

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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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

**RECEIVED**  
SEP 22 2016  
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

RESPONDENTS' MOTION TO STRIKE MATERIAL NOT IN RECORD

Respondents Gabriel Barnhill & GSB Enterprises, LLC hereby move this Honorable Court for an Order striking Swilley Appellants' references in their brief and in their Designation of Matter to any email from the Secretary of State concerning Nate Fata's notary and any notary related references.

## BACKGROUND

In pages 9 and 10 of their Initial Brief, Appellants refer to an email from the Secretary of State concerning the notary qualification of Respondents' counsel, Nate Fata. ("See Email from Allison Dempsey, Office of Secretary of State, dated Apr. 18, 2016 (copy attached hereto).") Appellants continue to allege a notary issue from page 9 of Appellants' Initial Brief, third paragraph, beginning, "Furthermore, the notarial commission date on Attorney Fata's seal . . ." through and including the first paragraph on page 10, beginning, "For any of these reasons. . ."

To Respondents' knowledge, the Allison Dempsey email was never presented to the lower court or to Respondents' counsel. Respondents' counsel wrote to Appellants' counsel on August 30, 2016, Exhibit A, and again on September 8, 2016, Exhibit B, requesting Appellants' counsel to verify that such email was presented to the lower court. Appellants did not respond to either letter.

## ARGUMENT

Swilley Appellants are attempting to introduce matter not presented to the lower court in an apparent effort to cast inaccurate and false light upon counsel. Appellants' actions violate SCACR 210(c). Rule 210(c), SCACR, prohibits the inclusion in the Record on Appeal of "matter which was not presented to the lower court or tribunal." What "matter" means in the Rule is *material*, whether it is a writing such as a motion or pleading, an exhibit, an email, or oral argument or testimony in transcript form. Rule 210(c), SCACR (matter in record on appeal including "orders, judgments, decrees, decisions, pleadings, transcript, charges, exhibits and other materials or documents").

Matter presented to the lower court means physical things presented to the lower court. Id. The Court of Appeal may not consider any fact which does not appear in the Record on Appeal. Rule 210(h), SCACR.

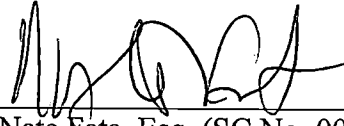
Allowing Appellants to introduce this new material to the Court would turn the appellate process on its head and turn it into a trial court where new evidence may be received for consideration. See Sanders v. Salley, 283 S.C 460, 461 322 S.E.2d 829, 830 (S.C. 1984). This is what the requirement that “The Record shall not, however, include matter which was not presented to the lower court or tribunal” is designed to prevent. Rule 210(c), SCACR. The introduction of any such new material is a fundamental violation of the principles of appellate practice and review, and undermines the very function of this Court.

It is clear from Appellants’ Initial Brief that they are attempting to put new material in the Record in an attempt to get this Court to (1) look beyond what was before the lower court in deciding this case, and (2) to malign Respondents’ counsel. See Appellants’ Initial Brief pages 9 and 10. Both are improper purposes. Consideration by the Court of the new email matter would break with existing law and set a dangerous precedent. The Court should strike all such references from page 9 of Appellants’ Initial Brief, third paragraph, beginning, “Furthermore, the notarial commission date on Attorney Fata’s seal . . .” through and including the first paragraph on page 10, beginning, “For any of these reasons. . .”

**CONCLUSION**

This Court should strike the Allison Dempsey email matter and all notary references in pages 9 and 10 of Appellants' Initial Brief, and order attorney fees and costs against Appellants in favor of Respondents for directly violating Rule 210, SCACR after Respondents' counsel wrote Appellants' counsel twice to address this issue.

NATE FATA, P.A.



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Nate Fata, Esq. (SC No. 009866)  
Post Office Box 16620  
Surfside Beach, SC 29587  
843-238-2676

September 21, 2016

Attorney for Respondents

# **EXHIBIT**

**A**

**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 AND U.S. MAIL

August 30, 2016

F. Miles Adler, Esq.  
ADLER LAW FIRM, LLC  
P.O. Box 4743  
Pawleys Island, SC 29585  
miles@adlerlaw.partners

Re: Gabriel Barnhill and GSB Enterprises, LLC vs. J. Floyd Swilley, et al.  
Appellate Case No. 2016-001328

Dear Miles:

I received the Initial Brief from your clients. I note a reference on page 9 to "an email from Allison Dempsey, Office of the Secretary of State, dated April 18, 2016 (copy attached hereto)." There is some discussion in the brief about notary information from the Secretary of State's office. However, I have not seen anywhere in the record where any such document was filed with or presented to the lower court prior to appeal. Appellate Rule 210(c) provides, in pertinent part, "The Record shall not, however, include matter which was not presented to the lower court or tribunal." I am unaware of any presentation by you or your clients of this email or such information to the lower court. If I am in error, please provide to me a pre-appeal, file stamped copy of the email. If no such document was presented to the lower court, then the Record on Appeal and your brief cannot contain or reference the same and it must be stricken.

Please confirm in writing with me within the next five days either (1) the date and time this email document was filed with the Clerk of Court or presented to the Circuit Court, or (2) acknowledge in writing that it was never presented to the Circuit Court at any time before appeal and that you will remove the references to this document and inclusion of it in the Brief and Record on Appeal.

With best regards, I remain

Very truly yours,  
NATE FATA, P.A.

  
Nate Fata

# **EXHIBIT**

# **B**

**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 AND U.S. MAIL**

September 8, 2016

F. Miles Adler, Esq.  
ADLER LAW FIRM, LLC  
P.O. Box 4743  
Pawleys Island, SC 29585  
miles@adlerlaw.partners

Re: Gabriel Barnhill and GSB Enterprises, LLC vs. J. Floyd Swilley, et al.  
Appellate Case No. 2016-001328

Dear Miles:

Further to my letter dated August 30, 2016, a copy of which is attached, concerning the Appellants' inclusion of matter references in the brief and record not included in the lower court's record, please provide a written response as previously requested. I have not received a response from you. Respondents will need to prepare and file the appropriate motion requesting all available relief if I do not receive a written response addressing the issue raised in my August 30, 2016 letter. I look forward to receiving a written response by the close of business this Monday, September 12, 2016.

With best regards, I remain

Very truly yours,  
NATE FATA, P.A.



Nate Fata  
NF/sh  
Attachment

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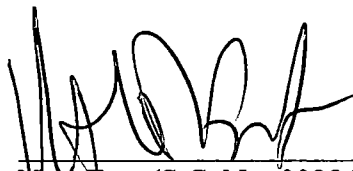
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Of Whom J. Floyd Swilley and Laurel K. Swilley and Heath Wendell Causey  
are the ..... Appellants

PROOF OF SERVICE

I certify that I have served Respondents' Motion To Strike Material Not in Record on F. Miles Adler, Esquire and Heath Wendell Causey, Pro Se by depositing a copy of same in the United States Mail, postage prepaid, on September 21, 2016, addressed to F. Miles Adler, Esquire, Adler Law Firm, LLC, P.O. Box 4743, Pawleys Island, SC 29585 and Heath Wendell Causey, 1705 N. Oak Street, Suite 2, Myrtle Beach, SC 29577.

September 21, 2016



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Nate Fata (S.C. No. 009866)

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(843) 238-2676

Attorney for Respondents

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SC Court of Appeals

VIA U.S. MAIL

September 21, 2016

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, South Carolina 29201


Re: Gabriel Barnhill and GSB Enterprises, LLC vs. J. Floyd Swilley, et al.  
Appellate Case No. 2016-001328

Dear Ms. Kitchings:

Enclosed for filing are an original and six copies of Respondents' Motion To Strike Material Not in Record and Proof of Service of same. I enclose a check in the amount of \$25 for the filing fee.

We appreciate the Court's consideration.

Sincerely,



---

Nate Fata (009866)  
Nate Fata, P.A.  
Post Office Box 16620  
Surfside Beach, SC 29587  
(843) 238-2676  
Attorney for Respondents

cc:


F. Miles Adler, Esquire  
Adler Law Firm, LLC  
P.O. Box 4743  
Pawleys Island, SC 29585  
Attorney for Appellants

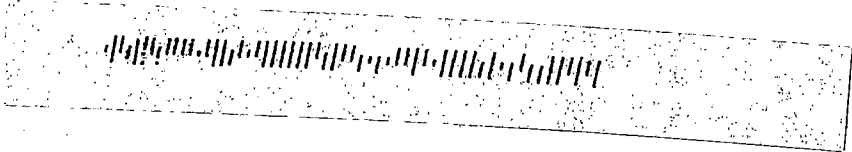
Heath Wendell Causey  
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Appellant, Pro Se

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The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, South Carolina 29211

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