STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF LEXINGTON)	CIVIL ACTION NO.: 2015-CP-32-01764
Kenneth A. Bingham,)	
)	
Plaintiff,)	
)	
v.)	ORDER IMPOSING SANCTIONS
)	UNDER RULE 37, SCRCP
William R. Folks, III, and FitsNews, LLC,)	
)	
Defendants.)	
_____)	

The plaintiff seeks to have the defendants held in civil contempt of court and for the court to impose sanctions pursuant to Rule 37, SCRCP. This court, like the defendants, is bound by the discovery order previously entered. A sanction is imposed against the defendants so that the plaintiff will be entitled to a jury instruction akin to a spoliation charge. The court declines to cite the defendants for contempt or to impose contempt sanctions involving jail or fines.

This lawsuit arises from claims that the defendants defamed the plaintiff in a series of articles that the defendants posted in an online publication known as *FITSNews*. At the time, the plaintiff, Mr. Bingham, was a member of the South Carolina House of Representatives and chair of the ethics committee. He was a public figure, which requires him to prove constitutional malice (actual malice) in order to make out a claim of defamation. This case reveals the tension involved in protecting both free speech and the right of a person not to have his reputation wrongfully damaged. A print or online news source sometimes has a statement embodying its guiding principle on the masthead of the publication. *FITSNews* identifies itself as "Unfair. Imbalanced." If that is a comedic attempt, it certainly conveys no humor to one who is defamed.

On January 25, 2016, confirmed after reconsideration on October 27, 2016, the Honorable R. Keith Kelly issued orders related to discovery that directed the defendants to disclose sources in three instances (quoting below from Judge Kelly's order):

1. "Mr. Folks' sources for his article entitled "The Revenge of Bobby Harrell … (Folks Dep. 108.)."

2. "Mr. Folks' "other sources" mentioned in Paragraph 14 of the Answer … This includes the identities of any of Mr. Folks' sources related to the publishing of the defamatory material in question, any sources stating that the complaints were not being handled in a timely manner, and any "insiders" believing indictments would be issued imminently against Bingham, White, Sandifer, and others."

3. "The source he [Mr. Folks] referenced in regard to Mr. Bingham being indicted that he learned of within the last couple of weeks (Folks Dep. 56:21 – 57:13.)."

Rule 37(b), SCRCP, is the controlling rule of civil procedure. It reads, in part:

(b) Failure to Comply With Order.

(1) Sanctions by Court in Circuit Where Deposition Is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

> **(C)** An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
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> **(D)** In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
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> . . .
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Rule 37(b)(1) provides that the court may cite the failure to answer a question posed in a deposition as being contempt of court. The word "may" is permissive, not mandatory.

Likewise, Rule 37(b)(2) permits a court to use subsection (D) to find that non-compliance with a discovery order is an act warranting a finding of contempt of court. However, the other subsections [(A), (B), and (C)] contain examples of remedies aside from a contempt citation or along with one that are sufficient in most cases, including this one, to address non-compliance. The court is charged with the responsibility to evaluate the situation and to "make such orders in regard to the failure as are just . . . [.]"

The defense argues that, in failing to disclose sources as ordered by Judge Kelly, they have not acted "with bad purpose either to disobey or disregard the law," citing the Supreme Court of South Carolina's description of the type of willful disobedience of a court order that is necessary to support a finding of contempt. *See*, In re Brown, 333 S.C. 414, 420, 511 S.E.2d 351, 355 (1998). In addressing this, the defendant Folks testified at the hearing that he is bound by journalistic ethics not to reveal a source to whom he has promised confidentiality. He stated that

being forced to reveal such a source will cause him irreparable harm, including financial harm. He testified that he tried to get the sources to waive confidentiality after the issuance of Judge Kelly's order, but they refused. Mr. Folks also stated that revealing a source to whom he promised confidentiality would subject him to civil liability for damages for breach of contract.

The court is aware that "[w]here a contemnor is unable, without fault on his part, to obey an order of the court, he is not to be held in contempt." Smith-Cooper v. Cooper, 344 S.C. 289, 301, 543 S.E.2d 271, 277 (Ct.App. 2001). However, Smith-Cooper dealt with a commonly recognized principle that a person cannot be held in contempt of court where he is financially unable to comply with a court-ordered support obligation. Clearly, where a court enters an order that requires something that is impossible for a person to follow, the failure to adhere is not contemptuous behavior. The inquiry in determining a willful act for contempt purposes is whether the party has a true choice as to whether to comply with the order [In re Brown].

Mr. Folks has the ability to provide the plaintiff with the names of the sources ordered to be revealed by Judge Kelly. He has a true choice. He has reasons not to comply, and he stated the reasons for his refusal. Those reasons deal with issues that have effectively been decided by Judge Kelly's order. As noted above, that order is binding on him and this court at this point.

The court could cite the defendants for civil contempt. However, the remedy for a discovery violation is to be targeted to mitigate the resulting harm to the plaintiff's case. Rule 37(b), SCRCP, requires sanctions to be just, and only criminal sanctions are meant to be punitive. *See*, DiMarco v. DiMarco, 393 S.C. 604, 607, 713 S.E.2d 631, 633: "Whereas civil contempt is either coercive or remedial in nature, criminal contempt is purely punitive."

Whether evaluating a contempt sanction or one of the others available under Rule 37, the Supreme Court of South Carolina in Davis v. Parkview Apartments, 409 S.C. 266,762 S.E.2d 535 (2014), has provided guidance.

> "[***W]hen the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly.***" Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct.App.1999) (citing Orlando v. Boyd, 320 S.C. 509, 466 S.E.2d 353 (1996)). Thus, "***[w]here the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction.***" Id. at 198–199, 511 S.E.2d at 718–19 (citing Baughman v. AT & T Co., 306 S.C. 101, 410 S.E.2d 537 (1991)); see also Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997) (stating when deciding the severity of sanctions "for failure to disclose evidence during the discovery process, ***the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice***") (citations omitted)."
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> Id., at 282. (Emphasis provided.)

The court is attempting to fashion a sanction that mitigates "the degree of prejudice" caused to the Plaintiff's case. Id., at 282. A sanction that is just and remedial is the goal. For the purpose of making that assessment, whether the defendants ought to be considered a member of the press is also relevant.[1]

The defendant Folks testified that he is engaged in and relies upon for his livelihood the gathering and dissemination of news for the public. The plaintiff proffered the testimony of Ms. Ashley Hunter in an attempt to bolster the position that the defendants are not engaged in a

[1] The Supreme Court of South Carolina, in Metts v. Mims, 384 S.C. 491, 682 S.E.2d 813 (S.C. 2009), upheld the trial court's refusal to impose sanctions on a newspaper, even though the newspaper had been held in contempt for refusing to comply with a discovery order. And the Court in Matter of Decker, 322 S.C. 212, 471 S.E.2d 459 (1995), "had the opportunity to consider if a qualified privilege exists under the First Amendment to the United States Constitution, and if so, how such a privilege is to be applied." In a matter of such public importance, the Court held, "it would be inappropriate to incarcerate appellant during the pendency of this appeal." Id., at 214. Clearly, circuit and appellate courts in South Carolina have been cautious with sanctions when their findings of contempt involved members of the press and/or First Amendment issues. The court is similarly cautious here.

legitimate journalistic endeavor. The court sustained the objection to her testimony, but allowed it to be proffered. When she made the proffer, she was asked about whether she had known Mr. Folks to accept cash, and she gave a cursory answer about an encounter she witnessed between Mr. Folks and a public figure. The incident she briefly described certainly may have exposed a failure of journalistic integrity, but the court cannot speculate to fill in the details that were never stated with clarity. No other rebuttal evidence was offered by the plaintiff. If the objection had not been sustained, Ms. Hunter's testimony was insufficient to allow a conclusion that *FITSNews* fails to amount to a journalistic enterprise for the purposes of this motion. In addition, much like the precedent related to assessing what constitutes a valid religion as opposed to a pretext for one in the context of entitlement to protection on religious grounds, courts must exercise caution in labeling a media outlet as legitimate or illegitimate. For the limited purposes of assessing the nature of the defendants' behavior and determining an appropriate sanction for such, the court is treating the defendant as a member of the press.

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. Taken in context, the actions of the

defendants are not the sort of bad faith or gross indifference that justify incarceration, fines, or the striking of the Answer. Still, there must be consequences for noncompliance. Sufficient means are available to deal with the discovery violations and to mitigate the degree of prejudice caused by the defendants' refusal to reveal sources.

The plaintiff's allegations of defamation against the defendants in the Complaint are set forth in seven paragraphs, numbered 7 through 13. Five of those seven paragraphs – the ones numbered 7 through 11 – pertain to whether the defendants acted with reckless disregard in publishing stories stating that an ethics complaint had been filed against the plaintiff by Colin Ross. The defendant Folks testified that Mr. Ross was the only one who provided him with information as to those alleged matters. There has been no indication that the plaintiff can contest this testimony. Therefore, the court finds the plaintiff's ability to prove defamation in the instances alleged in paragraphs 7 through 11 is not prejudiced by the nondisclosure of the confidential sources.

By contrast, the defendant Folks also testified that the plaintiff's defamation allegations set forth in paragraphs 12 and 13 in the Complaint – that the defendants acted with reckless disregard in publishing stories stating (in paragraph 12) the plaintiff through his committee ignored filed ethics complaints and (in paragraph 13) that many insiders at the South Carolina State House believed indictments against the plaintiff and others were imminent – are based, in part, upon information provided to the defendants by the source(s) he refuses to reveal. The failure to disclose the identities of the source(s) who provided him with information relative to the allegations of defamation set forth in paragraphs 12 and 13 prejudices the plaintiff in that it precludes his ability to call them as witnesses, to impeach their credibility, and to demonstrate to

the trier of fact that any reliance was unwarranted. There is a substantial degree of prejudice caused to the plaintiff's case by the noncompliance with the discovery order.

As for the plaintiff's argument that noncompliance with Judge Kelly's discovery order is also prejudicial in that it prevents him from "learning the identity of a potential defendant," the court declines to use that claim as a justification for the imposition of a sanction. This argument is an assertion that a proper purpose of discovery is to identify other individuals against whom he might have a defamation claim. 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 facts which assist the plaintiff in establishing his cause of action." Mahaffey v. Southern Ry. Co., 175 S.C. 198, 178 S.E. 838 (1935).

Also instructive in this regard is the Court's decision in Oncology and Hematology Associates of S.C., LLC v. South Carolina Dept. of Health and Environmental Control, 387 S.C. 380, 692 S.E.2d 920 (2010), which cites with approval the following portion of a decision of the Texas Supreme Court: "Although the scope of discovery is broad, requests must show a reasonable expectation of obtaining information that will aid the dispute's resolution." Id., at 388. If the request is not relevant to "the 'central issue' in the case before it," then it is improper. Id., at 388.

The central issue in this case is whether the defendants defamed the plaintiff through the publication of certain stories. As noted above, by not disclosing the names of the sources for the stories set forth in paragraphs 12 and 13 in the Complaint, the plaintiff is prejudiced in his ability to show that reliance upon those sources was unwarranted. But, his inability to learn the identities of others who might be sued for defamation is not a prejudice deserving a sanction.

Counsel for the plaintiff also pressed Mr. Folks about the assertion in the articles about there being a belief that an indictment was **imminent**. The insinuation here is that the defendants must have known that this claim is false because of the passage of time. Those are issues that the jury will have to evaluate at the proper time.

The court finds that the prejudice to the plaintiff's case as a consequence of the noncompliance with Judge Kelly's discovery order is fully mitigated by an instruction to the trier of fact that it must presume as a matter of law that the defendants had no individual sources for the allegedly defamatory matters published in the stories referenced in paragraphs 12 and 13 of the Complaint, with this presumption being subject to removal by the defendants' disclosure of those sources to the plaintiff at a reasonable time before trial.[2] The trial judge, in his or her discretion, may modify the language of the instruction as needed to address the issue of the discovery sanction as it exists at the time of trial.

As to the argument related to a stay of any imposed sanction pending an appeal of the contempt order, the court declines to issue a stay. If a party wishes to attempt an appeal at this stage, a petition may be filed with the appellate court for such relief.

Finally, any award of attorneys' fees and costs to be imposed by way of sanction is to be decided on written submissions, unless the attorneys request a further hearing. Counsel for the plaintiff have filed affidavits. If they wish to provide further submissions, those are due from the plaintiff's attorneys within 20 days of the filing of this order, with the defense attorneys being given 10 days from e-filing of the plaintiff's submissions in which to reply, and plaintiff's

[2] The article by Professor Achal Mehra published in Journalism Quarterly and titled "Sanctions for Reporters Who Refuse to Disclose Sources in Libel Cases," cited by the Defendant Folks in his return, is not binding upon the court; nevertheless, it usefully discusses cases in which judges imposed Rule 37 (b) sanctions on reporters who refused to disclose sources in a defamation case.

counsel having 5 days from e-filing of the defense's documents in which to file any reply in response.

THEREFORE, IT IS ORDERED that the failure of the defendants to comply with the discovery order(s) issued by Judge Kelly warrants a sanction under Rule 37(b)(2), SCRCP, such that 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, with said presumption being subject to removal by disclosure of the sources at least 30 days before trial. The trial judge, in his or her discretion, may modify the language of the instruction as needed.

AND IT IS SO ORDERED.

Lexington Common Pleas

Case Caption: Kenneth A Bingham VS William R Folks III

Case Number: 2015CP3201764

Type: Order/Sanctions

Circuit Judge

s/ William P. Keesley