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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Family Court

The Honorable Daniel E. Martin, Jr., Family Court Judge

Appeal No. 2023-000831

Thomas Ravenel, Appellant,

v.

Kathryn Dennis, Respondent.

REDACTED FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court commit reversible error in denying Plaintiff/Appellant's motion to unseal the record in Family Court case number 2020-DR-10-2681?

STATEMENT OF THE CASE

The parties were never married but are the natural parents of two minor children: K.C.R., born in 2014, and S.J.R., born in 2015. Both Plaintiff/Appellant (hereinafter "Father") and Defendant/Respondent (hereinafter "Mother") are public figures, having gained national and international notoriety through their appearance on the BRAVO reality TV series "Southern Charm." Mother has a large social media following on Instagram, Twitter, and Facebook, with whom she routinely shares personal and otherwise private information about her life and the lives of the parties' minor children.

On May 5, 2016, Father filed a child custody and visitation action in the Charleston County Family Court, Case No. 2016-DR-10-1687. Both Mother and Father requested that the record be sealed in this matter, however the Court denied the parties' request because Mother refused to keep the minor children off social media. (Mot. Hr'g Tr. 8:1-23, 10:9-13, Ex. A, Mem. of Law) (R. p. 1502, lines 1-23; R. p. 1504, lines 9-13). Case No. 2016-DR-10-1687 was subsequently resolved by way of a Complete Custody Agreement, which was approved by and made a Final Order of the Court on June 30, 2017. (June 30, 2017 Final Order) (R. pp. 1840-1863). This case file and Final Order remain unsealed.

On October 26, 2018, Mother filed a custody modification action in the Charleston County Family Court, Case No. 2018-DR-10-3671. Mother subsequently moved to have the record in this matter sealed, which Father contested. A hearing was heard on March 13, 2019, and an

Order Sealing the Record was issued by the Honorable Michèle Patrao Forsythe on May 8, 2019. (Order Sealing the Record, Ex. B, Mem. Of Law) (R. pp. 1506–1513). Judge Forsythe's Order required, in part, that the Parties be restrained from disclosing, discussing, or disseminating any information, records, or testimony related to this case to third parties. *Id.* at 7, ¶ 2 (R. p. 1512).

After the issuance of Judge Forsythe's Order, Father requested that the Court reconsider its Order Sealing the Record on grounds that Mother continued to discuss the parties' custody litigation in a public forum. A hearing was held before Judge Forsythe on May 22, 2019, and an Order Vacating the Order Sealing the Record was issued on June 7, 2019. (Ex. C, Mem. Of Law) (R. pp. 1514–1522). In determining that the previous Order Sealing the Record should be vacated, Judge Forsythe noted, in part, the following:

“[I]t appears that despite Mother's request to seal the record, she remains dedicated to discussing the custody case in the media; discussing the father of her children; and her very private life. Therefore, sealing the record serves no legitimate purpose, nor does it protect the children – who are routinely exposed to the public and the media. [...]

The Court has examined the perceived harm of unsealing the record in this matter. Unsealing the record adds no additional harm to these children, as much of their lives and their parents' lives has been well documented by the television show, as well as social media for years. Moreover, the litigants have engaged in open discussions about custody litigation in the past and present. The public interest is not served by sealing the documents. [...]

It appears that the reality television production has grabbed the attention of their [the parties'] viewers with this custody drama. While generally the Court would be inclined to believe there is no public interest in the proceeding, it would appear that the public status of the litigants and this case has been solidified for quite

some time. There is no historical value to this litigation, however the litigants and their children have been in the public eye for years. Over the course of several years, the parties voluntarily discussed their custody battle, their children, their previous addictions and challenges. All of this information has been available to the public without access to court records. Unsealing the record is appropriate. [...]

In the instant case, it has been well understood that the nature of the allegations made have already been aired in the very public forums of today's social media, news media, and entertainment media. In March, counsel for Mother argued that protecting the children in this action and the confidential medical records of the parties, warranted sealing the record in this case. However, it is clear to the Court that contrary to her own Motion and her Counsel's argument, Mother has no interest in protecting the privacy of her children or her own, based upon her frequent communications with the entertainment media...Mother's conduct indicates sealing of the file is unnecessary and is contrary to South Carolina law. Mother's conduct in her request to seal and then flouting the order itself warrants that she be responsible for Father's attorney fees and costs for purposes of this Motion."

Id. at p. 2, 5-8 (R. pp. 1515, 1518-1521).

Case No. 2018-DR-10-3671 was subsequently resolved by way of a Complete Settlement Agreement, which was approved by and made a Final Order of the Court on November 1, 2019. Ex. A, Pltf's Compl (R. pp. 63-88).

On October 23, 2020, Father initiated the action currently under appeal, seeking a modification of the 2019 Final Order based upon a substantial and material change of circumstances. *See* Pltf's Compl (R. pp. 50-89). A Consent Order to Seal the Record and For Protective Order was approved and filed with the Court on December 18, 2020. (R. pp. 6-10). The Consent Order provided, in pertinent part:

In the event that either of the parties hereto or any third party is desirous of unsealing the record in this action...the parties hereto shall be given prior notice of any motion or other proceeding to unseal the record and shall be given the opportunity to be heard thereon.

Id., p. 2 (R. p. 9).

On October 13, 2022, Father filed a Motion to Unseal the Record with the Court, alleging, *inter alia*, that since the issuance of the Consent Order to Seal the Record and For Protective Order, Mother had made multiple public statements regarding this matter not reflective of an interest, reliance, or expectation of privacy; there is a public interest in this custody action; Mother has made significant public mistruths related to this matter and has defamed the South Carolina Family Court, as well as the attorneys and judges involved in this matter; and that Mother's mistruths and defamatory comments, which have been circulated online and on social media, have affected both Father's reputation and public trust in the South Carolina judicial system. Mot. to Unseal the Record, ¶¶ 5-11 (R. pp. 113-114, ¶¶ 5-11).

Attached to Father's Motion to Unseal the Record were public media and social media statements made and/or republished by Mother subsequent to the sealing of the court record. These statements include defamatory comments regarding the family court and family court attorneys as well as comments to media outlets discussing this litigation while simultaneously claiming she had been "silenced by gag orders" which prevented her from "telling my story so that people can know the truth about what is going on." *Id.* at Ex. B. (R. pp. 122-138); Proffered Tr. Ex. 67 (R. pp. 1273-1289).

Father also provided the Court statements made by third parties in response to Mother's public commentary about this litigation. *See* Ex. C., Mot. to Unseal the Record (R. pp. 140-148).

Such statements included: "Money and power in a relatively small town."; "Just shows me how broken the system is! He [Father] has no business with custody of those kids either."; "SC judges are appointed by their peers and NOT elected. It's the epitome of corruption. Until that changes, the good ole boys network will rule the legal landscape. TRUTH."; "He's [Father's] disgusting. The only reason he has custody is because of the money and power he seems to have. Kathryn [Mother] never stood a chance..."; "It doesn't mean you are a good or fit parent...It means you are white, male, connected and have money."; "Just left after a week long vacation in the Charleston area...Kathryn may be a mess but that family [Father's family] for sure has influence in the local court system."; "[I]f you're in people's pockets in that town and resort to that sort of f*ckery, of course you're gonna be granted custody."; "T-Rav [Father] has custody because he has the money."; "Thomas [Father] has money and all Kathryn [Mother] has is the money she makes on the show. I'm sure he [Father] has one or two judges in his back pocket with the clout the Ravenel name carries in S.C." *Id.*

A hearing on Father's Motion to Unseal the Record was held on November 14, 2022, before the Honorable Spiros S. Ferderigos, and an Order on Plaintiff's Motion to Unseal the Record was issued on November 18, 2022. As set forth in his Order, Judge Ferderigos found and ruled as follows:

After reviewing the Plaintiff's [Father's] Motion, the Court file, and considering arguments by Plaintiff's counsel, the *pro se* Defendant, the Guardian *ad Litem*, the Court finds that a testimonial hearing is necessary to properly adjudicate Plaintiff's request for relief. The Plaintiff's Motion to Unseal the Record is therefore denied without prejudice, and the Plaintiff may re-raise his request to unseal the record at the Final Hearing in this matter. [emphasis added]

See Order on Pltf's Mot. to Unseal the Record (R. pp. 17–18).

A Final Hearing in this matter was held before the Honorable Daniel E. Martin, Jr. on December 12, 13, 14, 15 and 16, 2022. During the Final Hearing, upon oral motion by Father's counsel, Father re-raised his request to unseal the record in this matter. Final Order, p. 3 (R. p. 23). The Court heard argument from Counsel but did not consider witness testimony prior to denying Father's renewed motion to unseal the record. *Id.* Subsequent to the Court's ruling, Father's counsel proffered witness testimony relevant to Father's request to unseal the record. *Id.*

When asked why he wanted the record in this matter unsealed, Father proffered the following testimony:

I just want the truth to be out there for my own reputational purposes. And, I don't want it to be manipulated by the Defendant that I somehow paid off the court system, and that the system is rigged against her. And, I'm tired of this narrative and a lot of people believe it. I just want the truth... And, my children deserve it.

Tr. Tr. 301: 25, 302: 1-5, 7 (R. p. 1010, line 25–p. 1011, line 7).

Father's counsel subsequently examined Mother on issues relevant to Father's request to unseal the record. Mother acknowledged having reviewed the exhibits attached to Father's Motion to Unseal and admitted that she had given an interview with "Reality Blurb" stating that the family court action was a "big ploy." Tr. Tran. 403: 24-25, 404: 9-15 (R. p. 1115, line 24–p. 1116, line 1; R. p. 1116, lines 9–15); Pltf's Proffered Tr. Ex. 67 (R. pp. 1284–1288). Mother admitted to publicly stating on her Twitter account "It's a shame what some lawyers are willing to do. Can anyone relate?". Tr. Tran. 408: 1-9 (R. p. 1120, lines 1–9); Pltf's Proffered Tr. Ex. 67 (R. p. 1280). Mother admitted that while she did not write the statements in some of the social

media posts attached to Father's Motion to Unseal, she did share them to her social media "profile" and that she endorsed them. Tr. Tran. 406: 23-25; 407: 1-3 (R. p. 1118, line 23-p. 1119, line 3). Mother admitted that she publicly stated that she was "silenced by Gag Orders" and was unable to tell her story "so that people can know the truth about what's going on" and that this statement was published on a third-party Instagram account called "sidepieceshow". Tr. Trans. 409: 3-12, 24-25; 410: 1-3 (R. p. 1121, lines 3-12; R. p. 1121, line 24-p. 1122, line 3). Mother stated that she regretted this conduct and testified that "I'm not going to do it again." Tr. Trans. 410: 23-24; 411:25; 412:1 (R. p. 1122, lines 23-24; R. p. 1123, line 25-p. 1124, line 1). In response to this testimony, Father's counsel presented Mother with an Instagram post Mother made to her 974,000 Instagram followers during the trial of this matter. The post featured a photo of the Charleston County Courthouse, the geotag location of the Charleston County Courthouse, and text reading "Midnight justice oil." Tr. Trans. 412:2-23 (R. p. 1124, lines 2-23); Pltff's Proffered Tr. Ex. 68 (R. p. 1290).

The Court issued its Final Order on February 6, 2023, awarding Father sole legal and physical custody of the parties' minor children and Mother limited daytime supervised visitation. Final Order, pp. 17-18, ¶¶ 2-3 (R. pp. 37-38, ¶¶ 2-3). In reaching its decision, the Court made the following findings of facts regarding Father: "no evidence or testimony was presented before the Court substantiating Mother's allegations that Father abuses alcohol, that Father's consumption of alcohol has endangered the minor children, or that Father has driven the minor children in his vehicle while intoxicated"; that "the evidence shows that the children are thriving while in the care of Father", that "both children are properly monitored and are provided structure and routine while in his care"; that "Father supports the minor children's relationship

with Mother's family"; that "no evidence was presented that Father has tried to unjustifiably limit Mother's time with the minor children. [And] To the contrary, all evidence supports that Father filed this action to protect and ensure the minor children's safety." *Id.* at 12-14, ¶¶ 28-31 (R. pp. 32-34, ¶¶ 28-31).

In addressing Father's credibility, the Final Order found and stated as follows:

In an attempt to challenge Father's credibility, Mother presented the parties' former nanny, Dawn Ledwell, as a witness who raised allegations about Father which had already been resolved by mutual agreement. Ms. Ledwell testified that Father had sexually assaulted her in January 2015, an allegation which Father testified was not true. On cross-examination, Ms. Ledwell admitted that Mother and Mother's friends had encouraged her to file the criminal complaint against Father, that her claims against Father had been settled, and that she had executed an affidavit admitting that Father was a loving parent. After considering all of Ms. Ledwell's testimony, the Court finds Plaintiff to be a credible witness.

Id. at 12, ¶ 27 (R. p. 32, ¶ 27).





In addressing Father's request to unseal the record in this matter, the Final Order stated as follows:

The Plaintiff filed a Motion to Unseal the Record on October 13, 2022. A hearing was held on November 14, 2022 resulting in the issuance of the Court's Order on the Plaintiff's Motion to Unseal the Record dated November 18, 2022. As set forth in its Order, the Court found that a testimonial hearing was necessary to adjudicate Plaintiff's request to unseal the record and denied Plaintiff's motion without prejudice. The Order further provided that the Plaintiff could re-raise his request to unseal the record at the Final Hearing in this matter [...]

During the Final Hearing, upon oral motion by Plaintiff's counsel, the Plaintiff re-raised his request to unseal the record in this matter. After entertaining argument by Counsel, the Court denied Plaintiff's request to unseal the record. No testimony was heard on this matter prior to the Court's ruling, but witness testimony was proffered by the Plaintiff subsequent to the Court's denial of Plaintiff's motion.

Final Order, pp. 2-3 (R. pp. 22-23).

Father subsequently filed a limited moved to alter or amend the trial court's Final Order as it pertained to the denial of Father's request to unseal the record. *See* Pltf's Mot. to Unseal the Record incl. Exhibits, Mar. 15, 2023 (R. pp. 1321-1478). Father's motion was heard before the Honorable Daniel E. Martin, Jr. on May 9, 2023. At the hearing Father presented to the Court a Memorandum of Law which included the evidence and testimony proffered at the Final Hearing. Mot. to Alter or Amend Tran. 4: 15-25, 5:1-9 (R. p. 1786, line 15-p. 1787, line 5); Pltf's Mem. Of Law re Unsealing the Record incl. Exhibits (R. pp. 1479-1782). Father's counsel confirmed to the Court that Father was not seeking to introduce new evidence on that matter but was requesting that the Court amend its ruling based upon the testimony and evidence proffered at trial and pursuant to the Court's prior Order requiring a testimonial hearing on the issue. November 18, 2022 Order on Pltf's Mot. to Unseal the Record (R. pp. 17-18); Mot. to Alter or Amend Tran. 4:25; 5:1-4; 7:15-23; 9:20-25; 10:1-6; 13:20-25; 14:1 (R. p. 1786, line 25-p. 1787, line 4; R. p. 1789, lines 15-23; R. p. 1791, line 20-p. 1792, line 6; R. p. 1795, line 20-p. 1796, line 1); Mother filed no return to Father's motion and did not request an additional testimonial hearing on Father's request to unseal the record. *Id.* at 3:12-13 (R. p. 1785, lines 12-13).

The trial court heard argument from counsel for the parties and, upon request from the Court, the Guardian *ad Litem*. Father reiterated the arguments set forth in his Memorandum of Law. Mot. to Alter or Amend Tran. 6: 11-25; 7:1-25; 8:1-25; 9:1-19; 13:1-19 (R. p. 1788, line 11-p. 1791, line 19; R. p. 1795, lines 1-19). Counsel for Mother argued that Father had consented to sealing the record and reiterated Mother's proffered trial testimony that keeping the records sealed was in the children's best interests. *Id.* at 10: 19-20; 11:9-17 (R. p. 1792, lines 19-20; p. 1793, lines 9-17). Mother's counsel referenced evidence presented during trial that one of

the minor children had fetal alcohol syndrome, however, upon request for comment by Ms. Stringer, the Guardian *ad Litem* stated,

Your Honor, I stand by what I stated earlier in the hearing as far as only in a therapeutic setting would I want these children exposed to litigation, which is what I always testify to, as to the discussion about litigation or adult matters, **I will say that fetal alcohol syndrome was brought up in prior actions, and therefore is already out there, unfortunately. I was very supportive of sealing both of those cases, but it just simply didn't happen. So unfortunately, some of this is that the cow's been let out of the barn, Your Honor, and now we're trying to put everybody back in when there's information already out there, Your Honor.** [emphasis added]

Id. at 11:14-17; 12:9-19 (R. p. 1793, lines 14-17; p. 1794, lines 9-19).

The Court subsequently inquired if circumstances had changed since the court in Case No. 2018-DR-10-3671 found that unsealing the record would not result in harm to the minor children. Counsel for Father responded, "Your Honor, the final order in this matter did not go into detail about the children's developmental issues. There's nothing extremely sensitive in the final order about the children." *Id.* at 15:2-7 (R. p. 1797, lines 2-7). The Court concurred, stating "A lot was said and discussed, and I think the order reflected there's findings regarding the parents, not the children." *Id.* at 15:8-11 (R. p. 1797, lines 8-11).

On May 12, 2023, the Court issued its Order Denying the Plaintiff's Motion to Alter or Amend the Final Order. The Court stated that it had considered the portion of the Court's ruling denying the Father's Motion to Unseal the Record, the motion, argument from counsel, Father's memorandum of law, the proffered testimony of witnesses who testified during the final hearing, and pertinent statutes and case law, and that it found that unsealing the record in this matter would not be in the best interests of the minor children. *See*, Order Denying the Pltf's Mot. to

Alter or Amend the Final Order (R. pp. 47–49). In denying Father’s request to unseal the record, the Court found that the children would “be damaged by exposure of the private lives of the parties” if the record was unsealed and that there was no public, professional, or historic significance to this case and that the “fundamental interest of public access is not harmed by continuing to seal the record.” *Id.* at p. 2 (R. p. 49).

STANDARD OF REVIEW

“In appeals from the family court, the Court reviews factual and legal issues de novo.” *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). “De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court’s findings.” *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 654-55 (2011). “[T]he appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence.” *Id.* at 384, 709 S.E.2d at 651. Neither “respect for the family court bench nor the special need for finality in family court litigation may serve as a license to lessen [the Court’s] standard of review in family court appeals.” *Id.* at 390, 709 S.E.2d at 654.

ARGUMENT

The family court’s order to keep the record in this matter sealed should be reversed and/or vacated and the records in this matter should be unsealed. The findings of the trial court bely the evidence and testimony on the record, which was ignored and/or improperly applied to the factors set forth in Rule 41.1, SCRCP and relevant South Carolina law. Proper consideration of the law and the factors in light of the facts of this case do not establish a privacy interest or perceived harm to the minor children or the parties which would outweigh the public’s

constitutional right of access to court records. Any and all sensitive information which may otherwise warrant protection is already available to the public, through the parties' own public statements and/or conduct, as well as the unsealed court records from the parties' two prior family court actions. Contrary to the trial court's findings, there is public and professional significance to this case which is best served by unsealing the record in this matter. There are alternatives other than keeping the entire record sealed that can simultaneously protect the privacy interests of the minor children and the public's constitutional right of access. In addition, the trial court's sole reliance on the best interests of the minor children to deny Father's request to unseal the record in this matter violates Father's constitutional right to make decisions concerning the welfare and upbringing of his minor children.

I. KEEPING THE RECORD SEALED IN THIS MATTER VIOLATES THE PUBLIC'S CONSTITUTIONAL RIGHT TO PUBLIC ACCESS.

The trial court's order to keep the record in this matter sealed violates the public's constitutional right to access court records because the trial court failed to make findings of fact supported in the record evidencing that the interest of secrecy outweighs the presumption of public access.

a. Court Records are Presumptively Open to the Public Access.

The public have an inherent right to ensure that all branches of government are transparent. It is in fact a government of the people. The United States Supreme Court recognized this right in *Nixon v. Warner Commun., Inc.*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978) stating, under the common law,

...[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents...

American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the working of public agencies...and in a newspaper publisher's intention to publish information concerning the operation of government.

It is uncontested, however, that the right to inspect and copy judicial records is not absolute.

Id. at 597-98 S.Ct. at 1312, 55 L.Ed.2d at 579-90 (citation omitted); *Ex parte Capital U-Drive-It, Inc. v. Beaver*, 369 S.C. 1, 9-10, 630 S.E.2d 464, 469 (2006).

Court proceedings and records are presumptively open to the public under the common law, the First Amendment of the federal constitution, and the state constitution. S.C. Const. Art. I § 9 (“[a]ll courts shall be public”); *Davis v. Jennings*, 304 S.C. 502, 505, 405 S.E.2d 601, 603 (1991); *Nixon*, 435 U.S. at 597-98, 98 S.Ct. at 1312, 55 L.Ed.2d at 579-80; *Virginia Dept. of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir.2004); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986). However, “[p]ublic access to court records may be restricted in certain situations, such as matters involving juveniles, legitimate trade secrets, or information covered by a recognized privilege. Restrictions may be based on a statute or the court’s inherent power to control its own records and supervise the functioning of the judicial system.” *Ex parte Capital*, 369 S.C. at 10, 630 S.E.2d 469. *See e.g.*, S.C. Code Ann. § 63-3-590 (2008) (excluding general public from hearings which involve neglected, abused, or delinquent children).

Public access to courts and their records serves several fundamental interests which are crucial to the proper functioning

of judicial and government systems. Public access discourages perjury and encourages bringing truth to light because participants are less likely to testify falsely in a sunlit courtroom before their neighbors than in a private room before court officials. Public access promotes free discussion of governmental affairs by imparting a more complete understanding to the public of the judicial system and issues resolved by that system. Public access serves as a check on inappropriate or corrupt practices by exposing the judicial process to public scrutiny. Lawyers, witnesses, and judges may perform their duties in a more conscientious manner, knowing their conduct will be subject to public scrutiny either at the time of the proceeding or later through disclosure of court records.

Ex parte Capital, 369 S.C. at 10-11, 630 S.E.2d at 469-460, citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505-10, 104 S.Ct. 819, 821-24, 78 L.Ed.2d 629, 635-38 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-80, 100 S.Ct. 2814, 2821-29, 65 L.Ed.2d 973, 981-92 (1980); *Jessup v. Luther*, 277 F.3d 926, 927-28 (7th Cir.2002); *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 203 F.3d 291, 303 (4th Cir. 2000).

b. The record must be unsealed pursuant to Rule 41.1., SCRCP.

In deciding whether to seal or unseal a court record, the court must make specific factual findings, which weigh the need for secrecy against the right of access. *Davis*, 304 S.C. at 506, 405 S.E.2d at 604. The burden is on the party who seeks to overcome the presumption of access to show that the interest in secrecy outweighs the presumption. *Id.* at 506, 405 S.E.2d at 603.¹ The

¹See also, *Pichler v. Unite*, 238 F.R.D. 405, 408 (E.D. Pa. 2005) (It is the party seeking secrecy who "must show that the interest in secrecy outweighs the presumption by making a particularized showing of the need for secrecy if the documents are to remain under seal. This party cannot satisfy its burden with broad allegations of harm, bereft of specific examples or articulated reasoning.") (internal citations omitted); and *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178-79, 82 (9th Cir. 2006) (The party seeking secrecy must "articulate compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure...[T]he judge need not document compelling reasons to unseal; rather the proponent of sealing bears the burden with respect to

law requires detailed documentation by both party seeking secrecy and the family court justifying why the court record must be sealed. *State v. Price*, No. 2023-000629, 2023 WL 5734348 at *7 (S.C. Sept. 6, 2023).

In the instant case, the parties originally consented to seal the record based on various findings regarding lack of public interest, reliance on privacy, the potential damage to the parties and/or minor children should the record in this matter be available to the public. *See* Dec. 18, 2020 Consent Order Sealing the Record and for Protective Order. In considering Father's request to unseal the record, the question before the trial court was whether there is a continued need of secrecy in keeping the court record sealed that outweighs the presumption of public access.² The fact that the parties previously agreed to the sealing of the record is irrelevant to this analysis and is not a consideration in determining whether the record should be unsealed.³

In determining whether to seal or unseal a file, the Court must consider the following factors set forth in Rule 41.1(b) of the South Carolina Rules of Civil Procedure: (1) ensuring the parties' right to a fair trial or hearing; (2) the need for witnesses cooperation; (3) the reliance of the parties upon expectations of confidentiality of the proceeding; (4) the public or professional significance of the proceeding; (5) the perceived harm to the parties from disclosure; (6) why alternatives other than sealing the documents are not available to protect legitimate private

sealing. A failure to meet that burden means that the default posture of public access prevails.") (internal citations omitted).

² *Davis*, 304 S.C. at 506, 405 S.E.2d at 603 (1991). *See also*, *Pichler*, 238 F.R.D. at 408 ("[W]hen the continued sealing of documents is challenged...[it is] the party seeking secrecy who must show that the interest in secrecy outweighs the presumption").

³ *See BP Expl. & Prod., Inc. v. Claimant ID 100246928*, 920 F.3d 209, 211-12 (5th Cir. 2019) ("[T]here is a more fundamental reason that a sealing agreement by the parties should not bind a court. It is the *public* that has the right of access, so private litigants should not be able to contract that right away. Most litigants have no incentive to protect the public's right of access...This is why it is for judges, not

interests; and (7) why the public interest, including but not limited to, the public health and safety, is best served by sealing the documents. In addition, the Court may also consider (8) public interest in the proceeding; (9) the private or public status of the litigants and case generally; (10) whether release would enhance the public's understanding of an important historical event; (11) whether the public already has access to information contained in the records; and (12) whether a particular decision will sustain or offend the fundamental interests of public access. Rule 41.1 SCRPC; *Ex parte Capital*, 369 S.C. at 12, 630 S.E.2d at 470.

Family court records should be treated no differently than court records in any other case when considering whether to seal or unseal a court record. *Id.* 369 at 12-13, 630 S.E.2d at 470. However, Rule 41.1(b), SCRPC additionally requires the family court to consider "whether documents: 1) contain material which may expose private financial matters which could adversely affect the parties; and/or 2) relate to sensitive custody issues, and shall specifically balance the special interests of the child or children involved in the family court matter" when considering whether to seal or unseal a record. Rule 41.1(b); *Ex parte Capital*, 369 S.C. at 13, 630 S.E.2d at 471. In rendering its decision, the Court is required to make specific factual findings on the record. *Id.* 369 at 12, 630 S.E.2d at 470 (citing *Davis*, 304 S.C. at 505-06, 405 S.E.2d at 603-04).

The Supreme Court of South Carolina recently emphasized the seriousness of sealing a court record and the high bar required of the litigant seeking secrecy and all courts to justify the sealing of a court record under Rule 41.1., SCRPC:

We have attempted on numerous occasions to make clear to the public, to the bench, and to the bar that the sealing of any part of a court record is a serious matter requiring lawful authority and

litigants, to decide whether the justification for sealing overcomes the right of access.").

specific findings of fact that justify the sealing...Rule 41.1 illustrates the level of detailed documentation the law requires of the party asking for sealing and of an appellate, circuit, or family court considering the request.

State v. Price, No. 2023-000629, WL 2023 at *7 (internal citations omitted).

In this case, not only did the trial court fail to make specific factual findings regarding the mandatory factors that must be considered under Rule 41.1, SCRPC, the trial court ignored and/or misapplied the evidence on the record to these factors, which overwhelmingly weighs in favor of unsealing the record in this matter.

i. The parties' right to a fair trial and for witness cooperation are moot issues.

At the time the trial court denied Father's request to unseal the record, the trial of this matter had concluded, and all witnesses had testified. Keeping the record sealed to protect the parties' right to a fair trial and for witness cooperation were and are therefore moot concerns that warrant no consideration under Rule 41.1. SCRPC in this matter.

ii. Mother has not relied upon an expectation of confidentiality to protect any legitimate interest.

The parties expressed a mutual reliance on the expectation of privacy and of confidentiality of the proceedings at the time the Consent Order Sealing the Record was issued. *See*, Consent Order Sealing the Record and For a Protective Order, p. 2, ¶ 3 (R. p. 8, ¶ 3). However, Mother's conduct subsequent to the issuance of this order belies her attestation that she was ever reliant on an expectation of confidentiality. Quite the opposite, as supported by Mother's testimony and the exhibits proffered at the final hearing in this matter, Mother made and disseminated numerous public statements about this case and the South Carolina Family Court

after the court record was sealed. Proffered Tr. Ex. 67. (R. pp. 1273–1289).⁴ Even during the week of trial, Mother posted a photograph of the Charleston County Courthouse to her public Instagram account, which has close to one million followers. Proffered Tr. Ex. 68 (R. p. 1290). These public statements by Mother invited the very public attention and discourse the Consent Order Sealing the Record was intended to prevent. Ex. C, Pltf's Mot. to Unseal the Record (R. pp. 140–148). Mother's statements not only evidence a complete disregard for Father's reliance on the Consent Order to keep this matter confidential, but they also evidence Mother's lack of reliance on the Consent Order to protect any legitimate privacy interest she claimed initially warranted protection. Mother, the party who is seeking to keep the record in this matter sealed, is the very party who has discussed this matter in a public forum. Mother has, therefore, waived any privacy interest or expectation of confidentiality that she originally alleged she was reliant upon.⁵

iii. Public interest and significance in this matter warrant unsealing the record.

When determining whether to seal or unseal the record in the matter, the Court must consider whether there is public or professional significance of the proceeding, whether there is public interest in the proceeding, the private or public status of the litigants and case generally, whether the public interest is best served by keeping the records sealed, whether the release of records would enhance the public's understanding of an important historical event, and whether a particular decision will sustain or offend the fundamental interests of public access. *Ex parte*

⁴ See, France v. France, 224 N.C.App. 570, 579, 738 S.E.2d 180, 186 (N.C. Ct.App. 2012) (affirming the trial court's finding that information under seal subsequently discovered and published by various media constitutes a substantial change in circumstances to unseal the record in a family court matter).

⁵ See United States v. Southeast Eye Specialists, PLLC, 586 F.Supp.3d 787, 794-95 (M.D. Tenn. 2022) (finding that a party waived any privilege of confidentiality in previously sealed records by discussing

Capital, 369 S.C. at 12, 630 S.E.2d at 470. In denying Father's request to unseal the record, the trial court's order stated, without specific findings or reference to the record, that "there is no real public significance to the case and Plaintiff [Father] has failed to demonstrate any professional significance to unsealing the case record." Order Denying Pltf's Mot. to Alter or Amend the Final Order, p. 3 (R. p. 49). This finding belies the evidence proffered at trial.

Mother and Father are public figures and there is public interest in their lives and this litigation.⁶ Mother has almost one million followers on her Instagram account alone, and her public comments about this proceeding and the family court have and continue to influence public opinion not only about Father, but the South Carolina Judicial System as a whole. *See* Ex. C., Mot. to Unseal the Record (R. pp. 140–148). The public's response to Mother's comments about this proceeding evidence such influence, which not only includes accusations by the public that Father bribed the judiciary to gain an upper hand in this litigation, but also direct attacks against the integrity of the attorneys and judges involved in this matter and the South Carolina Judicial System as a whole. *Id.* This is direct evidence that the public attaches significance to this case and why, consequentially, this case is professionally significant to the attorneys and judges involved in this litigation.

information in the records in a public forum).

⁶ *See, Bradley on behalf of AJW v. Ackal*, 954 F.3d 216, 233 (5th Cir. 2020) ("[A] party's 'privacy interests are diminished' when that party is a public person") (quoting *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785, 787 (3d Cir. 1994), "Privacy interests are diminished when the party seeking protection is a public person subject to legitimate public scrutiny.") and *June Medical Services, L.L.C. v Phillips*, 22 F.4th 512, 520, 111 FedR.Serv.2d 1142 (5th Cir. 2022) ("The rationale for public access is even greater where...the case involves matters of public interest. The greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access.") (internal citations omitted).

Moreover, South Carolina has a fundamental state interest in ensuring public faith in the integrity of its judicial system.⁷ Such interests are not protected by keeping the record sealed in this matter because it has perpetuated public opinion that the trial court's award of sole custody to Father was procured through bribery and undue influence.⁸ The record in this matter must be unsealed to disillusion the public that the trial court's Final Order was based upon the merits of the evidence presented before it and not the result of unethical misconduct.⁹ Refusing to unseal the record offends the fundamental interests of public access and does nothing but perpetuate harm to the professional reputation of the judges and attorneys involved in this case and to the public's faith in the South Carolina Family Court.¹⁰ See, *Ex parte Capital*, 369 S.C. at 10-11, 630 S.E.2d at 469-460 ("Public access serves as a check on inappropriate or corrupt practices by exposing the judicial process to public scrutiny.").¹¹

⁷ See, *Id.*, 22 F.4th at 519 ("Judicial records belong to the American people; they are public, not private, documents. And the public's right of access to judicial records is a fundamental element to the rule of law. The public has an interest in transparent court proceedings that is independent of the parties' interests. This right serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness.") (quoting, *Binh Hoa Le v. Exeter Fin Corp.*, 990 F.3d 410, 417 (5th Cir. 2021); *Leopold v. United States (In re Leopold to Unseal Certain Elec. Surveillance Applications & Orders)*, 964 F.3d 1121, 1123 (D.C. Cir. 2020); *In re Gee*, No. 19-30953, slip op. at 8, 2019 WL 13067384 (5th Cir. Nov. 27, 2019) (Elrod, J., concurring); and *BP Expl. & Prod.*, 920 F.3d at 210).

⁸ "In either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption." *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983).

⁹ See *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305 (6th Cir. 2016) ("The public's focus is not only on the litigation's result, but also on the conduct giving rise to the case, and in both circumstances, the public is entitled to assess for itself the merits of judicial decisions." (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982))).

¹⁰ Counsel for Father emphasized this on the record to the trial court, not as argument, but as an attorney whose profession has been affected by their involvement in this matter and the lack of public transparency in the litigation of this case. See, Mot. to Alter or Amend Tran. at 9:11-16 (R. p. 1791, lines 11-16).

¹¹ See also, *Assoc. Press v. State*, 153 N.H. 120, 133, 888 A.2d 1236, 1238 (N.H. 2005) ("Domestic relations proceedings are a type of civil proceeding that has historically been open to the press and

iv. No perceived harm resulting from unsealing the record outweighs the presumption of public access.

In determining whether this case should be unsealed, the Court must consider what information contained in the record the public already has access to as well as what if any perceived harm the parties may incur if the record is unsealed. *Ex parte Capital*, 369 S.C. at 12, 630 S.E.2d at 470; Rule 41.1(b)(2), SCRCP. In family court matters, Rule 41.1, SCRCP also requires the Court to consider “whether documents: 1) contain material which may expose private financial matters which could adversely affect the parties; and/or 2) relate to sensitive custody issues, and shall specifically balance the special interests of the child or children involved in the family court matter.” Rule 41.1(b), SCRCP.

It is Mother, the party who is seeking to deny the public’s right of access, who bears the burden of overcoming this presumption by articulating compelling reasons supported by detailed documentation and factual findings as to why the need for secrecy overcomes the presumption of public access. *State v. Price*, No. 2023-000629, 2023 WL at *7; *Davis*, 304 S.C. at 506, 405 S.E.2d at 603; *Kamakana*, 447 F.3d at 1178-79; *Pichler*, 238 F.R.D. at 408.

In this case, Mother proffered no evidence or testimony on the record explaining with any specificity why unsealing the record in this matter would cause harm to herself or the minor children, and the trial court’s order references none.¹² Mother did not file a return to Father’s

general public. In addition, public access plays a significant role in domestic relations proceedings by enhancing the quality and safeguarding the integrity in the factfinding process and fostering an appearance of fairness, thereby heightening the public respect for domestic relations proceedings. The importance of matters regarding children and families not only heightens the need for openness and public accountability in domestic relations proceedings.” (internal citations omitted)).

¹² The trial court’s order denying Father’s request to unseal the record points to no specific testimony from Mother or the Guardian *ad Litem* evidencing as to why or how the minor children would be harmed if the court record was unsealed. Instead, the order simply states, “The Defendant [Mother] objects to the

Motion to Alter or Amend the Final Order, and she did not request or object to the trial court ruling on Father's request to unseal the record without an additional testimonial hearing. Mot. to Alter or Amend Tran., 3:12-13 (R. p. 1785, lines 12-13). The *only* proposed harm the trial court references in its order denying Father's motion to unseal the record is based on testimony *Father* gave at trial regarding the minor children. See Order Denying the Pltf's Mt. to Alter or Amend the Final Order, p. 2 (R. p. 48). This testimony was given by Father in support of unsealing the record, *not* sealing the record. See Mot. to Alter or Amend Tran., 12:20-25, 13:1-19 (R. p. 1794, line 20-p. 1795, line 19). Father testified that his reputation had been harmed as a result of the parties' celebrity status and Mother's public misstatements about Father, and that the minor children's lives had been negatively as a result of the public's poor perception of Father. Trial Tr. 301: 25, 302: 1-5, 7 (R. p. 1010, line 25-p. 1011, line 7). For example, Father had trouble arranging playdates for the minor children and the minor children were not always invited to functions and parties that their peers were invited to. See Pltf's Compl. (R. pp. 50-89); Mot. to Alter or Amend Tran. 13:1-9 (R. p. 1795, lines 1-9); Order Denying the Pltf's Mt. to Alter or Amend the Final Order, p. 2 (R. p. 48). Father testified that the record should be unsealed so that the public could know the truth and because the minor children deserve for the public to know that their Father is a good dad. Trial Tr. 301: 25, 302: 1-5, 7 (R. p. 1010, line 25-p. 1011, line 7). In other words, the harm to the minor children that the Court references in its order to justify keeping the record sealed is the very harm Father testified would be mitigated if the record was unsealed.

Court vacating its order to seal the record and maintains that the children would be harmed by allowing the record to be unsealed. The Guardian expresses similar concerns." Order Denying Pltf's Motion to

There is no evidence in the record that supports any finding that harm would result to the minor children if the record in this matter were unsealed, and the trial court's order references no document in the record, and consequently, no specific findings that any portion of the record would, if unsealed, cause perceived harm to the minor children. See, *State v. Price* No. 2023-000629, 2023 WL at *7 (requiring that the family court make detailed documentation and specific findings of fact justifying sealing a record). Much of the minor children's lives and their parents' lives have been documented on Southern Charm, Mother's social media accounts, and numerous online forums and media articles. See Ex. C, Mem. Of Law, p. 2, ¶¶ 5-8 (R. pp. 1481-1482, ¶¶ 5-8). Sensitive information regarding the minor children and the parties has been and remains available to the public in the unsealed case files from the parties' previous two custody actions. (South Carolina Family Court Case Nos. 2016-DR-10-1687 and 2018-DR-10-3671). The Guardian *ad Litem* stated to the Court that the most sensitive piece of child related information raised in the trial of this matter was already available to the public, adding that the "cow's been let out of the barn". Mot. to Alter or Amend Trans., 12:13-19 (R. p. 1794, lines 13-19).¹³ Moreover, the Court's Final Order reflected findings regarding the parents, not the minor children, a fact the trial court itself acknowledged at the hearing on Father's Motion to Alter or Amend. *Id.* at 15:8-10 (R. p. 1797, lines 8-10). There is simply no "new" or "unknown" sensitive child-related issue contained in this record which has not yet been made available or is not already known to the public.¹⁴

Alter or Amend the Final Order, p. 1 (R. p. 47).

¹³ See *In re Copley Press, Inc.*, 518 F.2d 889, 890 (1st Cir. 1979) ("Secrecy is a one-way street: Once information is published, it cannot be made secret again.").

¹⁴ See, *June Medical Services, L.L.C.*, 22 F.4th at 520 ("Publicly available information cannot be

Instead of making specific findings as to what documents in the record contain sensitive custody information that could cause harm to the minor children if they were unsealed, the trial court denied unsealing the record on grounds that the minor children would be “damaged by the exposure of the private lives of the parties.” Not only does this conflict with and disregard the fact that the parties’ “private” lives have been in the public eye the majority of the minor children’s lives, it contradicts Father’s testimony that unsealing the record would benefit his reputation and the minor children while simultaneously ignoring established caselaw which states that injury to reputation is insufficient to overcome the presumption in favor of public access to court records.¹⁵ The general conclusion that unsealing the record could cause tangential harm to the minor children by exposing the “private” lives of the parties is not only contravened by the record, it is not detailed documentation, specific factual finding, or compelling reason that overcomes the

sealed”)(citing the US Supreme Court, Seattle Times Co. v. Rhinehart, 567 U.S. 20, 34, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984)); Washington Post v. Robinson, 935 F.2d 282, 291-92 (D.C. Cir. 1991) (vacating order granting a motion to seal where the information was publicly available.).

¹⁵ “A claim that a court file contains extremely personal, private, and confidential matters is generally insufficient to constitute a privacy interest warranting the sealing of the file. Likewise, prospective injury to reputation, an inherent risk in almost every civil lawsuit, is generally insufficient to overcome the strong presumption in favor of public access to court records.” Ex Parte Capital, 369 S.C. at 14, 630 S.E.2d at 470. (citing Doe v. Heitler, 26 P.3d 539, 544 (Colo. App. 2001); The “mere fact that judicial records may reveal potentially embarrassing information is not in itself a sufficient reason to block public access.” Id. (citing Siedle v. Putnam Investments, Inc., 147 F.3d 7, 10 (1st Cir. 1998)); and “[E]mbarrassment, damage to reputation, and general desire for privacy do not constitute good cause to seal court records.” Id. (citing Doe v. New York Univ., 6 Misc.3d 866, 786 N.Y.S.2d 892, 902 (N.Y. Sup. 2004)). *See also*, In re Marriage of Kelly, 2020 Ill.App. 200130, ¶¶ 33-34, 174 N.E.3d 950, 447 Ill.Dec. 584 (Ill.App.Ct. 2020) (parties to a divorce proceeding, who were both entertainment celebrities, were not entitled to keep sealed portions of the record relating to the custody and visitation of the parties’ children when the portions contained no confidential information relating to the parties’ children, further noting that keeping these portions of the record sealed would “merely protect [the party] from embarrassment, which is an impermissible basis to withhold material from the public” and that “unflattering information regarding [the party’s] conduct is already in the broad public domain.”).

public's constitutional right of public access.¹⁶ Such a standard would open the floodgates for any contested custody matter involving misconduct by a "high-profile" parent to be sealed.¹⁷

v. Keeping the record sealed perpetuates harm to Father.

In denying Father's request to unseal the record, the trial court order disregarded the *actual* harm Father testified the sealing of the record had caused him, and it wholly disregarded the findings in its own Final Order that would unquestionably mitigate this harm if the record were unsealed.

The record clearly evidences that Mother took undue advantage of the confidentiality of the proceedings in this matter by purposefully portraying a false narrative of this case to the public, knowing that the public was prohibited from accessing the record and that Father was prohibited from disseminating it to prove otherwise. As evidenced in the record, subsequent to the sealing of this record Mother made and disseminated numerous public statements implying that the attorneys, judges, and the family court were unethical and/or prejudiced against her. Mot. to Unseal the Record, Ex. B. (R. pp. 122–138); Pltf's Proffered Tr. Ex. 67 (R. pp. 1273–1289). In perpetuating this narrative, Mother made the following statement to the media: "I've been silenced by gag orders. I hate saying that word because it feels wrong. I can't even continue

¹⁶ See, Matter of Krynicki, 983 F.2d. 74, 77 (7th Cir. 1992) (in rejecting a wealthy entrepreneur's request to seal a brief based on his concerns for family and financial privacy and the safety of his children, the court noted that he did not specify what additional information lurked in the sealed transcripts); and Goldberg v. Johnson, 485 So.2d 1386, 1389-90 (Fla.2d DCA 1986) (reversing the circuit court's order denying motion to unseal, finding that the protection of a minor litigant from being harassed by the media and that the parties to the litigation and the guardian *ad litem* had requested that the records be sealed are not good and cogent reasons to override the public's right of access to court proceedings and documents involved).

¹⁷ Id., 485 So.2d at 1389 (Concern "that the public not be apprised of the details of ... litigation is not grounds for closure. Were it otherwise, we suggest that a large percentage of the court proceedings in this nation would be closed.").

telling my story so that people know the truth about what is going on, so they know what really goes on in these situations. I am not the only one, there is a lot of us.” *Id.* (R. p. 131).

This statement not only flies in the face of any reliance on confidentiality, it is manipulative, purposefully misleading, and verifiably untrue. Mother consented to sealing the record in this matter, the Consent Order Sealing the Record and For a Protective Order contains no gag order or restriction on speech, and Mother has and continues to oppose Father’s request that the Court unseal the record in this matter. If Mother truly wanted the public to “know the truth about what is going on” she would not be opposing Father’s request that the record be unsealed. Mother’s statement, which has been republished by third parties and exists in perpetuity on third party media sites, is purposefully manipulative because it falsely and knowingly implies to the public that *if* the record were unsealed and Mother could freely speak about this litigation, the “truth” would favor Mother at Father’s implicit expense.

Moreover, the Court disregarded the findings in its own Final Order that would unquestionably aid in the rehabilitation of Father’s reputation. This not only includes multiple findings by the trial court evidencing that Father was a fit parent and that the children were “thriving” under Father’s care, but that mother’s impeachment witness, Dawn Ledwell, who had made public sexual assault allegations against Father, was not credible. See Final Order, pp. 12-14, ¶¶ 27-31 (R. pp. 32-34, ¶¶ 27-31). Ms. Ledwell’s claims were grounds cited by Mother in the parties’ prior custody action as reasons Father should lose custody. See Compl., Case No. 2018-DR-10-3671, p. 3, ¶ 11 (R. pp. 1869-1870, ¶ 11). This case was resolved by agreement, not a final hearing on the merits, and the court record in the matter remains unsealed, the contents of which have been accessed by the public and have subjected Father to considerable public scrutiny

as a result of Mother's pleading endorsing Ms. Ledwell's allegations against Father. See Pltf's Compl, Ex. A (R. pp. 63–88) and Mem. Of Law, Ex. C (R. pp. 1514–1522).

Keeping the record sealed in this matter does nothing more than suppress the truth and perpetuate falsehoods about Father which have been encouraged and disseminated by Mother to the public. Unsealing the record in this matter will bring truth to light and mitigate the harm suppression of the truth in this matter has inflicted on Father. See *Ex parte Capital*, 369 S.C. at 13, 630 S.E.2d at 471 (“Unsealing the public record will serve the fundamental interests of public access, especially the goal of bringing the truth to light.”).

Instead of acknowledging Father's testimony and the findings made in its own Final Order, the trial court offered a blanket critique of Father's motive for wanting the record unsealed, stating, “The Plaintiff [Father] now asks that the Court assist him to defend his reputation against statements made by the Defendant [Mother] on social media. The Plaintiff now appears to no longer rely on an expectation of privacy and is prepared to disclose to the world of social media all of the Court's findings relative to the Plaintiff and Defendant.” Order Denying Pltf's Mot. to Alter or Amend the Final Order, p. 2 (R. p. 48). These findings not only misstate and contradict Father's direct testimony and are unsupported by the record. More importantly, the trial court's order critiquing Father's motive improperly shifts the burden of proof to Father by implying that Father must provide the Court a justifiable reason for wanting the record unsealed. Father carries no such burden, and to the extent that Father's motive was a factor the Court considered in denying his request to unseal the record, such consideration was wholly improper.¹⁸

¹⁸ The “importance of the interest favoring public access are not lessened because they are asserted by a private party to advance its own interests.” *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998

vi. Less restrictive alternatives exist than sealing the entire record.

In determining whether this case should be unsealed, the Court must consider why alternatives other than sealing court documents are available to protect legitimate privacy interests. Rule 41.1(b)(6), SCRCP. In this matter, the trial court failed to consider and/or explain in its ruling why alternatives to sealing the entire record were not available to protect the legitimate privacy interests of the parties and/or minor children.¹⁹ This is despite Father's counsel proposing to the trial court that Father was agreeable to unsealing the Final Order alone as an alternative to unsealing the entire record. Mot. to Alter or Amend Tran. 16:16-19 (R. p. 1798, lines 16-19). As the trial court itself acknowledged, the Final Order contains findings regarding the parties' conduct, not the minor children. *Id.* at 15:8-11 (R. p. 1797, lines 8-11). Because the trial court failed to consider or explain why this alternative or any alternative to sealing the entire

F.2d 157, 167 (3d Cir. 1993) (vacating the district court's order denying intervenor's motion to unseal judicial records for improperly placing the burden of proof on the intervenor to provide a sufficient reason to discover the documents under seal rather than requiring the party demanding secrecy to demonstrate a particularized need for continuing to enforce the protective order); *See also, Larry Pitt & Assoc. v. Lundy Law, LLP*, 346 F.Supp.3d 761, 767 (E.D. Pa. 2018) ("The Supreme Court has made it plain that all persons seeking to inspect and copy judicial records stand on equal footing, regardless of their motive for inspecting such records. Thus, the press has no greater right of access than does the general public, and more importantly, an intervenor who is also a litigant ... enjoys no lesser rights merely because he desires to use public documents for his or her benefit.") (internal citations omitted).

¹⁹ *See, Stone v. University of Maryland Medical System Corp.*, 855 F.2d 178, 182 (4th Cir. 1988) (remanding district court order sealing record on account that it was overbroad and the trial court failed to consider less restrictive alternatives) and *State ex rel. Cincinnati Enquirer v. Forsthoefel*, 2022 Ohio St. 3580 (Ohio 2022) (reversing the trial court's order sealing documents in a marital dissolution action between the former State Treasurer of Ohio and his wife "to protect the privacy, safety, and security" of their minor children on account that the trial court's order was overbroad, failed to explain why the wholesale sealing of the documents was the only legally proper way to resolve the concerns related to the minor children, and failed to disclose whether court considered a less restrictive means of limiting public access).

record were unavailable, the trial court committed reversible error in violation of the public's constitutional right to public access by ruling that the entire court file should remain sealed.²⁰

II. KEEPING THE RECORD SEALED VIOLATES FATHER'S CONSTITUTIONAL RIGHT TO PARENT.

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States protects a parent's "fundamental right" to make decisions as to the care, custody, and control of his/her children. *Camburn v. Smith*, 355 S.C. 574, 579, 586 S.E.2d 565, 567 (2003) (citing *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 2060, 147 L.Ed. 2d 49, 56-57 (2000)).

In *Troxel*, the Supreme Court of the United States held that it was unconstitutional for the trial court to disregard and overturn a decision by a fit custodial parent based solely on the trial judge's disagreement with the parent's decision. The Supreme Court further held that "there is a presumption that fit parents act in the best interests of their children" and that, at minimum, the trial judge was required to accord special weight to the parent's determination of his/her children's best interests. *Troxel*, 530 U.S. at 67-68. While *Troxel* and *Camburn* involved a

²⁰ See, *Union Oil Co. of California v. Leavell*, 2020 F.3d 562, 568 (7th Cir. 2000) ("[I]t should go without saying that the judge's opinions and orders belong in the public domain"); *In re Marriage of R.E.*, 144 Wash.App. 393, 404-05, 183 P.2d 339, 344-45 (Wash.App.Div.1 2008) (reversing the family court judge's ruling to seal *all* records in a dissolution of marriage proceeding, on grounds that the minor children had a privacy interest in their mental health and treatment records, as overbroad, as less restrictive means were available to balance any sufficiently compelling privacy interest with the public interest in open files); *A.P. v. M.E.E.*, 354 Ill.App.3d 989, 821 N.E.2d 1238 (Ill.App.Ct. 2004) (finding that the trial court abused its discretion in sealing the entire court file when the contents of the files did not justify the conclusion that release of any part of them would be highly detrimental to the minor child, stating that, "it is possible as a practical matter to disclose information such as judicial determinations, the nature of the allegations and defenses contained in the pleadings, the identify of adult parties, matters of scheduling and appearances, and motions, briefs and argument concerning legal issues like subject matter jurisdiction and public access to court files, without disclosing information that may legitimately be kept

parent's decision to prohibit third parties access to their minor children, the constitutional right afforded to fit parents under the Due Process Clause of the United States Constitution is not limited to this singular issue, but extends to *all* decisions relating to the care, custody, and control of their children. As stated in *Troxel*, "so long as a parent adequately cares for his or her children (i.e. is fit), there will normally be no reason for the State...to further question the ability of that parent to make the best decisions concerning...that parent's children.") *Id.* at 68-69.

The trial court held that Father was a fit parent and awarded him sole custody of the minor children, and Father testified on the record that he believed it was in the children's interests that the record be unsealed. Final Order, p.17, ¶ 2 (R. p. 37, ¶ 2); Tr. Tr. 301: 25, 302: 1-5, 7 (R. p. 1010, line 25-p. 1011, line 7). The trial court found that Father was a credible witness. Final Order at 12, ¶ 27 (R. p. 32, ¶ 27). The Guardian *ad Litem* stated on the record that she believed Father was "too truthful", Trial Tr., 584:4-7 (R. p. 1161, lines 4-7). However, despite finding Father to be a fit parent and credible witness, the trial court gave no weight to Father's testimony that the minor children "deserve" that the record be unsealed so that the public knows that they are being cared for by a good Father. *Id.* at 17, ¶ 2 (R. p. 37, ¶ 2); Tr. Tr. 301: 25, 302: 1-5,7 (R. p. 1010, line 25-p. 1011, line 7). The trial court had no authority to disregard that decision. Its order denying Father's request to unseal the record gave no weight, let alone special weight, to Father's testimony and made no specific findings of fact that would overcome the presumption that Father's request to unseal the record is in the best interests of the minor children. Instead, the trial court misconstrued Father's testimony and relied on generalized statements by Mother and the Guardian *ad Litem* to conclude that the record should remain sealed. Order Denying Pltf's Motion

confidential.").

to Alter or Amend the Final Order, p.1 (R. p. 47). These conclusions ignored material portions of the record, are not a detailed documentation of the record, are not specific findings of fact, and do not establish a compelling reason sufficient to overcome the presumption that Father's request to unseal the record is in the children's best interests. In sum, they represent nothing more than a disagreement by the trial court with Father.

Because Father was awarded sole legal custody and therefore has exclusive authority to make decisions related to the minor children, Father has a constitutionally protected right to decide whether it is or is not in his children's best interests for the record in this matter to be unsealed.²¹ Father testified that unsealing the record in this matter would be in the children's best interests and, pursuant to *Troxel*, the Court cannot rule otherwise simply because the trial court disagrees with Father. Because the trial court solely relied on the minor children's best interests in denying Father's request to unseal the record, the trial court's ruling to keep the record in this matter sealed violates Father's constitutional right to parent and must be reversed.

CONCLUSION

There is no privacy interest or perceived harm under the circumstances of this case which would otherwise outweigh the public's constitutional right to public access. Father is the sole custodian of the minor children and has a constitutional right to make decisions regarding the safety and welfare of his family, and the Court has no authority to undermine that right by

²¹ To the Appellant's knowledge, neither this state nor any other state has addressed the application of *Troxel* to a fit parent's right to unseal the court record in an action involving his or her minor children. However, in *In re N.B.*, the Supreme Court of New Hampshire cited *Troxel* as a potential challenge to a New Hampshire statute whose application would prohibit a fit parent from publicly disclosing records of abuse and neglect proceedings related to their child, even if the parent determined it was in the best interests of his or her child. 169 N.H. 265, 273, 146 A.3d 146, 153 at footnote 3 (N.H. 2016).

questioning the merits of Father's decision that unsealing the record in this matter is in his and his children's best interests.

For the reasons set forth herein, the trial court's ruling denying Father's motion to unseal the record should be reversed and the record in this matter should be unsealed.

s/ Kelley D. Andrews-Edwards

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