THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge 15th Judicial Circuit

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Civil Action No. 2014-CP-26-08367
2014-CP-26-03362 (formerly 2013-CP-02816)

Appellate Case No. 2016-001328

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 Piner, Heath Causey, Sage Advisory Group LP, Sage Private Equity Group LLC, Secured Asset Factoring Exchange, Inc, SAFE, Inc, Digics, LLC, 9-1-1 Plumbing, LLC, and Sage Funding, LP and Christopher Pitcock, Defendants

of whom J Floyd Swilley, Laurel K Swilley and Heath Wendell Causey, are the Appellants.

BRIEF OF APPELLANT CAUSEY

Heath Causey,
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Pro Se Appellant

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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, the Appellant Laurel K. Swilley (collectively, the "Swilleys") and Heath Causey. 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 defendants denied the substantive claims against them and, further, all defendants asserted various counterclaims against Barnhill.

Subsequently, Barnhill served various discovery requests upon the Swilleys and Causey. Not satisfied with the Swilleys', Causeys, or other defendants 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, Causey (and others). *See* Motion 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, Causey (and others), although the order was not entered until January 25, 2016. *See* Order, entered Jan. 25, 2016 (R.9, p.29-31) ("January 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 and Causey) an opportunity to obtain new legal counsel to represent them in this matter. *(R.9,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* Plaintiffs' Notice of Motion & Motion for Summary Judgment and for Judgment on the Pleadings, filed Dec. 15, 2016 (R.41, p.410) ("Dec. Motion"). Still without legal counsel, and prior to the trial court hearing Attorney Leiter's motion to withdraw, I never received notice from the clerk regarding Barnhill's December Motion. *See* Causeys motion to Set Aside (R.36, p.394). In fact, I (Causey) did receive a copy of a notice of court from the Plaintiffs Council however it did not arrive until February 17 at 6pm after the motion had been heard in court. Significantly, both the notice and the hearing fell within the 30-day abeyance period set forth in the January Order. *See* "January 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, p436-469) Transcripts of Hearing 2/16/16 ("Feb. Transcripts."). Attorney Fata is Barnhill's counsel and Attorney Fiedler solely appeared on behalf of the Defendant 809 Holdings LP. *See* (R.45, p.438, lines 8-9; p.439, lines 5-12)"Feb. Transcripts". 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. Transcripts R.45, p.449, lines 4-10; p.465 lines 22-24).

For some reason, Attorney Fiedler made numerous misleading statements to the trial court as to the Swilleys and Causey, and thereby falsely suggesting that the Swilleys, Causey and other defendants purposefully avoided complying with discovery requests. *See* Feb. Transcripts (R.45, p.449, line 19-22 & p.450, line 8-17; Letter from Attorney Neill to Judge McIntosh, dated May 19, 2016 ("Neill Letter")(R.50, p531-532). And when presented with such evidence, the trial court verbally granted Barnhill's Motion to Strike the Swilleys' & Causeys pleadings and Motion for Attorney's Fees. *See* Feb. Transcripts. R.45, 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 & Causey as well as the defendants counterclaims against Barnhill. *See* Order, entered Mar. 21, 2016 ("March 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).

I filed a Motion to Set Aside the March Order pursuant to Rule 59(e), Rule 55(c) and Rule 60(b) of the South Carolina Rules of Civil Procedure ("SCRCP"), *see* Causey

Mot. to Set Aside (R.36, p.393-396), but those motions were denied, *see* Form 4 (R.18, p.18-20). On June 24, 2016, I timely submitted a notice of appeal in this matter. *See* Notice of Appeal.

This Appellant references the entire Brief of the Swilleys' and asserts the same arguments and assertions as his own unless specifically identified within this brief.

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." See January Order at 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 relitigated 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 25, 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 24, 2016 (30 days after January 25, 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, lines 8-14; p.439, lines 5-12). Moreover, at that hearing, the trial court ruled that it would strike the Swilleys' & Causey's pleadings and enter summary judgment in favor of Barnhill on the Swilleys' & Causey's counterclaims. See Feb Tr. (R. 45, p.446, line 6 through p. 447, line1-2; p.465, lines 5-20; p.466, lines 11-14).

Therefore, 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. 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 HEATH CAUSEY

"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 Co.*, 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 and Causey were clearly parties to the litigation, the Clerk of the Court never gave Causey notice of Barnhill's December Motion and/or the February Hearing thereon. *See* Motions to Set Aside (R.36, p.393).

Although Barnhill did himself provide notice to the Swilleys & Causey, *see* Feb. Transcripts (R.45, p.444, lines 6-8) , such notice was **a day after** 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 Causey (me) 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.

And procedurally, the Swilleys & Causey sought to have the trial court correct itself by way of a motion to set aside pursuant to Rule 59, SCRCP, *see* Motions to Set Aside, (R.36 p.393-396)(R.42 p.415-416)(R.43 p.420-424), but to no avail, *see* Form 4 (R.18, p18-20). *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).

Also See "Fata Letter attachment", affidavit of Sally Huffman (R39, p.402-403) (R.48, p.527-530), item #3 only references the Swilleys' and does not make reference to sending Heath Causey a copy of the notice or Defendants QC Financing LLC, Digits LLC or Chris Pitcock Pro se clearly showing a pattern for failure to copy the other parties on service timely as the copy of the affidavit was over 30 days old before servicing it to other parties. (R39, p.402-403) (R.48, p.527-530),

Therefore, the trial court's order in this case violated the Swilleys' and Causeys 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 AND CAUSEY

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 Terrazzo 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' or Causeys pleadings and then granting final judgment in favor of Barnhill.

Although Barnhill asserted that the Defendants had been evading several attempts at discovery, that is simply untrue. To the contrary, the Swilleys along with Causey 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 Letter (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, lines18-21) ; Letter from F. Miles Adler to Judge McIntosh, dated May 3, 2016 ("Adler Letter")(R.49, p.511-513).

Undisputedly, striking the Swilleys' and Causeys pleadings and granting final judgment against Causey severely prejudiced Causey 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]

In the instant case, the Swilleys and Causey 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* Counterclaims,[2] which Barnhill denied, *see* Answer to Counterclaims. 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 Causey and the Swilleys' and Causeys 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

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

[2]Although the Swilleys also asserted a counterclaim pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, the Swilleys & Causey acknowledges that such claim is unripe until the Swilleys & Causey prevail on Barnhill's claims against them. *See* S.C. Code § 15-36-10(C)(1); Feb. Tr. R.45 p.445 Lines 9-14.

to date in this matter. *See* Mar. Order 2-4; Feb. Tr. 5:14-15, 8:19B9:2. Also most if all of the responses from Barnhill were incomplete, Barnhill has provided very little if any discovery to support his claims, The documents that have been provided do not support his claims but do support the answers and counterclaims of the defendants.

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 Swilleys nor Causey 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. Second, Attorney Fata misrepresented to the trial court that he had given proper notice of the hearing to the Swilleys and Causey. *See id.* Third, Attorney Fiedler made numerous misleading statements to the trial court as to the Swilleys, Causey and other Defendants,

and thereby falsely conveying that the Swilleys and Causey purposefully avoided discovery and court proceedings. *See* Feb. Tr. (R.45 p.449 lines 19-22 & p.450 lines 8-17); Neill Letter (R.50, p531-532) and at least with respect to Attorney Fiedler's misstatements, Attorney Neill unequivocally advised the trial court of same. *See* Neill Letter (R.50, p531-532)

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, I Heath Causey respectfully requests that this Court:

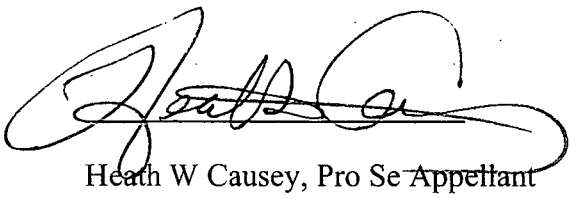
A. Reverse the trial court's order entered March 21, 2016, striking the Heath Causey pleadings and granting Barnhill summary judgment;

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

C. Remand the case for further proceedings; and

D. Grant Heath Causey any other and further relief the Court deems just and equitable including court filing fees.

Respectfully submitted,



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