

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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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Unpublished Opinion No. 2021-UP-288 (S.C. Ct.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 the Petitioners.

APPENDIX VOLUME II OF II

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TABLE OF CONTENTS

Volume I of II

Record on Appeal	1-500
------------------------	-------

Volume II of II

Record on Appeal	501-581
Supplement to Amended Record on Appeal	582-608
Second Supplement to Amended Record on Appeal	609-618
Appellant's Final Brief (Swilley).....	619-640
Final Brief of Respondent as to Swilley	641-675
Appellant's Final Brief (Causey).....	676-701
Final Brief of Respondent as to Causey.....	702-731
Appellant's Final Reply Brief (Causey)	732-759
Court of Appeals Opinion No. 2021-UP-288 Filed August 4, 2021	760-764
Petition for Rehearing	765-773
Order Denying Petition for Rehearing	774-775

1 I've asked in interrogatories from April of 2013 for
2 payments made to defendants, and there have been
3 three, four, five, six payments never disclosed to the
4 defendants themselves. I can show you where they are
5 outlined with the checks.

6 So having learned of that, after I go through all
7 the bank statements and spend tens of hours, and after
8 Judge Culbertson ruled on this in January, and after I
9 had a September consent order that I would get full
10 and fair disclosure of all of these answers, I still
11 don't have them today. I can't prepare for trial for
12 the end of this year if I don't have that basic
13 information.

14 It is not complicated, and the defendants are not
15 strangers to litigation, Your Honor. They have been
16 involved in other lawsuits. Mr. Swilley was involved
17 in an Oklahoma lawsuit ten years ago, and he told the
18 Court -- because he was in an investment scheme that
19 lost a hundred million dollars -- that he would
20 confess judgment for \$300,000 and not try to discharge
21 it in bankruptcy. He went through a long litany of
22 everything that it was so under the bankruptcy code he
23 would not discharge it. Two months later he is in
24 front of the bankruptcy judge in South Carolina and
25 he's trying to discharge it. Judge Waites issues a

1 20-page order saying you are not going to discharge
2 this debt because you pled guilty -- or you agreed
3 under the confession of judgment in federal court that
4 you would not file dischargeable liability, and now
5 you are trying to do it on an invoked judicial
6 estoppel, you are not doing that here. You are giving
7 it up.

8 Your Honor, Mr. Leiter took over this case in
9 January. I understand, you know, he's trying to do
10 what he can do, but I don't have answers to discovery
11 that have been subject to orders with the court. It
12 is pretty simple stuff. They know how much money they
13 have gotten paid, and they can produce the records
14 because the witness says, Yeah, I got a check from
15 Mr. Swilley. I mean, I don't know why I can't get
16 that check. I want to see where the money is coming
17 from, because I have to track it down. There is a lot
18 of cash that went through the pawn shop.

19 THE COURT: Mr. Leiter, what is the problem?

20 MR. LEITER: Thank you, Your Honor. My old
21 mentor used to say, If we had eggs, we would have eggs
22 and bacon, if we had bacon. Mr. Fata is trying to do
23 that. He wants the Court to believe that this is a
24 Ponzi scheme. It is not proven; in fact, it is not
25 true.

000494

Appendix 00502

1 So going to the motion for sanctions, it is true
2 that I got in late, and it is true that Mr. Fata filed
3 a motion for sanctions. Most of the things had been
4 provided before my time to Mr. Fata, but some things
5 after this consent order had been entered into were
6 not readily turned over, these included confidential
7 matters likes tax returns and an Attorney General's
8 investigation, by the way, of these operations --

9 THE COURT: Tax returns are just normally
10 produced in almost every case. I mean, when do you
11 not have a tax return available?

12 MR. LEITER: So we did produce it, Your Honor.
13 I'm suggesting that at the time I got in, a multitude
14 of documents have been turned over, but I'm explaining
15 some of them that was not turned over, including tax
16 returns.

17 THE COURT: This is what gives me concern.
18 Mr. Fata says that there was an obvious attempt to
19 provide information, but he has uncovered, through his
20 investigation, evidence of many payments having been
21 made to the defendants and other investors that were
22 not reported when he was given information concerning
23 what payouts had been made, and he's been able to find
24 that through depositions and other ways. Why wasn't
25 that stuff turned over?

1 MR. LEITER: If I can dissect that, Your Honor?
2 The deposition he's talking about is an investor,
3 Joyce Cauffman, who uses Mr. Swilley as a tax preparer.
4 Mr. Swilley is an enrolled tax agent. He's allowed to
5 do that. He's doing nothing wrong, but he's doing her
6 taxes as well. She asked, in essence, for a tax loan,
7 that is what she testified to, that is what she
8 received. So --

9 THE COURT: Is that what she said she got,
10 Mr. Fata?

11 MR. LEITER: I have parts of the deposition.

12 MR. FATA: I asked her how much money does she
13 think she got out of the investment account, and she
14 said about \$10,000, multiple payments. She doesn't
15 know where the money is coming from. She's a little
16 fuzzy, so I need to see the check to see where the
17 money is coming from. She's been paid, and she thinks
18 she's been paid from that account, but she doesn't
19 know.

20 THE COURT: Mr. Leiter is telling me, if I
21 understand you correctly, Mr. Leiter, we have
22 responded to the discovery.

23 MR. LEITER: We have, Your Honor, on that. Now,
24 can I dissect it a little deeper? The answer to your
25 question is, yes, but to go into it a little more

000496

Appendix 00504

1 deeply, Mr. Fata's motion for sanctions includes
2 Ms. Caufman, that we're talking about now. I was
3 handed today the check from Mr. Twig about 809. I
4 don't know anything about that, so I would object to
5 being handed that today.

6 MR. FATA: That was discovery once.

7 MR. LEITER: It was not part of your motion, Mr.
8 Fata. The motion is quite clear that this deals with
9 Ms. Caufman, and that is what I'm here to respond to.
10 Mr. Fata referenced another company called "Safe,"
11 which is another investment vehicle, not identical to,
12 but similar to 809. Again, it is our position that
13 although these are not your normal Exxon investment
14 kind of investment strategies, they are perfectly
15 legal.

16 Sage is not a party. No matter what Mr. Fata
17 says, Sage is not a party to this litigation. Her
18 response about where the money was coming from, she
19 was unclear, and I'm here to tell you my client is
20 telling me that she was reimbursed by Safe, not 809
21 Holdings. So that is why our response is accurate as
22 to Ms. Caufman.

23 Just to drive that point home a little bit more,
24 and I have a copy of the check that Mr. Swilley has as
25 an enrolled agent provided to her for a thousand

1 dollars, I'm willing to make that an exhibit.

2 MR. FATA: Your Honor, there are other checks,
3 too. I don't understand why they get to pick and
4 choose when there is testimony that Ms. Kaufman said,
5 I got about \$10,000. The problem with what we're
6 hearing is that Swilley and Piner are going to route
7 everything through different accounts, so I have no
8 way of knowing. They are not going to give the Court
9 the information -- if they want to say later at trial
10 it is not relevant, and I understand that, but there
11 is payments to Sage Financial, which is a party, which
12 never has been disclosed.

13 THE COURT: This is the problem, Mr. Fata. You
14 are asking for information that you think exists, but
15 we don't know it does. All I can do is say you have
16 to give it up if you have it. I mean, that is about
17 as far as the Court can go, other than saying you have
18 to give it up. If you determined later that they
19 didn't give it up, that is a different ball game, but.

20 MR. FATA: They didn't give up Sage Financial.
21 It is in the memo and part of the evidence. I have
22 copies of the checks. They never disclosed Sage,
23 which is owned by them, and so --

24 THE COURT: Out of 809?

25 MR. FATA: QC Financing. The interrogatory was,

000498

Appendix 00506

1 Any payment from QC Financing or 809, tell me what
2 money you have. Sage Financial is a party, and
3 \$17,000, three separate checks.

4 THE COURT: How about that, Mr. Leiter?

5 MR. LEITER: So that sounds --

6 MR. CAUSEY: It is a technicality, Your Honor.

7 THE COURT: Let your attorney talk.

8 MR. LEITER: This is Heath Causey. He is the
9 bookkeeper for the operations, and also he is a named
10 defendant, so I brought him for the purpose of having
11 him explain it if the Court feels it prudent to do so.

12 We dealt with Ms. Cauffman, and now there is a
13 total of maybe six checks at issue. I started by
14 saying that Mr. Fata has about two banker boxes full
15 of documents. We went through the sanction process.
16 I know how important it is to get the appropriate
17 documents, responsive documents, to Mr. Fata. There
18 has been nothing done in any way to prevent Mr. Fata
19 from getting this, but we're talking about
20 documents -- I know that under my tutelage we produced
21 over a thousand documents. I think it is closer to
22 2,000. It is conceivable that out of all of those
23 documents that we did not give over every piece of
24 paper, but I don't think we're held to a standard of
25 absolute perfection. The checks that Mr. Fata is

1 referring to, that we did not give, are not our
2 checks, meaning these were checks written by one of
3 the defendants, QC Financing, that is in default. I
4 don't represent them. They are a party, but not here.

5 THE COURT: Who owned QC Financing?

6 MR. LEITER: That is a more interesting question,
7 Your Honor. We're saying that Mr. Fata's client owned
8 QC Financing.

9 THE COURT: Who controlled it, Mr. Leiter?

10 MR. FATA: Mr. Swilley and Mr. Piner, along with
11 Mr. Wilkinson, set up QC Financing in 2010. Swilley
12 and Piner, along with Mr. Wilkinson, controlled it
13 until August of 2011, and then Swilley and Piner got
14 out, and my client became a 25 percent owner of QC
15 Financing, because things were not going well. They
16 said, Here, you take it.

17 The checks at issue are directly responsive to an
18 interrogatory that Judge Culbertson said you have to
19 comply with, and the interrogatory reads, What
20 payments did you get from either QC Financing or 809
21 Holdings. And so it is --

22 THE COURT: Who was that directed to?

23 MR. FATA: The defendants. Sage Financial is a
24 defendant, and so is Piner and Swilley. They also own
25 Sage Financial. Mr. Causey knows that there were

000500

Appendix 00508

1 other payments made to other investors.

2 THE COURT: Which one of these defendants -- oh,
3 I see.

4 MR. FATA: So this is very clear. I'm being
5 forced to read through thousands of bank records to
6 find what they haven't told me or the Court when I
7 have two court orders in place.

8 THE COURT: Okay. What defendant has not
9 complied with the order to produce? Is it Sage
10 Financial?

11 MR. FATA: And Bill Piner and, Your Honor, 809
12 Holdings, because 809 Holdings knew of a payment that
13 went to Mr. Twig to repay Mr. Twig his \$25,000. That
14 was a payment to an investor in 809 Holdings per the
15 language used in 809 Holdings' lawyer's letter. I've
16 included just some of the highlighted payments here,
17 Your Honor. There are others, but these are -- there
18 are also, I've been told, payments to Ms. Baggett, who
19 is another investor, but those have not been disclosed
20 either. A lot of people are getting paid, except my
21 client. The general partners, Swilley and Piner, are
22 responsible for that, so that is why I'm trying to
23 fair it out.

24 THE COURT: Who owes your client money?

25 MR. FATA: 809 Holdings issued the notes, and on

1 their books is my client, on 809 Holdings' books,
2 financial statements, it is the note holder and it's
3 guaranteed under the partnership agreement by Piner
4 and Swilley, because they are general partners, and
5 they are responsible for payment of all partnership
6 debt, it says that in the partnership agreement.

7 So there are three people among the group that
8 are directly responsible, and the others helped out in
9 this scheme. I'm trying to get information for trial.
10 I asked for information, gone to court twice. Mr.
11 Leiter is not responsible. He's only going to get the
12 information his clients give him, but the Request to
13 Admit that an investor received a payment in 2012 or
14 thereafter for the investment --

15 THE COURT: I mean, how difficult could that be?
16 Have they provided you with any records of payment of
17 investors?

18 MR. FATA: No. No information. Not in 2012.
19 They denied the Request to Admit, and that is false.
20 I have proven that an investor has gotten a payment
21 with a check.

22 THE COURT: What precisely have you not received?

23 MR. FATA: I've not received the payments -- copy
24 of any payments made to any other investors. I think
25 payments have been made to Ms. Baggett.

000502

Appendix 00510

1 THE COURT: For?

2 MR. FATA: Her investment.

3 THE COURT: For 2012?

4 MR. FATA: 2012, yes.

5 THE COURT: 2012?

6 MR. FATA: Yes.

7 THE COURT: Payments by which defendant?

8 MR. FATA: Any, in connection with the
9 investment. Because what is happening is a payment
10 will be made from someone, maybe through another
11 account, Your Honor --

12 THE COURT: Let me tell you where I see a
13 problem. There are a lot of individuals, a lot of
14 LLCs, corporate -- well, they are all LLCs. You are
15 saying from any defendant to any person by reason of
16 an investment?

17 MR. FATA: Any payments made to an investor.

18 THE COURT: Investor in what?

19 MR. FATA: 809 Holdings. There is seven, and
20 they have been disclosed by the defendants.

21 THE COURT: All right. And you identified those
22 seven?

23 MR. FATA: Yes.

24 THE COURT: And you've identified the seven?

25 MR. FATA: Yes. They have.

1 THE COURT: Any check written to these seven
2 investors?

3 MR. FATA: Yes.

4 THE COURT: So we're pigeonholing it. Okay. We
5 have that.

6 MR. FATA: Yes. Right.

7 THE COURT: In 2012.

8 MR. FATA: Or thereafter. Because my clients
9 didn't get any money in 2012, but others did.

10 THE COURT: You want any check from any defendant
11 to any of these seven people 2012 forward?

12 MR. FATA: Yes. And I would say, Your Honor, to
13 the extent that these defendants used other accounts
14 that might be named in a trade name, that that, too --
15 if any defendant knows of a payment to an investor in
16 connection with the 809 Holdings investment, that
17 should be disclosed.

18 THE COURT: I understand.

19 MR. FATA: I don't want them to say, This is a
20 separate company.

21 THE COURT: So we're only dealing with seven
22 investors?

23 MR. FATA: Yes.

24 THE COURT: How can we not keep up with seven
25 investors? There is only seven.

000504

Appendix 00512

1 MR. LEITER: We will respond to that, and I
2 believe we have. If we made a mistake in responding,
3 I will be the first to correct it.

4 THE COURT: It is not that. My understanding is
5 that you responded by saying no checks had been paid,
6 and Mr. Fata has come up with -- how many?

7 MR. FATA: Your Honor, we have a check for
8 Mr. Twig for 809 investments written in March of 2012
9 with a cover letter from their former counsel, Miles
10 Adler, that is one. We have testimony from
11 Ms. Cauffman that says I've been getting payments from
12 my investment account. How much? She didn't know. I
13 asked Mr. Leiter on several occasions, Can you get me
14 a copy of the checks so we don't have to do this, but
15 I get nothing. I think at least Tamara Baggett has
16 been paid money. Mr. Causey knows, I'm sure, and he
17 could swear to Your Honor, but I've been informed that
18 she has. So I want those payments and any other of
19 the four remaining investors. It is not hard, Your
20 Honor. That is why it is so frustrating after two
21 orders and a month before trial.

22 THE COURT: This is what I'm going to do. I
23 think, Mr. Leiter, your client is sandbagging. I'm
24 going to grant \$2,700 in costs against the defendants.
25 I don't know if you'll collect that, but I'll also

1 order directly that they provide copies of any
2 transfers of funds to any of the seven investors. I
3 want you to list them in an order from either 809
4 Holdings, 809 Holdings, any of the other defendants or
5 from any person or entity acting on behalf of 809
6 Holdings. I want them to understand, Mr. Leiter, that
7 this is an order, and failure to comply, if they
8 conceal any payments, I will consider it as an act of
9 direct contempt, okay.

10 MR. LEITER: I have learned over the years that
11 when the judge has spoken to sit on my hands, but may
12 I be heard on this?

13 THE COURT: Certainly.

14 MR. LEITER: So, you know, I have been working
15 with my clients on this, but I don't control their
16 documents, so I can't address that. I can address a
17 very important issue that I believe the Judge has
18 heard, and I believe an absolute need to correct it.
19 Mr. Fata, when he presents or made his initial
20 presentations seemed to be clear about these
21 companies, 809 and another investment vehicle --

22 THE COURT: I don't think he's clear. I think
23 that is what he wants to become, clear.

24 MR. LEITER: And I don't mind that, Your Honor.
25 I don't mind that. With well-constructed requests to

000506

Appendix 00514

1 us, we can be clearer. For instance, he brought up
2 two things, and I have to join them together. He
3 brought up Ms. Baggett and he heard that Ms. Baggett
4 has been paid back out of 809.

5 THE COURT: All you have to do is deny that.

6 MR. LEITER: That is what we've done, and that is
7 -- however, His Honor picked up on that and said we've
8 been sandbagging. The explanation for that is that
9 Ms. Baggett has been paid out of Safe, an entity that
10 is not a party to this. I have not been responding on
11 behalf of Safe.

12 THE COURT: I understand.

13 MR. LEITER: I have no requirement.

14 THE COURT: How about the other lady who
15 testified that she's been paid out of her investment
16 account? How about Mr. Twig, \$25,000 out of 809 and
17 no response concerning that? It all gives me great
18 concern.

19 MR. LEITER: Let me address each one of those,
20 Your Honor. The reason I'm addressing it is I believe
21 a \$2,700 sanction is too heavy for what we're dealing
22 with right now. I mean, we're not being --

23 THE COURT: I'll give them 30 days to pay it.

24 MR. LEITER: It wasn't the timing, it was the
25 amount. For instance, he did not include Mr. Twig in

000507

Appendix 00515

1 his motions for sanctions. He included Ms. Caufman.
2 I brought in the check for a thousand dollars showing
3 that that did not come from any of the entities that
4 are defendants in this action, but, yet, we are being
5 punished as if we held back something. We have not.

6 THE COURT: That \$25,000 check seems to be fairly
7 clear.

8 MR. LEITER: Which one?

9 THE COURT: The \$25,000, Mr. Twig.

10 MR. LEITER: If I could address that?

11 THE COURT: Go ahead.

12 MR. LEITER: That is a reason why I feel
13 ambushed, because he said it was produced before, but
14 it was not part of his motion. I had no opportunity
15 to respond to His Honor in a meaningful way on that,
16 but I believe that it will show -- even though the
17 letter from Miles Adler says 809 Holdings, it appears
18 to say that, but I believe this was a payment from
19 Safe and not 809 Holdings. I need time to check into
20 that, but that is what my client is telling me. So
21 it's not -- if what I say is true, if what I say is
22 accurate, it is unfair to say that we've been
23 sandbagging when we haven't, and we're hit with a
24 \$2,700 on top of it.

25 THE COURT: All right. Thank you. Mr. Fata will

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Appendix 00516

1 do the order in ten days.

2 (Court's Exhibit 1 marked.)

3 (Whereupon, the proceedings concluded.)

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CERTIFICATE OF REPORTER

State of South Carolina)

County of Horry)

I, Natalie Dahl, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the captioned case in the Court of Common Pleas for Horry County, South Carolina, on the 30th day of September, 2014.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

October 26, 2014.

Natalie Dahl, RPR
Natalie Dahl, RPR

Court Reporter

000510

Appendix 00518

F. MILES ADLER

ATTORNEY AT LAW

May 3, 2016

VIA EMAIL LMCINTOSH@SCCOURTS.ORG
AND U.S. MAIL

The Honorable R. Lawton McIntosh
P.O. Box 8002
Anderson, SC 29622

Re: Gabriel Barnhill et al. v. J. Floyd Swilley et al.
C/A No.: 2014-CP-26-3362

Dear Judge McIntosh:

I represent defendants J. Floyd Swilley and Laurel K. Swilley (the "Swilleys") in the matter referenced above and am writing to call attention to certain filings in the record that (based on my review of the transcript of hearing) were not brought your attention at the February 16, 2016 hearing.

Enclosed please find a copy of the letter prepared by Attorney Nate Fata and addressed to Judge Seals wherein Mr. Fata advised the Court that no depositions would take place until the Swilleys' former attorney John Leiter had his motion to be relieved heard by the Court. The letter did not mention that the burden to schedule future depositions was on the Swilleys. Shortly after writing the letter, Mr. Fata then filed a Motion to Compel Depositions and a Motion for Judgment on the Pleadings and/or Summary Judgment. In addition to the letter from Mr. Fata please also find a filed copy of Mr. Leiter's Motion to Withdraw and the Order Relieving Mr. Leiter which was filed January 25, 2016. Please note that Mr. Fata did not subsequently notice depositions after Mr. Leiter was relieved, instead Mr. Fata sought an order on his Motion to Compel Depositions and his Motion for Judgment on the Pleadings and/or Summary Judgment on Defendants' Counterclaims, which were both heard and ruled upon on February 16, 2016.

With respect to Mr. Leiter's withdrawal, the Order Relieving Attorney Leiter (the "Order") stated the proceedings in this case would be held in abeyance for thirty (30) days from the date of the Order relieving him as counsel. Pursuant to South Carolina Rule of Civil Procedure 58(a) the Order became effective when entered which, according to the Horry County Clerk of Court's records, was January 25, 2016. The Order granted the Swilleys and the other defendants a thirty day reprieve from the proceedings from the date the Order was entered. Thirty days from January 25, 2016 was February 24, 2016. As the hearing currently at issue was held on February 16, 2016, it is my clients' position that the hearing on Plaintiff's Motion to Compel Depositions and Motion for Judgment on the Pleadings and/or Summary Judgment on Defendants' Counterclaims was held during the period the case was ordered to be held in abeyance.

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Appendix 00519

000511

p. 2
Letter to Judge McIntosh
May 3, 2016
2014-CP-26-3362

The fact that the February 16, 2016 hearing was held while the proceedings were subject to the thirty day abeyance period forms the basis for the Swilleys' pending Motions to Set Aside Order.

We would ask that the Court grant us a hearing on these motions to afford the Swilleys the opportunity to present the full record to the Court and make arguments thereon.

Respectfully submitted,


F. Miles Adler

cc: Nate Fata
Mark D. Neill
J. Floyd Swilley (via email)
Laurel K. Swilley (via email)
Heath Causey

Enc.: as stated

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000512

Appendix 00520

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VIA EMAIL

December 3, 2015

The Honorable William Henry Seals, Jr.
Chief Administrative Judge
103 N. Main Street
Marion, SC 29571
Attn.: Paul Lawson

Re: Gabriel Barnhill and GSB Enterprises, LLC vs. J. Floyd Swilley, et al.
Civil Action No. 2014-CP-26-8367

Dear Judge Seals:

As you might recall I represent the Plaintiffs in this investor/Ponzi scheme pawn shop case against the Defendants who are represented by John Leiter and Mark Neill. Mr. Leiter filed a Motion to be Relieved as Counsel on October 22, 2015 and I am concerned that this case will be placed on the trial roster in the next month or two. For that reason, I would like to see if the Court has any time to schedule a short status conference to enter a scheduling order that would have a trial not before April 2016 date so that Mr. Leiter's Motion to be Relieved as Counsel could be heard in due course and/or have a hearing on Mr. Leiter's Motion. From my conversation with Mr. Leiter, no depositions will take place until Mr. Leiter's motion is heard. Because I need to take a half dozen or more depositions, the Motion to be Relieved has presented a challenge with scheduling and getting things done in preparation for trial.

We appreciate the Court's consideration and look forward to hearing from you.

With best regards, I remain

Very truly yours,
NATE FATA, P.A.


Nate Fata
NF/sh

cc: John M. Leiter, Esq.
Mark D. Neill, Esq.

000513

Appendix 00521

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Gabriel Barnhill and GSB Enterprises,
LLC,

Plaintiffs,

vs.

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,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2014-CP-26-08367
(formerly 2013-CP-26-02816)

HORRY COUNTY
2015 DEC 15 AM 9:08
HELAHIE H. HARRIS, CLERK OF COURT

PLAINTIFFS' NOTICE OF MOTION
AND MOTION TO COMPEL
DEPOSITIONS OF DEFENDANTS

Gabriel Barnhill and GSB Enterprises,
LLC,

Plaintiffs,

vs.

J. Floyd Swilley, J. Floyd Swilley
SMG Partners, LLC, SMS Services, LP,
William C. Piner, WCP Limited, LLC,
Alicia A. Piner, 809 Holdings, LP,
Heath Causey, Sage Financial Group,
LLC, Sage Advisory Group, L.P.,
Sage Private Equity Group,
Secured Asset Factoring Exchange, Inc.,
SAFE, Inc., Digics, LLC, 9-1-1, Plumbing,
LLC, and Sage Funding, L.P.,
Christopher Pitcock,

Defendants.

CASE NO. 2014-CP-26-3362

TO: Defendants J. Floyd Swilley, J. Floyd Swilley Investment Advisors, SMG Partners, LLC, SMS Services, LP, William C. Piner, WCP Limited, LLC, Alicia A. Piner, , Heath Causey, Sage Financial Group, L.P., Sage Private Equity Group, Secured Asset Factoring Exchange, Inc., SAFE, Inc., Digics, LLC, Sage Funding, L.P. and Christopher Pitcock and their counsel John Leiter, Esq.

copy

000514

Appendix 00522

809 Holdings, LP and its Counsel Mark D. Neff, Esq.

YOU WILL PLEASE TAKE NOTICE that Plaintiffs, Gabriel Barnhill and GSB Enterprise, LLC, by and through their attorney, Nate Fata, will move this Honorable Court within ten (10) days after service hereof or as soon thereafter for an Order to compel Depositions of Defendants.

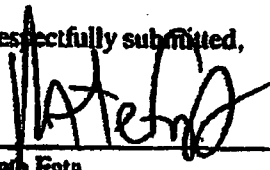
The following Notices of Deposition were served upon Defendants:

- 1. Plaintiffs' Notice of Deposition of WCP 30(b)(6) on November 16, 2015;**
- 2. Plaintiffs' Amended Notice of Deposition of Heath Causey on November 23, 2015;**
- 3. Plaintiffs' Amended Notice of Deposition of Laurel Swilley on November 23, 2015;**
- 4. Plaintiffs' Amended Notice of Deposition of Floyd Swilley on November 23, 2015; and**
- 5. Plaintiffs' Amended Notice of Deposition of 809 Holdings 30(b)(6) on November 23, 2015.**

Defendants did not appear for deposition. Multiple discovery sanction orders have been entered in this case. Defendants are further delaying discovery. Further consultation would serve no useful purpose.

This Court should strike Defendants' Answer and Counterclaim, award attorney fees and costs and award all other appropriate relief.

Respectfully submitted,



Nate Fata
NATE FATA, P.A.
Attorney for Plaintiffs
P. O. Box 16620
1500 U.S. Hwy. 17 N., Suite 215
Surfside Beach, SC 29587
Tel. (843) 238-2676
Fax (843) 238-0240

Surfside Beach, South Carolina
December 14, 2015

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Gabriel Barnhill and
GSB Enterprises, LLC

Plaintiff,

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

Defendants

IN THE COURT OF COMMON PLEAS
FOR THE 15TH JUDICIAL CIRCUIT

Civil Action No. 2014-CP-26-3362
(formerly 2013-CP-26-02816)

MOTION TO BE RELIEVED AS COUNSEL
FOR J. FLOYD SWILLEY, J. FLOYD
SWILLEY INVESTMENT ADVISORS,
LAUREL K. SWILLEY, SMG PARTNERS,
LLC, SMS SERVICES, LP, WILLIAM C.
PINER, WCP LIMITED, LLC, ALICIA A.
PINER, 809 HOLDINGS, LP, HEATH
CAUSEY, SAGE FINANCIAL GROUP,
LLC, SAGE PRIVATE EQUITY GROUP,
SECURED ASSET FACTORING
EXCHANGE, INC., DIGICS, INC., SAGE
FUNDING, L.P. AND CHRISTOPHER
PITCOCK

Gabriel Barnhill and GSB Enterprises,
LLC

Plaintiffs,

v.

J. Floyd Swilley, J. Floyd Swilley
SMG Partners, LLC, SMS Services, LP,
William C. Piner, WCP Limited, LLC,
Alicia A. Piner, 809 Holdings, LP,
Heath Causey, and Sage Financial
Group, LLC, Sage Private Equity Group,
Secured Asset Factoring Exchange, Inc.,
SAFE, Inc., Digics, LLC, 9-1-1, Plumbing,
LLC, and Sage Funding, L.P., and
Christopher Pitcock,

Defendants.

FILED
HORRY COUNTY
2015 OCT 27 AM 10:12
CLERK OF COURT
JELANIE HUGGINS-WARD

YOU WILL PLEASE TAKE NOTICE that the undersigned will move before this
Honorable Court ten (10) days after the service hereof or as soon thereafter as counsel may
be heard, at the Horry County Courthouse in Conway, South Carolina, for an Order relieving

000517

Appendix 00525

John M. Leiter, Esquire and the Law Offices of John M. Leiter, PA as counsel for the Defendants, J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K. Swilley, SMG Partners, LLC, SMS Services, LP, William C. Piner, WCP Limited, LLC, Alicia A. Piner, 809 Holdings, LP, Heath Causey, Sage Financial Group, LLC, Sage Private Equity Group, Secured Asset Factoring Exchange, Inc., Digics, Inc., Sage Funding, L.P. and Christopher Pitcock, in the above-captioned matter.

This Motion is based on South Carolina Rules of Professional Conduct pursuant to Rule 1.16(b)(5), the Defendants have failed to fulfill their obligation to pay the Law Offices of John M. Leiter, PA for their professional services rendered in this matter, despite having been given reasonable warning of its intent to withdraw unless the obligation is fulfilled; and Rule 1.16(b)(6), the representation will result in an unreasonable financial burden on the lawyer.

Counsel further states that he has given these Defendants reasonable notice of Counsel's intent to withdraw.

Presently before the Court are several Motions on the October 29, 2015 court roster. 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.

Counsel has complied with his duty to consult before filing this motion.

Respectfully submitted by

LAW OFFICES OF JOHN M. LEITER, PA

By: 

John M. Leiter, Esquire
1203 48th Avenue North, Suite 109
Myrtle Beach, SC 29577
(843) 449-1451

Myrtle Beach, South Carolina
October 20, 2015

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Gabriel Barnhill and
GSB Enterprises, LLC

Plaintiff,

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

Defendants

) IN THE COURT OF COMMON PLEAS
) FOR THE 15TH JUDICIAL CIRCUIT
)

) Civil Action No. 2014-CP-26-3362
) (formerly 2013-CP-26-02816)
)
)
)

) ORDER RELIEVING JOHN M. LEITER
) AND THE LAW OFFICES OF JOHN M.
) LEITER, PA AS COUNSEL FOR J. FLOYD
) SWILLEY, J. FLOYD SWILLEY
) INVESTMENT ADVISORS, LAUREL K.
) SWILLEY, SMG PARTNERS, LLC, SMS
) SERVICES, LP, WILLIAM C. PINER, WCP
) LIMITED, LLC, ALICIA A. PINER, HEATH
) CAUSEY, SAGE FUNDING, L.P., SAGE
) FINANCIAL GROUP, LLC, SAGE
) PRIVATE EQUITY GROUP, SECURED
) ASSET FACTORING EXCHANGE, INC.,
) DIGICS, LLC AND CHRISTOPHER
) PITCOCK

Gabriel Barnhill and GSB Enterprises,
LLC

Plaintiffs,

v.

J. Floyd Swilley, J. Floyd Swilley
SMG Partners, LLC, SMS Services, LP,
William C. Piner, WCP Limited, LLC,
Alicia A. Piner, 809 Holdings, LP,
Heath Causey, and Sage Financial
Group, LLC, Sage Private Equity Group,
Secured Asset Factoring Exchange, Inc.,
SAFE, Inc., Digics, LLC, 9-1-1, Plumbing,
LLC, and Sage Funding, L.P., and
Christopher Pitcock,

Defendants.

THIS CAUSE came before me for a hearing on the 4th day of January, 2016, upon the Motion of John M. Leiter, Esquire and the Law Offices of John M. Leiter, PA to be relieved as counsel for the Defendants, J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K.

Swilley, SMG Partners, LLC, SMS Services, LP, William C. Piner, WCP Limited, LLC, Alicia A. Piner, 809 Holdings, LP, Heath Causey, Sage Financial Group, LLC, Sage Private Equity Group, Secured Asset Factoring Exchange, Inc., Sage Funding, L.P., Digics, LLC and Christopher Pitcock.

Defendants were duly notified of the date, time and location of the hearing. None of the Defendants appeared at the hearing. Nate Fata, Esq. appeared on behalf of the Plaintiffs and Stefan Feidler, Esq. appeared on behalf of Defendant 809 Holdings, LP.

Mr. Leiter stated that the reason for the Motion to Withdraw was nonpayment of fees, including these Defendants' failure and refusal to honor their fee agreement with him, and their failure to honor the payment plan established by the parties.

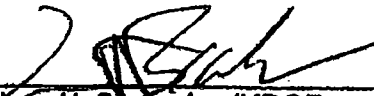
The Defendants shall obtain new legal counsel to represent them in this matter within thirty (30) days from the date of this Order. The proceedings in this case will be held in abeyance for thirty (30) days from the date of this Order. The Defendants must notify the Court within thirty (30) days of their new attorney. Based on the foregoing and without objection of counsel for any of the other parties, it is hereby

ORDERED that John M. Leiter and the Law Offices of John M. Leiter, PA shall be and the same are hereby relieved as counsel for Defendants J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K. Swilley, SMG Partners, LLC, SMS Services, LP, William C. Piner, WCP Limited, LLC, Alicia A. Piner, 809 Holdings, LP, Heath Causey, Sage Financial Group, LLC, Sage Private Equity Group, Secured Asset Factoring Exchange, Inc., Digics, Inc., Sage Funding, L.P. and Christopher Pitcock as of the date of the entry of this Order; and, it is

FURTHER ORDERED that these Defendants shall retain substitute counsel who shall enter an appearance with the Court within thirty (30) days from the date of this Order; and it is

FURTHER ORDERED that the Clerk of Court shall note that this matter shall not be called for trial before May 1, 2016.

AND IT IS SO ORDERED.



William H. Seals, Jr., JUDGE
Fifteenth Judicial Circuit

1/14, 2016
Conway, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Gabriel Barnhill and
GSB Enterprises, LLC

Plaintiff,

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

Defendants

Gabriel Barnhill and GSB Enterprises,
LLC

Plaintiffs,

v.

J. Floyd Swilley, J. Floyd Swilley
SMG Partners, LLC, SMS Services, LP,
William C. Piner, WCP Limited, LLC,
Alicia A. Piner, 809 Holdings, LP,
Heath Causey, and Sage Financial
Group, LLC, Sage Private Equity Group,
Secured Asset Factoring Exchange, Inc.,
SAFE, Inc., Digics, LLC, 9-1-1, Plumbing,
LLC, and Sage Funding, L.P., and
Christopher Pitcock,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE 15TH JUDICIAL CIRCUIT

Civil Action No. 2014-CP-26-3362
(formerly 2013-CP-26-02818)

ORDER RELIEVING JOHN M. LEITER
AND THE LAW OFFICES OF JOHN M.
LEITER, PA AS COUNSEL FOR J. FLOYD
SWILLEY, J. FLOYD SWILLEY
INVESTMENT ADVISORS, LAUREL K.
SWILLEY, SMG PARTNERS, LLC, SMS
SERVICES, LP, WILLIAM C. PINER, WCP
LIMITED, LLC, ALICIA A. PINER, HEATH
CAUSEY, SAGE FUNDING, L.P., SAGE
FINANCIAL GROUP, LLC, SAGE
PRIVATE EQUITY GROUP, SECURED
ASSET FACTORING EXCHANGE, INC.,
DIGICS, LLC AND CHRISTOPHER
PITCOCK

Copy

FILED
HARRY COUNTY
2016 JAN 25 PM 2:39
CLERK OF COURT
CLARENCE J. HUGGINS-WARD

THIS CAUSE came before me for a hearing on the 4th day of January, 2016, upon the
Motion of John M. Leiter, Esquire and the Law Offices of John M. Leiter, PA to be relieved as
counsel for the Defendants, J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K.

000522

Appendix 00530

Swilley, SMG Partners, LLC, SMS Services, LP, William C. Piner, WCP Limited, LLC, Alicia A. Piner, 809 Holdings, LP, Heath Causey, Sage Financial Group, LLC, Sage Private Equity Group, Secured Asset Factoring Exchange, Inc., Sage Funding, L.P., Digics, LLC and Christopher Pitcock.

Defendants were duly notified of the date, time and location of the hearing. None of the Defendants appeared at the hearing. Nate Fata, Esq. appeared on behalf of the Plaintiffs and Stefan Feldler, Esq. appeared on behalf of Defendant 809 Holdings, LP.

Mr. Leiter stated that the reason for the Motion to Withdraw was nonpayment of fees, including these Defendants' failure and refusal to honor their fee agreement with him, and their failure to honor the payment plan established by the parties.

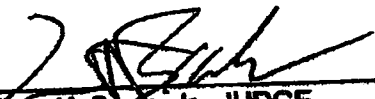
The Defendants shall obtain new legal counsel to represent them in this matter within thirty (30) days from the date of this Order. The proceedings in this case will be held in abeyance for thirty (30) days from the date of this Order. The Defendants must notify the Court within thirty (30) days of their new attorney. Based on the foregoing and without objection of counsel for any of the other parties, it is hereby

ORDERED that John M. Leiter and the Law Offices of John M. Leiter, PA shall be and the same are hereby relieved as counsel for Defendants J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K. Swilley, SMG Partners, LLC, SMS Services, LP, William C. Piner, WCP Limited, LLC, Alicia A. Piner, 809 Holdings, LP, Heath Causey, Sage Financial Group, LLC, Sage Private Equity Group, Secured Asset Factoring Exchange, Inc., Digics, Inc., Sage Funding, L.P. and Christopher Pitcock as of the date of the entry of this Order; and, it is

FURTHER ORDERED that these Defendants shall retain substitute counsel who shall enter an appearance with the Court within thirty (30) days from the date of this Order; and it is

FURTHER ORDERED that the Clerk of Court shall note that this matter shall not be called for trial before May 1, 2016.

AND IT IS SO ORDERED.



William H. Seale, Jr., JUDGE
Fifteenth Judicial Circuit

1/14, 2016
Conway, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Gabriel Barnhill and GSB Enterprises,
LLC,

Plaintiffs,

vs.

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,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2014-CP-26-08367
(formerly 2013-CP-26-02816)

AFFIDAVIT OF SALLY J. HUFFMAN

Gabriel Barnhill and GSB Enterprises,
LLC,

Plaintiffs,

vs.

J. Floyd Swilley, J. Floyd Swilley
SMG Partners, LLC, SMS Services, LP,
William C. Piner, WCP Limited, LLC,
Alicia A. Piner, 809 Holdings, LP,
Heath Causey, Sage Financial Group,
LLC, Sage Advisory Group, L.P.,
Sage Private Equity Group,
Secured Asset Factoring Exchange, Inc.,
SAFE, Inc., Digics, LLC, 9-1-1, Plumbing,
LLC, and Sage Funding, L.P.,
Christopher Pitcock,

Defendants.

CASE NO. 2014-CP-26-3362

Sally J. Huffman, being duly sworn, deposes and says:

1. I am over the age of eighteen years and am competent to make this Affidavit.

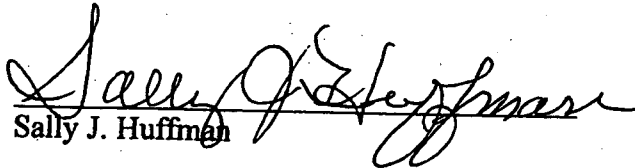
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HORRY COUNTY
2016 APR 13 AM 9:11
MELANIE HUGGINS-WARD
CLERK OF COURT

000525

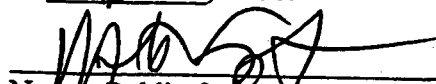
Appendix 00533

2. I am the legal assistant to Nate Fata, P.A.
3. That I served via U.S. Mail on February 3, 2016 the Notice of Hearing upon the Pro Se Defendants J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K. Swilley, SMG Partners, LLC, SMS Services, Sage Financial Group, LLC, Sage Advisory Group L.P., Sage Private Equity Group, Sage Funding, L.P. at their last known address of 629 Hemlock Avenue, Myrtle Beach, South Carolina 29577.
4. That on February 18, 2016 I served via U.S. Mail Plaintiffs' Affidavit for Attorney Fees and Motion for Attorney Fees above to the Pro Se Defendants at the above address.
5. That on February 24, 2016 a copy of the proposed Order sent to The Honorable R. Lawson McIntosh was mailed to the above Pro Se Defendants at the above address.
6. That on February 24, 2016 I mailed to Pro Se Defendants a copy of the Notice of Motion and Motion for entry of Default and Striking the Pleadings of All company Defendants to the above Pro Se Defendants at the above address.
7. That on March 29, 2016, I mailed to Pro Se Defendants a copy of the Order entered on March 21, 2016 to the above Pro Se Defendants at the above address.
8. That no mail sent by me to the 629 Hemlock Avenue, Myrtle Beach, South Carolina for the above mentioned Pro Se Defendants has been returned by the U.S. Post Office as being undeliverable.
9. Based on the fact the U.S. Post Office has delivered multiple Notices to the 629 Hemlock Avenue, Myrtle Beach address and the Swilleys' confirmation that they reside at such address, I continue to mail notices and pleadings to that address.

FURTHER AFFIANT SAYETH NAUGHT.


Sally J. Huffman

SWORN to before me this 13 day
of April, 2016.


Notary Public for the State of South Carolina
My Commission Expires: 12/16/2020

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Gabriel Barnhill and GSB Enterprises,
LLC,

Plaintiffs,

vs.

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,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2014-CP-26-08367
(formerly 2013-CP-26-02816)

CERTIFICATE OF SERVICE

Gabriel Barnhill and GSB Enterprises,
LLC,

Plaintiffs,

vs.

J. Floyd Swilley, J. Floyd Swilley,
SMG Partners, LLC, SMS Services, LP,
William C. Piner, WCP Limited, LLC,
Alicia A. Piner, 809 Holdings, LP,
Heath Causey, Sage Financial Group,
LLC, Sage Advisory Group, L.P.,
Sage Private Equity Group,
Secured Asset Factoring Exchange, Inc.,
SAFE, Inc., Digics, LLC, 9-1-1, Plumbing,
LLC, and Sage Funding, L.P.,
Christopher Pitcock,

Defendants.

CASE NO. 2014-CP-26-3362

FILED
HORRY COUNTY
2016 APR 25 PM 12:46
MELANIE HUGGINS-WARD
CLERK OF COURT

I, Sally J. Huffman, Legal Assistant, do hereby certify that I am an employee of Nate Fata, P.A., Counsel for Plaintiffs Gabriel Barnhill and GSB Enterprises, LLC and that on April 20, 2016 did serve a copy of Plaintiffs' Notice of Hearing on Defendants and counsel via email

000528

Appendix 00536

as follows:

J. Floyd Swilley
629 Hemlock Avenue
Myrtle Beach, SC 29577
jfs@sagesc.com

J. Floyd Swilley Investment Advisors
629 Hemlock Avenue
Myrtle Beach, SC 29577
jfs@sagesc.com

Laurel K. Swilley
629 Hemlock Avenue
Myrtle Beach, SC 29577
jfs@sagesc.com

WCP Limited, LLC
c/o William Piner
606 Calhoun Street
Myrtle Beach, SC 29577
bill.piner@gmail.com

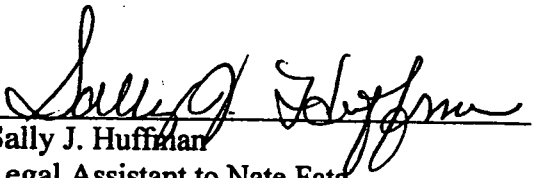
Heath Causey
1035 Pinwheel Loop
Myrtle Beach, SC 29577
heath@clear-acct.com

Sage Advisory Group, L.P.
629 Hemlock Avenue
Myrtle Beach, SC 29577
jfs@sagesc.com

Digics, LLC
c/o Chris Pitcock
Registered Agent
472 Mooreland Drive
Myrtle Beach, SC 29588
pitcockchris@gmail.com

Digics, LLC
c/o Christopher Pitcock
24242 Branchwood Court
Lutz, FL 33559
pitcockchris@gmail.com

809 Holdings
c/o Mark D. Neill, Esq.
Neill Law Firm
P.O. Box 2810
Murrells Inlet, SC 29576
mneill@neilllawfirm.com


Sally J. Huffman
Legal Assistant to Nate Fata

000530

Appendix 00538

NEILL LAW FIRM

MARK D. NEILL
MNEILL@NEILLLAWFIRM.COM

671 JAMESTOWNE DRIVE, SUITE 207
POST OFFICE BOX 2810
MURRELLS INLET, SC 29576
PHONE: (843) 651-8580 FACSIMILE: (843) 651-8586
WWW.NEILLLAWFIRM.COM

MARY ANNA NEILL
MANEILL@NEILLLAWFIRM.COM

May 19, 2016

Sent Via Email: lmcintoshj@sccourts.org
and Regular Mail

The Honorable R. Lawton McIntosh
P.O. Box 8002
Anderson, SC 29622

Re: Gabriel Barnhill and GSB Enterprises, LLC vs. J. Floyd Swilley
Case No(s): 2014-CP-26-3362

Dear Judge McIntosh:

I represent Defendant 809 Holdings, LP. I object to the proposed final order drafted by Plaintiff's attorney. The proposed order relies in part on mis-statements that were unfortunately made by my former associate, Mr. Fiedler, who is no longer with my firm. In hindsight, I certainly regret not being at the February 16th hearing, but I thought Mr. Fiedler was well prepared. Mr. Fiedler spent close to forty hours working on the file prior to the February 16th hearing and he also attended the January 4, 2016 hearing in this matter. I never imagined it possible for him to make mis-statements, or fail to make clarifying statements, to the Court which had the effect of impugning our client.

I want to make clear that 809 Holdings, LP never failed to attend a deposition. To my knowledge, the Plaintiff only scheduled and noticed the deposition of my client one time, to take place on December 9, 2015. See attached correspondence from Mr. Fata dated November 23, 2015. That deposition was canceled in advance by agreement of Plaintiff's attorney as a result of attorney John Leiter's motion to be relieved. The parties agreed that depositions would be rescheduled after the motion to be relieved was heard on January 4, 2016. Attached hereto is a letter from Mr. Fata dated December 3, 2015 to Judge Seals in which he states "[f]rom my conversation with Mr. Leiter, no depositions will take place until Mr. Leiter's motion is heard." Mr. Fata never re-noticed the depositions, as it was my belief that he was waiting to see if the Pro Se Defendants would obtain new counsel as provided in the order relieving Mr. Leiter filed January 25, 2016.

Prior to the February 16th hearing, Mr. Fiedler and Mr. Fata communicated about when to schedule the depositions of Plaintiff and 809 Holdings, LP. See attached emails. At the February 16th hearing, Plaintiff did not present any evidence showing 809 Holdings, LP failed to show up for its deposition – that is because the deposition previously scheduled for December 9th had been canceled by consent and no subsequent deposition was ever noticed. Had Plaintiff's attorney re-noticed a deposition for 809 Holdings, LP, representatives of the company would have appeared. 000531

000531

have attended because they adamantly deny the claims asserted by the Plaintiff. I respectfully request in lieu of striking 809 Holdings, LP's pleading, that the deposition of 809 Holding, LP be ordered to occur no later than May 31, 2016. If 809 Holdings, LP fails to appear, it would be sanctioned by having its pleading stricken.

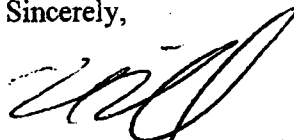
Finally, during the February 16th hearing, I believe the Court was given the wrong impression that 809 Holdings, LP had not cooperated in the discovery process. 809 Holdings, LP has produced hundreds of pages of documents and answered numerous Requests to Admit, Requests to Produce, and Interrogatories. As recently as January 8, 2016, 809 Holdings, LP provided discovery responses. I am not aware of any unanswered discovery requests, nor have I received any notice from Plaintiff's attorney indicating 809 Holdings, LP failed to respond to a discovery request. During the hearing, Plaintiff did not provide any evidence showing 809 Holdings, LP failed to cooperate.

I respectfully once again request a hearing on Defendant 809 Holdings, LP's Motion to Reconsider. I believe striking the Defendant's pleading is not supported by the record. Plaintiff did not submit any evidence showing 809 Holdings, LP failed to attend a deposition or failed to cooperate in the discovery process. In the alternative, I request the Court's order provide the deposition of 809 Holdings, LP be scheduled to occur no later than May 31, 2016 and its pleading will be stricken if it's representative fails to appear.

Thank you for your consideration in this matter. If you have any questions, please do not hesitate to contact me.

With kindest regards, I am

Sincerely,



Mark D. Neill

MDN/lah

Cc: Nate Fata, Esq.

Miles Adler

Pro Se Defendants

NATE FATA, P.A.
ATTORNEY AT LAW
P.O. Box 16620
THE COURTYARD, SUITE 215
SURFSIDE BEACH, SOUTH CAROLINA 29587
TELEPHONE (843) 238-2676
TELECOPIER (843) 238-0240
NFATA@FATALAW.COM

VIA U.S. MAIL

November 23, 2015

John M. Leiter, Esq.
Law Offices of John M. Leiter, PA
1203 48th Avenue, North, Ste. 109
Myrtle Beach, SC 29577

Mark D. Neill, Esq.
Neill Law Firm
P.O. Box 2810
Murrells Inlet, SC 29576

Re: Gabriel Barnhill and GSB Enterprises, LLC vs. J. Floyd Swilley, et al.
Civil Action No. 2014-CP-26-8367

Dear John and Mark:

Please see enclosed a copy of the following:

1. Plaintiffs' Amended Notice of 30(b)(6) Deposition of 809 Holdings, LP for Wednesday, December 9, 2015 beginning at 10:00 a.m.;
2. Plaintiffs' Amended Notice Deposition of Laurel Swilley for Thursday, December 10, 2015 beginning at 10:00 a.m.; and
3. Plaintiffs' Amended Notice Deposition of Floyd Swilley for Thursday, December 10, beginning at 1:00 p.m.;
4. Plaintiffs' Amended Notice Deposition of Heath Causey for Wednesday, December 16, 2015 beginning at 10:00 a.m.

Also enclosed is the Certificate of Service verifying service of the same upon you.

000533

Appendix 00541

John M. Leiter, Esq.
Mark D. Neill, Esq.
November 23, 2015
Page 2

With best regards, I remain

Very truly yours,
NATE FATA, P.A.

A handwritten signature in black ink, appearing to read "Nate Fata", with a stylized flourish extending from the end.

Nate Fata

NF/sh

Enclosures

000534

Appendix 00542

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Gabriel Barnhill and GSB Enterprises,)
LLC,)

Plaintiffs,)

vs.)

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,)

Defendants.)

IN THE COURT OF COMMON PLEAS

FIFTEENTH JUDICIAL CIRCUIT

CASE NO. 2014-CP-26-08367

(formerly 2013-CP-26-02816)

PLAINTIFFS AMENDED NOTICE OF
30(b)(6) DEPOSITION OF
809 HOLDINGS, LP

Gabriel Barnhill and GSB Enterprises,)
LLC,)

Plaintiffs,)

vs.)

J. Floyd Swilley, J. Floyd Swilley)
SMG Partners, LLC, SMS Services, LP,)
William C. Piner, WCP Limited, LLC,)
Alicia A. Piner, 809 Holdings, LP,)
Heath Causey, Sage Financial Group,)
LLC, Sage Advisory Group, L.P.,)
Sage Private Equity Group,)
Secured Asset Factoring Exchange, Inc.,)
SAFE, Inc., Digics, LLC, 9-1-1, Plumbing,)
LLC, and Sage Funding, L.P.,)
Christopher Pitcock,)

Defendants.)

CASE NO. 2014-CP-26-3362

TO THE DEFENDANTS AND ITS COUNSEL:

YOU WILL PLEASE TAKE NOTICE that the attorney for the above-named Plaintiffs
shall take the deposition of those persons designated by the Defendant 809 Holdings, LP ("809

Appendix 00543

000535

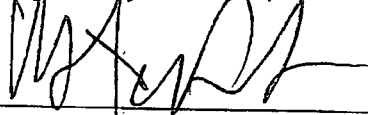
Holdings”) under Rule 30(b)(6), South Carolina Rules of Civil Procedure, for the purpose of being examined on the following matters:

1. Payments and/or transfers from 809 Holdings to QC Financing, LLC at any time;
2. Payments and/or transfers from QC Financing, LLC to 809 Holdings at any time.
3. Any and all financial statements of QC Financing or 809 Holdings;
4. Any and all financing arrangements with QC Financing, including any obligations of QC Financing to 809 Holdings;
5. The business records, financial records and corporate records of 809 Holdings;
6. The ownership of 809 Holdings from inception to present, all changes thereto and the dates;
7. Any and all persons acting on behalf of 809 Holdings from inception to present;
8. Any and all bank accounts in the name of 809 Holdings from inception to present;
9. Any and all payments made to any investors of 809 Holdings at any time from 2011 to present and the basis therefore;
10. Any and all payments made to any Defendants at any time from 809 Holdings and the basis therefor;
11. Any and all transfers of assets from 809 Holdings to any person from August 2011 to present;
12. The factual basis for any and all counterclaims and defenses asserted in this action; and
13. The description and value of each item of collateral securing any 809 Holdings loan in June 1, July 1, August 1, and September 1, 2011.

The corporate representative(s) for the purpose of this 30(b)(6) Notice of Deposition shall appear at **10:00 a.m. on Wednesday, December 9, 2015** at the **Law Offices of Nate Fata, P.A., 1500 U.S. Highway 17 North, The Courtyard, Suite 215, Surfside Beach, South Carolina 29587** and such deposition will continue from day to day until completed. It is fully expected that more than one corporate representative may be necessary to respond to all of these areas and that said deposition may have to be continued from time to time as may be mutually agreeable with counsel.

Court Reporter: Starkey Court Reporting.

Respectfully submitted,



Nate Fata SC Bar #9866

NATE FATA, P.A.

Attorney for the Plaintiffs

1500 US Highway 17 North, Suite 215

Post Office Box 16620

Surfside Beach, SC 29587

Tel.: (843) 238-2676

Fax: (843) 238-0240

Surfside Beach, South Carolina
November 23, 2015

NATE FATA, P.A.
ATTORNEY AT LAW

P.O. Box 16620
THE COURTYARD, SUITE 215
SURFSIDE BEACH, SOUTH CAROLINA 29587
TELEPHONE (843) 238-2676
FACSIMILE (843) 238-0240
www.fatalaw.com

VIA EMAIL

December 3, 2015

The Honorable William Henry Seals, Jr.
Chief Administrative Judge
103 N. Main Street
Marion, SC 29571
Attn.: Paul Lawson

Re: Gabriel Barnhill and GSB Enterprises, LLC vs. J. Floyd Swilley, et al.
Civil Action No. 2014-CP-26-8367

Dear Judge Seals:

As you might recall I represent the Plaintiffs in this investor/Ponzi scheme pawn shop case against the Defendants who are represented by John Leiter and Mark Neill. Mr. Leiter filed a Motion to be Relieved as Counsel on October 22, 2015 and I am concerned that this case will be placed on the trial roster in the next month or two. For that reason, I would like to see if the Court has any time to schedule a short status conference to enter a scheduling order that would have a trial not before April 2016 date so that Mr. Leiter's Motion to be Relieved as Counsel could be heard in due course and/or have a hearing on Mr. Leiter's Motion. From my conversation with Mr. Leiter, no depositions will take place until Mr. Leiter's motion is heard. Because I need to take a half dozen or more depositions, the Motion to be Relieved has presented a challenge with scheduling and getting things done in preparation for trial.

We appreciate the Court's consideration and look forward to hearing from you.

With best regards, I remain

Very truly yours,
NATE FATA, P.A.


Nate Fata
NF/sh

cc: John M. Leiter, Esq.
Mark D. Neill, Esq.

000538

Appendix 00546

Lisa Hnizdil

From: Stefan Feidler [sfeidler@neilllawfirm.com]
Sent: Thursday, February 11, 2016 8:54 AM
To: 'Nate Fata'
Cc: 'Lisa Hnizdil'
Subject: RE: Barnhill v. 809 et al - Motion to Compel and MSJ

Nate,

Could you please provide the same for Mr. Barnhill and GSG Enterprises? I am waiting to hear back from 809, but will get back to you as soon as I do.

Best,

Stefan

From: Nate Fata [mailto:nfata@fatalaw.com]
Sent: Tuesday, February 09, 2016 2:14 PM
To: 'Stefan Feidler'
Subject: FW: Barnhill v. 809 et al - Motion to Compel and MSJ

Stefan,

Please send some 809 dep dates to me in which your client is available.

Thanks,

Nate

Nate Fata, P.A.
P.O. Box 16620
Surfside Beach, SC 29587
(843) 238-2676

AV Preeminent, Martindale-Hubbell

CONFIDENTIALITY NOTICE: This e-mail and the transmitted documents contain private, privileged and confidential information belonging to the sender. The information herein is solely for the use of the addressee. If your receipt of this transmission has occurred as the result of an error, please immediately notify us so we can arrange for the return of the documents. In such circumstances, you are advised that you may not disclose, copy, distribute or take any other action in reliance on the information transmitted.

From: Stefan Feidler [mailto:sfeidler@neilllawfirm.com]
Sent: Monday, February 08, 2016 2:42 PM
To: 'Nate Fata'
Cc: shuffman@fatalaw.com
Subject: Re: Barnhill v. 809 et al - Motion to Compel and MSJ

Nate,

000539

Appendix 00547

Lisa Hnizdil

From: Stefan Feidler [sfeidler@neilllawfirm.com]
Sent: Tuesday, February 09, 2016 2:15 PM
To: 'Lisa Hnizdil'
Cc: 'Mark Neill'
Subject: FW: Barnhill v. 809 et al - Motion to Compel and MSJ

Lisa,

Please see below.

From: Nate Fata [mailto:nfata@fatalaw.com]
Sent: Tuesday, February 09, 2016 2:14 PM
To: 'Stefan Feidler'
Subject: FW: Barnhill v. 809 et al - Motion to Compel and MSJ

Stefan,

Please send some 809 dep dates to me in which your client is available.

Thanks,

Nate

Nate Fata, P.A.
P.O. Box 16620
Surfside Beach, SC 29587
(843) 238-2676

AV Preeminent, Martindale-Hubbell

CONFIDENTIALITY NOTICE: This e-mail and the transmitted documents contain private, privileged and confidential information belonging to the sender. The information herein is solely for the use of the addressee. If your receipt of this transmission has occurred as the result of an error, please immediately notify us so we can arrange for the return of the documents. In such circumstances, you are advised that you may not disclose, copy, distribute or take any other action in reliance on the information transmitted.

From: Stefan Feidler [mailto:sfeidler@neilllawfirm.com]
Sent: Monday, February 08, 2016 2:42 PM
To: 'Nate Fata'
Cc: shuffman@fatalaw.com
Subject: Re: Barnhill v. 809 et al - Motion to Compel and MSJ

Nate,

I know we have a motion to compel and MSJ set for next week. As to the motion to compel, Mark mentioned you both verbally agreed to cancel the previously set depositions. However, if you would like to re-schedule those depositions, we

000540

Appendix 00548

are more than happy to accommodate you and your client's request. Please let me know you and your clients availability and I have Lisa contact our clients to re-schedule those depositions.

Sincerely,

Stefan



STEFAN B. FEIDLER

Attorney at Law

Neill Law Firm, PA

Post Office Box 2810

Murrells Inlet, SC 29576

Phone: 843.651.8580

Fax: 843.651.8586

sfeidler@NeillLawFirm.com

www.NeillLawFirm.com

Confidentiality Note: This email message is covered by the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521. This e-mail is also intended only for the person or entity to which it is addressed and may contain information that is privileged, confidential or otherwise protected from disclosure. Dissemination, distribution or copying of this e-mail or the information herein by anyone other than the intended recipient, or an employee or agent responsible for delivering the message to the intended recipient, is prohibited. If you have received this e-mail in error, please notify us immediately by telephone at (843) 651-8580

000542

Appendix 00550

NATE FATA, P.A.
ATTORNEY AT LAW

P.O. Box 16620
THE COURTYARD, SUITE 215
SURFSIDE BEACH, SOUTH CAROLINA 29587
TELEPHONE (843) 238-2676
TELECOPIER (843) 238-0240
NFATA@FATALAW.COM

U.S. Mail

May 13, 2016

The Honorable Melanie Huggins
Horry County Clerk of Court
Post Office Box 677
Conway, South Carolina 29526

Re: Gabriel Barnhill and GSB Enterprises, LLC vs. J. Floyd Swilley, et al.
Civil Action No. 2014-CP-26-08367

Dear Ms. Huggins:

Enclosed for filing is an original and one copy of the following:

1. "Certificate of Service" verifying service of the Affidavit of Sally J. Huffman upon Counsel and Pro Se Defendant; and
2. "Certificate of Service" verifying service of the Notice of Bankruptcy Filings upon Counsel and Pro Se Defendant.

Please clock the enclosed, file the originals and return the clocked copies to me in the envelope enclosed for your convenience.

Thank you for your assistance in this matter.

With best regards, I remain

Very truly yours,
NATE FATA, P.A.


NF/sh
Enclosures

cc: Heath Causey, Pro Se
809 Holdings, LP / Mark Neill, Esq.
J. Miles Adler, Esq.

000543

Appendix 00551

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Gabriel Barnhill and GSB Enterprises,
LLC,

Plaintiffs,

vs.

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,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2014-CP-26-08367
(formerly 2013-CP-26-02816)

CERTIFICATE OF SERVICE

Gabriel Barnhill and GSB Enterprises,
LLC,

Plaintiffs,

vs.

J. Floyd Swilley, J. Floyd Swilley,
SMG Partners, LLC, SMS Services, LP,
William C. Piner, WCP Limited, LLC,
Alicia A. Piner, 809 Holdings, LP,
Heath Causey, Sage Financial Group,
LLC, Sage Advisory Group, L.P.,
Sage Private Equity Group,
Secured Asset Factoring Exchange, Inc.,
SAFE, Inc., Digics, LLC, 9-1-1, Plumbing,
LLC, and Sage Funding, L.P.,
Christopher Pitcock,

Defendants.

CASE NO. 2014-CP-26-3362

I, Sally J. Huffman, Legal Assistant, do hereby certify that I am an employee of Nate
Fata, P.A., Counsel for Plaintiffs Gabriel Barnhill and GSB Enterprises, LLC and that on May
13th 2016 did serve a copy of the Affidavit of Sally J. Huffman via U.S. Mail as follows:

000544

Appendix 00552

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Gabriel Barnhill and GSB Enterprises, LLC,)

Plaintiffs,)

vs.)

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,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2014-CP-26-08367
(formerly 2013-CP-26-02816)

AFFIDAVIT OF SALLY J. HUFFMAN

Gabriel Barnhill and GSB Enterprises, LLC,)

Plaintiffs,)

vs.)

J. Floyd Swilley, J. Floyd Swilley
SMG Partners, LLC, SMS Services, LP,
William C. Piner, WCP Limited, LLC,
Allich A. Piner, 809 Holdings, LP,
Heath Causey, Sage Financial Group,
LLC, Sage Advisory Group, L.P.,
Sage Private Equity Group,
Secured Asset Factoring Exchange, Inc.,
SAFE, Inc., Digies, LLC, 9-1-1, Plumbing,
LLC, and Sage Funding, L.P.,
Christopher Pitcock,)

Defendants.)

CASE NO. 2014-CP-26-3362

FILED
CLERK OF COURT
2016 APR 13 AM 9:11
JANIE HUGGINS-WALKER

Sally J. Huffman, being duly sworn, deposes and says:

1. I am over the age of eighteen years and am competent to make this Affidavit.

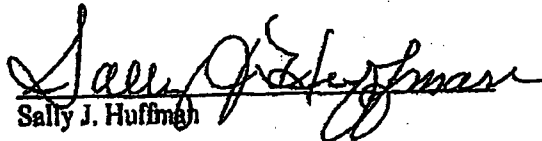
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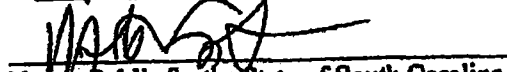
Appendix 00553

2. I am the legal assistant to Nate Fata, P.A.
3. That I served via U.S. Mail on February 3, 2016 the Notice of Hearing upon the Pro Se Defendants J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K. Swilley, SMG Partners, LLC, SMS Services, Sage Financial Group, LLC, Sage Advisory Group L.P., Sage Private Equity Group, Sage Funding, L.P. at their last known address of 629 Hemlock Avenue, Myrtle Beach, South Carolina 29577.
4. That on February 18, 2016 I served via U.S. Mail Plaintiffs' Affidavit for Attorney Fees and Motion for Attorney Fees above to the Pro Se Defendants at the above address.
5. That on February 24, 2016 a copy of the proposed Order sent to The Honorable R. Lawson McIntosh was mailed to the above Pro Se Defendants at the above address.
6. That on February 24, 2016 I mailed to Pro Se Defendants a copy of the Notice of Motion and Motion for entry of Default and Striking the Pleadings of All company Defendants to the above Pro Se Defendants at the above address.
7. That on March 29, 2016, I mailed to Pro Se Defendants a copy of the Order entered on March 21, 2016 to the above Pro Se Defendants at the above address.
8. That no mail sent by me to the 629 Hemlock Avenue, Myrtle Beach, South Carolina for the above mentioned Pro Se Defendants has been returned by the U.S. Post Office as being undeliverable.
9. Based on the fact the U.S. Post Office has delivered multiple Notices to the 629 Hemlock Avenue, Myrtle Beach address and the Swilleys' confirmation that they reside at such address, I continue to mail notices and pleadings to that address.

FURTHER AFFIANT SAYETH NAUGHT.


Sally J. Huffman

SWORN to before me this 13 day
of April, 2016.


Notary Public for the State of South Carolina
My Commission Expires: 12/16/2020

LAW OFFICES OF
JOHN M. LEITER, PA
ATTORNEY AND COUNSELOR AT LAW

1203 48TH AVE. N. SUITE 109
MYRTLE BEACH, SC 29577

TELEPHONE (843) 449-1451
FACSIMILE (843) 449-4884
E-MAIL jleiter@48th.com

January 5, 2016

The Honorable William H. Seals, Jr.
Chief Administrative Judge
103 N. Main Street
Marion, South Carolina 29571

Re: *Gabriel Barnhill and GSB Enterprises, LLC v. J. Floyd Swilley, et al.*
C/A No.: 2014-CP-26-08367

Dear Judge Seals:

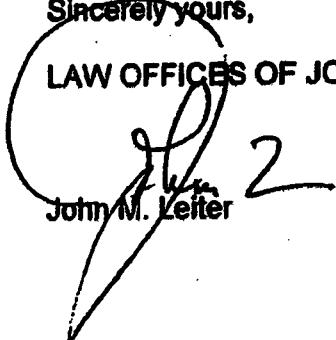
As you instructed at the motion hearing on January 4, 2016 in Conway, I have prepared and am enclosing a proposed Order Granting Leave to Withdraw as counsel for the various defendants named therein in the above case. If the proposed Order meets with your approval, kindly sign it and return it to me in the enclosed, self-addressed, stamped envelope and I will file it with the Clerk.

Thank you for your attention to this matter.

With kind regards,

Sincerely yours,

LAW OFFICES OF JOHN M. LEITER, PA


John M. Leiter

JML/smp

encl.

cc: Mark Neill, Esq.
Nate Fata, Esq.
J. Floyd Swilley
Laurel K. Swilley
William C. Piner
Alicia Piner
Heath Causey
Christopher Pitcock

000547

Appendix 00555

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Gabriel Barnhill and
GSB Enterprises, LLC

Plaintiff,

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

Defendants

Gabriel Barnhill and GSB Enterprises,
LLC

Plaintiffs,

v.

J. Floyd Swilley, J. Floyd Swilley
SMG Partners, LLC, SMS Services, LP,
William C. Piner, WCP Limited, LLC,
Alicia A. Piner, 809 Holdings, LP,
Heath Causey, and Sage Financial
Group, LLC, Sage Private Equity Group,
Secured Asset Factoring Exchange, Inc.,
SAFE, Inc., Digics, LLC, 9-1-1, Plumbing,
LLC, and Sage Funding, L.P., and
Christopher Pitcock,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE 15TH JUDICIAL CIRCUIT

Civil Action No. 2014-CP-26-3362
(formerly 2013-CP-26-02816)

ORDER RELIEVING JOHN M. LEITER
AND THE LAW OFFICES OF JOHN M.
LEITER, PA AS COUNSEL FOR J. FLOYD
SWILLEY, J. FLOYD SWILLEY
INVESTMENT ADVISORS, LAUREL K.
SWILLEY, SMG PARTNERS, LLC, SMS
SERVICES, LP, WILLIAM C. PINER, WCP
LIMITED, LLC, ALICIA A. PINER, HEATH
CAUSEY, SAGE FUNDING, L.P., SAGE
FINANCIAL GROUP, LLC, SAGE
PRIVATE EQUITY GROUP, SECURED
ASSET FACTORING EXCHANGE, INC.,
DIGICS, LLC AND CHRISTOPHER
PITCOCK

THIS CAUSE came before me for a hearing on the 4th day of January, 2016, upon the
Motion of John M. Leiter, Esquire and the Law Offices of John M. Leiter, PA to be relieved as
counsel for the Defendants, J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K.

000548

Appendix 00556

Swilley, SMG Partners, LLC, SMS Services, LP, William C. Piner, WCP Limited, LLC, Alicia A. Piner, 809 Holdings, LP, Heath Causey, Sage Financial Group, LLC, Sage Private Equity Group, Secured Asset Factoring Exchange, Inc., Sage Funding, L.P., Digics, LLC and Christopher Pitcock.

Defendants were duly notified of the date, time and location of the hearing. None of the Defendants appeared at the hearing. Nate Fata, Esq. appeared on behalf of the Plaintiffs and Stefan Feidler, Esq. appeared on behalf of Defendant 809 Holdings, LP.

Mr. Leiter stated that the reason for the Motion to Withdraw was nonpayment of fees, including these Defendants' failure and refusal to honor their fee agreement with him, and their failure to honor the payment plan established by the parties.

The Defendants 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. The Defendants must notify the Court within thirty (30) days of their new attorney. Based on the foregoing and without objection of counsel for any of the other parties, it is hereby

ORDERED that John M. Leiter and the Law Offices of John M. Leiter, PA shall be and the same are hereby relieved as counsel for Defendants J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K. Swilley, SMG Partners, LLC, SMS Services, LP, William C. Piner, WCP Limited, LLC, Alicia A. Piner, 809 Holdings, LP, Heath Causey, Sage Financial Group, LLC, Sage Private Equity Group, Secured Asset Factoring Exchange, Inc., Digics, Inc., Sage Funding, L.P. and Christopher Pitcock as of the date of the entry of this Order; and, it is

FURTHER ORDERED that these Defendants shall retain substitute counsel who shall enter an appearance with the Court within thirty (30) days from the date of this Order; and it is

FURTHER ORDERED that the Clerk of Court shall note that this matter shall not be called for trial before May 1, 2016.

AND IT IS SO ORDERED.

William H. Seals, Jr., JUDGE
Fifteenth Judicial Circuit

_____, 2016
Conway, South Carolina

000550

Appendix 00558

LAW OFFICES OF
JOHN M. LEITER, PA
ATTORNEY AND COUNSELOR AT LAW

1203 48TH AVE. N. SUITE 109
MYRTLE BEACH, SC 29577

TELEPHONE (843) 449-1451
FACSIMILE (843) 449-4884
E-MAIL jleiter@48th.com

January 21, 2016

The Honorable Melanie Huggins-Ward
Horry County Clerk of Court
P. O. Box 677
Conway, South Carolina 29528

Re: Gabriel Barnhill and GSB Enterprises, LLC vs. J. Floyd Swilley, et al.
Civil Action No.: 14-CP-26-3362

Dear Ms. Ward:

I am enclosing the original and one copy of an Order Relieving John M. Leiter and the Law Offices of John M. Leiter, PA as counsel for various defendants as identified in the Order. I would appreciate your filing the original and returning a clocked copy of the Order to me in the enclosed, self-addressed stamped envelope.

Thank you for your attention to this matter.

With best regards,

Sincerely yours,

LAW OFFICES OF JOHN M. LEITER, PA


Suzy Pettipas
Paralegal

/smp
Encl.

cc: J. Floyd Swilley & Laurel K. Swilley
J. Floyd Swilley Investment Advisors
SMG Partners, LLC
SMS Services, LP
William C. Piner & Alicia Piner
WCP Limited, LLC
Heath Causey
Sage Financial Group, LLC
Sage Private Equity Group
Secured Asset Factoring Exchange, Inc.
Sage Funding, L.P.
Christopher Pitcock
Digics, Inc.
Nate Fata, Esq.
Mark Neill, Esq.

000551

Appendix 00559

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Gabriel Barnhill and
GSB Enterprises, LLC

Plaintiff,

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

Defendants

Gabriel Barnhill and GSB Enterprises,
LLC

Plaintiffs,

v.

J. Floyd Swilley, J. Floyd Swilley
SMG Partners, LLC, SMS Services, LP,
William C. Piner, WCP Limited, LLC,
Alicia A. Piner, 809 Holdings, LP,
Heath Causey, and Sage Financial
Group, LLC, Sage Private Equity Group,
Secured Asset Factoring Exchange, Inc.,
SAFE, Inc., Digics, LLC, 9-1-1, Plumbing,
LLC, and Sage Funding, L.P., and
Christopher Pitcock,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE 15TH JUDICIAL CIRCUIT

Civil Action No. 2014-CP-26-3362
(formerly 2013-CP-26-02816)

ORDER RELIEVING JOHN M. LEITER
AND THE LAW OFFICES OF JOHN M.
LEITER, PA AS COUNSEL FOR J. FLOYD
SWILLEY, J. FLOYD SWILLEY
INVESTMENT ADVISORS, LAUREL K.
SWILLEY, SMG PARTNERS, LLC, SMS
SERVICES, LP, WILLIAM C. PINER, WCP
LIMITED, LLC, ALICIA A. PINER, HEATH
CAUSEY, SAGE FUNDING, L.P., SAGE
FINANCIAL GROUP, LLC, SAGE
PRIVATE EQUITY GROUP, SECURED
ASSET FACTORING EXCHANGE, INC.,
DIGICS, LLC AND CHRISTOPHER
PITCOCK

THIS CAUSE came before me for a hearing on the 4th day of January, 2016, upon the
Motion of John M. Leiter, Esquire and the Law Offices of John M. Leiter, PA to be relieved as
counsel for the Defendants, J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K.

000552

Appendix 00560

Swilley, SMG Partners, LLC, SMS Services, LP, William C. Piner, WCP Limited, LLC, Alicia A. Piner, 809 Holdings, LP, Heath Causey, Sage Financial Group, LLC, Sage Private Equity Group, Secured Asset Factoring Exchange, Inc., Sage Funding, L.P., Digics, LLC and Christopher Pitcock.

Defendants were duly notified of the date, time and location of the hearing. None of the Defendants appeared at the hearing. Nate Fata, Esq. appeared on behalf of the Plaintiffs and Stefan Feldler, Esq. appeared on behalf of Defendant 809 Holdings, LP.

Mr. Leiter stated that the reason for the Motion to Withdraw was nonpayment of fees, including these Defendants' failure and refusal to honor their fee agreement with him, and their failure to honor the payment plan established by the parties.

The Defendants 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. The Defendants must notify the Court within thirty (30) days of their new attorney. Based on the foregoing and without objection of counsel for any of the other parties, it is hereby

ORDERED that John M. Leiter and the Law Offices of John M. Leiter, PA shall be and the same are hereby relieved as counsel for Defendants J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K. Swilley, SMG Partners, LLC, SMS Services, LP, William C. Piner, WCP Limited, LLC, Alicia A. Piner, 809 Holdings, LP, Heath Causey, Sage Financial Group, LLC, Sage Private Equity Group, Secured Asset Factoring Exchange, Inc., Digics, Inc., Sage Funding, L.P. and Christopher Pitcock as of the date of the entry of this Order; and, it is

FURTHER ORDERED that these Defendants shall retain substitute counsel who shall enter an appearance with the Court within thirty (30) days from the date of this Order; and it is

FURTHER ORDERED that the Clerk of Court shall note that this matter shall not be called for trial before May 1, 2016.

AND IT IS SO ORDERED.

William H. Seals, Jr., JUDGE
Fifteenth Judicial Circuit

_____, 2016
Conway, South Carolina

000554

Appendix 00562

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
at O'clock & min M
APR 17 2003

BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (1)

IN RE:

John F. Swilley, a/k/a
Floyd Swilley,

Debtor.

Shadow Factory Films Ltd., Co.,
an Oklahoma Limited Liability Company,

Plaintiff,

v.

John F. Swilley, a/k/a
Floyd Swilley

Defendant.

C/A No. 02-09234-W

Adv. Pro. No. 02-80347-W

ENTERED
APR 17 2003
R. S. S.

ORDER

Chapter 7

THIS MATTER comes before the Court upon the Motion for Summary Judgment (the "Motion") filed by Shadow Factory Films Ltd., Co. ("Plaintiff"). Plaintiff urges the Court to apply the principles of res judicata, collateral estoppel, or judicial estoppel to bar John F. Swilley ("Debtor" or "Defendant") from asserting that the debt arising from prior litigation with Plaintiff is dischargeable. With Defendant thus estopped, Plaintiff asks the Court to grant its Motion pursuant to Federal Rule of Bankruptcy Procedure 7056 and declare that the debt at issue is excepted from discharge pursuant to 11 U.S.C. §523(a)(2) and §523(a)(4).¹ In response, Defendant argues that res judicata does not apply in this case because the judgment resolved a tort action and not the issue of dischargeability. Defendant also argues that collateral estoppel cannot be applied because the prior

¹ Further references to the Bankruptcy Code shall be by section number only.

judgment does not contain an actual finding of fraud and because there is no unity of parties. Finally, Defendant argues that the District Court for the Western District of Oklahoma lacked jurisdiction to consider the dischargeability of the debt because only bankruptcy courts can decide this issue. After considering the pleadings filed in the adversary proceeding, the attached materials from the prior litigation presented in support of the Motion, and counsel's arguments, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52, applicable in bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7052.²

FINDINGS OF FACT

1. On December 29, 2000, Plaintiff filed a Complaint against Defendant, Protocol Asset Management Trust, Laurel Knuckles ("Ms. Knuckles"), Antony Abirached, A. Abira Financial Associated Ltd., and Loli Trade & Finance Establishment, Ltd in the United States District Court for the Western District of Oklahoma (the "Oklahoma litigation"). Generally, the Oklahoma litigation arose from a dispute concerning a venture capital agreement whereby the above-listed defendants agreed to lend or participated in an agreement to lend Plaintiff \$125,000,000 over a ten year period.
2. On March 7, 2002, Defendant, in both an individual capacity and as Trustee for Protocol Asset Management Trust, and Ms. Knuckles executed a Settlement Agreement (the "Settlement Agreement") with Plaintiff to resolve the Oklahoma litigation. In the Settlement Agreement, the parties stipulate to three initial points. First, they agree that Plaintiff's causes of action include a

² The Court notes that, to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and, to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

claim for money acquired by false pretenses, false representation or actual fraud, fraud and defalcation while acting in a fiduciary capacity, embezzlement, and larceny. Next, the parties stipulate that they seek to settle all claims asserted or that could have been asserted in the Oklahoma litigation. Finally, the defendants stipulate "that one or more of Plaintiff's claims are of such character and nature that they cannot be discharged in bankruptcy."

3. Based upon these initial stipulations in the Settlement Agreement, the parties then agree to have a judgment entered against Defendant, Ms. Knuckles, and Protocol Asset Management Trust, jointly and severally, in the amount of \$300,000 on Plaintiff's claims that are not dischargeable in bankruptcy. The Settlement Agreement provides that the journal entry of the judgment shall reflect that the pleadings in the Oklahoma litigation are deemed to have been amended to assert claims of such character and nature that they cannot be discharged in bankruptcy. The Settlement Agreement then provides that the journal entry of judgment shall "recite agreement and stipulation of the Parties and a factual finding by the Court that, *inter alia*, the judgment is entered on one or more of those claims that are of such character and nature that they cannot be discharged in bankruptcy and that as a result thereof the judgment is not dischargeable in bankruptcy."

4. On March 8, 2002, Plaintiff, Defendant, and Ms. Knuckles participated in a settlement conference before the Honorable Magistrate Gary Purcell of the United States District Court for the Western District of Oklahoma. Judge Purcell thoroughly reviewed the terms of settlement and announced his understanding of the parties' settlement on the record. Specifically, Judge Purcell stated that the parties agree to have findings and a judgment entered against Defendant, Ms. Knuckles, and Protocol Asset Management Trust, jointly and severally, on Plaintiff's claims that are not dischargeable in bankruptcy in the amount of \$300,000. Judge Purcell also indicated that the

parties agree that any pleadings should be amended to assert claims that cannot be discharged in bankruptcy, and he found that it was clear that the agreement anticipates that no part of the judgment is capable of being discharged in bankruptcy.

5. During the settlement conference, Judge Purcell asked Defendant and his counsel if they understood and agreed to the terms of the Settlement Agreement. Both Defendant and his counsel responded affirmatively. Defendant also indicated that he was not threatened or forced to enter into the Settlement Agreement.

6. On March 11, 2002, the Honorable Stephen P. Friot, United States District Judge for the Western District of Oklahoma, entered the Journal Entry of Judgment (the "Oklahoma Judgment") resolving the Oklahoma litigation. The court recognized that Defendant, Ms. Knuckles, and Protocol Asset Management Trust stipulated to certain facts, and, based upon these facts, the court found that the claims Plaintiff asserted against them were of such character and nature that they cannot be discharged in bankruptcy. The court further found that, to the extent the pleadings were ambiguous, the court deemed them amended to assert claims of such nature and character that they cannot be discharged in bankruptcy. The court then entered the Oklahoma Judgment against Defendant and Ms. Knuckles on one or more of the nondischargeable claims and accordingly held that the Oklahoma Judgment was excepted from discharge. The Court entered a judgment against Defendant, Ms. Knuckles, and Protocol Asset Management Trust, jointly and severally, in the amount of \$300,000. Attorneys for Plaintiff and Defendant, Ms. Knuckles, and Protocol Asset Management Trust provided consensual signatures indicating that they agreed to and approved of the Oklahoma Judgment.

7. The Oklahoma Judgment is final, and there was no appeal of it.

000558

Appendix 00566

8. On August 5, 2002, Defendant filed his Voluntary Petition seeking Chapter 7 relief.

CONCLUSIONS OF LAW

A. Standard for Summary Judgment

Rule 56(e) of the Federal Rules of Civil Procedure, applicable to adversary proceedings under the Bankruptcy Code by Federal Rule of Bankruptcy Procedure 7056, provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. Summary judgment is appropriate "if the evidence is such that a reasonable jury could not return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In determining whether summary judgment is appropriate, the court must view all evidence in the light most favorable to the nonmoving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The moving party has the initial burden to show that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Celotex Corp v. Catrett, 477 U.S. 317, 332 (1986). Once this initial showing is made, the burden of production shifts to the nonmoving party. The nonmoving party must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324; see also Fed. R. Civ. P. 5(e). In meeting this burden, the nonmoving party "must do more than simply show that there is some metaphysical

doubt as to the material facts and must demonstrate there is a genuine issue for trial." Matsushita, 475 U.S. at 586-87; see also Campbell v. Deans (In re J.R. Deans Co.), 249 B.R. 121, 128 (Bankr. D. S.C. 2000) (quoting Dunes Hotel Assoc. v. Hyatt Corp. (In re Dunes Hotel Assoc.), 194 B.R. 967, 976 (Bankr. D. S.C. 1995)) ("[T]he party opposing summary judgment may not merely rely on his pleadings but must set forth specific facts which controvert the moving party's facts and which show the existence of a genuine issue for trial."). The Court should grant summary judgment "against a party who fails to make a showing sufficient to establish the evidence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Dunes Hotel Assoc., 194 B.R. at 976 (citing Celotex, 477 U.S. at 322).

B. Application of the Summary Judgment Standard to the Motion

Res judicata

Res judicata is a broad principle that prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding. See Brown v. Felson, 442 U.S. 127, 131 (1979); In re The Roof Doctor, C/A No. 97-01648-W, slip op. at 3 (Bankr. D. S.C. Aug. 26, 1998) (citing In re Varat Enterprises, Inc., 81 F.3d 1310 (4th Cir. 1996)). The elements of res judicata are the following: (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits. See Grausz v. Englander, 321 F.3d 467, 472 (4th Cir. 2003); Keith v. Aldridge, 900 F.2d 736, 739 (4th Cir. 1990). "On the merits" is a term of art and does not necessarily mean that the issues were actually litigated and is substantially different and broader than the "actually litigated" element of collateral estoppel.

000560

Appendix 00568

See Fed. Ins. Co. v. Gilson (In re Gilson), 250 B.R. 226, 236 (Bankr. E.D. Va. 2000). To determine whether the claim was previously available to a party in the earlier suit, the Fourth Circuit has adopted a transactional approach whereby it considers whether the roots of both actions arise from the same series of operative facts. See Grausz, 321 F.3d at 473; Keith, 900 F.2d at 739.³

In dischargeability proceedings, however, the use of res judicata is limited. In Felson, the Supreme Court held that bankruptcy courts are not confined to reviewing the judgment and record of a prior state court proceeding when considering the dischargeability of debt. See 442 U.S. at 139. The Court supported this conclusion by reasoning that allowing state courts to determine the dischargeability of a debt undercuts statutory policy that favors resolving dischargeability issues in bankruptcy courts. See id. at 136. Moreover, the Court questioned the merit of requiring parties to address dischargeability issues in state court and preserve them for subsequent determination by a bankruptcy court when the issues are not yet ripe because no bankruptcy case has been filed. See id. at 137; see also Tatge v. Tatge (In re Tatge), 212 B.R. 604, 608-09 (B.A.P. 8th Cir. 1997) (declining to apply res judicata to a prepetition state court judgment incorporating the parties' settlement agreement that classified debts as dischargeable and reasoning that, at the time of the decree, no bankruptcy petition had been filed and no cause of action under §523 existed). Accordingly, the Court held that bankruptcy courts could consider all the evidence, including a plaintiff's failure to pursue allegations of fraud and deceit during the prior state court proceeding, and look beyond the judgment and record of the prepetition state court proceeding to determine

³ The Court notes that, in Keith, the Fourth Circuit found that consent judgments can have preclusive effect if the parties intended to foreclose litigation of a claim through a settlement agreement. See 900 F.2d at 741; see also Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484, 487 (4th Cir. 1981).

whether a debt is excepted from discharge. See Felson, 442 U.S. at 139.

Felson effectively prohibits the blanket application of res judicata to prepetition state court determinations regarding the dischargeability of debts, and this principle has seemingly been applied to prepetition federal cases as well. See Gilson, 250 B.R. at 238. For example, in Strube Celery & Vegetable Co., Inc. v. Zois (In re Zois), 201 B.R. 501, 511 (Bankr. N.D. Ill. 1996), the bankruptcy court found that a federal district court's classification of a debt owed as nondischargeable was not res judicata as to the dischargeability of the debt. In Zois, the court reasoned that the district court lacked jurisdiction to reach this conclusion because, when it found that the debt was nondischargeable, no bankruptcy case had been filed. See also Coopers & Lybrand, Ltd. v. Gibbs (In re Gibbs), 107 B.R. 492, 497 (Bankr. D. N.J. 1989) (finding that a federal district court lacked subject matter jurisdiction to define a debt owed under a judgment as nondischargeable where no bankruptcy case had been filed). Moreover, the bankruptcy court found that the issue of dischargeability had not been litigated in the prior proceeding but was simply included in the language of the order. Cf. Saler v. Saler (In re Saler), 217 B.R. 166, 170 (E.D. Pa. 1998) (holding that a stipulation approved by a bankruptcy court that classified debts as excepted from discharge barred a redetermination of the issue of dischargeability in a subsequent bankruptcy case); Policemen's & Firefighters' Rel. Fund of Covington v. Tranter (In re Tranter), 245 B.R. 419, 420 (Bankr. S.D. Fla. 2000) (finding that a prior determination by a bankruptcy court that a debt was excepted from discharge was binding in another proceeding to except the same debt from debtor's discharge in debtor's subsequent bankruptcy case).

Based upon Felson's principles limiting the blanket application of res judicata to prepetition cases addressing the issue of dischargeability and because of other provisions of this Order, the Court

denies this aspect of Plaintiff's Motion. This Court is given the opportunity to look beyond the Oklahoma Judgment and the record of the Oklahoma litigation to decide whether Defendant's actions render his obligation excepted from discharge pursuant to §§523(a)(2) and (a)(4).

Collateral Estoppel

While the application of res judicata has been limited in dischargeability proceedings, the narrower concept of collateral estoppel can be applied more easily. See Grogan v. Garner, 498 U.S. 279, 285 n. 11 (1991); Pahlavi v. Ansari (In re Ansari), 113 F.3d 17, 19 (4th Cir. 1997). Collateral estoppel precludes relitigation of an issue decided previously in judicial or administrative proceedings provided the party against whom the prior decision was asserted enjoyed a full and fair opportunity to litigate that issue in an earlier proceeding. See Hagan v. McNallen (In re McNallen), 62 F.3d 619, 624 (4th Cir. 1995). When applying the principle of collateral estoppel, the Court typically looks to the forum state's law of collateral estoppel; however, this case deals with a prior judgment from a federal court. See McNallen, 62 F.3d at 624. In this situation, the Court must consider the principles of federal collateral estoppel. See Nestorio v. Associates Commercial Corp., 250 B.R. 50, 55 (D. Md. 2000); Shearer v. Dunkley (In re Dunkley), 221 B.R. 207, 212 (Bankr. N.D. Ill. 1998); Federal Trade Comm'n v. Harrell (In re Harrell), C/A No. 98-06980-W, Adv. Pro. No. 98-80266-W, slip op. at 8 (Bankr. D. S.C. Apr. 22, 1999). For federal collateral estoppel to apply, the proponent must establish the following elements: (1) the issue sought to be precluded is identical to one previously litigated; (2) the issue must have been actually determined in the prior proceeding; (3) determination of the issue must have been a critical and necessary part of the decision in the prior proceeding; (4) the prior judgment must be final and valid; and (5) the party against whom estoppel is asserted must have had a full and fair opportunity to litigate the issue in the previous forum. See

Sec. & Exch. Comm'n v. Zandford, 238 F.3d 559, 562 (4th Cir. 2001), rev'd on other grounds by 535 U.S. 813 (2002); Sedlack v. Braswell Services Group, Inc., 134 F.3d 219, 224 (4th Cir. 1998).

The undisputed material facts indicate that some of these elements are satisfied. First, there is no dispute as to the identity of issues. In the Oklahoma Judgment, the court considered allegations of acquiring money by false pretenses, false representation or actual fraud, fraud and defalcation while acting in a fiduciary capacity, embezzlement, and larceny, the presumptive grounds for a debt to be declared nondischargeable pursuant to §523(a)(2) and §523(a)(4), and the court found that the amount of the judgment was not dischargeable in bankruptcy. Likewise, the issue in this proceeding is whether the debt is excepted from discharge pursuant to §523(a)(2) and §523(a)(4). Second, the undisputed material facts also demonstrate that the Oklahoma Judgment is final and was not appealed. Third, the record of the Oklahoma litigation reflects that Defendant was represented by counsel and that he participated in a sophisticated legal setting in two levels of the Federal District Court for the Western District of Oklahoma. Moreover, the transcript of the Settlement Conference reflects that Judge Purcell meticulously reviewed and announced the terms of the Settlement Agreement and asked Defendant if he understood and agreed to the terms. Defendant clearly agreed to the terms and had a full and fair opportunity to defend against Plaintiff's causes of action.

There is a question whether the Oklahoma Judgment satisfies the actually determined element.⁴ The Oklahoma Judgment is a consent order that settles the Oklahoma litigation. Ordinarily, when a case is settled rather than litigated to a judgment, the settlement does not give rise to collateral estoppel unless it is clear that the parties intended the settlement to have such an effect.

⁴ Several cases refer to this element as "actually litigated." The Court will use actually litigated and actually determined synonymously.

See Arizona v. California, 530 U.S. 392, 414 (2000) ("[S]ettlements ordinarily occasion no issue preclusion (sometimes called collateral estoppel), unless it is clear . . . that the parties intended their agreement to have such an effect."); Halpern v. First Georgia Bank, 810 F.2d 1061, 1064 (11th Cir. 1987) ("[T]he central inquiry in determining the preclusive effect of a consent judgment is the intention of the parties as manifested in the judgment or other evidence."). Generally, courts have examined the parties' intent in two ways. One approach focuses on whether the settlement or consent judgment includes sufficient facts to support a finding that a debt is excepted from discharge. See, e.g. Levinson v. United States, 969 F.2d 260, 264 (7th Cir. 1992) (declining to apply collateral estoppel where the consent judgment did not include sufficient facts to support a finding that the debtor's fraud rendered the debt excepted from discharge); Halpern, 810 F.2d at 1064-65 (finding that the parties intended a prior state court consent order to operate as a final adjudication where the order included detailed factual findings sufficient to satisfy §523(a)(2)(A) as well as specific language providing that liability under the judgment will be excepted from discharge in any bankruptcy case); Gialino v. Detrano (In re Detrano), 266 B.R. 282, 291 (E.D. N.Y. 2001) (affirming the bankruptcy court's decision to decline to apply collateral estoppel where the settlement order did not contain stipulated facts that would establish that a debt was nondischargeable under §523(a)(4)); Kohlenberg v. Baumhaft (In re Baumhaft), 271 B.R. 517, 522-23 (Bankr. E.D. Mich. 2001) (applying collateral estoppel and granting summary judgment where the settlement agreement related to a consent judgment listed specific facts allowing the court to conclude a debt was excepted from discharge pursuant to §523(a)(2)(A) and (B) and where the agreement provided that the parties would not object to the dischargeability of the debt in any subsequent bankruptcy proceeding); Mustaine v. Kennedy (In re Kennedy), 243 B.R. 1, 12 (Bankr. W.D. Ky. 1997) (finding that the

consent order did not manifest an intent for the judgment to be conclusive where the judgment at issue was a blanket entry of judgment on the fraud counts of a complaint and contained no discussion of culpability); Estate of Samson v. Ward (In re Ward), 194 B.R. 53, 58 (Bankr. D. S.C. 1995) (denying summary judgment motion because the form order entered resolving a trial after the parties reached a settlement was silent as to the exact terms of settlement or the basis for the judgment but suggesting that collateral estoppel could be appropriate if the evidence indicated that a party confessed to committing a particular type of fraud or defalcation that would preclude discharge); Pasada Del Rey v. Pearson (In re Pearson), 120 B.R. 396, 399 (Bankr. N.D. Tex. 1990) (declining to apply collateral estoppel because there were insufficient facts in the consent order to establish that the debt was excepted from discharge); Fisher v. Heatly (In re Fisher), C/A No. 92-73995, Adv. Pro. No. 92-8250, slip op. at 8 (Bankr. D. S.C. Feb. 1, 1993) ("Without the legal basis for the court's findings or a discussion or record of the elements constituting the plaintiff's burden of proof, this Court is unable to determine whether the plaintiff in the state court proved and whether that court properly considered the elements and issues of fraud as are required for a finding of non-dischargeability pursuant to 11 U.S.C. section 523. Therefore, the issues raised by 11 U.S.C. section 523(a)(2) and this lawsuit were not actually litigated."); see also Nissan v. Weiss (In re Weiss), 235 B.R. 349, 358-59 (Bankr. S.D. N.Y. 1999), aff'd by 255 B.R. 115 (S.D. N.Y. 2000) (finding that a confession of judgment satisfied the actually litigated requirement and applied collateral estoppel to find that the debts at issue in the judgment were excepted from discharge where the confession of judgment represented a confession to each claim in the complaint, including fraud and breach of fiduciary duty). Other courts review prior consent or settlement orders to determine if it is clear that the parties intended the prior litigation to have a collateral estoppel effect. Courts using this

000566

Appendix 00574

approach have applied collateral estoppel even if the prior judgment does not contain specific stipulated or court-found facts to support a conclusion that a debt would be excepted from discharge pursuant to §523. See, e.g., Peoples Bank of Dickson v. Duke (In re Duke), 172 B.R. 575, 579 (M.D. Tenn. 1994) (applying collateral estoppel to bar the debtor from arguing that her debt at issue was discharged when she asserted in a prior criminal matter that the debt would be excepted from discharge); Doughty v. Hill (In re Hill), 265 B.R. 270, 279 (Bankr. M.D. Fla. 2001) (concluding that a consent judgment without specific factual findings but with a specific stipulation to an amount of fraud damages satisfied the actually litigated element in a subsequent proceeding regarding dischargeability); Buglione v. Berlingeri (In re Berlingeri), 246 B.R. 196, 201 (Bankr. D. N.J. 2000) (applying collateral estoppel to a prior settlement order declaring that certain debts arising from a divorce proceeding would be excepted from discharge where it was evident the parties intended to settle an intentional tort claim and intended the settlement to survive a bankruptcy discharge); Smith v. Smith (In re Smith), 189 B.R. 240, 244 (Bankr. D. N.H. 1995) (declining to apply collateral estoppel because the prior judgment contained neither findings that the court could rely on to determine dischargeability or a statement indicating that the judgment would be excepted from discharge); Smith v. Beeson (In re Smith), 128 B.R. 488, 491 (Bankr. S.D. Fla. 1991) (finding the issue of the debtor's fraud was sufficiently litigated in the prior state court proceeding to invoke collateral estoppel from language in the settlement agreement treating the judgment against the debtor as excepted from discharge).

Upon reviewing the Oklahoma Judgment, the Settlement Agreement, and the settlement conference transcript, the Court concludes that the parties clearly intended the Oklahoma Judgment to have preclusive effect as to the dischargeability of the amount owed under the judgment. The

language of the Oklahoma Judgment is unequivocal and thoroughly describes the judgment amount as nondischargeable, and the language is much more than a mere statement that the debt would be excepted from discharge. Cf. Klingman v. Levinson, 831 F.2d 1292, 1296 (7th Cir. 1987) (finding that language in a consent decree providing that the debt at issue would not be dischargeable in a bankruptcy proceeding illustrated the parties' intent for the decree to have preclusive effect). Indeed, the Oklahoma Judgment indicates that the parties intended to conclusively resolve the issue of dischargeability by agreeing that (1) the pleadings are deemed amended to assert claims that cannot be discharged in bankruptcy, (2) the Oklahoma Judgment is entered on one or more of the claims that are of such character and nature that they cannot be discharged in bankruptcy, (3) the Oklahoma Judgment is based upon a factual finding by the Court, and (4) the Oklahoma Judgment is not dischargeable in bankruptcy. Moreover, during the settlement conference, Judge Purcell carefully reviewed all of the terms of the Settlement Agreement, and he asked the parties whether they agreed to and understood these terms, including terms that indicated the judgment would be based upon factual findings. Defendant clearly acknowledged that he willingly accepted the terms, including the provisions concerning the nondischargeability of the debt. To this Court, the settlement materials clearly illustrate that the parties intended the Oklahoma Judgment to be the final resolution of the dispute, including the future dischargeability of the debt, and this Court will honor and enforce that intent. While the Oklahoma Judgment does contain a detailed enumeration of findings of fact, this step is not necessary when it is clear that the Oklahoma court relied on the factual basis that Defendant, Ms. Knuckles, and Protocol Asset Management Trust acknowledged and stipulated to prior to the entry of the Oklahoma Judgment in finding that the debt it represents would be excepted from discharge. In other words, the Oklahoma Judgment is based on factual findings that were

agreed upon and established in an unappealed order and record. For these reasons, the Court finds that the Oklahoma Judgment satisfies the actually litigated element of collateral estoppel.⁵

The Court also finds that the issue of dischargeability was a necessary part of the Oklahoma litigation. The original complaint includes specific allegations of acquiring money under false pretenses, false representation or actual fraud, fraud and defalcation while acting in a fiduciary capacity, embezzlement and larceny, and the Oklahoma court and the settlement materials recognize these allegations and buttress them further by a specific provision amending the complaint to ensure the allegations are pled sufficiently to support a finding of nondischargeability. This specificity leads the Court to conclude that the determination that the elements of §523(a)(2) and §523(a)(4) on which the Oklahoma Judgment was found to be nondischargeable were a necessary part of the proceeding. See Nissan v. Weiss (In re Weiss), 235 B.R. 349, 359 (Bankr. S.D. N.Y. 1999), aff'd by 255 B.R. 115 (S.D. N.Y. 2000).

For the above stated reasons, the Court concludes that all of the elements of federal collateral estoppel are satisfied. Accordingly, the Court applies the principle to bar Defendant from arguing

⁵ Although the Court's prior cases involving collateral estoppel in the context of a dischargeability proceeding are slightly different from the case at bar, the finding that the Oklahoma Judgment was actually litigated is consistent with rulings in prior cases. For example, the Court previously applied collateral estoppel to default judgments where the judgments resulted in implicit findings satisfying the elements of subsections of §523. See, e.g., Stroud v. Read (In re Read), C/A No. 98-08285-W, Adv. Pro. No. 98-80295-W, slip op. at 9-10 (Bankr. D. S.C. Jul. 1, 1999); Brown v. Evans (In re Evans), C/A No. 98-05148-W, Adv. Pro. No. 98-80212-W, slip op. at 11 (Bankr. D. S.C. Apr. 26, 1999); Fed. Trade Comm'n v. Harrell (In re Harrell), C/A No. 98-06980-W, Adv. Pro. No. 98-80266-W, slip op. at 15 (Bankr. D. S.C. Apr. 23, 1999). Arguably, a default judgment is less "actually litigated" than a settlement or consent order that both parties participate in drafting and then in presenting to a court for approval. Further, the Court has previously held that a prior judgment could clearly establish that a punitive damages award was based upon actions that were willful and malicious without making specific findings of willfulness or maliciousness. See Read, at 6.

that the debt represented by the Oklahoma Judgment is dischargeable and grants Plaintiff's Motion.

Judicial Estoppel

"Judicial estoppel precludes a party from adopting a position that is inconsistent with a stance taken in prior litigation. The purpose of the doctrine is to prevent a party from playing fast and loose with the courts, and to protect the essential integrity of the judicial process." John S. Clark Co. v. Faggert & Frieden, P.C., 65 F.3d 26, 28-29 (4th Cir. 1995); see also In re Brown, C/A No. 01-12506-B, slip op. at 5-6 (Bankr. D. S.C. Jun. 4, 2002); Dunes Hotel Associates v. Hyatt Corp. (In re Dunes Hotel Associates), C/A No. 94-75715-W, Adv. Pro. No. 95-8042-W, slip op. at 8-9 (Bankr. D. S.C. Feb. 12, 1997). "Acting on the assumption that there is only one truth about a given set of circumstances, the courts apply judicial estoppel to prevent a party from benefitting itself by maintaining mutually inconsistent positions regarding a particular situation. As we have previously observed, the doctrine is invoked to prevent a party from 'playing fast and loose with the courts,' from 'blowing hot and cold as the occasion demands,' or from attempting 'to mislead the courts to gain unfair advantage.'" King v. Herbert J. Thomas Mem'l Hosp., 159 F.3d 192, 196 (4th Cir. 1998). "Because the rule is intended to prevent improper use of judicial machinery, judicial estoppel is an equitable doctrine invoked by a court at its discretion." 1000 Friends of Maryland v. Browner, 265 F.3d 216, 226 (4th Cir. 2001).

In the Fourth Circuit, there is no specific formula for applying judicial estoppel; however, the presence of the following factors is generally required: (1) the party to be estopped must be asserting a position that is factually incompatible with a position taken in a prior judicial or administrative proceeding and the position sought to be estopped must be one of fact rather than law or legal theory; (2) the prior inconsistent position must have been accepted by the tribunal; and (3)

the party to be estopped must have taken inconsistent positions intentionally for the purpose of gaining unfair advantage. See 1000 Friends, 265 F.3d at 226-27; Lowery v. Stovall, 92 F.3d 219, 224 (4th Cir. 1996); Dunes Hotel, at 9. Of these factors, the third is the most critical. See Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co., 232 F.3d 383, 390 (4th Cir. 2000) (citing Lowery, 92 F.3d at 224). Judicial estoppel, however, will not be applied where the party's inconsistent positions results from inadvertence or mistake. See King, 159 F.3d at 196-97.

In this case, the inconsistent position is that Defendant previously agreed to settlement terms and the entry of the Oklahoma Judgment based upon his stipulation and agreement to facts that rendered that debt excepted from discharge. Now, only a few months after consenting to the Oklahoma Judgment, Defendant attempts to deny this prior position, reject these facts, and argue that the Oklahoma Judgment is dischargeable. The elements are present to invoke judicial estoppel as Defendant asserts an inconsistent factual position that was accepted by the Oklahoma federal court during the settlement conference and by entry of the Oklahoma Judgment. While it has been held that judicial estoppel does not apply to the settlement of an ordinary civil suit because there is no judicial acceptance of anyone's position, in this case the federal court undertook a thorough effort to ensure the judgment was voluntary, complete and fully agreeable and therefore, there is sufficient judicial acceptance. See Lowery, 92 F.3d at 225 and Reynolds v. Commissioner of Internal Revenue, 861 F.2d 469, 473 (6th Cir. 1988). Moreover, these inconsistent positions are an attempt to gain an unfair advantage as Defendant previously resolved litigation, which sought a recovery of \$125,000,000 against him, for a significantly lesser amount conditioned upon its nondischargeability. In March 2002, Defendant adopted one position on dischargeability and less than five months later upon his filing bankruptcy, he argues a directly contrary position. In similar circumstances, other

courts applied judicial estoppel in the bankruptcy context to bar a debtor who previously agreed that certain debts were excepted from discharge from subsequently asserting that the debts were dischargeable. See Dunkley, 221 B.R. at 213 (applying judicial estoppel to bar the debtor from adopting the inconsistent legal position that debts incurred pursuant to his divorce or separation were dischargeable when the debtor had, in a prior bankruptcy case, entered into a stipulated settlement order that treated the debt as excepted from discharge); see also In the Matter of Cassidy, 892 F.2d 637, 642 (7th Cir. 1990) (applying judicial estoppel to bar the debtor from relitigating the issue of the dischargeability of his tax debts where the debtor previously urged the Seventh Circuit Court of Appeals to address the issue of discharge of his tax debts on appeal after his Tax Court proceeding, but, after receiving a ruling that the tax debts were excepted from discharge, the debtor returned to the bankruptcy court and argued that the Tax Court lacked jurisdiction to consider dischargeability). Likewise, because Defendant's position in the Oklahoma litigation was unequivocal and relied upon by Plaintiff and the court and he has now entirely reversed his position, this Court applies judicial estoppel in this case to bar Defendant from asserting that the underlying facts supporting the Oklahoma Judgment are insufficient to establish that the debt represented by the Oklahoma Judgment is excepted from discharge pursuant to §523(a)(2) and §523(a)(4). The Court has serious concerns about what appears to be Defendant's manipulation of the judicial process, and it will not countenance such gamesmanship.⁶

CONCLUSION

For the above stated reasons, the Court grants Plaintiff's Motion and

⁶ The Court also believes equitable estoppel or promissory estoppel may be additional principles that bar Defendant from disputing the agreed-upon facts supporting the determination that the debt represented by the Oklahoma Judgment is excepted from discharge.

000572

Appendix 00580

ORDERS that the debt Defendant owes represented by the Oklahoma Judgment is excepted from discharge pursuant to §523(a)(2) and §523(a)(4).

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
April 17, 2003.

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Appendix 00581

RECEIVED
JUL 28 2017
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the 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

Case No. 2014-CP-26-8367 (Formerly 2013-CP-26-2816)

Appellate Case No. 2016-001328

Gabriel Barnhill & 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, J. Floyd Swilley SMG Partners, LLC, Alicia A. Piner, Heath Causey, Sage Advisory Group, L.P., Sage Private Equity Group, Secured Asset Factoring Exchange, Inc., SAFE, Inc., Digics, LLC, 9-1-1, Plumbing, LLC, and Sage Funding, L.P., Christopher Pitcock, Defendants,

Of Whom J. Floyd Swilley and Laurel K. Swilley and Heath Wendell

Causey are the
Appellants

SUPPLEMENT TO AMENDED RECORD ON APPEAL PURSUANT ORDER OF JULY 12, 2017

Appendix 00582

THE STATE OF SOUTH CAROLINA

In the 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

Case No. 2014-CP-26-8367 (Formerly 2013-CP-26-2816)

Appellate Case No. 2016-001328

Gabriel Barnhill & 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, J. Floyd Swilley SMG Partners, LLC, Alicia A. Piner, Heath Causey, Sage Advisory Group, L.P., Sage Private Equity Group, Secured Asset Factoring Exchange, Inc., SAFE, Inc., Digics, LLC, 9-1-1, Plumbing, LLC, and Sage Funding, L.P., Christopher Pitcock, Defendants,

Of Whom J. Floyd Swilley and Laurel K. Swilley and Heath Wendell

Causey are the
Appellants

SUPPLEMENT TO AMENDED RECORD ON APPEAL PURSUANT ORDER OF JULY 12, 2017

Appendix 00583

TABLE OF CONTENTS

SUPPLEMENT TO AMENDED RECORD ON APPEAL PURSUANT ORDER OF JULY 12, 2017

In order to supplement the Amended Record on Appeal pursuant the Order of the Honorable Court and to accommodate the requested changes of the parties the following Supplement to Amended Record on Appeal is submitted.

1. Certificate of Service for Order Signed by Judge William H. Seals, Jr. 9/8/15	0001
<i>Supplements Item No.7 p.23</i>	
2. Certificate of Service for Answer to Counterclaim 8/2/13	0003
<i>Supplements Item No. 15 p.92</i>	
3. Certificate of Service by F. Miles Adler 10/28/13	0004
<i>Supplements Item No. 17 p. 97</i>	
4. Certificate of Service for Motion and Motion to Compel 1/9/14	0005
<i>Supplements Item No. 18 p. 112</i>	
5. Certificate of Service for Notice of Motion to Consolidate 2/3/15	0007
<i>Supplements Item No. 28 p. 333</i>	
6. Plaintiff's Motion for Sanctions November 4, 2013	0008
<i>Replaces Amended Record on Appeal No. 17 at page 99</i>	
7. Motion For Sanctions June 27, 2014	0016
<i>Supplements Original Motion by adding COS and Coversheet Item 21 P. 132</i>	

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Gabriel Barnhill and GSB Enterprises,
LLC,

Plaintiffs,

vs.

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,

Defendants.

Gabriel Barnhill and GSB Enterprises,
LLC,

Plaintiffs,

vs.

J. Floyd Swilley, J. Floyd Swilley
SMG Partners, LLC, SMS Services, LP,
William C. Piner, WCP Limited, LLC,
Alicia A. Piner, 809 Holdings, LP,
Heath Causey, Sage Financial Group,
LLC, Sage Advisory Group, L.P.,
Sage Private Equity Group,
Secured Asset Factoring Exchange, Inc.,
SAFE, Inc., Digics, LLC, 9-1-1, Plumbing,
LLC, and Sage Funding, L.P.,
Christopher Pitcock,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2014-CP-26-08367
(formerly 2013-CP-26-02816)

CERTIFICATE OF SERVICE

CASE NO. 2014-CP-26-3362

HORRY COUNTY
2015 SEP 10 PM 1:00
CLERK OF COURT

I, Sally J. Huffman, Legal Assistant, do hereby certify that I am an employee of Nate Fata, P.A., Counsel for Plaintiffs Gabriel Barnhill and GSB Enterprises, LLC and that on

September 8, 2015 I did serve a copy of the "Order" signed by Judge William H. Seals, Jr.

Counsel for Defendants by mailing a copy of the same postage prepaid to:

John M. Leiter, Esq.

Law Offices of John M. Leiter, PA

1203 48th Avenue, North, Ste. 109

Myrtle Beach, SC 29577

Counsel for J. Floyd Swilley, J. Floyd Swilley Investment Advisors,

Laurel K. Swilley, SMG Partners, LLC, SMS Services, LP,

William C. Piner, WCP Limited, LLC, Alicia A. Piner,

Heath Causey, Sage Financial Group, LLC, Sage Advisory Group, LP

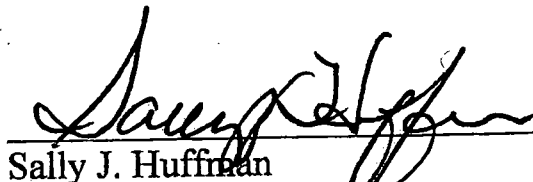
Sage Private Equity Group and Secured Asset Factoring Exchange, Inc.

Mark D. Neill, Esq.

P.O. Box 2810

Murrells Inlet, SC 29576

Counsel for 809 Holdings, LP



Sally J. Huffman

Legal Assistant to Nate Fata, P.A.

000002

Appendix 00586

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2013-CP-26-2816

Gabriel Barnhill and GSB Enterprises,
LLC,

Plaintiffs,

vs.

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,

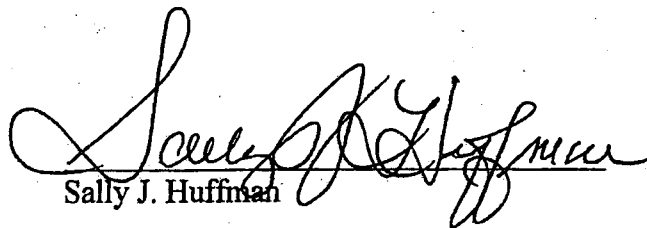
Defendants.

CERTIFICATE OF SERVICE

FILED
HORRY COUNTY
2013 AUG -5 PM 2:23
MELANIE HUGGINS-WARD
CLERK OF COURT

I, Sally J. Huffman, Legal Assistant, do hereby certify that I am an employee of Nate Fata, P.A., Counsel for Plaintiffs Gabriel Barnhill and GSB Enterprises, LLC and that on August 2, 2013 I did serve a copy of Plaintiffs' Answer To Counterclaim by mailing a copy of the same postage prepaid to:

F. Miles Adler, Esq.
The Adler Law Firm
P.O. Box 4743
Pawleys Island, SC 29484
Counsel for Defendants


Sally J. Huffman

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Gabriel Barnhill and GSB Enterprises, LLC,

Plaintiffs,

vs.

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,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT
Case No.: 2013-CP- 26 – 2816

CERTIFICATE OF SERVICE

13 OCT 11 PM 1:43
CLERK OF COURT
CLOCK IN THE CANCELLED

This is to certify that I, F. Miles Adler have caused to be served on counsel of record by causing copies of same to be deposited in the United States Mail, proper postage prepaid, this 28th day of October, 2013 addressed as follows:

FATA LAW FIRM
1500 Hwy 17 North – Suite 215
Surfside Beach, SC 29575

FILED
HORRY COUNTY
13 DEC 11 AM 11:38
MELANIE HUGGINS-WARD
CLERK OF COURT

October 28, 2013
Pawleys Island, South Carolina


F. Miles Adler

000004

Appendix 00588

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Gabriel Barnhill and GSB Enterprises,
LLC,

Plaintiffs,

vs.

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,

Defendants.

) IN THE COURT OF COMMON PLEAS
)
) FIFTEENTH JUDICIAL CIRCUIT
)
) CASE NO. 2013-CP-26-2816

CERTIFICATE OF SERVICE

NOTED COUNTY
14 JAN 10 PM 2:04
CLERK OF COURT

I, Sally J. Huffman, Legal Assistant, do hereby certify that I am an employee of Nate Fata, P.A., Counsel for Plaintiffs Gabriel Barnhill and GSB Enterprises, LLC and that on January 9, 2014 I did serve a copy of Plaintiff's Notice of Motion and Motion To Compel J. Floyd Swilley Investment Advisors, SMG Partners, LLC, WCP Limited, LLC, 809 Holdings, LP, SMS Services, LP, and Sage Financial Group, LLC by mailing a copy of the same postage prepaid to:

J. Floyd Swilley
350 Hilton Road, Suite 100
Myrtle Beach, SC 29572

Laurel K. Swilley
1317 3rd Avenue, Suite B
Conway, SC 29526

William C. Piner
606 Calhoun Road
Myrtle Beach, SC 29577

Heath Causey
350 Hilton Road, Suite 100
Myrtle Beach, SC 29572

J. Floyd Swilley Investment Advisors
350 Hilton Road, Suite 100
Myrtle Beach, SC 29572
Attn: J. Floyd Swilley

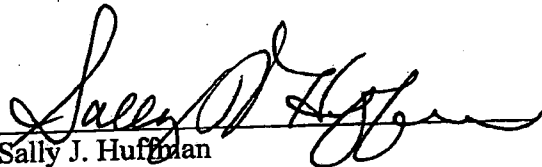
SMG Partners, LLC
350 Hilton Road, Suite 100
Myrtle Beach, SC 29577

Sage Financial Group, LLC
350 Hilton Road, Suite 100
Myrtle Beach, SC 29572
Attn: J. Floyd Swilley

SMS Services, LP
350 Hilton Road, Suite 100
Myrtle Beach, SC 29572
Attn: Heath Causey

WCP Limited, LLC
606 Calhoun Road
Myrtle Beach, SC 29577
Attn: William C. Piner

809 Holdings, LP
1317 3rd Avenue, Suite B
Conway, SC 29526
Attn: Laurel K. Swilley


Sally J. Huffman

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Appendix 00590

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Gabriel Barnhill and GSB Enterprises,
LLC,

Plaintiffs,

vs.

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,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2014-CP-26-08367
(Formerly 2013-CP-26-02816)

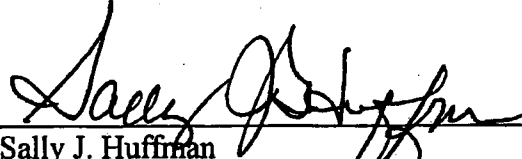
CERTIFICATE OF SERVICE

FILED
HORRY COUNTY
15 APR 27 PM 12:24
KELLY HOGANS-WARD
CLERK OF COURT

I, Sally J. Huffman, Legal Assistant, do hereby certify that I am an employee of Nate Fata, P.A., Counsel for Plaintiffs Gabriel Barnhill and GSB Enterprises, LLC and that on February 12, 2015 I did serve a copy of Plaintiffs Notice of Motion and Motion to Consolidate upon Counsel for Defendants by mailing a copy of the same postage prepaid to:

John M. Leiter, Esq.
Law Offices of John M. Leiter, PA
1203 48th Avenue, North, Ste. 109
Myrtle Beach, SC 29577
Counsel for Defendants

Jarrett S. Calder, Esq.
Grand Strand Law Group, LLC
P.O. Box 3237
Myrtle Beach, SC 29578
Counsel for 9-1-1 Plumbing, LLC


Sally J. Huffman
Legal Assistant to Nate Fata, P.A.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2013-CP-26-2816

Gabriel Barnhill and GSB Enterprises,
LLC,

Plaintiffs,

vs.

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,

Defendants.

PLAINTIFFS' NOTICE OF
MOTION AND MOTION FOR
SANCTIONS FOR DEFENDANTS'
FAILURE TO COMPLY WITH
DISCOVERY ORDER

13 NOV - 4 PM 1:50
MELANIE HUGGINS - WARD
CLERK OF COURT

TO: Defendants J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K. Swilley, SMG Partners, LLC, SMS Services, L.P., William C. Piner, WCP Limited, LLC, 809 Holdings, LP, Heath Causey and Sage Financial Group, LLC, and their Counsel:

YOU WILL PLEASE TAKE NOTICE that Plaintiffs, Gabriel Barnhill and GSB Enterprise, LLC, by and through their attorney, Nate Fata, will move this Honorable Court within ten (10) days after service hereof or as soon thereafter as counsel may be heard for an Order entering the appropriate relief against Defendants J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K. Swilley, SMG Partners, LLC, William C. Piner, WCP Limited, LLC, 809 Holdings, LP, SMS Services, LP, Heath Causey and Sage Financial Group, LLC for failure to comply with the Court's Order filed on September 20, 2013.

The Plaintiffs by and through their attorney, Nate Fata, pursuant to South Carolina Rule of Civil Procedure 37, in support of their Motion, state as follows:

1. The Court ordered full and complete responses to the Plaintiffs' discovery requests by Order filed on September 20, 2013. The discovery requests were served in April, 2013.

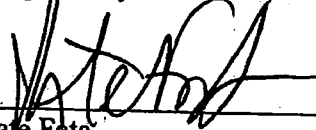
2. The Defendants have not provided full and complete responses, as outlined in counsel's letter dated October 21, 2013, a copy of which is attached as Exhibit "A".

3. Defendants' responses do not comply with the Court's Order filed on September 20, 2013. The responses are incomplete. Clearly relevant, responsive materials such as tax returns have not been provided.

4. The Court should strike the Answer of Defendants, award attorney fees and costs and enter all other appropriate relief.

WHEREFORE, Plaintiffs, Gabriel Barnhill and GSB Enterprises, LLC, request that this Court enter an Order striking the Answer of Defendants J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K. Swilley, SMG Partners, LLC, William C. Piner, WCP Limited, LLC, SMS Services, LP, and Heath Causey, enforcing the September 20, 2013 Order, awarding reasonable attorney fees in connection with this Motion and hearing, and granting all other appropriate relief pursuant to Rule 37, SCRPC.

Respectfully submitted,



Nate Fata

NATE FATA, P.A.

Attorney for Plaintiffs

P. O. Box 16620

1500 U.S. Hwy. 17 N., Suite 215

Surfside Beach, SC 29587

Tel. (843) 238-2676

Fax (843) 238-0240

Surfside Beach, South Carolina
October 31, 2013

EXHIBIT

A

000010

Appendix 00594

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NATE FATA, P.A.
ATTORNEY AT LAW

P.O. Box 16620
THE COURTYARD, SUITE 215
SURFSIDE BEACH, SOUTH CAROLINA 29587
TELEPHONE (843) 238-2676
TELECOPIER (843) 238-0240
NFATA@FATALAW.COM

VIA EMAIL

October 21, 2013

F. Miles Adler, Esq.
The Adler Law Firm
P.O. Box 4743
Pawleys Island, SC 29484
miles@theadlerlawfirm.com

Re: Gabriel Barnhill and GSB Enterprises, LLC vs. J. Floyd Swilley, et al.
Civil Action No. 2013-CP-26-2816

Dear Miles:

I am in receipt of the Defendants' Responses to Interrogatories and Requests For Production. The responses do not comply with the Court's Order filed on September 20, 2013. Under the Order, the Defendants were to provide responsive documents and complete responses to all Interrogatories and Request For Production of Documents which are the subject of the Motion to Compel no later than October 15, 2013. Instead, I received incomplete answers and a myriad of objections. The time to object to any of the Interrogatories was prior to the hearing. I am addressing some of the incomplete and inadequate responses below.

Interrogatories

Interrogatory 1. Addresses have not been provided. Please provide a complete address so that subpoenas may be sent.

Interrogatory 5. No summary sufficient to inform the Plaintiffs of the important facts known or observed by the witnesses have been provided. The phrase "actions of Plaintiffs relative to QC Pawn" or "inventory issues relative to QC Pawn" do not provide any important facts known or observed by the witness. Please provide complete answers to the Interrogatory.

Interrogatory 6. No disclosure of any amounts provided to 809 Holdings, LLP by Defendants Piner, Atkinson, Swilley have been disclosed. If any Defendants made any

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Appendix 00595

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"investments" into 809 Holdings or QC Financing, please disclose the same in accordance with the Interrogatory.

Interrogatory 7. A complete answer has not been provided. Please review the Interrogatory and provide the amount of compensation and responsibilities for each Defendant relating to QC Financing or 809 Holdings. For example, and not by way of limitation, what was Sage Tax's arrangement and how much was it paid?

Interrogatory 11. (Second Number 11). The number of persons who invested in 809 Holdings and their investment amounts are all included in response to Interrogatory 9. However, Interrogatory 11 asks for the total amount of investor money that was lost or not repaid to these investors. Please state the amount of money that has not been repaid to the investors. My clients do not have access to 809 Holdings' information and do not know the amount of money invested in 809 Holdings. Again, full and complete answers are required to be provided under the Order. This information is readily available to your client.

Interrogatory 15. Please set forth all facts that support your contention that Gabriel Barnhill and/or Dave Wilkinson's actions caused the failure of 809 Holdings or any losses realized by 809 Holdings.

Interrogatory 16. Please provide the identity of any company in which any of the Defendants share common interests. For example, Secured Asset Factoring Exchange, Inc. might be owned by both Bill Piner and Floyd Swilley. If that is the case, during the relevant time period requested, please disclose those ownership interests.

Interrogatory 18. Please identify the terms of any loan any of the Defendants contend were made to 809 Holdings or QC Financing and identify all loan documents. No loan documents have been provided based on my review.

Interrogatory 19. Please set forth the mathematical formula used to assign ownership interest to Gabriel Barnhill. If no mathematical formula was used, please state the same.

Supplemental Interrogatories

With respect to responses to Supplemental Interrogatories you have not provided full and complete answers.

Supplemental Interrogatory 1. Documents submitted to the State of South Carolina are not subject to the attorney client privilege. Please immediately provide all such documents.

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Appendix 00596

F. Miles Adler, Esq.
October 21, 2013
Page 3

Supplemental Interrogatory 2.

Please identify all lien papers and provide a copy of the same.

Supplemental Interrogatory 3.

Please answer Interrogatory 3. You have not stated whether a conflict of interest existed.

Request For Production of Documents

Request for Production 3.

You have not supplied responsive documents to this request.

Request for Production 6.

Please respond to this Request.

Request for Production 7.

Please respond to this Request.

Request for Production 10.

Request for Production number 10 is not confidential and proprietary. My client is entitled to 809 Holdings tax returns and QC Financing tax returns. Please produce the same.

Request for Production 11.

Please produce financial statements related to 809 Holdings and QC Financing, including the recent years of 2012 and 2013.

Request for Production 12.

Please ensure all bank statements of 809 Holdings LLP to present have been provided, including the recent years of 2012 and 2013.

Request for Production 13.

Please ensure all software registers or accounting statements to present have been provided. I do not see recent years in the documents produced, including the recent years of 2012 and 2013.

Request for Production 16.

Please produce any and all documents bearing Gabriel Barnhill's signature or initials. The response that Plaintiff already has possession of the same is inadequate.

Request for Production 18.

Please produce documents responsive to this Request.

Request for Production 19.

Please produce any and all loan documents to the extent you are claiming loans were made.

Request for Production 20.

Please produce documents relating to the Plaintiff. Your response that Plaintiff has these documents is inadequate.

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Appendix 00597

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F. Miles Adler, Esq.
October 21, 2013
Page 4

Request for Production 21. Please produce documents relating to the Plaintiff. Your response that Plaintiff has these documents is inadequate.

Request for Production 22. Please produce all the corporate records of any of the Defendants.

Please provide the requested documents and information no later than October 28, 2013. If we do not receive the same by then, we will file the appropriate motion asking the Court to enter the appropriate relief including striking the answer and counterclaim for failure to provide discovery under the Order, attorney fees and costs.

With best regards, I remain

Very truly yours,
NATE FATA, P.A.



Nate Fata

NF/sh

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Appendix 00598

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Gabriel Barnhill and GSB Enterprises,
LLC,

Plaintiffs,

vs.

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,

Defendants.

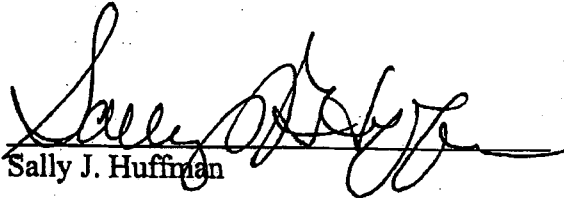
IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2013-CP-26-2816

CERTIFICATE OF SERVICE

HORRY COUNTY
13 NOV - 4 PM '13
CLERK OF COURT
NATE HUGHES-WARD

I, Sally J. Huffman, Legal Assistant, do hereby certify that I am an employee of Nate Fata, P.A., Counsel for Plaintiffs Gabriel Barnhill and GSB Enterprises, LLC and that on November 1, 2013 I did serve a copy of Plaintiff's Notice of Motion and Motion For Sanctions For Defendants' Failure To Comply With Discovery Order by mailing a copy of the same postage prepaid to:

F. Miles Adler, Esq.
The Adler Law Firm
P.O. Box 4743
Pawleys Island, SC 29484
Counsel for Defendants


Sally J. Huffman

Gabriel Barnhill and GSB Enterprises, LLC
☒ Plaintiff

v.

J. Floyd Swilley, Et Al.
☐ Defendant.

CASE NO.
2013--CP-26-2816

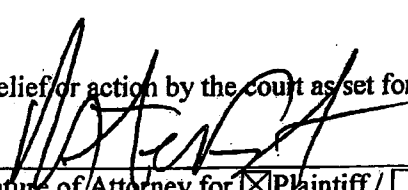
MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Nate Fata, Esq., Bar No. 09866 Address: P.O. Box 16620 Surfside Beach, SC 29587 phone: 843-238-2676 fax: 843-238-0240 e-mail: nfata@fatalaw.com other:	Defendant's Attorney: John M. Leiter, Bar No. Address: 1203 48 th Avenue, N., Suite 109 Myrtle Beach, SC 29577 phone: 843-449-1451 fax: 843-449-4866 e-mail: jleiter@48th.com other:
--	---

☐ MOTION HEARING REQUESTED (attach written motion and complete SECTION I)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

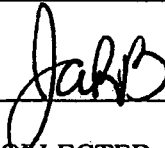
Horry County
16 JAN 27 2014
MELANIE HUGGINS
CLERK OF COURT

SECTION I: Hearing Information
Nature of Motion: Plaintiffs' Notice of Motion and Motion for Sanctions
Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type
☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant
June 24, 2014
Date submitted

SECTION III: Motion Fee
☒ PAID - AMOUNT: 25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION ☒ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE: Date:
---	----------------------

CLERK'S VERIFICATION
Collected by: 
Date Filed: 6/27/14
☐ MOTION FEE COLLECTED: 25
☐ CONTESTED - AMOUNT DUE:

SCCA/233 (11-03)

Appendix 00600

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2013-CP-26-2816

Gabriel Barnhill and GSB Enterprises,
LLC,

Plaintiffs,

vs.

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,

Defendants.

PLAINTIFFS' NOTICE OF
MOTION AND MOTION FOR
SANCTIONS AS TO DEFENDANTS

HORRY COUNTY
JAN 27 2015
CLERK OF COURT
JANIE HUGGINS-WARD

TO: Defendants J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K. Swilley, SMG Partners, LLC, SMS Services, L.P., William C. Piner, WCP Limited, LLC, 809 Holdings, LP, Heath Causey and Sage Financial Group, LLC, and their Counsel:

YOU WILL PLEASE TAKE NOTICE that Plaintiffs, Gabriel Barnhill and GSB Enterprise, LLC, by and through their attorney, Nate Fata, will move this Honorable Court within ten (10) days after service hereof or as soon thereafter as counsel may be heard for an Order awarding sanctions and striking the Answer and Counterclaim of Defendants.

Despite Court Orders concerning discovery entered on September 20, 2013 and January 16, 2014, Defendants continue to engage in discovery abuse. Truthful answers to discovery requests are required to ferret out the misdeeds of a fairly complex Ponzi scheme. Discovery abuse is just another leg of the scheme in which Defendants further misrepresent and defraud not only the Court, but its litigants of the truth.

A. False Denial of Request to Admit

In its January 16, 2014 Order, the Court ordered Defendants to comply with the discovery rules, provide responses and produce documents, and awarded attorney fees to Plaintiffs. The Court should now grant sanctions and award fees and costs due to Defendants' continuing disregard of the Court's Orders and discovery rules. In their response to Plaintiffs' Request to Admit, Defendants falsely denied that any payments were made to investors, such as Joyce Kaufman, after 2011.

Plaintiff Request to Admit Dated April 22, 2014:

1. Since January 1, 2012, at least one person disclosed in your response to Plaintiffs' Interrogatory Number 9 to be an 809 Holdings' investor, including but not limited to a note purchaser or limited partner, received a payment in connection with the 809 Holdings investment.

Defendants' Response: Denied.

Joyce Kaufman, an investor, testified in her deposition on May 22, 2014 and June 9, 2014 that she received payments from her account on multiple occasions, including a payment just before her deposition. Defendants refuse to produce a copy of the checks to Joyce Kaufman. At least one investor has received a payment after 2011. The Court should find the Plaintiffs have proven the Request to Admit, strike the Answer and Counterclaim of Defendants, award attorney fees and costs and enter all other appropriate relief.

B. Failure to disclose payments

In their Supplemental Response to Interrogatories dated January 12, 2014, Defendants failed to disclose various payments to themselves or their companies.

Plaintiffs' Interrogatories dated April 29, 2013:

Interrogatory 6. For the period August 2010 to the present, set forth each and every amount you provided to or received from 809 Holdings, or QC Financing and for each amount state:

- a. The date of the remittance;
- b. The form of remittance (cash, money order, check, etc.); and
- c. The reason for remittance (investment, loan, repayment, dividend, etc.)

Defendants' Response dated January 12, 2014:

1. Sage Financial Group – No payments disclosed by Defendants.

However per bank records, Sage Financial received:

12/01/2010	Check #1031	\$2,000.00
04/13/2011	Check #1041	\$5,000.00
06/08/2011	Check #1087	\$10,000.00

2. Sage Private Equity Group – No payments disclosed by Defendants.

However per bank records, Sage Private Equity Group received:

05/01/2012	Checking W/D	\$10,000.00
------------	--------------	-------------

3. Swilley Financial – No payments disclosed by Defendants.

However per bank records, Swilley Financial received:

01/11/2011	Check #1019	\$2,000.00
------------	-------------	------------

4. William C. Piner – No payments disclosed by Defendants.

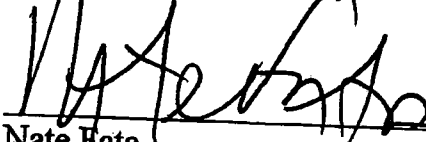
However per bank records, William C. Piner received:

01/11/2011	Check #1017	\$4,000.00
------------	-------------	------------

The undersigned certifies further consultation would serve no useful purpose.

WHEREFORE, Plaintiffs, Gabriel Barnhill and GSB Enterprises, LLC, request that the Court enter an Order deeming the Request to Admit admitted, striking the Answer and Counterclaim of Defendants, awarding reasonable attorney fees and costs in connection with the Motion and hearing, and granting all other appropriate relief pursuant to Rule 37, SCRPC. The Motion will be based on the discovery, the record and all other matters to be presented at the hearing.

Respectfully submitted,



Nate Fata

NATE FATA, P.A.

Attorney for Plaintiffs

P. O. Box 16620

1500 U.S. Hwy. 17 N., Suite 215

Surfside Beach, SC 29587

Tel. (843) 238-2676

Fax (843) 238-0240

Surfside Beach, South Carolina
June 25, 2014

000020

Appendix 00604

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Gabriel Barnhill and GSB Enterprises,
LLC,

Plaintiffs,

vs.

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,

Defendants.

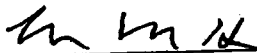
IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2013-CP-26-2816

CERTIFICATE OF SERVICE

HORRY COUNTY
15 JUN 23 2014
MELANIE HUGGINS-WARD
CLERK OF COURT

I, Claudia M. Heaton, Legal Assistant, do hereby certify that I am an employee of Nate Fata, P.A., Counsel for Plaintiffs Gabriel Barnhill and GSB Enterprises, LLC and that on June 25, 2014 I did serve a copy of Plaintiff Notice of Motion and Motion For Sanctions on Defendants by mailing a copy of the same postage prepaid to:

John M. Leiter, Esq.
Law Offices of John M. Leiter, PA
1203 48th Avenue, North, Ste. 109
Myrtle Beach, SC 29577



Claudia M. Heaton
Legal Assistant to Nate Fata, P.A.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Gabriel Barnhill and GSB Enterprises,
LLC,

Plaintiffs,

vs.

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,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2014-CP-26-08367
(formerly 2013-CP-26-02816)

CERTIFICATE OF SERVICE

2016 MAY 16 PM 2:08
CLERK OF COURT

Gabriel Barnhill and GSB Enterprises,
LLC,

Plaintiffs,

vs.

J. Floyd Swilley, J. Floyd Swilley,
SMG Partners, LLC, SMS Services, LP,
William C. Piner, WCP Limited, LLC,
Alicia A. Piner, 809 Holdings, LP,
Heath Causey, Sage Financial Group,
LLC, Sage Advisory Group, L.P.,
Sage Private Equity Group,
Secured Asset Factoring Exchange, Inc.,
SAFE, Inc., Digics, LLC, 9-1-1, Plumbing,
LLC, and Sage Funding, L.P.,
Christopher Pitcock,

Defendants.

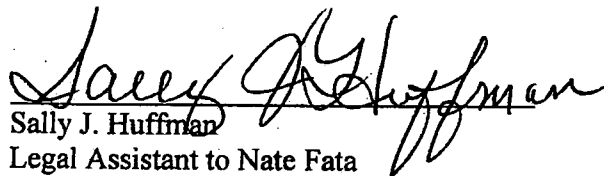
CASE NO. 2014-CP-26-3362

I, Sally J. Huffman, Legal Assistant, do hereby certify that I am an employee of Nate
Fata, P.A., Counsel for Plaintiffs Gabriel Barnhill and GSB Enterprises, LLC and that on May
13, 2016 did serve a copy of the Affidavit of Sally J. Huffman via U.S. Mail as follows:

Stefan Fiedler, Esq.
Mark D. Neill, Esq.
Neill Law Firm
P.O. Box 2810
Murrells Inlet, SC 29576
Counsel for 809 Holdings, LP

Heath Causey
1035 Pinwheel Loop
Myrtle Beach, SC 29577
Pro Se

F. Miles Adler, Esq.
ADLER LAW FIRM, LLC
P.O. Box 4743
Pawleys Island, SC 29585
*Counsel for J. Floyd Swilley, Laurel K. Swilley,
SMG Partners, LLC, SMS Services, LP,
Sage Financial Group, LLC and Sage Private Equity Group, LLC*


Sally J. Huffman
Legal Assistant to Nate Fata

000023
2

Appendix 00607

Scanned by CamScanner

The documents contained herein are submitted as a supplement to the Amended Record of Appeal submitted this the 27th day of July, 2017.

Respectfully Submitted



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JUL 28 2017

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the 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

Case No. 2014-CP-26-8367 (Formerly 2013-CP-26-2816)

Appellate Case No. 2016-001328

Gabriel Barnhill & 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, J. Floyd Swilley SMG Partners, LLC, Alicia A. Piner, Heath Causey, Sage Advisory Group, L.P., Sage Private Equity Group, Secured Asset Factoring Exchange, Inc., SAFE, Inc., Digics, LLC, 9-1-1, Plumbing, LLC, and Sage Funding, L.P., Christopher Pitcock, Defendants,

RECEIVED

AUG 28 2017

SC Court of Appeals

Of Whom J. Floyd Swilley and Laurel K. Swilley and Heath Wendell

Causey are the
Appellants

SECOND SUPPLEMENT TO AMENDED RECORD ON APPEAL PURSUANT REQUEST OF RESPONDENT

Appendix 00609

In order to supplement the Amended Record on Appeal pursuant the Motion of the Respondent and to accommodate the requested changes of the Respondent the following Second Supplement to Amended Record on Appeal is submitted.

TABLE OF CONTENTS

SECOND SUPPLEMENT TO AMENDED RECORD ON APPEAL PURSUANT REQUEST OF RESPONDENT

1. Certificate of Service for PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGEMENT AND FOR JUDGEMENT ON THE PLEADINGS filed December 16, 2015, the instant certificate is to supplement and complete numerical item 31. At page 355. 0001

1. Certificate of Service for PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGEMENT AND FOR JUDGEMENT ON THE PLEADINGS filed December 16, 2015, the instant certificate is to supplement and complete numerical item 31. At page 355.

The documents contained herein are submitted as a supplement to the Amended Record of Appeal submitted this the 24th day of Aug, 2017.

8/24, 2017

Respectfully Submitted



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Appendix 00612
000002

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Gabriel Barnhill and GSB Enterprises, LLC

☒ Plaintiff

v.

J. Floyd Swilley, Et Al.

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2014-CP-26-8367

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
Nate Fata, Esq., Bar No. 09866
Address:
P.O. Box 16620
Surfside Beach, SC 29587
phone: 843-238-2676 fax: 843-238-0240
e-mail: nfata@fatalaw.com other:

Defendant's Attorney:
John M. Leiter, Bar No.
Address:
1203 48th Avenue, N., Suite 109
Myrtle Beach, SC 29577
phone: 843-449-1451 fax: 843-449-4884
e-mail: jleiter@48th.com other:

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Plaintiff's Motion For Summary Judgment on the Pleadings

Estimated Time Needed: Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

December 16, 2015

Date submitted

SECTION III: Motion Fee

- ☒ PAID - AMOUNT: \$25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Collected by: Jab

Date Filed: 12/21/15

- ☐ MOTION FEE COLLECTED: 25
☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Gabriel Barnhill and GSB Enterprises,)
LLC,)

Plaintiffs,)

vs.)

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,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2014-CP-26-08367
(formerly 2013-CP-26-02816)

HORRY COUNTY
2015 DEC 21 PM 3:15
CLERK OF COURT

PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR SUMMARY
JUDGMENT AND FOR
JUDGMENT ON THE PLEADINGS

Gabriel Barnhill and GSB Enterprises,)
LLC,)

Plaintiffs,)

vs.)

J. Floyd Swilley, J. Floyd Swilley)
SMG Partners, LLC, SMS Services, LP,)
William C. Piner, WCP Limited, LLC,)
Alicia A. Piner, 809 Holdings, LP,)
Heath Causey, Sage Financial Group,)
LLC, Sage Advisory Group, L.P.,)
Sage Private Equity Group,)
Secured Asset Factoring Exchange, Inc.,)
SAFE, Inc., Digics, LLC, 9-1-1, Plumbing,)
LLC, and Sage Funding, L.P.,)
Christopher Pitcock,)

Defendants.)

CASE NO. 2014-CP-26-3362

TO: ALL DEFENDANTS:

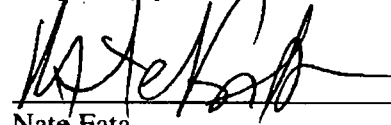
YOU WILL PLEASE TAKE NOTICE that Plaintiffs, Gabriel Barnhill and GSB Enterprises, LLC, by and through their attorney, Nate Fata, will move this Honorable Court within ten (10) days after service hereof or as soon thereafter as counsel may be heard for

Appendix 00614

000004

summary judgment and judgment on the pleadings on all of Defendants' counterclaims. There is no issue of material fact. Defendants have failed to state a claim. Plaintiffs are statutorily shielded from liability for any alleged company debt. Moreover, Defendants have no evidence of Plaintiffs' misappropriating any sums or any damages allegedly caused by Plaintiffs. As more fully set forth in the accompanying Memorandum, Plaintiffs are entitled to judgment on all counterclaims.

Respectfully submitted,



Nate Fata

NATE FATA, P.A.

Attorney for Plaintiffs

P. O. Box 16620

1500 U.S. Hwy. 17 North

The Courtyard, Suite 215

Surfside Beach, SC 29587

Tel. (843) 238-2676

Fax (843) 238-0240

Surfside Beach, SC.
December 16, 2015

Appendix 00615

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Gabriel Barnhill and GSB Enterprises, LLC,)

Plaintiffs,)

vs.)

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,)

Defendants.)

Gabriel Barnhill and GSB Enterprises, LLC,)

Plaintiffs,)

vs.)

J. Floyd Swilley, J. Floyd Swilley
SMG Partners, LLC, SMS Services, LP,
William C. Piner, WCP Limited, LLC,
Alicia A. Piner, 809 Holdings, LP,
Heath Causey, Sage Financial Group,
LLC, Sage Advisory Group, L.P.,
Sage Private Equity Group,
Secured Asset Factoring Exchange, Inc.,
SAFE, Inc., Digics, LLC, 9-1-1, Plumbing,
LLC, and Sage Funding, L.P.,
Christopher Pitcock,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2014-CP-26-08367
(formerly 2013-CP-26-02816)

CERTIFICATE OF SERVICE

CASE NO. 2014-CP-26-3362

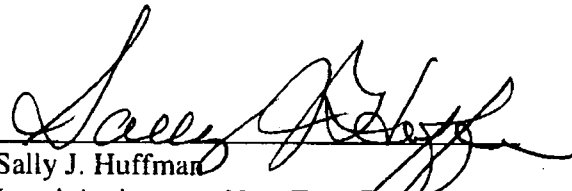
HORRY COUNTY
2016 DEC 21 PM 3:15
MELANIE HUGHES-WARD
CLERK OF COURT

I, Sally J. Huffman, Legal Assistant, do hereby certify that I am an employee of Nate Fata, P.A., Counsel for Plaintiffs Gabriel Barnhill and GSB Enterprises, LLC and that on

December 11, 2015 I did serve a copy of Plaintiffs' Notice of Motion and Motion for Summary Judgment and For Judgment on the Pleadings upon Counsel for Defendants by mailing a copy of the same postage prepaid to:

John M. Leiter, Esq.
Law Offices of John M. Leiter, PA
1203 48th Avenue, North, Ste. 109
Myrtle Beach, SC 29577
*Counsel for J. Floyd Swilley, J. Floyd Swilley Investment Advisors,
Laurel K. Swilley, SMG Partners, LLC, SMS Services, LP,
William C. Piner, WCP Limited, LLC, Alicia A. Piner,
Heath Causey, Sage Financial Group, LLC, Sage Advisory Group, LP
Sage Private Equity Group and Secured Asset Factoring Exchange, Inc.*

Mark D. Neill, Esq.
P.O. Box 2810
Murrells Inlet, SC 29576
Counsel for 809 Holdings, LP


Sally J. Huffman
Legal Assistant to Nate Fata, P.A.

The documents contained herein are submitted as a supplement to the Amended Record of Appeal submitted this the 24th day of Aug., 2017.

8/24/, 2017

Respectfully Submitted



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S.C. Bar No.: 70238
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IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
The Honorable R. Lawton McIntosh, Circuit Court Judge

Civil Action No. 2014-CP-26-08367
(formerly 2013-CP-26-02816)

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, J. Floyd Swilley SMG Partners, LLC, Alicia A. Piner, Heath Causey, Sage Advisory Group, L.P., Sage Private Equity Group, Secured Asset Factoring Exchange, Inc., SAFE, Inc., Digics, LLC, 9-1-1, Plumbing, LLC, and Sage Funding, L.P., Christopher Pitcock, Defendants,

Of Whom J. Floyd Swilley, Laurel K. Swilley, and Heath Wendell Causey are the Appellants.

FINAL BRIEF OF APPELLANTS
J. FLOYD SWILLEY AND LAUREL K. SWILLEY

RECEIVED

AUG 30 2017

SC Court of Appeals

F. Miles Adler, Esquire ADLER
LAW FIRM, LLC SC Bar No.:
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Attorney for Appellants

Appendix 00619

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE.....	1
ARGUMENT	
I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO ABIDE BY ITS OWN ORDER STAYING THE PROCEEDINGS FOR 30 DAYS.....	4
II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RULING ON THE MATTER DESPITE THE DEFECTIVE SERVICE OF NOTICE TO THE SWILLEYS.....	9
III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT AS A SANCTION AGAINST THE SWILLEYS	11
IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT WHEN THERE REMAINED GENUINE ISSUES OF MATERIAL FACT IN DISPUTE	13
V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RELYING ON FALSE STATEMENTS AND MISREPRESENTATIONS BY LEGAL COUNSEL	16
CONCLUSION.....	17

TABLE OF AUTHORITIES

Cases	Page
<i>Arizona v. California</i> , 460 U.S. 605 (1983)	7
<i>Bankers Trust of S.C. v. Bruce</i> , 283 S.C. 408, 323 S.E.2d 523 (Ct. App. 1984)	16
<i>Bowman v. Richland Mem'l Hosp.</i> , 335 S.C. 88, 515 S.E.2d 259 (Ct. App. 1999)	5
<i>Davis v. Parkview Apts.</i> , 409 S.C. 266, 762 S.E.2d 535 (2014).....	0
<i>Dawkins v. Fields</i> , 345 S.C. 23, 545 S.E.2d 515 (Ct. App. 2001), <i>rev'd on other grounds</i> , 354 S.C. 58, 580 S.E.2d 433 (2003).....	14, 15
<i>Dawkins v. Fields</i> , 354 S.C. 58, 580 S.E.2d 433 (2003)	14
<i>Dukes & Dukes, Inc. v. Hygrade Food Prods. Corp.</i> , 236 S.C. 69, 113 S.E.2d 254 (1960)	7
<i>Flexon v. PRC-Jasper, Inc.</i> , 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015)	5
<i>Graham v. Graham</i> , 301 S.C. 128, 390 S.E.2d 469 (Ct. App. 1990).....	5
<i>Hampton v. Conso Prods., Inc.</i> , 808 F. Supp. 1227 (D.S.C. 1992)	14, 15
<i>Ingram v. Kasey's Assocs.</i> , 340 S.C. 98, 531 S.E.2d 287 (2000).....	7, 10
<i>Mullane v. Cent. Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950)	8, 9
<i>Ogburn-Matthews v. Loblolly Partners</i> , 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998).....	8, 9
<i>Parker v. Spartanburg Sanitary Sewer Dist.</i> , 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005)	13
<i>Robinson v. Estate of Harris</i> , 388 S.C. 616, 698 S.E.2d 214 (2010).....	16

TABLE OF AUTHORITES (CONT'D)

Cases	Page
<i>Ross v. Med. Univ. of S.C.</i> , 328 S.C. 51,492 S.E.2d 62 (1997)	5
<i>Rycroft v. Tanguay</i> , 279 S.C. 76, 302 S.E.2d 327 (1983)	16
<i>Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n</i> , 298 S.C. 179, 379 S.E.2d 119 (1989)	4
<i>Shirley's Iron Works, Inc. v. City of Union</i> , 403 S.C. 560, 743 S.E.2d 778 (2013)	5
<i>Stevens v. United States</i> , No. 98-554C, 2012 WL 2021740 (Fed. Cl. filed June 4, 2012)	7
<i>Tanner v. Florence County Treasurer</i> , 336 S.C. 552, 521 S.E.2d 153 (1999)	13
<i>Traynum v. Scavens</i> , 416 S.C. 197, 786 S.E.2d 115 (2016)	14
<i>Tryron Fed. Sav. & Loan Ass'n v. Phelps</i> , 307 S.C. 361,415 S.E.2d 397 (1992)	9
<i>Universal Benefits, Inc. v. McKinney</i> , 349 S.C. 179, 561 S.E.2d 659 (Ct. App. 2002)	11
<i>Webster v. Clanton</i> , 259 S.C. 387, 192 S.E.2d 214 (1972)	9
 Statutes	
IA C.J.S. <i>Acknowledgements</i> § 33 (Westlaw database updated Aug. 2016)	9
60 C.J.S. <i>Motions and Orders</i> § 75 (Westlaw database updated Aug. 2016)	7
 Other Authorities	
Rule 56, SCRCF	14
Rule 58, SCRCF	5

TABLE OF AUTHORITIES (CONT'D)

Other Authorities	Page
Rule 59, SCRCF.....	4, 10
Rule 407, SCACR, Rules of Prof'l Conduct, Rule 3.3.....	6, 9
Rule 407, SCACR, Rules of Prof'l Conduct, Rule 3.4.....	6, 9
Rule 407, SCACR, Rules of Prof'l Conduct, Rule 5.3	11
Rule 407, SCACR, Rules of Prof'l Conduct, Rule 8.4.....	6, 9

STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court commit reversible error by failing to abide by its own order staying the proceedings for 30 days?
- II. Did the trial court commit reversible error by ruling on the matter despite the clerk's defective service of notice?
- III. Did the trial court commit reversible error by striking pleadings and granting final judgment as a sanction?
- IV. Did the trial court commit reversible error by granting summary judgment when there remained genuine issues of material fact in dispute?
- V. Did the trial court commit reversible error by relying on false statements and misrepresentations by counsel?

STATEMENT OF THE CASE

In April 2013, the Appellees Gabriel Barnhill and GSB Enterprises, Inc. (collectively, "Barnhill") commenced the instant litigation against, inter alia, the Appellant J. Floyd Swilley and the Appellant Laurel K. Swilley (collectively, the "Swilleys"). In short, Barnhill alleged that the Swilleys engaged in a Ponzi scheme which caused Barnhill to lose a substantial amount of money. In June 2013, the Swilleys denied the substantive claims against them and, further, asserted various counterclaims against Barnhill.

Subsequently, Barnhill served various discovery requests upon the Swilleys. Not satisfied with the Swilleys' responses, Barnhill filed several motions to compel discovery on July 3, 2013, January 8, 2014, January 10, 2014, September 5, 2014, and October 5, 2014. Still not satisfied, Barnhill ultimately filed motions for sanctions on November 4, 2013, May 4, 2015, and June 12, 2015.

On October 27, 2015, John M. Leiter, Esquire ("Attorney Leiter") filed a motion to be relieved as counsel for the Swilleys (and others). *See* Mot. to be Relieved As Counsel, filed Oct 27, 2015(R.30, p.352-354). That Motion was not heard until January 4, 2016. On January 14, 2016, the trial court signed an order releasing Attorney Leiter as counsel for the Swilleys (and others), although the order was not entered until January 25, 2016. *See* Order, entered Jan. 25, 2016 (R.9, p.29-31) ("Jan. Order"). In relevant part, the January Order stated as follows: "The proceedings in this case will be held in abeyance for thirty (30) days from the date of this Order" so as to allow Attorney Leiter's former clients (including the Swilleys) an opportunity to obtain new legal counsel to represent them in this matter. (*R9*, p.30).

Meanwhile, back on December 16, 2015, Barnhill had filed a Notice of Motion and Motion for Summary Judgment and for Judgment on the Pleadings. *See* Pls.' Notice of Mot. & Mot. for Summ. J. and for J. on the Pleadings, filed Dec. 15, 2016 (R.41,p.410) ("Dec. Mot."). Still without legal counsel, and prior to the trial court hearing Attorney Leiter's motion to withdraw, the Swilleys never received notice from the clerk regarding Barnhill's December Motion. *See* Mots. to Set Aside(R.42,p.416; R.43, p.424). In fact, the only notice the Swilleys received was directly

from Barnhill's attorney just days prior to the February 16, 2016 hearing and, even then, they only received the Notice but not the Motion and Memorandum in Support. Significantly, both the notice and the hearing fell within the 30-day abeyance period set forth in the January Order. *See* Jan. Order (R.9,p.32).

The only persons in attendance at the February 16, 2016 hearing were Barnhill's attorney, Nate Fata, Esquire ("Attorney Fata") and Stephan B. Fiedler, Esquire ("Attorney Feidler"). *See* (R.45,p.436-469) ("Feb. Tr."). Attorney Fata is Barnhill's counsel and Attorney Fiedler solely appeared on behalf of the Defendant 809 Holdings LP. *See* Feb. Tr. (R.45, p.438, lines 8-9; p.439, lines 5-12). Furthermore, Attorney Fiedler was new to the case (and fairly new to the practice of law) and was stepping in for senior partner Mark D. Neill, Esquire ("Attorney Neill"). *See* Feb. Tr. (R.45,p.449, lines 4-10; p.30;p.465, lines 22-24).

For some reason, Attorney Fiedler made numerous misleading statements to the trial court as to the Swilleys, and thereby falsely suggesting that the Swilleys purposefully avoided complying with discovery requests. *See* Feb. Tr. (R45, p. 449, line 19-22; p.450, lines 8-17); Ltr. from Attorney Neill to Judge McIntosh, dated May 19, 2016 ("Neill Ltr.")(R.50,p. 531-532). And when presented with such evidence, the trial court verbally granted Barnhill's Motion to Strike the Swilleys' pleadings and Motion for Attorney's Fees. *See* Feb. Tr. (R45. p. 467 line 25 through p.468, line 2; p. 469, lines 11-14).

Later, in March 2016, based on the February 16 hearing, as well as the Plaintiffs' Memorandum in Support of their Motion for Judgment on the Pleadings and/or Summary

Judgment ("Barnhill Memo"), initially submitted in December 2015 and prior to the February 2016 hearing, the trial court granted Barnhill summary judgment on its claims against the Swilleys as well as the Swilleys' counterclaims against Barnhill. *See* Order, entered Mar. 21, 2016 ("Mar. Order")(R. 10, p.32-38). Notably, however, the March Order did not follow the verbal ruling of the trial court on February 16, 2016 (R.8., p. 27) but, rather, reflected the contents of the Barnhill Memo. (*R.10,p.32-38*).

The Swilleys each filed a Motion to Set Aside the March Order pursuant to Rule 59(e) of the South Carolina Appellate Court Rules ("SCACR"), *see* Mots. to Set Aside(R. 42, p.415-416; R43., p. 420-424), but those motions were denied, *see* Form 4; Order entered May 25, 2016 ("May Order")(R.18, p.18-20). On June 16, 2016, the Swilleys timely submitted a notice of appeal in this matter. *See* Notice of Appeal.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO ABIDE BY ITS OWN ORDER STAYING THE PROCEEDINGS FOR 30 DAYS

In its January Order, the trial court clearly and expressly stated that "[t]he proceedings in this case will be held in abeyance for thirty (30) days from the date of this Order." Jan. Order 2 (R.9, p.30).

"To stay an order is to hold it in abeyance or refrain from enforcing it; a stay is a stopping." *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179,184,379 S.E.2d 119, 122 (1989) (internal quotations omitted). The purpose of a stay is to preserve

the status quo pending some later determination. *See Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469,470 (Ct. App. 1990).

In effect, then, holding the case in abeyance renders the status quo the law of the case. *See Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 571-72, 776 S.E.2d 397, 403-04 (Ct. App. 2015) ("[T]he doctrine of the law of the case prohibits issues [that] have been decided in a prior appeal from being re-litigated in the trial court in the same case." (quoting *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62,492 S.E.2d 62, 68 (1997)); *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right." (internal quotations marks omitted))).

Although the January Order was signed on January 14, 2016, it was not entered until January 27, 2016. *See* Jan. Order (R. 9, p.29). An order is effective from the date of entry, not signature. *See* Rule 58(a), SCRCP ("A judgment is effective only when so set forth *and entered* in the record" (emphasis added)); *Bowman v. Richland Mem'l Hosp.*, 335 S.C. 88, 92, 515 S.E.2d 259, 261 (Ct. App. 1999) (holding the effective date of a trial court order is the date the order is entered by the clerk of court, not the date the order is signed). Accordingly, the January Order effectively froze the proceedings through February 26, 2016 (30 days after January 27, 2016).

Nevertheless, the trial court held a hearing on February 16, 2016, at which only Attorney Fata (Respondents' counsel) and Attorney Fiedler (809 Holdings' counsel) were present. *See* Feb. Tr. (R.45, p. 438, lines 8-14; p.439, lines 5-12). Significantly, the Swilleys' absence was solely due to the fact that they had no notice of the hearing. *See* Mots. To Set Aside (R. 42, p. 416-420; R.43, p. 421-424). Moreover, at that hearing, the trial court ruled that it would strike the Swilleys' pleadings and enter summary judgment in favor of Barnhill on the Swilleys' counterclaims. *See* Feb. Tr. (R. 45, p.446, line 6 through p. 447, lines 1-2; p. 465, lines 5-20; p. 466, lines 11-14). Notably, whereas Judge McIntosh presided over the proceedings for the February 16 hearing and resulting March 21 order (R10, p. 52), *see* Feb. Tr.(R. 45, p.436); Mar. Order, Judge Seals presided over the previous proceedings in this matter, including the January 27 order staying the matter for 30 days, *see* Jan. Order(R.9, p.29). Yet Barnhill, by and through Attorney Fata, clearly knew about the January 27 order having been involved in all aspects of the instant litigation. Nevertheless, Attorney Fata failed to disclose that order or otherwise apprise Judge McIntosh of its import, effectively defrauding both the trial court and the Swilleys. *See* Rule 407, SCACR, Rules of Professional Conduct, Rule 3.3 (prohibiting a lawyer from knowingly making a false statement of fact or law to the court, including the failure to inform the court of material fact or law that will enable the court to make an informed decision, even if such fact or law is adverse to the lawyer's position); *id.* Rule 3.4(a) (prohibiting a lawyer from knowingly obstructing "another party's access to ... material having potential evidentiary value"); *id.* Rule 8.4(d), (e) (describing "professional misconduct" as including "conduct involving dishonesty, fraud, deceit or

misrepresentation" as well as "conduct that is prejudicial to the administration of justice"). Thus, as a matter of equity, Barnhill should not be rewarded for its legal counsel's misconduct. See *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 n.2 (2000) (describing and applying both the doctrines of unclean hands and equitable estoppel).

In any event, no matter the cause, it is beyond dispute that the trial court violated its own order of abeyance by conducting the February 16 hearing and making substantive determinations therein. As such, the trial court's order is unlawful. See *Dukes & Dukes, Inc. v. Hygrade Food Prods. Corp.*, 236 S.C. 69, 113 S.E.2d 254 (1960) (unappealed order becomes law of case and, thus, is binding on the litigants and the court alike); *Stevens v. United States*, No. 98-554C, 2012 WL 2021740, at *4 (Fed. Cl. Ct. filed June 4, 2012) ("Law of the case ... provides that a trial court should abide by its own legal rulings during the pendency of the same proceeding." (citing *Arizona v. California*, 460 U.S. 605, 618 (1983)); 60 C.J.S. *Motions and Orders* § 75 (Westlaw database updated Aug. 2016) ("[A]n order of court ... is binding on the parties and their privies, as well as on the court" (emphasis added))).

On that basis, the trial court's decision below must be reversed and the matter remanded for further proceedings.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RULING ON THE MATTER DESPITE THE DEFECTIVE SERVICE OF NOTICE TO THE SWILLEYS

"The requirements of due process include notice [and] an opportunity to be heard in a meaningful way." *Ogburn-Matthews v. Loblolly Partners*, 332 S.C. 551,562,505 S.E.2d 598, 603 (Ct. App. 1998); *see also Mullane v. Cent. Hanover Bank & Trust CO.*, 339 U.S. 306, 314 (1950) (stating that the Due Process Clause demands "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or opportunity to be heard, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights. A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on.

Webster v. Clanton, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972); *accord Tryron Fed. Sav. & Loan Ass'n v. Phelps*, 307 S.C. 361,362,415 S.E.2d 397, 398 (1992).

In the instant case, although the Swilleys were clearly parties to the litigation, the Clerk of the Court never gave the Swilleys notice of Barnhill's December Motion and/or the February Hearing thereon. *See* Mots. to Set Aside (R 42, p.417; R.43, p.424).

Although Barnhill asserted to the trial court that he had provided notice to the Swilleys, *see* Feb. Tr. (R. 45, p. 444, lines 6-8), such notice was only a couple days before the February Hearing and did not include the subject documentation, i.e.,

Barnhill's motion or memorandum in support thereof. Thus, the notice actually given was not reasonably calculated to provide the Swilleys with an honest opportunity to respond thereto. *See Ogburn-Matthews*, 332 S.C. at 562, 505 S.E.2d at 603; *Mullane*, 339 U.S. at 314.

Consequently, just as Attorney Fata misrepresented the trial court's previous stay of the proceedings, *see supra* Part I, Attorney Fata also misrepresented that the Swilleys were properly noticed of the February 16 hearing. *See* Rule 407, SCACR, Rules of Professional Conduct, Rules 3.3, 3.4(a), 8.4(d), 8.4(e).

As further evidence of this wrongdoing, the Swilleys direct the court's attention to the Affidavit of Sally J. Huffman ("Huffman Aff.") (R.48, p.527). In that document, Attorney Fata's legal assistant averred that on February 3 she served notice of the February 16 hearing upon the Swilleys. *See* Huffman Aff (R. 48, p.527). Yet the notary on the affidavit is none other than Attorney Fata. As an initial matter, an otherwise qualified notary is disqualified to acknowledge a document if the notary has a financial or beneficial interest in the subject transaction. (R. 48, p.527) *See* IA C.J.S. *Acknowledgements* § 33 (Westlaw database updated Aug. 2016).

Furthermore, the notarial commission date on Attorney Fata's seal is inaccurate and/or falsified. Not only does the original document show that the date was changed by evidence of white out or correction tape, but the December 16, 2020 date cannot be correct because the Notarial Office of the Secretary of State has no record of any applications on December 16, 2010, 10 years from the date of the purported notarial commission.

For any of these reasons, the affidavit should have been stricken as invalid. *See also* Rule 407, SCACR, Rules of Prof'l Conduct, Rule 5.3 (lawyer shall make reasonable efforts to ensure that non-lawyer employee's conduct is compatible with professional obligations of lawyer; lawyer shall be responsible for conduct of non-lawyer employee if lawyer knows of conduct at time when its consequences can be avoided or mitigated and fails to take reasonable action).

Thus, as a matter of equity, Barnhill should not be rewarded for its legal counsel's misconduct. *See Ingram*, 340 S.C. at 107 n.2, 531 S.E.2d at 292 n.2 (describing and applying both the doctrines of unclean hands and equitable estoppel).

And procedurally, the Swilleys sought to have the trial court correct itself by way of a motion to set aside pursuant to Rule 59, SCRPC, *see* Mots. to Set Aside, but to no avail, *see* Form 4; May Order. *Cf Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183-84, 561 S.E.2d 659, 661-62 (Ct. App. 2002) (holding that party was not denied an opportunity to be heard because the party failed to pursue a motion to set aside the order pursuant to Rule 59, SCRPC).

Therefore, the trial court's order in this case violated the Swilleys' due process rights and thus is void. On that basis, the trial court's decision below must be reversed and the matter remanded for further proceedings.

**III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR
BY GRANTING SUMMARY JUDGMENT AS A SANCTION
AGAINST THE SWILLEYS**

As summarized by the courts:

"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). Therefore, an appellate court will not interfere with "a trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters" unless the court abuses its discretion. *Karppi v. Greenville Terrazza Co., Inc.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997) (citation omitted). "An 'abuse of discretion' may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law." *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) (citation omitted). The appealing party bears the burden of demonstrating that the lower court abused its discretion. *Id.* (citation omitted).

However, "when 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))[]

Davis v. Parkview Apts., 409 S.C. 266, 281-83, 762 S.E.2d 535, 543-44 (2014).

In the instant case, there was no factual basis to support the decision to impose the ultimate sanction penalty of striking the Swilleys' pleadings and then granting final judgment in favor of Barnhill.

Although Barnhill asserted that the Swilleys had been evading several attempts at discovery, that assertion is simply untrue. To the contrary, the Swilleys had already produced hundreds of pages of documents in response to requests to produce and also answered numerous requests for admissions and interrogatories. *See* Neill Ltr. (R. 50, p.531-532) Moreover, there was only one scheduled deposition of the Swilleys, but the parties had verbally agreed to reschedule same, and no other date had yet been established. *See id.*; Feb. Tr. (R. 45, p.450, lines 18-21); Ltr. from F. Miles Adler to Judge McIntosh, dated May 3, 2016 ("Adler Ltr.") (R. 49, p. 511-513).

Undisputedly, striking the Swilleys' pleadings and granting final judgment against the Swilleys severely prejudiced the Swilleys in this action. *See Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716 (Ct. App. 2005) ("The prejudice Rule 15 envisions [allowing leave to be granted to amend pleadings when leave does not prejudice any other party] is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." (citing, inter alia, *Tanner v. Florence County Treasurer*, 336 S.C. 552, 521 S.E.2d 153 (1999))).

Therefore, the trial court's order was an abuse of discretion, and on that basis, the trial court's decision below must be reversed and the matter remanded for further proceedings.

**IV. THE TRIAL COURT COMMITTED REVERSIBLE
ERROR BY GRANTING SUMMARY JUDGMENT
WHEN THERE REMAINED GENUINE ISSUES OF**

MATERIAL FACT IN DISPUTE

As recently summarized:

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court...." *Quail Hill, L.L.C. v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citing *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000)). "[A] trial court may grant a motion for summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* at 234, 692 S.E.2d at 505 (quoting Rule 56(c), SCRPC).

Traynum v. Scavens, 416 S.C. 197, 201, 786 S.E.2d 115, 117 (2016).

"In determining whether [the "drastic remedy" of] summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003).

Furthermore:

Those facts which are "material" for purposes of summary judgement are identified by the substantive law of the claim asserted. In other words, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgement. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 [] (1986). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* Conversely, an issue is not "genuine" and summary judgement warranted if there is insufficient evidence favoring the non-moving party for a jury to return a verdict for that party. *Id.*

Hampton v. Conso Prods., Inc., 808 F. Supp. 1227, 1232 (D.S.C. 1992).¹

¹"Rule 56 of the South Carolina Rules of Civil Procedure is identical to its federal

In the instant case, the Swilleys vehemently deny the substantive allegations of Barnhill's complaint. *See generally* Answer. Moreover, J. Floyd Swilley asserted a counterclaim against Barnhill for breach of contract, *see* Countercl.,² which Barnhill denied, *see* Answer to Counter cl. Clearly, then, there are "genuine" disputes of "material" fact that preclude judgment as a matter of law for either party on Barnhill's claims against the Swilleys and the Swilleys' counterclaim against Barnhill. *See Hampton*, 808 F. Supp. at 1232.

Moreover, "[s]ummary judgment ... must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Dawkins*, 354 S.C. at 69, 580 S.E.2d at 439. As repeatedly brought up in this case, there has been virtually no discovery to date in this matter, *see* Mar. Order (R.10, p.32-35); Feb. Tr. R. 45, p.440, lines 14-5; p.433, lines 19-22; p. 434, lines 1-9), , at least from Barnhill to the Swilleys, *cf* Neill Ltr. (the Swilleys have produced hundreds of documents in response to Barnhill's discovery requests). Due to the disregard for the 30-day stay and the counterpart. In the absence of state law on the issue in question, federal cases interpreting the rule are persuasive."

Dawkins v. Fields, 345 S.C. 23, 28, 545 S.E.2d 515, 518 (Ct. App.

2001), *rev'd on other grounds*, 354 S.C. 58, 67, 580 S.E.2d 433, 438 (2003).

² Although the Swilleys also asserted a counterclaim pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, the Swilleys acknowledges that such claim is unripe until the Swilleys prevail on Barnhill's claims against them. *See* S.C. Code § 15- 36-10(C)(1); Feb. Tr. 20:9-14.

lack of notice, *see supra* Parts I & II, respectively, the Swilleys have not yet had a full and fair opportunity to engage in discovery prior to the entry of summary judgment in this case.

Therefore, the drastic remedy of summary judgment was not warranted based on the existing record and, thus, the trial court's decision below must be reversed and the matter remanded for further proceedings.

V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RELYING ON FALSE STATEMENTS AND MISREPRESENTATIONS BY LEGAL COUNSEL

"A court of equity has the inherent power to set aside a judgment on the ground of fraud." *Bankers Trust of S.C. v. Bruce*, 283 S.C. 408, 415, 323 S.E.2d 523, 528 (Ct. App. 1984) (citing, *inter alia*, *Rycroft v. Tanguay*, 279 S.C. 76, 302 S.E.2d 327 (1983)).

"A judgment may be set aside on the ground of fraud only if the fraud is 'extrinsic' and not 'intrinsic.'" *Hagy [v. Pruitt]*, 339 S.C. 425, 431, 529 S.E.2d 714, 717 (2000)]. Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard." *Id.* at 431, 529 S.E.2d at 717-18 (quoting *Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). "[R]elief is granted for extrinsic fraud on the theory that by reason of the fraud preventing a party from fully exhibiting and trying his case, there never has been a real contest before the court of the subject matter of the action." *Chewning v. Ford Motor Co.*, 354 S.C. 72, 82, 579 S.E.2d 605, 610 (2003).

Robinson v. Estate of Harris, 388 S.C. 616, 625, 698 S.E.2d 214, 219 (2010).

In the instant case, the trial court's order is based on multiple instances of extrinsic fraud. First, the trial court held a hearing during the 30-day stay that the court had

previously issued. *See supra* Part I. Second, the Swilleys were not given proper notice of the February 16 hearing and, thus, were deprived of a reasonable opportunity to be heard. *See supra* Part II. Moreover, Attorney Fata misrepresented to the trial court that he had given proper notice of the hearing to the Swilleys. *See id.* Third, Attorney Fiedler made numerous misleading statements to the trial court as to the Swilleys, and thereby falsely conveying that the Swilleys purposefully avoided discovery and court proceedings. *See* Feb. Tr. R. 45, p. 449, lines 19-22; p.450, lines 8-17); Neill Ltr.(R.50, p.531-532) and at least with respect to Attorney Fiedler's misstatements, Attorney Neill unequivocally advised the trial court of same. *See* Neill Ltr. (R. 50, p.531-532)

Therefore, the trial court's decision is based on extrinsic fraud and, on that basis, the decision below must be reversed and the matter remanded for further proceedings.

CONCLUSION

In light of the foregoing arguments and authorities cited, it is clear that the trial court committed multiple errors, any one of which requires reversal.

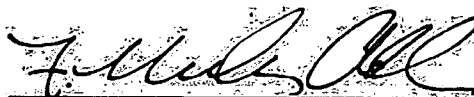
WHEREFORE, the Swilleys respectfully requests that this Court:

- A. Reverse the trial court's order entered March 21, 2016, striking the Swilleys' pleadings and granting Barnhill summary judgment;
- B. Reverse the trial court's order entered May 25, 2016, denying the Swilleys' motion to set aside the March 21, 2016 order;
- C. Remand the case for further proceedings; and

D. Grant the Swilleys any other and further relief the Court deems just and equitable.

Dated: 8/28/17

Respectfully,

A handwritten signature in black ink, appearing to read 'F. Miles Adler', written over a horizontal line.

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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-26-8367
(Formerly 2013-CP-26-2816)

Appellate Case No. 2016-001377

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SC Court of Appeals

Gabriel Barnhill & GSB Enterprises LLC Respondents

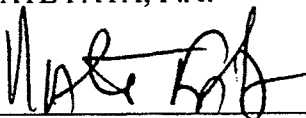
v.

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, J. Floyd Swilley SMG Partners, LLC, Alicia A. Piner, Heath Causey, Sage Advisory Group, L.P., Sage Private Equity Group, Secured Asset Factoring Exchange, Inc., SAFE, Inc., Digics, LLC, 9-1-1, Plumbing, LLC, and Sage Funding, L.P., Christopher Pitcock, Defendants,

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

FINAL BRIEF OF RESPONDENTS

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November 10, 2017

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Appendix 00641

INDEX

	<u>PAGE</u>
Index	i
Table of Authorities	iii
Statement of Issues on Appeal.....	1
Statement of the Case	1
Statement of Facts.....	3
Argument	12
I. Swilley Did Not Preserve For Appeal The Court's Determination That Swilleys' Pleadings Be Stricken For Failure To Cooperate In Discovery	12
A. By failing to appear at the February 16, 2016 hearing, Swilley has waived its arguments	13
B. The record does not support any claim that Swilley did not know about the hearing	15
C. Swilley's new arguments on appeal are barred	15
II. The Trial Court Properly Calculated Thirty Days Under The Plain Language Of The Order.....	16
III. The Court Did Not Abuse Its Discretion In Denying Swilleys' Motion To Set Aside Because The Notice Of Hearing Was Served On Swilley And Barnhill's December 2015 Pleadings Were Served On Swilley's Counsel	19
IV. The Court Exercised Sound Discretion In Striking Swilley's Pleadings Pursuant To Barnhill's Motion To Compel	22
V. The Court Properly Granted Summary Judgment Against Swilley On The Counterclaim.....	24
VI. Swilley's Extrinsic Fraud Arguments Fail Because They Were Not Preserved For Appeal And They Are Baseless	25

VII. Swilley's Arguments Of Professional Misconduct Or Ethical Violations Are Groundless	27
Conclusion.	28
Designation of Matter to Be Included In the Record On Appeal	v

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Barnette v. Adams Brothers Logging</u> , 355 SC 588, 586 S.E. 2d 572 (2003).....	22
<u>Bowman v. Richland Memorial Hospital</u> , 335 S.C. 88, 92, 515 S.E.2d 259, 261 (Ct. App. 1999).....	18
<u>Coleman v. Dunlap</u> , 306 S.C. 491, 413 S.E. 2d 15 (1992).....	22
<u>Eddins v. Eddins</u> , 304, S.E.2d 164 (Ct. App. 1991).....	17
<u>Dixon v. Dixon</u> , 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005)	14
<u>Fields v. Melrose Ltd. Partnership</u> , 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993).....	20
<u>Gainey v. Gainey</u> , 382 S.C. 414, 675 S.E.2d 792 (Ct. App. 2009)	27
<u>Glasscock v. U.S. Fidelity & Guaranty Co.</u> , 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001)	16, 27
<u>Herron v. Century BMW</u> , 395 S.C. 461, 465, 466, 719 S.E.2d 640, 642 (2012).....	12
<u>Hickman v. Hickman</u> , 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990).....	13, 14
<u>Hunter v. Staples</u> , 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999).....	13
<u>Pye v. Estate of Fox</u> , 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006).....	12, 15
<u>Ray v. Ray</u> , 347 S.C. 79, 647 S.E.2d 237 (Ct. App. 2007).....	27
<u>Rosen vs. Hiller</u> , 307 S.C. 331, 415 S.E.2d 117, 118 (Ct. App. 1992).	19
<u>S.C. Dep't of Transp. v. First Carolina Corp. of S.C.</u> , 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007).	13, 25
<u>Schleicher v. Schleicher</u> , 310 S.C. 275, 423 S.E.2d 147 (1992)	21
<u>Spreeuw v. Barker</u> , 385 S.C. 451, 682 S.E.2d 843 (S.C. App. 2009)	14
<u>Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia</u> Op. No. 27433 (S.C. Sup.Ct. filed Aug. 20, 2014).....	14

<u>In re: John F. Swilley</u> , 02-09234-W, Adv. Pro. No. 02-80347-W, U.S. Bankr. Ct. (D.S.C. 2003)	4
<u>Wilder Corp. v. Wilke</u> , 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)	12

RULES OF THE COURT

Rule 5, SCRCP	21, 25
Rule 5(a) SCRCP	21
Rule 5(b), SCRCP	21
Rule 59, SCRCP	10, 13
Rule 59(e), SCRCP	13, 14
Rule 60(b), SCRCP	22
Rule 60(b)(3) SCRCP	27

STATEMENTS OF ISSUES ON APPEAL

- I. Did the Appellant properly preserve issues for Appeal?
- II. Did the Court abuse its discretion in striking Appellant's pleadings based on Appellant's repeated and well documented discovery obstruction?

STATEMENT OF THE CASE

This is an appeal by Laurel Swilley and Floyd Swilley ("Swilley") of the March 22, 2016 Order. In that Order, the court struck Swilley's pleadings for repeatedly failing to cooperate in discovery and granted summary judgment to Gabriel Barnhill and GSB Enterprises, Inc. (collectively referred to as "Barnhill") on Swilley's counterclaims.

Barnhill commenced this action by filing a Summons and Complaint. Complaint (R. pp. 53-73) on April 25, 2013, asserting causes of action, inter alia, for violation of the South Carolina Investment Act, breach of fiduciary duty, fraud, misrepresentation, and violation of the Unfair Trade Practices Act. Complaint (R. pp. 53-73). Swilley filed a Counterclaim which was denied by Barnhill. Barnhill Answer to Counterclaim (R. pp. 92-96). Swilley was initially represented by Miles Adler ("Adler") and, subsequently, by John Leiter ("Leiter"). During the nearly three years of litigation, Barnhill filed seven discovery motions and four motions for sanctions for discovery abuse. The court entered multiple orders granting attorney fees and other relief to Barnhill on the discovery motions.

In October 2015 Leiter moved to be relieved as counsel for Causey and all other defendants, except 809 Holdings, L.P. ("809") which was represented by Mark Neill ("Neill"). Leiter Motion To Be Relieved (R. pp. 352-354). Barnhill filed a motion to compel and also moved for summary judgment and judgment on the pleadings as to Swilley's counterclaims in December 2015. Barnhill December 2015 Motion To Compel

(R. pp. 409-414); Barnhill December 2015 Motion For Summary Judgment and Judgment on Pleadings (S.S.R. pp. 3-7)¹. Barnhill's December 2015 Motion to Compel's requested relief was to strike the pleadings of Swilley and other defendants for failure to cooperate in discovery. Barnhill December 2015 Motion to Compel (R. p. 411). Judge Seal's heard Leiter's Motion to be relieved as counsel on January 4, 2016. Swilley was not present. January 4, 2016 Hearing Transcript (R. pp. 429-434). The court granted the motion, stayed the proceedings for 30 days and directed Leiter to prepare the Order. Leiter prepared the Order and sent it to Judge Seals who signed and dated it January 14, 2016. January 2016 Order (R. pp. 29-31). The Order was entered on January 25, 2016.

The court scheduled a hearing on Barnhill's Motion to Compel and Barnhill's Motion for Summary Judgment and Judgment on the Pleadings as to Swilley's counterclaims for February 16, 2016. Barnhill mailed notice of the hearing to Swilley on February 3, 2016. Notice of February 16, 2016 Hearing (R. pp. 367-371). Although counsel for 809 appeared at the February 16, 2016 hearing, Swilley did not. February 16, 2016 Hearing Transcript (R. pp. 436-469). The court granted Barnhill's requested relief and entered an Order on March 21, 2016 (R. pp. 32-38). In particular, the court struck Swilley's pleadings for discovery obstruction pursuant to Barnhill's Motion to Compel (R. pp. 32-38). In addition, the court granted summary judgment and judgment on the pleadings as to Swilley's counterclaims. (R. pp. 32-38). Swilley then moved to set aside the March 21, 2016 Order on April 1, 2016. Swilley Motions To Set Aside (R. pp. 415-420; R. pp. 423-424). The court denied the Swilley Motions to Set Aside in its May 2016 Order. May 2016 Order (R. pp. 41-48). Swilley then filed their appeal.

¹ As used herein S.R. means Supplemental to Amended Record on Appeal and S.S.R. means Second Supplemental to Amended Record on Appeal.

When Swilley filed the Initial Brief and Designation of Matter, Swilley included material not presented to the lower court. Barnhill filed a Motion to Strike. This Court granted the Motion to Strike by Order dated November 16, 2016. Swilley then filed an Amended Initial Brief.

STATEMENT OF FACTS

Barnhill alleges that in 2011 defendants engaged in a Ponzi scheme in which Barnhill, who was Floyd Swilley's accounting and financial advisory client, invested no less than \$115,000 in 809 and received approximately \$2,000 in return. Complaint par. 1-16; par. 74-76 (R. pp. 59-60). Barnhill was 26-27 years of age at the time. Complaint, par. 8 (R. p. 53). Laurel Swilley, Floyd Swilley and William Piner established 809 in 2010. Complaint par. 9-31 (R. pp. 54-55). 809 was a startup company that would loan money to companies in a "factoring" arrangement. Complaint, par. 50-53, 74 (R. pp. 57-59). The borrower company was QC Financing, LLC, a pawn shop entity established by Piner and Swilley. Complaint, par. 28-32 (R. p. 55). As alleged in the Complaint, Swilley and Piner took investor/client retirement monies to fund their own startup businesses. Complaint, par. 50-55 (R. p. 57). Barnhill filed a companion case asserting derivative claims in 2014 and the two Barnhill cases were subsequently consolidated. Barnhill Derivative 2014 Amended Complaint and April 27, 2015 Order Consolidating Cases (R. pp. 137-149; R. pp. 16-17).

In 2011, at the direction of Swilley and Piner, Barnhill's retirement monies were invested in the 809's Notes and Barnhill became a limited partner. Complaint, par. 58-59 (R. p. 304). 809 was a limited partnership created and owned by the Swilley and Piner Defendants and their companies. Barnhill Memorandum filed April 20, 2015, p. 3 (R. p.

295). Laurel Swilley is an attorney. Floyd Swilley is a bookkeeper/financial advisor. William Piner and Heath Causey are businessmen. Barnhill Memorandum filed April 20, 2015, p. 3 (R. p. 295). Swilley has been involved with other investment schemes. Barnhill Memorandum filed April 20, 2015 (R. pp. 295-296). As set forth in In Re: John F. Swilley, Floyd Swilley and Laurel Knuckles Swilley agreed to confess judgment in an Oklahoma federal case in which over \$100,000,000 was allegedly lost by investors. Order filed on April 17, 2003 by U.S. Bankruptcy Judge Waites in In Re: John F. Swilley, 02-09234-W, Adv. Pro. No. 02-80347-W., United States Bankruptcy Court, (D.S.C. 2003). Exhibit B to Barnhill's Memorandum filed on April 20, 2015 (R. pp. 306-325).

Swilley is a sophisticated litigant whose legal positions are contrary to the facts and rise to the level of gamesmanship as previously noted by Judge Waites. "Moreover these inconsistent positions are an attempt to gain an unfair advantage as defendants' previously resolved litigation, which sought a recovery of \$125,000,000 against him, for a significantly lesser amount conditioned upon its non-dischargeability." In Re: John F. Swilley Order, p. 17. (R. p. 322). Judge Waites further stated, "The court has serious concerns about what appears to be defendants' manipulation of the judicial process, and it will not countenance such gamesmanship." In Re: John F. Swilley, April 17, 2003 Order, p. 18 (R. p. 323).

Initially, Miles Adler ("Adler") represented all defendants. On October 28, 2013, Adler moved to be relieved as counsel citing a conflict. October 28, 2013 Adler Motion (R. pp. 97-98). The court relieved Adler as counsel under Order filed December 11,

2013. December 11, 2013 Order (R. pp. 2-4). John Leiter (“Leiter”) entered an appearance for defendants on January 13, 2014. Leiter Appearance (R. p. 114).

In their attempts to ferret out this complex Ponzi scheme, Barnhill served discovery requests upon the defendants. Swilley and the other defendants did not comply with the discovery rules or orders. Barnhill filed seven motions to compel discovery.² Furthermore, Plaintiffs filed four (4) Motions for Sanctions for Defendants’ failure to comply with court orders and discovery: November 4, 2013 (R. pp. 99-101), February 19, 2014 (R. pp. 115-131) and on June 27, 2014 (S.R. pp. 16-21), and June 8, 2015 (R. pp. 404-408).

In connection with Barnhill’s July 2013 Motion to Compel responses to April 2013 discovery requests, the court entered a Consent Order on September 20, 2013. September 2013 Consent Order (R. p. 001). When defendants failed to provide responsive information and, instead, lodged objections, Barnhill filed a motion for sanctions on November 4, 2013. November 2013 Motion for Sanctions (S.R. pp. 8-15). The court partially granted Plaintiffs’ Motion for Sanctions and Judge Culbertson awarded attorney fees by Order filed January 16, 2014 (R. pp. 05-06).

On October 15, 2014 the court again entered an Order for Sanctions in response to Barnhill’s June 27, 2014 Motion for Sanctions and Barnhill’s Memorandum in Support. October 2014 Order (R. pp. 7-12), Barnhill September 2014 Memorandum in support of Motion for Sanctions filed June 27, 2014 (R. pp. 180-268). In that Order, Judge Hyman found, “Defendants have been sandbagging in their discovery responses... . The March

² Barnhill filed Motions to Compel on the following dates: July 3, 2013 (R. pp. 75-91); January 10, 2014 (R. pp. 112-113), September 5, 2014 (R. pp. 151-160) and September 5, 2014 (R. pp. 161-175); October 20, 2014 (R. pp. 269-292); May 5, 2015 (R. pp. 335-349), and December 15, 2015 (R. p 34).

2012 payment to Twigg for his 809 Holdings, LP investment and the multiple undisclosed payments to Defendants are examples of Defendants' sandbagging and obstruction in the discovery process.³ October 15, 2014 Order, p. 4 (R. p. 10).

Defendants disclosed the following 809 investors in their Court ordered response to Interrogatory Number 9 of the Plaintiffs' Interrogatories dated April 29, 2013⁴:

Investor	Amount	Date
Raymond LaForest	\$50,000.00	9/22/10
John Teska	\$ 6,000.00	9/22/10
Tamrin Baggett	\$68,900.00	11/8/10
	\$ 6,200.00	12/1/10
Joyce Kauffman	\$48,000.00	1/11/11
Scott Mogal	\$17,000.00	3/11/11
Robert Twigg	\$25,000.00	8/12/11
Mark Sarvis	\$40,000.00	8/12/11
Gabriel Barnhill	\$49,000.00	5/26/11
	\$41,000.00	3/28/11
GSB Enterprises	\$25,000.00	4/11/11

October 15, 2014 Order (R. pp. 8-9).

Plaintiffs' Supplemental Interrogatory Number 2, dated February 25, 2014 requested,

For any payment made after 2011 to any investor, including, but not limited to, those persons disclosed by you to be a note purchaser or limited partner in response to Interrogatory Number 9, identify the bank name, address, payee, amount, date of payment and reason for payment.

³ Twigg filed a separate action *Robert L. Twigg and Twigg Enterprises, LLC vs. J. Floyd Swilley, Heath Causey, Laurel Swilley, Sage Financial Group, LLC; Secured Asset Factoring Exchange, Inc. and 809 Holdings, LP*, Civil Action No. 2013-CP-26-5477. The Defendants in Twigg are represented by Mark Neill, Esq. (R. p. 34; March 21, 2016 Order, p. 3)

⁴ Floyd Swilley's purported loan is not referenced.

Defendants responded “none”. October 15, 2014 Order (R. p. 9). However, Judge Hyman found that defendants failed to disclose multiple payments, including a payment to Twigg, which was known to Causey and Swilley. October 15, 2014 Order, p. 4 (R. p. 10). Judge Hyman ordered defendants to produce the requested information and ordered defendants to pay Plaintiffs’ attorney fees of \$2,700. October 15, 2014 Order (R. pp. 11-12).

Defendants created another Ponzi vehicle, Secured Asset Factoring Exchange (“SAFE”), in late 2011. 2014 Derivative Amended Complaint (R. pp. 137-149). As set forth in defendants’ answers to interrogatories, defendants raised \$896,325 from SAFE offerings to other investors and only \$533,659 has been repaid. Page 5 of Defendants’ Answers to Supplemental Interrogatories dated October 30, 2014, attached as Exhibit C to Barnhill’s Memorandum filed on April 20, 2015 (R. p. 331). Between 809 and SAFE, investors are out more than \$650,000; more than \$300,000 from 809 and more than \$350,000 from SAFE. October 15, 2014 Order (R. pp. 7-12); page 5 of Defendant’s Answers to Supplemental Interrogatories dated October 30, 2014, attached as Exhibit C to Barnhill’s Memorandum filed on April 20, 2015 (R. p. 331). Out of his \$115,000 investment, Barnhill received less than \$3,000. Complaint, par. 93 (R. p. 62).

Barnhill’s Motion to Compel Deposition filed on October 20, 2014 was heard on April 20, 2015. In the October 2014 Motion to Compel Deposition, the deposition notice for Swilley was attached. That Motion evidences Swilley was served with Deposition Notice on September 4, 2014 (R. pp. 269-291). Swilley would not and did not appear for deposition. Barnhill October 20, 2014 Motion to Compel (R. pp. 269-291). Pursuant to

the April 2015 hearing, the court entered an Order on May 22, 2015, requiring, in part, that the parties cooperate for depositions. May 22, 2015 Order (R. pp. 18-20).

Barnhill's Motion to Compel Discovery filed May 15, 2015 followed a documented pattern of discovery obstruction by defendants. Barnhill May 15, 2015 Motion to Compel, p. 2 (R. pp. 335-337). On June 12, 2015 Barnhill again moved for sanctions based on Defendants' failure to provide discovery responses. June 2015 Motion for Sanctions (R. pp. 404-408). Judge Seals, the Chief Administrative Judge, heard the motions and entered an Order granting relief on September 10, 2015, including the award of attorney fees. September 10, 2015 Order (R. pp. 23-26).

On October 21, 2015, Leiter moved to be relieved as counsel citing defendants' failure to abide by the terms of his fee agreement. October 21, 2015 Leiter Motion to be Relieved p. 2 (R. p. 353). On November 24, 2015, deposition notices were served on Causey and Swilley. Barnhill December 15, 2015 Motion to Compel (R. p. 411). The depositions did not occur. On December 15, 2015 Barnhill filed the Motion to Compel. December 15, 2015 Motion to Compel (R. pp. 410-414). In his motion, Barnhill specifically requested that the court strike the answer and counterclaim of Swilley and the other defendants. Barnhill December 15, 2015 Motion to Compel (R. p. 411). The December 2015 Motion to Compel was served on Leiter, counsel for Swilley. Barnhill December 15, 2015 Motion to Compel, Certificate of Service (R. pp. 413-414).

On December 21, 2015 Barnhill filed and served on Leiter a Motion for Summary Judgment and Judgment on the Pleadings. December 2015 Barnhill Motion for Summary Judgment and Judgment on the Pleadings with Certificate of Service (R. pp. 355-356, S.S.R. pp. 6-7). Barnhill also filed and served on Leiter a Memorandum in Support of

Motion for Summary Judgment and Judgment on the Pleadings. December 2015 Barnhill Memorandum in Support of Motion for Summary Judgment, Certificate of Service (R. pp. 357-366).

On January 4, 2016, Judge Seals held a hearing and granted Leiter's request to be relieved as counsel because Swilley and other defendants had failed to pay him in accordance with his fee agreement. A Form 4 was entered on January 4, 2016. January 4, 2016 Form 4 Order (R. pp. 27-28). Swilley was not present at the hearing. January 2016 Hearing Transcript (R. pp. 429-433). On January 5, 2016 Leiter transmitted an Order to Judge Seals for signature. Swilley was copied on the Leiter transmittal to the court. January 5, 2016 Leiter letter to Court (R. pp. 547-550). On January 14, 2016, Judge Seals dated the Order and signed it. January 2016 Order (R. p. 31). On January 21, 2016 Leiter transmitted the Order to the Clerk of Court for filing with notice to Swilley. January 21, 2016 Leiter letter (R. p. 551). The Order was entered on January 25, 2016. January 2016 Order (R. p. 29).

The court scheduled a hearing on Barnhill's two December 2015 motions for February 16, 2016. On February 3, 2016 Barnhill's counsel mailed notice of the February 16, 2016 hearing on the two December 2015 motions to Swilley. February 3, 2016 Notice of Hearing (R. pp. 367-371).

On February 16, 2016 Barnhill's counsel and 809's counsel attended the hearing. Swilley was not present. February 16, 2016 Transcript of Hearing (R. pp. 436-469). The court granted the relief requested by Barnhill in its Order filed March 21, 2016. March 2016 Order (R. pp. 32-38). Attorney Feidler of Mark Neill's offices appeared for 809 Holdings at the hearing and stated the following.

Mr. Feidler: Yes, Your Honor. But 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 day of January, giving them 13 [sic] days to find new counsel. So I'm only here on 809 Holdings, LP, Your Honor. As you can see, none of the other Defendants are here today. February 16, 2016 Transcript of Hearing, p. 4, lines 5-12. (R. p. 439, lines 5-12).

According to Mr. Feidler, Floyd Swilley knew about the hearing.

Mr. Feidler: I know that Mr. Swilley and Mr. Piner are representatives of that corporation. And they are the gentlemen that we have been in touch with per 809. They were notified of this hearing, they knew everything that's going on, and we are just - - we're trying to move - - 809 at this point is trying to claim bankruptcy. February 16, 2016 Transcript of Hearing, p. 15, lines 9-15 (R. p. 450, lines 9-15).

And Mr. Fiedler did not have cooperation from Swilley for the 809 deposition.

Mr. Feidler: Your Honor, I don't know how to phrase it, but I guess my ability to argue for my clients is as good as whether they cooperate with me, Your Honor. February 16, 2016 Transcript of Hearing, p. 14, lines 19-22 (R. p. 449, lines 19-22).

In its Order the Court ruled that all parties had been duly notified of the hearing. March 2016 Order, p. 2 (R. p. 33). No objections to the February 16, 2016 hearing were lodged at any time prior to April 2016.

On April 1, 2016, Swilley filed a Motion to Set Aside the March 2016 Order April 1, 2016 Swilley Motion to Set Aside (R. pp. 415-428) pursuant to Rule 59, SCRCp. (Swilley Initial Brief, p. 10). To support their Motion to Set Aside, Swilley asserted the following grounds:

1. At the time and date of the purported notice of hearing Swilley was under the veil of protection of Order of the Court signed on the 25th day of January 2016.

2. Swilley did not receive a copy of the motion or timely notice of the hearing that resulted in the Order.

3. The Order is based upon errors of facts.

In response to Swilley's Motion to Set Aside, Barnhill filed an Affidavit of Sally Huffman on April 13, 2016, confirming service of the Notice of Hearing for the February 16, 2016 hearing on Swilley and that no mail to Swilley was returned undelivered. April 2016 Huffman Affidavit (R. pp. 525-529). On April 19, 2016, more than two months after the February 16, 2016 hearing, Adler, former counsel for Swilley and the other defendants, filed a Notice of Appearance on behalf of Swilley only (R. pp. 373-375). On April 25, 2016 Barnhill filed a Notice of Bankruptcy Filings, informing the court of the bankruptcies filed by the various defendant companies. April 25, 2016 Notice of Bankruptcy Filings (R. pp. 397-400).

On May 2, 2016, a Form 4 was entered by Judge McIntosh denying Swilley's Motion to Set Aside the Order of March 21, 2016. May 2016 Form 4 (R. p. 39). On May 25, 2016, the Order denying Swilley, Causey and 809's Motion to Set Aside Order of March 21, 2016 was entered. (R. pp. 41-48).

The court denied the Swilley Motion to Set Aside. Specifically, the court found the date of Judge Seal's Order was January 14, 2016, and not signed on January 25, 2016 as asserted in paragraph 1 of Swilley's motion. May 2016 Order, p. 3 (R. p. 43). The court further found that Swilley knew of the hearing, that the hearing was no surprise to Swilley, that Swilley did not assert through affidavit or otherwise that they did not know of the hearing, that Swilley chose not to attend the hearing, and that Swilley raised no objection prior to the hearing or at the hearing. May 2016 Order (R. pp. 43-44).

809 never appealed the ruling of the lower court striking its answer and counterclaim for discovery obstruction. 809 is in default.

Swilley then filed the Notice of Appeal on June 16, 2016. In its Initial Brief Swilley attempted to include matters not contained in the record. This Court granted Respondents' Motion to Strike Matters Not Contained in the Record in its November 16, 2016 Order.

ARGUMENT

I. Swilley Did Not Preserve For Appeal The Court's Determination That Swilleys' Pleadings Be Stricken For Failure To Cooperate In Discovery.

Swilley's appeal fails on issue preservation grounds. Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the court with a platform for meaningful appellate review. *Herron v. Century BMW*, 395 S.C. 461, 465, 466, 719 S.E.2d 640, 642 (2012). "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

"It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved." *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006). While "a party is not required to use the exact name of a legal doctrine in order to preserve the issue," *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2012), the party nonetheless must be sufficiently clear in framing his objection so as to draw the court's attention to the precise nature of the alleged error. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733.

(1998). If the party is not reasonably clear in his objection to the perceived error, he waives his right to challenge the erroneous ruling on appeal. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007). Furthermore, a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not. *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990). Finally, Swilley may not raise in its reply brief any new issues. *Hunter v. Staples*, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999).

Swilley's appeal fails on three different levels of issue preservation. First, Swilley was notified of the hearing, knew of the hearing and chose not to attend, thereby waiving any argument that could have been presented to the lower court on February 16, 2016. Second, the Record on Appeal does not support Swilley's claims and has not been preserved. Third, Swilley is raising arguments for the first time on appeal that were never presented to the lower court. Those new issues or arguments have not been preserved and may not be asserted for the first time on appeal.

A. By failing to appear at the February 16, 2016 hearing, Swilley has waived its arguments.

Swilley did not raise any argument at the February 16, 2016 hearing. The court ruled they were notified of the hearing pursuant to the Notice of Hearing. March 2016 Order, p. 2 (R. p. 33); May 2016 Order, p. 3 (R. p. 43). In its order addressing Swilley's Rule 59 motion, the court recited the statements of 809's counsel, the fact that Swilley and Swilley companies were mailed nine separate mailings of the notice of hearing, and were mailed the notice of hearing. May 2016 Order, p. 3 (R. p. 43). The Court also

noted that nothing in the record indicated Floyd Swilley and Laurel Swilley did not know about the hearing. May 2016 Order, p. 3-4 (R. pp. 43-44).

Swilley cannot use Rule 59(e) to present to the court an issue Swilley could have raised prior to the March 2016 Order but did not. See *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481, 482 (Ct. App. 1990). *Spreeuw v. Barker*, 385 S.C. 451, 682 S.E.2d 843 (S.C. App. 2009); *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (finding issue raised for first time in Rule 59 SCRPC motion is not preserved for review); *Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, Op. No. 27433 (S.C. Sup.Ct. filed Aug. 20, 2014)(“a party cannot use a Rule 59(e) motion to present to the court an issue the party could have raised to the circuit court prior to judgment, but did not.”).

Swilley’s only arguments in the Motion to Set Aside was that the court’s stay was in effect at the time of the February 16, 2016 hearing and Swilley did not receive “timely” notice of the hearing or a copy of the motion. In the lower court, Swilley never asserted that they did not know about the hearing. In fact, Fiedler, counsel for 809 informed the Court that Floyd Swilley knew about the hearing. The lower court’s conclusion that Swilley knew about the hearing and ignored the hearing is not an abuse of discretion. The record supports the conclusion that Swilley knew about the hearing. The record does not support the Swilley contention on appeal that they did not know about the hearing. Thus, Swilley ignored the hearing at its own peril and waived the arguments that could have and should have been raised to the trial court at that time.

In addition, in the Motion To Set Aside, Swilley did not address the court’s ruling or analysis that their pleadings be stricken for failure to cooperate in discovery pursuant

to Barnhill's December 2015 Motion to Compel. Swilley failed to raise in their Motion to Set Aside any argument that there was an agreement between Swilley and Barnhill to reschedule the depositions as Swilley asserts on appeal in page 10 of Swilley's Brief. Swilley has failed to preserve for appeal the court's ruling to strike the pleadings for repeated discovery abuse pursuant to Barnhill's Motion to Compel.

B. The record does not support any Swilley claim that they did not know about the hearing.

Swilley's claim that they did not know about the hearing is baseless. (See Swilley Initial Brief, p. 6). Swilley filed no affidavits stating that they did not know of the hearing or that they never received notice of the hearing. Instead, Swilley only asserted in the motion to set aside that they did not receive "timely" notice of the hearing. Thus, Swilley cites nothing in the record which supports the claim that they did not know about the hearing. The court concluded Swilley was served notice of the hearing and knew of the hearing. March 2016 Order, p. 2 (R. p. 33); May 2016 Order, p. 3-4 (R. pp. 43-44). The Affidavit of Huffman supports the court's conclusion. The Certificate of Service of Notice of Hearing supports this conclusion, as do the statements of 809's counsel, Fiedler. Swilley has not preserved the record to support any argument that Swilley did not know of the hearing (R. pp. 367-371).

C. Swilley's new arguments on appeal are barred.

Most of Swilley's arguments were never made to the lower court and have not been preserved. Many of those latest arguments are an attempt to smear Barnhill's counsel with purported ethical violations. Those baseless claims were not raised to the lower court and have not been preserved. *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006). Moreover, they are without any factual or legal basis.

On pages 6 and 7 of the Initial Brief, Swilley asserts that Barnhill's counsel committed a myriad of ethical violations or committed professional misconduct in connection with providing notice of the hearing. These arguments or issues were never presented to the lower court. They have not been preserved. Similarly, Swilley complains of misrepresentations, misconduct and ethical violations by Barnhill's counsel on pages 9 and 10 of the Initial Brief. In addition, for the first time on appeal, Swilley makes a non-sensical argument that Attorney Fata's notary seal is falsified. Yet, again, there is no evidence in the record that this issue was ever raised to the lower court because it was not. Furthermore, Swilley cites no supporting authority for the non-sensical notary arguments. *Glasscock v. U.S. Fidelity & Guaranty Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review").

Similarly, for the first time on appeal Swilley argues extrinsic fraud. Swilley Initial Brief, p. 15-16. These arguments were not raised to the lower court and have not been preserved.

II. The Trial Court Properly Calculated Thirty Days Under The Plain Language Of The Order.

Under the plain language of the January 14, 2016 Order, the 30 day stay began on January 14, 2016 and ended on February 13, 2016. Contrary to Swilley's arguments, the date an Order is filed does not automatically begin the timing or parameters within the Order. Rather, the language used by Judge Seals in his Order determines the date a time period, such as a thirty day stay, is to commence. Nothing requires time parameters within an order to start on the date the order is entered.

Judgments are to be construed like other written instruments. The determinative factor is the intention of the court gathered from all parts of the order. Such construction should be given to a judgment as will give force and effect to every word of it, if possible and make it as a whole construed and reasonable. *Eddins v. Eddins*, 304, S.C. 133, 403 S.E.2d 164 (Ct. App. 1991).

The order relieving Leiter as counsel was prepared by Swilley's counsel, Leiter, within a day of the January 4, 2016 hearing. In the January 2016 Order, the court used two distinct phrases "within thirty (30) days from the date of this Order" and "as of the date of the entry of this Order". (R. p. 30). The lower court distinguished the "as of the date of entry of this order" from the "date of this order." January 2016 Order (R. p. 30). If the court intended the thirty day period to begin upon the filing of the Order, the court would have used the language "as of the date of the entry of this Order." The distinctive language used by the court refutes Swilleys' argument. There is no dispute that the date the Order was signed is January 14, 2016 (R. p. 31). The court rendered its written decision and ruling on that date as evidenced by the language, "IT IS SO ORDERED". January 14, 2016 Order, p. 3 (R. p. 31); May 2016 Order (R. p. 43).

The lower court gave an extra ten days from the court's ruling from the bench on January 4, 2016 for Swilleys to obtain counsel and stay the action. The court was aware of the scheduling issues and pushed the trial date to not before May 1, 2016. January 2016 Order (R. pp. 29-31). Under Swilleys' flawed logic, there would be no reason for a judge to ever date an order if time parameters within the order are to begin only upon entry of the order.

While the Order was required to be filed with the court to become effective, the time frames set forth in the Order are not superseded by the date the Order is filed. Rather, the time frame is triggered by the language within the Order. In this instance, Judge Seals chose to give Swilleys 30 days from dating his Order. After he signed the Order, he mailed it back to Leiter and obviously understood Leiter would receive it and file it with the clerk. Judge Seals did not know the date the Order would be entered because Leiter was responsible for filing it. He did know, however, that he gave 30 days at the hearing for Swilleys to obtain new counsel. January 4, 2016 Hearing Transcript, p. 4-5 (R. pp. 432-433). And Judge Seals knew the date he signed and dated the Order. Thus, the date placed on the Order by Judge Seals is the date the clock begins to run on Swilley. To hold otherwise would be to disregard the intent of the court and the clear, distinctive language used within the Order.

The *Bowman v. Richland Memorial Hospital*, 335 S.C. 88, 92, 515 S.E.2d 259, 261 (Ct. App. 1999) case cited by Swilley is inapplicable and is not persuasive. In *Bowman*, the appellant did not ignore a hearing. Instead, the *Bowman* court weighed the equity of a ten day period running when both parties were unaware of which of two competing orders the judge signed until after one of the orders was filed with the clerk of court. In *Bowman*, appellants' counsel's assumption that the ten days began to run upon entry of the order was evidenced by a handwritten memo to a law clerk and notations on counsel's desk calendar. *Id.* Thus, the appellant in *Bowman* attended the hearing and preserved the record, unlike Swilley.

In the instant case, equitable factors clearly rebut Swilley's argument. Swilley never obtained new counsel so they suffered no prejudice. After Swilley failed to appear

at the January 4, 2016 hearing, Swilley was notified of the court's ruling from the bench on January 5, 2016. Leiter January 5, 2016 letter with Order (R. pp. 547-550). Swilley counsel, Leiter, was duly notified of the court's decision on January 4, 2016. Swilley was served a copy of the unsigned Order on January 5, 2016. Nothing in SCRCF requires service of the filed Order. See *Rosen v. Hiller*, 307 S.C. 331, 415 S.E.2d 117, 118 (Ct. App. 1992). Swilley received the Notice of Hearing. And, Swilley did not appear at the February 16, 2016 hearing to lodge any objection to preserve their argument. Thus, even if Swilley had an argument on the stay being in effect at the time of the February 16, 2016 hearing, Swilley was required to present that argument to the court on February 16, 2016. Swilley has not preserved for appeal this timing issue because they had notice of the hearing and chose not to attend.

III. The Court Did Not Abuse Its Discretion In Denying Swilley's Motion To Set Aside Because The Notice Of Hearing Was Served on Swilley And Barnhill's December 2015 Pleadings Were Served On Swilley's Counsel.

Barnhill properly served the December 2015 Motion to Compel and Motion for Summary Judgment and Judgment on the Pleadings. Barnhill served Swilley counsel, Leiter, in December 2015 with those two Motions. Barnhill December 2015 Motion to Compel and Motion for Summary Judgment including Certificates of Service (R. pp. 410-414; 355-356; S.S.R. pp. 3-7). Barnhill then served Swilley with notice of the February 16, 2016 hearing on February 3, 2016. Notice of Hearing (R. pp. 367-372). At the time any hearing was set by the Clerk of Court, Swilleys' counsel, Leiter, was responsible for providing notice to Swilley. Barnhill provided additional notice of the February 16, 2016 hearing on February 3, 2016 to Swilley.

Contrary to Swilley's arguments on page 9 of the brief, Plaintiffs' were under no obligation to serve again a previously filed and served motion with the Notice of Hearing. Swilley cites no procedural rule requiring redundant service of a written motion on a party. No court order required such redundant service. Swilley's conclusory arguments are without support in fact and in law. An issue is deemed abandoned on appeal if it is argued in a short conclusory statement without supporting authority. *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993).

When Adler withdrew as counsel from Swilleys under Order filed on December 11, 2013, Swilley was ordered by the court to advise the Clerk of their address. December 11, 2013 Order (R. p. 2). Nowhere in the record did Swilley ever notify the court of their address when they were not represented by counsel. Any argument by Swilley that the clerk did not provide notice is without merit and would be due to Swilley's failure to comply with the prior order of the court.

Swilley does not cite any matter in the record which indicates Leiter was not notified of the hearing or that Leiter was unaware of the hearing. No affidavit of Leiter was filed attesting that he was not aware of or not informed of the February 16, 2016 hearing before January 25, 2016. Thus, the record does not support Swilleys' bare appellate contention that they were unaware of the hearing until after it occurred. And the court was within its sound discretion to reject Swilleys' bare assertions that they didn't receive the "timely" notice of the hearing. Everyone, Swilley included, knew of the hearing. February 16, 2016 Hearing Transcript p. 15, lines 9-17 (R. p. 450, lines 9-17). 809's counsel was present at the hearing. In its March 21, 2016 Order, the court

noted Neill, whose firm represented 809 at the hearing, was representing Swilley and others in the Twigg case. March 21, 2016 Order, p. 3, fnnt. 2 (R. p. 34).

Barnhill complied with the Rules of Civil Procedure in serving notice of the hearing upon Swilley. Service is effective upon mailing pursuant to Rule 5, SCRPC. Personal service or actual service of a hearing notice is not required. ("Service by mail is complete upon mailing all pleadings and papers subsequent to service of the original summons and complaint.) Rule 5(b), SCRPC. See also *Schleicher v. Schleicher*, 310 S.C. 275, 423 S.E.2d 147 (S.C. 1992). Rule 5(a), SCRPC addresses, in part, the service of notices.

If notice of a motion hearing required actual knowledge by the non-moving party, as confirmed by the non-moving party, SCRPC Rule 5 would be useless. Any litigant could wait to open mail until after a hearing time and dodge judgments and court orders. This type of litigation gamesmanship should not be embraced by the Court.

The lower court was not obligated to accept Swilleys' bare, contradictory statements that it did not know of the hearing or that it was entitled to some other form of notice of the hearing when:

1. Service of the Notice of Hearing was effective on February 3, 2016 pursuant to SCRPC, Rule 5;
2. Service of the Motion to Compel and Motion for Summary Judgment was properly made on Leiter, Swilley's counsel in December 2015;
3. Swilley filed no affidavits attesting that they did not know of the hearing or that their counsel, Leiter, did not receive notice of the hearing;

4. Swilley was previously ordered to notify the court of their address but they did not;

5. Swilley did not attend the February 16, 2016 hearing or file any papers objecting to the hearing before April, 2016;

6. Swilley never obtained new counsel, so they suffered no prejudice;

7. The record reflects Swilley has not complied with and has ignored multiple court orders; and

8. Neill, Swilley counsel in a related case, *Twigg vs. 809 et al*, received notice of the February 16, 2016 hearing and his firm attended the hearing.

The trial court was well within its discretion to reject Causey's bare, unsupported "timely" notice arguments. Swilley never defines "timely". Swilley has not met its burden in proving the lower court abused its discretion.

IV. The Court Exercised Sound Discretion In Striking Swilley's Pleadings Pursuant To Barnhill's Motion To Compel.

Absent an abuse of discretion, discovery sanctions will not be reversed on appeal, and the party appealing from the order of sanctions carries the burden of proving an abuse of discretion occurred. *Barnette v. Adams Brothers Logging*, 355 S.C. 588, 586 S.E.2d 572 (S.C. 2003). Similarly, motions for relief under Rule 60(b) SCRPC are within the trial court's discretion, and the appellate court will not reverse the trial court absent an abuse of discretion. *Coleman v. Dunlap*, 306 S.C. 491, 413 S.E.2d 15 (S.C. 1992).

The court did not abuse its discretion by granting the relief requested when there is a well-documented pattern of discovery abuse. The court previously found defendants were "sandbagging" in discovery and no party's depositions had been taken despite

multiple deposition notices and multiple motions to compel.

The record reflects seven (7) motions to compel filed against defendants including Swilley's four (4) motions for sanctions filed and four Orders granting sanctions/fees. The court did not abuse its discretion in striking Swilleys' pleadings for failure to cooperate in discovery. Two notices of deposition were served on the Swilleys. Barnhill October 20, 2014 Motion to Compel with Swilleys' deposition notices (R. pp. 269-291); Barnhill December 2015 Motion to Compel with Swilley deposition notice (R. pp. 410-411). Swilley never appeared for deposition or offered to appear for a deposition. March 2016 Order, p. 3-4 (R. pp. 34-35). The trial court rejected the argument that there was some verbal agreement to reschedule the depositions. May 2016 Order, p. 4 (R. p. 44). Again the record does not support Swilley's arguments. No abuse of discretion occurred.

The court struck Swilley's pleadings due to the well documented discovery abuse and delay of Swilley. March 2016 Order (R. p. 35). Judge Hyman previously held Swilley was sandbagging in their discovery responses. October 2014 Order (R. p. 10). In the Court's May 2015 Order, Swilley was required to cooperate with depositions (R. p. 19). They did not. Swilley admits in their Initial Brief, ... "there has been virtually no discovery to date in this matter ..." (Swilley Initial Brief, p. 4). In December 2015, after two and a half years of litigation, Swilleys did not appear for deposition for the second time. October 20, 2014 Barnhill Motion to Compel with Causey deposition notices (R. p. 269-291); December 2015 Motion to Compel (R. pp. 410-411). Swilleys cites nothing in the record where they ever offered to appear for a deposition, when they were represented by counsel or as a *pro se* litigant. The court noted this fact. March 25, 2016 Order, pp.3-

4 (R. pp. 43-44). The court was well within its discretion to conclude that after nearly three years of litigation, Swilley's pleadings should be stricken for failure to cooperate in discovery. Swilley's argument on page 15 of its Brief that "the Swilleys have not yet had a full and fair opportunity to engage in discovery" is groundless. The eleven discovery based motions filed by Barnhill and four court orders on discovery support the court's well-reasoned decision.

V. The Court Properly Granted Summary Judgment Against Swilley On The Counterclaim.

The court exercised sound discretion when it struck Swilley's counterclaim under the Frivolous Proceeding Act and Floyd Swilley's additional counterclaim for breach of contract. March 2016 Order; May 2015 Order. Summary judgment was properly entered, as no evidence was submitted by Swilley at the February 2016 Hearing. Moreover, Swilley admits in his Brief on page 14 that even the Frivolous Proceedings counterclaim was not ripe. Once the court struck Swilley's pleadings based on the Motion to Compel, there was no legal basis for a frivolous proceeding's claim ever as Barnhill's allegations are deemed admitted.

Swilley does not contest on appeal the court's finding that no legal duty was owed to Swilley by Barnhill under the Breach of Contract Counterclaim. (March 2016 Order, p. 6). Thus, this unappealed ruling is the law of the case. Finally, and as an additional basis for affirming the lower court's Order, Swilley counterclaim was stricken pursuant to the March 21, 2016 Order on Barnhill's Motion to Compel.

VI. Swilley Extrinsic Fraud Arguments Fail Because They Were Not Preserved For Appeal And They Are Baseless.

Swilley arguments of extrinsic fraud on pages 15-16 of their Brief fail, because they were not presented to the lower court and they are baseless. Swilley did not set forth any extrinsic fraud arguments in the Motion to Set Aside, which was filed more than six weeks after the hearing. Swilley is barred from raising these arguments to this Court when the lower court had no opportunity to address them. For an issue to be preserved for Appellate review, it must have been raised to and ruled upon by the trial judge. *S.C. Dept. of Transportation vs. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903 (2007).

Substantively, Swilley's extrinsic fraud arguments are that (1) Swilley was not given proper notice of the hearing; (2) that "Attorney Fata misrepresented to the trial court that he had given proper notice of the hearing to the Swilleys"; and (3) that Attorney Fata made misleading statements to the Court. Swilley Brief, p. 15-16.

As to Swilley's first argument, Swilley was served Notice of the Hearing on February 3, 2016. Notice of Hearing (R. pp. 367-371). Service is effective upon mailing, not receipt. Rule 5, SCRCF. The December 2015 motions were served on Swilley's counsel. Swilley cites no procedural rule requiring redundant service of the pleadings. December 2015 Motion to Compel; December 2015 Motion for Summary Judgment and Judgment on the Pleadings (R. pp. 410-414; 355-356). Swilley was properly notified of the hearing, knew of the hearing, but chose not to attend.

Swilley's second argument that Fata misrepresented to the trial court that Swilley had been given proper notice of the hearing also fails. As stated above, service of the Notice of Hearing was effected at the time of mailing, February 3, 2016. SCRCF, Rule 5.

The court ruled they were notified. Contrary to Swilley's argument, Fata was not required to argue Swilley's position at the February 2016 hearing. Fata was never apprised of Swilley's arguments until after April 1, 2016. Swilley could have filed an objection prior to the hearing.

Finally, Swilley asserts that Mark Neill's office, who is also Swilley's counsel in the *Twigg* case, made misrepresentations to the court at the February 16, 2016 hearing. Again, another lawyer's candid comments to the Court which were completely consistent with defendants' documented discovery obstruction, litigation history and lack of cooperation does not amount to extrinsic fraud. Counsel's comments to the court concerning bankruptcy filing by defendants is wholly consistent with bankruptcies filed by the many defendant companies. Notice of Bankruptcy Filings (R. pp. 399-402). Furthermore, Mr. Fiedler's recitation to the court of the fact that Judge Seals signed an order relieving Leiter on the 14th day of January was accurate. February 16, 2016 Transcript of Hearing, p. 4, lines 5-12 (R. p. 439, lines 5-12).

Swilley could have presented their arguments at the hearing as did 809. The result would have been the same. Swilley had no reasonable explanation as to why they did not appear for deposition after multiple discovery motions and orders. More importantly, Swilley did not rely on any person in failing to appear at the February 16, 2016 hearing. Swilley cannot argue extrinsic fraud or that they were induced not to appear at the hearing when their lawyer drafted the January 2016 Order and Swilley knew of the hearing and was served notice of the hearing.

Extrinsic fraud is the only type of fraud for which relief from judgment may be granted; extrinsic fraud is fraud that induces a person not to present a case or deprive a

person of the opportunity to be heard. SCRCF, Rule 60(b)(3), *Gainey v. Gainey*, 382 S.C. 414, 675 S.E.2d 792. (Ct. App. 2009). The essential distinction between intrinsic and extrinsic fraud for purposes of relief from judgment is the ability to discover fraud. *Ray v. Ray*, 347 S.C. 79, 647 S.E.2d 237 (Ct. App. 2007). The court made no mistake and was not misled when it reviewed the pleadings and considered the matters at issue on February 16, 2016, or thereafter. Swilley ignored the February 2016 hearing. Swilley was duly notified and has relied on no one. Swilley's belated extrinsic fraud arguments were not preserved and fail as they are groundless.

VII. Swilley's Arguments Of Professional Misconduct Or Ethical Violations Are Groundless.

Throughout the Brief, Swilley argues that Fata and Fiedler breached ethical and professional duties as a basis for relief from the lower court's orders. Swilley has cited no rule of civil procedure, no case law and filed no affidavits to support any of these groundless arguments. The simple recitation of rules of professional conduct on appeal does not create a basis for relief. Swilley cites no specific statement of what counsel Fiedler or Fata said to the court that was objectionable. These non-sensical arguments are without factual and legal support and should be deemed abandoned on appeal. *Glasscock vs. U.S. Fidelity & Guaranty Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001).

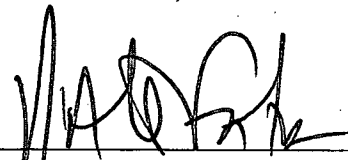
On page 6 of the Initial Brief, Swilley argues that Fata should have informed the court of the January 2016 Order and its import. In essence, Swilley is arguing on appeal that Fata should have asserted Swilley's position at the February 16, 2016 hearing, which was unknown to Fata and which Swilley did not assert until April 2016. Attorney Fiedler informed the court of the January 2016 order and even told the court the date the order

was signed. February 16, 2016 transcript of Hearing, p. 4, lines 5-12 (R. p. 439, lines 5-12). Swilley overlooks the transcript and does not mention that the court was informed of the January 2016 order. On page 9, Swilley argues that Fata misrepresented that Swilley was properly served notice of the hearing. Yet, Swilley cites no procedural requirement that was violated or not followed. Swilley cites no case law which requires redundant service of pleadings. Further on page 9, Swilley argues a lawyer may not serve as a notary for his legal secretary. Again, Swilley makes a confounding argument that has no basis in law or in fact. The Swilley gamesmanship, previously noted by Judge Waites, and previously noted as sandbagging by Judge Hyman, is now being used to contrive frivolous arguments on appeal. This Court should soundly reject those belated, frivolous arguments.

CONCLUSION

The lower court's Orders should be affirmed in their entirety.

NATE FATA, P.A.

A handwritten signature in black ink, appearing to read 'Nate Fata', is written over a horizontal line.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the 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

Case No. 2014-CP-26-8367
(Formerly 2013-CP-26-2816)

Appellate Case No. 2016-001328

Gabriel Barnhill & 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, J. Floyd Swilley SMG Partners, LLC, Alicia A. Piner, Heath Causey, Sage Advisory Group, L.P., Sage Private Equity Group, Secured Asset Factoring Exchange, Inc., SAFE, Inc., Digics, LLC, 9-1-1, Plumbing, LLC, and Sage Funding, L.P., Christopher Pitcock, Defendants,

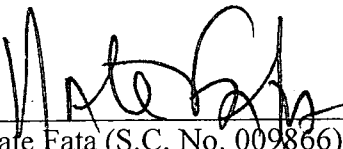
Of Whom J. Floyd Swilley and Laurel K. Swilley and Heath Wendell Causey
are the Appellants

CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondents certifies that the Final Brief of Respondents complies with Rule 211(b), SCACR.

Appendix 00674

November 10, 2017



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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge 15th Judicial Circuit

Civil Action No. 2014-CP-26-08367
2014-CP-26-03362 (formerly 2013-CP-02816)

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Gabriel Barnhill & 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, J Floyd Swilley, SMG
Partners LLC, Alicia Piner, Heath Causey,
Sage Advisory Group LP, Sage Private
Equity Group LLC, Secured Asset Factoring
Exchange, Inc, SAFE, Inc, Digics, LLC, 9-1-
1 Plumbing, LLC, and Sage Funding, LP
and Christopher Pitcock,

Defendants

of whom J Floyd Swilley, Laurel K Swilley
and Heath Wendell Causey, are the

Appellants.

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Appendix 00676

TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities	ii
Statement of Issues on Appeal.....	1
Statement of the Case	2
<u>Arguments</u>	
Argument I.....	6
I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO ABIDE BY ITS OWN ORDER STAYING THE PROCEEDINGS FOR 30 DAYS	
Argument II.....	9
II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RULING ON THE MATTER DESPITE THE DEFECTIVE SERVICE OF NOTICE TO HEATH CAUSEY	
Argument III.....	12
III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT AS A SANCTION AGAINST THE SWILLEYS AND HEATH CAUSEY	
Argument IV	13
IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT WHEN THERE REMAINED GENUINE ISSUES OF MATERIAL FACT IN DISPUTE	
Argument V	18
V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RELYING ON FALSE STATEMENTS AND MISREPRESENTATIONS BY LEGAL COUNSEL	
Conclusion	20

TABLE OF AUTHORITIES

CASES

<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 [] (1986)	15
<i>Bankers Trust of S.C. v. Bruce</i> , 283 S.C. 408, 415, 323 S.E.2d 523, 528 (Ct. App. 1984) ...	18
<i>Brockbank v. Best Capital Corp.</i> , 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000)).....	15
<i>Bowman v. Richland Memorial Hosp.</i> , 335 S.C. 88, 92, 515 S.E.2d 259, 261 (Ct. App. 1999).....	7
<i>Chewning v. Ford Motor Co.</i> , 354 S.C. 72, 82, 579 S.E.2d 605, 610 (2003)	18
<i>Cf. Universal Benefits, Inc. v. McKinney</i> , 349 S.C. 179, 183-84, 561 S.E.2d 659, 661-62 (Ct. App. 2002)	10
<i>Davis v. Parkview Apts.</i> , 409 S.C. 266, 281-83, 762 S.E.2d 535, 543-44 (2014).....	13
<i>Dawkins v. Fields</i> , 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003)	15, 16 & 17
<i>Dukes & Dukes, Inc. v. Hygrade Food Prods. Corp.</i> , 236 S.C. 69, 113 S.E.2d 254 (1960)	8
<i>Dunn v. Dunn</i> , 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989).....	12
<i>Downey v. Dixon</i> , 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987).	11
<i>Flexon v. PHC-Jasper, Inc.</i> , 413 S.C. 561, 571-72, 776 S.E.2d 397, 403-04 (Ct. App. 2015)	6
<i>Graham v. Graham</i> , 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990).....	6
<i>Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.</i> , 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999).....	12
<i>Hampton v. Conso Prods., Inc.</i> , 808 F. Supp. 1227, 1232 (D.S.C. 1992).....	16
<i>Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n</i> , 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)	17
<i>Hagy [v. Pruitt]</i> , 339 S.C. 425, 431, 529 S.E.2d 714, 717 (2000)	17

<i>Karppi v. Greenville Terrazzo Co., Inc.</i> , 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997).....	12
<i>Mullane v. Cent. Hanover Bank & Trust Co.</i> , 339 U.S. 306, 314 (1950)	9
<i>Ogburn-Matthews v. Loblolly Partners</i> , 332 S.C. 551, 562, 505 S.E.2d 598, 603 (Ct. App. 1998).....	9,10
<i>Parker v. Spartanburg Sanitary Sewer Dist.</i> , 362 S.C. 276, 286, 607 S.E.2d 711, 716 (Ct. App. 2005)	13
<i>Quail Hill, L.L.C. v. Cnty. of Richland</i> , 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010)	15
<i>Robinson v. Estate of Harris</i> , 388 S.C. 616, 625, 698 S.E.2d 214, 219 (2010).	18
<i>Santee Cooper Resort, Inc. v. S.C. Public. Serv. Commission</i> , 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989).....	6
<i>Stevens v. United States</i> , No. 98-554C, 2012 WL 2021740, at *4 (Fed. Cl. filed June 4, 2012).....	8
<i>Tryron Fed. Sav. & Loan Ass'n v. Phelps</i> , 307 S.C. 361, 362, 415 S.E.2d 397, 398 (1992)...	9
<i>Tanner v. Florence County Treasurer</i> , 336 S.C. 552, 521 S.E.2d 153 (1999)).....	14
<i>Traynum v. Scavens</i> , 416 S.C. 197, 201, 786 S.E.2d 115, 117 (2016).....	14
<i>Webster v. Clanton</i> , 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972);.....	9
Reference Join also with the Brief of the Swilleys' in its entirety	

STATUTES

S.C. Code § 15-36-10(C)(1)	15
SC Rules of Civil Procedure - SCRP Rule 15	12
SC Rules of Civil Procedure - SCRP Rule 56 (c).....	14
SC Rules of Civil Procedure - SCRP Rule 58 (a).....	7
SC Rules of Civil Procedure - SCRP Rule 59	10

OTHER AUTHORITIES & REFERENCES

<u>"ADLER LETTER"</u> LETTER FROM F. MILES ADLER TO JUDGE MCINTOSH DATED MAY 3, 2016	13
<u>BARNHILL MEMO</u> PLAINTIFF MEMORANDUM IN SUPPORT OF THEIR MOTION FOR JUDGEMENT ON THE PLEADINGS AND/OR SUMMARY JUDGEMENT	5
<u>"CAUSEYS MOTION TO SET ASIDE"</u> DEFENDANTS HEATH CAUSEY'S NOTICE OF MOTION TO SET ASIDE SUMMARY JUDGEMENT	5 & 10
<u>"DECEMBER MOTION"</u> PLAINTIFF NOTICE OF MOTION AND NOTION FOR SUMMARY JUDGMENT AND FOR JUDGMENT OF THE PLEADINGS	3
<u>"FEB TRANSCRIPTS"</u> TRANSCRIPT OF RECORD OF THE COURT HELD ON FEBRUARY 16, 2016	3,4,8,9,13,15,16,17, &18
<u>"FATA LETTER"</u> LETTER FROM NATE FATA TO JUDGE MCINTOSH WITH ATTACHMENTS THEREAFTER DATED MAY 13, 2016	19
<u>"FORM 4"</u> ORDER DATED 4/28/2016	10
<u>"JANUARY ORDER"</u> ORDER RELEIVING JOHN M LEITER AND THE LAW OFFICES OF JON M LEITER AS COUNCEL FOR J FLOYD SWILEY, J FLOYD SWILLEY INVESTMETN ADVISORS, LAUREL K SWILLEY, SMG PARTNERS, LLC, SMS SERVICES, LP, WILLIAMS C PINER, WCP LIMITED, LLC, ALICIA A PINER, HEATH CAUSEY, SAGE FUNDING, LP, SAGE FINANCIAL GROUP LLC, SAGE PRIVATE EQUITY GROUP, SECURED ASSET FACTORING EXCHANGE, INC DIGICS, LLC, AND CHRISTOPHER PITCOCK FILED OCTOBER 27, 2015	2,3,6 &7
<u>"MARCH ORDER"</u> ORDER FILED MAR 21, 2016	4 &17
<u>"MAY ORDER"</u> ORDER FILED MAY 25, 2016	4 &17
<u>"MOTION TO BE RELIEVED AS COUNCEL"</u> MOTION TO BE RELIEVED AS COUNCEL FOR J FLOYD SWILEY, J FLOYD SWILLEY INVESTMETN ADVISORS, LAUREL K SWILLEY, SMG PARTNERS, LLC, SMS SERVICES, LP, WILLIAMS C PINER, WCP LIMITED, LLC, ALICIA A PINER, HEATH CAUSEY, SAGE FUNDING, LP, SAGE FINANCIAL GROUP LLC, SAGE PRIVATE EQUITY GROUP, SECURED ASSET FACTORING EXCHANGE, INC DIGICS, LLC, AND CHRISTOPHER PITCOCK FILED OCTOBER 20, 2015	2
<u>"NEIL LETTER"</u> LETTER FROM MARK NEIL ATTORNEY FOR 809 HOLDINGS LP TO JUDGE MCINTOSH MAY 19, 2016	19

<u>"NOTICE OF APPEAL"</u> NOTICE OF APPEAL FILED_ JUN 27, 2016.....	5
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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court commit reversible error by failing to abide by its own order staying the proceedings for 30 days?
- II. Did the trial court commit reversible error by ruling on the matter despite the clerk's defective service of notice?
- III. Did the trial court commit reversible error by striking pleadings and granting final judgment as a sanction?
- IV. Did the trial court commit reversible error by granting summary judgment when there remained genuine issues of material fact in dispute?
- V. Did the trial court commit reversible error by relying on false statements and misrepresentations by counsel?

STATEMENT OF THE CASE

In April 2013, the Appellees Gabriel Barnhill and GSB Enterprises, Inc. (collectively, "Barnhill") commenced the instant litigation against, inter alia, the Appellant J. Floyd Swilley, the Appellant Laurel K. Swilley (collectively, the "Swilleys") and Heath Causey. In short, Barnhill alleged that the Swilleys engaged in a Ponzi scheme which caused Barnhill to lose a substantial amount of money. In June 2013, the defendants denied the substantive claims against them and, further, all defendants asserted various counterclaims against Barnhill.

Subsequently, Barnhill served various discovery requests upon the Swilleys and Causey. Not satisfied with the Swilleys', Causeys', or other defendants responses, Barnhill filed several motions to compel discovery on July 3, 2013, January 8, 2014, January 10, 2014, September 5, 2014, and October 5, 2014. Still not satisfied, Barnhill ultimately filed motions for sanctions on November 4, 2013, May 4, 2015, and June 12, 2015.

On October 27, 2015, John M. Leiter, Esquire ("Attorney Leiter") filed a motion to be relieved as counsel for the Swilleys, Causey (and others). *See* Motion to be Relieved As Counsel, filed Oct. 27, 2015(R.30, p.352-354). That Motion was not heard until January 4, 2016. On January 14, 2016, the trial court signed an order releasing Attorney Leiter as counsel for the Swilleys, Causey (and others), although the order was not entered until January 25, 2016. *See* Order, entered Jan. 25, 2016 (R.9, p.29-31) ("January Order"). In relevant part, the January Order stated as follows: "The proceedings in this case will be

held in abeyance for thirty (30) days from the date of this Order" so as to allow Attorney Leiter's former clients (including the Swilleys and Causey) an opportunity to obtain new legal counsel to represent them in this matter. (R.9,p.30).

Meanwhile, back on December 16, 2015, Barnhill had filed a Notice of Motion and Motion for Summary Judgment and for Judgment on the Pleadings. *See* Plaintiffs' Notice of Motion & Motion for Summary Judgment and for Judgment on the Pleadings, filed Dec. 15, 2016 (R.41, p.410) ("Dec. Motion"). Still without legal counsel, and prior to the trial court hearing Attorney Leiter's motion to withdraw, I never received notice from the clerk regarding Barnhill's December Motion. *See* Causeys motion to Set Aside (R.36, p.394). In fact, I (Causey) did receive a copy of a notice of court from the Plaintiffs Council however it did not arrive until February 17 at 6pm after the motion had been heard in court. Significantly, both the notice and the hearing fell within the 30-day abeyance period set forth in the January Order. *See* "January Order"(R.9, p.32).

The only persons in attendance at the February 16, 2016 hearing were Barnhill's attorney, Nate Fata, Esquire ("Attorney Fata") and Stephan B. Fiedler, Esquire ("Attorney Feidler"). *See* (R.45, p436-469) Transcripts of Hearing 2/16/16 ("Feb. Transcripts."). Attorney Fata is Barnhill's counsel and Attorney Fiedler solely appeared on behalf of the Defendant 809 Holdings LP. *See* (R.45, p.438, lines 8-9; p.439, lines 5-12)"Feb. Transcripts". Furthermore, Attorney Fiedler was new to the case (and fairly new to the

practice of law) and was stepping in for senior partner Mark D. Neill, Esquire ("Attorney Neill"). *See* Feb. Transcripts R.45, p.449, lines 4-10; p.465 lines 22-24).

For some reason, Attorney Fiedler made numerous misleading statements to the trial court as to the Swilleys and Causey, and thereby falsely suggesting that the Swilleys, Causey and other defendants purposefully avoided complying with discovery requests. *See* Feb. Transcripts (R.45, p.449, line 19-22 & p.450, line 8-17; Letter from Attorney Neill to Judge McIntosh, dated May 19, 2016 ("Neill Letter")(R.50, p531-532). And when presented with such evidence, the trial court verbally granted Barnhill's Motion to Strike the Swilleys' & Causeys pleadings and Motion for Attorney's Fees. *See* Feb. Transcripts. R.45, p.467, line 25 through p.468, line 2; p.469, lines 11-14).

Later, in March 2016, based on the February 16 hearing, as well as the Plaintiffs' Memorandum in Support of their Motion for Judgment on the Pleadings and/or Summary Judgment ("Barnhill Memo"), initially submitted in December 2015 and prior to the February 2016 hearing, the trial court granted Barnhill summary judgment on its claims against the Swilleys & Causey as well as the defendants counterclaims against Barnhill. *See* Order, entered Mar. 21, 2016 ("March Order")(R.10, p.32-38). Notably, however, the March Order did not follow the verbal ruling of the trial court on February 16, 2016 (R.8, p.27) but, rather, reflected the contents of the Barnhill Memo. (R.10, p.32-38).

I filed a Motion to Set Aside the March Order pursuant to Rule 59(e), Rule 55(c) and Rule 60(b) of the South Carolina Rules of Civil Procedure ("SCRCP"), *see* Causey

Mot. to Set Aside (R.36, p.393-396), but those motions were denied, *see* Form 4 (R.18, p.18-20). On June 24, 2016, I timely submitted a notice of appeal in this matter. *See* Notice of Appeal.

This Appellant references the entire Brief of the Swilleys' and asserts the same arguments and assertions as his own unless specifically identified within this brief.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO ABIDE BY ITS OWN ORDER STAYING THE PROCEEDINGS FOR 30 DAYS

In its January Order, the trial court clearly and expressly stated that "[t]he proceedings in this case will be held in abeyance for thirty (30) days from the date of this Order." See January Order at 2(R.9,p.30).

"To stay an order is to hold it in abeyance or refrain from enforcing it; a stay is a stopping." *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989) (internal quotations omitted). The purpose of a stay is to preserve the status quo pending some later determination. See *Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990).

In effect, then, holding the case in abeyance renders the status quo the law of the case. See *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 571-72, 776 S.E.2d 397, 403-04 (Ct. App. 2015) ("[T]he doctrine of the law of the case prohibits issues [that] have been decided in a prior appeal from being relitigated in the trial court in the same case." (quoting *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997)); *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right." (internal quotations marks omitted)).

Although the January Order was signed on January 14, 2016, it was not entered until January 25, 2016. *See* Jan. Order (R.9, p.29). An order is effective from the date of entry, not signature. *See* Rule 58(a), SCRCP ("A judgment is effective only when so set forth *and entered* in the record" (emphasis added)); *Bowman v. Richland Mem'l Hosp.*, 335 S.C. 88, 92, 515 S.E.2d 259, 261 (Ct. App. 1999) (holding the effective date of a trial court order is the date the order is entered by the clerk of court, not the date the order is signed). Accordingly, the January Order effectively froze the proceedings through February 24, 2016 (30 days after January 25, 2016).

Nevertheless, the trial court held a hearing on February 16, 2016, at which only Attorney Fata (Respondents' counsel) and Attorney Fiedler (809 Holdings' counsel) were present. *See* Feb. Tr. (R.45, p. 438, lines 8-14; p.439, lines 5-12). Moreover, at that hearing, the trial court ruled that it would strike the Swilleys' & Causey's pleadings and enter summary judgment in favor of Barnhill on the Swilleys' & Causey's counterclaims. *See* Feb Tr. (R. 45, p.446, line 6 through p. 447, line 1-2; p.465, lines 5-20; p.466, lines 11-14).

Therefore, it is beyond dispute that the trial court violated its own order of abeyance by conducting the February 16 hearing and making substantive determinations therein. As such, the trial court's order is unlawful. *See Dukes & Dukes, Inc. v. Hygrade Food Prods. Corp.*, 236 S.C. 69, 113 S.E.2d 254 (1960) (unappealed order becomes law of case and, thus, is binding on the litigants and the court alike); *Stevens v. United States*, No. 98-554C, 2012 WL 2021740, at *4 (Fed. Cl. filed June 4, 2012) ("Law of the case . . . provides that a trial court should abide by its own legal rulings during the pendency of the same proceeding." (citing *Arizona v. California*, 460 U.S. 605, 618 (1983)); 60 C.J.S. *Motions and Orders* § 75 (Westlaw database updated Aug. 2016) ("[A]n order of court . . . is binding on the parties and their privies, *as well as on the court*" (emphasis added))).

On that basis, the trial court's decision below must be reversed and the matter remanded for further proceedings.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RULING ON THE MATTER DESPITE THE DEFECTIVE SERVICE OF NOTICE TO HEATH CAUSEY

"The requirements of due process include notice [and] an opportunity to be heard in a meaningful way." *Ogburn-Matthews v. Loblolly Partners*, 332 S.C. 551, 562, 505 S.E.2d 598, 603 (Ct. App. 1998); *see also Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (stating that the Due Process Clause demands "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or opportunity to be heard, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights. A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on.

Webster v. Clanton, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972); *accord Tryron Fed. Sav. & Loan Ass'n v. Phelps*, 307 S.C. 361, 362, 415 S.E.2d 397, 398 (1992).

In the instant case, although the Swilleys and Causey were clearly parties to the litigation, the Clerk of the Court never gave Causey notice of Barnhill's December Motion and/or the February Hearing thereon. *See* Motions to Set Aside (R.36, p.393).

Although Barnhill did himself provide notice to the Swilleys & Causey, *see* Feb. Transcripts (R.45, p.444, lines 6-8) , such notice was a day after the February Hearing and did not include the subject documentation, i.e., Barnhill's motion or memorandum in support thereof. Thus, the notice actually given was not reasonably calculated to provide the Causey (me) with an honest opportunity to respond thereto. *See Ogburn-Matthews*, 332 S.C. at 562, 505 S.E.2d at 603; *Mullane*, 339 U.S. at 314.

And procedurally, the Swilleys & Causey sought to have the trial court correct itself by way of a motion to set aside pursuant to Rule 59, SCRPC, *see* Motions to Set Aside, (R.36 p.393-396)(R.42 p.415-416)(R.43 p.420-424), but to no avail, *see* Form 4 (R.18, p18-20). *Cf. Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183-84, 561 S.E.2d 659, 661-62 (Ct. App. 2002) (holding that party was not denied an opportunity to be heard because the party failed to pursue a motion to set aside the order pursuant to Rule 59, SCRPC).

Also See "Fata Letter attachment", affidavit of Sally Huffman (R39, p.402-403) (R.48, p.527-530), item #3 only references the Swilleys' and does not make reference to sending Heath Causey a copy of the notice or Defendants QC Financing LLC, Digits LLC or Chris Pitcock Pro se clearly showing a pattern for failure to copy the other parties on service timely as the copy of the affidavit was over 30 days old before servicing it to other parties. (R39, p.402-403) (R.48, p.527-530),

Therefore, the trial court's order in this case violated the Swilleys' and Causeys due process rights and thus is void. On that basis, the trial court's decision below must be reversed and the matter remanded for further proceedings.

**III. THE TRIAL COURT COMMITTED
REVERSIBLE ERROR BY GRANTING SUMMARY
JUDGMENT AS A SANCTION AGAINST THE
SWILLEYS AND CAUSEY**

As summarized by the courts:

"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). Therefore, an appellate court will not interfere with "a trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters" unless the court abuses its discretion. *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997) (citation omitted). "An 'abuse of discretion' may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law." *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) (citation omitted). The appealing party bears the burden of demonstrating that the lower court abused its discretion. *Id.* (citation omitted).

....

However, "when 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))[.]

Davis v. Parkview Apts., 409 S.C. 266, 281-83, 762 S.E.2d 535, 543-44 (2014).

In the instant case, there was no factual basis to support the decision to impose the ultimate sanction penalty of striking the Swilleys' or Causeys pleadings and then granting final judgment in favor of Barnhill.

Although Barnhill asserted that the Defendants had been evading several attempts at discovery, that is simply untrue. To the contrary, the Swilleys along with Causey had already produced hundreds of pages of documents in response to requests to produce and also answered numerous requests for admissions and interrogatories. *See* Neill Letter (R.50, p.531-532) Moreover, there was only one scheduled deposition of the Swilleys, but the parties had verbally agreed to reschedule same, and no other date had yet been established. *See id.*; Feb. Tr. (R.45, p.450, lines18-21) ; Letter from F. Miles Adler to Judge McIntosh, dated May 3, 2016 ("Adler Letter")(R.49, p.511-513).

Undisputedly, striking the Swilleys' and Causeys pleadings and granting final judgment against Causey severely prejudiced Causey in this action. *See Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716 (Ct. App. 2005) ("The prejudice Rule 15 envisions [allowing leave to be granted to amend pleadings when leave does not prejudice any other party] is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." (citing, inter alia, *Tanner v. Florence County Treasurer*, 336 S.C. 552, 521 S.E.2d 153 (1999))).

Therefore, the trial court's order was an abuse of discretion, and on that basis, the trial court's decision below must be reversed and the matter remanded for further proceedings.

IV. THE TRIAL COURT COMMITTED
REVERSIBLE ERROR BY GRANTING SUMMARY
JUDGMENT WHEN THERE REMAINED GENUINE
ISSUES OF MATERIAL FACT IN DISPUTE

As recently summarized:

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court. . . ." *Quail Hill, L.L.C. v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citing *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000)). "[A] trial court may grant a motion for summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* at 234, 692 S.E.2d at 505 (quoting Rule 56(c), SCRCP).

Traynum v. Scavens, 416 S.C. 197, 201, 786 S.E.2d 115, 117 (2016).

"In determining whether [the "drastic remedy" of] summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003).

Furthermore:

Those facts which are "material" for purposes of summary judgement are identified by the substantive law of the claim asserted. In other words, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgement. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 [] (1986). An issue is

"genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* Conversely, an issue is not "genuine" and summary judgement warranted if there is insufficient evidence favoring the non-moving party for a jury to return a verdict for that party. *Id.*

Hampton v. Conso Prods., Inc., 808 F. Supp. 1227, 1232 (D.S.C. 1992).¹

In the instant case, the Swilleys and Causey vehemently deny the substantive allegations of Barnhill's complaint. *See generally* Answer. Moreover, J. Floyd Swilley asserted a counterclaim against Barnhill for breach of contract, *see* Counterclaims,² which Barnhill denied, *see* Answer to Counterclaims. Clearly, then, there are "genuine" disputes of "material" fact that preclude judgment as a matter of law for either party on Barnhill's claims against the Swilleys and Causey and the Swilleys' and Causeys counterclaim against Barnhill. *See Hampton*, 808 F. Supp. at 1232.

Moreover, "[s]ummary judgment . . . must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Dawkins*, 354 S.C. at 69, 580 S.E.2d at 439. As repeatedly brought up in this case, there has been virtually no discovery

¹"Rule 56 of the South Carolina Rules of Civil Procedure is identical to its federal counterpart. In the absence of state law on the issue in question, federal cases interpreting the rule are persuasive." *Dawkins v. Fields*, 345 S.C. 23, 28, 545 S.E.2d 515, 518 (Ct. App. 2001), *rev'd on other grounds*, 354 S.C. 58, 67, 580 S.E.2d 433, 438 (2003).

²Although the Swilleys also asserted a counterclaim pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, the Swilleys & Causey acknowledges that such claim is unripe until the Swilleys & Causey prevail on Barnhill's claims against them. *See* S.C. Code § 15-36-10(C)(1); Feb. Tr. R.45 p.445 Lines 9-14.

to date in this matter. *See* Mar. Order 2-4; Feb. Tr. 5:14-15, 8:19B9:2. Also most if all of the responses from Barnhill were incomplete, Barnhill has provided very little if any discovery to support his claims, The documents that have been provided do not support his claims but do support the answers and counterclaims of the defendants.

Therefore, the drastic remedy of summary judgment was not warranted based on the existing record and, thus, the trial court's decision below must be reversed and the matter remanded for further proceedings.

V. THE TRIAL COURT COMMITTED
REVERSIBLE ERROR BY RELYING ON FALSE
STATEMENTS AND MISREPRESENTATIONS BY
LEGAL COUNSEL

"A court of equity has the inherent power to set aside a judgment on the ground of fraud." *Bankers Trust of S.C. v. Bruce*, 283 S.C. 408, 415, 323 S.E.2d 523, 528 (Ct. App. 1984) (citing, inter alia, *Rycroft v. Tanguay*, 279 S.C. 76, 302 S.E.2d 327 (1983)).

"A judgment may be set aside on the ground of fraud only if the fraud is 'extrinsic' and not 'intrinsic.'" *Hagy [v. Pruitt]*, 339 S.C. 425, 431, 529 S.E.2d 714, 717 (2000)]. Extrinsic fraud is "'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.'" *Id.* at 431, 529 S.E.2d at 717-18 (quoting *Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). "[R]elief is granted for extrinsic fraud on the theory that by reason of the fraud preventing a party from fully exhibiting and trying his case, there never has been a real contest before the court of the subject matter of the action." *Chewning v. Ford Motor Co.*, 354 S.C. 72, 82, 579 S.E.2d 605, 610 (2003).

Robinson v. Estate of Harris, 388 S.C. 616, 625, 698 S.E.2d 214, 219 (2010).

In the instant case, the trial court's order is based on multiple instances of extrinsic fraud. First, the Swilleys nor Causey were not given proper notice of the February 16 hearing and, thus, were deprived of a reasonable opportunity to be heard. *See supra* Part II. Second, Attorney Fata misrepresented to the trial court that he had given proper notice of the hearing to the Swilleys and Causey. *See id.* Third, Attorney Fiedler made numerous misleading statements to the trial court as to the Swilleys, Causey and other Defendants,

and thereby falsely conveying that the Swilleys and Causey purposefully avoided discovery and court proceedings. *See* Feb. Tr. (R.45 p.449 lines 19-22 & p.450 lines 8-17); Neill Letter (R.50, p531-532) and at least with respect to Attorney Fiedler's misstatements, Attorney Neill unequivocally advised the trial court of same. *See* Neill Letter (R.50, p531-532)

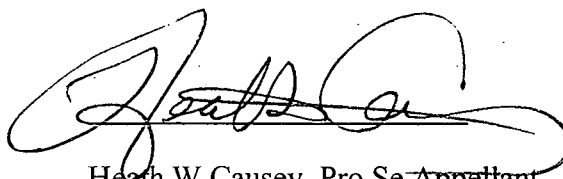
Therefore, the trial court's decision is based on extrinsic fraud and, on that basis, the decision below must be reversed and the matter remanded for further proceedings.

CONCLUSION

In light of the foregoing arguments and authorities cited, it is clear that the trial court committed multiple errors, any one of which requires reversal. WHEREFORE, I Heath Causey respectfully requests that this Court:

- A. Reverse the trial court's order entered March 21, 2016, striking the Heath Causey pleadings and granting Barnhill summary judgment;
- B. Reverse the trial court's order entered May 25, 2016, denying Heath Causey's motion to set aside the March 21, 2016 order;
- C. Remand the case for further proceedings; and
- D. Grant Heath Causey any other and further relief the Court deems just and equitable including court filing fees.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Heath W Causey', with a large, stylized flourish at the end.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

RECEIVED

R. Lawton McIntosh, Circuit Court Judge

NOV 13 2017

Trial Court Case No. 2014-CP-26-8367
(Formerly 2013-CP-26-2816)

SC Court of Appeals

Appellate Case No. 2016-001328

Gabriel Barnhill & GSB Enterprises LLC..... Respondents

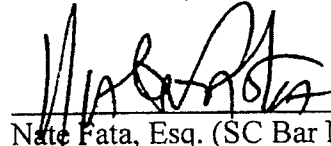
v.

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, J. Floyd Swilley SMG Partners, LLC, Alicia A. Piner, Heath Causey, Sage Advisory Group, L.P., Sage Private Equity Group, Secured Asset Factoring Exchange, Inc., SAFE, Inc., Digics, LLC, 9-1-1, Plumbing, LLC, and Sage Funding, L.P., Christopher Pitcock, Defendants,

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

FINAL BRIEF OF RESPONDENTS

NATE FATA, P.A.



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November 10, 2017

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Appendix 00702

INDEX

	<u>PAGE</u>
Index	i
Table of Authorities	ii
Statement of Issues on Appeal	1
Statement of the Case	2
Statement of Facts	4
Argument	11
I. Causey Did Not Preserve For Appeal The Court's Determination That His Pleadings Be Stricken For Failure To Cooperate In Discovery	11
II. The Court Exercised Sound Discretion In Striking Causey's Pleadings Pursuant To Barnhill's Motion To Compel	14
III. The Court Did Not Abuse Its Discretion In Denying Causey's Motion To Set Aside, Because Causey Was Served With The Notice Of Hearing And Barnhill's December 2015 Pleadings Were Served On Causey's Counsel	15
IV. The Trial Court Properly Calculated Thirty Days Under The Plain Language Of The Order	18
V. Summary Judgment Was Not Granted As A Sanction	21
VI. The Court Properly Granted Summary Judgment Against Causey On His One Counterclaim Under The Frivolous Proceedings Act	22
VII. Causey's Extrinsic Fraud Arguments Fail Because He Has Not Preserved Them For Appeal And They Are Baseless	22
Conclusion	24

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Anderson v. Short</u> , 323 S.C. 522, 476 S.E.2d 475 (1996)	13
<u>Barnette v. Adams Brothers Logging</u> , 355 SC 588, 586 S.E. 2d 572 (S.C. 2003).	14
<u>Bowman v. Richland Memorial Hospital</u> , 335 S.C. 88, 92, 515 S.E.2d 259, 261 (Ct. App 1999)	20
<u>Coleman v. Dunlap</u> , 306 S.C. 491, 413 S.E. 2d 15 (S.C. 1992).	14
<u>Eddins v. Eddins</u> , 403 S.E.2d 164 (Ct. App. 1991).	19
<u>Fields v. Melrose Ltd. Partnership</u> , 312 S.C. 102, 439 SE2d 283 (Ct. App. 1993).	15, 16
<u>Gainey v. Gainey</u> , 382 S.C. 414, 675 S.E.2d 792. (S.C. App 2009)	24
<u>Herron v. Century BMW</u> , 395 S.C. 461, 465, 466, 719 S.E.2d 640, 642 (2012).	12
<u>Hickman v. Hickman</u> , 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990).	13
<u>Pye v. Estate of Fox</u> , 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006).	12
<u>Ray v. Ray</u> , 347 S.C. 79, 647 S.E.2d 237 (Ct. 2007)	24
<u>Rosen vs. Hiller</u> , 307 S.C. 331, 415 S.E.2d 117 (Ct. App. 1992).	21
<u>S.C. Dep't of Transp. v. First Carolina Corp. of S.C.</u> , 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007).	13, 22
<u>Wilder Corp. v. Wilke</u> , 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)	12

RULES OF THE COURT

Rule 5, SCRCP	17, 23
Rule 5(a) SCRCP	17
Rule 5(b), SCRCP	17
Rule 55(c), SCRCP	15

Rule 59, SCRCP	12
Rule 59(e), SCRCP	13
Rule 60, SCRCP	12
Rule 60(b), SCRCP	13, 15
Rule 60(b)(3) SCRCP	24

STATEMENTS OF ISSUES ON APPEAL

- I. Did the Appellant properly preserve issues for Appeal?
- II. Did the Court abuse its discretion in striking Appellant's pleadings based on Appellant's repeated and well documented discovery obstruction?

STATEMENT OF THE CASE

This is an appeal by Heath Causey (“Causey”) of the March 22, 2016 Order. In that Order, the court struck Causey’s pleadings for repeatedly failing to cooperate in discovery and granted summary judgment to Gabriel Barnhill and GSB Enterprises, Inc. (collectively referred to as “Barnhill”) on Causey’s counterclaim.

Barnhill commenced this action by filing a Summons and Complaint on April 25, 2013, asserting causes of action, inter alia, for violation of the South Carolina Investment Act, breach of fiduciary duty, fraud, misrepresentation, and violation of the Unfair Trade Practices Act. Complaint (R. pp. 53-73).¹ Causey filed a Counterclaim which was denied by Barnhill. Barnhill Answer to Counterclaim (R. pp. 92-96). Causey was initially represented by Miles Adler (“Adler”) and, subsequently, by John Leiter (“Leiter”). During the nearly three years of litigation, Barnhill filed seven discovery motions and four motions for sanctions for discovery abuse. The court ordered entered multiple orders granting attorney fees and other relief to Barnhill on the discovery motions.

In October 2015 Leiter moved to be relieved as counsel for Causey and all other defendants, except 809 Holdings, L.P. (“809”) which was represented by Mark Neill (“Neill”). Leiter Motion To Be Relieved (R. pp. 352-354). Barnhill filed a motion to compel and also moved for summary judgment and judgment on the pleadings as to Causey’s counterclaim in December 2015. Barnhill December 2015 Motion To Compel (R. pp. 409-414) and Barnhill December 2015 Motion For Summary Judgment and

¹ As used herein S.R. means Supplemental to Amended Record on Appeal and S.S.R. means Second Supplemental to Amended Record on Appeal.

Judgment on Pleadings (R. pp. 355-356). Barnhill's December 2015 Motion to Compel's requested relief was to strike the pleadings of Causey and other defendants for failure to cooperate in discovery. Barnhill December 2015 Motion to Compel (R. pp. 409-414). Judge Seals heard Leiter's Motion to be relieved as counsel on January 4, 2016. Causey was not present. January 4, 2016 Hearing Transcript (R. pp. 429-434). The court granted the motion, stayed the proceedings for 30 days and directed Leiter to prepare the Order. Leiter prepared the Order and sent it to Judge Seals who signed and dated it January 14, 2016. January 2016 Order (R. pp. 29-31). The Order was entered on January 25, 2016.

The court scheduled a hearing on Barnhill's Motion to Compel and Barnhill's Motion for Summary Judgment and Judgment on the Pleadings as to Causey's counterclaim for February 16, 2016. Barnhill mailed notice of the hearing to Causey on February 3, 2016. Notice of February 16, 2016 Hearing (R. pp. 367-371). Although counsel for 809 appeared at the February 16, 2016 hearing, Causey did not. February 16, 2016 Hearing Transcript (R. pp. 436-469). The court granted Barnhill's requested relief and entered an Order on March 22, 2016 (R. pp. 32-38). In particular, the court struck Causey's pleadings for discovery obstruction pursuant to Barnhill's Motion to Compel (R. pp. 32-38). In addition, the court granted summary judgment and judgment on the pleadings as to Causey's counterclaim (R. pp. 32-38). Causey then moved to set aside the summary judgment ruling in the March 22, 2016 Order on April 6, 2016. Causey Motion To Set Aside (R. pp. 343-394). The court denied Causey's Motion to Set Aside in its May 2016 Order. May 2016 Order (R. pp. 41-48). Causey then filed this appeal.

STATEMENT OF FACTS

Barnhill alleges that in 2011 defendants engaged in a Ponzi scheme in which Barnhill, who was Floyd Swilley's accounting and financial advisory client, invested no less than \$115,000 in 809 and received approximately \$2,000 in return. Complaint, pp. 1-16, par. 74-76 (R. pp. 53-54). Barnhill was 26-27 years of age at the time. Complaint, par. 8 (R. p. 53). Laurel Swilley, Floyd Swilley (collectively "Swilley") and William Piner established 809 in 2010. Complaint, par. 9-31 (R. pp. 54-55). 809 was a startup company that would loan money to companies in a "factoring" arrangement. Complaint, par. 50-53 (R. p. 57). The borrower company was QC Financing, LLC, a pawn shop entity established by Piner and Swilley. Complaint, par. 28-32 (R. p. 55). As alleged in the Complaint, Swilley and Piner took investor/client retirement monies to fund their own startup businesses. Complaint, 50-55 (R. p. 57). Barnhill filed a companion case asserting derivative claims in 2014 and the two Barnhill cases were subsequently consolidated. Barnhill Derivative 2014 Amended Complaint; April 27, 2015 Order Consolidating Cases (R. pp. 137-149; R. pp. 16-17).

In 2011, at the direction of Swilley and Piner, Barnhill's retirement monies were invested in the 809's Notes and Barnhill became a limited partner. Complaint (R. pp. 58-59, 304). 809 was a limited partnership created and owned by the Swilley and Piner Defendants and their companies. Barnhill Memorandum filed April 20, 2015, p. 3 (R. p. 295). Laurel Swilley is an attorney. Floyd Swilley is a bookkeeper/financial advisor. William Piner and Heath Causey are businessmen. Barnhill Memorandum filed April 20, 2015, p. 3 (R. p. 295). Swilley has been involved with other investment schemes. Barnhill Memorandum filed April 20, 2015 (R. pp. 295). As set forth in In Re: John F.

Swilley, Floyd Swilley and Laurel Knuckles Swilley agreed to confess judgment in an Oklahoma federal case in which \$100,000,000 was allegedly lost by investors. Order filed on April 17, 2003 by U.S. Bankruptcy Judge Waites in In Re: John F. Swilley, 02-09234-W, Adv. Pro. No. 02-80347-W., United States Bankruptcy Court, (D.S.C. 2003). Exhibit B to Barnhill's Memorandum filed on April 20, 2015 (R. pp. 306-325).

Initially, Miles Adler ("Adler") represented all defendants. On October 28, 2013, Adler moved to be relieved as counsel citing a conflict. October 28, 2013 Adler Motion (R. pp. 97-98). The court relieved Adler as counsel under Order filed December 11, 2013. December 11, 2013 Order (R. pp. 2-4). John Leiter ("Leiter") entered an appearance for defendants on January 13, 2014. Leiter Appearance (R. p. 114).

In their attempts to ferret out this complex Ponzi scheme, Barnhill served discovery requests upon the defendants. Causey and the other defendants did not comply with the discovery rules or orders. Barnhill filed seven motions to compel discovery.² Furthermore, Plaintiffs filed four (4) Motions for Sanctions for Defendants' failure to comply with court orders and discovery: November 4, 2013 (R. pp. 99-101), February 19, 2014 (R. pp. 115-131) on June 27, 2014 (R. pp. 132-133), and June 8, 2015. (R. pp. 404-409).

In connection with Barnhill's July 2013 Motion to Compel responses to April 2013 discovery requests, the court entered a Consent Order on September 20, 2013. September 2013 Consent Order (R. p. 001). When defendants failed to provide responsive information and, instead, lodged objections, Barnhill filed a motion for

² Barnhill filed Motions to Compel on the following dates: July 3, 2013; January 10, 2014, September 5, 2014 and September 5, 2014; October 20, 2014; May 5, 2015, and December 15, 2015. (R. pp. 75-91; R. pp. 112-113; R. pp. 151-160; R. pp. 161-175; R. pp. 269-292; R. pp. 335-349; R. pp. 410-415).

sanctions on November 4, 2013. November 2013 Motion for Sanctions (S. R. pp. 8-15). The court partially granted Plaintiffs' Motion for Sanctions and Judge Culbertson awarded attorney fees by Order filed January 16, 2014. January 16, 2014 Order (R. pp. 5-6).

On October 15, 2014 the court again entered an Order for Sanctions in response to Barnhill's June 27, 2014 Motion for Sanctions and Barnhill's Memorandum in Support. October 2014 Order, Barnhill September 2014 Memorandum in support of Motion for Sanctions filed June 27, 2014 (R. pp. 7-12; R. pp. 180-268). In that Order, Judge Hyman found, "Defendants have been sandbagging in their discovery responses... . The March 2012 payment to Twigg for his 809 Holdings, LP investment and the multiple undisclosed payments to Defendants are examples of Defendants' sandbagging and obstruction in the discovery process."³ October 15, 2014 Order, p. 4 (R. p. 10).

Defendants disclosed the following 809 investors in their Court ordered response to Interrogatory Number 9 of the Plaintiffs' Interrogatories dated April 29, 2013⁴:

Investor	Amount	Date
Raymond LaForest	\$50,000.00	9/22/10
John Teska	\$ 6,000.00	9/22/10
Tamrin Baggett	\$68,900.00	11/8/10
	\$ 6,200.00	12/1/10
Joyce Kauffman	\$48,000.00	1/11/11
Scott Mogal	\$17,000.00	3/11/11
Robert Twigg	\$25,000.00	8/12/11

³ Twigg filed a separate action *Robert L. Twigg and Twigg Enterprises, LLC vs. J. Floyd Swilley; Heath Causey, Laurel Swilley; Sage Financial Group, LLC; Secured Asset Factoring Exchange, Inc. and 809 Holdings, LP*, Civil Action No. 2013-CP-26-5477. The Defendants in Twigg are represented by Mark Neill, Esq. Barnhill September 2014 Memorandum in Support of June 27, 2014 Motion for Sanctions (R. p. 34).

⁴ Floyd Swilley's purported loan is not referenced.

Mark Sarvis	\$40,000.00	8/12/11
Gabriel Barnhill	\$49,000.00	5/26/11
	\$41,000.00	3/28/11
GSB Enterprises	\$25,000.00	4/11/11

October 15, 2014 Order (R. pp. 8-9).

Plaintiffs' Supplemental Interrogatory Number 2, dated February 25, 2014 requested,

For any payment made after 2011 to any investor, including, but not limited to, those persons disclosed by you to be a note purchaser or limited partner in response to Interrogatory Number 9, identify the bank name, address, payee, amount, date of payment and reason for payment.

Defendants responded "none". October 15, 2014 Order (R. p. 9). However, Judge Hyman found that defendants failed to disclose multiple payments, including a payment to Twigg, which was known to Causey and Swilley. October 15, 2014 Order, p.4 (R. p. 10). Judge Hyman ordered defendants to produce the requested information and ordered defendants to pay Plaintiffs' attorney fees of \$2,700. October 15, 2014 Order (R. pp. 11-12).

Defendants created another Ponzi vehicle, Secured Asset Factoring Exchange ("SAFE"), in late 2011. 2014 Derivative Amended Complaint (R. pp. 137-149). As set forth in defendants' answers to interrogatories, defendants raised \$896,325 from SAFE offerings to other investors and only \$533,659 has been repaid. Page 5 of Defendants' Answers to Supplemental Interrogatories dated October 30, 2014, attached as Exhibit C to Barnhill's Memorandum filed on April 20, 2015 (R. p. 5). Between 809 and SAFE, investors are out more than \$650,000, more than \$300,000 from 809 and more than

\$350,000 from SAFE. October 15, 2014 Order (R. pp. 7-12); and page 5 of Defendant's Answers to Supplemental Interrogatories dated October 30, 2014, attached as Exhibit C to Barnhill's Memorandum filed on April 20, 2015 (R. p. 331). Out of his \$115,000 investment, Barnhill received less than \$3,000. Complaint, par. 93 (R. p. 62).

Barnhill's Motion to Compel Deposition filed on October 20, 2014 was heard on April 20, 2015. In the October 2014 Motion to Compel Deposition, three deposition notices for Heath Causey were attached (R. pp. 269-270; R. pp. 271-290). That Motion evidences Causey was served with Deposition Notices on June 24, 2014, August 4, 2014, and September 4, 2014, but Causey would not and did not appear for depositions. Barnhill October 20, 2014 Motion to Compel (R. pp. 269-270). Pursuant to the April 2015 hearing, the court entered an Order on May 22, 2015, requiring, in part, that the parties cooperate for depositions. May 22, 2015 Order (R. pp. 18-20).

Barnhill's Motion to Compel Discovery filed May 15, 2015 followed a documented pattern of discovery obstruction by defendants. Barnhill May 15, 2015 Motion to Compel, p. 2 (R. pp. 335-337). On June 12, 2015 Barnhill again moved for sanctions based on Defendants' failure to provide discovery responses. June 2015 Motion for Sanctions (R. pp. 404-408). Judge Seals, the Chief Administrative Judge, heard the motions and entered an Order granting relief on September 10, 2015, including the award of attorney fees. September 10, 2015 Order (R. pp. 23-26).

On October 21, 2015, Leiter moved to be relieved as counsel citing defendants' failure to abide by the terms of his fee agreement. October 21, 2015 Leiter Motion to be Relieved p. 2 (R. p. 353). On November 24, 2015, deposition notices were served on Causey and Swilley. Barnhill December 15, 2015 Motion to Compel (R. pp. 410-411).

The depositions did not occur. On December 15, 2015 Barnhill filed the Motion to Compel. December 15, 2015 Motion to Compel (R. pp. 410-414). In his motion, Barnhill specifically requested that the court strike the answer and counterclaim of Causey and the other defendants. Barnhill December 15, 2015 Motion to Compel (R. p. 411). The December 2015 Motion to Compel was served on Leiter, counsel for Causey. Barnhill December 15, 2015 Motion to Compel, Certificate of Service (R. pp. 410-414).

On December 21, 2015 Barnhill filed and served on Leiter a Motion for Summary Judgment and Judgment on the Pleadings. December 2015 Barnhill Motion for Summary Judgment and Judgment on the Pleadings with Certificate of Service (R. pp. 355-356; S.S.R. pp. 3-7). Barnhill also filed and served on Leiter a Memorandum in Support of Motion for Summary Judgment and Judgment on the Pleadings. December 2015 Barnhill Memorandum in Support of Motion for Summary Judgment, Certificate of Service (R. pp. 357-366).

On January 4, 2016, Judge Seals held a hearing and granted Leiter's request to be relieved as counsel because Causey and other defendants had failed to pay him in accordance with his fee agreement. A Form 4 was entered on January 4, 2016. January 4, 2016 Form 4 Order (R. pp. 27-28). Causey was not present at the hearing. January 2016 Hearing Transcript (R. pp. 429-433). On January 5, 2016 Leiter transmitted an Order to Judge Seals for signature. Causey was copied on the Leiter transmittal to the court. January 5, 2016 Leiter letter to Court (R. pp. 547-550). On January 14, 2016, Judge Seals dated the Order and signed it. January 2016 Order (R. p. 31). On January 21, 2016 Leiter transmitted the Order to the Clerk of Court for filing with notice to Heath

Causey. January 21, 2016 Leiter letter (R. p. 551). The Order was entered on January 25, 2016. January 2016 Order (R. p. 29).

The court scheduled a hearing on Barnhill's two December 2015 motions for February 16, 2016. On February 3, 2016 Barnhill's counsel mailed notice of the February 16, 2016 hearing on the two December 2015 motions to Causey. February 3, 2016 Notice of Hearing (R. pp. 367-371).

On February 16, 2016 Barnhill's counsel and 809's counsel attended the hearing. Causey was not present. February 16, 2016 Transcript of Hearing (R. pp. 436-469). The court granted the relief requested by Barnhill in its Order filed March 21, 2016. March 2016 Order (R. pp. 32-38). In its Order the Court ruled that all parties had been duly notified of the hearing. March 2016 Order, p. 2 (R. p. 33). No objections to the hearing were lodged at any time prior to April 2016.

On April 6, 2016, Causey filed a Motion to Set Aside the March 2016 Order on summary judgment on his counterclaim. April 6, 2016 Causey Motion to Set Aside (R. pp. 393-394). To support his Motion to Set Aside the Summary Judgment on his Counterclaim, Causey asserted only the following grounds:

(1) He was never notified of the hearing. Causey Motion To Set Aside, Par. 2 (R. p. 394).

(2) He was notified of the hearing the day of the hearing after the hearing had been held. Causey Motion To Set Aside, Par. 3 (R. p. 394).

Causey specifically asked for an order setting aside summary judgment. Causey Motion, Par. 3 (R. p. 394). Causey did not request relief from any ruling on his pleadings being stricken for his failure to cooperate in discovery.

On April 13, 2016, Barnhill filed an Affidavit of Sally Huffman, confirming service of the Notice of Hearing for the February 16, 2016 hearing on Swilley and that no mail was returned undelivered. April 2016 Huffman Affidavit (R. pp. 525-530). On April 19, 2016, more than two months after the February 16, 2016 hearing, Adler, former counsel for Causey and the other defendants, filed a Notice of Appearance on behalf of Swilley only. On April 25, 2016 Barnhill filed a Notice of Bankruptcy Filings, informing the court of the bankruptcies filed by the various defendant companies. April 1, 2016 Notice of Bankruptcy Filings (R. pp. 397-400).

On May 2, 2016, a Form 4 was entered by Judge McIntosh denying Causey's Motion to Set Aside the Order of March 21, 2016. May 2016 Form 4 (R. p. 39). On May 25, 2016, the Order denying Swilley, Causey and 809's Motion to Set Aside Order of March 21, 2016 was entered. May 2016 Order (R. pp. 41-48). 809 remains in default as it never appealed the ruling of the lower court striking its answer and counterclaim for discovery obstruction. Causey then filed his Notice of Appeal on June 24, 2016.

ARGUMENT

I. Causey Did Not Preserve For Appeal The Court's Determination That His Pleadings Be Stricken For Failure To Cooperate In Discovery.

The lower court's March 21, 2016 Order addressed two Barnhill motions: Barnhill's Motion to Compel and Barnhill's Motion for Judgment on the Pleadings and Summary Judgment on Causey's Counterclaim under the Frivolous Proceedings Act.

March 2016 Order (R. pp. 32-38). In his Rule 59 and 60 Motion, Causey appealed only the ruling on the Plaintiffs' Motion for Summary Judgment and Judgment on the Pleadings as to Causey's Counterclaim. April 6, 2016 Causey Motion To Set Aside (R. p. 394). Causey did not preserve for appeal the lower court ruling against him based on Barnhill's Motion to Compel. Causey's failure to cooperate in discovery was the basis for the court's striking Causey's pleadings. March 2016 Order, p. 3-4 (R. pp. 34-35).

In the Order denying Causey's motion for reconsideration, the lower court noted that Causey failed to address the Court's rulings on the Barnhill December 2015 Motion to Compel. May 2016 Order, p. 4 (R. p. 44). Thus, Causey has not preserved for appeal the lower court's rulings on the Motion to Compel, which were the basis for striking Causey's pleadings.

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the Court with a platform for meaningful appellate review. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012). "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

"It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved." *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006). While "a party is not required to use the exact name of a legal doctrine in order to preserve the issue," *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2012), the party nonetheless must be sufficiently clear in framing his objection so as to draw the court's attention to the precise

nature of the alleged error. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). If the party is not reasonably clear in his objection to the perceived error, he waives his right to challenge the erroneous ruling on appeal. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007). Furthermore, a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not. *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990).

Causey did not raise any argument at the February 16, 2016 hearing or in his Motion To Set Aside Summary Judgment on the Court's ruling that his pleadings be stricken for his failure to cooperate in discovery pursuant to Barnhill's December 2015 Motion to Compel. Furthermore, in his Brief to this Court, Causey only refers to Barnhill's December 2015 Motion for Summary Judgment and does not mention Barnhill's December 2015 Motion to Compel. Causey has failed to preserve for appeal the court's ruling to strike his pleading for repeated discovery abuse pursuant to Barnhill's Motion to Compel. The Court's May 2016 Reconsideration Order addressed the failure by Causey to address or raise any issue with the Court striking his pleadings pursuant to Barnhill's Motion to Compel. May 2016 Order (R. p. 44). That decision of the lower court is the law of the case. *Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996) (where a decision is based on more than one ground, the appellate court will affirm unless the Appellant appeals all grounds because the unappealed ground will become law of the case).

Similarly, Causey never set forth any grounds in his motion that the court should have stayed the hearing. In fact, Causey's only argument in his Motion to Set Aside was

a notice argument on Barnhill's December 2015 Motion for Summary Judgment: that he received the Notice of Hearing the day of the hearing in connection with Barnhill's Motion for Summary Judgment (R. p. 394). Thus, Causey failed to preserve for appeal any argument involving any stay of the action and the hearing date.

II. The Court Exercised Sound Discretion In Striking Causey's Pleadings Pursuant To Barnhill's Motion To Compel.

Absent an abuse of discretion, discovery sanctions will not be reversed on appeal, and the party appealing from the order of sanctions carries the burden of proving an abuse of discretion occurred. *Barnette v. Adams Brothers Logging*, 355 S.C. 588, 586 S.E.2d 572 (S.C. 2003). Similarly, motions for relief under Rule 60(b) SCRPC are within the trial court's discretion, and the appellate court will not reverse the trial court absent an abuse of discretion. *Coleman v. Dunlap*, 306 S.C. 491, 413 S.E.2d 15 (S.C. 1992).

The court did not abuse its discretion by granting the relief requested when there is a well-documented pattern of discovery abuse. The court previously found defendants were "sandbagging" in discovery and no depositions had been taken despite multiple deposition notices and motions to compel. Causey's own admission in his Brief to this Court that very little discovery had been done- after nearly three years and 11 motions on discovery issues-confirms his delay tactics.

In his brief, Causey admits the essence of the case which gave rise to the court striking Causey's pleadings under the Plaintiffs' discovery motion. "As repeatedly brought up in this case, there has been virtually no discovery to date in this matter." Causey Brief, p. 17. The record reflects seven (7) motions to compel filed against defendants including Causey, four (4) motions for sanctions filed and four Orders granting sanctions/fees. The court did not abuse its discretion in striking Causey's

pleadings for failure to cooperate in discovery. Four notices of deposition were served on Causey. Barnhill October 20, 2014 Motion to Compel with Causey Deposition Notices; Barnhill December 2015 Motion to Compel (R. pp. 269-291; R. pp. 410-414). Causey never appeared for deposition or offered to appear for a deposition. March 2016 Order, p. 3-4 (R. pp. 34-35). Causey cites no evidence in his Brief to support his conclusory argument. An issue is deemed abandoned on appeal if it is argued in a short conclusory statement without supporting authority. *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993).

III. The Court Did Not Abuse Its Discretion In Denying Causey's Motion To Set Aside, Because Causey Was Served With The Notice Of Hearing And Barnhill's December 2015 Pleadings Were Served On Causey's Counsel.

Causey moved to set aside summary judgment that was entered against him pursuant to Rule 55(c) and 60(b). In support of his Motion, Causey asserts he was never notified of the hearing but then avers he was notified. Causey Motion to Set Aside, p. 2 (R. p. 394). The lower court, with Causey's conflicting assertions, and with thirteen days between Barnhill's mailing of the Notice of Hearing to Causey and the hearing date, concluded Causey was duly notified. March 2016 Order (R. p. 44). Causey did not set forth any other grounds for relief in his motion to set aside. Causey did not assert the thirty day period stayed the action beyond the February 16, 2016 hearing date. Causey has waived that argument.

Causey was properly served with Barnhill's December 2015 Motion to Compel and Motion for Summary Judgment and Judgment on the Pleadings. Plaintiffs' served Causey's counsel, Leiter, in December 2015 with those two Motions. Barnhill December 2015 Motion to Compel and Motion for Summary Judgment including Certificates of

Service (R. pp. 410-414; R. pp. 355-356; S.S.R. 3-7). Plaintiffs served Causey with notice of the February 16, 2016 hearing on February 3, 2016. Notice of Hearing (R. pp. 367-371). Furthermore, at the time any hearing was set by the Clerk of Court, Causey's counsel, Leiter, would be responsible for providing notice to Causey. Plaintiffs' counsel provided additional notice of the February 16, 2016 hearing.

Contrary to Causey's arguments on page 9 of his brief, Plaintiffs' were under no obligation to serve again a previously filed and served motion with the Notice of Hearing upon Causey. Causey cites no procedural rule requiring redundant service of a written motion on a party. No court order required such redundant service. Causey's conclusory arguments are without support in fact and in law. An issue is deemed abandoned on appeal if it is argued in a short conclusory statement without supporting authority. *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993).

When Adler withdrew as counsel from Causey under Order filed on December 11, 2013, Causey was ordered by the court to advise the Clerk of his address. December 11, 2013 Order (R. pp. 2-4). Nowhere in the record did Causey ever notify the Court of his address when he was not represented by counsel. Any lack of hearing notice from the clerk argument by Causey is without basis and would be due to Causey's failure to comply with the court's prior order. Interestingly, Causey asserts in his Motion to Set Aside that Adler was notified of the hearing. Causey Motion to Set Aside, Par. 1 (R. p. 394).

Causey does not cite any matter in the record which indicates his counsel up to January 25, 2016 was not notified of the hearing or that Leiter was unaware of the hearing. No affidavit of Leiter was filed attesting that he was not aware of or not

informed of the February 16, 2016 hearing before January 25, 2016. Thus, the record does not support Causey's contention that he was unaware of the hearing until after it occurred. And the court was within its sound discretion to reject Causey's bare assertions that he received the Notice of Hearing a few hours late. Everyone else, Swilley included, knew of the hearing. February 16, 2016 Hearing Transcript p. 15, lines 9-17 (R. p. 450, lines 9-17). 809's counsel was present at the hearing, and Causey worked with Swilley in 809. In its March 22, 2016 Order, the court noted Neill, whose firm represented 809 at the hearing, was representing Causey and others in the Twigg case. March 22, 2016 Order, p. 3, ftnt. 2 (R. p. 34, ftnt. 2).

Service is effective upon mailing pursuant to Rule 5, SCRCP. Personal service or actual service of a hearing notice is not required. ("Service by mail is complete upon mailing all pleadings and papers subsequent to service of the original summons and complaint.) Rule 5(b), SCRCP. Rule 5(a), SCRCP addresses, in part, the service of notices.

If notice of a motion hearing required actual knowledge by the non-moving party, as confirmed by the non-moving party, SCRCP Rule 5 would be useless. Any litigant could wait to open mail until after a hearing time and dodge judgments and court orders. The lower court is not obligated to accept Causey's bare, contradictory statements as true or as a valid reason to set aside its Order when:

1. Service of the Notice of Hearing was effective on February 3, 2016 pursuant to SCRCP, Rule 5;
2. Causey filed no affidavits attesting that neither he nor his counsel had notice of the hearing;

3. Causey was previously ordered to notify the court of his address but he did not;
4. Causey's prior counsel, Leiter, was not relieved until January 25, 2016;
5. Causey did not attend the February 16, 2016 hearing or file any papers objecting to the hearing before April, 2016;
6. Causey never obtained new counsel, so he suffered no prejudice;
7. The record reflects Causey has not complied with and has ignored multiple court orders; and
8. Neill, Causey's counsel in a related case, *Twigg vs. 809 et al*, received notice of the hearing and his firm attended the hearing.

Furthermore, Causey's assertions in his Initial Brief conflict with assertions made to the trial court. In his Motion to Set Aside the Summary Judgment, Causey asserts he "received said notice the day of the hearing, [February 16, 2016] after the hearing had been heard." Causey's Notice of Motion To Set Aside Summary Judgment, Par. 3 (R. p. 394). In his Initial Brief, p. 3, Causey now argues that he received the notice on February 17, 2016, the day after the hearing. The trial court was well within its discretion to reject Causey's bare, contradicting notice arguments. Causey has not met his burden in proving the lower court abused its discretion.

IV. The Trial Court Properly Calculated Thirty Days Under The Plain Language Of The Order.

Under the plain language of the January 14, 2016 Order, the 30 day stay began on January 14, 2016 and ended on February 13, 2016. Contrary to Causey's arguments, the date an Order is filed does not automatically begin the timing or parameters within the

Order. Rather, the language used by Judge Seals in his Order determines the date a time period, such as a thirty day stay, is to commence. Once the order is filed, it is effective. But nothing requires time parameters within the order to start on the date the order is entered.

Judgments are to be construed like other written instruments. The determinative factor is the intention of the court gathered from all parts of the order. Such construction should be given to a judgment as will give force and effect to every word of it, if possible and make it as a whole construed and reasonable. *Eddins v. Eddins*, 304, S.C. 133, 403 S.E.2d 164 (S.C. Ct. App. 1991).

The order relieving Leiter as counsel was prepared by Causey's counsel, Leiter, within a day of the January 4, 2016 hearing. In the January 2016 Order, the court used two distinct phrases "within thirty (30) days from the date of this Order" and "as of the date of the entry of this Order". The lower court distinguished the "as of the date of entry of this order" from the "date of this order." January 2016 Order (R. pp. 29-31). If the court intended the thirty day period to begin upon the filing of the Order, the court would have used the language "as of the date of the entry of this Order." The language used by the court refutes Causey's argument. There is no dispute that the date of the Order is January 14, 2016. The court rendered its written decision and ruling on that date as evidenced by the language, "IT IS SO ORDERED". January 14, 2016 Order, p. 3 (R. p. 31).

The lower court gave an extra ten days from the court's ruling from bench on January 4, 2016 for Causey to obtain counsel and stay the action. The court was aware of the scheduling issues and pushed the trial date to not before May 1, 2016. January 2016

Order (R. p. 31). Under Causey's flawed logic, there would be no reason for a judge to ever date an order if time parameters within the order are to run only upon entry of the order.

While the Order was required to be filed with the court to become effective, the time frames set forth in the Order are not superseded by the date the Order is filed. Rather, the time frame is triggered by the language of the Order. In this instance, the Judge Seals chose to give Causey 30 days from the date of his Order. After he signed the Order, he mailed it back to Leiter and obviously understood Leiter would receive it and file it with the clerk. Judge Seals did not know the date the Order would be entered because Leiter was responsible for filing it. He did know, however, that he gave 30 days at the hearing for Causey to obtain new counsel. January 4, 2016 Hearing Transcript, p. 4-5 (R. pp. 429-433). And Judge Seals knew the date he signed and dated the Order. Thus, the date placed on the Order by Judge Seals is the date the clock begins to run on Causey. To hold otherwise would be to disregard the intent of the court.

The *Bowman v. Richland Memorial Hospital*, 335 S.C. 88, 92, 515 S.E.2d 259, 261 (Ct. App 1999) case cited by Causey is inapplicable and is not persuasive. In *Bowman*, the court weighed the equity of a ten day period running when both parties were unaware of which order the judge signed until after the Order was filed with the Clerk of Court. In *Bowman*, Appellants' counsel's assumption that the ten days began to run upon entry of the Order was evidenced by a handwritten memo to a law clerk and notations on counsel's desk calendar. *Id.*

In the instant case, equitable factors clearly rebut Causey's argument. Causey never obtained new counsel so he suffered no prejudice. After Causey failed to appear at

the January 4, 2016 hearing, Causey was notified of the court's ruling from the bench on January 5, 2016. Leiter January 5, 2016 letter with Order (R. pp. 547-550). Causey's counsel, Leiter, was duly notified on January 4, 2016. Causey was served a copy of the unsigned Order on January 5, 2016. Nothing in SCRPC requires service of the filed Order. See *Rosen v. Hiller*, 307 S.C. 331, 415 S.E.2d 117, 118 (Ct. App 1992). Causey received the Notice of Hearing. And, Causey did not appear at the February 16, 2016 hearing to lodge any objection to preserve his argument.

V. Summary Judgment Was Not Granted As A Sanction.

The court exercised sound discretion when it struck Causey's pleadings for failure to cooperate in discovery. March 2016 Order (R. pp. 32-35). In his brief, on page 12, Causey erroneously argues the court granted summary judgment as a sanction against Causey. The court struck Causey's pleadings due to the well documented discovery abuse and delay of Causey. March 2016 Order (R. p. 35). Judge Hyman previously held Causey was sandbagging in his discovery responses. October 2014 Order (R. p. 10). In the Court's May 2015 Order, Causey was required to cooperate with depositions (R. p. 19). He did not. In December 2015, after two and a half years of litigation, Causey did not appear for deposition for the fourth time. October 20, 2014 Barnhill Motion to Compel with Causey deposition notices; December 2015 Motion to Compel (R. pp. 269-293; R. pp. 410-414). Causey cites nothing in the record where he ever offered to appear for a deposition, when he was represented by counsel or as a *pro se* litigant. The court noted this fact. March 22, 2016 Order, pp.3-4 (R. pp. 34-35). The court was well within its discretion to conclude that after nearly three years of litigation, Causey's pleadings should be stricken for failure to cooperate in discovery. The eleven discovery based

motions filed by Barnhill and four court orders on discovery clearly support the court's well-reasoned decision.

VI. The Court Properly Granted Summary Judgment Against Causey On His One Counterclaim Under The Frivolous Proceeding Act.

Causey's sole counterclaim was under the Frivolous Proceeding Act. March 2016 Order; May 2015 Order (R. p. 36; R. p. 19). Summary judgment was properly entered, as no evidence was submitted by Causey at the February 2016 Hearing. Moreover, Causey admits in his Brief on page 16 that even his counterclaim was not ripe. Finally, and as an additional basis for affirming the lower court's Order, Causey's counterclaim was stricken pursuant to the March 22, 2016 Order on Barnhill's Motion to Compel. Those grounds have not been appealed.

VII. Causey's Extrinsic Fraud Arguments Fail Because He Has Not Preserved Them For Appeal And They Are Baseless.

Causey's arguments of extrinsic fraud fail, because he did not present them to the lower court and they are baseless. Causey did not set forth any extrinsic fraud arguments in his Motion To Set Aside, which was filed more than six weeks after the hearing. Causey is barred from raising these arguments to this Court when the lower court had no opportunity to address them. For an issue to be preserved for Appellate review, it must have been raised to and ruled upon by the trial judge. *S.C. Dept. of Transportation vs. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903 (S.C. 2007).

Substantively, Causey's arguments on page 18 of his Brief are that (1) Causey was not given proper notice of the hearing; (2) that "Attorney Fata misrepresented to the trial court that he had given proper notice of the hearing to the Swilleys"; and (3) that Attorney Fata made misleading statements to the Court.

As to Causey's first argument, Causey received Notice of the Hearing, as admitted by Causey. He was served the Notice on February 3, 2016. Service is effective upon mailing, not receipt. Rule 5, SCRCP. December 2015 Motion to Compel; December 2015 Motion for Summary Judgment and Judgment on the Pleadings (R. p. 410-414; R. pp. 355-356; S.S.R. pp. 3-7). The December 2015 motions were served on Causey's counsel. Causey cites no procedural rule requiring redundant service of the pleadings. Causey was properly notified of the hearing, but chose not to attend.

Causey's second argument that Fata misrepresented to the trial court that Swilley had been given proper notice of the hearing also fails. As stated above, service of the Notice of Hearing was effected at the time of mailing, February 3, 2016. SCRCP, Rule 5. More importantly, Causey asserts this argument only as to the Swilleys, and not to himself. Thus, Causey has not argued that Fata misrepresented proper notice as to Causey. Causey's argument for the Swilleys is wholly irrelevant to Causey.

Finally, Causey asserts that Mark Neill's office, who is also his counsel in the *Twigg* case, made misrepresentations to the court at the February 16, 2016 hearing. Again, another lawyer's candid comments to the Court which were consistent with defendants' documented delay and discovery obstruction does not amount to extrinsic fraud. Counsel's comments to the court concerning bankruptcy filing by defendants is wholly consistent with bankruptcies filed by the many defendant companies. Notice of Bankruptcy Filings (R. pp. 397-398). Causey could have presented his arguments at the hearing as did 809. The result would have been the same. Causey had no reasonable explanation as to why he did not appear for deposition the fourth time, after multiple discovery motions and orders. Causey did not rely on any person in failing to appear at

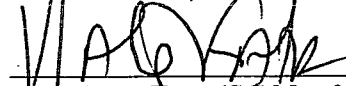
the February 16, 2016 hearing. Causey cannot argue extrinsic fraud or that he was induced not to appear at the hearing when his lawyer drafted the January 2016 Order and Causey's only contention is that he did not see the notice of the hearing until the day of or the day after the hearing about the hearing.

Extrinsic fraud is the only type of fraud for which relief from judgment may be granted; extrinsic fraud is fraud that induces a person not to present a case or deprive a person of the opportunity to be heard. SCRCF, Rule 60(b)(3), *Gainey v. Gainey*, 382 S.C. 414, 675 S.E.2d 792. (S.C. App 2009). The essential distinction between intrinsic and extrinsic fraud for purposes of relief from judgment is the ability to discover fraud. *Ray v. Ray*, 347 S.C. 79, 647 S.E.2d 237 (Ct. 2007). The court made no mistake and was not misled when it reviewed the pleadings and considered the matters at issue on February 16, 2016, or thereafter. Causey ignored the February 2016 hearing. He was duly notified and has relied on no one. Causey's belated extrinsic fraud arguments fail.

CONCLUSION

The lower court's Orders should be affirmed in their entirety.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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NOV 13 2017

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

Case No. 2014-CP-26-8367
(Formerly 2013-CP-26-2816)

Appellate Case No. 2016-001328

Gabriel Barnhill & 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, J. Floyd Swilley SMG Partners, LLC, Alicia A. Piner, Heath Causey, Sage Advisory Group, L.P., Sage Private Equity Group, Secured Asset Factoring Exchange, Inc., SAFE, Inc., Digics, LLC, 9-1-1, Plumbing, LLC, and Sage Funding, L.P., Christopher Pitcock, Defendants,

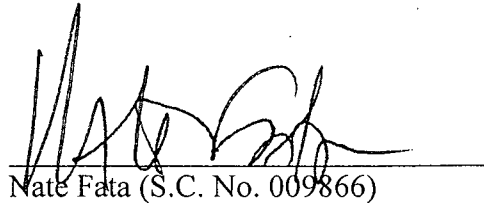
Of Whom J. Floyd Swilley and Laurel K. Swilley and Heath Wendell Causey
are the Appellants

CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondents certifies that the Final Brief of Respondents complies with Rule 211(b), SCACR.

Appendix 00730

November 10, 2017

A handwritten signature in black ink, appearing to read "Nate Fata", is written over a horizontal line.

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Attorney for Respondents

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge 15th Judicial Circuit

Civil Action No. 2014-CP-26-08367

2014-CP-26-03362 (formerly 2013-CP-02816)

Appellate Case No. 2016-001328

Gabriel Barnhill & 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, J Floyd Swilley, SMG
Partners LLC, Alicia Piner, Heath Causey,
Sage Advisory Group LP, Sage Private
Equity Group LLC, Secured Asset Factoring
Exchange, Inc, SAFE, Inc, Digics, LLC, 9-1-
1 Plumbing, LLC, and Sage Funding, LP
and Christopher Pitcock,

Defendants

of whom J Floyd Swilley, Laurel K Swilley
and Heath Wendell Causey, are the

Appellants.

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OCT 16 2017

SC COURT OF APPEALS

APPELLANT CAUSEY'S REPLY TO BRIEF OF RESPONDENTS

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Appendix 00732

TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
Statement of Issues on Appeal	1
Statement of the Case	1

Arguments

Argument I	4
------------------	---

I. BARNHILL FAILS TO ADDRESS CERTAIN ISSUES SET FORTH IN THE APPELLANTS INITIAL BRIEF THEREFORE IT IS DEEMED THAT THE RESPONDENT BARNHILL CONCURS WITH OUR POSITION AND HIS ARGUMENTS ARE ABANDONED

Argument II	4
-------------------	---

II. DID PROPER SERVICE OCCUR

Argument III	10
--------------------	----

III. THE TRAIL COURT DID NOT PROPERLY CALCULATE THE THIRTY DAYS OF THE ORDER

Argument IV	11
-------------------	----

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT WHEN THERE REMAINED GENUINE ISSUES OF MATERIAL FACT IN DISPUTE

Argument V	21
------------------	----

V. DID APPELLANTS PROTECT OUR RIGHT TO APPEAL AND DOES THE APPELLATE COURT HAVE THE RIGHT TO REVIEW

Conclusion.. ..	22
-----------------	----

TABLE OF AUTHORITIES

CASES

<i>809 Holding Etal v David Wilkinson etal</i>	19
<i>Bulloch v. United States</i> , 763 F. 2d 1115, 1121 (10th Or. 1985)	13,22
<i>Chewning v. Ford Motor Co.</i> , 354 S.C. 72, 82, 579 S.E.2d 605, 610(2003}	16
<i>Cunningham v. Helping Hands, Inc.</i> , 352 S.C 485, 575 S.E.2d 549 (2003);	14
<i>Davis v. Parkview Apts.</i> , 409 S.C. 266, 281-83, 762 S.E.2d 535, 543-44 (2014)	12
<i>Faile v. South Carolina Dep't of Juvenile Justice</i> , 350 S.C. 315, 566 S.E.2d 536 (2002 ..	14
<i>Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.</i> , 334 S.C. 193, 198, 511 S.E.2d	
716, 718 (Ct. App. 1999)	11
<i>McNairv. Rainsford</i> , 330 S.C. 332, 499 S.E.2d488 (Ct. App. 1998)	14
<i>Moore v. Moore</i> , 376. S.C. 467, 657S.E.2d 743 (2008	8
<i>Mullane v. Cent. Hanover Bank & Trust Co.</i> , 339 U.S. 306, 314 (1950)	5
<i>Ogburn-Matthews v. Loblolly Partners</i> , 332 S.C. 551, 562, 505 S.E.2d 598, 603 (Ct, App.	
1998)	5
<i>Rozier v Ford Motor Co</i> , 573 F.2d at 1338	16
<i>Tatev. Oxner</i> , 236 S.C. 313, 114 S.E.2d 225 (1960)	22
<i>Toyota of Florence, Inc. v. Lynch</i> , 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994	15
<i>Tryron Fed. Sav. & Loan Ass'n v. Phelps</i> , 307S.C. 361, 362, 415 S.E.2d397, 398 (1992)...5	
<i>Webster v. Clanton</i> , 259 S.C. 387, 391, 192 S.E.2d 214, 216(1972);	5
<i>Woods v. Rock Hill Fertilizer Co.</i> , 102 S.C. 442, 86S.E. 817(1915)	22
<i>Young v. South Carolina Dep't of Corr.</i> , 333 S.C. 714, 511 S.E.2d413 (Ct. App. 1999	14

STATUTES

S.C. Code§ 15-36-10(C)(1)	16
Federal Rules of Civil Procedure -FEDERAL Rule 60(b)(6)	13,21
SC Rules of Civil Procedure - SCRP Rule 5.....	6,9,21
SC Rules of Civil Procedure -SCRP Rule 50.....	21
SC Rules of Civil Procedure -SCRP Rule 52.....	21
SC Rules of Civil Procedure - SCRP Rule 58 (a)	10,11
SC Rules of Civil Procedure -SCRP Rule 59.....	13,21
SC Rules of Civil Procedure - SCRP Rule 60(b)(3)	12,13,16,21
SC Rules of Civil Procedure -SCRP Rule 203.....	21
SC Rules of Appellate Practice - SCAP Rule 252(2)	10

OTHER AUTHORITIES & REFERENCES

I Join by reference Briefs of the Swilleys' in its entirety	
"ADLER LETTER"" LETTER FROM F. MILES ADLER TO JUDGE MCINTOSH DATED MAYS, 2016	9
ASSISTANT HUFFMAN'S AFFIDAVIT.....	2,6
ASSISTANT HUFFMANS EMAIL.....	2
APPELLANT CAUSEY INITIAL BRIEF	3,4,7,10,11
APPELLANT CAUSEY MOTION TO STRIKE RESPONSE	7
APPELLANT SWILLEY AMENDED INITIAL BRIEF	3,4,10,11
"CAUSEYS MOTION TO SET ASIDE" DEFENDANTS HEATH CAUSEY'S NOTICE OF MOTION TO SET ASIDE SUMMARY JUDGEMEN	2,6
"FEB TRANSCRIPTS" TRANSCRIPT OF RECORD OF THE COURT HELD ON FEBRUARY 16, 2016	2,12,15,16,17,20
"FATA LETTER" LETTER FROM NATE FATA TO JUDGE MCINTOSH WITH ATTACHMENTS THEREAFTER DATED MAY 13, 2016	7,14,19

"FORM 4" ORDER DATED 4/28/2016	2
"JANUARY ORDER" ORDER RELEIVING JOHN M LEITER AND THE LAW OFFICES OF JON M LEITHER AS COUNCEL FOR J FLOYD SWILEY, etal FILED OCTOBER 27, 2015	10
"JANUARY TRANSCRIPTS" TRANSCRIPT OF RECORD OF THE COURT HELD ON JANUARY 13, 2014.....	12,20
Piner Affidavit	20
"NEIL LETTER" LETTER FROM MARK NEIL ATTORNEY FOR 809 HOLDINGS LP TO JUDGE MCINTOSH MAY 19, 2016.....	9,14,18,20
RESPONDANT INITIAL BRIEF	4,10
RESPONDANTS BARNHILLS MOTION TO STRIKE SWILLEYS INITIAL BRIEF	7
September 30. 2014 Transcripts	17,18

STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court commit reversible error by failing to abide by its own order staying the proceedings for 30 days?
- II. Did the trial court commit reversible error by ruling on the matter despite the clerk's defective service of notice? Did Proper Service Occur?
- III. Did the trial court commit reversible error by striking pleadings and granting final judgment as a sanction?
- IV. Did the trial court commit reversible error by granting summary judgment when there remained genuine issues of material fact in dispute?
- V. Did the trial court commit reversible error by relying on false statements and misrepresentations by counsel?

COUNTER STATEMENT OF ISSUES INCLUDED IN BARNHILL BRIEF

- I. Did the Appellant properly preserve issues for Appeal?
- II. Did the Court abuse its discretion in striking Appellant's pleadings based on Appellant's repeated and well documented discovery obstruction?

STATEMENT OF THE CASE

Causey hereby restates and incorporates hereto by reference Causey's Statement of the Case from Appellant Causey's Initial Brief and Appellants Swilley Initial Brief in its entirety.

STATEMENT OF FACTS

This Appellant Causey hereby restates and incorporates hereto by reference my statement of facts from Appellants initial brief and Appellants Swilley Initial Brief in its entirety. The following additions are made to the original statement of facts as follows:

On April 6, 2016, Causey filed a Notice of Motion and Motion to Set Aside Summary Judgment. Wherein it is noted Causey asserts that prior to the hearing of February 16, 2016: "He was never notified of the hearing." (APPELLANT CAUSEYS MOTION TO SET ASIDE, Par. 2)(R.36,p394).

The Motion was filed to set aside the entire judgment due to lack of proper service and the fact that these Appellants were under a protective stay. Despite Attorney Fata statement in open court that he mailed notice to all Defendants separately (FEB TRANSCRIPTS, Page 9, line.6)(R.45,p.444, line6), The Affidavit of Sally Huffman filed April 13, 2016, stands in marked contrast to the statement of Barnhill's Counsel wherein she only confirms service of the Notice of Hearing for the February 16, 2016 hearing to only the Company Defendants and Defendant Swilley(s) (ASSISTANT HUFFMANS AFFIDAVIT, p.2, numerical item 3.)(R.39, P402-403)(R.48, p.527-530 Item.3) but did not include in that same Affidavit service as to Causey. It should be further noted that the aforementioned Affidavit of Sally Human, that had been acknowledged by Notary of Attorney Nate Fata, which was filed on April 13, 2016 was not served to these defendants until May 13, 2016 some thirty (30) days after it had been filed of record giving no time of these defendants to file counter affidavit attesting to the contrary. Further it should also be noted that the Form 4 Order on the Hearing was filed April 26, 2016 (FORM 4)(R.18, p.18-20). One day after Attorney Fata Assistant Huffman resubmitted via email to his Honorable Judge McIntosh with the filed defendants pleading and Attorney

Fata's unfiled Memorandum in Responses to Defendant's Motions with Exhibits. Interesting enough in this email , Lack of the Affidavit of Sally Huffman , this affidavit filed on April 13, 2016, the same Affidavit of Sally Huffman was not proffered to these defendants until after the Honorable Lower Court had ruled some 30 days after it was filed [ASSISTANT HUFFMANS EMAIL] [FATA LETTER] (R.39, P402-403)(R.48, p.527-530)

This Appellant case does hereby supplement those facts as follows. Respondent Barnhill filed his Initial Brief on October 31, 2016. The Appellant Causey filed his motion for extension for time to file his Reply Brief on November 11, 2016. This Appellant Causey filed his Reply Brief on December 13, 2016. On December 15, 2016 Attorney Fata sent a letter to this Appellant Causey questioning if 5 items if they were of record of the court. On December 21, 2016 This Appellant Causey sent Attorney Fata a letter requesting additional time to research this. On December 27, 2016 Attorney Fata file a motion to strike material not on record. January 4, 2017 Clerk Allen sent Attorney Fata notice of deficiency. On January 9, 2017 Attorney Fata sent his \$25 check with correspondence to his honorable court without noticing any other party of the case. The aforementioned item just another example of his flagrant disregard for the rules of the court. If Attorney Fata and his office fails to adhered rules of service with this honorable court, then logically they did the same in the lower courts.

ARGUMENTS

This Appellant Causey hereby restates an incorporates hereto by reference my arguments from Appellants initial brief and Appellants Swilley Initial Brief in its entirety. The following additions are made to the original the Arguments as follows: (APPELLANT CAUSEY INITIAL BRIEF) (APPELLANT SWILLEY AMENDED INITIAL BRIEF)

I. BARNHILL FAILS TO ADDRESS CERTAIN ISSUES SET FORTH IN THE APPELLANTS INITIAL BRIEF THEREFORE IT IS DEEMED THAT THE RESPONDENT BARNHILL CONCURS WITH OUR POSITION AND HIS ARGUMENTS ARE ABANDONED

In his Initial Brief, Barnhill through Counsel fails to address the failure to advise the Honorable Court that a stay was in effect. Further he confirms the Appellants position when he notes that Attorney Lieter was relieved on January 25, 2016 (RESPONDENT INITIAL BRIEF, p. 9). If Attorney Leiter was relieved on January 25, 2016 then the Order granting the Appellants thirty days to obtain new counsel and placing the case in abeyance would have run until February 24, 2016 and the Hearing was in direct violation of the Court's own Order. Therefore the Hearing which resulted in the Order under appeal should never had been held thus making the Order invalid.

II. DID PROPER SERVICE OCCUR?

This Appellant Causey restates, affirms and incorporates by reference all assertions set forth in his initial Brief and the Swilley's Amended Initial Brief. (APPELLANT CAUSEY BRIEF) (APPELLANT SWILLEY BRIEF)

The Honorable Court's attention is drawn Attorney Fata was in Court when this Appellant Causey's Attorney was allowed to withdraw, that Attorney Fata was well aware of 30 day time granted Appellant Causey to get an attorney, as an attorney of record Attorney Fata has duty and obligation to be aware of all contents of the record and to proceed accordingly, that the fact Attorney Fata scheduled events prior to the 30 period shows he was not aware of time restraints or that he chose to avoid, also that Attorney Fata had knowledge or reason to know this

Appellant Causey was not represented by an attorney and should act accordingly. This conduct is at great disadvantage to this Appellant Causey which is magnified by lack of due and timely service of pleadings, correspondence, otherwise there could be indications of ex parte if the court involved and this Appellant Causey was not involved in or properly noticed.

"The requirements of due process include notice [and] an opportunity to be heard in a meaningful way." *Ogburn-Matthews v. Loblolly Partners*, 332 S.C. 551, 562, 505 S.E.2d 598, 603 (Ct. App. 1998); *see also Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (stating that the Due Process Clause demands "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or opportunity to be heard, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights. A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on. *Webster v. Clanton*, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972); accord *Tryon Fed. Sav. & Loan Ass'n v. Phelps*, 307 S.C. 361, 362, 415 S.E.2d 397, 398 (1992).

As set out herein above in the Facts of the Case, the Affidavit of Sally Huffman confirms that Appellant Heath Causey did not receive proper notice of the Hearing at issue. As Barnhill's counsel, has correctly pointed out service pursuant Rule 5 is completed upon mailing all pleadings and papers (emphasis ours). In addition to failing to include Appellant Causey, the

Affidavit of Huffman fails to confirm that ALL paper which would include the exhibits was mailed to the defendants. In the instant case these defendants did not timely receive the notice, moreover the Affidavit of Huffman in failing to include Causey confirms that all parties were not served therefore it would be impossible for proper service to have occurred.

Barnhill Service chose to notice on Defendants on February 3, 2016 to insure compliance with rule 5.

Rule 5 (b)(1) Service ... upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address ... Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there be no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving a copy at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint.

On April 13, 2016, Barnhill filed an Affidavit of Sally Huffman, confirming service of the Notice of Hearing for the February 16, 2016 hearing on Swilley and that no mail was returned undelivered. (ASSISTANT HUFFMANS AFFIDAVIT) (R.39, P402-403)(R.48, p.527-530). If we assume that Huffman's affidavit is true and correct and represents all the relevant facts of the case, then her decision to leave out a key fact, that she had also timely served Defendant Causey at his known address, we can only assume that was because it did not happen. That evidence alone should have cautioned the court and his Honorable Judge McIntosh of an error and his honor should have allowed all parties an opportunity to present arguments.

As plead in Appellant Causey Motion to Set Aside, this Appellant Causey did not receive the Notice of Hearing until after the Hearing occurred not prior to as is required by Rule 5. (APPELLANT CAUSEYS MOTION TO SET ASIDE, p. 2)(R.36, p.394). If Notice is defective or improper then it is impossible for the Appellant to comply.

The Honorable Court's attention is drawn to the fact that the same Affidavit of Sally Huffman was delivered to this Appellant Causey and all other parties more than 30 days after it was presented to the lower court and ruled on. This is just another example of Barnhill and his counsel's continuing pattern of abuse of process and Ex Parte communication. (FATA LETTER)(R.51p.543)

Further, the Honorable Court's attention is drawn to Respondent Barnhill's Motion to Strike Swilley's Initial Brief and specifically the attached Exhibits A&B correspondence letter as well as this Appellant's' Response to that aforementioned Motion to Strike. (RESPONDENT BARNHILL'S MOTION TO STRIKE SWILLEY BRIEF) (APPELLANT CAUSEYS MOTION TO STRIKE RESPONSE) Appellant Causey draws his Honors attention to the fact that the Respondent Barnhill and Attorney Fata failed to serve Appellant Causey on the enclosed communications discussed within Exhibits A & B letters when Attorney Fata originally served these letters by mail to Attorney Adler. This is just another example of Barnhill and his attorney engaging in ex parte communications, Opposing Counsel is required to provide a copy to all parties to the case all communications between himself and another party of the case.

Further, the Honorable Court's attention is drawn that on page 11 of this Appellant Causey's Initial Brief Appellant Causey adopted and incorporated by reference the entire brief of the Swilley(s): (APPELLANT CAUSEY BRIEF p.11)

..."This Appellant [Causey] references the entire Brief of the Swilleys' and asserts the same arguments and assertions as his own unless specifically identified within this brief."... Therefore, it was incumbent upon the Respondent to include a copy of any and all correspondence including but not limited to communication by and between himself and the courts or other parties or their counsel. As set out herein, this has not occurred.

The Respondent has argued that this Appellant Causey knew or should have known the time and date of the scheduled hearing because Attorney Neill, who represented this Appellant Causey in another matter, and the Swilley's were noticed. This is tantamount to an admission that he failed to notice this Appellant Causey. Such assertion is buttressed by the Affidavit of Respondents own paralegal Ms, Huffman who fails to include this Appellant Causey in her affidavit and therefore confirms this Appellant Causey was not included. If this Appellant Causey by the Respondents own admission, was not included in the service it would have been impossible for proper service to have occurred pursuant Rule 5 and the Respondents argument fails based upon their own admission. This is echoed in the findings of the South Carolina Supreme Court wherein it frequently notes:

"[p]rocedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Moore v. Moore. 376 S.C. 467, 657 S.E.2d 743(2008).

If the Respondent fails to comply with the rules of the Appellant Court it reasonably follows that he would fail to adhere to the rules of the lower courts if they prevented an impairment to him taking advantage of an unrepresented party. The fact that the Respondent has admitted that this Appellant Causey was not given proper notice confirms that his due process rights were violated by not allowing him to have his day in court and should result in the Order being set aside.

This Appellant Causey would further argue that Attorney Fata's pattern to not include this appellant on any service of process lists, that by doing so Attorney Fata left the Appellant Causey out of the picture and that Attorney Fata had as much of duty if not more to advise this Appellant Causey of the status of the case and what was going on because this Appellant was proceeding pro se the demonstrates conscious disregard for Civil Rule 5 which sets out

service of process....if Attorney Fata was up on the record he would know that no attorney had entered appearance on behalf of Defendant / Appellant Heath Causey so this appellant Causey as an individual had to be given proper notice individually and timely otherwise it looks like what it is ... Attorney Fata is trying to get around the rules and ignoring this Appellant Causey's position... Attorney Fata was in court, was aware counsel had withdrawn, was aware or should have been aware no one had entered an appearance on behalf of this Appellant Causey, therefore this Appellant Causey is entitled to same notice on all pleadings, correspondence, communications as any other party and all other due process. Barnhill's claims of un- timely filed arguments should carry little weight where there is a question of proper service and evidenced continued pattern of improper service abuse under Rule 5, further Barnhill should not be allowed to profit by denying this Appellant Causey 's opportunity to be heard in a meaningful way.

This Appellant Causey would further argue that the lower court aided in these patterns of improper service when the lower court only contacting Attorney Fata by sending him the Form 4 and not to the other parties, This Appellant Causey, including Attorney Neill and Attorney Adler who had filed a notice of appearance and should have been copied on all communication. This Appellant, Attorney's Neill & Adler were not, as atestified by their emails (ADLER EMAIL)(R.49,p.511-529), & (NEILL EMAIL MAY 17)(R.50p.531-542).

Attorney Fata filed his motion to strike on December 27, 2016 and neglected to enclose the required check in the amount of \$25 for the filing fee. This appellant received this motion on December 29, 2016. On January 5, 2017, Clerk Allen notified Attorney Fata via an attached letter that he had failed to attached the required filing fee of \$25 and therefore the filing was

deficient. Clerk Allen gave 10 days from that date to correct that filing error. January 9, 2017 Attorney Fata sent the \$25 required filing fee see attached letter. Attorney Fata ignored the rules of this honorable court and intentionally did not copy this appellant on this filing as required by Rule 262(2). Appellant Causey was required to wait until that deficiency had been corrected to tender his response.

RULE 262(2) FILING AND SERVICE (2) "Any document filed with the appellate court shall be accompanied by proof of service of such document on all parties."
...(emphasis ours)

With a pattern of these flagrant disregards for the rules by the Respondent, this Appellant Causey could not have been and was not given proper notice and confirms that his due process rights were violated by not allowing him to have his day in court and should result in the Order being set aside.

III. THE TRAIL COURT DID NOT PROPERLY CALCULATE THE THIRTY DAYS OF THE JANUARY ORDER.

This Appellant Causey restates, affirms and incorporates by reference all assertions set forth in his initial Brief and the Swilley's Amended Initial Brief. . (APPELLANT CAUSEY BRIEF) (APPELLANT SWILLEY BRIEF)

The Respondent has argued Attorney Leiter was relieved as counsel for this Appellant Causey by means of an Order [JANUARY ORDER] entered on January 25, 2016. It is well held that an Order becomes effective on the date it is clocked with the Clerk. In fact, this is set out in Rule 58(a) (SCRCP Rule 58(a)). Through his own admission that the Order was not entered until January 25, 2016 (Respondents Brief, p.9). The Trial Judge, His Honor Judge Seals,

ordered that the Appellants be given thirty days to obtain counsel from "the date of this Order", inter alia, to assure the parties were represented and to assure that they were not taken advantage of by opposing counsel while not being represented. The Order was entered on January 25, 2016 as admitted by the Respondent. The Respondent also admits that the Appellants were to have 30 days from the date of the Order. Rule 58(a) directs that the Order date is the entry date. Therefore the Appellants including this Appellant Causey, were under a protective order and the Hearing which resulted in the March Order was under appeal, was improper, and should not have been held. As a result the Appellants rights have been violated and the Entire March Order should be reversed.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT WHEN THERE REMAINED GENUINE ISSUES OF MATERIAL FACT IN DISPUTE

In direct response to the Respondent, this Appellant Causey hereby restates and incorporates by reference the assertions stated in his Initial Brief and the Appellant Swilley's Initial Brief. (APPELLANT CAUSEY BRIEF) (APPELLANT SWILLEY BRIEF)

The Respondent argues that the lower court exercised sound discretion in striking this Appellant Causey 's Pleadings. However, it is well held that:

"When 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))[.] *Davis v. Parkview Apts.*, 409 S.C. 266, 281-83, 762 S.E.2d 535, 543-44 (2014).

In the instant case, there was no factual basis to support the decision to impose the ultimate sanction penalty of striking the Swilleys' pleadings and then granting final judgment in favor of Bamhill. The Respondent has stated in open court at the hearing that: "...I [Attorney Fata] know nothing about with no information,[Attorney Fata] have no depositions yet..." (FEB TRANSCRIPTS, p.8, In20)(R.45,p.443 line 20). "...I [Attorney Fata] got two months to get ready for trial and I've got you know nothing..." (Id., p.17)(R.45,p.452 Line 2-4)

Attorney Fata therefore presented to the court "the topic" of all discovery and depositions. Attorney Fata's misstatements on the topic or matter of "discovery" and "depositions" were not correct, and the court ruled on "participation". "Participation" or lack thereof as alleged was the reason for the Summary Judgment and Order to Strike the pleadings. Therefore all "Participation" on the discovery process was presented to the court and it was ruled upon. Attorney Fata inaccurately stated there was no information and no depositions when in reality deposition and discovery "information" did in fact exist and was "*Voluminous*" by his own admissions in the Hearing on January 13, 2014 Page 7 Line 7. (R.46, p.476 Line 7), Attorney Leiter correcting Attorney Fata on Page 8 *Line 12*(R.46, p.477 Line 12-20), said discovery was "*Thousands of Pages*". **Thousands of Pages of a response can't be Nothing!**

Rule 60(b)(3), SCRCF, provides:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud, misrepresentation, or other misconduct of an adverse party;

Rule 60(b)(3), SCRCP. (emphasis in original)

RELIEF PURSUANT TO FEDERAL RULE 60 (B) (6)

Rule 60 (b) (6) permits an independent action ...to set aside a judgment for fraud on the court. "Fraud on the Court" is a term of art with a stringent definition. It occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense.

Fraud upon the court is fraud which is directed to the judicial machinery itself and is not fraud between the parties of fraudulent documents, false statement or perjury... It is where the court or a member is corrupted or influenced or influence is attempted or where a judge has not performed his judicial function - - thus where the impartial function of the court have been directly corrupted." Bulloch v. United States. 763 F. 2d 1115. 1121 (10 Cir. 1985).

In this case fraud on the court occurred when the judicial machinery itself has been tainted, when the actions of Attorney Fata, who is an officer of the court, was involved in the perpetration of fraud by making material misrepresentations and misstatements to the court. This Fraud upon the court would make void the orders and judgments of that court.

Our Honorable Courts have consistently held that Summary Judgment is not appropriate if there are any triable issues:

In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Cunningham v. Helping Hands. Inc., 352 S.C. 485, 575 S.E.2d 549 (2003); Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002); McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). If triable issues exist, those issues must go to the jury. Young v. South Carolina Dep't of Corr., 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

The parties on both sides had rescheduled depositions by agreement. Attorney Neill's letter reiterates this point:

"...Depositions was canceled in advance by agreement of plaintiffs attorney as a result of attorney John Leiter's Motion to be relieved . The Parties agreed that depositions would be rescheduled after the motion to be relieved was heard..."

"... Mr [Attorney] Fata never re-noticed the depositions " ("NEILL LETTER"- Attorney Neill letter to Judge McIntosh, May 19, 2016.) (R.50,P.531-546)

This agreement is further confirmed by Attorney Fata in his letter to His Honorable Judge Seals of December 3, 2015 wherein he acknowledges that no depositions would occur until after the Motion to Relieve Attorney Leiter as counsel. (Attorney Fata Letter to His Honorable Judge

Seal, December 3, 2015)(R.50,p.538) "From my [Attorney Fata] conversations with Mr Leiter, no depositions will take place until Mr Leiter's [Attorney Leiter] motion is heard."

The decision to apply the Summary Judgment was not based upon triable issues but rather Attorney Fata's questionable comments to his Honorable Judge McIntire that we, The Appellant Causey and Appellant Swilleys, refused to participate in discovery; were the main reason for all the Judgments as well as 809 Holdings Counsel Fiedler's misstatements (FEB TRANSCRIPTS)(R.45,p.436-469). The invalidity of Attorney Fielder's comments was confirmed in Attorney Neill's letter to His Honorable Judge McIntosh.

The misrepresentations of Attorney Feidler and inflammatory statements of Attorney Fata served to prejudiced the Appellants. The SC Supreme Court has held that "even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice." *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994).

The Honorable Court's attention is drawn to the fact that here have been multiple discovery documents and amendments to interrogatories tendered to the Respondent and said counsel. These are voluminous in nature and to many to add to the record on their own.

This Appellant Causey continues to describe Attorney Fata's scheme that the defendants produced no evidence, refused depositions, and thumbed their nose at the court. This Appellant uses the term scheme because most of the so called facts that Attorney Fata stated are not based in truth, but that of complete falsehood. Unfortunately, they are, infinite in number so this Appellant will focus on the few of these accuracies that this Appellant Causey believes

materially influenced his Honor to completely ignore the defendants and all evidence they could have presented.

A person does not commit perjury unless the false testimony is given "willfully."

S.C. Code Ann. § 16-9-10(2003)

"The subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud." *Chewning v. Ford Motor Company*, 354 S.C. at 82, 579 S.E.2d at 610. there was "a showing that one has acted with an intent to deceive or defraud the court." *Chewning*, 354 S.C. at 78, 579 S.E.2d at 608 ("it [is] essential that there be a showing of conscious wrongdoing – what can properly be characterized as a deliberate scheme to defraud - before relief from a final judgment is appropriate.").

We hold an act of perjury or concealment of a document coupled with an intentional scheme to defraud the court justifies the setting aside of a judgment pursuant to Rule 60(b) due to extrinsic fraud. See, e.g., *Rozier v Ford Motor Co*, 573 F.2d at 1338 ("In order to set aside a judgment or order because of fraud upon the court under Rule 60(b) . . . it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision.")

This Appellant Causey Draws the Honorable Courts attention to Transcripts of the Hearing on February 16, 2016 , Attorney Fata takes over the conversation of the Hearing (Transcripts of February 16, 2016 Hearing Page 4 Line 25)(R.45,p.439 Line 25).

" I [Attorney Fata] might be able to help" He then states the entire case giving his and only his version of the facts. (Page 4 Line 25) (R.45,p.439 Line 25). [Attorney Fata "This case is odd for me. After 20 years of practicing... "(Page 5 Line 5) (R.45,p.440 Line 5).

He was assuring His Honor of His creditability of a 20+ year practicing attorney, it was this creditability that His Honor relied on that Attorney Fata presented evidence would be true and correct and completely 100% factual.

Attorney Fata stated " I know nothing about with no information, I have no deposition yet". (Page 8 Line 21) (R.45,p.443 Line 521)

Attorney Fata's statements are not factually accurate. The record clearly shows that depositions, specifically this same depositions was referenced and referred to on the September 30, 2014 Hearing on Page 12, Line 3 and Page 8, Line 2. This was one of the same hearings that Attorney Fata referenced as receiving a sanction. So clearly there were depositions as they were referenced.

This Appellant Causey Draws the Honorable Courts attention to Transcripts of the Hearing on February 16, 2016 , Attorney Fata takes over the conversation of the Hearing (Transcripts of February 16, 2016 Hearing Page 4 Line 25) (R.45,p.439 Line 25)

" I [Attorney Fata] might be able to help" He then states the entire case giving his and only his version of the facts. (Page 4 Line 25) [Attorney Fata "This case is odd for me. After 20 years of practicing.. "(Page 5 Line 5) (R.45,p.440 Line 5)

He was assuring His Honor of His credibility of a 20+ year practicing attorney, it was this credibility that His Honor relied on that Attorney Fata presented evidence would be true and correct and completely 100% factual.

Attorney Fata stated " I know nothing about with no information, I have no deposition yet". (Page 8 Line 21) (R.45,p.443 Line 21)

Attorney Fata's statements are not factually accurate. The record clearly shows that depositions had already been taken. His Honors attention should further be drawn to the Deposition, specifically referenced and referred to on the September 30, 2014 Hearing on Page 12, Line 3 (R.47, p.496 Line 3) and Page 8, Line 2 (R.47, p.492 Line 2). This was one of the same hearings that Attorney Fata referenced as receiving a sanction. So had His Honor Judge McIntosh read the transcripts he would have discovered this referenced Deposition, but he relied on Attorney Fata representations of the so called truth or the alternate reality that Attorney Fata created.

ATTORNEY FIELDER: It's my understanding ... that there was a supposed gentleman's agreement..." THE COURT: Is that true? ATTORNEY FATA: "No, your honor it was, I need some dates,..."(Page 15 Line 18) (R.45,p.450 Line 18)

The Honorable Courts attention should be drawn to the fact the parties on both sides had rescheduled depositions by agreement. Attorney Neill's letter reiterates this point:

" ...Depositions was canceled in advance by agreement of plaintiffs attorney as a result of attorney John Leiter's Motion to be relieved . The Parties agreed that depositions would be rescheduled after the motion to be relieved was heard..." "... Mr [Attorney] Fata never re-noticed the depositions " ("NEILL LETTER"-

Attorney Neill letter to His Honorable Judge McIntosh, May 19, 2016.)

(R.50,P.531-546)

This agreement is further confirmed by Attorney Fata in his letter to His Honorable Judge Seals of December 3, 2015 wherein he acknowledges that no depositions would occur until after the Motion to Relieve Attorney Leiter as counsel. (Attorney Fata Letter to His Honorable Judge Seal, December 3, 2015) "From my [Attorney Fata] conversations with Mr Leiter, no depositions will take place until Mr Leiter's [Attorney Leiter] motion is heard."

This would support the fact that some agreement was present as Attorney Fata sent a letter to Honorable Judge Seals. So either the letter to the Honorable Judge Seals not true or was the Testimony to his Honorable Judge McIntosh was in error. If the Depositions were canceled by both Parties pending Defendants to obtain new council then how could the Defendants be in violation of the court and no sanction should have occurred?

THE COURT: and Mr Finer is one that you've also sought to have his deposition taken?

ATTONERY FATA: Yes.

THE COURT: But he doesn't participate in it?

ATTONERY FATA: Correct.

THE COURT: He gives an affidavit?

ATTONERY FATA: That's right, that's right, your honor.

[February 16, 2016 Transcripts Page 25 Line 5] (R.45,p.460 Line 18)

The Courts attention should be drawn to the fact this affidavit was presented in the 2012

case where 809 Holdings Etal v David Wilkinson & QC Financing LLC. (Later referred to on Page 26) (R.45,p.461) This letter was added to the list of evidence in this case and not because Attorney Fata requested a deposition. (Piner Affidavit) Yet this is another misstatement of facts entered by Attorney Fata.

"THE COURT: 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 the action. I think it's appropriate." (February 16, 2016 Transcripts Page 12 Line 4) (R.45,p.447 Line 4)

THE COURT: So essentially what I'm hearing is that the defendants won't cooperate in any form of fashion, although they've been ordered to. And at this juncture because they haven't cooperated, we're entitled no to have summary judgment issued against us; is that a fair statement in some sense of the word? (February 16, 2016 Transcripts Page 30 Line 15) (R.45,p.465 Line 15)

The court would only have that impression because of Attorney Fata mislead the court stating that the defendants produced nothing, and he had nothing to go on. That simply is not true the Defendants have *vehemently denied such and have produced extensive evidence to support their claim.* (NEILL LETTER"- Attorney Neill letter to His Honorable Judge McIntosh, May 19, 2016.) (R.50,P.531-546)

In the Hearing on January 13, 2014 Page 7 Line 7 even Attorney Fata used the term "Voluminous", Page 8 Line 12 of this same hearing "Thousands of Pages" was used when describing the amount of discovery and These Defendants filed answers and amended answers and therefore "not participating" would be an incorrect assessment, Attorney Fata would have know this, an attorney with 20 or 21 years experience, seams even Attorney Fata in the

transcripts was unsure of the actual number of years of his practice during his version of facts on the Hearing on February 16, 2016. (R.46, p.476 Line 7)(R.46, p.477 Line 12-20).

The case is ripe with triable issues that could not have been resolved absent additional discovery including depositions. This is confirmed by the evidence of record cited herein. Therefore the harsh sanction of summary judgment was not within the sound discretion of the lower court. As such the Order should be reversed and the case remanded for trial.

V. DID APPELLANTS PROTECT OUR RIGHT TO APPEAL AND DOES THE APPELLATE COURT HAVE THE RIGHT TO REVIEW?

[A]n order granting summary judgment, even a partial one, is appealable. *Nauful v. Milligan*, 258 S.C. 139, 187S.E.2d511 (1972).

A timely post-trial motion, including a motion to alter or amend the judgment stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion. See Rule 203(b)(1), SCACR; Rules 50(e), 52(c), Rule 59(e) and 59(f), SCRCP. a timely filed post-trial motion not only as a vehicle to request the trial court "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. A post-trial motion has long has been viewed as "motion for reconsideration" despite the absence of those words from the rule. Basically it was been interpreted to as equivalent to an Notice of Intent to Appeal and thus stayed the time for an appeal.

Barnhill assertions of un- timely filed arguments should carry little weight when there is a continued pattern of improper service abuse under Rule 5.

Under Rule 60(b)(3), SCRCP, & RELIEF PURSUANT TO FEDERAL RULE 60 (B)(6)

Fraud upon the court is fraud which is directed to the judicial machinery itself and is not fraud between the parties of fraudulent documents, false statement or perjury... It is where the court or a member is corrupted or influenced or influence is attempted or where a judge has not performed his judicial function — thus where the impartial function of the court have been directly corrupted." *Bulloch v. United States*, 763 F. 2d 1115, 1121 (10th Cir. 1985).

In this case fraud on the court occurred when the judicial machinery itself has been tainted, when the actions of Attorney Fata, who is an officer of the court, was involved in the perpetration of fraud by making material misrepresentations and misstatements to the court. This Fraud upon the court would make void the orders and judgments of that court.

The South Carolina Supreme Court has for years held that it has the discretion to review an entire order if the order contains an appealable issue. E.g., *Tate v. Oxner*, 236 S.C. 313, 114 S.E.2d 225 (1960); *Woods v. Rock Hill Fertilizer Co.*, 102 S.C. 442, 86 S.E. 817 (1915).

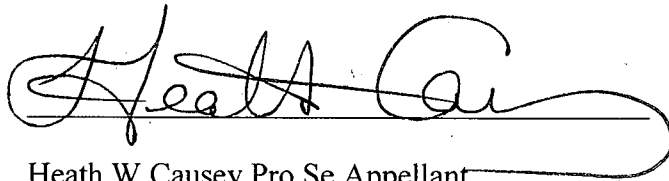
CONCLUSION

In light of the foregoing arguments and authorities cited, it is clear that the trial court committed multiple errors, any one of which requires reversal. It is clear the Attorney Fata did not portray accurate facts to the honorable court, that fact along with his pattern of improper service even in the appellant process clearly demonstrates that multiple errors have occurred with this case and it should be reversed.

WHEREFORE, This Appellant Heath Causey respectfully requests and prays that this Honorable Court:

- A. Reverse the trial court's order entered March 21, 2016, striking the Heath Causey pleadings and granting Barnhill summary judgment;
- B. Reverse the trial court's order entered May 25, 2016, denying Heath Causey's motion to set aside the March 21, 2016 order;
- C. Remand the case for further proceedings; and
- D. Grant Appellant Heath Causey any other and further relief the Court deems just and equitable including court filing fees.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Heath Causey", written over a horizontal line.

Heath W Causey Pro Se Appellant
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Myrtle Beach, SC 29577
t. 843-424-9258
heath.causey@mac.com .
Pro Se Appellant

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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, J. Floyd Swilley SMG Partners,
LLC, Alicia A. Piner, Heath Causey, Sage Advisory
Group, L.P., Sage Private Equity Group, Secured Asset
Factoring Exchange, Inc., SAFE, Inc., Digics, LLC, 9-1-
1, Plumbing, LLC, and Sage Funding, L.P., Christopher
Pitcock, Defendants,

Of Whom J. Floyd Swilley, Laurel K. Swilley, and Heath
Wendell Causey are the Appellants.

Appellate Case No. 2016-001328

Appeal From Horry County
R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion No. 2021-UP-288
Submitted October 1, 2019 – Filed August 4, 2021

AFFIRMED

Appendix 00760

Frederick Miles Adler, of Pawleys Island, for Appellants
J. Floyd Swilley and Laurel K. Swilley.

Heath Wendell Causey, of Myrtle Beach, pro se.

Natale Fata, of Nate Fata, PA, of Surfside Beach, for
Respondents.

PER CURIAM: J. Floyd Swilley and Laurel K. Swilley (Swilleys) and Heath Wendell Causey (Causey) (collectively, Appellants) appeal the trial court's order striking their answer, counterclaims, and pleadings as a sanction for discovery violations and granting summary judgment to Gabriel Barnhill and GSB Enterprises (collectively, Respondents) on Appellants' counterclaims. They also appeal the trial court's denial of their motion to set aside the sanction/summary judgment order. We affirm.

1. We disagree with Appellants' assertion the trial court erred in ruling on Respondents' motion to compel discovery and/or for sanctions and their motion for summary judgment/judgment on the pleadings on the counterclaims when adequate service had not been made on them. *See* Rule 5(b)(1), SCRCP ("Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint."); *Green v. Green*, 320 S.C. 347, 350, 465 S.E.2d 130, 132 (Ct. App. 1995) ("Mailing ordinarily occurs when a document is deposited with the U.S. Postal Service properly addressed with sufficient postage affixed."); *Schleicher v. Schleicher*, 310 S.C. 275, 277, 423 S.E.2d 147, 148 (Ct. App. 1992) (holding "service of the notice of the time and date of the merits hearing became effective when [the respondent's] attorney mailed the notice to [the appellant] 'at his last known address, by certified mail, return receipt requested' and not at the time [the appellant] actually received the notice"). Respondents served all defendants with notice of the hearing on February 3, 2016. Therefore, service of the notice of the hearing was complete upon the mailing on February 3. We find the Swilleys' assertions regarding the validity of the affidavit executed by Respondents' counsel's legal assistant are not properly before this court because they were never raised to or ruled on by the trial court. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review."). We also find no merit to

the Swilleys' claim the clerk of court never provided them with notice of Respondents' motions or the February hearing. *See* Rule 5(b)(1), SCRCPP ("Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court."); *Ex parte Strom*, 343 S.C. 257, 262, 539 S.E.2d 699, 701 (2000) ("[A]fter entering an appearance with the court, an attorney must receive a court order pursuant to Rule 11(b) [of the South Carolina Rules of Civil Procedure (SCRCPP)] in order to be relieved as counsel."). Until their former counsel was relieved, service was proper on him for his clients.

2. We disagree with Appellants' argument that the trial court erred in holding a hearing during the time in which they contend the case was held in abeyance by Judge Seals's January Order. First, the Swilleys and Causey did not appear at the February hearing and make this argument. While the Swilleys raised this argument in their motion to alter or amend, Causey did not raise this issue in his motion to set aside. As this issue does not involve the court's subject matter jurisdiction, it must have been raised to the trial court in a timely manner and ruled on to be preserved for review. *See Watson v. Watson*, 319 S.C. 92, 93, 460 S.E.2d 394, 395 (1995) ("Subject matter jurisdiction refers to the court's 'power to hear and determine cases of the general class to which the proceedings in question belong.'" (quoting *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994))); *Herron v. Century BMW*, 395 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." (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006))); *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) ("There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002))); *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) ("[A] party cannot use a Rule 59(e)[, SCRCPP,] motion to advance an issue the party could have raised to the [trial] court prior to judgment, but did not."). Thus, this issue is not preserved.

3. We disagree with Appellants' argument the trial court erred in granting summary judgment because genuine issues of material fact remained. *See David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006) ("[S]ummary

judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner."); *Sims v. Amisub of S.C., Inc.*, 408 S.C. 202, 208, 758 S.E.2d 187, 190-91 (Ct. App. 2014) ("Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." (quoting *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004))); *Eadie v. Krause*, 381 S.C. 55, 64 n.5, 671 S.E.2d 389, 393 n.5 (Ct. App. 2008) ("[T]o survive a motion for summary judgment, the plaintiff must offer some evidence that a genuine issue of material fact exists as to each element of the claim unless that element is either uncontested or agreed to by stipulation; otherwise, the plaintiff cannot meet his burden of proof and the claim may be determined as a matter of law by the trial [court]."). As the Swilleys and Causey failed to come forward with specific facts that show there is a genuine issue of fact remaining for trial, we find summary judgment was appropriate.

4. We disagree with Appellants' argument they did not have a full and fair opportunity to complete discovery. Appellants do not explain why the time was insufficient and what they expected to discover. See *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009) ("A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact."). *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) ("[T]he nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is 'not merely engaged in a 'fishing expedition.'" (quoting *Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991))). Furthermore, this argument was never raised to the trial court. See *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review.")

5. We find Appellants' argument that the trial court committed reversible error by granting summary judgment as a sanction is not properly before the court. See *S.C. Dep't of Transp.*, 372 S.C. at 301-02, 641 S.E.2d at 907 ("There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." (quoting *Jean Hoefer Toal et al.*, *supra*, at 57)). Causey never raised

this issue below and the Swilleys only raised it through a letter from their current counsel to the court dated May 3, 2016. Furthermore, the trial court held, "Swilley never objected in writing to the Motion to Compel in the sixty days after the Motion was filed. Additionally Swilley did not raise any such argument at the hearing." Because we find the Swilleys received notice of the February hearing, we agree with the trial court they should have appeared at the hearing to make this argument in a timely manner.

6. We find Appellants' argument the trial court erred by relying on false statements and misrepresentations by legal counsel is not preserved for our review as it was never raised to or ruled on by the trial court. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review.").

AFFIRMED.¹

HUFF, WILLIAMS, and MCDONALD, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

RECEIVED

Aug 17 2021

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,

¹This 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

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related proceeding in another court).

Aug 17 2021**SC Court of Appeals****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:

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August 17, 2021

The South Carolina Court of Appeals

Gabriel Barnhill and GSB Enterprises, LLC,
Respondents,

v.

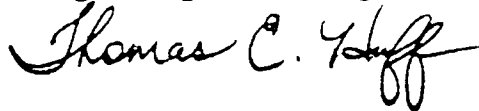
J. Floyd Swilley, J. Floyd Swilley Investment Advisors,
Laurel K. Swilley, SMG Partners, LLC, SMS Services,
LP, William C. Piner, WCP Limited, LLC, 809 Holdings,
LP, QC Financing, LLC, Heath Causey, and Sage
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LLC, Alicia A. Piner, Heath Causey, Sage Advisory
Group, L.P., Sage Private Equity Group, Secured Asset
Factoring Exchange, Inc., SAFE, Inc., Digics, LLC, 9-1-
1, Plumbing, LLC, and Sage Funding, L.P., Christopher
Pitcock, Defendants,

Of Whom J. Floyd Swilley, Laurel K. Swilley, and Heath
Wendell Causey are the Appellants.

Appellate Case No. 2016-001328

ORDER

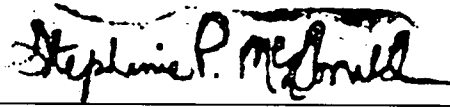
After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.



J.



J.



J.

Columbia, South Carolina

cc:

Heath Wendell Causey

Frederick Miles Adler, Esquire

Natale Fata, Esquire

The Honorable R. Lawton McIntosh

FILED
Sep 08 2021