THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Goodstein, First Judicial Circuit
Honorable Maite Murphy, First Judicial Circuit

Appellate Case No. 2023-000879

Molly M. Morphew — Appellant

v.

Stephen Dudek and Doreen Cross — Respondents

APPELLANT'S INITIAL BRIEF

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Table of Contents

ISSUES ON APPEAL

1. Did the lower court properly granted summary judgment while discovery ordered by the lower court was still pending?
2. Did the lower court committed discovery error or a violation of when it issued a protective order on discovery relating to material issues or allegations within the scope of the complaint and when any reasoning to not be had by Respondents falls outside the criteria for protection as mandated by discovery Rule 26?

3. Viewed in the light most favorable to the Appellant, was there was a genuine issue of material fact regarding any of its claims?
4. Did the court of equity lack subject matter jurisdiction and discretion to award specific performance to the Respondents in the original action, and now this court in which this action arises, raising a genuine dispute about material facts or allegations within the scope of the complaint?
5. Does the Respondents' terminated or expired *time is of the essence* sales contract affect the legal standing of the Respondents, Appellant or jurisdiction of the courts?
6. Did the lower court commit reversable errors or abuse its discretion denying Appellant's 2nd and 3rd 59(e) motions?
7. Did the Respondents file a proper or sufficient 12(b)(6) motion to dismiss that tolled the time to answer the complaint?

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STANDARD OF REVIEW

When reviewing a grant of summary judgment, an appellate court applies the same standard used by the trial court. *Lanham v. Blue Cross and Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). A grant of summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule

56(c), SCRCP; *Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo. *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). *Town of Summerville v. City of North Charleston*, 662 SE 2d 40 - SC: Supreme Court 2008.

"Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, and is fundamental. Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court. *Fielden v. Fielden.* 274 S.C. 219,262 S.E. (2d) 43 (1980); *Harden v. South Carolina State Highway Dept.*, 266 S.C. 119,221 S.E. (2d) 851 (1976); *State v. Gorie.* 256 S.C. 539, 183 S.E. (2d) 334 (1971).

Issues related to subject matter jurisdiction may be raised at any time. *Browning v. State*, 320 S.C. 366, 465 S.E.2d 358 (1995).

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).

In an action in equity tried by the judge alone, on appeal the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. Grosshuesch v. Cramer, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005); Campbell v. Carr, 361 S.C. 258, 263, 603 S.E.2d 625, 627 (Ct. App. 2004)

In an action in equity, tried first by the master or a special referee and concurred in by the judge, the findings of fact will not be disturbed on appeal unless found to be without evidentiary support or against the clear preponderance of the evidence. *Ex Parte, Guaranty Bank & Trust Co.*, 255 S.C. 106, 177 S.E. (2d) 358 (1970).

ARGUMENTS AND PROCEDURAL HISTORY

1. **The lower court improperly granted summary judgment while discovery ordered by the lower court was still pending.**

Appellant, Molly Morphew, (herein "Appellant") contends the lower court not only improperly granted summary judgment while ordered discovery was pending, but also improperly denied, 1) Appellant's evidence request at the hearing, 2) Appellant's motion to compel discovery and 3) Appellant's motion for Rule to Show Cause why Respondents have failed to serve Appellant the court ordered discovery. To deny the court ordered discovery commits discovery violations, violates due process and the rules of the court. As demonstrated below, summary judgment must be reversed, Appellant's motion to compel and motion for rule to show cause granted, and due Respondents' intentional contempt of a court order, sanctions as requested in Appellant's motion for rule to show cause or as this court deems fit.

On May 9, 2020, Appellant served its separate discovery requests for Admissions, Interrogatories and Requests for Production on both Respondents, Doreen Cross and Stephen Dudek (herein "Respondents"). Respondents' responses were due on or before June 8, 2020. (Plntf. Req. for Discovery)

On June 5, 2020, the Respondents filed a motion for protection against the discovery. That motion contained no answers, responses or objections to each request. (Motion for Protection).

On or about July 23, 2020, IAW Rule 36 SCRCP and after Appellant had not been served any response to its requests for admissions, Appellant served a motion to deem admissions admitted. In its motion, Appellant argued among other things, that all admissions are relevant to the subject matter of the action and the truth of any matters within the scope of SCRCP Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request; and that Respondents have not served a timely

response. Appellant is entitled to an order admitting the truth of the matters specified in Appellant's requests pursuant to SCRCP 36(a), and Federal Rules of Civil Procedure 36(a) (Mtn Admissions Admitted). As argued below and repeated here, nowhere does Rule 36 indicate a general motion for protection from discovery automatically overrules the timely response of admissions. Respondents did not defend or respond to Appellant's motion. Consequently, Respondents fail to demonstrate good faith or good cause in their failure to respond to the requests for admissions as required by Rule 36. Appellant has not been served responses to the admissions.

A year later, on May 26, 2021, a motion hearing took place on several motions, including Appellant's motion to deem admissions admitted. Due to time constraint, the Respondents' motion for protection from discovery and Appellant's motion to deem admissions admitted did not allow for oral argument but was to be reviewed after the hearing by the judge, Judge Murphy. Judge Murphy did order from the bench, and in accordance with the discovery rules, the Respondents to provide Appellant responses to her discovery, and to give specific reasons why objecting to[1], and allowed 1 week for compliance, due June 2, 2021(Transcript). The Respondents failed to serve the responses to each discovery request as ordered by the court. Respondents failed to respond or answer the discovery requests they did not object to or were not seeking protection from. The Respondents are in contempt.

On June 9, 2021, after receiving no discovery or response from Respondents, Appellant served its motion to compel discovery and response to Respondents' additional memorandum in support of protective order for discovery (Motion to compel/response). In its motion, she demonstrates the memo was untimely or filed *after* the hearing (Additional Memo Protection), therefore any additional evidence or arguments to support their motion for protective order was not before the court for its consideration. contending their motion contained no answers, responses or objections to each request, nor did they produce documents; and that their reasons for protection falls outside

[1] SCRCP Rule 33, Rule 34 and Rule 36

'protection' as outlined in Rule 26(c) SCRCP (where justice only requires to protect a party or person from annoyance, embarrassment, oppression or undue burden by expense). All discovery is relevant to the subject matter of the action and the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request; and that Respondents have not served a timely response. Further, they should not be given leave to decide what's relevant to the case and what is not or be protected from discovery alleged provided in a separate prior case. The discovery rules provide a broad allowance of discovery and do not indicate, or mandate discovery produced in another case cannot be produced in a separate subsequent case, notwithstanding the fact the Respondents cannot or failed to point to any case or discovery request in which they provided the same discovery. Additionally, Respondents generally state "the plaintiff attempts to relitigate issues already litigated" but fail to point to even one issue or allegation already specifically litigated that falls outside the scope of the complaint or does not address issues of material fact as alleged in the Amended Complaint. They also fail to point to any evidence or case precedent which supports their allegations that any of the discovery requests require justice to protect. Rule 26(c) SCRCP. Since the discovery was previously provided but not to Appellant, it's already in discoverable format and at the Respondents' fingertips and does not meet the criteria for 'protection'[2]. The discovery rules provide a broad allowance of discovery and do not indicate, or mandate discovery produced in another case cannot be produced in a separate subsequent case. Based on the above, the court record, and the fact Respondents did not answer, respond to or defend Appellant's motion and response, and the court record, the protective order filed later on August 23, 2021, was improper and an abuse of the discovery rules and the court's discretion. (59e motion to compel).

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[2] Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense...)Rule 26(c) (emphasis added)

On August 23, 2021, Judge Murphy issued an order protecting [some] discovery supporting its ruling generally stating, "*I agree with the Respondents*". The order failed to point to any arguments, cases, rules or statutes to support its denial of discovery. She also commanded the Respondents to provide [some] discovery or all other items [the discovery requests not highlighted or circled in the Respondents' memorandum to support their protective order] within 30 days of its order or September 22, 2021. (Order,pg.5) (Additional Memo Protection, Ex. 1, non-circled/non-highlighted items).

> "*Attached to the Defendants' Additional Memorandum was an exhibit which contained all the Plaintiff's requests. The requests to which the Defendants objected were highlighted/circled, and the Defendants' reasons for objecting to the requests were stated in their Motion and Additional Memorandum. This Court agrees with the Defendants. The Defendants shall not be required to respond to the highlighted/circled requests. The Defendants shall respond to all remaining requests within 30 days of issuance of this Order.*" (Order, pg. 5) (emphasis added)

Further, Appellant's motion to compel discovery and response to Respondents memo to support their protective order motion was pending at the time of the hearing, but due the apparent lack of time, and rushed atmosphere, plus the fact the judge said she will be reviewing the entire record "*I'm certainly going to look at the entire record to see what was filed...*" (Transcript 5-21 l.25-pg. 23 l. 2) "*I'm going to take the time to review -- this is, obviously, a voluminous court record. I'm not going to make a decision right here without reading it to ensure that you're protected and the other side is protected. So that's why I'm asking you if we've got everything in here, so procedurally, I can look at it to see when motions were filed, when other things were filed, to ensure that all the timeliness of those motions are followed. and what objections were filed to ensure that's taken care of appropriately.*" (Trans. 5-21), Appellant had been confident her motion was going to considered.

It should be noted by this court that Judge Murphy failed to consider Appellant's motion to compel and response to Respondents' Additional Memo in its order or rulings on August 23, 2021,

and this issue was raised in Appellant's 59e motion (59 motion 8-21, pg. 15-19). To further support that Appellant's motion and response was not considered in its ruling, it was not dispositioned either in the order or on the record after the hearing, but was [again] improperly scheduled *over a year later* to be heard at the November 22, 2022 hearing by a different judge, Judge Goodstein, even though it was required to be considered in 2021 by Judge Murphy. Judge Goodstein later in its order dated Dec. 30, 2022, in error and against another judge's ruling, denied Appellant's motion to compel discovery and motion for rule to show cause [why the discovery ordered by Judge Murphy has not been complied with].

> "*When a circuit court issues an order, that issue is done. I cannot nor will I go behind what another circuit court judge has done in deciding an issue.*" Judge Goodstein (Transcript)

Judge Goodstein's granting of summary judgment and denial of court ordered discovery violates discovery rules, rules for summary judgment, and a prior court order by another judge, Judge Murphy, Order dated Aug. 23, 2021[3](Order 8-21) (59e motion 1-23).

Appellant contends that due to Respondents' intentional contempt of a court order and major delay in the proceedings, sanctions are due. Along with pending discovery and the errors and oversites by Judge Murphy and then by Judge Goodstein, Appellant's motion to compel and motion for rule to show cause should be reversed and granted, along with Respondents' motion for protection from discovery reversed and denied. It's been over 3 years and the discovery is still pending.

This court should also take notice the Respondents came to court asking for a protective order from [some] discovery requests, and over a year later it was granted on [some] discovery and the remaining discovery was ordered to be responded to and provided to Appellant. Now, the Respondents, with full knowledge of non-compliance, refuse to comply with the court order and are in obvious contempt. It is clear the Respondents have neither integrity nor consideration for the

[3] At the hearing in November 2022, Judge Goodstein even stated she is unable to overrule Judge Murphy's discovery order/rulings.

processes of the court or discovery rules. Again, their outright contempt or refusal to provide the ordered discovery, discovery that addresses the very issues in granting of summary judgment, warrants this court to reverse the granting of protection from discovery, reverse the denial of Appellant's motion to compel and motion for rule to show cause, and grant sanctions and remand back to the lower court for further proceedings.

On August 28, 2021, Appellant served its 59e motion (Motion). Respondents did not defend or respond to Appellant's motion. As argued herein and repeated here, Appellant's motion included, but not limited to, to provide all discovery requested because the discovery rules allow for any discovery related to the issues in the instant complaint and just because it may relate to another case does not make it non-discoverable in this case, nor was any of the discovery undue burden or cost. In addition, this Court indicates in its Aug. 23, 2021, order that the Respondents' motion filed for protection from discovery has the automatic effect of preventing requests from being deemed admitted and cites *Baughman v. American Tel. and Tel.* Co. in support of its ruling (Order). *Baughman* specifically finds a protective order is not automatic in preventing requests for admissions to be admitted. "A motion for a protective order is not conclusive in preventing requests for admissions to be admitted. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101,109,410 S.E.2d 537,542 (1991). As cited in *Baughman*, the South Carolina Supreme Court found a motion for a protective order *may* be an appropriate response, but only when made in good faith would it operate to prevent matters from being deemed admitted. *Supra, Baughman. Baughman* is not even remotely the same as this instant case, where unlike in Baughman, in this instant case the admissions are minimal, the questions easily answered, and there were no requests to provide certain information in the event the request was denied. In Baughman, there was 1000's of admissions, many of them required Plaintiffs to provide certain information in the event the request was denied, thus "not in proper form" because their effect was "nothing more than interrogatories10(guised as requests for

admission) seeking to ascertain knowledge of facts." *Supra, Baughman.* Respondents failed to provide any responses to the admissions in its motion for protection from discovery and failed to respond to Appellant's motion to deem admissions admitted, therefore Respondents failed to demonstrate good faith.

If all it takes for a litigant to avoid requests for admission was to submit a general motion for protection from discovery that failed to respond to each or submit reasoning for objecting specifically why it should be protected, then every litigant could easily and without effort avoid requests for admissions or delay answering for years, such as in this case.

It's been years and Appellant still hasn't been served responses to any its discovery requests, even the discovery ordered by the court and due September 22, 2021[4]. Such shows a critical failing of good faith, an intentional delay of the proceedings, and contempt of a court order (59e motion 1-23)(59e motion 8-21)(Mtn Compel/Response)(Mtn Rule to Show Cause)

On February 15, 2022, after giving the Respondents more than ample time to comply with the court order, Appellant served and filed a motion for rule to show cause why the Respondents have failed to provide the ordered discovery to Appellant. The Respondents did not answer or respond to the motion rule to show cause either in filings or at the November 22, 2022, hearing. Later, the court denied the motion even though all ordered discovery is still pending. It's abuse of discretion or process to deny a show cause motion why Respondents failed to comply with the court order, particularly when they failed to show good cause or respond to or defend Appellant's motion (Mtn Rule Show Cause) (59e motion, 1-23). Due the above, Appellant's motion for rule to show cause must be reversed and granted, along with sanctions as required under the circumstances, IAW the motion.

On March 30, 2022, the Respondents filed a 1-page, blank motion for Summary Judgment which contains no arguments. Respondents' motion was not served on Appellant, required and for a

[4] Respondents failed to file the responses and documentation with the court in response to the order.

pro se party where traditional service by mail is mandatory and email is not an accepted method of service, nor does it contain a certificate of service upon Appellant as required by Rule 5 SCRCP; Rule 5 FRCP[5]. The motion was obtained by the Appellant from the lower court after receiving the order dated December 30, 2022 (Motion). No memorandums or affidavits were served on Appellant. Respondents bring summary judgment, but allege, *"no genuine reason as to any material fact"*. Summary judgment states, *"no genuine issue as to any material fact"*. Appellant could find no case or filing where the use of the word 'reason' has been used or is even applicable to bringing a motion for summary judgment. They are 2 different words with 2 different meanings, where reason is an 'explanation' and issue is 'an important topic or problem for debate', and they are not interchangeable. Summary judgment does not require a genuine explanation to a material fact. Due the above, their motion fails to meet the requirements under the rule for summary judgment.

In the November 2022 motion hearing, Appellant's 2021 motion to compel discovery and 2022 motion for rule to show cause was considered. Additionally, Appellant raised subject matter jurisdiction. Respondents did not respond or defend either motion or subject matter jurisdiction in filings or at the hearing. Respondents presented the [unserved] motion for summary judgment primarily raising and arguing that of an alleged illegality of the easement (Trans.11-22), not an issue raised in their motion nor within the scope of the complaint (Amended complaint).

> *"Again, every cause of action she alleged arises out of this alleged easement. And because the easement itself as it existed was illegal in that it was a single water line and a single meter serving two separate parcels, that easement cannot continue to exist. It's illegal. It's an illegal contract. Those are my arguments in a nutshell."* (Trans. 11-22).

"Thus, it should be concluded that public policy would be offended by permitting the partners, who were all parties to the illegal contract, to invoke the aid of our courts to enforce any claims

[5] This Rule 5(a) is the same as Federal Rule

depending on it.' *Jackson v. Bi-Lo Stores, Inc.*, 437 SE 2d 168 - SC: Court of Appeals 1993. Appellant defended and asked for proof or evidence of an alleged legal issue with the easement. That discovery is still pending IAW a previous court order by Judge Murphy in 2021.

> "*The requests to which the Defendants objected were highlighted/circled, and the Defendants' reasons for objecting to the requests were stated in their Motion and Additional Memorandum. The Defendants shall not be required to respond to the highlighted/circled requests. The Defendants shall respond to all remaining requests within 30 days of issuance of this Order*." (Order, pg. 5)

Specifically, "*Every item, document, evidence or communications in which you based your claim that the waterline or water to the Plaintiff's property ... is illegal or that Dorchester County declared that specific waterline illegal,*" AND "*Every item, document, evidence or communications in which you based your claim that the water line that was in existence at all times material.... 'violates county codes.*" (Cross Add. memo, Ex.1: # 5 & #8);(*see* Dudek Additional memo, Ex.1 # 6 & #8).

The question at law in this case requires the pending ordered discovery before summary judgment can be granted, especially on a dispositive issue granting summary judgment. "Because the parties are given the right to police non-jurisdictional questions, it follows that this right would be destroyed by the district court's exercising it on behalf of the parties *sua sponte.*" *Ellenburg v. Spartan*, 519 F.3d 192, 198 (4th Cir. 2008)

The 2021 order (Order), along with Appellant's pending motion to compel and/or motion rule to show cause, is proper notice to the courts that discovery is pending. The ordered discovery was due September 22, 2021. The Appellant has still not been served any responses to its discovery requests. Discovery has been pending for over 3 years and both the court and the Respondents refuse court ordered discovery. (59e Motions(s)) To refuse court ordered discovery denying Appellant's request at the hearing and its motion to compel and motion for rule to show cause, and then grant

summary judgment while the discovery is pending on the very issues summary judgment was granted includes but not limited to abuse of discretion[6], abuse of Appellant's due process, abuse of the processes of the courts, and a violation of discovery rules, and violation of summary judgment (Rule 56 SCRCP and FRCP), where the Appellant must be given every opportunity to obtain discovery before summary judgment is proper. In no event, however, should the court enter judgment against a party who has not been apprised of the materiality of the dispositive fact and been afforded an opportunity to present any available evidence bearing on that fact. Rule 56 SCRCP and FRCP.

Additionally, the cause of action for trespass upon real property does not arise out of the easement as alleged but arises out of lack of subject matter jurisdiction and their invalid purchase contract for the servient property and a void order. Subject Matter Jurisdiction #4 Issue below repeated here. The Respondents, at all times material, due their contract expiration on November 30, 2012, had no valid or negotiable purchase contract therefore had no legal or valid claim to the property nor ability to compel specific performance.[7] The Respondents are not bona fide purchasers, therefore are actual trespassers (Amend. Complaint p.1, para.1; p.2 #8,). Consequently, the master in the original action in which this action arises had no jurisdiction or discretion to award specific performance to the Respondents, nor does the court in this instant action have jurisdiction to grant summary judgment. (Order, Case #2013-CP-18000183 Morphew v. Dudek, et al, Dudek v. Ferro)

On Dec. 30, 2022, the lower court filed an order. In that order, Judge Goodstein denied Appellant's motion to compel discovery and motion for rule to show cause finding in obvious error, "the discovery sought in the motion to compel was the same discovery Judge Murphy ordered the

[6] Appellant argues failing to comply with a court order or the requirement to produce court ordered discovery and/or denying Appellant's motions to compel and rule to show cause is not a discretionary decision.

[7] The expiration of the Respondents' purchase contract was never specifically adjudicated. Nothing in the record of any court in any case, including the original action in which this instant actions arises, shows the court(s) considered and ruled on the expiration of and due the Respondents' own hand, as alleged by appellant.

Defendants did not have to respond." (Order, 12-22, pg. 4 Para. #1). As agued above and below #2 and incorporated herein, Appellant contends the lower court committed reversible error in its order, for the discovery sought in both the motion to compel and rule to show cause *in fact* points to the *ordered* discovery and Respondents' failure to provide or comply with a court order (59e motion(s), not contested or defended by Respondents)(Mtn Rule to Show Cause, not contested or defended by Respondents)(Mtn Compel Discovery/response, not contested or defended by Respondents).

It's been years since the discovery was ordered. The Respondents failed to comply with the court order and served responses. The Respondents are in contempt of a court order and sanctions are required due to the failure to provide the ordered discovery, and their lack of good cause shown for their failure to comply and failure to respond to the Appellant's motion for rule to show cause (Mtn Rule to Show Cause).

Due to the above and pending discover, summary judgment was not proper. Appellant asks this court to reverse the court order for summary judgment as improper; reverse its denial of Appellant's motion to compel discovery and motion for rule to show cause; and as a sanction for contempt of a court order and failure to respond to a motion for rule to show cause, provide *all* discovery requested, not just the discovery ordered. Respondents will have an opportunity later to object to any evidence, therefore they are not prejudiced. And maybe most importantly, discovery regarding their closing/loan/financial documents could rule out several issues or causes of action prior to trial.

The court order indicates summary judgment is applicable because the Appellant failed to have any evidence to prove a genuine material fact. It is highly prejudicial to Appellant that the court granted summary judgment for lack of evidence when this very same court refused or denied Appellant every opportunity, even discovery due Appellant from a court order, to gather evidence necessary to persuade a reasonable jury of a material fact.

Since the crux of the Respondents argument lies on the allegation that the easement was illegal and that ordered discovery regarding that very allegation is still pending, among much other pending ordered discovery regarding the facts and allegations of the complaint or Respondents allegations, summary judgment is improper and must be reversed.

"A party can move for summary judgment on the grounds that an opponent cannot muster sufficient evidence to show that a dispute of material fact is "genuine." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); see *Scott v. Harris, 550 U.S. 372, 380 (2007).* As the Court has said, a dispute about a material fact is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson, 477 U.S.* at 248. Thus, if, after a party has had every opportunity to gather evidence, that party nonetheless still lacks the evidence necessary to persuade a reasonable jury of a material fact, the court "shall grant" summary judgment against that party. Fed. R. Civ. P. 56(a)[8] ; see *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986)(emphasis added)

Alternatively, a party can move for summary judgment for a completely different reason—namely, that the undisputed material facts show that the party is entitled to judgment as a matter of law. *Ortiz v. Jordan, 562 U.S.* 180, 188-90 (2011). A party moving for summary judgment on that basis does not contest the "genuine[ness]" of any factual dispute nor the sufficiency of the opponent's evidence. Fed. R. Civ. P. 56(a). Instead, the party assumes the truth of all the facts and every adverse inference that can be drawn therefrom but claims nonetheless that the undisputed facts show the party is entitled to judgment. When used that way, a motion for summary judgment is more like a common law demurrer. Either way, summary judgment is improper until all discovery and/or court ordered discovery has been served and completed.

The drastic remedy of Summary Judgment, where summary judgment "should be cautiously invoked" so that no person will he improperly deprived of a trial of the disputed factual issues (*Watson*

[8] SCRCP Rule 56 is the language of Federal Rule 56.

v. Southern Ry. Co., 420 F. Supp. 483, 486 (D.S.C. 1975)(emphasis added); 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). In no event, however, should the court enter judgment against a party who has not been apprised of the materiality of the dispositive fact and been afforded an opportunity to present any available evidence bearing on that fact. **Rule 50** SCRCP and FRCP

Granting summary judgment or scheduling a trial on its merits to be decided without discovery and with the legal position of the Respondents or Appellant in question violates public policy and will improperly deprive Appellant of a trial of the disputed factual issues, thus is severely prejudicial, let alone the intentional prejudice it would cause the Appellant in its ability to appeal the issues, if applicable. Especially when the Appellant is neither at fault for the Respondents' failure to provide discovery or their contempt of a court order.

Though the judge should have requested this evidence herself, as neither she nor the Respondents are experts in the matter, with no valid evidence in the record to support an illegality issue, she refused and instead decided a question of law and granted summary judgment. Even so, as argued in below and repeated here, no affidavits or memorandum was served on Appellant. Blank motions for summary judgement and personal affidavits, especially not served on opposing party, do not support questions at law nor support granting summary judgment. Again, summary judgment is not to weigh evidence or decide the law, just to decide if there is any question of material fact for trial.

Either way, discovery is still pending on material facts, noting those that are the crux used in granting summary judgment. Until discovery is completed summary judgment is improper and

prejudices Appellant its right to discovery and due process. The denial of its motion to compel and motion for rule to show cause is improper, or made in error, and must be reversed or else the lower court would be found in violation of overruling another judge's order, thus a violation of discovery rules and due process. Furthermore, damages cannot be properly assessed or presented until discovery has been served and completed, thus any issue due to lack of presenting damages is improper, especially where a live affidavit and worksheet was filed in the court record (Dynamic Damages/Costs Affidavit and Worksheet) where the appellant's affidavit specifically states the total sum certain amount filed in the lower court is a running total or live document (59e motion[9] 8-21 p.9) It does not include any possible future costs to appellant to defend its complaint, and that appellant will produce, if required, any costs not yet incurred or foreseen prior to completed discovery and that are not included in this affidavit. Whether or not the Respondents are bona fide purchasers, they intentionally prevented water to the Appellant's property at all times material by terminating water service to the property should be liable for any damages their actions caused or causing.

The outstanding discovery or document requests and court order should have been sufficient to inform this Court that, in the absence of a waiver, proceeding to summary judgment is appropriate only after Appellant has had a full opportunity to conduct discovery and the validity of, and obtain full knowledge or understanding of the parties' legal standing and their ability to defend here and at trial. (also *see* Mtn Rule Show Cause; 59e motion(s)). It was premature and in error for this Court to grant summary judgment under these circumstances. Due the above, Appellant moves this Court to allow Appellant's right to due process and reverse the order for summary judgment, motion to compel and motion for rule to show cause, and for sanctions due Respondents contempt of court orders.

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[9] Stating, "Plaintiff will provide the damages prior to the hearing, as such accounting is ongoing and the Defendants have previously been provided a preliminary and detailed accounting in 2020"

In January 2023, Appellant issued a 59e motion arguing summary judgment was improper due to pending discovery ordered by the court. It further pointed out errors of facts and issues raised in support for summary judgment, and/or for the first time in the order or where appellant first notice of these issues or alleged findings was in the court order, and appellant was not given the opportunity to defend or obtain the discovery ordered by the court (*see* below 'Rulings/Facts/Findings in Error')(**59e motion** 1).

Rulings/Facts/Findings in Error:

A. The Order finds, "*Defendants did not ratify the Ferros' handwritten language in the contract.*"

In the order is the first time Appellant was given notice this defense for summary judgment as the motion for summary judgment was blank, no memorandum or affidavits served on Appellant, and issue not raised at the motion hearing, and due the pending ordered discovery appellant was not given the opportunity to defend or obtain the discovery ordered by the court (hereafter argument referenced as "no notice of this defense"). By signing the addendum that included the handwritten language, not contesting the contract or the easement prior to purchase or at the time they allegedly found out the easement as constructed was illegal, and using that same contract to purchase the property, notwithstanding the ruling/finding of the District Court, where it found the handwritten easement/ addendum was signed by the respondents and agreed to in the contract to grant a water easement to a third party (Appellant), the Respondents ratified the contract in whole, including any handwritten language (as argued herein brief and repeated here). They had plenty of time to address the issue prior to terminating water service to the Appellant's property, but failed to do so, thus sat on their rights. *Regions Bank v. Schmauch*, 582 S.E.2d 432, 440 (S.C. Ct. App. 2003) (stating that "[a] person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it" and that "[a] person signing a document is responsible for reading the

document and making sure of its contents"). (59e motion, 1-23 pg. 2-4)(District Court Order, Case # 2:19-cv-3237-DCN, provided to judge at the November 2022 hearing)

B. The Order incorrectly finds, "*Plaintiff used the Barn as an investment property to rent to tenants and never lived there. When the Defendants took possession of the Property, there were tenants living in the Barn.*"

First, Appellant had no notice of this defense. Second, it was not a barn but a house since Respondent contract ratification. Third, Appellant did not use it as investment property and it was her primary residence since June 2017. The order further found 'the Respondents waited until the tenants moved out before terminating water service to Appellant's property on or about February 16, 2018.' There were no renters or tenants. Paragraph C below repeated here. These are all questions at law, where in summary judgment the court is not to decide questions of law or weigh evidence. Regardless, Respondents provided no proof of tenants, contracts, proof of 'investment' or any material and validated evidence to support the courts finding of (**59e motion**, Jan 2023 pg. 2-4).

C. The Order incorrectly states "*Once the tenants moved out of the Barn, the Defendants, on February 16, 2018, sent letter, by certified mail, to the Plaint(ff informing her of the installation of the bypass line taking place in ten (10) days and they would be shutting off the water to perform the installation.*"

First, Appellant had no notice of this defense prior to the order. Second, there were no tenants. Third, appellant was not aware of any letter until the Order since it was not delivered (Undelivered letter). Further, the 2018 letter did not contain notice of *a bypass line* taking place in 10 days, it just states the Respondents will be terminating water service to Appellant's property in 10 days., notwithstanding the fact the undelivered notice did not contain any reference to an alleged illegality[10], or any valid or legal reason why they were terminating the water easement. Since water service is the

[10] Which Respondents testified they knew of the prior year.

water easement contained in their purchase contract, a party to a contract cannot alter it without permission from the receiving party or a valid and lawful order absence of fraud from the court. The Respondents did not seek nor receive permission from the Appellant to terminate water to her property (herein referred to "dominant property" or "Appellant's property") or trespass upon easement. Further, intentionally and permanently cutting off water to Appellant's property without proper notice for any reason except an emergency is unlawful. Due it the water easement, it is unlawful without altering the purchase contract, thus is a breach of contract and trespass upon the water easement provision which they were fully aware of its construction or purpose (**Ferro Affidavit**). Again:

i. The Respondents took the law into their own hands and unlawfully terminated water to the Appellant's property;

ii. They gave no notice of the termination or good cause as to why they were terminating it;

iii. They obtained no permission from the Appellant to terminate water to her property or touch or alter her personal property (i.e., waterline connected to their personal waterline), whether there is an easement or not, as their personal property provided water through Appellant's property or waterline. The personal waterline at the main house has provided water to the [remaining 2 acres] for almost 20 years prior to Respondents' purchase of the servient property; (**Ferro Affidavit**)

iv. Unless due to an emergency, termination of water to the Appellant's property or trespassing upon the water easement agreement without proper notice and a legal alteration of the agreement is unlawful;

v. The Respondents gave no notice of an emergency or good cause to terminate water to the Appellant's property or trespass upon easement prior to Respondents' termination of;

vi. The Respondents' purchase contract/water easement agreement has not been lawfully altered or amended and contains unlawful language that must be addressed by an action in the court before the Respondents can lawfully terminate water to the Appellant's property;

vii. They violated the water easement agreement contained in their signed purchase contract used to purchase the property; (**Contract and Addendum B**)

viii. As argued above and repeated here, the Respondents agreed to provide water to the Appellant's property via the water easement agreement contained within their contract;

ix. They gave no notice to the recipient or to the other party to their contract, the sellers Ferro, of any easement issue nor have they petitioned the court to address the water easement or terminating water to the Appellant's property prior to its termination of;

x. If the water easement as constructed at the time of termination or trespass is found illegal, then another trial will have to take place to void the contract or remove the unlawful language contained in their purchase contract;

xi. Regardless, due to the above, all damages to Appellant during the litigation of the action for trespass upon easement or at all times material from termination of water until the sale of the Appellant's property are due Appellant.

D. The Order states, "*The Defendants' new pipe, from the house to the water meter, was approximately 500-feet…..*"

First, Appellant had no notice of this defense prior to the order. Second, plaintiff cannot speak to any alleged new waterline since she has not received the ordered discovery to this matter, and there are no filings or proof of this construction. Further this was not raised at the hearing nor were any affidavits or memorandum served on Appellant prior to the hearing. This is the first time in this order that Plaintiff has heard of the Defendants putting in a new 500-foot waterline (**59e motion**, Jan 2023 pg. 7-9).

E. The Order states there was no evidence finding trespass upon easement or trespass upon real property.

The Respondents admit they terminated water service to Appellant's property. They did so without notice (Undelivered Letter). The water service, as constructed, is the water easement contained in their purchase contract. As argued herein brief and repeated here, Respondents raised and argued the construction and agreement of said easement in another case in the District Court, where the court found in an unappealed Order the Respondents agreed to the water easement contained within their signed purchase contract to provide water to the Appellant's property. The Respondents did not raise the illegality issue known to them at the time of litigation[11]. Appellant contends this is a position contrary to the position they have taken in this instant case, therefore the Respondents should be prevented from its defense. The District Court order was provided to the judge at the hearing in November 2022 (District Court Order)(59e motion)

Further, the record contains many items proving trespass upon real property, including Respondents' expired or invalid contract to purchase, lack of loan approval to purchase at all times material, and issue of lack of subject matter jurisdiction in the original action in which this case arises, a void order, and Respondents' lack of standing in the courts, as argued herein and repeated here.

Regardless, the lower court prevented all discovery requests, even those ordered to be served on Appellant. (Order)(Mtn Compel Discovery/response)(Mtnrule to show cause). It is against the rules of this court and its discretion in granting summary judgment to prevent ordered discovery especially pertaining to the material facts at issue. The court cannot 'find' there is no evidence when ordered discovery is still pending. Meaning, it cannot be found Appellant has no evidence when the court itself prevented the evidence from being discovered in the first place.

[11] It's apparent if they had raised this issue, the possibility the District Court would have found their contract inequitable or void under, or at a minimum the requirement to have a separate trial to determine its unlawfulness and address the unlawful language it contains.

Also, the fact the appellant no longer owns the subject water line does not erase the unlawful actions of the respondents at all times material or before the forced sale of the property. Meaning the appellant owned the property and was the recipient of the subject easement at the time of trespass. Further, the court provided no case law or precedent supporting relevancy of ownership at the time of its order.

F. Judge Goodstein, on her own accord, and for the first time in her order, raised and ruled on a defense, a merger doctrine.

Appellant had no notice of this defense prior to the order. An issue that has been raised and argued for the first time in an order without notice to the Appellant, prevents her right to properly defend, is improper and violates the rules and processes of this court, violates appellants due process to defend, and let alone an abuse of its discretion. Issues not presented by the litigants in the trial court cannot be raised (and ruled on) by the court for the first time in its order. It would be the same as the appellant raising an issue for the first time on appeal. An issue outside the scope of the complaint that was not noticed to appellant prior to the hearing or given opportunity to defend prior to its ruling, thus summary judgment is not proper Rule 12(c) SCRCP, Rule 56 SCRCP (59e motion 1) and must be reversed.

G. The Order states, "*There was evidence presented that the property was sold and the new owners have complied with the Dorchester County Ordinance in Chap, 44, Ari. 3, Div. 2. Sect. 44-60, by placing their own meter and waterline on their property.*"

First, Appellant had no notice of this argument prior to the order. Second, the sale of the property 2 years after their termination of the water to the property is irrelevant to the case, as the action Appellant complains of took place and proceeded up [until the sale of the property]. Further,

the sale of the property only took place due the Respondents unlawfully terminating her water[12]. Additionally, the allegation the new owners complied with a county ordinance is moot or irrelevant, as discovery regarding the alleged violated ordinance is pending, notwithstanding the fact Appellant did not own the property at that time and has no knowledge of. This is a matter at law and requires the ordered discovery or discovery to be completed prior to granting summary judgment. The court cannot decide matters of law in a summary judgment action. Further, this action regarding an illegal issue requires another separate trial to determine the law and remove the unlawful language from the contract if found illegal.

The ordered discovery is still pending, including discovery regarding a question of a violation of a county ordinance,[13] making it impossible for Appellant to present evidence, thus summary judgment is improper.

H. The court order stated the Respondents' affidavits are uncontested as the Appellant did not file any affidavits or memorandum in opposition to the Respondents' motion (Order, 12-22).

This is the *first time* that Appellant was made aware of any defendant affidavits or memorandum as they contained no certificates of service and were not served on Appellant (59e motion 1-23, pg. 1 para. 4 *uncontested by Respondents). No affidavits or memorandums were presented at the hearing (Trans. 11-22 pg. 1). When a motion is to be supported by affidavit, the affidavit shall be served with the motion. Rule 6(d) SCRCP and FRCP. Under Rule 5 the motions and affidavits when filed are to contain a certificate of service on other parties. Rule 5 SCRCP; Rule 5 FRCP. Appellant obtained a copy of the Respondents' motion, affidavits and memorandum from the court after

[12] The property was sold to prevent foreclosure due the Respondents' actions and intentional delay in the proceedings.

[13] This court should take note neither the judge nor the Respondents are experts in the construction of the easement or of county law or ordinances; did not present documented evidence nor provided the ordered discovery of same to support any unlawful easement as constructed; The judge improperly interpreted the the law and prevented discovery on the very issue granting summary judgment.

receiving the order, showing clearly the filed documents contained no certificates of service; plus, the affidavits contained a copy of some general letter from Respondents that was not served on Appellant and shows 'undelivered' (therefore moot). It should be noted by this court the fact that neither the letter raises any illegality issues nor does the undelivered letter provide proper notice of termination of Appellant's water service to her property(**Motion, affidavits, memorandum**).

The subsequent order of April 23 is basically a follow-on to its prior orders of January and March 2023, therefore Appellant incorporates its arguments above here. Due the above, Appellant asks this court to reverse the grant of summary judgment and the denying of Appellant's Motions (Order(s))(59(e) Motion(s))

2. **The lower court committed discovery error or a violation of when it issued a protective order on discovery relating to material issues or allegations within the scope of the complaint and when any reasoning to not be had by Respondents falls outside the criteria for protection as mandated by discovery Rule 26.**

Issue #1 above argument incorporated fully herein.

Rule 26(c) clearly states justice only requires protecting a party or person from annoyance, embarrassment, oppression or undue burden by expense. Nowhere in the rules does it say that discovery can be protected for any other reason. SCRCP Rule 26(c). The Respondents present none of the above 'criteria' to protect in their motion for protection against discovery thus justice does not require protection. Rule 26(c) SCRCP (Mtn for protection discovery[14]). Instead, they complain they don't understand why it's being asked for and have been given leave to decide what is relevant to the case and what is not, including "the plaintiff attempts to relitigate issues already litigated", or 'the

[14] Respondents have not served admissions, answers or objections to the interrogatories and requests for production, meaning they have not responded to each as required by the discovery rules and from the bench in the 2020 hearing. At a minimum, there were many discovery items not protected by the order that the Respondents have not served responses or production of.(*see uncircled/not highlighted items,* ***Ex. 1)***

discovery was already provided in a separate case', and asked the court to examine the full scope of the requests and limit them to items relevant to this action.

All discovery is relevant to the current instant complaint and the Respondents failed to show good cause for protection. The Respondents claim they already provided the same discovery in a separate prior case but point to no case or discovery request showing said discovery was provided to appellant. Further, if the material discovery was already provided then the discovery is already in proper format and at the Respondents' fingertips, therefore should waive any right for protection under Rule 26(c). **(Mtn Compel Discovery/response)(Mtn Rule Show Cause)**.

This court should take notice the Respondents come to court asking for a protective order from [some] discovery, and over a year later it was granted on [some] discovery, and the remaining discovery was ordered to be provided to Appellant. Then the Respondents turn around and refuse or fail to comply with the court order. It is clear the Respondents have neither integrity nor consideration for the processes of the court or discovery rules.

Due the above and Respondents' contempt or refusal to provide the ordered discovery, Appellant asks this court to reverse the granting of [some] protection from discovery, reverse the denial of Appellant's motions to compel and motion for rule to show cause, and grant sanctions.

3. **Viewed in the light most favorable to the Appellant, there was a genuine issue of material fact regarding any of its claims.**

There are genuine issues of material facts, therefore summary judgment is improper and must be reversed.

As argued previously herein #1 and #2 above and repeated here, and especially because court ordered discovery is still pending, there are many genuine issues of material fact due to include but not limited to:

a. Substantial ordered discovery on many material facts or dispositive issues granting summary

judgment has not been served on Appellant and is pending;

b. The Respondents filed a 1-page, blank motion for Summary Judgment which contains no arguments and only the alleged illegality of the easement was raised at the hearing, which requires the court ordered discovery before summary judgment can be granted.

c. If the easement is found illegal as constructed, the Respondents admit they knowingly performed an illegal act for almost a year [until it suited them]. Appellant contends the Respondents should not be allowed to come to the courts claiming an illegal action as a defense to their trespass when they agreed to the easement as constructed (Addendum B*)(see unappealed* ***District court order****, where signing a contract one cannot argue later they did not understand it)* AND performed the same illegal action for almost a year after discovering an illegal water easement or unlawful language in their purchase contract. Such is a violation of the maxim of 'clean hands.' The Respondents purchased the servient property on June 2, 2017. The Respondents testified they found out about the illegal water construction shortly after purchase. The Appellant was not given notice, let alone of any alleged illegal water easement, prior to their trespass or terminating water service to her property. The Respondents did not raise any issue of the easement in 2017 and continued to provide water service to the Appellant's property for almost a year before preventing water to the Appellant's property (i.e., trespass upon easement). The Respondents made no attempt to amend their purchase contract with the sellers and/or Appellant at any time. The Respondents did not come to the courts on their own accord to raise this issue or to amend the contract at any time or in 2017 when they say they had knowledge of unlawful language or the easement being illegal and their contract being unlawful. Instead, they sat on their rights and *only* when Appellant filed its complaint for trespassing upon easement, among other things, and several years later at a hearing for a motion for summary judgement did the Respondents use 'illegality' as a defense. Summary judgment should not be granted

when the Respondents, with full knowledge, performed an illegal action while sitting on their rights until it suited them. (59e motion 1-23)

d. The SC Court of Appeals has held that the illegality defense does not apply to "an independent contract," *Jackson v. Bi-Lo Stores, Inc.*, 437 SE 2d 168 - SC: Court of Appeals 1993. The lawsuit here was not based on an alleged illegal easement, but on the agreement made by Respondents prior to purchase contained within their purchase contract to provide water easement (or right to use Respondents' personal waterline to provide water to the adjacent 2-acre property as argued herein and repeated here (*see* unappealed District Court Order)[15], where the right to use was freely given and no charge indicated[16]. Therefore, enforcement of the obligation was not repugnant to public policy. Regardless, the illegal defense and the granting of summary judgment is improper due the pending material discovery due to be served on Appellant on this very issue.

e. The Respondents take a position contrary to this instant case, where in this case the Respondents claim the easement illegal and therefore unenforceable, where in the District Court case they claim only that the easement Plaintiff seeks is the use of their water line is not the same as the water and sewer easement granted. The doctrine of judicial estoppel is meant to prevent litigants from adopting inconsistent factual positions in related cases. In 1997, the South Carolina Supreme Court adopted the doctrine, describing it as one that "punishes those who take the truth-seeking

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[15] Nevertheless, plaintiffs attempt to divorce their granting of the water and sewer easement from Morphew's claim thereto, noting that *"Morphew . . . was simply using the 'easement' title, when in fact, based on the complaint, she clearly wanted to use the Plaintiffs' water line."* ECF No. 14 at 9. *Of course, the right to use another's property is precisely what an easement is.* See EASEMENT, Black's Law Dictionary (11th ed. 2019) (*"An interest in land owned by another person, consisting in the right to use or control the land . . . for a specific limited purpose . . ."*). *Plaintiffs granted an easement, or the right to use a water and sewer line on the Property, and in the 2018 Action, Morphew seeks to enforce that right to use a water and sewer line on the Property...."* (Where the District Order found after argument from the Respondents, the Respondents granted an easement and the right to use a water and sewer line on the property. **District Court Order**, *use the one filed with the amended complaint pg. 22, Footnote 7) (emphasis added)

[16] Respondents argue the water easement in the contract did not state the water was free, but it should be noted by this court that that it also did not state or indicate it was not.

function of the system lightly. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him. It is certainly conceivable that parties may want to present novel legal theories, which may require changing one's previous legal theory. However, the truth-seeking function of the judicial process is undermined if parties are allowed to change positions as to the facts of the case, unless compelled by newly-discovered evidence." *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 252, 489 S.E.2d 472, 477 (1997).

f. Appellant raised subject matter jurisdiction in its 59e motion and now here (Motion). Respondents did not defend or respond to Appellant's arguments. The lower court did not take notice, consider or adjudicate the lack of subject matter jurisdiction.(Order(s)). Subject matter jurisdiction or the lack of needs to be addressed before summary judgment is awarded. See #4 Issue below repeated here.

To further support the question of lack of jurisdiction and the validity of the Respondents' purchase contract, IF the easement as it existed is found illegal and/or found illegal AFTER discovery on the matter is concluded, the Respondents' purchase contract therefore would contain unlawful language and considered illegal.[17,18] Another trial or hearing would have to take place for the court to address the unlawful language in the Respondents' purchase contract.

When bringing a summary judgment motion, a party is arguing that there can be no real dispute about material facts, and the moving party is entitled to win the case as a matter of law. A

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[17] As testified by Respondents, *"And because the easement itself as it existed was illegal....that easement cannot continue to exist. It's illegal. It's an illegal contract."* **(transcript)**

[18] When faced with unlawful language in a contract, the judge generally has three options: Sever or strike the unlawful clause from the contract and enforce the rest of the agreement; Edit the illegal or unenforceable term to something legal and reasonable, or Void the entire agreement. The facts of each situation will determine which option the judge chooses. https://willcoxlaw.com/2021/10/07/if-one-clause-in-a-contract-is-deemed-unlawful-is-the-whole-contract-invalid/

motion for summary judgment does not allow the court to decide issues of fact or conclusions of law, but to examine the pleadings and proof to determine if a trial is necessary. The court is only to review if there is a genuine issue of material fact, that de novo review is improper for summary judgment; it must not weigh the evidence and reach a decision on the merits, rather than to determine only whether material issues of disputed fact exists.

> "[T]here is no such thing as ... findings of fact, on a summary judgment motion." *Thompson v. Mahre,* 110 F.3d 716, 719 (9th Cir.1997). But in a bench trial on the record, the judge will have to make findings of fact under SCRCP 52(a). The process of finding the facts "specially," as that rule requires, sometimes leads a judge to a different conclusion from the one he would reach on a more holistic approach. Also, it completely changes a court's authority on review, from de novo review of summary judgment to clearly erroneous review of findings of fact. That change could be outcome determinative. Thus trial on the record, even if it consists of no more than the trial judge rereading what he has already read, and making findings of fact and conclusions of law instead of a summary judgment decision, may have real significance. *Kearney v. Standard Ins. Co.*, 175 F. 3d 1084 - Court of Appeals, 9th Circuit 1999

Based on the above, at a minimum there is a very genuine issue of material fact, whether the easement or water connection providing water to the dominant property as constructed prior to trespass or its alteration of was illegal. With *ordered* discovery regarding the alleged illegality still pending, summary judgment is improper. Further, additional ordered discovery pending addresses many other material facts thus the lower court cannot find there is no genuine issue to any material fact until all discovery is complete. Additional questions may arise from discovery, such as how much liability is on the Respondents, who clearly agreed to the water easement or use of their water line in their purchase contract? Even if the easement is found illegal after discovery, did the Respondents have right to alter or terminate water to the innocent party's property without proper notice to the property owner or permission of, AND an order from the court to alter their purchase contract? And, is Appellant, an innocent party who was not party to the Respondent/seller contract at

ratification, liable for any alleged illegal construction of the easement? Further, based on the fact in the complaint and valid evidence in the record that the Respondents had no legal right to the property or to compel specific performance thus a question of jurisdiction of the court, what effect does that have on the legal standing of the litigants and jurisdiction of this court? It's clear that summary judgment is not proper nor warranted until discovery is complete. (59e Motion)

4. **The court of equity lacked subject matter jurisdiction and discretion to award specific performance to the Respondents in the original action, and now this court in which this action arises, which raises a genuine dispute about material facts or allegations within the scope of the complaint.**

Lack of subject matter jurisdiction by the trial court is an issue that can be raised at any time and may even be raised sua sponte by the Appellate court. Otherwise, the prevailing party would benefit from a judgment rendered by a court without jurisdiction.

> A Court of competent jurisdiction is one having power and authority of law at the time of acting to do a particular act; one that has jurisdiction both of the person and of the subject matter; one provided for in the constitution or created by legislature and which has jurisdiction of the subject matter and of the person; ..." 21 C.J.S. Courts § 22, p. 35. *Harden v. SC State Highway Dept.*, 221 SE 2d 851 - SC: Supreme Court 1976
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> "Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court." *Lake v. Reeder Const. Co.,* 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct.App.1998). The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, and is fundamental. Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court. *Anderson v. Anderson,* 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989). *See Fielden v. Fielden,* 274 S.C. 219, 262 S.E.2d 43 (1980); *Harden v. South Carolina State Highway Dept.,* 266 S.C. 119, 221 S.E.2d 851 (1976); *State v. Gorie,* 256 S.C. 539, 183 S.E.2d 334 (1971). In personam jurisdiction may be waived; subject matter jurisdiction may not be waived and the issue may be raised at any stage of the proceeding. *Eaddy v. Eaddy,* 283 S.C. 582, 324 S.E.2d 70 (1984). Even though the issue of the Court's subject matter jurisdiction was not raised until appeal, and it was raised by the

Respondent, it is the duty of this court to take notice and determine if the Court had proper jurisdiction for its actions.*id*

Lack of jurisdiction of the subject matter cannot be waived even by consent and therefore such lack can and should be taken notice of by this Court *ex mero motu. State v. Gorie, supra; McCullough v. McCullough, supra; Hunter v. Boyd*, 203 S.C. 518, 28 S.E. (2d) 412 (1943).

The burden rests on the Appellant to show the Circuit Court's decision is against the preponderance of the evidence. *Chavis, supra; Crim v. Decorator's Supply,* 291 S.C. 193, 352 S.E.2d 520 (Ct.App.1987). Or that the decision was based on fraud and fraudulent misrepresentations.

The trial court erred granting summary judgement when subject matter jurisdiction of the court in the original action in which this complaint arises was raised, consequently affecting the subject matter jurisdiction of the court in this instant case (59e motion**(s)**).

In the complaint in this instant action, Appellant states as fact the Respondents' *time is of the essence* sales contract expired November 30, 2012 (herein referred to as "Respondents' purchase contract" or "Respondents' contract"), that the Respondents are not bona fide purchasers, and that they are trespassers to real property (herein "property" or "servient property") (Amended Complaint). Throughout prior cases and this instant case, the Appellant has been prevented from obtaining discovery to address these genuine issues of material fact, even court ordered discovery. (Mtn Compel Discovery/response)

As clearly demonstrated, the Respondents, with *full knowledge* at all times material came to the courts in the original action and now this action with unclean hands and no legal standing[19].

[19] The fact remains, the Respondents had no legal claim to the property, specifically no valid and negotiable purchase contract at initial application, such critical failure or breach was not remedied thus were denied any ability to obtain a loan to tender payment for the purchase of.

Respondents committed critical material perjury, misrepresentation, and forgery, while their attorney suborned critical and material perjury to obtain an award of specific performance.

In a nutshell, the equity court lacked subject matter jurisdiction over them as non-qualifying movants for the purpose of specific performance. The movants or Respondents failed to satisfy the elements or guiding principles of law and equity required in order for the judge to retain subject matter jurisdiction to adjudicate or order the contract to be performed, which is a substantive and/or dispositive requirement to retain subject matter jurisdiction. In its order, the master points to those principles in which it is held to in order to retain jurisdiction or discretion to award the remedy of specific performance. (**Order,p. 3-4 below,**Guiding Principles of Law & Equity, herein "Principles")

GUIDING PRINCIPALS OF LAW & EQUITY

This Court is guided by many principals of law and equity. These guides include the following:

1. It is not the province of the courts to construe contracts broader than the parties have elected to make them or to award benefits where none was [sic] intended. *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 151, 533 S.E.2d 597, 601 (2000).
2. The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous. *Hardee v. Hardee*, 355 S.C. 382, 387, 585 S.E.2d 501, 503 (2003).
3. The law by which a contract is to be governed, is resolved into the terms whereby it is entered into; provided that the contract be consistent with morality and not repugnant to law or the principles of public policy. *Satterwhite's Adm'rs v. McKie*, 16 S.C.L. 397, 398 (S.C. Const. App. 1824).
4. Where a contract's language is plain and unambiguous, the language used by the parties "determines the instrument's force and effect." *Jordan v. Sec. Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993).
6. If a promisor prevents or hinders the occurrence of a condition, or the performance of a return promise, and the condition would have occurred or the performance of the return promise been rendered except for such prevention or hindrance, the condition is excused, and the actual or threatened nonperformance of the return promise does not discharge the promisor's duty, unless (a) the prevention or hindrance by the promisor is caused or justified by the conduct or pecuniary circumstances of the other party; or (b) the terms of the contract are such that the risk of such prevention or hindrance as occurs is assumed by the other party. Restatement (First) of Contracts § 295 (1932)

7. Impracticability excuses the non-occurrence of a condition if the occurrence of the condition is not a material part of the agreed exchange and forfeiture would otherwise result. Restatement (Second) of Contracts § 271 (1981).

8. Waiver is the voluntary and intentional relinquishment of a known right. *Janasik*, 307 S.C. at 344, 415 S.E.2d at 387. It may be implied from circumstances indicating an intent to waive. *Bonnette v. State*, 277 S.C. 17, 282 S.E.2d 597 (1981); *Lyles v. BMI, Inc.*, 292 S.C. 153, 355 S.E.2d 282 (Ct.App.1987). Acts that are inconsistent with the continued assertion of a right may also give rise to a waiver. *Bonnette*, 282 S.E.2d 597. *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 928-29 (Ct. App. 1994).

9. In the construction of a contract, the intention of the parties to be collected from the instrument, (if in writing,) should be constantly in view, and in their performance, good faith and fair dealing is always required. And from hence, [the Court] deduce[s] the rule that when a contract stipulates for the performance of a condition on the event of a contingency, the occurrence of which must be known to one of the parties, but not necessarily known to the other, it is the duty of him to whom it is known to give notice of it to the other. . . *Birdseye v. Davis*, 13 S.C.L. 296, 298, 297-98 (S.C. Const. App. 1822).

10. Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. *Restatement (Second) of Contracts § 205 (1981).*

11. The discretion to grant or refuse specific performance is a judicial discretion to be exercised in accordance with special rules of equity and with regard to the facts and circumstances of each case." *Guignard v. Atkins*, 282 S.C. 61, 64, 317 S.E.2d 137, 140 (Ct.App.1984); *accord Bishop v. Tolbert*, 249 S.C. 289, 298, 153 S.E.2d 912, 917 (1967) ("The rule is well settled that the granting of specific performance is not a matter of absolute right, but rests in the sound or judicial discretion of the Court, guided by established principles, and exercised on a consideration of all the circumstances of each particular case."). "Specific performance will not be ordered unless the contract expresses the true intent of the parties and is fair, just and equitable." *Amick v. Hagler*, 286 S.C. 481, 484, 334 S.E.2d 525, 527 (Ct.App.1985). "[S]pecific performance ... is only available to enforce a contract that is fair, just, and equitable." *Hodge v. Shea*, 252 S.C. 601, 612, 168 S.E.2d 82, 87 (1969). "In order to compel 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).

The Respondents at their own hand failed to have the ability to tender payment or perform their contract at the moment they compelled specific performance on January 15, 2013. "The party seeking to compel specific performance must be able to perform at the exact time he requested specific performance, not some reasonable time in the future. *Ingram*, 340 S.C. at 106 n.1, 531 S.E.2d at 291 n.1." *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000) ("At a

minimum, Ingram must demonstrate that he was ready and willing to perform his part of the contract (i.e. willing to tender the purchase price) on February 28, 1994, the date the lease expired, or on March 14, 1994, the date he brought the action for specific performance.) The record indicates the Respondents were not, and could not be due their expired purchase contract, in a position to pay the sellers for the purchase price of the servient property on contract expiration, November 30, 2012, nor on January 15, 2013, the day they filed their complaint for specific performance. It is especially critical when time is of the essence[20]. A "time is of the essence" clause makes completion dates a *material* term of a contract, causing a breach if performance is late, particularly in this instance where performance wasn't attempted or didn't take place. They filed an intentional frivolous action and then committed perjury by answering the complaint and then testifying at trial they were ready to close or ready, able and willing at all times material. According to the rules, guiding principles of law and equity, maxims of equity, and supported by the master himself in his order (Order, pg.4 #11), specific performance can only be compelled and awarded if it is found by valid and documented evidence that the Respondents' purchase contract is valid and negotiable AND that at all times material, the party who has come to compel specific 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).

The Respondents' critical conditions were *time is of the essence*, those conditions being (1) closing date of November 30, 2012: where closing is required to take place on or before this date; (2)(a) loan application and processing: where application to be made within 10 days of contract ratification or November 3, 2012, and (b) buyer approval within 20 days of contract ratification or November 13, 2012, where the application for loan is complete and accepted and approved based on

[20] The phrase "time is of the essence" means that timely performance is an essential obligation under a contract, and thus failure to perform in a timely manner or on or before the date required amounts to a material breach of contract giving rise to the other party's right to exercise its remedies for breach.

buyer ability[21] to obtain a loan; (3) extension agreement [but also states where in no event shall closing occur later December 16, 2012]; (4) Inspections: (a) buyer inspections, where all buyer inspections shall be completed by November 20, 2012, and (b) Wood infestation report (CL100), where the seller must obtain the report on or before November 30, 2012[22]. It also states clearly that obligations of the seller under para. 19 terminates on the closing date or contract expiration of November 30, 2012. (Purchase contract) (Order, pg. 5 #1 below)

> **FINDINGS OF FACT**
>
> 1. The Dudek/Cross Contract is a conditional contract. Four conditions[1] are in the "printed matter" of the Contract. The parties agree these conditions require that "TIME IS OF THE ESSENCE." These conditions are found in Paragraph 3[2]; Paragraph 8;[3] Paragraph 12;[4] and Paragraph 19: Condition of Property (B. Inspection[5]) and (D. Wood Infestation[6]).

The court found that the transaction was required to occur on or before November 30, 2012 (Order, pg. 5 #3). The closing or tender of payment and transfer of deed did not take place on or before November 30, 2012, because the Respondents abandoned their *time is of the essence* purchase contract when they critically breached their material conditions precedent of any seller obligation. Specifically, they intentionally allowed their purchase contract to expire before making application for a loan[23] (Application). Their contract expiration was never remedied, or the requested signed contract extension addendum was never obtained to remedy the critical breach, resulting in failure to complete their application and the denial of. The Respondents were required to inform the other parties their inability to perform their contract and/or required to inform the master the truth of the matters to any material fact that pertains to its jurisdiction and/or discretion to award specific performance. (Order, pg. 4) *See* "Principles", above #9 & #10).

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[21] It is not a final approval, only when all conditions are met is a loan considered final and a closing can be scheduled.

[22] Seller obtained the report on November 30, 2012. That fact was uncontested.

[23] Application due on or about November 3, 2012. Buyer loan approval due on or about November 13, 2012. Contract closing date or expiration November 30, 2012. Application made on or about December 10, 2012.

The Respondents, their agent (Susan Nicholson) and loan officer (Allison Williams) had full knowledge their contract expired and was invalid/non-negotiable at least on or about December 6, 2012 (App. Requirements Checklist); again on December 12, 2012; and again with express notice on January 3, 2023, (10-day notice) which they received no reply to; They were denied any lending and their file closed. (Denial letters). The Respondents and their counsel, David Collins, had full knowledge of the Respondents lack of legal claim to the property thus inability to tender payment. The Respondents had a duty of good faith and fair dealings in its performance and its enforcement *Restatement (Second) of Contracts§ 205 (1981)*("Principles" #10 above). The performance, good faith and fair dealings of the Respondents is always required and if one party knows of a contingency precedent to another it cannot perform, it is required that the knowing party inform the other parties ("Principles", #9 above) , Sellers Ferro, or other parties to the case, Sellers Ferro and Appellant, where Appellant's purchase contract was contingent upon termination of Respondents' contract (Appellant contract) and where Appellant was granted specific performance and its ability to perform was contingent upon termination of Respondents' contract (Order p.).

It's evident that the master had no jurisdiction or discretion to award specific performance to the Respondents under the circumstances of the action, case precedent, or in accordance with the guiding principles of law and equity required for a court to retain jurisdiction or its discretion to award. According to *Bishop v. Tolbert*, 249 S.C. 289, 298, 153 S.E.2d 912, 917 (1967) ("The rule is well settled that the granting of specific performance is not a matter of absolute right, but rests in the sound or judicial discretion of the Court, guided by established principles and exercised on a consideration of all the circumstances of each particular case.") [S]pecific performance ... is only available to enforce a contract that is fair, just, and equitable.' *Hodge v. Shea*, 252 S.C. 601, 612, 168 S.E.2d 82, 87 (1969). "In order to compel 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. *Cambell v, Carr*. 361 S.C. 258, 63-64, 603 S.E.2d 625. 627-28 (Ct. App. 2004).

1) Based on testimony of their loan officer, and the court record, the Respondents' *time is of the essence* purchase contract expired at the hands of the Respondents, and was never remedied[24], thus terminated on contract end date or November 30, 2012. All due their critical material breach resulting in their lack of a valid and negotiable purchase contract.

> Direct examination of witness Allison Williams (A), loan officer, First Federal [at the time] by John Massalon (Q) (**Transcript**, pg. 210 l. 1-6 Case #2013-CP-18000183)
>
> A The remaining condition was a contract extension, which we never got.
>
> Q So the contract expired and you didn't have a live contract at the time --
>
> A We wouldn't move forward without the contract extension.

Not only does their breach waive their right to demand performance of, but according to the guiding principles neither the Respondents had the ability to compel specific performance nor did the court retain jurisdiction or have discretion to award the remedy. (Application Checklist requiring contract extension)(**10-day letter**, where Respondents failed to respond to, requiring contract extension addendum)(Denial letters, Respondents failed to complete their app. with a valid contract).

2) The Respondents' expired purchase contract that was never remedied is void and cannot be found *under any circumstance*, even with a court order, to be a valid and negotiable agreement, therefore specific performance or the property was not available to the Respondents. An expired

[24] There is no clear or valid evidence in the record of a valid agreement.

contract is neither valid nor negotiable thus not equitable. "[S]pecific performance ... is only available to enforce a contract that is fair, just, and equitable." *Hodge v. Shea.* 252 S.C. 601, 612, 168 S.E.2d 82, 87 (1969)("Principles", #1-5, #8-11 above). The validity of the contract was never specifically raised and adjudicated. Regardless, a valid contract is a critical requirement directly relating to the master's jurisdiction and discretion to award specific performance, notwithstanding the Respondents were never ready or able to perform at all times material. "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." *Campbell v. Carr*, 361 S.C. 258, 262, 603 S.E.2d 625, 628 (Ct. App. 2004). "The party seeking to compel specific performance must be able to perform at the exact time he requested specific performance, not some reasonable time in the future." *Ingram,* 340 S.C. at 106 n.1, 531 S.E.2d at 291 n.1.

Further, the Respondents very critical and inexcusable breach of contract waived any seller obligation or contract condition. Actually, it waives all rights of the Respondents to demand *anything* from the sellers. The breached material buyer contract condition required the respondents to make application by November 3, 2012, *time is of the essence.* The Respondents made application on or about December 10, 2012. *37 days after application was due* and *10 days after contract expiration.* They were denied any lending for the property because they failed to present a valid contract to purchase[25]. The Respondents had no valid purchase contract or legal claim to the property after November 30, 2012. Consequently, the sellers had no legal obligation whatsoever to perform the [dead] contract. #2 above repeated here. (*see* "Principles" #11 above)(Denial letters)(Transcript).

3) The Respondents gave false testimony or committed fraud in their filings and at the

[25] Nowhere in the record is documented loan approval or a promissory note.

trial testifying they were approved for a loan, ready to close or ready, able and willing or that they had nothing else they had to produce [to obtain the loan or close] (Respondents' Complaint)(Respondents' Answers to Appellant complaint)

> Examination of D. Cross by John Massalon
> Transcript, pg. 79 l. 1-4
> **John Massalon:** I may have misunderstood you, but I thought I understood you to say that this letter approved you for a loan $295,000?
> **Doreen Cross:** Correct.
>
> DIRECT EXAMINATION D. CROSS BY MR. COLLINS
> Transcript, pg 75 1.8-14
> **COLLINS:** Mr. Massalon asked you a question and really this is what really boils down to, Doreen, on the 14th of December you were ready to close with all of your documents, correct?
> **Doreen Cross:** I personally, Mr. Dudek, we were ready to go. Nobody was waiting on anything from us, we had provided it long ago.
>
> REDIRECT EXAMINATION D. Cross BY MR. MASSALON
> Transcript, pg 80, 1.6-7
> **Doreen Cross:** Basically when the December 12th letter came out, we were ready to close.

The Respondents solely and completely prevented a closing or the ability of the sellers to transfer the deed due t*hey had no legal claim to the property or valid & negotiable purchase contract after November 30, 2012* to obtain a loan to tender the payment to purchase the property. They failed to inform the sellers or court of this material fact. No court can excuse Respondents their intentional and critical breach or their false evidence or fraud. The Respondents failed to perform conditions precedent to the taking effect of the obligation of the sellers and had no valid excuse for their failure to perform. (Order). Any seller breach or non-performance of found is moot and no longer has standing.

Due the above, and the court's complete lack of jurisdiction or discretion to award specific performance to the Respondents, most of the findings of fact in favor of the Respondents, or against sellers and Appellant in its Order is irrelevant, not proper and/or no longer has standing. (Order)

It's very clear that equity does not favor the granting of specific performance in this case

as a matter of law and/or sound judicial discretion. This court should also rely on the equity maxim: "He who seeks equity must do equity." *Norton v. Matthews*, 249 S.C. 71, 152 S.E.2d 680 (1967). The Respondents were well aware they had no legal claim to the Property when seeking specific performance and preventing the sellers from performing the Appellant's contract. The Respondents knew it was their own and complete fault they failed to perform but still came to the courts with the intent they would get away with their unlawful actions. Additionally, the evidence demonstrates that the Respondents only decided to seek specific performance because they discovered the Sellers had obtained another buyer. 42 days after contract expiration, on January 11, 2013, with unclean hands, the Respondents filed a frivolous lis pendens to prevent Appellant's performance of her purchase contract followed by their complaint seeking specific performance (Qualey email). According to the record, Appellant had sole right to obtain the property at all times material but was unlawfully prevented from performing or obtaining the Property. Further, the Respondents committed fraud, or material perjury, misrepresentations, and concealment of material facts in order to obtain an award for specific performance, thus fraud in the transfer of the deed. The fraud committed in their filings, depositions and at trial unequivocally established their willingness to resort to any means to produce the results they sought. This so taints the entire endeavor as to render the claims of the Respondents, which derive solely from the illegal or voided agreement, unenforceable. The Respondents award for specific performance, which derived solely from their expired or illegal purchase contract offends public policy. "Thus, it should be concluded that public policy would be offended by permitting the partners, who were all parties to the illegal contract, to invoke the aid of our courts to enforce any claims depending on it.' *Jackson v. Bi-Lo Stores, Inc.*, 437 SE 2d 168 - SC: Court of Appeals 1993.

4) According to the maxim of clean hands, which states that "one who comes into equity must come with clean hands," the courts must deny thus reverse the award granting specific performance to the Respondents. This doctrine requires the court to deny equitable relief to

a party who has violated good faith with respect to the subject of the claim. The purpose of the doctrine, as explained *in Colby Furniture Company, Inc. v. Belinda J. Overton* is to prevent a party from obtaining relief when that party's own wrongful conduct has made it such that granting the relief would be against equity and good conscience. *COLBY FURNITURE COMPANY, INC.* v. Overton, 299 So. 3d 259 - Ala: Court of Civil Appeals 2019. The Respondents came to the court complaining of seller breach and demanded the sellers specifically perform due their wrongful actions, when they themselves committed the most critical and material breach, abandoning their *time is of the essence* contract and allowing it to expire at their own hand. They then intentionally committed fraud in order to obtain their award for specific performance.

5) Appellant claims intentional interference with the Appellant's contractual relations with the sellers Ferro, where Appellant was ready, able and willing, had a closing date in January 2013 but was prevented its [sole] right when the Respondents filed a frivolous lis pendens to prevent that sale (**Qualey email**)(**Lis pendens**) and frivolous complaint against the sellers. Further, Appellant was granted specific performance contingent on the termination of the Respondents' contract[26]. (**Order**). Based on validated/documented evidence in the record, the Respondents' purchase contract terminated November 30,2012. Appellant has been denied its sole right to obtain the property or use of since December 16, 2012 or January 3, 2013 (when she was ready and able to tender payment for).

Due the above, the granting of specific performance to the Respondents is unlawful, based on fraud, and violates many, if not all, the guiding principles of law and equity and maxims of equity. Consequently, the order granting specific performance to the Respondents is void ab initio. "Any order entered without jurisdiction is void ab initio." *Turner v. Malone*, 24 S.C. 398 (1886) (judgment entered without jurisdiction is void ab initio). A contract which contravenes public policy is void,

[26] Respondents' had full knowledge their contract expired, thus terminated, on November 30, 2012; and that they had no legal right to the property and no ability to tender payment as required by precedent and the principles of law and equity.

and an action cannot be maintained for either its breach or for inducing its breach. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 129, at 994 & n. 68 (5th ed. 1984); James 0. Pearson, Jr., Annotation, *Liability for Interference With Invalid or Unenforceable Contract*, 96 A.L.R.3d 1294 (1979). In this case, where the guiding principles of law and equity were not met, the court failed to retain jurisdiction in the Respondents' claim for specific performance. In the same case, where those principles were met, the court retained jurisdiction in the Appellant's claim for specific performance. Complete justice is due. "A court of equity, when it acquires jurisdiction in a claim made for specific performance, can retain jurisdiction, and adjudicate all of the legal rights of the parties to the suit in conformity with justice, equity, and good conscience. The court is bound to see that complete justice is done to the parties before the court.' *Bull v. Fallaw*, 109 S.C. 306, 96 S.E. 147, 148." (emphasis added). An order that fails on its face and is unlawful is void. An unlawful order violates public policy and must be voided.

6) Due the above and repeated here, the Respondents are not bona fide purchasers and are actual trespassers upon real property in this instant case; Consequently, the court in this action lacks subject matter jurisdiction to grant or award anything to the Respondents, including summary judgment, therefore must be reversed.

7) The question of the litigants legal standing in this instant case arises out of the court's lack of jurisdiction in the original action thus this instant action, as such is a genuine issue of material fact where summary judgment is improper and must be reversed.

5. The Respondents' terminated or expired *time is of the essence* sales contract affects the legal standing of the Respondents, Appellant or jurisdiction of the courts.

As argued herein and repeated here, the Respondents' *time is of the essence* purchase contract expired at their own hand on November 30, 2012. In this instant action, Respondents testified the contract itself contained unlawful actions and verbiage and the contract is illegal, giving

rise to a genuine issue of material fact as to the contract's validity/termination, thus this court's and the equity court's lack of subject matter jurisdiction to award anything to the Respondents, let alone summary judgment in this instant case, especially while discovery on these issues is pending. Consequently, summary judgment must be reversed, and Appellant's motion to compel and motion for rule to show cause granted [in order to obtain the discovery or ordered discovery pending to address the issues raised in the complaint and the court(s) lack of subject matter jurisdiction]. (59e motion(s))

6. **The lower court committed reversable errors or abused its discretion denying Appellant's 2nd and 3rd 59(e) motions.**

Appellant appeals the Order filed March 15, 2023, and the Order filed April 28, 2023 where appellant appeals the denial of its 59e motions filed on or about February 14, 2023, and filed March 30, 2023 due the requirements of the 59e motion(s) have not met the requirements of a 59(e) motion', specifically, 1) as untimely 'was *filed* outside the 10-day period IAW SCRCP Rule 59e'; 2) Plaintiff failed to provide a copy of the motion to the court; 3) oral argument will not assist in the ruling; and 4) Plaintiff failed to raise any novel issue for the court's consideration (**Orders**, March 15, 2023 and April 28, 2023). Appellant addresses each issue below (also *see* **59e Motion** March 26, 2023)

1. In the court's denials, the court ruled 'untimely' for failure to *file*..... in accordance with Rule 59(e).

The court misquoted Rule 59(e). Rule 59e states the motion "...shall be *served*' no later than 10 days after receipt of written notice of the entry of the order." SCRCP Rule 59(e), where service is only required upon Defendants.

Appellant, pro se, received the relevant order or written notice dated January 27, 2023, via USPS regular mail on February 2, 2023. Plaintiff *served* on the Respondents the relevant motion to

alter or amend on February 10, 2023, therefore timely, notwithstanding the 5-day added time when service upon mailing. (SCRCP Rule 6(e)). Even if 'filing' within 10 days...was the requirement for 59(e), which it is not, the due date would have been February 17, 2023. Appellant's motion was mailed USPS Express Mail on February 10, 2023, received on February 13, 2023 (Screenshot) but stamped on February 14, 2023. Regardless, Appellant's motion was filed prior to February 17, 2023, therefore timely IAW SCRCP Rule 59(e) and SCRCP Rule 6(e) (59e motion 3-23 p. 1-3).

2. In the court's denials in its order of March 2023, it ruled that denial was proper because it found "*Plaintiff failed to provide a copy of the motion to the court as required...*" (Order)

On February 14, 2023, Appellant provided three (3) copies in its mailing: One for filing, one to send back to the Appellant in the stamped, self-addressed envelope, and one copy of the motion for the judge, therefore denying its motion based on failing to timely provide a copy of the motion to the court or to the judge is improper and must be reversed. (Motion 2-23 and Cover letter)

Dear Ms. Graham:

In regards to the above referenced matter, I'm faxing the motion (without attachments) due the time constraint to file.

I've also mailed on this same day, the required hard copies including the attachments and the motion fee. In the mailing, please find enclosed for filing the original and two (2) copies of the PLAINTIFF'S 59(e) MOTION and certificate of service.

Please file the original, file-stamp the copies, returning a copy of each to me in the enclosed self-addressed, stamped envelope.

Further, could you please provide a copy of each to the Honorable Judge Goodstein as required by Rule 59, SCRCP. I do not have any other way to provide this motion and this appears to be the best avenue for its assurance. Please advise if this is incorrect, via USPS mail please as I am pro se and require all service by mail.

If you have any questions, please do not hesitate to contact me.

With kind regards,

According to SCRCP Rule 59(g), "**Judge to be Provided with Copy.** A party filing a written motion under this rule shall *provide* a copy of the motion to the judge within ten (10) days after the filing of the motion. SCRCP Rule 59(g) (emphasis added). *Serving* the judge or the court is not a requirement. The rule does not provide any mandates or guidance in regards to the means in which

a movant is to 'provide' the motion to the judge, nor does it mandate the means by which Appellant provided the motion to the judge is improper. SCRCP Rule 59(g)

In separate cases in this court, Appellant provided her 59e motions to the judge(s) by the very same means which the court now brings issue to. In fact, Appellant provided a copy of the motion to the same judge in the same manner in the prior 59e motion of January 2023 in this same case. It was accepted without issue. (Jan. 23 Letter)(Feb. 23 Letter). Not once prior to the Appellant's 2nd 59e motion, has this court raised issue to Appellant's mailing a copy of the motion to the court for the judge.

Appellant received no notice of error or issue from the court or the judge (nor even a notice from the clerk stating they cannot deliver the provided motion to the judge or that it cannot give legal advice (if applicable). In its order, the judge only states the Appellant is required to provide the motion to her but provides no valid cases or precedents that mandate Appellant's means of providing a copy to the court for the judge is improper. If not mailing to the court, then what other address is this Appellant pro se supposed to use to send the order to the judge?

In its order of April 2023, the judge references *Smith v. Fedor,* to deny the motion, stating, "*In the case of Smith v. Fedor, when a trial court issued an Order denying a motion for reconsideration "'because the [c]ourt did not receive a copy of the motion within ten days of the motion being filed," the Court of Appeals affirmed the decision of the trial court. 422 S.C. 118,124,809 S.E.2d 612,615 (Ct. App. 2017)".* In its confirmation that the court did not receive a copy of the motion [for the judge], it ruled "*The trial court properly denied [appellant's] motion for reconsideration because he failed to provide the motion to the trial judge within ten days of filing.*" *Id.*at 616.

Further, the judge in this instant case [in error] found, "*Just as mailing a copy of the motion to the opposing party and filing it with the clerk's officer was not sufficient in Smith,*

Plaintiffs mailing of the second motion and filing with the clerk's office is not sufficient to satisfy Rule 59(g)." **(Order** April 2023). Appellant didn't just mail a copy to the Respondents and file a copy with the clerk, she also mailed a copy to the court for the judge. Just as important, in *Smith,* the *insufficiency* wasn't in the 'means' in which he was denied, that he mailed a copy to the Respondents and filed it with the clerk's office, it was ultimately in his *admission* that he failed to provide a copy of the motion to the judge within 10 days of filing. For this reason, his motion was denied and his arguments not considered or ruled on. *id 615.*

Smith is not the same or a similar situation to this case.

> *"Smith filed a subsequent motion for reconsideration, arguing the original motion was timely because it was properly mailed to Fedor and the clerk of court and Fedor suffered no prejudice from the failure to provide the court with the motion within ten days of filing."* Id 615

Contrary to this case, where Appellant mailed three (3) copies to the court, which specifically included and called out one (1) copy of the motion for the judge, whereas in Smith, the Appellant admitted he failed to provide the court with a copy of the motion [for the judge] within 10-days of filing. In Smith, the Appellant was denied based on his admission that he failed to provide a copy of, not the means in which it failed. Where in this case, the Appellants motion was denied on the means in which it provided the copy for the judge and its arguments *were* considered and ruled on[27]. A motion considered and ruled on its merits waives any right of the court to deny for insufficiency of Rule 59(g).

The judge provides no case similar to this case, while it's apparent, in *Smith,* the SC Court of Appeals finds acceptable providing a copy of the motion to the court within 10 days of filing, as the Appellant did in this case, therefore satisfies Rule 59(g), notwithstanding the fact this court accepted

[27] "..it fails to raise any novel issues for the Court's consideration; therefore, Plaintiffs second Motion to Reconsider is DENIED" (**Order** March 15, 2023)

prior copies of 59e motions for the judges from Appellant. For example, a copy of the motion was provided to the same judge in Appellant's previous 59e motion and not contested by the court[28](59e 1-23 Letter)(59e motion 1-23). There is nothing in Rule 59(g) that mandates a particular means or delivery in which to provide a copy to the judge nor does it mandate an unacceptable means.

It's apparent the judge was delivered the provided the copy of the motion Appellant provided to the court for the judge. The judge ruled on the merits of the motion on or about 30 days from filing AND providing a copy of for the judge. Appellant filed its motion and provided a copy to the court for the judge on February 14, 2023. The order was filed on March 15, 2023. In comparison, on March 30, 2023, Appellant's subsequent 59e motion was filed. An order was filed on April 28, 2023, on or about 30 days of filing it motion.

Due the above, Appellant sufficiently complied with Rule 59(g), therefore the denial of its motion should be reversed.

3. As for the court finding 'oral argument will not assist in the ruling of the motion,' Appellant is not certain how the court derived that finding as no argument, fact finding, case law or precedent was provided in the order.

4. In its denial of the motion , the judge found Appellant failed to raise any novel issues for the Court's consideration; therefore, Plaintiffs second Motion to Reconsider is denied.

#5 below repeated here.

As argued previously herein brief and motions, the lower court improperly granted summary judgment when court ordered discovery was and is still pending (Order 8-21). Consequently, granting summary judgment and denying Appellant's motion to compel discovery and rule to show cause the Respondents failure to comply, the judge overruled a previous court order from another

[28] By accepting the means to provide the motion to the judge in a previous 59e motion, the lower court waived any right to deny Appellant's subsequent motion.

judge. In addition, subject matter jurisdiction has been raised over and over but the lower court ignores this issue or refuses to consider the raised issue. Additionally, an expired contract used to purchase the servient property, a void contract thus a void order from the beginning, the legal standing of the respondents to the servient property and the respondents are trespassers to real property/not bona fide purchasers. Since subject matter jurisdiction and issues that relate to can be raised at any time in any court, including for the first time on appeal, this is a novel issue properly raised. "Issues related to subject matter jurisdiction may be raised at any time." *Browning v.State*, 320 S.C. 366, 465 S.E.2d 358 (1995). (59e motion 3-23, p. 5-9) (59e motion, 1-23.)

These are issues at law and equity, issues that violate discovery rules and the rule for Summary Judgment, issues that question the legal standing of the litigants and the jurisdiction and discretion of the lower court in these matters. For these reasons and due the above, the denial of Appellants motions must be reversed. (Order(s))

7. The Respondents did not file a timely proper 12b motion to dismiss that tolled the time to answer the amended complaint.

Though this Court's August 23rd Order ultimately forgives Defendants' default and allows Defendants to file an Answer, it's forgiveness is based on an improper assumption the Defendants plead a timely and proper "12(b)(6) motion" to Dismiss the Amended Complaint. (Order 8-21)

On March 12, 2020, Appellant filed an Amended Complaint (Complaint)

On March 26, 2020, Respondents filed a motion to dismiss the amended complaint alleging Appellants failure to comply with Rule 15(a) warrants its dismissal of (herein "Rule 15 Motion") (Rule 15 Motion) Specifically, claiming Appellant was required to obtain consent from the Respondents to amend, failed to move to amend, and failed to consult with the Respondents counsel prior to filing. (Rule 15 Motion). In response filed 4/14/2020 (Response), Appellant contended the Respondents have not filed an answer or responsive pleading to the Amended Complaint therefore

consent or moving to amend is not required. Further, "There is no duty of consultation...with pro se litigants." Rule 11 SCRCP (Rule 15 Motion)(Resp to Rule 15 Motion)

On April 13, 2020, Respondents filed a Rule 12(b)(6) motion to dismiss the amended complaint (herein "Rule 12(b)(6) Motion). (Motion) In its response filed 4/27/2020 (Response) Appellant asserts their motion was insufficient as they failed to state with particularity the grounds for the motion. "Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion." SCRCP 12(b). Their motion states, *"On April 29, 2019, the Defendants filed a Motion to Dismiss the Plaintiff's Complaint (the "Motion"). 'The Defendants request dismissal of the First Amended Complaint* for *all the reasons stated in the Motion and supporting memorandum, which remain under advisement, and they incorporate those filings herein."* The motion and memorandum pointed to were no longer under advisement or available for consideration as of March 12, 2020, the filing date of the Amended Complaint or operative complaint (Order, 8-21[29]).

It is well-settled that a motion to dismiss a complaint becomes moot if an amended complaint is filed prior to a determination of complaint that is subject to the motion. *See Schein v. Lamar*, 284 S.C. 252, 325 S.E.2d 573 (Ct. App. 1985). Consequently, the respondents fail to plead any defense, they just point to filings that can no longer be considered by the court. If the Respondents wanted to assert defenses from filings pertaining to the original complaint, they should have reasserted them specifically in the 12(b)(6) motion to dismiss the amended complaint or filed a new memorandum to support.

[29] where the court ruled the Amended complaint the operative complaint [and any filings pertaining to the original complaint, including motions to dismiss and its memorandum, were no longer before the court for its consideration] as of the filing of the amended complaint or on March 12, 2020.

Almost *a year and a half later*, on August 23, 2021, the court filed an order ruling the Amended Complaint the operative complaint going forward, thus the filing of the Amended Complaint rendered all filings in relation to the Original Complaint, including motions to dismiss the original complaint and its memorandum, moot or not before the court for its consideration (Order). The court denied Respondents Rule 15 motion to dismiss and erroneously allowed them under Rule 15, without a previous order altering that deadline as required by Rule 15, to answer within 15 days from issuance of its order. "A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fifteen days after service of the named amended pleading, whichever period may be the longer, unless the court otherwise orders." SCRCP Rule 15(a). The August 2021 "order" does not meet the requirements of a Rule 15(a) order. If a court was allowed to wait as long as they want, and in this case almost 18 months, to issue an order altering the time to answer an amended complaint, it would render Rule 15(a) requirement for a prior order to alter the time to answer irrelevant. There is no order in the record that altered the time to answer pursuant Rule 15(a). Further, there is nothing in the rules that states a motion made to dismiss for failure to comply with Rule 15(a) [or Rule 11] automatically tolls the time to answer until the motion is ruled on. The Respondents were required to answer the amended complaint at least by May 14, 2020, but failed to. Respondents are in default and must be found so.

In the order the court stated Respondents' 12(b) motion was being denied but provided no disposition as to why it was denied, if it even was, and refuses to properly disposition it. (59(e) Motion(s)). Appellant requests disposition of, and as argued herein and in its motion and memo in support of default, the disposition, or sufficiency, of their 12(b) motion is very important as only 12(b) motions can toll the time to answer a complaint without a prior court order.

Based on the above, the Respondents' Rule 12(b)(6) motion fails to plead therefore is insufficient, must be denied as insufficient, and does not toll the time to answer the amended

complaint ((12(b)(6) Motion 4-2020)(Response)(59e motion 8-21). As s result, the Respondents are in default. Appellant asks this court to reverse the denial of its Motion for Default. (Motion for Default)(Memo in support of Default).

CONCLUSION

Due to the herein, and that [ordered] discovery is still pending, summary judgment is improper and must be reversed.

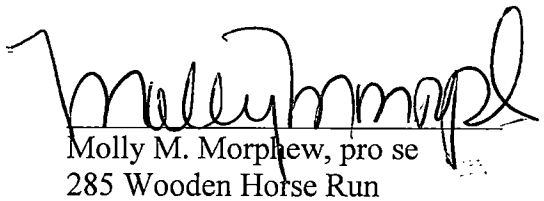
Further, due Respondents are in contempt of a court order; that the Respondents failed to show good cause shown for being in contempt; that the Respondents took the law into their own hands terminating water service to the Appellants property or trespassing upon easement without notice to the Appellant or prior amendment of their contract; that if the easement is found illegal, the contract has not been amended and still contains the water easement agreement or alleged unlawful language and requires a separate trial to address; that the equity court in the case in which this instant case arises lacked subject matter jurisdiction or any lawful ability to award specific performance to the Respondents thus the order is void from the beginning; that due the equity court's lack of retaining subject matter jurisdiction, this court in which this instant complaint arises lack's subject matter jurisdiction to award [anything] to the Respondents, let alone summary judgment, especially while discovery is pending on the very dispositive issues ruled on in its order; thus all relief requested herein brief be granted.

Additionally, the order protecting discovery failed to include Appellant's pending motion and the response, which is notice to the court to consider, therefore the motion for protection was not fully heard or considered. The court abused its discretion failing to consider the pending documents. The order and denial of Appellant's 59e motion to compel discovery/response requires reversal.

Respondents' Rule 12(b)(6) motion failed to plead, therefore is insufficient and fails as a motion to toll the time to answer the amended complaint. Appellant asks this court for full

adjudication on the 12(b)(6) motion. A motion filed under Rule 15 does not toll the time to answer the amended complaint, only a previous court order can expand the time as required to answer an amended complaint. Due the arguments herein, the Respondents failed to file a timely proper Rule 12(b) motion to toll the time to answer and are in default. Regardless, Appellant asks this court for full adjudication on the Respondent's 12(b)(6) motion to dismiss the amended complaint and find Respondents in default.

Respectfully submitted,



Molly M. Morphew, pro se
285 Wooden Horse Run
Ridgeland, SC 29936

October 18, 2023

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
OCT 24 2023
SC Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Honorable Maite Murphy, First Judicial Circuit

Appellate Case No. 2023-000879

Molly M. Morphew, Appellant,

v.

Stephen Dudek and Doreen Cross, Respondents.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Appellant's Initial Brief complies with Rule 208(b).

Molly M. Morphew, pro se
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Ridgeland, SC 29936
(843) 514-7299

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v.

Stephen Dudek and Doreen Cross, Respondents.

CERTIFICATE OF SERVICE

I, Molly M. Morphew, Appellant, pro se for said case, hereby certify that I have, on this date indicated below, served counsel below with an Appellants INITIAL BRIEF, CERTIFICATE OF SERVICE, CERTIFICATE OF COMPLIANCE pursuant Rule 208(b), and its DESIGNATION OF MATTER to be included in Record on Appeal, by mailing a copy of same via United States Mail, postage prepaid and return address clearly indicated on said envelope, to counsel at the following address:

Zachary Closser, Esquire
P.O. Box 40578
Charleston, SC 29423-0578
Attorney for Respondents:
Stephen Dudek
Doreen Cross

Molly M. Morphew, pro se

October 18, 2023

October 18, 2023

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29211

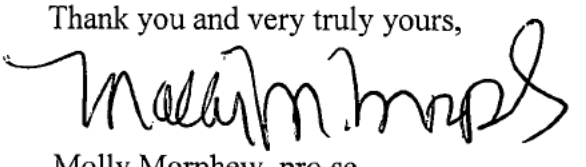
Re: Appellate Case No. 2023-000879
Molly M. Morphew v. Stephen Dudek and Doreen Cross

Dear Ms. Kitchings:

Please find enclosed Appellants INITIAL BRIEF, the CERTIFICATE OF SERVICE, CERTIFICATE OF COMPLIANCE, and its DESIGNATION OF MATTER to be included in Record on Appeal, to be recorded and filed.

Also enclosed is a copy of above to be kindly recorded and returned in the self-addressed, stamped envelope.

Thank you and very truly yours,



Molly Morphew, pro se

Cc: Zachary Closser, Esq.

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