

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. 2016-001377

RECEIVED

DEC 29 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 Heath Wendell Causey is the Appellant

RESPONDENTS' MOTION TO STRIKE MATERIAL NOT IN RECORD

Respondents Gabriel Barnhill & GSB Enterprises, LLC hereby move this Honorable Court for an Order striking Causey Appellant's references in his Response to Initial Brief of Respondents and in his Amended Designation of Matter to items not presented to the lower court. The following items referenced in Causey's Amended Designation of Matter were not presented to the lower court:

21. Deposition of Joyce Kauffman;
22. Deposition of Mark Sarvis;
23. Case Docket from Lower Court;
28. Plaintiffs' Supplemental Interrogatory to Defendants dated January 11, 2016; and
29. Letter from this Appellant or Affiant with all Discovery Items Listing provided along with an approximate number of pages to demonstrate the voluminous amount of Discovery these defendants did provide plaintiffs.

BACKGROUND

On pages 12 and 14 of Causey's Response to Initial Brief of Respondents and Amended Designation of Matter numbers 21 and 22, Appellant refers to depositions of Mark Sarvis and Joyce Kauffman having been taken. These depositions were not presented to the lower court and are not contained in the record. Similarly, the Case Docket from the lower court, listed as number 23 on Causey's Amended Designation of Matter, was not submitted to the lower court. On pages 2 and 10 of Causey's Response to Initial Brief of Respondents and indicated on his Amended Designation of Matter as number 28, Causey references Plaintiffs' Supplemental Interrogatory to Defendants dated January 11, 2016, although it was not submitted to the lower court. On pages 12 and 14 of Causey's Response to Initial Brief of Respondents and Amended Designation of Matter number 29, Causey references a "letter" which does not exist and was not submitted to the lower court.

Counsel wrote Appellant Causey on December 15, 2016 in an attempt to address these issues. Exhibit A. Causey replied that he would research and respond by the close of business on Monday, December 26, 2016. No response from Causey was received.

ARGUMENT

Causey is attempting to introduce matter in this appeal which was not presented to the lower court. His 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 Appeals may not consider any fact which does not appear in the Record on Appeal. Rule 210(h), SCACR.

Allowing Appellant 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.

CONCLUSION

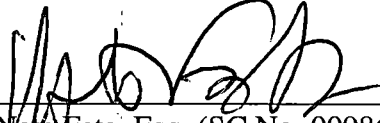
This Court should strike the following items from Causey's Amended Designation of Matter and any references to them in his brief:

21. Deposition of Joyce Kauffman;
22. Deposition of Mark Sarvis;

23. Case Docket from Lower Court;
28. Plaintiffs' Supplemental Interrogatory to Defendants dated January 11, 2016; and
29. Letter from this Appellant or Affiant with all Discovery Items Listing provided along with an approximate number of pages to demonstrate the voluminous amount of Discovery these defendants did provide plaintiffs.

The references are contained in pages 2, 10, 12, and 14 of Causey's Response to Initial Brief of Respondents and Numbers 21, 22, 23, 28 and 29 of the Amended Designation of Matter To Be Included in the Record on Appeal. In addition, the Court should award attorney fees and costs against Appellant in favor of Respondents for directly violating Rule 210, SCACR after Respondents' counsel wrote Appellant to address this issue.

NATE FATA, P.A.



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

December 27, 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

December 15, 2016

Heath W. Causey
1705 N. Oak Street, Suite 2
Myrtle Beach, SC 29577
heath@clear-acct.com

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

Dear Heath:

I received your Response to Initial Brief of Respondents and Amended Designated of Matter. I have not seen anywhere in the record where any of the following documents referenced in your Amended Record on Appeal were filed with or presented to the lower court prior to appeal:

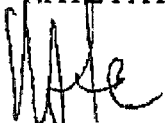
21. Deposition of Joyce Kauffman;
22. Deposition of Mark Sarvis;
23. Case Docket from Lower Court;
28. Plaintiffs' Supplemental Interrogatory to Defendants dated January 11, 2016; and
29. Letter from this Appellant or Affiant with all Discovery Items Listing provided along with an approximate number of pages to demonstrate the voluminous amount of Discovery these defendants did provide plaintiffs.

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 anyone else of such information to the lower court. If I am in error, please provide to me a pre-appeal, file stamped copy of these documents. 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 they must be stricken.

Heath W. Causey
December 15, 2016
Page 2

Please confirm in writing with me within the next five days either (1) the date and time these documents were filed with the Clerk of Court or presented to the Circuit Court, or (2) acknowledge in writing that it/they were not presented to the Circuit Court at any time before appeal and that you will remove the references to these documents and inclusion of them in the Response Brief and Amended Record on Appeal.

Very truly yours,
NATE FATA, P.A.



Nate Fata
NF/sh

cc: Miles Adler, Esq. via email miles@adlerlaw.partners

EXHIBIT

B

Heath W. Causey
1705 N Oak Street Suite 2
Myrtle Beach, SC 29577

December 21, 2016

VIA EMAIL

Nate Fata, PA
P.O. Box 16620
Surfside Beach, SC 29587

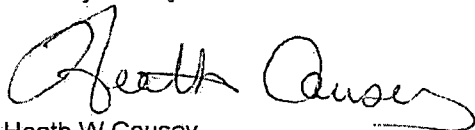
Re: Gabriel Barnhill and GSB Enterprises. LLC v J. Floyd Swilley et al.
Case No.: 2014-CP-26-08367 Appellate Case No.: 2016 -001328

Dear Nate,

I received your letter dated December 15, 2016 and am researching the items that you requested. I was unclear of the calculation of time of the 5 days therefore I chose to follow Rule 263 and Saturday & Sunday will not be counted since it is less than 7 days nor are Holidays.

Again I am still researching the items per your request and will respond to you by Monday December 26, 2016 by close of business because we have Christmas and other Holidays.

Thank you for your kind assistance in this matter



Heath W Causey

CC: F. Miles Adler, Esq

THE STATE OF SOUTH CAROLINA
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APPEAL FROM HORRY COUNTY
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R. Lawton McIntosh, Circuit Court Judge

Trial Court Case No. 2014-CP-26-8367
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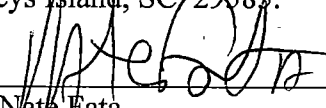
J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K. Swilley, SMG Partners, LLC, SMS Services, LP, William C. Piner, WCP Limited, LLC, 809 Holdings, LP, QC Financing, LLC, Heath Causey, and Sage Financial Group, LLC, J. Floyd Swilley SMG Partners, LLC, Alicia A. Piner, Heath Causey, Sage 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 Heath Wendell Causey is the Appellant

PROOF OF SERVICE

I certify that I have served Respondents Motion to Strike Material Not In Record on Heath Wendell Causey, Pro Se and F. Miles Adler, Esq. by depositing a copy of same in the United States Mail, postage prepaid, on December 27, 2016, addressed to Heath Wendell Causey, 1705 N. Oak Street, Suite 2, Myrtle Beach, SC 29577 and F. Miles Adler, Esquire, Adler Law Firm, LLC, P.O. Box 4743, Pawleys Island, SC 29585.

December 27, 2016



Nate Fata

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

NATE FATA, P.A.
ATTORNEY AT LAW

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SC Court of Appeals

VIA U.S. MAIL

December 27, 2016

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

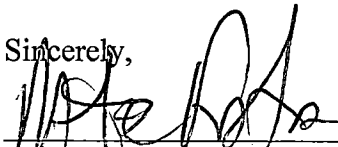
Re: Gabriel Barnhill and GSB Enterprises, LLC vs. Heath Wendell Causey
Appellate Case No. 2016-001377 (filed under 2016-001328)

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:

Heath Wendell Causey
1705 N. Oak Street, Suite 2
Myrtle Beach, SC 29577
Appellant, Pro Se

F. Miles Adler, Esquire
Adler Law Firm, LLC
P.O. Box 4743
Pawleys Island, SC 29577

↓

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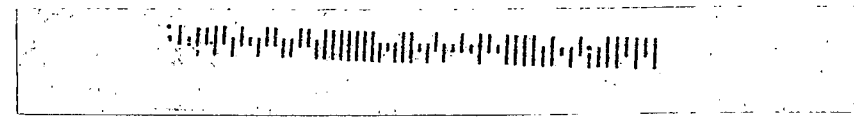
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Columbia, South Carolina 29211