

**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

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

v.

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

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

**RESPONDENT’S MEMORANDUM IN OPPOSITION TO
APPEALABILITY OF JULY 29, 2014 ORDER**

Respondent submits the following memorandum in support of its position that the July 29, 2014 “ORDER AWARDING ATTORNEY’S FEES AND COSTS AND EXPERT FEES TO PLAINTIFF,” (“the Order”), issued by the Honorable J. C. Nicholson, Jr., is not immediately appealable.

BACKGROUND/PROCEDURAL HISTORY

Respondent takes exception to the following recitals in Appellant’s
“BACKGROUND/PROCEDURAL HISTORY:”

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SC Court of Appeals

1. Appellant contends that: *During that time frame, hearings regarding the production were conducted on July 29, 2013, and June 13, 2014.* Appellant has failed to include reference to another hearing regarding the spoliation of evidence by Appellant in the process of producing his computer, on May 27, 2014. Relevant excerpts from that Transcript are attached hereto, collectively, as Exhibit “A”.

2. Appellant next contends: *However, a dispute thereafter arose regarding certain [computer] 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.*

The issue of whether Appellant “*merely moved for purposes of organization,*” or deleted substantial amounts of information and files on his computer before turning it over for inspection, violated Judge Nicholson’s October 9, 2013 Order, were extensively argued by both parties at the May 27 and June 13, 2014 hearings. Expert witnesses for both parties testified at length with regards to these issues at the June 13, 2014 hearing. Judge Nicholson clearly concluded that Appellant had either deleted substantial information in direct violation of his Order, or had deliberately taken actions on his computer(s), which made it substantially more difficult and time consuming for Respondent’s forensic expert to find. (See: May 27, 2014 Transcript of Record, p. 14, line 1 – p. 20, line 5, attached hereto as **Exhibit “A”**. See: June 13, 2014 Transcript of Record, p. 45, line 1 – p. 47, line 19; p. 101, line 14 – p. 102, line 23; p. 103, line 3 – p. 105, line 21; p. 108, line 5 – p. 109, line 19.) The June 13, 2014 Transcript references attached hereto collectively as **Exhibit “B”**.

3. Contrary to Appellants contention, the Order *sub judice*, does **not** find Appellant to be in contempt. Echoing Rule 37(a)(4), and (d), SCRCP, the Order specifically held:

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. Abrams' attempts to analyze Defendant's computer and electronic storage devices. Therefore, the Court orders Defendant Michael J. Finley to pay:

In his instructions to Respondent's attorneys for preparation of the subject Order, on the record, Judge Nicholson carefully restricted the award of fees and costs, by awarding only those fees and costs incurred as a result of the Appellant's spoliation, or obfuscation, of electronic evidence on his computer and other electronic devices which he was required to turn over to Respondent's computer forensic expert. (June 13, 2014 Transcript of Record, p. 153, lines 12 – 22.) **(Exhibit "C.")** Although, at the May 27, 2014, hearing, Judge Nicholson distinctly indicated the possibility that he would find the Appellant in contempt if he failed to comply with his verbal order that day from the Bench, (May 27, 2014 Transcript of Record, p. 14, line 15, - p. 15, line 11.), he did not find the Appellant in contempt at that time, nor at the hearing on June 13, 2014. And as previously stated, the Order itself does not find the Appellant in contempt. As discussed more fully below, an Order imposing sanctions for failure to cooperate in discovery is interlocutory and therefore not appealable.

LAW/ANALYSIS

I. THE JULY 29, 2014 ORDER IMPOSING SANCTIONS FOR FAILURE TO COOPERATE IN DISCOVERY IS INTERLOCUTORY, NOT IMMEDIATELY APPEALABLE.

The original Order requiring production of Appellant's computer to Respondent's forensic expert was filed in this case on September 4, 2013. A copy is attached hereto as Exhibit "D." This order clearly required production of this computer as a matter of discovery, and specifically ruled that: *"All other matters of discovery as to all parties are to be left to the parties, their counsel and the court in the normal course of litigation of the underlying Complaint."*

As noted by our Supreme Court in *Davis v. Parkview Apartments*, Opinion No. 27429 (August 6, 2014): *"An Order directing a party to participate in discovery is interlocutory and not directly appealable..."* (Citing: *Ex Parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881 – 882 (1986).) In *Grosshuesch v. Cramer*, 377, S.C. 12, 31, 659 S.E.2d 112, 122 (2008), the Supreme Court similarly noted the well settled law that: *"...discovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute [§14-3-330], involve the merits of the actions or affect a substantial right."* *Hamm v. SCPSC*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994); *Wallace v. Interamerican Trust Co.*, 246 S.C. 563, 568 – 569, 144 S.E.2d 813, 816 (1965).

Rule 37(b)(2) provides that when a party...*"fails to obey an order to provide or permit discovery... the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:* (Emphasis added.) Subsections (A) – (C) provide available sanctions that the Circuit Court may impose,

and subsection (D), provides the trial court with the option of “*treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination...*” Thus the trial court is not required to find a party in contempt as a prerequisite to imposing reasonable sanctions in accordance with 37(a)(4), and/or 37(d). In the present case, Judge Nicholson imposed reasonable sanctions, limited to only the increased costs of discovery caused by Appellant’s spoliation or concealment of information on the computer he was required to produce for analysis by Respondent’s computer forensic expert, pursuant to the court’s order of September 4, 2013. It appears likely that, if Judge Nicholson had found the Appellant to be in contempt, he would have also placed him in jail. (May 27, 2013 Transcript of Record, p. 18, line 25 – p. 20, line 3.) (Exhibit “A.”)

II. APPELLANT WAIVED HIS RIGHT TO APPEAL THE JULY 29, 2014 ORDER, IF IT WERE OTHERWISE APPEALABLE.

A. Appellant’s “OBJECTIONS TO PLAINTIFF’S MOTION FOR COSTS.”

Following the June 13, 2014, hearing, on July 7, 2014, Appellant filed a document formally challenging the court’s award of costs and fees, titled “DEFENDANT FINLEY’S OBJECTIONS TO PLAINTIFF’S MOTION FOR COSTS.” A copy of this objection, including the letter of Appellant’s counsel delivering this objection to Judge Nicholson, is attached hereto as **Exhibit “D”**. Nowhere throughout this six (6) page document, does Appellant’s counsel argue that the Court improperly found Appellant to be “in contempt.” This entire document strenuously argues only against the amount of fees and costs to be awarded by the court, not the imposition of such costs. Appellant’s argument was based upon the Affidavits of Plaintiff’s expert witness and attorneys, which had been delivered to Appellant’s counsel. In the conclusion of this document,

Appellant's counsel contends that the appropriate amount to be awarded for attorney's fees and expert witness fees, was \$10,768.00.

By submitting this objection, without concurrently objecting to any alleged finding of contempt, and without arguing that the award of costs and fees was an error of law or fact, Appellant effectively waived these arguments. *"Waiver is a voluntary and intentional abandonment or relinquishment of a known right."* Eason v. Eason, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009) (quoting Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994)). *Waiver "may be expressed or implied by a party's conduct."* Parker, 313 S.C. at 487, 443 S.E.2d at 391 (citing Mende v. Conway Hosp., Inc., 304 S.C. 313, 404 S.E.2d 33 (1991)). *"An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable."* Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282, 285 (Ct. App. 1987) (Citing Pitts v. N.Y. Life Ins. Co., 247 S.C. 545, 148 S.E.2d 369 (1966)).

It is well settled that: *"The imposition of [discovery] sanctions is generally entrusted to the sound discretion of the Circuit Court."* Davis v. Parkview Apartments, *supra*; (Citing: Downey v. Dickson, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. Ap. 1987). (Remaining citations omitted.) Appellant's objection merely sought to influence the exercise of Judge Nicholson's discretion in this matter, and failed to allege any errors of law, or erroneous findings of fact controlling the award of such costs and fees. *In order for an issue to be preserved for Appellant review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.* State. v. Dunbar, 356 S.C. 138, 587 S.E.2d 691, 693 –

694 (2003). Citing: Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001). In submitting their objection to the award of such costs, without arguing against the propriety of any alleged finding of contempt, or the imposition of discovery sanctions, Appellant essentially stipulated that the award of discovery sanctions was proper, and waived any argument that he had been found in contempt, improvidently or otherwise.

B. Appellant's [Rule 59(e)] "MOTION TO ALTER OR AMEND ORDER AWARDING ATTORNEYS FEES AND COSTS".

On or about August 12, 2014, Appellant filed and served a Rule 59(e) Motion, a copy of which is attached hereto as **Exhibit "E"**. In this Motion, Appellant merely sought to amend a reference to "*deleted emails*" in the Court's July 29, 2014 order, and substitute the term "*deleted files*." Appellant raised no other issues whatsoever in this Motion, and Respondent consented to the amendment of the July 29, 2014 order to reflect the amendment of this terminology. (A copy of the "CONSENT ORDER AMENDING ORDER AWARDING ATTORNEYS FEES AND COSTS," filed herein on September 3, 2014, is attached hereto as **Exhibit "F"**.)

As with Appellant's objection to the award of costs, the Rule 59(e) Motion fails to raise any argument that Appellant was erroneously found to be "in contempt," or that the award of reasonable discovery sanctions was in error. Neither of these issues, therefore, was brought to the trial court's attention, or ruled upon by the trial court. *"It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved."* Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006). *"A party must file [a Rule 59(e), SCRPC] motion when an issue or argument has been raised, but not ruled on, in order*

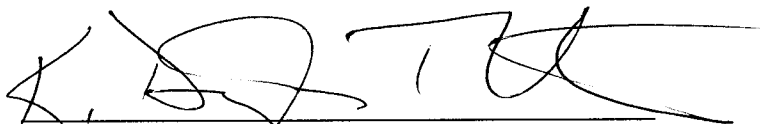
to preserve it for appellant review. Elam v. S.C. Dept. of Transp, 361 S.C. 9.4, 602 S.E.2d 772, 780 (2004).

In addition, Appellant's Notice of Appeal dated September 10 is untimely for any challenge to the underlying order of July 29, 2014. The Appellant's Rule 59(e) Motion did not address the merits of the appealed order in any way, and should not serve to toll the appeal deadline from the July 29, 2014, order.

CONCLUSION

The order appealed from, therefore, is not a "contempt" order as averred by Appellant, but an order imposing reasonable sanctions for failure to cooperate in discovery, and failure to abide by prior court orders, in accordance with Rule 37, SCRPC. This order is, therefore, not appealable. Even if the order was construed to have implicitly held Appellant in contempt, despite the record being completely devoid of any such finding, Appellant waived his right to appeal the order, by stipulating to the propriety of an award of discovery sanctions against him, and by failing to raise these issues before the trial court for determination. Respondent therefore requests that the Appellant's appeal be dismissed, and that all costs and fees herein be awarded to Respondent, pursuant to Rule 222, SCACR.

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'K. Douglas Thornton', written over a horizontal line.

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EXHIBIT "A"

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

COURT OF COMMON PLEAS

BTM MACHINERY, INC.)
PLAINTIFF,)

v.)

TRANSCRIPT OF RECORD
13-CP-10-436

MICHAEL J. FINLEY,)
INDIVIDUALLY AND D/B/A)
FINLEY AND ASSOCIATES,)
KATHRYN A. FINLEY, WILBUR)
ROSS MCMILLAN, JR., AND)
4M IRON, LLC)

DEFENDANTS.)

May 27, 2014
Charleston, South Carolina

BEFORE :

THE HONORABLE J. C. NICHOLSON, JR., JUDGE

APPEARANCES:

BRIAN C. DUFFY, ESQ.
DOUG THORNTON, ESQ.
Attorneys for the Plaintiff

RICHARD A. HRICIK, ESQ.
Attorney for Defendants

FRANCES BAKIS-RAY, RPR
Circuit Court Reporter

1 that the Apple computer at BIM was purchased in May
2 of 2012. And it was furnished for Mr. Finley's use,
3 and it was purchased brand new. And what he did in
4 May of 2012 is he took all the data that was on his
5 Dell computer and he copied it over and on to the
6 computer at BIM, that Apple computer. And when he
7 made copies of files off there that were his emails
8 and contacts and put them back on to his own
9 computer, he was copying back in fact his own
10 information. That Apple computer at BIM, Mr. Finley
11 did not delete any information from; and in fact,
12 all the information from Mr. Finley's computer up
13 until the time he left is and was on the Apple
14 computer at BIM.

15 THE COURT: Well, Mr. Abrams' affidavit
16 says on April the 5th, two days before he was to
17 turn over the computer by court order, he deleted a
18 copy of the MFinley@BTM/machine.com pst archives
19 containing emails taken from BIM.

20 MR. HRICIK: He ---

21 THE COURT: Let me finish.

22 MR. HRICIK: I'm sorry, Your Honor.

23 THE COURT: He also said that he had
24 deleted total data base personally owned by laptop
25 contained two thousand one hundred twelve 537 emails

1 that were disposed of. It also was a total of
2 42,151 deleted after July the 24th, 2013.

3 Now my problem is this, get this
4 information produced properly. It hasn't been
5 produced at this point in time. Now what I'm going
6 to do -- and I'll hear you before I make a final
7 decision. I'm gonna order Mr. Finley to produce
8 that information, to produce it by 5:00 tomorrow.
9 If he doesn't produce it I'm gonna find him in
10 contempt of Court. I'm going to put him in jail
11 until it is produced. Is that clear enough?

12 MR. HRICIK: Yes, sir.

13 THE COURT: We're not going to play these
14 silly games of this gentleman deleting emails,
15 deleting files, after I've ordered it and he knows
16 what's going on. Do you understand?

17 MR. HRICIK: Yes, Your Honor.

18 THE COURT: He's got till 5:00 tomorrow to
19 produce whatever he's going to produce, computer,
20 DVD, whatever is going to be produced, but I want
21 something produced on what he had on those computers
22 as of the middle of March 2013. If he doesn't do it
23 by 5:00 tomorrow he's going to jail until it is
24 produced. You understand?

25 MR. HRICIK: Yes, I do, Your Honor.

1 THE COURT: I can't be any clearer than
2 that.

3 MR. HRICIK: No, you cannot.

4 THE COURT: After that is produced we will
5 reconvene this TRO. Have a good day.

6 MR. HRICIK: If I may, Your Honor.

7 THE COURT: Yes, sir. I'm just not going
8 to put up with this. I'm not going to put up with
9 it, period.

10 MR. HRICIK: Your Honor —

11 THE COURT: If he doesn't understand a
12 court order he better understand it now.

13 MR. HRICIK: Your Honor, I understand but
14 —

15 THE COURT: I'm not playing these silly
16 games, period.

17 MR. HRICIK: Your Honor, I understand and
18 your anger is justifiable. Certainly I understand
19 and I agree. Here's what I can tell you. First,
20 the file that was copied off the BIM Apple computer
21 is still there. The one that he copied on to his
22 computer is, in fact, still there. What he did was
23 is he made a copy of what it was he had copied,
24 worked from it and deleted it. But the original BIM
25 pst file is still on there.

1 THE COURT: That may well be. Just get it
2 produced by 5:00 tomorrow. It's real simple.

3 MR. HRICIK: But Your Honor, here's -- I
4 believe here is the problem. I can only produce and
5 he can only produce what it was and what it is that
6 we have. I've taken whatever steps I could when
7 there was some discovery of a deletion of
8 information by producing the copy that I had made
9 for me pursuant to my rules and obligations to the
10 court and counsel. That's why I produced that copy,
11 Your Honor. Now I can't assure you as I stand here
12 that there is any other source out there. I
13 can't -- you are asking to produce something that
14 may not exist. All I can do is produce what it is
15 we have and what Mr. Abrams has asked for; but I
16 have produced what, in fact, the only copy that I
17 had of that data at that period of time.

18 THE COURT: I'm talking about the middle
19 of March 2013 is what I'm talking about.

20 MR. HRICIK: And I understand, Your Honor,
21 and all I can say to you is we will produce whatever
22 it is we can find, but I've already produced
23 whatever was --

24 THE COURT: Mr. Abrams, what do you think
25 they can find?

1 THE WITNESS: Well —

2 THE COURT: I mean, I don't know. I'm
3 gonna get it produced. Now they're telling me they
4 can't produce it.

5 THE WITNESS: Okay.

6 THE COURT: Which I don't necessarily
7 agree with, but I don't know enough about computers
8 to know whether he's right or wrong.

9 THE WITNESS: Right. I think that what he
10 did give me, Mr. Ackerman's was a good first step.
11 However, I believe that there's more information
12 that they have. If they have any other computer
13 that might have and Mr. Hricik is talking only about
14 a pst file. There were several other BTM files that
15 were taken besides the pst files and those files
16 were on this, some of them were —

17 THE COURT: You think it was on a Dell
18 computer?

19 THE WITNESS: I'm —

20 THE COURT: Are we talking about —

21 THE WITNESS: We don't know. I mean, what
22 I'm saying is that I believe that Mr. Finley has
23 access to other computers that he may have used in
24 the preparation of this data.

25 THE COURT: All right. Let me say this,

1 either produce the information, produce whatever
2 computers he used when he was deleting this
3 information or whatever he was doing. If it's three
4 computers, four computers, I don't care. They're
5 going to be produced and this man is going to
6 examine them. Do you understand?

7 MR. HRICIK: I do, Your Honor.

8 THE COURT: Mr. Finley, do you understand?

9 MR. FINLEY: Yes, sir.

10 THE COURT: You got till 5:00 tomorrow.
11 Before I issue a bench warrant for his arrest I will
12 hear from you again, okay?

13 MR. FINLEY: Yes, sir.

14 THE COURT: Thank you very much.

15 MR. HRICIK: Your Honor, one last point
16 and I understand, is that Mr. Abrams referenced Mat
17 Klein and the way the process of information on
18 those spreadsheets were produced. They were
19 produced by being uploaded to someone who is a third
20 party who sent out an email. Now that of which we
21 have no control. That's why those files were in
22 fact produced that said this is what these emails
23 are.

24 THE COURT: Well, y'all get together, see
25 what he produces, see if it's adequate for Mr.

1 Abrams. If it's not, let me know, we'll reconvene.
2 If he's still playing games, I'm gonna put him in
3 jail till he produces is. It's real clear, okay?

4 MR. DUFFY: Yes, sir.

5 THE COURT: Thank y'all very much.

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7 * * * END OF REQUESTED TRANSCRIPT OF RECORD * * *

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EXHIBIT "B"

1 Q. What is a file slack -- file sir?

2 A. Can I ask you a question?

3 Q. Please do.

4 A. If there was file slack that was on Mr. Akerman's
5 image and there was no file slack found on my image for
6 the same file and we know that Mr. Finley had wiping
7 software because he wiped this drive did he also wipe the
8 file slack between Mr. Akerman's image and my image.
9 That's what this would indicate to me; in other words;
10 trying to cover the forensic.

11 Q. Was there any --

12 A. In other words my question is did your client use
13 any anti-forensic software on the computer before giving
14 it to me?

15 Q. And Mr. Abrams do you have evidence that he did?

16 A. You just handed it to me.

17 Q. Okay. So you're saying the presence of that file
18 indicates...

19 A. Yes.

20 THE COURT: Where are you talking about? Which
21 file on defendant's exhibit 3?

22 THE WITNESS: Your Honor, maybe I should explain to
23 Your Honor what we're ---.

24 THE COURT: --- just tell me which one you're
25 referring to that shows that it was wiped?

1 THE WITNESS: On this exhibit which Mr. Hricik just
2 handed me you will see there are 16 files where in the
3 where found on SNA image its says N-A for not applicable
4 or not available. So the first one is this 4-9-0-E-2-1-
5 5-4.temp.file slack. And then there are several other
6 file slack files throughout the -- throughout here; 16 of
7 them.

8 THE COURT: Okay.

9 THE WITNESS: So if the files had not been touched
10 if the files were left in the same state from Mr.
11 Akerman's image to my image the file slack would not have
12 been changed.

13 Q. [Mr. Hricik] Okay. Mr. Abrams you keep coming
14 back and saying the disk had been professional wiped.
15 Would it not also be in that state if it was never used?

16 A. No. If the disk had never been used -- that's a
17 good question. If the disk had never been used you would
18 have had all the free software that comes on the disk
19 when you buy it at Office Depot.

20 If you've bought a hard drive, I know you use a
21 computer, it comes with the drivers for the drive, it
22 comes with like cloud security and all sorts of other
23 free software. So a brand new drive from Office Depot
24 would have about six or seven files on it and this has
25 nothing on it. This is all zeros. So this has been

1 wiped. Also the fact that this drive was used for a time
2 as indicated by the registry you wouldn't -- there would
3 be no reason to put a wiped drive in your computer on
4 10/5 except maybe to wipe it. But essentially no, that
5 drive is not the way that it would have come and that
6 drive would have been unformatted not formatted.

7 Q. And the registry would have shown if there had been
8 wiping wouldn't it?

9 A. Not necessarily.

10 Q. Okay.

11 A. The registry simply shows -- the registry simply
12 shows me the last date that Windows saw this drive.

13 Q. Okay. But the registry does not show that any
14 wiping occurred on that drive true?

15 A. You're assuming that this drive was wiped using Mr.
16 Finley's computer. He has a bunch of other computers at
17 his disposal that could have wiped it. So the fact that
18 -- I mean you're asking a question that would not -- that
19 doesn't follow.

20 Q. Well Mr. Abrams, you make assumptions about things
21 he's doing to the computer without evidence and then when
22 I ask you for what evidence there is on his computer to
23 do the same thing you tell me well, that could be
24 somewhere else. The questions are very simple ones sir.
25 It's obvious ---

1 Abrams referred to it as litigation.

2 THE WITNESS: Litigation hold.

3 THE COURT: Litigation hold. What normally
4 transpires?

5 THE WITNESS: My typical process would be to do
6 what we did; was get possession of the computer. We did
7 it that night; we didn't wait until the next day. We got
8 it that night and made a forensic copy of it so that all
9 the files and data on the computer are preserved as
10 quickly as possible. I keep a hard drive that has the
11 full forensic image of it in my office for up to two
12 years at least. So it's preserved in any case that I
13 become involved.

14 THE COURT: Well, I guess one concern I have is you
15 did your forensic copy and then at some point in time I
16 guess -- I don't remember the date October...

17 THE WITNESS: 7th.

18 THE COURT: October whenever it was the defendant
19 in this case several or a couple of days before the
20 computer is supposed to be turned over starts moving
21 files around.

22 THE WITNESS: That's true.

23 THE COURT: Is that normally done? Do you advise
24 clients to do that or did he just do this on his own?
25 I'm not trying to get any confidential information

1 specific to this case. I'm talking about in
2 generalities.

3 THE WITNESS: Sure. I would never advise a client
4 to delete any files if they don't have to -- I'm sorry.
5 I would never advise a client to delete any files. We've
6 made a forensic copy of it and certainly going and moving
7 the files and just from looking at it what it looks like
8 he was doing was trying to reorganize them, which
9 wouldn't affect a forensic examiners analysis of it
10 because it was ---

11 THE COURT: --- well it depends on how you do the
12 analysis.

13 THE WITNESS: That's true, that's true.

14 THE COURT: If you use your word search it might --
15 it depends on what kind of word you're looking for.

16 THE WITNESS: Yes, if it's a divorce case an we're
17 looking for cheating I've got a whole set of ---

18 THE COURT: --- I understand ---

19 THE WITNESS: --- terms I look for and then in this
20 case what we were looking at were spreadsheets ---

21 THE COURT: --- I guess my question in this case
22 did it make the forensic examiner's job more difficult?

23 THE WITNESS: It did not.

24 THE COURT: Okay. Thank you, very much. Go
25 ahead.

1 CROSS-EXAMINATION

2 BY MR. DUFFY:

3 Q. Mr. Akerman, weren't files on the desktop that were
4 moved and weren't they originally on the desktop in a
5 folder called something with the name databases in them?

6 A. The name of the folder is database files.

7 Q. And it was on the desktop?

8 A. Correct.

9 Q. Was database files that folder put somewhere else or
10 were the different files moved?

11 A. The entire folder database files based on my
12 analysis the entire folder database files was moved to
13 the My Documents folder. I'm looking at defendant's
14 exhibit 3 showing where those were moved to the My
15 Documents folder.

16 Q. When you say those you mean ---

17 A. --- the database files folder and the contents
18 within it.

19 Q. There is no longer a database file folder on the
20 desktop when Mr. Abrams got it ---

21 A. --- that's true ---

22 Q. --- is that right ---

23 A. --- that's true.

24 Q. There was also no longer some information that had
25 been deleted between the time you got it and Mr. Abrams

1 got it is that right?

2 A. I'm sorry, say that again please.

3 Q. Between the time you got the computer and Mr. Abrams
4 got it there had been information deleted is that right?

5 A. That's true. And may I explain briefly?

6 Q. Sure.

7 A. In my affidavit we provided some explanation as to
8 the files that had been deleted from the desktop that
9 were -- and the relevancy I guess to the case.

10 Q. Sure. And in your opinion or your indication at
11 least that you didn't think they were relevant is that
12 right?

13 A. That's correct.

14 Q. Okay. But do you have any idea whether these web
15 photos involved material or data that had been obtained
16 from BTM?

17 A. The web photos folder was on the desktop in the
18 image that I created that had been produced to the
19 plaintiffs so the plaintiffs could independently evaluate
20 that on their own and decide whether or not it's relevant
21 to the case. I don't have any knowledge as to whether
22 it's relevant to the case but you've got that.

23 Q. But it was deleted before it was given to Mr. Abrams
24 right?

25 A. That's true.

1 Q. Okay. And you didn't give your -- at the same time
2 you didn't give your image to us when Mr. Abrams was
3 going to analyze his did you?

4 A. That's true.

5 Q. Okay. Yet you're saying that it was no different
6 for Mr. Abrams to do his analysis you didn't offer yours.
7 Things were changed and deleted but that's all the same
8 according to you is that right?

9 A. If Steve called me I might have offered mine; I
10 don't know.

11 THE COURT: Did you know those had been deleted?

12 THE WITNESS: I did not.

13 THE COURT: When did you find out they had been
14 deleted?

15 THE WITNESS: When -- after the last hearing when
16 we were discussing the desktop and all the files that had
17 been moved from the desktop and I did a thorough analysis
18 of what was on the two desktops ---

19 THE COURT: --- and then you found out some things
20 had been deleted?

21 THE WITNESS: That's when I found out.

22 THE COURT: When you compared it to your original
23 copy?

24 THE WITNESS: Correct. Everything was on my copy;
25 it just had been moved by the time they gave the computer

1 the litigation hold letter and the suit was filed in July
2 I believe, June or July and the time you got the computer
3 in September?

4 A. I haven't looked at it.

5 Q. Have you seen -- you've testified in your affidavit
6 you've looked over Mr. Abram's affidavits is that right?

7 A. That's true.

8 Q. Did you see that he indicated that there were over
9 40,000 files that had been deleted in that time?

10 A. I did see that.

11 Q. Okay. And do you dispute that?

12 A. I haven't done an independent analysis on that, no.

13 Q. Do you dispute it?

14 A. No, I wouldn't dispute it.

15 Q. Okay. I'm going to ask you to look at plaintiff's
16 exhibit number 1 ---

17 THE COURT: --- let me ask the question. Is the
18 email --- these 40,000 files that were deleted before you
19 did your forensic copy is there any way of retrieving
20 that?

21 THE WITNESS: I was going to say that I wouldn't
22 dispute that 42,000 files were deleted ---

23 THE COURT: --- was it 42,000 or 40?

24 MR. DUFFY: It was over 40. I didn't have exact
25 numbers ---

1 THE COURT: --- but you say ---

2 THE WITNESS: --- 43 ---

3 MR. DUFFY: --- 42 and change.

4 THE COURT: You say 40,000 and you say 42. Is
5 there any way to retrieve them ---

6 THE WITNESS: --- I thought he said 40,000 -- I'm
7 sorry ---

8 THE COURT: --- is there any way that you can
9 retrieve that?

10 THE WITNESS: Some yes, some no, some may have no
11 relevant bearing at all. Every time you ---

12 THE COURT: --- I'm not talking about relevant
13 bearing. That's for them to decide. The problem here is
14 apparently -- I shouldn't comment -- the relevancy not my
15 question. My question is do you have a way of retrieving
16 those 42 items that were deleted or files that were
17 deleted or whatever it was deleted that's my question;
18 whether it's relevant or not.

19 THE WITNESS: Some you can and some you cannot.

20 THE COURT: Why is that?

21 THE WITNESS: The way that the computer works when
22 you delete a file it tells the computer this space is now
23 available to be overwritten. And so as you add new files
24 they are overriding that space potentially. And so some
25 of that data is still there and some of it has been

EXHIBIT "C"

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

COURT OF COMMON PLEAS

BTM MACHINERY, INC.)
PLAINTIFF,)

v.)

TRANSCRIPT OF RECORD
13-CP-10-436

MICHAEL J. FINLEY,)
INDIVIDUALLY AND D/B/A)
FINLEY AND ASSOCIATES,)
KATHRYN A. FINLEY, WILBUR)
ROSS McMILLAN, JR., AND)
4M IRON, LLC)

DEFENDANTS.)

May 27, 2014
Charleston, South Carolina

B E F O R E :

THE HONORABLE J. C. NICHOLSON, JR., JUDGE

A P P E A R A N C E S:

BRIAN C. DUFFY, ESQ.
DOUG THORNTON, ESQ.
Attorneys for the Plaintiff

RICHARD A. HRICIK, ESQ.
Attorney for Defendants

FRANCES BAKIS-RAY, RPR
Circuit Court Reporter

1 MR. AKERMAN: --- is it okay for me ---

2 THE COURT: --- I'm not -- if you're concerned
3 about that then do a privilege log and then I'll look at
4 them, okay. I'm not going to allow y'all to make a
5 decision of whether it's privileged or not privileged so
6 make a privilege log if you think that's a problem.

7 MR. AKERMAN: Okay.

8 THE COURT: I'll make the decision whether it's
9 privileged or not from the privilege log okay. Any other
10 questions?

11 MR. AKERMAN: [Nods negatively]

12 THE COURT: All right. Mr. Abrams, I'm going to
13 ask you to give me an affidavit as to costs involved in
14 your search being more difficult in how the computer was
15 presented to you with the changes that were made in going
16 through the files okay.

17 MR. ABRAMS: Okay.

18 THE COURT: Mr. Duffy, I want you to give me an
19 attorney's fees affidavit as to the cost on the
20 spoliation issue solely; not the lawsuit but the
21 spoliation okay.

22 MR. DUFFY: Yes, sir.

23 THE COURT: I will issue a temporary short order to
24 the effect of what I just said and it will be a temporary
25 order pending my final decision on the total picture of

EXHIBIT "D"

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2013-CP-10-04366

BTM MACHINERY, INC.,)
)
Plaintiff,)
)
vs.)
)
MICHAEL J. FINLEY, individually and)
d/b/a Finley & Associates, KATHRYN)
A.FINLEY, WILBUR ROSS McMILLAN,)
JR. and 4 M IRON, LLC,)
)
Defendants.)
_____)

DEFENDANT FINLEY'S OBJECTIONS
TO PLAINTIFFS' MOTION FOR COSTS

This matter is before the Court on the Court's request for information regarding costs incurred by Plaintiffs related to the alleged spoliation of evidence on Defendant Michael Finley's computer. Among other things, the Plaintiffs, at the Court's request, have provided an attorney fee affidavit and an affidavit from computer expert Steven Abrams that purports to set out the costs incurred by Mr. Abrams that arose from Defendant's alleged spoliation. Combined, the affidavits seek the following costs purportedly incurred due to Defendant's alleged spoliation:

1. \$8,643 in fees incurred by Duffy & Young, LLC
2. \$3,322.50 in fees incurred by Douglas Thornton
3. \$14,380.36 in fees incurred by Steven Abrams.

Defendant Finley does not object to the affidavit and fees incurred by Duffy & Young.

Douglas Thornton

Unlike the fees submitted by Duffy & Young, there is no break down or explanation of how the fees for Mr. Thornton were reached, so it is difficult to address same. It is apparent that the lion's share of the work on the spoliation issue was done by Duffy & Young. Brian Duffy of Duffy & Young argued the issue at the hearings. At the last hearing, Mr. Thornton arrived late and presented no argument.

Based on the totals submitted by Duffy & Young, the lack of documentation or explanation from Mr. Thornton, and the fact that Mr. Thornton did not participate in the latest hearing held on this matter, Defendant would ask that attorney fee award be limited to the \$8,643.00 submitted by Duffy & Young.

Steven Abrams

The Court asked Mr. Abrams to provide an affidavit "as to costs involved in your search being more difficult in how the computer was presented to you with the changes that were made in going through the files." Transcript, Page 153.

Mr. Abrams candidly admits that determining costs arising from the alleged spoliation is difficult, Abrams' Affidavit, Paragraph 5, and it appears that in the first half of the affidavit, or the majority of fees he seeks compensation for, he made no effort to distinguish between his general work and work caused by Defendant Finley moving files from his desktop to other areas. As explained by Defendant's expert, John Ackerman, this difficulty should not be surprising since the typical action taken is to simply search the entire computer, not go through computers file by file or folder by folder.

Mr. Abrams' affidavit opines that he has charged his client over \$23,000 to date for his forensic work, and, of that work, \$14,380.36 was spent solely as a result of the

alleged spoliation. The affidavit divides Mr. Abrams' work into two sections, "Spoliation Analysis Costs" (Paragraphs 7-16) and "Added Costs of Initial Examination as a Result of Data Tampering." (Paragraphs 17-19).

SPOILIATION ANALYSIS COSTS

It should initially be pointed out that this portion of Mr. Abrams' affidavit includes an apparent math mistake. Mr. Abrams seeks all fees reflected in Invoice 1099, or \$5,125, and Invoice 1101, or \$6,470.36. These two figures total to \$11,595.36, but Mr. Abrams totals them to \$13,380.36 (Paragraph 16). This figure should be \$11,595.36.

The majority of Mr. Abrams' affidavit, namely Paragraphs 7 through 16, simply outlines the total costs of all work done by Mr. Abrams from April and May of 2014. This work included two searches of separate copies of Defendant Finley's laptop, meetings with his client, preparation for hearings, (Invoice 1099), the total of all searches done on the other devices turned over by Defendant Finley, and attendance at two hearings (Invoice 1101).

The reason Mr. Abrams' estimate is so high is that he is attributing all searches of Mr. Finley's computers to the alleged spoliation. In other words, Mr. Abrams is implying that he would not have done any searches at all had it not been for Mr. Finley's alleged spoliation.

Mr. Abrams' affidavit is deficient in that the attached invoices, identified as Invoices 1099 and 1101, do not identify any "search" or break out any costs for a "search." They do reference "computer forensics" in several entries, but these entries are not explained, nor is it explained how each one was generated as a result of the alleged spoliation. Furthermore, Invoice 1099 includes entries such as imaging the computer, meeting with

client, and trial preparation (a total of \$1,250) that has no apparent relationship to additional costs of spoliation.

Next, Mr. Abrams addresses his costs related to the acquisition and review of devices that were plugged into the Finley computer after an image of the Finley computer was made on September 11, 2013. Abrams' Affidavit, Paragraphs 11-14. First, there has been no evidence that Mr. Finley "moved" any files on these devices. While Mr. Finley has been frank in discussing the emails removed from his computer prior to September 11, 2013, the testimony at the hearing demonstrated that 1) Plaintiffs have been provided with the September 11, 2013 image, 2) there was no evidence of any intentional deletions of anything following September 11, 2013, only that Mr. Finley continued to use the computer after that date, which necessarily results in the creation and deletion of temporary files that are duplicates of what is on the computer, and 3) there was no evidence of the loss of anything of relevance on the computer after September 11, 2013.

Mr. Abrams next asserts that his attendance at two hearings, as well as his searches of the devices turned over to him, were all fully caused by the alleged spoliation. Abrams' Affidavit, Paragraph 15. Again, the Court should be able to recognize that 1) Mr. Abrams would no doubt have conducted a full search on all the devices regardless of any spoliation claims, and 2) Mr. Abrams attendance at the hearings were related, at least in part, to Plaintiffs' motion for a temporary restraining order. Unlike the attorney fee affidavit, Mr. Abrams makes no effort to attribute any portion of this work to these other activities or explain how this work was driven solely by the spoliation claims.

Mr. Abrams' concludes the first portion of his affidavit by claiming that these costs add up to \$13,380.36 (in fact they add up to \$11,595.36), essentially the total cost of all of his searches of these computers and attendance at hearings. Abrams Affidavit, Paragraph 16. He makes no effort to address the facts that 1) Abrams would have performed the searches on all of these devices regardless of any claims of spoliation, and 2) Abrams would have attended the hearings on the Motion for Temporary Restraining Order regardless of any claims of spoliation.

ADDED COSTS OF INITIAL EXAMINATION AS A RESULT OF DATA TAMPERING

Unlike the first half of the affidavit, the second part of Abrams' affidavit does actually attempt to recognize that Mr. Abrams' work is guided not just by claims of spoliation, but by Plaintiffs' obvious desire to search every computer and device that Defendant Finley has touched in the past two years. He estimates that the additional "unnecessary searching costs" of Mr. Finley's laptop, the only device that allegations of spoliation have been shown, is \$1,000. Abrams' Affidavit, Paragraph 17. Mr. Abrams declines to associate any costs to searching the other devices. Abrams' Affidavit, Paragraph 18.

Based on the foregoing, Defendant Finley would ask that any award of costs with regards to Mr. Abrams' work be limited to the following:

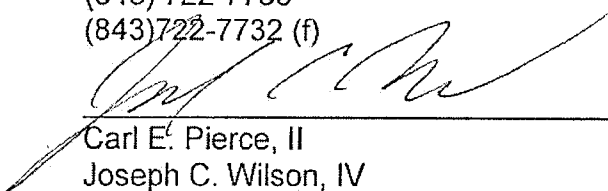
- a. \$1,000 for the additional costs of searching Mr. Finley's laptop;
- b. \$1,125 for half the time of Mr. Abrams' appearance at the last two court hearings.

Consequently, Defendant Finley would ask that the Court limit any award of costs related to Mr. Abrams' work to \$2,125.

CONCLUSION

Based on the foregoing, Defendant Finley would ask that the Court limit its award of costs to the Plaintiffs to \$8,643 in attorney fees and \$2,125 in Mr. Abrams' fees for a total of \$10,768.

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The Blake House
321 East Bay Street (29401)
P.O. Box (22437)
Charleston, SC 29413
(843) 722-7733
(843) 722-7732 (f)



Carl E. Pierce, II
Joseph C. Wilson, IV

Attorneys for Defendants

7/7, 2014
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mail or hand delivered in the manner prescribed by the applicable Rule of Civil Procedure.

This 7 day of July, 2014
Kelley D. Forrester

EXHIBIT "E"

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

MOTION FEE COLLECTED: \$ _____

CONTESTED - AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 BTM MACHINERY, INC.,)
)
 Plaintiff,)
)
 vs.)
)
 MICHAEL J. FINLEY, FINLEY &)
 ASSOCIATES, LLC, KATHRYN A.)
 FINLEY, WILBUR ROSS McMILLAN,)
 JR. and 4 M IRON, LLC,)
)
 Defendants.)
)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2013-CP-40-0466

FILED
 2014 AUG 12 PM 4:34
 JULIE J. ARMSTRONG
 CLERK OF COURT

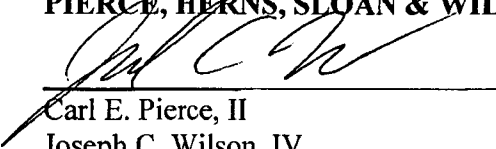
**MOTION TO ALTER OR AMEND
 ORDER AWARDING ATTORNEYS'
 FEES AND COSTS**

TO: DOUGLAS K. THORNTON, ESQUIRE AND BRIAN C. DUFFY, ESQUIRE,
 ATTORNEYS FOR THE PLAINTIFF:

PLEASE TAKE NOTICE THAT Defendant Michael J. Finley (“Finley”) hereby moves, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, to alter or amend an erroneous reference to “deleted *emails*” in the Court’s July 29, 2014 Order Awarding Attorneys’ Fees and Costs and Expert Fees to Plaintiff. Specifically, the Order incorrectly referenced a “word search on the approximate 42,000 deleted e-mails” when in fact the word search concerned roughly 42,000 deleted *files*. (See Exhibit A, Supplemental Affidavit of Steven M. Abrams at ¶ 10, stating “there were a total of 42,151 files deleted after July 24, 2013”). While many of these files may have contained emails, they were not in fact individual emails or email lists. Given the emphasis on emails and email lists in this litigation, the distinction between files and emails is critical. Accordingly, Defendant Finley respectfully requests that the Court amend its previous Order by replacing the term “emails” with “files” so as to conform with the evidence reflected in the attached Affidavit.

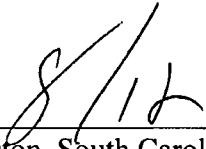
--Signature to Follow--

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 Defendants Michael J. Finley, Finley
& Associates, LLC, & Kathryn A. Finley*



2014
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 12 day of August, 2014
Kelly D. Forrester

FILED
2014 AUG 12 PM 4:34
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

BTM MACHINERY, INC.
PLAINTIFF,

VS.

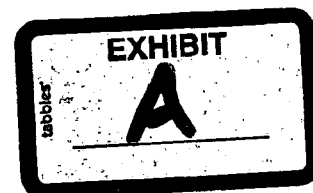
MICHAEL J. FINLEY, et al,
DEFENDANTS.

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

SUPPLEMENTAL AFFIDAVIT OF
STEVEN M. ABRAMS, J.D., M.S.

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. I am a member of the South Carolina Electronic Crime Task Force and a contractor to the United States government to provide digital forensics services to the Department of Justice and Department of Defense. From 1996 to 2000, I was the owner of a database direct marketing company, Direct Marketers of Charleston, and am familiar with the business of developing and selling marketing lists. My CV is attached to this affidavit as Appendix A.
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. BTM is currently engaged in an ongoing legal matter with a former employee Michael J. Finley ("Defendant").

3. I have previously conducted a forensic review of BTM's Apple computer used by Defendant while in its employment. My analysis of that computer was the subject of my first affidavit in this matter. This affidavit is focused on my initial review of Defendant Mike Finley's personally owned Dell Latitude E6420 laptop (S/T: FHH64R1) that was produced pursuant to Judge Nicholson's court order. This second review has produced additional evidence that Defendant Finley engaged in a systematic, deceptive, and deliberate effort to capture BTM's proprietary business emails and contacts from the Apple computer his in BTM's office and to transfer those business emails and contacts information, after his employment at BTM was terminated, to his Windows personal computers at his home. Based upon my review of emails between defendants and filed in this case, Defendants then used the business contacts taken from BTM to conduct their own competing business, thereby depriving Defendant Finley's principal of business opportunities resulting from its proprietary business contacts data.
4. Following the issuance of the Order compelling Defendant Finley to produce his computer, the parties agreed to allow the Defendants to review for privilege any documents harvested from the Defendant's computer prior to release of said documents to Plaintiff. Because that review period was still ongoing at the time of this writing, I will restrict my affidavit to forensic evidence, such as file metadata, and will not disclose any specific material or documents at this time. I will supplement this affidavit with specific supporting documents at the appropriate time.

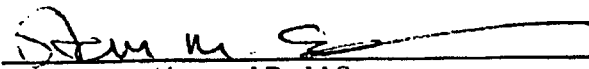
5. In the information age economy that we live in, the players who best manage the accumulation and manipulation of data are destined for the greatest success. BTM like many other information age businesses is wholly dependent on its database of suppliers and sales contacts for its continued profitability. The database of business contacts developed by BTM was labor intensive and costly to assemble. Like all similar databases its value is directly proportional to the care and level of detail exercised in its creation. Even if some of the data contained in it may be from public sources, the many steps involved in massaging the data, such as verifying the accuracy of the data, matching the lists of contacts with phone numbers and email addresses, and de-duplicating the lists results in a database that is valuable and proprietary. There is a huge market for list brokers who buy and sell specialized marketing databases like the "ACT" database developed and used by BTM. In January 2012, BTM purchased 9105 "verified" contacts from Rally Marketing of Greenville, South Carolina, for \$5052.50. These contacts sold for \$.50 each.
6. While he was an employee of BTM Defendant Finley made use of the proprietary ACT database developed by BTM. Many of the email addresses he used for marketing came from that database. Those addresses from the database were incorporated into Defendant Finley's emails and stored in the PST archives on the computers that he used while employed by BTM.
7. My examination of the Apple computer discussed in my previous affidavit in this case revealed that Defendant Finley purchased software to convert the Apple format email archives to Windows format PST email archives. According to BTM he was never asked to do this as part of his job at BTM, and his conversion

of the emails he had on his Apple computer to Windows format was for his own purposes. My examination of the Dell computer from Defendant Finley found similar conversion software installed on his Windows based laptop. OLMtoPST_converter_Pro_Setup.exe was installed on the Dell computer at 3:23 PM on March 13, 2013.

8. My examination of the Dell computer revealed that a number of PST archives were copied from the Apple computer at BTM onto Defendant Finley's Dell laptop on 3/13/2013 and 3/14/2013, after he was terminated from BTM and had no legitimate business purpose to have the email addresses from BTM's proprietary database. Two of these PST files copied from BTM's computer were "mfinley@btm-machinery.com.pst" and "mac outlook conversion.pst." In total, the databases copied from his BTM Apple computer to his personally owned Dell laptop contained 212,537 email messages.
9. I also found that Defendant Finley enlisted the aid of a computer consultant on 3/13/2013 who recommended software from Imhsoft.com to extract the email addresses from these PST files to a database. Thus Finley was able to capture the email address from his BTM emails (many of which were from BTM's proprietary ACT database) into a database list that he and co-defendant Ross McMillian used as the basis of an email marketing campaign for their 4M Iron business, that directly competes with Finley's former principal BTM.
10. I also found evidence of spoliation of data in my examination of the Dell laptop computer. I have been informed that BTM's legal counsel sent a preservation letter to Defendants on July 24, 2013. An examination of the Dell computer produced by Defendant Finley revealed that there were a total of 42,151 files

deleted after July 24, 2013. Many of these deleted files are emails and other potentially relevant material. On October 5, 2013, (two days before turning over the computer for my court ordered inspection) Defendant Finley deleted a copy of the mfinley@btm-machinery.com.pst PST archive containing emails taken from BTM. The BTM emails in the remaining copies of this PST file are all deleted within the PST file.

FURTHER THE AFFIANT SAYETH NOT!



Steven Marc Abrams, J.D., M.S.

SWORN TO AND SUBSCRIBED BEFORE ME THIS
13th, DAY OF NOV, 2013.



NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 4/4/22



PIERCE, HERNS, SLOAN & WILSON, LLC

ATTORNEYS AND COUNSELORS AT LAW

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JAMES G. KENNEDY
WILLIAM P. EARLY

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

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

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

August 12, 2014

VIA HAND DELIVERY

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad St., Suite 106
Charleston, SC 29401

Re: *BTM Machinery, Inc., v. Michael J. Finley, et. al.*
Case No.: 2013-CP-10-04366
PHSW File No.: D2544.00

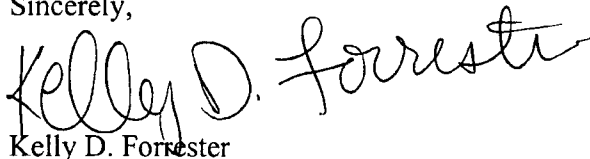
Dear Ms. Armstrong:

Enclosed, please find the original and one copy of each of the Motion to Alter or Amend Order Awarding Attorneys' Fees and Costs in the above matter, along with filing fees. Please file the originals and return a filed, clocked-in copy to our office via our courier.

Should you have any questions or concerns, please do not hesitate to contact our office. By copy of this letter and the enclosures, I am serving all counsel of record with the same.

With kind regards,

Sincerely,



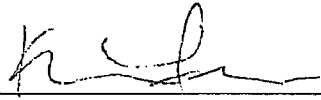
Kelly D. Forrester
Paralegal to Joseph C. Wilson

JCW/kdf

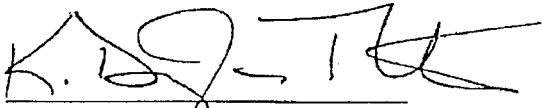
cc: Richard A. Hricik, Esq.
Fleet Freeman, Esq.
Douglas K. Thornton, Esq.

EXHIBIT "E"

I SO MOVE:

for 
Joseph C. Wilson
PIERCE, HERNS, SLOAN & WILSON, LLC
Attorney for Michael J. Finley, Finley &
Associates, LLC, and Kathryn A. Finley

I CONSENT:


K. Douglas Thornton
THORNTON LAW FIRM, LLC
Attorney for Plaintiff

I CONSENT

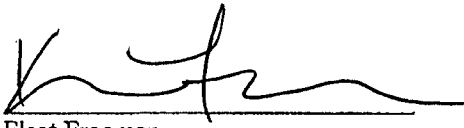
for 
Fleet Freeman
FLEET FREEMAN, LLC
Attorney for Defendants Wilbur Ross
McMillan, Jr. & 4 M Iron, LLC

EXHIBIT "F"

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE NO.: 2013-CP-10-4366

BTM MACHINERY, INC.,)
)
) PLAINIFF,

VS.)

MICHAEL J. FINLEY, individually)
and d/b/a Finley & Associates,)
KATHRYN A. FINLEY, WILBUR)
ROSS McMILLAN, JR. and)
4M IRON, LLC,)

DEFENDANTS.)
)
)
)
)
)
)

ORDER

BY _____

JULIE J. ARMSTRONG
CLERK OF COURT

2013 SEP -4 AM 9:55

FILED

DATE OF HEARING: July 29, 2013 at 10:30 A.M.
PLAINTIFF'S ATTORNEY: K. Douglas Thornton
DEFENDANTS' ATTORNEY: Richard Hricik (Michael and Kathryn Finley)
Fleet Freeman (4M Iron, LLC & Ross McMillan)

BACKGROUND

This cause came to be heard on Plaintiff's Motion for a Temporary Restraining Order pursuant to SCRCP 65, against all of the Defendants named above. All parties were represented by counsel.

Plaintiff filed the TRO, with numerous supporting affidavits, emails and exhibits, on July 26, 2013, seeking to restrain Defendants in a wide variety of business activities, including the use of Plaintiff's customer data base, and information pertaining to heavy equipment marketing, repair, and shipping, in the conduct of a similar – competing business by Defendants Michael J. Finley, Wilbur Ross McMillan, Jr., and 4M Iron,

LLC.¹ An expedited hearing was set for July 29, 2013. Defendants handed up at the hearing the affidavits of Michael Finley, Kathryn Finley, and Ross McMillan.

FINDINGS

Based upon all the evidence before the Court, including the affidavits and arguments of counsel, the Court finds that whether Plaintiff's data base and marketing formula is a protectable "trade secret," is a significant legal issue. Plaintiff's IT expert, Mr. Steve Abrams, who submitted an affidavit on Plaintiff's behalf, was not present to answer questions related to this issue.

Mr. Finley's counsel informed the Court that Mr. Finley's computers would not be useful for the requested production, because the information sought by Plaintiff was sent out for Mr. Finley by a third party vendor. The Court therefore revised its initial ruling that Mr. Finley's computer be produced, in reliance on this statement, and ordered that only the email list of contacts be produced if that was deemed adequate by Mr. Abrams. Subsequent to the hearing Mr. Abrams informed Plaintiff's counsel, who in turn informed opposing counsel and the Court, that the email list alone would, in fact, be inadequate. I find, therefore, that Mr. Finley shall be required to produce his computer from which the subject email list was uploaded to a third party vendor. Such production shall occur as soon as Mr. Abrams is available to begin his examination. Mr. Finley's computer shall be returned to his attorney within no more than five (5) business days from the date it is delivered to Mr. Abrams.

¹ Plaintiff has not yet established a factual basis for its belief that Defendant Kathryn A. Finley is directly involved in her husband's heavy equipment business.

I have specifically provided that Plaintiff may file a subsequent Motion seeking additional relief, including the some or all of the same injunctive and declaratory relief it sought in the present Motion, if it believes this Order will be inadequate to protect its interests, and that it can adequately clarify the character of its data base, and related information, as "trade secrets" and otherwise protectable confidential information. In so doing, the Court is mindful of the terms of the parties' contract. The contract characterizes Mr. Finley as an "Independent Contractor," but also specifically provides that this information is Plaintiff's "trade secret" and confidential property, and specifically prohibits Mr. Finley from utilizing or disclosing such information in any way, for a period of three (3) years, in the event he were terminated "for cause," as he has been. It also appears to me that Plaintiff has an adequate remedy at law in the form of monetary damages for the acts complained of by the Defendants. Plaintiff may also challenge this finding by subsequent Motion if it so desires.

Notwithstanding the Court's decision on the denial of the Temporary Restraining Order, the Court finds that some restrictions need to be placed on electronic evidence, and that Plaintiff is entitled to the production of certain evidence without delay.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. Plaintiff's Motion for a Temporary Restraining Order against all parties is DENIED;
2. Defendant Michael Finley shall immediately produce for the Plaintiff any and all computers used to deliver the emails to any third parties, including vendors who, in turn, mass-emailed the information to others utilizing BTM's data base. The Court is here referring to those emails referencing Mr. Finley's name and 4M Iron, LLC, that

BTM Machinery, Inc. vs. Michael J. Finley, et al.

Case No.: 2013-CP-10-4366

Order

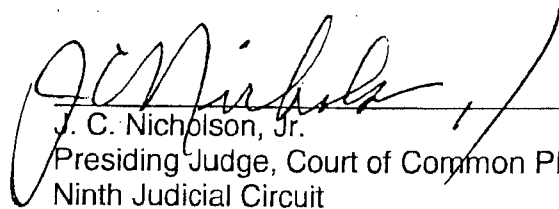
were the subject of affidavits submitted in support of Plaintiff's temporary restraining order. Such computer(s) shall be delivered by Mr. Finley's attorney to Steve Abrams within three (3) business days from the date of this Order. Mr. Abrams shall return such computers(s) to Defendant's attorney within five (5) business days from the date of delivery, not including the date of delivery. As the emails were sent through a third-party vendor, the emails/contacts were uploaded and transferred to the third-party email vendor and are readily identifiable. These will be turned over to Plaintiff as well and, if need be, verified by the Plaintiff's expert, Steve Abrams;

3. BTM Machinery and Michael Finley have agreed to a mutual restraining order, prohibiting both parties from deleting any electronic data/emails located on their servers/personal computer(s) related to the matter prior to formal discovery orders in the underlying lawsuit; and

4. All other matters of discovery as to all parties are to be left to the parties, their counsel and the court in the normal course of litigation of the underlying Complaint.

5. Plaintiff's expert, Mr. Abrams is ordered to not ~~disclose~~ disclose any e-mails sent to or received by Defendant's attorney, Mr. Hricik.

AND IT IS SO ORDERED.



J. C. Nicholson, Jr.
Presiding Judge, Court of Common Pleas
Ninth Judicial Circuit

Charleston, South Carolina

Dated: 8/30/13

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, 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 4N Iron, LLC,.....Defendants,

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

CERTIFICATE OF SERVICE

I, Regina R. Cagle, as an employee of Thornton Law, LLC, certify that a copy of Respondent's Memorandum in Opposition to Appealability of July 29, 2014 Order, in the above captioned action was served upon all counsel of record on the 16th day of October, 2014, via U.S. Mail, postage prepaid.


Regina R. Cagle

October 16, 2014

Conway, SC

RECEIVED
OCT 17 2014
SOUTH CAROLINA COURT OF APPEALS

Thornton Law, LLC

K. Douglas Thornton

KDOUGLASTHORNTON@GMAIL.COM

1025 THIRD AVENUE
CONWAY, SC 29526

PHONE: 843-488-5858

FAX: 843-488-5859

October 16, 2014

VIA: FEDERAL EXPRESS OVERNIGHT DELIVERY

Honorable Jenny Abbott Kitchings
Attn: Ella
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29211

Re: BTM Machinery, Inc. v. Michael J. Finley, et al.
Appellate Case No. 2014-001963

Dear Ella:

Enclosed herewith please find an original and one (1) copy of the Respondent's Memorandum in Opposition to Appealability of July 29, 2014 Order, and Certificate of Service. Please record the originals and return a clocked copy of both documents to our office in the envelope provided for the Court's convenience.

With kind regards, I am

Very truly yours,

THORNTON LAW, LLC



Regina R. Cagle
Paralegal to K. Douglas Thornton

Enclosures as stated

cc: Blake Thornton
Brian Duffy, Esquire
Carl E. Pierce, II, Esquire
Joseph C. Wilson, IV, Esquire
Kristen B. Fehsenfeld, Esquire
Fleet Freeman, Esquire

RECEIVED

OCT 17 2014

SC Court of Appeals