

STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

The Honorable Larry B. Hyman, Circuit Court Judge

Appellate Case No.: 2014-001152

Rawcliffe Resorts, Inc., Respondent,

v.

Matt Becker and Associates, Inc. d/b/a Ocean Breeze Beach Vacations Matt Becker and
Karen Clark Becker Appellants.

Final Brief of Respondent

James L. Hills, Sr., Esquire
Jennifer D. Hills, Esquire
HILLS & HILLS, P.C.
5001 N. Kings Highway
Rainbow Harbor-Suite 210
Myrtle Beach, SC 29577
(843) 626-2600
(843) 448-6792 (Fax)
jlh@hillsandhills.com
Attorney for Respondent

Other Counsel of Record:
Randall K. Mullins, Esquire
Jarrod E. Ownbey, Esquire
Post Office Box 585
North Myrtle Beach, SC 29597
SC Bar # 06466
(843) 272-8902
(843) 272-3075 (Fax)
mullinslawfirm@aol.com
Attorney for Appellants

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STATEMENT OF ISSUES ON APPEAL

- I. Was the trial judge's finding of contempt supported by the evidence?
- II. Did the trial judge abuse his discretion in finding Mr. Becker and Mrs. Becker in civil contempt?
- III. Did the trial court apply an incorrect standard of proof in finding the Defendants in contempt?

STATEMENT OF THE CASE

On February 15, 2013, the Plaintiff Rawcliffe Resorts, Inc. (herein after referred to as "Rawcliffe"), filed a Summons and Complaint against Ocean Breeze Beach Vacations (herein after referred to as "Defendant Company") and Karen Clark Becker (herein after referred to as "Mrs. Becker"), on the following causes of action: temporary and permanent injunction, unfair trade practices, false advertising, and misappropriation. **(R. p. 17, filed Feb. 15, 2015)** Filed at the same time was a Motion for a Temporary and Permanent Injunction, seeking a temporary and permanent injunction against the use of Rawcliffe's photographs, advertising, and the lure of Rawcliffe's amenities in Mrs. Becker's attempts to market her own business. **(R. p. 66)** A hearing on the issue of a temporary injunction was set for April 2, 2013. Prior to that hearing Robert E. Lee was retained to represent Mrs. Becker and Defendant Company, as well as Matt Becker (herein after referred to as "Mr. Becker"). Mr. Becker informed Rawcliffe that Ocean Breeze Beach Vacations was a d/b/a" for Matt Becker & Associates, Inc, of which he is the sole owner/President. At that time the Parties reached an agreement on the issue of the temporary injunction, Mr. Becker agreed to be added as a party to the lawsuit, and all Parties agreed the caption should be amended to reflect the accurate name of Defendant Company and list all parties. **(R. pp. 14-16)**

A Consent Order Granting Temporary Injunction was signed by Mr. Becker as owner/President of Matt Becker and Associates, Inc. d/b/a Ocean Breeze Beach Vacations and Mrs. Becker as Operator/Manager of Ocean Breeze Beach Vacations, Rawcliffe, and Judge Benjamin Culbertson on April 2, 2013, and filed the same day. All Parties received a copy of that Order that day while at the courthouse, but out of an abundance of caution the Order was also served on Robert E. Lee via U.S. Mail on April 9, 2013, together with an Affidavit of Service by Mail. An additional consent order was signed by all parties and filed June 25, 2013 to amend the caption and add Mr. Becker as an individual party. **(R. p. 12)**

On April 11, 2013, Rawcliffe filed and served a Summons for Amended Complaint and Amended Complaint listing the following causes of action on April 11, 2013: temporary and permanent injunction; unfair trade practices; fraud/intentional misrepresentation; false advertising—violations of the Lanham Act, Section 43(a); misappropriation of trade names, copyrights, and service marks in order to confuse the public; theft of services; tortious interference with a contract; tortious interference with a prospective business relationship (homeowners); and tortious interference with a prospective business relationship (guests); trademark/mark/trade name infringement; trademark dilution; slander/defamation; individual liability; trespass to land; trespass to chattels; conversion; and nuisance. **(R. pp.24-50)** On May 23, 2013, Defendants filed and served their Answer and Counterclaim **(R. pp-51-62)** and Plaintiffs replied. **(R. pp. 63-65)**

Rawcliffe presented a Petition and Citation for Contempt, and a Rule to Show Cause was signed by Judge Culbertson on August 16, 2013 and filed on August 29, 2013.

Mr. Becker and Mrs. Becker were served personally, and Mr. Becker was served personally as registered agent for the Defendant Company, all on September 20, 2013. A hearing was set for that matter on October 9, 2013. (R. pp. 90-97)

On October 2, 2013, at a motion hearing on a Motion to Compel Discovery in this same case, Mr. Mullins appeared as new counsel for Mr. Becker, Mrs. Becker and Defendant Company. Upon his motion a 20 day continuance was granted. The Rule to Show Cause and all other outstanding motions in this case were rescheduled to be heard February 10, 2014. After that hearing Judge Hyman issued an Order of Contempt (Violations of Temporary Injunction) finding that Mr. Becker and Mrs. Becker were held in civil contempt for intentionally implying access to amenities owned by Rawcliffe. (R. pp.1-8) This appeal followed.

FACTS

This case involves the repeated and continuing intentional theft of services from a business. It was filed out of frustration by Rawcliffe, whose business owns and manages many varied amenities for the use of guests staying in units on its rental program. Rawcliffe Resorts trades, *inter alia*, under the name Sands Resorts. It has six (6) different resorts that Rawcliffe either owns outright or owns all the commercial elements in and does rentals in. The Sand Dunes property is an oceanfront resort located at 74th Avenue North in Myrtle Beach, which is the property involved in this case. There is an adjacent property that is a waterpark, which is wholly owned by Rawcliffe and exists as a benefit for the guests who rent through Rawcliffe's rental program. Rawcliffe also owns and runs the convention center adjacent to the Sand Dunes, as well as the Ocean Dunes resort (which is wholly owned by Rawcliffe). Only guests who have rented through

Rawcliffe's rental program are allowed to use the waterpark. The waterpark is secured, gated, and coded wristbands issued by Rawcliffe's front desk are given only to guests who are staying on the Rawcliffe rental program. Rawcliffe does not own all the units it rents, however, a large percentage of the individually-owned units are rented through the Rawcliffe rental program. Individually-owned units are not required to be on the Rawcliffe rental program, and some owners choose not to. Some of those owners choose to rent their units through the Defendant Company, which is solely owned by Mr. Becker, and of which Mrs. Becker is a manager/operator. Under the terms of the Master Deed, any rental of any unit must be done through the Rawcliffe rental program. However, it is worth noting that the company's president, Lee J. Rawcliffe, has never attempted to force all owners wishing to rent their unit to join his company's rental program. **(R. p. 103, l. 6 - p. 108, l. 21; p. 192)**

Mrs. Becker admitted in her affidavit, which was signed under oath, and which was prepared for the Temporary Hearing on the issue of an injunction, that she had been giving people fake wristbands to get into the waterpark for years. Having been verbally asked to stop, asked to stop in writing, and having never stopped, this action resulted. **(R. pp. 194-198), (R. p. 108, l. 4; p. 110, l. 21)**

In April 2013 Mrs. Becker, Mr. Becker, and the Defendant Company consented to a temporary injunction stating that "Defendants shall not use by word (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 . . . "Sand Dunes Water Park". (Consent Order Granting Temporary Injunction, April 2, 2013). **(R. p. 15, para. 4)**

In July 2013 Mrs. Kim Ball and her family came to Myrtle Beach for a family vacation and stayed in a room rented through Defendant Company and Mrs. Becker. While the room was booked through Wanda Hughes, Mrs. Ball's mother's name, Ms. Ball's testimony that she made all the arrangements and the room was simply in her mother's name because the vacation was put on her mother's credit card was not disputed. When Mrs. Ball and her family arrived and were unable to get into the waterpark, Mrs. Ball testified that this surprised her, because Mrs. Becker had assured her on the phone when she booked the vacation that she would be able to use the waterpark. When Mrs. Ball contacted Mrs. Becker she received no response, so she then contacted Mr. Becker. Mrs. Ball testified that Mr. Becker told her he would pass a message on to Mrs. Becker and, though neither Mr. Becker nor Mrs. Becker responded orally to that message, Mrs. Ball testified that when she returned to her room from the beach there was an envelope with 10 wristbands in it. She and her family then attempted to use those wristbands to gain access to the waterpark, only to find out they were fraudulent and lacked the correct codes to get into the waterpark. Mrs. Ball was upset by this turn of events and eventually contacted employees of Rawcliffe, who put her into contact with Mr. Rawcliffe.

Rawcliffe filed and served a Rule to Show Cause against Mrs. Becker, Mr. Becker, and the Defendant Company in August 2013. A deposition of Mrs. Ball was taken in preparation for that hearing, as she was unable to be present at the hearing. A summary of her testimony was recounted and the transcript of her deposition entered into evidence. (R. pp. 123, ll. 11-18; p. 123, ll. 14-17; pp. 173-190) Mr. Rawcliffe and David Rivera, facilities manager for Rawcliffe, both testified on Rawcliffe's behalf, and

both were found entirely credible by the trial judge. Mr. Becker and Mrs. Becker testified on their own behalf as well as that of Defendant Company, and both of their testimonies were found to lack credibility by the trial judge. The trial judge ruled that Mr. Becker and Mrs. Becker were held in civil contempt, and this appeal followed. (Order of Contempt filed May 12, 2014) (**R. pp. 1-8**)

While the use of the photographs displaying Rawcliffe's amenities is part of Rawcliffe's case-in-chief, the Rule to Show Cause at issue in this appeal focused on Mr. Becker, Mrs. Becker, and Defendant Company's use of wristbands to imply and/or give access to Rawcliffe's waterpark. This is the only issue for which the Defendants were held in civil contempt.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review in a contempt question is a finding of contempt rests within the sound discretion of the trial judge. Durlach v. Durlach, 359 S.C. 64, 70, 596 S.E.2d 908, 912 (2004) (citation omitted). Such a finding should not be disturbed on appeal unless it is unsupported by the evidence or the judge has abused his discretion. Id. Actions for injunctive relief are equitable in nature. Miller v. Borg-Warner Acceptance Corp., 279 S.C. 90, 302 S.E.2d 340 (1983); Wiedemann v. Town of Hilton Head Island, 344 S.C. 233, 542 S.E.2d 752 (Ct. App. 2001); Williams v. Wilson, 341 S.C. 136, 533 S.E.2d 593 (Ct. App. 2000), *aff'd in part, reversed in part*, 349 S.C. 336, 563 S.E.2d 320 (2002); Godfrey v. Heller, 311 S.C. 516, 429 S.E.2d 859 (Ct. App. 1993). Likewise, the granting of temporary injunctive relief is within the sound discretion of the trial court and

will not be overturned absent an abuse of that discretion. City of Columbia via Pic-A-Flick Video, Inc., 340 S.C. 278, 531 S.E.2d 518 (2000).

II. LEGAL ARGUMENT

On the nonissue of whether or not Mr. Becker can be held in contempt, it is worth noting:

A command to a corporation is, in effect, a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the order directed to the corporation, prevent compliance, or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience and may be punished for contempt. An officer of a corporation who participates in the disobedience of a court mandate is punishable for contempt provided he has been made a party to the contumacious conduct and due notice has been given to him. Since a corporation can only act through individuals, a corporation enjoined from doing certain acts may be held liable for the acts of its employees who violated the injunction. The sole stockholder and president of defendant corporations was improperly individually excluded from a contempt order issued against defendant corporations, where he had been personally served and participated in the willful disobedience of a former temporary restraining order. Citibank, N.A. v. Anthony Lincoln-Mercury, Inc. 86 App Div 2d 828, 447 NYS2d 262 (1st Dep't 1982).

Because Mr. Becker volunteered to be bound by the temporary injunction in this matter, and because Mr. Becker agreed to be added to this lawsuit as a party and signed the temporary injunction as a representative for Matt Becker & Associates, Inc. d/b/a Ocean Breeze Beach Vacations, Appellant knew of its obligations to comply with the

Court's order. Having failed to do so, Mr. Becker can be and was properly held in contempt for his failure to ensure his company complied with the temporary injunction.

I. Was the trial judge's finding of contempt supported by the evidence?

An appellate court should reverse a decision regarding contempt only if it is without evidentiary support." 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).

"Contempt results from a willful disobedience of a court order." 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." Spartanburg Co. Dep't of 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. Hawkins v. Mullins, 359 S.C. 497, 501, 597 S.E.2d 897, 899 (Ct.App.2004).

The order in this matter existed and neither party denied that all parties entered into it voluntarily in lieu of a temporary hearing on the issue of the injunction. At that hearing Mr. Becker voluntarily agreed to not only become a party to the lawsuit, but also agreed to sign the temporary injunction as President of Defendant Company. (Consent Order Granting Temporary Injunction filed April 2, 2013; Consent Order Correcting/Amending Caption and Adding Matt Becker as a Necessary Party filed June 25, 2013. (R. p. 65, l. 5 – p. 66, ll. 6) While Plaintiff and his supporting witnesses, Mr. Rivera and Ms. Ball, were found to be entirely credible, neither Defendant Karen Becker

nor Defendant Matt Becker were found credible. The court in its discretion found that both Karen and Matt Becker lacked credibility in their testimony. They failed to offer any alternative theories or explanations as to how the wristbands ended up in Ms. Ball's testimony. Their own testimony as to whether or not Mrs. Ball called them to report her fraudulent wristbands denied her access to the waterpark was found to lack credibility.

While the Appellant implies that Mrs. Ball received authentic wristbands from Rawcliffe in return for her testimony, it is important to note that the timeline of these events is uncontroverted—Mrs. Ball reported her issue to Rawcliffe's employees, agreed to give a statement, gave that statement, and was then given wristbands by Rawcliffe. Mrs. Ball testified she didn't know Mr. Rawcliffe would give her wristbands until after she had given her statement, and Mr. Rawcliffe testified to that as well. (R. p. 125, l. 20- p. 126, l. 2) (R. pp. 194-198)

II. Did the trial judge abuse his discretion in finding Mr. Becker and Mrs. Becker in civil contempt?

"A determination of contempt is a serious matter and should be imposed sparingly; whether it is or is not imposed is within the discretion of the trial judge, which will not be disturbed on appeal unless it is without evidentiary support." Floyd v. Floyd, 365 S.C. 56, 72, 615 S.E.2d 465, 473 (Ct.App.2005) (quoting Haselwood v. Sullivan, 283 S.C. 29, 32-33, 320 S.E.2d 499, 501 (Ct.App.1984)). The trial court also properly found the defendants guilty of civil contempt. Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes; to coerce the defendant into compliance with the court's order, and to compensate the complainant for

losses sustained. Gompers v. Buck's Stove & Range Co., 221 U.S. at pages 448, 449, 31 S.Ct. at pages 500, 501, 55 L.Ed. 797, 34 L.R.A.,N.S., 874. Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy. But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.

The trial judge could have chosen to find the Defendants in criminal or civil contempt in this matter, but it is clear from the Court's order that it desired to coerce the Defendant into advertising their own rental program correctly and in compliance with the temporary injunction. The trial judge's calculation of the contempt fine was in no way connected to the damages suffered by Plaintiff, but instead was offered as a way to ensure that Defendants would comply with the Court's order in the future. In the Court's order Judge Hyman states the difficulty of determining the compensation owed to the Plaintiff. It is important to note that this Contempt hearing took place *during* the lawsuit, not after, and for that reason discovery had not yet been completed. Without completing discovery fully, it is impossible to know the full worth of the wristbands given to the guests of Defendant Company who were unable to gain access to the waterpark. Because those guests might not come back to the Plaintiff's resort to stay in the future, but might have if they had stayed on Rawcliffe's rental program and been able to properly access amenities, the damage done to Rawcliffe is far higher than solely Rawcliffe's lost profits. The lack

of direct compensation to Rawcliffe in the Order of Contempt is less significant because of its location within the actual lawsuit—put simply, Rawcliffe will be able to recover compensation for this violation of the temporary injunction once discovery is completed and it is able to calculate damages and make a request for those damages at trial in this matter.

Should the Court find that the lack of compensation to Rawcliffe nullifies this sentence as an appropriate civil contempt sanction, it is worthwhile to note that a temporary injunction is an equitable remedy and the sanction for violation of such a remedy should be equitable as well. As the Defendants were only fined \$1000.00 if they did not wish to be incarcerated, the Defendants could hardly have been less damaged than they were. To that end, the remedy fashioned by the trial court is *not* an abuse of the Court's discretion and should not be disturbed on appeal. In the event this Court finds that it is inappropriate, it would be equitable to remand only the sanction in order that the trial court fashion a civil remedy, rather than disturbing the finding of contempt, which was clearly within the Court's discretion to hold.

III. Did the trial court apply an incorrect standard of proof in finding the Defendants in contempt?

"The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice." *Curlee v. Howle*, 277 S.C. 377, 382, 287 S.E.2d 915, 917 (1982) (citing *McLeod v. Hite*, 272 S.C. 303, 251 S.E.2d 746 (1979); *State v. Goff*, 228 S.C. 17, 88

S.E.2d 788 (1955)); *see also* In re Brown, 333 S.C. 414, 420, 511 S.E.2d 351, 355 (1998). "The court's power includes the ability to maintain order and decorum." Stone v. Reddix-Smalls, 295 S.C. 514, 516, 369 S.E.2d 840, 841 (1988). Contempt results from the willful disobedience of an order of the court, and before a court may hold a person in contempt, the record must clearly and specifically demonstrate the acts or conduct upon which such finding is based. Curlee at 382, 287 S.E.2d at 918; *accord* Hawkins v. Mullins, 359 S.C. 497, 501, 597 S.E.2d 897, 899 (Ct.App.2004); Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 606, 567 S.E.2d 514, 519 (Ct.App.2002). Civil contempt must be proved by clear and convincing evidence. Durlach v. Durlach, 359 S.C. 64, 71, 596 S.E.2d 908, 912 (2004) (citation omitted). A willful act is "one done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law." State v. Bevilacqua, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct.App.1994) (internal quotation marks and citation omitted); *accord* Widman v. Widman, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct.App.2001).

Plaintiff entered into evidence a number of fraudulent wristbands, some of which were confiscated from Mrs. Ball and her family, and others which were taken from other guests. **(R. p. 193)** The existence of these wristbands and possession of them by a customer of Defendant Company, who testified credibly that the wristbands were promised and subsequently provided to them after communication with both Mr. and Mrs. Becker, makes evident that Mr. and Mrs. Becker voluntarily and intentionally violated the Court's order by providing fake wristbands to their guests. **(R. p. 112, l. 2- p.**

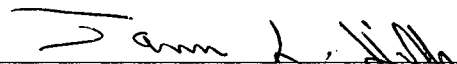
117, l. 6; pp.173-190) These are the willful acts done intentionally by Defendant Company and/or Mr. and Mrs. Becker to disobey the Temporary Injunction.

CONCLUSION

For the foregoing reasons, the Appellate Court should uphold the finding of contempt issued by the Circuit Court. In the alternative, the Appellate Court should upholding the findings of the lower court and reverse on the issue of the sentence only, and remand to the trial court for the Court for the imposition of an appropriate sentence for civil contempt.

Respectfully submitted.

HILLS & HILLS, P.C.



James L. Hills, Sr., SC Bar No.: 2517
Jennifer D. Hills, SC Bar No.: 100119
5001 N. Kings Highway
Rainbow Harbor-Suite 210
Myrtle Beach, SC 29577
(843) 626-2600
(843) 448-6792 (Fax)

Myrtle Beach, South Carolina

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she/he served the
counsel(s) for the Appellant with a copy of the **Final Brief of Respondent** by mailing a copy of
the same by United States Mail with first class postage prepaid to the following address:

Randall K. Mullins, Esquire
Jarrod E. Ownbey, Esquire
Mullins Law Firm
1312 Madison Drive
North Myrtle Beach, SC 29582


HILLS & HILLS, P.C.

Myrtle Beach, South Carolina

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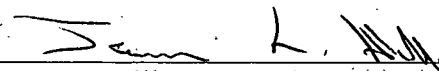
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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

HILLS & HILLS, P.C.


James L. Hills, Sr., SC Bar No.: 25117
Jennifer D. Hills, SC Bar No.: 100119
5001 N. Kings Highway
Rainbow Harbor-Suite 210
Myrtle Beach, SC 29577
(843) 626-2600
(843) 448-6792 (Fax)

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