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SC Court of Appeals

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IN THE STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF PICKENS)	FOR THE 13TH JUDICIAL CIRCUIT
Click Properties, LLC and Hyper Formance, LLC,)	C. A. No. 2020-CP-39-00266
Plaintiffs,)	**ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION**
vs.)	
Thomas SC Properties, LLC and All-Tech Tire and Auto Repair, LLC,)	
Defendants.)	

This litigation began in February of 2020. The present matter came before me on Plaintiffs' Motions for Rule to Show Cause filed December 12, 2022; September 22, 2023; October 4, 2023; and November 2, 2023; and upon Defendants' Motion to Dismiss the Rules to Show Cause. The Court issued an Order on March 1, 2024, denying Defendants' Motion and finding Defendants in contempt. Defendants have filed a Rule 59(e) Motion to Alter or Amend. This Motion is respectfully denied.

Defendants' Motion to Dismiss

Defendants first requested the Court to reconsider the oral denial of their Motion to Dismiss the several Rules to Show Cause filed by Plaintiffs. The Motion is respectfully denied.

1. Standard

Defendants filed their Motion on October 4, 2023. The Court will address this Motion as a Rule 12(b)(6) SCRCP motion. The standard requires the Court to construe Plaintiffs' Rules to Show Cause in the light most favorable to the non-moving parties. *Grimsley v. S.C. Law Enf't Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012), (quoting *Rydde v. Morris,* 381 S.C. 643, 646, 675 S.E.2d 431, 433, (2009)). Also, the Court is required to determine "if the facts alleged and

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the inferences reasonably deducible from the pleadings would entitle Plaintiffs to relief on any theory of the case". *Id.* (quoting *Rydde,* 381 S.C. at 646, 675 S.E.2d at 433). "If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, the dismissal under Rule 12(b)(6) is improper." *Id.*

2. This Court has jurisdiction to address the Rules to Show Cause

The Court retains jurisdiction over matters "not affected by the appeal including the authority to enforce any matters not stayed." Rule 241(a), SCACR. Injunctions are not automatically stayed by an appeal. Rule 241(b)(1 & 8), SCRAP. Defendants' Motion to Stay Pending Appeal was denied as to the injunction by Judge Gravely's April 21, 2023 Order. Therefore, in the light most favorable to the non-moving parties, this Court retains jurisdiction to enforce the September 21, 2022 Order requiring Defendants to abate the nuisance and not to harass Brent and Shelly Click.

3. Defendants have waived their argument that the September 21, 2022 Order is too vague

Defendants claim in their Motion that the September 20, 2022 Order of Judge Gravely is too vague as to the abatement of the nuisance and does not meet the requirements of case law to be enforced as a contempt action. However, Defendants previously failed to raise the issue of vagueness in either a Rule 59(e) Motion or in their appeal. An issue must be raised and ruled upon by the trial judge in order to be preserved for review, and failure to file a Rule 59(e) Motion to clarify an order is fatal.

Nelums v. Cousins, 304 S.C. 306, 403 S.E.2d 681 (Ct. App. 1991) is on point. Reverend Nelums sued Cousins after she constructed a gate that prevented him from traveling to his property along a road in use since 1908. The trial court found that Nelums had obtained a prescriptive easement across Cousins' property. Cousins argued on appeal that the Order was too vague and

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the trial court erred by "failing to clarify and specify whether this right of way was an easement by necessity or a prescriptive easement." The Court of Appeals found the issue of vagueness was not preserved for appellate review since the trial court was never afforded the opportunity to clarify its order because Cousins failed to make a Rule 59(e) Motion. *Id.* 304 S.C. at 407, 403 S.E.2d at 681-82.

Defendants did not ask the court to clarify its Order of September 21, 2022 through a Rule 59(e) Motion. Defendants argue the Order is too vague that they cannot comply; however, they never provided the court with the opportunity to provide any requested clarification. Therefore, taking the facts in the light most favorable to the non-moving parties, the issue has not been preserved.

Defendants' appellate Initial Brief lists the Issues on Appeal on page 6. None of the five issues raise vagueness. Defendants therefore have waived this argument. The failure of an appellant to raise a question by way of an exception constitutes a waiver. *Bentrim v. Bentrim*, 282 S.C. 333, 335, 318 S.E.2d 131, 133 (Ct.App.1984). Defendants have, (in the light most favorable to the non-moving parties) therefore, waived any argument that the September 21, 2022 Order is unreasonably vague.

Finally, Defendants did raise the issue of vagueness in their previous Motion to Stay Pending Appeal. Nevertheless, Judge Gravely denied Defendants' Motion, noting:

> To the contrary [to vagueness] the Supreme Court of South Carolina in *Dill v. Dance Freight Lines*, 247 S.C. 159 (1966), upheld an Order that was "broad and general" in enjoining Defendant from operating their terminal in a manner that continued to blanket their neighbor's property in red dust but left the method of accomplishing that to the discretion of Defendant.

April 21, 2023 Order.

Defendants failed to file a Rule 59(e) Motion, thereby waiving the argument.

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4. The "Law of the Case" precludes a vagueness attack

This unappealed issue has become the law of the case. "[A]n unappealed ruling, right or wrong, is the law of the case." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012); *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998); *Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997).

Judy v. Martin, 381 S.C. 455, 674 S.E.2d 151 (2009) is on point. Martin filed suit in magistrate's court against Judy, seeking $2,500 in damages. Judy filed an Answer and Counterclaim. The magistrate found for Martin in the amount of $2,555. Judy appealed to the Circuit Court, who affirmed the magistrate's judgment. Judy did not seek reconsideration from the Circuit Court or file an appeal.

Judy filed a new action and sought to reopen the question of whether the magistrate had subject matter jurisdiction to hear the merits of the underlying dispute. The South Carolina Supreme Court declined, finding the Circuit Court had affirmed the magistrate's judgment and Judy did not file a motion for reconsideration, an appeal with the Court of Appeals, or a motion to set aside the judgment. The Supreme Court held, "[t]he circuit court's unchallenged disposition on the magistrate's subject matter jurisdiction therefore became the law of the case, and this Court declines to reopen that issue in this subsequent action." *Id.* 674 S.E.2d at 153. In the light most favorable to the non-moving parties, the unchallenged order becomes the law of the case.

5. Defendants are barred by the doctrine of *res judicata* and orders may be enforced through contempt proceedings

Defendants cannot use a contempt hearing to raise issues that were not raised before the trial court hearing the matter. *Simpson v. Simpson*, 404 S.C. 563, 746 S.E.2d 54 (Ct. App. 2013) (Simpson II) is instructive. Husband was ordered to transfer certain property to Wife in a Final

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Decree for divorce. Husband appealed the equitable division of marital property. In *Simpson I*, [Unpublished Opinion No. 2007-UP-147 (Ct. App. April 4, 2007); *cert. den.* February 21, 2008] the Court of Appeals found the Husband's argument that the family court erred in awarding to Wife certain pieces of real property that were owned by an LLC had not been preserved for appellate review.

Following *Simpson I*, Wife filed a contempt action alleging Husband and Son were in contempt for failing to transfer the properties awarded to her in the Final Decree. The family court issued an Order finding Husband was not in contempt because the LLC was the titled owner of the subject properties. In *Simpson II*, The Court of Appeals found the family court erred in allowing Husband and Son to relitigate the issue of ownership of the subject properties at the contempt hearings. The Court held...

> Husband and Son's argument that Husband, individually, could not comply with the Final Decree because the subject properties were titled in the name of the LLC, was barred by the doctrine of res judicata. . . . *Richardson v. Richardson*, 309 S.C. 31, 35, 419 S.E.2d 806, 808 (Ct.App.1992) (upholding the family court's ruling that the "issue of alimony was res judicata and could not be relitigated and it was the court's duty to effect compliance with the agreement as best as possible". . . .)
> . . . .
>
> Therefore, Husband and Son were not entitled to take a second bite at the apple by defending themselves in the contempt proceedings on the ground that the subject properties were titled in the name of the LLC.

Simpson, 404 S.C. at 573, 746 S.E.2d at 60.

Defendants did not file a Rule 59(e) Motion to Reconsider the September 21, 2022 Order or the April 21, 2023 Order, nor did they appear to raise vagueness in their appeal. They cannot now argue the Order was too vague for them to be held in contempt for failure to comply. Taking the facts in the light most favorable to the non-moving parties, they are barred by the doctrine of res judicata. A contempt proceeding is the proper remedy for their continued non-compliance.

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6. The Court has equitable authority to enforce the orders

Although this Court lacks subject matter jurisdiction to modify the injunction, it does have the equitable authority to enforce and hold Defendants in contempt. *See Swentor v. Swentor*, 336 S.C. 472, 480 n.2, 520 S.E.2d 330, 334 n. 2 (Ct. App. 1999) (stating that although an order is not modifiable, it may be enforced). Therefore, even if the injunction may be vague, it is the duty of the Court to interpret the intent of the Order and effect compliance as best possible. *Simpson, supra*, 404 S.C. at 573, 746 S.E.2d at 61.

"The primary purpose of an action for civil contempt is to exact compliance" and in doing such, "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). In this instance, the Jury found Defendants created a serious nuisance, and the Court required Defendants to abate the nuisance. After a year and a half, they have not adequately addressed the injunction, and therefore, are in contempt.

7. The orders are sufficiently specific for Defendants' compliance

Alternatively, the Orders are sufficiently specific to allow compliance.

A. *Dill* sets forth the applicable standard

South Carolina's Supreme Court set forth the applicable standard in *Dill v. Dance Freight Lines*, 247 S.C. 159, 162, 146 S.E.2d 574, 575 (1966) over 50 years ago:

> It has been too frequently held by this court to require further discussion that, when the existence of a nuisance has been established by the verdict of a jury, the party injured is entitled as a matter of right to an injunction to prevent its continuance.

The South Carolina Supreme Court upheld an order that left the method of abatement to the discretion of the Defendant. Both of the orders in the present case relied upon *Dill*.

B. The nuisance is sufficiently defined

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Plaintiffs' verified Complaint states in Paragraph 26:

> Plaintiffs are informed and believe that the erosion will continue unless an appropriate retaining wall is erected and seek damages sufficient for the erection of a retaining wall or for an order from this Court that Defendants be required to construct an appropriate retaining wall to mitigate the significant and on-going damage to the Click Property.

The September 21, 2022 Order defines the nuisance as the "erosion caused by the Defendants' excavation." Geotechnical testing, accepted by both Plaintiffs' and Defendants' engineers, substantiated the area where excavation created a dangerous instability. Plaintiff's engineer, Hall, defined this area at trial. Defendants, therefore, have the information they need to abate the erosion created by their negligent excavation.

Judge Gravely affirmed the injunction that was "broad and general," but an injunction Defendants knew how to abate, having the issue addressed by engineering experts at trial.[1]

The specific requirements for the actions that Defendants choose to undertake to abate the erosion are provided in Pickens County's ordinances, South Carolina statutes and regulations, and the 2021 International Building Code, with South Carolina Modifications, adopted by Pickens County. *See Swatzell v. Nat. Resources & Envt'L Protec.*, 996 S.W.2d 500 (Ky. 1999) (finding that in order to receive his mining permit, Swatzell was required to submit a detailed reclamation plan and that this plan and the applicable mining regulations, set forth in precise detail the steps Swatzell was to perform in order to abate the regulatory violations). The nuisance is sufficiently defined.

C. Lack of a deadline does not prevent a finding of contempt

[1] David Hall, P.E. testified that a retaining wall is necessary to prevent ongoing damage to the Plaintiffs' property through continued erosion and to restore safety to the embankment. (May 4, 2022 Affidavit of David Hall, ¶ 5; May 12, 2022 Affidavit of David Hall, ¶ 12).

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An order of the court implies a reasonable time for compliance if a specific time period is not set forth. More than one year has passed since Judge Gravely's Order requiring Defendants to abate the nuisance. A year has passed since Judge Gravely's April 21, 2023 Order in which he denied Defendants' Motion to Stay and noted they had done nothing towards complying with the September Order. Defendants have had more than a reasonable period of time in which to comply and have not presented competent evidence to the contrary.

Other jurisdictions have addressed this issue and held a reasonable period of time to comply is implied. In the case of *In re Estate of Patton*, 971 So.2d 1281 (Miss. App. 2008), Patton died leaving a will that named his wife as executrix. Patton's children filed a motion to remove Mrs. Patton as executrix. The Court ordered decedent's children to inventory and turn over all assets in their possession that belonged to their father's estate.

When they failed to comply, Mrs. Patton filed a motion to compel. The Court found decedent's children in contempt and awarded attorney's fees. Decedent's daughter argued on appeal that she should not have been found in contempt because there was no deadline for compliance. In affirming, the Mississippi Court of Appeals noted the daughter had failed to comply for almost seven months. The lack of a specific deadline did not excuse compliance.

Ohio Courts have also held where an order does not include a deadline, a reasonable time may be inferred. *See Willis v. Willis*, 775 N.E.2d 878 (Ohio App. 2002) (applying the "common standard of reasonable length of time" in affirming the trial court's finding of contempt where the order lacked a deadline for payment of children's medical expenses in a shared parenting agreement); *McFarland v. McFarland*, 5th Dist. Licking No. 01CA00021, 2001-Ohio-1843, 7-8 (stating that "in determining the defendant's compliance with [an order, directing the defendant to pay certain debts, that does not set a repayment schedule], the common standard of reasonable

length of time is appropriate").

Similarly, the Texas Court of Appeals found even though the lower court's decree did not specifically state a date by which one party was required to close on the home, the law implies a reasonable time. Therefore, it was within the lower court's jurisdiction to enforce the decree. *Noyes v. Noyes*, No. 04-08-00627-CV (Tex. App. 8/12/2009), No. 04-08-00627-CV. (Tex. App. Aug 12, 2009). Thus, the fact that Defendants have failed to abate the nuisance, which was first ordered in September of 2022, makes them subject to contempt.

Therefore, the Motion to Dismiss is denied.

This Court Properly Found Defendants in Contempt for Failing to Abate the Nuisance

Next, this Court's March 1, 2024 Order is not contrary to the evidence. This Court affirms the finding that failure to competently abate the nuisance for almost a year and a half was intentional. This was supported by the several statements by Defendants' representative Thomas himself that he would not abate the nuisance. Thomas states the reason he had not complied with the Court's Order on page 4 of his unnumbered Affidavit filed on February 16, 2023: "... it does not make any sense to spend money" if Brent eventually owns his property to satisfy the $196,000 Jury Verdict. Second, if no time is stated in an Order, then a reasonable time applies. Defendants' refusal to address the continuing erosion for almost a year and a half is not reasonable.

This Court reaffirms its finding that Plaintiffs are to use the driveway to its full extent. The evidence is sufficient to prove that Plaintiffs would not be able to use the full extent of their drive. The testimony of Plaintiffs' engineer Hall established that the footings dug by Defendants would negatively impact the use of the gravel drive and does not abate the nuisance. Therefore, the Defendants are enjoined from building a retaining wall based on the placement of the footings. Defendants are free to build the wall in a manner that will not negatively impact the gravel drive.

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Their failure to abate the nuisance to date supports the contempt finding.

This Court has Discretion Regarding how Long to Hold the Record Open and Properly Found a Preliminary Injunction was Warranted

The Court agreed to leave the Record open as to the Preliminary Injunction for a limited time, informing the Defendants that it could reconvene the following week to consider any evidence from Defendants' surveyor. Defendants later informed the Court that it would be four to six weeks before a surveyor could be scheduled. The Court is not required to hold the record open indefinitely.

The decision whether to reopen a record for additional evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion. *Wright v. Strickland*, 306 S.C. 187, 188, 410 S.E.2d 596, 597 (Ct.App.1991). In *Wright*, the Court of Appeals affirmed a trial judge's refusal to reopen the record where the moving party did not proffer any testimony or show that the evidence could make any difference to the outcome of the case. *Id.* 306 S.C. at 188, 410 S.E.2d at 597. Defendants' proffered testimony would not make a difference to the outcome of the case.

Defendants submitted a supplemental Memorandum following the March 1, 2024 hearing along with a letter from Hood, Defendants' licensed professional engineer. Hood prepared the design drawing for the retaining wall and included the prohibition of any surcharge within 10 feet of the wall. Hood did not refute the testimony of Plaintiffs' expert Hall that Defendants' location of the footings for the wall would negatively impact Plaintiffs' property or their ability to use their driveway.

Plaintiffs' expert Hall presented an Exhibit that showed how the erection of a retaining wall as designed by Defendants' engineer in the present location of the footings would prohibit the use of Plaintiffs' driveway and turn around area. Hall's testimony regarding the impact of the

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retaining wall if built at the location where the footings were dug was not dependent on the location of the property line but was determined based on the location of the footings. The Preliminary Injunction is warranted, and Defendants' request to keep the record open is denied.

Defendants' Contempt and Awarded Reimbursement

Next, the Court has authority to issue a Contempt Order of $15,000 when Plaintiffs presented testimony and documentary evidence that they suffered damages as a result of continued harassment and additional damage to their property since September 21, 2022, including a newly formed ditch and flooding in their workshop, as a result of Defendants' untimely failure to abate the erosion. Plaintiffs presented the Court with a summary of damages on January 5, 2024 in the total amount of $258,905. The Court had ample evidence to support its ruling. Plaintiffs have properly proven continued harassment and failure to abate the nuisance by clear and convincing evidence.

Civil contempt sanctions serve two functions: to coerce future compliance and to remedy past noncompliance. *Jarrell v. Petoseed Co.*, Inc., 331 S.C. 207, 209, 500 S.E.2d 793 (Ct. App. 1998) citing *United States v. United Mine Workers of Amer.*, 330 U.S. 258, 302-04 (1947). Civil compensatory contempt is designed to remedy past noncompliance.[2] The fact that Defendants were eventually required to comply with the Court's Order does not render the issue of contempt moot.

Defendants' argument that the award of attorney's fees is inappropriate. The Court disagrees. Th Court has broad discretion in assessing matters of contempt. *See Stone v. Reddix-Smalls*, 295 S.C. 514, 516, 369 S.E.2d 840, 840 (1988). "In a civil contempt proceeding, a

[2] "The sanction is employed not to vindicate the court's authority but to make reparation to the injured party and restore the parties to the position they would have held had the injunction been obeyed." *Id.* 331 S.C. at 210 quoting *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979).

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contemnor may be required to reimburse a complainant for the costs he incurred in enforcing the court's prior order, including reasonable attorney's fees." *Poston v. Poston*, 331 S.C. 106, 114, 502 S.E.2d 86, 90 (1998); *see also Miller v. Miller*, 375 S.C. 443, 463, 652 S.E.2d 754, 764 (Ct.App.2007) ("Courts, by exercising their contempt power, can award attorney's fees under a compensatory contempt theory."). The determination of the amount of the award is within the Court's discretion. *Poston*, 331 S.C. at 114, 502 S.E.2d at 90.

Plaintiffs also filed an Affidavit for Attorney's Fees on January 5, 2024 in in which fees in the amount of $22,500 were requested. The March 1st Order awards for failure to abate a nuisance and for harassment, along with granting the preliminary injunction. There is no issue on which Plaintiffs did not prevail. Plaintiffs' Motions for an Order and Rule to Show Cause filed in December 2022 and September, October and November of 2023 required three separate hearings, and the award of attorney's fees is entirely reasonable and appropriate. Defendants did not prevail and are not entitled to an award of attorney's fees.

The Preliminary Injunction does not Excuse Defendants from Complying with the September 21, 2022 Order

Defendants are required to comply with the September 21, 2022 Order. The March 1, 2024 Order enjoins them from acting in a manner that will cause additional damage to Plaintiffs' property. David Hall testified that Defendants could construct the wall designed by Thomas Hood by operating in accordance with the design plans and constructing the wall 10 feet away from the embankment and following the engineering requirements contained in the plan. Defendants are not relieved from contempt in refusing to comply with the Court's Order because it does not suit them to construct the retaining wall in the manner required by their own engineer.

The Rules to Show Cause and Preliminary Injunction were Properly Before the Court

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As noted above, Defendants attempt to state this Order is improper because it is not before the Court. The Court retains jurisdiction over matters "not affected by the appeal including the authority to enforce any matters not stayed." Rule 241(a), SCACR. Injunctions are not automatically stayed by an appeal. Rule 241(b)(1 & 8), SCRAP. Defendants' Motion to Stay Pending Appeal was denied as to the injunction by Judge Gravely's April 21, 2023 Order. Therefore, this Court has jurisdiction over these motions.

Stay of Order

Defendants request this Court to stay any enforcement proceedings of any financial requirements of its Order. This request, respectfully, is denied. The granting of a motion to stay rests entirely with the discretion of this Court. Injunctions are not automatically stayed by an appeal. Rule 241(b) (1 and 8), SCRCP. Defendants' Motion to Stay Pending Appeal was denied as to the injunction by Judge Gravely's April 21, 2023 Order.

Defendants were first ordered to abate the nuisance by jury verdict in May 2022. It would be inequitable to stay the enforcement of this injunction, along with the penalties for contempt. The functions of civil contempt sanctions will be served by requiring payment to coerce future compliance and to remedy past noncompliance. Further, a judgment directing the payment of money is not automatically stayed. S.C. Code §18-9-130.

IT IS THEREFORE ORDERED that Defendant's Motion for Reconsideration of the Court's March 1, 2024 is hereby DENIED.

AND IT IS SO ORDERED.

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Pickens Common Pleas

Case Caption: Click Properties, Llc , plaintiff, et al VS Thomas Sc Properties Llc , defendant, et al

Case Number: 2020CP3900266

Type: Order/Other

So Ordered

G.D. Morgan Jr.