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Dec 08 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No.: 2021-001124

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,
and Sage Financial Group LLC, Defendants.

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

**REPLY TO RESPONSE
ORIGINAL AND AMENDED¹ PETITION FOR A WRIT OF CERTIORARI²**

Petitioners J. Floyd Swilley, Laurel K. Swilley and Heath Causey submit Reply to the Response filed by Respondents Gabriel Barnhill and GSB Enterprises LLC, and renew their request for issuance of a Petition for Writ of Certiorari pursuant to Rule 242, SCACR, seeking this Court’s Writ to review and vacate the proceedings before and decision of the Court of Appeals.

¹ Heath Causey was inadvertently omitted as a Petitioner.

² Or alternate relief

ISSUES ONE AND TWO

Petitioners J. Floyd Swilley and Laurel K. Swilley timely filed their Petition for Writ of Certiorari on October 25, 2021, in accordance with this Court's order.

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 on October 6, 2021 granting an extension of time to submit this Petition until October 25, 2021. The petition was properly filed on that date.

The filing of October 26, 2021 was an amended Petition, filed to include an additional petitioner whose name was inadvertently left off the initial filings by Petitioner's counsel. To the extent that the amended filing is a day late, Petitioner Heath Causey respectfully requests that his amended petition be accepted as a late filing, in that there is no prejudice to Respondent and further because the one-day delay in adding Causey to the Petition is not a jurisdictional defect.

The only jurisdictional defect that would prevent this Court from allowing a one-day delay would be in the event an appealing party failed to timely serve a Notice of Appeal upon the Respondent. *USAA Property and Casualty Company v. Clegg*, 377 S.C. 643, 661 S.E.2d 791 (2008). No other proceeding in an appellate proceeding is jurisdictional.

The Petition for Writ of Certiorari has to be filed prior to the transmittal by the Court of Appeals of the remittitur, in accordance with Rule 221(b), SCACR. The record of the Court of Appeals in Appellate Case No. 2016-001328 shows that the remittitur has not been transmitted to the trial court by the Court of Appeals, meaning jurisdiction of the case and all parties to the case has remained in the appellate courts at all times since Appellate Case No. 2016-001328 was filed, and such jurisdiction remains now.

The amendment to the Petition for Writ of Certiorari filed on October 26, 2021 is, as asserted by Respondent, identical in format except for the additional designation of Mr. Causey as a Petitioner. The correction between the Petition for Writ of Certiorari filed on October 25, 2021 and the amended Petition for Writ of Certiorari filed on October 26, 2021 was simply the correction of a clerical error. There was no substantive change to the content of the Petition for Writ of Certiorari.

Should the Court determine that the amendment made to the Petition for Writ of Certiorari filed on October 26, 2021 contained a substantive change that affected the nature of the issues presented by the original Petition dated October 25, 2021, that error would affect only Petitioner Causey. Respondent acknowledges that the Petition for Writ of Certiorari filed on October 25, 2021 as to Petitioners J. Floyd Swilley and Laurel K. Swilley was timely filed. Petitioner Causey is informed and believes that the relief requested by Petitioners Swilley is equally applicable to him, and the issues to be addressed in this proceeding are not altered in any way by his presence as a Petitioner.

ISSUE THREE

Respondent asserts that there are no novel issues or issues raised by the Petition that warrant the exercise of this Court's extraordinary powers under certiorari. That is simply not the case. There is no existing precedent of which Petitioners are aware that address the issue of whether a subsequent circuit judge can ignore a stay issued by a prior circuit judge and proceed to hear a matter which was filed and served when the opposing parties had been granted protection by the earlier circuit court judge. Perhaps more importantly, the Court of Appeals failed to even address this issue, even though it was presented and fully argued on appeal.

It is clear that the Court of Appeals erred in concluding that service on Petitioner's prior counsel constituted service on Petitioners, because there was no service on Petitioner's prior counsel. This led to the improbable and nonsensical conclusion that Petitioner's objection to the hearing was not preserved since they did not appear at the hearing when their prior counsel nor they were served with notice of the hearing. Petitioners do not dispute that notice to their counsel would constitute notice to them, but they had no counsel at the time, and their prior counsel was not served. The Court of Appeals' imputation of knowledge of notice of the hearing based on notice served on Petitioner's prior counsel is clearly legal error since there was no service on Petitioner's prior counsel.

Respondents offer no explanation as to why they ignored the stay issued by Judge Seals in his order date January 14, 2016. Respondents do not affirmatively acknowledge their violation of Judge Seals' order in filing for relief during the period of the stay afforded by Judge Seals. But, they assert that the service of the Notice of the hearing was deposited in the United States mail on February 3, 2016, which was also during the period of time for which Petitioners had protection. Respondents created this conundrum by intentionally ignoring the stay issued by Judge Seals and then attempting to capitalize on the Petitioner's unavailability by violating the order which granted protection to Petitioners for thirty (30) days. Respondent's counsel further capitalized on this situation by falsely stating during the hearing that he was "sure" Petitioner's prior counsel had notified them of the . . . hearing. (Petition p. 4, ROA p. 450, lines 9-12). He knew very well prior counsel had not notified Petitioners of the hearing, because Respondent's counsel did not notify Petitioner's former counsel of the hearing.

Respondent's counsel does not dispute his misrepresentations made to the trial court, as demonstrated in the Petition for Writ. Similarly, Respondent does not dispute that the Court of Appeals misapprehended the exact nature of the issues presented to it and decided collateral issues that were not borne out by the record.

Respondents erroneously stated that the matters Petitioners seek to raise are matters that fall within the discretion of the court and are therefore not worthy of this Court's consideration on Certiorari.

CONCLUSION

For the reasons set forth in the original (and amended) Petition for Writ of Certiorari, Petitioners pray that the Petition be granted in whole or in part, to allow this Court to address the significant legal issues presented, for the benefit of these clients specifically, and the bench and bar generally.

Respectfully submitted,

s/ Desa Ballard
Desa Ballard (SC Bar No. 498)
Harvey M. Watson III (SC Bar No.74053)
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ATTORNEYS FOR PETITIONERS

December 8, 2021

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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.

PROOF OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, do hereby certify that on December 8, 2021, I served a copy of the **Reply to Return to Amended Petition for a Writ of Certiorari**, in the above-captioned case on the following individuals by electronic mail using their email address listed in the Attorney Information System, addressed as follows:

Natale Fata, Esquire
Natale Fata, PA
nfata@fatalaw.com



Beth Cogan, Paralegal

December 8, 2021

Beth Cogan

From: Beth Cogan
Sent: Wednesday, December 8, 2021 5:25 PM
To: nfata@fatalaw.com; shuffman@fatalaw.com
Cc: Desa Ballard
Subject: (Barnhill, et al. v. Swilley, et al. 2021-001124) Ltr to Howard encl Reply to Return to Petition for Writ of Cert
Attachments: 2021 12 08 Ltr to Howard encl Reply to Return to A. Petition.pdf; 2021 12 08 Reply to Return.pdf; 2021 12 08 POS Reply to Return.pdf

Good afternoon,

Please see the attached Reply to Return for the above-referenced matter that is being filed today with the Supreme Court and Court of Appeals.

Kindest Regards,
-Beth

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December 8, 2021

Via Electronic Mail (suptctfilings@sccourts.org)
The Honorable Patricia Howard
Supreme Court Clerk of Court
Post Office Box 11330
Columbia, South Carolina 29211

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Dec 08 2021

SC Court of Appeals

Re: *Gabriel Barnill, et al. v. J. Floyd Swilley, et. al.*
Appellate Case No.: 2021-001124

Dear Ms. Howard:

Please find enclosed the Reply to Return to Amended Petition for a Writ of Certiorari. By copy of this letter and as evidenced by the Proof of Service, these filing has been served upon counsel for the Respondents. Thank you for your time in this matter. If you have any questions, please do not hesitate to contact our office.

With warm personal regards, I am,

Sincerely yours,

Desa Ballard
desab@desaballard.com

Enclosures

cc: *Via Electronic Mail*
The Court of Appeals
Natale Fata, Esquire
Laurel Swilley
Floyd Swilley
Heath Causey