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Aug 18 2021

SC Court of Appeals

**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-26-08367
(Formerly 2013-CP-26-02816)**

**Appellate Case No. 2016-001328 (cons)
2016-001377**

Gabriel Barnhill and GSB Enterprises LLC.....Respondents,

v.

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

Of Whom Heath Causey, PRO Se..... Appellant.

**APPELLANTS HEATH CAUSEY PETITION
FOR REHEARING**

Pursuant to Rule 221(a), SCACR, Appellant Heath Causey ("Causey") hereby petitions the Court for rehearing of its Opinion filed August 4, 2021.

The Appellant adopts and incorporates the Petition filed herein by the Appellant Laurel Swilley and John Swilley("Swilleys") in its entirety:

In its Opinion, the Court affirmed the trial court's (1) March 21, 2016 Order (the "March

Order”) striking the Swilleys’ pleadings as a sanction for discovery violations and granting summary judgment to Respondents Gabriel Barnhill and GSB Enterprises, LLC (collectively, “Barnhill”), on the Swilleys’ counterclaims, and (2) May 25, 2016 Order (the “May Order”) denying the Swilleys’ separate motions to set aside the March Order. The grounds for this Petition are that the Court misapprehended the law in ruling that unrepresented parties are required to appear pro se at a hearing held unlawfully, while the case is in abeyance pursuant to the order of a predecessor judge allowing them time to obtain substitute counsel, to preserve their arguments as to the unlawfulness of the proceeding and on the merits. In support of this Petition, the Causey submits the incorporated memorandum with citation of authorities.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

INTRODUCTION AND BACKGROUND

The relevant timeline for purposes of this Petition is as follows: On October 27, 2015, John M. Leiter filed a motion to be relieved as counsel for the Swilleys, among others. (R. pp. 352-354.) In December 2015, Barnhill filed (1) a motion to compel seeking to strike Causey & Swilleys’ pleadings as a discovery sanction, and (2) a motion for summary judgment and for judgment on the pleadings as to the Causey & Swilleys’ counterclaims. (R. pp. 409-414; S.S.R. pp. 3-7.)

On January 4, 2016, the trial court, Judge William H. Seals Jr. presiding, heard Mr. Leiter’s motion to be relieved as counsel. (R. p. 29.) On January 14, 2016, Judge Seals signed the Order (the “January Order”) granting Mr. Leiter’s motion and relieving him as counsel for Causey & the Swilleys. (R. p. 31.) The January Order stated, in relevant part, that the Causey “shall obtain new legal counsel to represent them in this matter within thirty (30) days from the date of this Order. The proceedings in this case will be held in abeyance for thirty (30) days from the date of this

Order.”(R. p. 30.) Judge Seals’s January Order was entered on January 25, 2016. (R. p. 29)

Despite Judge Seals’s January Order holding the case in abeyance for 30 days, the trial court violated its own Order by scheduling a hearing before Judge R. Lawton McIntosh on February 16, 2016. (R. pp. 436-469.) Barnhill’s counsel likewise violated the January Order in various ways, including by mailing notice of the unlawful hearing to Causey, who was then without counsel. (R. pp. 367-371.) On February 16, 2016, Judge McIntosh conducted the hearing, which Causey and the Swilleys, who were still unrepresented, did not attend. (R. p. 436.) While “catch[ing Judge McIntosh] up with the background” of the case (R. p. 440, lines 2-3), Barnhill’s counsel told Judge McIntosh that Judge Seals said “I’ll give the Defendants 30 days to get new counsel.” (R. p. 444, lines 1-2.) That was only after counsel for one of the other Defendants, 809 Holdings, LP, who was the only other person in attendance, had mistakenly informed Judge McIntosh that Judge Seals had “signed an order relieving [Mr. Leiter as counsel] on the 14th of January, giving them 13 days to find new counsel.” (R. p. 439, lines 8-10.) Neither attorney informed Judge McIntosh of when the January Order was entered or that Judge Seals had also ordered the proceedings in this case to be held in abeyance for 30 days.

On March 21, 2016, the trial court entered Judge McIntosh’s March Order granting both of Barnhill’s motions, including striking Causey & the Swilleys’ pleadings and dismissing their counterclaims with prejudice. (R. pp. 32-38.) On April 1, 2016, the Swilleys filed separate motions to set aside the March Order for various reasons, including that they had not actually received the mailed notice of the February 16, 2016 hearing. (R. pp. 415-420, 423-424.) Causey filed a Motion to set aside (R. pp. 393-396) Causey’s motion for a hearing similarly arguing that he had not notice of the hear prior to it occurring. On May 25, 2016, the trial court entered Judge

McIntosh's May Order denying Causey & the Swilleys' motions to set aside the March Order, which led to this appeal. (R. pp. 41-48)

ARGUMENT AND CITATIONS OF AUTHORITIES

THE COURT MISAPPREHENDED THE LAW IN RULING THAT UNREPRESENTED PARTIES MUST APPEAR PRO SE AT A HEARING HELD UNLAWFULLY, WHILE THE CASE IS IN ABEYANCE, TO PRESERVE THEIR ARGUMENTS AS TO THE UNLAWFULNESS OF THE PROCEEDING AND ON THE MERITS

On appeal, Causey & the Swilleys argued, among other things, that the 30-day stay effected by Judge Seals's January Order, which was entered on January 25, 2016, encompassed the February 16, 2016 hearing and thereby rendered both the hearing and the March Order based on the hearing unlawful. (*See* Appellants' Final Br. pp. 4-7 (citing, among other authorities, *Dukes & Dukes, Inc. v. Hygrade Food Prod. Corp.*, 236 S.C. 69, 113 S.E.2d 254 (1960).) In rejecting this argument in its Opinion, the Court did not refute or even address the Swilleys' authorities on this issue. Instead, the Court held only that the Swilleys had failed to preserve the issue by failing to "appear at the February hearing and make this argument," even though they had both raised this argument in their motions to set aside the March Order. (Slip Op. p. 3.) Causey made a similar argument on XXXXX. The Court also rejected another of Causey and the Swilleys' arguments on appeal, that the trial court had committed reversible error by granting summary judgment as a sanction (*See* Appellants' Final Br. pp. 11-13), for the same reason, that is, that Causey and the Swilleys, having "received [constructive] notice of the February hearing, should have appeared at the hearing to make this argument in a timely manner" to preserve the issue for appeal (Slip Op. p. 5). Thus, the Court's ruling is that unrepresented parties with constructive notice of a hearing set and held in violation of a court order must appear pro se at the unlawful hearing to argue both (1) that the hearing was

unlawful, and (2) the merits of the matter being unlawfully heard, to preserve their right to appeal the unlawfulness of the hearing and a subsequent order on the merits based on that unlawful hearing. With all due respect, that is neither the law nor should be the law.

To begin, once entered, a court's unappealed order becomes "the law of the case and [is] binding upon the court and the litigants alike." *Dukes & Dukes*, 236 S.C. at 75, 113 S.E.2d at 256; *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."); *Bowman v. Richland Mem'l Hosp.*, 335 S.C. 88, 91, 515 S.E.2d 259, 260 (Ct. App. 1999) ("An order is not final until it is written and entered by the clerk of court.")

This is especially true where, as here, an unappealed order entered by one judge becomes the law of the case and is thus binding on, and may not be set aside by, a second judge in the same case. *See Dukes & Dukes*, 236 S.C. at 74, 113 S.E.2d at 256 (1960) ("It is well settled that one circuit judge cannot set aside or modify the orders of another," which orders become the law of the case if the first judge's orders are not appealed (quoting *Georgian Co. v. Britton*, 141 S.C. 136, 139 S.E. 217, 219 (1927))); *see also Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) ("One Circuit Court Judge does not have the authority to set aside the order of another.") In that event, the second judge's order "must be set aside." *Cook v. Taylor*, 272 S.C. 536, 538, 252 S.E.2d 923, 924 (1979). That was the relief sought by the Swilleys in their motions to set aside Judge McIntosh's March Order, which followed from his erroneous decision to hold the February 16, 2016 hearing in violation of Judge Seals's January Order holding the case in abeyance for 30 days.

Despite the settled law in South Carolina that Judge McIntosh's decision to hold the February 16, 2016 hearing and entry of the March Order based on the hearing were unlawful and

had to be set aside, the Court affirmed Judge McIntosh's refusal to grant such relief to the Swilleys because they should have appeared pro se at the unlawful hearing to contest its unlawfulness and to argue the merits while they were at it. (Slip Op. pp. 3, 5.) The Court's circular reasoning puts Causey & the Swilleys, and other similarly situated unrepresented parties, in an untenable position. Judge Seals ordered the 30-day abeyance because Causey & the Swilleys were unrepresented after he granted Mr. Leiter's motion to be relieved as their counsel, thereby giving them time to obtain substitute counsel without having to participate in any proceedings during those 30 days. *See Santee CooperResort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989) (a stay or abeyance is a "stopping"); *Blackwell v. Fulgum*, 375 S.C. 337, 345, 652 S.E.2d 427, 431 (Ct. App. 2007) ("[T]he very definition of 'abeyance' is that of 'temporary inactivity' or 'suspension.'" (quoting *Black's Law Dictionary* 4 (7th ed. 1999))). Contrary to the abeyance ordered by JudgeSeals, Judge McIntosh nonetheless held the February hearing during the 30-day stoppage. And this Court now holds that Causey and the Swilleys had to appear pro se at the hearing, despite the 30-day stoppage, to contest that an unlawful hearing was being held and even to argue the merits even though they were still unrepresented and the abeyance had been ordered for the purpose of allowing them to obtain substitute counsel. This is the sort of procedural Catch-22 that courts normally avoid at all costs. *See, e.g., Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2167 (2019) (overruling state-litigation requirement in just-compensation cases because it placed takingsplaintiffs in Catch-22). Indeed, the Court's ruling actually creates a perverse incentive for parties opposing temporarily unrepresented parties to deliberately schedule proceedings while a case is held in abeyance to permit the unrepresented parties to obtain substitute counsel, knowing that theunrepresented parties would have to appear pro se to defend themselves in the unlawful proceedings to preserve their right to appeal on the merits and otherwise. But that obviously defeats

the purpose of the stay, and it rewards opposing parties' inequitable conduct, which is exactly what happened here.

Further In Bowman, the Court expounded as follows:

“Based upon the aforementioned case law, the final and effective date of the trial judge's order was the date the order was entered by the clerk of court on September 23, 1996, not when the order was signed. The order was not binding on the parties until it was delivered to the clerk of court for filing. Thus, we find the appellants had ten days from the date the order was entered by the clerk of court to amend their complaint before the Hospital could be dismissed from the action based upon noncompliance with the order. In this case, appellants filed and served the amended complaint on October 2, which was within ten days of the date of the order. Thus, the trial judge erred in holding that appellants failed to amend their complaint within the time frame specified in the order.

Our holding is further mandated by principles of fairness and equity. The parties to an action are not provided [***7] with notice of a judge's ruling at the time the judge signs an order. Rather, only after the order is filed with the clerk of court are the parties given notice of the order and provided with an opportunity to comply with the order. In this case, both parties submitted proposed orders and they were unaware of which order the judge signed until after the order was filed with the clerk of court. Thus, appellants lacked knowledge that the ten-day time period had begun to run until after the order was filed. By holding that the appellants were bound from the date the order was signed, the circuit court judge left appellants with only six days to accomplish what the order stated they had ten days to do. Additionally, had the judge waited ten days or more to file the order, the appellants would have been placed in a situation which rendered it impossible

to comply with the mandates of the order.” *Bowman v Richland Memorial Hospital*, 335 S.C. 88, Court of Appeals, March 15, 1999.

Where the instant matters differs from Bowman is that Mr. Fata submitted self serving orders embellishing them to the Court which the other parties had not had a chance to review or challenge. The March 21, 2016 Order of the Court was prepared by Fata and submitted to the Court. On its face the Order it is filled with multiple self serving supposed facts. On April 28, 2016 Judge Macintosh signed a Form 4 denying Defendants’ Swilley, Causey and 809 Holdings’ Motion to Set Aside Order of March 21, 2016 Nate Fata to prepare a formal order with no copy distributed to the Appellants. These motions were scheduled for hearing on May 25, 2016. Unbeknownst to the Appellants from April 28, 2016 . Thus April 28, 2016 to May 17, 2016 attorney Fata was preparing the Order and delivered and signed by Judge Macintosh on May 23, 2016 and filed at the clerk’s office on May 25, 2016. Please bear in mind that attorney Fata was the only one aware the denied ruling and while he preparing his self serving order and we the appellants were preparing for hearing. Counsel Neil for 809 was informing the court of his 809 counsel of lack of candor misrepresentation to the court.

Other actions of Mr. Fata during the time the court order abeyance included”

- a. Notice of hearing*
- b. Motion*
- c. 60 days from filing Summary Judgment was during the abeyance*
- d. 2/16/2016 hearing*
- e. Order prepared and no copy sent to appellants or counsel*

f. Motion for Attorney Fees

Which he filed on the day the opposing parties were under the impression a hearing on their Motion would be held. The Motion filed expounds on in correct legal standards which were obviously meant to serve Mr. Fata's ends not the Courts.

It might be argued that the rule should be different as to Laurel Swilley, who is a lawyer (J. Floyd Swilley nor Heath Causey is not). That should not matter. The old adage that a party who acts as his or her own lawyer has a fool for a client applies equally to parties who also happen to be attorneys. *See State v. Owens*, 124 S.C. 220, 117 S.E. 536, 537 (1922); *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 289, 543 S.E.2d 563, 568 (Ct. App. 2001), *cert. denied* (Oct. 25, 2001).

In any event, whether or not the Causey and Swilley had notice of the hearing, they could not have been expected to appear pro se at a hearing, held unlawfully while this case was in abeyance because they were without counsel, to argue that the hearing was unlawful and to argue the merits of Barnhill's motions. The Court should rehear and reconsider its rulings that Causey failed to preserve various issues for appeal by not appearing pro se at the February 16, 2016 hearing.

¹This is where counsel for Barnhill and 809 Holdings, LP, went awry in failing to inform Judge McIntosh of the 30-day abeyance ordered by Judge Seals. *Cf. Dunlap v. Bd. of Prof'l Resp. of Sup. Ct. of Tenn.*, 595 S.W.3d 593, 607-08 (Tenn. 2020) (the failure to disclose material information to a tribunal is the equivalent of an affirmative misrepresentation under Rule 3.3(a)(1); attorney violated Tennessee's version of Rule 3.3(a)(1) by failing to disclose a stay entered in a related proceeding in another court).

CONCLUSION

For the foregoing reasons, the Court should grant this Petition and rehear its Opinion.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Heath Causey", is written over a horizontal line.

Heath Causey, Pro Se

Appellant

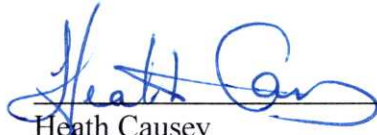
8/18/2019

CERTIFICATE OF SERVICE

I hereby certify that I have served on this date the individuals named below with the foregoing Appellants' Petition for Rehearing by causing copies to be sent via first-class United States Mail, postage prepaid, as follows:

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August 18, 2021

Heath Causey
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Pro Se

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Aug 18 2021

SC Court of Appeals

Jenny Abbott Kitchings
Clerk of Court
1220 Senate Street
Columbia, SC 29201

Re: Appellants Heath Causey Petition for Rehearing

Dear, Ms Kitchings,

Please find attached the referenced motion. Per my phone call on 8/18/2021 at 11:15 am. I am sending the \$50 filing fee via US Mail and filing the motion via email to ctappfilings@sccourts.org.

Sincerely



Heath Causey