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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price, Circuit Court Judge

Appeal No. 2020-001095

Joseph Abruzzo, Respondent,

v.

Bravo Media Productions LLC, Haymaker Media, Inc., NBC Universal Media, LLC, Comcast Corporation, Craig Conover, Chelsea Meissner, and Madison LeCroy, Appellants.

RESPONDENT'S RETURN IN OPPOSITION TO APPELLANTS' MOTION TO STRIKE OR AMEND FINAL BRIEF

Pursuant to SCACR Rule 240, Respondent hereby submits the following Return in Opposition to the Appellants' Motion to Strike or Amend Final Brief of Respondent ("Motion to Strike"):

SUMMARY

The rationale behind Appellants' Motion to Strike is puzzling at best, and the motion borders on frivolous. The total of eight (8) corrected words[1] identified by Appellants in Respondent's Final Brief are no magic words. They are nothing more than

[1] Respondent's Initial Brief - excluding the Title Page, Table of Contents, and Table of Authorities - contained 14,703 words over 48 pages according to Microsoft Word.

correction of minor typographical errors, well within the purview of SCACR Rule 211, that are immaterial to the substance of this case.

The eight (8) words identified by Appellants create no new arguments; no new headings or subsections; no new facts or allegations; no new procedural history; no new legal citations; no new issues on appeal or standards of review; no new documents; no new relief requested. Indeed, Appellants do not even make such a claim in their motion. According to Appellants, however, these eight (8) corrected words mark such a material and substantive deviation from Respondent's Initial Brief that this Court should strike his Final Brief in its entirety or, in the alternative, order Respondent to amend his Final Brief to re-insert/omit these eight (8) words.

The undersigned is aware of no precedent for granting the relief requested in Appellants' motion, and Appellants cite to none. Appellants give no explanation to justify the filing of their motion, much less their requested relief. Instead, they simply identify these minor corrections and give them a blanket label of "substantive changes." They are not. As set forth herein, Appellants' motion is wholly without merit and should be summarily denied.

ARGUMENT

The relevant language of SCACR Rule 211 reads as follows:

> (b) Content. The final brief(s) shall be identical to the brief(s) previously served under Rule 208, except for the following:
>
> (1) *References to the Record.* The references in the initial brief shall be revised to indicate where the material appears in the Record on Appeal. These revised references may be in place of or in addition to the initial references, and shall be in the form indicated by the following examples:

(R. p. 15, line 4) (R. p. 75, lines 8-20) (R. p. 90, line 1-p. 101, line 14) (R. pp. 29-31).[2]

(2) *Correction of Typographical Errors and Misspellings.* The party may correct obvious typographical errors and misspellings which were contained in the initial brief. No other changes may be made.

"Typographical error" is not defined in the rule, nor is it defined in Black's Law Dictionary. *See* Black's Law Dictionary, 10th Ed. (2014).[3] Merriam-Webster defines typographical error as "a mistake (such as a misspelled word) in typed or printed text." https://www.merriam-webster.com/dictionary/typographical%20error. While it gives the example of a misspelled word, the definition simply describes a mistake in typed or printed text. Given SCACR Rule 211's plain text authorizing the correction of both typographical errors *and* misspellings, the removal and/or insertion of words to correct obvious typographical mistakes are authorized in addition to misspelled words.

Here, all four instances identified in Appellants' Motion to Strike amount to nothing more than the correction of obvious typographical mistakes. The four (4) words removed are redundant, illogical in the context of the argument, or otherwise do not belong. The four (4) words inserted are obviously needed words inadvertently omitted from the Initial Brief.[4]

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[2] References to the record were added to Respondent's Final Brief for the reader's ease of reference. *See, e.g.* Resp. Final Brief, pp.1-3, fn 1-2. Appellants assert no impropriety with these insertions.

[3] Black's Law defines clerical error as "an error resulting from a minor mistake or inadvertence and not from judicial reasoning or determination. Among the numberless possible examples of clerical errors are…mistranscribing or omitting an obviously needed word…." 10th Ed. (2014).

[4] The undersigned also brings to the Court's attention another typographical correction not identified in Appellants' Motion to Strike. On page 24 of Respondent's Initial Brief it reads:

To understand the obviousness and necessity of these corrections, this Court must do something Appellants apparently failed to do before filing their Motion to Strike: consider the context in which the words were inserted and/or omitted. The instances identified by Appellants in their Motion to Strike are responded to below in the order with which they were raised.

I. PAGE 36

Appellants assert the removal of the word "ostensibly" from page 36 of Respondent's Final Brief is improper. This alleged impropriety is contained in Respondent's argument that the Arbitration Agreement is procedurally unconscionable. The relevant passage of the Initial Brief reads as follows:

> "Further, given the non-negotiable Arbitration Agreement here, concealed from sight and sprung on Plaintiff's in the midst of a chaotic filming session, the false representation that it was a mere formality that authorized them to begin filming, and the Defendants' acknowledgement that they would not have filmed anything if Plaintiff did not sign, it is entirely reasonable to infer Defendants were in fact executing an orchestrated scheme to defraud him. He had already authorized the filming of the dinner, flown to Charleston, and underwent hours of preparation. The true purpose in having him sign the Arbitration Agreement, immediately before beginning, was to **ostensibly** grant Defendants the illegal and outrageous rights purportedly enforceable therein and provide cover for the Defendants to avoid culpability in the very jurisdiction where the fraud was perpetrated. This cannot be tolerated. Accordingly, a finding that Plaintiff lacked a meaningful choice in their ability to negotiate the "Arbitration Agreement" is warranted."

> "Defendants argue in their brief that there exists 'a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration.' Satisfied this is all that is required of them, Defendants seem to argue the trial court **simply** should've rubber stamped their motion to compel arbitration **simply** because they showed a piece of paper that says 'arbitration' on it."

(emphasis added)(internal citations omitted).

Respondent's Final Brief removed the first "simply" because it was redundant. *See* Resp. Final Brief, p. 24. Appellants assert no impropriety with this correction.

Resp. Final Brief, p. 36 (emphasis added to indicate word removed).

Ostensible is defined as "open to view; declared or professed; apparent." Black's Law Dictionary, 10th Ed. (2014). Colloquially, it is sometimes used to describe an arguable point. One must consider the context in order to understand why it was removed, and why its removal is irrelevant. This entire subsection argues it is clear as day that the timing of presentation, concealment of everything but the signature block, and false representations made to Respondent before, during, and after signing renders the Arbitration Agreement procedurally unconscionable. This specific passage further argues it is unenforceable because the Appellants' true intent was not to enter into an arm's length agreement, but rather to dupe Respondent, grant themselves illegal and outrageous rights, and use the "Arbitration Agreement" in an attempt to avoid accountability for their conduct.

To the extent Respondent's argument was not apparent and/or Appellants dispute those contentions, this passage is found in the "argument" portion of Respondent's brief, which seems to make the matter self-evident. Thus, the word "ostensibly" in this passage is simply unnecessary. Removing it alters nothing in Respondent's argument and prejudices the Appellants in no way.

II. PAGE 37

Appellants next assert the insertion of the words "through arbitration" at the end of a sentence on page 37 of Respondent's Final Brief is improper. This alleged impropriety is contained in Respondent's argument that the Arbitration Agreement is substantively unconscionable. The relevant passage of the Initial Brief reads as follows:

> "Finding a contract to be one of adhesion or procedurally unconscionable is merely the beginning point in the analysis of whether the contract is unconscionable. Here, neither Plaintiff, nor any rational person,

> could have reasonably contemplated that by authorizing the Defendants to film his dinner with his then girlfriend, that he somehow was authorizing them to lie, disparage, defame, depict him in a false or misleading fashion, intentionally harm, or otherwise cause him irreparable injury. It is inconceivable Plaintiff, or any other rational person, could have reasonably contemplated that he was somehow authorizing the Defendants to engage in any type of conduct whatsoever while simultaneously being bound to complete secrecy **[through arbitration]**. It is inconceivable Plaintiff, or any other rational person, could have reasonably contemplated that, should he try to prevent or mitigate his loss resulting from the Defendants' conduct by seeking judicial relief, that he could not do so and rather must arbitrate – again in complete secrecy - the false, fraudulent, and intentional harm perpetrated upon him by the Defendants or that he would not be able to recover *any damages whatsoever.*
>
> It is further inconceivable Plaintiff could have reasonably contemplated that, should he dare to seek injunctive relief to prohibit continued harm caused by such unforeseeable conduct, he would be prevented from doing so and subject to a liquidated damages penalty of $500,000.00, along with payment of fees and expenses incurred by the Defendants – the very tortfeasors who caused the harm in the first place. It is inconceivable Plaintiff, or any other rationale person, could have reasonably contemplated those severe restrictions and penalties, all while the Defendants simultaneously are permitted to continue to publish the false content on television and online, in perpetuity and throughout the universe."

Resp. Final Brief pp. 37-38 (emphasis and brackets added to indicate words inserted)(footnotes in original omitted)(internal citations omitted).

The insertion of "through arbitration" adds obviously needed words for this passage. The last sentence of the first paragraph clearly identifies the fact that arbitration would be conducted through confidential proceedings which, in essence, would give the Appellants the right to publicly lie, defame, disparage, and publish fraudulently altered photos of Respondent to millions of people throughout the world in perpetuity while leaving Respondent's only right of recourse, if any existed under the agreement, through private and confidential arbitration. Without the words "through arbitration" in the preceding sentence, a reader could conceivably interpret the words "complete secrecy" to refer not just to confidential arbitration, but also other provisions of the Arbitration Agreement.

For example, the Arbitration Agreement purports to grant the Network the right to publicize the Program including the name, likeness, voice, information or comments about Respondent in any way it chooses, even if it chooses to do so falsely or fraudulently. (R. pp. 45-48 ¶¶ 1, 12). At the same time, it purports to preclude Respondent from:

- Disclosing any information about the Producer, the Network, the Arbitration Agreement, the Program, its participants, locations, events, and outcomes (such confidentiality to continue in perpetuity);
- Discussing with any third party the Program or his participation in the Program; and
- Making negative statements about or otherwise disparage any of the Release Parties.

(Id at ¶ 12).

The Arbitration Agreement goes on to declare that should Respondent do any of those things, the Network would be entitled to injunctive relief (without posting bond) because such conduct would cause irreparable damage that cannot be reasonably or adequately compensated by damages. *Id*. Bewilderingly, this provision is then immediately followed by a declaration that, in addition to being enjoined from speaking or otherwise trying to restore his reputation, Respondent would also need to pay Producer and Network the sum of $500,000, per breach, plus disgorgement of any income received in connection with any breach of the aforementioned confidentiality. *Id*.

Again, one must consider the context in which these words were inserted. This particular passage argues compelling confidential arbitration of the Respondent's claims pursuant to this Arbitration Agreement would be so manifestly lopsided and unfair that it shocks the conscious. The words "through arbitration" should have been there all along. Adding them simply clarifies that confidential arbitration itself is, under the circumstances, substantively unconscionable. Inserting these words alters nothing in Respondent's argument and prejudices the Appellants in no way.

III. PAGE 45

Next, Appellants assert the insertion of the words "parents" and "subsidiaries" and the removal of the words "and Haymaker are" from page 45 of Respondent's Final Brief is improper.[5] This alleged impropriety is contained in Respondent's argument that if any right to compel arbitration exists under the agreement, which Respondent denies, it would belong only to Appellant Haymaker and would not extend to the other corporate or individual parties. The relevant passage of the Initial Brief reads as follows:

> "Even assuming the Arbitration Agreement is valid and enforceable, which Plaintiff denies, a close reading of the Arbitration Agreement reveals the Individual Defendants cannot compel arbitration. The very first sentence of the Arbitration Agreement explicitly says it is one agreement between Plaintiff and Defendant Haymaker Media, Inc.:
>
> > '[t]his is an agreement between [Plaintiff] and Haymaker Media, Inc. (including its licensees, successors and assigns, and each of their respective parents, subsidiaries, agents and affiliates, and each of their respective officers, directors, shareholders, employees, agents and representatives (collectively, the 'Producer').
>
> This sentence identifies the parties to the Arbitration Agreement as Plaintiff and Defendant Haymaker. It is not alleged Defendants Bravo, NBC, or Comcast are **[parents]**, licensees, successors, **[subsidiaries]**, or assigns of Defendant Haymaker, nor are the Individual Defendants alleged to be employees or agents of any of the Corporate Defendants, their parents or subsidiaries (*see, e.g.* Am. Compl. ¶¶ 2-11), and the Defendants make no such claim.
>
> 'Released Parties' is defined in ¶ 17 as 'Producer, Network, and/or any of their parents, subsidiaries, assignees, licensees, affiliates or anyone associated with the Program.' Plaintiff alleges Defendants Bravo **and Haymaker are** owned in whole or part by Defendants NBC and Comcast. Thus, an objective reading of the Arbitration Agreement would include them as 'Released Parties.'"
>
> For the reasons set forth above, the identity of 'anyone associated with the program' is so vague and ambiguous as to be unenforceable. If this is the case, the Individual Defendants would not fall within the definition of 'Released Parties.' Thus, they would not be third-party beneficiaries within

[5] Appellants assert two improprieties on this page. This Return combines them for brevity.

the meaning of ¶ 21 who could be entitled to compel compliance with ¶ 19 of the Arbitration Agreement. Even if they were 'Released Parties' and therefore third-party beneficiaries, however, the explicit terms of ¶ 19 of the Arbitration Agreement do not entitle third-party beneficiaries to compel *arbitration*. The relevant language reads as follows:

> Where any dispute in connection with this agreement arises, **the parties** agree to first try to resolve such dispute through confidential mediation. If mediation is unsuccessful, then all disputes, including the scope or applicability of this agreement to arbitrate, shall be resolved by final and binding arbitration administered by JAMS or its successor ("JAMS") in accordance with its streamlined arbitration rules and procedures…**My agreement to mediate any and all disputes shall extend to the Released Parties**.

Arbitration Agreement ¶ 19 (emphasis in original).

The plain and obvious meaning of this provision is that the parties to the Arbitration Agreement (Plaintiff and Defendant Haymaker) are obligated to first mediate any dispute prior to arbitration. The agreement to *mediate* extends to the 'Released Parties' but ¶ 19 says nothing of an agreement to *arbitrate* any dispute with anybody other than Defendant Haymaker, much less any 'Released Parties.' Such a glaring omission can only be interpreted to mean the parties intended to grant 'Released Parties' the right to compel mediation, but not arbitration…Accordingly, even if this Court finds the Arbitration Agreement valid and enforceable, the only party to this litigation with any right to compel arbitration is Defendant Haymaker. Thus, the trial court's decision should be affirmed with that limited exception."

Resp. Final Brief, pp. 44-45 (emphasis added to indicate words removed) (emphasis and brackets added to indicate words inserted)(footnotes and internal citations in original briefs omitted).

This passage essentially says that if the Court determines the Arbitration Agreement to be enforceable, Haymaker would be the only one who could conceivably enforce it. Based on the language of the Arbitration Agreement and the corporate ownership structure, however, the point argued in this section is that neither the remaining corporate defendants nor the individual defendants have any right to compel arbitration.

Both corrections refer to Respondent's allegations. The Amended Complaint does *not* allege Bravo, NBC, or Comcast are parents, licensees, successors, subsidiaries, or assigns

of Haymaker. R. pp. 94-96, Am. Compl., ¶¶ 2-10 (alleging corporate defendants relationships to one another as well as the individual defendants). The Amended Complaint likewise does *not* allege Defendant Haymaker is owned in whole or in part by NBC and Comcast. *Id*. The original statements in Respondent's Initial Brief regarding the allegations of the corporate defendants relationships to one another could conceivably have been read otherwise. That was obviously an unintentional error. Correcting the text to accurately reflect basic and undisputed facts and allegations of the corporate relationships benefits the Court in its understanding of the case. Such corrections are not only permitted, but should be encouraged.

Appellants' objection to these corrections becomes even more confusing when, in their motion, they say "this substantive edit appears to be in response to footnote 22 of the Reply Brief of Appellants."[6] To be clear, the removal of "and Haymaker are" comes in response to nothing Appellants have argued in the trial court, their Initial Brief, or their Reply Brief. Candidly, the undersigned does not recall even reading footnote 22 of Appellants' Reply Brief. Having now done so, however, the removal of the words "and Haymaker are" both conforms the text of the Final Brief with the allegations in Respondent's Amended Complaint, and the Appellants do not dispute that fact. Thus, the reasoning behind Appellants objection to this passage remains a mystery to the undersigned because granting Appellants motion would create confusion where none presently exists. Regardless, and once again, the insertion/removal of these words alters nothing in Respondent's argument and prejudices the Appellants in no way. Accordingly, their motion should be denied.

[6] Footnote 22 of Appellants' Reply Brief says "Plaintiff's asserts (sic) that Haymaker is owned by NBCUniversal and Comcast. That is not true. (R. pp. 161-162)."

CONCLUSION

For the reasons set forth herein, Appellants' Motion to Strike is wholly without merit, serves no useful purpose, and the motion should be summarily denied in its entirety. Further, because the motion lacks an adequate basis for filing and to support the requested relief, the Court should grant appropriate relief in favor of Respondent and against Appellants pursuant to SCACR Rule 269.

Respectfully submitted,

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Dated: March 15, 2021

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PROOF OF SERVICE

I certify that I have served **RESPONDENT'S RETURN IN OPPOSITION TO APPELLANTS' MOTION TO STRIKE OR AMEND FINAL BRIEF** on Appellants, by emailing it to their attorneys of record, as follows:

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