IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
The Honorable R. Lawton McIntosh, Circuit Court Judge

Civil Action No. 2014-CP-26-08367
(formerly 2013-CP-26-02816)

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, 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, Laurel K. Swilley, and Heath Wendell Causey are the Appellants.

FINAL BRIEF OF APPELLANTS J. FLOYD SWILLEY AND LAUREL K. SWILLEY

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court commit reversible error by failing to abide by its own order staying the proceedings for 30 days?

II. Did the trial court commit reversible error by ruling on the matter despite the clerk's defective service of notice?

III. Did the trial court commit reversible error by striking pleadings and granting final judgment as a sanction?

IV. Did the trial court commit reversible error by granting summary judgment when there remained genuine issues of material fact in dispute?

V. Did the trial court commit reversible error by relying on false statements and misrepresentations by counsel?

STATEMENT OF THE CASE

In April 2013, the Appellees Gabriel Barnhill and GSB Enterprises, Inc. (collectively, "Barnhill") commenced the instant litigation against, inter alia, the Appellant J. Floyd Swilley and the Appellant Laurel K. Swilley (collectively, the "Swilleys"). In short, Barnhill alleged that the Swilleys engaged in a Ponzi scheme which caused Barnhill to lose a substantial amount of money. In June 2013, the Swilleys denied the substantive claims against them and, further, asserted various counterclaims against Barnhill.

Subsequently, Barnhill served various discovery requests upon the Swilleys. Not satisfied with the Swilleys' responses, Barnhill filed several motions to compel discovery on July 3, 2013, January 8, 2014, January 10, 2014, September 5, 2014, and October 5, 2014. Still not satisfied, Barnhill ultimately filed motions for sanctions on November 4, 2013, May 4, 2015, and June 12, 2015.

On October 27, 2015, John M. Leiter, Esquire ("Attorney Leiter") filed a motion to be relieved as counsel for the Swilleys (and others). *See* Mot. to be Relieved As Counsel, filed Oct 27, 2015(R.30, p.352-354). That Motion was not heard until January 4, 2016. On January 14, 2016, the trial court signed an order releasing Attorney Leiter as counsel for the Swilleys (and others), although the order was not entered until January 25, 2016. *See* Order, entered Jan. 25, 2016 (R.9, p.29-31) ("Jan. Order"). In relevant part, the January Order stated as follows: "The proceedings in this case will be held in abeyance for thirty (30) days from the date of this Order" so as to allow Attorney Leiter's former clients (including the Swilleys) an opportunity to obtain new legal counsel to represent them in this matter. *(R9., p.30).*

Meanwhile, back on December 16, 2015, Barnhill had filed a Notice of Motion and Motion for Summary Judgment and for Judgment on the Pleadings. *See* Pls.' Notice of Mot. & Mot. for Summ. J. and for J. on the Pleadings, filed Dec. 15, 2016 (R.41,p.410) ("Dec. Mot."). Still without legal counsel, and prior to the trial court hearing Attorney Leiter's motion to withdraw, the Swilleys never received notice from the clerk regarding Barnhill's December Motion. *See* Mots. to Set Aside(R.42,p.416; R.43, p.424). In fact, the only notice the Swilleys 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. Significantly, both the notice and the hearing fell within the 30-day abeyance period set forth in the January Order. *See* Jan. Order (R.9,p.32).

The only persons in attendance at the February 16, 2016 hearing were Barnhill's attorney, Nate Fata, Esquire ("Attorney Fata") and Stephan B. Fiedler, Esquire ("Attorney Feidler"). *See* (R.45,p.436-469) ("Feb. Tr."). Attorney Fata is Barnhill's counsel and Attorney Fiedler solely appeared on behalf of the Defendant 809 Holdings LP. *See* Feb. Tr. (R.45, p.438, lines 8-9; p.439, lines 5-12). Furthermore, Attorney Fiedler was new to the case (and fairly new to the practice of law) and was stepping in for senior partner Mark D. Neill, Esquire ("Attorney Neill"). *See* Feb. Tr. (R.45,p.449, lines 4-10; p.30;p.465, lines 22-24).

For some reason, Attorney Fiedler made numerous misleading statements to the trial court as to the Swilleys, and thereby falsely suggesting that the Swilleys purposefully avoided complying with discovery requests. *See* Feb. Tr. (R45, p. 449, line 19-22; p.450, lines 8-17); Ltr. from Attorney Neill to Judge McIntosh, dated May 19, 2016 ("Neill Ltr.")(R.50,p. 531-532). And when presented with such evidence, the trial court verbally granted Barnhill's Motion to Strike the Swilleys' pleadings and Motion for Attorney's Fees. *See* Feb. Tr. (R45. p. 467 line 25 through p.468, line 2; p. 469, lines 11-14).

Later, in March 2016, based on the February 16 hearing, as well as the Plaintiffs' Memorandum in Support of their Motion for Judgment on the Pleadings and/or Summary

Judgment ("Barnhill Memo"), initially submitted in December 2015 and prior to the February 2016 hearing, the trial court granted Barnhill summary judgment on its claims against the Swilleys as well as the Swilleys' counterclaims against Barnhill. *See* Order, entered Mar. 21, 2016 ("Mar. Order")(R. 10, p.32-38). Notably, however, the March Order did not follow the verbal ruling of the trial court on February 16, 2016 (R.8., p. 27) but, rather, reflected the contents of the Barnhill Memo. *(R.10,p.32-38).*

The Swilleys each filed a Motion to Set Aside the March Order pursuant to Rule 59(e) of the South Carolina Appellate Court Rules ("SCACR"), *see* Mots. to Set Aside(R. 42, p.415-416; R43., p. 420-424), but those motions were denied, *see* Form 4; Order entered May 25, 2016 ("May Order")(R.18, p.18-20). On June 16, 2016, the Swilleys timely submitted a notice of appeal in this matter. *See* Notice of Appeal.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO ABIDE BY ITS OWN ORDER STAYING THE PROCEEDINGS FOR 30 DAYS

In its January Order, the trial court clearly and expressly stated that "[t]he proceedings in this case will be held in abeyance for thirty (30) days from the date of this Order." Jan. Order 2 (R.9, p.30).

"To stay an order is to hold it in abeyance or refrain from enforcing it; a stay is a stopping." *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n,* 298 S.C. 179,184,379 S.E.2d 119, 122 (1989) (internal quotations omitted). The purpose of a stay is to preserve

the status quo pending some later determination. *See Graham v. Graham,* 301 S.C. 128, 130, 390 S.E.2d 469,470 (Ct. App. 1990).

In effect, then, holding the case in abeyance renders the status quo the law of the case. *See Flexon v. PHC-Jasper, Inc.,* 413 S.C. 561, 571-72, 776 S.E.2d 397, 403-04 (Ct. App. 2015) ("'[T]he doctrine of the law of the case prohibits issues [that] have been decided in a prior appeal from being re-litigated in the trial court in the same case.'" (quoting *Ross v. Med. Univ. of* S.C., 328 S.C. 51, 62,492 S.E.2d 62, 68 (1997)); *Shirley's Iron Works, Inc. v. City of Union,* 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right." (internal quotations marks omitted)).

Although the January Order was signed on January 14, 2016, it was not entered until January 27, 2016. *See* Jan. Order (R. 9, p.29). An order is effective from the date of entry, not signature. *See* Rule 58(a), SCRCP ("A judgment is effective only when so set forth *and entered* in the record" (emphasis added)); *Bowman v. Richland Mem'l Hosp.,* 335 S.C. 88, 92, 515 S.E.2d 259, 261 (Ct. App. 1999) (holding the effective date of a trial court order is the date the order is entered by the clerk of court, not the date the order is signed). Accordingly, the January Order effectively froze the proceedings through February 26, 2016 (30 days after January 27, 2016).

Nevertheless, the trial court held a hearing on February 16, 2016, at which only Attorney Fata (Respondents' counsel) and Attorney Fiedler (809 Holdings' counsel) were present. *See* Feb. Tr. (R.45, p. 438, lines8-14; p.439, lines 5-12). Significantly, the Swilleys absence was solely due to the fact that they had no notice of the hearing. See Mots. To Set Aside (R. 42, p. 416-420; R.43, p. 421-424). Moreover, at that hearing, the trial court ruled that it would strike the Swilleys' pleadings and enter summary judgment in favor of Barnhill on the Swilleys' counterclaims. *See* Feb. Tr. (R. 45, p.446, line 6 through p. 447, lines 1-2; p. 465, lines 5-20; p. 466, lines 11-14). Notably, whereas Judge McIntosh presided over the proceedings for the February 16 hearing and resulting March 21 order (R10, p. 52), *see* Feb. Tr.(R. 45, p.436); Mar. Order, Judge Seals presided over the previous proceedings in this matter, including the January 27 order staying the matter for 30 days, *see* Jan. Order(R.9, p.29). Yet Barnhill, by and through Attorney Fata, clearly knew about the January 27 order having been involved in all aspects of the instant litigation. Nevertheless, Attorney Fata failed to disclose that order or otherwise apprise Judge McIntosh of its import, effectively defrauding both the trial court and the Swilleys. *See* Rule 407, SCACR, Rules of Profl Conduct, Rule 3.3 (prohibiting a lawyer from knowingly making a false statement of fact or law to the court, including the failure to inform the court of material fact or law that will enable to court to make an informed decision, even if such fact or law is adverse to the lawyer's position); *id.* Rule 3.4(a) (prohibiting a lawyer from knowingly obstructing "another party's access to ... material having potential evidentiary value"); *id.* Rule 8.4(d), (e) (describing "professional misconduct" as including "conduct involving dishonesty, fraud, deceit or

misrepresentation" as well as "conduct that is prejudicial to the administration of justice"). Thus, as a matter of equity, Barnhill should not be rewarded for its legal counsel's misconduct. *See Ingram v. Kasey's Assocs.,* 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 n.2 (2000) (describing and applying both the doctrines of unclean hands and equitable estoppel).

In any event, no matter the cause, it is beyond dispute that the trial court violated its own order of abeyance by conducting the February 16 hearing and making substantive determinations therein. As such, the trial court's order is unlawful. *See Dukes & Dukes, Inc. v. Hygrade Food Prods. Corp.,* 236 S.C. 69, 113 S.E.2d 254 (1960) (unappealed order becomes law of case and, thus, is binding on the litigants and the court alike); *Stevens v. United States,* No. 98-554C, 2012 WL 2021740, at *4 (Fed. Cl. Ct. filed June 4, 2012) ("Law of the case ... provides that a trial court should abide by its own legal rulings during the pendency of the same proceeding." (citing *Arizona v. California,* 460 U.S. 605, 618 (1983)); 60 C.J.S. *Motions and Orders§* 75 (Westlaw database updated Aug. 2016) ("[A]n order of court ... is binding on the parties and their privies, *as well as on the court"* (emphasis added)).

On that basis, the trial court's decision below must be reversed and the matter remanded for further proceedings.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RULING ON THE MATTER DESPITE THE DEFECTIVE SERVICE OF NOTICE TO THE SWILLEYS

"The requirements of due process include notice [and] an opportunity to be heard in a meaningful way." *Ogburn-Matthews v. Loblolly Partners,* 332 S.C. 551,562,505 S.E.2d 598, 603 (Ct. App. 1998); *see also Mullane v. Cent. Hanover Bank & Trust CQ.,* 339 U.S. 306, 314 (1950) (stating that the Due Process Clause demands "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

> It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or opportunity to be heard, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights. A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on.

Webster v. Clanton, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972); *accord Tryron Fed. Sav. & Loan Ass'n v. Phelps,* 307 S.C. 361,362,415 S.E.2d 397, 398 (1992).

In the instant case, although the Swilleys were clearly parties to the litigation, the Clerk of the Court never gave the Swilleys notice of Barnhill's December Motion and/or the February Hearing thereon. *See* Mots. to Set Aside (R 42, p.417; R.43, p.424).

Although Barnhill asserted to the trial court that he had provided notice to the Swilleys, *see* Feb. Tr. (R. 45, p. 444, lines 6-8), such notice was only a couple days before the February Hearing and did not include the subject documentation, i.e.,

Barnhill's motion or memorandum in support thereof. Thus, the notice actually given was not reasonably calculated to provide the Swilleys with an honest opportunity to respond thereto. *See Ogburn-Matthews,* 332 S.C. at 562, 505 S.E.2d at 603; *Mullane,* 339 U.S. at 314.

Consequently, just as Attorney Fata misrepresented the trial court's previous stay of the proceedings, *see supra* Part I, Attorney Fata also misrepresented that the Swilleys were properly noticed of the February 16 hearing. *See* Rule 407, SCACR, Rules of Profl Conduct, Rules 3.3, 3.4(a), 8.4(d), 8.4(e).

As further evidence of this wrongdoing, the Swilleys direct the court's attention to the Affidavit of Sally J. Huffman ("Huffman Aff.") (R.48, p.527). In that document, Attorney Fata's legal assistant averred that on February 3 she served notice of the February 16 hearing upon the Swilleys. *See* Huffman Aff (R. 48, p.527). Yet the notary on the affidavit is none other than Attorney Fata. As an initial matter, an otherwise qualified notary is disqualified to acknowledge a document if the notary has a financial or beneficial interest in the subject transaction. (R. 48, p.527) *See* IA C.J.S. *Acknowledgements* § 33 (Westlaw database updated Aug. 2016).

Furthermore, the notarial commission date on Attorney Fata's seal is inaccurate and/or falsified. Not only does the original document show that the date was changed by evidence of white out or correction tape, but the December 16, 2020 date cannot be correct because the Notarial Office of the Secretary of State has no record of any applications on December 16, 2010, 10 years from the date of the purported notarial commission.

For any of these reasons, the affidavit should have been stricken as invalid. *See also* Rule 407, SCACR, Rules of Profl Conduct, Rule 5.3 (lawyer shall make reasonable efforts to ensure that non-lawyer employee's conduct is compatible with professional obligations of lawyer; lawyer shall be responsible for conduct of non-lawyer employee if lawyer knows of conduct at time when its consequences can be avoided or mitigated and fails to take reasonable action).

Thus, as a matter of equity, Barnhill should not be rewarded for its legal counsel's misconduct. *See Ingram,* 340 S.C. at 107 n.2, 531 S.E.2d at 292 n.2 (describing and applying both the doctrines of unclean hands and equitable estoppel).

And procedurally, the Swilleys sought to have the trial court correct itself by way of a motion to set aside pursuant to Rule 59, SCRCP, *see* Mots. to Set Aside, but to no avail, *see* Form 4; May Order. *Cf Universal Benefits, Inc. v. McKinney,* 349 S.C. 179, 183-84, 561 S.E.2d 659, 661-62 (Ct. App. 2002) (holding that party was not denied an opportunity to be heard because the party failed to pursue a motion to set aside the order pursuant to Rule 59, SCRCP).

Therefore, the trial court's order in this case violated the Swilleys' due process rights and thus is void. On that basis, the trial court's decision below must be reversed and the matter remanded for further proceedings.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT AS A SANCTION AGAINST THE SWILLEYS

As summarized by the courts:

> "The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." *Downey v. Dixon,* 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987). Therefore, an appellate court will not interfere with "a trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters" unless the court abuses its discretion. *Karppi v. Greenville Terrazza Co., Inc.,* 327 S.C. 538, 542, 489 S.E.2d 679,681 (Ct. App. 1997) (citation omitted). "An 'abuse of discretion' may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law." *Dunn v. Dunn,* 298 **S.C.** 499,502,381 S.E.2d 734, 735 (1989) (citation omitted). The appealing party bears the burden of demonstrating that the lower court abused its discretion. *Id.* (citation omitted).
>
> However, "when the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.,* 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999) (citing *Orlando v. Boyd,* 320 S.C. 509,466 S.E.2d 353 (1996)). Thus, "[w]here the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction." *Id.* at 198-199, 511 S.E.2d at 718-19 (citing *Baughman v. AT&T Co.,* 306 S.C. 101, 410 S.E.2d 537 (1991))[.]

Davis v. Parkview Apts., 409 S.C. 266, 281-83, 762 S.E.2d 535, 543-44 (2014).

In the instant case, there was no factual basis to support the decision to impose the ultimate sanction penalty of striking the Swilleys' pleadings and then granting final judgment in favor of Barnhill.

Although Barnhill asserted that the Swilleys had been evading several attempts at discovery, that assertion is simply untrue. To the contrary, the Swilleys had already produced hundreds of pages of documents in response to requests to produce and also answered numerous requests for admissions and interrogatories. *See* Neill Ltr. (R. 50, p.531-532) Moreover, there was only one scheduled deposition of the Swilleys, but the parties had verbally agreed to reschedule same, and no other date had yet been established. *See id.;* Feb. Tr. (R. 45, p.450, lines 18-21); Ltr. from F. Miles Adler to Judge McIntosh, dated May 3, 2016 ("Adler Ltr.") (R. 49, p. 511-513).

Undisputedly, striking the Swilleys' pleadings and granting final judgment against the Swilleys severely prejudiced the Swilleys in this action. *See Parker v. Spartanburg Sanitary Sewer Dist.,* 362 S.C. 276, 286, 607 S.E.2d 711, 716 (Ct. App. 2005) ("The prejudice Rule 15 envisions [allowing leave to be granted to amend pleadings when leave does not prejudice any other party] is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." (citing, inter alia, *Tanner v. Florence County Treasurer,* 336 S.C. 552, 521 S.E.2d 153 (1999)).

Therefore, the trial court's order was an abuse of discretion, and on that basis, the trial court's decision below must be reversed and the matter remanded for further proceedings.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT WHEN THERE REMAINED GENUINE ISSUES OF

MATERIAL FACT IN DISPUTE

As recently summarized:

> "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court...." *Quail Hill, L.L.C. v. Cnty. of Richland,* 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citing *Brockbank v. Best Capital Corp.,* 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000)). "[A] trial court may grant a motion for summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* at 234, 692 S.E.2d at 505 (quoting Rule 56(c), **SCRCP).**

Traynum v. Scavens, 416 S.C. 197,201, 786 S.E.2d 115, 117 (2016).

"In determining whether [the "drastic remedy" of] summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party." *Dawkins v. Fields,* 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003).

Furthermore:

> Those facts which are "material" for purposes of summary judgement are identified by the substantive law of the claim asserted. In other words, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgement. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 [] (1986). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* Conversely, an issue is not "genuine" and summary judgement warranted if there is insufficient evidence favoring the non-moving party for a jury to return a verdict for that party. *Id.*

Hampton v. Conso Prods., Inc., 808 F. Supp. 1227, 1232 (D.S.C. 1992).[1]

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[1] "Rule 56 of the South Carolina Rules of Civil Procedure is identical to its federal

In the instant case, the Swilleys vehemently deny the substantive allegations of Barnhill's complaint. *See generally* Answer. Moreover, J. Floyd Swilley asserted a counterclaim against Barnhill for breach of contract, *see* Countercl.,2 which Barnhill denied, *see* Answer to Counter cl. Clearly, then, there are "genuine" disputes of "material" fact that preclude judgment as a matter of law for either party on Barnhill's claims against the Swilleys and the Swilleys' counterclaim against Barnhill. *See Hampton,* 808 F. Supp. at 1232.

Moreover, "[s]ummary judgment ... must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Dawkins,* 354 S.C. at 69, 580 S.E.2d at 439. As repeatedly brought up in this case, there has been virtually no discovery to date in this matter, *see* Mar. Order (R.10, p.32-35); Feb. Tr. R. 45, p.440, lines 14-5; p.433, lines 19-22; p. 434, lines 1-9), , at least from Barnhill to the Swilleys, *cf* Neill Ltr. (the Swilleys have produced hundreds of documents in response to Barnhill's discovery requests). Due to the disregard for the 30-day stay and the counterpart. In the absence of state law on the issue in question, federal cases interpreting the rule are persuasive." *Dawkins v. Fields,* 345 S.C. 23, 28, 545 S.E.2d 515, 518 (Ct. App. 2001), *rev'd on other grounds,* 354 S.C. 58, 67, 580 S.E.2d 433, 438 (2003).

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2 Although the Swilleys also asserted a counterclaim pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, the Swilleys acknowledges that such claim is unripe until the Swilleys prevail on Barnhill's claims against them. *See* S.C. Code § 15- 36-10(C)(1); Feb. Tr. 20:9-14.

lack of notice, *see supra* Parts I & II, respectively, the Swilleys have not yet had a full and fair opportunity to engage in discovery prior to the entry of summary judgment in this case.

Therefore, the drastic remedy of summary judgment was not warranted based on the existing record and, thus, the trial court's decision below must be reversed and the matter remanded for further proceedings.

V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RELYING ON FALSE STATEMENTS AND MISREPRESENTATIONS BY LEGAL COUNSEL

"A court of equity has the inherent power to set aside a judgment on the ground of fraud." *Bankers Trust of* S.C. *v. Bruce,* 283 S.C. 408,415, 323 S.E.2d 523, 528'(Ct. App. 1984) (citing, inter alia, *Rycroft v. Tanguay,* 279 S.C. 76, 302 S.E.2d 327 (1983)).

> "A judgment may be set aside on the ground of fraud only if the fraud is 'extrinsic' and not 'intrinsic.'" *Hagy [v. Pruitt,* 339 S.C. 425, 431, 529 S.E.2d 714, 717 (2000)]. Extrinsic fraud is "'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.'" *Id.* at 431, 529 S.E.2d at 717-18 (quoting *Hilton Head Ctr. of* S.C., *Inc. v. Pub. Serv. Comm'n,* 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). "[R]elief is granted for extrinsic fraud on the theory that by reason of the fraud preventing a party from fully exhibiting and trying his case, there never has been a real contest before the court of the subject matter of the action." *Chewning v. Ford Motor Co.,* 354 S.C. 72, 82,579 S.E.2d 605, 610 (2003).

Robinson v. Estate of Harris, 388 S.C. 616, 625, 698 S.E.2d 214, 219 (2010).

In the instant case, the trial court's order is based on multiple instances of extrinsic. fraud. First, the trial court held a hearing during the 30-day stay that the court had

previously issued. *See supra* Part I. Second, the Swilleys were not given proper notice of the February 16 hearing and, thus, were deprived of a reasonable opportunity to be heard. *See supra* Part II. Moreover, Attorney Fata misrepresented to the trial court that he had given proper notice of the hearing to the Swilleys. *See id.* Third, Attorney Fiedler made numerous misleading statements to the trial court as to the Swilleys, and thereby falsely conveying that the Swilleys purposefully avoided discovery and court proceedings. *See* Feb. Tr. R. 45, p. 449, lines 19-22; p.450, lines 8-17); Neill Ltr.(R.50, p.531-532) and at least with respect to Attorney Fiedler's misstatements, Attorney Neill unequivocally advised the trial court of same. *See* Neill Ltr. (R. 50, p.531-532)

Therefore, the trial court's decision is based on extrinsic fraud and, on that basis, the decision below must be reversed and the matter remanded for further proceedings.

CONCLUSION

In light of the foregoing arguments and authorities cited, it is clear that the trial court committed multiple errors, any one of which requires reversal.

WHEREFORE, the Swilleys respectfully requests that this Court:

A. Reverse the trial court's order entered March 21, 2016, striking the Swilleys' pleadings and granting Barnhill summary judgment;

B. Reverse the trial court's order entered May 25, 2016, denying the Swilleys' motion to set aside the March 21, 2016 order;

C. Remand the case for further proceedings; and

D. Grant the Swilleys any other and further relief the Court deems just and equitable.

Dated: 8/28/17

Respectfully,

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