

STATE OF SOUTH CAROLINA

COUNTY OF HAMPTON

Renee S. Beach, as Personal Representative
of the Estate of Mallory Beach,

PLAINTIFF,

v.

Gregory M. Parker, Inc. d/b/a Parker's
Corporation, Richard Alexander Murdaugh,
and Richard Alexander Murdaugh, Jr.,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2019-CP-25-00111

**PARKER'S RETURN TO
PLAINTIFF'S MOTION FOR RULE
TO SHOW CAUSE**

This matter is set for a hearing on December 10, 2021. The Plaintiff has alleged that Gregory M. Parker, Inc. a/k/a Parker's Corporation ("the Defendant"), "along with its responsible representatives" should be sanctioned and held in contempt for alleged violations of Rule 8, South Carolina Rules of Alternative Dispute Resolution (SCRADR). For the reasons stated herein, Defendant respectfully requests that the Plaintiff's motion be denied.

LEGAL STANDARD

Civil contempt must be proven by clear and convincing evidence, and the record must demonstrate the specific contemptuous act. *Ex parte Lipscomb*, 398 S.C. 463, 469, 730 S.E.2d 320, 323 (Ct. App. 2012); *Curlee v. Howle*, 277 S.C. 377, 382, 287 S.E.2d 915, 918 (1982); *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994); *In re General Motors Corp.*, 61 F.3d 256, 258 (4th Cir. 1995) (civil contempt must be proven by clear and convincing evidence); 17 Am.Jur.2d Contempt § 207; see also *Moseley v. Mosier*, 306

S.E.2d 624 (S.C. 1983) (willfulness of the violation must be shown by clear and specific acts or conduct). Civil contempt occurs when a party willfully disobeys a clear and definite court order. See *Phillips v. Phillips*, 288 S.C. 185, 188, 341 S.E.2d 132, 133 (1986). In the context of civil contempt, an act is willful if it is "done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." *Spartanburg Cnty. Dep't of Soc. Servs. v. Padgett*, 296 S.C. 79, 82–83, 370 S.E.2d 872, 874 (1988).

South Carolina recognizes that “[c]ontempt is an extreme measure; this power vested in a court is not lightly asserted.” *Bigham v. Bigham*, 212 S.E.2d 594, 596 (S.C. 1975); see also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991) (“Because of their very potency, inherent powers must be exercised with restraint and discretion.”).

ARGUMENT

I. The Plaintiff’s Motion fails for lack of supporting affidavit.

There is a distinction between direct contempt and constructive contempt. *State v. Kennerly*, 331 S.C. 442, 450, 503 S.E.2d 214, 219 (Ct.App.1998) *aff’d* by 337 S.C. 617, 524 S.E.2d 837 (1999) (citing *State v. Goff*, 228 S.C. 17, 88 S.E.2d 788 (1955)). Direct contempt is defined as contemptuous conduct occurring in the presence of the court, while constructive contempt is contemptuous conduct occurring outside the presence of the court. *Kennerly*, 331 S.C. at 451, 503 S.E.2d at 219 (citing *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 442 S.E.2d 611 (1994)). The distinction is important because it determines how the contempt proceedings must be brought. A charge of constructive contempt brought by a rule to show

cause must be based on an affidavit or verified petition, and the failure to support the rule to show cause by an affidavit or verified petition is a fatal defect. *Miller v. Miller*, 375 S.C. 443, 454–55, 652 S.E.2d 754, 760 (Ct.App.2007). Because the Plaintiff’s motion alleges conduct that occurred outside the presence of the court, this is a charge of constructive contempt for which an affidavit is required.

Under Rule 6(d), SCRCP, the Plaintiff was required to file any such affidavit with the motion. Instead of supporting affidavits, though, the Plaintiff’s motion instead contains one paragraph of hearsay allegations which serve as the basis of the motion. Paragraph C of Plaintiff’s motion alleges that a journalist named Vicky Ward had purchased a copy of the mediation presentation video and other materials from the case and contains purported quotes from Ms. Ward that she obtained “the Beach case file” from “Parker and his law firm.” Putting statements in quotation marks, though, is not analogous to providing an affidavit, which is a sworn statement given under penalty of perjury. In fact, in direct contradiction to the Plaintiff’s allegations contained in Paragraph C, Ms. Ward has categorically denied that she has ever purchased materials. In a statement made to a local news outlet through her attorney, Ms. Ward stated:

“The allegation that I bought anything is false...I had a very pleasant meeting with [Plaintiff’s counsel] Mark Tinsley, but there were obviously some crossed wires in our conversation, which he may have misinterpreted. I have never bought anything from anyone for journalistic purposes and I never would. I am deeply sorry he got that impression.”¹

Therefore, the allegations that Ms. Ward purchased portions of “the Beach case file” from “Parker and his law firm” are highly suspect, and not the appropriate basis for a contempt

¹ <https://www.islandpacket.com/news/local/crime/article254745897.html>.

motion. Additionally, in an Affidavit filed by Ms. Ward in support of a Motion to Quash the Notice of Deposition and subpoena served by Plaintiff's counsel, Ms. Ward set forth a disturbing account of being lured under false pretenses to a meeting with Mr. Tinsley. (Exhibit A). That Plaintiff's counsel has now withdrawn the Notice of Deposition and subpoena to Ms. Ward may be an indication that he does not actually want a sworn statement from Ms. Ward – because evidently her testimony would contradict the quotations attributed to her in Paragraph C of the motion. These “crossed wires” and apparent dissonance between Ms. Ward and Mr. Tinsley demonstrate that the hearsay statements made in Paragraph C are inherently unreliable and reinforce the importance of the requirement that constructive contempt actions be supported by sworn testimony such as an affidavit.

The hearsay rules of evidence are founded upon the notion that statements must be subject to examination, and statements uttered outside the courtroom are not under oath, tested by cross-examination, or made under the seriousness and trappings of a legal proceeding. SCTRHB § 16:2. Such is the case here. No statements made in the Plaintiff's motion are corroborated by sworn testimony, and are therefore unreliable hearsay or simply arguments by counsel. Further, Plaintiff's counsel cannot serve as a witness without violation of the witness-advocate rule. See comments to Rule 3.7, South Carolina Rules of Professional Conduct (“A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate witness should be taken as proof or as an analysis of the proof.”). Finally, it is well established law that counsel's statements regarding

the facts of a case and counsel's arguments are not admissible evidence in a case. *South Carolina Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (“[a]rguments made by counsel are not evidence”); *Bowers v. Bowers*, 304 S.C. 65, 403 S.E.2d 127 (Ct. App. 1991) (“Arguments of counsel are also not evidence.”); *Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986) (on motion for summary judgment, the trial court properly disregarded the statements of counsel that he claimed reflected testimony appearing in depositions not otherwise entered into evidence). Therefore, the motion is without an evidentiary basis and fails as a matter of law. The Plaintiff has failed to put forth evidence to establish clear and convincing proof to support a finding of contempt.

II. Gregory M. Parker, Inc. and its attorneys did not make the alleged disclosure.

The specific allegations giving rise to the contempt motion are unclear. At best, the motion can be interpreted that an alleged disclosure of confidential mediation materials took place between July 7, 2020 and September 14, 2021. The motion contains no details regarding *who* purportedly disseminated the materials, *when* they were disseminated over the course of 439 days, or *how*.

Attorneys for Parker's came into possession of the mediation video on July 7, 2020, by email from Mr. Tinsley containing a link to Dropbox. (Exhibit B). Mediation then took place on September 20, 2020. (Exhibit C). After a failed mediation, and as outlined below, only after editorials were posted online indicating that the mediation video had already been disseminated, Parker's filed a Motion to use portions of the mediation video in support of its Motion to Transfer Venue. See *Defendant Gregory M. Parker, Inc.'s Motion to Use as Evidence Materials Formerly Designated as Confidential Mediation Materials*. The intent was to use

contradictory statements made by Renee Beach and Savannah Beach, as well as conduct by the witnesses in the video, to challenge the Affidavits filed in opposition to Parker's Motion to Transfer Venue. However, the exact content sought to be used was not discussed in the Motion. This was intentionally done in order to preserve the confidential nature of the video, even though disclosure of its contents by Plaintiff's counsel to Fitsnews had already waived her claim to privilege. The Motion was later withdrawn, after its contents were no longer needed to support the Motion to Transfer Venue. This filing, though, demonstrates the intent to preserve the confidential process of mediation. Instead of simply including the materials as exhibits in support of its Motion to Transfer Venue, Parker's and its attorneys first petitioned the Court for permission to use it.

III. To the extent any materials were disclosed, Plaintiff waived confidentiality by placing them in the public domain.

Plaintiff's counsel has shown a penchant for placing this case in the public eye and establishing repeated contact with the media, despite this Court's admonishment to avoid trying the case in the court of public opinion. Parker's and its attorneys have made every effort to follow the Court's instruction. In fact, Parker's has previously filed two (2) motions on this issue: 1) the above-mentioned Motion to Use as Evidence Materials Formerly Designated as Confidential Mediation Materials, filed November 12, 2021 (withdrawn); and 2) Motion to Limit Abuse of Discovery Process, filed November 16, 2021, which was granted.

As part of the Motion to Use as Evidence, Parker's set out the timeline of the production of the subject mediation materials. It is instructive to repeat that timeline here to show that Plaintiff's counsel placed the video in the public domain through his repeated

contact with Fitsnews. As noted above, Plaintiff's counsel emailed a Dropbox link on July 7, 2020 to defense counsel for Parker's to access the mediation video. That same month, on July 26, 2020, Fitsnews released an editorial by Mandy Matney, which set forth information that was exclusively contained within the Plaintiff's video. (Exhibit D). Specifically, the editorial contains a direct quote from Renee Beach, who had not yet been deposed at the time of the editorial. The quote in the editorial was taken verbatim from Renee Beach's statements in the video, complete with ellipsis where Ms. Beach pauses on the video. Then again on October 27, 2020, Fitsnews issued another piece, also by Mandy Matney, and again containing a quote from Ms. Beach straight from the 'confidential' video. (Exhibit E). Ms. Beach had not yet been deposed at that time either. It was apparent then that Fitsnews obtained the video, or portions thereof, directly from Plaintiff's counsel, and Plaintiff's counsel has only continued to show a pattern of maintaining direct and constant contact with members of the media, providing a sundry of quotes to Fitsnews in particular.²

It is important to note that Ms. Beach testified in her deposition that she has never spoken to Ms. Matney, so the information would have had to have come from her attorney. (R. Beach Dep. 106:6-24)(Exhibit F). The original editorial, though, does not attribute the quote from Ms. Beach as having come through her attorney, and reads as though it was a direct quote from Ms. Beach herself. (Exhibit D). This disconnect, again, establishes what the previous Parker's motions sought to demonstrate – Plaintiff's counsel is wagging the dog.

It is well established in South Carolina that a waiver of confidentiality occurs when

² For brevity, all articles quoting Plaintiff's counsel are not attached as exhibits to this return. However, a brief google search yields a number of results.

there is disclosure of the confidential information to third parties. See *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 692 S.E.2d 526 (2010). As a result, by disseminating the video, or some of its contents, to at least one third party, particularly with the intent that the public would have access to the information, the confidentiality of the video was breached and the Plaintiff has waived any claim of confidentiality as to its contents. The intent of Rule 8, SCRADR is to protect the communications made during the mediation itself and to protect the process. This protection does not, and should not, extend to communications made to manipulate the media and the general public.

Paragraph C of the Plaintiff's motion also makes mention that Vicky Ward "had not received any of the depositions of the Parker's employees or any of the policies produced by Parker's." The depositions referenced were actually filed by Plaintiff's counsel in violation of the South Carolina Rules of Civil Procedure, and are now part of the public domain. See *Parker's Motion to Limit Abuse of Discovery Process*, p. 3: "The timing of the Plaintiff's filing of these excerpts, without accompanying a motion and without an immediate trial date, instead appear to accompany and serve as support for a news article...These articles specifically make reference to these depositions and [an unrelated] case, and attempt to cast Parker's in a negative light. The timing and an apparent connection between Plaintiff's counsel and the writer of the articles are suggestive of an intent by the Plaintiff to try the case in the court of public opinion, or to leverage bad publicity for other ends." These depositions were filed by the Plaintiff in the public court index, in violation of Rules 26 and 32, SCRCP, so the significance of including a statement that Ms. Ward did not have the depositions of the Parker's employees is unclear. However, it is another misleading statement in the Plaintiff's

motion made without affidavit or evidentiary basis.

Finally, the Plaintiff's motion makes reference to photographs of Mallory Beach's body taken after her tragic passing. These photographs were produced by several sources in discovery, including the South Carolina Law Enforcement Division (SLED) and the Beaufort County Coroner's Office. There is no evidence that Ms. Ward obtained these photographs from the mediation video or from any defendant in this case. However, the mention of these photographs begs the question – Why would Parker's want these photographs or any contents from a mediation video prepared by the Plaintiff released to the public? There is no reason that anyone should release these photographs to the public and reinforce the tragedy at the center of this case.

IV. To the extent Plaintiff is seeking contempt against non-parties or attorneys that are not of record, Plaintiff's Motion fails for lack of jurisdiction.

The Plaintiff has addressed this Motion to “Gregory M. Parker, Inc. a/k/a Parker's Corporation,” and has asked this Court to issue an order finding Parker's and “its responsible representatives” in contempt. The Plaintiff's motion alleges that there was disclosure, production or dissemination of mediation material, but it does not name any specific individuals, other than reference to Greg Parker and his “personal” lawyer. Paragraph C of the motion then indicates that “the Beach case file” purportedly came from “Parker and his law firm.” Mr. Parker is not a named defendant in this case. No attorneys from Baker Hostetler have made any appearance in this case as counsel of record.

The Plaintiff's motion is not accompanied by a summons, and does not contain the essential elements of a summons. See *Ex Parte S.C. Dep't. of Revenue*, 350 S.C. 404, 566 S.E.2d

196 (Ct. App. 2002)(court lacked personal jurisdiction where party was served with a copy of the rule to show cause and only had 21 days in which to respond, not 30 days as required by Rule 12(a), SCRCP). The rule governing personal service of process serves at least two purposes; it confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action. *BB&T v. Taylor* 369 S.C. 548, 633 S.E.2d 501 (2006). The same rationale applies in a contempt action. *Citizens & S. Nat'l Bank of S.C. v. First Palmetto State Bank & Trust Co.*, 279 S.C. 252, 254, 305 S.E.2d 80, 80 (1983). To contain the essential elements of a summons, the motion must identify the parties to whom it is directed under Rule 4, SCRCP, and it must meet the 30-day notice requirement of Rule 12, SCRCP. Because the Plaintiff's motion does not contain these essential elements, any judgment of contempt against a non-party or an attorney not listed as counsel of record would be void for lack of personal jurisdiction. *Id.* at 407, citing *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995); see also *Coogler v. Cal. Ins. Co. of San Francisco, Cal.*, 192 S.C. 54, 58–59, 5 S.E.2d 459, 461 (1939) (“[N]o order or judgment affecting the rights of a party ... should be made or rendered without [proper] notice to the party whose rights are to be thus affected....”). Therefore, to the extent Plaintiff's motion is against Parker individually, the law firm of Baker Hostetler or any other non-parties, the motion fails as a matter of law.

CONCLUSION

Based upon the foregoing, the Defendant respectfully requests that the Plaintiff's motion be denied.

[SIGNATURE BLOCK ON FOLLOWING PAGE.]

GRIFFITH, FREEMAN & LIIPFERT, LLC

s/ *E. Mitchell Griffith*

By:

E. Mitchell Griffith (SC Bar #2287)

Kelly D. Dean (SC Bar #75372)

600 Monson Street

PO Drawer 570

Beaufort, SC 29901

843-521-4242

843-521-4247 (fax)

mgriffith@griffithfreeman.com

kdean@griffithfreeman.com

ATTORNEYS FOR GREGORY M. PARKER,
INC. D/B/A PARKER'S CORPORATION

December 7, 2021
Beaufort, South Carolina