THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master-in-Equity, Circuit Court Judge

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Case No. 2015-CP-23-02597
Appellate Case No. 2016-001695

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SC Court of Appeals

State of South Carolina on the relation of William Walter Wilkins, III, Solicitor of the Thirteenth Judicial Circuit,..... Respondent,

v.

Elephant Inc., Gregory Kenwood Gaines, and Frontage Road Associates, Inc., Defendants,

of which Elephant Inc. and Gregory Kenwood Gaines are the.....Appellants.

BRIEF OF RESPONDENT

13TH Circuit Solicitor William Walter Wilkins, III
Deputy Solicitor Andrew Culbreath
For Respondent State of South Carolina
305 East North Street, Suite 325
Greenville, SC 29601
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STATEMENT OF ISSUES ON APPEAL

I. **DESPITE TWO SUPREME COURT ORDERS AUTHORIZING JURISDICTION AND AN ORDER OF REFERENCE, DID THE LOWER COURT LACK SUBJECT MATTER JURISDICTION?**

II. **DID THE LOWER COURT ABUSE ITS DISCRETION WHEN DENYING APPELLANTS' SECOND, CONSECUTIVE CONTINUANCE REQUEST?**

III. **DID THE LOWER COURT ERR WHEN IT FOUND THE EVIDENCE ESTABLISHED APPELLANTS WILLFULLY VIOLATED ITS ORDER?**

IV. **DID THE LOWER COURT VIOLATE APPELLANTS' DUE PROCESS RIGHTS BY SANCTIONING THEIR CONTUMACIOUS CONDUCT?**

V. **DID THE EVIDENCE OF RECORD SOMEHOW FAIL TO ESTABLISH APPELLANTS VIOLATED THE LOWER COURT'S ORDER?**

VI. **DID THE LOWER COURT COMMIT ERROR BY EXPRESSLY RE-STATING GAINES' OBLIGATIONS UNDER ITS CONSENT ORDER?**

STATEMENT OF CASE

The State of South Carolina on the relation of Walter W. Wilkins, III, Solicitor of the Thirteenth Circuit ("State" or "Respondent" or "Solicitor"), hereby sets forth the statement of the case on appeal:

On April 17, 2015, Respondent filed a Verified Petition against Frontage Road Associates, Inc. ("FRAI" or "Landlord") and Appellant Elephant, Inc. ("EI"). (R.p. 87). Respondent later amended the Petition (treated collectively as "Nuisance Petition" or generally as "Nuisance Action") to name *inter alia* Appellant Gregory Kenwood Gaines ("Gaines"). (R.p. 195).[1] The Nuisance

[1] To avoid confusion, Respondent notes Gregory Kenwood Gaines uses a variety of different names, which appear at varying places in the Record. Such permutations include: Ken Wood, Ken Gaines, Ken Wood Gaines, Kenwood Gaines, Greg Gaines.

Petition sought a temporary and permanent injunction to abate a public nuisance allegedly occurring on property owned by FRAI and leased by EI and Gaines as joint-tenants. (R.pp. 211-212).

When filing the Nuisance Petition, the Solicitor also moved the trial court for a Preliminary Injunction as provided by S.C. Code § 15-43-30. (R.p. 432). Following a hearing, the lower court granted Respondent's motion for a temporary injunction on May 6, 2015, pending a trial on the merits. (R.p. 1). Appellants then appealed the Order granting the preliminary injunction on the day it issued. (R.p. 13). Within twenty-four hours of its filing (*i.e.*, May 7, 2015), the South Carolina Court of Appeals denied Appellants' petition for *supersedeas*. (R.p. 13).

Pursuant to Appellants' request, the lower court slated the case for an accelerated trial date before Circuit Court Judge James Barber on June 22, 2015, approximately sixty (60) days after the case commenced. (See e.g., R.pp. 8-9). Following extensive negotiations between the Parties and counsel, on June 3, 2015, Appellants executed a Consent Order ("Consent Order" or "2015 Order") with the State in an effort to resolve the Nuisance Action and avoid trial. (R.p. 15). Then, on April 27, 2016, the State filed a Verified Petition for Rule to Show Cause alleging EI and Gaines had serially and systematically violated the Consent Order. (R.p. 214).

On April 29, 2016, Chief Administrative Judge Robin Stilwell ordered Appellants to appear and show cause on May 18, 2016 and referred the case to the Honorable Charles B. Simmons, Jr. ("Judge Simmons" or "Trial Judge"). (R.p. 65).[2] Appellants then requested a continuance ("First Continuance"), which the lower court granted (on May 6, 2016) to allow Appellants time to hire new counsel. (R.pp. 303, line 16-304, line 2, 312, line 12-313, line 12). The lower court postponed the proceedings ("Contempt Proceedings") until June 14, 2016,

[2] Judge Simmons hears cases as both Master-in-Equity, and as per order of the South Carolina Supreme Court, as a specially designated Circuit Court Judge. (R.p. 629).

indicating no further continuances would follow. (Id.; see also R.p. 67). Appellants' prior counsel both received and formally accepted service of the filings. (R.p. 580).

The lower court held the Contempt Proceedings on June 14, 2016. (R.p. 299). Judge Simmons issued an Order ("Contempt Order") finding only Appellant EI in criminal and civil contempt on July 27, 2016. (R.p. 69). Appellants filed a motion for reconsideration on August 5, 2016. (R.p. 598). Prior to the lower court's hearing on the same and before it could issue a ruling, Appellants withdrew their motion for reconsideration on August 10, 2016. (R.p. 667). Appellants then filed their Notice of Appeal on August 10, 2016.

STATEMENT OF FACTS

Appellants seek review of a lower court order finding Appellant EI in criminal and civil contempt (i.e., the Contempt Order). (Not. of App.) The lower court found EI serially violated a Consent Order executed by the Court and Parties when resolving the underlying Nuisance Action and attendant appeal. (See also infra; R.p. 15). The facts and circumstances surrounding the Nuisance Action, the Consent Order's execution, the Consent Order's violation, and the ensuing Contempt Proceedings, all prove material to the issues now pressed by Appellants. This recitation of facts follows as a result:

A. The Underlying Proceeding

As noted above, Respondent commenced the Nuisance Action on April 17, 2015 against EI and FRAI. (R.p. 87). The Nuisance Petition alleged a Public Nuisance, as defined by South Carolina Code §15-43-10, et seq., existed and remained ongoing at 805 Frontage Road in Greenville, South Carolina ("Subject Property"). (R.pp. 195-212). FRAI owned the Subject Property. (R.pp. 195, 125-129.) EI leased the Subject Property and owned and operated an adult nightclub named Platinum Plus at the location. (Id.; R.pp. 293, line 18-294, line 4).

The Nuisance Petition detailed twenty-four categories of unlawful conduct occurring at the Subject Property, occurring on fifteen (15) different occasions, over the course of a one-year investigation. (R.pp. 197-198).[3] The State supported the Nuisance Petition with the Affidavit of Deputy Sheriff Robert Curtis. (R.pp. 106-194). The State also supported the Nuisance Petition with eight (8) sworn statements from individuals working at Platinum Plus during the time period material to the underlying dispute. (R.pp. 137-165; see also R.p. 559).

Upon filing the Nuisance Petition, the Solicitor moved the Court for a Preliminary Injunction as provided by S.C. Code §15-43-30. (R.p. 432). The Court granted the State's motion for a temporary injunction on May 6, 2015, pending a trial on the merits. (R.p. 1). In so doing, the lower court preliminarily found *inter alia*: "[T]he Solicitor has satisfied the burden under S.C. Code §15-43-30 by introducing evidence demonstrating a repeated and continuous nuisance...existed at the Subject Property within the meaning of the Nuisance Statute." (R.p. 4).

In granting the preliminary injunction, the lower court also found that a 2002 Consent Order (treated as "2002 Order") entered into by Appellants "clearly defined...what could or could not occur [at the Subject Property] and...set out the affirmative duties and obligations that [Appellants] undertook . . ." (R.p. at 5).[4] In so noting, the lower court found admissible

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[3] Contrary to their suggestions, Appellants were neither singled-out, see e.g., Appellant's Brief, p. 6, nor did the conduct occur on an isolated basis, nor did the conduct consist of mere "erotic message[s]." (App. Brief, p. 15). The Verified Nuisance Petition and attached sworn statements confirmed systematic and serial instances (on fifteen separate dates) of prostitution and lewd and lascivious conduct had occurred at the Subject Property. (See R.p. 87, ¶¶12(a)-(x)).

[4] Ironically, the 2002 Order arose out of a declaratory action wherein Platinum Plus sued Greenville County to obtain a judicial declaration interpreting and clarifying certain provisions of the Greenville County Sexually-Oriented Business Ordinance. Platinum Plus contended it feared "prosecution and the possibility of civil and criminal contempt" if it did not obtain clarification of the Ordinance. (R.p. 43). The 2002 Order resulted from negotiations between the Parties of that litigation to provide Platinum Plus clear contours of what it could and could not do. Platinum Plus similarly ignored the 2002 Order.

evidence, introduced by Respondent, established prohibited conduct "repeatedly and consistently occurred" at Platinum Plus. (R.p. at 5).[5] On the same day of its issuance, Appellants appealed the Order granting the preliminary injunction and filed a petition for an emergency writ of *supersedeas*, which this Court thereafter denied within twenty-four hours of its filing (*i.e.*, on May 7, 2015). (R.pp. 13-14).

B. The 2015 Consent Order

Facing an upcoming trial date, Appellants approached the State about resolving the Nuisance Proceedings. Following extensive negotiations between the Parties and counsel, Appellants entered into a Consent Order (treated as "Consent Order" or "2015 Order") with the State to avoid the upcoming trial, to resolve the Nuisance Action, and to end the ongoing appellate proceedings. (R.pp. 15-19). As reflected by its terms, the Consent Order specifically aimed to abate the unlawful conduct prompting the Nuisance Action's filing in the first place.[6] (R.pp. 15-19).

Due to the strength of the Solicitor's case, in Paragraph I of the Consent Order, Appellants specifically acknowledge[d] and stipulate[d] Respondent: "possesse[d] and could present sufficient evidence...that a presiding judge could find...Platinum Plus...constituted a public nuisance within the meaning of the Nuisance Statute." (R.p. 17, ¶1). Nonetheless, in exchange for Appellants' agreement to abide by the Consent Order's terms and conditions,

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[5] The Court also rejected an as-applied First Amendment challenge advanced by Platinum Plus as lacking "evidentiary support." (R.p. 8).

[6] See, e.g., 2015 Consent Order, ¶¶II, IV, V, VIII, IX (Providing for: a six (6) month shut-down, incorporating and reaffirming prior consent order, mandatory enhanced monitoring, surveillance footage, independent monitoring, contempt sanctions for non-compliance, and continued jurisdiction. (R.pp. 17, 19-20, 21-23).

Respondent agreed to forgo a trial on the merits of the Nuisance Action. (R.pp. 16, 23). Contrary to Appellants' unsupported assertions of being singled-out, Respondent also agreed to allow Platinum Plus to re-open on November 8, 2015, albeit under express (and negotiated) conditions designed to safeguard against the recurrence of the public nuisance at the Subject Property. (R.pp. 17-18, ¶II).[7]

The Consent Order imposed both mandatory and prohibitive obligations, which Appellants agreed to fulfill in order to avoid trial and eventually re-open. (R.pp. 15-23). As an initial matter, the Consent Order expressly "incorporated by reference...and reaffirmed" the 2002 Order's terms and conditions. (R.p. 19). Appellants agreed the 2002 Order would remain "in full force and effect..." and promised to comply with its provisions to re-open. (Id.) Important to the discussion below, and as previously found by the lower court, the 2002 Order "clearly defined...what could or could not occur [at the Subject Property]." (See, e.g., R.pp. 44-45 (Prohibiting inter alia the "state of nudity," "specified sexual activities," and "specified anatomical areas"); see also infra Section II.) Of note, like the 2015 Order, the reaffirmed 2002 Order similarly stated: "The parties further understand and agree that violations of the agreements set forth in this order shall be punishable as contempt of Court..." (R.p. 46).[8]

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[7] By contrast, had Respondent prevailed at the trial on the merits, the Public Nuisance Statute would have compelled: the closure of Platinum Plus for a year (in addition to the closure imposed by the preliminary injunction); the sale of Appellants' fixtures, furniture, and moveable property; and the issuance of a perpetual, statewide injunction. Compare S.C. Code §15-43-20 with §15-43-70 with §15-43-80.

[8] Respondent would also note the following language in the Consent Order: "EI and Gaines hereby acknowledge and stipulate that the [2002] Order remains and will continue to remain in full force and effect thereby mandating EI's and Gaines' continued compliance with the same." (R.p. 19). "The [2002] Order is likewise incorporated by reference into and reaffirmed by this Consent Order thereby mandating full compliance with same under this Consent Order as well." (Id.) Accordingly, for the reasons stated within, Appellants have not violated just the Consent Order but both the 2002 Order and the Consent Order, each of which contain stand-alone

Because Appellants had already violated the 2002 Order, Respondent insisted the Parties' settlement agreement be "made an Order of this Court requiring compliance with the same by operation of judicial decree." (R.p. 16). To foreclose any attempts—after-the-fact—to distort the Consent Order as a "mere settlement contract," such as those now advanced, see e.g., Appellant's Brief, p. 23, Paragraph VIII (entitled, "Sanctions for Violation of this Order") expressly stated: "Willful violations of the terms and conditions set forth in this Consent Order shall be punishable as contempt of Court." (R.p. 22).

C. Appellants Violated the Consent Order

Within only seven (7) days of re-opening, Platinum Plus commenced violating the Consent Order's terms and conditions. (See R.p. 72; R.p. 329, l. 18-24 & R.pp. 330-337). During the Contempt Proceedings, and as the lower court found, Appellants serially violated the Consent Order. (R.p. 72). The evidence of record established and lower court found:

- "Evidence overwhelmingly established Platinum Plus willfully and repeatedly violated the 2015 Order within only seven (7) days of re-opening." (R.p. 329, l. 18-24 & R.pp. 330-337).
- "Evidence established the Solicitor furnished notice to Platinum Plus of its noncompliance with the 2015 Order in January and February of 2016." (R.p. 168).
- "Evidence established serial and persistent violations continued to occur even after the Solicitor furnished notice to Platinum Plus of its non-compliance." (R.pp. 357, l.18-23, 362-363, 366, 370-373, 375, 382, 394, 395).
- "Evidence established serial and patent violations of the 2015 Order, which in and of itself, confirmed Platinum Plus's willful non-compliance. Evidence established at least thirteen (13) separate violations of the "state of nudity" prohibition incorporated into the 2015 Order from the 2002 Order." (See, e.g, R.pp. 330, 335, 362, 363, 370, 371, 372, 375, 395) "And, evidence established at least fifteen (15) separate violations of the "specified sexual activities" prohibition incorporated into the 2015 Order from the 2002 Order." (See R.pp. 330, 332, 333, 334, 362, 363, 366, 370, 371, 372, 375, 382, 394).

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provisions, yet cross-incorporated, subjecting Appellants to segregable contempt sanctions for each.

- "Evidence established Platinum Plus's management and employees turned an institutional blind eye to violative conduct that occurred in their presence." (See, e.g., R.pp. 333-334, 370-373, 394-395).

- "Evidence established Platinum Plus allowed dancers to wear patently violative clothing without taking corrective measures." (See R.pp. 361-362, 370, 372, 375).

- "Evidence established that as late as March of 2016 Platinum Plus did not inform prospective dancers of what clothing and conduct proved off-limits under the Court Order." (See R.pp. 406, l. 23-24, 412, l. 4-18).

- "Evidence established Platinum Plus continued to supply prospective dancers with an Entertainment Agreement, the terms of which failed to comply with the 2015 Order." (See R.p. 652; R.pp. 404-405).

- "Evidence established Platinum Plus violated Paragraph V(A)(4) of the 2015 Order by failing to provide the Solicitor video footage as requested." (R.pp. 338, l. 17-339, l. 18).

- "Evidence established the video cameras installed by Platinum Plus did not capture reviewable video footage in 'all places where Dancers' interacted with customers as required by Paragraph V(A) of the 2015 Order." (See R.pp. 324, 335-336; R.p. 168).

- "Video footage from Platinum Plus's surveillance cameras that was presented in Court during the hearing on June 14, 2016, clearly established the blatant and repeated violations of the Consent Orders (independent of the Monitors testimony) and substantially corroborated the testimony given by the State's witnesses." (R.p. 634-641).

(R.p. 72).

Due to their non-compliance, Respondent filed the Verified Petition seeking contempt sanctions on April 27, 2016. (R.p. 214). Pursuant to Appellants' request for additional time to retain new counsel, the lower court postponed the Contempt Proceedings until June 14, 2016. (R.pp 303, l. 11-304, l. 12; 312, l. 21-313, l. 12). The lower court thereafter held the Contempt Proceedings on June 14, 2016. (R.p. 299). The lower court then issued the Contempt Order on July 27, 2016. (R.p. 69). Appellants filed a notice of appeal on August 10, 2016. (Not. of App.). The instant appeal ensued as a result.

STANDARD OF REVIEW

A finding of contempt rests squarely within the trial court's sound discretion. As a consequence, the abuse of discretion standard governs the instant appeal.[9] See Rhoad v. State, 372 S.C. 100, 104, 641 S.E.2d 35, 37 (Ct. App. 2007) ("A determination of contempt ordinarily resides in the sound discretion of the trial court."); Id. at 105, 641 S.E.2d at 37 ("This court will reverse a trial court's decision regarding contempt only if it is without evidentiary support or is an abuse of discretion."); First Union Nat'l Bank v. First Citizens Bank & Trust Co. of S.C., 346 S.C. 462, 466, 551 S.E.2d 301, 303 (Ct. App. 2001); Stone v. Reddix-Smalls, 295 S.C. 514, 516, 369 S.E.2d 840, 840 (1988)("On appeal, a decision regarding contempt should be reversed only if it is without evidentiary support or the trial judge has abused his discretion."); S.C. Code Ann. § 14-5-320 ("The [trial] court may punish by fine or imprisonment, at the discretion of the court, all contempts of authority in any cause or hearing before the same."). As discussed below, both applicable law and ample evidence support the lower court's Contempt Order; the trial court's ruling should, therefore, be affirmed. See Durlach v. Durlach, 359 S.C. 64, 70, 596 S.E.2d 908, 912 (2004); Fontaine v. Peitz, 291 S.C. 536, 538–39, 354 S.E.2d 565, 566–67 (1987); Miller v. Miller, 375 S.C. 443, 452, 652 S.E .2d 754, 759 (Ct.App.2007) ("An appellate court should reverse a decision regarding contempt 'only if it is without evidentiary support or the trial [court] has abused his discretion.'").

ARGUMENT

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[9] By contrast, Appellants errantly rely upon the holding of Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981), an inapplicable ruling of the South Carolina Supreme Court involving a Family Court child support order. Stevenson does not even use the word "contempt," although Appellants acknowledge they have appealed an order finding them in contempt. Inapplicable to this case, Stevenson does not set forth the correct standard of review.

Appellants' brief fails to raise any legitimate basis to overturn the lower court's Contempt Order. Appellants advance and then recycle a series of confused and unsupported legal arguments from which they urge the Contempt Order's reversal. None possess factual or legal validity. The instant brief rebuts each of Appellants' arguments in turn.

I. SUBJECT MATTER JURISDICTION SUPPORTED THE TRIAL JUDGE'S CONTEMPT FINDINGS.

Appellants first contend the lower court lacked subject matter jurisdiction to hear the Contempt Proceedings and enter the Contempt Order ("First Argument"). (App. Brief, pp. 12-18). According to Appellants, the Trial Judge, the Honorable Charles Simmons, Jr. served as a Master-in-Equity and, therefore, could not preside over the Contempt Proceedings absent a proper order of reference. (Id.) Appellants' First Argument fails for three (3) reasons.

A. Two Separate Supreme Court Orders Authorized the Trial Judge to Hear and Adjudicate the Contempt Proceedings.

Despite Appellants' assertions, the South Carolina Supreme Court specifically granted the Trial Judge the authority to hear the Contempt Proceedings. The Supreme Court issued two separate yet identical orders (treated collectively as "Supreme Court Order") expressly designating and authorizing Judge Simmons to hear *inter alia* both civil and criminal non-jury matters in a Circuit Judge capacity, not as a Master-in-Equity. (R.pp. 629-630, ¶¶2 & 5). The Supreme Court Order states: "IT IS ORDERED that the Honorable Charles B. Simmons, Jr., Master-in-Equity for Greenville County is assigned as a Circuit Judge for the Thirteenth Judicial Circuit..." (*Id.*; R.pp. 629-630).[10]

The Supreme Court, in turn, specifically enumerated the subject matters over which the Trial Judge could exercise jurisdiction in the designated capacity as a Circuit Judge. Omitted by Appellants when quoting the same, see e.g., Appellants' Brief, p. 18, Paragraph 2 conferred jurisdiction upon the Trial Judge: "to try [civil nonjury matters] to conclusion." (*Id.*) Paragraph 5 similarly granted the Trial Judge jurisdiction: "to hear and dispose of...nonjury [criminal] trials" and "to perform all other nonjury criminal matters unless otherwise directed by the Chief Judge for Administrative Purposes." (R.pp. 629-630). Paragraph 6 further jurisdictionally empowered the Trial Judge to: "[p]erform such other duties" as needed "to effectuate" the Order's intent. (R.pp. 629-630). Accordingly, the Trial Judge possessed jurisdiction to hear the Contempt Proceedings, which proceeded as a non-jury matter and which arose out of a

[10] The Orders continued in effect until January 1, 2016 and January 1, 2017, respectively. (R.pp. 629-630). Both Orders state: "The purpose of this assignment is to allow Judge Simmons to assist with the docket and perform the[] additional duties..." enumerated therein. (R.pp. 629-630). "Regular Circuit Judges shall also continue to hear these matters." (R.pp. 629-630).

Consent Order executed by Judge Simmons himself in the underlying non-jury civil proceeding. (R.p. 214; R.p. 15).

The Solicitor specifically cited the Supreme Court Order at the Contempt Hearing. (R.p. 309, ll.1-7). The lower entered the Supreme Court Order as Court Exhibit 1. (R. pp. 629-630). The lower court then cited the Supreme Court Order in the written Contempt Order. (R.p. 75). And, while they claim to have never received the trial exhibits from the Contempt Proceedings, see e.g., Appellants' Brief, p. 12, Appellants somehow managed to quote Court Exhibit 1 verbatim in their brief. (See App. Brief, p. 18) The Supreme Court Order alone ends the need for further inquiry concerning Appellants' First Argument.

B. Contrary to What Appellants Represent, the Chief Administrative Judge Likewise Referred the Contempt Proceedings to the Trial Judge.

Appellants' First Argument fails for a second reason. According to Appellants, the Trial Judge lacked subject matter jurisdiction because "no one can find" an order referring the case to Judge Simmons, who also presides as the Greenville County Master-in-Equity. (App. Brief, p. 17) Appellants argue: "Whether there is an or is not an alleged Order of Reference, one thing is clear. It has not been filed in this case as may be seen by reference to the Greenville County Clerk of Court's docket sheet." (Id.) Not so.

On April 29, 2016, Chief Administrative Judge Robin Stilwell issued an Order to Show Cause ("Judge Stilwell's Order") subsequent to the filing of the Solicitor's petition. (R.p. 65).[11] Judge Stilwell's Order stated:

> Based upon my review of the Solicitor's Petition and incorporated exhibits, it appears that the Defendants may be in violation of the terms and conditions of the 2015 Consent Order. THEREFORE, IT IS ORDERED THAT DEFENDANTS

[11] In light of the Supreme Court Order, Judge Stilwell's Order of reference proved redundant, as Judge Simmons already possessed jurisdiction to hear the same.

> ELEPHANT, INC AND GREGORY KENWOOD GAINES APPEAR before the Greenville County Master-in-Equity located at 305 East North Street, Greenville, South Carolina, 29601, third floor, Courtroom #5 on May 18, 2016 at 3:15 o'clock p.m. The Defendants shall then and there be prepared to show cause, if they can, as to why this Court should not make a finding that these Defendants have violated conditions of the 2015 Consent Order.

(R.p. 65 (Emphasis added)). Thus, contrary to what Appellants claim in their brief, the Chief Administrative Judge (i.e., Judge Stilwell), did, in fact, refer the Contempt Proceedings to Judge Simmons. (R.p. 65).

While Appellants contend "no one" can find Judge Stilwell's Order referring the Contempt Proceedings to the Trial Judge *and* further represent such order "has not been filed" in the lower court, both statements ring untrue. Judge Stilwell's Order was, in fact, filed in the lower court and can also be readily found online at Greenville County's Public Index website. (See R.p. 679).[12]

To make matters worse, Appellants raised the same issues in the lower court and, in response, the Solicitor identified exactly in the Record where Judge Stilwell's Order referring the Contempt Proceedings to the Trial Judge could be found. (R.pp. 308, l. 25-309, l. 2)("There was a reference filed with regard to the Rule to Show Cause that Judge Stilwell...directed to [Judge Simmons]."')) Then, when Appellants cited the applicable passage in their brief, they regrettably omitted the Solicitor's response. (See, e.g., App. Brief, p. 17 (Quoting the Trial Judge inquiring about the reference (i.e., "Mr. Culbreath, is that correct?") and then omitting

[12] Appellants rely upon the decision of Bunkum v. Manor Properties, 321 S.C. 95, 467 S.E.2d 758 (Ct. App. 1995, cert. den. October 17, 1996), see Appellant's Brief p. 14, in support of their Jurisdiction Argument. Stating the obvious, Bunkum proves inapposite because unlike the Bunkum Master in Equity, both the Supreme Court Order and Judge Stilwell's Order conferred jurisdiction on the Trial Judge to hear and adjudicate the Contempt Proceedings.

the Deputy Solicitor's response quoted above (i.e., "There was a reference with regard to the Rule to Show cause...")).

Appellants' confusion over Judge Stilwell's Order grows increasingly difficult to understand in light of the Contempt Order itself, which specifically cited Judge Stilwell's Order and identified the exact date of its issuance, April 29, 2016. (See R.p. 75 (Contempt Order finding: "Moreover, and independent of the standing order, the presiding administrative judge issued an Order referring the current proceedings to the undersigned. See Order dated April 29, 2016.")) Appellants nonetheless claim "no one" can find Judge Stilwell's Order. This Court should altogether reject Appellants' First Argument for the most basic of reasons—it is factually incorrect.

C. The Underlying Consent Order Expressly Preserved the Trial Court's Jurisdiction to Enforce the Consent Order.

Appellants' First Argument fails for another reason, namely, Appellants both stipulated and consented to the lower court's continued exercise of personal and subject matter jurisdiction to enforce the Consent Order's terms.[13] In pertinent part, the Consent Order states as follows:

- "Willful violations of the terms and conditions set forth in this Consent Order shall be punishable as contempt of Court." (R.p. 22, §VIII).
- "All undersigned signatories have had the benefit of the advice of counsel and knowingly and voluntarily agree to be bound by the terms of this Consent Order." (R.p. 22, §IX, ¶A).

[13] As noted above, Judge Simmons presided over motions held in the underlying Nuisance Proceedings and thereafter executed the Consent Order, which formed the basis for the Contempt Proceedings. (R.pp. 1; 15; 69). The underlying Nuisance Action "was heard by the [lower court] in its capacity as a Circuit Judge." (R.p. 303, ll. 3-5). In turn, the Consent Order specifically preserved the lower court's continued jurisdiction to enforce violations of the Order by contempt. (R.p. 22-23, §§VIII & IX, ¶¶ (A)-(E); see also R.p. 75).

- "All undersigned signatories hereto stipulate and agree that the Greenville County Court of Common Pleas possesses personal jurisdiction over them as well as subject matter jurisdiction to hear this matter and enter this Consent Order." (R.p. 22, §IX, ¶B).

- "All undersigned signatories further stipulate to this Court's continuing personal jurisdiction over them for purposes of enforcing the terms of this Consent Order." (R.p. 22, §IX, ¶D).

- "Notwithstanding any other term and condition of this Order, the Greenville County Court of Common Pleas shall perpetually retain continuing jurisdiction to enforce the terms and conditions of this Consent Order." (R.p. 22, §IX, ¶E).

And, of course, presiding judges retain, by virtue of judicial necessity, the inherent authority to enforce orders they issue. Miller v. Miller, 375 S.C. 443, 453, 652 S.E.2d 754, 759 (Ct. App. 2007) ("The power to punish for contempt is inherent in all courts.") (internal citations omitted). For these reasons, the lower court possessed subject matter jurisdiction to hear the Contempt Proceedings.[14]

D. Appellants' Brief Contains Various Untrue Assertions Unsupported by the Record.

Section I of Appellants' brief contains various untrue (and unpreserved) assertions Respond feels compelled to address so as to avoid distortion of the Record and foreclose confusion.

[14] Appellants also suggest referral of the case to Judge Simmons deprived them of a right to jury trial. Respondent addresses such arguments below.

1. The Administrative Judge, Not the Solicitor, Chose What Trial Judge Presided Over the Contempt Proceedings.

Without any basis in the Record (or otherwise), Appellants suggest the Solicitor somehow hand-selected what Trial Judge heard the Contempt Proceedings. (See e.g., App. Brief, p. 15 ("[T]he Solicitor not be seen as picking the judge who hears the case); Id. at 21 ("[T]he Solicitor engage in impressible [sic] judge shopping"))[15] Again not so.[16] Apart from filing the State's Petition requesting an order requiring Appellants to appear and show cause, Respondent had nothing to do with the process of how the lower court assigned a judge to preside. Nor would Respondent presume to do so. Without input from Respondent, Judge Stilwell, as Chief Administrative Judge, assigned the Contempt Proceedings to Judge Simmons. (See R.p. 65). As they do throughout their brief, Appellants fail to provide the Court with any Record citation to support their unfounded accusations.[17]

2. Without Basis and Absent Any Citation to the Record, Appellants Suggest the Trial Judge Lacked Impartiality.

Appellants' brief similarly lobs other unfounded accusations presumably intended to create a false patina of unfair treatment. For example, again without any basis, Appellants suggest the Trial Judge lacked impartiality. (See e.g., Appellant's Brief, p. 15 ("[D]efendant is entitled to be heard before a neutral and detached magistrate."); Id. ("Government's suppression of the appellants' right to have a hearing with someone not invested in local affairs...")) Nothing in the record supports Appellants' aspersions and, notably, they cite none. (Id.) Before now, Appellants not once, even in quiet tones, suggested the lower court lacked impartiality. Yet, now for the first time, Appellants presently attempt to interject the issue, in sideways fashion, in hopes of propping-up an otherwise meritless appeal by casting an untrue innuendo of unfairness.

Had Appellants truly questioned the trial judge's impartiality, they could have (and would have)—but did not—file a motion to recuse the Trial Judge. Having never raised the issues below, having never allowed the Solicitor a chance to respond, and having never compiled a proper Record about such issues, Appellants cannot do so now. It is axiomatic that Appellants

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[15] Of note, Appellants' representations in this regard prove inconsistent even with other statements in their own brief. See, e.g., App. Brief, p. 12 ("At no time during this criminal contempt process did the State ask that the matter be referred to the Master-in-Equity.")

[16] Appellants also accuse the "government" of being obsessed with prosecuting harmless behavior and spending over five-hundred-dollars an hour in a sting operation. See App. Brief, p. 15. Of course, Appellants omit reference to the serial acts of prostitution and illegal conduct occurring at Platinum Plus Greenville, see *supra*, and Appellants omit the investigation costs were only incurred because such amounts were Platinum Plus Greenville's "sticker-price" for illegal prostitution and sex acts in its "Champagne Room," where the vast majority of the unlawful conduct occurred. (See, e.g., R.pp. 364, l. 3-365, l. 18 (Undercover agent explaining to enter the Champagne Room, Platinum Plus Greenville charges two-hundred and ninety-five dollars ($295.00) for a sixty dollar ($60.00) bottle of champagne and then individual negotiations ensued with each dancer for additional payments ranging in price between one hundred and fifty ($150.00) to four hundred dollars ($400.00).) Such monitoring and enforcement costs were, in turn, funded by Platinum Plus Greenville under the Consent Order. (See R.p. 358, ll. 13-18). Appellants agreed to pay such amounts to ensure their compliance with the Consent Order's terms and conditions, which they violated anyway. (See R.pp. 20-21, §V, ¶B(3)).

[17] Appellants also revisit their portrayal of the underlying illegal prostitution and sex acts as constitutionally protected speech. Yet again, Appellants failed to raise and preserve such issues in the lower court. Nor could they raise them at this juncture, as they were "adjudicated and deemed *res judicata*" by the parties' Consent Order. (See R.p. 23, §IX, ¶H). But, even if Appellants had actually raised and preserved the issue, and even if Appellants had not otherwise agreed the issue had been adjudicated, then just like the Solicitor did when Appellants attempted to raise such issues in the Nuisance Action, Respondent would direct the Court to the United States Supreme Court's opinion in Arcara v. Cloud Books, Inc., 478 U.S. 697, 707 (1986). In Arcara, the United States Supreme Court upheld the closure of an adult bookstore under New York's Nuisance Statute because protected activities (*i.e.*, bookselling) did not: "confer First Amendment coverage [so as] to defeat a valid statute aimed at penalizing and terminating illegal uses of premises..." (Id. at 707; see also Dorman v. Aiken Communications, Inc., 303 S.C. 63, 66 (1990)(Citing and following Arcara's analysis.) As Appellants know but failed to inform the Court, this was, in fact, the analysis followed and adopted by the lower court in the underlying Nuisance Proceedings. (See, e.g., R.pp. 8-9). Appellants thereafter dropped the issue, agreed it was adjudicated by the Consent Order, and failed to raise it in the Contempt Proceedings, but nonetheless improperly try to resurrect the issue on appeal, all while ignoring how it was addressed in the proceedings below.

cannot raise new issues for the first time on appeal. See Butler v. Sea Pines Plantation Co., 282 S.C. 113, 317 S.E.2d 464 (Ct.App.1984) (failure to object to a judge hearing a case on the ground of bias or prejudice constitutes a waiver to raise the issue on appeal); Patterson v. Patterson, 288 S.C. 282, 284–85, 341 S.E.2d 819, 820 (Ct. App. 1986)(noting appellant waived any objection he might have had to the judge hearing the case, and finding no bias or prejudice on the part of the judge). For the foregoing reasons, this Court should reject Appellants' First Argument and summarily dispense of the unsupported and unpreserved stray arguments they now attempt to interject for the first time for perceived tactical reasons.

II. THE LOWER COURT DID NOT ERR IN REFUSING TO GRANT APPELLANTS A SECOND, CONSECUTIVE CONTINUANCE.

Appellants next claim the lower court erred by refusing a second, consecutive continuance request ("Second Argument") further postponing the Contempt Proceedings. (App. Brief, pp. 18-21). Appellants' Second Argument, which they recycle several times through their brief, contends the lower court's refusal to grant them a second continuance deprived them of an adequate opportunity to prepare for the Contempt Proceedings. (Id.) The underlying facts belie Appellants' Second Argument.

A. Five (5) Weeks Before the Contempt Proceedings, the Lower Court Granted Appellants A Continuance of the Contempt Proceedings to Hire New Counsel.

Following the issuance of Judge Stilwell's Order on April 29, 2016, the lower court conducted a conference call on May 6, 2016 to address scheduling concerns raised by Appellants about the upcoming Contempt Proceedings (then slated for May 18, 2016). (R.p. 303; R.pp. 75-76). During the conference call, then-counsel of record for Appellants (and signatory to the Consent Order), Attorney Randall Hiller ("Hiller"), indicated Appellants needed additional time because they most likely would hire new counsel (i.e., to replace Hiller) to appear on their behalf

at the Contempt Proceedings. (R.p. 312, ll. 21-24). Over the Solicitor's objection, the Court granted Appellants until June 14th, 2016 to retain new counsel and prepare for the Contempt Proceedings. (R.p. 303). As the Trial Judge stated on the Record at the Contempt Proceedings: "And part of the Court's rationale" when granting the continuance "was to make sure that the Defendants had proper representation and that they had time to prepare for presentation of the case by the State." (R.pp. 303, l. 22-304, l. 2). To avoid any confusion, however, "At that time...the Court advised all counsel that the matter was going to be set for June 14th, and it would not be continued." (R.pp. 303, l. 22-304, l. 2).

B. Appellants' Claims of Inadequate Preparation Time Contradict Their Representations to the Lower Court, As the Contempt Order Specifically Found.

According to Appellants' brief, their new counsel lacked sufficient time to prepare, in part, because the Solicitor subpoenaed Hiller (on June 8, 2016) as a potential witness during the June 14th Contempt Proceedings. (App. Brief, p. 19) Yet, as noted by the lower court's Contempt Order, see R.p. 77, such contentions contradicted Appellants' May 6th, 2016 representations to the Trial Judge wherein they sought and were granted a continuance until June 14, 2016 so Appellants could retain new counsel. As the Contempt Order specifically found: "The [lower court] granted Defendants the requested continuance based upon [Appellants'] representations" in this regard. (R.p. 77). Indeed, "Hiller made it very clear at the outset that he was not an attorney of record on this particular aspect of the case." (R.p. 312, ll. 21-24).[18]

[18] The lower court also noted the factual inconsistencies of prior positions taken by the Appellants in this regard. (R.p. 77). While Appellants have now wisely abandoned their prior service of process argument, the lower court's ruling still proves instructive: "On one hand, Defendants assert Hiller could not accept service as of May 14, 2016 because he was not their attorney. On the other hand, Defendants assert they were caught short preparing for the hearing because Hiller, their attorney, received a subpoena just prior to the hearing causing them to scramble for

C. Appellants Made No Evidentiary Showing Whatsoever to Establish the Good Cause Necessary to Warrant a Second Continuance.

As the lower court held, "no evidence of record substantiated good cause to support a [second] continuance." (R.p. 78, FN16). Consistent with their failure to cite facts in the appellate record supporting their Continuance Argument, see e.g., Appellant's Brief, pp. 18-21, Appellants failed to present any evidence whatsoever to the Trial Judge to establish the good cause necessary to justify further delaying the Contempt Proceedings beyond the additional month the lower court had already granted. The lower court correctly found:

> No evidence demonstrated why Defendants could not retain counsel during the time granted by the Court—or—that they did not actually do so. No evidence demonstrated the actual engagement date of counsel or when Defendants first contacted counsel. No evidence showed how Defendants incurred prejudice of any kind. No evidence reflected how Defendants did not receive a 'fair' opportunity to retain counsel of their choosing.

(R.p. 78, FN16). As such, Appellants made no evidentiary showing satisfying the good cause burden required to justify a second, consecutive continuance, as required by both Rule 40(i), SCRCP and Rule 7(a), S.Crim.P.[19] Accordingly, the lower court did not abuse its discretion in

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new counsel." (R.p. 77). To date, Appellants remain circumspect about when they actually first contacted their new counsel and ultimately engaged the same.

[19] To make matters even starker (and as noted above), only now on appeal do Appellants challenge—for the first time—the lower court's finding that Appellants failed to introduce any evidence to satisfy the showing of good cause necessary to support Appellants' second continuance request. While Appellants did file a motion to reconsider the lower court's ruling as to other grounds, Appellants' motion never challenged the lower court's Contempt Order in this regard. Even if they had, however, Appellants withdrew their motion to reconsider before the lower court could hear the motion and enter a ruling. (Compare R.p. 598 *with* R.p. 667). Thus, Appellants cannot now challenge the lower court's ruling as to its finding of a lack of evidence supporting good cause. See e.g., Smith v. Phillips, 318 S.C. 453, 458, S.E.2d 427, 429 (1995) ("An appellate court cannot address an issue unless it was raised to, and ruled upon by, the trial court."); Doe v. Doe, 370 S.C. 206, 212 (Ct. App. 2006) ("[W]hen an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review.")

denying Appellants' second continuance request where Appellants made no effort to satisfy the required evidentiary showing.[20]

Appellants' second argument not only misstates the underlying facts but also disregards one of the trial court's most fundamental "adjudicative power[s]," namely, "the inherent power to control the order of its business." Williams v. Bordon's, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980). "The authority of the [lower] court to grant continuances and to determine the order in which cases shall be heard is derived from its power to hear and decide cases." Williams v. Bordon's, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980); see also In re Kim, 829 F.2d 35 (4th Cir. 1987); United States v. Salaam, 68 F.3d 462 (4th Cir. 1995). As such, decisions whether to grant or deny continuances fall within the trial judge's "sound discretion" and "will not be upset" on appeal absent a clear "abuse of discretion" accompanied by actual "prejudice." Id. Here, Appellants simply ignored the Trial Judge's directive that no further continuances would follow. No abuse of discretion occurred.

[20] Of note, Appellants similarly failed to file a written motion supporting their second requested continuance.

D. Denial of the Second Continuance Did Not Deprive Appellants of Their Choice of Counsel or Due Process.

As noted, following the Trial Court's granting of Appellants' first continuance request, Appellants had over five (5) weeks to retain new counsel and prepare for the Contempt Proceedings. (See *supra*) The Solicitor's Verified Petition detailed the conduct the State claimed as contumacious with respect to the Court's Consent Order. (R.p. 87). As such, Appellants received the opportunity to retain new counsel, prepare a response, call witnesses, and cross-examine the witnesses presented by the State.[21] In re Oliver, 333 U.S. 257, 275–76, 68 S. Ct. 499, 508–09, 92 L. Ed. 682 (1948). Contrary to Appellants' claims, no deprivation of Due Process occurred and any failure to prepare occurred at their own hand.

During the intervening five (5) week period, Appellants could easily have engaged new counsel, complied with South Carolina's *pro hac vice* requirements, prepared for the Contempt Proceedings, or, at a minimum, filed an affidavit establishing good cause existed to support their second continuance request. If the Court accepts their contentions (absent record evidence supporting the same), Appellants' contentions would mean they pursued no actions to prepare for the Contempt Proceedings, even after the Trial Judge warned them there would be no further postponement. Moreover, even if service of the subpoena on Hiller had the effect asserted by their brief (absent any record evidence supporting the same), Appellants failed to file a motion

[21] Of note, Appellants conceded they communicated with Respondent prior to the Contempt Proceedings and also admitted they were furnished a witness list so they would know who the State would call during the June 14th, 2016 hearing. (See R.p. 417, ll. 1-3 ("[Deputy Solicitor Culbreath] did send me a witness list, as evidenced in this Affidavit, and I did not mean to imply otherwise...")).

to quash the subpoena or even request a determination by the lower court that Hiller would, in fact, be disqualified from participation under the circumstances.[22]

While Appellants' out-of-state counsel--as of the date the Contempt Proceedings went forward (i.e., June 14, 2016)—had failed to file any of the paperwork necessary to appear *pro hac vice*, Appellants claim the Trial Judge deprived them of counsel of their choosing by adhering to South Carolina's *pro hac* mandates. Despite Appellants' suggestions to the contrary, however, a trial court does not abridge Sixth Amendment protections by requiring litigants to abide by state *pro hac* requirements. See, e.g., United States v. Menner, 374 F.App'x. 446, 447 (4th Cir. 2010) (unpublished). As the lower court concluded, if the Appellants wished to proceed with out-of-state counsel, they were required to complete the requisite steps to secure the privilege (not right) of such counsel to appear and do so in a timely manner. This is particularly true where, as here, the Court previously granted Defendants additional (and ample) time to retain new counsel and forewarned it would grant no further continuances. (R.pp. 303, l. 22-304, l. 2).

A defendant's right to counsel "is only a qualified one" and "the opportunity guaranteed is only a 'fair' one." Sampley v. Attorney General of North Carolina, 786 F.2d 610, 612-16 (4th Cir. 1986). "[A] defendant has no constitutional right to dictate the time" of his trial by "showing up" and objecting that his "then retained" counsel is not "counsel of his choice." Id. (internal citation omitted). When Appellants' new counsel elected to accept this case, they did so with the knowledge and understanding that the matter would not be delayed past June 14,

[22] Further, the lower court also found that Rule 3.7, RPC, Rule 407, SCACR ("Rule 3.7") would not have impaired Hiller's ability to help Defendants prepare for the Contempt Hearing, as it only restricts a lawyer's ability to advocate in court proceedings where he also may testify. (See S.C. Bar Ethics Adv. Op. #90-27; R.p. at 77).

2016 and they would need to complete their preparations by that date. Under these circumstances, the Trial Judge did not abuse his discretion to proceed with the Contempt Proceedings on June 14, 2016, as scheduled and as he forewarned would occur. See Mendelsohn v. Whitfield, 312 S.C. 17, 20, 430 S.E.2d 524, 526–27 (Ct. App. 1993), aff'd in part as modified, 312 S.C. 226, 439 S.E.2d 845 (1994)(court did not abuse its discretion in denying the motion for continuance where defendant showed no good cause for neglecting to retain trial counsel much earlier and lawyers proceeded to try the case). For the reasons set forth above, the Court should reject Appellants' Continuance Argument as contrary to both fact and law.

III. THE LOWER COURT IMPOSED CONTEMPT SANCTIONS BECAUSE APPELLANTS VIOLATED A CONSENT ORDER, NOT A CONTRACT.

Appellants' third argument ("Third Argument") does not make any sense and altogether lacks merit. Improperly conflating distinct concepts, Appellants contend: (A) the lower court lacked the authority to hold EI in criminal contempt because the Consent Order arose from an underlying civil case (see App. Brief, p. 23); and (B) Appellants were entitled to cure otherwise criminal acts before the Solicitor could seek relief from the lower court.[23] Appellants' Third Argument provides no basis for overturning the lower court.[24]

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[23] Appellants again interject various stray remarks under Section III of their brief. For example, Appellants suggest they only learned of the State's intention to pursue criminal contempt sanctions the day prior to the June 14, 2016 hearing. This is incorrect. Respondent's Petition requested both criminal and civil contempt sanctions. (See, e.g., R.p. 219, ¶16 (Requesting Appellants "be sanction to the maximum extent allowed by law" and requesting relief to "ensure the Defendants permanently abate all conduct creating a nuisance.")

[24] Appellants again complain about investigation costs and again omit the underlying facts. Appellants then liken their misconduct to selling illegal drugs. But, their analogy proves inapposite in several material respects. The correct analogy is a cocaine dealer who offers to sell a kilo of cocaine to an undercover law enforcement for fifty thousand dollars ($50,000.00) only to complain, once caught, that the undercover cop agreed to pay the exorbitant sticker-price he demanded thereby making his criminal enterprise simply irresistible and the by-product of government suppression at the foot of the State's jack-boot.

A. Contrary to Appellants' Assertions, Trial Judges Can Award Criminal Contempt in Civil Cases and Can Award Criminal and Civil Contempt in One Proceeding.

Appellants' Third Argument suffers from several false premises. The first false premise questions whether the lower court could award criminal contempt sanctions in a civil proceeding.[25] (See App. Brief, p. 23) However, no *bona fide* question exists concerning the lower court's authority in this regard. See, e.g., Brandt v. Gooding, 368 S.C. 618, 627, 630 S.E.2d 259, 263 (2006) (Affirming trial court's award of civil and criminal contempt sanctions in civil proceedings); DiMarco v. DiMarco, 393 S.C. 604, 608, 713 S.E.2d 631, 633 (2011) (In appeal arising out of a civil case, noting: "A judge certainly may order both a civil and a criminal contempt sanction..."); In re Brown, 333 S.C. 414, 421 (1998) (Civil matter: "[W]e hold respondent in civil contempt and in criminal contempt."); In re Diggs, 344 S.C. 434, 436, 544 S.E.2d 632, 633 (2001) (Civil matter: "In light of this civil contempt sentence, we decline to decide the criminal contempt matter at this time."); Checker Yellow Cab Co. v. Checker Cab & Parcel Service, Inc., 287 S.C. 608, 610 (Ct .App. 1986)(Awarding criminal contempt in civil case). [26]

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[25] In addition to the cases cited, multiple examples prove Appellants' argument as flatly wrong. For example, consent orders routinely issue in Family Court, where judges also routinely hold Appellants in criminal contempt when they are violated. Other examples include: run-of-the-mill injunction cases, environmental cases, disciplinary proceedings—all of which are civil proceedings—where consent orders commonly eventuate and Courts enforce the same with both criminal and civil contempt powers.

[26] "Courts have inherent power to punish for contemptuous conduct." Ex parte Jackson, 381 S.C. 253, 259 672 S.E.2d 585, 587 (Ct. App. 2009); see also S.C. Code Ann. § 14-5-320; S.C. Code Ann. § 14-1-150. "It is within the circuit court's discretion to punish by fine or imprisonment every act of contempt before the court." Ex parte Cannon, 385 S.C. 643, 660, 685 S.E.2d 814, 823 (Ct. App. 2009). A decision on contempt rests within the trial court's discretion. "Contempt results from the willful disobedience of a court order." Widman v. Widman, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct. App. 2001). "'In a proceeding for contempt for violation of a court order, the moving party must show the existence of the order,

B. Contrary to Appellants' Assertions, the Terms Consent Order and Contract Do Not Prove Synonymous.

The next fallacy afflicting the Third Argument concerns Appellants' interchanging of the terms Consent Order and contract, as if the terms proved synonymous. They are not. Yet, Appellants' brief simply ping pongs from one usage to another. Appellants err in their analysis.

Appellants' Third Argument fundamentally misapprehends the nature and purpose of Consent Orders. A Consent Order, "although founded on the agreement of the parties, is a judgment." United States v. Kellum, 523 F.2d 1284, 1287 (5th Cir. 1975). It exists as "a hybrid of a contract and a judicial act." Local No. 93, Int'l. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501, 519, 106 S. Ct. 3063, 92 L. Ed. 2d 405 (1986); see also 46 Am.Jur.2d §186 ("Consent decrees have attributes both of contracts and judicial decrees.") A Consent Order "mirrors a contract in that it reflects 'an agreement by the parties,' and it is a judicial act because it 'places the power and prestige of the court behind the compromise struck by the parties.'" Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. 1983).

"Courts are not reduced to approving" Consent Orders only to hope "for [their] compliance." Frew ex rel. Frew v. Hawkins, 540 U.S. 431, 440, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004). "Once entered, a consent decree may be enforced." Id.; see also Smyth v. Rivero, 282 F.3d 268, 276 (4th Cir. 2002) (A Consent Order "is entered as an order of the court, receives "court approval" and is subject to the "oversight attendant to the court's authority" and "contempt

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and the facts establishing the respondent's noncompliance.'" Widman v. Widman, 348 S.C. 97, 120, 557 S.E.2d 693, 705 (Ct. App. 2001) (citing Brasington v. Shannon, 288 S.C. 183, 184, 341 S.E.2d 130, 131 (1986)). The case law is clear that the Court may treat the contempt as criminal or civil, regardless of what the parties ask. This is because it is the Court's authority being vindicated and compliance with the Court's Order that is being exacted.

powers."). Indeed, Courts have an obligation to "protect the integrity of [their] decree with contempt powers." Williams, 720 F.2d at 920.

Despite its adoption by judicial decree, Appellants purport to treat the Consent Order like a run-of-the-mill "civil agreement" or "contract." (App. Brief, p. 23) According to Appellants, Consent Orders—although signed by a Trial Judge and reduced to a court judgment—do not implicate a trial court's contempt powers. (Id.) Appellants even go so far as to imply the lower court's award of criminal contempt sanctions equated to "abuse of process" by the Trial Judge. (Id.) Appellants' arguments "jump the shark" and have no basis in law whatsoever.

Of course, Appellants again fail to cite any actual legal authority supporting their position. (Id.) And, of course, if Appellants' arguments proved correct, Consent Orders would serve no purpose. Indeed, the core purpose of a Consent Order reinforces the Parties' brokered "compromise... to obtain its more ready enforceability by" the Court. (Id.)

As noted, the Parties specifically negotiated and agreed to incorporate their Settlement Agreement into a Consent Order to ensure compliance by operation of the Court's contempt power. (R.pp. 15-16, 22-23). This is what the Parties intended when they included such not-so-subtle terms as: "Willful violations of the terms and conditions set forth in this Consent Order shall be punishable as contempt of Court." (R.p. 22, §VIII). The Third Argument is simply another attempt by Appellants to distort the record, confuse the issues, and game the process.

C. Contrary to Appellants' Assertions, No Condition Precedent Exists in the Consent Order and the Solicitor Did, in Fact, Comply With the Cited Provision.

Appellants' attempt to portray the monitoring provisions as a contractual condition precedent altogether lacks merit for the following reasons:

1. The Provision Cited by Appellants Does Not Constitute a Condition Precedent.

Appellants are confused about conditions precedent and their nature. A condition precedent is an act or event that must occur before contingent promises can cement into contractual obligations necessitating reciprocal performance. See, e.g., Alexander's Land Co., L.L.C. v. M&M&K Corp., 390 S.C. 582, 596 (2010) ("If a contract contains a condition precedent, that condition must either occur or it must be excused before a party's duty to perform arises."); McGill v. Moore, 381 S.C. 179, 187, 672 S.E.2d 571, 575 (2009)("If a contract contains a condition precedent, that condition must either occur or it must be excused before a party's duty to perform arises."). The instant case does not involve conditions precedent.

More specifically, the monitoring provision, invoked by Appellants, does not create a condition precedent. Found in Section 5(B)(2) of the Consent Order, the Subject Provision states:

> The Monitor will visit the Subject Property no more than twenty (20) hours per month. No later than two weeks after each visit, the Monitor will provide the Solicitor with a report detailing: the days and times of his or her visit, a description of the areas he or she visited while on the Subject Property, and instances of non-compliance with this Consent Order, if any. If there are any instances of non-compliance, then the Solicitor shall forward such reports to EI, which will include the date and time when the Monitor visited the Subject Property, the incident of non-compliance observed and where such non-compliance occurred at the premises.

(R.p. 20, §5(B)(2)). As the above passage reflects, Appellants' compliance obligations nowhere hinge upon their *post-facto* receipt of notice confirming they were caught disobeying the lower Court. (Id.) Such would be tantamount to saying Appellants could violate the Court's Order and underlying state and local laws, so long as they did not receive an Independent Monitor's report ("IM Report" or "IM Reports").[27]

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[27] Nor can the provision be read to afford Appellants the right to cure violations of law and of the Court Order, as Appellants once argued, then abandoned, but now revisit. (See e.g., R.p. 81). ("Defendants complain they were entitled to...[a] right to cure...") Obviously, neither the

Paragraph VIII of the Consent Order, in turn, states: "Willful violations of the terms and conditions set forth in this Consent Order shall be punishable as contempt of Court." (R.p. 22, §VIII). Nowhere does enforcement of the Consent Order's terms hinge upon Appellants' receipt of the IM Reports. Nor could it. Contractual conditions precedent cannot constrain a trial court's inherent authority to enforce its judicial decrees. Appellants' legal arguments persistently twist, turn, and shade their way to convenient but incorrect conclusions. The instant argument proves no different and should be rejected.

2. Respondent Did, In Fact, Supply the IM Reports to Appellants.

To make matters worse, the Solicitor gave Appellants the IM Reports. Testimony during the Contempt Proceedings, to which Appellants did not object, confirmed the same. (R.p. 386, ll. 6-12). Even so, the lower court specifically inquired about the IM Reports, on the record, and the Solicitor confirmed the reports were, in fact, provided to Appellants, which proves consistent with the other evidence of record. (Id.)[28] Indeed, to date, the Solicitor has possession of the correspondence forwarding the attached IM Reports that Appellants now incorrectly represent *were* not provided. (See App. Brief, p. 24 ("Since the Solicitor did not do this...")) Respondent is glad to furnish such correspondence to this Court—at any time—if Appellants desire to press their unfounded representations in this regard. And, of note, there was a very

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Court nor the Solicitor can grant Appellants license to violate applicable law so long as they cure their illegal conduct afterwards. (See R.p. 81 (The Consent Order "substantially incorporates state law, local ordinances, and a 2002 Order of this Court. The Solicitor did not, and could not, grant Defendants the ability to violate but then cure their violations of state law, local ordinances, and a Court Order.")

[28] Although not required by the Consent Order, Respondent also provided notice to Appellants' counsel of "multiple violations of the consent order" relating to "specified sexual activities" by email correspondence on both January 25th and 26th, 2016. (See R.p. 168).

basic reason why Respondent did not introduce the reports into evidence during the Contempt Proceedings--they did not establish a *prima facie* element of the State's case.

Conversely, as the lower court noted (discussed further infra), if Appellants wished to present a defense to Respondent's *prima facie* contempt showing, they had the opportunity to present such evidence but elected not to do so. (R.p. 81, FN23). Of course, nothing compelled Appellants to present such evidence. If they desired to present a defense, however, the burden remained theirs to satisfy in the lower court. (Id.) No evidence of record supports Appellants' contentions, nor do Appellants cite any. For these reasons, Appellants' Third Argument fails.

IV. THE LOWER COURT DID NOT DEPRIVE APPELLANTS OF DUE PROCESS OF LAW.

Appellants' fourth argument ("Fourth Argument") conflates a series of distinct arguments, many of which Appellants simply repeat from elsewhere in their brief. None have merit.

As an initial matter, Appellants' Fourth Argument advances at least two legal tenets with which Respondent can agree. For example, Appellants correctly state findings of criminal contempt and civil contempt involve different standards of proof. (See App. Brief, p. 27). They also correctly note criminal and civil contempt serve distinct purposes. (Id. at 28). Unfortunately, the balance of Appellants' remaining legal analysis, as set forth under their Fourth Argument, proves incorrect.

A. The Lower Court Used the Correct Burden of Proof As to Civil and Criminal Contempt.

No error resulted from the different burdens of proof applicable to civil and criminal contempt. The lower court used the correct burden as to each. (See, e.g., R.p. 73). Appellants' brief does not indicate why they raise this issue.

B. The Lower Court Did Not Construe Appellants' Silence Against Them.

According to Appellants, the lower court "construed their silence against them when finding Elephant, Inc. guilty of criminal contempt." (App. Brief, p. 27). In reaching this conclusion, Appellants cite Footnote 23 of the Contempt Order which states: "The Court does not mean to suggest the Solicitor shouldered a burden to prove the State's compliance with the Order. If Defendants wished to raise such issues as a defense, they had the opportunity to present such evidence but elected not do so." (R.p. 81, FN23). Based upon Footnote 23, Appellants errantly conclude: "[T]he lower court erred in construing the defendant[s]' silence against them and then compounded the error by relieving the Solicitor of his Constitutional duty to prove every element of his case." (App. Brief, p. 28).

As discussed above, see supra, Appellants' conclusion suffers from a faulty premise. The cited passage again relates to Section 5(B)(2) appearing on page 6 of the Consent Order. (R.p. 20, §5(B)(2)). Because they errantly treat the provision as a condition precedent conferring upon them a right to cure, Appellants conclude the State shouldered a burden to prove its compliance with Consent Order as a *prima facie* element of their case. (App. Brief, p. 28). As Respondent demonstrates above, however, the language of Section 5(B)(2) neither created a condition precedent nor afforded Appellants a right to cure their contumacious and otherwise illegal conduct. (See supra).

For this reason, the lower court did not construe Defendants' silence against them. (R.p. 81, FN23). The Court did correctly find, however, that if Appellants desired to invoke the issue as a defense, they shouldered the burden of presenting evidence of the same, since it did not

form part of the State's required showing, which Respondent satisfied.[29] See e.g., Miller v. Miller, 375 S.C. 443, 454 (Ct. App. 2007) (Where, as here, "the moving party has made out a *prima facie* case, the burden then shifts to the respondent to establish his or her defense and inability to comply with the order."); see also Widman v. Widman, 557 S.E.2d 693, 705 (Ct. App. 2001); Henderson v. Henderson, 298 S.C. 190, 379 S.E.2d 125, 1989 S.C. LEXIS 79 (1989). Of course, Defendants had the right to remain silent, which they did, and nowhere does the lower court's opinion hold their failure to testify against them. As such, the issue has no merit.

C. Civil Compensatory Contempt Sanctions, Like Those Granted By the Lower Court, Do Not Require a Method to Purge the Contempt.

Appellants next contend criminal and civil contempt prove mutually exclusive and the lower court could not grant both. (App. Brief, p. 28). In order for the lower court to issue civil contempt sanctions, Appellants argue the Contempt Order "had to contain a method of purging the contempt." For this reason, Appellants conclude the lower court must be reversed with instructions "to try the defendant, Elephant, Inc. on either civil or criminal contempt, but not both." (Id. at 29). Appellants' reasoning fails for several reasons.

1. Trial Courts Can Award Both Civil and Criminal Contempt Sanctions.

First, as noted above, a trial court can, in fact, award criminal and civil sanctions in the same proceeding. (See supra (Discussing availability of both criminal and civil contempt

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[29] Of note, without infringing upon the Fifth Amendment, South Carolina law imposes upon criminal defendants the burden of proving various defenses to the extent they chose to pursue them. See, e.g., State v. Cole, 304 S.C. 47, 50 (1991) (Criminal defendants shoulder burden to prove necessity as defense); State v. Hinson, 253 S.C. 607, 620 (1970) (Criminal defendants shoulder burden to prove insanity as defense); Babb v. State, 240 S.C. 235, 237 (1962) (Criminal burden shoulder defense of entrapment).

sanctions and citing Brandt v. Gooding, 368 S.C. at 627, 630 S.E.2d at 263; DiMarco v. DiMarco, 393 S.C. at 608, 713 S.E.2d at 633; In re Brown, 333 S.C. at 421, 511 S.E.2d at 355; In re Diggs, 344 S.C. at 436, 544 S.E.2d at 632.) Appellants' argument simply errs in this regard.

2. The Lower Court Issued Civil Compensatory Contempt Sanctions, Which Do Not Implicate the Ability to Purge.

Overlooked by Appellants, civil contempt sanctions can serve two purposes: to coerce compliance or to restore the petitioner's rights (i.e., compensatory contempt). See Curlee v. Howle, 277 S.C. 377, 386, 287 S.E.2d 915 (1982). Sanctions for the former require a method for the contemnor to purge the contempt. But, sanctions for the latter do not.

South Carolina Courts have recognized the remedial aspects of civil compensatory contempt since at least 1904. In the decision of Lorick & Lowrance v. Motley, 69 S.C. 567, 571, 48 S.E. 614, 615 (1904), the South Carolina Supreme Court held: "It is within the power of the court...to order the contemnor to place the party injured in as good situation as he would have been if the contempt had not been committed..." Id. "To deny such power to the courts would be to strike down one of the main safeguards of society against lawlessness and against the oppression of the weak by the strong." Id.

Since that time, courts have utilized compensatory contempt to restore the plaintiff as nearly as possible to his original position. Curlee v. Howle, 277 S.C. 377, 386, 287 S.E.2d 915, 920 (1982). But, where, as here, the Order violated by the contemnor involves measures obtained by the State to safeguard the public interest, monetary sanctions do not place the State "in as good situation" as it would have been if the contempt had not occurred. Id. In such instances, the Court can award compensatory contempt in the form of equitable relief, since it

restores the petitioner's adjudicated rights. The decision of State ex rel. Love v. Howell, 277 S.C. 377, 386, 287 S.E.2d 915, 920 (1985) illustrates the principle. The Howell Court held:

> The purpose of licensing architects is to protect the public. It is obvious that the public is not being protected by the actions of Howell and his disregard for the laws of South Carolina and orders of the court.
>
> We hold that George L. Howell was in contempt of court. The trial judge should have so held. The case is remanded to the trial court not for the purpose of determining whether Howell was in civil contempt but for the purpose of imposing sanctions. It is apparent that Howell will not respond to the mere dictates of the court. The trial judge has full authority to imprison him or fine him or both or close up his entire business operation if necessary to assure full compliance with the injunctive orders herefore issued by the Court of Common Pleas.

State ex rel. Love v. Howell, 285 S.C. 53, 328 S.E.2d 77, 1985 S.C. LEXIS 345 (1985) (emphasis added). Thus, in connection with civil contempt proceedings under an Order secured to protect the public interest, trial courts have discretion to grant compensatory contempt to restore lost rights by invoking equitable powers, not just awarding monetary damages.

Here, the lower court did exactly what was described above. On page 16 of the Contempt Order, the lower court held:

> a. "In light of the fact that the State is a party to this action, the Court finds such sanctions serve the remedial purpose of delivering to the Solicitor the benefits contemplated by the 2015 Order, namely, upholding the integrity of this Court's Order, the abatement of the public nuisance at the Subject Property and compliance with state law, local ordinance, and prior order of this Court."
>
> b. "Platinum Plus's non-compliance with the 2015 Order deprived the State of such benefits."
>
> c. "The Court finds imposition of such sanctions, in this case, restores to the State, in remedial fashion, the agreed upon reciprocal benefits set forth in the 2015 Order, which Defendants failed to deliver and/or comply with."

(R.p. 84, ¶2(a)-(c)). As such, the lower Court restored to the State the rights lost under the 2015 Order by fashioning compensatory relief mirroring the benefits the State would have

obtained, but did not, had Appellants honored their word and complied with the Consent Order.[30] Under the unusual facts of this case, the lower court imposed compensatory contempt sanctions in the only available manner to restore to the State the rights lost. Appellants have supplied no basis for this Court to overturn the lower court's fashioning of such relief.

3. Appellants Abandoned the Instant Argument in the Lower Court.

Moreover, Appellants abandoned this issue in the Court below. Appellants specifically raised the issue in their Motion to Reconsider. (See R.pp. 599-602, 604). However, before the lower court could conduct a hearing and issue a ruling on the same, Appellants withdrew their Motion to Reconsider. Accordingly, Appellants abandoned the issue and otherwise failed to preserve the same for appellate review. Compare R.pp. 610-612 with R.p. 667; see I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (Litigant must present and receive a ruling from trial court before issue is preserved); see Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995).

D. The Contempt Proceedings Did Not Implicate Appellants' Jury Trial Rights.

Appellants contend the Contempt Proceedings triggered their jury trial rights ("Jury Trial Argument") because the lower court could have, but did not, impose a sentence of more than

[30] Like the Nuisance Statute, the 2015 Order was designed to abate the public nuisance occurring at Platinum Plus. Instead of shuttering Platinum Plus's doors for a year, however, under the 2015 Order, the Parties agreed Platinum Plus would close its doors for only six (6) months and exchanged the remaining six (6) month interval with a twelve (12) month enhanced monitoring program, so Platinum Plus could re-open more quickly. Within only one (1) week of re-opening, however, Platinum Plus dishonored its commitments and allowed the nuisance conduct to resume on a serial and widespread basis. As a civil compensatory remedy, then, the Court re-imposed upon Platinum Plus the exact same terms and conditions from the 2015 Order's inception so as to restore to the State the rights lost by Appellants' contumacious conduct.

six months imprisonment. (App. Brief, pp. 29-30).[31] However, Appellants fail to apply the correct legal test. The test for determining when jury trial rights attach in a criminal contempt proceeding focuses upon the penalty "actually imposed," not the potential penalty the Court could impose. (See infra).

The United States Supreme Court examined when jury trial rights attach to a criminal contempt proceeding in the decision of Taylor v. Hayes, 418 U.S. 488, 41 L. Ed. 2d 897, 94 S. Ct. 2697 (1974). The Taylor Court held:

> [O]ur cases hold that petty contempt like other petty criminal offenses may be tried without a jury and that contempt of court is a petty offense when the penalty actually imposed does not exceed six months...Hence, although petitioner was ultimately found guilty and sentenced separately on eight counts of contempt, the sentences were to run concurrently and were, as the Kentucky Court of Appeals held, equivalent to a single sentence of six months. The original sentences imposed on the separate counts were to run consecutively and totaled almost four and one-half years, with two individual counts each carrying a year's sentence. But the trial court itself entered an amended judgment which was understood by the Kentucky Court of Appeals to impose no more than a six-month sentence. The eight contempts, whether considered singly or collectively, thus constituted petty offenses, and trial by jury was not required.

Id. at 496 (emphasis added)(internal citations omitted). This analysis applies here.

Taylor conclusively refutes Appellants' arguments. In Taylor, the defendant not only faced four and one-half years of imprisonment but the trial court initially imposed such a sentence before reducing the same to a "six-month sentence." Id. Contrary to Appellants' assertions, then, here, just as in Taylor, a "[T]rial by jury was not required," since the lower court did not

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[31] Appellants raised the same argument in their Motion to Reconsider filed with the lower court on August 5, 2016 and thereafter withdrawn on August 10, 2016 before the lower court could rule on the Motion. (Compare R.pp. 603-605 with R.p. 667). Accordingly, Appellants abandoned the issue and otherwise failed to preserve the same for appellate review.

even find Gaines in contempt, nor did the lower court impose incarceration as an actual penalty. Id.[32]

Taylor was neither an aberrant nor outlying holding but well-established precedent. See, e.g., Frank v. United States, 395 U.S. 147, 149 (1969) ("[S]everity of the penalty actually imposed" best indicates the "seriousness of the particular offense" and "[S]entences for criminal contempt of up to six months may be constitutionally imposed without a jury trial."); Grayton v. United States, 50 A.3d 497, 2012 D.C. App. LEXIS 339 (D.C. 2012) ("Our analysis of [Defendants'] right to a jury trial on a contempt charge is backward-looking...and turns on the sentence actually imposed."); United States v. McCoy, 866 F.2d 826, 830 (6th Cir. Mich. 1989) ("Even contempt of court has been held to be a "petty offense" when the penalty actually imposed does not exceed six months, and "petty contempt like other petty criminal offenses may be tried without a jury."); United States v. Woods, 450 F. Supp. 1335, 1340 (D. Md. 1978) ("Hence, the only relevant factor in such prosecutions is the length of the sentence actually imposed, and whether a defendant must be accorded a right to trial by jury for such a charge cannot be determined until guilt has been adjudged and sentence pronounced."). Additionally, contrary to the Appellants' assertions, the State can stipulate that it is not seeking incarceration of six months to obviate a jury trial. See e.g., Girard v. Goins, 457 F. Supp. 369, 1978 U.S. Dist. LEXIS 15333 (E.D. Mo. 1978) ("State has a right to reduce a sentence to less than six months and thereby to obviate a jury trial. Accordingly, this Court will order the petitions of each of the petitioners be dismissed"). And, of course, to the extent the Contempt Proceedings sounded in

[32] See also State v. Passmore, 363 S.C. 568, 576 (Ct. App. 2005) (Analyzing Taylor: "[Taylor] involved a contemptuous attorney whose sentences totaled almost four and one half years in the aggregate, but ran concurrently and were equivalent to a single sentence of six months," and, therefore, constituted "petty offenses and trial by jury was not required.")

civil contempt, jury trial rights did not attach. Poston v. Poston, 331 S.C. 106, 113 (1998) ("A civil contempt proceeding does not require a jury trial.").

Appellants provide no authority to the contrary. Appellants provide no analysis why the decisions previously cited and relied upon by Respondent do not control. As a result, Appellants failed to preserve the issue even if it were otherwise valid, which it is not. For these reasons, Appellants' Jury Trial Argument lacks merit.

E. The Lower Court Did Not Err Regarding in Its Ruling Concerning the IM Reports.

Appellants next recycle a hodgepodge of their other arguments, primarily: 1) Appellants' right to remain silent (addressed supra); and 2) whether Respondent provided Appellants with notice of their violations and contempt (also addressed supra). Respondent has debunked each of these points above and for the sake of brevity, incorporates its prior analysis and discussion. (See supra).

F. The Lower Court Did Not Err in Refusing to Grant Appellants a Second, Consecutive Continuance.

Appellants again simply restate their prior arguments regarding the lower court's denial of their second request for a continuance. To avoid duplication, Respondent incorporates its prior responses to Appellants' claimed error. (See supra; see also United States v. Menner, 374 F.App'x. at 447, cert. denied, 131 S.Ct. 191, 178 L.Ed.2d 114 (2010).[33]

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[33] Appellants cite United States v. Gonzales-Lopez, 548 U.S. 140, 126 S.Ct. 2357 (2006). Gonzalez-Lopez has no application to the instant case, as this is not a matter where chosen counsel was disqualified. Appellants have always been free to select the counsel of their choosing, and the Supreme Court in Gonzales-Lopez clearly recognized "the authority of trial courts to establish criteria for admitting lawyers to argue before them." United States v. Gonzalez-Lopez, 548 U.S. at 151, 126 S. Ct. at 2565.

V. AMPLE PROOF OF RECORD SUPPORTS THE LOWER COURT'S CONTEMPT FINDINGS.

Appellants' fifth argument ("Fifth Argument"), in substantial part, repeats their Third Argument inasmuch as they contend the State failed to give Defendants' notice of their unlawful conduct so they could cure the same. (App. Brief, pp. 33-36). Based upon the same, Defendants conclude the "the record is silent as to any knowing violation by any Defendant." (Id. at 36). Appellants' Fifth Argument fails because: it suffers from the same false premises outlined above; it suffers from manifest internal inconsistency; and hand-selects limited testimony while altogether ignoring the overwhelming evidence of record and the lower court's actual ruling.

In an effort to avoid restating prior briefing, Respondent incorporates by reference those portions of its brief, set out in Section III (above), explaining in detail:

- Appellants misstate what Section 5(B)(2) on page 6 of the Consent Order actually provides (see supra);
- The Consent Order only required the Solicitor to furnish Appellants with the IM Reports (see supra);
- The Solicitor, in fact, provided Appellants the IM Reports; the requirement to supply the IM Reports constituted neither a condition precedent nor a right to cure (see supra);
- The Solicitor did not, and could not, grant Defendants the ability to violate but then cure their violations of state law, local ordinances, and a Court Order (see supra);
- The provision of the IM Reports did not constitute a *prima facie* element of Respondent's case (see supra);
- And, to the extent Appellants desired to raise the same as an affirmative defense, which they were not required to do, Appellants, not Respondent, shouldered the burden of proof (see supra).

For these reasons, Appellants' Fifth Argument suffers from the same errant premises and fails for the same reasons as set forth in Section III.

Appellants' Fifth Argument likewise suffers from patent inconsistency. On one hand, Appellants contend (falsely) that they never received the IM Reports, which, in turn, foreclosed their "right to cure," which nowhere exists in the Consent Order. On the other hand, and in the same breath, Appellants contend "the State proved the defendants' innocence for them" because they worked to cure their contumacious conduct by firing one of the exotic dancers whose conduct they acknowledge violated the Consent Order. (See App. Brief, p. 35). As has elsewhere occurred in this case, Appellants advance inconsistent assertions. And, such termination only serves to confirm the evidence of record indicating Respondent supplied the IM Reports as provided by the Consent Order. (See e.g., R.p. 386, ll. 6-12).

While ignoring almost the entire record and disregarding the lower court's specific findings, Appellants lastly claim: "the record is silent as to any knowing violation by any Defendant." (App. Brief, p. 36). Left undisputed by Appellants, the Contempt Order catalogues the evidentiary grounds supporting its finding of willfulness. As noted above, the Contempt Order speaks for itself:

- "Evidence overwhelmingly established Platinum Plus willfully and repeatedly violated the 2015 Order within only seven (7) days of re-opening." (R.p. 329, ll. 18-24, pp. 330-337).[34]

- "Evidence established the Solicitor furnished notice to Platinum Plus of its noncompliance with the 2015 Order in January and February of 2016." (R.p. 168).

- "Evidence established serial and persistent violations continued to occur even after the Solicitor furnished notice to Platinum Plus of its non-compliance." (R.pp. 357, ll. 18-23, 362-363, 366, 369-373, 375, 382, 394, 395).

- "Evidence established serial and patent violations of the 2015 Order, which in and of itself, confirmed Platinum Plus's willful non-compliance. Evidence established at least

[34] For ease of reference, Respondent has inserted the corresponding citations to the appellate record but the remainder of the text and citations appear verbatim on pages 4-5 of the Contempt Order.

thirteen (13) separate violations of the "state of nudity" prohibition incorporated into the 2015 Order from the 2002 Order." (See, e.g, R.pp. 329, 335, 362, 363, 370, 371, 372, 375, 395). "And, evidence established at least fifteen (15) separate violations of the "specified sexual activities" prohibition incorporated into the 2015 Order from the 2002 Order." (See R.pp. 329, 332, 333, 334, 362, 363, 366, 370, 371, 372, 375, 382, 394).

- "Evidence established Platinum Plus's management and employees turned an institutional blind eye to violative conduct that occurred in their presence." (See, e.g., R.pp. 333-334, 370-373, 394-395).

- "Evidence established Platinum Plus allowed dancers to wear patently violative clothing without taking corrective measures." (See R.pp. 361-362, 370, 372, 375).

- "Evidence established that as late as March of 2016 Platinum Plus did not inform prospective dancers of what clothing and conduct proved off-limits under the Court Order." (See R.pp. 406:23-24, 412:4-18).

- "Evidence established Platinum Plus continued to supply prospective dancers with an Entertainment Agreement, the terms of which failed to comply with the 2015 Order." (See R.p. 652; R.pp. 404-405).

- "Evidence established Platinum Plus violated Paragraph V(A)(4) of the 2015 Order by failing to provide the Solicitor video footage as requested." (R.pp. 338, l. 17-339, l. 18).

- "Evidence established the video cameras installed by Platinum Plus did not capture reviewable video footage in 'all places where Dancers' interacted with customers as required by Paragraph V(A) of the 2015 Order." (See R.pp. 324, 335-336; R. p. 170).

- "Video footage from Platinum Plus's surveillance cameras that was presented in Court during the hearing on June 14, 2016, clearly established the blatant and repeated violations of the Consent Orders (independent of the Monitors testimony) and substantially corroborated the testimony given by the State's witnesses." (R.pp. 634-641).

Appellants simply ignore the evidence presented by the State and cited in the Contempt Order. Their Fifth Argument has no merit.

Additionally, Appellants raised the lack of willfulness as a ground in their Motion to Reconsider. When Appellants withdrew that Motion before the lower court could rule upon the same, they abandoned their Fifth Argument and it no longer remains preserved for appellate

review. Compare R.pp. 610-612 with R.p. 667); see I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (Litigant must present and receive a ruling from trial court before issue is preserved); see Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995). Accordingly, for the reasons set forth above, Appellants' Fifth Argument lacks merit and the Court should summarily reject the same.

VI. CONTRARY TO APPELLANTS' PORTRAYAL, THE LOWER COURT DID NOT IMPOSE ADDITIONAL OBLIGATIONS ON GAINES.

Appellants' sixth argument ("Sixth Argument") portrays the Contempt Order as imposing "additional reporting requirements on" Gaines and warning "him of enhanced penalties." (App. Brief, p. 36) Appellants nowhere specify what additional reporting requirements they contend the lower court imposed. (Id.) This is because the lower court did no such thing. Appellants' Sixth Argument fails as a result.

The Contempt Order articulated the Trial Judge's concerns about whether the Consent Order provided Gaines with sufficiently clear notice of his compliance obligations. (R.p. 74, FN10 (citing Spartanburg Buddhist Ctr. of S.C. v. Ork, 417 S.C. 601, 606, 790 S.E.2d 430, 433 (Ct. App. 2016)).[35] As a result, the lower court declined to hold Gaines in contempt of Court. However, to avoid any future misunderstandings, the lower court provided Gaines express notice of what it viewed as his existing compliance obligations under the Consent Order. (Id.) The passage states:

> Notwithstanding the above, as to Gaines, the Court finds the level and manner of his obligations and duties under the Consent Orders, as well as any determination of guilt or violation, less clear. The Court acknowledges Paragraph IX(A) of the 2015 Order states: "All undersigned signatories have had the benefit of the advice

[35] See also County of Greenville v. Mann, 347 S.C. 427, 435, 556 S.E.2d 383, 387 (2001) ("One may not be convicted of contempt for violating a court order which fails to tell him in definite terms what he must do.")

> of counsel and knowingly and voluntarily agree to be bound by the terms of this Consent Order." (2015 Order, p. 8, ¶IX(A).) Gaines also signed the Consent Order individually and in his capacity as "sole shareholder and Chief Executive Officer" of Elephant, Inc. (Id. at 11 & 12.) And Paragraphs I, II, III, IV, and V of the 2015 Order all apply equally to both "EI and Gaines." (2015 Order.) The Court is likewise reluctant to excuse a party's voluntary failure to perform obligations imposed by a court order.
>
> Even in light of this, the Court questions whether the Orders established in sufficiently definite terms the duties and obligations Gaines was personally undertaking or that the evidence establishes Gaines personally willfully violated the Consent Order beyond either a reasonable doubt or clear and convincing standard. As such, the Court declines to sanction Gaines for contempt of court. However, going forward, the Court hereby provides Gaines with clear and unequivocal notice that, as Elephant, Inc.'s sole shareholder and Chief Executive Officer, as a named tenant of the Subject Property, and as a signatory to the Consent Order in dual capacity, the Court concludes he does possess an affirmative duty to ensure Platinum Plus adheres to the 2015 Order's terms and conditions. Such affirmative duty requires Gaines to avail himself of and learn all such facts as are necessary to ensure Platinum Plus's compliance with the Order. Moving forward, Gaines may not assert ignorance of such facts to avoid the responsibilities undertaken under the 2015 Order. Having now been expressly afforded such notice, further violations of the 2015 Order by Platinum Plus may likely result in Gaines personally being subject to contempt of court sanctions.

(R.p. 75).

If anything, the above passage demonstrates an act of both judicial restraint and lenity. The Trial Judge could easily have held Gaines in contempt of court. Yet, in an effort to abide by the holdings in Ork and Mann *inter alia*, the lower court refrained from doing so and instead followed a more conservative course clarifying, in unequivocal terms, Gaines' compliance obligations under the Consent Order. There is simply nothing wrong with the Trial Judge clarifying Gaines' obligations to the lower court when Gaines expressed confusion about the same. (See e.g., R.pp. 610-612). Nor have Appellants supplied any authority to the contrary.

Last, like many of the grounds raised in their appeal, Appellants abandoned this issue by raising it in their Motion to Reconsider but then withdrawing that Motion before the lower court

could rule upon the Motion. (Compare R.pp. 610-612; R.p. 667).[36] For these reasons, Appellants' Sixth Argument has no merit.

CONCLUSION

For all of the above-stated reasons, Respondent asks this Honorable Court to affirm the ruling of the lower court. Appellants' arguments lack support in fact and law. This Court should affirm and hold Appellants responsible for their blatant and willful disregard of the lower court's authority.

RESPONDENT STATE OF SOUTH CAROLINA
ON THE RELATION OF THE 13TH CIRCUIT SOLICITOR

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[36] See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (Litigant must present and receive a ruling from trial court before issue is preserved); see also Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master-in-Equity, Circuit Court Judge

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SC Court of Appeals

Case No. 2015-CP-23-02597
Appellate Case No. 2016-001695

State of South Carolina on the relation of William Walter Wilkins, III, Solicitor of the Thirteenth Judicial Circuit, ... Respondent,

v.

Elephant Inc., Gregory Kenwood Gaines, and Frontage Road Associates, Inc., Defendants,

of which Elephant Inc. and Gregory Kenwood Gaines are the ..... Appellants.

CERTIFICATE OF COUNSEL

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

RESPONDENT STATE OF SOUTH CAROLINA
ON THE RELATION OF THE 13TH CIRCUIT SOLICITOR

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March 21, 2017