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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the 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.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- 1) WHETHER THE TRIAL COURT ABUSED ITS DISCRETION OR OTHERWISE COMMITTED REVERSIBLE ERROR IN ISSUING THE CONTEMPT ORDERS?
- 2) WHETHER THE SANCTIONS FOR CONTEMPT IMPOSED BY THE TRIAL COURT ARE UNREASONABLE, OVERLY BURDENSOME OR OPPRESSIVE, OR IMPERMISSIBLY BEYOND THE SCOPE AND INTENT OF THE TEMPORARY INJUNCTION UPON WHICH THEY ARE BASED?

STATEMENT OF THE CASE

The Appellant, Joel D. Barber (“Appellant” or “Barber”), is a residential real estate agent in Myrtle Beach, South Carolina. (Am. Compl., ¶ 6-7). He was affiliated as an independent contractor with Respondent R&G Corp. d/b/a Century 21 The Harrelson Group (“Century 21”) for approximately five (5) years, from March 14, 2017 through February 7, 2022. (*Id.*, ¶ 8, 33-34). The business relationship between Barber and Century 21 was memorialized in an Independent Contractor and Broker Agreement (*Id.*, ¶ 33 and Ex. A).

On February 7, 2022, Barber was terminated by Century 21 (*Id.*, ¶ 35). Essentially, Respondents accuse Barber of having improperly accessed and used information belonging to them, including clients, client lists, leads, prospects, etc., pertaining to the parties’ business as real estate agents or brokerages, and then converting the same to his own use and benefit, in the form of future listings and commissions generated from real estate sales, all in violation of the Independent Contractor and Broker Agreement. (*Id.*, ¶ 44-45; 50-57). In pertinent part, the Independent Contractor and Broker Agreement provides as follows:

Independent Contractor shall not, after the termination of this contract, use to his/her own advantage, or the advantage of any competing person or corporation, any marketing materials, business plans, scripts, flyers, websites, website providers, email templates, email scripts, listing strategies, reduction letters or subscribe to any systems, CRM’s, software or cloudware that they were introduced to and/or subscribed to during this business relationship and any information gained

for or from files or business of Broker and not generally known. (Am. Compl., Ex. A, ¶ 12) (emphasis added).

This exception for information that is “generally known” is especially relevant to this appeal and is discussed in the Arguments section of this Brief.

Through this action, Respondents seek the entry of judgment against Barber for actual, compensatory, lost profit, and punitive damages; statutory damages, including treble damages; equitable and preliminary, temporary, and permanent injunctive relief; attorneys’ fees, costs, and interest; and all consequential, actual, and special damages arising from or related to Barber’s conduct. (*Id.*, Prayer for Relief). Barber has denied all liability to Respondents for the claims and causes of action alleged against him, and has asserted a Counterclaim for certain unpaid commissions due and owing to him by Century 21. (Answer to Am. Compl. and Counterclaim).

The Temporary Injunction

Contemporaneously with the filing of their original complaint, on March 2, 2022, Respondents filed a Motion for a Temporary Restraining Order and Temporary Injunction. Following a hearing on said motion, on April 8, 2022, the trial court issued a Temporary Injunction (the “Injunction”). As relevant to this appeal, the Injunction found that Respondents made *prima facie* showings of entitlement to injunctive relief, and enjoined Barber from each of the following:

- accessing or using the personal property of Respondents;
- using any information to which he gained access to by being an independent contractor and working with any of the Respondents between March 14, 2017 and February 7, 2022 including, but not limited to, leads, clients, prospects, customers, marketing materials, business plans, scripts, flyers, websites, website providers, email templates, email scripts, listing strategies, reduction letters, system subscriptions, CRMs [Customer Relationship Management technology], software or cloudware, and files;
- initiating contact or communication with leads, clients, prospects, and customers he gained access to by being an independent contractor and working with any of the Respondents between March 14, 2017 and February 7, 2022; and

- selling or disclosing any information to which he gained access to by being an independent contractor and working with any of the Respondents between March 14, 2017 and February 7, 2022 including, but not limited to, leads, clients, prospects, customers, marketing materials, business plans, scripts, flyers, websites, website providers, email templates, email scripts, listing strategies, reduction letters, system subscriptions, CRMs [Customer Relationship Management technology], software or cloudware, and files.

(Temporary Injunction, Pages 4-6). Respondents subsequently posted a \$100,000 bond as required security for the Injunction.

The Motion for Contempt and Sanctions

On July 25, 2022, Respondents filed a Motion for Contempt and Sanctions (“the Motion for Contempt”), alleging that Barber violated the terms of the Temporary Injunction. The Motion for Contempt was initially supported by affidavits from Greg Harrelson (“Harrelson”), Susan Brown and Rob Safa. On October 5, 2022, Barber submitted his own affidavit in opposition to the Motion for Contempt. Barber consented to have certain exhibits to the Motion for Contempt filed under seal. (Consent Order to File Under Seal Pursuant to Consent Confidentiality and Protective Order, filed November 8, 2022). However, for reasons unknown to the undersigned, Respondents failed to provide the sealed documents to the trial court before the hearing on the Motion for Contempt. On November 11, 2022, a third affidavit from Harrelson was submitted in support of the Motion for Contempt, which greatly expanded the basis for the motion. In response thereto, Barber submitted a second affidavit on November 15, 2022. The Motion for Contempt was heard on November 16, 2022. A Form 4 Order was issued that very same day, stating that the Motion for Contempt was granted. A formal written order was subsequently entered on November 22, 2022 (the “Contempt Order”). In pertinent part, the Contempt Order directed Barber (1) to “turn over all real estate business-related data devices and databases to Plaintiffs for the Plaintiffs’ expert, Clark Walton, to image, preserve, and conduct a searching and reporting investigation on

all file sources, using generally accepted forensic tools and methodologies”, (2) to hold all real estate commissions he has received or will receive since February 7, 2022, in trust pending final resolution of the action, and (3) to refrain from using his real estate business-related databases during the pendency of the action. (Order Granting Plaintiffs’ Motion for Contempt, filed November 22, 2022, Page 3).

The Motion to Reconsider and Subsequent Notice of Appeal

On November 22, 2022, Barber timely filed a Motion to Reconsider the Contempt Order. Prior to the hearing thereon, the parties submitted additional affidavits, memoranda of law, the transcript of the hearing on the Motion for Temporary Injunction, and the sealed documents pursuant to the parties’ consent order that were not provided to the trial court prior to the hearing. The Motion to Reconsider was heard on January 3, 2023. Upon reconsideration, the trial court agreed to modify the Contempt Order in limited respects. (Form 4 Order filed January 9, 2023). On January 26, 2023, a formal written order was entered (the “Amended Contempt Order”). The primary, if not the only, change made by the Amended Contempt Order as compared to the Contempt Order was to expand upon the sanction requiring Barber to turn over all real estate business-related data devices for inspection. In that regard, the trial court ruled that the imaging, preservation, and searching and reporting (i.e., the inspection) of Barber’s devices and databases could be conducted by “some other third-party examiner as agreed upon by the parties” in lieu of Plaintiffs’ expert, Clark Walton. (Amended Contempt Order, Pages 3-4, ¶ 1). The Amended Contempt Order also addressed some procedural aspects of the inspection pertaining to privilege and confidentiality which were not contained in the Contempt Order. *Id.* However, the Amended Contempt Order did not amend in any respect the sanctions requiring Barber to hold all real estate commissions he has received or will receive since February 7, 2022, in trust pending final

resolution of the action, and to refrain from using his real estate business-related databases during the pendency of the action. While the parties subsequently agreed to a third-party examiner, the inspection of Barber’s devices has yet to occur, and the parties are still in discussion regarding the protocol order to be applied by the examiner.

On February 7, 2023, Barber timely filed a Notice of Appeal of the Contempt Order and the Amended Contempt Order. This appeal is now ripe for adjudication.

STANDARD OF REVIEW

A finding of contempt is immediately appealable. *Ex Parte Cannon*, 385 S.C. 643, 660, 685 S.E.2d 814, 823 (Ct. App. 2009). “A decision on contempt rests within the sound discretion of the circuit court.” *Id.* (citation omitted). “It is within the circuit court’s discretion to punish by fine or imprisonment every act of contempt before the court.” *Id.* (citation omitted). On appeal, this Court should reverse the contempt decision if it is without evidentiary support or if the trial court otherwise abused its discretion. *Id.* (citation omitted).

ARGUMENTS

I. THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR IN ISSUING THE CONTEMPT ORDERS.

A. South Carolina Law on Contempt, Generally.

“The circuit court may punish by fine or imprisonment, at the discretion of the court, all contempts of authority in any cause or hearing before the same.” S.C. Code Ann. § 14-5-320. “[C]ontempt is an extreme measure and the power to adjudge a person in contempt is not to be lightly asserted.” *Hook v. S.C. Dep’t of Health & Env’t Control*, 439 S.C. 52, 74, 885 S.E.2d 442, 454 (Ct. App. 2023). “All courts have the inherent power to punish for contempt, which is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice.” *Ex parte Cannon*,

385 S.C. 643, 660, 685 S.E.2d 814, 824 (Ct. App. 2009). “Contempt results from the willful disobedience of a court order, and before a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct.” *Id.* at 660-61, 685 S.E.2d at 824. “A willful act is one done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.” *Id.* at 661, 685 S.E.2d at 824. “Once the moving party has made out a prima facie case for contempt, the burden then shifts to the respondent to establish his defense and inability to comply with the order.” *Id.* “If, through no fault of his own, the contemnor is unable to obey a court order, the contemnor cannot be held in contempt.” *Id.*

Contempt can be either civil or criminal. *Id.*; *see also DiMarco v. DiMarco*, 393 S.C. 604, 608, 713 S.E.2d 631, 634 (2011) (“A sanction is either civil or criminal; it cannot be both because they serve different purposes.”). “The distinction between civil and criminal contempt is crucial because criminal contempt triggers additional constitutional safeguards.” *Ex parte Cannon*, 385 S.C. at 661, 685 S.E.2d at 824. “Intent for purposes of criminal contempt is subjective, not objective, and must necessarily be ascertained from all the acts, words, and circumstances surrounding the occurrence.” *Id.* “Additionally, civil contempt must be proven by clear and convincing evidence, while criminal contempt must be proven beyond a reasonable doubt.” *Id.* (citing *Poston v. Poston*, 331 S.C. 106, 133, 502 S.E.2d 86, 89 (1998)). “Clear and convincing evidence is that degree of proof which will produce in the fact finder a firm belief as to the allegations sought to be established.” *Satcher v. Satcher*, 351 S.C. 477, 483, 570 S.E.2d 535, 538 (Ct. App. 2002). The clear and convincing evidentiary standard required for civil contempt is a *lower* standard than proof beyond a reasonable doubt required for criminal contempt. *Id.*

“In determining whether the contempt is civil or criminal, the major factor to consider is the purpose for which the power is exercised, including the nature of the relief and the purpose for which the sentence is imposed.” *Ex parte Cannon*, 385 S.C. at 662, 385 S.E.2d at 824 (citing *Poston*, 331 S.C. at 111, 502 S.E.2d at 88). “The purpose of civil contempt is to coerce the defendant to do the thing required by the order for the benefit of the complainant, while the primary purposes of criminal contempt are to preserve the court’s authority and to punish for disobedience of its orders.” *Id.* “An unconditional penalty is criminal in nature because it is solely and exclusively punitive in nature.” *Poston*, 331 S.C. at 111, 502 S.E.2d at 88. “In civil contempt cases, the sanctions are conditioned on compliance with the court’s order.” *Id.* at 112, 502 S.E.2d at 89. “The conditional nature of the punishment renders the relief civil in nature because the contemnor can end the sentence and discharge himself at any moment by doing what he had previously refused to do.” *Id.*

The *Poston* Court gives several examples of civil contempt sanctions and criminal contempt sanctions. *Id.* at 114-15, 502 S.E.2d at 90. Unfortunately, none of the examples given bear any resemblance to the sanctions imposed in this case (i.e., Barber was not ordered to pay a fine or to serve any jail time). Thus, the Contempt Order and the Amended Contempt Order arguably reflect an abuse of discretion in that the sanctions imposed exceed the trial court’s authority to impose sanctions for contempt, which should be limited to a fine or jail time, or an order to pay the other party’s costs and attorneys’ fees incurred in enforcing the court’s prior order. *See id.*; *see also* S.C. Code Ann. § 14-5-320 (“The circuit court may punish by fine or imprisonment, at the discretion of the court, all contempts of authority in any cause or hearing before the same.” (emphasis added)).

B. The Trial Court Failed to Say Whether the Contempt was Civil or Criminal, but Applied the Evidentiary Standard for Civil Contempt.

The Motion for Contempt is void of any reference to civil contempt versus criminal contempt, and neither the Contempt Order nor the Amended Contempt Order states whether the sanctions imposed against Barber are civil or criminal in nature. However, both contempt orders recite that “this Court finds *clear and convincing evidence* that Defendant Barber willfully, voluntarily, and intentionally violated the Injunction ...” (emphasis added), which suggests that the trial court applied the standard of proof required for civil contempt. (Contempt Order, Pages 2-3; Amended Contempt, Page 3). There is nothing anywhere in the record to suggest that the trial court applied the heightened evidentiary standard of proof beyond a reasonable doubt as required for the imposition of criminal contempt sanctions.

C. The Contempt Sanctions Imposed are More Likely Criminal than Civil.

The sanctions imposed by the trial court are more likely criminal than civil because they are unconditional and punitive in nature, and there is nothing that Barber can do to “purge” himself of the contempt through compliance with the Injunction. The sanction requiring Barber to hold all of his commissions earned, and to be earned in the future, after February 7, 2022, in trust until final resolution of this action is clearly unconditional in nature. Moreover, it is also punitive in nature because it completely deprives Barber of the use and benefit of his commissions and leaves him without any real means to pay his living expenses and other debts. This sanction does nothing to coerce Barber’s compliance with the Injunction, because regardless of whether any commission is rightfully or wrongfully earned, Barber must still hold it in trust until final resolution of this action. Nor is there any means or procedure by which Barber can exempt himself from this directive, such as by proving that the commission was rightfully earned through no violation of the Injunction, or through the posting of a bond in lieu of holding commissions in trust. The same

arguments can be made regarding the sanction requiring that Barber refrain from using his real estate business-related databases during the pendency of the action.

The sanction requiring Barber to turn over all real estate business-related data devices and databases for inspection is also more likely criminal than civil because it, too, is unconditional in nature and does nothing to coerce Barber's compliance with the Injunction. Moreover, it is tantamount to an order regarding discovery when no motion to compel discovery was duly noticed or scheduled for hearing.¹ The Contempt Orders do not appear to be imposing sanctions under Rule 37, SCRPC, as a result of any failure to participate in discovery. In this regard, it is a punitive sanction seemingly designed to punish Barber by expediting and circumventing the normal discovery and motions process. It does not seek to coerce Barber's compliance with the Injunction, but instead seeks to provide Respondents with a means of verifying whether Barber has done so.

D. The Contempt Sanctions Potentially Violate Barber's Due Process Rights.

As observed in *Poston*, sanctions that punish a party for future violations without first holding a hearing to determine if the party willfully violated the order on that future occasion potentially violates the party's due process rights. 331 S.C. at 116, 502 S.E.2d at 91 (citing, *inter alia*, *Bloom v. Illinois*, 391 U.S. 194 (1968) (most procedural requirements applicable to other criminal trials are applicable to a hearing on criminal contempt including notice and an opportunity to be heard)). By requiring Barber to hold all future commissions in trust, the trial court has effectively determined that all future listings and commissions will be obtained by Barber in violation of the Injunction, without affording Barber notice or opportunity to be heard on whether those future commissions are actually obtained in a manner that does not violate the Injunction.

¹ Plaintiffs filed a Motion to Compel on October 31, 2022, seeking an order compelling Barber "to permit inspection of items responsive to Plaintiffs' First Request for Inspection of Property", but this motion was not noticed or heard prior to the filing of the Notice of Appeal. The motion was eventually heard after the Notice of Appeal was filed and was denied.

Barber cannot be punished for future violations of the Injunction unless those violations are properly established by the requisite evidentiary standard. Accordingly, the trial court abused its discretion to the extent its orders require Barber to hold future commissions in trust.

E. The Trial Court Failed to Apply the Appropriate Evidentiary Standard to the Motion for Contempt and Sanctions.

The clear and convincing standard applied by the trial court (as recited in the Contempt Orders) only applies to civil contempt and is a lesser standard than the proof beyond a reasonable doubt standard required for criminal contempt. If this Court agrees that the contempt sanctions are criminal in nature (or even if one of the sanctions is criminal in nature, or if the sanctions are hybrid in nature), then the trial court failed to apply the correct evidentiary standard, which is an abuse of discretion warranting reversal. *Poston*, 331 S.C. at 115, 502 S.E.2d at 91 (reversing because the contempt order was not clear and it was impossible to determine whether the contempt sanction was criminal or civil).

F. Regardless of Whether the Contempt is Deemed Civil or Criminal, the Evidence Presented by Respondents Fails to Meet the Evidentiary Standard Required for Either, Especially When Considering the Rebuttal Evidence Submitted by Barber.

In both the Contempt Order and the Amended Contempt Order, the trial court states that its finding of contempt is “[b]ased upon this Court’s review of Rob Safa, Susan Brown, Defendant Barber, and Plaintiff Harrelson’s affidavits, Defendant Barber’s deposition testimony from November 15, 2022 represented by Plaintiffs’ counsel, and all arguments of counsel”. (Contempt Order, Pages 2-3; Amended Contempt Order, Page 3). Notably absent from this list is the Affidavit of Sandra Churgin, Barber’s Memorandum of Law in Support of Motion to Reconsider and accompanying exhibits, and the Transcript of the hearing on the Motion for Temporary Injunction. Thus, it is unknown whether and to what extent the trial court considered these other submissions.

Regardless, it is clear from a full examination of all materials submitted that there was not clear and convincing evidence, yet alone proof beyond a reasonable doubt, of Barber's willful violation of the Injunction, as required to support a finding of contempt under any standard.

The Affidavit of Rob Safa merely establishes that he is not aware of how Barber could have obtained his contact information other than from Respondents. (Affidavit of Rob Safa, Page 3, ¶ 11). However, Barber submitted his own affidavit in which he explains how he obtained Safa's contact information from an independent source *after* he was terminated from Century 21. (Affidavit of Joel Barber, Page 2, ¶ 7-8, 16, and Exhibits A, B and C). Thus, Barber's email communication with Safa does not violate the Injunction, and certainly there is not clear and convincing evidence of such violation from the evidence presented.

The same explanation applies to Susan Brown. She states that she received communications from Barber but cannot definitively say how Barber obtained her contact information or rule out that he obtained it from a source other than Respondents. (*See generally*, Affidavit of Susan Brown). Barber submitted his own affidavit explaining how he obtained Brown's contact information separate and apart from any access he may have had to Respondents information. (Affidavit of Joel Barber, Page 2, ¶ 9-10, 16, and Exhibits D and E). Thus, Barber's email communication with Brown does not violate the Injunction, and certainly there is not clear and convincing evidence of such violation from the evidence presented.

Harrelson, through his Third Affidavit, merely states that "third-party leads, prospects, clients and customers identified on the Century 21 Harrelson/Barefoot CRM tools have been and continue to be contacted by Joel Barber" (Third Affidavit of Greg Harrelson, Page 2-3, ¶ 10). But this, too, falls far short of establishing a willful violation of the Injunction, especially when viewed alongside Barber's own affidavit and in consideration of the practical reality that just

because a name and contact information appears in a Century 21 database does not mean that Barber could not have otherwise obtained the same name and contact information from another source, independent of his prior association with Century 21, or that such name and contact information are not “generally known” within the meaning of Section 12 of the Independent Contractor and Broker Agreement between Barber and Century 21.

In sum, there is not clear and convincing evidence of Barber’s willful violation of the Injunction with respect to these communications. At best, the trial court was presented with competing affidavits and other evidence, and would have had to ignore Barber’s submissions (or otherwise found him not to be a credible witness) in favor of the logically disconnected and conclusory affidavits submitted by Respondents, in order to base a finding of contempt upon Barber’s isolated communications with Safa and Brown. Yet, the trial court did not make any factual findings to even suggest that Barber was not a credible witness or that his rebuttal evidence was not entitled to equal weight as that of Safa, Brown and/or Harrelson.

Barber’s communications with Safa and Brown were the only asserted bases in support of the Motion for Contempt at the time it was filed. However, on November 11, 2022, a few days before the hearing on the Motion for Contempt and over three (3) months after the motion was filed, Respondents submitted the Fourth Affidavit of Greg Harrelson, which significantly expanded the allegations of contempt to include dozens of MLS listings in Barber’s name for the period of February 15, 2022 through November 9, 2022. (*See generally*, Fourth Affidavit of Greg Harrelson). These new allegations fall victim to the same logical fallacy as the original allegations of contempt based upon Barber’s communications with Safa and Brown, in that just because a name appears in a Century 21 database does not mean that Barber necessarily obtained the name from that database (or otherwise from Respondents) in violation of the Injunction.

Barber tried his best, under the circumstances², to respond to the Fourth Harrelson Affidavit and to present his own evidence regarding the MLS listings prior to the hearing on November 16, 2022. In his Second Affidavit, Barber denies violating the Injunction and explains, in general terms, how he gained access to the leads which resulted in the MLS listings at issue. Barber unequivocally stated that he “did not obtain any of the MLS listings referenced in the Fourth Harrelson Affidavit as a result of any access I had to Plaintiffs’ databases or otherwise by virtue of my prior status as an independent contractor and real estate agent for Century 21 The Harrelson Group.” (Second Affidavit of Joel Barber, Page 1, ¶ 3). Thus, aside from the arguments against “gotcha” litigation, trial by ambush, improper supplementation of a motion, and general lack of notice, all of which the trial court should have considered as a basis for either continuing the November 16, 2022 hearing or refusing to consider the late-filed Fourth Affidavit of Harrelson, the evidence presented through the additional affidavit does not amount to clear and convincing evidence of a willful violation of the Injunction. In fact, one of the listings cited in Harrelson’s Fourth Affidavit is not even a listing of Barber’s. (Second Affidavit of Joel Barber, Page 2, ¶ 4). This fact alone should have given the trial court pause in considering the veracity and accuracy of Harrelson’s affidavit, weighing it against the competing/rebuttal evidence submitted by Barber, and then determining whether additional discovery or court hearings should be conducted prior to any finding of contempt or imposition of sanctions.

² Barber had very limited time to respond to the Fourth Harrelson Affidavit prior to the hearing on the Motion for Contempt on November 16, 2022. Though the Fourth Harrelson Affidavit was submitted for e-filing on November 11, 2022 (a Friday), the Notice of Electronic Filing is dated November 14, 2022 (the following Monday) and undersigned counsel for Barber did not access it until that time. On November 15, 2022, Barber was deposed in Charleston, SC, and the deposition lasted from approximately 10:00AM until 5:00PM. Accordingly, Barber and his counsel had very limited time to review the Fourth Harrelson Affidavit and to prepare a respond thereto prior the hearing, and certainly did not have time to conduct a detailed review of the dozens of MLS listings referenced therein. *See* Second Affidavit of Joel Barber, ¶ 8.

Prior to the hearing on the Motion to Reconsider, Barber submitted a Third Affidavit, which supplemented his Second Affidavit and provided a more specific response to the allegations contained in the Fourth Affidavit of Harrelson. Barber's Third Affidavit and the exhibits attached thereto clearly rebut Harrelson's allegations regarding the source of the MLS listings at issue and defy any finding of clear and convincing evidence of a willful violation of the Injunction. Notably, for at least fifteen (15) of the MLS listings at issue (nearly 14% of them), Barber submitted signed documents from his clients indicating the source of their connection, which documents easily contradict any conclusion that Barber obtained those listings by resort to Respondents' information.³ Additionally, Barber submitted an affidavit from one of his clients, Sandra Churgin, who attests to the genesis of their connection as related to a couple of the MLS listings at issue and clearly establishes that Barber did not obtain those listings (or otherwise communicate with her) as a result of any improper access to or use of Respondents' information in violation of the Injunction. Respondents attempted to discredit Churgin through the submission of even more affidavits, but, at best, all Respondents succeeded in doing was creating witness credibility and fact issues that should have warranted further discovery and investigation by the trial court before it jumped to a finding of contempt. It is also questionable whether the trial court even considered all of these submissions.

In sum, whether the contempt is deemed civil or criminal in this case is largely academic, because the evidence presented by Respondents simply does not establish even clear and convincing evidence (yet alone proof beyond a reasonable doubt), of a willful violation of the Injunction, especially when Respondents' evidence is properly considered alongside Barber's

³ Please refer to Exhibits 22, 46, 58, 73a, 74, 76, 83, 85, 91, 96, 99, 102, 103, 105, and 107 to the Spreadsheet attached as Exhibit A to the Third Affidavit of Joel Barber.

rebuttal evidence. The trial court abused its discretion in holding Barber in contempt, and must be reversed on appeal.

G. The Trial Court Seemingly Failed to Consider the “Generally Known” Exception Under the Independent Contractor and Broker Agreement.

Barber cannot be in breach of the Independent Contractor and Broker Agreement if the information he is accused of improperly accessing and/or using is “generally known” within the meaning of Section 12 of that agreement, which reads in pertinent part as follows:

Independent Contractor shall not, after the termination of this contract, use to his/her own advantage, or the advantage of any competing person or corporation, any marketing materials, business plans, scripts, flyers, websites, website providers, email templates, email scripts, listing strategies, reduction letters or subscribe to any systems, CRM’s, software or cloudware that they were introduced to and/or subscribed to during this business relationship and any information gained for or from files or business of Broker and not generally known. (Am. Compl., Ex. A, ¶ 12) (emphasis added).

The Independent Contractor and Broker Agreement is the primary, if not the sole, basis for the Injunction. (Injunction, Pages 4-5, ¶ 16-21). The concept of “generally known” (sometimes alternatively referred to during this litigation as “independent source”) was argued to the trial court at both the November 16, 2022 hearing on the Motion for Contempt and the January 3, 2023 hearing on the Motion to Reconsider, as well as in the supporting materials submitted to the trial court. (Transcript of November 16, 2022 hearing, Pages 16 and 18; Transcript of January 3, 2023 hearing, Pages 10 and 12; Memorandum of Law in Support of Motion to Reconsider, pages 7, 14-15). Unfortunately, the Independent Contractor and Broker Agreement does not define what it means to be “generally known”, nor has there been any finding or judicial declaration to that effect in this case. However, as the trial court originally recognized at the hearing on the Motion for Temporary Injunction, it is not an automatic violation of the Injunction (or the underlying independent contractor agreement) for Barber to contact or obtain a listing from someone who appears in a Century 21 database. (Transcript of March 31, 2022 hearing, Pages 38-39). Judge

Steven H. John (“Judge John”), who presided over the hearing on the Motion for Temporary Injunction, foresaw the very thing that has now occurred – that Barber would obtain listings from individuals contained in the Century 21 database, that Respondents would argue that the listings were obtained as a result of Barber’s improper access and/or use of Respondents’ information, and that Barber would be forced to explain how he obtained the listings in a way that does not violate the Injunction or the underlying agreement. *Id.* Unfortunately, it seems that the change in judges from the time the Motion for Temporary Injunction was heard to the time the Motion for Contempt and Motion to Reconsider were heard may have caused the trial court to lose sight of this important exception for information that is generally known or otherwise obtained from a source independent of Respondents. At a minimum, the trial court should have made factual findings regarding the concept of generally known and/or independent source, given that not all communications and interactions between Barber and individuals appearing in a Century 21 database are an automatic violation of the Injunction or the underlying agreement. It is not as if Respondents are seeking to protect the Coca-Cola® formula or some other clearly identifiable trade secret; at issue are merely names and contact information for residents in Myrtle Beach, SC and the surrounding area, where Barber himself has lived and worked for a number of years. It seems obvious that virtually every real estate agent in the area would have some degree of overlapping names and contact information in their database of leads, given that property ownership records are public records and with modern technologies, such as the Internet, names and contact information for virtually anyone is easily accessible. For these reasons, the evidence presented does not establish contempt by the requisite evidentiary standards.

II. THE SANCTIONS FOR CONTEMPT IMPOSED BY THE TRIAL COURT ARE UNREASONABLE, OVERLY BURDENSOME AND OPPRESSIVE, AND IMPERMISSIBLY BEYOND THE SCOPE AND INTENT OF THE TEMPORARY INJUNCTION UPON WHICH THEY ARE BASED.

Separate and apart from the issue of whether the trial court's findings of contempt are supported by the requisite level of evidentiary proof is the issue of whether the sanctions imposed for contempt are reasonable in light of the alleged misconduct. "Any component of a sanction must be directly related to the contemptuous conduct and the loss incurred by the offended party." *Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 609, 567 S.E.2d 514, 520 (Ct. App. 2002). Where there is no reasonable relationship to the contemptuous conduct and the sanction imposed, the sanction will be reversed on appeal. *Id.*

As discussed in Section I.A. above, and also in the *Poston* case, 331 S.C. 106, 502 S.E.2d 86 (1998), the typical sanction for contempt, whether criminal or civil, is a fine, imprisonment, or an order to pay the opposing party's costs and attorneys' fees. Here, none of the traditional sanctions were imposed, which should make the sanctions actually imposed particularly susceptible to scrutiny for reasonableness, assuming that the trial court even has discretion to vary from the traditional sanctions, which S.C. Code § 14-5-320 and the other cases cited herein seem to suggest it may not.

As previously argued herein, requiring Barber to turn over his real estate business-related data devices and databases seems less like a contempt sanction and more like a discovery order. In fairness, the trial court did amend this sanction in response to certain confidentiality and privilege concerns raised by Barber, but it is still tantamount to a discovery order when no discovery motion was noticed or otherwise scheduled for hearing. If the trial court felt that the inspection of Barber's devices and databases was relevant to a finding of contempt, then the better practice would have been to obtain the results of the inspection before making any finding of

contempt or imposing any sanctions as a result. It is also worth mention that Judge John specifically denied Respondents' request at the hearing on the Motion for Temporary Injunction for an expedited inspection of Barber's devices, stating that such a request was "a matter for a motion of discovery strictly for that" and was not proper in the request for a temporary injunction. (Transcript of March 31, 2022 hearing, Page 37). By the same logic that the trial court determined the inspection of devices should not be granted in the context of the Motion for Temporary Injunction, it should not have been granted in the context of the Motion for Contempt, either, and doing so was an abuse of discretion.

Next, and perhaps more importantly, the trial court's order for Barber to hold all real estate commissions in trust until final resolution of this case is clearly unreasonable, unduly burdensome and oppressive. First, compliance is arguably impossible with respect to the prior commissions earned before the sanction was imposed. Those prior commissions were most likely already spent, commingled with other funds, or otherwise disposed of. The trial court provided no means of accounting for that reality, but the sanction nonetheless requires Barber to somehow come up with a sum of money to be held in trust on account of those prior commissions. As argued strenuously to the trial court, such a sanction also effectively limits Barber's ability to pay his living expenses and other debts, including income and other taxes. (Transcript of Hearing on January 3, 2023, Page 14; Memorandum of Law in Support of Motion to Reconsider, Page 16; Third Affidavit of Joel Barber, Pages 5-6, ¶ 14). No trial date has been set in this case. The trial court did not conduct any inquiry into Barber's personal financial situation or his ability to comply with the sanction without risking a defaulting on his mortgage, car payment, or federal/state taxes. Barber should not be deprived of his commissions (as his sole means to an income) for such an indefinite period of time, especially in light of the concerns expressed by Barber himself in that regard. (Third Affidavit of

Joel Barber, Pages 5-6, ¶ 14). The trial court abused its discretion by imposing this sanction, and further abused its discretion by failing to offer Barber an alternative, such as the payment of a bond in lieu of the constructive trust, that would have enabled Barber to mitigate these concerns.

CONCLUSION

For each of the reasons set forth herein, this Court should reverse the trial court's findings of contempt as expressed in the Contempt Order and the Amended Contempt Order. Alternatively, this Court should overturn the contempt sanctions imposed by the trial court and remand with instructions for the trial court to conduct a new hearing for the purpose of imposing more reasonable sanctions against Defendant Barber that do not violate his due process rights.

Respectfully submitted, this the 31st day of May, 2023.

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