THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Judge

Appellate Case No. 2015-000778
Case No. 2013-CP-23-01762

Carol Simpson, Appellant,

v.

Frank A. Landgraff, Carol Sutton, Sutton & Associates Investigations, Inc., Defendants,

Of Whom Frank A. Landgraff is the Respondent.

SUPPLEMENTAL RECORD ON APPEAL

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Pursuant to the Court's order filed on September 23, 2016, Appellant includes the following documents in the Supplemental Record on Appeal.

Orders

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	THIRTEENTH JUDICIAL CIRCUIT
Carol Simpson, Plaintiff, v. Frank A. Landgraff, Carol Sutton, Carol Sutton & Associates-Investigations, Inc., Defendants.	C.A. NO.: 2013-CP-23-01762 **ORDER GRANTING PLAINTIFF'S MOTION TO RECONSIDER IN PART AND DENYING IT IN PART AND DENYING PLAINTIFF'S MOTIONS TO STRIKE**

I. Motion to Reconsider

Plaintiff is correct that summary judgment should have been limited to Defendant Landgraff, and the Court has issued an Amended Order rectifying this mistake. The remainder of the Motion is denied, and several issues Plaintiff raises are discussed below.

(a) Inadequate time for discovery

Plaintiff claims summary judgment should not have been granted because she has not had a "full and fair opportunity" to complete discovery. Defendant's Motion for Summary Judgment was heard on November 7, 2014. Plaintiff contends summary judgment was premature because Defendants had not answered the 6 sets of discovery she had served upon them.

The chronology of this litigation is revealing. On December 5, 2014, the court notified all counsel by Form 4 that it was granting summary judgment to Defendant. Defendant, as requested, submitted a proposed order. On December 22, 2014, Plaintiff's counsel filed a "Memorandum in Opposition" to the proposed order, which presented for the first time various answers to Defendant's discovery. The clear purpose of the filing was to introduce new matter to avoid summary judgment.

Then, on January 27, 2015, Plaintiff filed some of her 6 discovery requests mentioned above with the Clerk of Court. These requests had the perfect alibi for being previously absent from the record: they did not exist before January 26, 2015, the date Mr. Mayer certified he served them on defense counsel. Also on January 27, 2015, Plaintiff filed her Response to Defendant Sutton's First Request for Production, which contained two documents also making their debut in the record: a copy of an Incident Report and what is evidently a portion of the Solicitor's internal Prosecution Memo.[1]

On February 3, 2015 the court filed its summary judgment order. On February 12, 2015, Plaintiff filed her Motion to Reconsider, alluding to the "outstanding discovery" it had pending against Defendant. The Motion did not explain that the discovery was outstanding because (1) it had just been served and the answers were not yet due, and (2) the discovery was propounded well after the court's December 2014 Form 4 had granted Defendant summary judgment, which by any reasonable measure would close discovery.

Plaintiff even implied that her discovery requests had been outstanding since July 2014. The amazing (and alarming) nature of Plaintiff's argument can be best seen from the following excerpt from her Motion to Reconsider:

> Plaintiff responded to Landgraff's discovery. She then filed a Motion to Strike and Summary Judgment Motion. With a Form 4 Order, the Court denied Plaintiff's Motion for Summary Judgment on July 1, 2014 based on Defendant Landgraff's 56(f) affidavit. After the holiday, Landgraff filed his Answer to the Amended Complaint. Sutton did not file an Answer until after the hearing on Landgraff's motion.
>
> Plaintiff re-filed her Motion to Strike to narrow the issues so she could begin discovery. The Court heard that motion on the same day as this Motion for Summary Judgment. The following discovery had been served on Defendants, but remain unanswered.

[1] It is important to note that these documents were filed in the Clerk's Office, and Plaintiff's counsel did not send copies to the judge. Nor did the court ever see them before reviewing the file upon receipt of this Motion to Reconsider.

1. Request for Entry Upon Land for Inspection and Other Purposes;
2. Plaintiff's First Requests for Production to Defendant Frank A. Landgraff;
3. Plaintiff's First Set of Interrogatories to Defendant Frank A. Landgraff;
4. Plaintiff's First Set of Interrogatories to Defendant Carol Sutton and Carol Sutton & Associates—Investigations, Inc.;
5. Plaintiff's First Requests for Admissions to Defendant Carol Sutton and Carol Sutton & Associates—Investigations, Inc.; and
6. Plaintiff's First Requests for Production to Defendant Carol Sutton and Carol Sutton & Associates—Investigations, Inc.

In short, the Court ruled pursuant to Landgraff's 56(f) affidavit that summary judgment was premature. Since that time, Defendants have not answered Plaintiff's discovery and no depositions have been taken.

Motion at 23-24. This is egregiously misleading. As noted above we know from Mr. Mayer's own sworn certificate of service that these discovery requests did not exist before January 27, 2015, yet Plaintiff is now claiming that Defendants have not answered the discovery since July 2014.

While this is troubling enough, it tracks the disturbing pattern of Plaintiff's counsel's questionable filings in this matter. Indeed, the case commenced with Mr. Mayer filing his own affidavit as the sole support for an ex parte temporary restraining order, an anomaly this court addressed in its May 17, 2013 Order. See Order Denying Plaintiff's Motion for Temporary Restraining Order.

This case has been pending two years. If there is any immutable truth, it is that lawyers have known that for decades cases on the Common Pleas docket of this circuit are subject to being called for trial within 12-18 months of filing, as Rule 40, SCRCP provides. In this particular case, Plaintiff's window to pursue discovery from March 2013 to November 7, 2014 was limitless. Middleborough Horiz. Property Regime Council of Co-Owners v. Montedison S.p.A., 320 S.C. 470, 479-80, 465 S.E.2d 765, 771 (Ct. App. 1995) (four months a "full and fair opportunity" to conduct discovery).

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Plaintiff claims she was awaiting disposition of her Motion to Strike before embarking on discovery. Rarely granted, Motions to Strike are notorious time-wasters, Cobell v. Norton, 2003 WL 721477, 1 (D.D.C. 2003) (citing 5A Wright & Miller, Federal Practice and Procedure § 1382), viewed with disfavor because they squander resources by "requiring judges to engage in busy work and judicial editing without addressing the merits of a party's claim," U.S. Bank Nat'l Ass'n v. Alliant Energy Res., Inc., 2009 WL 1850813, at *3 (W.D. Wis. 2009). They are designed to remove "redundant, immaterial, impertinent or scandalous matter" or insufficient defenses from a pleading. Rule 12(f), SCRCP. Delaying discovery for over a year until a motion to strike defenses is resolved is a novel strategy for a plaintiff, and not a reasonable ground for a court to forestall ruling on a defendant's motion for summary judgment on a plaintiff's claims.

Finally, it is curious why Plaintiff now believes she needs further time for discovery when she moved for partial summary judgment in November 2013, an action that necessarily meant she had a good faith belief that there were no genuine issues of material fact. See Rules 11 and 56, SCRCP.

(b) Plaintiff's claim that the court overlooked evidence

Plaintiff contends the court "missed the evidence and inferences that the recordings contain images of Plaintiff." Motion for Reconsideration at 7. The Motion also deems several portions of the court's order as "false," including the finding that there was no "proof that the recordings contain any images of Plaintiff." Order at 2. Plaintiff states "[t]he Court has obviously missed the copious proof in the record showing that this statement is false. The most conclusive is found in the Greenville County Sheriff's Incident Report..." Motion at 7.

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Plaintiff is correct that the court missed the Incident Report. This oversight may have been caused by the fundamental law of time: the Incident Report had never been mentioned or referred to, much less made a part of the record, in this litigation before January 27, 2015, some 54 days after the court had announced its intent to grant Defendant summary judgment, and over a month after Defendant had submitted a proposed order highlighting Plaintiff's failure to produce evidence concerning the existence or contents of the videotape. Nevertheless, the court has considered the Incident Report as discussed in the amended summary judgment order.

The conduct of Plaintiff's counsel in filing documents for the purpose of distorting the record may be most charitably described as reckless. The drafters of the rules of civil procedure, knowing nothing is ever new under the sun, anticipated that misguided counsel may attempt to abuse the summary judgment process, which is why Rule 56(g) sanctions filing affidavits in bad faith or for delay and mentions contempt. It is regrettable that the court must expend the energy to expose such tactics for what they are: attempts to manipulate the record and the judicial process, which the court may later deal with pursuant to its inherent power.

II. Plaintiff's Motion to Strike Certain Defenses of Sutton

The motion to strike is denied. In determining whether the defenses are sufficient, the court may not venture beyond the pleading. The motion must be denied where, as here, the defenses when viewed in the light most favorable to Defendant would entitle Defendant to relief on any theory of the case. Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 567, 703 S.E.2d 197 (2010). As alleged, Sutton's defenses state valid legal principles; whether they are likely to succeed is not an inquiry permitted by Rule 12(f). Motions to Strike are to be dealt with by dispatch and "should be denied unless the challenged allegations have no possible

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relation or logical connection to the subject matter of the controversy and may cause some form of significant prejudice to one or more of the parties to the action... Modern litigation is too protracted and expensive for the litigants and the court to expend time and effort pruning or polishing the pleadings." 5A Wright & Miller, Federal Practice and Procedure § 1382.

IT IS SO ORDERED.

D. Garrison Hill
Circuit Judge

February 27, 2015
Greenville, South Carolina

STATE OF SOUTH CAROLINA)) COUNTY OF GREENVILLE)	IN THE COURT OF COMMON PLEAS Civil Action No. 2013-CP-23-01762
Jane Doe, Plaintiff, vs. Frank A. Landgraff, Carol Sutton, Carol Sutton & Associates-Investigations, Inc., Defendants.	**ORDER AND RULE TO SHOW CAUSE**

TO: PLAINTIFF

UPON READING THE MOTION FOR ENTRY OF RULE TO SHOW CAUSE FILED FEBRUARY 5, 2014, YOU ARE HEREBY ORDERED TO APPEAR IN THIS COURT AT THE GREENVILLE COUNTY COURT OF COMMON PLEAS, 305 E. NORTH STREET, ON _____ ___, 2014, AT _____ A.M., TO SHOW CAUSE WHY YOU SHOULD NOT BE HELD IN CONTEMPT OF THIS COURT'S ORDER FILED JANUARY 6, 2014 AND WHY PERMISSIBLE RELIEF REQUESTED BY DEFENDANT LANDGRAFF SHOULD NOT BE GRANTED.

_____
Judge of the Court of Common Pleas
Thirteenth Judicial Circuit

_____, South Carolina

_____, 2014

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)

Civil Action No. 2013-CP-23-01762

Jane Doe,

Plaintiff,

vs.

Frank A. Landgraff, Carol Sutton, Carol Sutton & Associates-Investigations, Inc.,

Defendants.

MOTION FOR ENTRY OF RULE TO SHOW CAUSE

Defendant Frank A. Landgraff ("Landgraff") hereby moves this Court for the issuance of a Rule to Show Cause for Plaintiff's ongoing failure to comply with the Court's Order filed January 6, 2014 (the "January 6, 2014 Order", attached hereto as Exhibit A).

The January 6, 2014 Order states "[w]ithin ten (10) days of the receipt of this Order, Plaintiff is ordered to amend her Complaint for the sole purpose of substituting her real name for the pseudonym Jane Doe." (p. 4).

The order coversheet reflects a mailing date to all counsel of January 6, 2014, and Landgraff's counsel received the order on January 8, 2014, all as reflected on Exhibit A.

On January 24, 2014, Landgraff's counsel sent a letter to Plaintiff's counsel (attached hereto as Exhibit B), pointing out she had not yet filed her Amended Complaint as ordered and requesting that she do so.

On January 31, 2014, Landgraff's counsel sent a second letter to Plaintiff's counsel (attached hereto as Exhibit C), pointing out she had not yet filed her Amended Complaint as

ordered and requesting that she do so immediately. To the extent an affirmation under Rule 11, SCRCP is required for this motion this letter meets the requirement.

As of Wednesday, February 5, 2014 at 1:00 p.m., Plaintiff has not yet amended her complaint as ordered by the January 6, 2014 Order (court docket attached hereto as Exhibit D).

Landgraff prays for an Order of this Court as follows:

A. Ordering Plaintiff to show cause, if any she can, why she should not be held in willful contempt of this Court's January 6, 2014 Order;

B. Finding and holding Plaintiff in willful and intentional violation of the aforementioned Order, in the various particulars alleged hereinabove, requiring her immediate compliance with the January 6, 2014 Order and punishing her in accordance with all applicable law and issuing all sanctions which this Court may deem just and appropriate; and

C. Awarding such other and further relief as this Court may deem just and proper.

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2/5, 2014

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)
) Civil Action No. 2013-CP-01762
Jane Doe. 2014 JAN 6 P7 2 30)
)
Plaintiff,)
)
vs.)
)
Frank A. Landgraff, Carol Sutton, Carol Sutton & Associates-Investigations, Inc.,) **ORDER**
)
Defendants.)

Defendant Frank Landgraff ("Landgraff") moves to set aside the May 17, 2013 Order ("Subject "Order") allowing Plaintiff to proceed anonymously in this lawsuit and restraining the parties from disclosing Plaintiff's identity to third-parties. Oral argument on the motion was held November 12, 2013. The Court grants Landgraff's Motion and dissolves the Subject Order.

Plaintiff did not serve Landgraff with a Summons, Complaint, or the Subject Order until June 1, 2013. Plaintiff concedes the Subject Order issued pursuant to an *ex parte* application under Rule 65, SCRCP. (*See* Pl. Opp. Memo. at 6.) The Subject Order therefore expired on May 28. 2013, ten (10) days after its entry. Rule 65(b), SCRCP (Order "shall expire by its terms within such time after *entry*, not to exceed 10 days...") (emphasis added). By operation of Rule 65(b), the Subject Order lapsed before Landgraff was ever served.

Plaintiff did not seek to renew the temporary injunction; consequently it has evaporated. See Rule 65(b), SCRCP ("[I]f [s]he does not [thereafter file an application for a temporary injunction], the Court shall dissolve the temporary restraining order.")

Landgraff further contends Plaintiff fails to satisfy the required showing to proceed anonymously. Given the record as it now stands, the court agrees. As a result, the Subject Order

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is vacated. A "general presumption of public identification of parties" exists in cases pending in South Carolina's courts. *Doe v. Howe*, 362 S.C. 212, 219, 607 S.E.2d 354, 357 (Ct. App. 2004). To overcome the presumption, the *Howe* Court outlined several factors (in contested hearings) to be considered, including, *inter alia*: (1) whether the justification asserted by the requesting party merely seeks to avoid the annoyance and criticism attendant to any litigation or seeks to preserve privacy in a matter of sensitive and highly personal nature; (2) whether identification poses a risk of retaliatory physical or mental harm to the requesting party; (3) the ages of the persons whose privacy interests are sought to be protected; (4) whether the action is against a governmental or private party; and (5) the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously. *Doe*, 362 S.C. at 217-218. Plaintiff has not satisfied these criteria.

Plaintiff predicates her need to proceed anonymously on privacy concerns. However, the Court finds Plaintiff's privacy interests are substantially diminished, if not entirely absent, given her voluntary filing of an affidavit ("Prior Affidavit") in another lawsuit.[1] The Prior Affidavit contains detailed information about Plaintiff's relationship with Landgraff's former spouse during Landgraff's marriage, an issue cited by Landgraff as material to his defense of Plaintiff's invasion of privacy claims.[2] Plaintiff cannot claim privacy interests as to issues already disclosed in the public record.

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[1] The Court notes that all parties involved in this case are adults and the conduct cited in the Complaint occurred while they were adults. No evidence exists that Plaintiff's mere *identification* poses a risk of retaliatory physical or mental harm to the requesting party, as reflected by the existence of the Prior Affidavit in the public record.

[2] The Court will refrain from detailing the content of the Prior Affidavit but for purposes of a complete record does incorporate the Prior Affidavit by reference herein. The Prior Affidavit can be found attached as Exhibit 2 to the Motion to Strike in the Circuit Court's record in: *Mulligan v. Landgraff*, C.A. No. 2010-CP-23-6024.

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The Court also finds the Subject Order unfairly prejudices Landgraff. Plaintiff publicly levels serious allegations against Landgraff, which he denies. Conversely, in support of his defense, Landgraff levels serious allegations against Plaintiff, which she presumably also denies. Allowing Plaintiff to proceed anonymously, while Landgraff defends publicly, places the parties on unequal footing in the absence of *bona fide* privacy concerns. The Court declines to elevate one party's litigation position over that of another and instead elects to abide by the "general presumption" requiring public identification of parties. *Doe v. Howe*, 362 S.C. at 219.

Landgraff similarly argues, and the Court so finds, that his ability to conduct discovery from third-parties (*i.e.*, issuance of third-party subpoenas and conducting third-party depositions) is impaired because the Subject Order restricts his ability to identify Plaintiff to third-parties while gathering evidence in his defense.

Plaintiff opposes Landgraff's Motion as untimely, mistakenly relying on the 10 day time limit found in Rule 59, SCRCP. Rule 59 relates to final judgments, not interlocutory orders. By contrast, it is well-settled in South Carolina that a trial court may set aside, alter or amend interlocutory orders before entry of final judgment. *See, e.g., PPG Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc.*, 297 S.C. 176, 183 (S.C. Ct. App. 1988) ("A trial judge, until final judgment, controls the trial of the case before him, and as a general rule may amend, correct, modify, or otherwise change its findings of fact and conclusions of law before entry of judgment or decree.") Plaintiff's timeliness argument similarly ignores Rule 65, SCRCP, which dissolves by operation and law *ex parte* orders after ten (10) days. Finally, the court has the inherent power to vacate the Subject Order due to the circumstances under which it was obtained.[1] *Ex Parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440 (Ct.App. 1983) (Sanders, C.J.)

[1] Plaintiff's counsel has represented to the court that he had no knowledge of the public filing of

("Courts have the inherent power to do all things reasonably necessary to insure that just results are reached...").

Accordingly, the May 17, 2013 Order is hereby vacated. Within ten (10) days of the receipt of this Order, Plaintiff is ordered to amend her Complaint for the sole purpose of substituting her real name for the pseudonym Jane Doe. All prior restrictions related to identifying the Plaintiff as found in the Subject Order are hereby removed.

IT IS SO ORDERED.

D. Garrison Hill
Circuit Judge

12/23, 2013
Greenville, S.C.

his client's prior affidavit before the Subject Order was obtained.

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January 24, 2014

VIA EMAIL (mrmayersoffice@aol.com)
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William G. Mayer
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Re: Jane Doe vs. Frank A. Landgraff, et. al.
C.A. No: 2013-DR-23-1762
NMRS File No. 35353/01502

Dear Bill:

This letter follows up on our phone conversation earlier today, January 24, 2014, regarding the above-captioned matter.

Amended Complaint

The Order filed January 6, 2014 (enclosed) vacated the May 17, 2013 Order and stated "[w]ithin ten (10) days of the receipt of this Order, Plaintiff is ordered to amend her Complaint for the sole purpose of substituting her real name for the pseudonym Jane Doe. All prior restrictions related to identifying the Plaintiff as found in the Subject Order are hereby removed." (Order p. 4).

The cover sheet reflects the Clerk mailed the Order on January 6, 2014, and Plaintiff has not yet amended her Complaint as ordered. Please file and serve the amended Complaint with Plaintiff's real name as soon as possible.

Hearing

Plaintiff's Motion to Strike and Motion for Partial Summary Judgment dated October 31, 2013 is set for hearing on Wednesday, January 29, 2014 at 2:00 p.m. in the Greenville County Court of Common Pleas.

This motion was previously set for hearing on December 5, 2013 and was continued by the Order for Continuance filed December 5, 2013 "pending the discovery process."

We continue to believe the motion is premature and should be withdrawn (without prejudice to re-file at a later date). In any event, I understand you will seek a continuance of next week's hearing. Please request that the rescheduled hearing not be set until a time that allows us an opportunity to conduct discovery.

I look forward to hearing from you as described above.

With best personal regards, I remain

Very truly yours,

Reid T. Sherard

RTS:rts
Enclosures
cc: Frank Landgraff, via US Mail
Joe Mooneyham, via email only

Certificate of Counsel

The undersigned hereby certifies that the Supplemental Record on Appeal contains all material proposed to be included by any of the parties that complies with this Court's order and not any other material.

September 28, 2016

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