

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)
)
KENNETH A. BINGHAM,)
Plaintiff,)
)
v.)
)
WILLIAM R. FOLKS, III AND)
FITSNEWS, LLC,)
Defendants.)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2015-CP-32-1764

**PLAINTIFF'S MOTION
PURSUANT TO RULE 59(E), SCRPC**

PLEASE TAKE NOTICE that the Plaintiff, Kenneth A. Bingham, moves the Court pursuant to Rule 59(e), SCRPC, to reconsider the Order filed September 25, 2017, issuing a purported sanction which is the equivalent of a spoliation charge against Defendant, William R. Folks, III ("Folks") for failing to comply with Judge Kelly's Order requiring him to identify the sources contained in paragraphs 12 and 13 of the Complaint. The purported sanction ordered by the Court is not an actual sanction because Folks has an option to avoid any sanction by doing what the Court has ordered him to do. Even though he has the ability to and has willfully refused to obey the Court's Order, he will suffer no consequences for his disobedience of the Order. For the reasons set forth below, the Court's Order should be altered or amended.

In the Order filed November 28, 2016, Judge Kelly denied Folks's Motion for Reconsideration regarding the identity of the sources for paragraphs 12 and 13 of Bingham's Complaint. (Kelly Order). The Order specifically held that "there is no First Amendment privilege that the defendants can claim in this matter." (Kelly Order p. 1). The Order also held that the "South Carolina Reporter's Shield Law does not protect Mr. Folks from disclosure of his sources." (Kelly Order p. 2). Finally, the Order held that "as to the second line of questioning (paragraphs 12 and 13), the Court finds it is *relevant to the issues involved in the litigation and therefore discoverable*." (Kelly Order p. 3) (emphasis added). The Order stated that Bingham could re-depose Folks upon ten-days notice. (Kelly Order p. 4).

At the reconvened deposition on January 6, 2017, Folks again refused to answer the questions regarding paragraphs 12 and 13 of the Complaint, in clear violation of Judge Kelly's Order. On January 23, 2017, Bingham filed a Motion for Civil Contempt and for Sanctions Pursuant to Rule 37, SCRPC. (Mot. for Contempt). The Court held a hearing on Bingham's Motion on June 28, 2017, and issued an Order on September 25, 2017. (Order). Despite finding that Folks has the ability to comply with Judge Kelly's Order¹, the Court "declines to cite the defendants for contempt" (Order p. 1).

The Order imposes a sanction on the Defendants that is "akin to a spoliation charge" (Order p. 1): "the trier of fact is to be instructed to presume as a matter of law that no individual sources supplied the allegedly defamatory matters published in the stories referenced in paragraphs 12 and 13 of the Complaint" (Order p. 10). Assuming Folks does not comply and identify the sources within thirty-days prior to trial, the proposed instruction would be given to the jury. However, this instruction is inaccurate information because the source does exist. The source, through counsel, Bruce Bannister, appeared at the June 28, 2017 hearing. During the hearing Mr. Bannister went back with counsel to Chambers during a break in the proceedings and was copied on Bingham's email to the Court with his proposed order following the hearing. This is not a situation where the evidence no longer exists or has been destroyed by a party that results in a negative inference charge. See Stokes v. Spartanburg Reg. Med. Ctr., 368 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006) (holding a spoliation charge appropriate where two pieces of evidence were missing from the medical record). As the Court found, Folks has the ability to comply but has deliberately chosen not to do so. An adverse inference does not apply here because the evidence – the source – does undeniably exist. To falsely instruct the jury to assume Folks did not have a source when in fact he did and the source has made an appearance in this action through counsel is contrary to the facts and untruthful. Bingham submits that the Court should not untruthfully instruct the jury but should

¹ "Mr. Folks has the ability to provide the plaintiff with the names of the sources ordered to be revealed by Judge Kelly." (Order p. 4).

instead take such steps as are necessary to obtain Folks's compliance with the Judge Kelly's Order. Bingham requests the Court alter or amend the Order to find Folks in civil contempt or, alternatively, to issue a sanction such as striking the Defendants' Answer if the Court is not inclined to find Folks in civil contempt.²

As fashioned by the Court, the purported sanction is not really a sanction at all as Folks may face no penalty for willfully violating the Court's Order.³ "The purpose of civil contempt is to coerce the defendant to do the thing required by the order for the benefit of the complainant." Poston v. Poston, 331 S.C. 106, 111, 502 S.E.2d 86, 88 (1998) (internal quotation omitted). "In civil contempt cases, the sanctions are conditioned on compliance with the court's order." Id. at 112, 502 S.E.2d at 89. "The conditional nature of the punishment renders the relief civil in nature because the contemnor can end the sentence and discharge himself at any moment by doing what he had previously refused to do." Id.

The Court's Order conflates contempt with sanctions. The Court does not find Folks in civil contempt, yet issued a contempt-like penalty by ordering Folks to reveal the source up to thirty days before trial or have the jury instructed the source does not exist. The Order does not sanction him at all unless he refuses to identify the source. Under this penalty, Folks is given an option of whether to comply. The Order does not coerce compliance with Judge Kelly's valid and unaltered Order. The Court also does not sanction Folks because he may choose to never reveal the source and, in fact, he and his counsel publicly stated they believe this is a complete victory for them. Therefore, although it is undeniable that Folks is willfully violating a valid order, he is escaping scot free in a manner that he believes permits him to violate a valid order without repercussion.

² For appellate purposes, Bingham maintains that Folks willfully violated Judge Kelly's Order warranting a finding of civil contempt.

³ The Court highlighted the willfulness in choosing to not obey Judge Kelly's Order: "The refusal by the defendants to comply with Judge Kelly's directives is willful in the sense that it involves a conscious decision to disobey a court order. It is willful in that the defendants have a true choice, as discussed above." (Order p. 6).

If the Court is not going to find Folks in contempt in order to ensure compliance with Judge Kelly's Order, then a sanction is warranted that penalizes Folks sufficiently for his non-compliance. There is no sanction when Folks is given the option of whether to comply when the Court has already held the information is relevant and discoverable. Folks illustrates that the sanction really is not a sanction that punishes him for his non-compliance with Judge Kelly's Order by his stating after the Order that "[w]e won on every count" (Ex. 1). It is ironic that Folks has the ability to comply and has willfully chosen not to so, all while the Court's purported "sanction" results in him winning on every count. Bingham submits that the Court should sanction Folks for his willful violation of Judge Kelly's Order and impose such sanctions as will ensure compliance with Judge Kelly's Order. Otherwise, parties are free to disobey a Court's order and instead of being held in contempt or sanctioned for refusing to comply, the Court simply gives the party more time and the option of whether to comply. The requirement of compliance with Court orders applies equally to all parties and an exception should not be carved out for journalists and the press.⁴

The Order should also be altered or amended so as to not overrule Judge Kelly's Order, which is prohibited under the two-judge rule. Enoree Baptist Church v. Fletcher, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) ("One Circuit Court Judge does not have the authority to set aside the order of another"). The Order notes that the Court is bound by Judge Kelly's Order but proceeds to overrule it in several key respects.

First, the proposed jury instruction that Folks did not have a source for paragraphs 12 and 13 of the Complaint implicitly overrules Judge Kelly's Order, thus violating the two-judge rule. Judge Kelly's Order held that the information regarding the identity of the sources was *relevant to the issues involved in the litigation and therefore discoverable*" in denying Folks's Motion for Protective Order. (Kelly

⁴ As noted at the June 2017 hearing, Bingham maintains Folks is not a journalist based on his own writings stating such.

Order p. 3). Judge Kelly's Order held that Bingham was entitled to learn the identity of the sources for paragraphs 12 and 13 of the Complaint. Despite this holding, the proposed jury instruction fashioned as a sanction states that there were no sources. By ordering a proposed sanction that tells the jury there was no source, when there was and Judge Kelly's Order held the information was discoverable, the Court is implicitly overruling Judge Kelly's Order. Language contained in the Order illustrates that the Court is overruling Judge Kelly: "The Supreme Court of South Carolina has held that discovery does not provide the plaintiff with 'the opportunity to go upon a fishing expedition,' but requires that the examination be confined to the facts which assist the plaintiff in establishing his cause of action." (Order p. 8) (citation omitted). Judge Kelly held that the source of the statements in Folks's article was discoverable, and the Court should not overrule that holding by determining that the source may not be discoverable.⁵

Second, the Order should be altered or amended to state that the Court is not interpreting First Amendment law differently than Judge Kelly has already held as to do so would violate the two-judge rule. Following the Order, Folks wrote on his blog that the Court "did an excellent job carving out protections for traditional and non-traditional journalists alike. Keesley also cleared up several points of First Amendment law that were ignored in a truly terrible order issued a year ago by S.C. circuit court judge Keith Kelly." (Ex. 2). Any issues regarding First Amendment law were not before the Court on Bingham's Motion for Civil Contempt and Sanctions and the Court cannot overrule or alter Judge Kelly's Order on any First Amendment issues.

⁵ Although not a direct quote, the following highlights the overruling of Judge Kelly's Order that the source does not have to be disclosed: "The order may also set a significant precedent in South Carolina. This ruling represents the first time a judge in the state has found that a journalist being sued for defamation does not need to reveal anonymous sources as part of discovery, Davis said." *South Carolina political blogger does not need to reveal anonymous sources, judge rules*, Jamie Lovegrove, THE POST AND COURIER, September 25, 2017, available at http://www.postandcourier.com/politics/south-carolina-political-blogger-does-not-need-to-reveal-anonymous/article_4400d3a0-a239-11e7-904f-9b26fb110a98.html. (Ex. 3).

Lastly, Bingham also requests alteration or amendment of the Order to hold there is no qualified privilege created under the Court's Order because any such privilege would violate Judge Kelly's Order. Judge Kelly held in his November 28, 2016 Order that there is no privilege that protects Folks from disclosing the source and that the Shield Law does not apply. (Kelly Order pp. 1-2). Based on public statements by Folks's counsel following the Court's September 25, 2016 Order, Bingham anticipates Folks will attempt to use the Order as creating a qualified privilege.⁶ Again, the issue of any qualified privilege was not before the Court on Bingham's Motion for Civil Contempt as that was already decided in Judge Kelly's Order. If a qualified privilege was created by the Court's Order, it would contradict Judge Kelly's Order finding no privilege applied and violate the two-judge rule. To the extent the Court did not overrule Judge Kelly's Order on these points, the Order should be amended to clearly state these points.

For these reasons and all other reasons put forth in the briefing and at the hearing on the Motion for Civil Contempt, the Court should alter or amend its September 25, 2017 Order. The Court should find Folks in civil contempt and fashion a remedy that ensures compliance with Judge Kelly's Order. If the Court does not hold Folks in civil contempt, the sanction should be such to adequately penalize him for his willful non-compliance with a Court order. Folks should not win on every count for violating a Court's Order.

[SIGNATURE PAGE TO FOLLOW]

⁶ "The judge really carved out here a qualified privilege for journalists, which I think is very important." (Ex. 3).

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

BY: /s/ John E. Parker

John E. Parker
William F. Barnes, III
101 Mulberry Street East
P.O. Box 457
Hampton, SC 29924
Phone: (803) 943-2111
Fax: (803) 914-2014
ATTORNEYS FOR PLAINTIFF

October 5, 2017
Hampton, South Carolina

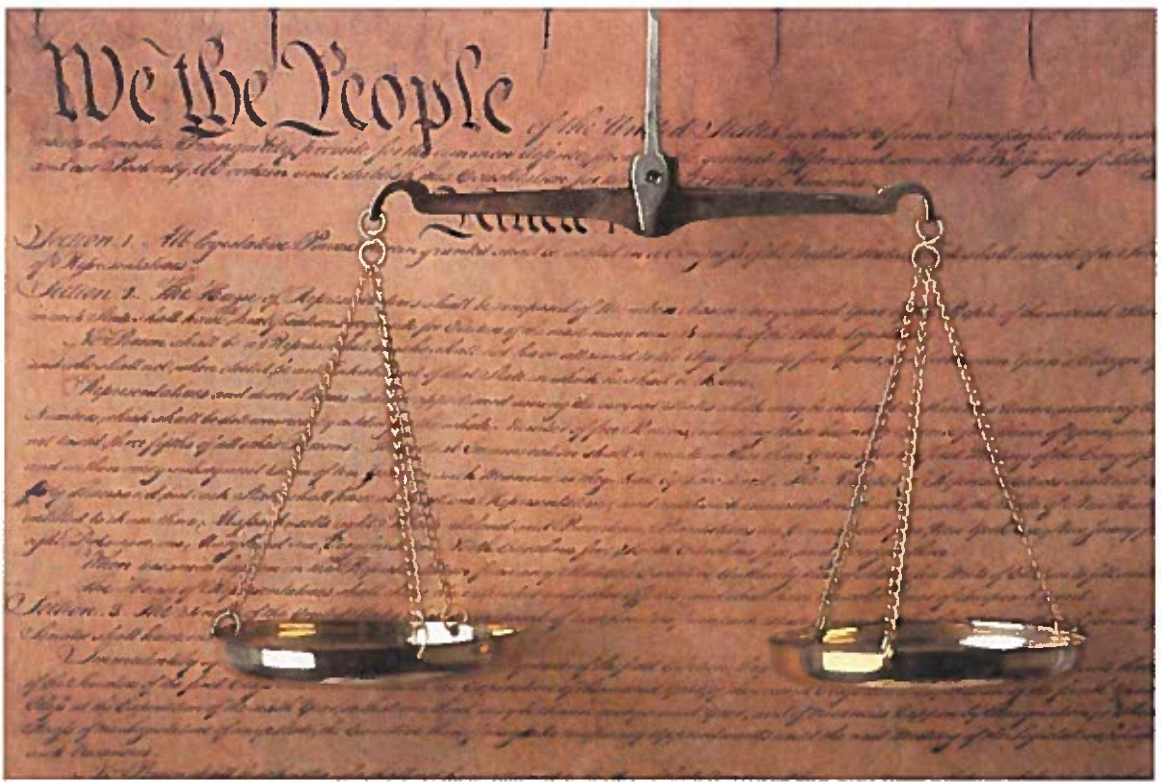


SC DC USA 2020 BIZ GLOBE SPORTS POP SUBSCRIBE LOGIN

SC

FITSNews Wins Source Protection Ruling

Published 1 week ago on September 25, 2017
By FITSNews



South Carolina circuit court judge [William P. Keesley](#) has issued his long-awaited ruling in a source protection case involving this website and its founding editor, [Will Folks](#). Readers will recall Folks [risked jail time](#) by refusing to reveal his confidential sources in connection with an ongoing libel case brought by a former state lawmaker.

In his order ([pdf](#)), released late Monday, Keesley declined to jail Folks, declined to fine him and even declined to find him in contempt of court.

Translation? We won on every count ...

We'll be doing a full story on this ruling momentarily, and will be publishing a statement from our founding editor.

Stay tuned ...

UPDATE ...

Here are our founding editor's [thoughts on the matter](#).



WANNA SOUND OFF?

Got something you'd like to say in response to one of our stories? Please feel free to submit your own guest column or letter to the editor via-email [HERE](#). Got a tip for us? [CLICK HERE](#). Got a technical question? [CLICK HERE](#). Want to support what we're doing? [SUBSCRIBE HERE](#).

Powered by [Glad](#)

RELATED TOPICS: [#FEATURED](#) [#FIRST AMENDMENT](#) [#NEW MEDIA](#) [#SOURCE PROTECTION](#) [#WILL FOLKS](#) [#WILLIAM P. KEESLEY](#)

[DON'T MISS](#) [#SCStateHouse: Str File For Vacant Lowcountry Seat](#)
[UP NEXT](#) [Will Folks: On That Source Protection Ruling](#)

YOU MAY LIKE



[#FITSPicks: NCAA September 30](#)



[Will Folks: On That Source Protection Ruling](#)



[SC Gas Tax Spoils: Inside Jobs](#)



[SC Moves To Dismiss Gas Tax Lawsuit](#)



[#SouthernCharm: Shep Reson Isn't Signed, Either](#)



[#SouthernCharm: Season Five Scoop](#)

COMMENTS



SC DC USA 2020 BIZ GLOBE SPORTS POP SUBSCRIBE LOGIN

Copyright © 2008-2017 FITSNews, LLC



HEADLINES

Will Folks: On That Source Protection Ruling



Published 1 week ago on September 26, 2017
By Will Folks



14

There's a lot of news to cover today but I did want to offer a few thoughts on yesterday's [source protection ruling](#) involving me and my website (the one you are currently reading).

As many of you recall, earlier this year I risked jail time by [refusing to reveal my confidential sources](#) in connection with an ongoing libel case brought by a former state lawmaker, Kenny Bingham.

As I testified under oath this summer, I simply could not divulge the identity of someone whose name I had pledged to keep confidential – *even under the threat of imprisonment or monetary fines.*

Bottom line? I'll go to jail or go bankrupt before I ever rat out a source.

Will Folks: On That Source Protection Ruling – FITSNews

Yesterday, S.C. circuit court judge [William P. Keesley](#) issued his long-awaited ruling in this case – deciding *against* putting me in jail or imposing monetary sanctions against me.

"The press has legitimate, essential and beneficial reasons for gathering and disseminating information from confidential sources, particularly concerning persons in power and those who hold positions of public trust," Keesley wrote in his order ([pdf](#)).

Amen to that ...

Basically, Keesley's ruling holds that members of the press – including unconventional new media outlets like this one – cannot be compelled to disclose their confidential sources whenever frivolous lawsuits are filed against them.

[Mitch Pugh](#), executive editor of *The (Charleston, S.C.) Post and Courier*, [called](#) Keesley's ruling "a clear victory for all South Carolina media."

He's right ...

Credit for that victory goes to many people ... *most notably the readers of this website*. Your clicks have made – and kept – this website credible and relevant. Were it not for that support, I'd have been toast. Also literally hundreds of you have reached out to me personally over the last few months to offer your encouragement related to this case, which has truly meant the world to me.

Even people I've written not-so-nice things about in the past have offered their support ...

As for the ruling itself, I'm tremendously grateful to judge Keesley for seeing the bigger picture in this matter. His ruling wasn't entirely flattering to me or to this website, but he did an excellent job carving out protections for traditional and non-traditional journalists alike. Keesley also cleared up several points of First Amendment law that were ignored in a truly terrible order issued a year ago by S.C. circuit court judge [Keith Kelly](#).

Kelly's ill-considered judgment could have created a terrible precedent for *all* media outlets in this state.

Working overtime to make sure that didn't happen? My team of attorneys – [Pete Strom](#), [Tom Davis](#), [John Alphin](#) and [Mandy Powers Norrell](#). All four of these individuals aren't just brilliant lawyers, they are loyal friends. But they weren't just loyal to me, they worked their asses off to make sure that *all* reporters in this state have the safeguards in place necessary to do their jobs.

Which brings me to the Palmetto State's mainstream media ...

Regular readers are well aware that I haven't always been kind to this state's "legacy press." In some cases I've been downright *unkind* to them.

Nonetheless these reporters – led by [Corey Hutchins](#) of the *Columbia Journalism Review* and [Meg Kinnard](#) of The Associated Press – also saw the bigger picture in this case. They stood up for me and had my back at every step of this drama.

As I get back to work, I have every intention of continuing to call things like I see it in an effort to improve outcomes for the citizens and taxpayers of my home state of South Carolina. You won't always agree with me (and I probably won't always get it 100 percent right), but I will continue trying to seek (and will keep trying to tell) the truth as best I am able to decipher it in this [crazy new marketplace of ideas](#) in which we are operating.



Will Folks is the founding editor of the website you are currently reading.

WANNA SOUND OFF?

Got something you'd like to say in response to one of our stories? Please feel free to submit your own guest column or letter to the editor via-email [HERE](#). Got a tip for

Will Folks: On That Source Protection Ruling – FITSNews

us? [CLICK HERE](#). Got a technical question? [CLICK HERE](#). Want to support what we're doing? [SUBSCRIBE HERE](#).

Answer via [Chat](#)

RELATED TOPICS: #COREY HUTCHINS #FEATURED #FIRST AMENDMENT #JOHN ALPHIN #KENNY BINGHAM #MAINSTREAM MEDIA #MANDY POWERS-NORRELL #MEG KINNARD #MITCH PUGH #PETE STROM #TOM DAVIS #WILL FOLKS #WILLIAM P. KEESLEY

← **DON'T MISS** [FITSNews Wins Source Protection Ruling](#) **UP NEXT** [SC Bar Hosts Town Hall On Confederate Icons](#) →

YOU MAY LIKE



#FITS Picks: NCAA September 30



#NukeGate: More Lawsuits



FITSNews Wins Source Protection Ruling



SC Gas Tax Spoils: Inside Jobs



SC Moves To Dismiss Gas Tax Lawsuit



#NukeGate: Santon Cooper Documents Subpoenaed, Too

COMMENTS



FITSNEWS
LIVE. UPDATES. ANALYSIS.

f t y

SC DC USA 2020 RIZ JOBS SPORTS POP SUBSCRIBE LOGIN

Copyright © 2008-2017 FITSNews, LLC

http://www.postandcourier.com/politics/south-carolina-political-blogger-does-not-need-to-reveal-anonymous/article_4400d3a0-a239-11e7-904f-9b26fb110a98.html

TOP STORY

South Carolina political blogger does not need to reveal anonymous sources, judge rules

By Jamie Lovegrove jlovegrove@postandcourier.com Sep 25, 2017



Columbia-area blogger Will Folks answers questions during a hearing in Lexington where attorneys for former Rep. Kenny Bingham seek to hold him in contempt of court. Maya T. Prabhu/Staff

Buy Now

By Maya T. Prabhu mprabhu@postandcourier.com

COLUMBIA — South Carolina political blogger Will Folks will not need to reveal his anonymous sources as part of a defamation case against him, a judge ruled Monday.

But Circuit Judge William Keesley added that the Columbia-area blogger will not be able to use those confidential sources as part of his defense that he did not act with malice or reckless disregard for the truth.

Folks is being sued by former Cayce Republican state Rep. Kenny Bingham, who alleges that Folks defamed him in a series of articles on his website, fitsnews.com, in 2014 and 2015. The articles were about a possible ethics investigation and Statehouse corruption probe.

State Sen. Tom Davis, a Beaufort Republican representing Folks in the case, said he considered the Lexington County order to be a "complete victory" for Folks' First Amendment rights.

"The best we could have hoped for here is what we got, which was not being compelled to reveal the source," Davis said.

Folks said the ruling "bodes well for all of us in the news-gathering business," and he added that he plans to continue to defend himself against the broader defamation claim.

"With all due respect, I respect (Bingham's) right to press the issue. Certainly that's his prerogative," Folks said. "But for a public figure to bring a case like this is just ludicrous."

The order may also set a significant precedent in South Carolina. This ruling represents the first time a judge in the state has found that a journalist being sued for defamation does not need to reveal anonymous sources as part of discovery, Davis said.

"The judge really carved out here a qualified privilege for journalists, which I think is very important," he said.

Folks will now have to disprove the defamation claim using other evidence. But Davis said he has no concern he will be able to do that, arguing he has plenty of other forms of evidence to clear Folks in the case.

Bingham's attorney, John Parker, said his client maintains that the claims Folks made are untrue, and he will continue to pursue the case against him. Parker said he and Bingham never intended to force Folks to go to jail — they just wanted him to comply with a previous judge's order to reveal the sources.

As to whether the case has prompted him to reconsider his aggressive reporting, Folks said he had thought about it, describing himself as a "loose cannon," a "flame-thrower," and "less than genteel at times."

"But I've always told the truth as I know it and believe it to be," Folks said, reiterating what he had said in court under oath. "And I certainly have always viewed the contract between a journalist and their sources to be absolutely inviolable."

Follow Jamie Lovegrove on Twitter @jslovegrove.

Jamie Lovegrove

Jamie Lovegrove is a political reporter covering the statehouse and congressional delegation. He previously covered Texas politics in Washington for The Dallas Morning News and in Austin for the Texas Tribune. He graduated from Northwestern University.