

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF AIKEN )  
 )  
Gina P. Salatino )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
City of Aiken, )  
 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SECOND JUDICIAL CIRCUIT  
  
CIVIL ACTION: 2017-CP-02-02522

**ORDER**  
  
**RECEIVED**  
**Mar 17 2022**  
**SC Court of Appeals**

THIS MATTER is before the Court on *Defendant’s Motion for Dismissal, Sanctions, and Compensatory Contempt for Attorneys’ Fees and Costs* (filed Oct. 11, 2021). Having reviewed the filings by the parties, considered arguments of counsel, and reviewed the pertinent case law on the matter, the Defendant’s motion is DENIED in part and GRANTED in part.

**HISTORY OF THE CASE/DISPUTE**

On October 17, 2017, Plaintiff Gina P. Salatino filed her Summons and Complaint, which was supplemented by an Amended Complaint on December 28, 2017. The Plaintiff initially sought damages for violation of S.C. Code of Laws § 5-31-450, negligence under the South Carolina Tort Claims Act<sup>1</sup>, trespass, and nuisance. The Plaintiff also sought a mandatory injunction that would require the City of Aiken to provide drainage deemed adequate for the Plaintiff’s property. The Honorable Frank R. Addy, Jr. later ruled that the Defendant was protected from the nuisance claim under the doctrine of sovereign immunity<sup>2</sup> (*see* Order dated December 11, 2019).

<sup>1</sup> S.C. Code Ann. §§ 15-78-10 to -220 (2005 and Supp. 2020).  
<sup>2</sup> S.C. Code Ann. § 15-78-60(7).

## PROCEDURAL HISTORY AND FINDINGS OF FACT

This case was first tried before the Honorable Debra McCaslin, beginning November 30, 2020. It ended on December 2, 2020, with the declaration of a mistrial after the Court found that “no amount of curative action by the Court could remedy the prejudice suffered by the Defendant.”<sup>3</sup> It was once again called for trial during the September 27, 2021 term in the Aiken County Court of Common Pleas, with the undersigned presiding.

Plaintiff was called as the first witness, and direct examination began the morning of September 28<sup>th</sup>. Before noon of that day, the Court made its concerns known regarding the first two days of trial, particularly regarding the number of sustained objections that were ruled in favor of the Defendant. That afternoon, there was a lengthy discussion of the proper measure of damages and the manner in which the Plaintiff could testify as to those damages. After arguments were heard from both parties, the Court ruled that the measure of damages was to be calculated as the decrease in the value of the property, therefore the Plaintiff was forbidden from testifying using her tax records or Plaintiff’s loss in rental damages. However, the Court noted that Plaintiff was expressly permitted to testify as to her perceived loss in value of the property due to her role as landowner.<sup>4</sup>

The trial concluded for the day while the Plaintiff was still on the stand, with the jury having to be excused on multiple occasions for necessary clarifications regarding Plaintiff and Plaintiff’s counsel’s improper presentations of evidence. Prior to the jury being brought into the courtroom on September 29<sup>th</sup>, the Court once again stated its ruling on the proper measure of damages, and allowed Plaintiff’s counsel to proffer testimony regarding the loss of use and

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<sup>3</sup> Order dated January 2, 2021

<sup>4</sup> This ruling is consistent with the Supreme Court’s ruling in *South Carolina State Hwy. Dept. v. Grant*, 265 S.C. 28, 216 S.E.2d 758 (1975).

potential loss of profits outside the presence of the jury. The Court also reiterated that it would not hesitate to hold a party in contempt if the circumstances so required.

Once the jury was ushered into the courtroom, Plaintiff's counsel began questioning Plaintiff further. Within ten minutes, Defendant's counsel made six proper objections, including an objection to the Plaintiff testifying outside of the clear scope of damages that was ruled upon by the Court the day prior, and repeated less than 30 minutes prior to this objection. It was at this point that the jury was once again excused and the Defendant moved for a mistrial.

This Court, having shared previous concerns with counsel for both parties regarding the manner in which the trial was proceeding, with particular concern shown for Plaintiff and Plaintiff's counsel's inability to follow the Court's orders and the jury's capacity to fully understand the procedural aspects of the case, found that, due to the reasons listed above, the declaration of a mistrial was manifestly necessary to preserve the ends of justice and to prevent any resulting prejudice against the movant.<sup>5</sup>

#### **INVOLUNTARY DISMISSAL UNDER SCRPC 41(b)**

Defendant has moved for sanctions against the Plaintiff for the misconduct of the Plaintiff herself on the witness stand, as well as Plaintiff's counsel's misconduct. One measure of sanctions being requested by the Defendant is involuntary dismissal of the Plaintiff's case pursuant to Rule 41(b) of the South Carolina Rules of Civil Procedure.<sup>6</sup>

After review of the record, this Court hereby denies the Defendant's request for involuntary dismissal of Plaintiff's claim pursuant to Rule 41(b) of the South Carolina Rules of Civil

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<sup>5</sup> See, *Keene v. CNA Holdings, LLC*, 426 S.C. 357, 377, 827 S.E.2d 183, 194 (Ct. App. 2019); *State v. Kirby*, 269 S.C. 25, 28-29, 236 S.E.2d 33, 34 (1977).

<sup>6</sup> In pertinent part, the Defendant claims that the text of Rule 41(b) provides that "an involuntary dismissal may be granted '[f]or failure of the plaintiff...to comply with these rules or any order of court.'"

Procedure. While the text of the rule does contemplate dismissal “for failure of the plaintiff to...comply with...any order of court,” the decision to dismiss is ultimately at the discretion of the trial court.<sup>7</sup> The decision to dismiss a claim for failure to comply with a court order is a notably “harsh remedy” that is only appropriate in extreme circumstances, such as extreme disobedience and where “lesser sanctions would not serve the best interests of justice.”<sup>8</sup> That harsh remedy is not appropriate at this time, as the best interests of justice will be better served through lesser sanctions.

### CONTEMPT

The Defendant also moved for the Plaintiff and Plaintiff’s counsel to be held in contempt for their misconduct. This Motion requested that the Plaintiff and Plaintiff’s counsel pay reasonable attorneys’ fees to the Defendant, as well as any other compensatory costs deemed appropriate. The total amount of monetary compensation sought by the Defendant is \$11,299.32.<sup>9</sup>

“The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice.”<sup>10</sup> “Contempt results from the willful disobedience of an order of the court.”<sup>11</sup> It is in the discretion of the trial judge to determine whether a party is found to be in contempt.<sup>12</sup>

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<sup>7</sup> See *Therens v. Faircloth*, 291 S.C. 451, 453, 354 S.E.2d 54, 55 (Ct. App. 1987) (stating that a trial court’s decision to dismiss a claim for failure to comply with a court order may only be overturned on appeal “by showing an abuse of discretion.”).

<sup>8</sup> See *Spencer v. Doe*, 139 F.3d 107, 40 Fed. R. Serv. 3d (LCP) 98 (2d Cir. 1998); *Griggs v. SGE Management, L.L.C.*, 905 F.3d 835, 844 (5th Cir. 2018).

<sup>9</sup> According to the Defendant’s Motion, that includes “\$8,910.00 in attorney’s fees, \$1,905.00 in paralegal fees, and \$484.32 in litigation costs.”

<sup>10</sup> *Miller v. Miller*, 375 S.C. 443, 453, 652 S.E.2d 754, 759 (Ct. App. 2007).

<sup>11</sup> *Bigham v. Bigham*, 264 S.C. 101, 104, 212 S.E.2d 594, 596 (1975).

<sup>12</sup> *Supra* note 8 at 454.

Contempt may be either civil or criminal in nature. This determination turns on the purpose of the ruling.<sup>13</sup> Civil contempt rulings are issued where the Court is seeking to alter the defendant's conduct so as to conform to the orders of the Court, whereas criminal contempt rulings are issued where the Court is seeking to punish the defendant for misconduct.<sup>14</sup>

Civil contempt's conditional nature often distinguishes this form of punishment from criminal contempt. Where criminal contempt rulings are unconditional and cannot be undone, civil contempt rulings may, at times, be purged once the contemnor has fully complied.<sup>15</sup> However, where the contemnor is ordered to pay a fine to the complainant, the sanction is said to be remedial and compliance with the court's order is insufficient to remove this fine.<sup>16</sup>

Counsel for the Defendant in this matter has asserted a claim for compensatory contempt in the form of reasonable attorney's fees and costs. It has been found that, in "a civil contempt proceeding, a contemnor may be required to reimburse a complainant for the costs [they] incurred in enforcing the court's prior order, including reasonable attorney's fees. The award of attorney's fees is not a punishment but an indemnification" to the complainant.<sup>17</sup> Because the payment of attorney's fees is deemed an indemnification and not a punitive measure against the contemnor, it is considered to be a civil contempt measure, rather than one of criminal contempt.

In this matter, the Defendant has alleged that the Plaintiff and her counsel have committed the same misconduct that led to the declaration of a mistrial of the first attempt to try this case, as ordered by the Honorable Debra McCaslin on January 4, 2021. There, Judge

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<sup>13</sup> *Poston v. Poston*, 331 S.C. 106, 111-12, 502 S.E.2d 86, 88-89 (1998).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Supra*, n. 7 at 114, 502 S.E.2d at 90.

McCaslin found that a mistrial was manifestly necessary due to the “numerous and continued violations of evidentiary rulings by the Plaintiff.”<sup>18</sup>

The Defendant has argued, and this Court now finds, that the Plaintiff’s personal testimony while on the witness stand evinced a willful disregard for the Court’s rulings regarding the measure of damages and the proper scope of her own testimony. The Court also finds that Plaintiff’s counsel’s failure to adhere to the Court’s clear evidentiary rulings throughout the trial was willful and thus merits a finding of contempt. Not only was the repeated nature of the evidentiary presentations improper, but it also evidenced a willful disregard for the clear and unequivocal ruling of the Court. Most notably, Plaintiff and Plaintiff’s counsel, in tandem, are found to have acted contumaciously in failing to properly adhere to the rulings of the Court regarding the ultimate measure of damages. That has led to the unavoidable decision by this Court to conclude that contempt is appropriate.

### CONCLUSION

This Court is concerned that this case is now forced to be tried a third time. This Court believes that is due to the repeated behavior of the Plaintiff making it impossible for the jury to adequately hear and fairly judge the facts, presentation of discovery, and the presentation of witnesses. Plaintiff’s counsel did not seem to have an understanding of rulings with regards to discovery and objections. Further arguments on objections after the court has made clear rulings will not be tolerated.

Pursuant to these findings, it is ORDERED that Plaintiff’s counsel is in contempt and, as such, is fined in an amount totaling \$11,299.32, to be paid to the Defendant as a means of

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<sup>18</sup> See, Order entered January 4, 2021.

indemnification. This case is not to be set for trial until Plaintiff's counsel has paid \$3,766.44 to the Defendant, with the remaining \$7,532.88 award to be held in abeyance to ensure counsel's compliance with the orders of the court in the upcoming trial. If these issues do not continue, the remaining sum shall be purged. However, if the presiding trial judge does determine that the same behavior exists and has resulted in a third mistrial, Plaintiff's counsel is responsible for the balance of the award in the amount of \$7,532.88. At the appropriate time thereafter, Defense counsel may request of the presiding trial judge any additional contempt award or attorneys' fees.

This order is in no way intended to impede counsel's ability to zealously advocate for her client and make necessary and proper objections, arguments, or inquiries of the Court.

Based on the above, the Defendant's motion is GRANTED in part and DENIED in part. The Motion for Dismissal under SCRCR Rule 41(b) is DENIED. The Motion for Sanctions is hereby GRANTED in the manner stated previously.

AND IT IS SO ORDERED.

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Judge Courtney Clyburn Pope  
2<sup>nd</sup> Judicial Circuit of South Carolina

\_\_\_\_\_, 20\_\_\_\_

STATE OF SOUTH CAROLINA  
COUNTY OF Aiken  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP0202522

Gina P Salatino  
PLAINTIFF(S)

Aiken City Of  
DEFENDANT(S)

RECEIVED

Mar 17 2022

SC Court of Appeals

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  
 Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

Plaintiff's SCRPC Rule 59(e) Motion to Alter or Amend the Order filed on February 8, 2022 is DENIED.

ORDER INFORMATION

This order  ends  does not end the case.

See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 03/08/2022 .

Robert Alan Sowinski

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

**Court Reporter:**

**E-Filing Note:** The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRPC.

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Aiken Common Pleas

**Case Caption:** Gina P Salatino VS Aiken City Of

**Case Number:** 2017CP0202522

**Type:** Order/Electronic Form 4

So Ordered

The Honorable Courtney Clyburn Pope