’s defense is “Some or all of Simpson’s claims are barred by the doctrine of justification.” What claims are barred? What does Landgraff claim he was justified to do? Landgraff’s next statement does not help – “To the extent Simpson’s allegations in any way prove true, which is denied, Landgraff’s actions proved justified as an exercise of rights available to him under common law.” What rights? “This statement alone is purely a legal conclusion and clearly falls below the standard mandated by Rule 8.”¹² As such, it should be stricken.

¹¹ *RoTec Services* at 884.

¹² *Id.*

H. *Ex Turpi Causa (Landgraff's Seventh and Sutton's Eleventh Defense)*

Landgraff alleges that "Some or all of Simpson's claims are barred by the doctrine of *ex turpi causa*. It is a well-founded principle of law that no person can acquire a right of action from their own unlawful act. One who participates in an unlawful act cannot recover damages for the consequences of that act. In addition, no wrongful intrusion can occur in instances where Simpson enjoyed no lawful right to be present and was engaging in activities contrary to law and public policy of the State of South Carolina." Problematically, Landgraff does not identify the activities, the law, or the public policy.

Sutton alleges that Plaintiff "seeks to profit from his or her own unlawful acts" before reciting her understanding of the doctrine of *ex turpi causa*. Sutton also does not identify any activities, the statutory or common law, or public policy.

Let's first dispose of Landgraff's patently ridiculous assertion. In his answer, Landgraff denies that Plaintiff was a frequent and sometimes overnight guest at his and his wife's house. He now asserts that Plaintiff had no right to be present in there. Yet, he sets up a hidden video camera in the bedroom to record her. Why go to all the trouble if she weren't going to be there?

On the other hand, Plaintiff and Landgraff's wife have both given sworn testimony that Landgraff set the whole evening up. He told them he was leaving town. Concerned about the workers building a new house next door, Landgraff wanted Plaintiff to stay with his wife so that she would not be alone. Not that it matters to the alleged crime committed, but which story makes more sense?

Next, let's dispose of the public policy arguments. Neither Landgraff, nor Sutton identify what public policy Plaintiff violated. An understandable omission since a careful review of all the offenses against public policy in South Carolina confirm that she has not violated any of

them under any reading of the facts of this case.¹³ As a result, without further guidance from the Defendants, we are forced to chalk this up to boilerplate and meaningless language.

The defense of *ex turpi causa* is a rule that prevents a claimant from using the courts to obtain compensation for loss which he has suffered as a result of his own acts. The four reported cases in South Carolina deal with attempting to enforce illegal contracts.¹⁴ The defense arises from English law:

The principle of public policy is this, *ex dolo malo non oritur action*. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise, the cause of action appear to arise *ex turpi causa*, or a transgression of a positive law of this country, there the Court says he has no right to be assisted." - *Holman vs. Johnson*, (1775) 1 Cowp., 343.

In this case, Defendants propound that Plaintiff committed adultery and is seeking to recover compensation that she has suffered as a result. The defense fails (1) on the facts of what Plaintiff seeks to recover and (2) because Plaintiff did not commit adultery.

Even if Landgraff and Sutton were correct that Plaintiff committed adultery, their defense fails. Plaintiff is not seeking to profit from her acts, unlawful or otherwise. She is seeking to be

¹³ Chapter 17 of Title 16 of the South Carolina Code of Laws enumerates the "Offenses Against Public Policy" -- barratry; desecration or mutilation of flags; improper use of names; conspiracy; disturbing schools; unlawful communication; regulation of unsolicited consumer telephone calls; regulation of automatically dialed announcing device; refusal to relinquish party telephone line for emergency call; eavesdropping, peeping, voyeurism; contributing to the delinquency of a minor; custodial interference; sale or purchase of tobacco products or alternative nicotine products for minors; distribution of tobacco product or alternative nicotine product samples; cigarette packages violating certain federal laws; enticing enrolled child from attendance in school; disturbance of religious worship; wilfully, knowingly or maliciously disturbing funeral service; public disorderly conduct; bribery with respect to agents, servants or employees; bribery of athletes and athletic officials; assault or intimidation on account of political opinions or exercise of civil rights; interference with fire and police alarm boxes; removing State line marks; destruction or desecration of human remains or repositories thereof; soliciting emigrants without licenses; blackmail; cockfighting; using dry wells for sewerage in towns of 500 or over; record shall be kept by dealers in crossties; secondary metals recycler permits to purchase, transport or sell nonferrous materials; fortunetelling for purpose of promoting another business; tattooing; resale of ticket to event; impersonating law enforcement officer; filing of false police reports; charges for political advertisements in newspapers; and sale or possession of "cigarette load".

¹⁴ *Dudley v. Odom*, 5 S.C. 131, 134 (1874) (Two creditors contract not to bid against each other at public sale); *Johnson v. Clarke*, 15 S.C. 72 (S.C. 1880) (Usurious interest rate for note in estate); *Harvin v. Weeks*, 45 S.C.L. 601 (S.C.App.Law 1858) (Contract to defraud creditors); *Kenneth & Gibson v. SC Railroad Company*, 49 S.C.L. 284 (S.C.App.Law 1868) (Exaction of illegal rates for shipping freight).

compensated for the damages that Landgraff and Sutton caused her by their actions. They intruded on her privacy not to be videotaped without her consent. As long as Landgraff and Sutton secretly videotaped a private aspect of Plaintiff, her relationships, or communications, the content of the videotape is irrelevant. Significantly, the damages from the intentional infliction of emotional distress and civil conspiracy are solely a result of Defendants' actions. Even if Plaintiff did commit a crime, it would not impact her ability to recover those damages.

Accepting Landgraff and Sutton's argument would be paramount to saying that wiretapping is not illegal if they recorded Plaintiff committing a crime. To the contrary, the act of wiretapping is illegal regardless of what is recorded.

More importantly, Plaintiff did not commit the crime of adultery. Thus, the defense of *ex turpi causa* fails on the merits. The relevant questions are as follows:

1. Did Plaintiff violate a federal statute prohibiting adultery?
2. Did Plaintiff violate a South Carolina statute prohibiting adultery?
3. Did Plaintiff commit the common law crime of adultery?

Plaintiff is not in the military so violation of the Uniform Code of Military Justice is not possible. Her actions on private property in Greenville, SC violate no federal statute proscribing adultery. So, the answer to Question 1 is "no".

The first legislative enactment in South Carolina making adultery a crime was in 1880. Thirty-two years earlier, the Court of Appeals of Equity of South Carolina defined adultery in a *civil* case addressing whether a man can give more than ¼ of his estate to a single woman with whom he lived "in adultery" without violating the Act of 1795.¹⁵ That Court stated, "Adultery is familiarly known in law, as the illicit intercourse of two persons, one of whom, at least, is

¹⁵ *Hull v. Hull*, 21 S.C.Eq. (Strob) 174 (1848).

married.”¹⁶ This definition has been adopted by Family Courts as a ground for divorce and as a bar to alimony,¹⁷ but was explicitly rejected by the legislature in defining adultery in the criminal code.

The current criminal code defines adultery as “the living together and carnal intercourse with each other or habitual carnal intercourse with each other without living together of a man and woman when either is lawfully married to some other person.”¹⁸ This is the same definition used by the S.C. Supreme Court addressing the statutory crime of adultery 125 years earlier.¹⁹

In interpreting a statute, the first question is whether the statute is clear on its face. “When a statute’s terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.”²⁰

While the term “carnal intercourse” is not defined in the statute, it clearly requires the behavior to be “between a man and woman”.²¹ Since the Garden of Eden, the terms “man” and

¹⁶ *Id.* Curiously, even if the legislature had adopted this definition, activity connived and condoned by Landgraff is not illicit.

¹⁷ *Panhorst v. Panhorst*, 390 S.E.2d 376, 301 S.C. 100 (S.C.App. 1990).

¹⁸ South Carolina Code of Laws § 16-15-70.

¹⁹ *State v. Carroll*, 30 S.C. 85, 8 S.E. 433, 433 (S.C. 1889).

²⁰ *Miller v. Aiken*, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005); *Carolina Power & Light Co. v. City of Bennettsville*, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). If a statute’s language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning. *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003); *Paschal v. State Election Comm’n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995); *see also City of Camden v. Brassell*, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct.App.1997) (“Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature’s language.”). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. *Bayle v. S.C. Dep’t of Transp.*, 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct.App.2001). The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. *Durham v. United Cos. Fin. Corp.*, 331 S.C. 600, 604, 503 S.E.2d 465, 468 (1998); *Adkins v. Comcar Indus., Inc.*, 323 S.C. 409, 411, 475 S.E.2d 762, 763 (1996); *Worsley Cos. v. S.C. Dep’t of Health & Envtl. Control*, 351 S.C. 97, 102, 567 S.E.2d 907, 910 (Ct.App.2002); *see also Timmons v. S.C. Tricentennial Comm’n*, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970) (observing that where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature’s language).

²¹ Curiously, other references in South Carolina statutes and court cases use the terms “sexual intercourse” and “illicit intercourse”, but not “carnal intercourse” which is only used in Chapter 15 of Title 16 of the South Carolina Code of laws. While sexual intercourse and carnal intercourse are not defined, the legislature distinguished

“woman” have been crystal clear and unambiguous on their face. Thus, the Court must apply their literal meaning and has no right to impose another meaning.

As Defendant’s have also made crystal clear, this case does not involve a man and a woman. Thus, Plaintiff has not violated the South Carolina statute prohibiting adultery. So, the answer to Question 2 is “no”.

Adultery is not a common law crime in South Carolina. In 1712, South Carolina enacted the reception statute which incorporated the body of English common law into the jurisprudence of South Carolina.²² “The reception statute provides: “All, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section.”²³ Adultery was not a crime at common law in England so it was not incorporated into the common law of South Carolina by the reception statute.²⁴

Adultery was an offense of exclusively ecclesiastical cognizance in England.²⁵ The “jurisdiction of those courts was not conferred by the Constitution of 1790 or by the statutes passed under the power conferred upon the General Assembly by Article 3 of that Constitution upon any court in South Carolina.”²⁶

intercourse from other sexual activities in the criminal context by defining sexual battery in S.C. Code Ann. § 16-3-651(h) (“‘Sexual battery’ means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes.”)

²² *Huff v. Jennings*, 319 S.C. 142, 459 S.E. 2d 886 (Ct. App. 1995); *State v. McAteer*, 511 S.E. 2d 79, 333 S.C. 615, 618 (S.C. App. 1998)

²³ *McAteer* at 618; S.C. Code Ann. § 14-1-50 (1976)

²⁴ *Wardlaw v. Peck*, 282 S.C. 199, 208, 318 S.E. 2d 270, (1984) (“During this period of judicial retrenchment, the English courts settled the rule that words imputing sexual immorality to the plaintiff, without more, would not give rise to an action at common law. . . . Such defamation was considered merely spiritual because adultery and fornication were not common law crimes.”)

²⁵ “Yet, in the particular circumstance of adultery, other courts have concluded that it makes more sense to look at the canon law. Because adultery, unlike other crimes, was *not* a common law crime, they have reasoned that the common law provides less assistance than it normally does as a tool for statutory interpretation, whereas the canon law definition is more appropriate that it otherwise would be because it was the ecclesiastical courts in England that were given the task of defining and punishing people for engaging in adulterous conduct.” Peter Nicolas, *The Lavender Letter*, 63 Florida Law Review 97 (2011).

Plaintiff identified no South Carolina court has created or recognized a common law crime of adultery. To the contrary, before it became a statutory offense, adultery was “not an indictable offense in this state: nor can an indictment be maintained for living in adultery by charging it as an offense against public decency”²⁷ So, the answer to Question 3 is “no”.

In short, Plaintiff has committed no illegal or immoral act that is against public policy. Therefore, the defense of *ex turpi causa* fails and should be stricken.

I. Willful Publication/Consent (Landgraff's Eighth and Sutton's Sixth and Twelfth Defenses)

Landgraff avers willful publication claiming that “Plaintiff voluntarily submitted an affidavit in prior court filings wherein she divulged detailed information about the private affairs she now claims supports her claim for intrusion.” Sutton avers previous disclosure of “events or occurrences which give rise to his or her causes of action” Nothing could be further from the truth and Plaintiff urges Landgraff and Sutton to stop deceiving the Court about this issue.

This is an action for wrongful intrusion into private affairs, not wrongful publication of private affairs. The one affidavit that Plaintiff presented in a closed courtroom to a file that was sealed was presented before Plaintiff even knew a videotape existed. How could she disclose something of which she had no knowledge? These assertions confirm that Defendants evidently misunderstand the intrusion claim. More likely, they are purposely trying to shift the focus away from their actions. The intrusion was the spying and making the videotape -- the content of the videotape is irrelevant.²⁸

²⁶ *Davis v. Whitlock*, 90 S.C. 233, 73 S.E. 171, 174 (1911)

²⁷ SC Digest, 1783-1886 Vol. 1, West Publishing Co. summarizing *State v. Brunson*, 2 Bailey 149.

²⁸ i.e., *In re Marriage of Tigges*, 758 N.W.2d 824 (Iowa 2008) (“Although the tape was not offered in evidence, we credit [Wife’s] testimony that it recorded the ‘comings and goings’ from the bedroom she regularly used. Notwithstanding the unremarkable activities recorded on the tape, [Wife] suffered damage as a consequence of [Husband’s] actions.” “The wrongfulness of the conduct springs not from the specific nature of the recorded activities, but instead from the fact that [Wife’s] activities were recorded without her knowledge and consent at a time and place and under circumstances in which she has a reasonable expectation of privacy.”)

Both Landgraff and Sutton aver the defense of consent. Sutton includes that Plaintiff “implicitly or explicitly consented to the surveillance complained of” Fatal to their defense, both just make the allegation with absolutely no factual support. What consent did Plaintiff give?

“Consent may be found where the evidence shows a voluntary agreement to do something proposed by another, and the party consenting possesses sufficient information and ability to make an intelligent choice.”²⁹ Landgraff and Sutton never proposed to Plaintiff that she voluntarily agree to allow them to intrude on her private affairs, damage her emotionally, or conspire to damage her. Needless to say, Plaintiff never consented to their actions.

Because the Eighth and Sixth Defenses are insufficient under Rule 8 pleading standards, they should be stricken.

J. Improper Remedies (Landgraff’s Tenth Defense)

Landgraff’s total defense is that “Plaintiff’s Prayer for Relief seeks remedies unavailable under the claims alleged.” He fails to give even a passing effort to identifying what remedies are unavailable to which claim. This Defense gives Plaintiff no statement of facts so that it is insufficient under Rule 8(b) pleading standards and should be stricken.

K. Failure to Join Indispensable Party (Sutton’s Fourth Defense)

Sutton alleges that Plaintiff “failed to join parties who are indispensable to the just resolution of this matter.” Who? Plaintiff is left to guess. Sutton gets the remedy wrong by saying the “matter must be dismissed for failure to join those parties, pursuant to Rule 12(b)(7) and Rule 19(a).” To the contrary, the proper remedy is that “the court shall order that he be made a party.”³⁰ Since only Sutton knows the identity of said parties, the Court should order

²⁹ *Hawkins By and Through Hawkins v. Multimedia, Inc.*, 344 S.E.2d 145, 288 S.C. 569 (S.C. 1986).

³⁰ SCRCP 19(a).

Sutton to reveal their identity and then order their joinder.

L. Punitive Damages (Sutton's Seventh Defense)

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

Sutton offers no explanation of the specific provision for punitive damages in *Snakenburg*³¹ case that recognized the claims for invasion of privacy in South Carolina. Sutton also ignores the chain of cases handed down by the U.S. Supreme Court that do not support this assertion. In addition, she ignores the statutory provision for punitive damages in SC Code of Laws §15-32-510.

Again, Sutton provides not one fact to inform Plaintiff what she did that precludes punitive damages “in this cause.” Because this Defense is insufficient under Rule 8 pleading standards and erroneous, it should be stricken.

M. Assumed the Risk (Sutton's Eighth Defense)

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

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

³¹ *Snakenberg v. Hartford Casualty Ins. Co., Inc.*, 383 S.E.2d 2, 299 S.C. 164 (S.C. App. 1989).

himself to the danger.”³²

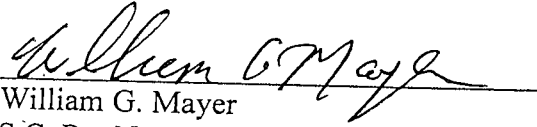
Sutton gives no fact that indicates that Plaintiff knew that the defendants were going to intrude on her private affairs, damage her emotionally, or conspire to damage her. She could have no knowledge that Defendants were videotaping her. By their own admission, they installed a hidden, motion-activated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

Plaintiff has no notice of the facts constituting this defense. Because this Defense is implausible and insufficient under Rule 8(b) pleading standards, it should be stricken.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court strike the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Affirmative Defenses of Defendant Landgraff and the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and Twelfth Defenses of Defendants Carol Sutton and Carol Sutton & Associates-Investigations, Inc.

Respectfully submitted,


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

October 30th, 2014
Greenville, SC

³² *Senn v. Sun Printing Co.*, 295 S.C. 169, 367 S.E.2d 456 (Ct.App.1988).

STATE OF SOUTH CAROLINA FILED BY CLERK OF COURT IN THE COURT OF COMMON PLEAS
GREENVILLE CO. S.C.
COUNTY OF GREENVILLE PAUL E. WICKER CIVIL Action No. 2013-CP-23-01762

Carol Simpson,

2014 NOV 24 PM 12 24

Plaintiff,

vs.

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

Defendants.

SUPPLEMENTAL MEMORANDUM
SUPPORTING SUMMARY JUDGMENT

Frank A. Landgraff ("Landgraff") respectfully submits this supplemental memorandum supporting his motion for summary judgment. The instant case is absurd. The Court should, therefore, grant Landgraff's summary judgment motion for the following reasons:

1) PLAINTIFF FAILED TO SERVE TIMELY OPPOSITION AFFIDAVITS.

Landgraff's motion for summary judgment sought summary judgment based *inter alia* upon the lack of evidence supporting each element of Plaintiff's three claims (*i.e.*, intrusion, outrage, and civil conspiracy). Baughman v. AT&T, 306 S.C. 101, 115 (1991) ("With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility "may be discharged by 'showing' -- that is, pointing out to the [trial] court -- that there is an absence of evidence to support the nonmoving party's case.") Plaintiff was, therefore, required but did not serve on Landgraff opposing affidavits—demonstrating the existence of disputed material facts for a jury to decide—forty-eight hours in advance of the hearing held on Monday November 17, 2014. See Rule 6(d), SCRCP ("[O]pposing affidavits may be served not later than two days before the hearing.") Accordingly, the Court should grant summary judgment in

Landgraff's favor because Plaintiff failed to interpose timely affidavits opposing Landgraff's summary judgment motion.¹

2) **NONE OF THE UNTIMELY AFFIDAVITS PLAINTIFF DID FILE ESTABLISH ANY ELEMENT OF ANY OF HER THREE CLAIMS.**

Not one of the ten (10) affidavits submitted by Plaintiff establishes an issue of material fact as to any element of her claims for intrusion, outrage, or civil conspiracy.² Without leave of the Family Court, Plaintiff simply recycled all of the affidavits found in the sealed Family Court record as of August of 2010. At that snapshot in time, none of the affiants—as reflected in the content of their affidavits—even knew Landgraff had positive evidence (*i.e.*, video footage) of Carol Simpson's³ adultery with Lynn Landgraff.⁴ As a result, none of the affidavits discuss the video or anything relevant to this case, despite Plaintiff's representations.

¹ Plaintiff only served opposing affidavits on Landgraff *after* the Court's hearing on Monday November 17, 2014. Indeed, Plaintiff served a copy of her memorandum in opposition on Friday November 15, 2014 but withheld all of the opposing affidavits from Landgraff. (See Attached Ex. A.) Even if Simpson had served the affidavits with her memorandum, opposing affidavits were required to be filed and served by Thursday November 14, 2014. Importantly, Landgraff takes exception to Plaintiff's serial disregard of the Court's rules and orders, which have prejudiced him.

² Plaintiff submitted the following affidavits into the record: Jann Faiga Affidavit; Bobby Thompson Affidavit; Joint Affidavit of William K. Haney and Suzanne Haney; Hester Billings Affidavit; Sarepta Wilson Affidavit; Van Wilson Affidavit; Harold Lefkowitz; Andrea Gum Affidavit; Lynn Mulligan Affidavit; Carol Simpson Affidavit.

³ Indeed, Simpson's affidavit proves highly disingenuous when compared to the evidence of her actual extra-marital conduct, as unearthed in the Landgraff divorce proceedings.

⁴ Notably, all of the affidavits filed by Plaintiff were sealed by the Family Court. Unlike Simpson's affidavit, the materials were not publicly filed in this Court before the Family Court sealed the materials. Nonetheless, Simpson filed the materials in the public record notwithstanding the Family Court Order.

a. The evidence supports none of the elements of Plaintiff's wrongful intrusion claim.

As noted during the hearing on November 17, 2014, Plaintiff's wrongful intrusion claim has the following elements: (i) an intrusion; (ii) into that which is private; (iii) which is substantial and unreasonable enough to be legally cognizable; and (iv) the act was intentional. Snakenberg v. Hartford Casualty Ins. Co., 299 S.C. 164, 171 (S.C. Ct. App. 1989). Plaintiff's affidavits do not even relate to her claims, let alone do they establish the elements of wrongful intrusion. Nowhere does the evidence even establish the most basic facts such as:

- Plaintiff failed to submit a video into the Court record.
- No evidence establishes an intrusion occurred; none of Plaintiff's affidavits even reference a video and no evidence of record even discusses one.
- No evidence establishes what is on any video.
- No evidence establishes the facts or circumstances surrounding the video's making.
- No evidence establishes who is on the video or what conduct is on the video.
- No evidence establishes that what is on the video is private.
- No evidence establishes that what is on the video is of such a nature as to render an intrusion substantial or unreasonable enough to be legally cognizable.
- No evidence establishes any action as being intentional.
- No evidence establishes damages.

During the hearing, Plaintiff cited a litany of facts to the Court as supporting her claims. When Landgraff questioned the factual basis for her assertions (*i.e.*, where they appeared in the record), Plaintiff's counsel indicated they were in the—as of yet—un-served affidavits. But they were not. The Court should grant summary judgment as to the wrongful intrusion claim.

b. The evidence supports none of the elements of Plaintiff's outrage claim.

None of the affidavits filed by Plaintiff establish any element of Plaintiff's outrage claim. To establish a claim for outrage (or intentional infliction of emotional distress), Plaintiff must show: (i) an intentional and reckless infliction of severe emotional distress; (ii) conduct so extreme and outrageous as to exceed all possible bounds; (iii) Defendant's actions caused Plaintiff's emotional distress; and (iv) the emotional distress suffered by Plaintiff was so severe no one could be expected to endure it. Ford v. Hutson, 276 S.C. 157 (1981). Like Plaintiff's intrusion claim, because none of the affidavits actually relate to the asserted claims, none of the evidence establishes any element of the tort of outrage.

In this regard, the evidence fails:

- To establish Landgraff intended or recklessly caused emotional distress; indeed, no evidence demonstrates any distress or relates to any of the conduct alleged against Landgraff;
- No evidence demonstrates any conduct on the part of Landgraff, let alone conduct so extreme and outrageous as to exceed all possible bounds;
- No evidence demonstrates distress on the part of Plaintiff nor does it establish any conduct of Landgraff caused the distress;
- No evidence demonstrates distress so severe no one could be expected to endure it;
- No evidence demonstrates Plaintiff sustained damages whatsoever.
- No evidence even discusses the video tape Plaintiff complains about;
- No evidence discusses what is on the video tape Plaintiff complains about;
- No evidence discusses the facts and circumstances surrounding the video tape.

Plaintiff has failed to discharge her summary judgment burden as to her outrage claim.

If Rule 56, SCRPC and the jurisprudence under the same mean anything, this Court should dismiss Plaintiff's outrage claim.

c. The evidence supports none of the elements of Plaintiff's civil conspiracy claim.

None of the affidavits submitted by Plaintiff support her claim for civil conspiracy. To establish a claim for civil conspiracy, Plaintiff must show: (i) a combination of 2 or more people; (ii) for the purpose of injuring Plaintiff; (iii) which caused special damages. LaMotte v. Punchline, 296 S.C. 66 (1988). Here, none of the affidavits relate to any of the *prima facie* elements for civil conspiracy.

Plaintiff's opposing affidavits fail, as follows:

- No evidence demonstrates a combination of two or more people;
- No evidence establishes the combination of two or more people was for the purpose of injuring Plaintiff;
- No evidence establishes Plaintiff sustained damages whatsoever let alone special damages;
- No evidence of record even discusses a video tape let alone its content or the circumstances of its making.

Accordingly, the Court should grant summary judgment to Landgraff.

Landgraff has a procedural right to avoid the cost and expense of litigating this case and trying it to a jury, unless Plaintiff can make a minimal threshold showing establishing the existence of disputed facts for the jury to decide. Plaintiff failed. Now, out of fairness, the Court should no longer ignore Plaintiff's disregard for the Court's procedural rules. Now, out of fairness, the Court should dismiss this case.

3) THE COURT SHOULD DISMISS PLAINTIFF'S INTRUSION AND OUTRAGE CLAIMS AS A MATTER OF LAW.

While Plaintiff might laugh—out of the Court's presence—about getting away with pursuing this case as far as she has, she has not yet escaped the Court's gate-keeping function as to her claims for intrusion and outrage.

a. Intrusion fails as a matter of law.

As to her intrusion claim, the issue as to whether the Plaintiff has demonstrated an intrusion that is "substantial and unreasonable" is "in the first instance, a question of law for the Court." Snakenberg v. Hartford Casualty Ins. Co., 299 S.C. 164, 171 (S.C. Ct. App. 1989). As a matter of law, Plaintiff has failed to introduce any evidence of an intrusion, let alone evidence demonstrating its substantiality and unreasonableness. As a consequence, then, Plaintiff also failed to demonstrate that the alleged intrusion was "substantial and unreasonable" enough to support a legal claim. The Court should, therefore, dismiss the intrusion claim on this ground as well.

b. Outrage fails as a matter of law.

As to her outrage claim, "whether the conduct alleged by Plaintiff constitutes extreme and outrageous conduct is a threshold legal issue for the Court to decide." Hainer v. Am. Med. Int'l., 320 S.C. 316, 324 (Ct. App. 1995). None of Plaintiff's affidavits relate to the conduct alleged against Landgraff. They, therefore, cannot—by definition—establish extreme and outrageous conduct. The Court should—if this common law standard is to have any meaning whatsoever—dismiss this claim immediately.

4) **AS TO HER CIVIL CONSPIRACY CLAIM, PLAINTIFF FAILED: TO PLEAD SPECIAL DAMAGES CORRECTLY AND FAILED TO INTRODUCE ANY EVIDENCE SHE SUSTAINED SPECIAL DAMAGES.**

Not only does Plaintiff's Complaint fail to plead damages with the requisite particularity, see Rule 9(g), SCRCF, she has now failed to introduce any evidence demonstrating the existence of any special damages. Thus, Plaintiff's claim for civil conspiracy should be summarily adjudged.

5) **THE DOCTRINES OF EX TURPI CAUSA/IN PARI DELICTO BAR PLAINTIFFS' CLAIMS, EVEN IF SHE HAD SATISFIED HER SUMMARY JUDGMENT OBLIGATION.**

In South Carolina, a Plaintiff cannot recover damages arising out of her own wrongdoing or unlawful act. Compare Jackson v. BI-LO, 313 S.C. 272 (1993) ("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.") with Myatt v. RHBT Fin. Corp., 370 S.C. 391, 395 (S.C. Ct. App. 2006) ("The doctrine of *in pari delicto* is "[t]he principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing.") Here, even if all of Plaintiff's allegations proved true, which they patently are not, Carol Simpson committed adultery with Landgraff's wife. See RGM v. DEM, 306 S.C. 145, 149 (1991) ("Homosexual activity between persons, at least one of whom is married to someone other than the sexual partner, constitutes adultery.") Adultery violates the public policy of the State of South Carolina.⁵ Plaintiff, in this way, asks this Court to stamp its imprimatur on Carol Simpson's

⁵ In addition, both the acts of adultery and buggery are illegal. S.C. Code §§16-15-70 & 16-15-120.

wrongful conduct by allowing her to use South Carolina's court systems to pursue a damage claim arising out of conduct that is both against public policy and unlawful. This Court—as a matter of law—should refuse to do so.

6) LANDGRAFF'S SUMMARY JUDGMENT MOTION IS NOT PREMATURE.

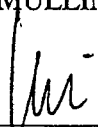
Landgraff's summary judgment motion proves timely. The instant case is approaching two years old. The case is slated on the trial calendar for March of 2015. Plaintiff has had ample time to conduct discovery. Moreover, Plaintiff has not filed a Rule 56(e) affidavit indicating she has had insufficient time to conduct discovery. And, Plaintiff has not otherwise argued she needs additional time to conduct discovery. Accordingly, the motion is ripe for the Court to adjudicate.

CONCLUSION

Certain cases present the prospect of bringing the jury trial system into disrepute. This is one of them. However, that risk has now abated because Plaintiff failed to meet her obligations in response to Landgraff's summary judgment motion.

Because Plaintiff failed to follow the Rules of Civil Procedure, because Plaintiff failed to meet her summary judgment burden, because the Court should exercise its gate-keeping function, because the Court should dismiss two of Plaintiff's claims as a matter of law, because Plaintiff did not plead special damages nor did she introduce any evidence of the same, because the doctrines of *ex turpi causa* and *in pari delicto* bar Plaintiff's claims, and because allowing the instant case to proceed will tarnish the integrity of the jury trial system due to its pure absurdity, this Court should dismiss Plaintiff's claims *with prejudice*.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Timothy E. Madden, SC Bar No. 11786

E-Mail Address: tim.madden@nelsonmullins.com

Lane W. Davis, SC Bar No. 68796

E-Mail: lane.davis@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

Greenville, South Carolina

Attorneys for Frank A. Landgraff

Nov - 21, 2014

EXHIBIT A

Lane Davis

From: Mr Mayer's Office <mrmayersoffice@aol.com>
Sent: Friday, November 14, 2014 3:10 PM
To: Lane Davis
Cc: Laurie Jennings
Subject: Re: Motion "MSUMJM-Motion/Summary Judgment" for Case "2013CP2301762-Mary R McCorvey , plaintiff, et al vs. Jane Roe , defendant, et al" was added to a Motions Roster for 11/17/2014 at 10:00 AM
Attachments: Landgraff Memo.pdf

Lane,

I look forward to seeing you Monday morning. Attached is a copy of Brief in Opposition to Motion for Summary Judgment.

-----Original Message-----

From: Lane Davis <lane.davis@nelsonmullins.com>
To: Joe Mooneyham (joe@mbllc.com) <joe@mbllc.com>
Cc: mrmayersoffice <mrmayersoffice@aol.com>
Sent: Fri, Nov 14, 2014 11:33 am
Subject: Motion "MSUMJM-Motion/Summary Judgment" for Case "2013CP2301762-Mary R McCorvey , plaintiff, et al vs. Jane Roe , defendant, et al" was added to a Motions Roster for 11/17/2014 at 10:00 AM

Joe and Bill:

As per prior correspondence and to recap, the following motions will be heard at 10 AM on Monday:

Landgraff's motion to compel;
Plaintiff's motion to strike;
Landgraff's motion for summary judgment.

I will see you then.

Best regards,

Lane Davis
Nelson Mullins Riley & Scarborough, LLP

-----Original Message-----

From: roster@greenvillecounty.org [<mailto:roster@greenvillecounty.org>]
Sent: Monday, November 10, 2014 12:07 PM
To: Lane Davis
Cc: slopez@greenvillecounty.org; Laurie Jennings
Subject: Motion "MSUMJM-Motion/Summary Judgment" for Case "2013CP2301762-Mary R McCorvey , plaintiff, et al vs. Jane Roe , defendant, et al" was added to a Motions Roster for 11/17/2014 at 10:00 AM

A Hearing in this case is SCHEDULED - DATE and TIME reflected above Movant is responsible to notify all counsel and/or self represented parties.
CHECK THE ONLINE ROSTER at <http://www.greenvillecounty.org/scjd/courtrosters/>
Please address requests for continuance to the Chief Administrative Judge: send via e-mail to the Non-Jury Coordinator and copy all counsel and/or parties if pro se If Resolved or Withdrawn please contact Steve Lopez (864)467-8546
njcoord@greenvillecounty.org **MEMO REQUIREMENTS** at
<http://www.greenvillecounty.org/courtsupport/MemPolicies.asp>
(File w Clerk AND Deliver paper copy of Brief or Memo to Presiding Judge 72

Hours Prior to Hearing)

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Carol Simpson,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. 2013-CP-23-01762

PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANT FRANK A.
LANDGRAFF'S MOTION FOR SUMMARY
JUDGMENT

Frank A. Landgraff's ("Landgraff") alleges that "[N]o issue of material facts exists as to any element of any claim asserted by Plaintiff" While it is difficult to respond to nothing but his unsupported statements, Plaintiff cites the following facts to contradict Landgraff's declarations. Plaintiff provides support for her statements summarized below in the Paragraphs indicated.

¶	Landgraff's Allegations	Facts in a "light most favorable" to Plaintiff
1	"Even if Plaintiff could otherwise demonstrate an 'intrusion' . . . which she cannot"	She actually does demonstrate his intrusion through Landgraff's affidavit and the existence of the videotape. Certainly, his intrusion was intentional.
2	Intrusion "into her privacy"	The correct legal standard is intrusion "into that which is private".
3	"all such allegations fail to constitute a 'substantial and unreasonable' intrusion so as to sustain relief?"	How do they fail?
4	"Plaintiff complains because a video camera . . . caught Plaintiff. . . ."	Plaintiff denied this allegation in her discovery responses.
5	"unlawful relations"	There were no unlawful relations per U.S. Supreme Court, SC statutes, and SC case law.
6	"while Landgraff was out of town"	His affidavits indicate he may have been in town and his location is irrelevant.
7	"no lawful right to be in Landgraff's bedroom"	Plaintiff had a lawful right to be there.

8	"Plaintiff would not have appeared on the video committing unlawful acts"	Plaintiff would appear on the video by walking in the room.
9	"Plaintiff cannot claim Landgraff's installation of a video camera in his own home and in his own bedroom constitutes 'extreme and outrageous' behavior as a matter of law"	She doesn't.
10	"Fails to allege special damages with sufficient particularity"	What is insufficient?
11	"Nor does Plaintiff have any evidence supporting her claim of special damages."	While Plaintiff is not required to provide evidence in her Complaint to support the ultimate facts, the evidence is apparent.
12	"All of Plaintiff's claims are barred by the doctrine of <i>exturpi causa</i> ."	Plaintiff is not guilty of any unlawful.
13	"Absent Plaintiff's unlawful conduct, none of the issues about which she complains could or would have occurred"	Tort exists even if no activity occurs.

1. Intruding is, "watching, spying, prying, besetting, overhearing, or other similar conduct."¹
Landgraff admits that he used a motion-sensitive hidden camera to make a videotape of Plaintiff.
Using the ordinary meaning of the words, this is certainly watching and spying. Thus, Plaintiff has demonstrated an intrusion.
2. Landgraff has misread the standard for a wrongful intrusion into private affairs. While this tort involves the right to privacy, it is significantly different than the other privacy torts.² The invasion is not into some expectation of "privacy", but an intrusion into what is "private" as opposed to public. The United States Supreme Court has stated that behavior such as Plaintiff's is private.³
3. Landgraff seems to think that his declaring something to be true makes it true. It does not. He must give some indication of how the allegation fails to be "substantial and unreasonable".

¹ *Shakenberg v. Hartford Casualty Ins. Co., Inc.*, 383 S.E.2d 2, 299 S.C. 164 (S.C. App. 1989).

² *Id.* at 171.

³ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.")

Judging by the damage Plaintiff has suffered the intrusion was very substantial and completely unreasonable.

4. Plaintiff complains about Landgraff's intrusion. *His* trespass upon her solitude is the issue, not *her* behavior. The act of wiretapping is illegal, regardless of what is recorded.
5. In *Lawrence v. Texas*, the United States Supreme Court stated that "It is not until the 1970s that any State singled out same-sex relations for criminal prosecution, and only nine states have done so." According to the Court, South Carolina was not one of those states. Plaintiff fully addressed the issue of a crime under South Carolina statute and common law on pages 7-12 of her Memorandum in Support of Plaintiff's Motion to Strike. Landgraff's declaration is meaningless. Only a judge or jury can declare Plaintiff's actions unlawful.
6. Based on the timetable in Defendants' affidavits, Landgraff may not have been out of town.
7. Landgraff gives no indication of what was unlawful about Plaintiff's presence. She did not break into the house. To the contrary, Landgraff and his wife invited Plaintiff to be a guest in their home. Significantly, based on the attached affidavits, the Family Court made an initial finding that Landgraff may have connived to be certain that Plaintiff was present and engaging in the activity he intentionally videotaped.
8. Landgraff describes the camera he installed as motion-sensitive. Consequently, Plaintiff would have appeared on the video when she walked into the room and continued to be videotaped as long as she moved in front of the motion sensor. As a result, the intrusion results regardless of Plaintiff's acts.
9. Landgraff's installation of the video camera wrongfully intruded into that which was private. His actions in conniving to be certain that Plaintiff would be present to be recorded and his outrageous conduct after the intrusion comprise the basis for his intentionally inflicting of emotional distress on Plaintiff. For example, a reasonable person would know that Landgraff's actions in Family Court would cause Plaintiff distress. If he were truly just making the videotape in an attempt to prove adultery, revealing Plaintiff's name and printing still shots from the

videotape to enter into the record were legally unnecessary. If he thought such actions were legally necessary, he could have entered the evidence under seal to protect Plaintiff as a third party to that action.

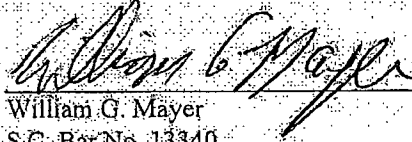
10. As usual, Landgraff simply states that something is insufficient, but does not identify what. Dismissal of a civil conspiracy claim is only appropriate when "a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim."⁴ Plaintiff clearly lists "special damages including, but not limited to loss of professional reputation, medical expenses, and future medical expenses."
11. Simply identifying all of the judges and attorneys to whom Landgraff has chosen to disclose Plaintiff's identity for no bona fide legal reason proves these damages.
12. Landgraff stopped short of properly stating what the Court "held" in the *Jackson v. Bi-Lo* case. The Court stated that "South Carolina courts have reached similar conclusions refusing to aid plaintiffs who are themselves guilty of an illegal act." The attached certified criminal records search is conclusive evidence that Plaintiff is not guilty of an illegal act. In addition, Plaintiff has discussed the issue of whether her behavior was criminal or in violation of the law with both the Greenville County Solicitor and a deputy in the Greenville County Sheriff's office. Both indicated it was not.
13. Plaintiff's conduct or lack thereof is irrelevant. When Landgraff installed the camera he was intentionally "watching, spying . . ." What he was watching just had to be "that which is private" for his behavior to be actionable. The behavior of those he was watching is irrelevant.

⁴ *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115, 682 S.E.2d 871, 874. (In this case, the parties admitted they had committed bribery.)

CONCLUSION

Based on the facts presented above, the Court should deny Landgraff's Motion for Summary Judgment.

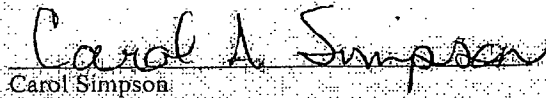
Respectfully submitted,



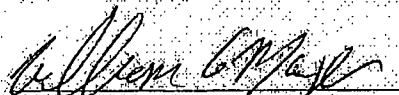
William G. Mayer
S.C. Bar No. 13340
Attorney for the Plaintiff
118 West Main Street
Laurens, SC 29360
864-984-9202 Telephone
864-715-0496 Facsimile

VERIFICATION

PERSONALLY appeared before me the undersigned who, after first being duly sworn, states: That she is the Plaintiff in the foregoing action; that she has read this PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT FRANK A. LANDGRAFF'S MOTION FOR SUMMARY JUDGMENT and the same are true of her own knowledge.


Carol Simpson

SWORN TO BEFORE ME THIS
November 14, 2014


Notary Public for South Carolina
Commission Expires 9-28-18

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Carol Simpson,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
C.A. 2013-CP-23-01762

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO THE DEFENDANT'S
PROPOSED ORDER**

FILED-CLERK OF COURT
GREENVILLE CO. SC.
PAUL E. WILSON, CLERK
DEC 22 5 14 PM '13

Plaintiff objects to the language of the Defendant's Proposed Order granting Landgraff's Motion for Summary Judgment for the following reasons:

1. The Proposed Order Grants Landgraff's Motion Based on a Legal Error
2. The Proposed Order Does Not Meet the Requirements for Proper Summary Judgment Order
3. The Court Did Not Consider the Entire Record Before Preparing the Proposed Order
4. The Proposed Order Shows that the Court Failed to Properly Consider All -- and Only -- the Relevant Evidence in the Record
5. The Proposed Order Contains a Factual Misstatements
6. The Proposed Order Fails to Show Facts that Support A Specific Finding that Defendant Carried His Burden
7. The Proposed Order Fails to Identify the Following Facts and Inferences Presented by Plaintiff and How They Do Not Present a Genuine Issue of Material Fact
8. The Proposed Order Contains No "If Appropriate" Analysis Required by Rule 56(e)
9. The Proposed Order Fails to Address the Other Two Motions Rendered Moot by the Form 4 Order

The Proposed Order Grants Landgraff's Motion Based on a Legal Error

In response to Landgraff's motion, then [sic], Plaintiff was required to file and serve opposing affidavits (or other competent evidence) demonstrating the existence of a material fact for a jury to decide forty-eight hours in advance of the November 17, 2014

hearing. See Rule 6(d), SCRC ("[O]pposing affidavits may be served not later than two days before the hearing."). Plaintiff failed to do so in the time required by Rule 6(d), SCRC. Accordingly, the Court grants Landgraff's motion for summary judgment. Prop. Order, pp. 1-2.

Rule 6(d) actually requires provides that "additional or opposing affidavits may be served not later than two days before the hearing, *unless the court permits them to be served at some other time.*" (Emphasis added). However, the distinction is irrelevant to this case.

Rule 56(c), *not Rule 6(d)*, governs summary judgment proceedings.

(c) Motions and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party *may* serve opposing affidavits not later than two days before the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . . (Emphasis added.)

In other words, Rule 56 does not require Plaintiff to file an affidavit at all. Further, if Landgraff does not carry his initial burden, Plaintiff doesn't have to present any evidentiary matter.¹ If Landgraff carries his burden, Plaintiff cannot rest on her pleadings, "but must, *by affidavit or otherwise*, set forth specific facts to show that there is a genuine issue for trial." (Emphasis added.)² So even then, Plaintiff is not required to file an affidavit if she can *otherwise* set forth specific facts. Significantly, four affidavits are part of the record of this case and they provide copious specific facts.³ Thus, even if Rule 56 required Plaintiff to defend the motion with an affidavit, she has done so with the four already in the record.

Interestingly, the Order that vacated the Order Granting Plaintiff Right to Proceed Anonymously was based on Landgraff's introduction of one of the affidavits. Now, Landgraff states that the following about the very same affidavit: "none of the affidavits discuss the video or anything relevant to this case. . . ."⁴ So to be clear, Landgraff allowed the Court to vacate a prior Order based on an affidavit that he presented to the court knowing that it did not contain "anything relevant to this case."

¹ The "'party opposing summary judgment need not come forward in any way if the moving party has not supported his motion to the point of showing that issue is a sham.' It is also clear from the Advisory Committee's Notes on the 1963 Amendment to Federal Rule 56 that 'where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied, even if no opposing evidentiary matter is presented.'" *Title Ins. Co. of Minnesota v. Christian*, 226 S.E.2d 240, 242, 267 S.C. 71 (S.C. 1976) (internal citations omitted).

² "Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial." *Lord v. D&J Enters., Inc.*, Op. No. 27376, (S.C. 2014) at page 6.

³ See Footnote 49 for an itemized list.

⁴ Landgraff's Supplemental Memorandum Supporting Summary Judgment, p. 2.

The Proposed Order Does Not Meet the Requirements for Proper Summary Judgment Order

“‘[A circuit] court's order on summary judgment must set out facts and accompanying legal analysis sufficient to permit meaningful appellate review.’ ‘Such an order must include those facts which the circuit court finds relevant, determinative of the issues and undisputed.’”. The order should also ‘provide clear notice to all parties and the reviewing court as to the rationale applied in granting ... summary judgment.’”⁵

In this case, the Court simply issued a Form 4 order with instructions for Landgraff's counsel to write “a short order.” The court provided no directive to guide the drafting of the Order. Consequently, the Proposed Order only contains Landgraff's rationale, not the Court's rationale, for granting summary judgment. Notably, the “court's failure to exercise discretion is itself an abuse of discretion.”⁶

The Court Did Not Consider the Entire Record Before Preparing the Proposed Order

The appellate court reviews the Court's grant of summary judgment under the same standard as the trial court.⁷ “It is our duty to undertake a thorough and meaningful review of the trial court's order and the entire record on appeal.”⁸ The trial court has no less a duty to examine the entire record, but failed to do so.

The Court issued its Form 4 order even though part of the record was in a folder in the file room. Plaintiff does not have a complete inventory of what was left in the file room. However, she knows that Plaintiff's First Supplemental Response to Frank A. Landgraff's First Interrogatories, which is one document that Rule 56(c) requires the Court to examine, was in the file room rather in the file when the Court made its decision to grant Landgraff's summary judgment motion.

The Proposed Order Shows that the Court Failed to Properly Consider All -- and Only -- the Relevant Evidence in the Record

When ruling on a motion for summary judgment, the circuit court should examine the “pleadings, depositions, answers to interrogatories, and admissions on file, together with [any]

⁵ *Froneberger v. Kirkland Dale Smith, et al*, 406 S.C. 37, 748 S.E.2d 625, 634 (S.C. App. 2013); Bowen, at page 238.

⁶ *Schmidt v. Courtney*, 357 S.S. 310,, 321-22 592 S.E.2d 326 (S.C. app. 2003); *In re Robert M.*, 294 S.C. 69, 362 S.E.2d 639 (1987); *State v. Smith*, 276 S.C. 494, 280 S.E.2d 200 (1981); *Fields v. Regional Med. Ctr. Orangeburg*, 354 S.C. 445, 581 S.E.2d 489 (Ct.App.2003); *State v. Mansfield*, 343 S.C. 66, 538 S.E.2d 257 (Ct.App.2000); *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (Ct.App.1990). *See Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997) (“When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.”); *Balloon Plantation*, 303 S.C. at 155, 399 S.E.2d at 441 (“It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.”).

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

⁸ *Bowen V. Lee Process Systems Co.*, 342 S.C. 232, 236, 536 S.E.2d 86 (S.C. App. 2000).

affidavits" to determine if "there is no genuine issue as to any material fact."⁹ Rule 56 does not, "distinguish between documents merely filed and those singled out by counsel for special attention--the court must consider both before granting a summary judgment."¹⁰ The Proposed Order indicates that the Court considered only that evidence that was "singled out." Worse, the Proposed Order demonstrates that the Court only considered the Untimely Affidavits and argument of Landgraff's counsel.¹¹

Considering the arguments of Landgraff's counsel is improper. The Supreme Court "has repeatedly held that statements of fact appearing only in argument of counsel will not be considered. . . ."¹² Consequently, "factual statements of counsel, whether made during oral argument or in written briefs or memoranda, ordinarily may not be considered."¹³ Clearly, "where there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record."¹⁴

⁹ *Froneberger*, 748 S.E.2d at page 631.

¹⁰ *Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180, 183-4 (S.C. App., 1986), quoting *Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir. 1980).

¹¹ The following are the references to the Untimely Affidavits are the basis for the Court's decision:

1. "First, none of the Untimely Affidavits demonstrate the existence of a disputed issue of material fact as to the *prima facie* elements of Plaintiff's intrusion claim";
2. "The Untimely Affidavits do not address the elements of Plaintiff's wrongful intrusion.";
3. "Yet, after careful review of the Untimely Affidavits, none of the evidence of record supports Plaintiff's assertions that her intrusion claim is legally and factually viable. Plaintiff's intrusion claim is, therefore, dismissed with prejudice.";
5. "Second, none of the Untimely Affidavits establish any element of Plaintiff's outrage claim.";
6. "Because none of the affidavits actually address Plaintiff's asserted claims, none of the evidence establishes any element of the tort of outrage. . . . Plaintiff has, therefore, failed to discharge her summary judgment burden as to her outrage claim. As a consequence, the Court dismisses Plaintiff's outrage claim with prejudice.";
7. "Third, the Untimely Affidavits likewise fail to support Plaintiff's claim for civil conspiracy."
8. "Here like her two other claims, none of the Untimely Affidavits address any of the *prima facie* elements for civil conspiracy. . . . Accordingly, the Court dismisses Plaintiff's civil conspiracy claim with prejudice.";
9. "None of the Untimely Affidavits relate to the conduct alleged against Landgraff. They, therefore, cannot --by definition--establish the alleged extreme and outrageous conduct. As a result, the Court dismisses Plaintiff's outrage claims as a matter of law.";

¹² *McManus v. Bank of Greenwood Et. Al.*, 171 S.C. 84, 171 S.E. 473, 475 (S.C. 1933); *West v. Gladney*, 533 S.E.2d 334, 341 S.C. 127, 135 (S.C. App. 2000) ([T]his court ordinarily will not consider statements of fact presented only in an attorney's argument in determining whether a genuine issue of material facts exists sufficient to preclude summary judgment.").

¹³ *Gilmore*, 348 S.E.2d at 183; *Higgins v. Medical Univ. of SC*, 486 S.E.2d 269, 272, 326 S.C. 592 (S.C. App. 1997) ("However, factual statements of the attorneys, whether made during argument or in written briefs or memoranda, ordinarily may not be considered by the court in determining whether a genuine issue of material fact exists.").

¹⁴ *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (S.C. App., 1996), FN 2 ("However, where there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record.").

The Proposed Order gives no indication that the Court considered the pleadings,¹⁵ answers to interrogatories, admissions on file, affidavits, its prior Orders, or the documents on file.¹⁶

The Proposed Order also does not show that the Court drew any reasonable inferences from the evidence. "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party."¹⁷ The "evidence of the [Plaintiff] is to be believed, and all justifiable inferences are to be drawn in [her] favor."¹⁸ In other words, all ambiguities, conclusions, and inferences arising in and from the evidence must be construed most strongly against Landgraff and the Court must accept all of Plaintiff's evidence as true.

The Proposed Order does indicate that the Court exercised its discretion¹⁹ and accepted Plaintiff's Memorandum in Opposition to Defendant Frank A. Landgraff's Motion for Summary Judgment even though it was not timely filed.²⁰ However, by referencing only the Untimely Affidavits as distinct from the memorandum, the Court indicates that it failed to realize that Plaintiff verified the memorandum making it an affidavit that meets the requirements of Rule 56(e).²¹ The four-page memorandum contains many specific facts that address Plaintiff's claims that should have been considered, but weren't.

¹⁵ While Plaintiff "may not rest upon the mere allegations or denials" in her pleadings, the Court is to examine them in reaching its decision to grant or deny summary judgment.

¹⁶ *Bates v. City of Columbia*, 301 S.C. 320, 391 S.E.2d 733 (Ct.App.1990) ("In determining whether to grant summary judgment, the pleadings and documents on file must be liberally construed in favor of the nonmoving party who must be given the benefit of all favorable inferences that might reasonably be drawn from the record."); *Lattie v. SHS Enterprises, Inc.*, 300 S.C. 417, 389 S.E.2d 300 (1990). ("In considering the issue of whether the circuit court was correct in granting SHS's motion for summary judgment, we must liberally construe the pleadings, affidavits, and other documents in favor of Lattie, the nonmoving party, and give him the benefit of all favorable inferences that might reasonably be drawn therefrom.")

¹⁷ *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006).

¹⁸ *Anderson v. Liberty Lobby*, 477 U.S. 242, 259 (1986).

¹⁹ Our supreme court has ruled that the trial court may, in its discretion, "refuse to consider materials that were not timely served such that the opposing party had no time to prepare a response." *West*, 533 S.E.2d at 341, quoting *Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55, 60, 488 S.E.2d 327, 329 (1997).

²⁰ The Court also gave Landgraff 4 days to file a response to the Memorandum. In addition, the Proposed Order refers to the Untimely Affidavits throughout.

²¹ *Dawkins v. Fields*, 545 S.E.2d 515, 345 S.C. 23, 31 (S.C. App. 2001). "Accordingly, we hold that for summary judgment purposes, a verified pleading is equivalent to an affidavit, provided it meets the requirements of Rule 56(e).

Under Rule 56(e), an affidavit or verified complaint must meet three criteria to be considered by the court: (1) it must be made upon personal knowledge; (2) it must set forth facts admissible in evidence; (3) it must show that the affiant is competent to testify to the matters stated therein.

The verification in the present case states:

PERSONALLY APPEARED before me, Lamar W. Dawkins, who being duly sworn, deposes and says: that he is one of the Plaintiffs, in the foregoing action, that he has read the within Complaint, and that the facts are true of his own knowledge, except those matters and things therein alleged upon information and belief, and as to those, he believes them to be true.

Here, the requirements of Rule 56(e) are met. First, the verification states that the facts are made upon personal knowledge. Second, in reading the complaint, while some averments are conclusory and should not be considered

"[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."²² In other words, "it is not the role of the circuit court or this Court to determine whether [Plaintiff] will prevail on her [claims], but whether she presented a mere scintilla of evidence to withstand [Landgraff's] motion for summary judgment."²³

The Proposed Order Contains a Factual Misstatements

Landgraff only first received opposing affidavits from Plaintiff after the Court conducted its hearing on November 17, 2014. While Plaintiff served on Landgraff a copy of her memorandum in opposition on Friday, November 15, 2014 [sic] (via email), she failed to provide any of the affidavits upon which her opposition purports to rely. Prop. Order, p. 2

The truth is that Plaintiff served Landgraff with a copy of her memorandum *with opposing affidavits* on Friday, November 14, 2014. SCRCP 5(b)(1) provides that "[s]ervice by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint." The Certificate of Service filed with the memorandum clearly states that it was mailed on November 14, 2014. The copy sent via email was a courtesy so that Landgraff would have the memorandum before the mail arrived.²⁴

The Proposed Order Fails to Show Facts that Support A Specific Finding that Defendant Carried His Burden

"Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact."²⁵ However, as the Proposed Order states, "With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility 'may be discharged by "showing"' – that is, pointing out to the [trial] court – that there is an absence of evidence to support the nonmoving party's case."

Landgraff's motion puts forth two grounds and one defense. His first ground is that "No issue of material fact exists as to any element of any claim asserted by Plaintiff and Landgraff is entitled to judgment as a matter of law."²⁶

Landgraff is not required to offer any affidavits to support his position. However, he is required to inform the Court of the basis of his motion and to identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

facts admissible in evidence, other statements are factual and would be admissible. Finally, the verification identifies Dawkins as a plaintiff in the action; therefore, he is competent to testify."

²² *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

²³ *Lord*, at page 12.

²⁴ The Proposed Order states that Thursday is November 14th. Thursday is November 14th and Friday is the 15th.

²⁵ *Baughman v. Amer. Tel. and Tel Co.*, 306 S.C. 101, 115, 410 S.E.2d 537 (S.C. 1990).

²⁶ Motion for Summary Judgment, ¶1, page 1.

affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact."²⁷

Problematically, he presents no evidence to support his position. As a result, no evidence contrary to Plaintiff's exists as to any element of any claim. Thus, it would seem that Plaintiff, not Landgraff, is entitled to summary judgment. At the very least, Landgraff's motion must fail on this ground.

The second ground for summary judgment upon which Landgraff relies involves showing the absence of an essential element in Plaintiff's case:

[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.²⁸

For Plaintiff's wrongful intrusion into private affairs claim, Landgraff asserts that the essential element of the intrusion being substantial and unreasonable enough to be legally cognizable is missing. Landgraff argues that all of Plaintiff's "allegations fail to constitute a 'substantial and unreasonable' intrusion so as to sustain relief. 'Whether the conduct in question meets this test is, in the first instance, a question of law for the court.'"²⁹ Then, Landgraff precedes to present NO evidence or facts to support his position.

In his Motion, he presents only argument of his counsel which cannot properly be considered. Even so, the argument misrepresents Plaintiff's position as stated in her answers provided to Landgraff's Requests for Admissions.³⁰ In his Supplemental Memorandum Supporting Summary Judgment, Landgraff ignores most of the facts. He does inform the Court that certain affidavits did not address the video.

However, he fails to show the Court that the other affidavits, pleadings, answers to an interrogatory, or admission on file contain no material issue of fact that would lead the court to find the intrusion to be substantial and unreasonable. Yet, the Proposed Order does not provide clear notice as to the rationale the Court applied in granting the Summary Judgment.

²⁷ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 323, 106 S.Ct.2548, 91 L.Ed.2d 265 (1986).

²⁸ *Baugman*, 410 S.E.2d at 545-6 quoting *Celotex* 477 U.S. at 322-23, 106 S.Ct. at 2552, 91 L.Ed.2d at 273

²⁹ Motion for Summary Judgment, ¶1, page 1.

³⁰ See, Plaintiff's Response to Frank A. Landgraff's First Requests for Admissions, ¶15, page 7-8.

For Plaintiff's intentional infliction of emotional distress, Landgraff argues that whether "the conduct alleged by Plaintiff constitutes 'extreme and outrageous' conduct is a threshold legal issue for the Court to decide."³¹ In his Motion, Landgraff again only presents argument of counsel. That argument amounts to a conclusion that Plaintiff cannot claim Landgraff's action are extreme and outrageous. He gives the no factual basis on which to base its legal conclusion.

More egregious, Landgraff misstates Plaintiff's basis sole for the emotional distress claim as "installation of a video camera." Her Complaint plainly identifies that "On numerous occasions, Defendants have taken specific actions relating to the videotaping to embarrass and intimidate Plaintiff."³² This misunderstanding may explain why Landgraff claims that "None of the affidavits filed by Plaintiff establish any element of Plaintiff's outrage claim."³³

In his Supplemental Memorandum, Landgraff claims that "because none of the affidavits [filed with the Memorandum] actually relate to the asserted claims, none of the evidence establishes any element of the tort of outrage."³⁴ Even if this assertion about the affidavits were true, he ignores the evidence in the other affidavits, pleadings, answers to an interrogatory, or admission on file.

Even with this glaring omission, the Proposed Order grants Landgraff's motion. However, it again fails to provide clear notice as to the rationale the Court applied in granting the Summary Judgment.

For Plaintiff's claim for civil conspiracy, Landgraff states that Plaintiff "fails to allege special damages with sufficient particularity, as required by Rule 9(g), SCRCp; nor does Plaintiff have any evidence supporting her claim of special damages as caused by an alleged civil conspiracy."³⁵ Once again, in his Motion, Landgraff simply offers his bare assertion as evidence.

In his Supplemental Memorandum, he only offers the evidence that "None of the affidavits submitted by Plaintiff [with the Memorandum] support her claim for civil conspiracy. . . Accordingly, the Court should grant summary judgment to Landgraff."³⁶ Landgraff again ignores the other Rule 56(c) evidence. Even so, the Proposed Order grants Landgraff's motion without providing its rationale as to how it can ignore this evidence while granting the motion for summary judgment.

Landgraff's summary judgment motion then presents a defense of *ex turpi causa*. He claims that Plaintiff has engaged in some unnamed unlawful activity and that, absent that conduct, none of the issues about which she complains could or would have occurred.³⁷

³¹ Motion for Summary Judgment, page 2.

³² Amended Complaint, ¶ 7, page 1.

³³ Supplemental Memorandum Supporting Summary Judgment at page 4.

³⁴ *Id.*

³⁵ Motion for Summary Judgment, ¶4, page 2.

³⁶ Supplemental Memorandum Supporting Summary Judgment at page 5.

³⁷ Motion for Summary Judgment, ¶5, page 3.

In his Supplemental Memorandum, Landgraff asserts a defense not raised in his Answer or Amended Answer. This violates Rule 12(b), so Plaintiff will not address his new found defense of *in para delicto*.³⁸ Landgraff also asserts that Plaintiff committed adultery.

Plaintiff assumes that Landgraff is asking this Court to grant him summary judgment on the affirmative defense of *ex turpi causa*. He now identifies the crime as adultery. To prevail, Landgraff "has the initial responsibility of demonstrating the absence of a genuine issue of material fact."³⁹ He alleges that Plaintiff committed adultery with his wife.

The South Carolina criminal code defines adultery as "the living together and carnal intercourse with each other or habitual carnal intercourse with each other without living together of a man and woman when either is lawfully married to some other person."⁴⁰ By definition (and Landgraff's admission), neither Plaintiff, nor Landgraff's wife, is a man. Thus, whatever activity in which they engaged does not constitute the crime of adultery.⁴¹

Plaintiff produced a certified copy of a criminal records search that shows she has no convictions in Greenville County. Plaintiff's second affidavit presents the additional fact that "Plaintiff has discussed the issue of whether her behavior was criminal or in violation of the law with both the Greenville County Solicitor and a deputy in the Greenville County Sheriff's office. Both indicated it was not."⁴²

Even with this information, Landgraff asks the trial court to transform itself into the judge and jury in General Sessions Court and convict Plaintiff of a crime for which she has not even been indicted. While this would certainly be an abuse of discretion, ruling on Landgraff's motion for summary judgment before ruling on Plaintiff's Motion to Strike regarding this defense may also be an abuse of discretion.⁴³

**The Proposed Order Fails to Identify the Following Facts and Inferences
Presented by Plaintiff and How They Do Not Present a Genuine Issue of Material Fact**

It must not be forgotten that, in actions at law, trial by jury of disputed questions of fact is guaranteed by the Constitution, and that even questions of law arising in a case involving questions of fact can be more satisfactorily decided when the facts are fully before the court than is possible upon pleadings and affidavits. The motion for summary judgment . . . should be granted only where

³⁸ "Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto" SCRCP 12(b).

³⁹ *Baughman*, 306 S.C. at 115.

⁴⁰ South Carolina Code of Laws § 16-15-70.

⁴¹ Apparently, in the spirit of throw enough against the wall something is bound to stick, Landgraff asserts that buggery is illegal in South Carolina. He is correct, but nothing in his Supplemental Memorandum gives Plaintiff or the Court why this is relevant.

⁴² Plaintiff Memorandum in Opposition, ¶ 12.

⁴³ "The Supreme Court affirmed the remand of a case because "the trial court erred in ruling on the summary judgment motion without first ruling on Lanham's motion to produce and motion to compel. Accordingly, we affirm the Court of Appeals' remand of this issue" *Lanham v. Blue Cross & Blue Shield of S.C.*, 349 S.C. 356, 363, 563 S.E.2d 331, 333 (2002).

it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law.⁴⁴

"A party defeats summary judgment by affirmatively demonstrating the presence of a genuine issue of material fact."⁴⁵ The Proposed Order identifies various facts that the evidence of record fails to establish. However, the Proposed Order gives Plaintiff no indication that it considered the following facts from the pleadings,⁴⁶ answers to interrogatories,⁴⁷ admissions on file,⁴⁸ affidavits,⁴⁹ its prior orders and other documents on file.⁵⁰

Because the Proposed Order did not recognize these facts, it also fails to construe all ambiguities, conclusions, and inferences arising in and from the evidence against Landgraff. As discussed above, for summary judgment purposes, the Court must accept all of Plaintiff's evidence as true.

Wrongful Intrusion into Private Affairs Claim

The basis of Plaintiff's wrongful intrusion claim is the intentional making of the covert videotape. The elements of the tort are enumerated below with the evidence from the record supporting each element.

1. An intrusion

A. Request for Admission #4

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

⁴⁴ *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir. 1951)

⁴⁵ *Hoard ex rel. Hoard v. Roper Hosp., Inc.*, 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010).

⁴⁶ The record contains an Amended Complaint filed June 14, 2013 with Answers filed by all three Defendants and a court-ordered Amended Complaint filed June 19, 2014 with an Answer filed by Frank A. Landgraff.

⁴⁷ Plaintiff's Response to Frank A. Landgraff's First Interrogatories is in the file attached to Landgraff's Motion to Compel. Plaintiff's First Supplemental Response to Frank A. Landgraff's First Interrogatories was filed on November 14, 2014.

⁴⁸ Plaintiff's Response to Frank A. Landgraff's First Requests for Admission is in the file attached to Landgraff's Motion to Compel.

⁴⁹ Affidavits on file include the following: (1) The Amended Affidavit of William G. Mayer ("Mayer Affidavit"); (2) Sutton Affidavit attached to the Mayer Affidavit and Memoranda filed with the Court; (3) Landgraff Affidavit attached to the Mayer Affidavit and Memoranda filed with the Court; (4) Simpson Affidavit incorporated into the file by Court's Order filed January 6, 2014; (5) Affidavits referenced in Footnote 2 of the Proposed Order and in Footnote 2 of Landgraff's Supplemental Memorandum; and (6) Plaintiff's [Verified] Memorandum in Opposition to Defendant Frank A. Landgraff's Motion for Summary Judgment.

⁵⁰ Documents on file include the following: (1) Plaintiff's Response to Frank A. Landgraff's First Requests for Production; (2) Invoices from McCall Counseling & Therapy and Dr. Deborah Leporowski attached to Plaintiff's First Supplemental Response to Frank A. Landgraff's Requests for Production to Plaintiff; (3) Plaintiff's Motion to Seal File attached to Plaintiff's Memorandum in Support of Motion to Strike; and (4) prior orders of this Court.

Answer -- Plaintiff would have been captured on video regardless of why she entered the master bedroom of Landgraff and Mulligan. She could have walked into the room to change her clothes or throw her coat on the bed and Landgraff's actions would have still intruded into her private affairs.

Inference -- Landgraff asks Plaintiff about being captured on video in his master bedroom. The Court can infer that a camera was set up at that location and it recorded her.

B. Request to Admit #15

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

Answer: Plaintiff reported Landgraff to criminal justice authorities because she believed and still believes that she was the victim of a crime. Refusing the request of deputies and the sheriff and, despite his own admission that a statute had been violated, the 13th Circuit Solicitor refused to prosecute. The State Office of Victim Assistance determined that Plaintiff met the eligibility standards pursuant to South Carolina Laws to receive victim assistance from the Crime Victim's Compensation Fund.

C. Landgraff's Answer

"An affirmative defense conditionally admits the allegations of the complaint, but asserts new matter to bar the action. In other words, it assumes all elements of the plaintiff's case have been established. Because the plaintiff is taken to have proved a good cause of action, the burden of proof shifts to the defendant to show he is not liable."⁵¹

Inference -- Landgraff pled an affirmative defense of privilege and justification to Plaintiff's intrusion claim. If he didn't do anything wrong, he should not have to defend himself.

D. Verified Memorandum in Opposition

Intruding is "watching, spying, prying, besetting, overhearing, or other similar conduct."⁵² Landgraff admits that he used a motion-sensitive hidden camera to make a videotape of Plaintiff. Using the ordinary meaning of the words, this is certainly watching and spying. Thus, Plaintiff has demonstrated an intrusion.

"Landgraff describes the camera he installed as motion-sensitive. Consequently, Plaintiff would have appeared on the video when she walked into the room and continued to be videotaped as long as she moved in front of the motion sensor. As a result, the intrusion results regardless of Plaintiff's acts."

⁵¹ *O'Neal v. Carolina Farm Supply*, 279 S.C. 490, 494, 309 S.E.2d 776 (S.C.App. 1983).

⁵² *Snakenberg v. Hartford Casualty Ins. Co., Inc.*, 383 S.E.2d 2, 299 S.C. 164 (S.C. App. 1989).

"She actually does demonstrate his intrusion through Landgraff's affidavit and the existence of the videotape. Certainly, his intrusion was intentional."

2. Into that which is private

A. Request to Admit # 16

Request: Plaintiff reported Landgraff to criminal justice authorities (law enforcement and/or prosecutorial) in an attempt to gain a tactical advantage in this lawsuit.

Answer: To the contrary, had the State prosecuted the crime Landgraff committed, there would be no civil action. Because of its declining to prosecute for whatever reason, the civil court was the only form of redress. Plaintiff waited as long as the law allowed before filing this lawsuit.

Inference – Law enforcement investigated and found Plaintiff to be a victim of a crime.

B. Prior Court Orders

The Court found the following in its Order Granting Plaintiff Right to Proceed Anonymously filed May 17, 2013: "The court finds that the subject matter of this lawsuit related to Plaintiff's private affairs, and has no significant public interest. Identifying the Plaintiff poses a right to Plaintiff's legitimate privacy interests and that could chill her rights to the judicial process. The court can discern no unfairness or other prejudice to Defendants." The Court vacated Plaintiff's right to proceed anonymously, but did not repudiate its findings that the lawsuit involves her private affairs.

The record shows that the Courts decision to vacate its order was based on an affidavit that Landgraff now argues is irrelevant to this case. Plaintiff has asserted that the presentation by Lane Davis at the hearing in which he presented the affidavit was "in varying degrees, incomplete, misleading or false."

Landgraff asked for the facts supporting this statement in Interrogatory # 20.

RESPONSE: Without waiving her objection to the word "all", Plaintiff provides the following facts:

- a. Plaintiff did not even know about Landgraff's intrusion into her private affairs at the time she wrote her affidavit so nothing in it refers to his intrusion;
- b. Plaintiff did not present the affidavit in an open courtroom, but in a locked courtroom at Family Court;
- c. Lane Davis failed to inform the judge that Landgraff, not Plaintiff, presented the affidavit to the Court of Common Pleas;
- d. Lane Davis did not explain the circumstances that forced Plaintiff to provide the affidavit, but categorized her actions as voluntary;

- e. Lane Davis failed to mention that the affidavit stayed in the judge's chambers rather than in the clerk's file room so it was not available for anyone's inspection;
- f. Lane Davis failed to mention that a motion for an emergency hearing was granted on the Motion to Seal the Family Court file to protect the Plaintiff;
- g. Lane Davis failed to mention that Landgraff joined in the Motion to Seal the Family Court file;
- h. Lane Davis failed to mention that the file containing Plaintiff's affidavit was sealed;
- i. Lane Davis failed to mention that the case in which Landgraff presented the affidavit was for claims of defamation and publicizing of private affairs and had nothing to do with the facts of the intrusion claim; and
- j. Lane Davis failed to mention that Plaintiff was not a party to that action.

Inference: Lane Davis misrepresented the relevance of this affidavit to induce the court to force Plaintiff to identify herself so she would dismiss her claims against Landgraff. See Mayer Affidavit – "Plaintiff said that she does not think she will proceed in this case if she is forced to make her real name public."

C. Mayer Affidavit

"Plaintiff was a guest in the home when the videotaping occurred."

"Plaintiff did not know Defendants had installed a hidden camera in a bedroom to secretly videotape her."

"Plaintiff thought she could reasonably expect her privacy at the time of the videotaping."

"Plaintiff did not consent to the secret videotaping."

D. Verified Memorandum in Opposition

While this tort involves the right to privacy, it is significantly different than the other privacy torts.⁵³ The invasion is not into some expectation of "privacy", but an intrusion into what is "private" as opposed to public. The United States Supreme Court has stated that behavior such as Plaintiff's is private.⁵⁴

"Plaintiff complains about Landgraff's intrusion. *His* trespass upon her solitude is the issue, not *her* behavior. The act of wiretapping is illegal, regardless of what is recorded."

⁵³ *Snakenburg*, 299 S.C at 171.

⁵⁴ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.)

E. Case Law

Plaintiff's actions that touch "upon the most private human conduct, sexual behavior, and the most private of places, the home."⁵⁵

Plaintiff as "an overnight guest ha[d] a reasonable expectation of privacy" in Defendant's home.⁵⁶ Even so, on at least two occasions, Defendants installed a secret camera to videotape Plaintiff in a bedroom.

The South Carolina Supreme Court has recognized that Plaintiff's expectation of privacy is reasonable under these circumstances.⁵⁷

Ironically, the case that recognized invasion of privacy as a tort in South Carolina also involved the secret videotaping of guests in the bedroom of a private residence.⁵⁸

3. Which is substantial and unreasonable enough to be legally cognizable

A. Verified Memorandum in Opposition

"Judging by the damage Plaintiff has suffered the intrusion was very substantial and completely unreasonable."

B. Decisions from Other Courts Have Found Secret Videotaping Legally Cognizable

In a Wisconsin criminal case,⁵⁹ a boyfriend was convicted for secretly videotaping his girlfriend, without her consent, while she was nude. The Court stated that

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

and

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

⁵⁵ *Lawrence*, 539 U.S. at 567.

⁵⁶ *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed. 85

⁵⁷ "By choosing to share the privacy of their home with [Plaintiff] on several occasions in the past and on the occasion in question, both the [Defendants] and [Plaintiff] demonstrated a subjective expectation of privacy, and that expectation, we hold, is one that society is prepared to recognize as reasonable." *State v. Missouri*, 603 S.E.2d 594, 597-98 (S.C. 2004)

⁵⁸ *Snakenberg*, *supra*.

⁵⁹ *State of Wisconsin v. Jahnke*, 762 N.W.2d 696, 699 (Wis. App. 2008), review denied, 765 N.W.2d 578 (Wis. 2009)

In a domestic case in Iowa,⁶⁰ a husband installed a motion-activated camera in the parties master bedroom. It only captured the “comings and goings” of the wife, but the court held that the wife “did not forfeit through marriage her expectation of privacy.” In doing so, the Court stated that

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

In deciding whether the federal government had a right to videotape suspected terrorists in a federal building, the Court in a Seventh Circuit case⁶¹ followed in six other federal circuits observed that

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

A 2010 Minnesota case,⁶² a husband videotaped his wife, without her knowledge while she was undressed in their shared residential bathroom. The court used the wiretapping prohibition in observing that

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

C. Landgraff’s Answer

Inference – Landgraff pled an affirmative defense of willful publication and consent. If his intrusion was not substantial and reasonable, he should not have to defend himself.

4. *The act was intentional*

A. Standard from *Snakenburg* Case

“For purposes of civil liability, an act is intentional if (1) it is done willingly; and either (2) the actor desires the result of his conduct, whatever the likelihood of that result happening; or (3) the actor knows or ought to know the result will follow from his conduct, whatever his desire may be as to that result.”

⁶⁰ *In re the Marriage of Tigges*, 758 N.W.2d 824, 828 (Iowa 2008).

⁶¹ *United States v. Torres*, 751 F.2d 875, 878 (7th Cir. 1984).

⁶² *State of Minnesota v. Perez*, 779 N.W.2d 105, 110 (Minn. App. 2010).

B. Landgraff Affidavit

"... I have requested that a covert camera be installed in the marital home that is located at 122 Antiqua Way. The location I requested this camera to be installed was in the marital bedroom that is shared by me and my wife. ... I was present and approved the installation of the covert camera and I am responsible for its presents [sic] in the marital bedroom."

C. Reasonable Inference

Landgraff willingly set up the "covert" camera to make a videotape.

5. *Suffered damages*

A. Standard from *Snakenburg* Case

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

B. Interrogatory # 3

Request: Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the plaintiff.

RESPONSE: Plaintiff objects to this request in that it requires her to usurp the authority of the jury to determine the damages and amount of the damages for the intrusion into private affairs claim. Plaintiff also objects to this request in that it exceeds the scope of discovery by seeking information that will be determined by experts. Without waiving these objections, Landgraff admits that damages are more than \$25,000 by propounding more than standard interrogatories. Landgraff valued his fair compensation from Mulligan at \$250,000 if she assisted Plaintiff in an action against him for his actions that are the subject of this lawsuit. Punitive damages would be based on Landgraff's ability to pay and he has represented to another court that he had a net worth of approximately \$12,000,000.

C. Interrogatory # 11

Request: In relation to the injuries the plaintiff allegedly sustained from the conduct the plaintiff attributes to any defendant, has the plaintiff been admitted to or treated by any health professional (e.g. physicians, mental health professionals, etc.) or at any hospital or health-related institution, whether as an in-patient or out-patient, or received any

treatment for such injuries, related illnesses, or related conditions, from any physician or health personnel? If so, identify:

- a. The contract information of any such health professional, hospital, and health-related institution;
- b. The circumstances of the treatment or admission (i.e., type of injury, illness or condition, the nature of the treatment, and dates);
- c. A statement of all medical costs involved.

RESPONSE: Due to her status as crime victim, State Office of Victim Assistance paid for sessions with Gretta McCall, a counselor recommended by Julie Valentine Center. Ms. McCall's phone number is 864-270-9324.

Inference – Because the State Office of Victim Assistance paid for Plaintiff's counseling, it determined that Plaintiff was a victim of a crime, that she had not committed a crime, and she was damaged.

D. Case Law

"Although the tape was not offered in evidence, we credit [Wife's] testimony that it recorded the 'comings and goings' from the bedroom she regularly used. Notwithstanding the unremarkable activities recorded on the tape, [Wife] suffered damage as a consequence of [Husband's] actions."⁶³

Inference – If other courts can find that a woman suffered damages by being videotaped by walking into a room, a jury could find damages in this case.

Intentional Infliction of Emotional Distress Claim

The basis of the intentional infliction claim is actions taken by defendants' before and after the wrongful intrusion as well as the wrongful intrusion. The elements of the tort are enumerated below with the evidence from the record supporting each element. "Moreover, inquiry into the facts is desirable to clarify the application of the law of outrageous conduct."⁶⁴

1. Intentionally or recklessly inflicted severe emotional distress or was certain distress would result

A. Mayer Affidavit

"On numerous occasions, Defendants have taken specific actions relating to the videotaping to embarrass and intimidate Plaintiff." "Based on their past actions, Defendants could escalate their actions if not enjoined."

⁶³ *In re Tigges*, 758 N.W.2d 828.

⁶⁴ *Gilmore*, 348 S.E.2d at 184.

B. Verified Memorandum in Opposition

"Landgraff's installation of the video camera wrongfully intruded into that which was private. His actions in conniving to be certain that Plaintiff would be present to be recorded and his outrageous conduct after the intrusion comprise the basis for his intentionally inflicting of emotional distress on Plaintiff. For example, a reasonable person would know that Landgraff's actions in Family Court would cause Plaintiff distress. If he were truly just making the videotape in an attempt to prove adultery, revealing Plaintiff's name and printing still shots from the videotape to enter into the record were legally unnecessary. If he thought such actions were legally necessary, he could have entered the evidence under seal to protect Plaintiff as a third party to that action."

C. Interrogatory # 4

Request: List the names and addresses of any expert witnesses whom the plaintiff proposes to use as a witness at the trial of the case. Provide a summary of all opinions plaintiff expects to introduce at trial from all expert witnesses identified.

RESPONSE: At this time, plaintiff has not identified anyone she intends to call as an expert. She is considering experts in family law, criminal law, victims of adult sexual abuse, emotional damages, and re-victimization.

Inference: Plaintiff is actually the victim of sexual abuse at Landgraff's hands.

2. *So extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious*

A. Request to Admit #7

Request: Plaintiff intruded on Landgraff's relationship with his wife.

Answer: This request to admit is denied. In fact, the exact opposite is true. Landgraff introduced Plaintiff to his wife. When Plaintiff informed Landgraff that she would not have an adulterous affair with him, Plaintiff asked Mulligan to take Plaintiff to their beach house while he was out of town. His subsequent actions to foster a friendship between Plaintiff and Mulligan led Plaintiff to believe that he truly desired to have two "wives".

B. Request to Admit #8

Request: Plaintiff's sexual activities with Landgraff's wife in his master bedroom at 122 Antiqua Way, Greer, South Carolina intruded on Landgraff's affairs.

Answer: This is not a case of an intrusion, but of an inclusion. Landgraff included Plaintiff in his "affairs" which court records show have included several other women, pornography, frequenting exotic places of adult entertainment, and regular trip to the all-nude resort Hedonism.

From his words and actions, Landgraff demonstrates that he profited from Plaintiff's actions. He fulfilled his fantasies of being with two women and his fantasy of having a "homemade" videotape of two women together. In addition, he used the videotape to gain a tactical advantage, or more explicitly, for blackmail in his divorce from Mulligan.

C. Verified Memorandum in Opposition

"Significantly, based on the attached affidavits, the Family Court made an initial finding that Landgraff may have connived to be certain that Plaintiff was present and engaging in the activity he intentionally videotaped."

Inference -- A reasonable inference is that Landgraff orchestrated the encounter and videotaped it for his own gratification.

D. Mulligan Affidavit

Wife's affidavit contains the following description of her sexual relationship with Landgraff:

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

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

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

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

Inference -- Landgraff made the videotape for his own sexual gratification.

Inference -- Landgraff spend months orchestrating the events that damages Plaintiff. Based on his connivance, one could reasonable infer the Plaintiff conducted herself exactly as Landgraff requested.

Inference -- Landgraff is not the victim that his attorneys have tried to portray him as. He is a much different person that they have led this court to believe.

E. All the "Untimely Affidavits"

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

3. *Defendant's actions caused Plaintiff's emotional distress.*

A. Mayer Affidavit

"I have witnessed Plaintiff's emotional distress and her efforts to repair the extensive damage Defendants' actions have caused her."

"Plaintiff fears the attention and questions from the media, friends, co-workers, and the general community that public disclosure would inevitably bring.

"Plaintiff said that she does not think she will proceed in this case if she is forced to make her real name public."

B. See prior facts regarding Simpson's therapy and counseling provided by two therapists for almost 3 years.

4. *Damages*

A. Interrogatory # 4

Request: List the names and addresses of any expert witnesses whom the plaintiff proposes to use as a witness at the trial of the case. Provide a summary of all opinions plaintiff expects to introduce at trial from all expert witnesses identified.

RESPONSE: At this time, plaintiff has not identified anyone she intends to call as an expert. She is considering experts in family law, criminal law, victims of adult sexual abuse, emotional damages, and re-victimization.

Inference: Plaintiff has suffered emotional damages from Landgraff's actions and also from being re-victimized.

B. Interrogatory # 9

Request: Regarding any person (including the plaintiff), insurance company or other entity who has paid any sums (i.e. bills, expenses, fees, costs, etc.) as a result of the allegations in the Amended Complaint filed June 14, 2013, identify:

- a. Who paid said bills or expenses;
- b. The amount paid by each person/entity; and
- c. Identify the bills and expenses paid.

RESPONSE: South Carolina State Office of Victim Assistance and Plaintiff have both paid for Plaintiff's counseling. Plaintiff has attached the bills to her supplemental responses to the request for production. Plaintiff paid all charges for Deborah K. Leporowski, Psy. D. and all cash charges to McCall Counseling & Therapy, LLC.

Civil Conspiracy Claim

The basis of Plaintiff's civil conspiracy claim is the Defendants setting up the circumstances to ensure Plaintiff would be present to be recorded, recording the videotape, and using it for their benefit. The elements of the tort are enumerated below with the evidence from the record supporting each element.

1. *A combination of 2 or more people*

A. Sutton Affidavit

"As requested – The camera was installed in Mr. Landgraff's home, in his presence on Monday, December 14, 2009 and it was removed on Wednesday, December 16, 2009"

B. Landgraff Affidavit

"... I have requested that a covert camera be installed in the marital home that is located at 122 Antiqua Way. The location I requested this camera to be installed was in the marital bedroom that is shared by me and my wife. ... I was present and approved the installation of the covert camera and I am responsible for its presents [sic] in the marital bedroom."

C. Inference – A reasonable jury could find a conspiracy from Landgraff and Sutton working together to install the camera and make the videotape.

2. *For the purpose of injuring Plaintiff*

A. Court's Order Vacating Prior Order to Proceed

Landgraff entered Simpson Affidavit in an open file in his Common Pleas case to which Simpson was not a party.

Inference – A reasonable person could infer that Landgraff did this to cause Simpson to lose credibility with the judges, attorneys, witnesses, court personnel, and others involved in the case since he provides no reason that he could not have gotten whatever legal benefit from the affidavit by entering it under seal or redacted.

B. Request to Admit #8

Request: Plaintiff's sexual activities with Landgraff's wife in his master bedroom at 122 Antiqua Way, Greer, South Carolina intruded on Landgraff's affairs.

Answer: This is not a case of an intrusion, but of an inclusion. Landgraff included Plaintiff in his "affairs" which court records show have included several other women, pornography, frequenting exotic places of adult entertainment, and regular trip to the all-nude resort Hedonism.

From his words and actions, Landgraff demonstrates that he profited from Plaintiff's actions. He fulfilled his fantasies of being with two women and his fantasy of having a "homemade" videotape of two women together. In addition, he used the videotape to gain a tactical advantage, or more explicitly, for blackmail in his divorce from Mulligan.

C. Plaintiff's Motion to Seal File

Plaintiff attached this Motion to Seal File which was filed in Landgraff's family court case to her Motion to Strike in this lawsuit. That Motion contains the following language which Landgraff has never refuted.

Defendant Frank A. Landgraff ("Husband") has filed several motions and affidavits in this [family court] case alleging the Plaintiff's involvement with a third party and mentioning the name of a third party ("the third party"). He has also secretly videotaped the Plaintiff [in the family court case] and the third party. His filings have included still pictures and videotape of the Plaintiff and of the third party in the nude ("sensitive material."). Husband made no attempt to introduce the sensitive material under seal.

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

Inferences – Landgraff and Sutton both entered affidavits in Landgraff's family court case. Neither redacted the names of the third party who is Plaintiff. Further, they jointly decided to enter still pictures that could be easily viewed by anyone.

D. Simpson's Affidavit

Shortly thereafter, she call [Plaintiff] to say that Frank gave her a letter telling her she had 6 days to leave the house or he would expose our affair.

Since that day, I have talked to many people who confirmed that Frank had told them that [Wife] and I were having an affair. Even as early as November, he was telling people to watch us. I soon learned that my alleged affair was known to many people including those in corporate McDonald's from Atlanta to Raleigh.

Inference – Landgraff and Sutton both used the video for their benefit. Landgraff was able to use it in his family law case to "blackmail" his Wife into a better settlement by threatening its disclosure or by embarrassing Plaintiff if his Wife did not agree to his terms. If nothing else, Sutton got paid for her participation in the scheme. He had no reason to identify me.

E. Inference from All the Evidence

A reasonable person could infer that Landgraff made the videotape to injure Plaintiff by his actions. He could have refused to name Simpson. He could offer to produce all copies of the videotapes and destroy them.

3. *Which caused special damages*

A. Verified Memorandum in Opposition

"Plaintiff clearly lists 'special damages including, but not limited to loss of professional reputation, medical expenses, and future medical expenses.'"

"Simply identifying all of the judges and attorneys to whom Landgraff has chosen to disclose Plaintiff's identity for no bona fide legal reason proves these damages."

B. Introduction of Plaintiff's Affidavit in Prior Common Pleas Case

Landgraff introduced Plaintiff's affidavit into a case between he and his former wife without redacting her name. One could easily infer that he did this to damage her professional reputation with the judges.

Adultery Affirmative Defense

A. Admission #3

Request -- The conduct identified in Request for Admission No. 1 above constitutes a criminal act in the State of South Carolina.

Answer -- The request to admit is denied because Plaintiff knows of no crime she has committed and Landgraff did not identify what crime he contends she has been committed.

The only possible crimes that have arisen in discussion of Landgraff's actions are adultery and fornication. Fornication is inapplicable since Landgraff and Mulligan were married. Section 16-15-70 of the SC Code provides that "'Adultery' is the living together and carnal intercourse with each other or habitual carnal intercourse with each other without living together of a man and woman when either is lawfully married to some other person."

The crime of adultery involves conduct between a man and a woman. Thus, any conduct between Mulligan and Plaintiff is not a crime. Landgraff presented himself as impotent so that no conduct between him and Plaintiff falls in the category of "carnal intercourse".

B. Verified Memorandum in Opposition

"In *Lawrence v. Texas*, the United States Supreme Court stated that "It is not until the 1970s that any State singled out same-sex relations for criminal prosecution, and only nine states have done so." According to the Court, South Carolina was not one of those states. Plaintiff fully addressed the issue of a crime under South Carolina statute and common law on pages 7-12 of her Memorandum in Support of Plaintiff's Motion to

Strike. Landgraff's declaration is meaningless. Only a judge or jury can declare Plaintiff's actions unlawful."

"The attached certified criminal records search is conclusive evidence that Plaintiff is not guilty of an illegal act. In addition, Plaintiff has discussed the issue of whether her behavior was criminal or in violation of the law with both the Greenville County Solicitor and a deputy in the Greenville County Sheriff's office. Both indicated it was not."

"There were no unlawful relations per U.S. Supreme Court, SC statutes, and SC case law."

"Plaintiff had a lawful right to be there."

"Plaintiff's conduct or lack thereof is irrelevant. When Landgraff installed the camera he was intentionally "watching, spying . . ." What he was watching just had to be "that which is private" for his behavior to be actionable. The behavior of those he was watching is irrelevant."

The Proposed Order Contains No "If Appropriate" Analysis Required by Rule 56(e)

The Court has an affirmative duty to grant summary judgment only if it is appropriate. Even if Plaintiff failed to respond to Landgraff's motion, Rule 56(e) mandates that the court deny the motion unless it determines that it is appropriate. "If he does not so respond, summary judgment, **if appropriate**, shall be entered against him."⁶⁵ The Proposed Order shows no such analysis.

The United States Supreme Court recognized that there may be cases where there is no manifest material factual dispute, but the trial judge nevertheless "believe[s] that the better course would be to proceed to a full trial, presumably because in the circumstances of the case a fuller record might afford a more substantial basis for decision."⁶⁶

South Carolina courts have delineated several situations in which summary judgment is not appropriate. One situation involves the Court applying the law to the facts. "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law."⁶⁷ Arguably, as Plaintiff develops the facts through discovery, she will be able to unequivocally convince the Court that the intrusion was substantial. Thus, summary judgment is not appropriate.

Another situation is when different conclusions could be drawn from undisputed facts. "Summary judgment should not be granted even when there is no dispute as to evidentiary facts

⁶⁵ Rule 56(e) (Emphasis added).

⁶⁶ Anderson 477 U.S. at 255; See Atchison, T. & S.F. Ry. v. Buell, 480 U.S. 557, 567-71 (1987); Anderson v. Hodel, 899 F.2d 766, 770-71 19th Cir. 1990); Veillon v. Exploration Servs" 876 F.2d 1197, 1200 (5th Cir. 1989).

⁶⁷ Lanham, 349 S.C. at 362.

if there is dispute as to the conclusion to be drawn from those facts.”⁶⁸ The Court makes no finding that the evidence of emotional distress case is so lacking that a reasonable person may differ with his opinion.

Concerning issues of this sort, traditionally resolved by juries, the Supreme Court said in 1873: “It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.”⁶⁹

This case involves a motion-sensitive camera hidden to record a person who does not know she is being recorded. While several other states have found this to be an invasion of privacy, the issue is novel in South Carolina.⁷⁰ This alone may make this case inappropriate for summary judgment.⁷¹

South Carolina courts have made it clear that because “summary judgment is a drastic remedy, it must not be granted until the opposing party has had a ‘full and fair opportunity to complete discovery.’”⁷² In other words, “summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.”⁷³ An “if appropriate”

⁶⁸ *Gilliland v. Elmwood Properties, Inc.*, 301 S.C. 295, 391 S.E.2d 577, 579 (1990).

⁶⁹ *Railroad Co. v. Stout*, 84 U.S. 657, 664 (1873).

⁷⁰ See factual discussion regarding legally cognizable, *supra*.

⁷¹ “We find it extremely troubling this case was resolved on a summary judgment basis, especially considering the injury to Schmidt and the novel issue involved in this case. No South Carolina cases discuss the issue of personal injury from the impact of errant golf shots.” *Schmidt v. Courtney*, 357 S.C. 310, 318, 592 S.E.2d 326 (S.C. App. 2003).

⁷² *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003); *Lanham*, 349 S.C. at 363; *Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001); *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999); *Baughman*, 306 S.C. at 112; *Schmidt*, 357 S.C. at 319.

⁷³ *Baughman*, 306 S.C. at 115 citing the following support: 10A Wright & Miller, Federal Practice and Procedure § 2741, p. 543 (1983); 6 Moore’s Federal Practice p 56.02, p. 56-39 (2d ed. 1990); see, e.g., *First Chicago Int’l v. United Exchange Co.*, 836 F.2d 1375 (D.C.Cir.1988) (“[O]ther circuits have excused the absence of a Rule 56(f) filing on the ground that other documents filed by the plaintiff—such as opposing motions and outstanding discovery requests—sufficed to alert the district court of the need for further discovery and thus served as the functional equivalent of an affidavit.”); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230 (2d Cir.1985) (“The harshness of the remedy is exacerbated when the trial court refuses to allow plaintiff to conduct discovery. Discovery serves important purposes, such as avoiding surprise, fully disclosing the nature and scope of the controversy, narrowing, simplifying, and framing the issues involved, and enabling parties to obtain the factual information needed to prepare for trial. . . . Dismissal of the case at that point, without further opportunity to conduct discovery, was an abuse of discretion.”); *Tyler v. City of Enterprise*, 521 So.2d 951 (Ala.1988) (“That case held that summary judgment was improper where discovery was incomplete. A party is entitled to complete his or her discovery in order to be able to counter a motion for summary judgment.”); *Gangadean v. Leumi Fin. Corp.*, 13 Ariz.App. 534, 478 P.2d 532 (1970) (“The trial judge should not order summary judgment until the opposing party has had time to discover essential facts.”); *Commercial Bank of Kendall v. Heiman*, 322 So.2d 564 (Fla.Dist.Ct.App.1975) (“We reverse on the state of the record, as it was premature for the trial court to award the defendant a summary judgment when the plaintiff, through no fault of its own, had not completed discovery.”); *Board of Education v. Van Buren & Firestone, Architects, Inc.*, 165 W.Va. 140, 267 S.E.2d 440 (1980) (“Thus, a decision for summary judgment before discovery has been completed must be viewed as precipitous.”); See also, *Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854 (S.C. 2001) (“This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.”).

analysis could have led the Court to find that Plaintiff should have been given the opportunity to depose Landgraff and others to try to discover further evidence.

The Proposed Order tangentially addressed the discovery issue in its footnote.

Of note, the instant case is approaching two years in age and is slated for trial in March of 2015. Plaintiff has had ample time to conduct discovery and did not file a Rule 56(f) affidavit specifying why she could not present facts justifying her opposition. See Rule 56(f), SCRCP. And, Plaintiff has not argued that two years has been insufficient time to conduct discovery.

This statement is misleading, if not false, in light of Plaintiff's Motion to Strike and Defendant's Motion to Compel that were both before the Court on the same day as the Motion for Summary Judgment. The Court was well aware that Plaintiff was, for the second time, asking the Court to dismiss virtually all of the 23 boilerplate defenses propounded by the three defendants so she could conduct meaningful discovery.⁷⁴ In these circumstances, "the purposes of Rule 56(f) were served. As a result, it would be unfair to penalize [Plaintiff] for failing to file the formal affidavit called for by the rule."⁷⁵

While the case was filed on 20 months ago, Plaintiff has not been dilatory in conducting discovery. Defendant Landgraff just filed his answer to the Amended Complaint about 5 months ago on July 10, 2014. More significantly, the other two defendants had not even filed their answers at the time of the hearing.

In addition, Landgraff knows, but failed to tell the Court, that Plaintiff had already served discovery on him, but he had not responded even though the some of it is overdue. Also, the parties have discussed conducting depositions.⁷⁶

Filing a 56(f) affidavit is not necessary in South Carolina if, as in this case, the trial court knows that further discovery is necessary. "Although Plaintiffs did not file an affidavit invoking this provision, other courts have not mandated strict compliance with the technical requirements of Rule 56(f) where, as here, the need for further discovery is otherwise made known to the trial court."⁷⁷ Similarly, "[Landgraff] contends [Plaintiff] was required to file an affidavit pursuant to Rule 56(f), SCRCP, to the effect that [she] had insufficient information upon which to submit an affidavit. We find counsel's representation to the court that [Plaintiff] was in need of further discovery sufficient."⁷⁸

⁷⁵ *Harrod Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 246 (Fed. 4th Cir. 2002)

⁷⁶ This omission and Landgraff's email request that the Court ignore this information and the controlling legal authority regarding arguably violates Rule 3.3: Candor Toward the Tribunal

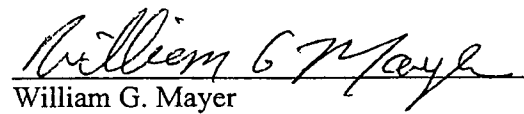
⁷⁷ *First Chicago Int'l*, supra; *Baughman*, 306 S.C. at FN 4; *see also*, *Schmidt*, 357 S.C. at 319 ("Although Kent did not specifically ask for a continuance, it is clear from the transcript of the hearing the trial judge was fully aware of the importance of having expert testimony for this case . . .").

⁷⁸ *Lanham*, 349 S.C. at 366 at FN 1.

**The Proposed Order Fails to Address the Other Two Motions
Rendered Moot by the Form 4 Order**

The Form 4 entered by the Court indicated that Defendant's Motion to Compel and Plaintiff's Motion to Strike were rendered moot by the Court's grant of Defendant's Summary Judgment Motion. Plaintiff understands how the Court's decision would render the Motion to Strike moot against Landgraff with the possible exception of the *ex turpi causa* defense. However, she asks the Court to clarify how it renders the motion moot as to the other two Defendants Carol Sutton and Carol Sutton & Associates-Investigations, Inc.

Respectively Submitted,


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

December 22, 2014
Greenville, SC

CAROL SIMPSON
47 GREENLAND I
GREENVILLE

December 1

Via Facsimile Only 864-467-8595

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

Re: C.A. No. 2013-DR-23-1762

Dear Judge Hill:

I am sending you this information because for the last week. I attempted to contact him this morning and he is evidently in court. I think you will see that time is of the essence.

I have learned that the verified Memorandum in Opposition the Motion for Summary Judgment and multiple other documents were still in the file room this morning. As a result, they were not in the file when you made your ruling. Apparently, those documents are being forwarded to you so you can "re-rule."

To my knowledge, Mr. Mayer was unable to send you the attached case last week. Pursuant to Rule 3.3, I am providing *Doe v. Batson* which may be controlling in this case:

"Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). **This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Id.**" (Emphasis added)

From the hearing on Plaintiff's Motion to Strike, the Court is fully aware that we have not even been able to narrow the issues in this case, much less have a "full and fair opportunity to complete discovery." Even so, Defendant Landgraff was served, but has ignored, the Request to Enter that was served on him on October 13th. He was also served with Requests for Production on November 13th. I also understand that a tentative schedule for depositions has been discussed.

I am also providing the attached case of *West v. Gladney* regarding the timeliness of the affidavit filed in this case:

Our supreme court has ruled that the trial court may, in its discretion, "refuse to consider materials that were not timely served such that the opposing party had no time to prepare a response." *Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55, 60, 488 S.E.2d 327, 329 (1997).

PHONE 864-233-4995 ♦ FAX 864-233-2004 ♦ EMAIL CAROL@CAROLSIMPSONLAW.COM

ROA_0553



Greenville County 13th Judicial Circuit Public Index


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[Family Court Public Index](#)
[Switch View](#)

Mary R McCorvey , plaintiff, et al vs. Jane Roe , defendant, et al

Case Number:	2013CP2301762	Court Agency:	Greenville County Common Pleas	Filed Date:	03/27/2013
Case Type:	Common Pleas	Case Sub Type:	Personal Injury 350	File Type:	Jury
Status:	Dismissed	Assigned Judge:			
Disposition:	Other / Circuit Civil	Disposition Date:	04/10/2015	Disposition Judge:	Verdin, Letitia H
Original Source Doc:		Original Case #:		Restore Reason:	Reopened Case
Judgment Number:		Court Roster:			

Case Parties Judgments Tax Map Information Associated Cases Actions Financials

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
McCorvey, Mary R	Stipulation Of Dismissal/Carol Sutton,Carol sutton & assoct	Filing		12/02/2015-15:23		
Sutton, Carol	Order/Relief and Replacement of Def Counsel	Order		05/19/2015-12:35		
Sutton, Carol	Motion/Motion Filing Fee	Motion		05/13/2015-12:10		
Simpson, Carol	Notice/Notice of Appeal/Service	Filing		04/13/2015-12:06		
McCorvey, Mary R	Order/Form 4 -Case is Stayed Pending the Appeal	Order		04/10/2015-13:13		
Sutton, Carol	Order/Atty King's Appearance for Def Sutton	Order		04/08/2015-14:04	04/10/2015-14:04	
McCorvey, Mary R	Order/Denying Plt's Motion for Reconsideration	Order		03/23/2015-16:00	04/10/2015-16:00	
Simpson, Carol	Plt's Motion/Reconsideration of Orders/Cert of Service	Motion		03/16/2015-17:00	04/10/2015-17:00	
McCorvey, Mary R	Affidavit/Affidavit of	Filing		03/16/2015-15:04	04/10/2015-15:04	
Sutton, Carol	Def's Motion (Add Co-Counsel)	Motion		03/13/2015-16:20	04/10/2015-16:20	
Simpson, Carol	Order/granting Plt's Motion in Part/Denying in Part/Strike	Order		02/27/2015-17:00	04/10/2015-17:00	
Landgraff, Frank A	Amended/Order Granting SJ to Def Landgraff	Order		02/27/2015-16:58	04/10/2015-16:58	
Mayer, William G.	Roster/Notice of Motions Roster Publication Sent	Action		02/16/2015-15:00	04/10/2015-15:00	
Davis, Lane Whittaker	Roster/Notice of Motions Roster Publication Sent	Action		02/16/2015-15:00	04/10/2015-15:00	
Madden, Timothy E.	Roster/Notice of Motions Roster Publication Sent	Action		02/16/2015-15:00	04/10/2015-15:00	

Mooneyham, Joseph A.	Roster/Notice of Motions Roster Publication Sent	Action		02/16/2015-15:00	04/10/2015-15:00	
Sherard, Reid T.	Roster/Notice of Motions Roster Publication Sent	Action		02/16/2015-15:00	04/10/2015-15:00	
Simpson, Carol	Plt's Motion/Reconsideration/Cert of Service	Motion		02/12/2015-16:32	04/10/2015-16:32	
Sutton, Carol	Defs Motion/Summary Judgment	Motion		02/12/2015-10:12	04/10/2015-10:12	
McCorvey, Mary R	Service/Affidavit Of Service	Filing		02/04/2015-08:59	04/10/2015-08:59	
McCorvey, Mary R	Order/Granting Def's SJ Motion	Order		02/03/2015-15:54	02/03/2015-15:54	
Simpson, Carol	Response To Sutton's First Interrogatories And Service	Filing		02/03/2015-12:53	04/10/2015-12:53	
Simpson, Carol	Plt's First Req for RTA to Def Sutton & Carol Sutton & Assoc	Filing		01/27/2015-16:57	02/03/2015-16:57	
Simpson, Carol	Plt's First Req for RFP to Def Sutton & Carol Sutton & Assoc	Filing		01/27/2015-16:57	02/03/2015-16:57	
Simpson, Carol	Plt's First Set of INT to Def Sutton & Carol Sutton & Associ	Filing		01/27/2015-16:54	02/03/2015-16:54	
Simpson, Carol	Response And Ser To Sutton's First Req For Production To Plt	Filing		01/27/2015-14:29	02/03/2015-14:29	
Simpson, Carol	Plt Memo in Opposition To Def Proposed Order	Filing		12/22/2014-09:24	02/03/2015-09:24	
McCorvey, Mary R	Service/Certificate Of Service Certified Mail	Filing		12/05/2014-15:06	02/03/2015-15:06	
Landgraff, Frank A	Order/Form 4/Granting Def's SJ Motion	Order		12/05/2014-12:18	02/03/2015-12:18	
Sutton, Carol	Answer/Answer To Amended Complaint	Filing		11/26/2014-12:31	02/03/2015-12:31	
Carol Sutton & Associates Investigations Inc	Answer/Answer To Amended Complaint	Filing		11/26/2014-12:31	02/03/2015-12:31	
McCorvey, Mary R	Service/Certificate Of Service	Filing		11/25/2014-13:00	02/03/2015-13:00	
Landgraff, Frank A	Supplemental Memo Supporting Summary Judgment/Cert	Filing		11/24/2014-16:49	02/03/2015-16:49	
Sutton, Carol	Def Sutton, Caron Sutton & Assoc Inv 1st INT to Simpson	Filing		11/19/2014-15:12	02/03/2015-15:12	
Sutton, Carol	Def Sutton, Caron Sutton & Assoc Inv 1st RFP to Simpson	Filing		11/19/2014-15:11	02/03/2015-15:11	
Simpson, Carol	First Supp Resp And Ser To Landgraff's First Interrogatories	Filing		11/14/2014-11:14	02/03/2015-11:14	
Simpson, Carol	First Supp Resp/Ser To Landgraff's First Reqs For Production	Filing		11/14/2014-11:11	02/03/2015-11:11	
Simpson, Carol	Plt Memo in Oppos To Def Frank A Landgraff Mot/Sum Judm	Filing		11/14/2014-09:10	02/03/2015-09:10	
Sherard, Reid T.	Roster/Notice of Motions Roster Publication Sent	Action		11/10/2014-12:06	02/03/2015-12:06	
Mooneyham, Joseph A.	Roster/Notice of Motions Roster Publication Sent	Action		11/10/2014-12:06	02/03/2015-12:06	
		Action				

Madden, Timothy E.	Roster/Notice of Motions Roster Publication Sent			11/10/2014-12:06	02/03/2015-12:06	
Davis, Lane Whittaker	Roster/Notice of Motions Roster Publication Sent	Action		11/10/2014-12:06	02/03/2015-12:06	
Mayer, William G.	Roster/Notice of Motions Roster Publication Sent	Action		11/10/2014-12:06	02/03/2015-12:06	
Landgraff, Frank A	Motion/Summary Judgment	Motion		11/07/2014-09:37	11/17/2014-09:37	
Simpson, Carol	Memo/Memo In Support Of Plt's Motion To Strike And Service	Filing		10/30/2014-12:53	02/03/2015-12:53	
Simpson, Carol	Service/Certificate Of Service By Mail Of Motion To Strike	Filing		10/30/2014-12:38	02/03/2015-12:38	
Simpson, Carol	Answer/Answer To Motion To Compel And Service	Filing		10/30/2014-08:59	02/03/2015-08:59	
Mayer, William G.	Roster/Notice of Motions Roster Publication Sent	Action		10/14/2014-09:38	02/03/2015-09:38	
Davis, Lane Whittaker	Roster/Notice of Motions Roster Publication Sent	Action		10/14/2014-09:38	02/03/2015-09:38	
Madden, Timothy E.	Roster/Notice of Motions Roster Publication Sent	Action		10/14/2014-09:38	02/03/2015-09:38	
Mooneyham, Joseph A.	Roster/Notice of Motions Roster Publication Sent	Action		10/14/2014-09:38	02/03/2015-09:38	
Sherard, Reid T.	Roster/Notice of Motions Roster Publication Sent	Action		10/14/2014-09:38	02/03/2015-09:38	
Simpson, Carol	Plts Motion/Strike	Motion		10/13/2014-16:16	11/17/2014-16:16	
Mayer, William G.	Roster/Notice of Case Roster Publication Sent	Action		09/22/2014-13:53	02/03/2015-13:53	
Mooneyham, Joseph A.	Roster/Notice of Case Roster Publication Sent	Action		09/22/2014-13:53	02/03/2015-13:53	
Sherard, Reid T.	Roster/Notice of Case Roster Publication Sent	Action		09/22/2014-13:53	02/03/2015-13:53	
Davis, Lane Whittaker	Roster/Notice of Case Roster Publication Sent	Action		09/22/2014-13:53	02/03/2015-13:53	
Madden, Timothy E.	Roster/Notice of Case Roster Publication Sent	Action		09/22/2014-13:53	02/03/2015-13:53	
Madden, Timothy E.	Roster/Notice of Case Roster Publication Sent	Action		09/08/2014-14:54	02/03/2015-14:54	
Mayer, William G.	Roster/Notice of Case Roster Publication Sent	Action		09/08/2014-14:54	02/03/2015-14:54	
Mooneyham, Joseph A.	Roster/Notice of Case Roster Publication Sent	Action		09/08/2014-14:54	02/03/2015-14:54	
Davis, Lane Whittaker	Roster/Notice of Case Roster Publication Sent	Action		09/08/2014-14:54	02/03/2015-14:54	
Sherard, Reid T.	Roster/Notice of Case Roster Publication Sent	Action		09/08/2014-14:54	02/03/2015-14:54	
Sherard, Reid T.	Roster/Notice of Motions Roster Publication Sent	Action		08/29/2014-10:54	02/03/2015-10:54	
Mooneyham, Joseph A.	Roster/Notice of Motions Roster Publication Sent	Action		08/29/2014-10:54	02/03/2015-10:54	
Madden, Timothy E.	Roster/Notice of Motions Roster Publication Sent	Action		08/29/2014-10:54	02/03/2015-10:54	
Davis, Lane Whittaker	Roster/Notice of Motions Roster Publication Sent	Action		08/29/2014-10:54	02/03/2015-10:54	
Mayer, William G.	Roster/Notice of Motions Roster Publication Sent	Action		08/29/2014-10:54	02/03/2015-10:54	
Landgraff, Frank A	Motion/Compel/Cert of Service	Motion		08/28/2014-16:11	11/17/2014-16:11	
McCorvey, Mary R	Service/Affidavit Of Service	Filing		07/24/2014-14:42	02/03/2015-14:42	

Landgraff, Frank A	Answer/Answer To Amended Complaint	Filing		07/10/2014-11:57	02/03/2015-11:57	
Mayer, William G.	Roster/Notice of Case Roster Publication Sent	Action		07/09/2014-09:22	02/03/2015-09:22	
Mooneyham, Joseph A.	Roster/Notice of Case Roster Publication Sent	Action		07/09/2014-09:22	02/03/2015-09:22	
Davis, Lane Whittaker	Roster/Notice of Case Roster Publication Sent	Action		07/09/2014-09:22	02/03/2015-09:22	
Madden, Timothy E.	Roster/Notice of Case Roster Publication Sent	Action		07/09/2014-09:22	02/03/2015-09:22	
Sherard, Reid T.	Roster/Notice of Case Roster Publication Sent	Action		07/09/2014-09:22	02/03/2015-09:22	
Landgraff, Frank A	Order/Form 4/Def's Motion/Strike Denied/Plt's Partial SJ Den	Order		07/01/2014-13:40	02/03/2015-13:40	
McCorvey, Mary R	Rule 56(f) Affidavit of Lane W. Davis	Filing		06/23/2014-11:22	02/03/2015-11:22	
McCorvey, Mary R	Memo in Support Plt Mot To Strike/Mot Partial Sum Judm	Filing		06/20/2014-13:03	02/03/2015-13:03	
Simpson, Carol	Amended/Amended Complaint	Filing		06/20/2014-09:59	02/03/2015-09:59	
McCorvey, Mary R	Service/Affidavit Of Service to William G Mayer	Filing		05/19/2014-09:21	02/03/2015-09:21	
Mayer, William G.	Roster/Notice of Motions Roster Publication Sent	Action		04/02/2014-11:21	02/03/2015-11:21	
Madden, Timothy E.	Roster/Notice of Motions Roster Publication Sent	Action		04/02/2014-11:21	02/03/2015-11:21	
Davis, Lane Whittaker	Roster/Notice of Motions Roster Publication Sent	Action		04/02/2014-11:21	02/03/2015-11:21	
Mooneyham, Joseph A.	Roster/Notice of Motions Roster Publication Sent	Action		04/02/2014-11:21	02/03/2015-11:21	
Sherard, Reid T.	Roster/Notice of Motions Roster Publication Sent	Action		04/02/2014-11:21	02/03/2015-11:21	
Sherard, Reid T.	Roster/Notice of Motions Roster Publication Sent	Action		04/02/2014-11:21	02/03/2015-11:21	
Mooneyham, Joseph A.	Roster/Notice of Motions Roster Publication Sent	Action		04/02/2014-11:21	02/03/2015-11:21	
Davis, Lane Whittaker	Roster/Notice of Motions Roster Publication Sent	Action		04/02/2014-11:21	02/03/2015-11:21	
Madden, Timothy E.	Roster/Notice of Motions Roster Publication Sent	Action		04/02/2014-11:21	02/03/2015-11:21	
Mayer, William G.	Roster/Notice of Motions Roster Publication Sent	Action		04/02/2014-11:21	02/03/2015-11:21	
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Madden, Timothy E.	Roster/Notice of Motions Roster Publication Sent	Action		04/02/2014-11:20	02/03/2015-11:20	
Davis, Lane Whittaker	Roster/Notice of Motions Roster Publication Sent	Action		04/02/2014-11:20	02/03/2015-11:20	
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Sherard, Reid T.	Roster/Notice of Motions Roster Publication Sent	Action		04/02/2014-11:20	02/03/2015-11:20	
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Mooneyham, Joseph A.	Roster/Notice of Motions Roster Publication Sent	Action		04/02/2014-11:20	02/03/2015-11:20	
Davis, Lane Whittaker	Roster/Notice of Motions Roster Publication Sent	Action		04/02/2014-11:20	02/03/2015-11:20	
Madden, Timothy E.	Roster/Notice of Motions Roster Publication Sent	Action		04/02/2014-11:20	02/03/2015-11:20	
		Action				

Mayer, William G.	Roster/Notice of Motions Roster Publication Sent			04/02/2014-11:20	02/03/2015-11:20	
McCorvey, Mary R	Order/Form 4/Plt's Motion/Alter/Amend Order Denied	Order		03/31/2014-15:09	02/03/2015-15:09	
Doe, Jane	Memo/Memo In Support Of Motion To Amend Order	Filing		03/28/2014-00:00	02/03/2015-00:00	
Madden, Timothy E.	Roster/Notice of Case Roster Publication Sent	Action		03/24/2014-10:10	02/03/2015-10:10	
Sherard, Reid T.	Roster/Notice of Case Roster Publication Sent	Action		03/24/2014-10:10	02/03/2015-10:10	
Davis, Lane Whittaker	Roster/Notice of Case Roster Publication Sent	Action		03/24/2014-10:10	02/03/2015-10:10	
Mooneyham, Joseph A.	Roster/Notice of Case Roster Publication Sent	Action		03/24/2014-10:10	02/03/2015-10:10	
Mayer, William G.	Roster/Notice of Case Roster Publication Sent	Action		03/24/2014-10:10	02/03/2015-10:10	
Mooneyham, Joseph A.	Roster/Notice of Motions Roster Publication Sent	Action		03/05/2014-14:41	02/03/2015-14:41	
Sherard, Reid T.	Roster/Notice of Motions Roster Publication Sent	Action		03/05/2014-14:41	02/03/2015-14:41	
Mayer, William G.	Roster/Notice of Motions Roster Publication Sent	Action		03/05/2014-14:41	02/03/2015-14:41	
Madden, Timothy E.	Roster/Notice of Motions Roster Publication Sent	Action		03/05/2014-14:41	02/03/2015-14:41	
Davis, Lane Whittaker	Roster/Notice of Motions Roster Publication Sent	Action		03/05/2014-14:41	02/03/2015-14:41	
Mayer, William G.	Motion/Motion Filing Fee	Motion		03/05/2014-09:29	02/03/2015-09:29	
Doe, Jane	Plaintiff's Motion/Amend Order	Motion		03/05/2014-09:19	03/31/2014-09:19	
Davis, Lane Whittaker	Roster/Notice of Motions Roster Publication Sent	Action		02/24/2014-17:05	02/03/2015-17:05	
Madden, Timothy E.	Roster/Notice of Motions Roster Publication Sent	Action		02/24/2014-17:05	02/03/2015-17:05	
Mayer, William G.	Roster/Notice of Motions Roster Publication Sent	Action		02/24/2014-17:05	02/03/2015-17:05	
Sherard, Reid T.	Roster/Notice of Motions Roster Publication Sent	Action		02/24/2014-17:05	02/03/2015-17:05	
Mooneyham, Joseph A.	Roster/Notice of Motions Roster Publication Sent	Action		02/24/2014-17:05	02/03/2015-17:05	
Landgraff, Frank A	Motion/Motion For Entry of Rule to Show Cause	Motion		02/20/2014-14:12	06/23/2014-14:12	
Landgraff, Frank A	Rule To Show Cause	Filing		02/20/2014-14:11	02/03/2015-14:11	
Mooneyham, Joseph A.	Roster/Notice of Motions Roster Publication Sent	Action		02/20/2014-11:36	02/03/2015-11:36	
Sherard, Reid T.	Roster/Notice of Motions Roster Publication Sent	Action		02/20/2014-11:36	02/03/2015-11:36	
Mayer, William G.	Roster/Notice of Motions Roster Publication Sent	Action		02/20/2014-11:36	02/03/2015-11:36	
Madden, Timothy E.	Roster/Notice of Motions Roster Publication Sent	Action		02/20/2014-11:36	02/03/2015-11:36	
Davis, Lane Whittaker	Roster/Notice of Motions Roster Publication Sent	Action		02/20/2014-11:36	02/03/2015-11:36	
Davis, Lane Whittaker	Roster/Notice of Motions Roster Publication Sent	Action		02/11/2014-15:24	02/03/2015-15:24	
Madden, Timothy E.	Roster/Notice of Motions Roster Publication Sent	Action		02/11/2014-15:24	02/03/2015-15:24	
Mayer, William G.	Roster/Notice of Motions Roster Publication Sent	Action		02/11/2014-15:24	02/03/2015-15:24	
		Action				

Sherard, Reid T.	Roster/Notice of Motions Roster Publication Sent			02/11/2014-15:24	02/03/2015-15:24	
Mooneyham, Joseph A.	Roster/Notice of Motions Roster Publication Sent	Action		02/11/2014-15:24	02/03/2015-15:24	
Landgraff, Frank A	Landgraff's Motion/Rule to Show Cause	Motion		02/06/2014-10:46	06/23/2014-10:46	
Landgraff, Frank A	Motion For Involuntary Dismissal/Cert of Service	Motion		02/05/2014-16:20	06/23/2014-08:29	
Mooneyham, Joseph A.	Roster/Notice of Motions Roster Publication Sent	Action		01/31/2014-10:37	02/03/2015-10:37	
Mayer, William G.	Roster/Notice of Motions Roster Publication Sent	Action		01/31/2014-10:37	02/03/2015-10:37	
Madden, Timothy E.	Roster/Notice of Motions Roster Publication Sent	Action		01/31/2014-10:37	02/03/2015-10:37	
Davis, Lane Whittaker	Roster/Notice of Motions Roster Publication Sent	Action		01/31/2014-10:37	02/03/2015-10:37	
Sherard, Reid T.	Roster/Notice of Motions Roster Publication Sent	Action		01/31/2014-10:37	02/03/2015-10:37	
Sherard, Reid T.	Roster/Notice of Motions Roster Publication Sent	Action		01/31/2014-10:25	02/03/2015-10:25	
Davis, Lane Whittaker	Roster/Notice of Motions Roster Publication Sent	Action		01/31/2014-10:25	02/03/2015-10:25	
Madden, Timothy E.	Roster/Notice of Motions Roster Publication Sent	Action		01/31/2014-10:25	02/03/2015-10:25	
Mayer, William G.	Roster/Notice of Motions Roster Publication Sent	Action		01/31/2014-10:25	02/03/2015-10:25	
Mooneyham, Joseph A.	Roster/Notice of Motions Roster Publication Sent	Action		01/31/2014-10:25	02/03/2015-10:25	
Mayer, William G.	Roster/Notice of Case Roster Publication Sent	Action		01/24/2014-16:00	02/03/2015-16:00	
Madden, Timothy E.	Roster/Notice of Case Roster Publication Sent	Action		01/24/2014-16:00	02/03/2015-16:00	
Mooneyham, Joseph A.	Roster/Notice of Case Roster Publication Sent	Action		01/24/2014-16:00	02/03/2015-16:00	
Davis, Lane Whittaker	Roster/Notice of Case Roster Publication Sent	Action		01/24/2014-16:00	02/03/2015-16:00	
Sherard, Reid T.	Roster/Notice of Case Roster Publication Sent	Action		01/24/2014-16:00	02/03/2015-16:00	
McCorvey, Mary R	Order/Granting Def Landgraff's Motion to Set Aside Order	Order		01/06/2014-14:10	02/03/2015-14:10	
McCorvey, Mary R	Order/Continuance	Order		12/05/2013-16:24	02/03/2015-16:24	
Mooneyham, Joseph A.	Roster/Notice of Motions Roster Publication Sent	Action		12/03/2013-17:02	02/03/2015-17:02	
Mayer, William G.	Roster/Notice of Motions Roster Publication Sent	Action		12/03/2013-17:02	02/03/2015-17:02	
Madden, Timothy E.	Roster/Notice of Motions Roster Publication Sent	Action		12/03/2013-17:02	02/03/2015-17:02	
Davis, Lane Whittaker	Roster/Notice of Motions Roster Publication Sent	Action		12/03/2013-17:02	02/03/2015-17:02	
Sherard, Reid T.	Roster/Notice of Motions Roster Publication Sent	Action		12/03/2013-17:02	02/03/2015-17:02	
McCorvey, Mary R	Motion/Motion Filing Fee	Filing		12/03/2013-15:21	02/03/2015-15:21	
McCorvey, Mary R	Memo in Opposition To Def Mot To Set Aside/Modify	Filing		11/11/2013-16:46	02/03/2015-16:46	
Sherard, Reid T.	Notice of Motions Roster Publication Sent	Action		11/11/2013-14:09	02/03/2015-14:09	
Davis, Lane Whittaker	Notice of Motions Roster Publication Sent	Action		11/11/2013-14:09	02/03/2015-14:09	
		Action				

Madden, Timothy E.	Notice of Motions Roster Publication Sent			11/11/2013-14:09	02/03/2015-14:09	
Mooneyham, Joseph A.	Notice of Motions Roster Publication Sent	Action		11/11/2013-14:09	02/03/2015-14:09	
Mayer, William G.	Notice of Motions Roster Publication Sent	Action		11/11/2013-14:09	02/03/2015-14:09	
Mayer, William G.	Notice of Motions Roster Publication Sent	Action		11/11/2013-14:08	02/03/2015-14:08	
Mooneyham, Joseph A.	Notice of Motions Roster Publication Sent	Action		11/11/2013-14:08	02/03/2015-14:08	
Madden, Timothy E.	Notice of Motions Roster Publication Sent	Action		11/11/2013-14:08	02/03/2015-14:08	
Davis, Lane Whittaker	Notice of Motions Roster Publication Sent	Action		11/11/2013-14:08	02/03/2015-14:08	
Sherard, Reid T.	Notice of Motions Roster Publication Sent	Action		11/11/2013-14:08	02/03/2015-14:08	
Davis, Lane Whittaker	Notice of Motions Roster Publication Sent	Action		11/11/2013-14:07	02/03/2015-14:07	
Madden, Timothy E.	Notice of Motions Roster Publication Sent	Action		11/11/2013-14:07	02/03/2015-14:07	
Mooneyham, Joseph A.	Notice of Motions Roster Publication Sent	Action		11/11/2013-14:07	02/03/2015-14:07	
Sherard, Reid T.	Notice of Motions Roster Publication Sent	Action		11/11/2013-14:07	02/03/2015-14:07	
Mayer, William G.	Notice of Motions Roster Publication Sent	Action		11/11/2013-14:07	02/03/2015-14:07	
McCorvey, Mary R	Memo Supporting Plt Motion To Set Aside/Modify/Cert	Filing		11/08/2013-14:44	02/03/2015-14:44	
McCorvey, Mary R	Archived Document	Filing		11/05/2013-00:00	02/03/2015-00:00	
Mayer, William G.	Motion/Motion Filing Fee	Filing		11/04/2013-14:44	02/03/2015-14:44	
Doe, Jane	Jane Doe's Motion/Strike & for Partial Summary Judgment	Motion		11/04/2013-14:06	06/23/2014-14:06	
Mayer, William G.	Notice of Motions Roster Publication Sent	Action		10/02/2013-08:37	02/03/2015-08:37	
Mooneyham, Joseph A.	Notice of Motions Roster Publication Sent	Action		10/02/2013-08:37	02/03/2015-08:37	
Madden, Timothy E.	Notice of Motions Roster Publication Sent	Action		10/02/2013-08:37	02/03/2015-08:37	
Davis, Lane Whittaker	Notice of Motions Roster Publication Sent	Action		10/02/2013-08:37	02/03/2015-08:37	
Sherard, Reid T.	Notice of Motions Roster Publication Sent	Action		10/02/2013-08:37	02/03/2015-08:37	
Landgraff, Frank A	Motion/Motion Filing Fee	Filing		09/27/2013-10:30	02/03/2015-10:30	
Landgraff, Frank A	Motion/Re: Order Granting Plt Right to Proceed Anonymously	Motion		09/26/2013-12:22	11/12/2013-12:22	
	Service/Affidavit Of Service by mailing	Filing		07/18/2013-00:00	02/03/2015-00:00	
	Ans Of Carol Sutton And Carol Sutton & Associates-Investigat	Filing		07/15/2013-00:00	02/03/2015-00:00	
	Answer/Answer To Amend Complaint Of Frank A. Landgraff	Filing		07/01/2013-00:00	02/03/2015-00:00	
	Amended/Amended Complaint	Filing		06/14/2013-00:00	02/03/2015-00:00	
		Filing		05/29/2013-00:00	02/03/2015-00:00	

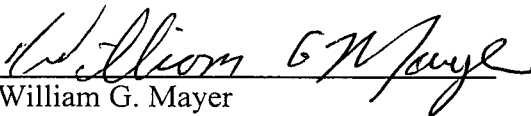
	Amended/Amended Summons And Amended Complaint					
	Order/Order Denying Plt's Motion For Temp Restraining Order	Order		05/17/2013-00:00	02/03/2015-00:00	
	Order/Order Granting Plaintiff Right To Proceed Anonymously	Order		05/17/2013-00:00	02/03/2015-00:00	
	Amended/Amended Summons And Amended Complaint	Filing		04/25/2013-00:00	02/03/2015-00:00	
Mayer, William G.	Motion/Motion Filing Fee	Filing		04/19/2013-14:44	02/03/2015-14:44	
	Plaintiff's Motion/Temporary Restraining Order	Motion		04/12/2013-08:39	04/25/2013-08:39	
Mayer, William G.	Notice of Motions Roster Publication Sent	Action		04/02/2013-10:51	02/03/2015-10:51	
	Verification/Verified S/C	Filing		04/02/2013-09:08	02/03/2015-09:08	
Mayer, William G.	Motion/Motion Filing Fee	Filing		03/28/2013-14:47	02/03/2015-14:47	
Mayer, William G.	Notice of Motions Roster Publication Sent	Action		03/27/2013-16:03	02/03/2015-16:03	
McCorvey, Mary R	Motion/Motion Filing Fee	Filing		03/27/2013-14:56	02/03/2015-14:56	
McCorvey, Mary R	Summons & Complaint	Filing		03/27/2013-14:12	02/03/2015-14:12	
	Plaintiff's Motion/Proceed Under Pseudonym	Motion		03/27/2013-16:01	04/25/2013-16:01	
McCorvey, Mary R	ADR/Alternative Dispute Resolution (Workflow)	Action		03/27/2013-14:12	02/03/2014-14:12	

Certificate of Counsel

Respondent also proposed that additional documents to be included in the Record on Appeal. In this Court's order filed December 4, 2015, only those matters that were "presented to the lower court or filed with the court prior to the date of the final order on appeal" were to be included so those documents are not included in the record.

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties that complies with this Court's order and not any other material.

May 17, 2016


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

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