

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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R. Lawton McIntosh, Circuit Court Judge

NOV 13 2017

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

SC Court of Appeals

Appellate Case No. 2016-001328

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

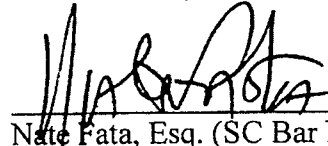
v.

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 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

FINAL 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

November 10, 2017

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 Heath Causey (“Causey”) of the March 22, 2016 Order. In that Order, the court struck Causey’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 Causey’s counterclaim.

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 (R. pp. 53-73).¹ Causey filed a Counterclaim which was denied by Barnhill. Barnhill Answer to Counterclaim (R. pp. 92-96). Causey 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 ordered 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 (R. pp. 352-354). Barnhill filed a motion to compel and also moved for summary judgment and judgment on the pleadings as to Causey’s counterclaim in December 2015. Barnhill December 2015 Motion To Compel (R. pp. 409-414) and Barnhill December 2015 Motion For Summary Judgment and

¹ As used herein S.R. means Supplemental to Amended Record on Appeal and S.S.R. means Second Supplemental to Amended Record on Appeal.

Judgment on Pleadings (R. pp. 355-356). Barnhill's December 2015 Motion to Compel's requested relief was to strike the pleadings of Causey and other defendants for failure to cooperate in discovery. Barnhill December 2015 Motion to Compel (R. pp. 409-414). Judge Seals heard Leiter's Motion to be relieved as counsel on January 4, 2016. Causey was not present. January 4, 2016 Hearing Transcript (R. pp. 429-434). 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 (R. pp. 29-31). 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 Causey's counterclaim for February 16, 2016. Barnhill mailed notice of the hearing to Causey on February 3, 2016. Notice of February 16, 2016 Hearing (R. pp. 367-371). Although counsel for 809 appeared at the February 16, 2016 hearing, Causey did not. February 16, 2016 Hearing Transcript (R. pp. 436-469). The court granted Barnhill's requested relief and entered an Order on March 22, 2016 (R. pp. 32-38). In particular, the court struck Causey's pleadings for discovery obstruction pursuant to Barnhill's Motion to Compel (R. pp. 32-38). In addition, the court granted summary judgment and judgment on the pleadings as to Causey's counterclaim (R. pp. 32-38). Causey then moved to set aside the summary judgment ruling in the March 22, 2016 Order on April 6, 2016. Causey Motion To Set Aside (R. pp. 343-394). The court denied Causey's Motion to Set Aside in its May 2016 Order. May 2016 Order (R. pp. 41-48). Causey then filed this appeal.

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 (R. pp. 53-54). Barnhill was 26-27 years of age at the time. Complaint, par. 8 (R. p. 53). Laurel Swilley, Floyd Swilley (collectively "Swilley") and William Piner established 809 in 2010. Complaint, par. 9-31 (R. pp. 54-55). 809 was a startup company that would loan money to companies in a "factoring" arrangement. Complaint, par. 50-53 (R. p. 57). The borrower company was QC Financing, LLC, a pawn shop entity established by Piner and Swilley. Complaint, par. 28-32 (R. p. 55). As alleged in the Complaint, Swilley and Piner took investor/client retirement monies to fund their own startup businesses. Complaint, 50-55 (R. p. 57). 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 (R. pp. 137-149; R. pp. 16-17).

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 (R. pp. 58-59, 304). 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 (R. p. 295). 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 (R. p. 295). Swilley has been involved with other investment schemes. Barnhill Memorandum filed April 20, 2015 (R. pp. 295). 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 \$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 (R. pp. 306-325).

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 (R. pp. 97-98). The court relieved Adler as counsel under Order filed December 11, 2013. December 11, 2013 Order (R. pp. 2-4). John Leiter ("Leiter") entered an appearance for defendants on January 13, 2014. Leiter Appearance (R. p. 114).

In their attempts to ferret out this complex Ponzi scheme, Barnhill served discovery requests upon the defendants. Causey and the other defendants did not comply with the discovery rules or orders. Barnhill filed seven motions to compel discovery.² Furthermore, Plaintiffs filed four (4) Motions for Sanctions for Defendants' failure to comply with court orders and discovery: November 4, 2013 (R. pp. 99-101), February 19, 2014 (R. pp. 115-131) on June 27, 2014 (R. pp. 132-133), and June 8, 2015. (R. pp. 404-409).

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 (R. p. 001). When defendants failed to provide responsive information and, instead, lodged objections, Barnhill filed a motion for

² 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. pp. 75-91; R. pp. 112-113; R. pp. 151-160; R. pp. 161-175; R. pp. 269-292; R. pp. 335-349; R. pp. 410-415).

sanctions on November 4, 2013. November 2013 Motion for Sanctions (S. R. pp. 8-15). The court partially granted Plaintiffs' Motion for Sanctions and Judge Culbertson awarded attorney fees by Order filed January 16, 2014. January 16, 2014 Order (R. pp. 5-6).

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 (R. pp. 7-12; R. pp. 180-268). 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."³ October 15, 2014 Order, p. 4 (R. p. 10).

Defendants disclosed the following 809 investors in their Court ordered response to Interrogatory Number 9 of the Plaintiffs' Interrogatories dated April 29, 2013⁴:

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

³ 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. Barnhill September 2014 Memorandum in Support of June 27, 2014 Motion for Sanctions (R. p. 34).

⁴ Floyd Swilley's purported loan is not referenced.

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 (R. pp. 8-9).

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 (R. p. 9). 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 (R. p. 10). Judge Hyman ordered defendants to produce the requested information and ordered defendants to pay Plaintiffs' attorney fees of \$2,700. October 15, 2014 Order (R. pp. 11-12).

Defendants created another Ponzi vehicle, Secured Asset Factoring Exchange ("SAFE"), in late 2011. 2014 Derivative Amended Complaint (R. pp. 137-149). 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 (R. p. 5). 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 (R. pp. 7-12); 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 (R. p. 331). Out of his \$115,000 investment, Barnhill received less than \$3,000. Complaint, par. 93 (R. p. 62).

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, three deposition notices for Heath Causey were attached (R. pp. 269-270; R. pp. 271-290). That Motion evidences Causey was served with Deposition Notices on June 24, 2014, August 4, 2014, and September 4, 2014, but Causey would not and did not appear for depositions. Barnhill October 20, 2014 Motion to Compel (R. pp. 269-270). 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 (R. pp. 18-20).

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 (R. pp. 335-337). On June 12, 2015 Barnhill again moved for sanctions based on Defendants' failure to provide discovery responses. June 2015 Motion for Sanctions (R. pp. 404-408). 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 (R. pp. 23-26).

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 (R. p. 353). On November 24, 2015, deposition notices were served on Causey and Swilley. Barnhill December 15, 2015 Motion to Compel (R. pp. 410-411).

The depositions did not occur. On December 15, 2015 Barnhill filed the Motion to Compel. December 15, 2015 Motion to Compel (R. pp. 410-414). In his motion, Barnhill specifically requested that the court strike the answer and counterclaim of Causey and the other defendants. Barnhill December 15, 2015 Motion to Compel (R. p. 411). The December 2015 Motion to Compel was served on Leiter, counsel for Causey. Barnhill December 15, 2015 Motion to Compel, Certificate of Service (R. pp. 410-414).

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 (R. pp. 355-356; S.S.R. pp. 3-7). 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 (R. pp. 357-366).

On January 4, 2016, Judge Seals held a hearing and granted Leiter's request to be relieved as counsel because Causey 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 (R. pp. 27-28). Causey was not present at the hearing. January 2016 Hearing Transcript (R. pp. 429-433). On January 5, 2016 Leiter transmitted an Order to Judge Seals for signature. Causey was copied on the Leiter transmittal to the court. January 5, 2016 Leiter letter to Court (R. pp. 547-550). On January 14, 2016, Judge Seals dated the Order and signed it. January 2016 Order (R. p. 31). On January 21, 2016 Leiter transmitted the Order to the Clerk of Court for filing with notice to Heath

Causey. January 21, 2016 Leiter letter (R. p. 551). The Order was entered on January 25, 2016. January 2016 Order (R. p. 29).

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 Causey. February 3, 2016 Notice of Hearing (R. pp. 367-371).

On February 16, 2016 Barnhill's counsel and 809's counsel attended the hearing. Causey was not present. February 16, 2016 Transcript of Hearing (R. pp. 436-469). The court granted the relief requested by Barnhill in its Order filed March 21, 2016. March 2016 Order (R. pp. 32-38). In its Order the Court ruled that all parties had been duly notified of the hearing. March 2016 Order, p. 2 (R. p. 33). No objections to the hearing were lodged at any time prior to April 2016.

On April 6, 2016, Causey filed a Motion to Set Aside the March 2016 Order on summary judgment on his counterclaim. April 6, 2016 Causey Motion to Set Aside (R. pp. 393-394). To support his Motion to Set Aside the Summary Judgment on his Counterclaim, Causey asserted only the following grounds:

(1) He was never notified of the hearing. Causey Motion To Set Aside, Par. 2 (R. p. 394).

(2) He was notified of the hearing the day of the hearing after the hearing had been held. Causey Motion To Set Aside, Par. 3 (R. p. 394).

Causey specifically asked for an order setting aside summary judgment. Causey Motion, Par. 3 (R. p. 394). Causey did not request relief from any ruling on his pleadings being stricken for his failure to cooperate in discovery.

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. April 2016 Huffman Affidavit (R. pp. 525-530). On April 19, 2016, more than two months after the February 16, 2016 hearing, Adler, former counsel for Causey 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 1, 2016 Notice of Bankruptcy Filings (R. pp. 397-400).

On May 2, 2016, a Form 4 was entered by Judge McIntosh denying Causey's Motion to Set Aside the Order of March 21, 2016. May 2016 Form 4 (R. p. 39). On May 25, 2016, the Order denying Swilley, Causey and 809's Motion to Set Aside Order of March 21, 2016 was entered. May 2016 Order (R. pp. 41-48). 809 remains in default as it never appealed the ruling of the lower court striking its answer and counterclaim for discovery obstruction. Causey then filed his Notice of Appeal on June 24, 2016.

ARGUMENT

I. Causey Did Not Preserve For Appeal The Court's Determination That His Pleadings Be Stricken For Failure To Cooperate In Discovery.

The lower court's March 21, 2016 Order addressed two Barnhill motions: Barnhill's Motion to Compel and Barnhill's Motion for Judgment on the Pleadings and Summary Judgment on Causey's Counterclaim under the Frivolous Proceedings Act.

March 2016 Order (R. pp. 32-38). In his Rule 59 and 60 Motion, Causey appealed only the ruling on the Plaintiffs' Motion for Summary Judgment and Judgment on the Pleadings as to Causey's Counterclaim. April 6, 2016 Causey Motion To Set Aside (R. p. 394). Causey did not preserve for appeal the lower court ruling against him based on Barnhill's Motion to Compel. Causey's failure to cooperate in discovery was the basis for the court's striking Causey's pleadings. March 2016 Order, p. 3-4 (R. pp. 34-35).

In the Order denying Causey's motion for reconsideration, the lower court noted that Causey failed to address the Court's rulings on the Barnhill December 2015 Motion to Compel. May 2016 Order, p. 4 (R. p. 44). Thus, Causey has not preserved for appeal the lower court's rulings on the Motion to Compel, which were the basis for striking Causey's pleadings.

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, 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).

Causey did not raise any argument at the February 16, 2016 hearing or in his Motion To Set Aside Summary Judgment on the Court's ruling that his pleadings be stricken for his failure to cooperate in discovery pursuant to Barnhill's December 2015 Motion to Compel. Furthermore, in his Brief to this Court, Causey only refers to Barnhill's December 2015 Motion for Summary Judgment and does not mention Barnhill's December 2015 Motion to Compel. Causey has failed to preserve for appeal the court's ruling to strike his pleading for repeated discovery abuse pursuant to Barnhill's Motion to Compel. The Court's May 2016 Reconsideration Order addressed the failure by Causey to address or raise any issue with the Court striking his pleadings pursuant to Barnhill's Motion to Compel. May 2016 Order (R. p. 44). That decision of the lower court is the law of the case. *Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996) (where a decision is based on more than one ground, the appellate court will affirm unless the Appellant appeals all grounds because the unappealed ground will become law of the case).

Similarly, Causey never set forth any grounds in his motion that the court should have stayed the hearing. In fact, Causey's only argument in his Motion to Set Aside was

a notice argument on Barnhill's December 2015 Motion for Summary Judgment: that he received the Notice of Hearing the day of the hearing in connection with Barnhill's Motion for Summary Judgment (R. p. 394). Thus, Causey failed to preserve for appeal any argument involving any stay of the action and the hearing date.

II. The Court Exercised Sound Discretion In Striking Causey'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) SCRPC 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 depositions had been taken despite multiple deposition notices and motions to compel. Causey's own admission in his Brief to this Court that very little discovery had been done- after nearly three years and 11 motions on discovery issues-confirms his delay tactics.

In his brief, Causey admits the essence of the case which gave rise to the court striking Causey's pleadings under the Plaintiffs' discovery motion. "As repeatedly brought up in this case, there has been virtually no discovery to date in this matter." Causey Brief, p. 17. The record reflects seven (7) motions to compel filed against defendants including Causey, four (4) motions for sanctions filed and four Orders granting sanctions/fees. The court did not abuse its discretion in striking Causey's

pleadings for failure to cooperate in discovery. Four notices of deposition were served on Causey. Barnhill October 20, 2014 Motion to Compel with Causey Deposition Notices; Barnhill December 2015 Motion to Compel (R. pp. 269-291; R. pp. 410-414). Causey never appeared for deposition or offered to appear for a deposition. March 2016 Order, p. 3-4 (R. pp. 34-35). Causey cites no evidence in his Brief to support his conclusory argument. 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).

III. The Court Did Not Abuse Its Discretion In Denying Causey's Motion To Set Aside, Because Causey Was Served With The Notice Of Hearing And Barnhill's December 2015 Pleadings Were Served On Causey's Counsel.

Causey moved to set aside summary judgment that was entered against him pursuant to Rule 55(c) and 60(b). In support of his Motion, Causey asserts he was never notified of the hearing but then avers he was notified. Causey Motion to Set Aside, p. 2 (R. p. 394). The lower court, with Causey's conflicting assertions, and with thirteen days between Barnhill's mailing of the Notice of Hearing to Causey and the hearing date, concluded Causey was duly notified. March 2016 Order (R. p. 44). Causey did not set forth any other grounds for relief in his motion to set aside. Causey did not assert the thirty day period stayed the action beyond the February 16, 2016 hearing date. Causey has waived that argument.

Causey was properly served with Barnhill's December 2015 Motion to Compel and Motion for Summary Judgment and Judgment on the Pleadings. Plaintiffs' served Causey's counsel, Leiter, in December 2015 with those two Motions. Barnhill December 2015 Motion to Compel and Motion for Summary Judgment including Certificates of

Service (R. pp. 410-414; R. pp. 355-356; S.S.R. 3-7). Plaintiffs served Causey with notice of the February 16, 2016 hearing on February 3, 2016. Notice of Hearing (R. pp. 367-371). Furthermore, at the time any hearing was set by the Clerk of Court, Causey's counsel, Leiter, would be responsible for providing notice to Causey. Plaintiffs' counsel provided additional notice of the February 16, 2016 hearing.

Contrary to Causey's arguments on page 9 of his brief, Plaintiffs' were under no obligation to serve again a previously filed and served motion with the Notice of Hearing upon Causey. Causey cites no procedural rule requiring redundant service of a written motion on a party. No court order required such redundant service. Causey'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 Causey under Order filed on December 11, 2013, Causey was ordered by the court to advise the Clerk of his address. December 11, 2013 Order (R. pp. 2-4). Nowhere in the record did Causey ever notify the Court of his address when he was not represented by counsel. Any lack of hearing notice from the clerk argument by Causey is without basis and would be due to Causey's failure to comply with the court's prior order. Interestingly, Causey asserts in his Motion to Set Aside that Adler was notified of the hearing. Causey Motion to Set Aside, Par. 1 (R. p. 394).

Causey does not cite any matter in the record which indicates his counsel up to January 25, 2016 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 Causey's contention that he was unaware of the hearing until after it occurred. And the court was within its sound discretion to reject Causey's bare assertions that he received the Notice of Hearing a few hours late. Everyone else, Swilley included, knew of the hearing. February 16, 2016 Hearing Transcript p. 15, lines 9-17 (R. p. 450, lines 9-17). 809's counsel was present at the hearing, and Causey worked with Swilley in 809. In its March 22, 2016 Order, the court noted Neill, whose firm represented 809 at the hearing, was representing Causey and others in the Twigg case. March 22, 2016 Order, p. 3, ftnt. 2 (R. p. 34, ftnt. 2).

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. 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. The lower court is not obligated to accept Causey's bare, contradictory statements as true or as a valid reason to set aside its Order when:

1. Service of the Notice of Hearing was effective on February 3, 2016 pursuant to SCRCp, Rule 5;
2. Causey filed no affidavits attesting that neither he nor his counsel had notice of the hearing;

3. Causey was previously ordered to notify the court of his address but he did not;
4. Causey's prior counsel, Leiter, was not relieved until January 25, 2016;
5. Causey did not attend the February 16, 2016 hearing or file any papers objecting to the hearing before April, 2016;
6. Causey never obtained new counsel, so he suffered no prejudice;
7. The record reflects Causey has not complied with and has ignored multiple court orders; and
8. Neill, Causey's counsel in a related case, *Twigg vs. 809 et al*, received notice of the hearing and his firm attended the hearing.

Furthermore, Causey's assertions in his Initial Brief conflict with assertions made to the trial court. In his Motion to Set Aside the Summary Judgment, Causey asserts he "received said notice the day of the hearing, [February 16, 2016] after the hearing had been heard." Causey's Notice of Motion To Set Aside Summary Judgment, Par. 3 (R. p. 394). In his Initial Brief, p. 3, Causey now argues that he received the notice on February 17, 2016, the day after the hearing. The trial court was well within its discretion to reject Causey's bare, contradicting notice arguments. Causey has not met his burden in proving the lower court abused its discretion.

IV. 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 Causey'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. Once the order is filed, it is effective. But nothing requires time parameters within the 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 (S.C. Ct. App. 1991).

The order relieving Leiter as counsel was prepared by Causey'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 (R. pp. 29-31). 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 language used by the court refutes Causey's argument. There is no dispute that the date of the Order 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 (R. p. 31).

The lower court gave an extra ten days from the court's ruling from bench on January 4, 2016 for Causey 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 (R. p. 31). Under Causey's flawed logic, there would be no reason for a judge to ever date an order if time parameters within the order are to run 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 of the Order. In this instance, the Judge Seals chose to give Causey 30 days from the date of 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 Causey to obtain new counsel. January 4, 2016 Hearing Transcript, p. 4-5 (R. pp. 429-433). 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 Causey. To hold otherwise would be to disregard the intent of the court.

The *Bowman v. Richland Memorial Hospital*, 335 S.C. 88, 92, 515 S.E.2d 259, 261 (Ct. App 1999) case cited by Causey is inapplicable and is not persuasive. In *Bowman*, the court weighed the equity of a ten day period running when both parties were unaware of which order the judge signed until after the Order 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.*

In the instant case, equitable factors clearly rebut Causey's argument. Causey never obtained new counsel so he suffered no prejudice. After Causey failed to appear at

the January 4, 2016 hearing, Causey was notified of the court's ruling from the bench on January 5, 2016. Leiter January 5, 2016 letter with Order (R. pp. 547-550). Causey's counsel, Leiter, was duly notified on January 4, 2016. Causey was served a copy of the unsigned Order on January 5, 2016. Nothing in SCRCR requires service of the filed Order. See *Rosen v. Hiller*, 307 S.C. 331, 415 S.E.2d 117, 118 (Ct. App 1992). Causey received the Notice of Hearing. And, Causey did not appear at the February 16, 2016 hearing to lodge any objection to preserve his argument.

V. Summary Judgment Was Not Granted As A Sanction.

The court exercised sound discretion when it struck Causey's pleadings for failure to cooperate in discovery. March 2016 Order (R. pp. 32-35). In his brief, on page 12, Causey erroneously argues the court granted summary judgment as a sanction against Causey. The court struck Causey's pleadings due to the well documented discovery abuse and delay of Causey. March 2016 Order (R. p. 35). Judge Hyman previously held Causey was sandbagging in his discovery responses. October 2014 Order (R. p. 10). In the Court's May 2015 Order, Causey was required to cooperate with depositions (R. p. 19). He did not. In December 2015, after two and a half years of litigation, Causey did not appear for deposition for the fourth time. October 20, 2014 Barnhill Motion to Compel with Causey deposition notices; December 2015 Motion to Compel (R. pp. 269-293; R. pp. 410-414). Causey cites nothing in the record where he ever offered to appear for a deposition, when he was represented by counsel or as a *pro se* litigant. The court noted this fact. March 22, 2016 Order, pp.3-4 (R. pp. 34-35). The court was well within its discretion to conclude that after nearly three years of litigation, Causey's pleadings should be stricken for failure to cooperate in discovery. The eleven discovery based

motions filed by Barnhill and four court orders on discovery clearly support the court's well-reasoned decision.

VI. The Court Properly Granted Summary Judgment Against Causey On His One Counterclaim Under The Frivolous Proceeding Act.

Causey's sole counterclaim was under the Frivolous Proceeding Act. March 2016 Order; May 2015 Order (R. p. 36; R. p. 19). Summary judgment was properly entered, as no evidence was submitted by Causey at the February 2016 Hearing. Moreover, Causey admits in his Brief on page 16 that even his counterclaim was not ripe. Finally, and as an additional basis for affirming the lower court's Order, Causey's counterclaim was stricken pursuant to the March 22, 2016 Order on Barnhill's Motion to Compel. Those grounds have not been appealed.

VII. Causey's Extrinsic Fraud Arguments Fail Because He Has Not Preserved Them For Appeal And They Are Baseless.

Causey's arguments of extrinsic fraud fail, because he did not present them to the lower court and they are baseless. Causey did not set forth any extrinsic fraud arguments in his Motion To Set Aside, which was filed more than six weeks after the hearing. Causey 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 (S.C. 2007).

Substantively, Causey's arguments on page 18 of his Brief are that (1) Causey 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.

As to Causey's first argument, Causey received Notice of the Hearing, as admitted by Causey. He was served the Notice on February 3, 2016. Service is effective upon mailing, not receipt. Rule 5, SCRCP. December 2015 Motion to Compel; December 2015 Motion for Summary Judgment and Judgment on the Pleadings (R. p. 410-414; R. pp. 355-356; S.S.R. pp. 3-7). The December 2015 motions were served on Causey's counsel. Causey cites no procedural rule requiring redundant service of the pleadings. Causey was properly notified of the hearing, but chose not to attend.

Causey'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. More importantly, Causey asserts this argument only as to the Swilleys, and not to himself. Thus, Causey has not argued that Fata misrepresented proper notice as to Causey. Causey's argument for the Swilleys is wholly irrelevant to Causey.

Finally, Causey asserts that Mark Neill's office, who is also his 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 consistent with defendants' documented delay and discovery obstruction 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 (R. pp. 397-398). Causey could have presented his arguments at the hearing as did 809. The result would have been the same. Causey had no reasonable explanation as to why he did not appear for deposition the fourth time, after multiple discovery motions and orders. Causey did not rely on any person in failing to appear at

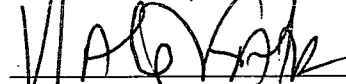
the February 16, 2016 hearing. Causey cannot argue extrinsic fraud or that he was induced not to appear at the hearing when his lawyer drafted the January 2016 Order and Causey's only contention is that he did not see the notice of the hearing until the day of or the day after the hearing about the hearing.

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. SCRCF, Rule 60(b)(3), *Gainey v. Gainey*, 382 S.C. 414, 675 S.E.2d 792. (S.C. 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. 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. Causey ignored the February 2016 hearing. He was duly notified and has relied on no one. Causey's belated extrinsic fraud arguments fail.

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

RECEIVED

NOV 13 2017

SC Court of Appeals

Gabriel Barnhill & GSB Enterprises LLC Respondents

v.

J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K. Swilley, SMG Partners, LLC, SMS Services, LP, William C. Piner, WCP Limited, LLC, 809 Holdings, LP, QC Financing, LLC, Heath Causey, and Sage Financial Group, LLC, J. Floyd Swilley SMG Partners, LLC, Alicia A. Piner, Heath Causey, Sage Advisory Group, L.P., Sage Private Equity Group, Secured Asset Factoring Exchange, Inc., SAFE, Inc., Digics, LLC, 9-1-1, Plumbing, LLC, and Sage Funding, L.P., Christopher Pitcock, Defendants,

Of Whom J. Floyd Swilley and Laurel K. Swilley and Heath Wendell Causey are the Appellants

RESPONDENTS' DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Respondents propose the following to be included in the Record on Appeal:

I. Pleadings

1. Plaintiffs' Complaint, filed April 25, 2013;
2. Plaintiffs' Notice of Motion and Motion to Compel Discovery, filed July 3, 2013;
3. Plaintiffs' Answer to Counterclaim, filed August 5, 2013;

4. Consent Order, dated September 17, 2013 filed September 20, 2013;
5. Defense Counsel's Motion to Withdraw, dated October 28, 2013;
6. Plaintiffs' Notice of Motion and Motion for Sanctions for Defendants Failure to Comply With Discovery Order, filed November 4, 2013;
7. Order Granting Defense Counsel's Motion to Withdraw, dated December 9, 2013 filed December 11, 2013;
8. Plaintiffs' Notice of Motion and Motion to Compel Response to Supplemental Interrogatories to Defendants, filed January 10, 2014;
9. Notice of Appearance by John Leiter filed January 13, 2016;
10. Form 4 Order, dated January 13, 2014 filed January 16, 2014;
11. Plaintiffs' Notice of Motion and Motion for Sanctions for Defendants' Failure to Comply With Discovery Orders, filed February 19, 2014;
12. Plaintiffs' Notice of Motion and Motion for Sanctions As to Defendants, filed June 27, 2014;
13. Plaintiffs' Notice of Motion and Motion for Judgment On The Pleadings and/or To Dismiss Counterclaims, filed July 14, 2014;
14. Amended Complaint (Derivative Action) filed August 28, 2014;
15. Plaintiffs' Notice of Motion and Motion to Compel Discovery, filed September 5, 2014;
16. Plaintiffs' Notice of Motion and Motion to Compel Discovery, filed September 5, 2014;
17. Plaintiffs' Memorandum in Support of Their Motion For Sanctions As to Defendants, filed September 30, 2014 with Exhibits;
18. Order Granting Sanctions Against Defendants, dated October 9, 2014 filed October 15, 2014;
19. Plaintiffs' Notice of Motion and Motion to Compel Depositions, filed October 20, 2014;

20. Plaintiffs' Memorandum in Support of Motions To Be Heard on April 20, 2015, filed April 20, 2015 with Exhibits;
21. Plaintiffs' Notice of Motion and Motion To Consolidate, filed April 27, 2015;
22. Consent Order Consolidating Cases, dated April 20, 2015 filed April 27, 2015;
23. Plaintiffs' Notice of Motion and Motion to Compel Discovery, filed May 15, 2015;
24. Order dated, May 15, 2015 filed May 22, 2015;
25. Plaintiffs' Notice of Motion and Motion for Sanctions, filed June 12, 2015;
26. Order, dated September 3, 2015 filed September 10, 2015;
27. Motion to Be Relieved as Counsel for J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K. Swilley, SMG Partners, LLC, SMS Services, LP, William C. Pincer, WCP Limited, LLC, Alicia A. Piner, 809 Holdings, LP, Heath Causey, Sage Financial Group, LLC, Sage Private Equity Group, Secured Asset Factoring Exchange, Inc., Digics, Inc., Sage Funding, L.P. and Christopher Pitcock, dated October 21, 2015;
28. Plaintiffs' Notice of Motion and Motion to Compel Depositions of Defendants, filed December 15, 2015;
29. Plaintiffs' Notice of Motion for Summary Judgment and for Judgment on the Pleadings, filed December 21, 2015;
30. Plaintiffs' Memorandum in Support of Their Motion for Judgment on the Pleadings and/or Summary Judgment, filed December 21, 2015 with Exhibits;
31. Form 4 Order, January 4, 2016 filed January 4, 2016;
32. Order Relieving John M. Leiter and the Law Office of John M. Leiter, PA as Counsel for J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K. Swilley, SMG Partners, LLC, SMS Services, LP, William C. Pincer, WCP Limited, LLC, Alicia A. Piner, Heath Causey, Sage Funding, L.P., Sage Financial Group, LLC, Sage Private Equity Group, Secured

Asset Factoring Exchange, Inc., Digics, Inc., and Christopher Pitcock,
dated January 14, 2016 filed January 25, 2016;

33. Plaintiffs' Notice of Hearing served February 3, 2016, filed February 9, 2016;
34. Order, dated March 16, 2016, filed March 21, 2016;
35. Affidavit of Sally J. Huffman, filed April 13, 2016;
36. Notice of Adler Appearance, dated April 19, 2016;
37. Plaintiffs' Notice of Hearing, filed April 21, 2016;
38. Laurel Swilley's Motion to Set Aside Summary Judgment, filed April 1, 2016;
39. J. Floyd Swilley's Motion to Set Aside Summary Judgment, filed April 1, 2016;
40. Notice of Bankruptcy Filings, filed April 25, 2016;
41. Form 4 Order, dated April 28, 2016 filed May 2, 2016;
42. Certificate of Service for Notice of Bankruptcy Filings, filed May 16, 2016;
43. Certificate of Service for Affidavit of Sally J. Huffman, filed May 16, 2016;
44. Order Denying Defendants Swilley, Causey and 809 Holdings' Motion to Set Aside Order of March 21, 2016, dated May 17, 2016, filed May 25, 2016;

II. Transcripts

- a. Transcript of Hearing, January 4, 2016;
- b. Transcript of Hearing, February 16, 2016;

III. Other

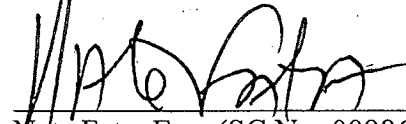
1. Order filed April 7, 2003 by U.S. Bankruptcy Judge Waites In Re: John F. Swilley, 02-09234-W, Adv. Pro. No. 02-80347-W., Bankr. Ct. (D.S.C. 2003);

2. Transmittal letter from John M. Leiter, dated January 5, 2016, with Order;
and
3. Transmittal letter from the office of John M. Leiter, P.A., dated January 21,
2016, with Order.

I certify that this designation contains no matter which is irrelevant to this appeal.

November 10, 2017

NATE FATA, P.A.

A handwritten signature in black ink, appearing to read "Nate Fata", written over a horizontal line.

Nate Fata, Esq. (SC No. 009866)

Nate Fata, P.A.

Post Office Box 16620

Surfside Beach, SC 29587

843-238-2676

Attorney for Respondents

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

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

Case No. 2014-CP-26-8367
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Appellate Case No. 2016-001328

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

v.

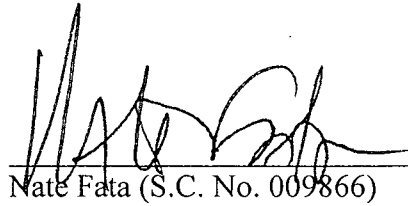
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Of Whom J. Floyd Swilley and Laurel K. Swilley and Heath Wendell Causey
are the Appellants

CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondents certifies that the Final Brief of Respondents
complies with Rule 211(b), SCACR.

November 10, 2017

A handwritten signature in black ink, appearing to read "Nate Fata", is written over a horizontal line.

Nate Fata (S.C. No. 009866)

Nate Fata, P.A.

Post Office Box 16620

Surfside Beach, SC 29587

(843) 238-2676

Attorney for Respondents