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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
The Honorable Vernon F. Dunbar, Circuit Court Judge

Case No. 2025-CP-23-04210
Appellate Case No. 2026-000858

Frank George Rogers, individually and derivatively as a member and on behalf of Exodus Aircraft, LLC,

Respondents,

v.

Joshua Brett Kimbrell, Liliya Shcherba Robertson Kimbrell, Exodus Airways, LLC, Thomas Blake Whitaker, *Defendants*,

of which Joshua Brett Kimbrell and Liliya Shcherba Robertson Kimbrell are the

Appellants.

BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

On March 12, 2026, the Honorable Vernon F. Dunbar, presiding over the Greenville County Court of Common Pleas, held Appellants Joshua Brett Kimbrell and Liliya Shcherba Robertson Kimbrell in willful civil contempt of the Court's Temporary Restraining Order and Consent Preliminary Injunction. (Contempt Order)

Respondent Frank George Rogers filed this action on July 10, 2025, individually and derivatively on behalf of Exodus Aircraft, LLC, asserting claims including breach of fiduciary duty, misappropriation of confidential business information, and conversion. (Complaint) The circuit court issued a Temporary Restraining Order ex parte on July 11, 2025. (July 11, 2025 Order) Appellants were out of the country when the TRO issued and were not served until July 14, 2025, resulting in a finding of the circuit court that the TRO "was not binding upon Defendants until this date." (Contempt Order, p.13)

The parties signed a Consent Order Granting Preliminary Injunctive Relief on July 21, 2025; it was entered on July 22, 2025, and Appellants received notice of entry through electronic service on their then-counsel that day. (Contempt Order, p.8)

Respondents filed a Petition for Rule to Show Cause on August 21, 2025. (RTSC Petition). Appellants answered the Petition on September 26, 2025. (RTSC Answer). The circuit court heard the Rule to Show Cause on December 19, 2025, together with four other motions. (Tr.) Appellants were not present; their prior counsel appeared and defended on their behalf. (Tr. 7:20–8:14)

On March 12, 2026, the circuit court entered the Contempt Order. The court rejected several of Respondents' theories. It found no violation arising from Appellant Josh Kimbrell's July 12–13, 2025 communications with employees and vendors (Contempt Order, p.14); no violation arising from the disassociation/dissolution form, which was never filed (Contempt Order, p.14); no violation arising from the December 2025 FITSNews article and video, in light of the First Amendment (Contempt Order, p.17-18); and no violation of the Exodus-name provision (Contempt Order, p.18).

The court found Appellants in willful contempt based on email deletions attributed to the period after service (Contempt Order, p.13; 13-14), the July 21, 2025 prospectus email (Contempt Order, p.15), a July 29, 2025 email attaching a profit-and-loss statement (Contempt Order, p.15-16), the non-forwarding of invoice emails (Contempt Order, p.16), and an October 14, 2025 communication described as an “Investor Update” (Contempt Order, p.16).

The court awarded $9,268.75 in forensic-expert expenses as compensatory contempt, directed Respondents' counsel to submit an attorney fee affidavit, ordered production of “all requested documents” within thirty days, and imposed a $250.00 per day fine for any continuing noncompliance. (Contempt Order, pp. 19–21).

Appellants served their Notice of Appeal with this Court on April 8, 2026. On May 5, 2026, the circuit court entered an order approving Respondents' fee affidavit and directing Appellants to pay $70,468.28 in attorney's fees and costs, while acknowledging that payment “may be potentially stayed during the pendency of the appeal.” (Order – Fees and Costs).

Appealability

The Contempt Order is immediately appealable. The Supreme Court has described suffering contempt and appealing from the contempt finding as the “normal course” for testing the underlying orders. *Davis v. Parkview Apartments*, 409 S.C. 266, 280 (2014). The Order here imposes a present monetary judgment of $9,268.75, a fee award since liquidated at $70,468.28, and an accruing fine of $250.00 per day, which are concrete sanctions that determine substantial rights and cannot be effectively reviewed after final judgment.

STATEMENT OF FACTS

Exodus Aircraft, LLC is an air charter company that was owned in equal shares by Respondent Frank George Rogers and Appellant Joshua Kimbrell, who served as its managing member and CEO.

Respondent filed this action on July 10, 2025, and obtained an ex parte TRO on July 11, 2025, while Appellants were on vacation in Bermuda. (Complaint; TRO Motion). The circuit court found that constructive notice was insufficient notice of the TRO and that the TRO "was not binding upon Defendants" until formal service on July 14. (Contempt Order, p.13). On July 21, 2025, the parties signed the Consent Preliminary Injunction; it was entered, and notice given through counsel, on July 22, 2025. (Contempt Order, p. 8).

A. The forensic evidence counted deletions, but did not identify who deleted any emails.

At the December 19, 2025 hearing, Respondents' digital forensics expert, Micah Sturgis, testified that 246 emails or calendar events were deleted from Josh Kimbrell's email account between July 19 and August 2, 2025, and six from Liliya Kimbrell's account in the same window. Tr. 21:13–17; 22:6–8. The July 19 boundary was a limitation of Microsoft's fourteen-day retention window, not a finding about conduct. Tr. 21:20–25; 23:17–25.

No evidence was presented regarding the IP address or the computer from which any deletion occurred. No witness testified to observing either Appellant delete an email. The forensic expert testified that he could state there were numerous emails in the Kimbrells' inboxes in June of 2025 that were no longer there at the time of his examination. Tr. 25:19–23. But he immediately had to admit he had no idea what the content of those emails was. Tr. 26:2.

Alisha Leonard, Exodus's controller, testified she was tasked with monitoring both Appellants' email accounts, so a third party had administrative access to the accounts from which the deletions were counted, and she was the person who provided the investigator and the expert their access. Tr. 29:4–5. As trial counsel argued without contradiction in closing, "[t]he e-mails [Respondents] allege to have been deleted after the date of service, [Respondents] have them." Tr. 123:20–22.

B. The remaining findings rest on two emails, non-forwarded invoices, and one unspecified communication.

The court found Josh Kimbrell forwarded an email titled "Fw: Exodus Aircraft AOC Prospectus" to his personal account on July 21, 2025, the same day he signed, and the day before entry of, the Consent Preliminary Injunction. (Contempt Order, p.15) It found a July 29, 2025 email to Doug Brennan attaching a 2024 profit-and-loss statement violated Paragraphs 4 and 9 of that injunction. (Contempt Order, p.15-16). It found invoice emails from two vendors were "never forwarded" to Exodus, and credited testimony that Exodus discovered approximately $600,000 in outstanding bills. (Contempt Order, p.16). Finally, the Court found an October 14, 2025 "Investor Update" communication to Vin Frey "violated both the TRO and the Preliminary Injunction Order" without identifying any provision of either. (Contempt Order, p.16).

C. The sanctions.

The court found the violations willful, awarded $9,268.75 in forensic-expert expenses as compensatory contempt payable within thirty days, directed a fee affidavit within ten days, ordered Appellants to produce "all requested documents as agreed to by the parties pursuant to the Preliminary Injunction Order within thirty days", and imposed a $250.00 per day fine "until agreement of the parties or further Order of this Court." (Contempt Order, p.21). On May 5, 2026, after the Notice of Appeal was served, the court awarded attorney's fees and costs of $70,468.28, reciting the nature and difficulty of the case, time expended, professional standing of counsel, beneficial results obtained, and customary fees. (May 5, 2026 Fee Order).

STANDARD OF REVIEW

A contempt order may be reversed when it is based on an abuse of discretion. *Means v. Means*, 277 S.C. 428, 431 (1982). An abuse of discretion occurs when a trial court issues a contempt order based on incorrect law or inadequate evidence. *Campione v. Best*, 435 S.C. 451, 457 (Ct. App. 2021). In light of *Stoney v. Stoney*, 422 S.C. 593, 813 S.E.2d 486 (2018), the scope of review is arguably de novo. *Campione*, 435 S.C. at 457 n.1. In this case, Appellants should prevail under either standard.

The burden of proof in a civil contempt proceeding is clear and convincing evidence. *Poston v. Poston*, 331 S.C. 106, 113 (1998); *United Mine Workers of America v. Bagwell,* 512 U.S. 821 (1994). Questions of law are reviewed de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110 (2008).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THE APPELLANTS IN WILLFUL CONTEMPT OF COURT BASED ON THE DELETION OF EMAILS.

Civil contempt occurs when a party willfully disobeys a clear and definite court order. *Campione*, 435 S.C. at 457. An act is willful when it is "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." *Spartanburg Cnty. Dep't of Soc. Servs. v. Padgett*, 296 S.C. 79, 82-83 (1988). Contempt must be proven by clear and convincing evidence, and "before a person may be held in contempt, the record must be clear and specific as to the acts or conduct upon which such finding is based." *Curlee v. Howle*, 277 S.C. 377, 382 (1982).

The findings regarding deletion of emails fail the contempt standard because this record contains no evidence identifying who deleted any emails. As trial counsel argued below, Respondent's forensic expert could not identify the IP address or the computer from which the deletions were made. Tr. 123:9–13. His methodology counted deletion artifacts by comparing two collections of the mailboxes, but could not attribute those artifacts to any human actor. Tr. 20:3–21:11. That same testimony made it clear the Respondent had access to the email accounts, since it was his credentials that were used to access the accounts. Tr. 20:8–19. No witness testified to observing either Appellant delete an email. Tr. 123:16–20.

That lack of observation was particularly important because the accounts were not within Appellants' exclusive control. In addition to the testimony regarding the expert using Respondent's credentials to access the emails, Exodus's controller testified she was tasked with monitoring both Appellants' email accounts and she supplied Respondents' investigator and expert their access to those accounts. Tr. 29:3–7. Whatever inference might be drawn from deletions in an account only its owner could access, there is no similar inference when a third party acting on behalf of the Appellants' opposing party had access to the accounts throughout the relevant period. Evidence consistent with multiple actors is not clear and convincing evidence against any one of them.

The Contempt Order's characterization of this record as "undisputed and unrefuted" (Contempt Order, pp.13; 17) is incorrect. No evidence was ever presented that either Appellant deleted any email. The evidence related to Liliya Kimbrell is even weaker. The expert attributed six deleted items to her account within the recoverable window, but there was no evidence connecting her personally to any of them. Tr. 21:15–17. Willfulness under *Padgett* requires specific intent; six artifacts in an account monitored by a third party is not clear and convincing evidence.

Finally, there was no prejudice proven by the Respondents. They possessed the emails they allege were deleted, a point made by Appellants' lawyer in closing and never rebutted. Tr. 123:21–22. A "deletion" of materials that remain fully available to the moving party is not the destruction of evidence, and it cannot support a willfulness narrative built on concealment. The good-faith principle requires the same result. A party who attempts in good faith to comply with a court order should not be held in contempt. *Ex parte Lipscomb*, 398 S.C. 463, 470 (Ct. App. 2012).

II. THE CIRCUIT COURT ERRED IN FINDING THE APPELLANTS IN CONTEMPT BASED ON CONDUCT THAT OCCURRED BEFORE SERVICE OF THE TEMPORARY RESTRAINING ORDER AND BEFORE THE ENTRY OF THE CONSENT PRELIMINARY INJUNCTION.

The Contempt Order correctly holds that the TRO "was not binding upon Defendants" until formal service on July 14, 2025, and that constructive notice was insufficient: "Until the TRO was formally served upon Defendants, it cannot be legally found and concluded that service was effective and proper prior to July 14, 2025." (Contempt Order p.13). The court also found the communications of July 12–13 could not violate the TRO "prior to service." (Contempt Order, p.14). Those holdings were correct, but the Order contradicts them.

Three findings rely on pre-service conduct. Finding 5[1] declares it “undisputed and unrefuted” that Defendants deleted or transferred thousands of emails “beginning on July 12, 2025, while on vacation.” Finding 16 states that “documents and emails were destroyed or deleted since the issuance of the TRO dated July 11, 2025,” and again invokes the “thousands of emails” deleted “beginning on July 12.” Finding 19 is the same. (Contempt Order, p.13; 17-18). Each of these relies on actions taken during a period of time when the court held the TRO did not bind Appellants. The forensic record confirms this. The expert's recoverable window began July 19, and the “thousands” figure describes June 2025 through July 12, 2025, which was before service, and largely before the TRO existed. (Contempt Order, p.11; Tr. 21:20–25). More importantly, the expert never said there was proof of “thousands” of emails being deleted. Instead, he said he could not tell, and “…we could be looking at hundreds or thousands.” Tr. 23:1–5. But he also qualified that statement by admitting there was no way to tell, and for purposes of this appeal, there was no proof.

The Order contains a second factual error. Finding 4 states Respondents proved willful violations of “Provisions 3 and 11” of the TRO; Finding 10 holds Respondents “failed to prove Kimbrell violated Provisions 1 and 3.” (Contempt Order, p.13-14). Both cannot be true, and the record must be “clear and specific as to the acts or conduct” underlying contempt. *Curlee*, 277 S.C. at 382. Conflicting findings in a contempt order do not meet this standard.

The July 21 prospectus finding presents the clearest legal error. The Order finds Josh Kimbrell signed the Consent Preliminary Injunction on July 21, 2025, and “[t]hat very same day” forwarded the prospectus email to his personal account, holding this a willful violation of Paragraph 4's surrender obligation. (Contempt Order, p.15). But the Order also establishes the injunction was entered and notice of entry given through counsel on July 22, 2025. (Contempt Order, p.8).

[1] The “Findings” refer to the paragraph numbers in the Contempt Order.

A consent agreement becomes an enforceable order of the court only upon entry. Conduct on July 21 cannot willfully disobey an order that did not exist until July 22. Contempt is the willful disobedience of "a clear and definite court order," *Campione*, 435 S.C. at 457. An obligation cannot be disobeyed before it becomes binding, and a party cannot form the *Padgett* specific intent to violate an order not yet in force.

These errors call the entire contempt order into question. The pre-service deletions supplied the Order's finding of concealment and its willfulness rationale and the July 21 email is one of only two specific communications found contemptuous under the injunction. Because the adjudication rests in material part on conduct outside the binding period of each order, by the Order's own chronology, it should be reversed.

III. THE CIRCUIT COURT ERRED IN FINDING THE APPELLANTS IN CONTEMPT FOR OBLIGATIONS THAT WERE NEVER CLEARLY IMPOSED AND IMPOSED A FINE BASED ON AMBIGUOUS ORDERS.

To support contempt, the language of the underlying order "must be clear and certain rather than implied." *Welchel v. Boyter*, 260 S.C. 418, 421 (1973). Two of the remaining findings, and the coercive sanction itself, do not meet that standard.

A. The invoice findings rest on an implied duty.

The Order holds Appellant Josh Kimbrell in contempt for invoice emails that were "never forwarded" to Exodus, crediting testimony that Exodus later discovered approximately $600,000 in outstanding bills. (Contempt Order, p.16).

Paragraph 4 of the injunction obligates Kimbrell to "surrender to Plaintiffs' counsel all business records and all information in his possession and control." (Consent Order, p.2). Paragraph 9 obligates him to preserve materials and not destroy, lose, or remove them. (Consent Order, p.3). Neither paragraph imposes an affirmative, ongoing duty to monitor an email account and to forward each incoming vendor invoice. An obligation of that kind was not imposed, and contempt cannot rest on a duty implied after the fact. *Welchel*, 260 S.C. at 421.

B. The Vin Frey finding identifies no order provision at all.

The Order states that an October 14, 2025 "Investor Update" communication to Vin Frey "violated both the TRO and the Preliminary Injunction Order" and "impacted the ongoing business operations of Exodus." (Contempt Order, p.16). The finding does not describe a specific provision of either order, does not articulate a standard beyond "impact," and cannot be reconciled with the court's own holding that Kimbrell's communications with third parties about his departure did not violate the status-quo provision. (Contempt Order, p.14).

A contempt record must be "clear and specific as to the acts or conduct upon which such finding is based," *Curlee*, 277 S.C. at 382, and a finding that any communication "impacting" the company is contemptuous, without linking the obligation to the text of an order, does not meet that standard.

C. The purge condition is indeterminate.

The Order directs Appellants to produce "all requested documents as referenced in the TRO and Preliminary Injunction Order" within thirty days and imposes a $250.00 per day fine thereafter until Appellants "produce the requested documents and abide by the terms of the Court's Orders." (Contempt Order, pp. 19–20). The Order does not identify which documents remain outstanding and it does not analyze Appellants' representation, made through counsel at the hearing, that every business record in their possession had been produced. Tr. 130:6–8. It conditions the fine's termination on open-ended compliance with "the terms of the Court's Orders" generally. Based on this order, Appellants cannot know when, or whether, they have purged.

That indeterminacy is fatal to the sanction's civil character. The essence of a civil, coercive sanction is that the contemnor "carr[ies] the keys of [his] prison in [his] own pocket[]" and can end the sanction at any moment by compliance. *Poston*, 331 S.C. at 112 (quoting *Hicks v. Feiock*, 485 U.S. 624 (1988)). Where compliance is undefined or impossible, as with emails the expert testified are permanently unrecoverable, Tr. 24:1–6, a per diem fine does not coerce; it punishes. An unconditional penalty is criminal in nature and may not be imposed without the procedural protections attending criminal contempt, including proof beyond a reasonable doubt. *Poston*, 331 S.C. at 111–13. At minimum, the sanction must be vacated and any purge condition remanded for specification of the precise conduct required.

IV. THE MONETARY SANCTIONS IN THIS CASE WERE IMPROPER.

A. The $9,268.75 compensatory award.

Compensatory contempt is "a money award for the plaintiff when the defendant has injured the plaintiff by violating a previous court order," and it "must of course be based upon evidence of complainant's actual loss." *Curlee*, 277 S.C. at 386–87. The award here reimburses forensic-expert expenses incurred to prove violations. (Contempt Order, p.19). If the contempt adjudication falls, as Arguments I through III establish it must, the compensatory award predicated on proving that contempt falls with it. Independently, the forensic project counted deletions of emails Respondents possess, in accounts their own controller monitored. An investigation that confirmed the absence of loss is not a proper foundation for a loss-based award.

B. The $70,468.28 fee award.

The March 12 Order directed a fee affidavit on the stated ground that the failure to provide tax documents "also constitutes discovery abuse pursuant to Rules 30 and 37," (Contempt Order, p.19), and on May 5, 2026, after the Notice of Appeal was served, the circuit court awarded fees and costs of $70,468.28. (Fee Order, p.1). That award is derivative of the Contempt Order and exists only because the March 12 Order directed it, as compensation for litigating the contempt. Reversal of the Contempt Order necessarily vacates the fee award.

The award is also legally erroneous. In civil contempt, "[t]he correct measure for attorney's fees awards ... focuses on the reasonableness of the fees sought and the benefit obtained," because "[f]ee awards in contempt serve to reimburse a party for the reasonable fees and costs incurred to enforce a court order, not to punish." *Campione*, 435 S.C. at 461–462 (holding it error, though harmless there, to apply the general domestic-relations fee factors instead of *Miller v. Miller,* 375 S.C. 443 (Ct. App. 2007) and *Poston*). The May 5 order recites those general factors (the nature and difficulty of the case, time expended, professional standing, beneficial results, and customary fees) and contains no findings tying $70,468.28 to the reasonable cost of enforcing the orders at issue, as opposed to litigating this case at large. The award also invokes Rules 30 and 37, SCRCP, though no Rule 37 motion or order to compel was at issue in the Rule to Show Cause; a contempt proceeding is not a discovery-sanctions proceeding, and Rule 30 governs depositions. The fee award should be vacated, or at minimum reversed and remanded for findings under the correct standard.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the circuit court's March 12, 2026 Contempt Order; vacate the $9,268.75 compensatory award, the $70,468.28 attorney fee and cost award, and the $250.00 per day fine; and remand with instructions. In the alternative, Appellants request that the Court vacate the coercive sanction and remand for entry of an order specifying with particularity the conduct required to purge any contempt, and reverse and remand the fee award for findings under *Miller* and *Poston*.

Respectfully submitted,

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