THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion No. 2021-UP-288 (S.C. Ct. App. filed Aug. 4, 2021)

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 LC, and Sage Financial Group LLC, ... Defendants.

Of whom J. Floyd Swilley, Laurel K. Swilley and Heath Causey are the .....Petitioners.

AMENDED PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

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AMENDED[1] PETITION FOR A WRIT OF CERTIORARI[2]

Petitioners J. Floyd Swilley, Laurel K. Swilley and Heath Causey submit this Petition for Writ of Certiorari pursuant to Rule 242, SCACR, seeking this Court's Writ to review and vacate the proceedings before the Court of Appeals.

Since Petitioners obtained new counsel for this proceeding, this Court granted Petitioners' request for an extension of time to submit this Petition following Petitioners' request. This Court issued its order granting an extension of time to submit this Petition until October 25, 2021.

[1] Heath Causey was inadvertently omitted as a Petitioner.

[2] Or alternate relief

CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 8, 2021. An order extending the time for submitting this Petition was granted by order dated October 6, 2021.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in failing to address Petitioner's argument that a second circuit court judge could conduct a hearing in violation a prior order which held the proceedings in abeyance for thirty (30) days?

2. Did the Court of Appeals err in holding that the Petitioners had failed to preserve their arguments by not appearing pro se at a hearing for which they had no notice and which was held in violation of the abeyance order?

STATEMENT OF THE CASE

These two actions were consolidated by consent order of Circuit Court Judge Steven H. John dated April 20, 2015. (ROA pp. 16-17). The issues surround a business dispute arising from a failed business enterprise. (ROA p. 24).

The parties had numerous disputes regarding discovery and a number of orders were issued addressing those issues. (ROA pp. 18-20; pp. 23-26). By motion filed October 27, 2015, attorney John M. Leiter moved to be relieved as counsel for Petitioners and others. (ROA pp. 352-354). The order was granted by order filed January 25, 2016. (ROA pp. 29-31). In granting Leiter's motion to be relieved, Judge Seals further provided:

> The Defendants 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. . .

(Order dated January 25, 2016, ROA pp. 29-31) (emphasis added). The order is reflected on the Clerk of Court's electronic docket. (**Exhibit A**, p. 3). The docket reflects mailing of the order relieving counsel on January 26, 2016. *Id.*

Despite the order to hold the proceedings in abeyance for 30 days, opposing counsel made three (3) filings immediately.

Plaintiff's Notice of Hearing:	Filed February 9, 2016
Plaintiff's Affidavit for Attorney Fees:	Filed February 16 2016
Motion to Strike:	Filed February 16, 2016

The record reflects a hearing was held on February 17, 2016 before Circuit Court Judge McIntosh. Petitioners did not appear. The trial judge at that hearing, Judge McIntosh, heard Respondent's Motion to Compel and a Motion for Sanctions and Summary Judgment and ruled on them verbally at that time. (Tr. pp. 436-446). Those motions had been filed prior to the order holding proceedings in abeyance, filed January 25, 2016. The conundrum presented is that Respondent's counsel attempted to provide notice of a hearing and to attend a hearing, at which he obtained substantive rulings, when the entire proceeding was held in abeyance at the time

Counsel for one of the Defendants advised Judge McIntosh that Petitioner's counsel had been relieved by order "14th of January, giving them 13[3] days to find new counsel." (Tr. p. 439, lines 5-12). While the order relieving John Leiter as counsel was signed on January 14th, it was

[3] It is impossible to know whether this is a typographical error in the transcript, but Petitioners assume it was, because later in the hearing the correct period of abeyance was stated as "30 days." (ROA p. 444, lines 1-3).

not filed nor served until January 25th, 2016. Opposing counsel did advise Judge McIntosh that the Petitioners had been given 30 days "to get new counsel." (ROA p. 444, lines 1-3).

Judge McIntosh did not reference the stay which had been granted by Judge Seals, and instead granted the motions filed by opposing counsel, noting "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 this action." (ROA p. 447, lines 4-6).

Opposing counsel stated: "I'm sure Mr. Leiter notified them of the upcoming hearing." (ROA p. 444, lines 10-11). Another counsel who had recently appeared in the action for a corporate defendant said that he was new to the action, but he stated that "Mr. Swilley. . . [is a] representative that corporation. And they are the gentlemen that we have been in touch with per 809. They were notified of this hearing." (ROA p. 450, lines 9-12). However, no mention was made of the stayed proceedings.

Judge McIntosh stated, based on statements of counsel "what I'm hearing is that the Defendants won't cooperate in any form or fashion, although they've been ordered to. And at this juncture because they haven't cooperated, we're entitled not to have summary judgment issued against us; is that a fair statement in some sense of the word?" (Tr. p. 465, lines 15-20). Nothing was said about the case being held in abeyance. In actuality, the hearing was taking place during the period of the abeyance.

Judge McIntosh concluded "My prior order striking the pleadings on the Defendants that you asked for is granted." (ROA p. 466, lines 11-12). Judge McIntosh issued an order that was filed on March 21, 2016. (ROA p. 32-38). The order states "[a]lthough the pro se defendants were duly notified of the hearing by plaintiff's counsel via hearing Notice filed on February 9,

2026, they were not present at the call of the case." That Notice of Hearing is included in the Clerk's docket. **Exhibit A.**

During the hearing, there was no discussion about the effect of Judge Seals which stayed the proceedings for thirty (30) days following the filing of the order dated January 14, 2016 or served on January 25, 2016.

The record contains a Notice of Hearing dated February 3, 2016, filed on February 9, 2012. The Notice of Hearing filed February 9, 2016, is accompanied by a "Certificate of Service" reflecting service on the *pro se* defendants at what appears to be a home address via United States mail. (ROA p. 367). There does not appear to be any evidence that this Notice was discussed at the February 16, 2016 hearing, although a reference to it appears in the signed order. Additionally, this notice seems to contradict opposing counsel's statement at the hearing that he assumed the counsel for Petitioners who had recently been relieved had probably told his clients about the date of the hearing.

ARGUMENT

1. The Court of Appeals erred in failing to address Petitioner's argument that a second circuit court judge could conduct a hearing in violation of a prior order which held the proceedings in abeyance for thirty (30) days.

2. The Court of Appeals erred in holding that the Petitioners had failed to preserve their arguments by not appearing pro se at a hearing for which they had no notice, and which was held in violation of the abeyance order.

In their Appellants' Brief on Appeal (filed August 18, 2017), Petitioners argued, error by the circuit court in failing to reverse the trial court's order based on the February 16, 2016 hearing having been held during a period of abeyance issued by Judge Seals. (Appellants' Brief pp. 4-7). The Court of Appeals failed to address this issue, concluding it was not preserved.

In its unpublished opinion, the Court of Appeals failed to address this issue other than by asserting that the Petitioners' absence at the February 16, 2016 still required them to object at the hearing and in order preserve the issue for further review. The Court of Appeals reasoned "[Petitioners] did not appear at the February hearing and make this argument," so the Court of Appeals conclusion is that a hearing held without notice to the parties that the hearing will occur constitutes a waiver of any objection other than subject matter jurisdiction. This conclusion turns the argument on its head, because Petitioners were not at a hearing that (1) they didn't have notice of and (2) was held despite an order prohibiting it from being held.

The Court of Appeals' analysis is complicated by its ruling, which concluded in part, that service of notice of the hearing to the Petitioner's prior counsel is sufficient notice to them. However, the record is clear that no notice to Petitioner's prior counsel was made. Respondents relied on their own notice of hearing, which indicates it was sent to Petitioners "last known address" and was <u>not</u> served on their former counsel.

However, the affidavit of Respondent's counsel's paralegal that she served Petitioners at their "last known address" did not establish that was, indeed, their last known address nor was sit proper notice to Petitioners. (ROA p. 526-527). The paralegal's affidavit merely states that she mailed several items to 629 Hemlock Avenue, Myrtle Beach, South Carolina 29577" and none of the United States mail had been returned. *Id.* Nothing in the record prior to that time established that as Petitioners' correct address.

A review of the Record on Appeal reflects two (2) letters from Petitioner's prior counsel that were copied to them by their prior counsel but neither establishes the address recited in the Paralegal as the proper address for Petitioners. (ROA p. 547 and p. 551).

While Petitioners' own Motion for Set Aside order on April 1, 2016 lists 629 Hemlock Avenue, Myrtle Beach as Petitioner's address, there was nothing in the clerk's files *prior to February 9, 2016* that verified this was Petitioners' address. The evidence on rehearing contained attestations from Petitioner Floyd Swilley that they had **not** received timely Notice of hearing for the February 16, 2016 hearing. (ROA 424, ¶ 2). "The Movant did not receive a copy of the motion or timely notice of the hearing that resulted in the Order. "

The Court of Appeals' conclusion invites opposing counsel not to notify opposing parties that a hearing is scheduled, because short of a subject matter jurisdiction issue, no relief can be granted on appeal absent a contemporaneous objection by the parties who did not receive notice of the hearing at which a contemporaneous objection was required.

The Court of Appeals properly noted that Petitioners raised this issue in their motion to alter or amend, but disposes of it on a failure-to-preserve basis because Petitioners were not at a hearing that was not supposed to be taking place.

Nothing in the record establishes that the February 9, 2016 hearing was sent to Petitioners at the correct address. Subsequent use of that address by a subsequent filing by Petitioners is not sufficient to retroactively establish that was the correct address at the time the Notice of Hearing was sent, especially in light of a signed statement from Petitioner Floyd Swilley that they "did not receive timely notice" of the hearing that resulted in the order.

It is respectfully asserted that service in February, 2016 is not notice that the address for Petitioners was the correct address at that time. In light of the attestation of Floyd Swilley that he did not receive timely notice of the hearing, it was error for the Court of Appeals to presume

service had been accomplished on Petitioners and to therefore burden with them an obligation to appear and object at a hearing that was not supposed to be taking place.

It is respectfully submitted that, even if Petitioners had received timely notice of the November 16, 2016 hearing, they were certainly entitled to rely upon an order filed January 25, 2016 that they were protected for 30 days while they found new counsel. A contemporaneous objection should not be required when a party has protection from court proceedings for thirty days and the order granting the protection is of record.

It certainly appears Judge McIntosh did not appreciate the significance of the order of Judge Seals giving Petitioners a thirty-day stay of all proceedings to find new counsel. It also appears that the Court of Appeals erred in requiring a contemporaneous objection when the proceedings were stayed.

One of the grounds expressly stated for a consideration by this Court for granting certiorari is where the decision of the Court of Appeals is in conflict with prior decisions of this Court. Rule 242(b)3), SCACR. Petitioners wish to call to this Court's attention the unusual circumstances present her at the trial court, where Petitioners were without counsel at the time motion which is the subject of this appeal was filed and served. There is no evidence that petitioners received notice of the hearing at which the order on appeal was issued, but more importantly, the case was stayed. The Court of Appeals refused to address this issue on the basis that Petitioners did not object to the hearing proceeding and assert the issue of failure of notice to the trial court. However, Since Petitioners were not aware of the hearing, they were not present at the hearing and could not raise the issue of failure of notice.

Additionally, This petition raises the issue of whether one circuit court judge can ignore an order or overrule an order issued by a different circuit court judge in the same matter. This is most definitely an issue that this Court ha addressed repeatedly, and even though the Court of Appeals' order is unpublished, Petitioners have been denied the application of the rule, nonetheless. *Tisdale v. American Life Insurance Co*., 216 S.C. 10, 56 S.E.2d 580 (1950); *Dickens v. Robbins*, 203 S.C. 199, 26 S.E.2d 689 (1943).

CONCLUSION

For the reasons stated, Petitioners ask the Court to grant this petition for a writ of certiorari, so the issues presented here can be explored more fully. Alternatively, Petitioners ask that the case be remanded to the Court of Appeals with instructions to vacate the decision and grant oral argument.

Respectfully submitted,

s/ Desa Ballard
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October 26, 2021