

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

RECEIVED

OCT 10 2014

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge
Case No. 2013-CP-10-4366

Appellate Case No. 2014-001963

BTM Machinery, Inc.,.....Respondent,

v.

Michael J. Finley, Finley & Associates,
LLC, Kathryn A. Finley, Wilbur
Ross McMillan, Jr. and 4M Iron, LLC,.....Defendants,

of whom Michael J. Finley is the.....Appellant.

**APPELLANT MICHAEL J. FINLEY'S MEMORANDUM IN SUPPORT OF
APPEALABILITY**

Pursuant to the Court's request, Appellant Michael J. Finley, by and through the undersigned counsel, submits this memorandum on the issue of appealability. For the reasons that follow, the instant matter challenging the circuit court's finding of contempt and award of fees and costs is a final order affecting a substantial right and is, therefore, immediately appealable.

BACKGROUND/PROCEDURAL HISTORY

This appeal challenges an award of attorney and expert fees premised on a finding of contempt arising out of a year-and-a-half long dispute regarding the production of electronically

stored information contained on Appellant's computer. During that time frame, hearings regarding the production were conducted on July 29, 2013, and June 13, 2014. The July 29, 2013 hearing concerned Respondent's request for temporary injunctive relief, and was denied by form order dated September 4, 2013. Following this hearing, the circuit court issued an order on October 9, 2013, requiring Appellant to produce his computer. (See October 9, 2013, Order attached hereto as Exhibit "A").

Pursuant to the order, Appellant produced his computer to Respondent's computer forensic expert, Mr. Steven Abrams. However, a dispute thereafter arose regarding certain files which Appellant merely moved for purposes of organization, as well as Appellant's deletion of certain spam and personal emails having no relevance to the present case. Respondent alleged Appellant's actions violated the Court's October 9, 2013 Order and resulted in spoliation of evidence.

Thereafter, on June 13, 2014, a hearing was held on the issues of spoliation and Respondent's renewed request for injunctive relief. At the hearing, the issue of attorneys' fees and costs as well as expert fees incurred as a result of the alleged spoliation was addressed. Notably, no finding of contempt had been made at this time. On July 29, 2014, the Circuit Court filed the order at issue in this appeal, entitled "Order Awarding Attorneys' Fees and Costs and Expert Fees to Plaintiff." The Order specifically finds Appellant in contempt, stating:

[T]he Court finds that Defendant violated this Court's order by deleting and/or modifying files on his computer and electronic devices which resulted in the filing of the Plaintiff's motion and belabored Mr. Abram's attempt to analyze Defendant's computer and electronic storage devices. Therefore, the Court orders Defendant Michael J. Finley to pay:

- I. Mr. Steven Marc Abrams in the amount of \$14,380.36 (See Exhibit A);
- II. Mr. Brian C. Duffy, attorney for Plaintiff, in the amount of \$8,643.00 (See Exhibit B);

III. Mr. K. Douglas Thornton, attorney for Plaintiff, in the amount of \$2,317.50 (See Exhibit C as revised by this Court).

(Exhibit A, Order Awarding Attorneys' Fees and Costs and Expert Fees to Plaintiff). Because Appellant disputes the basis for the Court's contempt finding as well as the amount of fees and costs awarded, Appellant timely filed the instant appeal.¹

LAW/ANALYSIS

I. THE CIRCUIT COURT'S ORDER FINDING APPELLANT IN CONTEMPT AND AWARDING FEES AND COSTS IS IMMEDIATELY APPEALABLE.

"The right of appeal arises from and is controlled by statutory law." Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). "An appeal ordinarily may be pursued only after a party has obtained a final judgment." Id. (citing S.C. Code Ann. § 14-3-330(1); Rule 72, SCRPC; Rule 201(a), SCACR). "Absent a specialized statute, an order must fall into one of several categories set forth in Section 14-3-330 in order to be immediately appealable." Id. In particular, § 14-3-330 authorizes appellate jurisdiction of the following orders:

(1) intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

¹ Due to a scrivener's error regarding an incorrect reference to "42,000 deleted e-mails" when in fact the order concerned "42,000 deleted files," Appellant filed a motion to alter or amend which tolled the time for appeal.

S.C. Code Ann. § 14-3-330. “An order ‘involves the merits,’ as that term is used in Section 14-3-330(1)[,] and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense.” *Id.* at 7, 630 S.E.2d at 467 (footnote omitted).

A. The Circuit Court’s finding of contempt is a final judgment that is immediately appealable.

“A contempt order . . . is a final order that is immediately appealable.” *Hooper v. Rockwell*, 334 S.C. 281, 291, 513 S.E.2d 358, 364 (1999). Such orders are consistently reviewed by our courts as immediately appealable. *See e.g. Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.*, 713 S.E.2d 624, 625 (2011) (review of a trial court’s imposition of severe sanctions and award of fees for the delay created by Appellant’s attempt to remove action to federal court); *Hooper*, 334 S.C. at 291-92, 513 S.E.2d at 364-365 (order holding mother in contempt for failing to undergo psychological testing in compliance with consent order that was entered after her children were taken into emergency protective custody was immediately appealable); *Jarrell v. Petoseed Co., Inc.*, 500 S.E.2d 793 (Ct. App. 1998) (order finding seller liable for civil compensatory contempt was appealable, even though damages were undetermined and fraud claim had not been decided, since order involved merits and determined substantial matter forming underlying cause of action).

Here, the July 29, 2014 Order at issue contains (1) a ruling on contempt, and (2) an award of attorneys’ fees and expert fees. Although the Order does not contain the term “contempt,” it is, in effect a contempt order. Contempt is defined as “a disregard of, or disobedience to, the rules or orders of a legislative or judicial body.” CONTEMPT, *Black’s Law Dictionary* (9th ed. 2009) (quoting Edward M. Dangel, *Contempt* § 1, at 2 (1939)). It is also defined as “[c]onduct that defies the authority or dignity of a court or legislature . . . Because such conduct interferes

with the administration of justice, it is punishable, usu. by fine or imprisonment.” Id. (citing Fed. R. Civ. P. 45(e); Fed. R. Crim. P. 42; 18 U.S.C.A. § 401). Similarly, “civil contempt” is defined as “[t]he failure to obey a court order that was issued for another party’s benefit.” Consistent with these definitions, our courts have likewise stated, “[c]ontempt results from the willful disobedience of a court order.” Ex parte Cannon, 685 S.E.2d 814, 824 (Ct. App. 2009). Given these defining characteristics, the Circuit Court’s finding that Appellant “violated this Court’s order by deleting or modifying files on his computer” and its resulting assessment costs and fees against Appellant for the violation can be regarded as nothing other than a finding of contempt. (See Exhibit A, July 29, 2014 Order). In other words, the Order, while labeled as an award of fees and costs, is both a contempt order and an award of fees.

Furthermore, as noted in Jarrell, “[a] civil compensatory fine is analogous to a tort judgment for damages caused by wrongful conduct.” 500 S.E.2d at 794. Thus, no further action is required in the circuit court to determine the parties’ rights with regard to the underlying matter, and no appellate remedy would likely repair any damage by Appellant’s improper payment of fees pursuant to the Order if these fees were to be paid. See Ex Parte Capital U-Drive-It, Inc., 369 S.C. at 7-8, 630 S.E.2d at 468 (finding order unsealing family court record immediately appealable where (1) access to parties’ divorce record was determined a substantial matter in family court proceeding, (2) no further action was required by family court to determine parties’ rights, and (3) no appellate remedy available to repair any damage done by an improper disclosure of the court file once unsealed). Indeed, the Order at issue is neither a discovery order nor an order compelling discovery for which Appellant has failed to comply. Rather, the July 29, 2014 Order at issue is a contempt order assessing fees and costs against Appellant in the amount of Twenty Five Thousand Three Hundred Forty dollars and 86/100

(\$25,340.86). Thus, pursuant to § 14–3–330(1) and the above-referenced case law, such an order is a final judgment from which an appeal may be taken.

B. The July 29, 2014 Order affects a substantial right by finally determining the issue of contempt and requiring payment of fees and costs within a specified time frame.

“An order affects a substantial right and is immediately appealable when it ‘(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial[,] or (c) strikes out an answer or any part thereof or any pleading in any action.’” Hagood v. Summerville, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005) (brackets omitted) (quoting § 14–3–330(2)). To appeal an order affecting a substantial right, an order must not only involve a right, but it must also “prevent[] a judgment from which an appeal might be taken.” Cobb v. Maccaro, 310 S.C. 303, 305, 423 S.E.2d 156, 157 (Ct. App. 1992) (quoting Ex parte Johnson, 63 S.C. 205, 208, 41 S.E. 308, 309 (1902) (this case has been renamed in the West Reporter, See Rutledge v. Tunno)).

In Cobb v. Maccaro, the Court of Appeals found an order denying a motion to vacate a mechanic’s lien affected a substantial right for purposes of appealability where the order impacted the appellant’s “right to avoid a burden on their title and to avoid defending foreclosure.” 310 S.C. at 305, 423 S.E.2d at 157 (finding order affected a substantial right where appellants contended their right to avoid a burden on their title and to avoid defending foreclosure was impinged upon by the trial judge’s denial of their motion to vacate the mechanic’s lien). Similarly, in the present case, the July 29, 2014 Order awarding fees and costs impacts Appellant’s right to avoid the burden of payment of excessive fees and costs awarded pursuant to an unfounded contempt ruling. Moreover, as noted above, the Order finally determines the contempt issue and thus constitutes a final judgment from which an appeal may

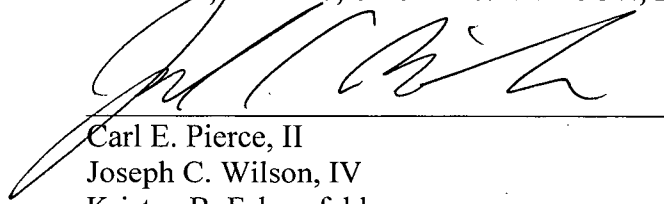
be taken. See Hagood, 362 S.C. at 195, 607 S.E.2d at 709 (noting an order that does not finally end a case or prevent a final judgment from which a party could appeal is not immediately appealable).

CONCLUSION

In sum, to the extent the Order at issue finds Appellant liable for civil compensatory contempt, it is immediately appealable as a final judgment affecting a substantial right. Accordingly, the circuit court's July 29, 2014 Order finding Appellant in contempt is a final judgment from which an appeal may be taken.

Respectfully submitted,

PIERCE, HERNS, SLOAN & WILSON, LLC



Carl E. Pierce, II
Joseph C. Wilson, IV
Kristen B. Fehsenfeld
321 East Bay Street
Post Office Box 22437
Charleston, SC 29401
(843) 722-7733

Attorneys for Appellant Michael J. Finley

October 6, 2014

Other Counsel of Record:

K. Douglas Thornton, Esquire
Thornton Law, LLC
1025 Third Avenue
Conway, South Carolina 29526
(843)488-5858
kdouglasthornton@gmail.com
Attorney for Respondent BTM Machinery, Inc.

Brian C. Duffy
Duffy & Young, LLC
98 Broad St.
Charleston, South Carolina 29401
bduffy@duffyandyoung.com
Attorney for Respondent BTM Machinery, Inc.

Fleet Freeman
Beth Santilli
Law Offices of Fleet Freeman, LLC
941 Houston Northcutt Blvd, Suite 204
Mt. Pleasant, SC 29464
(843)216-0009
ffreeman@fflawfirm.com
Attorney for Ross McMillian Jr. and 4 M Iron, LLC

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS)
NINTH JUDICIAL CIRCUIT)

BTM MACHINERY, INC.,)

Civil Action NO. 2013-CP-10-4366)

Plaintiff,)

ORDER AWARDING)
ATTORNEYS' FEES AND COSTS)
AND EXPERT FEES TO PLAINTIFF)

v.)

MICHAEL J. FINLEY, Individually and)
d/b/a FINLEY & ASSOCIATES,)
KATHRYN A. FINLEY, WILBUR ROSS)
MCMILLAN, JR. and 4M IRON, LLC,)

Defendants.)

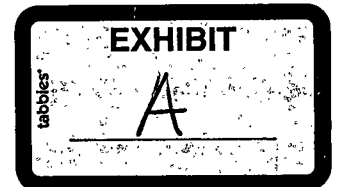
FILED
2014 JUL 29 AM 9:16
JULIE J. ARMSTRONG
CLERK OF COURT
BY

gm

This matter came before this Court on June 13, 2014, upon Plaintiff's request for a hearing. At this hearing, Plaintiff alleged that Defendant Michael J. Finley engaged in a series of acts that were in direct contravention to this Court's order of September 4, 2013, and subsequent order of October 8, 2013. Both orders restrained the Defendant from deleting or altering any electronic data and/or e-mails on his computer and electronic devices containing files in controversy. Based on testimony provided by Mr. Steven Abrams, computer forensic expert for the Plaintiff, the Court finds that Defendant violated this Court's order by deleting and/or modifying files on his computer and electronic devices which resulted in the filing of the Plaintiff's motion and belabored Mr. Abram's attempts to analyze the Defendant's computer and electronic storage devices. Therefore, the Court orders Defendant Michael J. Finley to pay:

- I. Mr. Steven Marc Abrams in the amount of \$14,380.36 (See Exhibit A);
- II. Mr. Brian C. Duffy, attorney for Plaintiff, in the amount of \$8,643.00 (See Exhibit B);
- III. Mr. K. Douglas Thorton, attorney for Plaintiff, in the amount of \$2,317.50 (See Exhibit C as revised by this Court).

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Defendant Finley shall pay the above within forty-five (45) days from the date of this order.

It is further ordered that Defendant shall pay Mr. John Ackerman, computer forensic expert for Defendant, to conduct a word search on the approximate 42,000 deleted e-mails which were contained on Defendant's computer and produce the results to Plaintiff and his expert, Mr. Abrams. If any e-mails contain material subject to the attorney-client privilege, Defendant may attach a privilege log.

IT IS SO ORDERED!

7/24, 2014
Charleston, South Carolina

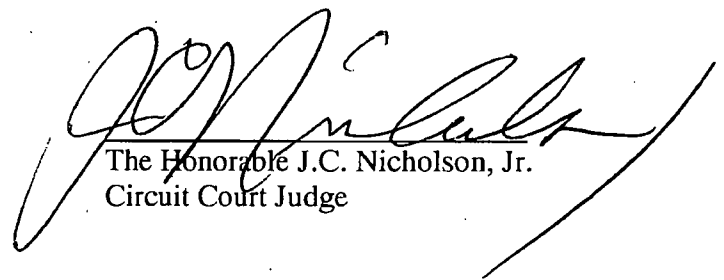

The Honorable J.C. Nicholson, Jr.
Circuit Court Judge

Exhibit A

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

BTM MACHINERY, INC.
PLAINTIFF,)

VS.)

MICHAEL J. FINLEY, et al,
DEFENDANTS.)

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2013-CP-10-4366

AFFIDAVIT OF STEVEN ABRAMS
REGARDING FORENSICS FEES
INCURRED AS A RESULT OF
DEFENDENT MICHAEL FINLEY'S
SPOILIATION OF EVIDENCE

PERSONALLY appeared before me the undersigned who duly sworn and says as follows:

1. My Name is Steven Marc Abrams. I am a licensed attorney and commissioned state constable in South Carolina. My field of concentration is computer forensics examination. My office address is Post Office Box 305, Sullivans Island, SC 29482. My business phone number is (843) 216-1100. I make my living as a digital forensics examiner and instructor of digital forensics technologies.
2. I was retained in this matter by BTM Machinery Inc. ("BTM") to conduct a digital forensics investigation of computers used by Defendants in the above captioned matter. I charge \$250 per hour for my services as a digital forensics examiner.
3. At the conclusion of the June 13, 2014, hearing the Court asked me to prepare an affidavit explaining the added costs of searching for data as a result of the difficulties introduced by Defendants' tampering with the Dell laptop computer prior to turning it over for my examination.
4. To date I have invoiced a total of \$23,005.36 for my services in this matter.
5. As explained below, a reasonable estimate of my charges to date which BTM incurred as a result of Mr. Finley making changes on the computer is \$14,380.36.
6. Putting an exact figure on the added costs of my searches as a result of the way the computer was doctored prior to being presented to me is difficult. There are two parts to this analysis, the first part concerns the duplication of effort required to search Mr. Akerman's image of the Dell computer and the other devices

presented on May 28, 2014 that were said to contain relevant and potentially missing data. Had Mr. Finley presented his computer unaltered, along with any other media and devices containing relevant data per the September 4, 2014 Order initially then all of my efforts to prove spoliation in hopes of compelling production of the missing data would have been unnecessary. While these spoliation analyses are not directly costs of searching for defendant Finley's business and marketing data, the searches that Plaintiff was entitled to make would never have been made available without them. These spoliation costs would not have occurred but for the condition of the Dell computer when it was presented to me. Below I have provided a detailed description of these spoliation analyses and the costs incurred for them.

SPOLIATION ANALYSIS COSTS

7. Through his legal counsel, Richard Hricek, Defendant Finley made a Dell Laptop and a DVD-ROM optical disk available for my forensic investigation on October 7, 2013.
8. As a result of evidence obtained during my forensic examination of the hard drive in the Dell laptop, I became concerned that Mr. Finley had deleted, altered, and moved data on the Dell laptop after the Order and before making the computer available to me. I prepared an affidavit on February 21, 2014, explaining my concerns and circulated it among the lawyers in this matter.
9. In response to my affidavit Mr. Hricek confirmed in writing that files had been deleted prior to my examination. Mr. Hricek then instructed his digital forensics expert, John Akerman, to make me a copy of an image that Mr. Akerman had made of the Dell laptop on September 11, 2013, which contained some of the files deleted prior to my examination. Before my initial spoliation affidavit, and the discussions that ensued thereafter, there had been no disclosure of even the existence of the less altered copy of the Dell hard drive in Defendant's possession since September 11, 2013.
10. From February through May 2014, I repeated my searches of the Dell laptop using Mr. Akerman's September 11, 2013 image, a lengthy and expensive process unnecessary but for Mr. Finley's tampering with the computer prior to my

examination. My costs related to this examination and preparation to testify about the spoliation I observed are listed in my invoice 1099 which totals \$5,125.00.

11. As a result of the evidence tampering done on the Dell laptop by, or at the direction of, Mr. Finley, I attended and testified in two spoliation evidentiary hearings held on May 27, 2014 and June 13, 2014. On May 28, 2014, after an Order that defendant Finley turn over devices or files containing the relevant data from the period beginning in mid-March 2013, Defendant Finley produced a Seagate GoFlex hard drive, a Lexar thumb drive, an Apple iPad, a Dell laptop, an Apple iPod Nano, a Macbook laptop, and a hard drive containing assorted files from defendant Finley's computers, an image of a Kingston SE9 Flashdrive, and Mr. Finley's online dropbox (cloud) account.
12. The May 28, 2014 production did not include all of the mass storage devices known to have been recently used in defendant Finley's Dell laptop during the critical period after Mr. Akerman's image (September 11, 2013) and before my image on October 7, 2013, when most of the known tampering occurred. A complete list of recently used devices obtained from the Windows Registry was provided to Mr. Akerman on May 28, 2014.
13. I have yet to receive at least two of the crucial and requested devices, these include a Kingston Data Traveler 102 thumb drive and a Western Digital Passport hard drive. Both are known to have been used only one and a half days before the first Dell laptop was turned over to me in October 2013. My analysis of the devices provided to me by Defendant Finley has shown to a scientific certainty that the Seagate Free Agent hard drive was wiped clean of data after it was last used on October 5, 2013, to a point that it cannot be recovered.
14. At the June 13, 2013 hearing Mr. Akerman indicated that he had made me copies of images of the heretofore missing Kingston Data Traveler 102 thumb drive and Mr. Finley's Apple iPhone. As of the signing of this affidavit I have not received them.
15. My fees for attending the two hearings related to spoliation and my analysis of the data produced on May 28, 2014, are contained in Invoice 1101 in the amount of \$6,470.36.

16. Thus the added analysis costs to date directly a result of the spoliation by defendant Finley are \$13,380.36.

ADDED COSTS OF INITIAL EXAMINATION AS A RESULT OF DATA TAMPERING

17. The second part of this cost analysis has to do with the unnecessary time spent searching these Finley devices for database files that prior to my examination were kept open and obviously on the Windows desktop. As testimony showed, between the time of Mr. Akerman's image on September 11, 2013 and October 7, 2013, when I was given the computer, Defendant Finley's database files, one obvious target of my examination, were altered, moved off the desktop, and in a few cases deleted. My initial search of the Dell computer would have been much quicker had the database files been on the desktop in the "Database files" directory as they were in the Ackerman image. According, to my invoice #1083, I spent 27 hours on my initial examination of the Dell computer, at a cost of \$7,750.00. Only seven hours of this time was used looking for database files, the balance was used looking for emails and other evidence of the business conducted by Defendants. Thus \$1750 was spent on searching for database files. I would estimate that I would have saved at least half of this seven hours if all the database files had been intact as there were when Mr. Akerman had the machine a month prior. Thus on this one device, the Dell computer, I incurred about \$1,000 in unnecessary searching costs.
18. I am still in the process of searching all of the additional devices presented or identified on May 28, 2014. Until I complete my analysis of these devices I will not know if they contain information that was on the Dell laptop before it was tampered with, but if they do contain such data then it could be argued that the cost of searching these devices also was an unnecessary cost incurred as a result of the changes made to the Dell computer before it was given to me.
19. Nevertheless, in response to the Court's inquiry at this stage, I estimate the costs of my services resulting from the spoliation are the \$13,380.36 from paragraph 16 above and the \$1000 from paragraph 17 above, for a grand total of \$14,380.36.

FURTHER THE AFFIANT SAYETH NOT!

Steven M. Abrams

Steven Marc Abrams

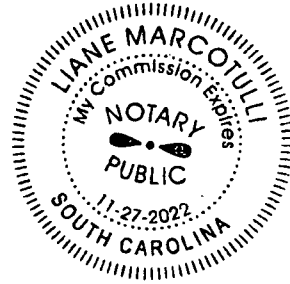
SWORN TO AND SUBSCRIBED BEFORE ME THIS

30 DAY OF June, 2014.

[Signature]

NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: 11/27/2022



Abrams Computer Forensics, LLC

Post Office Box 305
Sullivans Island, SC 29482

INVOICE

(843) 216-1100

DATE	INVOICE #
12/09/2013	1083

BILL TO:

BTM Machinery, Inc
501 Wando Park Blvd.
Suite 110
Mount Pleasant, SC 29466

SHIP TO:

BTM Machinery, Inc
501 Wando Park Blvd.
Suite 110
Mount Pleasant, SC 29466

		SHIP VIA	SHIP DATE	TRACKING NO.
General		P.O. NUMBER	TERMS	PROJECT
			On Receipt	
QUANTITY	DESCRIPTION	RATE	AMOUNT	
1.00	Make Forensic Image of Hard Drive	\$500.00	\$500.00	
2.50	10/17/2013 - Computer Forensics	\$250.00	\$625.00	
0.25	10/22/2013 - Computer Forensics	\$250.00	\$62.50	
0.50	10/24/2013 - Computer Forensics	\$250.00	\$125.00	
7.00	10/30/2013 - Computer Forensics	\$250.00	\$1,750.00	
3.50	10/31/2013 - Computer Forensics	\$250.00	\$875.00	
2.75	11/01/2013 - Computer Forensics	\$250.00	\$687.50	
0.50	11/03/2013 - Computer Forensics	\$250.00	\$125.00	
10.00	11/13/2013 - Computer Forensics and Affidavit	\$250.00	\$2,500.00	
2.00	11/22/2013 - Court Time - Hearing	\$250.00	\$500.00	
		TOTAL	\$7,750.00	

Abrams Computer Forensics, LLC

Post Office Box 305
Sullivans Island, SC 29482

INVOICE

(843) 216-1100

DATE	INVOICE #
03/05/2014	1091

BILL TO:

BTM Machinery, Inc
501 Wando Park Blvd.
Suite 110
Mount Pleasant, SC 29466

SHIP TO:

BTM Machinery, Inc
501 Wando Park Blvd.
Suite 110
Mount Pleasant, SC 29466

		SHIP VIA	SHIP DATE	TRACKING NO.
General		P.O. NUMBER	TERMS	PROJECT
			On Receipt	
QUANTITY	DESCRIPTION	RATE	AMOUNT	
1.00	2/18/2014 - Computer Forensics Review of Hricik's Priv log.	\$250.00	\$250.00	
1.00	2/20/2014 - Computer Forensics Prep for Affidavits	\$250.00	\$250.00	
5.00	2/21/2014 - Legal Drafting two affidavits and attachments	\$250.00	\$1,250.00	
1.00	FEDEX Shipping Affidavit to Doug Thornton	\$35.00	\$35.00	
		TOTAL	\$1,785.00	

Abrams Computer Forensics, LLC

Post Office Box 305
Sullivans Island, SC 29482

INVOICE

(843) 216-1100

DATE	INVOICE #
05/23/2014	1099

BILL TO:

BTM Machinery, Inc
501 Wando Park Blvd.
Suite 110
Mount Pleasant, SC 29466

SHIP TO:

BTM Machinery, Inc
501 Wando Park Blvd.
Suite 110
Mount Pleasant, SC 29466

		SHIP VIA	SHIP DATE	TRACKING NO.
General		P.O. NUMBER	TERMS	PROJECT
			On Receipt	
QUANTITY	DESCRIPTION	RATE	AMOUNT	
1.00	5/15/2014 - Computer Forensics Ackerman Image	\$250.00	\$250.00	
1.50	5/16/2014 - Meeting with Client	\$250.00	\$375.00	
3.00	5/20/2014 - Computer Forensics Ackernam Image	\$250.00	\$750.00	
7.50	5/21/2014 - Computer Forensics Statistical Analysis Dell vs Mac	\$250.00	\$1,875.00	
5.00	5/22/2014 - Computer Forensics Statistical Analysis	\$250.00	\$1,250.00	
2.50	5/23/2014 - Trial Preparation	\$250.00	\$625.00	
			TOTAL	\$5,125.00

Abrams Computer Forensics, LLC

Post Office Box 305
Sullivans Island, SC 29482

INVOICE

(843) 216-1100

DATE	INVOICE #
06/18/2014	1101

BILL TO:

BTM Machinery, Inc
501 Wando Park Blvd.
Suite 110
Mount Pleasant, SC 29466

SHIP TO:

BTM Machinery, Inc
501 Wando Park Blvd.
Suite 110
Mount Pleasant, SC 29466

		SHIP VIA	SHIP DATE	TRACKING NO.
General		P.O. NUMBER	TERMS	PROJECT
			On Receipt	
QUANTITY	DESCRIPTION	RATE	AMOUNT	
4.00	5/27/2014 - Court Time - Spoliation Hearing	\$250.00	\$1,000.00	
3.00	5/29/2014 - Hard Drive Media	\$115.12	\$345.36	
2.00	5/29/2014 - Make Forensic Image of Hard Drive (Wiped Seagate + Second Dell)	\$500.00	\$1,000.00	
0.25	6/2/2014 - Make Forensic Image of Lexar Thumb drive	\$500.00	\$125.00	
1.00	6/2/2014 - iPad Image and Report	\$750.00	\$750.00	
8.00	6/9/2014 - Computer Forensics Analysis of Spoliation	\$250.00	\$2,000.00	
5.00	6/13/2014 - Court Time - Spoliation Hearing	\$250.00	\$1,250.00	
			TOTAL	\$6,470.36

Exhibit B

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

BTM Machinery, Inc.,) Civil Action No. 2013-CP-10-4366

Plaintiff,)

v.)

AFFIDAVIT OF ATTORNEY'S FEES

Michael J. Finley, individually and d/b/a)
Finley & Associates, Kathryn A. Finley,)
Wilbur Ross McMillan, Jr. and 4M Iron,)
LLC,)

Defendants.)

Brian C. Duffy, being first duly sworn, deposes and says:

1. My name is Brian C. Duffy, and I am a citizen and resident of the State of South Carolina. I am over eighteen years of age, am competent to make this affidavit, and do so of my own personal knowledge.
2. I am a member of the law firm Duffy & Young, LLC, and I serve as co-counsel to Plaintiff BTM Machinery, Inc. in the above-referenced matter.
3. In this case my firm charges my time at the hourly rate of \$350.00; associate attorneys at the hourly rate of \$250.00; and paralegals at the hourly rate of \$125.00.
4. I have been asked by the Court to prepare and Affidavit of Fees resulting from the spoliation issue in this case.
5. I and others in my firm keep detailed and contemporaneous time entries for the purpose of submitting invoices to our client, BTM Machinery, Inc.
6. I have reviewed the invoices and time spent on this matter and believe them to be reasonable for the work done in this case.

7. A reasonable approximation of fees from my firm that BTM incurred as a result of the Finley spoliation is \$8,643.00.
8. While several entries are easily discernible as resulting from the spoliation issue, our records do not always specify precisely when an issue regarding the spoliation was addressed during our work with Mr. Abrams or in preparation for the hearings since multiple issues were addressed during those times. For fee entries that included work on the spoliation issue but do not segregate the time spent on that issue, therefore, I arrive at the figure included here by applying a multiple representing the estimated percentage of time spent on the spoliation issue as described below.
9. I estimated that (a) in preparing for the May 27 hearing, 15% of my time was dedicated to the spoliation issue; (b) in preparing for the June 13 hearing, 33% of my time and of my paralegal's time was dedicated to the spoliation issue; and (c) 85% of my time and my paralegal's time at the June 13 hearing was so dedicated.
10. Of the total fees in Paragraph 7 above addressing spoliation issues, the following subparagraphs show the amounts included in that total which are derived from the percentages described herein.
 - a. 15% of preparing for May 27, 2014 hearing: 4 hours at \$350 per hour = \$1,400.00
 - b. 33% of preparing for June 13, 2014 hearing
 - i. My time: 7 hours at \$350 per hour = \$2,450.00
 - ii. Paralegal time: 3.8 hours at \$125 per hour = \$475.00
 - c. 85% of time at June 13, 2014 hearing
 - i. My time: 3.5 hours at \$350 per hour = \$1,225.00

ii. Paralegal time: 3.5 hours at \$125 per hour = \$437.00

12. The total of fees of Duffy & Young, LLC from May 1, 2014 through June 13, 2014 in addressing spoliation in this matter total \$8,643.00.

FURTHER AFFIANT SAITH NOT.

This 10th day of July, 2014.



Brian C. Duffy (SC Bar No. 16247)

Duffy & Young, LLC

96 Broad Street

Charleston, SC 29401

(843) 720-2044 (tel)

(843) 720-2047 (fax)

bduffy@duffyandyoung.com

SWORN TO AND SUBSCRIBED before me this
10th day of ~~June~~ ^{July}, 2014.

Sarah E. Stives
Notary Public for South Carolina

My Commission Expires: Feb. 14, 2022

Exhibit C

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

COURT OF COMMON PLEAS
BUSINESS COURT -9TH CIRCUIT
CASE NO.: 2013-CP-10-4366

BTM MACHINERY, INC.,)
)
PLAINTIFF,)

VS.)

AFFIDAVIT OF ATTORNEY'S FEES
REGARDING SPOILATION

MICHAEL J. FINLEY,)
FINLEY & ASSOCIATES, LLC,)
KATHRYN A. FINLEY,)
WILBUR ROSS McMILLAN, JR.,)
and 4M IRON, LLC,)
)
DEFENDANTS.)

PERSONALLY appeared before me the undersigned, K. Douglas Thornton, who being first duly sworn, deposes and states as follows:

1. I am a licensed attorney in good standing in the State of South Carolina, and am active member of the Horry County Bar Association. I am co-counsel with Brian Duffy, Esquire, in the present action, representing the Plaintiff.

2. I have been representing BTM since the inception of this litigation, and have expended many hours dealing with all issues presented in this case, including the spoliation of evidence issue. I have attached hereto as Exhibit "A", invoices reflecting time expended by me regarding the spoliation issues consisting of 25.15 hours. Because BTM Machinery, Inc. is owned by my nephew, I only charged \$150.00 per hour. My normal hourly rate is \$250.00 per hour. At \$150.00 per hour, this comes to \$3,367.50

3. In submitting my bill for services rendered on behalf of BTM Machinery, Inc., pursuant to this Court's instructions, I made every effort to include only time expended by me specifically addressing Mr. Finley's deletion of information from his computer, before it was delivered to Steve Abrams in accordance with this Court's Order. As with Mr. Duffy's time records my invoices are reasonably detailed, but do not ordinarily articulate time expended by me on specific issues. Those invoice entries between the dates of 10/28/13 and 4/24/14 are for much less than my entire time devoted to this case during those dates, and in my opinion were caused by our efforts to establish the amount and type of data that had been deleted by Mr. Finley. As the evidence of these deletions was ascertained by Mr. Abrams, I began devoting more of

BTM Machinery, Inc. vs. Michael J. Finley, etc.
Case No.: 2013-CP-10-4366

Affidavit of Attorney's Fees - K. Douglas Thornton

my time to developing the Plaintiff's position on the issue. As the May 27, 2014 hearing approached, the spoliation issues also required that we deliver all pertinent information to Defendant Finley's expert, to avoid the potential of Mr. Ackerman contending that he did not have adequate information to either agree with or dispute Mr. Abram's findings and conclusions on this issue. Doing so required negotiation and conclusion of an additional confidentiality agreement for the production of data. None of this time has been included.

4. As my April 24, 2014 entry indicates, I reviewed the file on this date, and pulled exhibits to be used for a Power Point presentation. I discussed this with Steve Abrams, both to avoid overlap, and to confirm with him that he had all evidence that he may need. This would have included, for example, the spoliation letter I had prepared and served with the pleadings, and this Court's Order requiring production of Mr. Finley's computer, which also restrained all parties from altering electronic evidence during pendency of this matter. I spent an additional 3 hours on April 25, 2014, in preparation for the May 27th hearing, which were not included in this invoice on the spoliation issue.

5. With regard to my 5/15/14 invoice entry, I have revised that to reflect that 5.5 of the 7.0 hour total expended by me on that day, was devoted to the spoliation issue. This is approximately 80% of this entry. During this meeting, it was decided that Mr. Duffy would handle the presentation and argument of this motion, including the spoliation issue. A great deal of our time on this date was spent in conference with Mr. Abrams, tracking through this issue.

6. With regards to the 5/24/14 entry, this was time spent reviewing Mr. Abrams' Affidavits and evidence regarding deleted files and information, and reviewing research gathered by me concerning civil and criminal penalties for such conduct.

7. With regards to the 5/27/14 entry, the majority of this Motion argument was actually devoted to the spoliation issue. I only entered half of my actual time spent for travel and attending the hearing on this date.

8. My invoice entries for 5/28, 6/2, and 6/4/14, were all devoted to the spoliation issue, following the Court's ruling on May 27, 2014.

9. I was involved in a "fender bender" accident on my way to Charleston on the morning of June 13, 2014, and would have otherwise attended the entire hearing. We had agreed that Brian Duffy would take primary responsibility for the argument and presentation of this Motion, but I conducted a reasonable amount of preparation to enable me to assist Brian, and to be able to handle the Motion myself, if necessary. These preparations once again, involved my review of all available affidavits and evidence regarding the spoliation issue, reviewing the law I had collected on these issues, again briefly, and organizing evidence which Mr. Duffy or I may have needed. The primary focus of our Motion on June 13, 2014, was to address the spoliation issue.

BTM Machinery, Inc. vs. Michael J. Finley, etc.

Case No.: 2013-CP-10-4366

Affidavit of Attorney's Fees – K. Douglas Thornton

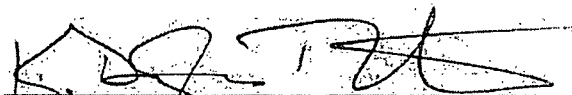
Page 2

Mr. Duffy agreed to cover the law regarding a TRO, and I was very familiar with the relevant facts supporting our position on this issue. I had argued this Motion extensively when it first came before this Court on July 27, 2013.

10. My invoice entry for June 13, 2014, represents the time I actually spent attending this Motion hearing, providing assistance to Mr. Duffy and Mr. Abrams. It also includes a brief review of these issues with our client following this hearing.

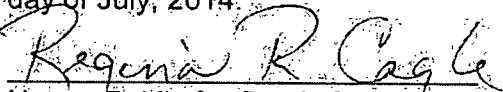
11. As an officer of the Court, I hereby affirm that, to every extent possible, I have not submitted any billable time for the Court's consideration, that was not directly and necessarily devoted to the spoliation issue.

Further your deponent not.



K. Douglas Thornton

SWORN to before me this 11th
day of July, 2014.



Regina R. Cagle
Notary Public for South Carolina
My Commission Expires: 9/1/16

EXHIBIT "A"

Thornton Law Firm, LLC
1025 Third Avenue
Conway, SC 29526

Invoice

Phone # 843-488-5858

Invoice #: 2237
Invoice Date: 6/24/2014
Due Date: 6/24/2014
Case:

Bill To:
BTM MACHINERY, INC.

Date	Description	Hours/Qty	Rate	Amount
10/28/2013	Phone calls to Steve Abrams. Phone conference with Blake about Mr. Abrams search of Finley's computer.	0.35	150	52.50
11/5/2013	Phone conference with Steve Abrams about the information he has found in general terms. Discussed him preparing an Affidavit - in general terms, based on what he has found.	0.35	150	52.50
11/12/2013	Phone conference with Steve Abrams about his Affidavit.	0.5	150	75.00
2/18/2014	Phone conference with Steve Abrams. Reviewing file. Sent Steve another copy of October 9, 2013 Consent Order (for production and protection)	1	150	150.00
2/24/2014	Reviewed Steve Abrams Affidavits.	0.7	150	105.00
4/24/2014	Pulling exhibits to use for power point. Spoke to Steve Abrams.	2	150	300.00
4/25/2014	Working on organizing file. Preparations for May 27th Hearing.	3	150	45.00
5/15/2014	Phone conference with Steve Abrams. To Charleston to meet with Brian, Steve, and Marsh. Prepare for 5/27/2014 Motion.	5.5	150	825.00

Total

Payments/Credits

Balance Due

The total amount is due and payable within ten (10) days of billing. A late payment penalty of 1 1/2% per month will be added to the total amount due if not paid within 20 days of billing. Any balance remaining after thirty days shall be subject to collection unless prior arrangements are made, and shall further entitle Attorney to be relieved as counsel for Client. In the event an outstanding balance of \$1,500.00 or more shall remain unpaid for a period of 15 days or more, Attorney shall be entitled to seek to be relieved as Attorney for Client.

Thornton Law Firm, LLC
1025 Third Avenue
Conway, SC 29526

Invoice

Phone # 843-488-5858

Invoice #: 2237
Invoice Date: 6/24/2014
Due Date: 6/24/2014
Case:

Bill To
BTM MACHINERY, INC.

Date	Description	Hours/Qty	Rate	Amount
5/24/2014	Reviewing file. Preparing for Motion argument (Spoliation evidence and research reviewed)	2.25	150	337.50
5/27/2014	To Court for Motion Hearing	2	150	300.00
5/28/2014	Reviewing emails between Hrick, Brian and Steve/Ackerman. Called Brian (Sarah) and Steve.	1.5	150	225.00
6/2/2014	Phone call to Steve Abrams and Marsh. Phone conference with Blake on the way to the Office.	0.5	150	75.00
6/4/2014	Reviewed emails between Brian and Hrick. Sent email to Brian.	0.5	150	75.00

Total \$2,617.50
Payments/Credits \$0.00
Balance Due \$2,617.50

The total amount is due and payable within ten (10) days of billing. A late payment penalty of 1-1/2% per month will be added to the total amount due if not paid within 20 days of billing. Any balance remaining after thirty days shall be subject to collection unless prior arrangements are made, and shall further entitle Attorney to be relieved as counsel for Client. In the event an outstanding balance of \$1,500.00 or more shall remain unpaid for a period of 15 days or more, Attorney shall be entitled to seek to be relieved as Attorney for Client.

2307.50

Thornton Law Firm, LLC
1025 Third Avenue
Conway, SC 29526

Invoice

Phone # 843-488-5858

Invoice #: 2234
Invoice Date: 6/13/2014
Due Date: 6/13/2014
Case:

Bill To:

BTM MACHINERY, INC.

Date	Description	Hours/Qty	Rate	Amount
6/12/2014	Preparations for TRO in Charleston tomorrow	3	250	450.00
6/13/2014	Attending hearing and travel time to Charleston.	2	250	300.00

Total	\$750.00
Payments/Credits	\$0.00
Balance Due	\$750.00

The total amount is due and payable within ten (10) days of billing. A late payment penalty of 1-1/2% per month will be added to the total amount due if not paid within 20 days of billing. Any balance remaining after thirty days shall be subject to collection unless prior arrangements are made, and shall further entitle Attorney to be relieved as counsel for Client. In the event an outstanding balance of \$1,500.00 or more shall remain unpaid for a period of 15 days or more, Attorney shall be entitled to seek to be relieved as Attorney for Client.

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge
Case No. 2013-CP-10-4366

Appellate Case No. 2014-001963

RECEIVED

OCT 10 2014

SC Court of Appeals

BTM Machinery, Inc.,

Respondent,

v.

Michael J. Finley, Finley & Associates,
LLC, Kathryn A. Finley, Wilbur
Ross McMillan, Jr. and 4M Iron, LLC,

of whom Michael J. Finley is the.....Appellant.

PROOF OF SERVICE

I certify that I have served all counsel of record a copy of Appellant Michael J. Finley's Memorandum on Appealability via United States Mail, postage prepaid on Oct 7, 2014.

PIERCE, HERNS, SLOAN & WILSON, LLC



Carl E. Pierce, II
Joseph C. Wilson, IV
Kristen B. Fehsenfeld
321 East Bay Street
Post Office Box 22437
Charleston, SC 29401
(843) 722-7733

Attorneys for Appellant Michael J. Finley

10/7 2014
Charleston, South Carolina

CARL E. PIERCE, II
LOUIS P. HERNS
ALLAN P. SLOAN, III *◆
JOSEPH C. WILSON, IV †
JAMES G. KENNEDY
WILLIAM P. EARLY

PIERCE, HERNS, SLOAN & WILSON, LLC

ATTORNEYS AND COUNSELORS AT LAW

THE BLAKE HOUSE • 321 EAST BAY STREET
CHARLESTON, SOUTH CAROLINA 29401

POST OFFICE BOX 22437
CHARLESTON, SOUTH CAROLINA 29413

M. TODD RAINSFORD
SONALY K. HENDRICKS
KRISTEN B. FEHSENFELD
CHRISTINA VON ZIELINSKI
RYAN K. MILLER
WHIDBEE S. PERRIN
BENJAMIN C. SMOOT, II

* MEMBER SC & FL BAR
◆ CERTIFIED SC CIRCUIT
COURT MEDIATOR
† MEMBER SC, FL & GA BAR

(843) 722-7733
(843) 722-7732 FAX
www.phswlaw.com

Direct Dial: (843) 725-7726
Email: kellyforrester@phswlaw.com

October 7, 2014

Jenny Abbott Kitchings
Clerk of Court, SC Court of Appeals
P.O. Box 11629
Columbia, SC 29201

RECEIVED
OCT 10 2014
SC Court of Appeals

Re: *BTM Machinery, Inc. v. Michael J. Finley, et al.*
PHSW File No. D2544.00

Dear Ms. Kitchings:

Enclosed, please find the original and seven (7) copies of Appellant Michael J. Finley's Memorandum in Support of Appealability. Please file the original with the court and return a clocked-in copy via the enclosed self-addressed envelope.

Should you have any questions or concerns, please do not hesitate to contact our office.

Kind regards,

Yours truly,



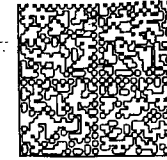
Kelly D. Forrester
Paralegal to Joseph C. Wilson, IV

Enclosures

cc: Fleet Freeman, Esq.
Douglas K. Thornton, Esq.
Brian C. Duffy, Esq.

Pierce, Hems, Sloan & Wilson, LLC
PO Box 22437
Charleston, SC 29413

Priority Mail
ComBasPrice



UNITED STATES POSTAGE
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02 1P \$ 005.49⁰⁰
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Jenny Abbott Kitchings
Clerk of Court, SC Court of Appeals
P.O. Box 11629
Columbia, SC 29201

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OCT 10 2014

SC Court of Appeals

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