THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
WILLIAM H. SEALS, JR., CIRCUIT COURT JUDGE

Appellate Case No. 2025-000796

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,
WCP Limited, LLC, 809 Holdings, LP, QC Financing, LLC
Heath Causey and Sage Financial Group, LLC, Defendants,

of which J. Floyd Swilley, Laurel Swilley and
Heath Causey are the ..... Appellants.

FINAL REPLY BRIEF

Desa Ballard (S.C. Bar No. 498)
Harvey M. Watson III (S.C. Bar No. 74053)
Haley Hubbard (S.C. Bar No. 103195)

BALLARD & WATSON
226 State Street
West Columbia, South Carolina 29169
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com
haley@desaballard.com

ATTORNEYS FOR APPELLANTS

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INTRODUCTION TO REPLY BRIEF

This Court has been asked by Appellants, and remains able, to consider for the first time and upon first opportunity the propriety of the lower court's implementation and application of the 2016 Order that was upheld on procedural grounds in a prior appeal between the parties. When the text of that order is fully and fairly considered, it will be clear that default and default judgment should not have been entered against Appellants, and the trial court's determination otherwise rose to the level of legal error and an abuse of discretion that needs and warrants correction and remand for further proceedings in accordance therewith.

Even to the extent default is upheld, subsequent proceedings include sufficient error and abuse of discretion to warrant remand and correction of the award to Respondents. Nothing in Respondents' brief compels or persuades any result to the contrary.

ARGUMENT

I. THE LAW OF THIS CASE DOES NOT BAR APPELLANTS' ARGUMENTS

Respondent misapprehends Appellants' argument, which is distinguished from that raised and ruled upon in the prior appeal in this matter. As a result, Respondent misapplies the "law of the case" doctrine to the issues and grounds appropriately raised by Appellants in this appeal.

Respondent's brief states "The 2016 Orders are the law of the case and preclude Appellants from arguing at this time that 'good cause' exists for them to be relieved from the court ordered consequences of their discovery obstruction nine years ago." (RB p. 11). Appellants are not seeking "to be relieved from the court ordered consequences" but rather, for the first time appealing an interpretation as to the nature and scope of such consequences, which was not ripe for determination at the time of the prior appeal. The question was asked for the first time at the

trial after remand, ruled upon, and then appropriately raised for the first possible time in this appeal.

Respondents' argument that "it is the law of the case" requires a definition of "it," which is clearly defined by the prior appeal, which did not touch or concern the question of how should the order be applied and required consequences thereof. Rather, the prior appeal was based on procedural arguments, about whether the order was properly entered. Only after remand could the issue of application and consequences of the (newly confirmed and recognized as controlling) 2016 Order be addressed. Appellants contested the issue for the first time at the trial court after remand, when the issue became one that was necessarily contested between the parties.

Accordingly, Respondents are correct when their brief states that "Any arguments as to the *appropriateness* of the March 2016 Order striking Appellants' Answers and pleadings for discovery obstruction which prejudiced Barnhill and GSB are barred under the law of the case doctrine." (emphasis added) (RB, p. 12). Yet Respondents do not argue appropriateness, but rather the means of subsequent *application* of the previously upheld 2016 Order. Application, how the order would be enforced, did not (and could not) arise as a disputed issue until after remand following the prior appeal, which solely decided whether the order was procedurally proper and could be enforced notwithstanding the order of stay of trial court proceedings that had previously been entered in the case.

Respondents' position is premised upon an argument that the appeal of the 2016 order concluded, as a matter of law of the case, all issues between the parties except the amount of damages to be awarded. That is inconsistent with Respondents own actions post-remittitur, which included the filing of a Motion for Entry of Default and a Motion for Default Judgment. (R. pp. 222-223; pp. 230-231). If default and judgment were unavoidable and accomplished previously

via the 2016 Order terms, those motions were superfluous and ineffective, as was any order granting the same. The necessity and existence of those filings, however, is confirmation that even Respondent knew that the 2016 Order's striking of pleadings (just upheld on appeal) left open and uncertain many application issues not addressed by the prior appeal. Those included the critical issue of judgment in Respondent's favor, which as Appellants have argued throughout its initial brief, should not have been granted.

II. APPELLANTS' ARGUMENTS ARE PRESERVED

Respondents cite caselaw regarding the necessity of preservation of arguments before the trial court as a prerequisite for preservation and review on appeal. However, all issues and argument raised by Appellants before this Court in this appeal were adequately presented and preserved below, such that Respondents must face them, not dodge them. Additionally, the Supreme Court has noted that "it may be good practice for us to reach the merits of an issue when error preservation is doubtful." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012). Moreover, "where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." *Id*. at 333, 730 S.E.2d at 287 (Toal, C.J., concurring in part and dissenting in part).

In their initial brief, Respondents reference the June 2024 Form 4 Order that denied Appellants' Motion for Relief from Entry of Default, and quotes the preceding hearing transcript whereby a Form 4 was proposed and discussed as an acceptable means by which the motion could be formally ruled upon. (RB, p. 13). The Form 4 that followed was sufficient to preserve all issues, as suggested by the trial court at the close of the hearing, given the detail presented to the trial court as part of Appellants' Amended Motion to Set Aside Default, and the argument presented during the hearing on that motion. Even so, Appellants did raise limited grounds expressly in an

ensuing Rule 59(e) motion, but further addressing one argument does not imply or determine insufficient consideration of all others previously raised. *See Bailey v. Segars,* 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001)(court issued form order in response to a directed verdict motion, and no Rule 59(e) motion made, but arguments in support of the motion were included in the record on appeal and thus preserved).

Likewise, Respondents argue that "Appellants did not raise any pending summary judgment motion argument in their June 2024 Rule 59(e) Motion and have not preserved it." (RB p. 18). Yet this argument was specifically presented as part of Appellants' Amended Motion for Relief from Entry of Default. (R. pp. 235-240). That motion was the one heard, resulting in the June order, and as such that argument was clearly presented to the Court and rejected, with an adequate record available for this Court to review and correct that error.

III. APPELLANTS' ARGUMENTS REGARDING APPLICATION OF THE 2016 ORDER AND THE UNJUSTIFIED DEFAULT ENTRY ARE MERITORIOUS

Appellants will not needlessly repeat all arguments made as to the merit of their own position with respect to relief from entry of default, but will address a few erroneous arguments of Respondents that were contained in their responsive brief.

On page 16 of Respondents' brief (citing p. 10 of Appellants Brief), Respondents evidence a misapprehension of Appellant's argument when they allege that Appellants "argue the March 2016 Order prevents the entry of a judgment after a damages hearing…". (RB, p. 16). That is incorrect. While Appellants certainly find fault with the conclusions and rulings that came "after a damages hearing" in this matter, that is argued separately in this appeal and in its brief. (See AB p. 17-23).

Appellants have made distinct arguments supporting their contention that there never should have been a damages hearing had the prior errors of the circuit court properly interpreted the 2016 Order. That is why Appellants stated in their brief that the 2016 Order "does not provide a legitimate basis for default or default judgment." (AB, p. 10). It was clearly the position of Appellants that the 2016 Order did not require either by its terms, as the 2016 Order was limited in the nature and extent of the sanctions imposed thereby. This was in response to Respondents having made the argument, which they still do, that the 2016 Order by its terms included and necessitated default and judgment as a result. They are simply wrong.

Respondents likewise erroneously assert that "Appellants cite no case law" in support of its position. However, Appellants clearly articulated an *expressio unius est exclusio alterius* ("the express mention of one thing excludes all others") argument as to the effect of the 2016 order upon the issue of default and default judgment. In doing so, in Argument Section II.A of Appellant's Brief at pages 10 – 12, Appellants included six citations to authority, including relevant case law rather than merely referencing the maxim. As such, Respondents' characterization of the argument as deemed abandoned and "without supporting authority" is wholly without merit.

IV. APPELLANTS ARGUMENTS AS TO DAMAGES AWARDED REMAIN COMPELLING AND DETERMINATIVE.

1. "Financial vulnerability" is a factor for consideration when considering an award of punitive damages. *Mitchell, Jr. v. Fortis Ins. Co*., 686 S.E.2d 176, 185, 385 S.C. 570 (2009). As noted by Respondents, the November 4, 2024 Order included a reference to a finding that Barnhill "was a young and naïve investor." Young and naïve is tantamount to merely inexperienced. Even if deemed true because of the order of default, is not the equivalent of "financially vulnerable." Respondents summarily states as much in the next

sentence, however, by stating "Barnhill was financially vulnerable." (RB p. 26). Notably and tellingly, Respondents do so without referencing any evidence in the record supporting that conclusion, and therefore continue to fail to provide evidence of such status as it relates to Barnhill. Likewise, there is no reference to the record regarding Respondent GSB being financially vulnerable to any extent or for any reason, just as the court's orders failed to state any basis with respect to Respondent GSB.

2. On page 27 of Respondent's Brief, references are made to prior unrelated legal proceedings in which Appellants Floyd Swilley and Laurel Swilley were involved in an attempt to justify the punitive award. The court below never referenced the same in its orders, notably. But also, the existence of findings contrary to the Swilleys in prior legal proceedings makes clear that whatever conduct now referenced by Respondents as having been addressed in those matters… makes clear it was fully addressed in those matters. In other words, an award of punitive damages against the Swilleys would be duplicative after having been addressed by another court (one in South Carolina, no less).

3. Respondents note that the April 2, 2025 Order substantially modified the November 2024 Order that initially granted judgment against Appellants. Respondents, however, then state that "As a result, [Appellants] were *required* to file a Rule 59(e) Motion to preserve any arguments…". (emphasis added). The citation provided by Respondents immediately thereafter, however, refutes that statement of the law. Respondents cite *Chapman v. Upstate RV & Marine*, 364 S.C. 82, 84 n.2, 610 S.E.2d 852, 854 n.2 (Ct. App. 2005) and describe that case via an explanatory parenthetical, asserting there that the case stands for the position that a "defendant *could* properly submit a Rule 59(e) motion challenging award of attorney fees." (emphasis added) (RB, p. 31).

Appellants certainly could have, but were not required to, file such a motion as such a motion could have been deemed successive and/or ineffective, including with respect to extending the deadline for appeal. See *Elam v. SC Dept. of Transp*., 361 S.C. 9, 602 S.E.2d 772 (2004). Issues need only to be raised and ruled upon. *Id*. at 23. Appellants had certainly raised the issue in its filed memorandum addressing the pending motions prior to the issuance of the ensuing April 2, 2025 order and need not have raised it again. (R. pp. 607-614).

4. Respondents have noted the inadvertent omission of a copy of the April 2, 2025 Order from the Notice of Appeal. (RB p. 32). Upon review after receipt of Respondents' Brief, it is clear that Appellants' counsel mistakenly included a copy of an unappealed order granting Appellants' motion pursuant to Rule 67, SCRCP to deposit funds with the Clerk of Court. Nevertheless, the Notice of Appeal itself correctly identified all orders being appealed, including the April 2, 2025 Order. When referencing that particular order as part of this appeal, the notice:

    - referenced the correct date of the order, which was the only order issued on that date in the matter below;
    - described the effect of the order ("which amended the November 6, 2024 order of judgment following cross-motions pursuant to Rule 59(e)");
    - and noted it had been received the same date as the order was issued.

    Respondents did not make a motion to exclude the order from appeal, but instead merely referenced the omitted attachment as part of Respondents' Brief. Regardless, the jurisdictional requirements for appeal of that and the other three orders were satisfactorily met by the contents of the notice and timely filing and service thereof, which fully and

specifically identified the nature and substance of all orders being appealed, consistent with Rule 203, SCACR. Nevertheless, for administrative clarity, Appellants are filing an Amended Notice of Appeal that corrects the scrivener's error of inclusion of the wrong attachment.

CONCLUSION

For the foregoing reasons and those set forth previously in Appellants' Brief, Appellants request that each of the orders on appeal be reversed and this matter remanded for further proceedings, including the hearing of Appellant's Motion for Summary Judgment that has remained outstanding since it was filed in 2016.

Respectfully submitted,

s/ Harvey M. Watson III
Desa Ballard (S.C. Bar No. 498)
Harvey M. Watson III (S.C. Bar No. 74053)
Haley Hubbard (S.C. Bar No. 103195)

BALLARD & WATSON
226 State Street
West Columbia, SC 29169
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com
haley@desaballard.com

ATTORNEYS FOR APPELLANTS

December 1, 2025

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

s/ Harvey M. Watson III
Desa Ballard (S.C. Bar No. 498)
Harvey M. Watson III (S.C. Bar No. 74053)
Haley Hubbard (S.C. Bar No. 103195)

BALLARD & WATSON
226 State Street
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Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com
haley@desaballard.com

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ATTORNEYS FOR APPELLANT