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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, individually, Mills, LLC, and Greg
Harrelson, individually, Respondents,

v.

Joel D. Barber, individually and as licensed realtor, Barber Real Estate, Inc.,
Nicholas Fitzpatrick, as licensed realty, Darcy Varney, individually, and as
broker-in-charge, eXp Realty, LLC, James Ray Lunsford, individually and as
broker-in-charge, and NorthGroup Real Estate, Inc., Defendants,

Of Whom Joel D. Barber is the Appellant.

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STATEMENT OF ISSUES ON APPEAL

- I. The circuit court did not abuse its discretion or otherwise commit reversible error in issuing the contempt orders.

- II. The sanctions for contempt imposed by the circuit court are not unreasonable, overly burdensome, or oppressive, and are not impermissibly beyond the scope and intent of the temporary injunction upon which they are based.

STATEMENT OF THE CASE

Appellant Joel Barber, a now-former agent of Century 21 Harrelson Group, improperly accessed, retained, and used confidential information and property belonging to Respondents for his benefit and for the benefit of the subsequent brokerage companies for which he worked. While working as an independent contractor for Century 21 Harrelson Group, Appellant entered Century 21 Harrelson Group's office building in the middle of the night. Once inside, Appellant broke into other agents' locked offices, accessed other agent's password-protected computers without authorization, and misappropriated data belonging to the Respondents. The data Appellant misappropriated included Respondents' comprehensive client leads and non-public databases ("Respondents' Information"), which have tremendous value to both agents and brokerage companies.

Soon after learning of Appellant's actions, Century 21 Harrelson Group terminated Appellant's Independent Contractor Agreement. Thereafter, Respondents initiated this lawsuit and moved for a temporary injunction to prevent Appellant and his co-defendants from using or disclosing Respondents' Information during the pendency of the lawsuit, as well as to prevent Appellant and his co-defendants from initiating contact with the leads reflected in Respondents' Information. The circuit court granted Respondents' Motion for Temporary Injunction, and entered a Temporary Injunction against Appellant. Appellant never appealed the Temporary Injunction, and it remains the law of the case.

A few months after the circuit court entered the Temporary Injunction, Respondents moved to hold Appellant in contempt due to Appellant's continued use and disclosure of Respondents' Information ("First Contempt Motion"). Following a hearing, the circuit court granted Respondents' First Contempt Motion and entered a contempt order ("Initial Contempt Order").

The Initial Contempt Order ordered Appellant to: (i) turn over his data devices and databases to Respondents' expert for preservation and inspection, (ii) hold all of his real-estate commissions in trust from the date of Appellant's termination from Century 21 Harrelson Group during the pendency of the action, and (iii) refrain from using the databases at issue during the pendency of the action. Appellant filed a Rule 59(e) motion, asking the Court to alter or amend the Initial Contempt Order. The circuit court amended the Initial Contempt Order slightly and entered the Amended Contempt Order. In the Amended Contempt Order, the circuit court incorporated some additional provisions related to inspection of Appellant's data devices and databases, including a provision allowing the parties to agree to use an independent third-party examiner. Otherwise, the Amended Contempt Order did not disturb the Initial Contempt Order. Appellant did not file a Rule 59(e) motion to alter or amend the Amended Contempt Order. Appellant now appeals the Amended Contempt Order.

STATEMENT OF FACTS

Century 21 Harrelson Group is an independent real estate brokerage company located in Myrtle Beach. Century 21 Harrelson Group maintains certain proprietary information (*i.e.*, Respondents' Information), including non-public databases and comprehensive client leads that require significant time and expense to develop and which are critical to the development of the brokerage's and the individual agents' client relationships. (**Harrelson Aff.**, ¶ 12, filed Mar. 2, 2022; **Second Harrelson Aff.**, filed Mar. 29, 2022, ¶¶ 11, 16-19).

On March 14, 2017, Appellant entered into an Independent Contractor and Broker Agreement with Century 21 Harrelson Group to act as an agent of the brokerage. (**Amended Complaint**, filed May 4, 2022, ¶ 33). Appellant remained an agent of Century 21 Harrelson Group until February 7, 2022. (*Id.* at 34). Relevant to this case, the Independent Contractor Agreement

prohibited Appellant from using any of Respondents' Information for his own advantage or the advantage of any competing person or corporation subsequent to termination of the Independent Contractor Agreement. (**Ex. A to Amended Complaint, filed May 4, 2022, ¶ 12**).

On February 7, 2022, Century 21 Harrelson Group discovered that Appellant had entered the Century 21 office building in the middle of the night. Once inside, Appellant gained unauthorized access to Respondents' Information by breaking into other agents' locked offices and logging onto their password-protected computers. (**Amended Complaint, filed May 4, 2022, ¶¶ 37-38**). During this and other episodes, Appellant misappropriated Respondents' Information, and also altered and manipulated data on other Century 21 agents' computers. (*Id.* at **40-45**; *see also Memo. in Support of Mot. for Temp. Inj., filed Mar. 30, 2022, p. 2-4*). Upon discovering Appellant's egregious misdeeds, Century 21 Harrelson Group terminated the Independent Contractor Agreement. (**Memo. in Support of Mot. for Temp. Inj., filed Mar. 30, 2022, p. 2**).

After Century 21 Harrelson Group terminated the Independent Contractor Agreement, Appellant commenced work as an agent for eXp Realty, LLC under broker-in-charge Darcy Varney. (**Amended Complaint, ¶ 9**). While at eXp Realty, Appellant used and disseminated Respondents' Information for his own benefit and attempted to sell the misappropriated information by and through eXp Realty in exchange for a share of commissions generated by Respondents' Information. (**Memo. in Support of Mot. for Temp. Inj., filed Mar. 30, 2022, p. 4**).

Respondents, which include Century 21 Harrelson Group, its owner (Greg Harrelson), a sister brokerage company owned by Greg Harrelson (Century 21 Barefoot), and an agent of Century 21 Barefoot whose information Appellant misappropriated (Kevin Mills), filed a Complaint naming Appellant, eXp Realty, and Darcy Varney as defendants on March 2, 2022.

(**Complaint, filed Mar. 2, 2022**). At the same time, Respondents filed a Motion for Temporary Injunction against Appellant and his co-defendants. (**Mot. for Temp. Inj., filed March 2, 2022**). The circuit court entered the Temporary Injunction on April 8, 2022, requiring Respondents to pay a \$100,000 bond and enjoining Appellant and his co-defendants from using or disclosing Respondents' Information, as well as from contacting any leads or clients Appellant gained access to by virtue of being an agent at Century 21 Harrelson Group. (**Order Granting Temp. Inj., filed April 8, 2022**). Appellant never appealed the Temporary Injunction.

Appellant worked for eXp Realty for less than two months. After leaving eXp, Appellant became an agent of NorthGroup Real Estate, Inc. under broker-in-charge James Ray Lunsford. (**Amended Complaint, filed May 4, 2022, ¶ 26**). Upon learning that Appellant yet again provided Respondents' Information to his new brokerage firm (NorthGroup) and broker-in-charge (Mr. Lunsford) for their wrongful use, Respondents amended the Complaint to add NorthGroup and Mr. Lunsford as Defendants. (**Amended Complaint, filed May 4, 2022**).

After the circuit court entered the Temporary Injunction on April 8, 2022, Respondents soon discovered that Appellant was violating the Temporary Injunction. Respondents collected evidence of Appellant's violations of the Temporary Injunction and filed their First Contempt Motion on July 25, 2022. (**Pl. Mot. for Contempt, filed July 25, 2022; Third Aff. of Greg Harrelson, filed July 25, 2022; Aff. of Susan Brown, filed July 25, 2022; Aff. of Rob Safa, filed July 25, 2022**). The circuit court held a hearing on the First Contempt Motion on November 16, 2022 and granted the Initial Contempt Order on November 22, 2022. (**Trans. Of Nov. 16, 2022 Hearing; Order Granting P. Mot. for Contempt, filed Nov. 22, 2022**). The Initial Contempt Order required Appellant to (i) turn over all real-estate related data devices and databases to Respondents' expert for imaging, preservation, and inspection, (ii) hold in trust all real estate

commissions Appellant received since February 8, 2022 until final resolution of the case, and (iii) refrain from using the databases subject to imaging, preservation, and inspection during the pendency of the action. (*Id.* at p. 3).

Appellant filed his Rule 59(e) Motion on November 22, 2022. (**Def. Mot. to Reconsider, filed Nov. 22, 2022**). In Appellant’s memorandum of law in support of his Rule 59(e) Motion, Appellant argued that (i) he did not violate the Temporary Injunction because he obtained leads and listing from independent sources, (ii) compliance with the Initial Contempt Order would result in disclosure of privileged and confidential information, and (iii) the sanctions in the Initial Contempt Order were vague and unreasonable, and compliance was arguably impossible. (**Mem. of Law in Supp. of Def. Mot. to Reconsider, filed Dec. 29, 2022**). Respondents opposed Appellant’s Rule 59(e) Motion and submitted a memorandum of law in opposition, along with supporting evidence. (**Pl. Memo. of Law in Opp. to Def. Mot. to Reconsider and Supporting Exhibits, filed December 28, 2022**). After a hearing on January 9, 2023, the circuit court amended the Initial Contempt Order slightly and entered the Amended Contempt Order. (**Form 4 Order Granting in Part Def. Mot. to Reconsider, filed Jan. 9, 2023**). The Amended Contempt Order modified the provisions of the Initial Contempt Order governing imaging, preservation, and inspection of Appellant’s data, devices, and databases to prevent disclosure of privileged and confidential information. (**Amended Order Granting Pl. Mot. for Contempt, filed Jan. 26, 2023, pp. 3-4**).

Appellant did not file a Rule 59(e) motion to alter or amend the Amended Contempt Order. Instead, Appellant filed a Notice of Appeal relating to the Amended Contempt Order with this Court, along with a Motion to Stay Enforcement of the Amended Contempt Order (“Motion to Stay”) with the circuit court. (**Def. Not. of App., filed Feb. 7, 2023; Def. Mot. to Stay Contempt**

Order, filed Feb. 7, 2023). The circuit court held a hearing on the Motion to Stay on March 24, 2023 and denied the motion that same day. (**Form 4 Order on Def. Mot. to Stay Contempt Order, filed Mar. 24, 2023**).

After losing the Motion to Stay, Appellant filed a Verified Petition for a Writ of Supersedeas with this Court on April 3, 2023 seeking to stay enforcement of the Amended Contempt Order during the appeal (“Petition for Supersedeas”). (**Appellant’s Ver. Pet. for Writ of Supersedeas, filed Apr. 3, 2023**). Respondents submitted a memorandum in opposition to the Petition for Supersedeas. (**Ret. to App. Ver. Pet. for Writ of Supersedeas, filed May 5, 2023**). This Court denied the Petition for Supersedeas in an order dated May 17, 2023. (**Order Denying Pet. for Writ of Supersedeas, filed May 17, 2023**). Accordingly, the Amended Contempt Order has never been stayed and is fully enforceable during the pendency of this appeal.

Notably, throughout this entire process, Appellant has refused to abide by the terms of the Temporary Injunction and the Amended Contempt Order. Respondents filed a second motion for contempt with supporting evidence on January 3, 2023 (“Second Contempt Motion”). (**Pl. Second Mot. for Contempt, filed Jan. 3, 2023; see also Third Aff. of Kevin Mills, filed Dec. 30, 2022; Fifth Aff. of Greg Harrelson, filed Dec. 30, 2022**). Respondents then filed a Supplement to the Second Contempt Motion on March 16, 2023. (**Pl. Supp. to Second Mot. for Contempt, filed Mar. 16, 2023; see also Sixth Aff. of Greg Harrelson, filed Mar. 16, 2023**). The circuit court held a hearing on the Second Contempt Motion on July 12, 2023 but has yet to issue an order. However, despite Appellant’s continued non-compliance and the pending Second Contempt Motion, the Temporary Injunction and Amended Contempt Order remain in full force and effect during the pendency of this appeal.

STANDARD OF REVIEW

“A finding of contempt rests within the sound discretion of the trial court.” *DiMarco v. DiMarco*, 393 S.C. 604, 607, 713 S.E.2d 631, 633 (2011). Specifically, “[e]ven though a party is found to have violated a court order, the question of whether or not to impose sanctions remains a matter for the court’s discretion.” *Hook v. S.C. Dep’t of Health & Envtl. Control*, 439 S.C. 52, 74, 885 S.E.2d 442, 454 (Ct. App. 2023). “On appeal, a decision regarding contempt should be reversed only if it is without evidentiary support or the trial judge has abused his discretion.” *Brandt v. Gooding*, 368 S.C. 618, 627, 630 S.E.2d 259, 263 (2006). “An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support.” *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009).

ARGUMENT

Appellant raises several new issues in his appeal that he never raised to the circuit court. Under South Carolina’s well-established preservation rules, those new issues are not preserved for this Court’s review. On the preserved issues, Appellant makes two arguments: (i) the circuit court should not have found Appellant in contempt of the Temporary Injunction based on the available evidence, and (ii) the circuit court exceeded its authority by imposing the sanctions in the Amended Contempt Order. But on both fronts, Appellant fails to demonstrate reversible error under the applicable standard of review. Therefore, this Court should affirm the Amended Contempt Order.

I. Appellant Failed to Preserve Several Issues Raised in His Appeal

Appellant raises three (3) issues for the first time in his Initial Brief. Specifically, Appellant contends the circuit court: (1) applied the incorrect evidentiary standard for finding Appellant in contempt; (2) exceeded its authority by imposing sanctions that did not come in the form of a fine, imprisonment, or attorneys’ fees and costs; and (3) “potentially” violated Appellant’s due process

rights through its sanctions. The Court can easily dispose of these issues and arguments, as they were never raised to the circuit court and are not preserved for appellate review.

A. Law on Preservation

“It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court.” *Lucas v. Rawl Family Ltd. P’ship*, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004). “Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *l’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). The prohibition on addressing issues raised for the first time on appeal extends to constitutional violations, including due process claims. *State v. Passmore*, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (2005) (quoting *Bakala v. Bakala*, 352 S.C. 612, 625, 576 S.E.2d 156, 163 (2003)).

The South Carolina Supreme Court has explained the mechanics of issue preservation as follows:

The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.

l’On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724. Rule 59(e) of the South Carolina Rules of Civil Procedure provides the procedural mechanism for requesting that a circuit court alter or amend its order prior to a party seeking appellate review. “The purpose of Rule 59(e), SCRCF, to alter or amend the judgment, is to request the trial judge to reconsider matters properly encompassed in a decision on the merits.” *Coward Hund Const. Co., Inc. v. Ball Corp.*, 336 S.C. 1, 4, 518 S.E.2d

56, 58 (Ct. App. 1999) (quoting *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)) (internal quotations omitted). “When an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review.” *McComb v. Conard*, 394 S.C. 416, 426, 715 S.E.2d 662, 667 (Ct. App. 2011).

There are exceptions to the issue preservation requirement. For example, lack of subject matter jurisdiction is an issue that may be raised at any time. *Town of Hilton Head v. Godwin*, 370 S.C. 221, 223, 634 S.E.2d 59, 60-61 (Ct. App. 2006). Additionally, the South Carolina Supreme Court has noted that it “does not require parties to engage in futile actions in order to preserve issues for appellate review.” *Staubes v. City of Folly Beach*, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000). Finally, this Court has stated that it will not “apply the rules of error preservation so rigidly as to bar an otherwise properly presented issue,” noting that the Court will correct scrivener’s errors when warranted. *Chastain v. Hiltabidle*, 381 S.C. 508, 516-17, 673 S.E.2d 826, 830-31 (Ct. App. 2009).

B. Appellant’s New Issues Are Not Preserved

The same day the circuit court issued the Initial Contempt Order, Appellant filed his Rule 59(e) Motion to alter or amend the Initial Contempt Order. In Appellant’s memorandum of law in support of the Rule 59(e) Motion, Appellant raised the following issues:

1. Appellant argued that he did not violate the Temporary Injunction because he obtained leads and listings from independent sources (rather than relying on the materials subject to the Temporary Injunction). Thus, the circuit court erred in finding Appellant in contempt of the Temporary Injunction. (**Mem. in Support of Def. Mot. to Reconsider, filed Dec. 29, 2022, pp. 6-8**).
2. Appellant argued that compliance with the Initial Contempt Order would result in disclosure of privileged and confidential information, and would also violate the parties’ prior agreements about inspection of electronic devices in discovery. (***Id.* at pp. 8-12**).
3. Appellant argued that the sanctions the circuit court included in the Initial Contempt Order were overly vague and unreasonable, and compliance was arguably impossible. Appellant

further argued that the sanctions were tantamount to “an illegal non-compete provision.” (*Id.* at pp. 12-16).

Upon review, the circuit court partially granted Appellant’s Rule 59(e) Motion and amended the Initial Contempt Order to address Appellant’s arguments regarding disclosure of privileged and confidential information.

The issues Appellant raised in his Rule 59(e) Motion are preserved for appellate review.

However, Appellant raises three (3) new issues and arguments in his Initial Brief that he **never raised** to the circuit court:

1. Appellant argues that the contempt sanctions are “more likely” criminal in nature, and therefore the circuit court erred by applying the evidentiary standard for civil contempt. (**App. Initial Brief, filed May 31, 2023, pp. 8-10**).
2. Appellant argues that the circuit court’s sanctions “arguably reflect an abuse of discretion” because the sanctions exceed the circuit court’s authority, which is limited to imposing sanctions in the form of a fine, imprisonment, or attorneys’ fees and costs. (*Id.* at pp. 7 & 17).
3. Appellant argues that the contempt sanctions “potentially” violate Appellant’s due process rights by holding future commissions in trust without affording Appellant notice and opportunity to be heard on whether the future commissions violate the Temporary Injunction. (*Id.* at pp. 9-10).

Again, Appellant’s Rule 59(e) Motion did not in any way raise, much less argue, these issues.

Under South Carolina law, these issues are not preserved for this Court’s review because the issues were not raised to and ruled upon by the circuit court. These new issues do not fall under any exception to the error preservation requirement. It would not have been futile to raise these issues to the circuit court and request a ruling in Appellant’s Rule 59(e) Motion, and the total absence of these issues in Appellant’s Rule 59(e) Motion cannot be characterized as a scrivener’s error. Because the issues are not preserved and do not fall under any exception, the Court must disregard them.

II. Were the Court to Consider Appellant’s Unpreserved Issues, Appellant’s Arguments Would Fail

In an abundance of caution, Respondents will address the three (3) issues Appellant raised for the first time on appeal, notwithstanding the fact that they are not preserved.

A. Civil versus Criminal Contempt

Appellant first complains that the circuit court did not state whether the contempt sanctions were civil or criminal, although Appellants concedes that the circuit court referenced the civil contempt evidentiary standard when weighing the evidence. (**App. Initial Brief, filed May 31, 2023, p. 8**). Appellant does not cite to any requirement that the circuit court explicitly characterize the type of sanction it is imposing (civil versus criminal). Regardless, the circuit court citing to the evidentiary standard it employed is sufficient to reveal that the circuit court intended to (and did in fact) hold Appellant in civil contempt.

Appellant next argues that the circuit court’s contempt sanctions are “*more likely*” criminal than civil, which matters because the evidentiary standards for civil and criminal contempt are different. As a threshold issue, if Appellant cannot assert with any certainty that the circuit court’s application of the civil contempt evidentiary standard was an error, then the Appellant has insufficient grounds for requesting this Court to overrule the circuit court for an abuse of discretion.¹

¹ Notably, Appellant twice previously conceded that the appropriate evidentiary standard for Respondents’ contempt motion was “clear and convincing evidence,” indicating that Appellant agreed that the sanctions were civil in nature. (**Trans. Of Nov. 16, 2022 Hearing, p. 22, lines 9-11**); (**Appellant’s Ver. Pet. for Writ of Supersedeas, filed Apr. 3, 2023, p. 4**) (“Upon information and belief, the Court below failed to appropriately consider such evidence and/or failed to apply the correct standard of review (clear and convincing evidence) to Plaintiffs’ Motion for Contempt.”).

Moving to the substance of the issue, Appellant’s arguments about why the Amended Contempt Order “more likely” imposes criminal rather than civil sanctions are unpersuasive.

i. Relevant Law on Civil Versus Criminal Contempt

“In determining whether a contempt sanction is criminal or civil, one must identify the purpose for which the sanction is imposed. Whereas civil contempt is either coercive or remedial in nature, criminal contempt is purely punitive.” *DiMarco*, 393 S.C. at 607, 713 S.E.2d at 633. “A sanction is either civil or criminal; it cannot be both because they serve different purposes.” *Id.* at 608, 713 S.E.2d at 634. In the civil contempt context, “the punishment is remedial and for the ***benefit of the complainant***,” whereas when a court finds a party is in criminal contempt, “the sentence is punitive and meant to vindicate the ***authority of the court***.” *Ex parte Cannon*, 385 S.C. 643, 662, 685 S.E.2d 814, 824 (Ct. App. 2009) (emphasis added). When the contempt sanction comes in the form of a fine, “it is punitive when it is paid to the court. However, a fine that is payable to the court may be remedial when the contemnor can avoid paying the fine simply by performing the affirmative act required by the court’s order.” *Poston v. Poston*, 331 S.C. 106, 112, 502 S.E.2d 86, 89 (1998). Alternatively, “[i]f the sanction is a fine, it is remedial and civil if paid to the complainant ***even though*** the contemnor has no opportunity to purge himself of the fine.” *Id.* (emphasis added). This is because the purpose of a fine payable to the complainant is meant to benefit the complainant, not to vindicate the authority of the court.

Similar to the civil and criminal cases generally, the evidentiary burden differs between civil and criminal contempt. “[C]ivil contempt must be proven by clear and convincing evidence, while criminal contempt must be proven beyond a reasonable doubt.” *Ex Parte Cannon*, 385 S.C. at 661, 685 S.E.2d at 824 (internal quotations omitted). In both scenarios, the moving party bears the initial burden. “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.

ii. The Contempt Sanctions Here are Civil, Not Criminal

The Amended Contempt Order imposes three sanctions as a result of Appellant’s continued violations of the Temporary Injunction: (1) Appellant must turn over his business-related data, devices, and databases to a third party examiner for imaging, preservation, and investigation; (2) Appellant must hold in trust all real-estate commissions received since February 7, 2022 until the resolution of this case; and (3) Appellant is enjoined from using the databases at issue in this case during the pendency of the action. (**Amended Order Granting Pl. Mot. for Contempt, filed Jan. 26, 2023, at pp. 3-4**).

Appellant argues that because these sanctions are “punitive” and Appellant cannot purge himself of the sanctions through compliance with the Temporary Injunction, the sanctions are criminal and require a heightened evidentiary standard.

Appellant applies a far too narrow reading of the law governing civil versus criminal contempt and misapprehends the importance of the *purpose to be served* by the sanctions. As noted in *Poston*, a finding of contempt is not automatically criminal simply because the contemnor cannot purge himself of the sanction through compliance with the underlying order; another purpose of civil contempt is to remediate harm to the complainant. *Poston*, 331 S.C. at 112-13, 502 S.E.2d at 89. Here, Respondents demonstrated to the circuit court that Appellant continues to use, contact, and disclose the leads at issue in this case, in violation of the Temporary Injunction. Respondents also demonstrated to the circuit court that Appellant’s actions are harmful to Respondents. As such, the Court used its discretion to craft sanctions meant to benefit the Respondents (*i.e.*, the “complainants” for purposes of the First Motion for Contempt) and

remediate their continued losses as a result of Appellant's violations. This is the very essence of civil contempt.

Had the circuit court wanted to instead punish Appellant with criminal sanctions, it could have done so. For example, if the circuit court had intended to merely punish Appellant for bad behavior, the circuit court could have imposed on Appellant an unconditional fine payable to the circuit court or imposed jail time for a finite period of time. But the circuit court did not do that. Instead, the circuit court ordered Appellant to hold his real estate commissions in trust during the pendency of this case. This is clearly meant to benefit Respondents by ensuring that Appellant does not spend his ill-gained commissions and prevent Respondents from a meaningful recovery upon prevailing in this case. Similarly, requiring Appellant to discontinue his use of the databases at issue during the pendency of this case and to provide Respondents access to the same for inspection and preservation are meant to benefit Respondents and prevent continued violations of the Temporary Injunction, not to punish Appellant and vindicate the authority of the court.

For these reasons, the Amended Contempt Order imposes sanctions for civil contempt and therefore the circuit court did not err in applying the "clear and convincing evidence" standard to Respondents' First Motion for Contempt.

B. Circuit Court's Authority to Craft Sanctions

Appellant erroneously suggests that the circuit court's authority to impose sanctions is limited to imposing fines, imprisonment, and attorneys' fees and costs. (**App. Initial Brief, filed May 31, 2023, pp. 7 & 17**). Appellant misapprehends the sources of the circuit court's authority to impose sanctions and ignores case-law demonstrating the extent of the circuit court's authority to craft sanctions appropriate for the case at hand.

As Appellant correctly cites, South Carolina circuit courts are statutorily empowered to “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. However, Appellant fails to acknowledge the relevant cases explicitly affirming that circuit courts have inherent discretion **in addition to** their statutory authority “to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice.” *Brandt*, 368 S.C. at 628, 630 S.E.2d at 264; *see also*, *Ex Parte Cannon*, 385 S.C. at 661, 685 S.E.2d at 824. “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.” *Hook*, 439 S.C. at 74, 885 S.E.2d at 454 (quoting in part *Ex Parte Cannon*, 385 S.C. at 660, 685 S.E.2d 824).

The broad authority inherent in all South Carolina courts to impose contempt sanctions is not limited by the enumerated sanctions in the contempt statute Appellant cites. For example, the South Carolina Supreme Court has acknowledged that circuit courts can impose civil sanctions in the form of dismissing a case with prejudice or even closing a contemnor’s business if necessary to force compliance with an injunction. *See, e.g., Brandt*, 368 S.C. at 627, 630 S.E.2d at 264 (“In the present case, the trial court found Brandt to be in contempt of court for introducing a fraudulent document. In response, the trial court dismissed the complaint as a sanction for perpetrating a fraud upon the court. We hold that the trial court did not abuse its discretion in dismissing the complaint as a sanction for civil contempt.”); *State ex rel. Love v. Howell*, 285 S.C. 53, 57, 328 S.E.2d 77, 80 (1985) (“We hold that George L. Howell was in contempt of court. . . . The trial judge has full authority to imprison him or fine him or close up his entire business operation if necessary to assure full compliance with the injunctive orders heretofore issued by the Court of Common

Pleas.”). Thus, Appellant is simply incorrect that the circuit court did not have authority to craft the contempt sanctions that it believed are necessary to administer justice in this case. Here, the circuit court used its inherent discretion to craft sanctions appropriate to Appellant’s contemptuous conduct and the underlying object of this lawsuit. Accordingly, the circuit court committed no error of law and, therefore, no abuse of discretion. As such, the Court should uphold the Amended Contempt Order.

C. Due Process Claim

Appellant alleges that the Amended Contempt Order “potentially” violates Appellant’s due process rights by imposing sanctions that punish Appellant for future violations without providing Appellant notice and an opportunity to be heard on those prospective violations. (**App. Initial Brief, filed May 31, 2023, pp. 9-10**). More specifically, Appellant argues that by requiring him to hold all future real-estate related commissions in trust, the circuit court effectively held that all future commissions will violate the Temporary Injunction. (*Id.*). Appellant cites to case-law affirming that most procedural due process rights applicable to criminal trials are applicable to criminal contempt proceedings as well. (*Id. at p. 9*).

As a threshold matter, if Appellant cannot assert with any certainty that a due process violation has occurred or will occur (Appellant complains only that his due process rights were “potentially” violated), then Appellant has no grounds to ask this Court to reverse the circuit court’s order for an abuse of discretion. Substantively, Appellant mischaracterizes this sanction as punitive, rather than remedial. The circuit court is not punishing Appellant for potential future violations of the Temporary Injunction; the circuit court crafted a sanction that is meant to address Appellant’s historical violations of the Temporary Injunction and force compliance going forward.

Thus, the sanction is not *criminal* and the case-law Appellant cites related to procedural safeguards in criminal contempt proceedings is inapplicable.

“The primary purpose of an action for civil contempt is to exact compliance. In exacting compliance with a prior decree, the court must interpret what the decree mandated, considering the purpose and the object of the underlying litigation.” *Richardson v. Richardson*, 309 S.C. 31, 35-36, 419 S.E.2d 806, 809 (Ct. App. 1992) (internal citations omitted). If the circuit court is unable to enforce the specific terms of the order as written, it is the duty of the circuit court to determine an appropriate method of making the aggrieved party whole. *Id.* at 36, 419 S.E.2d at 809.

Here, the Temporary Injunction requires Appellant to refrain from using or disclosing Respondents’ proprietary information, and to refrain from contacting leads to which Appellant gained access by being an independent contractor of any of the Respondents. (**Order Granting Temp. Inj., filed Apr. 8, 2022, ¶ 23**). Respondents demonstrated that Appellant continues to violate the Temporary Injunction, leaving the circuit court to assess how to exact compliance and make the Respondents whole. Understanding that one of the primary purposes and objects of the underlying litigation is to restore Respondents’ losses caused by Appellant’s misappropriation and unlawful use of their proprietary information in order to earn commissions, the circuit court was well within its discretion to require Appellant to hold his commissions in trust during the pendency of this action. The circuit court is not permanently confiscating the funds and did not find that all past and future commissions were *per se* a violation of the Temporary Injunction. Rather, the Amended Contempt Order attempts to ensure that Appellant will not continue to violate the Temporary Injunction and dispose of the ill-gained commissions prior to disposition of this case.

Ultimately, Appellant received notice that the circuit court would be considering the issue of his contempt and he was provided the opportunity for a meaningful hearing prior to the circuit court issuing its decision. Thus, Appellant received procedural due process and this sanction is entirely within the circuit court's discretion.

III. Appellant Fails to Demonstrate that the Circuit Court Abused its Discretion in Finding Appellant in Civil Contempt

With regard to the issues properly preserved for review, the basis of Appellant's first argument (that the circuit court abused its discretion in finding Appellant in contempt) boils down to a disagreement with how the circuit court weighed the available evidence. Again, in order for this Court to find that the circuit court abused its discretion, this Court would need to find that the circuit court either made an error of law or a finding of fact without evidentiary support. Appellant has demonstrated neither.

A. Relevant Law Regarding the Evidentiary Standard for Civil Contempt

Contempt results from willful disobedience of a court order. *Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 607, 567 S.E.2d 514, 519 (Ct. App. 2002). As already discussed herein, the evidentiary standard for a finding of civil contempt is clear and convincing evidence. *Ex Parte Cannon*, 385 S.C. at 661, 685 S.E.2d at 824. As articulated by this Court:

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. Such measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal.

Satcher v. Satcher, 351 S.C. 477, 483, 570 S.E.2d 535, 538 (Ct. App. 2002).

With regard to each party's evidentiary burden on a motion for contempt, the complainant must first make a *prima facie* showing that there is a court order and non-compliance with said order. *Hook*, 439 S.C. at 75, 885 S.E.2d at 454. A *prima facie* showing is one that is "sufficient to

establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue.” *Prima facie*, BLACK’S LAW DICTIONARY, 11 Ed. (2019). Upon the complainant making a *prima facie* showing, “the burden shifts to the respondent to establish his defense and inability to comply.” *Hook*, 439 S.C. at 75, 885 S.E.2d at 454.

B. There is Evidentiary Support for the Amended Contempt Order

Appellant spends several pages in his Initial Brief arguing that the circuit court did not appropriately weigh the available evidence in finding Appellant in contempt of the Temporary Injunction. But what Appellant never shows is that the circuit court’s decision was without evidentiary support, which is the standard for an abuse of discretion. In fact, Appellant lists and describes the evidence supporting the circuit court’s finding of contempt, including affidavits from Respondent Harrelson and two non-parties demonstrating Appellant’s violation of the Temporary Injunction, as well as other affidavits proffered by Respondents to discredit Appellant’s proffered evidence. (**App. Initial Brief, filed May 31, 2023, pp. 10-14**).

Clearly there is evidence to support the circuit court’s order; Appellant simply disagrees with the circuit court’s assessment of the evidence. Appellant complains that the Amended Contempt Order does not reference the circuit court’s assessment of each and every piece of available evidence, and therefore “it is unknown whether and to what extent the trial court considered these other submissions.” (***Id.* at p. 10**). Appellant further complains that the circuit court seems to have treated Appellant as a non-credible witness, but did not issue any “factual findings to even suggest that [Appellant] was not a credible witness or that his rebuttal evidence was not entitled to equal weight as that of [Respondents’ witness testimony].” (***Id.* at p. 12**). What Appellant fails to appreciate is that the circuit court is not required to explain its analysis of all

available evidence or even why it discredits or discounts certain evidence when issuing a contempt order. *See, e.g., Gulfstream Cafe, Inc. v. Lawhon*, 437 S.C. 445, 457, 879 S.E.2d 15, 21 (Ct. App. 2022) (“Moreover, we disagree with Appellants’ assertion that the circuit court’s order was insufficient because we do not know *why* the circuit court discredited their version of events.”) (emphasis in original). It is sufficient for the circuit court to state its findings of fact in support of its contempt order, based on the available evidence, which the circuit court did in this case.²

Appellant next walks through the evidence the parties submitted to the circuit court and argues that the circuit court erred in finding that Respondents’ evidence via party and witness affidavits clearly and convincingly proved that Appellant willfully violated the Temporary Injunction. (**App. Initial Brief, filed May 31, 2023, pp. 10-14**). Appellant’s argument is premised on the idea that Appellant provided evidence via affidavits purporting to rebut Respondents’ evidence—*ipso facto*, Respondents’ evidence could not be clear and convincing. Appellant’s reasoning fails for several reasons.

First, this Court has acknowledged that circuit judges often must confront competing witness accounts when making their factual determinations, and this Court “remain[s] mindful the circuit court [is] in a better position to judge the credibility of witnesses.” *Ex Parte Cannon*, 385 S.C. at 664, 685 S.E.2d at 826; *Gulfstream Cafe*, 437 S.C. at 456, 879 S.E.2d at 20. Accordingly, this Court will defer to the circuit court’s sound discretion and will not disturb a circuit court’s

² *See Amended Order Granting Pl. Mot. for Contempt, filed Jan. 26, 2023, at p. 3* (“Based 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, this Court finds clear and convincing evidence that Defendant Barber willfully, voluntarily, and intentionally violated the Injunction by using information, disclosing information, and initiating communication with leads, clients, prospects, and customers he gained access to or otherwise obtained during his time as an agent and independent contractor with Plaintiffs.”).

contempt order unless it is without any evidentiary support. *DiMarco*, 393 S.C. at 607, 713 S.E.2d at 633; *Brandt*, 368 S.C. at 627, 630 S.E.2d at 263; *see also*, *Gulfstream Cafe*, 437 S.C. at 456, 879 S.E.2d at 20 (“[E]ven if we disagreed with the circuit court’s ruling, we would still be bound by our standard of review, and there is sufficient evidence in the record to support the circuit court’s finding.”). Because there is evidence in the record supporting the circuit court’s contempt finding in this case, the Court is bound by the standard of review and cannot disturb the circuit court’s ruling.

Further, even if the Court were to undertake a closer examination of the circuit court’s contempt finding, Appellant does not demonstrate how the circuit court’s finding did not follow the appropriate evidentiary requirements. Appellant does not argue that Respondents failed to make a *prima facie* case that there was an order (*i.e.*, the Temporary Injunction) and non-compliance with the order. Appellant also does not argue with any clarity why Respondents’ evidence could not “produce in the fact finder a firm belief as to the allegations sought to be established,” which is the clear and convincing standard. *Satcher*, 351 S.C. at 483, 570 S.E.2d at 538. Again, this Court has stated that the clear and convincing evidentiary standard does not mean “clear and *unequivocal*.” *Id.* (emphasis added). Appellant simply argues that he presented some evidence to establish his defense, and therefore the circuit court could not have deemed Respondents’ evidence clear and convincing. This is simply incorrect under South Carolina law, and insufficient to enable this Court to provide the relief Appellant seeks.

Finally, Appellant also includes a section in his Initial Brief arguing that the circuit court “seemingly” failed to consider the “generally known” exception under the Independent Contractor Agreement when finding Appellant in contempt for violating the Temporary Injunction. (**App. Initial Brief, filed May 31, 2023, pp. 15-16**). In a nutshell, Appellant argues that the terms in

Appellant's Independent Contractor Agreement formed the basis for the Temporary Injunction, and those terms did not prevent Appellant from using "generally known" information subsequent to the agreement terminating. (*Id.* at 15). Appellant goes on to state:

[A]t issue are merely names and contact information for residents in Myrtle Beach, SC and the surrounding area, where [Appellant] 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.

(*Id.* at 16).

While this section of Appellant's Initial Brief is simply more argument about why the circuit court did not appropriately weigh the evidence (which is not the standard of review), it is worth noting that Appellant seems to be arguing that Respondents could never prove a violation of the Temporary Injunction. Appellant could always point to the fact that names and contact information reflected in Respondents' leads are publicly available. This argument completely mischaracterizes the information reflected in Respondents' leads, which is much more detailed and comprehensive than names and contact information. There is a reason Appellant broke into Respondents' offices and hacked Respondents' computers in the middle of the night to obtain this information that he now asserts is publicly and easily accessible. The reason he did so is because Respondents' Information is not generally known and is not publicly available. Appellant's *actions* in breaking-in and stealing Respondent's Information completely undercuts Appellant's counsel's *words* that Respondent's Information is generally known and publicly available. If it were, Appellant would not have taken the actions he did. Regardless, Appellant's argument attempts to attack the terms of the Temporary Injunction, making it effectively unenforceable. But Appellant did not appeal the Temporary Injunction, and cannot now in this forum argue that the Temporary

Injunction is toothless. If Appellant desired, he could have appealed the Temporary Injunction, but chose not to. Therefore, it is the law of the case.

For all of these reasons, there is no merit to Appellant's argument that the circuit court abused its discretion by finding Appellant in contempt of the Temporary Injunction. Many of Appellant's arguments are procedurally barred from review, and the remaining arguments do not demonstrate reversible error.

IV. Appellant Fails to Demonstrate that the Sanctions in the Amended Contempt Order Exceeded the Circuit Court's Authority

Appellant next argues that the circuit court exceeded its authority in imposing the sanctions in the Amended Contempt Order. Appellant argues the sanctions are unreasonable, overly burdensome, oppressive, and/or impermissibly beyond the scope of the Temporary Injunction. As an initial matter, Appellant revisits his argument that the circuit court is limited to sanctions in the form of fines, imprisonment, or attorneys' fees and costs. This issue is not preserved and the Court should disregard it. (*See, supra, Section I.b.i*). Respondents also have already demonstrated why that argument fails on the merits. (*See, supra, Section I.b.ii*).

Appellant only argues that the circuit court exceeded its authority in imposing two of the three sanctions in the Amended Contempt Order. Appellant does not mention or discuss the sanction enjoining Appellant from using the databases at issue during the pendency of the action. Because Appellant does not address this sanction in his Initial Brief nor in his arguments to the circuit court, the Court should limit its review to the other two sanctions.

Substantively, Appellant's fails to identify reversible error in the sanctions imposed by the Amended Contempt Order. First, Appellant cites case-law stating "[a]ny 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*, 350 S.C. at 609, 567 S.E.2d at 520. But Appellant never addresses how the

sanctions reflected in the Amended Court Order do not relate to Appellant’s contemptuous conduct and Respondents’ losses. Of course, the relationship between the sanctions and Appellant’s contemptuous conduct is easy to ascertain. The circuit found that Appellant “willfully, voluntarily, and intentionally violated the [Temporary] Injunction by using information, disclosing information, and initiating communication with leads, clients, prospects, and customers he gained access to or otherwise obtained during his time as an agent and independent contractor with [Respondents].” (**Amended Order Granting Pl. Mot. for Contempt, filed Jan. 26, 2023, at p. 3**). Ordering Appellant to hold his real estate commissions in trust, refrain from using the databases at issue, and allow Respondents to inspect them and ascertain the extent of Appellant’s theft and misuse are **directly** related to Appellant’s contemptuous conduct. In other words, the sanctions specifically seek to prevent and remediate Appellant’s continued violations of the Temporary Injunction, which is entirely appropriate.

Rather than arguing how the sanctions are unrelated to Appellant’s contemptuous conduct, Appellant argues that the sanction requiring Appellant to turn over his data devices and databases for inspection is “tantamount to a discovery order when no discovery motion was noticed or otherwise scheduled for hearing.” (**App. Initial Brief, filed May 31, 2023, p. 17**). But Appellant cites to no authority limiting the circuit court’s authority to impose contempt sanctions that may overlap with or relate to ongoing discovery issues. Again, the circuit court has inherent authority to “to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice.” *Brandt*, 368 S.C. at 628, 630 S.E.2d at 264. The Supreme Court went so far as to state that a circuit court had authority to “close up [an appellant’s] entire business operation if necessary to assure full compliance with the injunctive orders.” *State ex rel. Love*, 285 S.C. at 57, 328 S.E.2d at 80. In this case, Appellant’s brazen and continued use of Respondents’ proprietary information

in violation of the Temporary Injunction surely warrants a sanction requiring him to provide Respondents with an accounting of exactly how far his mischief has extended.³

Appellant next argues that the sanction of requiring Appellant to hold all of his real-estate commissions since February 7, 2022 is unreasonable, unduly burdensome, and oppressive. (**App. Initial Brief, filed May 31, 2023, p. 18**). Appellant argues that he could not possibly come up with and place in escrow the funds he earned prior to the circuit court imposing this sanction. (*Id.*). This argument underscores the importance of this sanction during the pendency of this action; Appellant has previewed that any funds that Appellant does not escrow will be spent and unavailable to cover damages if and when Respondents prevail in this lawsuit. Appellant also argues that he cannot pay his living expenses if all of his commissions are placed in escrow indefinitely, and the circuit court should have offered an alternative in the form of paying a bond to mitigate this concern. (*Id. at pp. 18-19*). These arguments ring hollow. First, nothing in the Temporary Injunction or Amended Contempt Order prevents Appellant from seeking other means of earning an income outside of real-estate commissions. Second, Appellant should have considered the potential financial consequences prior to violating his Independent Contractor Agreement and then blatantly violating a court order. Third, it is apparent that Appellant is unwilling to discontinue using and disclosing Respondents' Information so long as he is able to continue earning commissions as a result. This leaves the circuit court with few options to compel compliance with the Temporary Injunction. Holding Appellant's commissions in trust is a

³ Appellant argues that “[i]f the trial court felt that the inspection of [sic] [Appellant’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.” (**App. Initial Brief, filed May 31, 2023, p. 18**) (emphasis added). As this Court is well aware, the standard of review is not whether the circuit court followed best or better practices (whatever those phrases might mean), but whether the circuit court abused its discretion.

reasonable solution, considering his continued bad behavior. Finally, as repeated several times in herein, the only grounds for this Court to overturn the circuit court's Amended Contempt Order is to find that the circuit court committed an abuse of discretion through an error of law or finding of fact without evidentiary support. Appellant cites no error of law or unsupported finding of fact in these arguments. Thus, the Court should not disturb the sanctions in the circuit court's Amended Contempt Order.

CONCLUSION

For the reasons set forth herein, Respondents respectfully request this Court deny Appellant's appeal and affirm the Amended Contempt Order.

Respectfully submitted,

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