

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 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.

APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT

I. APPELLANT IS ABANDONING HIS ARGUMENTS ON APPEAL REGARDING THE CONTEMPT SANCTION REQUIRING AN EXAMINATION BY A THIRD-PARTY OF HIS BUSINESS RELATED-RELATED DATA DEVICES AND DATABASES.

Subsequent to the filing of his Notice of Appeal, the parties have continued to discuss and litigate the issues surrounding the circuit court's sanction and directive for Appellant to "turn over all real estate business-related data devices and databases to ... some other third-party examiner as agreed upon by the parties, to image, preserve, and conduct a searching and reporting investigation ... " (R. p. 31). Appellant now believes that his concerns with this directive have been satisfactorily resolved by virtue of subsequent agreements of the parties and/or their counsel, as well as subsequent court rulings and orders, such that this specific sanction and directive no longer needs to remain a subject or issue in this appeal. Appellant is ready, willing and able to turn over such devices and databases to the agreed-upon third-party examiner (David Shelton of Advanced Technology Investigations, LLC, in Greensboro, NC) upon Respondents' execution of Mr. Shelton's engagement letter and payment of his retainer fee, all as required by a recent ruling communicated to the parties by The Honorable Kristi F. Curtis on August 15, 2023, with formal written orders forthcoming.

However, the remaining sanctions contained in Paragraphs 2 and 3 on Page 4 of the Amended Contempt Order, as well as the underlying findings of contempt allegedly supporting those sanctions, remain subjects of and/or issues in this appeal (i.e., whether Appellant must hold all real-estate commissions he has received or will receive subsequent to February 7, 2022, in trust until final resolution of this action, and whether Appellant should be completely enjoined from using his real estate databases without any consideration of what is "generally known" within the meaning of Paragraph 12 of the Independent Contractor and Brokerage Agreement).

II. CONTRARY TO RESPONDENTS' ASSERTION, THE ISSUES ON APPEAL WERE DULY PRESERVED.

It is well-established law in this State that a party is not required to use the exact name of a legal doctrine in order to preserve an issue for appeal. *Cruce v. Berkeley Cnty. Sch. Dist.*, 435 S.C. 7, 21, 865 S.E.2d 391, 398 (Ct. App. 2021), *reh'g denied* (Dec. 2, 2021), *cert. granted* (Sept. 7, 2022) (citing *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011)); *Est. of Patterson v. Palmetto Bank*, 374 S.C. 116, 120, 646 S.E.2d 885, 888 (Ct. App. 2007).

This Court has also stated that it must be mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner. *Palmetto Wildlife Extractors v. Ludy*, 435 S.C. 690, 705, 869 S.E.2d 859, 867 (Ct. App. 2022), *reh'g denied* (Feb. 25, 2022) (citing *Herron*, 395 S.C. at 470, 719 S.E.2d at 644). Where the question of issue preservation for appeal is subject to multiple interpretations, any doubt should be resolved in favor of preservation. *Johnson v. Roberts*, 422 S.C. 406, 412, 812 S.E.2d 207, 210 (Ct. App. 2018), *aff'd*, 427 S.C. 258, 830 S.E.2d 910 (2019). Moreover, the failure to preserve an issue for appeal does not deprive the appellate court of jurisdiction to hear the appeal. *Hill v. S.C. D.H.E.C.*, 389 S.C. 1, 21-22, 698 S.C. 612, 623 (2010). The Supreme Court of South Carolina has cautioned that issue preservation “is not a ‘gotcha’ game aimed at embarrassing attorneys or harming litigants” and has even recognized that “it may be good practice for us to reach the merits of an issue when error preservation is doubtful”. *Atl. Coast Builders & Contractors v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012).

Here, Respondents concede that Appellant properly preserved the issue of whether the circuit court exceeded its authority by imposing the sanctions it did in the Amended Contempt Order (Respondents' Initial Brief, p. 8). Respondents then attempt to distinguish that concession by urging that Appellant's argument that the circuit court “exceeded its authority by imposing

sanctions that did not come in the form of a fine, imprisonment, or attorneys' fees and costs" was not so preserved (*Id.*). This distinction is overly semantic and/or trivial, at best, and is not in keeping with the spirit and intent of applicable law on issue preservation that eschews a rigid and hyper-technical approach in favor of a more practical approach that resolves any doubt in favor of the appellant. Under all of the circumstances, it can hardly be said that Appellant "kept an ace card up his sleeve" in failing to tease out the nuance of criminal versus civil contempt sanctions when, by all accounts, Appellant vigorously argued to the circuit court below that the sanctions imposed were "overly vague", "unreasonable", "overly harsh", "oppressive", "impossible" to be complied with, "improper", "excessive", "illegal", and "unlawful" in many different respects. R. pp. 297-301 (containing each of the above-quoted words); *see also Herron*, 395 S.C. at 470, 719 S.E.2d at 645.¹

Appellant concedes that the specific terminology of "criminal" versus "civil" contempt sanctions was not used at the circuit court level below, but Appellant contends that any "legal doctrine" surrounding that distinction, to the extent there even is one, should be deemed to be fairly encompassed within the arguments that were duly presented and preserved and which go to the ultimate issue of whether the circuit court abused its discretion in imposing the sanctions it did.

The same analysis should hold true for the issue of whether the sanctions imposed violate Appellant's due process rights. If this Court finds that they do, then it should be an issue that is likewise deemed to be encompassed within the arguments that were presented and preserved, and within the scope of those arguments set forth in Section III on Pages 12-16 of the Memorandum of Law in Support of Motion to Reconsider discussed above.

¹ It is also worth mentioning that once an issue has been raised by a Rule 59(e) motion, it is preserved, and a second motion is not required if the court does not specifically rule on the issue raised. *Zurich Am. Ins. Co. v. Tolbert*, 378 S.C. 493, 500 n.2, 662 S.E.2d 606, 610 n.2 (Ct. App. 2008), *aff'd*, 387 S.C. 280, 692 S.E.2d 523 (2010) (citing *Pye v. Estate of Fox*, 369 S.C. 555, 566, 633 S.E.2d 505, 510 (2006)).

III. THE CONTEMPT SANCTIONS ARE CRIMINAL IN NATURE, LACK EVIDENTIARY SUPPORT BY FAILING TO ACCOUNT FOR THE “GENERALLY KNOWN” EXCEPTION AND OTHER EVIDENCE PRESENTED, AND AMOUNT TO AN ABUSE OF DISCRETION, THEREBY WARRANTING REVERSAL.

Respondents emphasize the “purpose to be served” by the sanctions in determining whether they are civil or criminal in nature. (Respondents’ Initial Brief, p. 14). Yet, Respondents do not, and cannot, point to any express statement by the circuit court of such purpose or intent, either at the hearings or in the orders, and instead are merely making their own assumptions about the circuit court’s purpose in imposing the sanctions it did.

While it may be true, as argued by Respondents, that the circuit court’s purpose was to preserve the commissions for Respondents’ benefit following a favorable verdict and award of damages at trial, another purpose could have been to deprive Appellant of the use of those commissions as a means of punishment for his alleged non-compliance with the Temporary Injunction. At this juncture, the parties simply have no way of knowing what the circuit court was thinking. Had the circuit court required the posting of a bond in lieu of the trust, then perhaps the purpose of benefitting Respondent would be more clear, but the circuit court did not impose such a requirement.

Moreover, the fact that Appellant is required to hold his commissions in trust does not necessarily benefit Respondents, in that even upon a favorable verdict and award, additional orders and actions will be required in order for Respondents to actually receive those funds so held in trust. A trust controlled by Appellant also provides less safeguards to Respondents than a bond would. Under these circumstances, the purpose behind the sanction is more likely to have been punitive, and therefore criminal, but at best, the purpose is unclear, in which case it should be overturned. *Poston v. Poston*, 331 S.C. 106, 115, 502 S.E.2d 86, 91 (1998), *reh’g denied* (Jul. 17,

1998) (reversing because the contempt order was not clear and it was impossible to determine whether the sanction was criminal or civil).

Other factors more heavily influence the conclusion that the sanctions are criminal as opposed to civil. First, they are clearly unconditional. *See Poston*, 331 S.C. at 111, 502 S.E.2d at 88 (“An unconditional penalty is criminal in nature because it is solely and exclusively punitive in nature.”). Appellant must hold all commissions in trust. There are no exceptions, and no means for Appellant to try to convince the circuit court that any specific commission earned in the future should be exempt for any reason. This is also a violation of Appellant’s due process rights. *Id.* at 116, 502 S.E.2d at 91 (citing, *inter alia*, *Bloom v. Illinois*, 391 U.S. 194 (1968)) (recognizing that sanctions which punish a party for future violations without first holding a hearing to determine if the party willfully violated the order on that future occasion violate the party’s due process rights).

Moreover, Appellant is completely enjoined from using his real-estate databases. There are no exceptions to this sanction, either, which is problematic because it completely ignores a critical document and issue in the case, i.e., the Independent Contractor and Brokerage Agreement, upon which the Temporary Injunction was based, and which in Paragraph 12 contains a clear exception for information that is “generally known” (R. pp. 4-12; 57-60).² Thus, these are clearly unconditional sanctions, and are readily distinguishable from the type of “unconditional” fines or awards of costs/attorney’s fees that are commonly considered civil in nature.

Next, the sanctions do nothing to coerce Appellant’s compliance with the Temporary Injunction, because regardless of whether he uses a database or not, he is still required to hold any commission earned in trust. *See 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

² *See also*, Section I.G. of Appellant’s Final Brief for a discussion of the “generally known” exception.

complainant”). From that understanding, it does not matter, at a practical level to Appellant, whether he uses the databases or not, or even how he obtains a listing/sale/commission, given that any commission actually earned must be held in trust, with no exceptions.

It is also difficult to comprehend how the sanctions are not punitive and criminal in nature when the effective result is to completely deprive Appellant of a means to an income through his work as a real estate agent (the only job he’s had since at least 2016) and of any real ability to pay his bills and living expenses. At a minimum, the circuit court should have granted Appellant leave to submit an affidavit of his monthly expenses and allowed him to access and use his commissions earned up to that amount for such purposes, with any excess commissions earned then being held in trust, or alternatively, required Appellant to post a bond, which would provide a more tangible benefit to Respondents, while still allowing Appellant to earn a living and to pay his expenses. The sanctions, as currently written, represent a clear abuse of discretion under the circumstances.

CONCLUSION

For all of the foregoing reasons, and upon all of the foregoing authorities (as contained in this Reply Brief and in Appellant’s Initial Brief), this Court should reverse the circuit court’s findings of contempt as expressed in the Amended Contempt Order (as well as in the original Contempt Order) and vacate the sanctions imposed on Page 4, Paragraphs 2 and 3, therein. Alternatively, this Court should vacate those sanctions and remand with instructions for the circuit court to craft new and/or modified sanctions that comply with applicable law and do not unreasonably punish Appellant or violate his constitutional rights.

Respectfully submitted, this the 7th day of December, 2023.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with Rule 211(b), SCACR.

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