THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, First Judicial Circuit
The Honorable Edgar W. Dickson, First Judicial Circuit
Honorable Maite Murphy, First Judicial Circuit

Appellate Case No. 2018-002185

Molly M. Morphew, Appellant,

v.

Stephen Dudek, Doreen Cross, David Collins, Allison Williams, First Federal, Michael Scarafile, Susan Nicholson, Carolina One Real Estate, Carrie Boyer, Wooddy Law Firm, Respondents.

APPELLANT'S FINAL INITIAL BRIEF

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ISSUES ON APPEAL

1. The Order or ruling in-part of November 6, 2014 is VOID.
2. The trial court errored or abused its discretion specifically finding Respondent Collins not in default or that good cause exists to set aside any such entry of default.
3. The trial court errored or abused its discretion in denying Appellant's 2nd Motion for Entry of Default against Respondent Collins, or relieving Collins of default, or its entry of.
4. The trial court errored or abused its discretion or process granting Respondent David Collins Summary Judgment via 'conversion' of a Motion to Dismiss.
5. The trial court errored or abused its discretion in granting summary judgment on the very same causes of action another judge in the same case previously denied
6. The trial court errored or abused its discretion in granting summary judgment to Respondent(s) when discovery had not yet been completed.
7. The trial court errored or abused its discretion in granting summary judgment in favor of Respondents First Federal, Allison Williams, Michael Scarafile, Susan Nicholson, Carolina One Real Estate, and David Collins on Appellant's claim of fraud or fraud on the court.

8. The trial court errored or abused its discretion in granting summary judgment in favor of Respondents Wooddy Law Firm and Carrie Boyer on Appellant's claim of fraud on the court.
9. The trial court errored or abused its discretion in granting summary judgment in favor of Respondents Wooddy Law Firm, Carrie Boyer, First Federal, Allison Williams, Michael Scarafile, Susan Nicholson, David Collins, and Carolina One Real Estate on Appellant's claim of Tortious Interference with Existing Contractual Relations.
10. The Trial court errored or abused its discretion in granting summary judgment in favor of Respondents First Federal, Allison Williams, David Collins, Wooddy Law Firm, Carrie Boyer, Stephen Dudek, Doreen Cross, Michael Scarafile, Susan Nicholson and Carolina One Real Estate on Appellant's claim of Intentional Infliction of Emotional Distress.
11. The trial court errored or abused its discretion granting summary judgment to Respondents First Federal, Allison Williams, Michael Scarafile, Susan Nicholson, Carolina One Real Estate, David Collins, Wooddy Law Firm and Carrie Boyer on Appellant's claim of conspiracy to defraud.
12. The trial court errored in granting in-part Respondents Michael Scarafile, Susan Nicholson, Carolina One Real Estate and David Collins Motion to Dismiss when its motion lacked any argument, was totally unsupported or failed SCRCP Rules.
13. The trial court errored or abused its discretion granting in-part Respondents Stephen Dudek and Doreen Cross' Motion to Dismiss to Appellant's Cause of Action for Declaratory Judgement That No Contract Exists, and Cause of Action for Tortious Interference with Existing Contractual Relations pursuant Rule 12(b)(8).
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17. The trial court errored granting in-part Respondents First Federal, Allison Williams, Wooddy Law Firm, Carrie Boyer, David Collins, Michael Scarafile, Carolina One Real Estate and Susan Nicholson's

Motion to Dismiss to Appellant's Cause of Action for "Fraud - Untrue assertion of fact (or equivalent]; Assertion made with knowledge of falsity and intent to deceive"

18. The trial court errored in granting in-part Respondent Michael Scarafile, Susan Nicholson David Collins, Carolina One, First Federal and Allison Williams' Motion to Dismiss regarding Appellant's Cause of Action – Breach of Fiduciary Duty/Breach of Assumed Duty; Duty of Care; Duty of Full Disclosure; Duty to Act Fairly; and Duty of Good Faith and Fair Dealing; Tortious Conduct.
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FACTS AND PROCEDURAL HISTORY

On October 24, 2012 Respondents Stephen Dudek and Doreen Cross ("Dudeks") entered into a time is of the essence real estate contract for 788 E. Butternut Rd., located in Summerville, South Carolina ("said property") (R. pg. 964-971). After the Dudeks failed to schedule a closing or provide proof of financing, they received a termination notice from the sellers Ferro (R. pg. 950-952). The Sellers Ferro entered into a backup contract with Appellant Molly Morphew. After finding out the Ferros had another buyer that was ready to close, the Dudeks filed a lis pendens to prevent that sale (R. pg. 997) (R. pg. 982). On January 15, 2012 they filed a complaint to compel Specific Performance (R. pg. 544-554).

On January 31, 2013 Appellant filed a complaint to compel Specific Performance (R. pg. 469-474). Discovery ensued, including depositions, subpoenas, phone calls and/or meetings with Respondent(s).

On June 11-12, 2014 a trial without jury tried by the Master in Equity, the Honorable James Chellis, took place. The Respondent(s) presented evidence, including testimony, that the Dudeks had performed their sales contract or their conditions precedent, acted in good faith and fair dealings, secured financing and were at all times material ready, able and willing or tender payment or close escrow per their sales contract or specific performance. Further, all represented it was the sellers, Defendants Ferro, who caused their breach or prevented their ability to close.

In November 2014, the Master issued an Order awarding Specific Performance to the Dudeks first, and Morphew second if they failed to close. Only Appellant and Defendants Ferro appealed, both pro se.

During said appeal, Appellant discovered the evidence the Respondent(s) presented at trial was perjured, misrepresented, or falsified, and that they withheld critically material facts and documents from the opposing parties and lower court. It was also revealed the Defendants Ferro had also discovered validated evidence after trial and presented it to the Master in their closing statements via Petition to the court before he made his decision. The Master stated he was only taking closing statements from the attorneys and was not going to consider the new evidence presented by the Ferros, pro se (R. pg. 962) (R. pg. 371-387). The newly discovered evidence showed the Dudeks had intentionally let their sales contract

expire before making initial application for mortgage credit, therefore rendering same contract invalid and non-negotiable. Such critical breach was not remedied, therefore they were denied or refused financing to purchase said property (R. pg. 975-976). Appellant raised these issues within its appeal, but was not addressed by this Court. Instead, the lower court's ruling was affirmed based on the Standard of Review "The lower court was in a better position..." (R. pg. 1274-1277).

Pending appeal, Appellant filed this current action for fraud and fraud on the court on Aug. 24, 2016. Many motions to dismiss, for reconsideration, default, and summary judgment were ruled on. Appellant filed its notice of appeal on December 12, 2018, appealing 10 Orders. Respondents did not appeal. The 10 orders are 100 pages together, containing 42 rulings and encompassing several summary judgment(s), motion(s) to dismiss, and default. There are 10 Respondents, including civilians, lawyers, paralegals, sales agents, a real estate agency, a federally insured bank, and a loan officer. Because of number of orders, pages and respondents, and due to the extraordinary case addressing 1) fraud and fraud on the court, and 2) in question a ruling based on said Fraud and apparently contrary to law and equity or Void, and 3) effects public policy, Appellant had asked this court twice for permission to exceed the page limit pursuant App. Court Rule 208(b)(5) to allow her fair opportunity to defend fully (R. pg. 137-370). Both Motions were denied.

STANDARD OF REVIEW

1. A court may set aside an entry of default for good cause shown. Rule 55(c), SCRCP. Whether good cause is established is within the sound discretion of the court. *Wham v. Shearson Lehman Brothers, Inc.*, 298 S.C. 462, 381 S.E.2d 499 (Ct.App.1989). The power to set aside a default is exercised within the sound discretion of the trial court whose decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Frank Ulmer Lumber Co. v. Patterson*, 272 S.C. 208, 250 S.E.2d 121 (1978); *Estate of Weeks*, 329 S.C. 251, 495 S.E.2d 454 (Ct.App.1997). *Harbor Island Owners' Ass'n v. Preferred Island Prop., Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006). In reviewing the court's exercise of discretion, the issue before the appellate court is not whether it believes good cause existed to set aside the default, "but rather, whether the [trial judge's] determination is supportable by

the evidence and not controlled by an error of law." *Pilgrim v. Miller,* 350 S.C. 637, 567 S.E.2d 527 (2002).

2. This Court will not disturb a discretionary ruling on appeal unless it appears the ruling is without evidentiary support or controlled by some error of law. *Stanton v. Town of Pawley's Island, S.C.*, 420 S.E.2d 502 (1992). An abuse of discretion occurs where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support. *Tri-County Ice and Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990)
3. When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Peterson v. West Am. Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct.App. 1999). Since it is a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Watson v. Southern Ry. Co.*, 420 F. Supp. 483, 486 (D.S.C. 1975); *see also Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E. (2d) 728, 729 (1986) ("an extreme remedy to be cautiously invoked"). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. 10A Wright & Miller, *Federal Practice and Procedure* § 2741, p. 543 (1983); 6 *Moore's Federal Practice* ¶ 56.02[6], p. 56-39 (2d) ed. 1990); *see, e.g., First Chicago Int'l v. United Exchange Co.*, 836 F. (2d) 1375 (D.C. Cir.1988); *Commercial Bank of Kendall v. Heiman*, 322 So. (2d) 564 (Fla. Dist. Ct. App. 1975); *cf.* Rule 56(f), S.C.R.C.P.
4. "Summary judgment should be granted when plain, palpable and indisputable facts exist on which reasonable minds cannot differ." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct.App.2009). In addition, it must be shown that further inquiry into the facts is not needed to clarify the application of law. *Folkens v. Hunt*, 290 S.C. 194, 348 S.E. (2d) 839 (Ct. App. 1986). "In determining whether any triable issues of fact exist, the evidence and all inferences must be viewed in the light most favorable to the nonmoving party." *Pee Dee*, 381 S.C. at 240, 672 S.E.2d at 802. "Thus, the appellate court reviews all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party." Id; *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). "All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant". *Baugus, supra.* Further, " '[s]ummary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts.' "*Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009) (quoting *Brockbank*, 341 S.C. at 378, 534 S.E.2d at 692); *Gilliland v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577 (1990).

5. "It is an error of law for a court to decide a case on a ground not before it." *Griffin v. Capital Cash*, 310 S.C. 288, 294, 423 S.E.2d 143, 147 (Ct.App.1992); see *Friedberg v. Goudeau*, 279 S.C. 561, 562, 309 S.E.2d 758, 759 (1983) (reversing the grant of summary judgment because the ground for summary judgment was not properly before the trial court). A reversal is required when the trial court's ruling exceeds the limits and scope of the particular motion before it. *Skinner v. Skinner*, 257 S.C. 544, 550, 186 S.E.2d 523, 526 (1972).
6. The doctrines of res judicata and collateral estoppel do not bar collateral attack of a judgment based on fraud. *Arnold v. Arnold*, 285 S.C. 296, 328 S.E.2d 924 (1985). (The complaint of a plaintiff "must be liberally construed in favor of the pleader and sustained if the facts alleged, and the inferences reasonably deducible therefrom, entitle plaintiffs to relief on *any theory* of the case, even though different from that on which they may have supposed themselves entitled to recover." (Emphasis added.) *Arnold, supra*; *Springfield v. Williams Plumbing Supply Co.*, 249 S.C. 130, 153 S.E.2d 184 (1967).
7. An action for specific performance is one in equity. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 170 n. 2, 568 S.E.2d 361, 362 n. 2 (2002); *Wright v. Trask*, 329 S.C. 170, 176, 263*263 495 S.E.2d 222, 225 (Ct.App.1997). In an action in equity, tried by the judge alone, without a reference, on appeal the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "It is now well settled that this court has jurisdiction in appeals in equity cases to find the facts in accord with our view of the preponderance or greater weight of the evidence, in the absence of a verdict by a jury; and may reverse a factual finding by the trial court in such cases when the appellant satisfies this court that the finding is against the preponderance of the evidence." *Crowder v. Crowder*, 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965).
8. In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. The rule is the same whether the judge's findings are made with or without, a reference. The judge's findings are equivalent to a jury's findings in a law action. *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 211 S.E. (2d) 876 (1974).
9. Turning to the question of the determination of the existence of a fiduciary duty, this Court has said "[a] fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992).

10. The appellate court applies the same standard of review as the circuit court in scrutinizing the application of Rule 12(b)(8), SCRCP. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct.App.2009). A defendant may seek dismissal of an action pursuant to Rule 12(b)(8) when another action is pending between the same parties for the same claim. In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137 (1999); *Spence v. Spence*, 368 S.C. 105, 628 S.E.2d 869 (2006). "The trial court and this [C]ourt on appeal must presume all well pled facts to be true." *Morrow Crane Co. v. T.R. Tucker Constr. Co.*, 296 S.C. 427, 429, 373 S.E.2d 701, 702 (Ct.App. 1988). "[P]leadings in a case should be construed liberally so that substantial justice is done between the parties. Further, a judgment on the pleadings is considered to be a drastic procedure by our courts." *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) (citation omitted). The court should not dismiss the complaint merely because there exists doubt that the plaintiff will prevail in the action. *Doe*, 373 S.C. at 395, 645 S.E.2d at 248.

ARGUMENTS

1. The Order of November 6, 2014 is in-part VOID

The Order of Nov. 6, 2014 is VOID in-part that it fails on its face, fails all rules, statutes and precedents of law or equity, fails due to lack of jurisdiction or inherent power to adjudicate specific performance in favor of the Dudeks and/or that it was procured by fraud, and is a violation of public policy (R. pg. 1254-1273); (*See* Appellate Case No. 2017-001393). "A judgment obtained by fraud may, however, be void under some circumstances, and subject to collateral attack, as where such fraud appears on the face of the record or goes to the method of acquiring jurisdiction. Likewise, the judgment may be attacked collaterally where fraud had been practiced in the very act of obtaining the judgment, or on the party against whom the judgment was rendered, so as to prevent him from having a fair opportunity to present his case." (Emphasis added.) 49 C.J.S. Judgments § 434 Fraud, Collusion, or Perjury, p. 859

The ruling ordering specific performance in favor of the Dudeks is not supported by the record or any [valid] evidence in the record, and maybe most importantly, is contrary to the precedents of not only

the South Carolina Courts but to all state courts and the U.S. Supreme Court. The Dudeks failed to meet the strict conditions, precedents, laws, rules or statutes of equity conditional to their *ability* to compel specific performance, notwithstanding their attorney (Respondent Collins) suborned perjury, withheld critically material documentation and facts that directly affected the ability of its clients to compel, and the lower court's jurisdiction or inherent power to adjudicate, specific performance. Further, he also falsified or assisted in the falsification of financial documents, and conspired to deceive the court and all opposing parties to the case. Such actions are extrinsic fraud, or rise to the level of such.

A void judgment is one that is void on face of judgment roll, ***Elliot v. Piersol*, 1 Pet. 328, 340, 26 U.S. 328, 340 (1828): * Under Federal law which is applicable to all states, the U.S. Supreme Court stated that if a court is "without authority, its judgments and orders are regarded as nullities." *Cockett Oil Co. v. Effie*, 374 S.W.2d 154 (Mo.App. 1964). Decision is void on the face of the judgment roll when from four corners of that roll, it may be determined that at least one of three elements of jurisdiction was absent: (1) jurisdiction over parties, (2) jurisdiction over subject matter, or (3) jurisdictional power to pronounce particular judgment that was rendered, *B & C Investments, INC. v. F & M Nat. Bank & Trust*, 903 P.2d 339 (Okla.App.Div 3, 1995). Void order may be attacked, either directly or collaterally, at any time. They are not "voidable", but simply "void"; and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers. " *Elliot v. Piersol*, *supra*; Black's Law Dictionary, Sixth Edition, page 1574: Void judgment. One which has no legal force or effect, invalidity of which may be asserted by any person whose rights are affected at any time and at any place directly or collaterally. *Reynolds v. Volunteer State Life Ins. Co.*, Tex.Civ.App., 80 S.W.2d 1087, 1092. One which from its inception is and forever continues to be absolutely null, without legal efficacy, ineffectual to bind parties or support a right, of no legal force and effect whatever, and incapable of confirmation, ratification, or enforcement in any manner or to any degree.

In order to adjudicate specific performance, a court of equity *must* find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract. *Ingram*, 340 S.C. at 106, 531 S.E.2d at 291; *Campbell v. Carr*, 361 S.C. 258, 263-64, 603 S.E.2d 625, 627-28 (Ct. App. 2004)[1];*Gibson v. Hrysikos*, 293 S.C. 8, 358 S.E.2d 173 (Ct.App.1987) (citing *Thomson v. Scott*, 6 S.C. Eq. (1 McCord Eq.) 32 (1825)) (R. pg. 1254). At a minimum, the Dudeks must demonstrate that they were ready and willing to perform their part of the contract (i.e. willing to tender the purchase price) on November 30, 2012, the date the sales contract expired, or on January 15, 2013, the date they brought the action for specific performance. The record indicates that the Dudeks were not in a position to pay the Ferros the purchase price for the property in question on either date, specifically--and at their own hand-- were refused or denied lending because they waited until their sales contract expired before making initial application for financing, then failed to possess or produce a valid and negotiable sales contract to complete their mortgage application, a critical failure that was not remedied. Consequently, the lower court had no inherent power or jurisdiction to adjudicate specific performance in favor of the Respondents Dudek.

Here, equity does not favor the granting of specific performance as a matter of law or of sound judicial discretion. The Supreme Court relies on the equity maxim: "He who seeks equity must do equity." *Norton v. Matthews*, 249 S.C. 71, 152 S.E.2d 680 (1967). By law, the Respondents Dudek failed to 'do equity', therefore had no ability or right to seek specific performance, and the lower court had not the judicial discretion to award 'equity' to the Dudeks.

Further, the Respondent(s) provided false evidence to demonstrate they were ready, able and willing to close escrow or tender payment per their time is of the essence sales contract or specific performance. The Respondents Dudek testified and presented false evidence and forged financial documents to show they

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[1] Supra, Order for Specific Performance

had secured financing and performed all conditions of their sales contract and were ready, able and willing to close per specific performance but that a sellers breach precedent to their performance of their condition(s) prevented them from doing so[2]; Respondent(s) Williams or First Federal (herein "FF") (lender) testified and presented false evidence and forgered financial documents claiming their clients, the Dudeks, had secured financing per their sales contract or in a timely manner. They also presented at trial a "false promise[3]" they were extending the Dudeks mortgage credit for the purchase of the property. Respondent(s) Nicholson, Scarafile and Carolina One ("C1") represented its clients had performed their sales contract and were ready, able and willing to close but that the sellers prevented a closing, when in actuality the Dudeks had neither completed their mortgage application nor could obtain lending, all at their own hand (R. pg. 975-976); (R. pg. 955, para. 3, l. 9-10); (R. pg. 1448, #20); (*See* Appellate Case No. 2017-001393).

When the sellers, Defendants Ferro, discovered *true and valid* documentation contrary to the Respondent(s) evidence and testimony at trial, and presented such evidence as their closing statements in a Petition to the court in their case, the trial court should have dismissed the Dudeks claim for specific performance for want of jurisdiction (R. pg. 371-388). Instead, the Master in Equity chose to disregard the closing statements of the pro se party and 'not consider' the newly discovered and critically material evidence (R. pg. 962), and elected to rely solely on the false evidence and representations of the Respondent(s) and granted the Dudeks specific performance first, then Appellant second if they failed to close (R. pg. 1268, #19-22).

The Dudeks and their co-respondents' perjury, suborning of perjury, misrepresentations, forgery of financial documents and false promises were particularly egregious because it was more than the sellers that were affected. Their sales contract was time is of the essence and they knew the sellers had moved to

[2] The record indicates the sellers Ferro did not breach. Instead, they had performed the conditions required of them within the time indicated per the time is of the essence sales contract. Regardless, the Dudeks financing condition was precedent to any condition the sellers were required to perform (*See*, Appellate Case No. 2014-002633)

[3] An issue collateral to the original case

another state and had a contract to purchase a home out of state, contingent on the sale of their property in here. The Dudeks also had knowledge of another buyer (Appellant) ready to close since the start of the Dudek litigation (R. pg. 997). Additionally, the evidence demonstrates that the Dudeks only decided to exercise specific performance when they found out the sellers had secured another buyer, at which time they filed a lis pendens to prevent that sale (R. pg. 997). Thus, the Dudeks had improper ulterior purposes for using the judicial process, specifically to 1) interfere with the performance of the Appellant contract, therefore ultimately preventing her legal right to the property, and 2) forcing an innocent party to sell them property that, ultimately and by their own hand, they lost any right to, or *at all times material* had no legal right to.

The Dudeks should not continue to be rewarded for their unlawful conduct when they intentionally failed to do equity, or acted fraudulently or with unclean hands, therefore are in pari delicto. They totally disregarded their own contract by intentionally breaching every condition precedent to the performance of the sellers, were denied lending, and therefore knowingly filed an unlawful and frivolous complaint. They continued to litigate and then obtain the property only because of their fraud and conspiracy with their attorney, lender, sales agent, and closing attorney (i.e., co-respondents in this action); for without it a ruling in the Dudeks' favor would most likely have been impossible.

All respondents, particularly Respondents FF, Allison Williams, Susan Nicholson, and Carolina One/Michael Scarafile who were under oath, not litigants, and were in the best position to provide the financial status of the Dudeks and their readiness or ability to tender payment per specific performance, had a duty to speak at trial and/or in answering subpoenas during discovery. Both the Master and Appellant substantially relied on their duty to speak. If [any one of] the respondents had disclosed the truth or the concealed documents, or provided the true financial/mortgage credit status of the Dudeks instead of committing substantial fraudulent actions or non-actions to create a false promise and condition critically material to the action, the original case would have never made it to trial or the trial court would have known it lacked the jurisdiction or inherent power to adjudicate specific performance in the Dudeks' favor. If the

truth were told and material facts and documents disclosed, Appellant would have been able to present her case fully in the first place, closed on her home, and the subsequent cases against the Respondents or its co-respondents would not exist; consequently, fraud would not have been committed and Appellant would not be severely prejudiced and out undue and *extensive* costs, stress and time it's taken to right an injustice. Meaning, we wouldn't be here today with this court attempting to untangle the legal problems presented in the substantial litigation *caused by the Respondent(s).* The allegations and validated supporting documentation presented by Appellant make out a case such that the prior judgment of November 6, 2014 is void in-part and should be vacated.

Further, if the prior judgment of November 6, 2014 granting specific performance in favor of the Dudeks is allowed to stand then wouldn't the courts then be overturning their own precedents, especially without a compelling reason to do so, therefore creating new rules or setting a new precedent? It would then appear that any ruling, especially for specific performance that has relied on the equity maxims, "He who seeks equity must do equity" and "he who comes into equity must come with clean hands," could be overturned. Such cases include, *Ingram v. Kasey's Associates*, 340 S.C. 98, 531 S.E.2d 287 (2000); *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997); *Norton v. Matthews*, 249 S.C. 71, 152 S.E.2d 680 (1967); *Provident Life and Acc. Ins. Co. v. Driver*, 317 S.C. 471, 451 S.E.2d 924 (1994); *Taff v. Smith*, 114 S.C. 306, 103 S.E. 551 (1920); *New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc.*, 291 F.2d 471 [5th Cir. 1961])(where the court denied relief because the Giants did not come into equity with clean hands).

All respondents to this appeal had full knowledge at the time of the trial, and after, that the Dudeks did not have a valid or negotiable sales contract after November 30, 2012, that they had not been approved for mortgage credit and actually denied for lack of a valid and negotiable sales contract at application.

Consequently, their lending file was permanently closed in January 2013[4]. Accordingly, it was the Dudeks who intentionally hindered their own ability to obtain financing for the property, therefore critically breached and prevented their own closing *and* the seller's ability to transfer the deed. They knew before trial of the deceit, fraud, or unlawful acts they were going to commit, and that were committed, in the original action. They were fully aware of another buyer at start of the litigation (R. pg. 997), intentionally prevented the performance of her contract and contributed significantly to the breach of the Appellant contract, her failure to obtain the property as was her sole and legal right, the violation of her due process or failure to present her case fully *and fairly*, and now the ejectment from her home, the Dudeks' unlawful purchase of the property in question, and the inability of Appellant to live in her own neighboring home. The Respondents are substantially responsible for any damages caused to the Appellant in the prior litigation, including any additional and continuing damages in the subsequent complaint(s) arising from that action.

The Order of November 6, 2014 fails both in law and equity, and undermines the very precedence set in a ruling for specific performance, regardless of any fraud or of the improper or fraudulent acts perpetrated in obtaining the judgment. Such an order fails on its face and is void. Moreover, the lower court had knowledge before its ruling that the evidence on the face of the record critically failed to support specific performance in favor of the Dudeks, refused the closing statements of a pro se party and chose to disregard the evidence from same; such actions by the Master indicates bias, is an abuse of power, process and due process. Additionally, Appellant's substantive and procedural rights have been prejudiced because the decision is clearly erroneous and unlawful in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law.

[4] Where between the 10-day adverse letter and the denial letter(s), it's clear the Dudeks were denied or refused mortgage credit AND they would have submit a NEW application with a valid sales contract if interested at a later date.

Due to 1) the failure of the Order on its face, 2) the fraud committed in the intentional procurement of an unlawful ruling, 3) the Master's failure of inherent power, or its lack of jurisdiction, to *adjudicate* or order specific performance in favor of the Dudeks, or 4) for any other reason this court finds as represented by the record, said Order is Void and requires to be vacated or reversed.

2. The trial court errored or abused its discretion specifically finding Respondent Collins not in default or that good cause exists to set aside any such entry of default

The ruling or Order of the lower court, May 31, 2018 is void, unlawful or improper in-part as it is without valid evidentiary support or fails to have grounds to support a ruling specifically finding Collins not in default. Further, a hearing held without a motion presented or valid motion pending, and in the *excused absence of the Appellant*, is an abuse of discretion, displays bias and violates Appellant's due process. "*Defendants who have been treated with unfairness, bias and the appearance of prejudice by this Court, and the opposing counsel, leaves open the question of how an uninterested, lay person, would question the partiality and neutrality of this Court.* "*...our system of law has always endeavored to prevent even the probability of unfairness.*" In re *Murchinson*, 349 U.S. 133, 136 (1955). *Marshall v. Jerrico*, 100 S. Ct. 1610, 446 U.S. 238 (where the court had a duty to ensure fairness but failed, or refused to ensure that fairness). (Emphasis added). At the hearing, and unbeknownst to the Appellant until appeal, the Deputy Clerk, Becky Stevens, testified that she did not enter default [on Nov. 27, 2018] because Collins filed an Answer [on December 19, 2018]; and Collins testified he had filed a motion for relief of default, and that he was currently engaged in discovery, therefore good cause is shown. The record shows to the contrary. Specifically, Collins had never engaged in discovery, and neither filed an Answer or valid Answer nor did he file or present a motion pursuant Rule 55(c) requesting relief from default (R. pg. 389-411), notwithstanding the fact that even IF his filing of Dec. 19th was valid, it was untimely as Appellant's motion for default had been filed previously, therefore entry of default was required (R. pg. 439-465)

Regardless, the Clerk had already declared his improper filings invalid (R. pg. 931-932) therefore Collins was not properly before the court when he presented defense to his default and the court had no

grounds in which to relieve Collins of default or the entry of. Likewise, *no* motion, whether for default or relief from such default, *was presented to the court or ruled on* (R. pg. 1809-1814) (R. pg. 2) (R. pg. 429-438).

An Order without evidentiary support or grounds in which to hear the subject matter before it is void; as in this instance, where relief from default was granted where no motion for relief or relief pursuant Rule 55(c) was before the court. (The decision of whether to grant relief from an entry of default is solely within the sound discretion of the trial court) *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E. (2d) 535 (Ct. App. 1987. (An order based on an exercise of that discretion, however, will be set aside if it is controlled by some error of law or lacks evidentiary support) *Ricks v. Weinrauch, supra.* Indubitably, Collins neither made a claim for relief nor showed good cause to be relieved of his default to form a basis for the Court's Order in-part. "It is an error of law for a court to decide a case on a ground not before it." *Griffin v. Capital Cash*, 310 S.C. 288, 294, 423 S.E.2d 143, 147 (Ct.App.1992); (A reversal is required when the trial court's ruling exceeds the limits and scope of the particular motion before it) *Skinner v. Skinner*, 257 S.C. 544, 550, 186 S.E.2d 523, 526 (1972). Due to the reasons above or herein Brief, said Order is Void and must be reversed or vacated.

3. The trial court errored or abused its discretion in denying Appellant's 2nd Motion for Entry of Default against Respondent Collins, or relieving Collins of default, or its entry of

On October 1, 2018 a hearing was held on all pending motions before the court (R. pg. 1842-1854). Included was Appellant's [1st] Motion for Entry of Default and Default Judgment, its Motion to Strike Collins' Answer and Return to Motion, its 59(e) Motion, and its 2nd Motion for Entry of Default and Default Judgment. On October 18, 2018 the trial court provided notice via email to all parties granting four (4) Respondents' motions; and denying in-part one (1) Appellant's *2nd* Motion for Entry of Default and Default Judgment, specifically denying in-part *Entry* of Default against Collins. The court declared moot the 10 remaining Appellant and Respondents' motions.

Though Collins never filed an Answer or valid Answer, the lower court denied Appellant's 2nd Motion for Entry of Default for the sole reason "*Respondent Collins filed a timely motion to dismiss.*" (R. pg. 7-9); (R. pg. 412-426). The Order provided no reasoning, findings of fact, standard of review or law analysis.

Collins failed to request relief pursuant Rule 55(c), and at no time from the start of litigation did the trial court or Collins raise issue with an error of law in its entry or required entry, specifically grounded on the fact Collins 'filed a timely motion to dismiss'. In fact, Appellant had previously questioned the Clerk many times, even specifically asking for the date of entry of default and pointing out that entry was required by the Rules of the court. Though it never provided an answer, not once did the court raise issue with its entry (R. 935-949). It even went as far as testifying only "judgement" was previously denied because it needed to be scheduled to be heard. "*Judge Murphy signed a form four denying her motion for entry of default judgment and indicated that it needed to be heard*" (R. pg. 1811 [pg. 8, l. 13-15])) (R. pg. 1278). Such indicates and supports that the trial court considered *entry* complete and only *judgment* needed to be heard.

Regardless, filing a "timely motion to dismiss pursuant Rule 12(b)(6) or 12(b)(8)" is neither an 'Answer' or a responsive pleading nor is it compliant with the Rules of Civil Procedure, including SCRCP Rule 7, Rule 12, and Rule 8, therefore not grounds or a valid reason to deny Appellant's Motion for Entry of Default (R. pg. 389-411). Collins motion not only failed to make ANY pleading in its Motion to Dismiss or to plead with particularity as required by the rules, but also failed to "state in short and plain terms the facts constituting his defenses to each cause of action asserted and admit or deny the averments upon which the adverse party relies" as required by the Rules of a responsive pleading (R. pg. 466-468) (R. pg. 747-756).

The trial court's ruling was an error of law or lacks evidentiary support, therefore is an abuse of discretion, unlawful or improper and should be vacated or reversed. (The decision of whether to grant relief from an entry of default is solely within the sound discretion of the trial court) *Ricks v. Weinrauch*, 293 S.C.

372, 360 S.E. (2d) 535 (Ct. App. 1987). (An order based on an exercise of that discretion, however, will be set aside if it is controlled by some error of law or lacks evidentiary support) *Ricks v. Weinrauch, supra.*

Further, since no Answer was filed at the time Appellant filed its motion for default AND Appellant provided an Affidavit in support of entry of default, then pursuant to Rule 55(a) Default must be entered by the Clerk. (R. pg. 404-438). "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the Clerk shall enter his default upon the calendar (file book)." SCRCP Rule 55(a) (Emphasis added).

Even so, the entry of default is of no consequence. (Whether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the Clerk was required to perform once the default was made to appear by the affidavit of Mrs. Thynes (*Thynes v. Lloyd*, 294 S.C. 152, 363 S.E.2d 122 (Ct.App.1987) (Entering default is a ministerial act to be automatically performed once an affidavit shows the defendant has failed to comply with the requirements of the rules) *Stark Truss Co. v. Superior Const. Corp.*, 602 SE 2d 99 - SC: Court of Appeals 2004. Entry was completed or should have been completed as of November 27, 2017, therefore it cannot be denied by the Court. Once verified and entered by the Clerk, and not objected to by the defaulting party or court, entry of default cannot be denied or the defendant cannot be found "not in default" at a later time unless there was some error of law in its entry and such error is supported by evidence. *Thynes, supra.*

Based on the above, entry of default was required to be entered on Nov. 27, 2017, and the Court cannot deny its entry, especially for the sole reason a motion to dismiss was timely filed., Further, said Order is Void on its face and it fails to be supported by the record, therefore improper and must be reversed or vacated.

4. The trial court errored or abused its discretion or process granting Respondent Collins Summary Judgment via 'conversion' of a Motion to Dismiss

On November 15, 2018 the trial court granted Summary Judgment to Respondent Collins' as to all remaining causes of action pursuant SCRCP Rule 12(b)(6) for Summary Judgment under SCRCP Rule 56 ('conversion')(R. pg. 10-18).

As argued above and repeated herein, Collins is in default, entry was required, and as such his rights to defend the case was terminated, therefore granting summary judgment is improper. Further, Collins failed to request relief, present a motion for relief or have before the court a pending Motion to Dismiss pursuant 12(b)(6) for conversion, therefore a judge cannot adjudicate what is not properly before its court. "It is an error of law for a court to decide a case on a ground not before it." *Griffin v. Capital Cash, supra*; see *Friedberg v. Goudeau*, 279 S.C. 561, 562, 309 S.E.2d 758, 759 (1983) (reversing the grant of summary judgment because the ground for summary judgment was not properly before the trial court). A reversal is required when the trial court's ruling exceeds the limits and scope of the particular motion before it. *Skinner v. Skinner, supra*. Additionally, the trial judge gave no notice it was going to consider converting any 12(b)(6) motion to summary judgment nor were matters outside the pleading presented by Collins or presented in which the trial court gave notice it was going to consider for a conversion. (Providing notice prior to the hearing is essential under Rule 56(c)...) *Baird v. Charleston County*, 333 S.C. 519, 511 SE 2d 69 (1999). The first time Appellant had knowledge of such conversion or matters outside its pleadings was going to be heard was in the Court Order issued. And lastly, specific reasons for dismissal must be in the first document Collins filed with the court, otherwise that issue is considered waived. The first (and only) document Collins filed with the court was his Motion to Dismiss (R. pg. 466-468). Its motion failed to specify with particularity any reasons for dismissal, therefore has waived those issues in which the trial court granted him relief here and initially granted him relief in January 2017. Because his first document failed to provide any explanation as to the nature of the motion and the reasons therefore, as a result fails the SCRCP Rules and is not valid (R. pg. 747-756), and any issue in which the trial court now grants Collins is also waived, notwithstanding the fact Collins had no motion to dismiss before the court to support a Rule

12(b)(6) conversion. Consequently, said Order fails on its face and is VOID. An Order in violation of a S.C. Rule of Civil Procedure or which it has no grounds in which to support is void and must be vacated.

5. The Trial Court errored or abused its discretion granting summary judgment to Respondents

A. The trial court errored or abused its discretion in granting summary judgment on the very same causes of action another judge in the same case previously denied

The trial court granted summary judgment in November 2018 to all Respondents regarding several causes of action another judge in the same case denied in a previous order(s) (R. pg. 10-18) (R. pg. 19-30) (R. pg. 31-39) (R. pg. 49-64) (R. pg. 65-77) (R. pg. 78-87) (R. pg. 88-108) (R. pg. 401-48).

It is contended that "a circuit judge cannot grant relief which has been previously sought from another circuit judge and denied by him." Rule 60, Rules of Practice for the Circuit Courts of South Carolina. Further, the previous ruling DENYING IN-PART their motion(s) to dismiss had not been vacated, contested or appealed; therefore the current ruling(s) granting summary judgment is a violation of Rule 60. The cases applying Rule 60 are distinguishable, for they involve submission of the same issue based on the same facts to a second judge after the first judge had ruled. *See, e.g., Dukes & Dukes, Inc. v. Hygrade Food Products Corp.*, 236 S.C. 69, 113 S.E.2d 254 (1960); *Andrick Development Corp. v. Maccaro*, 280 S.C. 103, 311 S.E.2d 95 (1984).

The general rule is that a trial judge cannot vacate an order by another judge in the same case; even if the change is based on a correct assessment that first judge erred. Otherwise, the second judge would be acting "in the role of a one-judge appellate court." It's true that one trial judge cannot overrule an order entered by another judge either on a legal question or, in the absence of substantial changed circumstances, on a discretionary matter. In other words, a party cannot effectively seek "appeal" of a ruling at the trial level. As our Supreme Court has put it: "[I]t is well established in our jurisprudence that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Fontaine v. Peitz*, 291 S.C. 536, 354 SE 2d 565 (1987)

(The rule applies to district court as well); *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501 (1972). Denial of a motion to dismiss affects a substantial right because it necessarily affects the final judgment, therefore "the matter was then res judicata and no appeal lies from one superior court judge to another." *Revis v. Ramsey*, 202 N.C. 817, 164 S.E. 358 (1932)

Ultimately, the prior Order(s) denying in part the Respondents' motion(s) on several causes of action was a considered decision that appeared well reasoned, was not contested and has not been vacated or appealed; therefore the current order(s) granting summary judgment to the respondents is improper or an abuse of discretion of another judge to overrule the original decision, especially when no new evidence was presented by the Respondents that would allow the court to reconsider a prior ruling. Therefore Summary Judgment is improper and must be vacated or reversed.

B. The trial court errored or abused its discretion in granting summary judgment when discovery had not yet been completed

Summary judgment was premature because Appellant had three (3) pending motions to compel discovery documents or deem admissions admitted. The three (3) motions regarding one or more of the opposing parties' lack of response or refusal to merit discovery directly apply to all respondents and were heard the same time the respondents' motion(s) for Summary Judgment but were deemed moot (R. pg. 475-491) (R. pg. 492-495) (R. pg. 496-511) (R. pg. 981).

When summary judgment was granted, substantial discovery pending on the merits had not occurred; the respondents had not responded as to admissions and documents requested regarding the material and pertinent allegations in the complaint and to their own defenses, directly affecting the respondents. The respondents' refusal or failure to comply with discovery and the trial court's prevention of that discovery leaves issues open, such as whether the past and/or *continued actions* (after trial) of the respondents are fraud, extrinsic fraud or rises to the level of extrinsic fraud. Additionally, pending discovery could reveal any liability or additional liability alleged or the extent of Respondents' liability in the subsequent actions.(R. pg. 1254), the prevention of Appellant's performance of her sales contract with the

Ferros or the prevention of her legal right to the property, whether the Dudeks are bona fide purchasers (*See,* pend. App. Case No. 2017-000507 Morphew v. Dudeks), and the damages and/or continuing damages to Appellant, including unlawful ejection out of her home and being held in contempt (*See,* pend. App. Case No. 2017-001393 Morphew v. Dudeks, et al.), the undue stress, time and costs to defend the subsequent action Trespass Upon Easement complaint (*See* Civil Case No. 2018-CP-1801661 Morphew v. Dudek and Cross).

By declaring the discovery motions moot, and not compelling such pending discovery first, the trial court failed to give Appellant its full opportunity to pursue or complete merits discovery. Since it's a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Watson v. Southern Ry. Co.*, 420 F. Supp. 483, 486 (D.S.C. 1975); *see also Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E. (2d) 728, 729 (1986) ("an extreme remedy to be cautiously invoked"). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. 10A Wright & Miller, *Federal Practice and Procedure* § 2741, p. 543 (1983); 6 *Moore's Federal Practice* 56.02[6], p. 56-39 (2d) ed., 1990); *see, e.g., First Chicago Int'l v. United Exchange Co.*, 836 F. (2d) 1375 (D.C. Cir.1988); *Commercial Bank of Kendall v. Heiman*, 322 So. (2d) 564 (Fla. Dist. Ct. App. 1975); *Board of Education v. Van Buren & Firestone, Architects, Inc.*, 165 W. Va. 140, 267 S.E. (2d) 440 (1980); *cf.* Rule 56(f), S.C.R.C.P

The trial court erred when it assumed that pending merits discovery was 'moot', especially since Appellant was not at fault in the respondents failure to provide discovery on the merits. Further, the outstanding admissions and document requests were sufficient to inform the trial court that further discovery was needed, and in the absence of a waiver, summary judgment is appropriate only after Appellant has had a full opportunity to conduct discovery, it was premature for the trial court to dismiss the case against the Appellant without first permitting discovery on the merits, **therefore Summary Judgment is improper and must be vacated or reversed.**

C. **The trial court errored or abused its discretion in granting summary judgment in favor of Respondents First Federal, Allison Williams, Michael Scarafile, Susan Nicholson, Carolina One Real Estate, and David Collins on Appellant's claim of fraud or fraud on the court**

As argued previously and repeated herein, discovery was pending and that action was already previously ruled on by another judge in the same case. Regardless, the trial court dismissed Appellant's fraud cause of action, specifically, the false testimony or nondisclosure of material facts by the Respondents in a previous trial is intrinsic, not extrinsic, fraud therefore its cause of action for fraud and fraud on the court fails. (R. pg. 10-18) (R. pg. 19-30) (R. pg. 31-39) (R. pg. 401-48) (R. pg. 757-830).

Though normally South Carolina courts have found that "nondisclosure of material facts", and even "perjury", amount only to intrinsic, not extrinsic, fraud, the original case was not only acts of perjury, and nondisclosure of material facts, but encompassed *substantial* acts of perjury, falsifying financial documents, forgery misrepresentation, subornation of perjury, presenting false promises, conspiracy to commit fraud, and intentional concealment of documents by an attorney – all material and critical to the Questions of fact and the case, that if the Respondents had been honest and the truth was told during discovery or at trial, or that the concealed documents had been revealed during discovery, Appellant would have performed her contract and we wouldn't be here today for this court to sort out the 'labyrinth' of litigation caused by the Respondents. Instead, an order was issued in the prior action that is not supported or even substantially supported by valid evidence. In fact, all valid evidence in the record shows the Order fails on its face or is contrary to the rules, statutes or precedents of law and equity, specifically the strict requirements to compel specific performance. Such ruling also fails the maxims, "he who seeks equity must do equity" and "he who comes into equity must come with clean hands," both guiding doctrines in this case (R. pg. 1254). "The 'clean hands' maxim 'is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with bad faith or inequitableness relative to the matter in which he seeks relief, however improper may have been the behavior of defendant" *New York Football Giants, Inc.*

v. Los Angeles Chargers Football Club, Inc., 291 F.2d 471 [5th Cir. 1961. Thus the Respondents here are in pari delicto, and cannot seek relief when they were the very cause of the actions or damages.

Further, as stated herein Brief and repeated here, the mere presence of the various exceptions, many which are founded in equity principles, warrants affording the parties the opportunity to develop the record. As articulately stated in *People v. Plevy, supra* , preclusive doctrines are "not to be rigidly or mechanically applied and must on occasion, yield to more fundamental concerns." More precisely, the application of res judicata and collateral estoppel "may be precluded where unfairness or injustice results, or public policy requires it." *Nelson v. QHG, supra*; *State v. Bacote, supra*; *Carrigg v. Cannon, supra.*

Even so, as pointed out in 46 Am. Jur. (2d), Judgments, Section 396, "there is a wide difference between the effect of a judgment as a bar to the prosecution of a second action upon the same claim, demand, or cause of action, and its effect to preclude the relitigation of particular facts or issues in another action between the same parties on a different claim or cause of action. Here, the Respondents were not parties to the original litigation, therefore res judicata fails as a defense. Plus, Respondents FF and Williams' false promise or representation they were extending credit to the Dudeks is collateral to the prior action. The record here clearly shows the Dudek sales contract had expired before they made initial mortgage application, rendering said contract invalid and non-negotiable, and that the expired contract was never remedied. Moreover, all Respondents had knowledge or should have had knowledge of its expiration. Moreover, the cause of action 'Fraud and/or Fraud on the Court' was neither the same cause of action as in the former action nor was that an issue raised or actually litigated in the former action (R. pg. 469); (R. pg. 544-554); (R. pg. 1254-1273).

And finally, even if the issue was actually litigated and determined by a *valid*[5] and final judgment, relitigation of the issue can be allowed or considered under certain circumstances (R. pg. 757-812); (R. pg. 555-619). As argued herein Brief, unfairness or injustice resulted, or public policy requires it, thus would

[5] Issue of VOID Order of November 6, 2014 is raised herein Brief.

be considered an "exception." As the South Carolina courts have so pointed out in *Mr. T:* "As indicated, these preclusion concepts have been subjected to exceptions to their application. This court, in *Pye v. Aycock,* 325 S.C. 426, 437-38, 480 S.E.2d 455, 460-61 (Ct.App. 1997), adopted the Restatement (Second) of Judgments § 28 (1982), which states in pertinent part:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances: (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.
>
> The mere presence of the various exceptions, many which are founded in equity principles, warrants affording the parties the opportunity to develop the record. As articulately stated in *People v. Plevy,* 52 N.Y.2d 58, 64, 436 N.Y.S.2d 224, 417 N.E.2d 518, 521 (1980) (citation omitted), preclusive doctrines are "not to be rigidly or mechanically applied and must on occasion, yield to more fundamental concerns."[7] More precisely, the application of res judicata and collateral estoppel "may be precluded where unfairness or injustice results, or public policy requires it." *Nelson v. QHG,* 354 S.C. 290, 315, 580 S.E.2d 171, 184 (Ct.App.2003) rev'd in part, 362 S.C. 421, 608 S.E.2d 855 (2005) citing *State v. Bacote,* 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998); *Carrigg v. Cannon,* 347 S.C. 75, 552 S.E.2d 767 (Ct.App.2001).
>
> *Mr. T v. Ms. T,* 378 S.C. 127, 662 S.E2d 413 (2008)

Even if the parties were the same, res judicata cannot bar its independent action because when two actions are between the same parties upon different causes of action, the former judgment is conclusive only as to those issues *actually* determined, not what could have been determined:

> The plea of res judicata and estoppel brings into play what is sometimes referred to as the dual aspects of the doctrine of res judicata. As pointed out in 46 Am. Jur. (2d), Judgments, Section 396, "there is a wide difference between the effect of a judgment as a bar to the prosecution of a second action upon

the same claim, demand, or cause of action, and its effect to preclude the relitigation of particular facts or issues in another action between the same parties on a different claim or cause of action. Although there is virtual unanimity of agreement on this distinction, confusion frequently arises from variations in nomenclature applied thereto. The two aspects of the doctrine do not necessarily have the same consequences, the effect of a judgment upon a subsequent controversy between the parties being more limited where the controversy is based upon a different cause of action than where it is based upon the original cause of action."

Both aspects of res judicata involve the theory of estoppel and it is said that the more recent tendency is to describe the rule precluding the relitigation of particular issues in a subsequent action on a different cause of action as "collateral estoppel by judgment" as distinguished from the "direct estoppel by judgment" where the prior and subsequent cause of action are identical. 46 Am. Jur. (2d), Judgments, Section 397.

Regardless of the nomenclature used, our decisions recognize this dual aspect of the doctrine of res judicata. In *Wold v. Funderburg*, 250 S.C. 205, 157 S.E. (2d) 180, we restated the long established general rule that, in order to sustain the plea of res judicata the following three basic elements must be established: (1) identity of parties; (2) identity of the subject matter; and (3) an adjudication of the issue in the former suit.

The dual aspect of the doctrine derives largely from the application of the foregoing third element. The rule as to the conclusiveness of the prior adjudication has a different application where the prior and subsequent causes of action are identical and where the subsequent action is on a different cause of action. This distinction was pointed out in *Johnston-Crews Co. v. Folk*, 118 S.C. 470, 111 S.E. 15. The Court held in Johnston-Crews that, where the two action are between the same parties on identical causes of action, the former adjudication is conclusive, not only the precise issues raised and determined, but of such as might have been raised affecting the main issue. Where, however, the two actions are between the same parties upon different causes of action, a different effect is given the prior judgment. In the latter instance, the former judgment is conclusive only as to those issues actually determined.

Johnston-Crews succinctly states the foregoing principles as follows:

"The rule granting conclusiveness to a judgment in regard to issues of fact which could properly have been determined in the action is limited to cases involving the same cause of action. Where a second action is upon a different claim, demand, or cause of action, the established rule is that the judgment in the first action operates as an estoppel only as to the [issues,] points or question actually litigated

and determined, and not as to matters not litigated in the former action, even though such matters might properly have been determined therein." *Griggs v. Griggs*, 214 S.C. 177, 51 S.E. (2d) 622, (where the Court quoted extensively from American Jurisprudence, including the following now found in 46 Am. Jur. (2d), Judgment, Section 418). "In other words, the rule precluding relitigation of issues which might have been raised in the prior action applies only where the two actions involve the *same cause of action*; but all questions which were actually litigated in the prior action *and determined* by the judgment are conclusive in any subsequent action between the parties, or their privies, regardless of whether the subsequent action involves the same or a different cause of action."

Lowe v. Clayton, 264 S.C. 75, 212 SE 2d 582 (1975)

The prior action(s) between the Appellant, sellers Ferro and Dudeks was a breach of contract compelling Specific Performance, and the Dudeks' legal liability to sign the termination notice so Appellant could perform her contract. The present action seeks damages and to set aside the specific performance decree on the ground of a Void Order, fraud, and the fact the Dudeks came to the courts with unclean hands and conspired to deceive or commit fraud or fraud on the court, along with their co-respondents, to obtain a ruling in which they had no ability or legal right to. The two actions in regards to the Respondents here were not the same parties and not based upon the same cause of action and, if the present action is barred, it must be upon the ground that the issue now presented was identical, and if so, the 'identical' issue was litigated and properly determined in the prior action. Res judicata or issue preclusion does not apply to which might have been raised in the prior action, therefore based on the arguments above and herein Brief, summary judgment was improper and must be reversed or vacated.

D. The trial court errored or abused its discretion in granting summary judgment in favor of Respondents Wooddy Law Firm and Carrie Boyer on Appellant's claim of fraud on the court

As argued previously herein Brief and repeated here, granting summary judgement was improper due to pending discovery and/or this cause of action was already previously ruled on by another judge in

the same civil action, and not appealed or contested, therefore should be reversed an remanded back to the trial court for further proceedings (R. pg. 78-87).

Further, the record shows that at all times material the Dudeks sales contract had expired and was no longer valid and negotiable after November 30, 2012, and was not remedied. Thus, the Dudeks had no legal claim to the property at initial application on December 6, 2012, therefore there was no mortgage closing transaction in existence. Ultimately, FF refused them credit for their failure to complete their application (i.e., provide a valid and negotiable sales contract), and because of this failure, there never was a closing transaction in which Wooddy Law Firm or Boyer had standing to represent or prepare for. Consequently, the Respondents here were not justified, or within the law, to engage themselves as the 'closing attorney', demand any actions, including a closing, documents or repairs from the sellers, or from any party to the [non-existent] transaction. Meaning, their communications, representations, or 'requirements for closing' was unjustified, unlawful, false and/or to create a façade that "its clients had performed and were ready to close but it was the sellers that prevented such closing"[6]. Their misrepresentation was necessary to intentionally deceive the sellers, the Appellant and the court, whether to cover up their own failing, to prevent its clients from being charged with breach of contract and instead obtain the property, or because they had a pecuniary interest in the transaction. The record shows the Dudeks knew of the Appellant's back-up contract and filed a lis pendens and complaint for specific performance to prevent that sale, therefore it is assumed the Dudeks' closing attorney, the Respondents here, had that knowledge. Even so, such knowledge is not necessary. It is enough that the documents presented were used for the purpose of fraud. *State v. Bullock*, 54 S.C. 300, 311-12, 32 S.E. 424, 428-29 (1899) ("It is not necessary to state how the instrument could have been used for the purpose of fraud. It is enough if it appears from the character of the instrument, together with the provisions of the statute, that it might have been so used in connection with other facts, real or simulated, either then existing, or with which it was to

[6] In order to compel specific performance, the moving party must not have breached. But that breach can be excused if proved the non-moving party caused that breach.

be afterwards connected." (Citation omitted). Appellant has demonstrated such intent or purpose of the Respondents' actions/documents in its Complaint (ex., such as the documents used for deception in a court proceeding) (R. pg. 555-619); (R. pg. 831-843).

The Respondents, because they represented themselves as the 'closing attorney' until May 2017, and because this instant complaint had been initiated for almost a year prior, it can be properly assumed they, an allegedly well-versed and seasoned closing attorney had complete knowledge of or should have had knowledge of the expired contract, denial of lending, their lack of standing to make demands to the sellers to transfer the deed or perform repairs on a house, when at all times material there was no mortgage transaction, the Dudeks had no claim to the property, that there was another buyer, and the litigation that followed. Respondents have also done nothing to rectify or provide any documentation in this action to defend the allegations. Meaning neither the Respondents nor the court Order dispute the allegations, but instead rely on "*the actions alleged are normal business proceedings preparing for a closing*." Further, specific reasons for dismissal must be in the first document the Respondents filed with the court, otherwise that issue is considered waived. Not one of the Respondent(s) raised issue in their Motion(s) to Dismiss or Answer(s) that their actions alleged or as fact "are normal business proceedings." (R. 521-523); (R. pg. 701-721). Again, a closing transaction was never in existence and such transaction was *impossible* due to the Dudeks intentional failure to make initial application before their sales contract expired, which consequently led to FF refusing them mortgage credit even before litigation started.

As argued herein Brief and repeated here, Respondents had a duty to speak in the original litigation and in this instant case and failed to do so. Plus, the Respondents knew and were willingly part of this deception and therefore liable for their significant part in said fraud and fraud on the court for, including but not limited to, undermining or assisting in the undermining of the integrity of the judicial system, preventing Appellant from her lawful right to the property or performing her sales contract, violating her constitutional right of due process or preventing Appellant from fully and fairly presenting her case during trial, the subsequent loss of her home, the embarrassment, stress and cost of [unlawful] ejectment, loss of

work, time, and money, all which caused and is still causing undue emotional stress. Plus, as argued herein, Appellant contends the Respondents should be held liable in part for the damages in the original action and subsequent actions that currently exist or may exist in the future. They had a duty to speak by representing as legal counsel for an alleged closing, or at least the knowledge and means to prevent their clients and themselves from this position they are now in, but intentionally failed to do so, therefore are in no position to request relief when they caused or could have prevented the issues upon this court today. Appellant argues no matter what alleged failings the court finds in regards to this instant action and its causes of action, the substantial and unlawful behavior of the 10 respondents as a whole,[7] and their apparent conspiracy to commit such unlawful acts and use of the judicial process in a manner to obtain a ruling that fails in law and/or equity clearly meets the requirements "*rare, special, exceptional or unusual circumstances that may warrant equitable relief.*" particularly when such a ruling is an injustice, and is against all recognized principals of equity, the standards of good conscience and public policy, therefore should be rendered void. (We think no party has the right thus to create problems by its devious and deceitful conduct and then approach a court of equity with a plea that the pretended status which it has foisted on the public be ignored and its rights be declared as if it had acted in good faith throughout) *New York Football Giants, Inc., supra.*

The trial court's opinion implies that the dispositions here made is justified by uncontradicted facts, but the record demonstrates beyond question that serious controverted issues ought to be resolved before the Respondents may have relief. Given the fact the record shows, as a matter of law, there is genuine issue of material fact of whether the Respondents had justification to make such false promises, demands, and representations, and then failed to disclose the truth, indicating a deception, and what, if any, fiduciary

[7] All respondents knew the truth but all testified or have been litigating or asserting equally the same false facts. "Conspiracy" cannot be denied as it's very clear if the respondents party to the original case had not come together and plotted to tell the same false facts the ruling would have been very different, as there is no documents or validated evidence to support a ruling for specific performance in the Dudeks favor, and such is an obstruction of justice.

duties or duty of care were owed by Respondents in the prior litigation to the Defendants Ferro, and consequently to Appellant, in the prior court proceeding, this instant action, and any subsequent action arising from the original action. Further, a question lies if the duty to speak or disclose was breached resulting in a question of liability. Such presents a jury question(s). *Spence v. Wingate*, 385 S.C. 316, 684 S.E.2d 188 (Ct.App.2009) (Spence III); *Accord Smiley v. Woodmen of the World Life Ins., 249 S.C. 461, 154 S.E.2d 834 (1967)* (jury question as to whether life insurance applicant misrepresented his health with intent to deceive insurer notwithstanding insured's answering "no" to numerous questions regarding hospital treatment and medications, when insured had in fact been hospitalized for six days the year prior to his application).

In order to be entitled to summary judgment, Wooddy Law Firm would have to demonstrate that there is no genuine issue of material fact of their justification, legal standing, liability, or duty of care; that they did not make false promises or misrepresentations used in a legal proceeding; that they did not suppress evidence, or make a false statement or provide false evidence with any intent to deceive, regardless of the deceived; and that the evidence or statements did not materially or critically affect the ability of their clients' and the trial court in regards to awarding Specific Performance or rise to the level of fraud. These are matters for the jury in this case, therefore Respondents Wooddy Law Firm and Carrie Boyer were not entitled to summary judgment. Summary judgment was improper and must be reversed or vacated.

E. The trial court errored or abused its discretion in granting summary judgment in favor of Respondents Wooddy Law Firm, Carrie Boyer, First Federal, Allison Williams, Michael Scarafile, Susan Nicholson, David Collins, and Carolina One Real Estate on Appellant's claim of Tortious Interference with Existing Contractual Relations

As argued herein Brief and repeated here, the trial court's order for summary judgment was improper due to pending discovery and/or this cause of action was already previously ruled on by another judge in the same civil action, and not appealed or contested. Further, Appellant has raised issue the Master's November 6, 2014 Order granting specific performance to the Dudeks is in- part void. For these

reasons, the Order(s) granting summary judgment to the Respondent(s) therefore should be reversed and remanded back to the trial court for further proceedings.

Regardless, the trial court granted summary judgment to Respondents on said cause of action, reasoning Appellant has been unable to create a genuine issue of material fact with respect to *any* essential element of tortious interference with an existing contract (R. pg. 10-18); (R. pg. 31-39); (R. pg. 401-48). Even so, to recover under the cause of action, the elements are (1) a contract; (2) knowledge of the contract by the tortfeasor; (3) intentional procurement by the tortfeasor of the contract's breach; (4) absence of justification; and (5) resulting damages.

Appellant had a valid and negotiable contract through May 2017, as she was also awarded specific performance (R. pg. 1254); The Dudeks were aware of the contract, as they placed a lis pendens and then a complaint for specific performance on the property the moment they became aware of the other contract secured buyer in order to prevent that closing (R. pg. 997); Being the alleged sales agent, lender and closing attorney for the Dudeks, it is assumed the Respondents had knowledge of the backup buyer and contract, knew the expired status of its clients sales contract and (lack of) lending status. Though, it is a fact FF and Williams knew (R. pg. 972). The Respondents had a duty to speak by their representations as the lender, sales agent and closing attorney, especially in a court proceeding or an alleged mortgage closing transaction, or at least the knowledge and means to prevent their clients and themselves from this position they are now in. They intentionally failed to do so, therefore are in no position to request relief when they caused or could have prevented the issues upon this court today.

The Respondents actions were not justified as their clients had no legal right to the property after November 30, 2012. The Respondents actions or non-actions were critical to the breach of Appellant's contract, and their fraudulent action or non-actions caused and are still causing substantial and undue damages to the Appellant, as argued herein Brief and repeated here. Due to the reasons stated herein, on a void Order, or that material questions in fact remain, summary judgment was improper and must be reversed or vacated (R. pg. 975-979) (R. pg. 1311) (R. pg. 1428) (R. pg. 757-830).

F. The Trial court errored or abused its discretion in granting summary judgment in favor of Respondents First Federal, Allison Williams, David Collins, Wooddy Law Firm, Carrie Boyer, Stephen Dudek, Doreen Cross, Michael Scarafile, Susan Nicholson and Carolina One Real Estate on Appellant's claim of Intentional Infliction of Emotional Distress.

As previously argued herein Brief and repeated herein, the trial court's order for summary judgment was improper due to pending discovery and/or this cause of action was already previously ruled on by another judge in the same civil action, and not appealed or contested, therefore should be reversed an remanded back to the trial court for further proceedings. In regards to Collins, he is in default *and/or* the Order granting Collins' (non-existent) Motion to Dismiss [i.e., granting summary judgment via conversion pursuant Rule 12(b)(6)] is void.

In regards to Respondents Stephen Dudek, Doreen Cross, Michael Scarafile, Susan Nicholson and Carolina One Real Estate, Appellant contends their motion fails SCRCP rules and therefore is invalid. Though the Dudeks state in their motion, "*Motion for Summary Judgment is based on the fact that there is no genuine reason as to any material fact and the Defendants are entitled to judgment as a matter of law*", and that "*This Motion will be supported by Rule 56, South Carolina Rules of Civil Procedure, affidavits to be subsequently filed.....*" Their motion fails Rule 56 as they failed to submit a separate, short, and concise statement of material facts about which there are no genuine issues to be tried, or failed to submit their affidavit with the motion as required by the Rules. Further, the Motion itself does not set forth the true facts upon which Respondents seeks a summary judgment. (R. 518-520); (R. pg. 813-830).

In regards to Wooddy Law Firm and Carrie Boyer, the trial court reasoned Appellant "*failed to present any evidence of 'extreme and outrageous' conduct*" but also "*failed to present any evidence of any conduct which was directed at her*". "Instead, "*Plaintiff relies on a few communications between Defendant Boyer and co-Defendants which discuss preparing for a real estate closing, a common business activity that is not only tolerated but encouraged in a civilized society. In addition, Plaintiff has also failed to raise a genuine issue of material fact as to whether her "emotional distress" is sufficiently severe."*

The "communications" between the Respondents and its co-respondents AND presented as evidence in a court proceeding were groundless, making them dishonest, improper or unlawful. Their actions could not possibly "*be a common business activity that is not only tolerated but encouraged in a civilized society*," as the trial court asserts. Meaning, Appellant agrees the actions of the respondents may be considered 'common business activity..." IF its clients had a lawful claim to the property AND IF a valid mortgage closing transaction existed at all times material, AND IF the unjustified communications weren't used in a legal proceeding to "support its clients claims they performed their contract conditions or conditions precedent and were ready to close but 'couldn't get the sellers to do their part", then there may not have been this issue here today. Instead, as argued in above and repeated herein, the communications (i.e., official engagement letter requesting PI information, its demand for repairs to be performed/CL-100 cleared/contractor's letters provided to Respondents on a home the Dudeks neither owned nor had a legal right to (R. pg. 953-954, pg. 963) were dishonest, improper or unlawful, and the Respondents are liable for their deceptions and assisting in committing fraud or for the procurement of an Order that is Void or fails on its face (R. pg. 953); (R. pg. 954). Further, as argued herein Brief and repeated here, the unlawful procurement of the Order has subsequently caused Appellant, including but not limited to, the loss of her home, an unlawful ejectment, and substantial undue costs, time and effort to defend or right an injustice, including the sheer frustration with the lower court's clear bias against Appellant (R. pg. 981). Such raises a genuine issue of material fact of liability for the jury to decide, plus as to whether its "emotional distress" is "sufficiently severe". Regardless, there are many material questions in fact that remain, and the Respondents are in pari delicto and are in no position to request relief when they caused or could have prevented the issues upon this court today, therefore Summary Judgment is improper and must be reversed or vacated.

G. The trial court errored or abused its discretion granting summary judgment to Respondents First Federal, Allison Williams, Michael Scarafile, Susan Nicholson, Carolina One Real

Estate, David Collins, Wooddy Law Firm and Carrie Boyer on Appellant's claim of conspiracy to defraud

As argued previously herein and repeated here, the trial court's order for summary judgment was improper due to pending discovery and/or this cause of action was already previously ruled on by another judge in the same civil action, and not appealed or contested, therefore should be reversed an remanded back to the trial court for further proceedings. Again, Collins is in default, therefore summary judgment is improper.

Regardless, Appellant has more than presented herein Brief and now repeats herein that- all times material-- all Respondents had 1) full knowledge of the Appellant's contract, 2) that a mortgage closing transaction was not in existence, 3) that the Dudeks had no valid or lawful claim to the property all times material, and 4) [all] Respondents actions and/or non-actions before, during and after litigation of the original action, now in this instant action, and the subsequent actions pending before the civil court and this court-- were and are unjustified, unlawful, or improper. Such substantial fraudulent actions or non-actions of the Respondents were required as a whole to deceive Appellant and the court to obtain a ruling in favor of their clients, but that is contrary to the rules, maxims, statutes or precedents of equity and law. Without the alleged conspiracy and collusion to commit acts of fraud, the Dudeks would not have been able to ultimately obtain the property. And now, another subsequent action caused by the Respondents is against the Dudeks. In that action, its alleged the Dudeks "obtained the property fraudulently". Regardless, the Dudeks knew of the Appellant's claim to the property, therefore are not bona fide purchasers (*See* App. Case #2018-000507). Ultimately, there are many material questions in fact that remain, including but not limited to, question of liability and to what extent of damages to the Appellant, and if any continuing damages arising out of the original action. Maybe more importantly, the Respondents are in pari delicto and are in no position to request relief when they caused or could have prevented the issues upon this court today. Due to the reasons above and herein Brief, Summary Judgment is improper and must be vacated or reversed.

6. **The trial court errored or abused its discretion in granting in-part Respondent(s) Motion(s) to Dismiss.**

   A. **The trial court errored or abused its discretion granting in-part Respondents Michael Scarafile, Susan Nicholson, Carolina One Real Estate and David Collins Motion to Dismiss when its motion lacked any argument, was totally unsupported or failed SCRCP Rules.**

Respondents filed a motion to dismiss pursuant SCRCP Rule 12(b)(6) and 12(b)(8). The motion is improper as the defenses within its motion lack any argument and are totally unsupported (R. pg. 466-468); (R. pg. 88-108); (R. pg. 747-756). Though Respondents call out the nature of the motion, there's no explanation as to the nature of the motion and the reasons therefor. Meaning, it fails to plead with particularity the grounds for relief or on what grounds its request for dismissal is based as required by the South Carolina Rules of Civil Procedure, SCRCP Rule 7(b), hence the motion was a 'skeleton motion'. The Respondents failed to show that Appellant could prove no set of facts demonstrating that the conduct alleged in the complaint was insufficient to constitute a cause of action.

"An application to the court for an order shall be by motion which...shall be made in writing, *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." SCRCP Rule 7(b) (emphasis added). Though the Motion states the rule in which it is brought under, the motion does not comply with SCRCP Rule 7(b) as a one-sentence Rule 12b motion fails to satisfy the particularity requirement of Rule 7(b)(1), Fed.R.Civ.P.,[8] because the motion "failed to state even one ground for granting the motion and thus fails to meet the minimal standard of 'reasonable specification.'" A motion must include specifics and details, not just a general statement. The language at issue "failed to state even one ground for granting the motion." *Camp v. Camp*, 386 S.C. 571, 689 S.E.2d 634 (2010) quoting *Martinez v. Trainor*, 556 F.2d at 819 (1977) (quoting 2-A Moore's Federal Practice (3rd ed. 1975). Moreover, Defendants' motion to dismiss claims Rule 12(b)(8), but the parties to the prior pending action are not the same parties

[8] The federal rule 7(b)(1) is substantively the same as South Carolina's Rule 7(b)(1).

represented in their Motion to Dismiss, therefore this rule is not an applicable standard in the Respondents' Motion.

For these reasons, Respondent's motion lacks merit for grounds of dismissal of any cause of action. Even under the motion's unsupported standards, Appellant's Complaint is so thoroughly particularized that it must survive, therefore its dismissal(s) are improper and must be reversed or vacated.

B. The trial court errored or abused its discretion granting in-part Respondents Stephen Dudek and Doreen Cross' Motion to Dismiss to Appellant's Cause of Action for Declaratory Judgement That No Contract Exists, and Cause of Action for Tortious Interference with Existing Contractual Relations pursuant Rule 12(b)(8)

Dismissal under Rule 12(b)(8) may be proper when there is (1) another action pending, (2) between the same parties, (3) for the same claim. Rule 12(b)(8), SCRCP. At the time the lower court issued its ruling, the action in which it referenced *was not pending*. In its Order, the lower court even admitted such, stating, "*On appeal, the Court of Appeals affirmed the decision of the Master in Equity by Order dated, Jan. 11, 2017.*" (R. pg. 19-30). Further, the lower court ruled Appellant previously and *identically* asserted against the Dudeks in the Prior Civil Actions *these two claims* based on the same or similar facts. Appellant's cause of action for Declaratory Judgement That No Contract Exists is not claimed in the first case nor was that issue ever raised (R. pg. 469-474); and its cause of action for Tortious Interference with Existing Contractual Relations was withdrawn before being heard at trial, therefore did not exist or was not pending (Plnt. Brf Opp. Dudeks Mtn. to Dsms Oct. 4, 2016). Despite that, the Tortious Interference claim against Respondents in their individual capacities was not *identically* asserted as the claim in the first proceeding, as the facts supporting its cause of action are different. In the prior action, Appellant asserted the Dudeks intentional refusal to sign the termination notice prevented her from performing her sales contract. In the current action, Appellant asserts "fraud" as the basis for interference (R. pg. 569-574); (R. pg. 555-619).

Accordingly, the elements required to dismiss a cause of action based on rule 12(b)(8) had not been met, therefore dismissal of those cause of actions was inappropriate (R. pg. 524-532). More importantly, the Respondents are in pari delicto and are in no position to request relief when they caused or could have prevented the issues upon this court today, therefore dismissal is improper and must be vacated or reversed.

C. The trial court errored or abused its discretion granting in-part Respondents First Federal, Allison Williams, Michael Scarafile, David Collins, Susan Nicholson, and Carolina One Real Estate's Motion to Dismiss to Appellant's Cause of Action for Declaratory Judgement That No Contract Exists pursuant res judicata

As argued herein Brief and repeated herein, Extrinsic fraud exists, therefore res judicata cannot bar its collateral attack on the original action's judgment granting specific performance to the Dudeks. Respondents FF and Allison Williams 'false promise' at trial they were extending credit to the Dudeks is collateral to the prior action. The existence of the Dudek contract was not an issue raised nor actually litigated. Instead, it was 'assumed' based on that false promise, therefore any ruling, assumed or not, was based on fraud.

Regardless, both doctrines of res judicata and issue preclusion require the same parties, while res judicata also requires a pending action for the same claim. Here, the Respondents were not parties to the original litigation, nor was a pending action for the same claim, therefore res judicata fails as a defense.

The record clearly shows the Dudek sales contract had expired before they made initial mortgage application, rendering said contract invalid and non-negotiable, and that the expired contract was never remedied. Consequently, the Dudeks were denied lending (R. pg. 976-979). All Respondents had knowledge, or should have had knowledge, of its expiration. Moreover, the cause of action 'Declaratory Judgement That No Contract Exists' was neither the same cause of action as in the former action nor was that an issue raised or actually litigated in the former action (R. pg. 469-474); (R. pg. 544-554). And finally,

even if the issue was actually litigated and determined by a *valid*[9] and final judgment, relitigation of the issue can be allowed or considered under certain circumstances. *Mr. T, supra (*citing *Pye v. Aycock, supra).* More precisely, the application of res judicata and collateral estoppel "may be precluded where unfairness or injustice results, or public policy requires it." *Nelson v. QHG, supra*; *State v. Bacote, supra*; *Carrigg v. Cannon, supra*

Additionally, the lower court also declared that Appellant "*should*" have made a motion for a new trial based on newly discovered evidence pursuant SCRCP Rule 59 and 60(b), quoting *Gray v. Bryant, 298 S.C. 285, 286-87, 379 S.E.2d 894, 895 (1989) (*noting that Rule 59 and 60(b) should be read together with regard to motions for new trial due to newly-discovered evidence) (R. pg. 88-108).

First, nowhere does the trial court state it was *required* nor does it provide a ruling, statute or precedent to support its contention. Appellant has been unable to locate any cases similar to this present action which a Plaintiff's action was barred by res judicata or its failure to file a Rule 59 or 60(b) motion instead of filing an independent action. The trial court relied on *Gray v. Bryant*, but that case is not even similar to the case at hand. Unlike this current case, in *Gray* the Appellant filed a 59(e) motion for a new trial, and the issue was whether the motion was timely. In this instant action, Appellant discovered the fraudulent facts and evidence in January 2015, over 2 ½ months after the Order was issued, making it impossible to file a Rule 59 motion for a new trial. Even if possible, a 59(e) motion would most likely have been ineffective as the record shows the sellers/pro se defendants had already petitioned the court and as their closing statement in their case to consider the new evidence but the Master declared he was not going to consider the evidence only the attorney's closing statements (R. pg. 371-388); (R. pg. 962). Though raised on appeal, this court did not consider or rule on them, instead only affirmed the lower court's ruling based on its standard of review "*that the broad scope of review in an action of equity does not require it to disregard the findings at trial or to ignore the fact the master was in a better position to assess the credibility*

[9] Issue of VOID Order of November 6, 2014 is raised herein Brief.

of the witnesses", therefore affirming without considering or reviewing the fraud, or without its own view of the preponderance of the evidence (R. pg. 1274-1277). Further, Rule 60 does not mandate a litigant file a motion 60(b), but instead states "*This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court.*" This current 'independent' action was filed during the pendency of the appeal of the prior action (R. pg. 844-898).

Even so, Appellant has raised issue the Nov. 6, 2014 Order is void in-part, specifically in its granting specific performance in favor to the Dudeks. In its argument, the record shows that regardless of the fraud, intrinsic or extrinsic, perpetrated by the Respondent(s), the ruling was contrary to the rules, maxims, statutes or precedents of equity and obtained by substantial fraudulent actions or non-actions. Maybe more importantly, the Respondents are in pari delicto and are in no position to request relief when they caused or could have prevented the issues upon this court today, therefore due to the reasons above or argued herein Brief dismissal is improper and must be vacated or reversed.

D. The trial court errored or abused its discretion in granting in-part Respondents Stephen Dudek and Doreen Cross' Motion to Dismiss to Appellant's Cause of Action for Breach of Contract Accompanied by Fraudulent Act.

The lower court order granted in-part Respondents Motion to Dismiss in regards to Appellant's cause of action for Breach of Contract Accompanied by Fraudulent Act because the "*lower court lacked jurisdiction to hear any claim that was already litigated and decided by the Master in Equity*" (R. pg. 19-30).

Breach of contract accompanied by a fraudulent act by the Dudeks was not a claim already litigated or decided by the Master. In this current action, said breach of contract is a separate and subsequent breach by Respondents Dudek, not a claim against the *sellers* Ferro as in the original action. In its current cause of action Appellant claims the Dudeks breached their contract as they were to proceed with closing on or after November 15, 2014 for specific performance but failed to do so. "Per SC Rule 241(b)(4), orders,

judgments, decree or decision[s] on appeal that direct the sale or delivery of possession of real property as provided in S.C. Code Ann.§ 18-9-170, are not stayed on appeal." There was no stay on the order compelling specific performance[10], the Dudeks failed to proceed with closing, therefore a breach of contract and contempt of the court order, caused by their own fraud, and a matter not previously on appeal. The record shows *Respondents own fraud* prevented them from proceeding with the closing, meaning they had been denied lending for failure to have a valid and negotiable sales contract at initial application, which was never remedied, therefore never completed their mortgage application. The Dudeks *prior and continuing fraud is directly related to their own critical breach*, therefore this current claim for breach of contract was not encompassed in the prior action, either on appeal or as a cause of action.

Maybe more importantly, the Respondents are in pari delicto and are in no position to request relief when they caused or could have prevented the issues upon this court today, therefore due to the reasons above or argued herein Brief dismissal is improper and must be vacated or reversed.

E. The trial court err or abuse its discretion in granting Respondents Stephen Dudek and Doreen Cross' Motion to Dismiss to Appellant's Cause of Action for Fraud, etc; Bad Faith and Unfair Dealings and/or Accompanied by Fraudulent Action; conspiracy to defraud; and Fraud - Untrue assertion of fact (or equivalent]; Assertion made with knowledge of falsity and intent to deceive

In its Order, the lower court reasons that all the factual allegations asserted in its complaint were facts Appellant knew at all times relevant leading up to the trial and at trial, therefore are only issues which were adjudicated in the former suit and any issues which might have been raised in the former suit, therefore barred by res judicata. Even so, it also found no evidence of extrinsic fraud, only intrinsic, therefore accordingly is barred by res judicata (R. pg. 19-30)

[10] The Respondents even tried to force a stay on their purchase of the property in their attempt to obtain a court ruling ordering Appellant and the Ferros to purchase a supersedeas bond (*See*, R. pg. 1711-1718)

Res judicata cannot bar Appellant's complaint as the Respondents, including an attorney, concealed pertinent information and had a duty to speak. The concealed facts along with the misrepresentations were the center of the Appellant's Questions of fact and so vital and material to the transaction that if known could have changed the course of the litigation, therefore deprived Appellant the opportunity to fully exhibit and try her case. Ray v. Ray, 374 S.C. 79, 647 S.E.2d 237 (2007) (R. 439-465). Further, the *substantial* extent fraud (perjury, suborning of perjury, forgery, false promises, conspiracy) was committed, and the fact such fraud resulted in an injustice or a ruling the lower court did not have the inherent power or jurisdiction to rule (i.e., specific performance in favor of the Dudeks).

Just as important, and as argued herein brief and repeated here, Res judicata cannot bar Appellant's complaint based on its asserting that its current claims involve "issues which could have been raised in the former suit," because when two actions are between the same parties upon different causes of action, the former judgment is conclusive only as to those issues *actually* determined, not what could have been determined. *Johnston-Crews Co. v. Folk, supra.* Even if the issues were considered determined, those issues were supported only by fraud (i.e., false promises, perjury, suborning perjury, forgery of financial documents and misrepresentation), which resulted in an injustice or ruling contrary to rules, statutes, maxims and precedents of equity or law or a void order. Such would be considered fraud on the court or an exception to be relitigated. As pointed out in *Mr T v. Ms. T, supra*, more precisely, the application of res judicata and collateral estoppel "may be precluded where unfairness or injustice results, or public policy requires it." *Nelson v. QHG, supra;* citing *State v. Bacote, supra; Carrigg v. Cannon, supra.*

Maybe more importantly, the Respondents are in pari delicto and are in no position to request relief when they caused or could have prevented the issues upon this court today, therefore due to the reasons above or argued herein Brief dismissal is improper and must be vacated or reversed.

F. The trial court errored granting in-part Respondents First Federal, Allison Williams, Wooddy Law Firm, Carrie Boyer, David Collins, Michael Scarafile, Carolina One Real Estate and Susan Nicholson's Motion to Dismiss to Appellant's Cause of Action for "Fraud - Untrue

assertion of fact (or equivalent]; Assertion made with knowledge of falsity and intent to deceive"

The lower court order granted in-part Respondents' Motion(s) to Dismiss because the assertions made by the Plaintiff *'that, through testimony and discovery, the Defendants deceived both the Plaintiff and the Court by making untrue assertions. As such, the Plaintiff pleads a claim of perjury rather than fraud.*" (R. pg. 19-30, 49-64, 65-77, 88-109). Appellant's causes of action affirm far more than just "untrue assertions" by the Respondents. In fact, it includes false promise(s) or by a third party, unlawful acts of concealment, suborned perjury, and misrepresentation in discovery and at trial, all which directly affected the jurisdiction of the court, appellant's rights and public policy. More important, these promise(s) and acts were *critical* and *material* to its clients, Respondents Dudek's ability to compel specific performance AND therefore critical to the trial court's ability or inherent power to adjudicate such a remedy in favor of the Dudeks. Without the perjury, misrepresentations, false promise(s), conspiracy and concealment the Dudek's would fail all conditions precedent to lawfully compel specific performance, and the lower court would not have had the jurisdiction or inherent power to rule in their favor first.

Further, perjury IS fraud: In the state of South Carolina, Perjury is fraud, where "(the Supreme Court held that the charge of perjury or false swearing on the part of a party or his witnesses "is a species of... fraud," ...) *Corley v. Centennial Const. Co.*, 247 S.C. 179, 189, 146 S.E.2d 609, 614 (1966)(emphasis added). Moreover, such perjury was practiced in the very act of obtaining a judgment that fails on its face, is unlawful, is unsupported by valid evidence, and/or is contrary to the maxims, precedents, rules or statutes of law and equity. Additionally, the respondents' actions prevented Appellant from presenting her case fully and fairly. Since the Dudeks had no lawful or valid claim to the property after November 30, 2012 as they were denied lending for failure to have a valid and negotiable sales contract at all times material, there was *never* a valid or lawful mortgage closing transaction. Consequently, after the sales contract expired, all Respondents' actions were unlawful or fraudulent and they had no standing or justification to represent a closing transaction or make any demand to the sellers, especially to specifically perform. Maybe more

importantly, the Respondents are in pari delicto and are in no position to request relief when they caused or could have prevented the issues upon this court today, therefore due to the reasons above or argued herein Brief dismissal is improper and must be vacated or reversed.

G. The trial court errored in granting in-part Respondent Michael Scarafile, Susan Nicholson David Collins, Carolina One, First Federal and Allison Williams' Motion to Dismiss regarding Appellant's Cause of Action – Breach of Fiduciary Duty/Breach of Assumed Duty; Duty of Care; Duty of Full Disclosure; Duty to Act Fairly; and Duty of Good Faith and Fair Dealing; Tortious Conduct

The trial court in this current action specifically ruled because Appellant was not a party to the transaction(s), there was no duty owed to her and no fiduciary relationship created *As such, the Plaintiffs Tenth Cause of Action fails*"(R. pg. 88-108); (R. pg. 49-64).

Appellant was not required to be a party to the sales contract or loan for a duty of care or fiduciary duty to speak the truth or disclose critical and material facts or documents to the sellers, the courts or herself.[11] Even so, as the South Carolina court(s) also agree, a fiduciary relationship that has not yet been defined can arise from circumstances of the parties. "Courts of equity have carefully refrained from defining the particular instances of fiduciary relationship in such a manner that other and perhaps new cases might be excluded and have refused to set any bounds to the circumstances out of which a fiduciary relationship may spring." *Island Car Wash, Inc.*, 292 S.C. at 599, 358 S.E.2d at 152 (1987). A fiduciary relationship has been defined by the South Carolina Courts to be ["A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence"] *Island Car Wash, Inc. v. Norris*, 292 S.C. 595,599,358 S.E.2d 150, 152 (1987). "Parties in a fiduciary relationship must fully

[11] The ability of Appellant to perform her sales contract was, at all times material, directly related to the ability of the Dudeks to tender payment/ perform their sales contract or compel specific performance, which in turn was directly related to the trial court's ability, inherent power or jurisdiction to order specific performance in favor of the Dudeks; if the Dudeks failed, then Morphew could perform. Hence a fiduciary relationship clearly arose from the circumstances of the case or the parties.

disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud." *Ellie v. Miccichi*, 358 S.C. 78, 100, 594 S.E.2d 485, 497 (quoting *Anthony v. Padmar, Inc.*, 320 S.C. 436, 449, 465 S.E.2d 745, 752 (Ct.App.1995)); To establish the existence of a fiduciary relationship, the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so entrusted will act not in his own behalf but in the interest of the party so reposing. *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986); *Ellis*, 358 S.C. at 509, 595 S.E.2d at 822. The evidence must show the entrusted party actually accepted or induced the confidence placed in him. *Regions Bank*, 354 S.C. at 671, 582 S.E.2d at 444; *State v. Parris*, 353 S.C. 582, 593, 578 S.E.2d 736, 742 (Ct.App.2003); *Brown v. Pearson*, 326 S.C. at 423, 483 S.E.2d at 484 (1997). Here, the Respondent(s), as professionals and best to know the financial or "contractual" position of its clients, were under oath during the court proceeding, and so 'accepted or induced the confidence place in them by the judge *and* all parties, thus creating a fiduciary duty and a duty to speak in the prior action and/or in this current action. Maybe more importantly, the Respondents are in pari delicto and are in no position to request relief when they caused or could have prevented the issues upon this court today, therefore due to the reasons above or argued herein Brief dismissal is improper and must be vacated or reversed.

SUMMARY

Appellant raises issue with the Order of the original action of which this instant action arose from. Said Order is dated November 6, 2014, Civil Case No. 2013-CP-18-000183 and that it is VOID in-part or fails on its face, contrary to the maxims, rules, or statutes of law or equity and/or violates public policy regarding its award of specific performance to the Dudeks.

Regardless, the trial court's opinion implies that the dispositions made are justified by uncontradicted facts, but the record demonstrates beyond question that serious controverted issues ought to be resolved before the Respondents may have relief.

There are genuine questions of material fact present. Those issues include, but are not limited to, whether the Dudeks no longer had legal rights to the property in question after November 30, 2012;

whether or not a mortgage transaction or mortgage closing transaction was in existence at all times material or was ever in existence; whether the Order of November 6, 2014 is void; whether the Respondents are liable for false promises or collateral to the issue; whether the committed perjury, misrepresentations, suppressed evidence or suborned perjury materially and critically affected the lawful ability of the Dudeks – and the trial court's jurisdiction or inherent power—to compel or adjudicate Specific Performance, or if such actions deceived the trial court to make a decision contrary to the precedents set by the South Carolina Courts, and what, if any, fiduciary duties or duty of care were owed by Respondents to Appellant and/or the courts, and whether those duties were breached resulting in a question of liability; whether the Respondents' conduct of perjury, forgery, misrepresentations, concealment of material and critical facts and documents, conspiracy to commit fraud, and false promises may reasonably be regarded as sufficiently extreme and outrageous or reprehensible to permit recovery, and whether Appellant's assertions of emotional distress stress resulting from the actions of the respondents and the uncontested specific effects of said stress as testified are sufficient to rise above a "bald assertion." Such presents jury question(s). Maybe more importantly, the Respondents are in pari delicto and in no position to request relief when they caused or could have prevented the issues upon this court today.

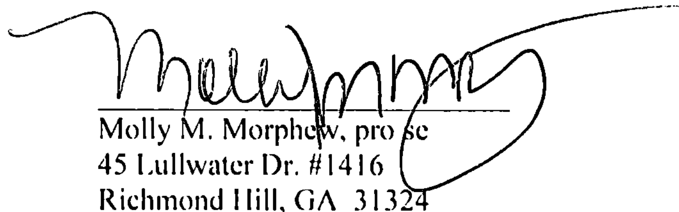
Further, discovery was pending to develop Appellant's theories of recovery, and/or many causes of action were already previously ruled on by another judge in the same civil action, and not appealed or contested by the Respondents. And again, Collins is in default, or should be held so, and would not be entitled to 'summary judgment' in any form.

CONCLUSION

Therefore, based on the reasons herein, and/or on a VOID order of the original action in which this instant independent action arose from, Respondent(s) are not entitled to summary judgment, motion(s) to dismiss, and/or relief from default. Appellant asks this court to void, vacate or reverse the trial court's ruling 1) granting specific performance to the Respondents Dudek, and 2) the trial court's

rulings granting summary judgment(s), motion(s) to dismiss or relief from default in favor of Respondent(s), and 3) rule Collins in default, and a) if this Court finds the Chief Deputy Clerk failed to enter default as required, order that entry of default was mandatory but not entered as required per Rule 55(a), and is no fault of the Plaintiff, but instead an error of the court, and b) because no valid Answer or request for relief from default pursuant Rule 55(c) has been filed or timely filed, Appellant requests default judgment entered and damages awarded as such, d) and impose sanctions that this court finds appropriate; 4) Respondents liability recognized; 5) sanctions as appropriate, and 6) remand back to the lower court for further action. Additionally, the Appellant respectfully asks this court to further consider any additional pending appeal before it regarding Appellant due to the appearance of bias and partiality from the trial court or its officers (R. pg. 981).

Respectfully submitted,



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March 10, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, First Judicial Circuit
The Honorable Edgar W. Dickson, First Judicial Circuit
Honorable Maite Murphy, First Judicial Circuit

Appellate Case No. 2018-002185

Molly M. Morphew — Appellant

v.

Stephen Dudek, Doreen Cross, Carolina One, Carolina One, Susan Nicholson, Wooddy Law Firm, Carrie Boyer, First Federal, Allison Williams, David A. Collins, Michael Scarafile — Respondents

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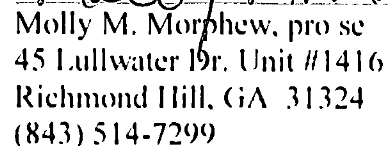
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that its Initial Briefs comply with Rule 208(b).



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March 10, 2020