THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh

Case No. 2020-001126

Kim Likins, …….. Respondent/Appellant,

v.

C.C. "Skip" Hoagland, ……..... Appellant/Respondent.

APPELLANT'S FINAL BRIEF OF APPELLANT-RESPONDENT

Taylor M. Smith IV
S.C. Bar No. 101584
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant/Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

SOUTH CAROLINA RULES

STATEMENT OF ISSUES

I. Did the lower court err in finding and holding Appellant/Respondent in criminal or civil contempt for violating a gag order in this matter?

STATEMENT OF THE CASE

Respondent/Appellant Kim Likins ("Likins") brought this action for defamation, intentional infliction of emotional distress, and invasion of personal privacy against Appellant/Respondent Skip Hoagland ("Hoagland") on December 10, 2015. (R. pp. 50; summons and verified complaint.) Likins' complaint also sought temporary and permanent injunctive relief, enjoining Hoagland "from, among other things," harassing, defaming, threatening, interfering with Likins employment, publishing untrue and malicious statements about Likins and "otherwise inflicting emotional distress on [Likins] through his outrageous conduct." (R. pp. 56; summons and verified complaint.)

On December 11, 2015, attorneys for Likins and Hoagland appeared before the Honorable Marvin H. Dukes, III, for a hearing on Likins' motion for temporary injunction. The parties resolved the motion by agreement and signing of a consent order wherein the parties agreed, and the Court ordered: "1) Defendant will not publish any statement to any third party about Plaintiff's employment at the Boys and Girls Club. 2) Defendant will make no statement to any third party referring to Plaintiff's fitness to for her job or her fitness to be around children. 3) Defendant will not refer to Plaintiff's employment with the Boys and Girls Club in any statements made to a third party." (R. pp. 46; consent order on temporary injunction.) The consent order providedit would remain in effect for the pendency of the action or until further order of the Court. (R. pp. 47; consent order on temporary injunction.)

On March 7, 2016, Hoagland filed his answer specifically and generally denying the allegations of Likins' verified complaint and asserted defenses of truth,

opinion, fair comment, freedom of speech regarding matter of public concern, First Amendment right to petition, good faith and contributory negligence. (R. pp. 86; answer.)

On June 29, 2016, Likins filed her motion for a rule to show cause and to hold Hoagland in contempt for violations of the consent order. (R. pp. 743; motion and rule to show cause with exhibits.) The motion also sought an order requiring Hoagland to comply with the consent order, pay Likins attorneys' fees and costs for enforcing the consent order, and also for issuance of a protective order prevent future misuse of documents produced by Likins in discovery. (R. pp. 747; motion and rule to show cause with exhibits.) Hoagland responded to Likins' motion by filing said response on July 11, 2016 that denied he willfully violated the consent order, asserted lack of personal jurisdiction over the trial court hearing the motion, and claiming Hoagland lacked sufficient notice of the nature of the contempt proceedings. (R. pp. 739; response to rule to show cause.) On August 11, 2016, the trial court issued its order granting Likins' request for a protective order[1], which prohibited Hoagland from personally contacting witnesses, harassing designated witnesses, and using information obtained during discovery to harass third parties. (R. pp. 45; protective order.) On September 1, 2016, the trial court entered its rule to show cause and directed Hoagland to appear at hearing one week later where he should be able to show cause why he should not be held in civil contempt. On September 8, 2016, the parties and trial court entered a consent order where the parties resolved the contempt issue and Hoagland agreed to abide the language of the consent order on temporary injunction filed December 21, 2015. (R.

[1] The order did not address Likins' request for a rule to show cause regarding contempt providing such request "has not been ruled upon and remains pending." (R. pp. 45; protective order.)

pp. 43; consent order on contempt motion.) Also, on September 8, 2016, Likins filed a memorandum of law in support of a contempt finding against Hoagland. (R. pp. 699; memorandum of law in support of contempt finding.)

Likins filed a motion to enforce settlement agreement and for sanctions on November 15, 2016. The motion provided that by handwritten agreement, attached to the motion as "Exhibit B", Hoagland agreed to pay Likins' attorneys $4,100 as an award for filing the contempt motion and that he failed to do so. (R. pp. 687; motion to enforce settlement agreement with exhibits.) On June 2, 2017, the trial court entered a Form 4 order resolving several motions between the parties, including Likins motion to enforce settlement, noting the motion was "resolved per attorneys". (R. pp. 39; order on several motions including to enforce settlement.)

Also, in 2017, Hoagland motioned to amend his answer to add counterclaims, affirmative defenses, and certain third-party defendants "based upon the Town of Hilton Head Island paying for this lawsuit of Kim Likins against the Defendant." (R. pp. 685; Hoagland motion to amend answer and add counterclaims.) In the trial court's June 2, 2017 order on several motions (above), Hoagland's motion to amend was denied. (R. pp. 39; order on several motions including to enforce settlement.) On July 13, 2017, a formal order denying Hoagland's motion to amend was entered. (R. pp. 28; order on Hoagland motion to amend answer and add counterclaims.)

On November 8, 2017, the trial court sua sponte entered its order prohibiting pretrial communications and publicity.

> Because of the posture and history of this case when it was assigned to the undersigned, and based upon the inherent authority of this Court to maintain and preserve decorum and integrity of Court proceedings and the sanctity of judicial proceedings, the Court finds that it is appropriate

and necessary to issue an order prohibiting the parties, their servants, agents, employees and all others acting at their behest from making, issuing, or causing to be uttered any extra-judicial statements or comments about this lawsuit in any form or fashion during the pendency of this case.

Accordingly, it is ordered, adjudged and decreed that:

1. The parties, their attorneys and staff, consulted or retained experts as well as any other servants, agent and/or employees of the above are prohibited from making ANY extra-judicial comments about this case to the media and any third parties about any aspect of this action until a jury verdict has been returned.
2. Nothing contained in this Order is intended to be nor shall be construed as a prior restraint on the media's ability to report on this case.
3. Any and all communications between counsel of record shall be conducted solely by the attorneys and/or their staff. The parties are expressly prohibited from communicating directly or indirectly with or to opposing counsel[1]. Nothing contained in this Order prohibits the parties from responding to opposing counsel's question posed in the deposition(s), answering discovery requests under the guidance of their counsel or participating in any subsequent hearing or trial.
4. This Order is not intended to prohibit legitimate, good faith communications with third parties (excluding the media) in the preparation of this case.
5. Nothing contained in this Order is intended to nor shall abridge any persons affected by this Order ability to exercise their First Amendment rights as long as they do not contravene the prohibitions contained herein.

[1] Reportedly, the Defendant has engaged in a pattern of communicating directly with Plaintiff's counsel by E-mail and/or otherwise.

(R. pp. 26; order on pretrial communications (emphasis in original).)

On January 4, 2018, Likins filed her motion for an order and/or rule to show cause why Hoagland should not be held in civil contempt for failure to comply with the trial court's order on pretrial communications. (R. pp. 543; motion for rule to show cause re pretrial communications with exhibits.) The motion alleged Hoagland had

directed abusive and derisive comments towards Likins counsel prior to the start of a deposition and Hoagland has sent nine email strings to Likins counsel totaling 126 pages. (R. pp. 543; motion for rule to show cause re pretrial communications with exhibits.) On January 16, 2018, Likins filed a memorandum of law in support of her motion for contempt and for rule to show cause with exhibits supplementing the motion. (R. pp. 466; memo in support of motion for rule to show cause re pretrial communications with exhibits.) Three days later, on January 19, 2018, Likins filed additional exhibits in support of motion for rule to show cause. The additional exhibits provided copies of emails sent to Likins' counsel allegedly by Hoagland. (R. pp. 453; additional exhibits in support motion for rule to show cause re pretrial communications with exhibits.) On January 23, 2018, Hoagland filed his reply to Likins' motion for rule to show cause case regarding pretrial communication. Mr. Hoagland asserted several reasons why he should not be held in contempt, including: 1) the emailed statements complained about concerned a separate lawsuit involving different parties over a matter of public concern, protected by the First Amendment to the United States Constitution, and thus not condemnable by a constitutional, narrowly-drawn order on pretrial communications; 2) if the pretrial order is interpreted to prohibit the complained about conduct, it is a violation of Hoagland's First Amendment right to freedom of speech; 3) Hoagland lacked actual notice of the pretrial communications order; and 4) Hoagland's deposition comments were instigated by crude hand gesture by Likins counsel and should be forgiven. (R. pp. 446; reply to motion for rule to show cause re pretrial communications.) On February 7, 2018, the trial court entered its order finding defendant Hoagland in contempt of court. "The Court finds by clear and convincing

evidence that the emails sent by Defendant, which are attached to the filings violate the Order and that Defendant's violations of the Order are willful." (R. pp. 21; order finding defendant in contempt of court.) The order found Hoagland in contempt of court but held "in abeyance the decision of whether Defendant Hoagland's contempt is civil contempt or criminal contempt." (R. pp. 22; order finding defendant in contempt of court.)

In 2018, the parties motion practice increased ahead of an anticipated trial date that year. Relevant to this appeal of the contempt sanctions against Mr. Hoagland, the parties on July 9, 2018 filed a stipulation resolving Hoagland's motion for partial summary judgment filed October 30, 2017. The stipulation provided that Likins would be deemed a "public official," under New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and its progeny, for all of Mr. Hoagland's statements concerning Plaintiff, "including those statements concerning Plaintiff's occupation with the Boys and Girls Club." (R. pp. 1472; stipulation regarding partial summary judgment with exhibit.) It also provided Likins was limiting the factual basis of her last remaining claim for defamation to those identified in her answers to interrogatories, dated September 26, 2017, attached as Exhibit A. (R. pp. 1472; stipulation regarding partial summary judgment with exhibit.)

The parties gathered at the Beaufort County courthouse before the Honorable R. Lawton McIntosh for the ostensible trial of this matter on March 9, 2020. At this court event, counsel for Likins announced it was dismissing all its claims in the verified complaint against Hoagland, except for her request for a permanent injunction. (R. pp. 895; trial transcript 8.) Prior to opening statements regarding the injunction, the trial

court noted: 1) it would consider arguments on contempt later and 2) "[b]ut in reading the local *The Island Packet* when I got her early this morning and having my cup of coffee, I noticed that Mr. Hoagland had been in communication with the paper again." (R. pp. 898; trial transcript 10.) After taking evidence relative to Likins request for a permanent injunction, the trial moved into a discussion of the pending contempt sanction and "a hearing for the punishment phase of the contempt." (R. pp. 1110; trial transcript 222.) The trial court outlined its thoughts on the likely contempt sanction but did not issue a ruling and indicated a formal order would follow. (R. pp. 1119; trial transcript 231.)

The same day as the trial, March 9, 2020, Likins filed the affidavit of Gregory M. Alford, attorney for her, that attached as exhibit emails Alford indicated had been sent to him by Hoagland since the February 6, 2018 order finding Hoagland in contempt. (R. pp. 1571; affidavit of Gregory M. Alford with exhibit.) On March 17, 2020, Likins filed the affidavit of John Linton, Jr. Esquire, who provided his hourly rate and a log of activity relevant to enforcement of the contempt sanctions against Hoagland. (R. pp. 1611; affidavit of John Linton regarding fees.) Two days later, Likins filed the affidavit of Gregory Alford, also attorney for her, who similarly provided his hourly rate and log of activity relevant to enforcement of contempt sanctions against Hoagland. (R. pp. 1608; affidavit of Gregory Alford regarding fees.) On March 30, 2020, Hoagland filed his memorandum in opposition to order of contempt and award of attorney's fees. Hoagland's memorandum in opposition renewed his protestations that both the pre-trial communication order and order finding him in contempt were

violative of his free speech rights as guaranteed under the First Amendment to the United States Constitution. (R. pp. 147, 340; memorandum in opposition to contempt, injunction.)

On August 4, 2020, the trial court entered its order denying permanent injunction and sentencing C.C. "Skip" Hoagland for contempt. Specifically, the order of August 4, 2020, provides that Appellant must, having been found in contempt of court on February 7, 2018, must pay certain funds and do community service, within 30 or 60 days of the order, or his sentence of incarceration and fine will no longer be suspended. (R. pp. 7; order denying injunction sentencing Hoagland for contempt.)

> With regard to the criminal contempt, the Court hereby sentences Hoagland to 30 days of incarceration and a $2,500 fine. This sentence is suspended to 100 hours community service and $1000 fine, provided Hoagland pays the $1000 fine and begins community service with 30 days of the filing of this order. For every 1.667 hours (or 1 hour and 40 minutes) of service that Hoagland completes, there will be a one-day reduction of the 30-day sentence, should he fail to complete the full 100 hours within six months of the date of this order.
>
> With regard to the civil contempt, Hoagland is hereby sentenced (consecutively to his criminal contempt) to Thirty (30) days suspended on payment of Plaintiff's reasonable attorney's fees with respect to the contempt proceedings. At the Court's direction, Gregory Alford, Esq. and John P. Linton Esq. filed affidavits of fees date March 17 and 19, 2020. Mr. Alford's affidavit stated based upon the time involved in the contempt proceedings, his firm was entitled to an award of $2,788.50 in fees. Mr. Linton's affidavit stated based upon the time involved in the contempt proceedings, his firm was entitled to an award of $3,315.00 in fees. Hoagland, through counsel, has informed the Court that while Hoagland objects to any fees being awarded, there is no objection concerning the amounts sought by the two law firms representing Plaintiff. After careful consideration, the Court Orders Hoagland to pay Walker Gressette Freeman & Linton, LLC $3,315.00 in attorneys' fees and the Alford Law Firm, LLC $2,788.50 in attorneys' fees. Hoagland has thirty (30) days to pay all attorney's fees ordered.

(R. pp. 17-18; order denying injunction sentencing Hoagland in contempt 11-12.)

On August 10, 2020, Hoagland filed a motion to reconsider the order denying injunction sentencing Hoagland in contempt, pursuant to Rule 59(e), SCRCP. (R. pp. 108; Hoagland motion to reconsider.) On August 12, 2020, the trial court denied Hoagland's motion to reconsider the order denying injunction but sentencing him in contempt. (R. pp. 4; order denying Hoagland motion to reconsider.) On August 13, 2020, Hoagland served and filed his notice of appeal with this Court and the trial court. (R. pp. 1614; notice of appeal.)

STANDARD OF REVIEW

"A finding of contempt rests within the sound discretion of the trial judge." Dimarco v. Dimarco, 393 S.C. 604, 607, 713 S.E.2d 631, 633 (S.C. 2011)(citing Durlach v. Durlach, 359 S.C. 64, 70, 596 S.E.2d 908, 912 (2004)(citation omitted)). "Such a finding should not be disturbed on appeal unless it is unsupported by the evidence or the judge has abused his discretion." Id.

"An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." In re: Care and Treatment of Miller, 393 S.C. 248, 256, 713 S.E.2d 253, 257 (2011). "When a trial court's decision is made on a sound evidentiary basis and is adequately explained with specific findings — as the law requires — [the appellate court] defer[s] to the trial court's discretion." Horton v. Jasper Cnty. Sch. Dist., 423 S.C. 325, 331, 815 S.E.2d 442, 444 (2018).

ARGUMENT

I. The lower court's finding and holding Appellant/Respondent in criminal or civil contempt for violating a gag order in this matter was error

It was an abuse of discretion for the trial court unconstitutionally apply the requirements of the order on pretrial communications, dated November 8, 2017, to Appellant/Respondent and it was a further abuse of discretion to unconstitutionally sanction Appellant/Respondent for alleged violations of said after the trial of this matter.

a) Background

Respondent/Appellant Kim Likins brought this action against Appellant/Respondent Skip Hoagland based upon statements made in email correspondence and telephone calls by Hoagland about Likins. (R. pp. 50; summons and verified complaint.) "Among other things Defendant has publicly stated and published to third parties that Plaintiff has conflicts of interest on Town Council and in her employment with the Boys & Girls Club, that she is a liar, that she is corrupt, that she violated the public's trust and that she is not fit for her job or position on Town Council." (R. pp. 52; summons and verified complaint 2.) On December 11, 2015, one day after filing of the verified complaint, Hoagland appeared for a temporary injunction hearing where he consented to "not publish any statement to any third party about Plaintiff's employment at the Boys and Girls Club," "make no statement to any third party referring to Plaintiff's fitness to for her job or her fitness to be around children," and "not refer to Plaintiff's employment with the Boys and Girls Club in any statements made to a third party." (R. pp. 46; consent order on temporary injunction.)

As Hoagland stated in numerous filings within this record, his intentions regarding statements made in the allegedly defamatory statement and other emails concerning Likins pertained to her performance as an elected official and how that bore on her veracity for the truth or honesty generally.

The record is void of any point during this litigation where Likins claims shift from concerning Hoagland's critique of Likins as a then member of the Hilton Head Island Town Council and how his statements tied the public performance of her sworn duties to her then simultaneous role with the Boys and Girls Club to anything else.

Furthermore, during the course of this litigation before the lower court, Hoagland would learn through discovery that approximately $200,000.00 of taxpayer monies held by the Town of Hilton Head Island were used to pay Likins counsel to bring suit against him. (R. pp. 109; Hoagland motion to reconsider.) He would not only further discuss the town's alleged misuse of taxpayer monies in emails during the litigation, but he would also petition the lower court to allow amendment of his answer to include these new claims. (R. pp. 685; Hoagland motion to amend answer and add counterclaims.) The lower court denied Hoagland's motion to amend, so Hoagland continued speaking and writing about Hilton Head Island's alleged misuse of public funds, including Likins role in it, and brought suit against the Town[2].

b) Gag Order

By trial court order on June 15, 2017, the Honorable R. Lawton McIntosh was assigned this matter. On November 8, 2017, the

[2] Hoagland v. Bennett, et al., United Stated District Court, District of South Carolina, Beaufort division C/A No.: 9:17-CV-1374-RMG, now presently before the Fourth Circuit Court of Appeals.

trial court sua sponte entered its order prohibiting pretrial communications and publicity (the "gag order").

> Because of the posture and history of this case when it was assigned to the undersigned, and based upon the inherent authority of this Court to maintain and preserve decorum and integrity of Court proceedings and the sanctity of judicial proceedings, the Court finds that it is appropriate and necessary to issue an order prohibiting the parties, their servants, agents, employees and all others acting at their behest from making, issuing, or causing to be uttered any extra-judicial statements or comments about this lawsuit in any form or fashion during the pendency of this case.
>
> Accordingly, it is ordered, adjudged and decreed that:
>
> 1. The parties, their attorneys and staff, consulted or retained experts as well as any other servants, agent and/or employees of the above are prohibited from making ANY extra-judicial comments about this case to the media and any third parties about any aspect of this action until a jury verdict has been returned.
> 2. Nothing contained in this Order is intended to be nor shall be construed as a prior restraint on the media's ability to report on this case.
> 3. Any and all communications between counsel of record shall be conducted solely by the attorneys and/or their staff. The parties are expressly prohibited from communicating directly or indirectly with or to opposing counsel[1]. Nothing contained in this Order prohibits the parties from responding to opposing counsel's question posed in the deposition(s), answering discovery requests under the guidance of their counsel or participating in any subsequent hearing or trial.
> 4. This Order is not intended to prohibit legitimate, good faith communications with third parties (excluding the media) in the preparation of this case.
> 5. Nothing contained in this Order is intended to nor shall abridge any persons affected by this Order ability to exercise their First Amendment rights as long as they do not contravene the prohibitions contained herein.
>
> [1] Reportedly, the Defendant has engaged in a pattern of communicating directly with Plaintiff's counsel by E-mail and/or otherwise.

(R. pp. 26; order on pretrial communications (emphasis in original).)

The gag order emphasizes in all capital letters that it applies to "ANY extra-judicial comments about this case" or "any aspect" of it and expressly prohibits "[t]he parties, their attorneys and staff, consulted or retained experts as well as any other servants, agent and/or employees of the above" from conveying such comments "to the media and any third parties". (R. pp. 26; order on pretrial communications.)

c) Order finding Hoagland in Contempt

"Prior to the hearing, on January 24, 2018, this Court issued a Rule to Show Cause directing Defendant C.C. "Skip" Hoagland ("Defendant" or "Defendant Hoagland") to appear before this Court and show cause as to why he should not be held in contempt of this Court's Order issued on November 8, 2017 ("the Order")." (R. pp. 21; order finding defendant in contempt of court.) The trial court found by clear and convincing evidence that "emails sent by Defendant" which were attached to Likins motion for a rule to show cause with exhibits filed in early January 2018. (R. pp. 22; order finding defendant in contempt of court; R. pp. 544; motion for rule to show causere pretrial communications with exhibits.) The trial court's order holding Hoagland in contempt also said he "failed to present any evidence establishing a defense or inability to comply with the Order" yet did not mention arguments raised by Hoagland that the underlying gag order was unconstitutional, that he did not receive actual notice of the entry of the order (due to technical issues in his counsel's law office), and that his conduct statements to opposing counsel at the deposition in question were in retort to a crude gesture made by opposing counsel toward Mr. Hoagland. (R. pp. 446; reply to motion for rule to show cause re pretrial communications; R. pp. 22; order finding

defendant in contempt of court.) In this order, the trial court did say it was taking under advisement and would hold in abeyance what sanction or punishment would be appropriate. (R. pp. 22; order finding defendant in contempt of court.)

d) Order denying permanent injunction and sentencing Hoagland for contempt

After Likins dismissed all of her causes of action except for the permanent injunction (and the need for a jury trial had evaporated) and an ostensible trial was held where testimony was taken on issues relevant to the requested permanent injunction, the Court issued its order of August 4, 2020 sentencing Hoagland for contempt. (R. pp. 7; order denying injunction sentencing Hoagland for contempt.) "The violations of this Court's Order are numerous and flagrant, as shown by the attachments to the Affidavits of Gregory Alford filed January 16, 2018; January 29, 2018, and March 9, 2020; and the Court's own review of the Island Packet newspaper the morning the trial began, which reflected Hoagland was discussing the case with the media in violation of the order." (R. pp. 17; order denying injunction sentencing Hoagland for contempt.) The trial court placed Hoagland in civil and criminal contempt, sentenced him to periods of incarceration and fines, but suspended those sanctions upon performance ofcommunity service.

e) Argument

It was an abuse of discretion for 1) the trial court to apply the unconstitutional gag order to Defendant's statements of public concern contained in this record and 2) the trial court to sentence Hoagland for violations of the unconstitutional gag order after concerns of pretrial publicity had ended.

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Department of City of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); Cohen v. California, 403 U.S. 15, 24, 91 S.Ct. 1780, 1787, 29 L.Ed.2d 284 (1971); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 269—270, 84 S.Ct. 710, 720—721, 11 L.Ed.2d 686 (1964), and cases cited; NAACP v. Button, 371 U.S. 415, 445, 83 S.Ct. 328, 344, 9 L.Ed.2d 405 (1963); Wood v. Georgia, 370 U.S. 375, 388—389, 82 S.Ct. 1364, 1371—1372, 8 L.Ed.2d 569 (1962); Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1949); De Jonge v. Oregon, 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278 (1937). As the United States Supreme Court makes clear in the cited authority above, there are limits placed on the exercise of government power against the liberties of the citizenry in this constitutional republic. These limits can be placed on all government actors, including the judiciary, where government power is used to suppress the free exchange of ideas.

Hoagland does not hide from the extrajudicial statements he made during the pendency of this case before the lower court. Counsel for Likins documents many such statements, which are part of this record as they are what the court relied on in throwing him in contempt, and Hoagland encourages this distinguished body to look at them. They may be inartful and unpleasant to read. They may be considered crude opinion or even pointed bullying of public officials, but censored speech is rarely pleasant to digest. Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the

members of society to cope with the exigencies of their period. See Thornhill v. Alabama, 310 U.S. 88, 102 (1940). It is speech on "matters of public concern" that is at the heart of the First Amendment's protection and ties together the concept of "public official" and "public figure". See Dun and Bradstreet. Inc. v. Greenmoss Builders. Inc., 472 U.S. 749, 758-758 (1985).

The "The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957); New York Times Co. v. Sullivan, 376 U. S. 254, 269 (1964). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U. S. 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values,"' and is entitled to special protection. NAACP v. Claiborne Hardware Co., 458 U. S. 886, 913 (1982); Carey v. Brown. 447 U. S. 455, 467 (1980).

Although Hoagland's extrajudicial comments may be controversial, they would still be considered by any reviewing Court to be statements upon matters of public concern deserving of protection. It was the overbreadth and unconstitutional reach of the language of the Gag Order, which (when applied to Hoagland in the order finding him in contempt) is the first abuse of discretion complained about in this appeal. A close review of paragraph 1 of the Gag Order reveals this ostensible and absurd example violation of it: a staff member of one of the parties' law firms discusses the upcoming vote on an issue before the Hilton Head Island Town Council with a friend. (The example contains: 1) "an aspect" (Likins decision as a council member to approve

the Chamber DMO contract); 2) "an attorney or their staff"; 3) "an extra judicial statement" (made to the friend not the court); and 4) "made to a third party" (the friend).) Surely a court order stopping discussion of matters of public concern by all people near to this litigation for more than a three-year period would not survive constitutional scrutiny, especially if then were used to sentence an alleged violator to contempt of court. (See R. pp. 21; order finding defendant in contempt of court; R. pp. 7; order denying injunction sentencing Hoagland for contempt.)

Lastly, the trial court abused its discretion in sentencing Hoagland for contempt despite no longer needing to prevent pretrial publicity. As provided in the statement of the case, the trial court held sanctions related to Hoagland's contempt finding in abeyance until after the trial of the case. At trial, all parties to the case and the trial court, were aware that a jury would no longer decide facts in this matter. "First, my law clerk reminded me, I want -- the gag order that I issued before ends today. Okay. The former gag order. There's no purpose in having it. The reason I wanted it was for pretrial publicity to keep the jury pool clean. That's no longer the need." (R. pp. 1100-01; trial transcript 212-13, lns. 24-3 (Judge McIntosh).) Although not incorporated into the order sentencing Hoagland to contempt, this is as close as the lower court got to identifying a state interest being upheld by Hoagland's censorship. (See R. pp. 7; order denying injunction sentencing Hoagland for contempt.) The order fails to mention which statements of Hoagland were violative of a protected state interest (like preservation of a Sixth Amendment right to a fair trial) and thus were worthy of sanction, but even if the Court had (and factually there was still to be a jury), it still would have been unconstitutional to sentence him in this matter.

"Taken together, these cases demonstrate that pretrial publicity even pervasive, adverse publicity does not inevitably lead to an unfair trial." Nebraska Press Association v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976)(citing Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962); Stroble v. California, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872 (1952)). The Supreme Court in Nebraska Press was weighing the balancing of interests from the newspapers First Amendment rights being violated by courtroom closure against the Defendant's rights to maintain his right to fair trial by an impartial jury of his peers. Id. The Supreme Court reiterated that with all the tools available to a judge to cure potential contamination of the jury, including delay of the trial start time, change of venue, juror sequestration after effective voir dire, it would likely be error to decide to close a courtroom first. Id. at U.S. 555. Assuming a jury was still to hear facts, it would still have been an abuse of discretion for the trial court sanction him for conduct that may have impacted the jury. A jury was not to hear this case at this point, so it was certainly an abuse of discretion for him impose sanctions for contempt.

Hoagland does not wish to abrogate the discretion provided trial courts in the maintenance of justice and charge over their courtrooms. Instead, he wishes for this Court to help the trial courts understand how to balance his rights under the U.S. Constitution with that discretion.

CONCLUSION

This court should reverse the lower court's orders holding and sentencing Hoagland in contempt of court.

Respectfully submitted,

_s/ Taylor Smith_____
Taylor M. Smith IV
S.C. Bar No. 101584
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

October 4, 2021