THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion No. 2021-UP-288 (S.C. Ct.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

Appellate Case No. 2021-001124

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.

RESPONDENTS' BRIEF

Nate Fata
Nate Fata, Esq. (S.C. No. 009866)
Post Office Box 16620
Surfside Beach, South Carolina 29587
Telephone 843-238-2676
Facsimile 843-238-0240
nfata@fatalaw.com
Attorney for Respondents

OTHER COUNSEL OF RECORD
Desa Ballard (S.C. Bar No. 498)
Harvey M. Watson III (S.C. Bar No. 74053)
Haley Hubbard (S.C. Bar No. 103195)
226 State Street
West Columbia, South Carolina 29169
Telephone 803-796.9299
desab@desaballard.com
harvey@desaballard.com
haley@desaballard.com
Attorneys for the Petitioners

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I. Did the Court of Appeals and trial court properly apply issue preservation rules when determining Petitioners failed to preserve their arguments?

II. Did the trial court abuse its discretion in either striking the pleadings of Petitioners based on well-documented discovery abuse or granting summary judgment against Petitioners on their counterclaims when Petitioners made no showing of any factual dispute?

III. Did the trial court properly interpret the January 2016 Order?

STATEMENT OF THE CASE

Laurel Swilley and Floyd Swilley (collectively referred to as "Swilley") and Heath Causey ("Causey") appeal the Court of Appeals' decision affirming the trial court's March 22, 2016 Order striking their answer, counterclaim, and pleadings as a sanction for discovery violations and granting summary judgment to Gabriel Barnhill and GSB Enterprises LLC (collectively, "Barnhill") and the trial court's denial of their motions to set aside the March 22, 2016 Order.

Barnhill filed a Summons and Complaint on April 25, 2013 against Petitioners for their violation of the South Carolina Investment Act, breach of fiduciary duty, fraud, misrepresentation, and violation of the Unfair Trade Practices Act in connection with an investment or Ponzi scheme. Swilley and Causey filed a Counterclaim which was denied by Barnhill.[1] (App. pp. 99-103). Swilley and Causey were initially represented by Miles Adler ("Adler") and subsequently represented by John Leiter ("Leiter"). During the nearly three years of litigation, Barnhill filed seven discovery motions and four sanctions motions for discovery abuse. The court entered multiple orders granting attorney fees and other relief to Barnhill on the sanctions and discovery motions.

In October 2015 Leiter moved to be relieved as counsel for Swilley, Causey and all other defendants, except 809 Holdings, L.P. ("809") which was represented by Mark Neill ("Neill"). (App. pp. 360-362). Barnhill filed a motion to compel and also moved for summary judgment and judgment on the pleadings as to Swilley's and Causey's counterclaims in December 2015. (App. pp. 418-423; pp. 613-617). The requested relief in the Motion to Compel was to strike the pleadings of Swilley and Causey and other defendants for failure to cooperate in discovery.

[1] References to the record are based on the Appendix pagination, which is different than the pagination used at the Court of Appeals.

(App. p. 419). The December 2015 Motions were served on Leiter. (App. pp. 418-423; pp. 613-617). Judge Seals heard Leiter's Motion to be relieved as counsel on January 4, 2016. Swilley and Causey were not present. (App. pp. 437-442). The court granted the motion and directed Leiter to prepare the Order. On January 5, 2016, Leiter prepared the Order and mailed it to Judge Seals, with a copy to Leiter's clients, including Swilley and Causey. (App. pp. 555-558). Judge Seals signed and dated the Order on January 14, 2016. (App. pp. 36-38). The Order was entered on January 25, 2016.

The trial court scheduled a hearing on Barnhill's Motion to Compel and Barnhill's Motion for Summary Judgment and Judgment on the Pleadings for February 16, 2016. Barnhill mailed notice of the hearing to Swilley and Causey on February 3, 2016. (App. pp. 375-379). Swilley received the Notice of Hearing several days prior to February 16, 2016. Swilley Brief to Court of Appeals, pages 2-3. (App. pp. 625-626). Although counsel for 809 appeared at the February 16, 2016 hearing, Swilley and Causey did not. (App. pp. 444-477). The trial court granted Barnhill's requested relief and entered an Order on March 21, 2016. (App. pp. 39-45). In particular, the trial court struck Swilley's and Causey's pleadings for discovery obstruction pursuant to Barnhill's Motion to Compel. (App. pp. 39-45). In addition, the trial court granted summary judgment and judgment on the pleadings as to Swilley's and Causey's counterclaims. (App. pp. 39-45).

Swilley moved to set aside the March 21, 2016 Order on April 1, 2016, asserting they had not received proper notice of the hearing and that the hearing occurred while a 30 day stay was in effect. (App. pp. 429-435; pp. 423-427). On April 6, 2016, Causey filed a motion to set aside only the grant of summary judgment under Rules 55(c) and 60(b), SCRCP. (App. pp. 401-404). The trial court denied the Swilley Motions to Set Aside in its May 2016 Order. (App. pp. 39-45).

Causey's Motion to Set Aside Summary Judgment was also denied. (App. pp. 39-45). Swilley and Causey then appealed.

In a unanimous decision, the Court of Appeals rejected all of Petitioners' arguments. (App. pp. 760-764). A rehearing was denied on September 8, 2021. (App. pp. 774-775). Swilley, and not Causey, received an extension from the Supreme Court and petitioned for Writ of Certiorari on October 25, 2021. A day later on October 26, 2021, Causey was included in an Amended Petition for Writ of Certiorari. The Court granted Writ of Certiorari.

FACTS

In the Complaint, 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. (App. pp. 60-80).[2] Barnhill was 26-27 years of age at the time. (App. p. 60). Laurel Swilley, Floyd Swilley and William Piner formed 809. (App. p. 62). 809 was a startup company that would loan money to companies in a "factoring" arrangement. (App. p. 64). The borrower company was QC Financing, LLC, a pawn shop entity established by Piner and Swilley. (App. p. 62).

In 2011, at the direction of Swilley and Piner, Barnhill's retirement monies were invested in the 809 Notes and Barnhill became a limited partner. (App. p. 66). 809 was a limited partnership created and owned by Swilley, the Piner Defendants and their companies. (App. p. 302). Laurel Swilley is an attorney, Floyd Swilley is a bookkeeper/financial advisor, and Heath Causey is a businessman. (App. p. 302).

[2] In 2014 Barnhill filed a companion case asserting derivative claims and the two Barnhill cases were subsequently consolidated. See Barnhill Derivative 2014 Amended Complaint and April 27, 2015 Consent Order Consolidating Cases (App. pp. 144-155; R. pp. 23-24).

Swilley has been involved with other investment schemes. Barnhill Memorandum filed April 20, 2015 (App. pp. 302-303). 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) (App. pp. 313-332). With respect to Swilley in that bankruptcy case, Judge Waites stated, "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 non-dischargeability." In Re: John F. Swilley, April 17, 2003 Order, p. 17. (App. p. 330). Judge Waites further stated, "The Court has serious concerns about what appears to be Defendant's manipulation of the judicial process, and it will not countenance such gamesmanship." In Re: John F. Swilley, April 17, 2003 Order, p. 18. (App. p. 331).

Initially, Miles Adler ("Adler") represented all defendants. On October 28, 2013, Adler moved to be relieved as counsel citing a conflict. (App. pp. 104-105). The court relieved Adler as counsel under Order filed December 11, 2013. (App. pp. 9-11). John Leiter ("Leiter") entered an appearance for Petitioners on January 13, 2014. (App. p. 121).

In their attempts to ferret out this complex Ponzi scheme, Barnhill served discovery requests upon the defendants. Barnhill filed seven (7) motions to compel discovery. Barnhill also filed four (4) motions for sanctions on the following dates due to Petitioners' failure to comply with court orders and discovery: November 4, 2013 (App. pp. 106-118), February 19, 2014 (App. pp. 126-138), June 27, 2014 (App. pp. 600-607), and June 12, 2015 (App. pp. 412-417).

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. (App. p. 008). When defendants failed to provide responsive information and, instead, lodged objections, Barnhill filed a motion for sanctions on November 4, 2013. (App. pp. 592-599). The court partially granted Plaintiffs' Motion for Sanctions and Judge Culbertson awarded attorney fees by Order filed January 16, 2014. (App. pp. 12-13).

On October 15, 2014 the court again entered an Order for Sanctions in response to Barnhill's June 27, 2014 Motion for Sanctions and his Memorandum in Support. (App. pp. 14-19; pp. 187-275). 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." (App. pp. 17-18). Judge Hyman ordered defendants to produce the requested information and ordered defendants to pay Barnhill's attorney fees of $2,700. (App. pp. 18-19).

Defendants created another investment vehicle, Secured Asset Factoring Exchange ("SAFE"), in late 2011. (App. pp. 144-156). 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. (App. p. 339). 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. (App. pp. 14-19). Out of the $115,000 investment, Barnhill received less than $3,000. (App. p. 69).

Barnhill's Motion to Compel Deposition filed on October 20, 2014 was heard on April 20, 2015. Swilley was served with a Deposition Notice on September 4, 2014 but would not and did not appear for deposition. (App. pp. 276-298). Pursuant to the April 2015 hearing, the trial court entered an Order on May 22, 2015, requiring, in part, that the parties cooperate for depositions. (App. pp. 25-27).

Barnhill filed a Motion to Compel Discovery on May 15, 2015. (App. pp. 343-345). On June 12, 2015 Barnhill again moved for sanctions based on Defendants' failure to provide discovery responses. (App. pp. 412-416). Judge Seals, the Chief Administrative Judge, heard motions and entered an Order granting relief on September 10, 2015, including the award of attorney fees. (App. pp. 30-33).

On October 21, 2015, Leiter moved to be relieved as counsel citing defendants' failure to abide by the terms of his fee agreement. (App. pp. 360-362). On November 24, 2015, deposition notices were served on Causey and Swilley who were then represented by Leiter. The depositions did not occur. On December 15, 2015 Barnhill filed and served the Motion to Compel Depositions of Swilley and Causey, specifically requesting that the trial court strike the answer and counterclaim of Swilley, Causey and the other defendants. (App. pp. 418-422). In December 2015 Barnhill also filed and served on Leiter a Motion for Summary Judgment and Judgment on the Pleadings and a Memorandum in Support. (App. pp. 363-374).

On January 4, 2016, Judge Seals held a hearing and granted Leiter's request to be relieved as counsel. Neither Swilley nor Causey was present at the hearing. (App. pp. 437-442). On January 5, 2016 Leiter transmitted an Order to Judge Seals for signature. Swilley and Causey were copied on the Leiter transmittal letter to Judge Seals. (App. pp. 555-558). On January 14,

2016, Judge Seals dated the Order and signed it. (App. p. 38). The Order was entered on January 25, 2016. (App. p. 36). The three ordering paragraphs provide: (1) "John M. Leiter and the Law Offices of John M. Leiter, PA . . . are hereby relieved as counsel for Defendants . . . as of the date of the entry of this Order"; (2) "Defendants shall retain substitute counsel who shall enter an appearance with the Court within thirty (30) days from the date of this Order"; and (3) "the Clerk of Court shall note that this matter shall not be called for trial before May 1, 2016". (App. p. 37). The paragraph preceding the first ordering paragraph, provides "The proceedings in this case will be held in abeyance for thirty (30) days from the date of this Order." (App. p. 37). However, this sentence is not included in the ordering paragraphs.

The trial 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 and Causey. (App. pp. 375-379).

On February 16, 2016 Barnhill's counsel and 809's counsel attended the hearing. Swilley and Causey were not present. (App. pp. 444-477). Attorney Feidler of Mark Neill's office 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. (App. p. 447, lines 5-12).

According to Mr. Feidler, Floyd Swilley knew about the hearing and that 809 was trying to claim bankruptcy.

> 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. (App. p. 458, lines 9-15)

Mr. Feidler acknowledged he 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. (App. p. 457, lines 19-22).

Toward the end of the hearing, the trial court expressed its view on Defendants' failure to cooperate in the three year old case.

> The Court: So essentially what I'm hearing is that the Defendants won't cooperate in any form or fashion, although they've been ordered to. And at this juncture because they haven't cooperated, we're entitled not to have summary judgment issued against us; is that a fair statement in some sense of the word?
>
> Mr. Feidler: Yes, Your Honor.
>
> The Court: You're being the sacrificial lamb here today; aren't you?
>
> Mr. Feidler: I am, Your Honor. (App. p. 473, lines 15-24).

In its Order filed on March 21, 2016 the Court ruled that all parties had been duly notified of the hearing. (App. p. 40). After detailing the discovery obstruction, the trial court found Petitioners have for more than two years obstructed the discovery process and have prejudiced Barnhill's ability to prepare for trial, which could be called on or after May 1, 2016 and granted the Motion to Compel and struck the pleadings of Petitioners. (App. pp. 39-42). In addition, the trial court granted summary judgment as to the counterclaims. (App. pp. 43-45). No objections to the February 16, 2016 hearing were lodged at any time prior to April 2016 by either Swilley or Causey.

On April 1, 2016, Laurel Swilley and Floyd Swilley filed identical Motions to Set Aside the March 21, 2016 Order. (App. pp. 423-435). To support their Motions to Set Aside, Swilley asserted: (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, and (3) the Order is based upon errors of facts. (App. pp. 423-435).

Causey filed a Motion to Set Aside Summary Judgment on April 6, 2016 pursuant to Rule 55 and 60. (App. pp. 401-403). However, Causey did not seek reconsideration on the trial court's Order striking his pleadings pursuant to the Motion to Compel.

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 Causey and that no mail was returned undelivered. (App. pp. 533-538). On April 19, 2016, more than two months after the February 16, 2016 hearing, Adler filed a Notice of Appearance on behalf of Swilley only. (App. pp. 381-383). Even in his letter dated May 3, 2016, Adler does not assert that Swilley did not know about the February 2016 hearing. Rather, according to Adler, "It is my clients' position that the hearing . . . was held during the period the case was ordered to be held in abeyance." (App. p. 519).

On May 25, 2016, the trial court entered an Order denying Swilley's, Causey's and 809's motions. (App. pp. 48-55). The trial court denied Swilley's Motion to Set Aside and 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. (App. p. 50). The trial court further found that Swilley was properly served with notice of the hearing, 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. (App. pp. 50-51). Causey's Motion to Set Aside Summary Judgment was also denied. (App. p. 51). 809 never appealed the ruling of the trial court striking its answer and counterclaim.

At the Court of Appeals, Swilley admitted receiving notice of the hearing days before February 16, 2016. Swilley Court of Appeals Brief, p. 2-3. (App. pp. 625-626).

STANDARD OF REVIEW

Abuse of discretion is the applicable standard of review in this appeal. As a general rule, appellate courts will be bound by the factual findings of a lower court made in response to motions preliminary to trial where there has been conflicting evidence or where the findings are supported by evidence and not clearly wrong or controlled by error of law. *City of Chester v. Addison,* 277 S.C. 179, 284 S.E.2d 579 (1981); *Askins v. Firedoor Corp. of Florida,* 281 S.C. 611, 316 S.E.2d 713 (Ct. App. 1984). An abuse of discretion arises when the trial court was controlled by an error of law or when the order is without evidentiary support. *Hillman v. Pinion,* 347 S.C. 253, 554 S.E.2d 427 (Ct. App. 2001).

ARGUMENT

I. CAUSEY HAS NOT PRESERVED, PRESENTED OR SUPPORTED ANY ARGUMENTS TO THIS COURT.

Causey has not preserved, presented or supported any of his arguments to this Court. In a footnote on page 1 of their Brief, Petitioners casually references "Petitioners" as "Appellants" and then state, "They are also referred to herein as "the Swilleys."" Although arguably Causey

might be included in the term "Swilleys," Petitioners' Brief argues only the Swilley issues and does not address the distinct Causey issues. In addition, Causey cites no support in the record for any of his arguments.

A. Causey has not preserved any argument on the striking of his pleadings.

The Court of Appeals held Causey did not address the striking of his pleadings with the trial court and, therefore, Causey failed to preserve that issue for appeal. (App. p. 762). "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). Causey has not addressed this Court of Appeals' ruling in Petitioners' Brief. The Court of Appeals' decision affirming the trial court's decision based on Causey's failure to seek reconsideration of the trial court's decision to strike his pleadings is the law of the case and his appeal should be denied. *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 the law of the case).

B. Causey has not presented or supported any of his arguments in Petitioners' Brief.

Causey has not raised any of his distinct arguments in Petitioners' brief and does not address the Court of Appeals' ruling that (1) Causey did not raise any argument at the hearing or in his motion to set aside that the trial court erred in holding the February 16, 2016 hearing and, therefore, the issue was not preserved; (2) Causey failed to come forward with specific facts that show there is a genuine issue of fact remaining for trial on the counterclaims; (3) that the court committed reversible error by granting summary judgment. *See Wright v. Craft,* 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) (finding an issue abandoned when it was listed in the

appellant's statement of issues on appeal but not addressed in the brief). Because Causey has failed to address these issues in Petitioners' brief, Causey's appeal should be denied.

Furthermore, Causey does not cite any matter in the record which supports any of his arguments. The Petitioners' citations to the record are for Swilley's arguments. Thus, Causey has abandoned his arguments and his appeal should be denied. See *Fields v. Melrose Ltd. Partnership,* 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993). Finally, Causey may not raise in his reply brief any new issues. Rule 211(b), SCACR.

C. Causey did not timely file any Petition for Writ of Certiorari.

Causey did not file any Petition for Writ of Certiorari in the Supreme Court within thirty days of the Court of Appeals' denial of Rehearing filed on September 8, 2021 as required by Rule 242(c), SCRCP. The initial Petition for Writ of Certiorari was filed only by Laurel Swilley and Floyd Swilley, after they (and not Causey) requested an extension. Causey's name was added to the Amended Petition for Writ of Certiorari on October 26, 2021, even though he never timely filed any Petition for Writ of Certiorari or any extension request. Because Causey failed to file a Petition for Writ of Certiorari within 30 days after the Court of Appeals denied the rehearing request, this Court should deny Causey's appeal or dismiss it as improvidently granted.

II. SWILLEY ADMITTED RECEIVING ACTUAL NOTICE OF THE HEARING AT THE COURT OF APPEALS AND SHOULD BE JUDICIALLY ESTOPPED FROM ARGUING OTHERWISE.

Swilley's new factual basis for the appeal in this Court is that they did not know about the February 16, 2016 hearing until after the fact, and, therefore, it was impossible for them to present their current arguments to the trial court. However, on pages two and three of their brief

to the Court of Appeals, Swilley admitted that they, in fact, received notice of the hearing days prior to the February 16, 2016 hearing.

> In fact, **the only notice the Swilley's 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. (App. pp. 625-626) (Emphasis added).

At the Court of Appeals, Swilley argued that although they received Notice of the hearing prior to February 16, 2016, they didn't receive the Motion or Memorandum with the Notice, so the Notice was defective. (App. pp. 625-626). The Court of Appeals rejected their argument because the December 2015 Motions and Memorandum were served on Swilleys' then counsel, Leiter. (App. pp. 761-762).

At the trial court Swilley never asserted they did not know about the hearing. In May 2016, Adler, Swilley's then counsel, informed the trial court that the February 2016 hearing was held during the period of abeyance and that fact formed the basis for the Swilley motions to set aside. (App. pp. 519-520). Swilley now asserts they never received notice of the hearing prior to February 16, 2016. However, any matters stated or alleged in Appellants' statement of facts are binding on Appellants. Rule 208(b)(1)(C), SCACR. In addition, judicial estoppel precludes Swilley from arguing a factual scenario which is completely contrary to Swilley's binding statement of fact at the Court of Appeals.

The South Carolina Supreme Court expressly adopted the doctrine of judicial estoppel, as it relates to matters of fact, in the case of *Hayne Federal Credit Union v. Bailey,* 327 S.C. 242, 489 S.E.2d 472 (1997). The doctrine precludes a party from adopting a position in conflict with one previously taken in the same or related litigation. *Id.* The purpose of the doctrine is not to

protect litigants from allegedly improper or deceitful conduct by their adversaries, but to protect the integrity of the judicial process and the courts. *Id.* The supreme court explained,

> In order for the judicial process to function properly, litigants must approach it in a truthful manner. Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. The doctrine thus punishes those who take the truth-seeking function of the system lightly. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.
>
> *Id.* at 251-52, 489 S.E.2d at 477.

Petitioners urge the Court to disregard well-established issue preservation law on the patently false assertion that ". . .they had no notice the hearing was taking place." Petitioners' Brief, page 11. Petitioners falsely claim, "this record demonstrates precisely the circumstance that a litigant was never given any actual or imputed notice of a hearing and missed the hearing as a result . . ." *Id.*, p. 12. Petitioners then argue they had good faith ignorance of the hearing and failed to appear as a result. *Id*, pp. 12-13.

Petitioners' false factual premise is completely contrary to their binding statements to the Court of Appeals that they in fact received notice of the hearing days before the February 16, 2016 hearing. Moreover the transcript of the February 16, 2016 hearing clearly reflects 809's counsel's statement that Floyd Swilley knew about the hearing. Although Counsel Feidler of Mark Neill's law firm was representing only 809 in the instant action, the trial court noted that Mark Neill's firm was representing defendant Swilley individually in the related Twigg litigation.[3] (App., p. 41). And there is no factual dispute that notice of the hearing was properly

[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.

served pursuant to Rule 5, SCRCP.

Petitioners most recent version of the facts require this Court to disregard: (1) Swilleys' binding statement to the Court of Appeals that they actually received notice of the hearing days before the hearing; (2) the statement of 809's counsel to the trial court that Swilley knew about the hearing; (3) the proper service under Rule 5, SCRCP, of the Notice of Hearing; (4) the trial court's factual conclusion that Swilley knew about the hearing; (5) that Swilley never filed an affidavit stating they did not know of the hearing; and (6) the failure by Adler, Swilley's then counsel, to assert this argument in his May 2016 letter to the trial court.

The record contains overwhelming evidence that Swilley was properly served Notice of the Hearing, received Notice of the Hearing, knew about the hearing, but chose to ignore the hearing because they were waiting for 809 to file bankruptcy. The trial court did not abuse its discretion in finding that Swilley knew about the hearing and that Swilley was served proper notice of the hearing pursuant to Rule 5, SCRCP.

Twenty years ago, Judge Waites documented Swilleys' litigation gamesmanship and invoked judicial estoppel to protect the integrity of the judicial process and the bankruptcy court. This Court should likewise invoke judicial estoppel to prevent Swilley from playing fast and loose with the facts on their actual, admitted receipt of notice of the hearing prior to the hearing. This Court should reject all Petitioners' arguments to create an exception to issue preservation case law based on the false pretext that Swilley did not receive any notice before the hearing or did not know about the hearing.

III. WELL-ESTABLISHED ISSUE PRESERVATION RULES PRECLUDE PETITIONERS' ARGUMENTS.

Petitioners failure to address all grounds in the trial court's and Court of Appeals rulings renders the unappealed rulings the law of the case requiring an affirmation of the trial court. See *Anderson v. Short,* 323 S.C. 522, 476 S.E.2d 475 (1996). Similarly, Petitioners' threadbare arguments without any citation to authority requires a denial of their appeal. *Fields v. Melrose Ltd. Partnership,* 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993).

A. Petitioners have not addressed the trial court's and Court of Appeals' ruling that they were properly served pursuant to Rule 5, SCRCP.

The trial court ruled that Petitioners were properly served with notice of the hearing in accordance with Rule 5(b)(1), SCRCP. (App. pp. 761). The Court of Appeals held, "Respondents served all defendants with notice of the hearing on February 3, 2016. Therefore, service of the notice of hearing was complete upon the mailing on February 3, 2016." (App. p. 761). Petitioners have not argued that Rule 5, SCRCP, was not applicable for providing notice of the hearing. The Court of Appeals' ruling on Rule 5, SCRCP, was not appealed and is the law of the case. *Anderson v. Short,* 323 S.C. 522, 476 S.E.2d 475 (1996). Moreover, there is no requirement that Petitioners admit to having actual notice of the hearing, as Petitioners appear to contend. Rule 5, SCRCP, sets forth the procedure for providing notice of a hearing, which was duly followed and which Swilley admitted they actually received.

Although Petitioners do not address the applicability of Rule 5, SCRCP, Petitioners argue that any such notice of hearing was null and void based on their interpretation of the January 2016 Order. However, Petitioners cite no case law or procedural rule which excepts the applicability of Rule 5, SCRCP, for providing notice of the February 16, 2016 hearing.

Likewise, Petitioners cite no authority that holds notice of hearing is a nullity if the hearing conflicts with a litigant's interpretation of a prior order.

B. Petitioners' failure to timely object to any alleged procedural irregularity results in waiver.

Notices of hearings and hearings themselves are not a nullity unless the trial court is provided the timely opportunity to rule upon the issues. Any procedural irregularity must be timely objected to or else it is waived. *Coon v. Coon,* 356 S.C. 342, 588 S.E.2d 624, 628 (Ct. App. 2003) (stating that as a general rule where there is no lack of subject matter jurisdiction, the court's judgment will be binding, even if affected by irregularity which would have defeated the proceeding if objection had been timely and properly made); *Bakala v. Bakala,* 352 S.C. 612, 629, 576 S.E.2d 156, 165 (2003) (Objections to personal jurisdiction, unlike subject matter jurisdiction, are waived unless raised.) Thus, even if there was a procedural irregularity with the February 16, 2016 hearing, that alleged irregularity must be brought before the trial court in a timely fashion. Otherwise, the irregularity is waived.

As the Court of Appeals found, Swilley and Causey were duly notified of the hearing in accordance with Rule 5, SCRCP. Moreover, Swilley knew about the hearing before February 16, 2016. Swilley Brief to Court of Appeals, pp. 2-3. (App. pp. 625-626). Petitioners cite nothing in the record which indicates when they received a copy of the filed January 2016 Order. There is no basis in the record to conclude that Swilley received or reviewed a copy of the filed January 2016 Order before the February 16, 2016 hearing to support Petitioners' implied claim that they relied on its entry date of January 25, 2016 to justify not appearing at the February 16, 2016 hearing.

Petitioners attempt to avoid issue preservation rules based on a self-serving, misinterpretation of an order. In a circular argument, Petitioners contend the February 16, 2016 hearing and notice of the hearing is a nullity based on Petitioners' interpretation of the January 2016 Order, and, therefore, they did not need to attend the February 2016 hearing to preserve their arguments. But, what if Petitioners' interpretation of the January 2016 Order is wrong? When would the trial court be afforded the opportunity to address Petitioners' erroneous interpretation and what record would there be for the appellate court to review if Petitioners were not required to timely lodge their objections with the trial court?

Issue preservation rules require that if a litigant could raise the issue at a hearing, the litigant must do so. The issue is whether Swilley could have raised the instant issues to the trial court on February 16, 2016. Swilley could have appeared at the trial court on February 16, 2016 and asserted the very arguments Swilley now asserts to this Court. Swilley chose not to. Petitioners do not have the option to sandbag issues for later use in the litigation. Issue preservation rules preclude sandbagging arguments for appeal. As held by the Court of Appeals, the issues involving the February 16, 2016 hearing do not involve subject matter jurisdiction and, therefore, error preservation rules apply and bar Petitioners' argument. (App. p. 762).

Moreover, Petitioners cite no authority which allows them to remain silent on their objections to a hearing and be allowed to raise the objections on appeal or in a motion to reconsider. Any futility argument asserted by Petitioners fails because they had actual notice, and otherwise under Rule 5, SCRCP, of the hearing. While case law might hold that in certain circumstances an objection during a trial is not necessary to preserve the issue for appeal, Petitioners cite no South Carolina case that holds that a litigant with notice of a hearing may

ignore the hearing due to the litigant's perception that any objection at the hearing would be futile.

The trial court must be provided the timely opportunity to first determine the factual and legal issues related to Petitioners' interpretation of the January 2016 Order and the alleged nullity of any hearing before the appellate courts are involved. Petitioners waived any arguments as to procedural irregularities because they did not timely provide the trial court with their arguments at the February 16, 2016 hearing and did not follow well-established law to timely address any alleged procedural issues.

C. Petitioners failed to preserve any argument that sending a notice on February 3, 2016 violates the provisions of the January 2016 Order.

Petitioners have waived any argument that the trial court's scheduling of a hearing or the sending of a notice of hearing on February 3, 2016 violated the January 2016 Order. No such arguments were raised to the trial court, ruled upon at the trial court, and argued at the Court of Appeals. "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." *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

D. Petitioners' attempts to blame others for their failure to attend the hearing is non-sensical and baseless.

Orders and their meaning are sometimes disputed. If there was a dispute as to the meaning of a phrase in Judge Seals' Order regarding a 30 day period, Swilley and Causey were obligated to make that dispute known at the February 16, 2016 hearing. Obviously, the trial court interpreted the January 2016 Order differently than Swilley and Causey and it set a hearing.

Barnhill's counsel and counsel for Swilley's company, 809, interpreted the Order differently than Petitioners and they attended the hearing.

Petitioners' unfounded argument that somehow counsel and the trial court are to blame for Swilley's decision to ignore the hearing is baseless. At no time did Petitioners file any papers with the trial court prior to the February 16, 2016 hearing. Petitioners did not move for reconsideration of the January 2016 Order. The trial court and other litigants are not clairvoyant and are not required to advance the undisclosed positions of a party who has been duly notified of a hearing pursuant to Rule 5, SCRCP who has actual notice of the hearing, but who chooses not to notify the Court of their position or appear before the trial court to make their position known. Petitioners cite no case law that supports their contention in this regard.

Similarly, Appellants' arguments and innuendo that somehow the trial court, counsel Feidler or Barnhill's counsel are to blame for Petitioners' failure to preserve their arguments is baseless. No one knew of Petitioners' arguments until April 2016. The hearing, with due notice to all parties pursuant to Rule 5, SCRCP, cannot be construed as an ex parte hearing as intimated by Petitioners. Notice was properly given. Even still, the trial court heard Petitioners' arguments advanced in their Motions to Set Aside and rejected them. Petitioners have suffered no prejudice.

More importantly, Petitioners have offered no factual arguments or legal support to this Court as to why their pleadings should not be stricken after two years of well-documented discovery obstruction and abuse. Petitioners do not include any factual basis in their brief, their statement of facts, or their arguments that the striking of their pleadings was unwarranted or that it was somehow an abuse of discretion. Petitioners have not addressed the underlying rulings

and the history which clearly warrants the relief granted. Moreover, Petitioners cite nothing in the record which indicates that the granting of summary judgment on their counterclaims was improper. The trial court properly ruled and did not abuse its discretion in dismissing the counterclaims and striking Petitioners' pleadings.

IV. APPELLANTS' INTERPRETATION OF THE ORDER IS CONTRARY TO THE PLAIN LANGUAGE USED BY THE TRIAL COURT.

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).

Under the plain language of the January 14, 2016 Order, a 30 day stay was never ordered. And even assuming arguendo that it was ordered, it began on January 14, 2016 and ended on February 13, 2016. Contrary to Petitioners' arguments in pages 4-6 of their Brief, the date an Order is filed does not automatically begin the timing 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.

The January 2016 Order relieving Leiter as counsel was prepared by Swilley's counsel, Leiter, within one day of the January 4, 2016 hearing. In the January 2016 Order, the trial court used two distinct time phrases, "within thirty (30) days from the date of this Order" and "as of the date of the entry of this Order." (App. p. 37). If the trial court intended a thirty day stay period to begin upon the entry of the Order, the trial court would have included the stay in the ordering paragraphs and used the language "as of the date of the entry of this Order" for the stay. The trial court did neither. Moreover, the distinctive language used in the Order by the trial

court refutes Swilleys' argument. There is no dispute that the date the Order was signed was January 14, 2016. (App. p. 38). The court rendered its written decision and ruling on that date as evidenced by the language, "IT IS SO ORDERED." (App. p. 38). The trial court agreed in its May 2016 Order that the date of the Order is January 14, 2016. ("The date of Judge Seals' Order is clearly January 14, 2016.") (App. p. 50). 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. Similarly, a judge would not use the "date of the order" language if it was meaningless or if it meant the date of the entry of the order.

The trial court gave an extra ten days from it ruling from the bench on January 4, 2016 for Petitioners to obtain counsel. The trial court was aware of the scheduling issues and pushed the trial date to not before May 1, 2016. (App. pp. 36-38). Chief Administrative Judge Seals was informed by Respondents' counsel in early December 2015 that (1) based on his conversation with Leiter, no deposition would occur until Leiter's Motion to be relieved was heard; (2) counsel was concerned about the case being placed on the trial roster; and (3) half a dozen or more depositions needed to be taken. (App. p. 521).

Petitioners cite no authority in support of their arguments on pages 5-6 of their brief that the stay must commence prospectively from the date the Order is filed. 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. Judge Seals had already been informed of the need for at least a half dozen depositions by Respondents' counsel and that the case could soon be called for trial. (App. p. 521). After he signed and dated the Order, he mailed it to Leiter and 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 on the hearing date for Swilleys to obtain new counsel. (App. pp. 440-441). 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 for any stay argument. To hold otherwise would be to disregard the intent of the trial court and the clear, distinctive language used within the Order. Petitioners' interpretation of the Order seeks to undermine or nullify the intent of the trial court. Under Petitioners' theory, counsel can withhold the filing of a Judge's Order for weeks and provide a litigant or his client with unintended delays to the prejudice of other litigants.

Bowman v. Richland Memorial Hospital, 335 S.C. 88, 92, 515 S.E.2d 259, 261 (Ct. App. 1999) cited by Petitioners is inapplicable and is not persuasive. In *Bowman,* the appellant did not ignore a hearing. 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. *Id.* 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 Petitioners.

Moreover, equitable factors clearly refute Petitioners' interpretation of the Order. Swilley and Causey never obtained new counsel in the three months following the January 4, 2016 hearing so they suffered no prejudice. After Swilley failed to appear at the January 4, 2016 hearing, Petitioners were notified of the court's ruling from the bench on January 5, 2016 via Leiter's January 5, 2016 letter with the Order. (App. pp. 555-558). Leiter served a copy of the unsigned Order on January 5, 2016 upon Petitioners. Nothing in SCRCP requires service of the filed Order. See *Rosen v. Hiller,* 307 S.C. 331, 415 S.E.2d 117, 118 (Ct. App. 1992). Petitioners

never sought reconsideration of the January 2016 Order. Petitioners received the Notice of Hearing days before February 16, 2016. And, Petitioners did not appear at the February 16, 2016 hearing to lodge any objection to preserve their argument. And nothing in the record evidences the date Swilley received the file stamped Order, so Swilley did not know when the Order was filed until after the February 16, 2016 hearing.

After ten years of litigation, including seven years on appeal, it would be fundamentally unfair and prejudicial to require Barnhill to start over in Circuit Court when Petitioners could have timely addressed their issues with the trial court but chose to ignore the hearing. Equitable factors require a denial of Petitioners' appeal.

CONCLUSION

The Court should deny the relief requested by Petitioners and affirm the Court of Appeal's and trial court's rulings. Issue preservation rules and Rule 5, SCRCP, will be severely undermined if a litigant can falsely claim lack of actual notice and vacate an Order from a hearing in which they were provided, and admittedly received, proper notice pursuant to Rule 5, SCRCP.

Respectfully submitted,

s/ Nate Fata
Nate Fata, Esq. (SC No. 009866)
Post Office Box 16620
Surfside Beach, SC 29587
Telephone 843-238-2676
Facsimile 843-238-0240
nfata@fatalaw.com
Attorney for Respondents

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