THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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

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

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BRIEF OF RESPONDENTS

NATE FATA, P.A.

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

December 27, 2016

Attorney for Respondents

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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 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). Swilley filed a Counterclaim which was denied by Barnhill. (Barnhill Answer to Counterclaim). 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). 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 and Barnhill December 2015 Motion For Summary Judgment and Judgment on Pleadings).

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). 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). 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). 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). Although counsel for 809 appeared at the February 16, 2016 hearing, Swilley did not. (February 16, 2016 Hearing Transcript). The court granted Barnhill's requested relief and entered an Order on March 21, 2016. In particular, the court struck Swilley's pleadings for discovery obstruction pursuant to Barnhill's Motion to Compel. In addition, the court granted summary judgment and judgment on the pleadings as to Swilley's counterclaims. Swilley then moved to set aside the March 21, 2016 Order on April 1, 2016. (Swilley Motions To Set Aside). The court denied the Swilley Motions to Set Aside in its May 2016 Order. (May 2016 Order). Swilley then filed their 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, pp. 1-16, par. 74-76). Barnhill was 26-27 years of age at the time. (Complaint, par. 8) Laurel Swilley, Floyd Swilley and William Piner established 809 in 2010. (Complaint, par. 9-31). 809 was a startup company that would loan money to companies in a "factoring" arrangement. (Complaint, par. 50-53, 73). The borrower company was QC Financing, LLC, a pawn shop entity established by Piner and Swilley. (Complaint, par. 28-32) As alleged in the Complaint, Swilley and Piner took investor/client retirement monies to fund their own startup businesses. (Complaint, par. 50-55). 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).

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). 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). 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). Swilley has been involved with other investment schemes. (Barnhill Memorandum filed April 20,

2015). 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).

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. 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.

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). The court relieved Adler as counsel under Order filed December 11, 2013. (December 11, 2013 Order). John Leiter ("Leiter") entered an appearance for defendants on January 13, 2014. (Leiter Appearance).

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.[1] Furthermore, Plaintiffs filed four (4) Motions for Sanctions for Defendants' failure to comply with court orders and discovery: November 4, 2013, February 19, 2014 and on June 27, 2014, and June 8, 2015. (R. p. __, four Motions for Sanctions).

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). 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). The court partially granted Plaintiffs' Motion for Sanctions and Judge Culbertson awarded attorney fees by Order filed January 16, 2014. (January 16, 2014 Order).

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). 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.[2]" (October 15, 2014 Order, p. 4).

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[1] 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.p.,).

[2] 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. (March 21, 2016 Order, p. 3)

Defendants disclosed the following 809 investors in their Court ordered response to Interrogatory Number 9 of the Plaintiffs' Interrogatories dated April 29, 2013[3]:

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).

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). 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). Judge

[3] Floyd Swilley's purported loan is not referenced.

Hyman ordered defendants to produce the requested information and ordered defendants to pay Plaintiffs' attorney fees of $2,700. (October 15, 2014 Order).

Defendants created another Ponzi vehicle, Secured Asset Factoring Exchange ("SAFE"), in late 2011. (2014 Derivative Amended Complaint) 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). 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; 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). Out of his $115,000 investment, Barnhill received less than $3,000. (Complaint, par. 93).

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. Swilley would not and did not appear for deposition. (Barnhill October 20, 2014 Motion to Compel). 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).

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). On June 12, 2015 Barnhill again moved for sanctions based

on Defendants' failure to provide discovery responses. (June 2015 Motion for Sanctions). 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).

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). On November 24, 2015, deposition notices were served on Causey and Swilley. (Barnhill December 15, 2015 Motion to Compel). The depositions did not occur. On December 15, 2015 Barnhill filed the Motion to Compel. (December 15, 2015 Motion to Compel). 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). The December 2015 Motion to Compel was served on Leiter, counsel for Swilley. (Barnhill December 15, 2015 Motion to Compel, Certificate of Service).

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). 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).

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). Swilley was not present at the hearing. (January 2016 Hearing Transcript). 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). On January 14, 2016, Judge Seals dated the Order and signed it. (January 2016 Order). On January 21, 2016 Leiter transmitted the Order to the Clerk of Court for filing with notice to Swilley. (January 21, 2016 Leiter letter). The Order was entered on January 25, 2016. (January 2016 Order).

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).

On February 16, 2016 Barnhill's counsel and 809's counsel attended the hearing. Swilley was not present. (February 16, 2016 Transcript of Hearing). The court granted the relief requested by Barnhill in its Order filed March 21, 2016. (March 2016 Order). 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.)

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.)

> 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.)

In its Order the Court ruled that all parties had been duly notified of the hearing. (March 2016 Order, p.2). 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) 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). 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. 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).

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). On May 25, 2016, the Order denying Swilley, Causey and 809's Motion to Set Aside Order of March 21, 2016 was entered.

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). 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).

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; May 2016 Order, p. 3). 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). 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).

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 SCRCP 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; May 2016 Order, p. 3-4). 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.

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". The lower court distinguished the "as of the date of entry of this order" from the "date of this order." (January 2016 Order). 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. 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; March 2016 Order).

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). 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). 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). 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 SCRCP 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). Barnhill then served Swilley with notice of the February 16, 2016 hearing on February 3, 2016. (Notice of Hearing). 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). 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). 809's counsel was present at the hearing. In its March 22, 2016 Order, the court noted Neill, whose firm represented 809 at the hearing, was representing Swilley and others in the Twigg case. (March 22, 2016 Order, p. 3, ftnt. 2).

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, 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. See also *Schleicher v. Schleicher*, 310

S.C. 275, 423 S.E.2d 147 (S.C. 1992). 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. 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 SCRCP, 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) SCRCP 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; Barnhill December 2015 Motion to Compel with Swilley deposition notice). Swilley never appeared for deposition or offered to appear for a deposition. (March 2016 Order, p. 3-

4). The trial court rejected the argument that there was some verbal agreement to reschedule the depositions (May 2016 Order, p. 4). 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). Judge Hyman previously held Swilley was sandbagging in their discovery responses. (October 2014 Order). In the Court's May 2015 Order, Swilley was required to cooperate with depositions (R. p). 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; December 2015 Motion to Compel). Swilleys cites nothing in the record where they ever offered to appear for a deposition, when there were represented by counsel or as a *pro se* litigant. The court noted this fact. (March 22, 2016 Order, pp.3-4). 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). Service is effective upon mailing, not receipt. Rule 5, SCRCP. 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). 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. SCRCP, 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). 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).

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. SCRCP, 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

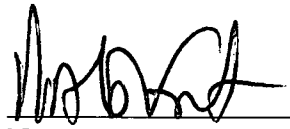
groundless arguments. The simple recitation of rules of professional conduct on appeal does not create a basis for relief. Swilley cites no specific statement of what counsel Fiedler or Fata said to the court that was objectionable. These non-sensical arguments are without factual and legal support and 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 unkown 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.) 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.



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

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

Appellate Case No. 2016-001377

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

v.

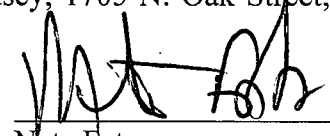
J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K. Swilley, SMG Partners, LLC, SMS Services, LP, William C. Piner, WCP Limited, LLC, 809 Holdings, LP, QC Financing, LLC, Heath Causey, and Sage Financial Group, LLC, J. Floyd Swilley SMG Partners, LLC, Alicia A. Piner, Heath Causey, Sage 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

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondents and Designation of Matter to be Included in the Record on Appeal on F. Miles Adler, Esq. and Heath Wendell Causey, Pro Se and by depositing a copy of same in the United States Mail, postage prepaid, on December 27, 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.

December 27, 2016



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

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

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 the Initial Brief of Respondents and Designation of Matter and Proof of Service of same.

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

First Class Mail

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

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