

State of South Carolina, County of Greenville
In the Court of Common Pleas, Thirteenth Judicial Circuit

Frank George Rogers, individually and
derivatively as a member and on behalf
of Exodus Aircraft, LLC,

Plaintiffs,

vs.

Joshua Brett Kimbrell, Liliya Shcherba
Robertson Kimbrell, Exodus Airways,
LLC, Thomas Blake Whitaker,

Defendants.

Case No. 2025-CP-23-04210

Order Denying Defendants'
Motion to Reconsider

This matter comes before the court on Defendants Joshua Brett Kimbrell and Liliya Shcherba Robertson Kimbrell's (Defendants) Motion for Reconsideration. Rule 54, SCRPC. This Motion is disposed of without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRPC; *Pollard v. City of Florence*, 314 S.C. 397, 401-02, 444 S.E.2d 534, 536 (Ct. App. 1994). For the reasons stated herein, the motion is denied.

This case has an extensive procedural history and only a portion is included herein. The court heard Plaintiffs' motion to compel discovery April 23, 2026. On May 5, 2026, the court issued its order providing Defendants additional time to respond to discovery and imposing sanctions striking Defendants' answer, defenses, and counterclaims if they failed to properly respond by noon on May 18, 2026. Four days after the deadline, Defendants filed a motion for an extension until May 28, 2026.¹ On June 29, 2026, Plaintiff filed a Motion for Default.²

Defendants filed a Motion to Reconsider and supporting memorandum July 22, 2026, seeking reconsideration on the Court's May 5, 2026 order. Plaintiff filed a

¹ The court issued a separate order deciding this motion.

² The court issued a separate order deciding this motion.

memorandum in opposition August 10, 2026. Defendants filed a supplemental memorandum in support August 24, 2026.

Rule 54 allows a Court to reconsider orders “subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.” Rule 54, SCRCP; *Carlson v. Boston Sci. Corp.*, 856 F.3d 320, 325 (4th Cir. 2017). When reconsidering a ruling the court may look to issues initially raised by the parties at the time of the hearing. *See Johnson v. Sonoco Products Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (citing *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct.App.1999)). An issue cannot be raised for the first time in a motion to reconsider. *Id.* “The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court.” *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987).

Defendants’ motion argues five primary points: (1) Defendant Joshua Kimbrell had legislative immunity during the period in which the Court required discovery to be provided to Plaintiff thus he was constitutional protected from compliance, (2) the Court relied on a contempt order that Defendants appealed, (3) Defendants have substantially complied with the Order thus the sanctions are disproportionate, (4) the Motion to Compel Order blanketly waived unwaivable spousal privilege, and (5) the striking of Defendants’ answer, defenses, and counterclaims for failure to comply conflicts with the due process clause.

Legislative Immunity

First, Article III, Section 14 of the South Carolina Constitution protects legislators “in their persons and estates during their attendance on, going to and returning from the General Assembly” and during the 10-day period immediately before and after session. *See S.C. Const. Art. III, § 14*. Legislative immunity is not absolute and applies only to acts in the performance of one’s legislative duties. *Richardson v. McGill*, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979) (holding a legislator was absolutely immune from liability for comments made during the performance of his legislative duties). Thus, the doctrine

applies only to conduct undertaken in a legislative capacity, such as legislative speech, debate, deliberation, and other activities integral to the legislative process. *Id.*

Defendant Joshua Kimbrell is the only party who is a member of the South Carolina legislature and thus the immunity could only apply to him. However, legislative immunity does not apply because none of the allegations stem from the performance of his duties as a legislator. Instead, actions in his individual capacity form the basis for the allegations in the complaint for breach of fiduciary duties, conversion, fraud, and conspiracy. The Motion to Compel arose from Defendant Joshua Kimbrell's duty to produce discovery in. The Plaintiff served discovery requests upon the Defendants on October 16, 2025, with responses due 30 days later when the legislature was not in session. The court's deadline of May 18, 2026, was also not during the regular legislative session.³ Therefore, the Court denies the motion to reconsider on the grounds Defendant Joshua Kimbrell had legislative immunity.

Court's Purported Reliance on Another Order

Second, Defendants argue the court improperly relied on an order holding Defendants in contempt a different judge issued March 12, 2026. The Plaintiffs cited the March 12, 2026 Order in their memorandum to support their motion. However, the Court's May 5, 2026 Order neither cites nor relies on the March 12, 2026 Order. The Court decided the motion based on the evidence presented at the hearing and in the briefs, not on a prior order. Therefore, the Court denies the motion to reconsider on the grounds the Court relied on an order which is now on appeal.

Sanctions for Discovery Violations

Third, severe discovery sanctions, such as striking pleadings, should be imposed only when justified by the totality of the circumstances and should be proportionate to the conduct at issue. *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C.

³ During the hearing, Defendants argued that a special session was called after the regular session ended May 14, 2026. The calling of a special session does not change the analysis.

193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999). A party has the duty to respond to written discovery requests unless there is a stated reason for the party to object. *Richardson on Behalf of 15th Circuit Drug Enforcement Unit v. Twenty-One Thousand and no/100 Dollars (\$21,000.00) U.S. Currency and Various Jewelry*, 430 S.C. 594, 598 (2020). When requested documents are held by a third party, such as a bank or other financial institution, the documents are still deemed to be in the possession, control, or custody of the party for purposes of discovery. *Innovative Waste Management, Inc. v. Crest Energy Partners GP, LLC*, 445 S.C. 19, 29, 911 S.E.2d 406, 411 (2025).

Here, the sanctions imposed are not disproportionate because the Defendants have not complied with court rules and orders, including prior consent orders, regarding discovery. The evidence showed Defendants understood their obligations to produce discovery responses and document but chose not to. The repetitive willful non-compliance justifies the Court's decision to strike the Defendants' answer, defenses, and counterclaims, particularly when the same order first provided additional time for Defendants to respond. Therefore, the Court denies the Defendants' motion to reconsider as the sanctions are proportionate to the Defendants' willful conduct.

Spousal Immunity

Fourth, South Carolina law recognizes spousal immunity protects confidential communications between spouses during their marriage. S.C. Code Ann. § 19-11-30. One cannot be compelled to testify against his or her spouse or to disclose protected communication to a party in litigation. *State v. Motes*, 264 S.C. 317, 323-324, 215 S.E.2d 190, 192 (1985).

"It is settled that '[a]n issue may not be raised for the first time in a motion to reconsider.'" *Repko v. Cnty. of Georgetown*, 424 S.C. 494, 502, 818 S.E.2d 743, 748 (2018) (quoting *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009)).

Defendants did not assert spousal immunity at the initial hearing. As such, the court need not consider it since motions for reconsideration are not the appropriate vehicle

for new arguments. Therefore, the Court denies the Defendants' motion to reconsider on the grounds that its order waived spousal privilege.

Due Process

Finally, the United States Constitution and the South Carolina Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. Due process means that a party has notice, a meaningful opportunity to respond, and judicial review. *See State v. Binnarr*, 400 S.C. 156, 165, 733 S.E.2d 890, 894 (2012) (citing *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008)). A second hearing on sanctions for failure to comply with a court order is appropriate only where the party upon which they are imposed has had no prior opportunity to be heard on the possible sanction. *Burns v. Universal Health Services Inc.*, 340 S.C. 509, 514, 532 S.E.2d 6, 9 (2000).

Here, Defendants' due process rights were not violated because they had an opportunity to be heard about potential sanctions at the April 23, 2026, hearing. Plaintiffs requested sanctions, including striking Defendants' answer, defenses, and counterclaims, in their motion to compel and supporting memorandum. Moreover, at the April 23, 2026, hearing, Defendants, represented by counsel, had the opportunity to argue against any possible sanctions. The Court considered both sides' arguments before issuing its order. Thus, the Order did not create a new sanction for which the Defendants needed another opportunity to be heard. Therefore, the Court denies the Defendants' motion to reconsider on the grounds that the Defendants' due process rights were violated.

Order

For the foregoing reasons, Defendants' motion to reconsider is **DENIED**.

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Greenville Common Pleas

Case Caption: Frank George Rogers , plaintiff, et al vs. Joshua Brett Kimbrell ,
defendant, et al
Case Number: 2025CP2304210
Type: Order/Other

It is so ordered.

s/ Jane H. Merrill
