

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Sep 18 2023

SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

WILLIAM H. SEALS, JR., CIRCUIT COURT JUDGE
Circuit Court Case No. 2022-CP-26-01323

Appellate Case No. 2023-000192

HSS Barefoot, LLC d/b/a Century 21 Barefoot, R&G Corp d/b/a Century 21
The Harrelson Group, Kevin Mills, 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 realtor, 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.

CONSENT MOTION TO FILE DOCUMENTS UNDER SEAL

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Attorneys for Respondents

This Court is presently presiding over Appellant’s appeal of the circuit court’s order finding Appellant in contempt and imposing sanctions against Appellant. Appellant and Respondents have submitted their Initial Briefs to the Court, and Appellant is now required to prepare and submit the Record on Appeal pursuant to Rule 210, SCACR. The content designated by the parties to be included in the Record on Appeal includes several documents that were marked as “Confidential” and/or “Attorneys’ Eyes Only” pursuant to the Stipulated Confidentiality and Protective Order entered by the circuit court on May 16, 2022, and attached hereto as Exhibit A. These documents were also filed under seal with the circuit court pursuant to the Consent Order to File Under Seal Pursuant to Consent Confidentiality and Protective Order (“Consent Order to File under Seal”) entered by the circuit court on November 8, 2022, which is attached hereto as Exhibit B.

Through the prior filing with this Court of their respective Designation of Matter to be Included in Record on Appeal, the parties have designated the following documents which have been previously designated as “Confidential” and/or “Attorney’s Eyes Only” and filed under seal with the circuit court pursuant to the Stipulated Confidentiality and Protective Order and/or the Consent Order to File Under Seal:

1. Homebot_000001—000833 (all documents produced by Homebot, Inc. in response to the subpoena issued by Respondents);
2. Affidavit of Records Custodian for Homebot, Inc.;
3. Barber 000611—001035 (full and un-redacted Exhibits B, C, and E to Appellant Joel D. Barber’s Affidavit filed October 5, 2022); and
4. Exhibit B to Respondents’ Reply Memorandum in Opposition to Appellant Barber’s Motion to Reconsider filed December 28, 2022 (Exhibits 52 and 53 to the deposition of Appellant Joel D. Barber).
5. Exhibit C to Respondents’ Reply Memorandum in Opposition to Appellant Barber’s Motion to Reconsider filed December 28, 2022 (Excerpts from deposition of Appellant Barber and Exhibits 1-3, 6-7, 50 and 54 thereto).

(collectively, the “Confidential Documents”).

The Parties now move to file the Confidential Documents under seal with this Court.

Request to File Under Seal with the Court of Appeals

As an initial matter, *but for* the confidentiality issue, the Confidential Documents are appropriate to include in the Record on Appeal, which must consist only of documents presented to the lower court that are relevant to the appeal. Rule 210(c), SCACR; Rule 209(b), SCACR. Respondents filed the Confidential Documents under seal with the circuit court, and the Confidential Documents are relevant to the appeal because the parties relied on the Confidential Documents in making their arguments for and against finding Appellant in contempt.

With regard to filing the Confidential Documents under seal on appeal, the Appellate Court Rules are silent on the proper procedure. However, “documents may be filed under seal upon motion to the appellate court pursuant to Rule 41.1, SCRCP.” JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 420 (3rd ed., South Carolina Bar 2016) (1991). With regard to filing a motion to seal, Rule 41.1(b), SCRCP states:

The motion shall state the reasons why sealing is necessary, explain why less drastic alternatives to sealing will not afford adequate protection, and address the following factors:

- 1) the need to ensure a fair trial;
- 2) the need for witness cooperation;
- 3) the reliance of the parties upon expectations of confidentiality;
- 4) the public or professional significance of the lawsuit;
- 5) the perceived harm to the parties from disclosure;
- 6) why alternatives other than sealing the documents are not available to protect legitimate private interests as identified by this Rule; and
- 7) why the public interest, including but not limited to, the public health and safety, is best served by sealing the documents.

To begin, it is necessary to file the Confidential Documents under seal because these documents are already protected from disclosure pursuant to the Stipulated Confidentiality and Protective Order. The reason the Stipulated Confidentiality and Protective Order exists in the first place is to protect the Confidential Documents from public disclosure. These Confidential Documents are at the heart of the dispute between the parties, and the parties need the ability to litigate concerning the Confidential Documents, while at the same time preserving their alleged character—as confidential, proprietary, and non-public.

It is imperative that this Court consider the Confidential Documents when deciding the appeal. The Confidential Documents are relevant to Respondents’ allegation that Appellant violated the temporary injunction, which is the basis of the Amended Contempt Order under appeal. Accordingly, there are no less drastic alternatives to filing the Confidential Documents under seal. Submitting the Confidential Documents under seal is the only method by which the confidentiality of the documents can be maintained while also balancing the Court’s interest in having full and fair knowledge of the facts relevant to this appeal.

With regard to the seven factors enumerated in Rule 41.1(b), Appellant and Respondents assert the following:

- **Impact on a Fair Trial:** Sealing the Confidential Documents will not have a negative impact on any possible trial in this case, nor will it have a negative impact on this appeal. Both counsel for Appellant and Respondents already have access to the documents, and the general public interest in openness in court proceedings does not outweigh the public interest in protecting alleged confidential, proprietary business information from public disclosure.

- **Impact on Witnesses:** There will be no witness testimony in this appeal outside of any affidavits included in the Record on Appeal, so this factor is largely irrelevant to this appeal.
- **Expectations of Confidentiality:** The parties designated the Confidential Documents as “Confidential” and/or “Attorneys’ Eyes Only” pursuant to the confidentiality orders entered by the circuit court, and therefore their expectations of confidentiality are high.
- **Public and Professional Significance:** The professional significance of this case may be important to members of the real estate profession given that the generation, purchase, and use of residential leads is widespread in the real estate. While this interest may be important, it does not outweigh the need to file the Confidential Documents under seal in this instance, so that the alleged character of the Confidential Documents—as confidential, proprietary, and non-public—remains intact while this case is decided by our Courts.
- **Perceived Harm from Disclosure:** If the Confidential Documents are publicly disclosed, it could greatly harm Respondents, who allegedly have developed the non-public Confidential Documents and who allegedly obtain a competitive advantage from the non-public nature of the Confidential Documents. Appellant could also suffer harm from such public disclosure in the form of reputational and other damages.
- **No Available Alternatives:** There are no other alternatives to sealing the Confidential Documents. The only means to preserve the confidential and proprietary nature of the Confidential Documents is to file them under seal.

- **Public Interest:** The public interest is served by filing the Confidential Documents under seal because there is a public interest in protecting alleged confidential, proprietary, non-public business information from public disclosure.

WHEREFORE, based on the foregoing, and for good cause shown, the parties respectfully request that the Court to grant this motion. Specifically, the parties move the Court to allow the parties to file the Confidential Documents under seal and to consider the Confidential Documents along with the Record on Appeal. Furthermore, because the Confidential Documents are voluminous (approximately 1,260 pages), counsel for Appellant seeks additional clarity from this Court regarding the means by which this Court prefers to receive such documents (i.e., electronically and/or printed and bound).

Respectfully submitted,

Dated: September 18, 2023

s/ Christian H. Staples

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PROOF OF SERVICE

I HEREBY CERTIFY that the foregoing **CONSENT MOTION TO FILE DOCUMENTS UNDER SEAL** was served on all counsel of record via email addressed as follows:

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This the 18th day of September, 2023.

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