THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Common Pleas Court Judge

2013-CP-26-00980

RAWCLIFFE RESORTS, INC.,

Respondent.

v.

MATT BECKER AND ASSOCIATES, INC. d/b/a OCEAN BREEZE VACATIONS, MATT BECKER AND KAREN CLARK BECKER,

Appellants.

BRIEF OF APPELLANTS

Randall K. Mullins, Esquire
Jarrod E. Ownbey, Esquire
P.O. Box 585
North Myrtle Beach, SC 29582
843.272.8902 Telephone
843.272.3075 Facsimile
Mullinslawfirm@aol.com
Counsel for Appellants

Other Counsel of Record:

James L. Hills, Esquire
Jennifer D. Hills, Esquire
5001 N. Kings Highway, Suite 210
Myrtle Beach SC 29577
Counsel for Respondent
843.626.2600 Telephone

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STATEMENT OF THE CASE

On February 15, 2013, the Respondent filed a verified Summons and Complaint against Ocean Breeze Vacations and Appellant Karen Becker, alleging causes of action for Temporary and Permanent Injunctions, Unfair Trade Practices, False Advertising, and Misappropriation. Simultaneously, the Respondent filed a Motion for Temporary Injunction and Permanent Injunction, as well as an affidavit in support of the Motion for Temporary Injunction and Permanent Injunction from the Chief Executive Officer of the Respondent and various printouts from Facebook. In response to the Respondent's Motion for Temporary Injunction, and prior to the time for responsive pleadings expiring, Appellant Karen Becker filed an Affidavit in opposition to the Respondent's motion with accompanying exhibits on April 1, 2013. On April 2, 2013, a Consent Order Granting Temporary Injunction was entered into by the Respondent, Appellant Karen Becker and Ocean Breeze Beach Vacations.

On April 11, 2013, prior to Appellant Karen Becker and Ocean Breeze Beach Vacations filing their Answer, Respondent filed and served a verified Amended Summons and Complaint adding Appellant Matt Becker to the action and alleged causes of action for Temporary and Permanent Injunction; Unfair Trade Practices; Fraud and Intentional Misrepresentation; False Advertising and Violation of the Lanham Act, Section 43 (a); Misappropriation of Trade Names, Copyrights, and Service Marks; Theft of Services; Tortious Interference with Contract; Tortious

Interference with Prospective Business Relationship; Trademark, Mark, Trade Name Infringement; Trademark Dilution; Slander and Defamation of the Plaintiff; Individual Liability against both Appellants; Trespass to Land; Trespass to Chattels; Conversion; and Nuisance. On May 23, 2013, Appellants and the corporate Defendant filed an Answer including Counterclaims against Respondent for False Advertising and Violation of Lanham Act, Section 43 (a); Unfair Trade Practices; Conversion; and Fraud and Intentional Misrepresentation. On June 25, 2013, a Consent Order Correcting/ Amending Caption and Adding Matt Becker as a Necessary Party was filed.

On July 18, 2013, Appellants filed a Notice of Motion and Motion for Protective Order relating to certain documents requested in discovery by Respondent. Thereafter, on August 7, 2013, Appellants filed a second Motion for Protective Order due to the discovery of a potential conflict in the continued representation of the Appellants and the corporate Defendant, and a Motion to be Relieved as Counsel. On August 9, 2013, Appellants filed a Motion to Stay the civil action pending the resolution of an investigation by the City of Myrtle Beach Police Department into allegations relating to the civil action. Respondent filed an Order and Rule to Show Cause, a Petition and Citation for Contempt and accompanying documents on August 29, 2013 against the Appellants and the corporate Defendant which was set for a hearing on October 9, 2013.

On September 30, 2013, a Consent Order relieving counsel for the Appellants, Robert E. Lee, Esquire was filed. On October 1, 2013, Randall K. Mullins, Esquire filed a Motion for Continuance of the October 2, 2013 motion hearings previously scheduled in the matter. On October 2, 2013, Respondent filed a Reply to the Counterclaims brought by the Appellants. At

the motion hearings on October 2, 2013, Judge Hyman orally ruled that the matter was to be continued for twenty (20) days and if the issues between the parties had not been resolved during that time, the motions were to be reset on the next available non-jury docket. Judge Hyman's ruling was reduced to a formal order and filed on November 15, 2013.

A hearing was held on Respondent's Order and Rule to Show Cause and Petition and Citation for Contempt on February 10, 2014 before the Honorable Larry B. Hyman, Jr. Subsequent to the hearing, an Order of Contempt was filed May 12, 2014 finding the Appellants in Contempt of the Consent Order Granting Temporary Injunction filed April 2, 2013. This appeal follows.[1]

FACTS

Respondent Rawcliffe Resorts, Inc. is a South Carolina corporation owned by Lee Rawcliffe and incorporated on January 2, 2008. Respondent owns, either wholly or at least the commercial elements, in six (6) resorts, including the Sand Dunes and Ocean Club Resorts. (Record, p. 105, lines 1-9). Additionally, Respondent is engaged in the rental management of several units in these resorts. (R. p. 105, line 5; p. 25, ¶ 7). The units in these resorts are primarily owned by private owners and then rented to third parties through rental programs, either controlled by Respondent or other vacation rental companies. Guests who rent units in these resorts through Respondent's rental program are provided access to certain amenities "including a waterpark, an indoor pool, a fitness room, and a 'Kid's Club' activity program. (R. p. 25, ¶ 7). These amenities are owned by Respondent. (R. p. 105, line 15- p. 108, line 5).

[1] The matter was subsequently stricken from the active trial docket pursuant to Rule 40 (j), SCRCP on April 1, 2014. A Motion to Restore Civil Action to Docket was filed by the Respondent on July 2, 2014 and that Motion is still pending.

However, units which are not rented through Respondent's rental program are prohibited from using the amenities. (R. p. 25, ¶ 8). Additionally, owners staying at the resort that do not utilize Respondent's rental program are likewise prohibited from using the amenities on the subject properties. (R. p. 122, lines 5- 21). Respondent charges owners a fifty percent (50%) commission from the rental of the units in the Sand Dunes Resort enrolled in Respondent's rental program. (R. p. 108, lines 6- 9).

Appellant Matt Becker owns a corporation known Matt Becker and Associates, Inc. which operates a vacation rental business under the trade name Ocean Breeze Beach Vacations. (R. p. 194, ¶ 2). Ocean Breeze Beach Vacations is operated by Appellant Karen Becker and has been in operation since June, 2011. (R. p. 194, ¶ 2). Ocean Breeze Beach Vacations manages the rental of thirteen (13) units in the Sand Dunes Resort which contains a total of four hundred (400) units in the resort complex. (R. p. 194, ¶¶ 3-4). The units rented through the Appellants' company represent approximately three percent (3%) of the total units in the Sand Dunes Resort. (R. p. 194, ¶¶ 3-5).

That in November 2012, Respondent discovered that photographs of Respondent's resort were being used on the internet website "Vacation Rentals by Owner", including photographs of the amenities and water park owned by Respondent. (R. pp. 25- 26, ¶ 9). Respondent further claimed that the photographs were professionally commissioned photographs owned solely by Respondent. (R. p. 26, ¶ 9). Respondent claims that the inclusion of the photographs and language included in the advertisements implied that customers renting through the website would have access to the amenities and water park. (R. p. 26, ¶¶ 9-10). Respondent contacted Appellant Karen Becker demanding that Ocean Breeze Beach Vacations discontinue using the

photographs of the resort and any language implying access to the amenities. (R. p. 26, ¶ 10). Appellant Karen Becker admits that photographs of the resort were included in the advertisements by her company on the website; however, Appellant Karen Becker maintains that the photographs were obtained from the Multi Listing Service "MLS" and were not subject to copyright or trademark protection.(R. p. 195, ¶ 11). Furthermore, other companies engaged in renting units in the Respondent's resorts have utilized the same photographs in advertisements; however Respondent has not commenced legal action against them. (R. p. 195, ¶ 12).

Respondent alleged that Appellant Karen Becker and her company Ocean Breeze Beach Vacations were providing wristbands to guests renting through Ocean Breeze Beach Vacations which provided access to the amenities owned by Respondent. (R. pp. 33-34, ¶ 56). Subsequently, Respondent and Appellants entered into a Consent Order Granting Temporary Injunction Against Ocean Breeze Beach Vacations and Karen Becker, filed April 2, 2013, in which the Appellant Karen Becker and Ocean Breeze Beach Vacations were enjoined from using photographs showing any part of the amenities owned by Respondent, and language implying any access to the amenities owned by Respondent including, in pertinent part the water park. (R. p. 15, ¶ 4).

Subsequent to the parties entering into the Consent Order filed April 2, 2013, an agent for Respondent was informed of counterfeit wristbands being used to gain access to the water park. (R. p. 129, lines 22-25). On one occasion, an agent for Respondent came into contact with Kim Ball who was in possession of counterfeit wristbands which were confiscated. (R. p. 130, lines 10- 25). Ms. Ball, through her mother, Wanda Hughes, reserved a unit at Respondent's resort through Ocean Breeze Beach Vacations for the period of July 20-27, 2013. (R. p. 180, lines 7-9). Ms. Ball testified that she contacted Appellant Matt Becker in an attempt to obtain wristbands for

the water park, and was told that he would talk to Appellant Karen Becker about the request and call her back.(R. p. 174, lines 19-24). Appellant Matt Becker never returned her call. (R. p. 174, lines 24-25). When Ms. Ball returned to the unit from the beach, there was an envelope containing ten (10) wristbands in the unit. (R. p. 175, lines 2-3). Ms. Ball did not see who left the water park wristbands in her unit. (R. p. 184, lines 9- 15). In exchange for Ms. Ball giving an affidavit to Respondent, Ms. Ball was provided with water park passes, tickets to the North Myrtle Beach Pavilion, Wild Water and Wheels Water Park and other complimentary items. (R. p. 181, line 9- p. 182, line 16; p. 182, line 20- p.183, line 17). The confiscated wristbands were kept in the possession of Respondent and were not produced prior to the contempt hearing for examination pursuant to discovery.(R. p. 113, lines 11-16; p.131, line 14- p. 132, line 20).

Subsequently, on August 29, 2013, Respondent filed an Order and Rule to Show Cause for contempt against the Appellants based upon Ms. Ball's statement to Respondent and an affidavit obtained from Stacey Johnson, which was attached to the Order and Rule to Show Cause. After a hearing, Judge Hyman found the Appellants in contempt of the Consent Order filed April 2, 2013.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN HOLDING THE APPELLANTS IN CONTEMPT OF COURT.

"An appellate court should reverse a decision regarding contempt only if it is without evidentiary support or the trial judge has abused his discretion." Abate v. Abate, 377 S.C. 548, 660 S.E.2d 515 (Ct. App. 2008) *citing to* Brandt v. Gooding, 368 S.C. 618, 627, 630 S.E.2d 259, 263 (2006). "An appellate court will reverse a manifest abuse of discretion where the error of law is 'so opposed to the trial judge's sound discretion as to amount to a deprivation of the legal

rights of the party." Id. *citing to* Jeter v. S.C. Dep't of Transp., 369 S.C. 433 , 438, 633 S.E.2d 143, 145-46 (2006). "The term 'abuse of discretion' does not reflect negatively upon the trial court; rather, it merely indicates that the appellate court believes an error of law occurred in the circumstances at hand." Id. *citing to* Macauley v. Query, 193, S.C. 1, 5, 7 S.E.2d 519, 521 (1940). "Contempt results from a willful disobedience of a court order." Id. *citing to* Lindsay v. Lindsay, 328 S.C. 329, 345, 491 S.E.2d 583, 592 (Ct. App. 1997)."Willful disobedience requires an act to be ' done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.'" Id. *citing to* Spartanburg Co. Dep't o/ Soc. Servs. v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d. 872, 874 (1988). "A party seeking a contempt finding for violation of a court order must show the order's existence and facts establishing the other party did not comply with the order." Id. *citing to* Hawkins v. Mullins, 359 S.C. 497, 501, 597 S.E.2d 897, 899 (Ct. App. 2004). "The purpose of civil contempt is to coerce the defendant to comply with the court's order." Price v. Turner, 387 S.C. 142, 691 S.E.2d 470 (2010) *citing to* Poston v. Poston, 331S.C. 106, 111, 502 S.E.2d 86, 88 (1998). "In contrast, criminal contempt is intended to punish a party for disobedience and disrespect. Id. "Civil contempt sanctions are conditioned on compliance with the court's order." Id. "Criminal contempt sanctions are unconditional." Id. "This distinction between civil and criminal contempt is crucial because criminal contempt triggers additional constitutional safeguards not mandated in civil contempt proceedings." Id. *citing to* Miller v. Miller, 375 S.C. 443, 457, 652 S.E.2d 754, 761 (Ct. App. 2007). "Civil contempt must be proven by clear and convincing evidence." Poston v. Poston, 331 S.C. 106, 502 S.E.2d 86 (1998) *citing to* United Mine Workers of America v. Bagwell, 512 U.S. 821, 114 S.Ct. 2552 (1994); In re General

Motors Corp. 61 F.3d 256 (4th Cir. 1995) (opinion after remand) 110 F.3d 1003 (4th Cir.); 17 Am.Jur.2d *Contempt* §207; Moseley v. Mosier, 279 S.C 348, 306 S.E.2d 624 (1983); Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 915 (1982). "In a criminal contempt proceeding, the burden of proof is beyond a reasonable doubt." Id. *citing to* State v. Bowers, 270 S.C. 124, 241 S.E.2d 409 (1978); State v. Bevilacqua, 316 S.C. 122, 447 S.E.2d 213 (Cr. App. 1994).

In the case before the Court, Respondent sought to have Appellants held in contempt of court alleging a violation of a Consent Order Granting Temporary Injunction Against Ocean Breeze Beach Vacations and Karen Becker, filed April 2, 2013. Appellants contend that the Trial Court committed reversible error by holding them in contempt of the Consent Order filed April 2, 2013.

The parties entered into a temporary injunction which enjoined the Appellant Karen Becker and Ocean Breeze Beach Vacations, a subsidiary of Matt Becker and Associates, Inc., from using photos of any part of any amenities owned by Respondent in any advertisements; from using any written or oral descriptions of any amenities owned by Respondent and/ or implying any access to those amenities in any advertisements; among other things. The Consent Order Granting Temporary Injunction was entered prior to Appellant Matt Becker being added as a necessary party to the action, as the Consent Order Correcting/ Amending Caption and Adding Matt Becker as a Necessary Party was not filed until June 25, 2013.

Respondent filed an Order and Rule to Show Cause alleging that the Appellants Matt and Karen Becker violated the Consent Order Granting Temporary Injunction on August 29, 2013. Specifically, Respondent claimed that Appellants "have continued implying and even attempting to gain unlawful access to amenities owned by the Plaintiff. Plaintiff is informed and believes

that Defendants have in fact gained unlawful access to amenities owned by Plaintiff." (R. p. 90, ¶ 3). Respondent alleged that Appellants violated paragraph 4 of the Consent Order Granting Temporary Injunction which provides in pertinent part: "Defendants shall not use by words (whether oral or written) any description of any amenity owned by Plaintiff, or imply access to any amenity owned by Plaintiff. These amenities include, but are not limited to: g. Sand Dunes Water Park..." (R. p. 15, ¶ 4). In connection with the Order and Rule to Show Cause, a hearing was scheduled for October 9, 2013. Due to several issues, including Appellant's counsel filing a Motion to be Relieved, a hearing was not held until February 10, 2014 before the Honorable Larry B. Hyman, Jr.

At the contempt hearing, Respondent relied upon the testimony of Lee Rawcliffe, owner of Respondent, David Rivera, facilities director for Respondent, as well as the deposition testimony of Kim Ball. In his direct examination, Mr. Rawcliffe testified that wristbands were collected from individuals at the water park. (R. p. 112, lines 12-13). Mr. Rawcliffe further testified that the wristbands issued by Respondent for access to the water park are coded to distinguish them from counterfeit wristbands. (R. p. 114, lines 16-23). On cross examination, Mr. Rawcliffe admitted that the wristbands he produced during direct examination had not been produced during discovery to Appellants' counsel. (R. p. 115, lines 6- 22). Mr. Rawcliffe likewise conceded that the wristbands did not include any writing identifying any connection to Respondent's resort or Ocean Breeze Beach Vacations. (R. p. 116, lines 1- 6). Furthermore, Mr. Rawcliffe agreed that the wristbands are of the type widely used in the area. (R. p. 116, lines 7-12). Additionally, Mr. Rawcliffe was unable to identify from whom certain wristbands used during his direct examination came from, even though he had been in control of them since they were confiscated. (R. p. 116, line 13- p. 117, line 9). In fact, none of the wristbands, nor the

envelopes they were allegedly transported in, had any identifying information showing from whom they were retrieved, when they were confiscated, or who issued the wristbands. (R. p. 117, line 11- p. 118, line 1). Additionally, Mr. Rawcliffe admitted that another individual was engaged, at least at some time, in issuing wristbands to guests at Respondent's resort. (R. p. 117, lines 19- 21).

Respondent also relied upon the deposition of Kim Ball, which was entered into evidence at the contempt hearing as Plaintiff's Exhibit 2. During Ms. Ball's stay at Respondent's resort, wristbands were confiscated from her and her family by agents of Respondent while at the water park. (R. p. 130, lines 10- 25). At that time, Ms. Ball signed an affidavit for Respondent relating to the incident. (R. p. 135, lines 8- 10; lines 21- 22). During cross examination, Mr. Rawcliffe admitted that in exchange for the affidavit Ms. Ball signed relating to the incident, Respondent gave Ms. Ball approximately Two Thousand Three Hundred and 00/100ths Dollars ($2,300.00) worth of merchandise. Specifically Ms. Ball indicated in her deposition that she received water park passes, tickets to the North Myrtle Beach Pavilion, Wild Water and Wheels Water Park and other complimentary items. (R. p. 181, line 9- p. 182, line 16; line 20- p. 183, line 17).

Mr. Rivera, the facilities director for Respondent identified a collection of wristbands as the wristbands confiscated from Ms. Ball. (R. p. 130, lines 10- 25). Mr. Rivera further testified that those wristbands were kept separate since they were confiscated. (R. p. 131, lines 1-2). The wristbands allegedly retrieved from Ms. Ball were entered into evidence as Plaintiff's Exhibit 3, over objection to the facts that the items being entered were never produced during discovery; they contained no identifying information concerning from whom they were confiscated, or where they were obtained; and that they were contained in a Sands Resort envelope, not an

Ocean Breeze Beach Vacations rental envelope. (R. p. 131, lines 10- 19; p. 132, lines 17- 22). Incidentally, Ms. Ball had testified in her deposition that there were ten (10) wristbands left in her unit at Respondent's resort; however, the envelope containing the wristbands claimed to be confiscated from Ms. Ball and entered into evidence contained only nine (9) wristbands. (R. p. 132, lines 1- 12; p. 175, lines 2- 3). Mr. Rivera confirmed on cross examination that the wristbands did not include any identifying information showing that the wristbands were provided by Appellants or Ocean Breeze Beach Vacations. (R. p. 135, lines 1- 5).

With regard to the deposition of Kim Ball, entered into evidence as Plaintiff's Exhibit 2, there are several questions concerning the bias and prejudice of this witness's testimony. First and foremost, Ms. Ball was not a direct client of Appellants. The unit was not reserved by Ms. Ball, but her mother, Wanda Hughes. (R. p. 174, lines 9-16). Furthermore, Ms. Ball has a criminal record. (R. p. 178, lines 10-23). Additionally, Ms. Ball, has never met Appellants, nor did she see who placed the water park wristbands in her unit. (R. p. 184, lines 6-12). Ms. Ball testified that there was nothing on the envelope containing the wristbands indicating where they came from. (R. p. 184, lines 13-15). However, it is clear that Ms. Ball received incentives from Respondent in exchange for signing an affidavit in this matter. (R. p. 183, lines 5- 17; p. 185, lines 16- 23).

In a civil contempt hearing, the Plaintiff bears the burden of proving noncompliance with the court's order by clear, cogent and convincing evidence. Poston v. Poston, 331 S.C. 106, 502 S.E.2d 86 (1998) *citing to* United Mine Workers of America v. Bagwell, 512 U.S. 821, 114 S.Ct. 2552 (1994); In re General Motors Corp. 61 F.3d 256 (4th Cir. 1995) (opinion after remand) 110 F.3d 1003 (4th Cir.); 17 Am.Jur.2d *Contempt* §207; Moseley v. Mosier, 279 S.C 348, 306 S.E.2d

624 (1983); Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 915 (1982). Clearly, this is a heightened burden of proof as opposed to the customary preponderance of the evidence standard generally used in civil matters. Plainly stated, clear and convincing evidence is that degree of proof which gives the finder of fact a firm belief that the facts sought to be proven are true. In the instant case, Respondent simply did not meet the required burden of proof.

First, the Respondent failed to produce any evidence showing that Appellants provided any wristbands to guests giving access to the water park. Respondent did not produce a single witness who saw Appellants provide wristbands to any guests, nor did they produce a witness that could definitively testify that they received wristbands from Appellants. Respondent produced generic wristbands, commonly used at resorts and other venues along the Grand Strand. Respondent could not produce any evidence that linking the allegedly confiscated wristbands to Appellants or their company, Ocean Breeze Beach Vacations. Furthermore, the wristbands entered into evidence in this matter were never produced during discovery, and could not be definitively identified by Mr. Rawcliffe, the owner of Respondent. While Mr. Rivera testified that the wristbands entered into evidence were the ones he confiscated from Ms. Ball, the envelope contained fewer wristbands than she said she was provided; even though the envelope had been maintained in the possession of Respondent from the time they were confiscated until the date of the contempt hearing.

Clearly, the evidence in the record in this matter is insufficient to meet the clear, cogent and convincing evidence standard of proof. Furthermore, the Consent Order Granting Temporary Injunction does not contain language which would prohibit the activities Appellants are accused of undertaking even if there was sufficient evidence in the record to prove Appellants committed

those acts, which Appellants contend there is not. In addition, the Consent Order Granting Temporary Injunction did not enjoin Appellant Matt Becker as Mr. Becker was not a party to the action at the time the Consent Order was issued, nor was he specifically named in the Consent Order Granting Temporary Injunction as being subject to its terms. Again, this is assuming Respondent provided sufficient evidence in support of its case, which Appellants contend Respondent failed to do. Based upon the foregoing, Appellants assert that the Trial Court committed reversible error and abuse its discretion in holding Appellants in contempt of the Consent Order Granting Temporary Injunction Against Ocean Breeze Beach Vacations and Karen Becker, and ask that this Court reverse the decision of the Trial Court.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY APPLYING THE WRONG STANDARD OF PROOF IN HOLDING THE APPELLANTS IN CONTEMPT OF COURT.

"The major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised; including the nature of the relief and the purpose for which the sentence is imposed." Poston v. Poston, 331 S.C. 106, 502 S.E.2d 86 (1998) *citing to* 17 Am.Jur.2d *Contempt* §9 (1990); Hicks v. Feiock, 485 U.S. 624, 108 S.Ct. 1423 (1988); State v. Magazine, 302 S.C. 55, 393 S.E.2d 385 (1990) (abrogated on other grounds by State v. Easler, 327 S.C. 121, 393 S.E.2d 385 (1997)). "The purpose of civil contempt is 'to coerce the defendant to do the thing required by the order for the benefit of complainant.'" Id. *citing to* Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441, 31 S.Ct. 492, 498 (1911). "The primary purposes of criminal contempt are to preserve the court's authority and to punish for disobedience of its orders." Id. *citing to* State v. Bevilacqua, 316 S.C. 122, 447 S.E.2d 213 (Ct. App. 1994). "If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court." Id. *citing*

to Hicks v. Feiock, 485 U.S. at 631, 108 S.Ct. at 1429 *quoting* Gompers v. Buck's Stove & Range Co., 221 U.S. at 441, 31 S.Ct. at 498. "An unconditional penalty is criminal in nature because it is solely and exclusively punitive in nature." Id. *citing to* Hicks v. Feiock, 485 U.S. at 633, 108 S.Ct. at 1430 *citing to* Gompers v. Buck's Stove & Range Co., 221 U.S. at 442, 31 S.Ct. at 498. "If the relief provided is a sentence of imprisonment ... it is punitive if the sentence is limited to imprisonment for a definite period." (Ellipses in original) Id. *citing to* Hicks v. Feiock, 485 U.S. at 632, 108 S.Ct. at 1429; State v. Magazine, 302 S.C. 55, 393 S.E.2d 385 (1990). "If the sanction is a fine, it is punitive when it is paid to the court. However, a fine that is payable to the court may be remedial when the contemnor can avoid paying the fine simply by performing the affirmative act required by the court's order."Id. "In civil contempt cases, the sanctions are conditioned on compliance with the court's order." Id. "The conditional nature of the punishment renders the relief civil in nature because the contemnor can end the sentence and discharge himself at any moment by doing what he had previously refused to do." Id. *citing to* Hicks, 485 U.S. at 633, 108 S.Ct. at 1430 *citing to* Gompers, 221 U.S. at 442, 31 S.Ct. 498. "If the relief provided is a sentence of imprisonment, it is remedial if the defendant stands committed unless and until he performs the affirmative act required by the court's order..." Id. *citing to* Hicks, 485 U.S. at 632, 108 S.Ct. at 1429. "If the sanction is a fine, it is remedial and civil if paid to the complainant even though the contemnor has no opportunity to purge himself of the fine or if the contemnor can avoid the fine by complying with the court's order." Id. *citing to* Hicks; Magazine; In re General Motors Corp. 61 F.3d 256 (4th Cir. 1995) (opinion after remand 110 F.3d 1003 (4th Cir.) cert. denied, 118 S.Ct. 61, 139 L.Ed2d 24 (1997)); 17 Am.Jur.2d *Contempt* §237 (1990). "Civil contempt must be proven by clear and convincing evidence." Poston, 331 S.C. 106, 502 S.E.2d 86 (1998) *citing to* United Mine Workers of America v.

Bagwell, 512 U.S. 821, 114 S.Ct. 2552 (1994); In re General Motors Corp. 61 F.3d 256 (4th Cir. 1995) (opinion after remand) 110 F.3d 1003 (4th Cir.); 17 Am.Jur.2d *Contempt* §207; Moseley v. Mosier, 279 S.C 348, 306 S.E.2d 624 (1983); Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 915 (1982). "In a criminal contempt proceeding, the burden of proof is beyond a reasonable doubt." Id. *citing to* State v. Bowers, 270 S.C. 124, 241 S.E.2d 409 (1978); State v. Bevilacqua, 316 S.C. 122, 447 S.E.2d 213 (Cr. App. 1994).

In the instant case before the Court, Appellants were purportedly held in civil contempt of the prior Consent Order Granting Temporary Injunction after a hearing before the Honorable Larry B. Hyman, Jr. In setting forth specific findings of fact and conclusions of law, the Trial Court's Order specifically found that Appellant Karen Becker "intentionally provided fraudulent wristbands to Kim Ball and her family, and those wristbands clearly implied access to Plaintiff's amenities and were a clear violation of the provisions of the Temporary Injunction." (R. p. 6, ¶ 13). The Trial Court's Order further makes the identical finding as it relates to Appellant Matt Becker. R. p. 6, ¶ 14). The Trial Court's Order of Contempt sets forth that the standard of proof employed in reaching its decision was by clear and convincing evidence. (R. p. 7, ¶ 15). The Trial Court sentenced each of the Appellants to a sentence of thirty days (30) incarceration for violation of the Temporary Injunction, from which they could each purge themselves by paying the sum of One Thousand and 00/100ths Dollars ($1,000.00) to the Horry County Clerk of Court. R. p. 7, ¶ 16; ¶¶ 2- 4; p. 8, ¶ 5). Appellants contend that this constitutes reversible error and an abuse of the Trial Court's discretion.

First and foremost, as addressed *supra*, Respondent produced no evidence at the hearing proving that Appellants provided the wristbands to Ms. Ball. No witness could definitively

identify the Appellants as the individuals who provided the wristbands to Ms. Ball and her family. Neither the wristbands, nor the envelope containing the wristbands contained any identifying information linking the production of the wristbands to Appellants. In fact, Respondent's own witness, Mr. Rawcliffe, the owner of Respondent, could not specifically identify the wristbands allegedly confiscated by Respondent's agent, Mr. Rivera, even though, they were claimed to have been in Respondent's possession since they were confiscated. (R. p. 116, line 13- p. 117, line 9). Appellants contend that the inclusion of the finding that they intentionally provided fraudulent wristbands to Ms. Ball in the Trial Court's Order was not supported by the evidence adduced at trial. This was an abuse of discretion by the Trial Court which requires reversal.

Assuming *arguendo*, that sufficient evidence appears in the record to support such a finding, it is erroneous, at least, as to Appellant Matt Becker. Mr. Becker was not a party to the action at the time that the Temporary Injunction was issued. Mr. Becker was not added as a necessary party to this action until June 25, 2013. The Temporary Injunction was entered on April 2, 2013, almost three (3) months prior to Mr. Becker being added as a party. It seems counterintuitive to hold an individual in contempt of a court order to which he was not a party. Mr. Becker was beyond the Court's jurisdiction at the time the Temporary Injunction was issued. If the Trial court could hold Mr. Becker in contempt of an Order to which he was not a party at the time of its issuance, it is indeed a slippery slope upon which we sit. Clearly, this was an abuse of discretion and a clear error of law.

Secondly, the Order of Contempt, while purporting to hold Appellants in civil contempt, actually imposes criminal contempt sanctions. The South Carolina Supreme Court in Poston v.

Poston *supra,* provided instruction on the differences between criminal contempt sanctions and civil contempt sanctions. Specifically, the Supreme Court provided the following examples of civil contempt sanctions:

> **I. The contemnor is ordered to pay a fine to the court; however, he may purge himself of the fine by complying with the prior court order. II. The contemnor is given a jail sentence to be served until he agrees to comply with the prior court order. III. The contemnor is ordered to pay a fine/damages to complainant and is ordered to pay a fine to the court; however, the contemnor may purge himself of the fine payable to the court by complying with the prior court order. IV. The contemnor is ordered to pay a fine/ damages to complainant and is given a jail sentence to be served until he agrees to comply with the prior court order.**

Poston, 331S.C. at 115. The Poston Court further provided examples of criminal contempt sanctions as follows:

> **I. The contemnor is ordered to pay a fine to the court. Even if the contemnor performs the affirmative act required by the prior court order, the fine must still be paid. II. The contemnor is sentenced to jail for a definite period of time. Even if the contemnor performs the affirmative act required by the prior court order, the contemnor must still serve the entire jail sentence. III. The contemnor is given a choice between paying a fine to the court or serving a definite period of time in jail. The contemnor must do one or the other, thus he cannot purge himself entirely of the sanction.**

Id.

In this case, the Trial Court's Order of Contempt clearly enunciates that it held Appellants in indirect civil contempt. (R. p. 7, ¶15). However, the Trial Court sanctioned Appellants by sentencing them to a definite period of incarceration of thirty days (30) in jail, which may be purged by paying the sum of One Thousand and 00/100ths Dollars ($1,000.00) to the Horry County Clerk of Court. (R. p. 7, ¶ 16; ¶2- p. 8, ¶ 5). Here, the Court imposed sanctions are clearly criminal in light of the instructions contained in Poston. In fact, the sanctions ordered in the present case are identical to the third example of criminal contempt sanctions from Poston.

Based upon the language of the Trial Court's Order of Contempt, there exists no means for Appellants to purge themselves of the contempt sanctions. This is the hallmark of criminal contempt.

Because the contempt sanctions ordered by the Trial Court are criminal contempt sanctions, the Trial Court erred in applying the clear and convincing evidence standard of proof; as criminal contempt sanctions are required to be proven beyond a reasonable doubt, due to the due process implications of criminal contempt. Price v. Turner, 387 S.C. at 145 *citing to* Miller v. Miller, 375 S.C. 443, 457, 652, S.E.2d 754, 761 (Ct. App. 2007). Appellants contend that the evidence adduced at trial does not meet the clear and convincing evidence standard, much less the heightened burden of beyond a reasonable doubt. Simply stated, the Trial Court erred in applying the standard of proof with regard to the contempt sanctions imposed. If the Trial Court's intent was to issue the criminal contempt sanctions, then the Trial Court should have employed the beyond a reasonable doubt standard. Conversely, if the Trial Court intended to utilize the clear and convincing evidence standard of proof, then the contempt sanctions are excessive. Either way, the Trial Court clearly abused its discretion and committed a error of law with regard to holding Appellants in civil indirect contempt, yet imposing criminal sanctions therefor.

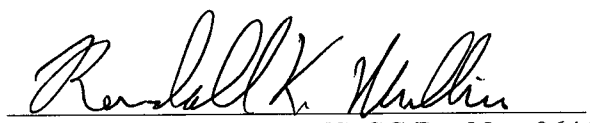
CONCLUSION

For the above stated reasons, Appellants contend that the Trial Court committed reversible error by abusing its discretion based upon a clear error of law in holding Appellants in contempt of court. Furthermore, Appellants maintain that the sanctions imposed by the Trial Court relevant to the finding of contempt were criminal in nature, and subject to the heightened

standard of proof, beyond a reasonable doubt, thus exhibiting an abuse of discretion based upon a clear error of law. Appellants respectfully request that this Court reverse the Order of the Trial Court and either remand the matter or dismiss the Respondent's Order and Rule to Show Cause.

Respectfully submitted.

MULLINS LAW FIRM, P.A.



RANDALL K. MULLINS, SC Bar No.: 06466
JARROD E. OWNBEY, SC Bar No.: 75417
ATTORNEYS FOR THE APPELLANTS
Post Office Box 585
North Myrtle Beach, SC 29597
(843) 272-8902 Telephone
(843) 272-3075 Facsimile

Dated: Feb. 12, 2015, 2015
North Myrtle Beach, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Common Pleas Court Judge

Trial Court Case No.: 2013-CP-26-00980
Appellate Court Case No.: 2014-001152

RAWCLIFFE RESORTS, INC.,

Respondent.

v.

MATT BECKER AND ASSOCIATES, INC. d/b/a OCEAN BREEZE VACATIONS, MATT BECKER AND KAREN CLARK BECKER,

Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b) SCACR.

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PROOF OF SERVICE

I certify that I have served a copy of the Brief of Appellants via regular U.S. Mail addressed to the following:

James L. Hills, Esquire
Jennifer D. Hills, Esquire
5001 N. Kings Highway, Suite 210
Myrtle Beach, SC 29577

MULLINS LAW FIRM, P.A.

Randall K. Mullins (JE)

RANDALL K. MULLINS SC Bar No.: 06466
JARROD E. OWNBEY SC Bar No.: 75417
ATTORNEY FOR THE APPELLANT
Post Office Box 585
North Myrtle Beach, SC 29597
(843) 272-8902 Telephone
(843) 272-3075 Facsimile

Dated: February 13, 2015
N. Myrtle Beach, South Carolina