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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Trial Court Case No. 2014-CP-26-08367
(Formerly 2013-CP-26-02816)

Appellate Case No. 2016-001328

Gabriel Barnhill and GSB Enterprises LLC.....Respondents,

v.

J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K. Swilley, SMG Partners, LLC, SMS Services, LP, William C. Piner, WCP Limited, LLC, 809 Holdings, LP, QC Financing, LLC, Heath Causey, and Sage Financial Group, LLC,

Of Whom J. Floyd Swilley and Laurel K. Swilley are the .....Appellants.

APPELLANTS' PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellants J. Floyd Swilley and Laurel K. Swilley (collectively, the "Swilleys") hereby petition the Court for rehearing of its Opinion filed August 4, 2021. In its Opinion, the Court affirmed the trial court's (1) March 21, 2016 Order (the "March Order") striking the Swilleys' pleadings as a sanction for discovery violations and granting summary judgment to Respondents Gabriel Barnhill and GSB Enterprises, LLC (collectively, "Barnhill"), on the Swilleys' counterclaims, and (2) May 25, 2016 Order (the "May Order")

denying the Swilleys' separate motions to set aside the March Order. The grounds for this Petition are that the Court misapprehended the law in ruling that unrepresented parties are required to appear pro se at a hearing held unlawfully, while the case is in abeyance pursuant to the order of a predecessor judge allowing them time to obtain substitute counsel, to preserve their arguments as to the unlawfulness of the proceeding and on the merits. In support of this Petition, the Swilleys submit the incorporated memorandum with citation of authorities.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

INTRODUCTION AND BACKGROUND

The relevant timeline for purposes of this Petition is as follows: On October 27, 2015, John M. Leiter filed a motion to be relieved as counsel for the Swilleys, among others. (R. pp. 352-354.) In December 2015, Barnhill filed (1) a motion to compel seeking to strike the Swilleys' pleadings as a discovery sanction, and (2) a motion for summary judgment and for judgment on the pleadings as to the Swilleys' counterclaims. (R. pp. 409-414; S.S.R. pp. 3-7.)

On January 4, 2016, the trial court, Judge William H. Seals Jr. presiding, heard Mr. Leiter's motion to be relieved as counsel. (R. p. 29.) On January 14, 2016, Judge Seals signed the Order (the "January Order") granting Mr. Leiter's motion and relieving him as counsel for the Swilleys. (R. p. 31.) The January Order stated, in relevant part, that the Swilleys "shall obtain new legal counsel to represent them in this matter within thirty (30) days from the date of this Order. The proceedings in this case will be held in abeyance for thirty (30) days from the date of this Order." (R. p. 30.) Judge Seals's January Order was entered on January 25, 2016. (R. p. 29.)

Despite Judge Seals's January Order holding the case in abeyance for 30 days, the trial court violated its own Order by scheduling a hearing before Judge R. Lawton McIntosh on February 16, 2016. (R. pp. 436-469.) Barnhill's counsel likewise violated the January Order in various ways, including by mailing notice of the unlawful hearing to the Swilleys, who were then without counsel. (R. pp. 367-371.) On February 16, 2016, Judge McIntosh conducted the hearing, which the Swilleys, who were still unrepresented, did not attend. (R. p. 436.) While "catch[ing Judge McIntosh] up with the background" of the case (R. p. 440, lines 2-3), Barnhill's counsel told Judge McIntosh that Judge Seals said "I'll give the Defendants 30 days to get new counsel." (R. p. 444, lines 1-2.) That was only after counsel for one of the other Defendants, 809 Holdings, LP, who was the only other person in attendance, had mistakenly informed Judge McIntosh that Judge Seals had "signed an order relieving [Mr. Leiter as counsel] on the 14th of January, giving them 13 days to find new counsel." (R. p. 439, lines 8-10.) Neither attorney informed Judge McIntosh of when the January Order was entered or that Judge Seals had also ordered the proceedings in this case to be held in abeyance for 30 days.

On March 21, 2016, the trial court entered Judge McIntosh's March Order granting both of Barnhill's motions, including striking the Swilleys' pleadings and dismissing their counterclaims with prejudice. (R. pp. 32-38.) On April 1, 2016, the Swilleys filed separate motions to set aside the March Order for various reasons, including that they had not actually received the mailed notice of the February 16, 2016 hearing. (R. pp. 415-420, 423-424.) On May 25, 2016, the trial court entered Judge McIntosh's May Order denying the Swilleys' motions to set aside the March Order, which led to this appeal. (R. pp. 41-48.)

ARGUMENT AND CITATIONS OF AUTHORITIES

THE COURT MISAPPREHENDED THE LAW IN RULING THAT UNREPRESENTED PARTIES MUST APPEAR PRO SE AT A HEARING HELD UNLAWFULLY, WHILE THE CASE IS IN ABEYANCE, TO PRESERVE THEIR ARGUMENTS AS TO THE UNLAWFULNESS OF THE PROCEEDING AND ON THE MERITS

On appeal, the Swilleys argued, among other things, that the 30-day stay effected by Judge Seals's January Order, which was entered on January 25, 2016, encompassed the February 16, 2016 hearing and thereby rendered both the hearing and the March Order based on the hearing unlawful. (*See* Appellants' Final Br. pp. 4-7 (citing, among other authorities, *Dukes & Dukes, Inc. v. Hygrade Food Prod. Corp.*, 236 S.C. 69, 113 S.E.2d 254 (1960).) In rejecting this argument in its Opinion, the Court did not refute or even address the Swilleys' authorities on this issue. Instead, the Court held only that the Swilleys had failed to preserve the issue by failing to "appear at the February hearing and make this argument," even though they had both raised this argument in their motions to set aside the March Order. (Slip Op. p. 3.) The Court also rejected another of the Swilleys' arguments on appeal, that the trial court had committed reversible error by granting summary judgment as a sanction (*See* Appellants' Final Br. pp. 11-13), for the same reason, that is, that the Swilleys, having "received [constructive] notice of the February hearing, should have appeared at the hearing to make this argument in a timely manner" to preserve the issue for appeal (Slip Op. p. 5). Thus, the Court's ruling is that unrepresented parties with constructive notice of a hearing set and held in violation of a court order must appear pro se at the unlawful hearing to argue both (1) that the hearing was unlawful, and (2) the merits of the matter being unlawfully heard, to preserve their right to appeal the unlawfulness of the hearing and a subsequent order on

the merits based on that unlawful hearing. With all due respect, that is neither the law nor should be the law.

To begin, once entered, a court's unappealed order becomes "the law of the case and [is] binding upon the court and the litigants alike." *Dukes & Dukes*, 236 S.C. at 75, 113 S.E.2d at 256; *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."); *Bowman v. Richland Mem'l Hosp.*, 335 S.C. 88, 91, 515 S.E.2d 259, 260 (Ct. App. 1999) ("An order is not final until it is written and entered by the clerk of court.") This is especially true where, as here, an unappealed order entered by one judge becomes the law of the case and is thus binding on, and may not be set aside by, a second judge in the same case. *See Dukes & Dukes,* 236 S.C. at 74, 113 S.E.2d at 256 (1960) ("It is well settled that one circuit judge cannot set aside or modify the orders of another," which orders become the law of the case if the first judge's orders are not appealed (quoting *Georgian Co. v. Britton*, 141 S.C. 136, 139 S.E. 217, 219 (1927))); *see also 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.") In that event, the second judge's order "must be set aside." *Cook v. Taylor*, 272 S.C. 536, 538, 252 S.E.2d 923, 924 (1979). That was the relief sought by the Swilleys in their motions to set aside Judge McIntosh's March Order, which followed from his erroneous decision to hold the February 16, 2016 hearing in violation of Judge Seals's January Order holding the case in abeyance for 30 days.

Despite the settled law in South Carolina that Judge McIntosh's decision to hold the February 16, 2016 hearing and entry of the March Order based on the hearing were unlawful and had to be set aside, the Court affirmed Judge McIntosh's refusal to grant such relief to the Swilleys

because they should have appeared pro se at the unlawful hearing to contest its unlawfulness and to argue the merits while they were at it. (Slip Op. pp. 3, 5.) The Court's circular reasoning puts the Swilleys, and other similarly situated unrepresented parties, in an untenable position. Judge Seals ordered the 30-day abeyance because the Swilleys were unrepresented after he granted Mr. Leiter's motion to be relieved as their counsel, thereby giving them time to obtain substitute counsel without having to participate in any proceedings during those 30 days. *See Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989) (a stay or abeyance is a "stopping"); *Blackwell v. Fulgum*, 375 S.C. 337, 345, 652 S.E.2d 427, 431 (Ct. App. 2007) ("[T]he very definition of 'abeyance' is that of 'temporary inactivity' or 'suspension.'" (quoting *Black's Law Dictionary* 4 (7th ed. 1999))). Contrary to the abeyance ordered by Judge Seals, Judge McIntosh nonetheless held the February hearing during the 30-day stoppage. And this Court now holds that the Swilleys had to appear pro se at the hearing, despite the 30-day stoppage, to contest that an unlawful hearing was being held and even to argue the merits even though they were still unrepresented and the abeyance had been ordered for the purpose of allowing them to obtain substitute counsel. This is the sort of procedural Catch-22 that courts normally avoid at all costs. *See, e.g., Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2167 (2019) (overruling state-litigation requirement in just-compensation cases because it placed takings plaintiffs in Catch-22). Indeed, the Court's ruling actually creates a perverse incentive for parties opposing temporarily unrepresented parties to deliberately schedule proceedings while a case is held in abeyance to permit the unrepresented parties to obtain substitute counsel, knowing that the unrepresented parties would have to appear pro se to defend themselves in the unlawful proceedings to preserve their right to appeal on the merits and otherwise. But that obviously defeats

the purpose of the stay, and it rewards opposing parties' inequitable conduct, which is exactly what happened here.

It might be argued that the rule should be different as to Laurel Swilley, who is a lawyer (J. Floyd Swilley is not). That should not matter. The old adage that a party who acts as his or her own lawyer has a fool for a client applies equally to parties who also happen to be attorneys. *See State v. Owens*, 124 S.C. 220, 117 S.E. 536, 537 (1922); *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 289, 543 S.E.2d 563, 568 (Ct. App. 2001), *cert. denied* (Oct. 25, 2001). Moreover, if some account is taken of Laurel Swilley's being a lawyer for purposes of the issue-preservation analysis, then that fact should also be considered in determining whether she actually had notice of the February 16, 2016 hearing so as to have been able to appear at the hearing in her own defense while she was still unrepresented. The Court's ruling on issue preservation is dependent on its underlying determination that the Swilleys had constructive notice of the hearing based on the mailing made by Barnhill's counsel on February 3, 2016. (Slip Op. p. 2.) But evidence of mailing establishes only a rebuttable presumption regarding receipt of a properly addressed document. *See, e.g.*, *Weir v. Citicorp Nat'l Servs., Inc.*, 312 S.C. 511, 516, 435 S.E.2d 864, 868 (1993).

Here, Laurel Swilley, who had a duty of candor toward the trial court, specifically represented in her motion to set aside the March Order that she "did not receive . . . timely notice of the hearing that resulted in the Order." (R. p. 417); Rule 3.3(a)(1), RPC, Rule 407, SCACR ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal[.]").[1] Therefore,

[1]This is where counsel for Barnhill and 809 Holdings, LP, went awry in failing to inform Judge McIntosh of the 30-day abeyance ordered by Judge Seals. *Cf. Dunlap v. Bd. of Prof'l Resp. of Sup. Ct. of Tenn.*, 595 S.W.3d 593, 607-08 (Tenn. 2020) (the failure to disclose material information to a tribunal is the equivalent of an affirmative misrepresentation under Rule 3.3(a)(1); attorney violated Tennessee's version of Rule 3.3(a)(1) by failing to disclose a stay entered in a

it was error for the trial court to indicate in its ruling denying Laurel Swilley's motion that she had not asserted "through affidavit or otherwise" that she did not know about the hearing in concluding that she "knew of the hearing but chose to not attend." (R. p. 43.) As a result, this Court likewise misapprehended the facts and law in ruling that the February 3, 2016 mailing notified the Swilleys of the February 16 hearing as a matter of law such that the Swilleys should have appeared pro se at the hearing to preserve their arguments on appeal.

In any event, whether or not the Swilleys had notice of the hearing, they could not have been expected to appear pro se at a hearing, held unlawfully while this case was in abeyance because they were without counsel, to argue that the hearing was unlawful and to argue the merits of Barnhill's motions. The Court should rehear and reconsider its rulings that the Swilleys failed to preserve various issues for appeal by not appearing pro se at the February 16, 2016 hearing.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition and rehear its Opinion.

Respectfully submitted,

s/ *F. Miles Adler*
F. Miles Adler, Esquire
ADLER LAW FIRM, LLC
SC Bar No. 70238
P.O. Box 4743
Pawleys Island, SC 29585
(843) 314-3204
miles@adlerlaw.partners

Attorney for Appellants

related proceeding in another court).

CERTIFICATE OF SERVICE

I hereby certify that I have served on this date the individuals named below with the foregoing Appellants' Petition for Rehearing by causing copies to be sent via first-class United States Mail, postage prepaid, as follows:

Heath Causey
4612 Oleander Drive, Suite 201
Myrtle Beach, SC 29577
Pro Se

Nate Fata, Esquire
Nate Fata, P.A.
P.O. Box 16620
Surfside Beach, SC 29587
Attorney for Respondents

s/ *F. Miles Adler*
F. Miles Adler, Esquire
ADLER LAW FIRM, LLC
SC Bar No. 70238
P.O. Box 4743
Pawleys Island, SC 29585
(843) 314-3204
miles@adlerlaw.partners
Attorney for Appellants

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