

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF LEXINGTON)	CIVIL ACTION NO.: 15-CP-32-1764
)	
Kenneth A. Bingham,)	
)	
Plaintiff,)	
)	
v.)	THE DEFENDANTS' MEMORANDUM IN
)	OPPOSITION TO THE PLAINTIFF'S
William R. Folks, III, and FitsNews,)	MOTION PURSUANT TO RULE 59(e), SCRPC
LLC,)	
)	
Defendants.)	
_____)	

The Defendants file the within Memorandum in Opposition to the Plaintiff's motion pursuant to Rule 59(e), SCRPC, wherein the Plaintiff asks the Court to reconsider the Order filed September 25, 2017 (the "Order Imposing Sanctions"), which sanctions the Defendant William R. Folks pursuant to Rule 37(b), SCRPC, for "the failure of the defendants to comply with the discovery order(s) issued by Judge Kelly." The Plaintiff offers two supporting arguments^a:

1. "[A]lthough 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 ... 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 ...'"

2. "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. [Citations omitted.] ("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."

^a The Plaintiff also spends some time arguing that the evidentiary rule of spoliation has been improperly applied since the Defendant Folks' confidential sources do in fact exist; however, that rule was only referenced by the Court as a means of describing the nature of the sanctions it was imposing (thus its use of the word "akin" in the order).

It is simply not true that, as the Plaintiff alleges, the Order Imposing Sanctions “permits [Folks] to violate a valid order without repercussions.” After finding that the Defendant Folks had violated Judge Kelly’s discovery orders and concluding that “there must be consequences for noncompliance,” the Court analyzes Rule 37(b), SCRPC (the controlling rule of civil procedure), and the relevant legal precedents issued by the South Carolina appellate courts, and then proceeds to “fashion a sanction that mitigates ‘the degree of prejudice’ caused to the Plaintiff’s case,” properly noting that a “sanction that is just and remedial is the goal.”

The Court finds the Defendant Folks’ failure to disclose the identities of the sources providing him with information relative to the allegations of defamation set forth in paragraphs 12 and 13 of the Complaint precludes the Plaintiff from demonstrating to the trier of fact that any reliance by the Defendant Folks upon what they said is unwarranted; that’s the degree of prejudice caused by his noncompliance with Judge Kelly’s discovery orders.

The Order Imposing Sanctions fully mitigates that prejudice: As a consequence of these sanctions, the Defendants’ claim that they did not act with actual malice in publishing the stories must now be proved by them without reliance on the information received from confidential sources – *the best outcome the Plaintiff could have hoped for had those confidential sources been disclosed and then subjected by the Plaintiff’s counsel to impeaching cross-examination.*^b

Moreover, the sanctions imposed by the Court fall squarely within those authorized by Rule 37(b)(2), SCRPC; i.e., they are in the nature of “prohibiting him from introducing designated matters into evidence.” The Plaintiff has not and cannot argue otherwise.

^b That the Plaintiff is not satisfied with the optimum evidentiary outcome resulting from the imposed sanctions is, the Defendants believe, proof that his objective in commencing the within action is not to prove defamation, but to discover the identity of the Defendant Folks’ sources for his blog stories, including those unrelated to the Plaintiff.

The only “proof” offered by the Plaintiff for his argument that the Order Imposing Sanctions has allowed the Defendant Folks to “violate a valid order without repercussions” – to escape “scot free” – is the Defendant Folks’ claim in a published blog post that “we won on every count.” Such puffery, of course, is probative of nothing; however, it is interesting to note that the Plaintiff’s legal counsel, in commenting on the Order Imposing Sanctions in a *Columbia Journalism Review* story (attached), said that such “means our side wins ... The jury will be charged that even though he said that he had a source ... that he didn’t have a source.”

Equally without merit is the Plaintiff’s second argument: that the Order Imposing Sanctions “overrule(s) Judge Kelly’s Order, which is prohibited under the two-judge rule.” This second argument by the Plaintiff consists of two separate averments:

1. That Judge Kelly ruled the Defendant Folks had an obligation to reveal the identity of confidential sources and the Order Imposing Sanctions improperly relieves him of that obligation.
2. That the Order Imposing Sanctions interpreted the First Amendment differently than Judge Kelly by finding the Defendant Folks had a qualified privilege to withhold the identity of his confidential sources.

On its face, however, the Order Imposing Sanctions does not relieve the Defendant Folks of the discovery obligation; in fact, it expressly acknowledges that Judge Kelly’s order established the discovery obligation (and properly notes that “[t]his court, like the defendants, is bound by the discovery order previously entered”), finds the Defendant Folks in breach of that obligation, and then imposes just and remedial sanctions against him for that breach. The Plaintiff (now, in any event) is apparently dissatisfied with the remedy the Court has fashioned for the Defendant Folks’ breach of the discovery obligation; however, it does not follow from this dissatisfaction that the Court, as the Plaintiff alleges, has “overruled” Judge Kelly’s order.

Nor does the Order Imposing Sanctions interpret First Amendment law in a manner differently than Judge Kelly by finding the existence of a qualified privilege that allows the Defendant Folks to withhold confidential sources; the discussion of the First Amendment therein is limited to an evaluation of the nature of the Defendant Folks' noncompliance – in particular, to a consideration of whether such constitutes “the sort of bad faith or gross indifference that justify incarceration, fines, or the striking of the Answer” – and of what constitutes just and remedial sanctions as a consequence of his breach of the discovery obligation.

If, as the Plaintiff alleges, the Order Imposing Sanctions in fact interprets the First Amendment differently than Judge Kelly and finds the existence of a qualified privilege, then its imposition of sanctions makes no sense; stated differently, its imposition of sanctions is evidence that it finds no qualified privilege exists and that the Defendant Folks' must be sanctioned, noting “there must be consequences for noncompliance.”

In truth, the Plaintiff's objections in this pending matter are wholly unrelated to the Order Imposing Sanctions itself, as evidenced by his inability to cite anything therein that suggests the creation of a qualified privilege. Rather, he is unhappy with the public statements made by the Defendant Folks and his legal counsel about the status of the case and the court's various rulings – thus his attachment of various press accounts as exhibits to the motion.

As noted above, however, the Plaintiff's legal counsel himself has engaged in such public commentary, explaining in the *Columbia Journalism Review* that the Order Imposing Sanctions “means our side wins ... The jury will be charged that even though he said that he had a source ... that he didn't have a source.” In any event, this Court ought not to be bothered with either the litigants' or their respective legal counsels' feelings regarding these public statements.

The Order Imposing Sanctions on its face is correct in every respect: it recognizes and honors Judge Kelly's order creating a discovery obligation, finds the Defendant Folks in breach of that obligation, sets forth the applicable legal authorities and applies them to the particular nature of the breach, and imposes a sanction for that breach that fully mitigates the degree of prejudice it has caused to the Plaintiff's case in a manner that is just and remedial. Moreover, the instruction to be given to the trier of fact is clear and unambiguous, as is the manner in which the Defendant Folks' can avoid this instruction being given.

In sum, the Plaintiff has provided no reason to "to alter or amend" the Order Imposing Sanctions; therefore, his within motion pursuant to Rule 59(e), SCRPC, should be denied.

Respectfully submitted:

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October 16, 2017
Beaufort, South Carolina

Columbia Journalism Review.

The voice of journalism

No jail time for
blogger who refused
court order to identify
sources

Via Pixabay

SOUTH CAROLINA CIRCUIT COURT JUDGE William Keesley ruled this week that political blogger Will Folks will not go to jail for defying a court order to reveal unnamed sources in a libel case, a decision some see as important for reporters seeking to protect confidential sources in the state.

At issue was whether Folks, a blogger for FITSnews.com (<http://fitsnews.com>), should be held in contempt for not revealing sources in stories he published about Kenny Bingham, a former member of the South Carolina House of Representatives. A previous judge ordered Folks to reveal those sources in a deposition and he refused.

I'm obviously pleased that their recognition of that underlying issue results in me not spending any time in the slammer, because that would not have been fun.

"This is the first time in a civil suit [in South Carolina when] a plaintiff has sought to get a journalist to reveal a source and the court actually ruled on what the obligations are," Folks's attorney and South Carolina Senator Tom Davis tells CJR. "So it really is a victory for the First Amendment and for the press in terms of protecting their sources."

ICYMI: Dancing around the word 'racist' in coverage of Trump
(https://www.cjr.org/covering_trump/trump-racism.php)

However, the ruling is not a flat-out win for Folks, a polarizing figure in the Palmetto State politics and media worlds. If Bingham's two-year-old defamation lawsuit against Folks goes to trial, Folks will not be able to rely on his unnamed sources as part of his defense against a libel accusation unless he identifies them. Folks has maintained that his sources told him things in confidence, and he has a duty to keep their identities secret.

"I'm thankful," Folks tells CJR about the ruling. "I'm glad that the court saw the really important issue here ... and I'm obviously pleased that their recognition of that underlying issue results in me not spending any time in the slammer, because that would not have been fun."

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To Taylor Smith, an attorney for the South Carolina Press Association, the ruling is a single sliver of a larger civil case that narrowly deals with sanctions and contempt as part of legal discovery. Because the ruling comes from a trial court judge and not an appeals court, it does not provide mandatory guidance for other judges to follow.

However, Smith says he appreciates the ruling for its recognition that the press has a legitimate, essential reason for gathering and reporting information from confidential sources. “It does help as a check on power and those who hold positions of public trust here in South Carolina,” he says.

In 2015, Bingham sued Folks and FITSnews for defamation after multiple posts on the site identified the then-lawmaker as the subject of an ethics complaint. One story claimed “insiders” at the statehouse once believed an indictment against Bingham “would be issued.” Bingham has not been indicted.

Last fall, a judge told Folks he would have to identify the unnamed sources for his Bingham stories if asked to do so in a deposition. Folks brazenly refused (https://www.cjr.org/united_states_project/blogger_journalist_politics_jail.php?utm_content=bufferc14eb&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer) saying he would not rat out a source. Bingham’s attorney, John E. Parker, filed a motion to hold Folks in contempt.

“I am honor bound, not as a reporter but as a human being, to keep my word,” Folks told CJR (https://www.cjr.org/united_states_project/will-folks-blogger-south-carolina.php) on the eve of his June 28 contempt hearing. “So that’s what I’ve done, that’s what I’m going to do, and if I have to go to jail as a result of that, that’s fine, I’ll do that.”

In his ruling, which FITSnews posted online (<https://www.fitsnews.com/wp-content/uploads/2017/09/WILL-FOLKS-ORDER.pdf>), Judge Keesley wrote that the Folks case “reveals the tension involved in protecting both free speech and the right of a person not to have his reputation wrongfully damaged.” Referring to a FITSnews slogan that appears on top of the website—“Unfair. Imbalanced.”—the judge wrote, “If that is a comedic attempt, it certainly conveys no humor to one who is defamed.”

In order to determine how or whether to sanction Folks, the judge wrote, it was pertinent to determine whether Folks is a journalist. That determination has long been a point of contention in South Carolina’s journalistic landscape, which hasn’t exactly embraced the blogger. An aggressive Libertarian polemicist, Folks is also a political consultant who was a controversial spokesman for former Gov. Mark Sanford before he started FITSnews.com. Folks made headlines in 2010 for claiming he had an “inappropriate physical relationship” with Sanford’s successor, Nikki Haley, now the US ambassador to the United Nations.

On his blog, Folks breaks news, regularly blisters local politicians, and sometimes slams reporters. He once wrote (<https://www.fitsnews.com/2013/08/11/sc-legacy-media-strikes-back/>) he has “little use for South Carolina’s ‘mainstream media,’” which he called an “intellectually and ideologically bankrupt assemblage of bought-and-paid for mouthpieces

parroting the propaganda of the Palmetto State's failed status quo." Folks often relies on unnamed sources. During the years I've known him, Folks has called himself a journalist but has also said he wasn't one. He now calls himself a "hybrid."

Though Keesley ultimately declared Folks "a member of the press," the judge also wrote that "courts must exercise caution in labeling a media outlet as legitimate or illegitimate" — a challenge the judge likened to determining "what constitutes a valid religion" (<https://www.fitsnews.com/wp-content/uploads/2017/09/WILL-FOLKS-ORDER.pdf>) to determine religious protections. Keesley elaborated:

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. The claim that confidential sources were promised confidentiality related to the articles in dispute is credible. 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. This is not a situation, however, where the defendants are ignoring the court. The refusal is based on articulated reasons, components of which deal with difficult, but very real and important decisions associated with the use of confidential sources.

The judge's sanctions barring Folks from relying on his unnamed sources to defend himself against the defamation lawsuit "means our side wins," says Parker, Bingham's attorney and one of the state's leading plaintiffs' attorneys in libel cases.

"The jury will be charged that even though he said that he had a source ... that he didn't have a source," Parker tells CJR. He adds that there is no trial date set, but he expects one within a year. "We hope to get a judgement," Parker says. "He defamed Mr. Bingham. He falsely accused him of crimes."

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(https://www.cjr.org/united_states_project/hurricane-irma-maria-cnn-headline.php)

Meanwhile, Folks's attorneys—Davis and former US attorney Pete Strom—call the ruling reasonable, and frame it as a win for press freedom in South Carolina.

Journalists are still going to get sued. And if this judicial approach is used, yes, they can protect their sources, but it would be easier for damages to come from them protecting their sources.

Journalists and the South Carolina Press Association have watched the case since Folks first declined (https://www.cjr.org/united_states_project/blogger_journalist_politics_jail.php?utm_content=bufferc14eb&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer) to reveal his sources. Some worried that the case against Folks might set a bad precedent for other reporters who work with confidential sources. While the state has a reporter's shield law, that law doesn't protect journalists from civil lawsuits, which led to a concern that a ruling against Folks might enable more civil defamation suits by subjects of stories who want to uncover anonymous sources who speak about them to reporters.

Following this latest ruling in the Folks case, state press association lawyer Smith says it might be time to try and change the state's reporter shield law.

"Journalists are still going to get sued," he says. "And if this judicial approach is used, yes, they can protect their sources, but it would be easier for damages to come from them protecting their sources."

Jay Bender, South Carolina's preeminent First Amendment attorney, cautions that reporters should still be explicit in agreements with sources about confidentiality, a decision he says that should involve newsroom management. "If the promise is 'I won't put your name in the story,'" says Bender, "that's quite a bit different from saying 'I'll go to jail to protect giving up your identity.'"

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(https://www.cjr.org/business_of_news/pivot-to-video.php)

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