

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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**Aug 28 2024**

**SC Court of Appeals**

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APPEAL FROM CHARLESTON COUNTY  
MIKELL R. SCARBOROUGH, CIRCUIT COURT JUDGE

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Appellate Case No.: 2024-000947

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Vicki Lynn Vergeldt, individually and as  
Successor Trustee of the John Vergeldt, Jr.  
Revocable living Trust dated September 27, 1978, .....Respondent,

v.  
John Edward Vergeldt and  
Teresa Shaw-Vergeldt, Defendants,

Of whom John Edward Vergeldt is the, .....Appellant.

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**INITIAL BRIEF OF APPELLANT**

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**STATEMENT OF ISSUES ON APPEAL**

1. Did the trial court err in denying Appellant's Motion to Dismiss pursuant to Rule 12(b)(6), SCRPC, when Respondent failed to comply with a condition precedent to foreclosing on any asset of Appellant as set forth in in S.C. Code Ann. § 18-9-130(A)(2)?
2. Did the trial court err in denying Appellant's Motion to Stay Proceedings in light of the appeal of the underlying matter that was pending before the Court of Appeals?
3. Did the trial court err in finding that Appellant willfully violated the trial court's order dated September 28, 2023, and further finding Mr. Vergeldt to be in contempt?
4. Did the trial court err in failing to apply the proper standard of proof in finding Appellant to be in criminal contempt of court and further imposing sanctions against Appellant for criminal contempt?
5. Did the trial court err in considering and admitting the Affidavit of Kevin Lowry in support of Respondent's Motion for Contempt and/or Sanctions when the Affidavit was not timely filed pursuant to Rule 6(d), SCRPC?

## STATEMENT OF THE CASE

The orders on appeal arise from litigation initiated by Respondent Vicki Lynn Vergeldt (hereinafter “Vicki”) to enforce a judgment against Appellant John Edward Vergeldt (hereinafter “John”) in the amount of \$361,092.88. Vicki obtained the judgment against John in Case No. 2016-CP-00820<sup>1</sup> before the Honorable Teasa Kay Weaver, Master in Equity for York County.

Following the entry of judgment, Vicki filed suit against John in Case No. 2021-CP-10-04257 on September 14, 2021, alleging that John took certain actions to prevent Vicki from collecting the judgment and asserting multiple causes of action including declaratory judgment, conversion, constructive trust, and conspiracy. (Complaint 2021 09 14). Additionally, Vicki instituted supplemental proceedings in Case No. 2021-CP-10-03640<sup>2</sup> on or about May 13, 2022. (Petition for Supplemental Proceedings 2022 05 13).

One of the assets at the center of the litigation is John’s primary residence, 1523 Star Flower Alley, Johns Island, SC 29455 (hereinafter the “property”), which Vicki seeks to have sold at public auction so that the proceeds from the sale may be applied towards the judgment.<sup>3</sup> On May 3, 2023, Vicki filed a Motion to Compel John to produce the property for interior and exterior inspection after John initially objected to the request as premature since the trial court had not issued an order declaring the property subject to execution. (Motion to Compel 2023 05 03). Vicki also filed an Amended Motion to Amend Complaint on July 7, 2023, seeking to add a cause of action against

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<sup>1</sup> This case was previously pending on appeal before this Court as Appellate Case No. 2021-000816. On February 14, 2024, the Court issued an Opinion affirming the trial court, and on April 11, 2024, the Court issued an Order denying John’s Petition for Rehearing. Subsequently, John filed a Petition for Writ of Certiorari on May 13, 2024, which is currently pending before the Supreme Court.

<sup>2</sup> Pursuant to Consent Order filed on August 19, 2022, the supplemental proceedings were consolidated with the instant proceedings.

<sup>3</sup> At this time, there has been no order determining that the property is an asset that can be used to satisfy the judgment.

John to foreclose on the property. (Amended Motion to Amend Complaint 2023 07 07). A hearing on both motions was held before the Honorable Mikell R. Scarborough on August 7, 2023, after which Judge Scarborough issued separate orders on September 28, 2023, granting both motions. (See Order Granting Motion to Amend and Order Granting Motion to Compel).

Vicki filed an Amended Complaint on October 13, 2023, after which John filed a Motion to Dismiss the Amended Complaint along with an Answer on October 30, 2023. The Order Granting Motion to Compel required John to make the property available to be appraised by a licensed appraiser agreed upon by both parties within forty-five (45) days of the issuance of the Order. After the appraisal scheduled for October 24, 2023, failed to go forward as planned due to the fault of the appraiser, John filed a Motion to Stay Proceedings on October 25, 2023, seeking to stay the collections proceedings until a decision was issued in the matter on appeal, Appellate Case No. 2021-000816. Vicki then filed a Motion for Contempt and/or for Sanctions alleging that John willfully violated the Order Granting Motion to Compel in failing to complete the appraisal.

A hearing on John and Vicki's motions was held before Judge Scarborough on January 8, 2024.<sup>4</sup> Following the hearing, Judge Scarborough denied John's Motions to Dismiss and Stay Proceedings and granted Vicki's Motion for Contempt and/or Sanctions. (See Order filed February 2, 2024). On February 12, 2024, John filed a Motion to Reconsider, and a re-hearing was held before Judge Scarborough on March 28, 2024, after which he issued an Order denying the Motion to Reconsider and affirming the Order filed on February 2, 2024. (See Form 4 Order filed March

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<sup>4</sup> While in route to the hearing on January 8, 2024, John's attorney, Ms. Ballard, suffered an unexpected medical emergency which cause her to miss the hearing. Judge Scarborough, unaware of Ms. Ballard's medical emergency, proceeded with the hearing in the absence of John and his counsel.

28, 2024). John timely filed a Motion to Reconsider on April 8, 2024, which was denied. (See Order filed May 6, 2024). This appeal followed.

### **STATEMENT OF FACTS**

While this appeal arises from orders issued in Circuit Court Case No. 2021-CP-10-04257, it is necessary to examine the underlying litigation in order to understand the full context of the issues on appeal. The underlying matter stems from lengthy litigation between two surviving adult children of the decedent, John Vergeldt Jr. The decedent executed a Revocable Living Trust in 1978 that became irrevocable at the time of his death. The trust was amended and restated in July 2009.

The first litigation was filed in probate court as Case No. 2014-GC-46-012. The probate judge referred the case to the Circuit Court and it was assigned Case No. 2014-CP-46-01956. The action sought a declaratory judgment “related solely to the construction and interpretation of the Trust Agreement...” (Complaint 2.28.2014, p. 1). At the time the action was filed, the plaintiff Vicki Lynn Vergeldt, sued her brother John Vergeldt and her sister Patricia Vergeldt Downey. *Id.* She sought a declaratory judgment as to the construction of the trust, as well as a determination that she had probable cause to bring the lawsuit such that she was not excluded from the trust by the “no contest” provision of the trust. *Id.* The first litigation was resolved after a trial in 2015. (2015.08.31 Order). The trial judge specifically stated that he was awarding equitable relief only. “I make no finding relating to the liability of any party or the lack thereof, as no claim is stated for breach of any duty, and no relief is sought from the Court to compel the trustee to perform any duties that may be required. . .”<sup>5</sup> (2015 08 31 Order, p. 2). Additionally, the trial judge found the

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<sup>5</sup> The trust document required construction of the trust under Michigan law, and all parties acknowledged the applicability of Michigan law to the issues before the Court).

settlor of the trust “likely became unable to manage or conduct his own affairs sometime between the late Fall of 2012, and March 2013, when his son John initiated a guardianship proceeding in York County Probate Court. *Id.* The trial judge found John Vergeldt “became successor trustee on March 6, 2013”<sup>6</sup> and prior to becoming successor trustee [on March 6, 2012], John’s duty was entirely to Mr. Vergeldt until Mr. Vergeldt’s death.” *Id.* at p. 8.

Less than a year later, Vicki filed a new lawsuit (Case No. 2016-CP-46-00820)<sup>7</sup> seeking to remove her brother, John, as successor trustee and for “additional or alternative injunctive relief” relating to John’s alleged failure to provide access to trust records. (2016.03.16 Petition for Removal of Trustee and related relief). Vicki did not seek damages against John, as all relief sought was equitable in nature. *Id.*

More than three years later, Vicki sought to amend her Petition to seek damages against John for the first time. (2019.05.14 Motion Amend Petition). John opposed the motion via counsel, but it was granted. (Order dated June 13, 2019). At subsequent trial, John objected to attempts to recover damages based upon the 2014 order concluding the 2014 case, and objected to expert testimony offered on the issue of alleged damages. Nevertheless, the trial court entered judgment against John in the total amount of \$361,092.88, “said amount being comprised of \$299,719.26 to restore the trust assets; additional expenses of \$5,870.00 and attorney’s fees of \$55,512.62.” (Order dated 2.2.2021 p. 12). After the trial court denied his motion to reconsider, John filed a Notice of Appeal on August 2, 2021, seeking to appeal the judgment. Vicki then

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<sup>6</sup> This finding was linked to a report from Mr. Vergeldt’s primary care physician introduced during the guardianship proceeding, which report was dated May 6, 2013). *Id.* p. 8.

<sup>7</sup> Like the first action, this action was filed initially in probate court and removed to Circuit Court.

instituted the action, 2021-CP-10-04257, on September 14, 2021, from which the instant appeal arises.

In Vicki's initial Complaint, she asserted causes of action against John for a declaratory judgment, conversion, constructive trust, civil conspiracy, and temporary injunction. (Complaint 2021 09 14). In pertinent part, the Complaint alleged that John transferred certain assets subject to the judgment, including the property located at 1523 Star Flower Alley (the "property"), in order to prevent Vicki from collecting on the judgement in the underlying litigation. *Id.* Additionally, Vicki instituted supplemental proceedings in Case No. 2021-CP-10-03640 seeking to identify John's assets and collect the judgment against John despite the underlying matter and judgment having been appealed. (Petition for Supplemental Proceedings 2022 05 13). As part of the supplemental proceedings, Vicki served John with a Request to Produce the interior and exterior property for inspection on February 16, 2023. (Motion to Compel 2023 05 03, Exhibit A). John objected to this request on the grounds that there was no order determining that the property was subject to execution. *Id.*

Vicki later filed an Amended Motion to Amend Complaint on July 7, 2023, seeking to foreclose on the property and sell it at public auction, using the proceeds to satisfy the judgment. John objected, arguing that Vicki had failed to comply with S.C. Code Ann. § 18-9-130(A)(2) which required Vicki to post a bond either twice the amount of the value of the property or twice the amount of the judgment before she could seek to enforce a sale of the property. (Memo in Opp. to Motion to Amend 2023 08 04). Moreover, at the time Vicki filed the Amended Motion to Amend Complaint, there had been no order determining that the property was an asset that could be used to satisfy the judgment, and the property, which was John's primary residence, was exempt from attachment, levy, and sale pursuant to S.C. Code Ann. § 15-41-30(A)(1)(a). *Id.*

Despite John's objections, the trial court granted Vicki's motion to amend the complaint on September 28, 2023 (Order Granting Motion to Amend), and Vicki filed the Amended Complaint on October 13, 2023. The trial court also issued an order granting Vicki's motion to compel, requiring John to make the property available for an appraisal. (Order Granting MTC 2023 09 28). Specifically, the order required John to make the property available "to an agreed upon South Carolina licensed real estate appraiser and/or home inspector at a date and time convenient to the designated real estate appraiser/home inspector." (Order Granting MTC). The order also required the appraisal to take place within forty-five (45) days of the date of the order. *Id.*

After conferring with Vicki, John agreed to make the property available on October 24, 2023, at 9:00 am, as required by the trial court's order. The licensed appraiser, Kevin Lowry, was selected by Vicki.<sup>8</sup> On the morning of the appraisal, Mr. Vergeldt was present at the property at 8:45 am with Ms. Shaw, a real estate professional, who was there to attend the appraisal. (Affidavit of JEV 2024 01 05). At 9:43 am, over 40 minutes past the scheduled appraisal, Vicki's counsel emailed John's counsel to advise that Mr. Lowry was running late and had been "sitting in traffic for an hour." (Motion to Stay 2023 10 25, ¶12). Mr. Lowry had only notified Vicki's counsel of his delay a minute or two before the message was relayed to John's counsel. *Id.* John's counsel, Ms. Ballard, contacted John at approximately 9:45 am to inform him that Mr. Lowry was running late due to a traffic delay and would arrive in ten minutes. (Affidavit of JEV). John informed Ms. Ballard that he had a doctor's appointment at 10:30 am and would not continue to wait, at which point Ms. Ballard advised John that he could leave. *Id.*

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<sup>8</sup> Vicki's counsel selected Mr. Lowry to which John's counsel had no objection. (Tr. March 28, 2024, P.12, lines 18-22).

When Mr. Lowry finally arrived at approximately 9:56 am, John was preparing to take his dogs out in the front yard before needing to leave for a doctor's appointment scheduled for 10:30 am.<sup>9</sup> *Id.* John informed Mr. Lowry that he was too late and would need to reschedule the appraisal due to his 10:30 am appointment. *Id.* Mr. Lowry attempted to enter the property to conduct the appraisal, at which time John raised his voice and demanded Mr. Lowry leave the property. *Id.* at ¶14.

Following the failed appraisal, John filed a Motion to Stay Proceedings due to the unnecessary burden placed on John in Vicki's quest to execute a judgment that was pending on appeal. (Motion to Stay 2023 10 25). Additionally, Vicki had threatened to move for sanctions against John for failure to complete the appraisal, even though the appraisal did not proceed due to Mr. Lowry's delay and failure to timely communicate the same. *Id.* As such, John requested that the supplemental proceedings be stayed until the Court of Appeals issued a ruling on the pending appeal.<sup>10</sup> *Id.* John also filed a Motion to Dismiss the amended complaint along with an Answer on October 30, 2023, seeking to dismiss the amended complaint pursuant to Rule 12(b)(6), SCRPC due to Vicki's failure to post a bond as required by S.C. Code Ann. § 18-9-130(A)(1). (MTD and Answer 2023 10 30).

On November 3, 2023, Vicki filed a Motion for Contempt and/or Sanctions, alleging that John willfully violated the trial court's Order Granting Motion to Compel by failing to cooperate and accommodate for "circumstances beyond Mr. Lowry's control," and seeking sanctions and attorney's fees. (Motion for Contempt 2023 11 03). An in-person hearing on all three motions was

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<sup>9</sup> The doctor's office was 20-25 minutes away from the property.

<sup>10</sup> At the time the motion was filed, oral arguments on the appeal were confirmed and scheduled for November 8, 2023.

set for January 8, 2024, before Judge Scarborough. Prior to the hearing, John filed an affidavit on January 5, 2024, attesting to the events that took place on the date of the appraisal and opposing Vicki's motion for contempt. (Affidavit of JEV). On the same day, counsel for Vicki filed the Affidavit of Kevin Lowry attesting to his version of the events that transpired on October 24, 2023. (Affidavit of Kevin Lowry).

On January 8, 2024, Judge Scarborough heard all motions in the absence of John or his counsel.<sup>11</sup> Following the hearing, Judge Scarborough denied John's Motions to Dismiss and Stay Proceedings and granted Vicki's Motion for Contempt and/or Sanctions. (See Order filed February 2, 2024). Judge Scarborough held John in contempt specifically finding that he willfully and intentionally violated the court's Order Granting Motion to Compel by clear and convincing evidence. John filed a Motion to Reconsider, and a re-hearing was held before Judge Scarborough on March 28, 2024, after which he issued an Order denying the Motion to Reconsider and affirming the Order filed on February 2, 2024.

### **STANDARD OF REVIEW**

"An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCPP." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "In deciding whether the trial court properly granted the motion to dismiss, this Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief." *Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413 (S.C. App. 2003). "In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint." *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (S.C. 2006).

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<sup>11</sup> See *supra* note 4.

“If the facts and inferences drawn from the facts alleged in complaint, viewed in the light most favorable to the plaintiff would entitle the plaintiff to relief on any theory, the grant of a motion to dismiss for failure to state a claim is improper.” *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999).

An appellate court should reverse a decision regarding contempt “only if it is without evidentiary support or the trial judge has abused his discretion.” *Durlach v. Durlach*, 359 S.C. 64, 70, 596 S.E.2d 908, 912 (2004) (quoting *Stone v. Reddix-Small*s, 295 S.C. 514, 516, 369 S.E.2d 840 (1988)). An abuse of discretion occurs either when the court is controlled by some error of law or where the order, based upon findings of fact, lacks evidentiary support.” *Miller v. Miller*, 375 S.C. 443, 652 S.E.2d 754 (Ct. App. 2007) (quoting *Townsend v. Townsend*, 356 S.C. 70, 73, 587 S.E.2d 118, 119 (Ct. App. 2003)). Civil contempt must be proven by clear and convincing evidence. *Poston v. Poston*, 331, S.C. 106, 502 S.E.2d 86 (1988). In a criminal contempt proceeding, the burden of proof is beyond a reasonable doubt. *Id.* (citing *State v. Bowers*, 270 S.C. 124, 241 S.E.2d 409 (1978)). “Before a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct.” *Widman v. Widman*, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct.App.2001).

## ARGUMENT

### **I. THE COMPLAINT SHOULD HAVE BEEN DISMISSED BECAUSE RESPONDENT FAILED TO COMPLY WITH A CONDITION PRECEDENT TO FORECLOSING ON ANY ASSET OF APPELLANT.**

Vicki’s amended complaint seeks to enforce the judgment from the underlying litigation and execute said judgment by foreclosing on the property and through supplemental proceedings. (Amended Complaint). Specifically, Vicki “believes that she is entitled to have [the Property] foreclosed, have the equity of redemption barred, and have the Property sold at the next available

public sale.” Id. at ¶27. However, S.C. Code Ann. §18-9-130(A)(2) provides that “a plaintiff may not enforce a sale of property after a notice of appeal is filed without giving an undertaking or bond to the defendant, with two good sureties, in double the appraised value of the property or double the amount of the judgment, conditioned to pay all damages the defendant may sustain by reason of the sale in case the judgment is reversed.”

John filed the notice of appeal to appeal the judgment against him on August 2, 2021. (Notice of Appeal 2021 08 02). Vicki filed the initial complaint in the instant action over a month after the notice of appeal was filed, and she filed the amended complaint seeking foreclosure and sale of the property over two years later on October 13, 2023. (See Amended Complaint). Clearly, Vicki is attempting to enforce the sale of the property after John appealed the judgment, however Vicki has failed to post a bond as required by S.C. Code Ann. §18-9-130(A)(2), and until she does so, the trial court cannot consider the property to be subject to execution of the judgment.

In denying John’s Motion to Dismiss, the trial court cites to S.C. Code Ann. §18-9-130(A)(1), which provides that “a notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution.” John does not dispute that the filing of a notice of appeal does not automatically stay the execution of a money judgment, however, this provision does not negate Vicki’s requirement to post a bond before she can enforce the sale of the property after a notice of appeal has been filed. As such, Vicki does not have standing to pursue collections against John as far as the property is concerned.

**II. BECAUSE OF A PENDING APPEAL OF THE UNDERLYING ACTION, THE MOTION TO STAY THE COLLECTION PROCEEDINGS SHOULD HAVE BEEN GRANTED.**

After the failed appraisal, John filed a Motion to Stay Proceedings on October 25, 2023. The grounds for the motion were to prevent causing additional unnecessary burden on John by attempting to move forward with the collections proceedings despite the underlying judgment being on appeal. (Motion to Stay 2023 10 25, ¶18). John sought to stay the proceedings until the Court of Appeals rendered a decision on the appeal, which request was more than appropriate and reasonable considering that oral arguments for the pending appeal were scheduled to take place two weeks from the date the motion was filed. *Id.*

Prior to the rehearing on the motion to stay, John filed a supplement to the motion indicating that the Court of Appeals had affirmed the underlying judgment and John had timely filed a Petition for Rehearing. (Supplement to Motion to Stay, 2024 03 27). The Court of Appeals requested that Vicki file a return to the Petition, which she did, and as of the date of the rehearing on the motion to stay, the Petition for Rehearing was ready for consideration by the court<sup>12</sup>. *Id.*

The trial court denied John's motion to stay despite the status of the appeal on the judgment finding that John was required to strictly comply with Rule 241, SCARC, and S.C. Code Ann. §18-9-130 before a stay could be granted. John has previously requested that Judge Weaver, who issued the judgment, consider a stay of the judgment, pursuant to S.C. Code Ann. §18-9-130, however this request was denied. (Tr. March 28, 2024, p.20, lines 11-17). Again, John does not dispute that the filing of a notice of appeal does not automatically stay the execution of a money judgment, which is why he filed the motion to stay. However, considering the posture of the appeal of the underlying judgment, the unnecessary burden upon John by Vicki's pursuit of collections while

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<sup>12</sup> The Court of Appeals denied the Petition for Rehearing after which John timely filed a Petition for Writ of Certiorari on May 13, 2024, which is currently pending before the Supreme Court.

the judgment is under appeal, and the fact that a stay would not prejudice Vicki, John asserts that the trial court erred in denying the motion to stay proceedings.

**III. THE TRIAL COURT ERRED IN CONCLUDING THAT JOHN WILLFULLY VIOLATED THE TRIAL COURT’S ORDER AND FURTHER FINDING HIM TO BE IN CONTEMPT.**

- a. There is no evidence in the record to support a finding that John willfully violated the trial court’s order.

“Contempt results from the willful disobedience of an order of the court.” *Bigham v. Bigham*, 264 S.C. 101, 104, 212 S.E.2d 594, 596 (1975); *Smith v. Smith*, 359 S.C. 393, 396, 597 S.E.2d 188, 189 (Ct.App.2004). “A willful act is defined as one done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law.” *State v. Bevilacqua*, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994) (citing *Spartanburg County Dep’t of Social Services v. Padgett*, 296 S.C. 79, 370 S.E.2d 872 (1988)). The trial court found that John willfully and intentionally violated the Order Granting Motion to Compel, however, there is simply no evidence in the record that demonstrates that John willfully and intentionally violated the trial court’s order.

First, it is important to understand exactly what the trial court’s order required of John. Specifically, the order required John to make the property available “to an agreed upon South Carolina licensed real estate appraiser and/or home inspector at a date and time convenient to the designated real estate appraiser/home inspector.” (Order Granting MTC). Additionally, the order required the appraisal to take place within forty-five (45) days of the date of the order. *Id.* It is undisputed that all parties agreed upon an appraiser, Mr. Lowry, and further agreed that the appraisal would take place at 9:00 am on October 24, 2023, which was within the forty-five-day

deadline. (Tr. March 28, 2024, p.45, lines 3-7). On the morning of the scheduled appraisal, John had been available and waiting for Mr. Lowry to arrive at the property since 8:45 am. (Affidavit of JEV, ¶5). At this point, John had done everything he was required to do pursuant to the trial court's order. The circumstances that occurred after that point were not within John's control and therefore cannot serve as the basis for a finding of a willful violation of the court's order.

It is also undisputed that Mr. Lowry was late to the scheduled appraisal and did not contact Vicki's counsel until 9:40 am to advise that he was running late, and that Vicki's counsel relayed the delay to John's counsel at approximately 9:43 am via email. *Id.* at lines 11-15. The email advised that Mr. Lowry had been "sitting in traffic for an hour"<sup>13</sup> and he would arrive in ten minutes. (Memo in Opposition 2024 03 26, Exhibit A). The primary issue here is that Mr. Lowry failed to communicate his delay in a timely manner. The appraisal was scheduled for 9:00 am, yet Mr. Lowry did not notify anyone of his delay until over forty (40) minutes after he was due to arrive. This should have been communicated to Vicki's counsel when Mr. Lowry realized that he would not arrive by 9:00 am.

When John was informed of the delay at 9:45 am, he advised his attorney that he could not wait any longer because he had a scheduled doctor's appointment at 10:30 am, which was a 20–25-minute drive from the property. (Affidavit of JEV; see also Tr. March 28, 2024, p. 43, lines 5-8). After speaking with John about Mr. Lowry's delay, John's attorney notified Plaintiff's counsel that John would not wait any longer and that the parties would need to reschedule the appraisal so long as Vicki would assume the cost for the next appraisal. (Memo in Opposition 2024 03 26, Exhibit B). When Mr. Lowry arrived at the property around 9:50 am, John also informed Mr.

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<sup>13</sup> To this date, neither Vicki nor Mr. Lowry has provided an incident report or official documentation of the traffic conditions on the morning of the appraisal which caused the delay.

Lowry that he was too late, and that the appraisal would need to be rescheduled due to his 10:30 am doctor's appointment. (Affidavit of JEV).

It is not disputed that John denied Mr. Lowry access to the property, however, this was only because Mr. Lowry was excessively late, and John had to leave the property to make his doctor's appointment on time. The situation giving rise to the failed appraisal does not constitute an intentional and willful violation of the trial court's order, nor does it indicate that John had a specific intent to violate the court's order requiring an appraisal of his home. Furthermore, "[a] good faith attempt to comply with the court's order, even if unsuccessful, does not warrant a finding of contempt." *Ward v. Washington*, 406 S.C. 249, 750 S.E.2d 105 (Ct.App.2013) (quoting *Ex parte Lipscombe*, 398 S.C. 463, 469, 730 S.E.2d 320, 323 (Ct.App.2012)). The evidence in the record supports that John attempted in good faith to comply with the trial court's order, and he substantially complied with the court's order by making the property available for appraisal at the agreed upon date and time. Even after the appraisal did not proceed, only due to the fault of Mr. Lowry, John still demonstrated a willingness to reschedule the appraisal and proposed an alternative solution.<sup>14</sup> As such, there is not sufficient evidence in the record to support a finding that John willfully and intentionally violated the court's order compelling the appraisal, thus the trial court erred in finding John in contempt of court.

- b. The trial court did not apply the proper standard of proof in finding John to be in criminal contempt of court.

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<sup>14</sup> John informed Vicki's counsel that he was willing to make the property available for another appraisal so long as he had input on the appraiser and Vicki agreed to pay for the subsequent appraisal. Despite the fact that Vicki would not agree to reschedule the appraisal under those conditions, John retained Burk Y. Herrin, Jr. on December 21, 2023, to conduct an appraisal of the property, further demonstrating that John took steps to comply with the court's order and mitigate any alleged violation of the court's order. (See Motion to Reconsider, 2024 02 12, Exhibit A).

Civil contempt must be shown by clear and convincing evidence, while criminal contempt must be shown beyond a reasonable doubt. *Poston v. Poston*, 331, S.C. 106, 502 S.E.2d 86 (1988). “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.” *Id.* at 111, 502 S.E.2d at 88. “The primary purposes of criminal contempt are to preserve the court’s authority and to punish for disobedience of its orders.” *Id.* (citing *State v. Bevilacqua*, 316 S.C. 122, 447 S.E.2d 213 (Ct.App.1994)). “An unconditional penalty is criminal in nature because it is solely and exclusively punitive in nature.” *Id.*

Here, the trial court assessed an unconditional fine against John in the amount of Five Hundred and 00/100 (\$500.00) Dollars payable to the Charleston County Master of Equity, which is punitive in nature, thus constituting criminal contempt. see *Hicks v. Feiok*, 485 U.S. at 632, 108 S.Ct. at 1429, 99 L.Ed.2d at 731 (“If the sanction is a fine, it is punitive when it is paid to the court.”). As additional sanctions, John was required to pay Vicki’s attorney’s fees and Mr. Lowry’s fees for services. (Order 2024 02 02). While the payment of attorney’s fees is not a criminal sanction, the assessment of an unconditional fine and payment to Mr. Lowry both constitute sanctions for criminal contempt. Thus, the trial court imposed criminal sanctions without a finding of willful violation beyond a reasonable doubt, which is the required standard of proof.

As discussed in detail above, there is not sufficient evidence in the record to support a finding of willful violation, let alone a willful violation beyond a reasonable doubt. The evidence presented to the trial court only demonstrates that the parties agreed to conduct an appraisal on October 24, 2023, at 9:00 am, John made the property available at the specified time, and the appraiser did not show up at the specified time pursuant to the parties’ agreement. John

substantially complied with the trial court's order by consenting to have Mr. Lowry conduct the appraisal on the agreed-upon date and time and making the property available for appraisal. As such, the trial court erred in imposing criminal sanctions against John without finding that he willfully violated the court's order beyond a reasonable doubt.

**IV. EVIDENCE NOT TIMELY FILED PURSUANT TO RULE 6(D), SCRCP SHOULD NOT HAVE BEEN CONSIDERED OR ADMITTED IN SUPPORT OF THE MOTION FOR CONTEMPT AND/OR SANCTIONS.**

As previously discussed, Vicki filed a motion for contempt and/or sanctions on November 3, 2023. Prior to the hearing on the motion scheduled for January 8, 2024, Vicki filed the Affidavit of Kevin Lowry on January 5, 2024, ostensibly in support of the motion for contempt. (See Affidavit of Kevin Lowry 2024 01 08). The trial court was provided with a copy of the affidavit and considered the affidavit in ruling on the motion. (Tr. January 8, 2024, p. 11, lines 3-9). However, this was in error as Mr. Lowry's affidavit was not timely filed pursuant to Rule 6(d), SCRCP. Rule 6(d), SCRCP, provides that "[w]hen a motion is to be supported by affidavit, the affidavit shall be served with the motion; and except as otherwise provided in Rule 59(c), additional or opposing affidavits may be served not later than two days before the hearing."

Vicki was required to file Mr. Lowry's affidavit with her motion for contempt on November 3, 2023. Instead, the supporting affidavit was filed on the Friday before the hearing on Monday, January 8, 2024. While John did file his own affidavit on January 5, 2024, there is no evidence in the record that indicates that Mr. Lowry's affidavit was filed in response to John's affidavit. As such, the trial court erred in considering Mr. Lowry's affidavit.

**CONCLUSION**

For the reasons set forth above, Appellant John Vergeldt respectfully seeks an order from this Honorable Court reversing the trial court’s order on Plaintiff’s Motion for Contempt and Sanctions, Defendant’s Motion to Stay Proceedings and Defendant’s Motion to Dismiss filed on February 2, 2024. Additionally, John seeks an order reversing the trial court’s Form 4 Order issued on March 28, 2024.

Respectfully submitted,

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