

RECEIVED

Nov 23 2021

S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion Op.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

Supreme Court Case No. 2021 001124

Gabriel Barnhill and GSB Enterprises, LLCRespondents.

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, Defendants,

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

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI
AND AMENDED PETITION FOR WRIT OF CERTIORARI

Nate Fata, Esquire (SC Bar No. 009866)
Nata Fata, P.A.
Post Office Box 16620
Surfside Beach, SC 29587
843-238-2676
Telephone 843-238-2676
Facsimile 843-238-0240
nfata@fatalaw.com
Attorney for Respondents

OTHER COUNSEL OF RECORD:
Desa Ballard, Esq. (S.C. Bar No. 498)
Harvey M. Watson, III, Esq. (S.C. Bar No. 74053)
226 State Street
West Columbia, South Carolina 29169
desab@desaballard.com
harvey@desaballard.com
Attorneys for Petitioners

INDEX

	<u>PAGE</u>
Index	2
Table of Authorities	3
Counter Statement of Questions Presented	4
Counter Statement of the Case	4
Argument	6
(1) Should the Amended Petition for Writ of Certiorari filed on October 26, 2021, by Petitioners J. Floyd Swilley, Laurel K. Swilley, (hereinafter collectively referred to as “Swilley”) and Heath Causey be dismissed in its entirety for untimely filing?	6
(2) Should Petitioner Causey be dismissed and/or stricken as a Petitioner for failure to file a Petition for Writ of Certiorari within the time permitted by Rule 242, SCACR?	8
(3) Should the Petition for Writ of Certiorari and the Amended Petition for Writ of Certiorari be denied because the issues do not warrant the extraordinary relief of a writ of certiorari?	9
(4) Should the document attached as Exhibit “A” to both the Petition for Writ of Certiorari filed on October 25, 2021, and the Amended Petition for Writ of Certiorari filed on October 26, 2021, be stricken because it was not part of the Record on Appeal, was not previously considered at any point, and cannot be added at this time?	14
Conclusion	15

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Goodson v. American Bankers Ins. Co. of Florida</u> , 295 S.C. 400, 368 S.E.2d 687 (1988)	15
<u>Herron v. Century BMW</u> , 395 S.C. 461, 719 S.E.2d 640 (2011)	15
<u>Hollman v. Woolfson</u> , 384 S.C. 571, 683 S.E.2d 495 (2009)	11
<u>Jacoby v. South Carolina State Bd. of Naturopathic Examiners</u> , 219 S.C. 66, 64 S.E.2d 138 (1951)	11
<u>Landry v. Landry</u> , 430 S.C. 153, 843 S.E.2d 491 (2020)	15
<u>Rowe v. City of West Columbia</u> , 334 S.C. 400, 513 S.E.2d 379, (1999)	9
<u>Wyse v. Wolfe</u> , 129 S.C. 499, 123 S.E. 818 (1924)	11
 <u>STATUTES</u>	
Rule 240, SCACR	7, 8
Rule 242, SCACR	4, 8-10
 <u>SECONDARY SOURCES</u>	
14 C.J.S. <u>Certiorari</u> § 6 (1991)	9
S.C. Ct. App. Administrative Order dated July 16, 2014	7
 <u>OTHER</u>	
Barnhill v. Swilley, Op. No. 2021-UP-288 (S.C. Ct.App. filed August 4, 2021)	5, 14
Brief for Appellants J. Floyd Swilley and Laurel K. Swilley	13

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Should the Amended Petition for Writ of Certiorari filed on October 26, 2021, by Petitioners J. Floyd Swilley, Laurel K. Swilley, (hereinafter collectively referred to as “Swilley”) and Heath Causey be dismissed in its entirety for untimely filing?

Suggested Answer: IN THE AFFIRMATIVE.

2. Should Petitioner Causey be dismissed and/or stricken as a Petitioner for failure to file a Petition for Writ of Certiorari within the time permitted by Rule 242, SCACR?

Suggested Answer: IN THE AFFIRMATIVE.

3. Should the Petition for Writ of Certiorari and the Amended Petition for Writ of Certiorari be denied because the issues do not warrant the extraordinary relief of a writ of certiorari?

Suggested Answer: IN THE AFFIRMATIVE.

4. Should the document attached as Exhibit “A” to both the Petition for Writ of Certiorari filed on October 25, 2021, and the Amended Petition for Writ of Certiorari filed on October 26, 2021, be stricken because it was not part of the Record on Appeal, was not previously considered at any point, and cannot be added at this time?

Suggested Answer: IN THE AFFIRMATIVE.

COUNTER STATEMENT OF THE CASE

The Court of Appeals affirmed the trial court’s decision to strike Petitioners’ pleadings as a sanction for discovery violations, grant summary judgment to Respondents on Petitioners’ counterclaims, and deny Petitioners’ motion to set aside the sanctions and summary judgment.

(Barnhill v. Swilley, Op. No. 2021-UP-288, S.C. Ct. App., filed August 4, 2021).

This case was brought by Respondents against their accountant and financial advisor, Petitioner J. Floyd Swilley, alleging that Respondents were the victims of a Ponzi scheme and other fraudulent acts engaged in by Petitioners. Respondents raised causes of action, *inter alia*, for fraud, misrepresentation, breach of fiduciary duty, unfair trade practices and violations of the South Carolina Investment Act. (ROA 53-73).

After several years of litigation and a multitude of discovery and other motions, the trial court granted Respondents' motion to strike Petitioners' pleadings and for summary judgment on Petitioners' counterclaims pursuant to a hearing held on February 16, 2016, (hereinafter "hearing"). (ROA 32-38). In the context of its decisions, the lower court noted that "[Petitioners] have failed to comply with multiple Court Orders on discovery and have and continue to obstruct the discovery process," (ROA 33), and have engaged in "two years of discovery abuse." (ROA 35).

Petitioners filed a motion to set aside the trial court's decisions on a number of grounds, two of which are relevant to the instant Petition and Amended Petition for Writ of Certiorari, namely: (1) that the hearing was improperly held during a time of "abeyance" pursuant to a previous order of court, and (2) that Petitioners did not attend the hearing because they did not have notice. (ROA 415-419). In denying Petitioners' motion, the trial court made specific findings that the court ordered abeyance had expired prior to the hearing and was not in effect on the date of the hearing, and that Petitioners had received notice of the hearing and chose not to attend. (ROA 41-46).

The Court of Appeals affirmed the trial court on August 4, 2021, and denied rehearing on September 8, 2021.

On October 5, 2021, three days before expiration of their time to file a Petition for Writ of Certiorari, Petitioners J. Floyd Swilley and Laurel K. Swilley, filed a “Motion for Extension of Time to File Petition for a Writ of Certiorari.” Petitioner Causey was not a party to this motion. By order dated October 6, 2021, this court granted the motion and extended the time for Petitioners Swilley to file and serve their Petition for Writ of Certiorari until October 25, 2021.

On October 25, 2021, the last day of the extended time period, Petitioners filed a Petition for Writ of Certiorari. On October 26, 2021, after the extension period had expired, they filed an untimely Amended Petition for Writ of Certiorari adding Petitioner Causey as a petitioning party. Neither the Petition nor the Amended Petition offers special or important reasons why this case warrants the extraordinary relief of a writ of certiorari.

The Petition and Amended Petition are presently before this court.

ARGUMENT

1. Should the Amended Petition for Writ of Certiorari filed on October 26, 2021, by Petitioners J. Floyd Swilley, Laurel K. Swilley, (hereinafter collectively referred to as “Swilley”) and Heath Causey be dismissed in its entirety for untimely filing?

Suggested Answer: IN THE AFFIRMATIVE.

Petition for Rehearing was denied by the Court of Appeals on September 8, 2021. On October 5, 2021, Petitioners J. Floyd Swilley and Laurel K. Swilley, filed their motion for extension of time and the court granted them until October 25, 2021, to file and serve a petition. Petitioner Causey was not a party to this motion.

On October 25, 2021, the final day of the extension period, Petitioners Swilley filed a Petition for Writ of Certiorari. On October 26, 2021, after expiration of the extension period,

Petitioners Swilley and Petitioner Causey filed an Amended Petition for Writ of Certiorari, without leave of court and without a motion requesting a further extension or leave to add an additional petitioning party. The Petition and Amended Petition appear to be identical except for the addition of Petitioner Causey as a petitioning party and the correction of a minor typographical error.

The court's order granting the extension of time made specific reference to an order of the Supreme Court of South Carolina dated July 16, 2014, regarding "Extensions in Cases Seeking a Petition for a Writ of Certiorari to Review a Decision of the South Carolina Court of Appeals." The referenced order establishes the court's policy regarding extensions and states that extensions beyond the original twenty (20) days, as had already been granted to the Swilleys, will be granted only in "extraordinary circumstances" beyond the control of the movant, which does not include the press of other business." (S.C. Ct. App. Administrative Order dated July 16, 2014). (emphasis added).

In this case, no motion for extension was ever requested by Petitioner Causey or granted to him by the court nor was a motion for an additional extension requested by Petitioners Swilley. There are no "extraordinary circumstances" that might have justified an extension even if one had been requested. Oversight or neglect to add Petitioner Causey to the original Petition would not constitute good cause or an extraordinary circumstance since Causey was not a party to the motion to extend in the first place.

Rule 240(a), SCACR, "governs all motions or petitions filed in the appellate court . . . [unless] Rules 241 through 246 provide different or additional requirements or procedures, [in which case] those requirements or procedures shall apply." Rule 240(g) further states that "[f]ailure of the moving party to perform any act required by this Rule may be deemed an

abandonment of the motion or petition.”

Timeliness of filing a petition is a matter required by both Rules 240 and 242, and is important to the efficiency of court administration and the judicial system in general. Petitions filed beyond the time permitted are improper on their face and there is no authority to permit an exception in the circumstances of this case. Accordingly, Respondents respectfully request that Petitioners’ Amended Petition for Writ of Certiorari be dismissed in its entirety for untimely filing.

2. Should Petitioner Causey be dismissed and/or stricken as a Petitioner for failure to file a Petition for Writ of Certiorari within the time permitted by Rule 242, SCACR?

Suggested Answer: IN THE AFFIRMATIVE.

Petitioner Causey appeared for the first time as a petitioning party in the Amended Petition for Writ of Certiorari filed on October 26, 2021. He was not a party to the motion for extension filed by Petitioner Swilley, nor did he file a motion for extension on his own behalf.

Rule 242(c), SCACR, requires Petitions for Writ of Certiorari to be filed “within thirty (30) days after the petition for rehearing or reinstatement is finally decided by the Court of Appeals.” In this case, the decision to deny rehearing was issued on September 8, 2021, and in the absence of an extension of time, the Petition for Writ of Certiorari was due to be filed no later than October 8, 2021. The first time anything was filed on behalf of Petitioner Causey was the Amended Petition filed on October 26, 2021, without leave of court or motion for extension and well after the October 8, 2021, deadline.

Accordingly, Respondents respectfully request that Petitioner Causey be dismissed and/or stricken as a Petitioner.

3. Should the Petition for Writ of Certiorari and the Amended Petition for Writ of Certiorari be denied because the issues do not warrant the extraordinary relief of a writ of certiorari?

Suggested Answer: IN THE AFFIRMATIVE.

Nature of Issues not Special or Important

Rule 242, SCACR, governs Petitions for Writ of Certiorari. Subsection (b) addresses the considerations governing review and states:

A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

- 1) Where there are novel questions of law.
- 2) Where there is a dissent in the decision of the Court of Appeals.
- 3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- 4) Where substantial constitutional issues are directly involved.
- 5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

The South Carolina Supreme Court has consistently held that “[a] writ of certiorari is an extraordinary form of relief that generally is used only in the absence of other effective relief.” Rowe v. City of West Columbia, 334 S.C. 400, 407-408, 513 S.E.2d 379, 383 (1999), citing 14 C.J.S. Certiorari § 6 (1991), which states that “[t]he writ is reserved for extraordinary situations or exceptional circumstances, and is granted sparingly.” (citations omitted) (emphasis added).

The issues in the present case do not involve novel questions of law, constitutional issues, federal questions, dissent in the Court of Appeals decision, or conflict with prior Supreme Court decisions. Their character does not rise to the same level of importance as those situations enumerated in Rule 242, SCACR. The questions raised in this case involve very routine matters of notice and issue preservation. These are not novel, unique, complex subjects that rest on the cutting edge of law. There is nothing extraordinary about the issues in this case that make it appropriate for a writ of certiorari.

The Court of Appeals roundly affirmed the trial court on every issue raised by Petitioners and found no basis for rehearing. The request for review in the present Petition and Amended Petition appears to be motivated by Petitioners' dissatisfaction with the result rather than sound legal grounds for review by the South Carolina Supreme Court.

Issues Involve Discretionary Matters

The essence of Petitioners' questions are that (1) the Court of Appeals allegedly failed to consider their argument that the trial court improperly held a hearing during a time of abeyance in violation of an order issued by another judge, and (2) they did not get notice of the hearing that was held in violation of the abeyance order and, as a consequence, could not preserve their issues for appeal. Both issues were considered and decided by the trial court and were addressed and affirmed by the Court of Appeals.

At the foundation of both these issues are the trial court's findings of fact that the abeyance order had expired prior to the date the hearing was held, and that Petitioners had notice of the hearing and chose not to attend. Based on its factual findings, the trial court applied the law on issue preservation, about which there is no dispute, and determined that Petitioners had not preserved their issues for appeal. The Court of Appeals agreed and affirmed the trial court,

applying the same reasoning.

South Carolina law is very clear that “[o]n certiorari, this Court will review only errors of law and will not review factual findings unless wholly unsupported by the evidence.” Hollman v. Woolfson, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009) (emphasis added). “It is well settled that this court will not review the findings of fact of an inferior court or body, on writ of certiorari, unless they are wholly unsupported by the evidence.” Jacoby v. South Carolina State Bd. of Naturopathic Examiners, 219 S.C. 66, 89, 64 S.E.2d 138, 148 (1951) (citations omitted) (emphasis added).

Likewise, this court has long held, “[t]he writ will not lie to review errors or mistakes in matters of discretion, where the court has acted within its jurisdiction, and where there has been no disregard by the court of the procedure prescribed by law.” Wyse v. Wolfe, 129 S.C. 499, 123 S.E. 818, 820 (1924) (citations omitted). “A writ of certiorari is a common law remedy to correct errors of law of inferior jurisdictions and the writ will not lie to review errors or mistakes in matters of discretion.” Jacoby, supra, at 89, 148 (citations omitted).

Both issues raised by Petitioners involve alleged errors of fact that fall squarely within the province of the trial court’s discretion. The lower court’s decisions were supported by the following abundant evidence as noted in its order dated May 17, 2016 (ROA 41-46):

- a. Judge Seals’ Order dated January 14, 2016, ordering an abeyance for thirty days from the date of the order. (ROA 29-31).
- b. Plaintiff’s Notice of Hearing and Certificate of Service dated February 3, 2016 showing service on counsel and Pro Se Defendants including J. Floyd Swilley; J. Floyd Swilley Investment Advisors; Laurel K. Swilley; SMG Partners, LLC; SMS Services, LP; QC Financing, LLC;

Sage Financial Group, LLC; Sage Advisory Group LP; Sage Private Equity Group; and Sage Funding, LP. (ROA 367-371).

- c. Affidavit of Sally J. Huffman dated April 13, 2016, testifying that she “served via U.S. Mail on February 3, 2016, the Notice of Hearing upon the Pro Se Defendants J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K. Swilley, SMG Partners, LLC, SMS Services; Sage Financial Group, LLC; Sage Advisory Group LP; Sage Private Equity Group; Sage Funding, L.P., at their last known address of 629 Hemlock Avenue, Myrtle Beach, South Carolina 29577.” (ROA 525-527).
- d. The testimony of the attorney of record for one of Petitioners’ companies, for which Petitioner J. Floyd Swilley was a representative, who stated as follows at the hearing: “I know that Mr. Swilley and Mr. Piner . . . were notified of this hearing, they knew everything that’s going on” (ROA 43).
- e. “Nine separate mailings of the Notice of Hearing were mailed on February 3, 2016, to the Swilley address . . . one for each Swilley and one for each of their seven company defendants.” (ROA 43).
- f. “Neither J. Floyd Swilley or Laurel Swilley assert through affidavit or otherwise that they did not know about the February 16, 2016, hearing.” (ROA 43).
- g. “[L]ike Swilley, Mr. Causey has not filed an affidavit testifying that he did not know about the hearing.” (ROA 44).

Based on that evidence, the court concluded as follows:

- a. “The date of Judge Seals’ Order is clearly January 14, 2016. The thirty days began on January 14, 2016 and not when the Order was filed. Their argument that the thirty days begins upon the filing of the Order is contrary to the plain language in the Order. Thus, any stay expired on February 13, 2016.” (ROA 43).
- b. “Swilley knew of the hearing but chose to not attend. Thus, the hearing was no surprise to them.” (ROA 43).
- c. “Mr. Causey ... was duly notified of the hearing through the Notice of Hearing that was mailed to him on February 3, 2016.” (ROA 44).
- d. Laurel Swilley and J. Floyd Swilley chose not to attend the hearing.” (ROA 44).

Moreover, in their brief to the Court of Appeals, Petitioners Swilley themselves admitted that they had notice days before the hearing. (Brief for Appellants J. Floyd Swilley and Laurel K. Swilley at 2-3, S.C. Ct. App).

Accordingly there was ample evidence upon which the trial court based its findings that the abeyance had expired prior to the hearing and that Petitioners had notice of the hearing and chose not to attend. In fact, the evidence overwhelmingly militates in favor of these being the only plausible conclusions. The court’s findings render Petitioners’ arguments about law of the case and one court order overruling another moot and without merit.

Contrary to Petitioners’ contentions the Court of Appeals specifically addressed both the issues of notice and abeyance in affirming the trial court. In numbered paragraph one of the Opinion, the Court of Appeals specifically stated, “Respondents served all defendants with

notice of the hearing on February 3, 2016. Therefore, service of the notice of hearing was complete upon the mailing on February 3.” In numbered paragraph two of the Opinion, the court specifically addressed the abeyance issue and concluded that the issue was not raised at the hearing or otherwise in a timely manner and was not, therefore, preserved for appeal. (Barnhill v. Swilley, Op. No. 2021-UP-288, S.C. Ct. App., filed August 4, 2021). In other words, the abeyance issue was not preserved because Petitioners had notice of the hearing, but chose not to attend and preserve their abeyance argument for appeal.

These findings were squarely within the discretionary province of the trial court, they were affirmed by the Court of Appeals, and they are not an appropriate subject for the extraordinary remedy of a writ of certiorari. Accordingly, Respondents request this court to deny the Petition and Amended Petition for Writ of Certiorari.

4. Should the document attached as Exhibit “A” to both the Petition for Writ of Certiorari filed on October 25, 2021, and the Amended Petition for Writ of Certiorari filed on October 26, 2021, be stricken because it was not part of the Record on Appeal, was not previously considered at any point, and cannot be added at this time.

Suggested Answer: IN THE AFFIRMATIVE.

In both their Petition and Amended Petition for Writ of Certiorari, Petitioners attach a document as Exhibit “A,” that was not part of the record on appeal and was never previously considered in any context by any court in this case. The document is a print-out of the clerk’s docket in the lower court and Petitioners make reference to it in an attempt to dispute the factual finding made by the trial court and affirmed by the Court of Appeals.

It is well settled law in South Carolina that matters cannot be raised for the first time on appeal. “It is axiomatic that an issue cannot be raised for the first time on appeal.” Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (citations omitted). The purpose of an appeal “is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor . . . to have the case tried in the appellate court a second time.” Id. at 466 and 643.

Likewise, adding a new document to be considered for the first time in a Petition or Amended Petition for Writ of Certiorari is equally inappropriate. This court has made it clear that appellants are responsible for compiling an adequate record from which appellate courts “can make an intelligent review. We will not consider facts that do not appear in the transcript of record.” Goodson v. American Bankers Ins. Co. of Florida, 295 S.C. 400, 404, 368 S.E.2d 687, 690 (1988) (citations omitted). “Normally, we are not inclined to provide litigants with another bite at the apple in presenting their case.” Landry v. Landry, 430 S.C. 153, 164, 843 S.E.2d 491, 496 (2020).

Petitioners’ request for this court to consider a document that is outside the record is inappropriate, and Respondents respectfully request that Exhibit “A” to Petitioners’ Petition and Amended Petition be stricken. Even if this document were considered, however, it is of no consequence to the ultimate issue inasmuch as the trial court had more than abundant evidence to make the findings of fact upon which its decision was based.

CONCLUSION

For the foregoing reasons, Respondents respectfully request this court to:

1. Dismiss and/or strike Petitioners’ Amended Petition for Writ of Certiorari.
2. Dismiss and/or strike Petitioner Causey as a petitioning party.

3. Deny the Petition and Amended Petition for Writ of Certiorari.
4. Strike Exhibit “A,” of the Petition and Amended Petition for Writ of Certiorari.

Respectfully submitted,

s/ Nate Fata

Nate Fata, Esq. (SC No. 009866)

Post Office Box 16620

Surfside Beach, SC 29587

Telephone 843-238-2676

Facsimile 843-238-0240

nfata@fatalaw.com

November 23, 2021

Attorney for Respondents