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,

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SC Court of Appeals

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.

APPELLANT CAUSEY'S REPLY TO BRIEF OF RESPONDENTS

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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? Did Proper Service Occur?

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?

COUNTER STATEMENT OF ISSUES INCLUDED IN BARNHILL BRIEF

I. Did the Appellant properly preserve issues for Appeal?

II. Did the Court abuse its discretion hi striking Appellant's pleadings based on Appellant's repeated and well documented discovery obstruction?

STATEMENT OF THE CASE

Causey hereby restates and incorporates hereto by reference Causey's Statement of the Case from Appellant Causey's Initial Brief and Appellants Swilley Initial Brief in its entirety.

STATEMENT OF FACTS

This Appellant Causey hereby restates and incorporates hereto by reference my statement of facts from Appellants initial brief and Appellants Swilley Initial Brief in its entirety. The following additions are made to the original statement of facts as follows:

On April 6, 2016, Causey filed a Notice of Motion and Motiön to Set Aside Summary Judgment. Wherein it is noted Causey asserts that prior to the hearing of February 16, 2016: "He was never notified of the hearing." (APPELLANT CAUSEYS MOTION TO SET ASIDE, Par. 2)(R.36,p394).

The Motion was filed to set aside the entire judgment due to lack of proper service and the fact that these Appellants were under a protective stay. Despite Attorney Fata statement in open court that he mailed notice to all Defendants separately (FEB TRANSCRIPTS, Page 9, line.6)(R.45,p.444, line6), The Affidavit of Sally Huffman filed April 13, 2016, stands in marked contrast to the statement of Barnhill's Counsel wherein she only confirms service of the Notice of Hearing for the February 16, 2016 hearing to only the Company Defendants and Defendant Swilley(s) (ASSISTANT HUFFMANS AFFIDAVIT, p.2, numerical item 3.)(R.39, P402-403)(R.48, p.527-530 Item.3) but did not include in that same Affidavit service as to Causey. It should be further noted that the aforementioned Affidavit of Sally Human, that had been acknowledged by Notary of Attorney Nate Fata, which was filed on April 13, 2016 was not served to these defendants until May 13, 2016 some thirty (30) days after it had been filed of record giving no time of these defendants to file counter affidavit attesting to the contrary. Further it should also be noted that the Form 4 Order on the Hearing was filed April 26, 2016 (FORM 4)(R.18, p.18-20). One day after Attorney Fata Assistant Huffman resubmitted via email to his Honorable Judge McIntosh with the filed defendants pleading and Attorney

Fata's unfiled Memorandum in Reponses to Defendant's Motions with Exhibits. Interesting enough in this email , Lack of the Affidavit of Sally Huffman , this affidavit filed on April 13, 2016, the same Affidavit of Sally Huffman was not proffered to these defendants until after the Honorable Lower Court had ruled some 30 days after it was filed [ASSISTANT HUFFMANS EMAIL] [FATA LETTER] (R.39, P402-403)(R.48, p.527-530)

This Appellant case does hereby supplement those facts as follows. Respondent Barnhill filed his Initial Brief on October 31, 2016. The Appellant Causey filed his motion for extension for time to file his Reply Brief on November 11, 2016. This Appellant Causey filed his Reply Brief on December 13, 2016. On December 15, 2016 Attorney Fata sent a letter to this Appellant Causey questioning if 5 items if they were of record of the court. On December 21, 2016 This Appellant Causey sent Attorney Fata a letter requesting additional time to research this. On December 27, 2016 Attorney Fata file a motion to strike material not on record. January 4, 2017 Clerk Allen sent Attorney Fata notice of deficiency. On January 9, 2017 Attorney Fata sent his $25 check with correspondence to his honorable court without noticing any other party of the case. The aforementioned item just another example of his flagrant disregard for the rules of the court. If Attorney Fata and his office fails to adhered rules of service with this honorable court, then logically they did the same in the lower courts.

ARGUMENTS

This Appellant Causey hereby restates an incorporates hereto by reference my arguments from Appellants initial brief and Appellants Swilley Initial Brief in its entirety. The following additions are made to the original the Arguments as follows: (APPELLANT CAUSEY INITIAL BRIEF) (APPELLANT SWILLEY AMENDED INITIAL BRIEF)

I. BARNHILL FAILS TO ADDRESS CERTAIN ISSUES SET FORTH IN THE APPELLANTS INITIAL BRIEF THEREFORE IT IS DEEMED THAT THE RESPONDENT BARNHILL CONCURS WITH OUR POSITION AND HIS ARGUMENTS ARE ABANDONED

In his Initial Brief, Barnhill through Counsel fails to address the failure to advise the Honorable Court that a stay was in effect. Further he confirms the Appellants position when he notes that Attorney Lieter was relieved on January 25, 2016 (RESPONDENT INITIAL BRIEF, p. 9). If Attorney Leiter was relieved on January 25, 2016 then the Order granting the Appellants thirty days to obtain new counsel and placing the case in abeyance would have run until February 24, 2016 and the Hearing was in direct violation of the Court's own Order. Therefore the Hearing which resulted in the Order under appeal should never had been held thus making the Order invalid.

II. DID PROPER SERVICE OCCUR?

This Appellant Causey restates, affirms and incorporates by reference all assertions set forth in his initial Brief and the Swilley's Amended Initial Brief. (APPELLANT CAUSEY BRIEF) (APPELLANT SWILLEY BRIEF)

The Honorable Court's attention is drawn Attorney Fata was in Court when this Appellant Causey's Attorney was allowed to withdraw, that Attorney Fata was well aware of 30 day time granted Appellant Causey to get an attorney, as an attorney of record Attorney Fata has duty and obligation to be aware of all contents of the record and to proceed accordingly, that the fact Attorney Fata scheduled events prior to the 30 period shows he was not aware of time restraints or that he chose to avoid, also that Attorney Fata had knowledge or reason to know this

Appellant Causey was not represented by an attorney and should act accordingly. This conduct is at great disadvantage to this Appellant Causey which is magnified by lack of due and timely service of pleadings, correspondence, otherwise there could be indications of ex parte if the court involved and this Appellant Causey was not involved in or properly noticed.

"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).

As set out herein above in the Facts of the Case, the Affidavit of Sally Huffman confirms that Appellant Heath Causey did not receive proper notice of the Hearing at issue. As Barnhill's counsel, has correctly pointed out service pursuant Rule 5 is completed upon mailing all pleadings and papers (emphasis ours). In addition to failing to include Appellant Causey, the

Affidavit of Huffman fails to confirm that ALL paper which would include the exhibits was mailed to the defendants. In the instant case these defendants did not timely receive the notice, moreover the Affidavit of Huffman in failing to include Causey confirms that all parties were not served therefore it would be impossible for proper service to have occurred.

Barnhill Service chose to notice on Defendants on February 3, 2016 to insure compliance with rule 5.

> *Rule 5 (b)(l) Service ... upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address ... Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there be no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving a copy at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint.*

On April 13, 2016, Barnhill filed an Affidavit of Sally Huffman, confirming service of the Notice of Hearing for the February 16, 2016 hearing on Swilley and that no mail was returned undelivered. (ASSISTANT HUFFMANS AFFIDAVIT) (R.39, P402-403)(R.48, p.527-530). If we assume that Huffman's affidavit is true and correct and represents **all** the relevant facts of the case, then her decision to leave out a key fact, that she had also timely served Defendant Causey at his known address, we can only assume that was because it did not happen. That evidence alone should have cautioned the court and his Honorable Judge Mcintosh of an error and his honor should have allowed all parties an opportunity to present arguments.

As plead in Appellant Causey Motion to Set Aside, this Appellant Causey did not receive the Notice of Hearing until after the Hearing occurred not prior to as is required by Rule 5. (APPELLANT CAUSEYS MOTION TO SET ASIDE, p. 2)(R.36, p.394). If Notice is defective or improper then it is impossible for the Appellant to comply.

The Honorable Court's attention is drawn to the fact that the same Affidavit of Sally Huffman was delivered to this Appellant Causey and all other parties more than 30 days after it was presented to the lower court and ruled on. This is just another example of Barnhill and his counsel's continuing pattern of abuse of process and Ex Parte communication. (FATA LETTER)(R.51p.543)

Further, the Honorable Court's attention is drawn to Respondent Barnhill's Motion to Strike Swilley's Initial Brief and specifically the attached Exhibits A&B correspondence letter as well as this Appellant's' Response to that aforementioned Motion to Strike. (RESPONDENT BARNHILL'S MOTION TO STRIKE SWILLEY BRIEF) (APPELLANT CAUSEYS MOTION TO STRIKE RESPONSE) Appellant Causey draws his Honors attention to the fact that the Respondent Barnhill and Attorney Fata failed to serve Appellant Causey on the enclosed communications discussed within Exhibits A & B letters when Attorney Fata originally served these letters by mail to Attorney Adler. This is just another example of Barnhill and his attorney engaging in ex parte communications, Opposing Counsel is required to provide a copy to all parties to the case all communications between himself and another party of the case.

Further, the Honorable Court's attention is drawn that on page 11 of this Appellant Causey's Initial Brief Appellant Causey adopted and incorporated by reference the entire brief of the Swilley(s): (APPELLANT CAUSEY BRIEF p.11)

..."This Appellant [Causey] references the entire Brief of the Swilleys' and asserts the same arguments and assertions as his own unless specifically identified within this brief."... Therefore, it was incumbent upon the Respondent to include a copy of any and all correspondence including but not limited to communication by and between himself and the courts or other parties or their counsel. As set out herein, this has not occurred.

The Respondent has argued that this Appellant Causey knew or should have known the time and date of the scheduled hearing because Attorney Neill, who represented this Appellant Causey in another matter, and the Swilley's were noticed. This is tantamount to an admission that he failed to notice this Appellant Causey. Such assertion is buttressed by the Affidavit of Respondents own paralegal Ms, Huffman who fails to include this Appellant Causey in her affidavit and therefore confirms this Appellant Causey was not included. If this Appellant Causey by the Respondents own admission, was not included in the service it would have been impossible for proper service to have occurred pursuant Rule 5 and the Respondents argument fails based upon their own admission. This is echoed in the findings of the South Carolina Supreme Court wherein it frequently notes:

> "[p]rocedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Moore v. Moore. 376. S.C. 467, 657 S.E.2d 743(2008).

If the Respondent fails to comply with the rules of the Appellant Court it reasonably follows that he would fail to adhere to the rules of the lower courts if they prevented an impairment to him taking advantage of an unrepresented party. The fact that the Respondent has admitted that this Appellant Causey was not given proper notice confirms that his due process rights were violated by not allowing him to have his day in court and should result in the Order being set aside.

This Appellant Causey would further argue that Attorney Fata's pattern to not include this appellant on any service of process lists, that by doing so Attorney Fata left the Appellant Causey out of the picture and that Attorney Fata had as much of duty if not more to advise this Appellant Causey of the status of the case and what was going on because this Appellant was proceeding pro se ....the demonstrates conscious disregard for Civil Rule 5 which sets out

service of process....if Attorney Fata was up on the record he would know that no attorney had entered appearance on behalf of Defendant / Appellant Heath Causey so this appellant Causey as an individual had to be given proper notice individually and timely otherwise it looks like what it is ... Attorney Fata is trying to get around the rules and ignoring this Appellant Causey's position... Attorney Fata was in court, was aware counsel had withdrawn, was aware or should have been aware no one had entered an appearance on behalf of this Appellant Causey, therefore this Appellant Causey is entitled to same notice on all pleadings, correspondence, communications as any other party and all other due process. Barnhill's claims of un- timely filed arguments should carry little weight where there is a question of proper service and evidenced continued pattern of improper service abuse under Rule 5, further Barnhill should not be allowed to profit by denying this Appellant Causey 's opportunity to be heard in a meaningful way.

This Appellant Causey would further argue that the lower court aided in these patterns of improper service when the lower court only contacting Attorney Fata by sending him the Form 4 and not to the other parties, This Appellant Causey, including Attorney Neill and Attorney Adler who had filed a notice of appearance and should have been copied on all communication. This Appellant, Attorney's Neill & Adler were not, as atestified by their emails (ADLER EMAIL)(R.49,p.511-529), & (NEILL EMAIL MAY 17)(R.50p.531-542).

Attorney Fata filed his motion to strike on December 27, 2016 and neglected to enclose the required check in the amount of $25 for the filing fee. This appellant received this motion on December 29, 2016. On January 5, 2017, Clerk Allen notified Attorney Fata via an attached letter that he had failed to attached the required filing fee of $25 and therefore the filing was

deficient. Clerk Allen gave 10 days from that date to correct that filing error. January 9, 2017 Attorney Fata sent the $25 required filing fee see attached letter. Attorney Fata ignored the rules of this honorable court and intentionally did not copy this appellant on this filing as required by Rule 262(2). Appellant Causey was required to wait until that deficiency had been corrected to tender his response.

> **RULE** 262(2) **FILING AND SERVICE** (2) **.... "Any document** filed with the appellate court shall be accompanied by proof of service of such document on all parties." ...(emphasis ours)

With a pattern of these flagrant disregards for the rules by the Respondent, this Appellant Causey could not have been and was not given proper notice and confirms that his due process rights were violated by not allowing him to have his day in court and should result in the Order being set aside.

III. THE TRAIL COURT DID NOT PROPERLY CALCULATE THE THIRTY DAYS OF THE JANUARY ORDER.

This Appellant Causey restates, affirms and incorporates by reference all assertions set forth in his initial Brief and the Swilley's Amended Initial Brief. . (APPELLANT CAUSEY BRIEF) (APPELLANT SWILLEY BRIEF)

The Respondent has argued Attorney Leiter was relieved as counsel for this Appellant Causey by means of an Order [JANUARY ORDER] entered on January 25, 2016. It is well held that an Order becomes effective on the date it is clocked with the Clerk. In fact, this is set out in Rule 58(a) (SCRCP Rule 58(a)). Through his own admission that the Order was not entered until January 25, 2016 (Respondents Brief, p.9). The Trial Judge, His Honor Judge Seals,

ordered that the Appellants be given thirty days to obtain counsel from "the date of this Order", inter alia, to assure the parties were represented and to assure that they were not taken advantage of by opposing counsel while not being represented. The Order was entered on January 25, 2016 as admitted by the Respondent. The Respondent also admits that the Appellants were to have 30 days from the date of the Order. Rule 58(a) directs that the Order date is the entry date. Therefore the Appellants including this Appellant Causey, were under a protective order and the Hearing which resulted in the March Order was under appeal, was improper, and should not have been held. As a result the Appellants rights have been violated and the Entire March Order should be reversed.

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

In direct response to the Respondent, this Appellant Causey hereby restates and incorporates by reference the assertions stated in his Initial Brief and the Appellant Swilley's Initial Brief. (APPELLANT CAUSEY BRIEF) (APPELLANT SWILLEY BRIEF)

The Respondent argues that the lower court exercised sound discretion in striking this Appellant Causey 's Pleadings. However, it is well held that:

"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 Bamhill. The Respondent has stated in open court at the hearing that: "...I [Attorney Fata] know nothing about with no information,[Attorney Fata] have no depositions yet..." (FEB TRANSCRIPTS, p.8, In20)(R.45,p443 line 20). "...I [Attorney Fata] got two months to get ready for trial and I've got you know ....nothing..." (Id., p.17)(R.45,p.452 Line 2-4)

Attorney Fata therefore presented to the court "the topic" of all discovery and depositions. Attorney Fata's misstatements on the topic or matter of "discovery" and "depositions" were not correct, and the court ruled on "participation". "Participation" or lack thereof as alleged was the reason for the Summary Judgment and Order to Strike the pleadings. Therefore all "Participation" on the discovery process was presented to the court and it was ruled upon. Attorney Fata inaccurately stated there was no information and no depositions when in reality deposition and discovery "information" did in fact exist and was *"Voluminous"* by his own admissions in the Hearing on January 13, 2014 Page 7 Line 7. (R.46, p.476 Line 7), Attorney Leiter correcting Attorney Fata on Page 8 *Line 12*(R.46, p.477 Line 12-20), said discovery was *"Thousands of Pages"*. **Thousands of Pages of a response can't be Nothing!**

Rule 60(b)(3), SCRCP, provides:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud, misrepresentation, or other misconduct of an adverse party;

Rule 60(b)(3), SCRCP. (emphasis in original)

RELIEF PURSUANT TO FEDERAL RULE 60 (B) **(6)**

Rule 60 (b) (6) permits an independent action ...to set aside a judgment for fraud on the court. "Fraud on the Court" is a term of art with a stringent definition. It occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense.

Fraud upon the court is fraud which is directed to the judicial machinery itself and is not fraud between the parties of fraudulent documents, false statement or perjury... It is where the court or a member is corrupted or influenced or influence is attempted or where a judge has not performed his judicial function - - thus where the impartial function of the court have been directly corrupted." Bulloch v. United States. 763 F. 2d 1115. 1121 (10 Cir. 1985).

In this case fraud on the court occurred when the judicial machinery itself has been tainted, when the actions of Attorney Fata, who is an officer of the court, was involved in the perpetration of fraud by making material misrepresentations and misstatements to the court. This Fraud upon the court would make void the orders and judgments of that court.

Our Honorable Courts have consistently held that Summary Judgment is not appropriate if there are any triable issues:

> In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Cunningham v. Helping Hands. Inc., 352 S.C. 485, 575 S.E.2d 549 (2003); Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002); McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). If triable issues exist, those issues must go to the jury. Young v. South Carolina Dep't of Corr., 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

The parties on both sides had rescheduled depositions by agreement. Attorney Neill's letter reiterates this point:

> " ...Depositions was canceled in advance by agreement of plaintiffs attorney as a result of attorney John Leiter's Motion to be relieved . The Parties agreed that depositions would be rescheduled after the motion to be relieved was heard..."
> "... Mr [Attorney] Fata never re-noticed the depositions " ("NEILL LETTER"- Attorney Neill letter to Judge McIntosh, May 19, 2016.) (R.50,P.531-546)

This agreement is further confirmed by Attorney Fata in his letter to His Honorable Judge Seals of December 3, 2015 wherein he acknowledges that no depositions would occur until after the Motion to Relieve Attorney Leiter as counsel. (Attorney Fata Letter to His Honorable Judge

Seal, December 3, 2015)(R.50,p.538) "From my [Attorney Fata] conversations with Mr Leiter, no depositions will take place until Mr Leiter's [Attorney Leiter] motion is heard."

The decision to apply the Summary Judgment was not based upon triable issues but rather Attorney Fata's questionable comments to his Honorable Judge McIntire that we ,The Appellant Causey and Appellant Swilleys, refused to participate in discovery; were the main reason for all the Judgments as well as 809 Holdings Counsel Fiedler's misstatements (FEB TRANSCRIPTS)(R.45,p.436-469). The invalidity of Attorney Fielder's comments was confirmed in Attorney Neill's letter to His Honorable Judge McIntosh.

The misrepresentations of Attorney Feidler and inflammatory statements of Attorney Fata served to prejudiced the Appellants. The SC Supreme Court has held that "even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice." Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994).

The Honorable Court's attention is drawn to the fact that here have been multiple discovery documents and amendments to interrogatories tendered to the Respondent and said counsel. These are voluminous in nature and to many to add to the record on their own.

This Appellant Causey continues to describe Attorney Fata's scheme that the defendants produced no evidence, refused depositions, and thumbed their nose at the court. This Appellant uses the term scheme because most of the so called facts that Attorney Fata stated are not based in truth, but that of complete falsehood. Unfortunately, they are infinite in number so this Appellant will focus on the few of these accuracies that this Appellant Causey believes

materially influenced his Honor to completely ignore the defendants and all evidence they could have presented.

A person does not commit perjury unless the false testimony is given "willfully." S.C. Code Ann. § 16-9-10(2003)

"The subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud." Chewning v. Ford Motor Company, 354 S.C. at 82, 579 S.E.2d at 610. there was "a showing that one has acted with an intent to deceive or defraud the court." Chewning, 354 S.C. at 78, 579 S.E.2d at 608 ("it [is] essential that there be a showing of conscious wrongdoing – what can properly be characterized as a deliberate scheme to defraud - before relief from a final judgment is appropriate.").

We hold an act of perjury or concealment of a document coupled with an intentional scheme to defraud the court justifies the setting aside of a judgment pursuant to Rule 60(b) due to extrinsic fraud. See, e.g., Rozier v Ford Motor Co, 573 F.2d at 1338 ("In order to set aside a judgment or order because of fraud upon the court under Rule 60(b) . . . it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision.")

This Appellant Causey Draws the Honorable Courts attention to Transcripts of the Hearing on February 16, 2016 , Attorney Fata takes over the conversation of the Hearing (Transcripts of February 16, 2016 Hearing Page 4 Line 25)(R.45,p.439 Line 25).

" I [Attorney Fata] might be able to help" He then states the entire case giving his and only his version of the facts. (Page 4 Line 25) (R.45,p.439 Line 25). [Attorney Fata "This case is odd for me. After 20 years of practicing... "(Page 5 Line 5) (R.45,p.440 Line 5).

He was assuring His Honor of His creditability of a 20+ year practicing attorney, it was this creditability that His Honor relied on that Attorney Fata presented evidence would be true and correct and completely 100% factual.

Attorney Fata stated " I know nothing about with no information, I have no deposition yet". (Page 8 Line 21) (R.45,p.443 Line 521)

Attorney Fata's statements are not factually accurate. The record clearly shows that depositions, specifically this same depositions was referenced and referred to on the September 30, 2014 Hearing on Page 12, Line 3 and Page 8, Line 2. This was one of the same hearings that Attorney Fata referenced as receiving a sanction. So clearly there were depositions as they were referenced.

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Attorney Fata's statements are not factually accurate. The record clearly shows that depositions had already been taken. His Honors attention should further be drawn to the Deposition, specifically referenced and referred to on the September 30, 2014 Hearing on Page 12, Line 3 (R.47, p.496 Line 3) and Page 8, Line 2 (R.47, p.492 Line 2). This was one of the same hearings that Attorney Fata referenced as receiving a sanction. So had His Honor Judge Mclntosh read the transcripts he would have discovered this referenced Deposition, but he relied on Attorney Fata representations of the so called truth or the alternate reality that Attorney Fata created.

ATTORNEY FIELDER: It's my understanding ... that there was a supposed gentleman's agreement..." THE COURT: Is that true? ATTORNEY FATA: "No, your honor it was, I need some dates,..."(Page 15 Line 18) (R.45,p.450 Line 18)

The Honorable Courts attention should be drawn to the fact the parties on both sides had rescheduled depositions by agreement. Attorney Neill's letter reiterates this point:

" ...Depositions was canceled in advance by agreement of plaintiffs attorney as a result of attorney John Leiter's Motion to be relieved . The Parties agreed that depositions would be rescheduled after the motion to be relieved was heard..." "... Mr [Attorney] Fata never re-noticed the depositions " ("NEILL LETTER"-

Attorney Neill letter to His Honorable Judge McIntosh, May 19, 2016.) (R.50,P.531-546)

This agreement is further confirmed by Attorney Fata in his letter to His Honorable Judge Seals of December 3, 2015 wherein he acknowledges that no depositions would occur until after the Motion to Relieve Attorney Leiter as counsel. (Attorney Fata Letter to His Honorable Judge Seal, December 3, 2015) "From my [Attorney Fata] conversations with Mr Leiter, no depositions will take place until Mr Leiter's [Attorney Leiter] motion is heard."

This would support the fact that some agreement was present as Attorney Fata sent a letter to Honorable Judge Seals. So either the letter to the Honorable Judge Seals not true or was the Testimony to his Honorable Judge McIntosh was in error. If the Depositions were canceled by both Parties pending Defendants to obtain new council then how could the Defendants be in violation of the court and no sanction should have occurred?

THE COURT: and Mr Finer is one that you've also sought to have his deposition taken?

ATTONERY FATA: Yes.

THE COURT: But he doesn't participate in it?

ATTONERY FATA: Correct.

THE COURT: He gives an affidavit?

ATTONERY FATA: That's right, that's right, your honor.

[February 16, 2016 Transcripts Page 25 Line 5] (R.45,p.460 Line 18)

The Courts attention should be drawn to the fact this affidavit was presented in the 2012

case where 809 Holdings Etal v David Wilkinson & QC Financing LLC. (Later referred to on Page 26) (R.45,p.461) This letter was added to the list of evidence in this case and not because Attorney Fata requested a deposition. (Piner Affidavit) Yet this is another misstatement of facts entered by Attorney Fata.

> "THE COURT: If they're not going to participate, they obviously don't' have or retained other counsel or don't seem to want to participate in the action. I think it's appropriate." (February 16, 2016 Transcripts Page 12 Line 4) (R.45,p.447 Line 4)
>
> THE COURT: So essentially what I'm hearing is that the defendants won't cooperate in any form of fashion, although they've been ordered to. And at this juncture because they haven't cooperated, we're entitled no to have summary judgment issued against us; is that a fair statement in some sense of the word? (February 16, 2016 Transcripts Page 30 Line 15) (R.45,p.465 Line 15)

The court would only have that impression because of Attorney Fata mislead the court stating that the defendants produced nothing, and he had nothing to go on. That simply is not true the Defendants have *vehemently denied such and have produced extensive evidence to support their claim.* (NEILL LETTER"- Attorney Neill letter to His Honorable Judge McIntosh, May 19, 2016.) (R.50,P.531-546)

In the Hearing on January 13, 2014 Page 7 Line 7 even Attorney Fata used the term "Voluminous", Page 8 Line 12 of this same hearing "Thousands of Pages" was used when describing the amount of discovery and These Defendants filed answers and amended answers and therefore "not participating" would be an incorrect assessment, Attorney Fata would have know this, an attorney with 20 or 21 years experience, seams even Attorney Fata in the

transcripts was unsure of the actual number of years of his practice during his version of facts on the Hearing on February 16, 2016. (R.46, p.476 Line 7)(R.46, p.477 Line 12-20).

The case is ripe with triable issues that could not have been resolved absent additional discovery including depositions. This is confirmed by the evidence of record cited herein. Therefore the harsh sanction of summary judgment was not within the sound discretion of the lower court. As such the Order should be reversed and the case remanded for trial.

V. DID APPELLANTS PROFECT OUR RIGHT TO APPEAL AND DOES THE APPELLATE COURT HAVE THE RIGHT TO REVIEW?

[A]n order granting summary judgment, even a partial one, is appealable. Nauful v. Milligan, 258 S.C. 139, 187S.E.2d511 (1972).

A timely post-trial motion, including a motion to alter or amend the judgment stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion. See Rule 203(b)(l), SCACR; Rules 50(e), 52(c), Rule 59(e) and 59(f), SCRCP. a timely filed post-trail motion not only as a vehicle to request the trial court "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. A post-trail motion has long has been viewed as "motion for reconsideration" despite the absence of those words from the rule. Basically it was been interpreted to as equivalent to an Notice of Intent to Appeal and thus stayed the time for an appeal.

Barnhill assertions of un- timely filed arguments should carry little weight when there is a continued pattern of improper service abuse under Rule 5.

Under Rule 60(b)(3), SCRCP, & RELIEF PURSUANT TO FEDERAL RULE 60 (B)(6)

> Fraud upon the court is fraud which is directed to the judicial machinery itself and is not fraud between the parties of fraudulent documents, false statement or perjury... It is where the court or a member is corrupted or influenced or influence is attempted or where a judge has not performed his judicial function — thus where the impartial function of the court have been directly corrupted." Bulloch v. United States, 763 F. 2d 1115, 1121 (10th Cir. 1985).

In this case fraud on the court occurred when the judicial machinery itself has been tainted, when the actions of Attorney Fata, who is an officer of the court, was involved in the perpetration of fraud by making material misrepresentations and misstatements to the court. This Fraud upon the court would make void the orders and judgments of that court

The South Carolina Supreme Court has for years held that it has the discretion to review an entire order if the order contains an appealable issue. E.g., Tate v. Oxner, 236 S.C. 313, 114 S.E.2d 225 (1960); Woods v. Rock Hill Fertilizer Co., 102 S.C. 442, 86 S.E. 817 (1915).

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. It is clear the Attorney Fata did not portray accurate facts to the honorable court, that fact along with his pattern of improper service even in the appellant process clearly demonstrates that multiple errors have occurred with this case and if should be reversed.

WHEREFORE, This Appellant Heath Causey respectfully requests and prays that this Honorable Court:

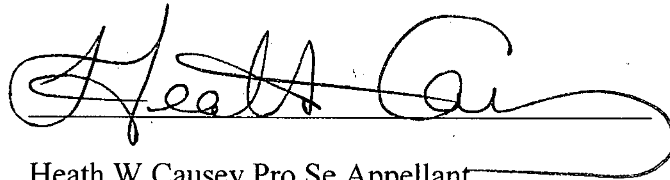
A. Reverse the trial court's order entered March 21, 2016, striking the Heath Causey pleadings and granting Barnhill summary judgment;

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

Respectfully submitted,



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