THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Doyet A. Early, Circuit Court Judge

Appellate Case No. 2019-000648
Civil Action No. 2018-CP-40-02425

Jefferson Davis, Jr. ..... Appellant,

v.

Ellen Weaver, Chad Connelly, Oran P. Smith, Neil J. Mellen, Howard S. Rich, Rick Reams, Stephen D. Kirkland, Palmetto Promise Institute, Palmetto Family Council, Palmetto Family Action, South Carolinians for Responsible Government, SCRG Foundation, Access Opportunity South Carolina, Friedman Foundation for Educational Choice, Inc., Cato Institute, South Carolina Educational Credit for Exceptional Needs Children Fund, South Carolina Education Oversight Committee, South Carolina Dept. of Revenue, South Carolina Dept. of Labor, Licensing and Regulation, First Impressions, Inc. d/b/a/ Richard Quinn & Associates, First Tuesday Strategies, LLC, Bill Wilson, Jason Bedrick, Jim DeMint, Randy Page, Tony Denny, Phillip Cease, Melanie Barton, Doris Cubitt, Susan Thomas, John McCormick, Nate Leupp, Institute of Management Consultants USA & John Doe(s) 1-40 ..... Respondents.

FINAL BRIEF OF RESPONDENTS CATO INSTITUTE AND HOWARD S. RICH

NELSON MULLINS RILEY & SCARBOROUGH, LLP

Miles E. Coleman
Post Office Box 10084
Greenville, SC 29601
(864) 250-2300

Attorney for Respondents Cato Institute and Howard S. Rich

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

COUNTER-STATEMENT OF THE ISSUES ON APPEAL 2

STATEMENT OF THE CASE 2

I. Mr. Davis' Complaint and the original defendants' Motion to Dismiss 2

II. Judge Benjamin's motion hearing and ruling 3

III. Mr. Davis' Amended Complaint and the new defendants' Motions to Dismiss 4

IV. Judge Early's motion hearing and ruling 6

V. Mr. Davis' Motion for Reconsideration and subsequent appeal 6

STATEMENT OF THE FACTS 7

STANDARD OF REVIEW 10

ARGUMENT 12

I. The trial court correctly interpreted Judge Benjamin's order as requiring Mr. Davis to file and serve his Amended Complaint within 15 days and correctly ruled that his failure to do so warranted the dismissal of his claims 12

A. A trial court's order granting leave to amend may place limitations and conditions on the scope and timing of the amendment 12

B. Judge Benjamin's Amended Order required Mr. Davis both to file and to serve his Amended Complaint within 15 days 14

C. Mr. Davis' failure to serve his amended pleading by the trial court's deadline warrants the dismissal of his new claims 17

II. The dismissal of Mr. Davis' claims against Cato Institute and Mr. Rich is also supported by the additional sustaining ground that the Amended Complaint fails adequately to allege any facts that could give rise to their liability 19

A. The Amended Complaint fails to allege any wrongdoing by Cato Institute 19

B. The Amended Complaint fails to allege any basis upon which Cato Institute could be vicariously liable for the alleged wrongdoing of others 21

C. The Amended Complaint fails to allege any facts supporting any claim against Mr. Rich under any of the causes of action asserted 22

D. The Amended Complaint fails to allege any basis upon which Mr. Rich could be vicariously liable for the alleged wrongdoing of others 23

III. The dismissal of Mr. Davis' claims against Cato Institute and Mr. Rich is also supported by the additional sustaining ground that the causes of action he attempts to assert are fatally deficient 24

IV. The trial court's dismissal of Mr. Davis' claims with (rather than without) prejudice was not an abuse of discretion, particularly when he had already been permitted to amend and when neither that amendment nor his post-dismissal filings have identified any facts sufficient to support a claim 29

A. The Rules and precedent support dismissal with prejudice when a party fails to comply with judicial conditions placed on the ability to amend 29

B. The general rule that a plaintiff should be given a chance to amend prior to dismissal pursuant to Rule 12(b)(6) is inapplicable here 31

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

Cases

Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997).....11

Bowman v. Richland Mem. Hosp., 335 S.C. 88, 515 S.E.2d 259 (Ct. App. 1999).....16, 17

Brouwer v. Sisters of Charity Providence Hosp., 409 S.C. 514, 763 S.E.2d 200 (2014).....11

Brown v. Easterling, 59 S.C. 472, 38 S.E. 118 (1901).....18

Brown v. Pearson, 326 S.C. 409, 483 S.E.2d 427 (Ct. App. 1997).....25

Brzozowski v. Randall, 281 F. Supp. 306 (E.D. Pa. 1968).....21

Cherry v. Myers Timber Co., Inc., 404 S.C. 596, 745 S.E.2d 405 (Ct. App. 2013).....23

Dewitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681 (4th Cir. 1976).....28

Doe ex rel. Doe v. Batson, 345 S.C. 316, 548 S.E.2d 854 (2001).....26

Doe v. Bishop of Charleston, 407 S.C. 128, 754 S.E.2d 494 (2014).....10, 11

Doe v. City of Duncan, 417 S.C. 277, 789 S.E.2d 602 (Ct. App. 2016).....30

Doe v. City of Duncan, No. 2008-CP-42-0475 (S.C. Ct. of Comm. Pleas, Spartanburg County, Judge Cole, Nov. 1, 2012).....30

Doe v. Unocal Corp., 27 F.Supp.2d 1174 (C.D. Cal. 1998).....16

Driggers v. Sherouse, No. 2011-CP-45-00648 (S.C. Ct. of Common Pleas, Williamsburg County, Hon. Ralph F. Cothran, Jr., July 25, 2012).....20

Ex parte TLC Laser Eye Centers, LLC, 404 S.C. 385, 745 S.E.2d 105 (2013).....10

Froneburger v. Smith, 406 S.C. 37, 748 S.E.2d 625 (Ct. App. 2013).....22

Georganne Apparel, Inc. v. Todd, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1990).....12, 30

Goodson v. Am. Bankers Ins. Co. of Florida, 295 S.C. 400, 368 S.E.2d 687 (Ct. App. 1988).....19

Griffis v. Cherry Hill Estates, LLC, No. 2009-CP-07-06054 (S.C. Ct. of Comm. Pl., Hon. Marvin H. Dukes, III, Oct. 27, 2010) 13, 18

Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 682 S.E.2d 871 (Ct. App. 2009) 29

Hainer v. Am. Med. Intern., Inc., 320 S.C. 316, 465 S.E.2d 112 (Ct. App. 1995) 26

Harris v. Tietex Int., Ltd., 417 S.C. 533, 790 S.E.2d 411 (Ct. App. 2016).....25

Harvin v. Comm. Credit Corp., 275 S.C. 14, 266 S.E.2d 789 (1980) 18, 30

Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry, 403 S.C. 623, 743 S.E.2d 808 (2013) 28

Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2012).....6

HHHunt Corp. v. Town of Lexington, 389 S.C. 623, 699 S.E.2d 699 (Ct. App. 2010) 11

I'on, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) 19

Intern. Controls Corp. v. Vesco, 556 F.2d 665 (2d Cir. 1977) 16

Johnson v. Thomas, No. 2000-CP-10-001015 (S.C. Ct. of Common Pleas, Charleston County, Hon. A. Victor Rawls, Jan. 12, 2001).....21

Jones v. Gilstrap, 288 S.C. 525, 343 S.E.2d 646 (Ct. App. 1986) 11

McCray v. S.C. Dept. of Corr., No. 1:19-1574-TLW-SVH, 2019 WL 4043958 (D.S.C. June 28, 2019).....21

Miller v. Stark, 29 S.C. 325, 7 S.E. 501 (1888) 16

Newkirk v. Circuit Court, No. 3:14CV372–HEH, 2014 WL 4072212 (E.D. Va. Aug.14, 2014) 21

Newman v. Old West, Inc., 286 S.C. 394, 334 S.E.2d 275 (1985).....11

Potter v. Clark, 497 F.2d 1206 (7th Cir. 1974).....21

Rice-Marko v. Wachovia Corp., 398 S.C. 301, 728 S.E.2d 61 (Ct. App. 2012).....20

Sharpe v. Brown, No. 2011-CP-32-01665, 2011 WL 12841693 (S.C. Ct. of Comm. Pl., Hon. William Keesley, Aug. 11, 2011) 13

Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 826 S.E.2d 585 (2019) 31, 32

Smith v. The Gillette Co., No. 2004-CP-40-0938 (S.C. Ct. of Comm. Pl., July 27, 2005, Hon. Casey Manning) 18, 30

*Smith-Jeter v. City of Columb*ia, No. 3:10-1188-JFA, 2011 WL 884123 (D.S.C. March 14, 2011) 13

Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006) 32

Stokes v. Murray, 99 S.C. 221, 83 S.E. 33 (1914) 12

Sturkie v. Sifly, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984) 28, 29

Sullivan v. Hawker Beechcraft Corp., 397 S.C. 143, 723 S.E.2d 835 (Ct. App. 2012) 12, 32

Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 514 S.E.2d 126 (1999) 25

Therens v. Faircloth, 291 S.C. 451, 354 S.E.2d 54 (Ct. App. 1987) 18

Town of Summerville v. City of North Charleston, 378 S.C. 107, 662 S.E.2d 40 (2008) 10

United Ed. Distrib., LLC v. Ed. Testing Servs., 350 S.C. 7, 564 S.E.2d 324 (Ct. App. 2002) 27

United States v. Reliant Hospice, Inc., No. 3:08-3724-CMC, 2011 WL 1321584 (D.S.C. April 4, 2011) 13

Wright v. Hiester Const. Co., No. 03-CP-07-890, 2005 WL 6582778 (S.C. Ct. of Comm. Pl., Hon. Curtis Coltrane, Sept. 13, 2005) 13

Rules

SCACR Rule 220(c) 19

SCACR Rule 268(d)(2) 21

SCRCP Rule 12(b)(6) 3, 20, 21, 31

SCRCP Rule 37(b)(2)(C) 18

SCRCP Rule 41(b) ..... *passim*

SCRCP Rule 59(e) 12

SCRCP Rule 6(e) 4, 14

SCRCP Rule 7(b)(1) 5

SCRCP Rule 8(a) 20

Statutes

S.C. Code Ann. § 39-5-10(b) 28

S.C. Code Ann. § 39-5-20(a) 28

Other Authorities

Am. Jur. 2d Pleading § 712 13

71 C.J.S. Pleadings 61A § 429 12

J. Toal, *et al*., *Appellate Practice in South Carolina* 62 (2d ed. 2002) 20

Restatement (Second) of Agency § 250 (1958) 23

INTRODUCTION

This appeal arises from a conspiracy theory masquerading as a lawsuit and looking for validation. Mr. Davis—an attorney representing himself—filed suit against two of his perceived political rivals, asserting nine claims including defamation, unfair trade practices, and, of course, conspiracy. At a hearing on the defendants' Motion to Dismiss, Judge DeAndrea Benjamin dismissed some of Mr. Davis' claims, gave him leave to replead two others, instructed him to name and serve the 20 "John Doe" defendants, and gave him a specific deadline to do so. Mr. Davis missed the deadline. Eventually, however, he served some (but not all) of the 31 newly-named defendants, who, in turn, moved to dismiss his claims against them. Judge Doyet Early heard arguments on the motions and dismissed Mr. Davis' claims against the new defendants.

This Court should affirm that ruling for multiple reasons. First, Judge Early correctly ruled that Judge Benjamin's written order, like her oral ruling, plainly required Mr. Davis to name and serve the new defendants by a specific date, and his failure to do so warranted dismissal. A trial court's imposition of such a deadline is neither unusual nor remarkable, and a trial court may (and often does) dismiss the claims of a party who fails to comply with such an order.

Further, even setting aside the untimeliness of Mr. Davis' Amended Complaint, there are additional, independent grounds to sustain the trial court's ruling. For example, Mr. Davis' belated pleading fails to allege facts sufficient to support any finding of liability against Cato Institute or Mr. Rich under any of the causes of action asserted. Further, the claims he attempts to assert are fatally deficient. Some are not cognizable in South Carolina; others fail to plead required elements; and yet others had previously been dismissed by Judge Benjamin without leave to replead them.

Finally, the trial court did not abuse its discretion by dismissing Mr. Davis' claims against the new defendants with (rather than without) prejudice. As required by the applicable Rule, and as this Court and the Supreme Court have previously held, dismissal with prejudice is appropriate when a party fails to comply with an order of the trial court or fails timely to commence an action, especially when (as here) the plaintiff has already had a chance to amend and *still* failed to allege facts and claims on which relief could be granted, and when (as here) the plaintiff's post-dismissal filings fail to identify any new facts he could plead. This Court should affirm.

COUNTER-STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial court properly dismiss Mr. Davis' claims against Cato Institute, Mr. Rich, and the other 29 Defendants who were first named in the Amended Complaint, ruling that Mr. Davis failed to serve them within the time frame required by the trial court's prior order granting him leave to amend?

2. Was the dismissal of Mr. Davis' claims against Cato Institute and Mr. Rich also supported by the additional sustaining ground that the Amended Complaint fails to make any factual allegations of wrongdoing by Cato Institute or Mr. Rich that injured or affected Mr. Davis and also fails to allege any basis upon which Cato Institute or Mr. Rich could be liable for the alleged wrongdoing of others?

3. Was the dismissal of Mr. Davis' claims against Cato Institute and Mr. Rich also supported by the additional sustaining ground that the claims Mr. Davis attempts to assert against them are fatally deficient?

4. Did the trial court properly dismiss Mr. Davis' claims against Cato Institute, Mr. Rich, and the other new Defendants with (rather than without) prejudice because Mr. Davis failed to comply with a prior order of the court, failed timely to serve the new defendants, has already been given an opportunity to amend his Complaint and *still* failed to assert viable claims or to allege facts capable of supporting them, and has identified no new facts in his post-dismissal filings that could remedy his deficient claims?

STATEMENT OF THE CASE

I. Mr. Davis' Complaint and the original defendants' Motion to Dismiss.

Mr. Davis—a graduate of the University of South Carolina School of Law and a lawyer licensed to practice in Georgia—filed his *pro se* Complaint on May 3, 2018. *See* Compl. (R. 17–30). The Complaint named an individual defendant (Ellen Weaver), a corporate defendant (Palmetto Promise Institute or "PPI"), and 20 pseudonymous defendants (Does 1–20). *Id*. The Complaint alleged Weaver and PPI had disparaged and defamed Mr. Davis and had produced allegedly false and misleading reports about him. *See, e.g.*, *id*. ¶¶ 7–20 (R. 21 to 23). The Complaint rehearsed Mr. Davis' political grievances against Weaver and PPI and speculated that a shadowy cabal of special interests, dark money, and political forces were conspiring to harm Mr. Davis and hinder his policy efforts relating to school scholarships for special needs children. *See, e.g.*, *id*. ¶¶ 21–32 (R. 23 to 25). Based on these allegations and speculations, the Complaint asserted nine claims:

(1) Defamation per se and per quod;

(2) False light publicity;

(3) Invasion of privacy;

(4) Negligence;

(5) Intentional infliction of emotional distress;

(6) Tortious interference with prospective contractual relations;

(7) Unfair trade practices;

(8) Pierce the corporate veil; and

(9) Conspiracy.

See id. ¶¶ 33–64 (R. 26 to 30). On June 7, 2018, Weaver and PPI filed a Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP. *See* Weaver's and PPI's Mot. to Dismiss (R. 144). Weaver and PPI filed a memorandum in support of their motion on September 26, 2018. *See* Weaver's and PPI's Mem. in Supp. (R. 146).

II. Judge Benjamin's motion hearing and ruling.

Judge DeAndrea Benjamin held a hearing on Weaver's and PPI's motion on October 1, 2018. *See* Hearing Tr. (R. 378). At the conclusion of the hearing, Judge Benjamin orally granted in part and denied in part the Motion to Dismiss and gave Mr. Davis leave to amend his complaint to name and serve the John Doe defendants. *See id*. at 24:16 to 26:21 (R. 401–02). Judge Benjamin expressly stated that the amendment required Mr. Davis both to name and serve the new defendants, and she specifically gave Mr. Davis a set time period in which to do so:

> The Court: On the John Does 1 through 20, I think you need to name, since you are going to amend the complaint -- and *those are the only things that I am granting you leave to amend the complaint on is* the invasion of privacy, conspiracy, *and the John Does, I think you need to name them and serve them*, because I'm not sure -- you have them as a named Defendant, and unless you are going to do it by publication, I'm not sure.
>
> Mr. Davis: And do we have the time period for amending it?
>
> * * *
>
> The Court: All right. It will be 15 days to amend.
>
> Mr. Davis: Thank you, Your Honor.

Hearing Tr. at 26:13–23 and 27:13–15 (R. 403–04) (emphasis added).[1]

On October 29, 2018, Judge Benjamin filed a written order memorializing her prior oral ruling. *See* Order (R. 1). The following day, she filed an Amended Order to correct a minor scrivener's error. *See* Amend. Order (R. 6). The Amended Order, like her prior oral ruling, dismissed several of Mr. Davis' claims and allowed him to replead two others. *See id*. at 2–3 (R. 7–8). Like her ruling from the bench, Judge Benjamin's Amended Order gave Plaintiff 15 days to amend the pleadings and to name and serve each of the "John Doe" defendants:

> **IT IS THEREFORE ORDERED** each John Doe referenced in the complaint shall be specifically named and served. This court allows the plaintiff 15 days to appropriately amend the pleadings.

Id. at 3 (emphasis in original).

III. Mr. Davis' Amended Complaint and the new defendants' Motions to Dismiss.

On November 19, 2018, Mr. Davis filed his Amended Complaint, naming 31 new defendants. *See* Amend. Compl. (R. 31–75).[2] He did not, however, serve the Amended Complaint on the new defendants within the deadline set by Judge Benjamin. Rather, he served some over the following weeks and others over the following months, and there are yet others have not been served even today. Though the 45-page Amended Complaint is prolix, it says surprisingly little about the new defendants. As to some of them, the Amended Complaint contains *no* factual assertions at all. As to others, the allegations are exceedingly sparse and impermissibly vague.

[1] Mr. Davis is thus incorrect when he argues "[t]here was no discussion at the October 1st hearing as to 'when' the newly to be named John Doe defendants were to be physically served." Brief of Appellant at 6.

[2] Mr. Davis filed the Amended Complaint 20 days, not 15 days, after Judge Benjamin entered her Amended Order. Mr. Davis argued below that because he received service of the Amended Order by mail, he was allowed an additional five days to comply pursuant to Rule 6(e), SCRCP. The distinction between 15 and 20 days makes no material difference because Mr. Davis did not serve the new defendants within 15 *or* 20 days of Judge Benjamin's Amended Order.

Cato Institute and Mr. Rich filed a Motion to Dismiss the Amended Complaint on December 26, 2018, and filed a Memorandum in support of the motion on February 6, 2019. *See* Cato's and Rich's Mot. to Dismiss (R. 210–14); Cato's and Rich's Mem. in Supp. (R. 304–12). The Motion and Memorandum argued dismissal was warranted for numerous reasons including Mr. Davis' failure to make specific factual allegations regarding Cato Institute or Mr. Rich; the absence of any claims on which relief could be granted; the running of the statute of limitations; and—most notably—Mr. Davis' failure timely to complete the amendment of his complaint by serving it on the new defendants within the time period allowed by Judge Benjamin. *See* Cato's and Rich's Mot. to Dismiss at 2 (R. 211); Cato's and Rich's Memo. in Supp. at 3 (R. 306) ("Judge Benjamin's Amended Order gave Plaintiff 15 days to amend the pleadings and to name *and serve* each of the 'John Doe' defendants.") (emphasis added); *id*. at 3 n.1 ("Notwithstanding Judge Benjamin's Amended Order that the new defendants be named *and served within 15 days*, it was not until much later still that some of them were served. Indeed, some have apparently not yet been served today.") (emphasis added).[3]

A number of the other newly-added defendants likewise filed Motions to Dismiss and supporting memoranda raising these and other bases for dismissal. *See e.g.*, Tony Denny's Mot. to Dismiss at 1–2 (R. 368–69) (moving for dismissal based on Mr. Davis' failure to amend within the 15-day period set by Judge Benjamin); Rick Reames' and S.C. Dept. of Revenue's Mot. to Dismiss at 2 (R. 179) (moving for dismissal on the basis of, among other things, insufficient

[3] Mr. Davis is thus incorrect when he argues that none of the defendants specifically raised the grounds of untimely service in their filings. *See* Brief of Appellant at 7. Further, even if defendants had not raised this argument prior to the motion hearing, counsel made this argument orally at the hearing, and thus it was a proper basis upon which the court could rule. *See* Rule 7(b)(1), SCRCP ("An application to the court for an order shall be by motion which, *unless made during a hearing* or trial in open court with a court reporter present, shall be made in writing….") (emphasis added).

service); Stephen Kirkland's Mot. to Dismiss at 1 (R. 183) (same); Randy Page's Mot. to Dismiss at 1 (R. 187) (same); Palmetto Family Council's and Palmetto Family Alliance's Mot. to Dismiss at 1 (R. 191) (same); First Tuesday Strategies, LLC's Mot. to Dismiss at 1–2 (R. 201–02) (same).[4]

IV. Judge Early's motion hearing and ruling.

Judge Early heard arguments on the new defendants' Motions to Dismiss on February 12, 2019. *See* Tr. (R. 412–49). At the hearing, counsel argued several bases for dismissal, including Mr. Davis' failure timely to serve the new defendants as required by Judge Benjamin's Amended Order. *See id*. at 27:8 to 28:5 (R. 438–39). Judge Early carefully reviewed Judge Benjamin's Amended Order, determined it required Mr. Davis to file and serve his Amended Complaint by the deadline set therein, and concluded Mr. Davis' failure to do so warranted dismissal. *Id*. at 28:14 to 29:1 (R. 439–40); *id*. at 32:24 to 33:12 (R. 443–44); *id*. at 35:2–15 (R. 446). Accordingly, Judge Early filed an Order on February 19, 2019 dismissing with prejudice Mr. Davis' claims against the new defendants. *See* Order (R. 10–13).[5]

V. Mr. Davis' Motion for Reconsideration and subsequent appeal.

Mr. Davis filed a Motion for Reconsideration (R. 370–77), which the trial court denied on March 27, 2019 (R. 14–16). Mr. Davis filed his Notice of Appeal on April 13, 2019. He subsequently sought and received two extensions of time to serve his Initial Brief and Designation

[4] Mr. Davis is thus incorrect when he argues defendants failed to assert insufficiency of service in their responsive pleadings and thus (supposedly) waived that argument. *See* Brief of Appellant at 8.

[5] Neither counsel nor Judge Early specifically identified Rule 41(b), SCRCP as the Rule under which dismissal was warranted. *See* Rule 41(b), SCRCP ("For failure of the plaintiff to . . . comply with . . . any order of court, a defendant may move for dismissal of an action or of any claim against him."). The absence of reference to the specific Rule relied on, however, is of no moment as the argument and the ruling were clearly relying on the doctrine found in case law and codified in that Rule. *See generally Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2012) (stating a party is not required to use the exact name of a legal doctrine so long as the argument is clear and reasonably understood).

of Matter, meaning those documents were due on August 9, 2019. Mr. Davis subsequently requested a third extension of time. His motion was not granted, but he nevertheless waited until September 9, 2019 to untimely serve and file a copy of his Initial Brief and Designation.

STATEMENT OF THE FACTS

The alleged facts underlying this litigation—at least to the extent they can be discerned from the Amended Complaint—are as follows. In 2013, Mr. Davis and his wife formed a nonprofit organization intended to serve as a scholarship-granting organization under a then-newly-enacted South Carolina law permitting such organizations to accept tax creditable donations and distribute the donations as academic scholarships to qualifying special needs children. *See* Amend. Compl. ¶¶ 39, 44 (R. 39–40); *see also id*. ¶ 207 (R. 66–67). Mr. Davis alleges he had prior experience with a similar program in Georgia. *Id*. ¶ 42 (R. 40).

In the course of planning for the January 1, 2014 start to the program, Mr. Davis alleges he conferred with various individuals and entities (many of whom he later named as defendants in this lawsuit) who were also interested in matters of education policy generally and in the new scholarship-granting legislation specifically. *See id*. ¶¶ 41, 45–46, 48–50 (R. 40–42). Some of them planned to form and operate private scholarship-granting organizations similar to Mr. Davis' organization; others were policy influencers or think tanks that advocated for such scholarship programs; and yet others served on state bodies overseeing education policy or scholarship-granting organizations. *Id*. ¶¶ 41, 47 (R. 40–41). Mr. Davis alleges many of them, like him, were advocates for school choice in South Carolina, but differed from him in their views of the details of how such programs should be implemented. *See id*. ¶¶ 207–09 (R. 66–67).

In the course of these interactions, Mr. Davis alleges he became aware of unspecified "troubling and potentially unethical and illegal actions involved in the political process." *Id*. ¶ 45

(R. 41). He further alleges that when he discussed the rapid success he anticipated *his* nonprofit would achieve, these other individuals and entities felt threatened and began working to hinder his efforts. *See id*. ¶¶ 48–62 (R. 41–45). These efforts, according to Davis' exceedingly non-detailed allegations, included communicating unidentified, but allegedly false, information about him to unidentified school officials; unidentified individuals allegedly "feeding" news stories about his past bankruptcy to the media; and unidentified "Defendants" supposedly placing misleading information about him on unspecified websites.[6] *See id*. ¶¶ 63–70, 78 (R. 45–46, 48). Even the Roman Catholic Church (which Mr. Davis has not sued) supposedly joined in by dispatching an unnamed diocesan employee from Georgia "to trash Davis" to the Diocese of Charleston, supposedly prompting the Vicar of Charleston to send Mr. Davis "a 'get lost' letter" declining his offer to assist the Diocese. *Id*. ¶¶ 69, 75 (R. 46–47).

Undeterred by these alleged "dirty tricks," Mr. Davis alleges he "continued to work triple hard" to make his nonprofit succeed. *Id*. ¶ 86 (R. 49). In response, the General Assembly, supposedly acting as a mere pawn of the non-specified "Defendants," allegedly joined the fray by surreptitiously enacting a budget proviso limiting the role bankruptcy filers could play in operating scholarship-granting organizations. *Id*. ¶ 87, 89 (R. 49–50). In Mr. Davis' view, this proviso was motivated not by an rational legislative basis, but rather by invidious discrimination aimed solely and specifically at him. *Id*. ¶ 87 (R. 49–50). Mr. Davis has not, however, sued the General Assembly.

Mr. Davis further alleges that he was "targeted" by the South Carolina Department of Revenue ("SCDOR") for an audit. *Id*. ¶¶ 97–104 (R. 51–52).[7] He complained about the audit and,

[6] In a striking example of the incredibly non-specific nature of these allegations, Mr. Davis alleges "Defendant's [sic] had misleading information on their various websites which were globally available and cast dispersions [sic] on Plaintiff Davis and his group." *Id*. ¶ 67 (R. 46).

[7] He also alleges his wife and their non-profit were targeted for an audit. *See id*. Neither his wife nor the non-profit are parties to this suit, and he cannot, of course, assert claims on their behalf.

when SCDOR retained an outside third-party to conduct a review, complained the third-party review was itself part of the alleged conspiracy against him. *Id*. ¶¶ 120–26 (R. 54–55).[8] Ultimately, the audits resulted in a favorable outcome for Mr. Davis—they "resulted in 'no change' letters" and concluded "[n]o money was unaccounted for," *id*. ¶¶ 102–03 (R. 52)—but he nevertheless argues that various defendants tarnished his reputation by allegedly providing copies of the audit report to members of the General Assembly and the public. *Id*. ¶¶ 131–38 (R. 56–57).

Mr. Davis alleges Howard Rich has contributed financially to multiple South Carolina nonprofits and entities including some private schools for children with special needs. *Id*. ¶¶ 163–68 (R. 60–61). The Amended Complaint fails, however, to allege any specific conduct by Mr. Rich that directly affected, much less injured, Mr. Davis, nor does it allege any instance in which Mr. Rich supposedly directed, controlled, participated, or was even aware of any alleged wrongdoing directed at Mr. Davis.

Mr. Davis rounds out his Amended Complaint with a laundry list of vague allegations including the following:

- He alleges his attempts to seek answers and redress for his many grievances has been hindered or slowed as a result of unspecified and shadowy "pressure from what is obviously very powerful and influential Defendant's [sic] and John Doe(s)," *id*. ¶ 148 (R. 58);
- Without specifying when, how, by whom, or to whom, he alleges "Defendants and/or John Doe(s)" have erroneously stated that "Davis is 'not from around here,'" *id*. ¶ 150 (R. 58);
- Again, without specifying when, how, by whom, or to whom, he alleges "Defendants and/or John Doe(s)" have incorrectly stated that Mr. Davis and his wife were responsible for the woes of Georgia's scholarship-granting program, *id*. ¶ 151 (R. 59);

[8] In response to the audit, Mr. Davis filed a complaint with the Office of Disciplinary Counsel against the then-Director of SCDOR, Rick Reames. *Id*. ¶¶ 116–17 (R. 54). Mr. Davis also filed professional complaints against the third-party reviewer. *See id*. ¶¶ 127–29 (R. 55–56).

- Similarly without any degree of detail whatsoever, he alleges that unspecified speakers have stated to unspecified audiences that Mr. Davis is a member of the Russian Mob, *id*. ¶ 152 (R. 59);
- He likewise vaguely alleges that unspecified speakers have incorrectly stated to unspecified audiences that Mr. Davis is sending donations out of the country, *id*. ¶ 153 (R. 59); and
- He alleges unspecified "Defendants and/or John Doe(s)" have created unidentified websites and have mailed letters to school officials, parents, and the Davises' neighbors containing false or misleading information, though he does not identify when the letters were sent, what websites he refers to, or what information was false or misleading, *id*. ¶¶ 156–58 (R. 59–60).[9]

On these shaky foundations, Mr. Davis erects nine claims—all of which are asserted generically against "Defendants" and none of which identify the specific conduct giving rise to the claim—for (i) defamation per se and per quod, (ii) defamation by innuendo, (iii) invasion of privacy, (iv) negligence, (v) intentional infliction of emotional distress, (vi) tortious interference with prospective contractual relations, (vii) unfair trade practices, (viii) pierce the corporate veil, and (ix) conspiracy. *See id*. ¶¶ 220–56 (R. 69–74).

STANDARD OF REVIEW

The trial court's dismissal of Mr. Davis' claims against the new defendants was based on Mr. Davis' failure to comply with the requirements of Judge Benjamin's prior Amended Order. The interpretation of an order is a question of law that is reviewed *de novo*. *Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 498 (2014); *Ex parte TLC Laser Eye Centers, LLC*, 404 S.C. 385, 392, 745 S.E.2d 105, 109 (2013); *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

The dismissal of Mr. Davis' claims against Cato Institute and Mr. Rich is also supported by the additional sustaining ground that Mr. Davis failed to assert claims against them upon which relief can be granted. When reviewing a dismissal for failure to state a claim, an appellate court

[9] The Amended Complaint also re-asserts the factual allegations and claims against Ellen Weaver and PPI. *See id*. ¶¶ 193–206 (R. 64–66). Those factual allegations and claims are irrelevant to the instant appeal, since Judge Early's Order dismissed only the claims against the new defendants, not the claims against Weaver and PPI.

applies the same standard as the trial court—the pleadings are construed liberally, and all well-pled facts are presumed true. *See Doe*, 407 S.C. at 134, 754 S.E.2d at 498–99 (citation omitted). The court need *not*, however, presume the truth of allegations pled merely in conclusory fashion or stating legal conclusions. *HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 635, 699 S.E.2d 699, 705 (Ct. App. 2010) ("[O]n a 12(b)(6) motion, the court is required to presume all well pled *facts*, not propositions of law, to be true.") (emphasis in original); *Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986) (stating that even under the liberal standard applicable to a motion to dismiss, a mere conclusory allegation, unsupported by particular allegations of fact, is insufficient). Under this standard, a claim should be dismissed when the facts alleged in the complaint do not support relief. *Brouwer v. Sisters of Charity Providence Hospital*, 409 S.C. 514, 519, 763 S.E.2d 200, 202 (2014).

Finally, the question of whether a claim should be dismissed with (rather than without) prejudice due to a party's failure to comply with a court order is answered in the affirmative by Rule 41(b). To the extent dismissal was also appropriate for failure to state facts supporting the claims and for failure to assert viable claims, the prejudicial effect of the dismissal is determined by the trial court's exercise of its discretion, and that decision will be reversed only for an abuse of discretion. *See Berry v. McLeod*, 328 S.C. 435, 449–50, 492 S.E.2d 794, 802 (Ct. App. 1997) (affirming trial court's dismissal with prejudice and without leave to amend and noting that such a ruling "is within the sound discretion of the trial court and will rarely be disturbed on appeal."); *Newman v. Old West, Inc*., 286 S.C. 394, 334 S.E.2d 275 (1985) (holding trial court's dismissal with, rather than without, prejudice was not an abuse of discretion). This is particularly true when—as here—the trial court dismisses with prejudice a complaint that has already been amended, and when the plaintiff's Rule 59(e) motion and subsequent appellate brief fail to cite any new factual allegations that would impact the issue. *See Sullivan v. Hawker Beechcraft Corp*., 397 S.C. 143, 153, 723 S.E.2d 835, 840–41 (Ct. App. 2012) (holding the trial court did not err by

dismissing with prejudice a previously amended complaint and noting an appellate court will not reverse such a ruling when the plaintiff has not identified any new facts that would alter the analysis).

ARGUMENT

I. The trial court correctly interpreted Judge Benjamin's order as requiring Mr. Davis to file and serve his Amended Complaint within 15 days and correctly ruled that his failure to do so warranted the dismissal of his claims.

As explained more fully below, the trial court did not err in interpreting Judge Benjamin's Amended Order as requiring Mr. Davis to serve his Amended Complaint within 15 days, nor did the trial court err in concluding that Mr. Davis' failure to comply with that requirement warranted the dismissal of his claims against the new defendants.

A. A trial court's order granting leave to amend may place limitations and conditions on the scope and timing of the amendment.

As a threshold matter, the law is clear that a trial court may, in its discretion, impose conditions, limitations, and deadlines on a party seeking leave to file an amended pleading.[10] *See, e.g.*, *Georganne Apparel, Inc. v. Todd*, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1990) (affirming ruling enforcing an order that imposed conditions on a party's ability to refile its claims); *Stokes v. Murray*, 99 S.C. 221, 83 S.E. 33 (1914) (holding it "was clearly within the discretion of" the trial court to impose terms on a party's ability to amend its pleading); *see also* 71 C.J.S. Pleadings 61A § 429 ("It is within the discretion of the court to impose such terms on allowing an amendment as seem, in the exercise of its sound discretion, to be just and reasonable.") (citations omitted); Am. Jur. 2d Pleading § 712 (analyzing Federal Rule 15(a) and noting "it is well settled" that a court may impose conditions on its grant of leave to amend a pleading) (citations omitted).

[10] Mr. Davis has not argued, either to the trial court or to this Court, that Judge Benjamin lacked the authority to place conditions on his ability to amend. Nevertheless, to avoid any uncertainty, Argument I.A of this brief explains that such conditions are permissible for a trial court to place on a party seeking leave to amend.

The trial court's exercise of this discretion may include requiring the amending party to file and serve the new pleading within a certain time period. Indeed, it is not uncommon for trial courts to impose such deadlines. *See, e.g.*, *Sharpe v. Brown*, No. 2011-CP-32-01665, 2011 WL 12841693 (S.C. Ct. of Comm. Pl., Hon. William Keesley, Aug. 11, 2011) (ordering the filing and service of the amended complaint within 30 days from the date of the order); *Griffis v. Cherry Hill Estates, LLC*, No. 2009-CP-07-06054, 2010 WL 10079931 (S.C. Ct. of Comm. Pl., Hon. Marvin H. Dukes, III, Oct. 27, 2010) ("If Third Party Plaintiffs fail to serve an Amended Complaint on or before November 14, 2010, the above referenced causes of action shall be dismissed with prejudice."); *Wright v. Hiester Const. Co*., No. 03-CP-07-890, 2005 WL 6582778 (S.C. Ct. of Comm. Pl., Hon. Curtis Coltrane, Sept. 13, 2005) (requiring service of an amended complaint within five days); *see also United States v. Reliant Hospice, Inc*., No. 3:08-3724-CMC, 2011 WL 1321584, at *7 (D.S.C. April 4, 2011) (granting motion to amend complaint, imposing limitations on the scope of the amendment, and requiring that it be filed within seven days and served within seven days thereafter); *Smith-Jeter v. City of Columb*ia, No. 3:10-1188-JFA, 2011 WL 884123 (D.S.C. March 14, 2011) (granting motion to amend complaint and ordering the amended pleading be filed and served within 14 days).

This is precisely what Judge Benjamin did in the instant proceeding by allowing Mr. Davis to amend his pleading subject to certain limitations on the scope and timing of the amendment. *See* Hearing Tr. at 26:16–19 (R. 403) (Judge Benjamin: "the only things that I am granting you leave to amend the complaint on is the invasion of privacy, conspiracy, and the John Does"); *id*. at 27:13 (R. 404) ("It will be 15 days to amend."). And as explained in the following section, Judge Benjamin not only *could* impose a deadline on the service of the Amended Complaint, she *did*.

B. Judge Benjamin's Amended Order required Mr. Davis both to file and to serve his Amended Complaint within 15 days.

Judge Early's ruling dismissing Mr. Davis' claims against the new defendants correctly interpreted Judge Benjamin's prior order requiring Mr. Davis to file and serve his Amended Complaint within 15 days. *See* Order at 2–3 (R. 7–8).[11] Mr. Davis concedes he did not serve the new defendants within 15 days of Judge Benjamin's Amended Order, but argues instead that Judge Benjamin did not actually require him to do so. *See* Brief of Appellant at 5, 8–9. Rather, according to Mr. Davis, the 15-day requirement applied only to the amount of time in which he could replead the two causes of action Judge Benjamin had found deficient and *file* the Amended Complaint. *See id*. He is incorrect for at least four reasons.

First, Mr. Davis' argument is contrary to the plain language and meaning of Judge Benjamin's Amended Order. The relevant language of the Amended Order is as follows:

> **IT IS THEREFORE ORDERED** each John Doe referenced in the complaint shall be specifically named and served. This court allows the plaintiff 15 days to appropriately amend the pleadings.

See Amended Order at 3 (R. 8). These sentences, read together and read in the context of the Amended Order, indicate that when Judge Benjamin ordered Mr. Davis to "amend" the complaint, she viewed the naming *and* serving of the pseudonymous defendants as part of the "amending" and intended those steps to be subject to the 15-day deadline.

Mr. Davis, however, reads the paragraph quoted above differently. In his view, the 15-day deadline applies only to select portions of the court's decree, namely the tasks of naming the new defendants, revising two claims, and *filing* the amended complaint (even though the latter two

[11] As noted above and as acknowledged in Judge Early's Order, *see* Order at 2 n.2 (R. 11), the question of whether Mr. Davis was entitled to an additional five days to comply pursuant to Rule 6(e), SCRCP, is irrelevant since he did not serve the new defendants within 15 *or* 20 days of Judge Benjamin's Amended Order.

steps are not expressly mentioned in the decretal language quoted above). *See* Brief of Appellant at 5, 8–9. Stated differently, Mr. Davis argues the 15-day deadline applies to things merely implied by Judge Benjamin's Amended Order but not to the express requirement of service on the new defendants. The plain language of the Amended Order states otherwise, and Mr. Davis cannot cherry pick which aspects of the decree are subject to the 15-day deadline.

Second, Mr. Davis' argument that the 15-day deadline applied only to repleading and filing (but not serving) the Amended Complaint is belied by his conversation at the hearing with Judge Benjamin in which they discussed the 15-day deadline. At that hearing, both Mr. Davis and Judge Benjamin discussed and undoubtedly understood that when she directed him to "amend" the complaint within 15 days, that included naming and serving the new defendants:

> The Court: On the John Does 1 through 20, I think you need to name, since you are going to amend the complaint -- and *those are the only things that I am granting you leave to amend the complaint on is* the invasion of privacy, conspiracy, *and the John Does, I think you need to name them and serve them*, because I'm not sure -- you have them as a named Defendant, and unless you are going to do it by publication, I'm not sure.
>
> Mr. Davis: And do we have the time period for amending it?
>
> * * *
>
> The Court: All right. It will be 15 days to amend.
>
> Mr. Davis: Thank you, Your Honor.

Hearing Tr. at 26:13–23 and 27:13–15 (R. 403–04) (emphasis added).[12] The only plausible interpretation of this exchange is the same one Judge Early reached in his Order dismissing the claims against the new defendants, namely that Judge Benjamin specifically required Mr. Davis to name and serve the new defendants within 15 days, and that his failure to do so warranted dismissal.

[12] Mr. Davis is thus incorrect when he argues "[t]here was no discussion at the October 1st hearing as to 'when' the newly to be named John Doe defendants were to be physically served." *See* Brief of Appellant at 6.

Third, even if the plain language of Judge Benjamin's Amended Order were unclear (and it is not), and even if the comments at the hearing she conducted left any room for doubt (and they do not), the law confirms that Judge Early's ruling was correct because the amending process includes service, and thus a 15-day deadline to "amend" includes service on the new defendants. South Carolina and other jurisdictions recognize that an amendment to a pleading is complete and effective only when it is served. *See Bowman v. Richland Memorial Hosp.*, 335 S.C. 88, 92, 515 S.E.2d 259, 261 (Ct. App. 1999) ("[A]ppellants had ten days from the effective date to amend their complaint. Therefore, appellants properly filed *and served* their amended complaint within ten days of the order.");[13] *Miller v. Stark*, 29 S.C. 325, 7 S.E. 501 (1888) ("The order also provided that the plaintiffs have leave *to amend* . . . and that, on failure *to amend* within the 20 days, the complaint be dismissed. The plaintiffs, however, did, within the prescribed time, *serve* an amended complaint . . . .") (emphasis added); *see also Intern. Controls Corp. v. Vesco*, 556 F.2d 665, 669 (2d Cir. 1977) (holding the amendment of a complaint is only effective when the amended complaint is served); *Doe v. Unocal Corp.*, 27 F.Supp.2d 1174, 1179 (C.D. Cal. 1998) ("An original complaint is only superseded . . . when the amended complaint is properly served, not when it is filed.") (citing *Vesco*, 556 F.2d at 669).

Fourth, further reinforcement of Judge Early's interpretation that the 15-day deadline required service on the new defendants can be found in the fact that such a ruling advances the orderly administration of justice without allowing for excessive delay and disparate treatment of

[13] In *Bowman*, the plaintiff timely filed and served an amended complaint within 10 days after the order was filed. The opinion indicates, however, that if (as here) the amended complaint had *not* been filed and served within the time frame set by the trial court, dismissal would have been appropriate. *See Bowman*, 335 S.C. at 92, 515 S.E.2d at 261 ("[W]e find the appellants had ten days from the date the order was entered by the clerk of court to amend their complaint before the Hospital could be dismissed from the action based upon noncompliance with the order.").

different defendants, and thus is the most likely and most sensible interpretation. In contrast, Mr. Davis' strained interpretation of Judge Benjamin's Amended Order would lead to an absurd result that cannot be correct. In his view, Judge Benjamin left him at liberty to decide if and when to serve the defendants, perhaps waiting a few weeks to serve some, waiting another month or two to serve a few others, and waiting a year or more to serve—or maybe never serve—the rest. (This is, of course, exactly what Mr. Davis did.) The inequities and inefficiencies of such a scenario are so plain that no judge would encourage or allow it. In sum, Judge Early correctly interpreted Judge Benjamin's Amended Order, which required Mr. Davis to file and serve his Amended Complaint within 15 days.

C. Mr. Davis' failure to serve his amended pleading by the trial court's deadline warrants the dismissal of his new claims.

A party's failure to comply with a trial court's conditions for the assertion of new claims warrants dismissal of those claims. The instant appeal presents precisely such a situation. Judge Benjamin, like many judges allowing or ordering a party to amend its pleading, set a deadline for the filing and service of the amended pleading. Mr. Davis missed the deadline. Therefore, under the applicable Rule and under well-established and long-standing South Carolina law, dismissal of his new claims was an appropriate sanction. *See, e.g.*, Rule 41(b), SCRCP (stating dismissal of an action or claim is warranted when a plaintiff fails to comply with an order of the court); *Bowman v. Richland Mem. Hosp.*, 335 S.C. 88, 92, 515 S.E.2d 259, 261 (Ct. App. 1999) (stating that, when the trial court had set a deadline for plaintiff to amend the complaint, the plaintiff "had ten days from the date the order was entered by the clerk of court to amend their complaint before the Hospital could be dismissed from the action based upon noncompliance with the order"); *Therens v. Faircloth*, 291 S.C. 451, 354 S.E.2d 54 (Ct. App. 1987) (noting it was "clear that the Circuit Court had the authority to dismiss" the plaintiff's suit due to plaintiff's failure to comply with a

prior order permitting the re-filing of his claims) (citing Rule 41(b), SCRCP); *Harvin v. Comm. Credit Corp*., 275 S.C. 14, 266 S.E.2d 789 (1980) (holding that where the circuit court had given plaintiff 20 days to amend the complaint, plaintiff's failure to do so was in effect a final dismissal, and no subsequent court or court could modify or extend that time limit); *Brown v. Easterling*, 59 S.C. 472, 38 S.E. 118 (1901) (holding an amended complaint should have been dismissed because the trial court had ordered the plaintiff to *serve* the amended complaint within 20 days and the plaintiff failed to do so, and noting also that when a trial judge fixes a time within which an amended pleading must be served, once that time passes the effect is final and cannot be modified or extended by another judge); *see also Griffis v. Cherry Hill Estates, LLC*, No. 2009-CP-07-06054, 2010 WL 10079931 (S.C. Ct. of Comm. Pl., Hon. Marvin H. Dukes, III, Oct. 27, 2010) (noting if a party failed "to serve an Amended Complaint on or before November 14, 2010, the above referenced causes of action shall be dismissed with prejudice."); Rules 37(b)(2)(C) and 41(b) (permitting dismissal when a party fails to comply with a court order); *Smith v. The Gillette Co*., No. 2004-CP-40-0938, 2005 WL 5712360 (S.C. Ct. of Comm. Pl., July 27, 2005, Hon. Casey Manning) (dismissing case with prejudice due to plaintiff's failure timely to comply with court order); *see also generally* Argument IV.A, *infra* (citing authorities demonstrating that dismissal with prejudice is appropriate in situations like the instant lawsuit).

Mr. Davis' status as a *pro se* plaintiff does not exempt him from dismissal for his failure to comply with Judge Benjamin's order.[14] *See Goodson v. Am. Bankers Ins. Co. of Florida*, 295 S.C. 400, 368 S.E.2d 687 (Ct. App. 1988) ("[A] party has a duty to monitor the progress of his case. Lack of familiarity with the legal proceeding is unacceptable and the court will not hold a

[14] As noted above, Mr. Davis' repeated claims of *pro se* status should not obscure the fact that he is a graduate of this state's leading law school and is licensed to practice law in a sister state.

layman to any lesser standard than is applied to an attorney."). Judge Benjamin informed him, both orally at the hearing and in her written Amended Order, of the requirement to file and serve the Amended Complaint within 15 days. Judge Early properly ruled that his failure to do so warranted dismissal. This Court should affirm the dismissal.

II. The dismissal of Mr. Davis' claims against Cato Institute and Mr. Rich is also supported by the additional sustaining ground that the Amended Complaint fails adequately to allege any facts that could give rise to their liability.

Even if this Court were to disagree with Judge Early's interpretation of the deadline for service found in Judge Benjamin's Amended Order, the Court should nevertheless affirm the dismissal of Mr. Davis' claims against Cato Institute and Mr. Rich for an additional and independent reason, namely that Mr. Davis has not pled any facts that could support the claims he has asserted. As a prevailing party below, Cato Institute and Mr. Rich may assert additional grounds to sustain the ruling below, even if (as here) those grounds were not relied on by the trial court in its ruling. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); *I'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("Under the present rules, a respondent—the "winner" in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court."); J. Toal, *et al*., *Appellate Practice in South Carolina* 62 (2d ed. 2002) (same). As explained more fully below, such additional sustaining grounds are present in the instant appeal.

A. The Amended Complaint fails to allege any wrongdoing by Cato Institute.

Dismissal of any and all claims against Cato Institute is required because the Amended Complaint never even mentions Cato Institute other than in the caption, the introductory section

naming the defendants, and as a former employer of co-defendant Jason Bedrick. *See* Amend. Compl. at ¶¶ 6, 16, 24, and 162 (R. 33, 35, 37, and 60). Neither in those paragraphs nor anywhere else does the Amended Complaint assert any factual allegations about *any* of Cato Institute's actions, much less any allegation of wrongdoing by Cato Institute or allegations of conduct that was directed against Mr. Davis and caused him harm.

In the absence of any factual allegation of *any* action (much less wrongdoing) by Cato Institute, the Amended Complaint fails to state any claims upon which relief can be granted, and dismissal is warranted. *See* Rule 8(a), SCRCP (requiring a pleading to set forth facts showing the pleader is entitled to relief from the defendant); Rule 12(b)(6), SCRCP (stating a claim may be dismissed for failing to allege facts sufficient to constitute a cause of action); *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 728 S.E.2d 61 (Ct. App. 2012) (affirming the dismissal of claims where the plaintiffs "failed to allege any facts" that could give rise to liability); *Driggers v. Sherouse*, No. 2011-CP-45-00648, 2012 WL 10861804, at *2 (S.C. Ct. of Common Pleas, Williamsburg County, Hon. Ralph F. Cothran, Jr., July 25, 2012) ("To begin, the Court dismisses the complaint as to the individual justices of the Supreme Court because the complaint fails to allege that the justices have done anything wrong. . . . Given the absence of allegations showing any wrongdoing by the four justices identified in the Complaint, the Court dismisses the complaint as to the individual justices of the Supreme Court.");[15] *Johnson v. Thomas*, No. 2000-CP-10-001015, 2001 WL 35947186 (S.C. Ct. of Common Pleas, Charleston County, Hon. A. Victor Rawls, Jan. 12, 2001) (dismissing claims against two defendants "because the Complaint does not

[15] Judge Cothran's dismissal was subsequently affirmed by this Court in an unpublished opinion. Because unpublished appellate court opinions are not to be cited, *see* Rule 268(d)(2), SCACR, Cato Institute and Mr. Rich mention the affirmance without citation merely to acknowledge the subsequent procedural history of the trial court ruling cited above.

set forth *any* factual allegations against those Defendants, let alone any allegations which would establish the elements of any cognizable cause of action against them.") (emphasis in original); *see also Potter v. Clark*, 497 F.2d 1206, 1207 (7th Cir. 1974) ("Where a complaint alleges no specific act or conduct on the part of the defendant and the complaint is silent as to the defendant except for his name appearing in the caption, the complaint is properly dismissed, even under the liberal construction to be given *pro se* complaints.") (citing *Brzozowski v. Randall*, 281 F. Supp. 306, 312 (E.D. Pa. 1968)); *Newkirk v. Circuit Court*, No. 3:14CV372–HEH, 2014 WL 4072212 (E.D. Va. Aug.14, 2014) (ruling the complaint was subject to summary dismissal with prejudice when there were no factual allegations against named defendants within the body of the pleading); *McCray v. S.C. Dept. of Corr*., No. 1:19-1574-TLW-SVH, 2019 WL 4043958 (D.S.C. June 28, 2019) (recommending same) adopted by 2019 WL 4038308 (D.S.C. Aug. 27, 2019).

Mr. Davis' Amended Complaint fails to allege any actions by Cato Institute, much less actions directed at him or causing him harm, and thus dismissal is warranted under Rule 12(b)(6) for failure to allege facts sufficient to support any claim to relief.

B. The Amended Complaint fails to allege any basis upon which Cato Institute could be vicariously liable for the alleged wrongdoing of others.

As noted above, the Amended Complaint does not include any factual allegations regarding any action performed at any time by Cato Institute, much less a wrongful action directed against Mr. Davis. Nor does the Amended Complaint plead any basis upon which Cato Institute could be vicariously liable for the actions of others. A corporate entity cannot be held liable for the wrongdoing of another except in certain limited situations not present here. The sole—and exceedingly tenuous—connection alleged between Cato Institute and any alleged harm to Mr. Davis is the assertion that co-defendant Jason Bedrick, who was previously allegedly employed

by Cato Institute, "has at Cato . . . made false and defamatory statements about Plaintiff Davis and his group." *See* Amend. Compl. at ¶¶ 24, 162 (R. 37, 60).

Even assuming *arguendo* the truth of these allegations (which Cato Institute and Mr. Rich do not concede), they fail to assert a basis upon which Cato Institute could be liable. "[A]n employer is vicariously liable for injuries to a third party resulting from torts its employee commits *within the scope of employment*." *Froneburger v. Smith*, 406 S.C. 37, 52, 748 S.E.2d 625, 633 (Ct. App. 2013) (emphasis added). The Amended Complaint does not allege that Mr. Bedrick's alleged defamatory statements were made in the scope of his employment with Cato Institute, nor is it reasonable to infer that the intended scope of his employment was to engage in intentional tortious conduct. Accordingly, because the Amended Complaint fails to allege Cato Institute is vicariously liable and, in any event, fails to plead facts sufficient to support a claim of vicarious liability, Cato Institute cannot be liable for Mr. Bedrick's or anyone else's alleged wrongdoing.

C. The Amended Complaint fails to allege any facts supporting any claim against Mr. Rich under any of the causes of action asserted.

Dismissal of any and all claims against Mr. Rich is required because even assuming the Amended Complaint's *de minimis* references to him are true (which is not conceded), they are insufficient to establish Mr. Davis' entitlement to relief. None of them allege any specific action or omission by Mr. Rich that affected or injured Mr. Davis. Rather, the allegations against Mr. Rich assert only (a) that he "funds and directs the operations and activities" of various other non-profit defendants and their employees, (b) that prior to 2014, Mr. Rich and other Defendants were engaged in undefined but supposedly "troubling" activities, (c) that in 2015, a California commission found he failed to comply with a campaign finance disclosure requirement, (d) that he has contributed money to South Carolina non-profits and entities including several independent schools,

and (e) he is or was allegedly a client of the Nexsen Pruet law firm. *See* Amend. Compl. at ¶¶ 6, 45, 163–68 (R. 33, 41, 60–61).

Even assuming *arguendo* the truth of these allegations, none of them alleges any wrongdoing by Mr. Rich himself that affected Mr. Davis, and none of them are sufficient bases upon which any liability could be imposed on Mr. Rich. Accordingly, dismissal of the claims against him is warranted. *See* Argument II.A, *supra* (citing Rules and cases in support of this argument).

D. The Amended Complaint fails to allege any basis upon which Mr. Rich could be vicariously liable for the alleged wrongdoing of others.

As noted above, the Amended Complaint fails to allege any wrongdoing by Mr. Rich that affected Mr. Davis. Nor does the Amended Complaint allege any basis on which he can be liable for the alleged wrongs that others supposedly inflicted on Mr. Davis. The Amended Complaint does not allege that Mr. Rich employed any of the alleged wrongdoers or that he instructed, compelled, or participated in any alleged act of wrongdoing. In the absence of such an allegation, Mr. Davis has failed to assert any claim for which Mr. Rich could be vicariously liable. *See Cherry v. Myers Timber Co., Inc*., 404 S.C. 596, 601, 745 S.E.2d 405, 407 (Ct. App. 2013) (noting the general rule that one can be vicariously liable only if he has the power to control or direct the actions of another, and if the servant's actions were, in fact, taken at the direction of the alleged master); *see also* Restatement (Second) of Agency § 250 (1958) (stating vicarious tort liability arises only where one engaging another to achieve a result controls or has the right to control the details of the latter's physical movements). Because the Amended Complaint fails to allege Mr. Rich is vicariously liable for the acts of others and, in any event, fails to plead facts necessary to support a claim of vicarious liability—*e.g.*, facts like employment, scope of employment, or control, instruction, or participation in the specific acts that allegedly harmed Mr. Davis—Mr. Rich cannot be liable for anyone else's alleged wrongdoing.

III. The dismissal of Mr. Davis' claims against Cato Institute and Mr. Rich is also supported by the additional sustaining ground that the causes of action he attempts to assert are fatally deficient.

Even if Mr. Davis had timely served his Amended Complaint (which he did not) and even if that pleading alleged facts supporting his claims (which it does not), this Court should nevertheless affirm the dismissal of those claims for another independent ground appearing in the Record,[16] namely that Mr. Davis' claims are legally and fatally deficient.

As an initial matter, each of Mr. Davis' claims are so generically drafted as to lack the requisite specificity necessary to establish cognizable causes of action. Each of them is asserted against "Defendants" generically, presumably including defendants against whom not a single factual allegation has been pled. *See* Amended Compl. ¶¶ 221, 226, 229, 234, 236, 238, 243, 250 (R. 69–72, 74); *see also id.* ¶ 243 (R. 73) (asserting claim generically against the "Corporate Defendants," who are never identified). Furthermore, each of the claims suffers from additional, specific defects summarized below.

Mr. Davis' *first* claim—defamation per se and per quod—fails because it does not identify any specific false statements (much less ones made by Cato Institute or Mr. Rich) and does not identify to whom any such false statements were made, in what respects they were false, or any injury or harm he has suffered as a result of the alleged defamation. *See id*. ¶ 224 (R. 69) (merely baldly asserting that "Defendant [sic] is entitled to" damages). In the absence of such specifics, Mr. Davis cannot recover. *See Harris v. Tietex Int., Ltd*., 417 S.C. 533, 790 S.E.2d 411 (Ct. App. 2016) (noting the plaintiff's "amended complaint did not identify the specific statements on which

[16] See generally the introductory paragraph of Argument II, *supra*, citing authorities in support of Respondents' ability to rely on additional grounds to sustain the ruling below.

his defamation claim was based" and thus concluding there was no basis upon which he could recover).

Mr. Davis' *second* claim—defamation by innuendo—fails for the same reasons. *See id*. ¶¶ 225–27 (R. 69–70) (failing to assert specific incident of defamation or any resulting damage, but instead simply claiming "Defendant [sic] is entitled to" damages); *Harris*, 417 S.C. 533, 790 S.E.2d 411. This claim further fails because it is a patently obvious attempt to assert a cause of action not cognizable in South Carolina, namely a claim for false light publicity. *See* Amend. Compl. ¶¶ 226 (claiming defendants made statements "about Defendant [sic] which placed him in a false light"). Indeed, this claim is essentially identical to the claim for false light publicity previously dismissed by Judge Benjamin *without leave to replead it*. *Compare* Compl. ¶¶ 38–40 (R. 26) *with* Amend. Compl. ¶¶ 225–27; *see also* Amended Order at 2 (R. 69–70) (dismissing Mr. Davis' second claim without leave to amend). Mr. Davis' attempt to paper over the true nature of his claim by slapping a new label on it should not be allowed to disguise the fact that it is, at bottom, a claim not recognized in this state. *See Brown v. Pearson*, 326 S.C. 409, 422, 483 S.E.2d 427, 484 (Ct. App. 1997).

Mr. Davis' *third* claim—invasion of privacy—fails because it does not identify who encroached on his privacy, how they did so, what non-public information they discovered, in what way it was publicized, and what damages Mr. Davis sustained. *See generally Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 477–78, 514 S.E.2d 126, 130–31 (1999). Further, this claim, which is nearly word-for-word identical to the third claim asserted in Mr. Davis' original complaint, *compare* Compl. ¶¶ 41–45 (R. 27) *with* Amend. Compl. ¶¶ 228–32 (R. 70), *still* suffers from the same defect that Judge Benjamin had previously identified and instructed Mr. Davis to correct. *See* Amended Order at 2 ("The third claim is invasion of privacy through

publicity. Plaintiff has not pled facts sufficient to constitute any cause of action for invasion of privacy because Plaintiff failed to allege that the information was publicized in any way. The court will allow Plaintiff the opportunity to amend the complaint to detail the element of publicity, *if plaintiff is unable to do so, this motion to dismiss will be granted*.") (emphasis added). Because Mr. Davis did not even *attempt*, much less succeed, in rectifying the defect specifically identified by Judge Benjamin, dismissal of the claim is warranted.

Mr. Davis' *fourth* claim—negligence—fails because nowhere in his Amended Complaint does he allege Cato Institute or Mr. Rich (or any other defendant, for that matter) owed him any duty, breached said duty, and thereby proximately caused him damages. In the absence of such allegations, Mr. Davis has not stated a viable claim for negligence. *See Doe ex rel. Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001) ("To state a cause of action for negligence, the plaintiff must allege facts which demonstrate the concurrence of three elements . . . .").

Mr. Davis' *fifth* claim—intentional infliction of emotional distress—fails because Mr. Davis has not pled any facts to support the requisite elements of the claim, namely that Cato Institute or Mr. Rich took any act to "intentionally or recklessly" inflicted emotional distress that was so extreme or outrageous that it exceeded all possible bounds and which no reasonable person could be expected to endure it. *See Hainer v. Am. Med. Intern., Inc.*, 320 S.C. 316, 324, 465 S.E.2d 112, 117 (Ct. App. 1995). In the absence of such supporting factual allegations, the claim cannot lie.

Mr. Davis' *sixth* claim—tortious interference with prospective contractual relations—fails because Mr. Davis' amended pleading does not identify any reasonable expectation of benefit from any identifiable *contract* (whether actual or prospective) with any identifiable person. In the absence of a real contract and actual interference with it, the claim is fatally defective:

> Upon a review of our limited South Carolina precedent, a cause of action for intentional interference with prospective contractual

> relations generally stands following the loss of an identifiable contract or expectation. . . .
>
> The plaintiff must actually demonstrate, at the outset, that he had *a truly prospective (or potential)* ***contract*** *with a third party*. This does not require plaintiff to prove the tort in his initial pleadings; rather, the allegations must present facts that give rise to some reasonable expectation of benefits from the alleged lost contracts.

United Ed. Distrib., LLC v. Ed. Testing Servs., 350 S.C. 7, 14–15, 564 S.E.2d 324, 328–29 (Ct. App. 2002) (affirming dismissal of claim for tortious interference with prospective economic advantage) (emphasis added). Here, the Amended Complaint has alleged no facts sufficient to support a claim for supposed contracts that were disrupted by the unspecified "Defendants" alleged wrongdoing, much less by Cato Institute and Mr. Rich. Furthermore, this is the same defect previously expressly identified by Judge Benjamin in her Amended Order, which dismissed this claim *without leave to replead it*. *See* Amend. Order at 2 (R. 7) ("The sixth claim is tortious interference with contractual relations, based on the arguments of counsel this matter does not involve any contracts, therefore this motion to dismiss is granted."). Not only has Mr. Davis repled the claim without leave; he didn't even bother to remedy the flaw previously identified by Judge Benjamin. *Compare* Compl. ¶¶ 50–52 (R. 28) *with* Amend. Compl. ¶¶ 237–39 (R. 71–72). Accordingly, it should be dismissed. Again.

Mr. Davis' *seventh* claim—unfair trade practices—fails because he has not pled facts indicating Cato Institute or Mr. Rich (or any other defendant, for that matter) has engaged in unfair competition or deceptive acts *in trade or commerce* as required and defined by the Unfair Trade Practice Act and case law interpreting that Act. *See* S.C. Code Ann. §§ 39-5-10(b), -20(a); *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 638 –39, 743 S.E.2d 808, 816 (2013) (holding the SCUTPA applies *only* in the context of "trade or commerce," meaning "business and consumer transactions" involving the sale or distribution of services, property, and

commodities). In addition, Mr. Davis fails to identify any deception, much less a resulting injury, that he has suffered as a result of the alleged unfair trade practices. *See* Amend. Compl. ¶¶ 240–44 (R. 72). Furthermore, Judge Benjamin already dismissed this claim *without leave to replead it*. *See* Amend. Order at 2–3 (R. 7–8) ("The seventh claim is unfair trade practice, based on the allegations and arguments of counsel this matter does not involve trade or commerce under the South Carolina Unfair Trade Practice Act, therefore this motion to dismiss is granted."). Undeterred by Judge Benjamin's ruling, Mr. Davis has repled the claim verbatim. *Compare* Compl. ¶¶ 53–57 (R. 28–29) *with* Amend. Compl. ¶¶ 240–44 (R. 72). Accordingly, this claim should be dismissed yet again.

Mr. Davis' *eighth* claim—"pierce the corporate veil"—fails because nowhere in the Amended Complaint does Mr. Davis claim or allege facts demonstrating the requisite elements of the equitable relief of piercing the corporate veil, namely that a specific entity is undercapitalized, had non-functioning officers or directors, lacked corporate records, and the like. *Sturkie v. Sifly*, 280 S.C. 453, 457–58, 313 S.E.2d 316, 318–19 (Ct. App. 1984) (citing *Dewitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co*., 540 F.2d 681 (4th Cir. 1976)). Indeed, the Amended Complaint does not even identify which corporate entity(ies) are allegedly alter egos or of whom. In addition, this claim fails to allege any damage caused to Mr. Davis as a result of the purported conflation of corporate and individuals interests. In the absence of such facts, identification, or resulting injury, relief cannot be granted on this claim, and its dismissal is warranted. *See id*.

Mr. Davis' *ninth* claim—conspiracy—fails, not only because he has not alleged any facts about Cato Institute or Mr. Rich that would support this claim, but the assertions in this claim specifically cannot apply to them. The claim for conspiracy is expressly aimed at the "Defendants" who are "senior political figures." *See* Amend. Compl. ¶ 252 (R. 74). Neither Cato Institute nor

Mr. Rich fall within this category. Cato Institute is a non-partisan, non-profit think tank. Mr. Rich is an individual who has never held political office. Further, the claim fails against all the defendants because it fails to allege additional conspiratorial acts separate from the other wrongful acts alleged in the complaint. *See Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115–16, 682 S.E.2d 871, 875 (Ct. App. 2009) ("In a civil conspiracy claim, one must plead additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim.").

In sum, the claims Mr. Davis attempts to assert are fatally deficient. Some are not cognizable in South Carolina; others fail to plead required elements; others fail to allege any damages arising from the claimed wrongdoing; yet others were already dismissed by Judge Benjamin without leave to replead ; and all of them are pled so generically as to fall woefully short of the pleading requirements imposed by the Rules and applicable case law. Accordingly, Judge Early's dismissal of the claims against the new defendants is supported by the additional sustaining ground that the Amended Complaint fails to assert any claims on which relief could be granted.

IV. The trial court did not err by dismissing Mr. Davis' claims with (rather than without) prejudice, particularly when he had already been permitted to amend, and when neither that amendment nor his post-dismissal filings identified any facts sufficient to support a claim.

Finally, Mr. Davis argues his failure to comply with Judge Benjamin's Amended Order should be excused and he should be given yet *another* bite at the apple. *See* Brief of Appellant at 9–10. For the reasons explained below, Mr. Davis' argument falls flat.

A. The Rules and precedent support dismissal with prejudice when a party fails to comply with judicial conditions placed on the ability to amend.

As explained above, a party's failure to comply with conditions, deadlines, or requirements imposed by the court on the party's ability to amend warrants dismissal. *See* Argument I.C, *supra*.

The relevant Rule and case law, in fact, go even further and indicates that in such circumstances, the dismissal should be with prejudice. *See, e.g.*, Rule 41(b), SCRCP ("For failure of the plaintiff to . . . comply with . . . any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision . . . operates as *an adjudication upon the merits*.") (emphasis added); *Georganne Apparel, Inc. v. Todd*, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1990) (affirming trial court's dismissal with prejudice when the plaintiff filed an amended complaint that failed to comply with the trial court's prior order imposing specific limitations on the reassertion of his claims); *Harvin v. Comm. Credit Corp*., 275 S.C. 14, 266 S.E.2d 789 (1980) (holding that when the circuit court had previously given plaintiff 20 days to amend complaint, plaintiff's failure to do so required a "final" dismissal); *see also Doe v. City of Duncan*, 417 S.C. 277, 286, 789 S.E.2d 602, 606 (Ct. App. 2016) (affirming dismissal with prejudice for failure timely to serve);[17] *Smith v. The Gillette Co*., No. 2004-CP-40-0938, 2005 WL 5712360 (S.C. Ct. of Comm. Pl., July 27, 2005, Hon. Casey Manning) (dismissing case with prejudice due to plaintiff's failure timely to comply with court order).

In the instant proceeding, Mr. Davis failed to comply with a prior order of the court. That failure warranted dismissal, and—as explained by the foregoing authorities—that dismissal was a final adjudication on the merits, *i.e*., the trial court appropriately dismissed with prejudice. This result is not only permissible (and indeed required) under the Rules and precedent; it is just. Mr. Davis has had ample opportunity to air his grievances, has already been given a second chance to do so, and had ample warning of the consequences of failing to comply with Judge Benjamin's

[17] The Record on Appeal in *Doe* contains the trial court's order, which states the dismissal was with prejudice. *See Doe v. City of Duncan*, No. 2008-CP-42-0475, Order Granting Defendant's Motion to Dismiss at 1 and 3 (S.C. Ct. of Comm. Pleas, Spartanburg County, Judge Cole, Nov. 1, 2012).

ruling. The grace sometimes shown to *pro se* defendants is not limitless, and Mr. Davis (a licensed lawyer) has exhausted it. The trial court did not err or abuse its discretion by dismissing his claims against the new defendants with prejudice.

B. The general rule that a plaintiff should be given a chance to amend prior to dismissal pursuant to Rule 12(b)(6) is inapplicable here.

In some situations involving a procedural posture different from the instant lawsuit, there is a general rule that "[w]hen a trial court finds a complaint fails 'to state facts sufficient to constitute a cause of action' under Rule 12(b)(6), the court should give the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal." *Skydive Myrtle Beach, Inc. v. Horry Cnty*., 426 S.C. 175, 179, 826 S.E.2d 585, 587 (2019) (citations omitted). As explained below, however, that rule is not applied in situations like the one presented in this appeal and, even if it were, an exception prevents its application here.

First, the general rule favoring amendment prior to final dismissal applies only when a court dismisses *pursuant to Rule 12(b)(6) for failure to state a claim*. *See Skydive*, *supra*. Accordingly, it does not apply here because Judge Early did not dismiss the suit on that basis. *See* Order (R. 10–13). Rather, he dismissed the suit due to Mr. Davis' failure to comply with the deadline set by Judge Benjamin. *Id*. Accordingly, the general rule set out in *Skydive* does not apply in the instant proceeding.

Second, to the extent the trial court *could* have relied on Mr. Davis' failure to state a claim (and to the extent this Court relies on that failure as an additional sustaining ground), the general rule favoring a chance to amend *still* does not apply here because *Judge Benjamin had already done so* and the amended pleading still failed to identify or allege any plausible claims or any facts sufficient to support any claims or theories under which Cato Institute or Mr. Rich could be liable. While South Carolina courts may be inclined to allow plaintiffs a second bite at the apple, *see Skydive*, 426 S.C. at 179, 826 S.E.2d at 587, those chances are not unlimited, and there is no judicial

policy of giving litigants who cannot state a plausible claim repeated opportunities to grasp for a cause of action where none exists.

Further, even if the general rule favoring amendment applied here (and it does not), and even if Mr. Davis hadn't already been given a chance to amend (which he was), the general rule is subject to an exception that is implicated here. Specifically, when a party argues a dismissal should have been without prejudice and he should have been given a chance to amend his pleading, but his post-dismissal Motion for Reconsideration and his appellate briefing *fail to identify any new facts or theories that he could or would have raised*, the dismissal with prejudice is appropriate and should be affirmed. *See Sullivan v. Hawker Beechcraft Corp*., 397 S.C. 143, 153, 723 S.E.2d 835, 840–41 (Ct. App. 2012) (holding the trial court did not err by dismissing with prejudice a previously amended complaint and noting the appellate court will not reverse or alter that ruling when the plaintiff has not identified any new facts that would alter the analysis); *see also Spence v. Spence*, 368 S.C. 106, 130–31, 628 S.E.2d 869, 882 (2006) (affirming the trial court's dismissal with prejudice and noting that even when a claim should have been dismissed *without* prejudice, the appellate court will nevertheless affirm the dismissal with prejudice when the appellant's brief merely rehashes the same inadequate facts and claims and fails to identify any new facts or theories of recovery).

CONCLUSION

For the foregoing reasons, Respondents Cato Institute and Howard S. Rich respectfully request this Court affirm the trial court's Order dismissing Mr. Davis' claims against them.

[*SIGNATURE PAGE ATTACHED*]

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Miles E. Coleman
SC Bar No. 78264
E-Mail: miles.coleman@nelsonmullins.com
2 W. Washington St. / Fourth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Attorney for Respondents Cato Institute and Howard S. Rich

June 12, 2020
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Doyet A. Early, Circuit Court Judge

Appellate Case No. 2019-000648
Civil Action No. 2018-CP-40-02425

Jefferson Davis, Jr. ..... Appellant,

v.

Ellen Weaver, Chad Connelly, Oran P. Smith, Neil J. Mellen, Howard S. Rich, Rick Reams, Stephen D. Kirkland, Palmetto Promise Institute, Palmetto Family Council, Palmetto Family Action, South Carolinians for Responsible Government, SCRG Foundation, Access Opportunity South Carolina, Friedman Foundation for Educational Choice, Inc., Cato Institute, South Carolina Educational Credit for Exceptional Needs Children Fund, South Carolina Education Oversight Committee, South Carolina Dept. of Revenue, South Carolina Dept. of Labor, Licensing and Regulation, First Impressions, Inc. d/b/a/ Richard Quinn & Associates, First Tuesday Strategies, LLC, Bill Wilson, Jason Bedrick, Jim DeMint, Randy Page, Tony Denny, Phillip Cease, Melanie Barton, Doris Cubitt, Susan Thomas, John McCormick, Nate Leupp, Institute of Management Consultants USA & John Doe(s) 1-40 ..... Respondents.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the Final Brief of Respondents Cato Institute and Howard S. Rich comply with Rule 211(b), SCACR.

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: _____

Miles E. Coleman
SC Bar No. 78264
E-Mail: miles.coleman@nelsonmullins.com
2 W. Washington Street / Fourth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Attorneys for Respondents Cato Institute and Howard S. Rich

June 12, 2020
Greenville, South Carolina