

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Jun 16 2023

APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion No. 2021-UP-288 (S.C. Ct. App. filed Aug. 4, 2021)

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,
and Sage Financial Group LLC, Defendants.

Of whom J. Floyd Swilley, Laurel K. Swilley and Heath Causey are thePetitioners.

PETITIONER'S BRIEF

Desa Ballard (S.C. Bar No. 498)
Harvey M. Watson III (S.C. Bar No. 74053)
Haley Hubbard (S.C. Bar No. 103195)
226 State Street
West Columbia, South Carolina 29169
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com
haley@desaballard.com

Attorneys for Petitioners

OTHER COUNSEL OF RECORD:

Nate Fata (S.C. Bar No. 9866)
Nate Fata, P.A.
Post Office Box 16620
Surfside Beach, South Carolina 29587
Telephone 843.238.2676
nfata@fatalaw.com

Attorneys for Respondents

TABLE OF CONTENTS

Table of Authorities ii

Issues Presented 1

Statement of the Case 2

Argument4

 I. THE ORDER HOLDING PROCEEDINGS IN ABEYANCE WAS
 STILL OPERATIVE AS OF FEBRUARY 16, 2016, THUS
 RENDERING ALL ACTS RELATED IN ANY WAY TO THE
 HEARING ON THAT DATE NULL AND VOID.....4

 II. THE ISSUE PRESERVATION RULES WERE APPLIED IN SUCH A
 MANNER THAT RENDERS CHALLENGES TO THE PROPRIETY
 OF A HEARING, REGARDLESS OF SUBSTANTIVE MERIT TO
 SUPPORT THE CHALLENGE, A PRACTICE IMPOSSIBILITY..... 11

Conclusion 13

TABLE OF AUTHORITIES

CASES

Bowman v. Richland Mem’l Hosp.,
335 S.C. 88, 91, 515 S.E.2d 259, 260 (Ct.App.1999)..... 5

Charleston County Dept. of Soc. Servs. v. Father, Stepmother, and Mother,
454 S.E.2d 307, 317 S.C. 283 (1994) 8

Dinkins v. Robbins,
203 S.C. 199, 26 S.E.2d 689 (1943) 8

Edwards v. Suncom,
631 S.E.2d 529, 369 S.C. 91 (2006) 7

Ford v. State Ethics Comm’n,
344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) 5

Herron v. Century BMW,
295 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) 11

Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm’n,
298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989) 6

State v. Passmore,
363 S.C. 568,611 S.E.2d 273, 282 (2005) 12

Tisdale v. Amer. Life Ins. Co.,
216 S.C. 10, 56 S.E.2d 580 (1950) 8

OTHER AUTHORITIES

Rule 4, SCRCP..... 11

Rule 52, SCRCP..... 4

Rule 55(c), SCRCP 4

Rule 58(a), SCRCP 5

Rule 59(e), SCRCP 3

Rule 77(d), SCRCP 5

Rule 3.3 (a)(2), Rule 407, SCACR 8

Rule 3.3 (d), Rule 407, SCACR.....	9
Rule 203 (b)(1), SCACR.....	5

ISSUES PRESENTED

1. Did the Court of Appeals err in failing to recognize the content and effect of the abeyance order that precluded the continuation of the underlying proceedings, including the particular hearing that resulted in the orders that were appealed?

2. Did the Court of Appeals err in concluding Appellants failed to preserve issues for review on the sole basis of a failure to present those issues at a hearing that was held improperly, in violation of an existing order, and without proper notice to Appellants?¹

¹ Although the Appellants at the Court of Appeals are now Petitioners at this time, for consistency with the materials contained in the Appendix, the use of “Appellants” is continued hereinbelow. They are also referred to herein as “the Swilleys.”

STATEMENT OF THE CASE

In April 2013, the Respondents Gabriel Barnhill and GSB Enterprises, Inc. (collectively “Barnhill”) commenced suit against the numerous parties listed in the caption, to include Petitioners J. Floyd Swilley and Laurel K. Swilley (also collectively referred to herein as the “Swilleys”). Barnhill alleged that the Swilleys had engaged in improper business practices that caused a failed business enterprise and for Barnhill to lose a substantial amount of money. In response, the Swilleys denied the substantive claims against them and asserted various counterclaims against Barnhill. During the ensuing pendency of the action, the parties had numerous disputes regarding discovery and a number of orders were issued addressing those issues.

On October 27, 2015, attorney John M. Leiter moved to be relieved as counsel for the Swilleys and others. (App. pp. 360 – 624). The motion stated that “Counsel moves for a stay of all proceedings in this matter for thirty (30) days following the Court’s order on this motion to allow Defendants to retain new counsel.” (App. p. 361) (emphasis added). On January 4, 2015, a hearing was held before Circuit Court Judge William H. Seals, Jr. on attorney Leiter’s motion to be relieved as counsel. The court announced an intention to grant the motion and requested that Leiter prepare a proposed order, which was thereafter submitted to the court via letter dated January 5, 2016. (App. p. 555). That proposed order was signed by Judge Seals and eventually filed of record with the clerk of court on January 25, 2016. (App. pp. 36 – 38). That filed order (hereinafter the “Abeyance Order”) stated that “The proceedings in this case will be held in abeyance for thirty (30) days from the date of this Order.” (App. p. 37).

After the motion to be relieved had been filed but prior to a hearing on that motion, Barnhill had filed a motion to compel deposition on December 15, 2015, and on December 21, further filed

a motion for summary judgment and for judgment on the pleadings. (App. pp. 418-420; pp. 613-615). Subsequent to those filings, the Abeyance Order was issued, filed, and properly served.

Nevertheless, in violation of the order holding all proceedings in abeyance, on February 16, 2015, Circuit Court Judge R. Lawton McIntosh² held a hearing on Barnhill's motions, which was attended by counsel for Barnhill and counsel for a defendant other than the Swilleys, without the presence of the Swilleys. After an exchange between those present at the hearing, Judge McIntosh orally ruled in favor of Barnhill. Judge McIntosh eventually issued a written order that was filed on March 21, 2016, granting Barnhill's motion for sanctions and motion for summary judgment against the Swilleys. (App. pp. 39 – 45).

Upon learning the hearing had been held in violation of the abeyance order, the Swilleys individually filed Motions to Set Aside the March Order pursuant to Rule 59(e), SCRCPP. (App. p. 415 – 428). Those motions were denied by order entered May 25, 2016. (App. pp. 18 – 20). The Swilleys thereafter timely appealed to the Court of Appeals on June 16, 2016. After briefing was completed, but without oral argument being held, the Court of Appeals issued an unpublished opinion dated August 4, 2021 that affirmed the lower court orders. (App. pp. 760 – 764). A Petition for Rehearing was filed by the Swilleys on August 17, 2021, (App. pp. 765 – 772), but subsequently denied by order dated September 8, 2021. (App. pp. 774 – 775).

The Swilleys timely petitioned for certiorari on October 26, 2021, and certiorari was granted by order dated May 17, 2023.

² There is nothing to suggest Judge McIntosh did anything improper and it is presumed that the clerk's office scheduled the hearing in the ordinary course, despite the existence of the abeyance order. Judge McIntosh just happened to be the judge assigned for that term of CPJN.

ARGUMENT

I. THE ORDER HOLDING PROCEEDINGS IN ABEYANCE WAS STILL OPERATIVE AS OF FEBRUARY 16, 2016, THUS RENDERING ALL ACTS RELATED IN ANY WAY TO THE HEARING ON THAT DATE NULL AND VOID.

The Court of Appeals failed to consider the threshold issue of the nature and continuing effect of the lower court's order instituting an abeyance of proceedings which, when properly applied, rendered the hearing held on February 16, and any orders resulting therefrom, null and void. First the lower court, and then the Court of Appeals, failed to recognize that the continuing effect of the order prevented any action on the case during the abeyance period. At the trial court and on appeal, the Swilleys sought to nullify the proceedings which occurred in violation of the abeyance order. In failing to accept the objections of the Swilleys, the Court of Appeals erred in relying upon their "failure" to preserve issues, as there was no legitimate requirement for participation on their part in proceedings that were unlawfully occurring. How the hearing got scheduled by the clerk during the abeyance period is not known. But counsel for Respondents was obligated to candidly advise Judge McIntosh the case was subject to an order of abeyance as of the commencement of the hearing on February 16, 2016. Instead, a failure in that regard promoted the resulting issuance of unlawful orders on appeal.

A. The date on which the order was filed by the clerk of court is the operative "date of the order" that controls any period of abeyance of the proceedings.

The Rules of Civil Procedure establishes deadline for actions taken in response to an order, as clearly being triggered upon filing, or "entry" of an order, not its mere date of signature. Rule 52, SCRCF ("The time for appeal for all parties shall be stayed by a timely motion to amend the judgment and shall run from the receipt of written notice of *entry of the order* granting or denying such motion)(emphasis added); Rule 55(c), SCRCF ("For good cause shown the court may set

aside an entry of default and, if a judgment by default has *been entered*, may likewise...”)(emphasis added); Rule 58(a), SCRCR (“A judgment is effective only when so set forth and *entered* in the record.”)(emphasis added); Rule 77(d), SCRCR (“Immediately upon the *entry* of an order or judgment the clerk shall serve a notice *of the entry* by...”)(emphasis added). The holds true as to the appellate court rules. Rule 203(b)(1), SCACR (“A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment.”). Case law is entirely consistent in recognition of the entry of an order making it effective. *Ford v. State Ethics Comm’n*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001)(“Until written *and entered*, the trial judge retains discretion to change his mind and amend his oral ruling accordingly.”)(emphasis added); *see also 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.”)(emphasis added).

B. The language of the order providing for an abeyance of proceedings must be interpreted to give it effect prospectively from the date of entry of the order.

The January 26, 2016 order granting Mr. Leiter’s motion to be relieved as counsel for the Swilleys and other defendants (“Abeyance Order”) broadly and without limitation provided that “The proceedings in this case will be held in abeyance for thirty (30) days from the date of this Order.” (App. pp. 37). The Abeyance Order did not define “date of this order,” and as such the effective period of the abeyance became effective consistent with the judicial system rules, caselaw, and norms discussed hereinabove, *i.e.* only upon entry of the order. It appears the clerk’s office ignored the Abeyance Order and continued to further proceedings along by scheduling a hearing with Judge McIntosh despite the effective scope and effect of the abeyance that covered the entirety of the case and thus prohibited any hearing from being scheduled or held during the relevant period.

Other options were available to Judge Seals to define the period of abeyance more restrictively and/or clearly in the Abeyance Order, but those were not included in the order and cannot be read in after the fact. To wit, the Abeyance Order could have used language commonly used in private contractual matters, which define the effective date of an agreement as of “the date of the signatures appearing below.” Or it could have set a definitive date for the general resumption of proceedings in the future, as it did in other respects within the Abeyance Order when it stated that “this matter shall not be called for trial before May 1, 2016.” (App. p. 38) or the order could have even set a definitive date in the past by simply saying “today” or “the date of this hearing.”

- C. Since the “proceedings” were held in abeyance as of February 16, 2016, any activity done on that date, and activity done beforehand in furtherance thereof, was null and void. The hearing should never have occurred.

This court has previously defined a stay of something as “to hold it in abeyance” and stated that a stay is “a stopping” of something. *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm’n*, 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989)(citing Black’s Law Dictionary 1267 (5th ed.1979)). “Abeyance” is defined as “Temporary inactivity; suspension.” Black’s Law Dictionary 4 (7th ed. 1999). “Proceeding” has many definitions, the first three of which are all relevant in this matter:

1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.
2. Any procedural means for seeking redress from a tribunal or agency.
3. An act or step that is part of a larger action.

Black’s Law Dictionary 1221 (7th ed. 1999).

It is clear from the record that instead of “a stopping,” the trial court, opposing counsel, and the clerk’s office all did the opposite of that which was required by the Abeyance Order. Each,

by various means, pressed ahead and the continuation of “acts,” “steps,” “events,” and “procedural means for seeking redress” were all undertaken and completed in direct violation of the Abeyance Order. By doing so, or at least attempting to do so, Barnhill violated the unappealed, never otherwise challenged, Abeyance Order terms.³

The obvious and express purpose of the Relief Order’s inclusion of abeyance relief (“The proceedings in this case will be held in abeyance for thirty (30) days from the date of this Order.”) was to protect the defendants, including the Swilleys, for a brief period, and to do so by express restriction against any continuation of any “proceedings” within the broad breadth of that term.

Therefore, even service of notices or scheduling during the abeyance period were clearly improper, and undermined the effectiveness and rights afforded to the Swilleys through the Abeyance Order, and frustrated the very intent of the order. Any activity during the abeyance period was in direct violation of the *status quo* established for the Swilleys to locate and retain successor counsel. Instead, dynamic circumstances arising from the improper continuation of proceedings impeded potential successor counsel’s ability to evaluate and consider involvement, to the detriment to the Swilleys. The “slowing” of proceedings rather than “a stopping” thereof is contrary to South Carolina caselaw.

The abeyance, as such, was strictly for the benefit of the Swilleys and other defendants, and should have operated to prevent their adversary, Barnhill, from taking advantage of the Swilleys during the abeyance period. Any interpretation or application of the Abeyance Order that would allow scheduling of, notice of, or holding of a hearing was in direct contravention of

³ The Relief Order notes that the terms of the order that granted relief to Leitner and established protections for the Swilleys were “without objection of counsel for any of the other parties,” i.e. without objection by Barnhill. The stay was not immediately appealable as an interlocutory order. *Edwards v. Suncom*, 631 S.E.2d 529, 369 S.C. 91 (2006). However, there was never any effort undertaken by Barnhill to set aside, clarify, or limit the order, just an object disregard therefore which has been repeated by the Court of Appeals.

the Abeyance Order issued by Judge Seals. No one told Judge McIntosh that the proceedings should not move forward on February 16, 2016, nor was Judge McIntosh told that any scheduling of future proceedings, and purported service of notices associated with the February 16, 2016 hearing for the benefit of Barnhill was prohibited. The hearing held on February 16, 2016 was in direct violation of the Abeyance Order, and was a breach of the protections afforded to the Swilleys and in direct contravention of the order that effectively, but simply and straightforwardly determined that such “proceedings” were “held in abeyance.”

D. Representations by adverse counsel obscured the continuing effect of the Abeyance Order, encouraging and facilitating error by the presiding judge.

Barnhill’s disregard for the still-effective order to hold the matter in abeyance was furthered by the willingness of Judge McIntosh to proceed on February 16, which occurred despite there being “a long-standing rule in this State that one judge of the same court cannot overrule another.” *Charleston County Dept. of Soc. Servs. v. Father, Stepmother, and Mother*, 454 S.E.2d 307, 317 S.C. 283 (1994) (citing *Tisdale v. Amer. Life Ins. Co.*, 216 S.C. 10, 56 S.E.2d 580 (1950) and *Dinkins v. Robbins*, 203 S.C. 199, 26 S.E.2d 689 (1943)). Presiding from the bench on that date, however, Judge McIntosh does not appear to have purposefully disregarded the continuing effect of the prior order, at least not initially at the hearing on February 16. The full nature and import of the prior order by Judge Seals could and should have been appreciated from review of the clerks’ file prior to or after the hearing, but that failure was surely exacerbated by those in attendance as revealed by the transcript. The attorneys who appeared before Judge McIntosh had an affirmative duty to disclose to Judge McIntosh the abeyance provision that called into question any proceedings, including but not limited to the hearing itself. Rule 3.3(a)(2), Rule 407, SCACR

“A lawyer shall not knowingly... fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client.”⁴

Instead, they took advantage of Judge McIntosh and the Swilleys by allowing the proceedings to move forward. For example, Counsel for 809 Holdings, LP (Stefan Feidler) made the first reference to the Abeyance Order during the discussion on the record that day, but referenced and characterized that order as follows:

I only represent 809 Holdings, LP. In fact, Mr. John Leiter, he’s an attorney, he was representing the other Defendants. And admin Judge Seals signed an order relieving him on the 14th of January, giving them [30]⁵ days to find new counsel.

That description of the order fails to mention that time to obtain new counsel and the abeyance were separately stated in the Relief Order. Later at the same hearing, counsel for Barnhill (Natale Fata) provided some additional, although misleading, detail as to the Abeyance Order when he stated:

The case has already been postponed by Judge Seals. He understood that we needed some more time January when Mr. Leiter was getting out. He said okay, I’ll give the Defendants 30 days to get new counsel. And after that, you know, we need to take off. So I haven’t been able to take off.

That description of the Abeyance Order states “we needed some more time” as if it granted *Barnhill* some form of relief, rather than the exact opposite, a restriction on Barnhill’s ability to

⁴ Additionally, the appropriate and justified absence of the Swilleys from the hearing essentially made the hearing an ex parte proceeding, potentially implicating Rule 3.3(d) (“In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.”). Comment 4 to Rule 3.3 further explains that “A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. [...] The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.” The Abeyance Order was clearly applicable to the case, yet the operative provision specifically establishing that abeyance was not properly disclosed in full candor.

⁵ The transcript actually asserts that “13” was stated, but it seems more likely that “30” was what Mr. Feidler stated at the time.

press the claims forward as discussed *supra*. Mr. Fata, like Mr. Feidler, mentions “30 days to get new counsel” while omitting reference to the abeyance of proceedings that was granted and remained in effect on February 16, 2016. Finally, the phrasing “after that” is inaccurate, as it implies conclusion of the period of abeyance. Even under the articulated position of Mr. Feidler, that the order was effective as of January 14, a position shared by Mr. Fata and his client Barnhill, the 30-day period would have lapsed a mere two days before the February 16 hearing. Any notice sent during the period of abeyance would be a nullity, as would the scheduling itself of the February 16, 2016 hearing. Mr. Fata’s statement that the parties thereafter “haven’t been able to take off” afterwards was deceptive and misleading, almost certainly intended to prejudice the Swilleys and allowed the proceedings to go forward. Judge McIntosh was not advised of the effect of the abeyance period, and thereafter explained and justified his oral pronouncement of a grant of the motion to strike pleadings on the record as follows:

If they’re not going to participate, they obviously don’t have or retained other counsel or don’t seem to want to participate in this action. I think it’s appropriate.

(Appendix p. 455, ll. 4 – 7).

Statements by Mr. Feidler and Mr. Fata, which were obviously intended to allow the hearing to move forward despite their knowledge of the Abeyance Order, contributed to Judge McIntosh’s initial failure to adequately consider the continuing effect of the order holding the matter in abeyance. The ambiguous and misleading statements made by counsel to Judge McIntosh were then exacerbated by the denied motion to reconsider filed by the Swilleys, and then further worsened by the Court of Appeals failure to do so for other reasons addressed *infra*. Mr. Fata and Mr. Fiedler clearly knew the hearing was not supposed to take place, but paid only lip service to Judge Seals’ order, resulting in a trap for Judge McIntosh and severe consequences to

the Swilleys, all of which should have been avoided by candid disclosures by Mr. Fata and Mr. Fiedler. Instead, their oblique statements to Judge McIntosh encouraged him to move forward with the hearing, resulting in the orders on appeal being issued.

II. THE ISSUE PRESERVATION RULES WERE APPLIED IN SUCH A MANNER THAT RENDERS CHALLENGES TO THE PROPRIETY OF A HEARING, REGARDLESS OF SUBSTANTIVE MERIT TO SUPPORT THE CHALLENGE, A PRACTICAL IMPOSSIBILITY.

As noted in the Court of Appeals opinion when it cited *Herron v. Century BMW*, 295 S.C. 461, 465, 719 S.E.2d 640, 642 (2011), “Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.” The Swilleys, however, likewise are entitled to a fair opportunity to challenge the propriety of the holding of a hearing without having to attend said hearing when it is being held unlawfully, especially when they had no notice the hearing was taking place.

A. The hearing was held in contravention of an order holding such proceedings in abeyance.

Notice is only proper to the extent it conveys accurate information about a lawful proceeding. Service of a summons and complaint at the outset of litigation, for instance, requires delivery of the actual recorded pleadings to a defendant, not a mere schoolyard game of tag. *See* Rule 4, SCRCP.

As set forth *supra*, however, the Abeyance Order by its stated terms remained in effect past the point at which the hearing on February 16 was held. That renders the hearing itself, all that which was done in relation thereto (both during, after, and prior to), null and void.⁶ As such, there

⁶ The alleged notice mailed by Barnhill’s counsel was mailed on February 3, which is indisputably within the effective abeyance window of time as it is not even 30 days past the oral pronouncement of intention to issue the Abeyance

can be no “failure” on the part of the Swilleys to attend or otherwise participate in that nullity, or to respond to an ineffective/improper “proceeding” by way of service of a notice⁷, especially when the nullity of the same is the very protection afforded to the Swilleys in the Relief Order.

- B. Challenges to a hearing that were indisputably held without notice would still fail the issue preservation test as applied by the Court of Appeals, despite being “timely raised” to the extent possible by Appellants.

This Court has previously noted that “the rule that an unpreserved issue will not be considered on appeal does have its exceptions” such as the doctrine of futility. *State v. Passmore*, 363 S.C. 568,611 S.E.2d 273, 282 (2005)(raising objection in a timely manner excused when doing so would be futile). It is respectfully submitted that this Court should establish an “impossibility” exception to avoid the absurd application of the issue preservation rules in circumstances such as this, where the objection is premised upon lack of notice producing an absence from a hearing that inherently precludes raising of the objection at that time, but instead after the discovery of a hearing having taken place. The Court of Appeals blamed the Swilleys for not objecting at a hearing about which they were unaware, and which was held in violation of the Abeyance Order about which they did know, and as such seems appropriate as the core example of an impossibility of a “timely” objection standard that is otherwise broadly applicable for preservation purposes.

This record demonstrates precisely the circumstance that a litigant was never given any actual or imputed notice of a hearing and missed the hearing as a result, as detailed in the Swilleys’ motions to reconsider. (App. pp. 423-424, 431-432). The Court of Appeals opinion below would still bar that litigant from subsequent challenge as to orders produced as a result of that undisclosed

Order, let alone any subsequent signature by the court or filing with the clerk. It does not matter to whom the notice was sent, because it was sent in violation of the Abeyance Order, rendering it null and void.

⁷ Even if the clerk’s office had sent notice of the hearing to Mr. Leiter, the Swilleys’ former counsel, Mr. Leiter had no obligation to notify the Swilleys because he was no longer their counsel and the proceedings were stayed.

hearing, despite the party having been in good faith ignorance of the hearing and failing to appear as a result. Stated otherwise, the Court of Appeals opinion sets a standard that requires attendance at a hearing for the purposes of timely raising that same party's ignorance of the hearing. That absurd condition precedent to reviewability of the hearing in question creates a perverse incentive, rewarding failures to provide adequate notice to an opposing party who could not thereafter challenge orders procured under those circumstances. This entire circumstance could have been avoided had Mr. Fata and/or Mr. Fielding accurately informed Judge McIntosh that the Abeyance Order prohibited the hearing from being scheduled or noticed, or at least intimated possible application that prompted the court's independent, direct consideration thereof. Instead, they took advantage of Judge McIntosh and the Swilleys to benefit their clients.

CONCLUSION

The fundamental egregious error of law is the Court of Appeals' failure to recognize the unchallenged operative, broad effect of the Abeyance Order that precludes the scheduling, noticing, or holding of any hearing during its effective period. The reasons why the presiding judge failed to appreciate them are set forth supra, but the Court of Appeals has no justification for ignoring the clear terms of the order in light of standard norms for interpreting the language used therein.

It is further improper for the Court of Appeals to refuse to address the merits of the Swilleys' arguments on appeal in that regard, premised upon absurd application of generally applicable preservation obligations to the impossible reality of given the specific issues in this matter. Having no legal obligation to participate in such an unlawful hearing, there can be no "failure" to raise any objections at that time. Likewise, there can be no legitimate "failed to

preserve” determination in response to a lack of notice challenge when the preservation standard imposed requires the impossibility of objection during the undisclosed hearing.

Accordingly, it is respectfully asserted that reversal of the Court of Appeals’ order is warranted. Remand to the Court of Appeals is not necessary, since the record is clear as to the effectiveness of the Abeyance Order, however, addressing the improper preservation determination would also be warranted. The Swilleys therefore ask this Court to vacate the decision of the Court of Appeals, vacate the order from the February 16, 2016 hearing, and remand to the trial court for matters to proceed as they should have when the abeyance period had actually expired.

Respectfully submitted,

s/ Desa Ballard

Desa Ballard (SC Bar No. 498)

Harvey M. Watson III (SC Bar No.74053)

Haley Hubbard (SC Bar No. 103195)

BALLARD & WATSON

226 State Street

West Columbia, South Carolina 29169

Telephone 803.796.9299

Facsimile 803.796.1066

desab@desaballard.com

harvey@desaballard.com

haley@desaballard.com

ATTORNEYS FOR PETITIONERS

June 16, 2023