

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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May 16 2023

SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge
Circuit Court Case No. 2022-CP-26-01323

Appellate Case No. 2023-000192

HSS BAREFOOT, LLC d/b/a CENTURY 21 BAREFOOT,
R&G CORP d/b/a CENTURY 21 THE HARRELSON GROUP,
KEVIN MILLS, MILLS, LLC, and GREG HARRELSON,Respondents,
JOEL D. BARBER,Appellant.

**APPELLANT’S REPLY
TO RETURN TO VERIFIED PETITION FOR A WRIT OF SUPERSEDEAS**

Appellant Joel D. Barber (“Barber”), through counsel, hereby timely files his Reply to Respondents’ Return to the Verified Petition for a Writ of Supersedeas, as follows:

Contrary to Respondents’ argument, enforcement of the January 26, 2023 Amended Order Granting Plaintiffs’ Motion for Contempt (the “Contempt Order”) while Barber’s appeal of that order remains pending will *absolutely* render the appeal moot, in the sense that there will be no real mechanism to undo or compensate for the harm that will necessarily result to Barber from such enforcement or compliance. In other words, Barber will have been effectively and irrevocably deprived of the fruits of a meritorious appeal if a supersedeas and stay does not issue.

Barber's Real Estate Business-Related Data Devices and Databases

Barber's real estate business-related data devices and databases (i.e., computers, laptops, cell phones, electronic storage devices, spreadsheets, etc.) undoubtedly contain, *inter alia*, privileged attorney-client communications, attorney work product, potentially incriminating information subject to Fifth Amendment protections previously asserted by Barber at his deposition in this case and affirmed by the trial court (*see* **Exs. 1 and 2**), and other personal, private and confidential information which is completely unrelated and irrelevant to this case. Requiring Barber to turn over such devices and databases to Plaintiffs for the Plaintiffs' expert, Clark Walton, to inspect, does not provide sufficient protection from the dangers of inadvertent or intentional disclosure or misuse of the information and documents generated by such inspection.

The existence of the Stipulated Confidentiality and Protective Order (the "Protective Order") (Ex. 5, Response) is an insufficient protection for Barber under the circumstances because it does not completely eliminate the risk of an inadvertent or intentional disclosure of information or documents that may subsequently be designated by Barber as "Confidential" or "Attorneys' Eyes Only" after the inspection has been completed by Plaintiffs' expert. Nor does the Contempt Order even contemplate how in practical reality Plaintiffs' expert could even inspect such devices and databases without acquiring at least a cursory knowledge of their contents. Such knowledge and/or potentially wrongful use or disclosure (whether inadvertent or intentional) would severely and irrevocably undermine Barber's defense of this case.

Admittedly, the Contempt Order does allow the parties to have "some other third-party examiner as agreed upon by the parties" conduct the inspection, and counsel for the parties previously agreed for a neutral, third-party to conduct the inspection (**Ex. 3**, p. 11 and Ex. 1 thereto). This agreement should be honored and upheld. However, to date, counsel for Respondents

has failed to fully communicate with undersigned counsel for Barber regarding the inspection protocol in order to actually facilitate and complete an inspection by the neutral third-party.¹ The Contempt Order does not provide any mechanism for resolution of these issues (although it does place the burden on Plaintiffs/Respondents “to submit a proposed examination protocol order to the Court” if the parties cannot agree upon an examination protocol, which Plaintiffs/Respondents have failed to do). (Ex. 15, Response). Based on all of the foregoing, enforcement of the Contempt Order’s directives regarding the inspection of Barber’s devices and databases should be stayed pending resolution of this appeal, unless the parties are able to submit a content order to the trial court outlining the examination/inspection protocol to be followed by the agreed upon neutral third-party examiner.

Barber’s Real Estate Commissions to be Held in Trust

Similar to the issues above, there will be no way to undo or compensate for the complete deprivation of Barber’s use of his past and future real estate commissions (all of which are to be indefinitely held in trust pursuant to the Contempt Order) during the pendency of this appeal if a supersedeas does not issue. Barber’s commissions constitute his sole and exclusive means to an income to pay his bills and living expenses. What if Barber cannot afford to pay his mortgage due to the inability to use his commissions? Will this Court be able to restore him to ownership and possession of his home following a foreclosure? An extreme example, perhaps, but not really. Appeals can take months and even years to resolve. Barber is a residential real estate agent. He does not have another job. He does not earn a salary. His commissions are his only income. He is paid as a result of representing a buyer or seller in a real estate transaction, and he is only paid in

¹ The last communication on this issue was on April 19, 2023, when Counsel for Respondents stated that she “will be touching base with you on the ESI on Friday or early next week.” No further communication has been received. *See Ex. 4.*

such instance. The Contempt Order effectively eliminates Barber's ability to pay his living expenses and to meet his financial obligations. It would be unfair and highly prejudicial to deny Barber a supersedeas and stay while his appeal remains pending.

Further Reply

As evident from the foregoing, barring a supersedeas and stay, Barber will suffer substantial and irreparable harm, and will be irrevocably deprived of the benefits of a successful appeal. On the flip side, the harm to Respondents if a supersedeas and stay is granted will be minimal, if any.

It is essential to understand that Respondents have not actually proven Barber's liability for any of the causes of action alleged. Nor have Respondents proven any entitlement to damages as a result of any alleged liability. Yet, Respondents seem to assume in their Response that their allegations have been definitively proven, seemingly because they say so, and that they are therefore entitled to substantial damages in whatever amount they can come up with as a result. But these questions of liability and damages are for the jury, not for Respondents, not for this Court, and not for the trial court below to decide (at least not at this juncture).

In that regard, Respondents' request for a supersedeas bond in an amount between \$350,000 and \$1,000,000 makes about as much sense as arguing for a range of \$3.50 and \$10,000,000. These are simply the numbers that Respondents came up with, based upon one monthly bank statement for an account in the name of Barber Real Estate, Inc. (which is notably not even subject to the Contempt Order) reflecting a couple of withdrawals totaling \$350,000 and a self-serving and completely unsupported affidavit from Greg Harrelson ("Harrelson"), an individually named Plaintiff/Respondent and the owner of one or more of the corporate Plaintiffs/Respondents. Neither Barber nor anyone else has been questioned under oath about the

bank statement at issue or the specific withdraws reflected therein. Respondents’ assertion that the funds were withdrawn from Barber’s “real estate account” or the “account used by Barber to receive real estate related commissions” has not been definitely proven or admitted. At best, Barber testified during his partially completed deposition in this case that he maintains personal and business accounts with First Citizens Bank, but there is no evidence regarding the nature or purpose of the \$350,000 withdrawn from the Barber Real Estate, Inc. account on November 21, 2022 and November 30, 2022, and no proof that the amounts withdrawn equal the amount of commissions earned by Barber at that time and which would be subject to the original contempt order.² Furthermore, Harrelson fails to describe with any explanation or calculation whatsoever how he arrived at the \$1,000,000 damages calculation set forth in his affidavit. (Ex. 19, ¶29, Response). Accordingly, Respondents’ arguments regarding the amount of a supersedeas bond should be taken for what they’re worth – essentially nothing.

It is, of course, relevant that Respondents were only required to post a \$100,000 bond in return for the Temporary Injunction, upon which the Contempt Order and this entire appeal are ultimately based, and which injunction placed significant and indefinite restrictions on Barber. It is even more notable that counsel for Respondents suggested at the most recent hearing before the trial court below that the \$100,000 bond should actually be *reduced*. Thus, applying the equities, Barber should not under any circumstances be required to post a bond greater than \$100,000 for a supersedeas and stay of the Contempt Order pending resolution of this appeal.

² Counsel for Barber did state at the January 1, 2023, hearing on Barber’s Motion to Reconsider that the funds were withdrawn in order to comply with the original contempt order, but there has been no statement, representation or admission, and no evidence to establish, that the amounts withdrawn represent the commissions Barber actually earned as of the dates of withdrawal that would be subject to the original contempt order. See **Ex. 5**, pp. 14-15. Thus, premising a supersedeas bond on the \$350,000 withdrawn from the Barber Real Estate, Inc. account in November 2022 would be completely baseless at this juncture.

Even more damning to Respondents are the facts that their Motion to Compel (which expressly sought the inspection of Barber's devices and databases) was recently denied by the trial court, and that the hearing on their Second Motion for Contempt and Sanctions was continued and has yet to be heard or decided. (**Ex. 2**; Exs. 7 and 14, Response). These facts raise questions about the inclusion in the Contempt Order of what essentially amount to discovery rulings when no discovery motion was noticed for hearing in connection with the original Motion for Contempt and Sanctions, and when the trial court has otherwise denied the requested discovery.

It should also be noted that the documents designated in support of Respondents' original Motion for Contempt and Sanctions that were to be filed under seal were not actually provided to the trial court until *after* the original contempt order was issued, and only a few days before the hearing on Barber's Motion for Reconsideration thereof. (**Ex. 6**). That fact alone should raise serious and significant questions regarding the validity of the original contempt order, given that much of Respondents' evidence in support thereof was not even available to the trial court.

In sum, the trial court failed to apply the appropriate standard of review to the motions for contempt, which is either clear and convincing evidence or proof beyond a reasonable doubt, depending on whether the sanctions imposed are based upon a finding of civil or criminal contempt (which the Contempt Order fails to specify, but which Barber intends to argue on appeal may have components of both). *See* Exs. 9 & 15, Response; *see also Ex parte Cannon*, 385 S.C. 643, 661, 685 S.E.2d 814, 824 (Ct. App. 2009) (citing *Poston v. Poston*, 331 S.C. 106, 113, 502 S.E.2d 86, 89 (1998)). These are exceptionally high standards that are simply not met when properly considering all of the evidence, especially the submissions from Barber to the trial court below (including three separate affidavits from Barber and an additional affidavit from a third-party witness), all of which plainly contradict the evidence submitted by Plaintiffs/Respondents. *See*

Exs. 7-9. Notably, the Contempt Order makes no mention of whether the trial court found Barber's contradictory and opposing evidence to be unreliable or inadmissible (or how it otherwise resolved the competing evidence against him), and makes scant findings of fact to support the significant and severe sanctions imposed. The trial court abused its discretion in entering the Contempt Order, and Barber believes his appeal will ultimately be meritorious.

Conclusion

The Contempt Order is unreasonable and oppressive, and compliance is arguably impossible. The trial court clearly abused its discretion in imposing the sanctions it did. A supersedeas should issue staying enforcement of the Contempt Order pending the resolution of this appeal, without the requirement of any bond therefore. In the alternative, the supersedeas and stay should issue upon a bond of no more than \$100,000. Barber respectfully requests the foregoing relief, and such other relief in his favor as justice may require.

Respectfully submitted, this the 16th day of May, 2023.

/s/ Christian H. Staples

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing **APPELLANT'S REPLY TO RETURN TO VERIFIED PETITION FOR A WRIT OF SUPERSEDEAS** was served on all counsel of record via email addressed as follows:

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This the 16th day of May, 2023.

/s/ Christian H. Staples

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