

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
CASE NO. 2009 - CP -10 - 5343
Circuit Court Judge J.C. Nicholson, Jr.

ROOSEVELT SIMMONS	)
Plaintiff, Appellant	)
	)
Vs.	)
	)
HATTIE BAILUM, RUBY BAILUM	)
VERDONE BAILUM,	)
JULIE B. JOHNSON,	)
MONICA MIDDLETON,	)
MARIE SMITH, MELVIN SINGLETON,	)
FRANKLIN SMITH, LMC, LLC,	)
JOHN MARTIN, ESQ. as TRUSTEE	)
Defendants, Respondents	)

RECORD ON APPEAL – VOLUME I

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Melvin Singleton, LMC, LLC and
John Martin, Esq. as Trustee

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CERTIFICATION

Counsel for appellant hereby certifies that the Record contains all the material designated by the parties to the appeal and no other materials.

Edward A. Bertele, Esq.

February 09, 2012

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Roosevelt Simmons,)
)
Plaintiffs,)
VS.)
)
Hattie Bailum, Ruby Bailum,)
Verdone Bailum, Julie B. Johnson,)
Monica Middleton, Marie Smith,)
Melvin Singelton, Franklin Smith,)
LMC, LLC, John Martin, Esq.,)
as Trustee,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-10-5343

ORDER

2011 JAN 11 PM 1:20
JULIE B. JOHNSON
CLERK OF COURT
BY _____

This matter initially came before the Court as a Motion to Dismiss filed by the Defendants. Upon the call of the case, the Court noted that the Parties had submitted a variety of affidavits and other exhibits. The Motion was converted to a Motion for Summary Judgment and the parties were given leave to submit further affidavits or other exhibits they deemed appropriate for the Court to consider. Counsel for both parties did so.

After careful consideration of the record herein, the Court records in cases 2004-CP-10-1459 and 2002-CP-10-4883, material provided by counsel and the oral arguments of counsel, the Court grants the Defendants' Motion for Summary Judgment as to all causes of action alleged by the Plaintiff.

The gravaman of the Plaintiff's case and argument is that Rule 60(b) of the South Carolina Rules of Civil Procedure would permit his case to proceed. The Defendants' argument is that Plaintiff's case is barred by the doctrine of res judicata and that he may not obtain relief under Rule 60(b) as there has been no fraud upon the Court.

The procedural history of the case is illustrative as it relates to both parties' position.

PROCEDURAL HISTORY
PRIOR ACTION

The present case emanates from an heirs property case which began in 2004 styled Clara Bailum, Ruby Bailum, Verdone Gray, and Julie B. Johnson v Monica Middleton, Roosevelt Simmons, Melvin Singleton, Marie Smith, et al., case number 2004-CP-10-1459. That case was filed on March 29, 2004. It was subsequently amended to substitute Hattie Bailum as a party Plaintiff due to the death of her mother Clara Bailum. On April 1, 2004 an Order was filed appointing a Guardian ad Litem.

On January 25, 2005 a Consent Order was proposed by counsel for Mr. Simmons referring this matter to the Honorable Joseph S. Mendelsohn as Special Referee. Counsel for the Plaintiffs consented.

On September 13, 2005 a Consent Order was signed by counsel of record amending the pleadings a second time to add as Defendants certain heirs of Hester Singleton, whose names were provided by the Defendant therein Roosevelt Simmons through his counsel Ruth Cupp, Esquire.

On November 10, 2005, Ruth Cupp, Esquire, was relieved of representation of Mr. Roosevelt Simmons.

During the pendency of the case, the record reflects there were numerous pre-trial or status conferences.

In September 2006, the 2004-CP-10-1454 matter was tried. The Special Referee, upon hearing the testimony and reviewing the record, requested proposed Orders from each counsel. Mr. Simmons was represented at this time by Louis E. Condon, Esquire, the former Master-In-Equity for Charleston County.

On October 6, 2006 the Special Referee convened a status conference with all counsel to review the proposed Final Orders. At that conference, the Special Referee ordered the pleadings be republished so as to insure the ends of justice and to insure that each person who may have an interest in the property was given a final opportunity to step forward. The Order was finalized and signed more than thirty (30) days after the publication period ended.

On October 13, 2006 Marie Smith, a Defendant in this action, gave notice that she was to be represented by Bruce Berlinsky, Esquire of the Charleston County Bar.

On January 11, 2007 the special referee executed his Order Quieting Title to the parcels of land at issue. In that Order Mr. Simmons, the Plaintiff herein, was granted the opportunity to purchase the property known as Parcel 1. Mr. Simmons had ten (10) days to provide confirmation of a loan or funds available. Value was not an issue as an appraisal was ordered by the Special Referee in May 2005.

On February 7, 2007 Marie Smith filed a Motion to Amend the Order under Rule 60. All counsel agreed that her name was omitted from the Order by scrivener's error.

On February 16, 2007 a hearing on the Motion to Amend was heard. At that Hearing, the issue of Mr. Simmons being permitted to purchase certain property was addressed again. Mr. Simmons by this time was now represented by Charles Houston, Esquire.

On March 6, 2007 the Amended Special Referee's Order was filed and served. This Order also addressed Mr. Simmons' post trial motions. The Special Referee denied Mr. Simmons' motions.

On March 29, 2007 Roosevelt Simmons filed a pro se Notice of Appeal.

On April 24, 2007 Charles Houston, Esquire entered a notice of appearance on behalf of Roosevelt Simmons.

On May 4, 2007 a Motion to Stay the Judgment authorizing the sale of the property was filed by Mr. Simmons' counsel.

On June 4, 2007 the Court of Appeals dismissed Mr. Simmons' appeal for failure to provide proof of ordering the transcript. Subsequently, the Court of Appeals reinstated the Appeal.

On June 6, 2007 a Hearing was held on the May 4, 2007 Motion to Stay. The issue of Mr. Simmons' purchase of the property was again discussed. The Motion to Stay was denied. That Order was never appealed.

On July 13, 2007 Mr. Houston filed a Motion for a Supercedeas or Other Relief. Judge Cureton's order stayed the sale of the property until the Respondents (all of whom are Defendants herein) filed their return. The Motion and Attached Memorandum also raised as a ground for the relief sought the issue of Mr. Simmons' purchase of the property.

On July 18, 2007 Charles Houston, Esquire was granted an extension to order the transcript and file his Initial Brief.

On July 31, 2007 the Respondents filed their return to the Supercedeas Motion with the Court of Appeals. The return also addresses the sale issue.

On September 4, 2007 the Court of Appeals ruled on the Motion for Supercedeas. The Supercedeas and Motion to Stay were denied. The Court of Appeals was fully aware of the purchase issue raised by Mr. Simmons.

On September 13, 2007 Mr. Houston filed a Petition for Full Appellate Review. This Petition was denied and nothing more was heard from Mr. Houston of Mr. Simmons for several months.

After many motions and petitions being filed, the Court of Appeals on March 24, 2008 dismissed the Appeal a second time due to Mr. Simmons' failure to file and serve the Initial Brief and Designation of Matter.

In July of 2008 Mr. Houston again sought leave to file late. The Respondents objected.

On August 7, 2008 Mr. Houston filed his Brief late without the approval of the Court. In that Brief, he again addressed the purchase issue.

On August 20, 2008 the Appeal was dismissed.

On August 28, 2008 Mr. Houston sought full appellate review of the dismissal of the Appeal. The Respondents filed an appropriate return.

On October 24, 2008 the Motion for Full Appellate Review was denied and the remittitur sent to the Clerk of Court for Charleston County.

On October 31, 2008 Mr. Houston sought reconsideration. The Respondents filed their return; however the Court returned the Respondent's Reply indicating they were not going to address the Motion for Reconsideration.

On December 1, 2008, no Petition for Certiorari having been filed, the case was remitted. Shortly thereafter, the Special Referee's Orders were acted upon.

CURRENT ACTION

The current action, styled Roosevelt Simmons v Hattie Bailum, Ruby Bailum, Verdone Gray, Julie B. Johnson, Monica Middleton, Marie Smith, Melvin Singleton, Franklin Smith, LMC, LLC and John Martin, Esquire, Trustee, case number 2009-CP-10-5343 was filed October 26, 2009.

In the current action, Roosevelt Simmons alleges that certain witnesses gave false testimony concerning Fannie Middleton so as to deprive Mr. Simmons of an interest in certain parcels of property. Plaintiff also asserts he was unaware of another action filed

in Charleston County some years earlier by Monica Middleton with regard to quieting the title to another parcel of property located on Johns Island (2002-CP-10-4883). Plaintiff alleges that testimony in the 2002 case differs from testimony in the 2004 case and that such differences were not discovered until after the trial of the 2004 case, thus entitling him to the relief he seeks under the theory that fraud upon the Court has occurred.

At the time of the trial of the 2004 case numerous stipulations were entered which have a bearing upon this matter.

First, the 2004 action involves the quieting of the title, partition and sale of the four parcels of land identified by the TMS Numbers 311-00-00-024 (Parcel 1); 312-00-00-065 (Parcel 2); 312-00-00-032 (Parcel 3); and 312-00-00-067 (Parcel 4). It is important to note that title to the property from the 2002 Middleton action is not at issue herein.

Second, since 1904, the "Bailum" name has sometimes been spelled as "Balaam". The parties stipulated that reference to "Balaam" is reference to "Bailum" and the caption shall reflect "Bailum a/k/a Balaam". Further, there are instances where "Hester Bailum" is referred to as "Esther Bailum". The parties stipulated that Hester Bailum and Esther Bailum are the same person. The caption reflected "Hester Bailum a/k/a Esther Bailum".

Third, the parties were realigned such that the living heirs of Samuel Bailum; to wit: Hattie Bailum, Ruby Bailum, Verdone Gray, Julie Johnson and Monica Middleton appeared in the caption as Plaintiffs. The known living heirs of Hester Bailum remained as Defendants. Until the day of the 2004 trial, Monica Middleton was a co-Defendant of Roosevelt Simmons. Roosevelt Simmons is not a blood heir of Samuel Bailum but rather he is an heir of Hester Singleton Bailum.

Fourth, the parties stipulate that due to health, age and travel considerations, Hattie Bailum, James Bailum, Verdone Gray, Julie Johnson, Leon Singleton and Melvin Singleton were permitted to testify by telephone.

Fifth, the parties stipulated to the admissibility of previously marked exhibits which were submitted and reviewed by counsel for all parties and the Guardian ad Litem prior to trial. It is also important to note that there is no evidence in the record that the parties in the present action engaged in any discovery in the underlying 2004 action. Mr. Simmons asserts that information "discovered" after the 2004 trial is the basis of his argument. However, had he or any of his able and learned counsel engaged in discovery prior to the 2004 case being tried, the information now discovered, which information is public record, could have been presented, if even relevant, at the time of the 2004 case. Mr. Simmons is asking this Court for the equivalent of Rule 60 relief, not for reasons permitted under the rules, but occasioned by his own failure to prosecute his claims or defenses.

Sixth, the Guardian ad Litem, Francis X. McCann, was to be paid for his services in equal shares by the Plaintiffs and Defendants. His fee was to be paid at the time of the sale of all or a portion of the property identified above. The Guardian ad Litem's fee was \$200.00 per hour.

Seventh, the Special Referee was to be paid for his services in equal shares by the Plaintiffs and Defendants. His fee was to be paid at the time of the sale of all or a portion of the property identified above. The Special Referee's fee was \$200.00 per hour.

Eighth, the prayer for relief was amended by stipulation to seek to have title to the four specifically identified parcels quieted and that once title was established, the parcels be partitioned and/or sold with the respective shares of the proceeds being distributed to the heirs of Samuel Bailum, Sam Bailum, Thomas Bailum, Tony Bailum, Mary Bailum

and Fannie Bailum Middleton or the heirs of Hester Bailum as determined appropriate by the Special Referee. The Special Referee did just that. He determined the heirs with an interest in the parcels and the heirs' respective percentages of ownership under the Statute of Descent and Distribution. Mr. Simmons disagrees with the Special Referee's well reasoned ruling, findings of fact and conclusions of law. The forum to address those issues is the appellate forum and not this Court.

Ninth, the parties stipulated to the Court Reporter's qualifications.

In the trial of the 2004 case, the Court took testimony from Hattie Bailum, James Bailum, Verdone B. Gray, Julie B. Johnson, and Roosevelt Simmons. Monica Middleton did not testify.

The Special Referee found, based upon all the testimony and exhibits before him that certain heirs of Sam Bailum had interest in four parcels of land. The Special Referee found that Monica Middleton was a direct lineal descendant of Fannie Bailum Middleton. Likewise, the 2002 Court found that Monica Middleton was a direct lineal descendant of Fannie Bailum Middleton. While the 2002 Order and 2004 Order differ as to whether Monica Middleton was a great granddaughter or granddaughter of Fannie Bailum Middleton, the distinction is without merit or relevance as to the Plaintiff's allegations of fraud upon the Court.

First, Monica Middleton did not testify in the 2004 action. Although she was named as a co-Defendant, Roosevelt Simmons undertook no discovery with regard to her interests in the property or her relationship to any of the parties to the litigation. Further, the 2002 action was and is a public record accessible to all by searching names or the TMS Number for the property.

Second, Monica Middleton and Roosevelt Simmons were both parties in the 2004 action. She did nothing that would have disenfranchised him or his interest in this

property. He had the discovery tools under the Rules of Civil Procedure and public record at his disposal. Monica Middleton did testify in the 2002 action in which Mr. Simmons was not named as a party. Mr. Simmons has sought no relief nor has he challenged the testimony he now asserts is inconsistent in the Order emanating from the 2002 case.

Irrespective of the alleged conflict in testimony, it has no bearing upon Mr. Roosevelt Simmons' interest, if any, in certain parcels of land. Mr. Simmons is not now nor has he ever been in the Fannie Bailum Middleton line of descent and distribution. As such, her status per her 2002 testimony regarding a different parcel of land is immaterial to his status. Any factual disparity as to Monica Middleton's lineage is irrelevant to Roosevelt Simmons' position.

As a matter of establishing Plaintiff's rights, if any, to property at issue herein, it is important to illustrate Plaintiff's status as determined from the exhibits from the prior trial of the 2004 case under the South Carolina Statute of Descent and Distribution.

Plaintiff alleged there was but one "Sam" Bailum (also spelled Balaam). However, based upon the exhibits at trial, many of which were proffered by the Plaintiff herein, the Special Referee concluded that there were no less than three Sam Bailums. Within the record established in this case are some of the many exhibits marked at the trial of the 2004 case.

Exhibit 1 attached to the Defendant's Supplemental Memorandum is the death certificate of Samuel Bailum who died in 1975. According to his death certificate, this Samuel Bailum's father was also Samuel Bailum.

Exhibit 2 to the Memorandum is the death certificate of the third Samuel Bailum ("Sammy") who died in 1999. According to his death certificate, his father was Samuel Bailum. Sammy was married to Ruby, who was a Plaintiff in the underlying action.

In short there was a Samuel Bailum (Samuel I) who married Julia. They had a number of children including Thomas, Tony, Fannie, Mary and Samuel (Samuel II). Samuel II married Lucille. They had a child named Samuel (Sammy). Sammy married Ruby, and they had a child Verdone – also a party and witness in the action below.

The Plaintiff herein, Roosevelt Simmons, is not related by blood to any lineal descendent of the Bailum family. The Plaintiff's grandmother, Hester Singleton, married Samuel Bailum (Samuel I) who was a widower. She had numerous children from prior marriage(s). The Plaintiff herein is a descendent of one of Hester Singleton's children. This fact is derived from Plaintiff's own exhibit detailing his family tree, which exhibit was introduced at the trial of the 2004 case. This exhibit also shows three "Sam Bailums". This is relevant because the underlying 2004 quiet title action involved multiple tracts of land. The Special Referee addressed each parcel with specificity in his Orders.

The Special referee concluded that Samuel I owned the parcel known by TMS# 311-00-024. He further concluded that the parcels known by TMS #'s 312-00-00-065, -067, and -032 were the residual parcels of a larger tract deeded in 1904 into Samuel II, Mary, Thomas, Tony and Fannie.

The Special Referee found that the Plaintiff's interest herein was limited to the marital spousal interest of his grandmother, Hester Singleton Bailum, in TMS# 311-00-024. The Referee further found that the Plaintiff had no interest in TMS #s 312-00-00-032, -065, and -067 since he is not a lineal descendent of any of the owners of those parcels.

The Special Referee found in 1904 that fifty-four acres were deeded unto Samuel II, Mary Thomas, Tony and Fannie. Subsequently parcels were deeded out to these individuals in the following approximate amounts, without the benefit of surveys or plats:

24 acres to Samuel

10 acres to Thomas

10 acres to Tony

5 acres to Mary

5 acres to Fannie.

Later, the property was platted to reflect acreages as those individuals began to sell their interests. Fannie's parcel came to be identified by TMS# 312-00-00-066; Tony's parcel came to be identified by TMS# 312-00-00-067. The parcels known by TMS# 312-00-00-032 and -065 were Sam's parcels.

By the time of the trial, only three of the original parcels remained. These parcels were 312-00-00-032, -065, and -067 with titles not yet quieted. Fannie's heir (Monica Middleton) quieted the title to her parcel some years earlier (the 2002 case). The residual acreage in all three parcels totaled 22.2 acres. The county tax records indicate that -065 and -032 were owned by the Estate of Sam Bailum and that -067 was owned by the estate of Tony Bailum. The parcel -067 now consists of 3.33 acres. (7.14 acres of his original ten acres had been previously subdivided and sold.) Thus, the residual interest of Sam Bailum (II) was 18.87 acres.

Were the Plaintiff correct in his argument that he is entitled to an interest in property owned by Samuel II (18.87 acres) then he could not possibly have any interest in property owned by Samuel I. Again, he is not a lineal descendent. He only takes his pro-rata share of his grandmother's marital interest. His grandmother was only married

to one Sam Bailum; yet Plaintiff herein argues and argued entitlement to all the property owned by any Sam Bailum.

There is ample evidence in the record separate and apart from the testimony alone to support the Special Referee's findings. There is no evidence in the record to support Mr. Simmons' allegation of fraud upon the Court.

In Evans v Gunter, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (Ct. App. 1988), the Court of Appeals noted one commentator described "fraud upon the court" as "that species of fraud which does, or attempts to, subvert the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." (citing H. Lightsey, J. Flanagan, South Carolina Civil Procedure, 408 (2nd ed. 1985).

Other jurisdictions describe fraud upon the court as follows:

"Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated will constitute fraud on the court. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court."

Rozier v. Ford Motor Co., 573 F.2d 1332, 1338 (5th Cir. 1978) citing United States v. Int'l Telephone & Telegraph Corp., 349 F.Supp. 22, 29 (D. Conn. 1972) (internal citations omitted).

Fraud upon the court is a "serious allegation... involving 'corruption of the judicial process itself'." Cleveland Demolition Co., Inc. v. Azcon Scrap Corp., supra 827 F.2d at 986 quoting In re Whitney-Forbes, 770 F.2d 692, 698 (7th Cir. 1985).

"... '[F]raud on the court,' whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court. A proper balance between the interests of finality on the one hand and allowing relief due to inequitable conduct on the other makes it essential that there be a showing of conscious wrongdoing - - what can properly be characterized as a deliberate

scheme to defraud - - before relief from a final judgment is appropriate.... Thus, when there is no intent to deceive, the fact that misrepresentations were made to a court is not of itself sufficient basis for setting aside a judgment for 'fraud on the court.'”

United States v. Buck, 281 F.3d 1136, 1342 (10th Cir. 2002) quoting Robinson v. Audi Aktiengesellschaft, 56 F.3d 1259, 1267 (10th Cir. 1995).

In considering collateral attacks on final judgments, a court must balance the interest of finality against the need to provide a fair and just resolution of the dispute. See Hagy v. Pruitt, 339 S.C. 425, 529 S.E.2d 714 (2000). In most circumstances, there is a time limitation upon a party who seeks to reopen a final judgment. Rule 60(b), SCRCivP, provides, in part:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.

On Motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud, misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

The Motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken... This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment order, or proceeding, or to set aside a judgment for fraud upon the court. (Emphasis added.)

There is no statute of limitations when a party seeks to set aside a judgment due to fraud upon the court. Rule 60(b), SCRPC; see Hagy v. Pruitt, supra (court has the inherent authority to set aside a judgment on the ground of extrinsic fraud in spite of any facially applicable statute of limitations). In order to secure equitable relief on the basis of fraud upon the court, the fraud must be extrinsic. Bryan v. Bryan, 220 S.C. 164, 66 S.E.2d 609 (1951). (Extrinsic fraud is necessary in order to secure equitable relief vacating a prior judgment.)

Extrinsic fraud is “fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action.” Hilton Head Ctr. of South Carolina v. Public Serv. Comm’n, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987).

Intrinsic fraud, on the other hand, is fraud which was presented and considered in the trial. Hagy v. Pruitt, 339 S.C. 425, 529 S.E.2d 714 (2000). It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud. Hilton Ctr. v. South Carolina Pub. Serv. Comm’n, supra.

Perjury by a party or a witness is intrinsic fraud. Rycroft v. Tanguay, 279 S.C. 76, 302 S.E.2d 327 (1983). “[O]rdinarily there is no ground for equitable interference with a judgment in the fact that perjury or false swearing was committed by such party or

his witnesses at trial, at least where the perjurious or false evidence was not accompanied by any extrinsic or collateral fraud, and related to issues or matters which were or could have been considered in the original cause.” Bryan v. Bryan, supra 220 S.C. at 168, 66 S.E.2d at 610. In addition, the failure to disclose to an adversary or court matters which would defeat one’s own claim is intrinsic fraud. Hilton Head Ctr. of South Carolina, Inc. v. Pub. Serv. Comm’n, supra. [4].

Equitable relief from a judgment is denied in cases of intrinsic fraud, on the theory that an issue which has been tried and passed upon in the original action should not be retried in an action for equitable relief against the judgment, and that otherwise litigation would be interminable; relief is granted for extrinsic fraud on the theory that by reason of the fraud preventing a party from fully exhibiting and trying his case, there never has been a real contest before the court of the subject matter of the action.

Bryan v. Bryan, supra S.C. at 168, S.E.2d at 610.

“Relief is granted for extrinsic but not intrinsic fraud on the theory that the latter deceptions should be discovered during the litigation itself, and to permit such relief undermines the stability of all judgments.” Mr. G. v. Mrs. G., 320 S.C. 305, 308, 465, S.E.2d 101, 103 (Ct. App. 1995).

The Court finds no evidence of extrinsic fraud upon the Court. Mr. Simmons was neither induced to not present his case nor deprived of the opportunity to be heard. His argument as it relates to the conflict in testimony is at best intrinsic fraud for which he is entitled to no relief. No fraud prevented him from fully exhibiting and trying his case. Mr. Simmons’ failure to engage in discovery prevented him from fully exhibiting and trying his case. He can not now seek relief occasioned by his own failures.

ROOSEVELT SIMMONS’ STATUTORY INTEREST

Roosevelt Simmons, the Plaintiff herein, was found to be an heir of Hester Singleton who had married Sam Bailum (I). The Special Referee concluded at the time of Sam Bailum’s (I) death, he held fee simple title to TMS# 312-00-00-024. At the time

of trial of the 2004 case, Final Orders and Appeal, Mr. Simmons' interest in this parcel was fully protected. To this day his proceeds from the sale of TMS 312-00-00-024 remain held in Trust. He was provided numerous opportunities to purchase this parcel, however at no time did he comply with the specific terms of any of the Special Referee's Orders. The Court notes from the records reviewed and memoranda submitted that Mr. Simmons was advised of his opportunity to purchase certain property and of the requirements to do so on no less than nine (9) occasions. Mr. Simmons failed to avail himself of those opportunities and failed to comply with the Special Referee's Orders from which he now seeks relief. Relief from those Orders' application of law or procedure comes not from this Court but from the Appellate Courts.

The Defendants herein deny the Plaintiff had any interest in the residual property owned by Sam Bailum (II) and concur with the Referee's finding. Assuming solely for the sake of illustration and argument that the Special Referee erred in finding there is but one Samuel Bailum, and the Plaintiff herein had some right to or interest in the residual parcels, what then would that interest be? Upon "Sam's" death, under the Statute of Descent and Distribution in effect at the time of his death, Hester would have taken the 1/3 of Sam's property and his children by his first wife would have taken the rest. Hester died intestate in 1952 (per Plaintiff's herein trial exhibit). She had nineteen children from prior marriage(s) (per Plaintiff's herein exhibit at trial of the 2004 case, Exhibit 3, Page 5. This exhibit was an article authored by Plaintiff's cousin Franklin O. Smith.) All of Hester's children were believed to be deceased. At the time of the trial of the 2004 case, four were known to be survived by children. Eugene Singleton was one of those four. Roosevelt Simmons is one of Eugene Singleton's fifteen children (per trial Exhibits.)

Thus, Hester Singleton Bailum would have, by intestate distribution taken 1/3 of "Sam's" 18.87 acres, or 6.284 acres. Upon Hester's death, assuming she did not remarry,

each of her nineteen children, or their children, per stirpes, including Eugene Singleton, would have taken 1/19 of the 6.284 acres, or .331 acres each. Upon Eugene Singleton's death, each child by intestate distribution or per stirpes, including Roosevelt Simmons, would take 1/15 of the .331 acres, or .022 acres (approximately 968 square feet – a parcel not legally subdividable.)

The Special Referee's ordered appraisal on these combined parcels (-032, -065 and -067) was in the amount of \$300,000.00 or \$12,500.00 per acre. Thus, were the Plaintiff herein correct that he has an interest in -032 and -065 ("Sam's") parcels, his interest is \$275.00 (\$12,500.00 X .022 acres) based upon the Partition by Sale Order.

The Plaintiff herein attempts to argue that a fraud has been committed upon the Court, as it relates to Monica Middleton's testimony in the trial of the 2002 case involving an entirely different parcel of land. Plaintiff argues that this information was not discovered until after the trial of this case and that it somehow impacts his statutory interest. The only matter which impacts Plaintiff's statutory interest is the Statute of Descent and Distribution as it relates to Hester's spousal share of the estate of the Sam Bailum she married. The Plaintiff's interest is by marriage, not blood.

Monica's interest in this property or her lineage has no relevance to Roosevelt Simmons' interest. The record in her quiet title action is and was since 2003 public record easily discoverable by counsel. Her interest in a distinct parcel of land was not relevant to Mr. Simmons' interest in property held by Sam Bailum's estate, as Monica Middleton had already quieted title to her land that the Bailum siblings deeded to her predecessor in title, Fannie, nearly 106 years ago while Sam Bailum was living. By Sam's deeding his interest to Fannie, he extinguished any claim Hester Singleton and her heirs would have had to Fannie Bailum's tract which is now known as Monica

Middleton's tract. This fact is not disputed and is public record in the Charleston County RMC Office.

Plaintiff was ably represented by counsel throughout the process. The action by Monica Middleton that Plaintiff refers to emanated from a quiet title action brought by Ms. Middleton with regard to property owned by Fannie Bailum Middleton. Her testimony in the quiet title action, which is public record, has no bearing or relevance to Plaintiff's claims to interests in property owned by one or more of the Sam Bailums. In 1905, the Bailum siblings, including Sam, deeded their interest in Fannie's five acres to Fannie. As such, her five acres was unaffected by the quiet title action filed in 2004. Further, Monica Middleton did not testify in the case from which this matter stems, as she had already quieted title to her five acres in a prior case. She offered no testimony as to her relationship to Sam Bailum. Therefore, there could be no extrinsic fraud upon the court.

The position that Monica Middleton's testimony from her 2002 quiet title action has relevance or is false is completely unfounded, as her suit did not touch upon property owned by any of the Sam Bailum's since Sam Bailum deeded his interest out to Monica's lineal ancestor, Fannie, during his lifetime.

The Plaintiff herein seeks relief for issues that could have been litigated at trial and on appeal. They were not litigated at trial, but every issue asserted herein was asserted on appeal. When the Plaintiff failed to perfect his appeal, he abandoned his rights to relitigate issues under Rule 60, Smith Companies of Greenville v. Hayes, 428 S.E. 2d 900 (Ct. App. 1993) and Tench v. S.C. Department of Education. Fraud upon the Court is a narrow and invidious species of fraud that subverts the integrity of the Court itself, or is a fraud perpetuated by the officers of the Court so that judicial machinery cannot perform in the usual manner its impartial task of adjudicating cases that are

presented for adjudication, Chewning v. Ford Motor Co. 579 S.E. 2d 605. (Ct. App. 1993.)

As a further ground for granting Defendants' Motion for Summary Judgment, the Court finds this action is barred by the Doctrine of Res Judicata. Res judicata requires "identical parties or their privies (2) identity of the subject matter and (3) adjudication of the issue in the former suit. If the time requirements are met, an unsuccessful litigant is precluded from relitigating claims that were actually litigated or any which could have been litigated (emphasis added)." Wold v. Funderburg 157 S.E. 2d 180 (1975). Res judicata bars not only claims that were actually raised in a prior action, but also those issues that might have been raised in the former suit. Also, res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. RIM Associates v. Blackwell 597 S.E.2d 152 (S.C. Ct. App. 2004).

The doctrine of res judicata provides that final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were or could have been raised in that action. Venture Engineering, Inc. v. Tishman Const. Corp. of South Carolina, 360 S.C. 156, 600 S.E.2d 547 (Ct. App. 2004), reh'g denied, (Aug. 24, 2004).

A res judicata defense requires a showing that prior judgment was final, valid, and on the merits, parties in subsequent action are identical to those in first action, and the second action involves matters properly included in the first action. Wright v. Marlboro County School Dist., 317 S.C. 160, 452 S.E.2d 12, 96 Ed. Law Rep. 814 (S.C. App. 1994).

In this action, the only persons not named as parties in the 2004 action but named herein are privies as required by the res judicata doctrine. LMC, LLC and Franklin Smith

(Marie Smith's son) are purchasers of the property sold pursuant to the Special Referee's Order.

The subject matter of this suit is the same as the subject matter of the 2004 case. Both cases address Mr. Simmons' claims to his alleged right, title and interest to specifically identified parcels of real estate. This Lis Pendens filed herein is identical to the Lis Pendens filed in the 2004 litigation.

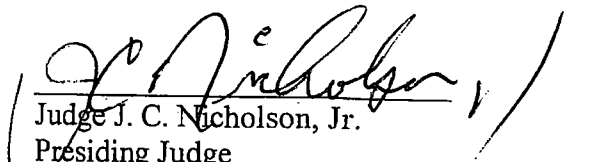
The underlying subject matters and issues in this case were adjudicated with prior judgments that were final, valid and on the merits as seen by the procedural history delineated above. Issues raised herein are issues that could have been litigated in the 2004 trial. The alleged inconsistent testimony of Monica Middleton in a 2002 case with that of other witnesses in the 2004 case could have been fully vetted at trial. The witnesses were subject to cross examination if the evidence was relevant. The record of the 2002 case is and was a public record. The Plaintiff herein could have served interrogatories, requests to produce, requests to admit or taken depositions in order to learn various witnesses' testimony and recollection. He did nothing, yet every matter in issue he asserts herein which was not "discovered" until after trial was easily discoverable before trial.

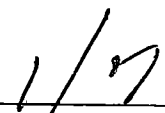
Plaintiff seeks to have this Court cure his defaults in discovery, trial and appeal. Each and every issue Plaintiff asserts is fully addressed in the record or could easily have been addressed and litigated had Plaintiff engaged in discovery or perfected his appeal. The Plaintiff's complaint falls squarely into doctrine of res judicata and is hereby barred.

When viewing all the evidence, facts, records, exhibits, pleadings, affidavits, court files, and argument of counsel, this Court concludes that in a light most favorable to the non-moving party, the Plaintiff Roosevelt Simmons, the Defendants are entitled to Summary Judgment.

This Court finds upon review of the evidence and all inferences which can be reasonably drawn there from, no triable issue of fact which would support Plaintiff's claim of fraud upon the court exists. Further, the Defendants are entitled to Summary Judgment as a matter of law based upon the application of the res judicata doctrine.

AND IT IS SO ORDERED!


Judge J. C. Nicholson, Jr.
Presiding Judge
Charleston County Court of Common Pleas


_____, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ROOSEVELT SIMMONS,)

PLAINTIFF,)

V.)

HATTIE BAILUM, RUBY BAILUM,)
VERDONE GRAY, JULIE B. JOHNSON,)
MONICA MIDDLETON,)
MARIE SMITH, MELVIN SINGLETON,)
FRANKLIN SMITH, LMC, LLC)
JOHN MARTIN, ESQ. as TRUSTEE)

DEFENDANTS.)

IN THE COURT OF COMMON PLEAS

CASE NO. 2009-CP-10-5343

SHORT ORDER

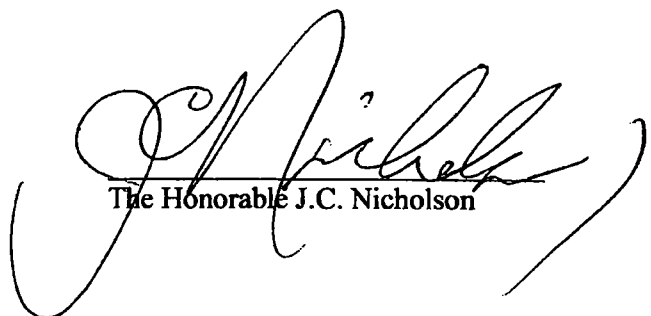
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2010 OCT -6 PM 2:06
JULIE J. ARMSTRONG
CLERK OF COURT
BX

THIS MATTER came before me pursuant to the Defendants' Motion to Dismiss under
SCRCP 12(B)(6).

Based on the evidence presented, the Complaint, and not considering the affidavits; the
Complaint is sufficient on its face for this Court to consider relief under SCRCP 60(B).

IT IS HEREBY ORDERED that the Defendants' Motion to Dismiss is DENIED.

AND IT IS SO ORDERED.


The Honorable J.C. Nicholson

Charleston, South Carolina
September 7, 2010

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 09-CP-10-5343

Simmons

Bailum

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

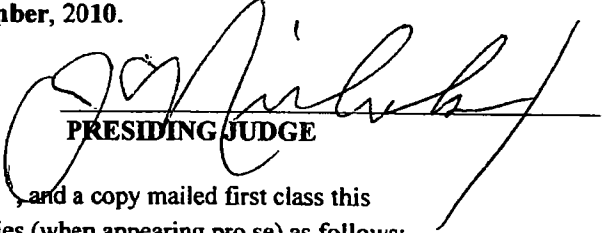
- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☐ See attached order. (Formal order to follow)
☒ Statement of Judgment by the Court: Motion to Disqualify

Bruce Berlinsky DENIED

Dated at Charleston, South Carolina, this 1st day of November, 2010.


PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR PLAINTIFF

ATTORNEY(S) FOR DEFENDANT

CLERK OF COURT

FILED
2010 NOV -3 PM 2:19
JULIE J. ARMSTRONG
CLERK OF COURT

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 09-CP-10-5343

Simmons

Bailum

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

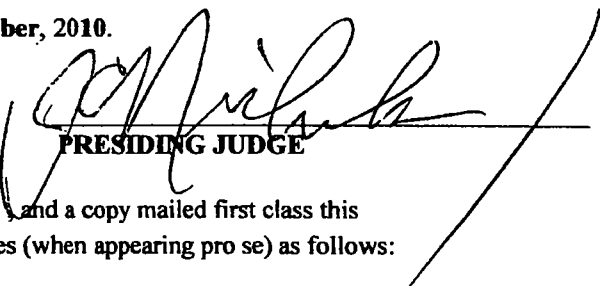
- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41, SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☐ See attached order. (Formal order to follow)
☒ Statement of Judgment by the Court:

Motion for Temporary Injunction against further actions involving the subject property DENIED

Dated at Charleston, South Carolina, this 1st day of November, 2010.


PRESIDING JUDGE

This judgment was entered on the day of 20 and a copy mailed first class this
day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR PLAINTIFF

ATTORNEY(S) FOR DEFENDANT

CLERK OF COURT

FORM 4

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS
Roosevelt Simmons

Case No.: 2009-CP-10-5343
versus Hattie Bailum, etc et al

PLAINTIFF(S)

DEFENDANT(S)

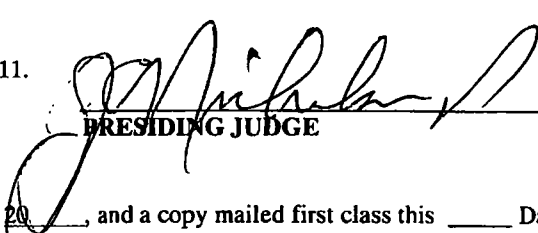
CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and the verdict has been rendered.
- ☐ **DECISION BY COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. nonsuit)
☐ Rule 43(k), SCRCP(Settled); ☐ Other -
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding Arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING THE LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order. (Formal order to follow)
☒ Statement of Judgment by the Court:

Plaintiff's Motion for Reconsideration and to Alter or Amend the January 11 Order granting Summary Judgment to the Defendants is respectfully Denied by this Court.

Dated at Charleston, South Carolina, this 28 day of February, 2011.


PRESIDING JUDGE

This judgment was entered on the ____ Day of ____, 20__, and a copy mailed first class this ____ Day of ____, 20__, to attorneys of record or to parties (when appearing pro-se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2009 - CP - 10 - 5343

ROOSEVELT SIMMONS)
Plaintiff)
Vs.)
HATTIE BAILUM, RUBY BAILUM)
VERDONE GRAY, JULIE B. JOHNSON)
MONICA MIDDLETON,)
MARIE SMITH, MELVIN SINGLETON,)
FRANKLIN SMITH, LMC, LLC,)
JOHN MARTIN, ESQ. as TRUSTEE)
Defendants)

COMPLAINT

FILED
2009 AUG 24 PM 4:44
JULIE J. ARMSTRONG
CLERK OF COURT
NY

Plaintiff Roosevelt Simmons, at all relevant times a resident of Johns Island, South Carolina, alleges the following as his complaint against the defendants:

HISTORY OF THE RIVER ROAD PROPERTIES

1. In 1904, Samuel Balaam, Mary Balaam, Thomas Balaam, Toney Balaam and Fannie Middleton acquired approximately 54 acres on the south side of River Road, Johns Island and in 1905 divided it amongst themselves as follows: Samuel received 24 acres; Toney received 10 acres, Thomas received 10 acres; Mary received 5 acres and Fanny Middleton received 5 acres. In 1910, the same Samuel Balaam individually acquired approximately 18 acres on the other side of River Road. The foregoing interests are a matter of public record and recorded in the Office of the Recorder of Mesne Conveyances for Charleston County.

THE PARTIES

2. Plaintiff Roosevelt Simmons is an heir of Samuel Balaam through his grandmother, Hester Singleton Balaam, the second wife of Samuel Balaam, a/k/a Samuel Baalim a/k/a Samuel Ballum.

3. Defendant Hattie Bailum is the purported heir of Samuel Balaam, through her father, Thomas Bailum deceased who allegedly was the son of Samuel Balaam. Defendant Ruby Bailum is the purported heir of Samuel Balaam through her husband, Samuel Bailum (Jr.) deceased who was the alleged son of Samuel Balaam. Defendant Verdone Gray is the daughter of Ruby Bailum. Defendant Julie B. Johnson is the purported heir of Samuel Balaam who allegedly was married to her mother Mary Warren deceased. These defendants are collectively referred to as the "Bailum heirs".

Monica Middleton is the purported heir of Samuel Balaam through her grandmother, Fannie Balaam deceased who was the daughter of Samuel Balaam.

4. Defendants Marie Smith and Melvin Singleton are heirs of Hester Singleton Balaam.

5. Defendants Franklin Smith, the son of Marie Smith, and LMC, LLC are the current owners of the 18 acre parcel, now designated as TMS 311-00-00-024 and 311-00-00-310 having subdivided it 50/50 between themselves. LMC, LLC is also the record owner of all or a portion the 24 acre parcel and two five acre parcels which were part of the original 54 acres, designated as TMS 312-00-00-032, 065 and 067. Monica Middleton is the record owner of the five acre parcel, originally acquired by Fannie Middleton in 1905, designated as TMS 312-00-00-066. The foregoing properties are collectively referred to as the "River Road properties".

6. Defendant John Martin, Esq. is the trustee of certain proceeds from the sale of the properties designated as TMS 311-00-00-024 and 311-00-00-310 and TMS 312-00-00-032, 065 and 067.

FACTS RELEVANT TO THE WITHIN ACTION

7. As an heir of Hester Balaam, Simmons had for many years made substantial efforts to protect his interest in the River Road properties including paying taxes, redeeming some of the property from tax sale, posting the property, collecting rents and overseeing the management of the

timber. Simmons also had a personal connection to the 18 acre parcel. He was raised there during his childhood and had rebuilt the dwelling when it was destroyed in a hurricane.

8. In November 2000, Simmons retained Arthur McFarland, Esq. to commence a quiet title action to the River Road properties. Simmons also requested that he obtain quitclaim deeds from the other Hester Balaam heirs. When McFarland failed to commence a quiet title action for more than two years, Simmons discharged him. McFarland was later given a public reprimand by the South Carolina Supreme Court for his lack of diligence in handling Simmons and several other clients.

9. While he was still representing Simmons, McFarland filed an action in December 2002, on behalf of Monica Middleton, Middleton v. Doe, 2002 CP-10-4883 to quiet title to the 5 acre lot (TMS 312-00-00-066) conveyed to Fannie Middleton in 1905. McFarland knew or should have known that the five acre parcel was part of the River Road properties that Simmons had been administering for many years but never disclosed this to Simmons. Consequently, Simmons had no notice or knowledge of this action. When the case was heard by the Master in Equity, Monica Middleton testified that her grandfather, Paul Middleton was the sole child of Fannie Middleton and that her father, George, was the sole child of Paul and Sally Middleton. Based upon her testimony, the Master in Equity entered an order dated October 15, 2003 quieting title in favor of Monica Middleton and a Master's deed was issued in her name. No one appeared to contest Monica Middleton's claim.

10. In early 2004, Simmons retained Ruth Cupp, Esq. to quiet title on the River Road properties. Simmons told her that McFarland had not attempted to address all the River Road properties in his proposed complaint and Cupp assured Simmons that she would include all of them in the action she was to file. During consultation with Simmons, attorney Cupp proposed that the matter be heard by someone other than the Master in Equity. Simmons strongly objected to her suggestion that anyone other than the Master in Equity decide the case and in particular to the use of former judge

Joseph Mendelsohn, Esq. for that purpose. Although attorney Cupp was in contact with McFarland he never revealed to her that the title to one of the lots, TMS 311-00-00-066, to which Simmons may have had an interest had already been decided in favor of Monica Middleton.

11. While Simmons was waiting for attorney Cupp to file a quiet title action, he was served with a complaint filed by the Bailum heirs, Bailum v. Simmons, 2004-CP-10-1459, to quiet title on the 24 acres which Samuel Balaam acquired in 1904, TMS 312-00-00-065 and the 18 acres he acquired in 1910, TMS 311-00-00-024. The Complaint also sought an injunction against Simmons alleged interference with plaintiffs' use of the property and order for the sale of both properties at a price to be determined by the Court. The complaint named Monica Middleton as a defendant and alleged that she was the wife of Paul Middleton, the son of Fannie Balaam Middleton, sister to Samuel, Thomas and Toney.

12. Although Simmons told attorney Cupp that his claims involved more than the two parcels mentioned in the Bailum heirs' complaint, she prepared an Answer and Counterclaim only addressing two of the five River Road properties.

13. Contrary to Simmons' objections to the use of Joseph Mendelsohn, Esq. to decide the case, in January 2005, attorney Cupp consented to his appointment as a Special Referee. Although Cupp executed a Consent Order in January 2005, the Bailum heirs did not file a motion for the appointment of a Special Referee until February 2006. The Consent Order does not state the basis for his appointment as required by South Carolina Code Ann. Section 14-11-60.

14. On January 26, 2005 Simmons attended a proceeding conducted by Joseph Mendelsohn, Esq. purportedly acting as Special Referee. Simmons was unaware that attorney Cupp had consented to Mendelsohn's appointment as Special Referee. He later told attorney Cupp that he would not accept Mendelsohn to decide the case. The Bailum heirs spoke to the Special Referee over

the telephone concerning the basis for their claims. When they discussed their intent to sell the parcels, Simmons insisted that he wanted to purchase the 18 acre parcel. In response, Mendelsohn made a disparaging racial remark directed at Simmons. Simmons later discharged attorney Cupp due to her failure to carry out his instructions and proceeded pro se.

15. In September, 2005, the Bailum heirs amended their complaint to acknowledge that their ancestor Samuel died leaving a widow, Hester and that Hester 's heirs was entitled to a 1/ 3 share of the 18 and 24 acre parcels properties.

16. In November 2005, while he was pro se, Simmons sent a letter to Special Referee Mendelsohn requesting that he enforce a directive made by Mendelsohn at the January proceeding requiring the Bailum heirs to provide information concerning their claims of kinship and the proposed sale of all the two parcels and repeated his intention to buy the 18 acre parcel. Mendelsohn never responded to Simmons request. A month later, Mendelsohn sent Simmons a letter accusing Simmons of missing a scheduled meeting on the case. Simmons promptly contacted Mendelsohn and told him he had no notice of the meeting to which Mendelsohn referred.

17. In February 2006, Special Referee Mendelsohn conducted a final pretrial hearing scheduling an evidentiary hearing and setting forth the conduct of the evidentiary hearing. The pre trial hearing was not transcribed and no Pre-Trial Order was entered as required by SC Rule of Civil Procedure 16(b). Simmons appeared pro se. Upon information and belief, Simmons objected to the testimony of the Bailum heirs on the telephone at the evidentiary hearing.

18. The scheduled evidentiary hearing was held on May 15, 2006. Simmons was represented by attorney Louis Condon. The parties agreed that two additional parcels, TMS 312-00-00-32 and 067 were to be included in the property titles to be decided. These were two- 5 acre parcels remaining from the 54 acres divided in 1905.

19. At the evidentiary hearing, the Bailum heirs testified by telephone. Contrary to their admission in September 2005 in the Second Amended Complaint that the heirs of Hester Balaam were entitled to a 1/3 interest in the 18 and 24 acre parcels, the Bailum heirs changed their story at the hearing. Hattie Bailum testified that she did not know who Hester Balaam was. Verdone Gray, Ruby Bailum's daughter, testified that the Samuel Balaam that acquired the 18 acre parcel in 1910 was not the same Samuel Balaam that acquired the 24 acres in 1905. She also testified that Monica Middleton was the daughter of her aunt Fannie Middleton who was the sister of her father Samuel Bailum (and by inference not the heir of Fannie Middleton who acquired the 5 acres in 1906). Defendant Julie Johnson testified that her father was Samuel Bailum by his second wife, Mary Warren, that she was Verdone Gray's aunt and that Monica Middleton was the child of her aunt Fannie Bailum Middleton. No explanation was given for the failure of Ruby Bailum or Monica Middleton to appear in person or by telephone to testify about the alleged distinction between the Samuel Balaam who acquired the 24 acres in 1905 and the Samuel Balaam who acquired the 18 acres across River Road in 1910. No evidence was introduced that Monica Middleton had claimed to be the heir of Fannie Middleton, one of the grantees of the 54 acre tract and not Fannie Balaam , one of Samuel Balaam's children.

20. In reliance on the Bailum heirs testimony, the Special Referee entered an Order of Quiet Title Partition and Sale in January 2007 excluding Simmons and the other Hester Balaam heirs, Marie Smith and Melvin Singleton from any interest in the proceeds of the sale of the 24 acres and the two 5 acre parcels included in the hearing. These were ordered to be sold pursuant to contract, for the appraised amount of \$330,000.00 . The Order provided that the Hester Balaam heirs including Simmons had a 1/3 interest in the 18 acres and that Simmons would be entitled to purchase the parcel at the appraised value, \$220,000.00, less a credit for his proportionate heirs interest of approximately

58,000.00 . By the time of the hearing, Simmons had acquired the interest of all of the other Hester Balaam heirs except for Marie Smith and Melvin Singleton. The Order only allowed Simmons 10 days to submit proof of financial capability to complete the purchase.

21. Attorney Condon filed a timely motion to alter and amend the Order to permit Simmons additional time to acquire the 18 acres. Marie Smith who was named as a defendant and heir of Hester Balaam but had not participated in the hearing filed a motion to be allowed to purchase some portion of the property also. The Special Referee decided both motions and on March 6, 2007, issued an Amended Order of Quiet Title Partition and Sale in which he reaffirmed Simmons right to acquire the 18 acres within 10 days of service of his order and extended that same right to Marie Smith or her family.

22. On March 16, 2007 Simmons filed and served evidence of adequate financial capability to complete the purchase of the entire 18 acres. He presented a letter from the President of the Bank of South Carolina indicating its commitment to lend \$150,000.00 toward the purchase and a letter from SunTrust Bank that funds in excess of \$15,000.00 were on deposit in a designated account. These funds although in the name of third parties had been pledged in writing by their owners who were Simmons' friends to assist him in completing the purchase. In total, these funds were in excess of the purchase price established in the Order of approximately \$162,000.00.

23. Despite Simmons compliance with the Order, the Special Referee refused to issue the deed to Simmons for the 18 acres.

24. Simmons filed a timely Notice of Appeal to the Court of Appeals of the Special Referee's Order of Quiet Title and retained new counsel, Charles Houston, Esq. to prosecute the appeal. Attorney Houston filed a motion to stay the sale pending appeal and to obtain a new trial based on evidence discovered by Simmons that the Hester Balaam heirs were entitled to share in the

proceeds of sale of the other three parcels because there was only one Samuel Balaam who could have acquired both the 24 acres in 1905 and the 18 acres in 1910.

25. The Special Referee denied plaintiff's motion for a new trial but ordered that 1/3 of the proceeds from the sale of the 24 acres and two- 5 acre parcels be held in escrow by attorney, John Martin, Esq. pending the decision of Simmons' appeal. For reasons not known or attributable to Simmons, Houston failed to timely file the appellant's brief and record on appeal and after various orders of extension, the Court of Appeal dismissed the appeal and in October 2008 issued a Remittitur of the case to the Circuit Court.

26. Thereafter, the Special Referee executed deeds to Franklin Smith as Marie Smith's assignee and to Mark Goldberg as contract purchaser of the 18 acre parcel that Simmons had attempted to purchase. Franklin Smith and Goldberg agreed to subdivide the property and recorded a plat and the title was separated. Franklin Smith is the record owner of approximately 8.9 acres of the original 18.44 acres, TMS 311-00-00-0-310, and Mark Goldberg deeded his interest to the remaining portion to LMC, LLC, designated as TMS 311-00-00-024. The Special Referee also executed a deed to Hazel Goldberg as contract purchaser of the 24 and two -5 acre parcels. Hazel Goldberg has deeded her interest in these to LMC, LLC. Upon information and belief, LMC, LLC is owned and or controlled by Mark Goldberg. Upon information and belief, attorney Martin disbursed the 1/3 portion of the proceeds of the sale of the 24 acre and two – 5 acre parcels lots being held in trust to the Bailum heirs, except that the proceeds designated for Monica Middleton from all the sales have not been disbursed.

FIRST COUNT
(Vacating Special Referee's deeds to TMS 311-00-00-024)

27. Simmons repeats and realleges each and every allegation of Paragraphs 1-26 as if more fully set forth herein.

28. The appointment of a special referee in Docket 04-CP-10-1459 was contrary to South Carolina Code Ann. 14-11-60 and Simmons never consented to this violation. This statute clearly requires that a special referee can only be appointed where the Master in Equity is unavailable or there is just cause shown. The Order directing his appointment does not contain such a finding and his appointment is void ab initio.

29. The proceeding before Special Referee Mendelsohn were marked with procedural irregularities including the conducting of proceedings on January 26, 2005 even before an order for his appointment had been submitted for entry, at which he interviewed witnesses informally and not on the record; his failure to transcribe the final pretrial hearing which occurred on February 20, 2006 and issue an order pursuant to SC Rule of Civil Procedure 16; and basing his decision on testimony not transcribed. Special Referee Mendelsohn's Order of Quiet Title Partition and Sale recites that evidentiary hearings were held on September 5 and 26, 2006 but there was no transcription of these. These violations of the South Carolina Rules of Civil Procedure were in disregard to Simmons rights to due process and created the appearance of fundamental unfairness. Upon information and belief these irregularities contributed to the problems encountered by Simmons appellate counsel, Charles Houston, Esq. in preparing the record on appeal and perfecting the appeal.

30. The Special Referee exhibited bias and prejudice against Simmons by among other things making a disparaging racial remark toward Simmons; failing to enforce his own prior directives against the Bailum heirs to produce documents to support their claims ; requiring Simmons to provide evidence of financial capability to complete the purchase within 10 days which are not

required by and contrary to the provisions of South Carolina Code Ann. Section 15-61-25; by ignoring Simmons compliance with these unreasonable requirements, on the basis that the financial documents were not in Simmons name although the funds had been pledged in writing to assist him. The foregoing acts are violative of Simmons rights to due process and an abuse of discretion .

31. The Special Referee wrongfully denied the stay of the sale of the 18 acre parcel although Simmons presented evidence that the Hester Balaam heirs had a 1/3 interest in the proceeds of sale of the 24 acre and two- 5 acre parcels which could be applied toward the purchase of the 18 acre parcel and Simmons had acquired the interest of all of Hester Balaam's heirs except for Marie Smith and Melvin Singleton. The Special Referee threatened to impose a million dollar bond as a condition for a stay which was greatly in excess of the value of the real property for which Simmons was seeking a stay and coerced Simmons into abandoning his request for a stay.

32. For reasons not known or attributable to Simmons, attorney Houston did not perfect Simmons appeal and the Court of Appeals dismissed the appeal and issued a Remittitur to the Circuit Court in October 2008. Notwithstanding that no stay of the Amended Order was issued, Special Referee Mendelsohn did not execute the deeds to all the properties covered under his Order including the 18 acre parcel until November 2008.

33. The Order and Amended Order Quiet Title and Partition was the result of a fraud on the court. The Bailum heirs conspired to deprive Simmons and the other Hester Balaam heirs of their 1/3 interest in the proceeds of sale of the three parcels of heirs property, valued at approximately \$110,000.00 and testified falsely and withheld relevant information from the court .

34. Verdone Gray falsely testified that the Samuel Balaam that acquired the 18 acre parcel in 1910 was not the same Samuel Balaam that acquired the 24 acres in 1905 and that Monica Middleton was the daughter of her aunt Fannie Middleton who was the sister of her father Samuel

Bailum (and by inference not the heir of Fannie Middleton who acquired the 5 acres in 1906).

Defendant Julie Johnson testified that her father was Samuel Bailum by his second wife, Mary Warren, that she was Verdone Gray's aunt and that Monica Middleton was the child of her aunt Fannie Bailum Middleton.

35. The testimony of the Bailum heirs at the hearing was false .The Bailum heirs are relatives of the children of the Samuel Balaam who was a resident of Johns Island in 1900 and 1910 and acquired both of the River Road properties. The Bailum heirs and Monica Middleton concealed the fact that Monica Middleton testified before the Master in Equity in 2003 that she was the great grand-daughter of Fannie Middleton, one of the grantees of the original 54 acres in 1905 and not the relative of Fannie Balaam, daughter of Samuel Balaam, another of the grantees.

36. This testimony was material to the determination of the ownership of the 24 acre and two -5 acre parcels before the court.

37. The Bailum heirs and Monica Middleton either knew that these statements were false or acted in reckless disregard of their truth or falsity and intended that the Special Referee rely upon their testimony.

38. The Special Referee and Simmons were ignorant of their falsity.

39. The Special Referee reasonably relied upon the Bailum heirs' false testimony in determining the ownership of the 24 acre and two-5 acre parcels .

40. But for their false testimony, Simmons would not have been deprived of a portion of the sale proceeds from these parcels to be used as a credit for him to purchase the 18 acre parcel.

41. Simmons has limited education and financial resources but was diligent in trying to protect his family interest in the River Road properties particularly the 18 acre parcel by paying the taxes and hiring and relying upon experienced counsel to prosecute and defend the quiet title actions.

Simmons has sustained irreparable damage by the loss of the right to acquire the 18 acres and his loss is not compensable by money damages.

42. Invalidation of the Special Referee's deeds to Franklin Smith and LMC, LLC would serve the interest of justice and would restore the status quo without prejudice to the grantees. Franklin Smith upon information and belief is a relative of Marie Smith, who had not taken any efforts to preserve or protect her interest in the property and her interest was solely financial. LMC, LLC is owned by an unrelated party and has no legal or equitable claims to the property since its purchase was subject to approval by the Special Referee.

43. It would be grossly inequitable to deny Simmons the opportunity to acquire the 18 acre parcel under the totality of the circumstances.

SECOND COUNT

(Vacating the March 6, 2009 Amended Order Quiet title and Partition)

44. Simmons repeats and realleges each and every allegation of Paragraphs 1-43 as if more fully set forth herein.

45. The Order and Amended Order Quiet Title Partition and Sale was the result of a fraud on the court. The Bailum heirs conspired to deprive Simmons and the other Hester Balaam heirs of their 1/3 interest in the proceeds of sale of the three parcels of heirs property, valued at approximately \$110,000.00 and testified falsely and withheld relevant information from the court .

46. Verdone Gray falsely testified that the Samuel Balaam that acquired the 18 acre parcel in 1910 was not the same Samuel Balaam that acquired the 24 acres in 1905 and that Monica Middleton was the daughter of her aunt Fannie Middleton who was the sister of her father Samuel Bailum (and by inference not the heir of Fannie Middleton who acquired the 5 acres in 1906).

Defendant Julie Johnson testified that her father was Samuel Bailum by his second wife, Mary Warren, that she was Verdone Gray's aunt and that Monica Middleton was the child of her aunt Fannie Bailum Middleton.

47. The testimony of the Bailum heirs at the hearing was false. The Bailum heirs are relatives of the children of the Samuel Balaam who was a resident of Johns Island in 1900 and 1910 and acquired both of the River Road properties. The Bailum heirs and Monica Middleton concealed the fact that Monica Middleton testified before the Master in Equity in 2003 that she was the great grand-daughter of Fannie Middleton, one of the grantees of the original 54 acres in 1905 and not the relative of Fannie Balaam, daughter of Samuel Balaam, another of the grantees.

48. This testimony was material to the determination of the ownership of the 24 acre and two -5 acre parcels before the court and the right to the proceeds of any sale to a third party. .

49. The Bailum heirs and Monica Middleton either knew that these statements were false or acted in reckless disregard of their truth or falsity and intended that the Special Referee rely upon their testimony.

50. The Special Referee and Simmons were ignorant of their falsity.

51. The Special Referee reasonably relied upon the Bailum heirs' false testimony in determining the ownership of the 24 acre and two-5 acre parcels and in apportioning the proceeds of their sale. .

52. But for their false testimony, Simmons would not have been deprived of a portion of the sale proceeds from these parcels. Simmons had acquired the rights to these parcels from all of the other Hester Balaam heirs except for Marie Smith and Melvin Singleton.

53. Simmons has limited education but retained experienced counsel to represent his interest throughout these proceedings. Simmons relied upon his attorneys to perform discovery and conduct

an appropriate defense of his interests. For reasons unknown or not attributable to Simmons, his counsel were unable to expose the Bailum heirs' conspiracy and their false testimony.

54. It would be grossly inequitable to deny Simmons his proportionate interest in the proceeds of the sale of the 24 acres and the two- 5 acre parcels, approximately \$74,000.00 under the circumstances present herein.

THIRD COUNT (Fraud)

55. Simmons repeats and realleges each and every allegation of Paragraphs 1-54 as if more fully set forth herein.

56. The Bailum heirs committed actual or constructive fraud against Simmons and conspired to deprive Simmons and the other Hester Balaam heirs of their 1/3 interest in the proceeds of sale of the three parcels of heirs property, valued at approximately \$110,000.00.

57. Verdone Gray falsely testified that the Samuel Balaam that acquired the 18 acre parcel in 1910 was not the same Samuel Balaam that acquired the 24 acres in 1905 and that Monica Middleton was the daughter of her aunt Fannie Middleton who was the sister of her father Samuel Bailum (and by inference not the heir of Fannie Middleton who acquired the 5 acres in 1906). Defendant Julie Johnson testified that her father was Samuel Bailum by his second wife, Mary Warren, that she was Verdone Gray's aunt and that Monica Middleton was the child of her aunt Fannie Bailum Middleton.

58. The testimony of the Bailum heirs at the hearing was false .The Bailum heirs are relatives of the children of the Samuel Balaam who was a resident of Johns Island in 1900 and 1910 and acquired both of the River Road properties. The Bailum heirs and Monica Middleton concealed the fact that Monica Middleton testified before the Master in Equity in 2003 that she was the great

grand-daughter of Fannie Middleton, one of the grantees of the original 54 acres in 1905 and not the relative of Fannie Balaam, daughter of Samuel Balaam, another of the grantees.

59. This testimony was material to the determination of the ownership of the 24 acre and two -5 acre parcels before the court and the right to the proceeds of any sale to a third party. .

60. The Bailum heirs and Monica Middleton either knew that these statements were false or acted in reckless disregard of their truth or falsity and intended that the Special Referee rely upon their testimony.

61. The Special Referee and Simmons were ignorant of their falsity. The Special Referee reasonably relied upon the Bailum heirs' false testimony in determining the ownership of the 24 acre and two-5 acre parcels and in apportioning the proceeds of their sale.

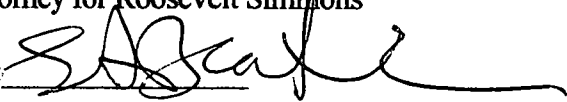
62. But for their false testimony, Simmons would not have been deprived of a portion of the sale proceeds from these parcels. Simmons had acquired all of the other Hester Balaam heirs' rights to these parcels from all of the other Hester Balaam heirs except for Marie Smith and Melvin Singleton. His proportionate interest in the sale proceeds was approximately \$74,000.00.

WHEREFORE, plaintiff requests that judgment be entered against the defendants as follows:

1. A declaration that the Special Referee's deeds dated November 25, 2008 conveying property known as TMS 311-00-00-024 to defendants Franklin Smith and Mark Goldberg and the deed dated December 9, 2008 from Mark Goldberg to LMC, LLC regarding be rescinded; and the Order entered on the record of the Recorder of Mesne Conveyances;
2. A declaration that Master in Equity's deed dated December 5, 2003 awarding property known as TMS 312-00-00-066 to defendant Monica Middleton be rescinded and the Order entered on the record of the Recorder of Mesne Conveyances;

3. A temporary and permanent injunction against the defendant, John Martin, Esq. from releasing any proceeds of the sale of properties known as TMS 311-00-00-024, 312-00-00-32, 065, and 067 pending further order of the court.
4. Judgment against Hattie Bailum, Ruby Bailum, Verdone Gray, Julie Johnson and Monica Middleton for \$110,000.00 representing the 1/3 interest of the heirs of Hester Balaam to the proceeds of the sale of TMS 312-00-00-32, 065, and 067;
5. A declaration of the rights of the parties hereunder to the title to TMS 312-00-00-066;
6. An award of counsel fees and costs to the plaintiff;
7. Such other relief as the Court deems just and equitable.

Edward A. Bertele, Esq.
1812 Pierce Street
Charleston, SC 29492
(843) 471-2082
Attorney for Roosevelt Simmons

By: 

Dated: August 21, 2009

STATE OF SOUTH CAROLINA,)
)
COUNTY OF CHARLESTON)
)
ROOSEVELT SIMMONS)

Plaintiff,)

vs.)

HATTIE BAILUM, RUBY BAILUM)
VERDONE GRAY, JULIE B. JOHNSON)
MONICA MIDDLETON,)
MARIE SMITH, MELVIN SINGLETON)
FRANKLIN SMITH, LMC, LLC)
JOHN MARTIN, ESQ. as TRUSTEE)
Defendant.)

IN THE COURT OF COMMON PLEAS

09-CP-10-5343

SUMMONS

FILE NO.

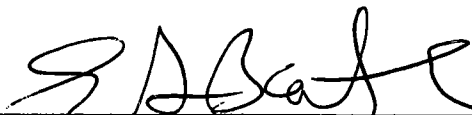
FILED
2009 AUG 24 PM 4:44
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Charleston, South Carolina

Dated: August 24, 2009



Plaintiff/Attorney for Plaintiff

Address: Edward A. Bertele, Esq.
1812 Pierce Street
Charleston, SC 29492
843-471-2082

SCCA 401 (5/02)

R 42

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2009 - CP -10 -5343

ROOSEVELT SIMMONS)
Plaintiff)

Vs.)

HATTIE BAILUM, RUBY BAILUM)
VERDONE GRAY, JULIE B. JOHNSON)
MONICA MIDDLETON,)
MARIE SMITH, MELVIN SINGLETON,)
FRANKLIN SMITH, LMC, LLC,)
JOHN MARTIN, ESQ. as TRUSTEE)
Defendants)

FILED
2009 AUG 24 PM 4:44
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____
LIS PENDENS

NOTICE IS HEREBY GIVEN that an action has been commenced and is now pending in the Court of Common Pleas for the County of Charleston, South Carolina upon a complaint of the above named plaintiff against the above named defendants for the purpose of determining the interest of the plaintiff and the interest of the defendants in the parcel of land hereinafter described and is brought under the provisions of the South Carolina Code of Laws Section 15-67-10 et seq. for the purpose of establishing that the above named plaintiff be declared the owner in fee simple and having good and marketable title to the property hereinafter described; that the premises to be affected by said complaint was at the time of the filing of this Lis Pendens situated, lying and being in the County of Charleston, South Carolina and is more particularly described as follows:

Parcel 1

ALL that lot, piece or parcel of land, situate and lying and being on Johns Island, in the County of Charleston and State of South Carolina, known as Lot 11A, Murray Gibbes Tract, as seen on a Plat by Lawrence J. Kennerty, Jr., PLS #12520, dated July 25, 2007 and entitled "PLAT SHOWING A BOUNDARY SURVEY OR PORTION OF LOT 11 INTO 11A & 11B, MURRAY GIBBES TRACT, TMS 311-00-00-024, LOCATED ON JOHNS ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA", to be recorded in the RMC Office for Charleston County.

Being a portion of the same property conveyed to Mark Goldberg by deed of and Franklin O. Smith dated December 10 2008 and to be recorded simultaneously herewith in the RMC Office for Charleston County, SC.

Portion of 311-00-00-024. Current TMS 311-00-00-310

Parcel 2

ALL that lot, piece or parcel of land, situate and lying and being on Johns Island, in the County of Charleston and State of South Carolina, known as Lot 11B, Murray Gibbs Tract, as seen on a Plat by Lawrence J. Kennerty, Jr., PLS #12520, dated July 25, 2007 and entitled "PLAT SHOWING A BOUNDARY SURVEY OR PORTION OF LOT 11 INTO 11A & 11B, MURRAY GIBBES TRACT, TMS 311-00-00-024, LOCATED ON JOHNS ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA", to be recorded in the RMC Office for Charleston County.

Being a portion of the same property conveyed to Mark Goldberg and Franklin O. Smith by deed of Joseph S. Mendelsohn, as Special Referee for Charleston County, SC, dated November 25, 2008 and to be recorded simultaneously herewith in the RMC Office for Charleston County, SC.

Portion of 311-00-00-024; Current TMS 311-00-00-024

Edward A. Bertele, Esq.
1812 Pierce Street
Charleston, SC 29492
843-471-2082

By: 

August 24, 2009
Charleston, SC

R 44

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
ROOSEVELT SIMMONS)
)
Plaintiff,)
versus)
)
HATTIE BAILUM, RUBY BAILUM)
VERDONE GRAY, JULIE B. JOHNSON,)
MONICA MIDDLETON, MARIE SMITH,)
MELVIN SINGELTON,)
FRANKLIN SMITH, LMC, LLC,)
JOHN MARTIN, ESQ. as TRUSTEE)
)
Defendants.)

IN THE COURT OF COMMON PLEAS

CASE NO: 2009-CP-10-5343

NOTICE OF MOTION AND
MOTION TO DISMISS

2009 SEP 16 PM 4:06
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

To: EDWARD BERTELE, ESQUIRE, ATTORNEY FOR THE PLAINTIFF

The Defendants, Hattie Bailum, Ruby Bailum, Verdone Gray, Julie B. Johnson,

Monica Middleton, Marie Smith, Melvin Singelton, Franklin Smith, LMC, LLC, John Martin

Esquire as TRUSTEE, through their undersigned attorney, move before the Presiding

Judge of the Charleston County Court of Common Pleas at the Charleston County

Courthouse, Charleston, SC to be heard the tenth (10) day after service thereof or as

soon thereafter as counsel may be heard, for an Order dismissing this case on the

following grounds:

1. Hattie Bailum, Ruby Bailum, Verdone Gray, Julie B. Johnson, Monica Middleton, Marie Smith, Melvin Singelton, Franklin Smith, LMC, LLC, John Martin Esquire as TRUSTEE parties to dismiss pursuant to SCRCP 12 (b)(8) in that another action pending between the same parties for the same claims (Case No.: 2004-CP-10-1459) has been tried and completed.

2. That all issues raised in Plaintiff's present Complaint were raised in the case entitled Bailum v. Simmons (04-CP-10-1459) which involved identical claims and which were all addressed at trial in post trial motions and in an appeal to the South Carolina Court of appeals.

R45

3. Pursuant to The Special Referees Order of January 11, 2007, Mr. Simmons was granted the opportunity to purchase Parcel one.
4. At another hearing in the fall of 2006, Mr. Simmons was advised at that time that he may purchase the property.
5. As set forth in the Order, Mr. Simmons had ten (10) days to provide confirmation of a loan or funds available. The value was not an issue, as the Court in May 2005 ordered an appraisal. Mr. Simmons did not comply with the Order. A hearing on the Motion to Amend the January 11, 2007 Order was held on February 16, 2007. At that hearing, the issue of Mr. Simmons being permitted to purchase the property was addressed yet again.
6. On March 6, 2007 an Amended Special Referee's Order was filed. The only amendment was to add Marie Smith's name in the purchase provision allowing her to purchase the property with Mr. Simmons. Her name had inadvertently been omitted from the January 11, 2007 Order. All the terms and conditions of the January 11, 2007 Order remained the same.
7. On March 6, 2007, a second Order was entered with regard to Mr. Simmons' Motion for Reconsideration. The court in this Order again addressed Mr. Simmons' purchase of the property. Honorable Joseph Mendelsohn, as Special Referee, in his discretion, declined to reconsider the earlier ruling.
8. On March 29, 2007, Roosevelt Simmons filed a pro se appeal of the March 6 Order.
9. On April 24, 2007, Charles Houston filed an Amended Notice of Appeal with regard to the Amended Order.
10. On May 4, 2007 a Motion to Stay the Judgment for the sale of the property was filed by Charles Houston on behalf of Roosevelt Simmons.

11. On June 4, 2007 the Appeal was dismissed for failure to provide proof of the transcript being ordered and failure to serve and file the Initial Brief.
12. On June 6, 2007 a hearing was held on the Motion to Stay. The issue of Mr. Simmons' purchase of the property was again fully vetted. The Motion was denied. The denial of the Motion was never appealed.
13. On July 18, 2007 Charles Houston was granted an extension to order the transcript and file his Initial Brief. On July 13, 2007 Charles Houston had filed a Motion for a Supersedeas or Other Relief. Judge Cureton's Order stayed the sale of the property until the Respondents filed their return. The Motion and Memorandum, filed by Charles Houston, also raises as a ground per the relief sought the issue of Mr. Simmons' purchase of the property.
14. On July 31, 2007 the Respondents filed their return with the Court of Appeals. That return also addresses the sale issue.
15. On September 4, 2007 the Court of Appeals ruled on the Motion. The Supersedeas and Motion to Stay were denied. The Court of Appeals was fully aware of the issue of the purchase by Mr. Simmons.
16. On September 13, 2007 Charles Houston filed a Petition for Full Appellate Review. This Petition was denied and nothing more was heard from Mr. Houston or Mr. Simmons for several months.
17. On March 20, 2008 the Appeal was dismissed for failure to serve the Brief and Designation of Matter. Mr. Houston asked for leave to file late, and Respondents filed the appropriate return.
18. On May 14, 2008 he was again granted to leave to file late by Justice Kaye Hearn.

19. In July of 2008 Charles Houston again sought leave to file late. The Respondents objected.

20. On August 7, 2008 Charles Houston attempted to file his Brief late, without the approval of the Court. In that Brief, he again addresses the purchase issue as well as all other issues set forth in the present complaint.

21. On August 20, 2008 the Appeal was dismissed yet again.

22. On August 28, 2008 Charleston Houston sought full appellate review of the dismissal of the Appeal. The Respondents filed an appropriate return.

23. On October 24, 2008, the Motion for Full Appellate Review was denied and the remittitur sent to the Clerk of Court for Charleston County.

24. On October 31, 2008 Charleston Houston sought reconsideration. The Respondents filed their return; however the Court returned the Respondent's Reply indicating they were not going to address the Motion.

25. On December 1, 2008, no Petition for Certiorari having been filed, the Appeal was remitted. Shortly thereafter, Judge Mendelson's Orders were acted upon. The property was sold pursuant to the Order. Mr. Simmons' proceeds from the sale and pursuant to the Orders were sent to Mr. Houston. Mr. Houston returned the check and advised Mr. Martin to correspond directly with Mr. Simmons. Mr. Martin has written Mr. Simmons and advised him to call his office and schedule a time to pick up his check and sign a receipt. Mr. Martin presently has \$50,690.55 in his trust account for Mr. Simmons.

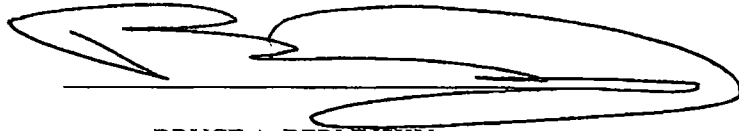
26. Mr. Simmons has no interest in the real estate subject to the action 2009-CP-10-1459, as that interest was properly extinguished by a partition and sale action. Mr. Simmons' complaints, if he has any, are with his counsel who may or may not have protected his rights by not properly perfecting an Appeal. There is no legal basis to vacate the judgment.

27. All decisions on the issues at trial and post trial were made in the sound discretion of the Special Referee. The forum to address these decisions is the Appellate Court. That body has spoken and the law of the case established with finality.

28. That all issues raised in Plaintiff's Complaint are res judicata. This Motion is based on the pleadings in this case, the pleadings in the case entitled *Bailum v Simmons* (04-CP-10-1459), and on such law as is appropriate and the foregoing grounds.

Respectfully Submitted

Bruce A. Berlinsky, PA

A handwritten signature in dark ink, appearing to read 'B. Berlinsky', is written over a horizontal line.

BRUCE A. BERLINSKY
PO Box 206
Charleston, SC 29402

Charleston, SC
September 3, 2009

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2009 - CP -10 -5343

ROOSEVELT SIMMONS)
Plaintiff)
Vs.)
HATTIE BAILUM, RUBY BAILUM)
VERDONE GRAY, JULIE B. JOHNSON)
MONICA MIDDLETON,)
MARIE SMITH, MELVIN SINGLETON,)
FRANKLIN SMITH, LMC, LLC,)
JOHN MARTIN, ESQ. as TRUSTEE)
Defendants)

2009 NOV -5 PM 2:28
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

PLAINTIFF'S MOTION TO DISQUALIFY
BRUCE BERLINSKY, ESQ. FROM
REPRESENTATION OF ALL DEFENDANTS

PLEASE TAKE NOTICE that on the tenth day following service of the within
NOTICE of MOTION or as soon thereafter as counsel may be heard, plaintiff Roosevelt
Simmons , by his attorney, Edward A. Bertele, Esq. shall move before the Presiding Judge of the
Court of Common Pleas for the Ninth Judicial Circuit at the Charleston County Courthouse, 100
Broad Street, Charleston, SC 29401 for an order disqualifying Bruce Berlinsky, Esq. as counsel
for the defendants pursuant to Rules of Professional Conduct 1.9 and denying all pending
motions filed by him on their behalf. Plaintiff will rely upon the annexed affidavits of Roosevelt
Simmons and Joe L. Burns, Jr. and the legal principles set forth herein.

BASIS FOR THIS MOTION

As set forth in the annexed affidavit of Roosevelt Simmons, Mr. Simmons consulted
with Mr. Berlinsky first in the year 2000 for the purpose of having Mr. Berlinsky represent him
in securing his interest in certain real property along River Road held in the name of the estate of

Sam Balaam and family. Mr. Berlinsky sent Mr. Simmons a retainer letter but the terms of the retention were not acceptable to Mr. Simmons and he did not retain him. Simmons mentioned that he had consulted with Berlinsky concerning the River Road properties to his cousin, Joe L. Burns Jr. and showed him the retainer letter. See affidavit of Joe L. Burns, Jr.

Subsequently, the defendants in this action, Hattie Bailum, Rubie Bailum and other Bailum family members, whom Mr. Berlinsky now represents in this case, filed an action against Mr. Simmons, Bailum v. Simmons, 2004-CP-10-1459 over these same property interests. They were represented by Thomas Martin, Esq. After that lawsuit was filed, Mr. Simmons again consulted with Mr. Berlinsky in order to have Mr. Berlinsky take over his representation, but Mr. Berlinsky refused.

Simmons started this action to set aside the judgment and certain deeds which were issued in the case of Bailum v. Simmons, 2004-CP-10-1459 due to exceptional circumstances which arose during and after the conclusion of that case including his discovery that the defendant Bailum heirs committed a fraud on the court, which was unknown and not discovered previously. He further alleges that their actions deprived him of some of the proceeds from the sale of the River Road property; that the appointed fact finder, Special Referee Joseph Mendelsohn was improperly appointed and exhibited bias and deprived me of my right to purchase the 15 acres. Mr. Berlinsky has appeared on behalf of all of the named defendants and filed two motions which are now pending unheard.

Although Mr. Simmons did not formally retain Mr. Berlinsky, these consultations created an attorney client relationship which bars Mr. Berlinsky from further representation of persons having any adverse interest in related matters about which he were consulted. The South Carolina Court of Appeals has defined a client as a person who "seeks legal advice by

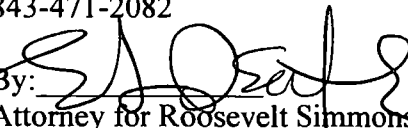
communicating in confidence with an attorney for the purpose of obtaining such advice." The legal advice or assistance must be sought from the attorney with a view to employing him professionally, whether or not actual employment results. Marshall v. Marshall, 282 SC 534, 539 (Ct. App. 1984).

Rules of Professional Conduct 1.9 prohibits a lawyer from representing another client in a matter which is substantially related and to which the former client's interest are materially adverse without consent. Roosevelt Simmons shared confidential information with Mr. Berlinsky for the purpose of obtaining his advice concerning prosecuting an action to quiet title and then defending against the claims of the Bailum heirs in their quiet title action. Therefore RPC 1.9 clearly prohibits him from representation of these defendants in this action where their interests are materially adverse and Mr. Simmons has not consented.

Upon learning of Simmons' previous contact with Berlinsky, plaintiff's counsel sent him a written demand to withdraw based upon a conflict of interest. See letter dated September 23, 2009, annexed to Simmons affidavit. Mr. Berlinsky responded that he did not recall having represented Simmons nor had any records in his office. However, the sworn statements of Mr. Simmons and Mr. Burns clearly overcome Mr. Berlinsky's lack of recollection.

Since Mr. Berlinsky has been notified of Mr. Simmons objection and has not withdrawn voluntarily, this court should order him to be disqualified and defendants ordered to obtain new counsel. Pending the appearance of new counsel, the pending motions should be denied without prejudice. Mr. Simmons should not be subjected to responding to motions filed in violation of the Rules of Professional Conduct.

Edward A. Bertele, Esq.
1812 Pierce Street
Charleston, SC 29492
843-471-2082

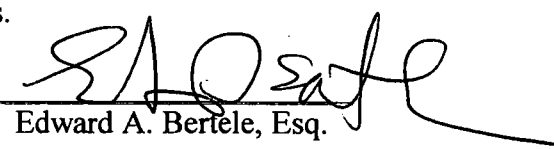
By: 
Attorney for Roosevelt Simmons

Dated: November 4, 2009
Charleston, SC

FILED
2009 NOV -5 PM 2:28
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the within Plaintiff's motion to disqualify defendants' attorney was served upon the defendants' attorney, Bruce Berlinsky, Esq. by regular mail postage prepaid at his last known mailing address.


Edward A. Bertele, Esq.

November 5, 2009
Charleston, SC

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

ROOSEVELT SIMMONS)
Plaintiff)

Vs.)

HATTIE BAILUM, RUBY BAILUM)
VERDONE GRAY, JULIE B. JOHNSON)
MONICA MIDDLETON,)
MARIE SMITH, MELVIN SINGLETON,)
FRANKLIN SMITH, LMC, LLC,)
JOHN MARTIN, ESQ. as TRUSTEE)
Defendants)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2009 - CP -10 -5343

2009 NOV -5 PM 2: 28
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

AFFIDAVIT OF
ROOSEVELT SIMMONS

Roosevelt Simmons of full age being duly sworn according to law upon his oath deposes and says:

1. I am the plaintiff in this action and submit this affidavit in support of my motion to disqualify attorney Bruce Berlinsky, Esq. as counsel for all of the defendants in this action.
2. About ten years ago, I started looking for an attorney to represent me as an heir to the estate of Samuel Balaam which held title to real property located along River Road on Johns Island. I got the name of attorney Bruce Berlinsky, Esq. from the lawyer referral service as someone who handles heirs property real estate. Sometime in the year 2000, I met him at his office at 1 Carriage Lane and told him about my family relationship to Sam Balaam, who was married to my grandmother Hester Singleton Balaam. I told him that I had been involved with the property over the course of many years. I asked him to represent me in establishing my claim to the River Road properties and particularly to be able to obtain title to the 15 acre parcel where I had lived as a child and paid the taxes for many years. Mr. Berlinsky sent me a written

retainer agreement to sign. After I reviewed it, I decided not to hire him since I did not want to pay the fee that he was asking which was in the tens of thousands of dollars.

3. I showed the Berlinsky retainer to other family members including my cousin, Mr. Joe Burns, Jr. while discussing the River Road property. His family also had an interest in the River Road properties since they are relatives of Hester Singleton Balaam.

4. Since I still needed lawyer, I hired Arthur McFarland, Esq. in November 2000 to file a quiet title action on the River Road properties. After waiting for years for attorney McFarland to file an action, I fired him. By this time, other alleged heirs to the same heirs property filed their own action against me, Bailum v. Simmons, 2004-CP-10-1459. The Bailum heirs were represented by Thomas Martin, Esq. While that case was pending and I was pro se, I again met with Mr. Berlinsky. I reviewed my claims against the River Road properties and asked him if he would take over my representation but he refused to take my case. I then hired attorney Louis Condon, Esq. and he represented me at the trial and through the entry of a final judgment and some post judgment motions. A final order was entered in January 2007 ordering the sale of the River Road properties but allowing me to purchase the 15 acre parcel subject to certain conditions.

5. Mr. Berlinsky then came into the case on behalf of Marie Smith, who is also an heir of my grandmother, Hester Singleton Balaam. Mr. Berlinsky filed a motion to have Marie Smith added as a defendant so that she could obtain a share of the proceeds from the River Road properties which were to be sold. Mr. Condon never advised me that Mr. Berlinsky's representation of Marie Smith would be adverse to my interest and I did not object to his representation of her then. After Mr. Berlinsky came into the case, the Special Referee refused to allow me to purchase the 15 acres on River Road although I had satisfied all the conditions he

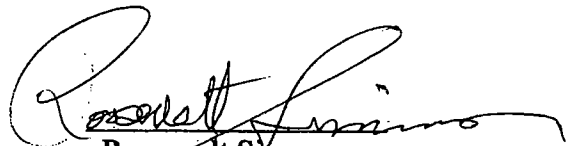
set, but allowed Marie Smith's son, Franklin Smith to buy it. I filed an appeal from this decision but it was never heard because my attorney, Mr. Charles Houston, Esq. failed to file a brief on the merits and the appeals court dismissed the appeal.

6. I started this action to set aside the judgment and certain deeds which were issued in the case of Bailum v. Simmons, 2004-CP-10-1459 due to exceptional circumstances which arose during and after the conclusion of that case including my discovery that the defendant Bailum heirs committed a fraud on the court, which was unknown and not discovered previously. I further allege that their actions deprived me of some of the proceeds from the sale of the River Road property; that the appointed fact finder, Special Referee Joseph Mendelsohn was improperly appointed and exhibited bias and deprived me of my right to purchase the 15 acres. After the complaint was served, Mr. Berlinsky filed two motions in this action on behalf of all of the named defendants not just Marie Smith. I am opposing those motions which have not yet been heard.

6. Mr. Berlinsky's clients have interests which are materially adverse to mine and involve the same circumstances about which I consulted him in 2000. The defendant Bailum heirs have obtained an additional \$110,000 from the sale of River Road property by an alleged fraud on the court which should have be distributed to me and other Hester Singleton Balaam heirs including Marie Smith. In addition to Mr. Berlinsky's conflict of interest in representing the Bailum defendants after previously entering into a confidential relationship with me about the same matter, Mr. Berlinsky has an additional conflict of interest between Marie Smith and the Bailum heirs. If I prevail on my claim that the Bailum heirs committed a fraud on the court and received \$110,00 to which they were not entitled, Marie Smith stands to benefit from those

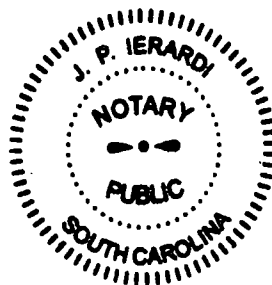
monies. Mr. Berlinsky is representing multiple defendants who have contrary interests in the same case.

7. After I learned from my attorney, Mr. Bertele that Mr. Berlinsky was representing all of the defendants, I advised him of the conflict and Mr. Bertele wrote to Mr. Berlinsky asking him to withdraw. See attached letter of September 23, 2009. Mr. Berlinsky responded that he had no recollection of representing me nor had any record in his files. He may have gotten about his offer to represent me because it was a long time ago but I do not want to allow him to continue to represent my adversaries. Since Mr. Berlinsky has a conflict of interest between his representation of the defendants in this action and my earlier confidential relationship with him concerning the same property in 2000 and has not voluntarily withdrawn, I ask the court to discharge him as counsel for all defendants and deny the pending motions he has filed on their behalf.


Roosevelt Simmons

Sworn and subscribed before me
this 5 day of November 2009


Notary Public of South Carolina



My Commission Expires 7-22-19

4.

R 57

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

ROOSEVELT SIMMONS)
Plaintiff)

Vs.)

HATTIE BAILUM, RUBY BAILUM)
VERDONE GRAY, JULIE B. JOHNSON)
MONICA MIDDLETON,)
MARIE SMITH, MELVIN SINGLETON,)
FRANKLIN SMITH, LMC, LLC,)
JOHN MARTIN, ESQ. as TRUSTEE)
Defendants)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2009 - CP -10 -5343

2009 NOV 23 PM 12:08
JULIE J. ARMSTRONG
CLERK OF COURT

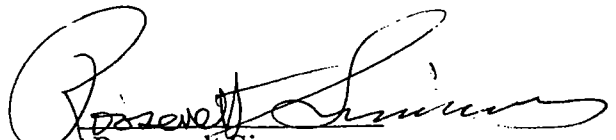
FILED

SUPPLEMENTAL AFFIDAVIT OF
ROOSEVELT SIMMONS

Roosevelt Simmons of full age being duly sworn according to law upon his oath deposes
and says:

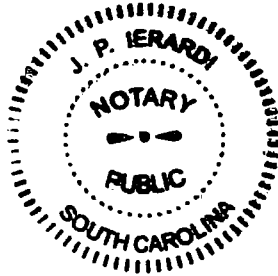
1. I am the plaintiff in this action and submit this supplemental affidavit in support of
my motion to disqualify attorney Bruce Berlinsky, Esq. as counsel for all of the defendants in
this action.

2. In paragraph 2 of my affidavit dated November 5th, I stated that I consulted with
Bruce Berlinsky, Esq. concerning the River Road properties which are at issue in this case and he
sent me a letter with the terms of a retainer agreement to handle my case. Attached as Exhibit A
is a copy of that letter. In the letter, Mr. Berlinsky specifically refers to the property I told him
about as part of the 54 acres that was the original tract acquired by Sam Balaam and others in
1905. This letter supports my statement that he consulted with me and has a conflict of interest
which prevents him from representing all of the defendants in this case.


Roosevelt Simmons

Sworn and subscribed before me
this 18 day of November 2009


Notary Public of South Carolina



My Commission Expires 7-22-19

BRUCE A. BERLINSKY, P.A.

Attorney at Law

One Carriage Lane· Building F
Charleston, SC 29407

Mailing Address:

P.O. Box 1506
Charleston, SC 29402

Office) 843/852-2202

Fax) 843/852-4844

Email: bablaw@bellsouth.net

July 17, 2003

Roosevelt Simmons
3416 Kitford Drive
Johns island, SC 29455

Re: Estate of Balaam
TMS 311-00-00-024
15 Acres

Dear Roosevelt:

I appreciate your taking the time to meet with me on June 23 with regard to the above referenced matter.

Pursuant to our discussion, I did a cursory exam of the records of the Records of the Charleston County RMC Office and find that the aforesaid property is a portion of a 54-acre tract that was conveyed to Sam Balaam, Tony Balaam, et al., as recorded in the RMC Office for Charleston County in Book T24, Page 137.

I could not find any plat references that could be located within a reasonable period of time and, therefore, cannot determine how the property was subdivided nor if deeds were executed to effectuate such subdivision.

For me to determine everything that needs to be done, I feel as if I need to do a complete title exam of the property. To complete a title exam of the property, I will need a retainer of \$500.00, which I will utilize solely for title work.

This will also confirm that we discussed your bringing a quiet title action to determine the heirs and owners of the aforesaid property.

In South Carolina, title to property can only be transferred in one of two ways, i.e. by an individual signing a deed or through probate proceedings. It appears as if no deed has been executed nor anyone's estate probated since the family acquired the property in approximately 1905. Hence, the only way to clear the title to the property is to bring a lawsuit to have the court determine the heirs of the property and their proportionate interest based upon the South Carolina Intestacy Statute.

As I explained, this type of litigation is very expensive. The cost alone will be approximately \$2500.00 to \$3000.00, which will cover filing fees, publication cost, and

Exhibit A
R 60

Roosevelt Simmons
July 17, 2003
Page 2

service of process, etcetera. These costs are required by statute and there is no way to avoid them.

In addition to the cost of the litigation, you will also be responsible for the attorney's fees. The attorney's fees for this type of litigation, based on past experience, will run anywhere between \$7,500.00 to \$15,000.00 provided that all the information you have given me is correct. If additional properties are added or there are nuances to the litigation, the fee could be more expensive. I will not know the fee range until such time as the complaint has been filed and served on everyone and answers have been received.

You indicated that you may want to discuss this with other family members and I provide this writing to you for that purpose.

I also contacted the Charleston County Planning Department. The property is currently zoned RSL. This means that the property could be subdivided into five 3-acre sites, provided you can meet minimum width requirements and DHEC sewer system requirements.

I hope the above has been helpful to you and your family. Please contact me once you decide to proceed so that we may begin initial examination of this title to determine its status so that we can, thereafter, prepare a family history.

I kindly await your reply and further instructions.

With kind regards, I am

Sincerely,



Bruce A. Berlinsky

BAB/kri
Enclosure

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2009 - CP 53

ROOSEVELT SIMMONS)
Plaintiff)
Vs.)
HATTIE BAILUM, RUBY BAILUM)
VERDONE GRAY, JULIE B. JOHNSON,)
MONICA MIDDLETON,)
MARIE SMITH, MELVIN SINGLETON,)
FRANKLIN SMITH, LMC, LLC,)
JOHN MARTIN, ESQ. as TRUSTEE)
Defendants)

FILED
JULIE J. ARMSTRONG
CLERK OF COURT
DEC 10 PM 4:49

PLAINTIFF'S MOTION FOR
A TEMPORARY INJUNCTION

PLEASE TAKE NOTICE that on the tenth day following service of the within
NOTICE of MOTION or as soon thereafter as counsel may be heard, plaintiff Roosevelt
Simmons , by his attorney, Edward A. Bertele, Esq. shall move before the Presiding Judge of the
Court of Common Pleas for the Ninth Judicial Circuit at the Charleston County Courthouse, 100
Broad Street, Charleston, SC 29401 for a temporary injunction pursuant to South Carolina
Rules of Civil Procedure 65(a) to enjoin the defendants, Franklin Smith and LMC, LLC from
any and all action involving real property known as TMS 311-00-00-024 and 311-00-00-310.
Plaintiff will rely upon the complaint filed heretofore and the annexed Affidavit of Roosevelt
Simmons and the legal principles set forth herein.

BASIS FOR THIS MOTION

Plaintiff requests a temporary injunction against certain defendants, namely Franklin
Smith and LMC, LLC from engaging in conduct involving certain real estate which is the

subject of this action, specifically TMS 311-00-00-310 and 024. The complaint filed in this action as supplemented by the affidavit of Roosevelt Simmons provides the factual basis for this motion. The complaint alleges that Roosevelt Simmons was the son of Hester Singleton, wife of Samuel Balaam, deceased, and heir to four parcels of real property located along River Road, Johns Island, held in the name of the estate of Samuel Balaam. For many years Simmons tried to protect his interest in the River Road properties by paying taxes, redeeming the property from tax sale, posting the property, collecting rents and overseeing the management of the timber. Simmons also had a personal connection to one of the parcels, consisting of 18 acres where he was raised and built a home.

In 2004, other purported heirs of Samuel Balaam filed a partition action seeking to sell the four parcels held in the estate of Samuel Balaam, Bailum v. Simmons, 2004-CP-10-1459. A special referee was appointed, conducted a hearing and entered a final judgment in which he granted Simmons the right to acquire the 18 acre parcel based upon his history of involvement with that property. Although Simmons provided financial commitments from friends willing to lend him the money to purchase the 18 acres, the Special Referee refused to issue a deed to Simmons. Simmons appealed his decision but his attorney failed to timely file the appellant's brief and record on appeal and the Court of Appeal dismissed the appeal. Thereafter, in December 2008, the Special Referee executed deeds to the 18 acre parcel to defendants Franklin Smith, son of Marie Smith, an heir to Hester Singleton and to LMC, LLC owned by Mark Goldberg, an investor. They subsequently divided it into two parcels and Franklin Smith is the record owner of TMS 311-00-00-0-310 and LMC, LLC is record owner of TMS 311-00-00-024.

In August 2009, Simmons commenced this action to vacate the final judgment and the special referee deeds based upon subsequently acquired evidence that the Bailum heirs

committed a fraud on the court and because of extraordinary circumstances which warrant equitable relief. The complaint alleges that the Bailum heirs concealed the fact that one of them, Monica Middleton, obtained a judgment in an earlier quiet title action, Middleton v. Doe, 2002 CP-10-4883, involving an adjacent 5 acre parcel, in which her testimony was contradictory to their testimony in the 2004 case. The complaint also alleges that due to this fraud and other conduct occurring during the 2004 case, he was deprived of proceeds of the sale of the other property held in the estate of Samuel Balaam which would have applied toward purchase of the 18 acre parcel and that the special referee was biased against him.

Simmons has recently learned that Franklin Smith has evicted tenants which had been occupying the house on the property and that trees are being taken down which could impair the assessment of the property as a tree farm. These actions are the reason for this application for a temporary injunction, until the court can decide the merits. The temporary injunction is necessary to protect Simmons legal rights during the pendency of this litigation. See Transcontinental Gas Pipe Line Corp. v. Porter, 252 S.C. 478, 480-481 (1969). "The sole purpose of a temporary injunction is to preserve the status quo and thus avoid possible irreparable injury to a party pending litigation." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 601 (2001). Powell v. Immanuel Baptist Church, 261 S.C. 219, 221(1973). "[A] temporary injunction is [used] to preserve the subject of controversy in the condition which it is at the time of the Order until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation...." County Council of Charleston v. Felkel, 244 S.C. 480, 483-84, 137 S.E.2d 577, 578 (1964) (citations omitted).

The temporary injunction seeks to prevent demolition of an existing structure and damage to an existing tree farm. Simmons is not financially able to rebuild or reconstruct either

of these if they are destroyed while he is waiting for his case to be heard. The defendant LMC, LLC is a shell company and may not have any financial capacity to pay damages for its actions. More importantly, removal of the tenants will undoubtedly result in the property being vandalized and suffering a loss in value. Neither of these is susceptible to calculation and constitutes irreparable harm.

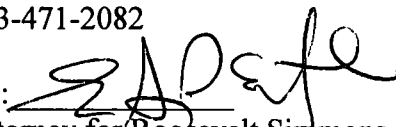
It is well settled that, in determining whether a temporary injunction should issue, the merits of the case are not to be considered, except in so far as they may enable the court to determine whether a prima facie showing has been made. When a prima facie showing has been made entitling plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits. Transcontinental Gas Pipe Line Corp., supra, 252 S.C. at 481; Helsel v. City of N. Myrtle Beach, 307 S.C. 29, 32 (1992).

Fraud on the court and the existence of extraordinary circumstances support Simmons claim to equitable relief under established case law. See Ray v. Ray, 374 S.C. 79 (2007); Chewning v. Ford Motor Co., 354 SC 72 (2003); T v. T, 662 S.E.2d 413 (Ct. App. 2008). Simmons contends that the Bailum heirs acted intentionally to deceive the court and to subvert the administration of justice. By having the case heard by a special referee, they avoided the possibility of exposure of the earlier judgment entered before the Master in Equity in the Monica Middleton action. They filed pleadings in which they admitted that Simmons was entitled to share in all of the 4 parcels held in the estate of Samuel Balaam but then gave contradictory testimony . Prior to the trial, Simmons had no reason to believe that he would not receive a statutory share in all of the heirs' property. Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting

and trying his case, there has never been a real contest before the court on the subject matter of the action." Hilton Head Ctr. of South Carolina v. Public Service Comm., 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). The Bailum heirs concocted a family history which was completely different from what Monica Middleton said under oath so as to give further credence to the Bailum heirs' claim of another Samuel Balaam. In Evans v. Gunter, 294 S.C. 525, 529 (Ct. App.1988), the Court of Appeals noted that fraud upon the court has been described as "that species of fraud which does, or attempts to, subvert the integrity of the Court itself." Moreover, Simmons would be entitled to a portion of the funds available to the heirs of Hester Balaam from the sale of the three parcels in order to purchase the 18 acre parcel. Therefore, he was prejudiced by the fraud on the court.

In considering an application for a temporary injunction, the court should be guided by general principles of equity: the equities of both sides are to be considered and the court of equity must "balance the equities" between the parties in determining what if any relief to give. Foreman v. Foreman, 280 S.C. 461, 464-465(Ct.App.1984) (citations omitted). The equities clearly favor Simmons and the temporary injunction should be granted.

Edward A. Bertele, Esq.
1812 Pierce Street
Charleston, SC 29492
843-471-2082

By: 
Attorney for Roosevelt Simmons

Dated: December 10, 2009
Charleston, SC

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
)
ROOSEVELT SIMMONS)
Plaintiff)
)
Vs.)
)
HATTIE BAILUM, RUBY BAILUM)
VERDONE GRAY, JULIE B. JOHNSON)
MONICA MIDDLETON,)
MARIE SMITH, MELVIN SINGLETON,)
FRANKLIN SMITH, LMC, LLC,)
JOHN MARTIN, ESQ. as TRUSTEE)
Defendants)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2009 - CP - 10 - 53

FILED
DEC 10 PM 4:53
JULIE J. ARMSTRONG
CLERK OF COURT

AFFIDAVIT OF
ROOSEVELT SIMMONS

Roosevelt Simmons of full age being duly sworn according to law upon his oath deposes and says:

1. I am the plaintiff in this action and submit this affidavit in support of my motion for a temporary injunction against the defendants, Franklin Smith and LMC, LLC from any and all action involving real property known as TMS 311-00-00-024 and 311-00-00-310. These two parcels were originally combined into the 18 acres that I cared for over many years as described in the Complaint.

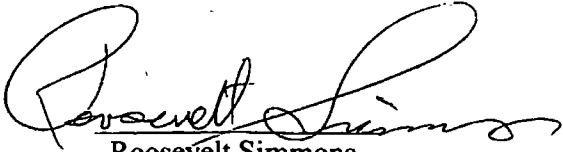
2. As alleged in the Complaint, instead of allowing me to purchase the property according to the final judgment, the special referee deeded the 18 acres to Franklin Smith, son of Marie Smith, an heir to Hester Singleton, and LMC, LLC, owned by an investor, Mark Goldberg in December 2008. They later divided it between themselves into two parcels. The parcel owned by Franklin Smith has the house I built on it. I had rented this house to relatives and friends for over three generations. The last tenants I had were members of the Magwood family. I wanted the house to remain occupied because I saw what happened to other properties in the area after

they became vacant; they were vandalized or became drug houses. I didn't want that to happen here. I also planted evergreen trees on the entire 18 acres and the other properties held in the estate of Samuel Balaam and had them assessed as "tree farms" to save on taxes until title to these properties was resolved. After I was wrongly denied the deed by the special referee, I continued to watch what was going on there until I could find a way to get the property back. I obtained new counsel and filed this action in August 2009.

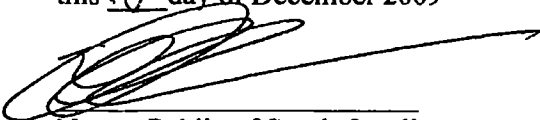
3. In October, the Magwoods told me they were being evicted by Franklin Smith. I went to court on November 17 when the case, Franklin v. Magwood, 2009 CI 00416, was heard by Magistrate Leonard. The court ordered the Magwoods to vacate the property by January 17th. Franklin Smith knows that I have been renting this property to preserve it for all of the Hester Singleton heirs for years. There was no reason for him to have the Magwoods removed unless he intends to demolish the house and prepare the property for development. I could not afford to reconstruct this house if it were demolished while this case is pending. Also, the destruction of part of the trees may result in the property being taken off tree farm status, which would also be too expensive for me to absorb.

4. Until the court can hear and decide my case and hopefully grant me the opportunity to purchase the 18 acres, I request that both defendants, Franklin Smith and LMC, LLC be prevented from taking any action to demolish or destroy the dwelling or any of the trees that comprise the tree farm I established.

5. Since I am asking for the court to maintain the current status, I also ask that no bond be ordered since defendants they are not sustaining any losses by keeping this property as is.


Roosevelt Simmons

Sworn and subscribed before me
this 10 day of December 2009


Notary Public of South Carolina

My Commission Expires February 01, 2015

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-10-5343

Roosevelt Simmons,)
Plaintiffs,)
VS.)

AFFIDAVIT OF JOHN F. MARTIN

Hattie Bailum, Ruby Bailum,)
Verdone Bailum, Julie B. Johnson,)
Monica Middleton, Marie Smith,)
Melvin Singelton, Franklin Smith,)
LMC, LLC, John Martin, Esq.,)
as Trustee,)
Defendants.)

2010 FEB 26 PM 2:09
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

PERSONALLY APPEARED BEFORE ME JOHN F. MARTIN, who being duly sworn, deposes and says:

1. That he is above the age of eighteen and competent to give this Affidavit.
2. That he has represented various parties in the matter of *Bailum, et al. v. Simmons, et al.*, case number 2004-CP-10-1459.
3. That he is personally familiar with the procedural history of the matter.
4. That he has reviewed the allegations of Mr. Simmons as raised in the Complaint filed in the matter of *Simmons v Bailum*, case number 2009-CP-10-5343.
5. That on August 18, 2009, affiant wrote to counsel for Mr. Simmons with regard to a letter authored by counsel and sent to parties who had purchased a portion of the property subject to the Order Quieting Title.
6. That counsel's letter is attached hereto as **Exhibit 1**. Affiant's response is attached hereto as **Exhibit 2**.

7. That counsel contended Mr. Simmons' rights to acquire the property at the time of the Quiet Title action were wrongfully denied.

8. That the opportunity to acquire the property by Mr. Simmons was addressed in pretrial conference, trial, post trial motions and appeal. In each instance, Mr. Simmons was represented by counsel.

9. That a procedural history with corresponding documents was provided to counsel. The exhibits attached to the letter are attached hereto as **Exhibit 3**.

10. That all other matters raised in the pleadings in 2009-CP-10-5343 were addressed and ruled upon in trial, post trial motions, or upon appeal. In each instance Mr. Simmons was represented by counsel.

11. That Mr. Simmons appealed the Orders arising from the case 2004-CP-10-1459. He was represented by counsel for the appeal. The South Carolina Court of Appeals dismissed Mr. Simmons' appeal.

12. That the issues asserted in 2009-CP-10-5343 were fully addressed at trial, by post trial motion or were matters raised upon appeal.

FURTHER AFFIANT SAYETH NOT!

SWORN TO before me this 26th
day of February, 2010.

Calvin M. Paxton (Seal)

Notary Public for South Carolina

My Commission expires: 09/20/2016

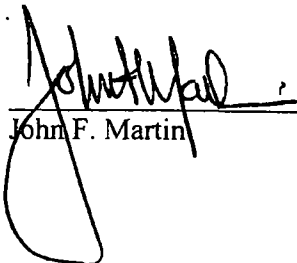

John F. Martin

EXHIBIT 1

EDWARD A. BERTELE, ESQ.
ATTORNEY AT LAW
1812 PIERCE STREET
CHARLESTON, SC 29492
843-471-2082
Email: ebertelc@msn.com

Member: SC, NJ & NY bars

August 14, 2009

VIA REGULAR & CERTIFIED MAIL R.R.R.
LMC, LLC
2812 Maybank Highway
Johns Island, SC 29455

Re: TMS 311-00-00-024
River Road, Johns Island, SC

Dear Sir or Madame:

I represent Roosevelt Simmons in a matter involving his interest in an 18 acre lot on River Road, Johns Island, South Carolina, formerly identified as Tax Map reference TMS 311-00-00-024. This property was the subject of a quiet title action, Bailum v. Simmons, 2004-CP-1456, in which Mr. Simmons was granted the right to purchase that lot. Mr. Simmons' position is that his rights to acquire title to the entire parcel were wrongfully denied and he has retained me to commence an action to vacate that judgment. As the record owner of a portion of that 18 acre parcel, you will be named as a defendant in this action. This letter shall give you notice of Mr. Simmons claims and that any actions taken regarding the property are at your own risk and peril as to future court decisions. I suggest that you contact an attorney regarding this matter.

Mr. Simmons is willing to consider resolving his claims in an amicable manner and to discuss a reasonable settlement which will enable him to acquire the property from you. If you are interested in pursuing such a solution, you or your attorney may contact me at the above address. The foregoing is intended for settlement purposes only and shall not be considered as a waiver or release of any of his rights and claims, legal or equitable that exist heretofore. Thank you for your attention to this matter.

Very truly yours,


Edward A. Bertele

Cc: Roosevelt Simmons

R73

EXHIBIT 2

R 74

Martin Law Firm

ATTORNEYS AND COUNSELORS AT LAW
113 WAPPOO CREEK DRIVE
CHARLESTON, SOUTH CAROLINA 29412

JOHN F. MARTIN

CAROLINE A. BERNARD
(SC & LA)

MARSHA E. HASS
OF COUNSEL

TEL: (843) 762-2121
FAX: (843) 762-2333

AUGUST 18, 2009

JOHN.MARTIN@THEMARTINLAWFIRM.NET
CBERNARD@THEMARTINLAWFIRM.NET

Edward Bertele, Esquire
1812 Pierce Street
Charleston, SC 29492

RE: Roosevelt Simmons

Dear Edward:

Bruce Berlinsky and I are in receipt of your letter of August 14, 2009. Bruce represents Ms. Marie Smith who owns 1/2 of what was once known as TMS 311-00-00-024. I have been asked to represent LMC, LLC who owns the residual part of what was once known as TMS 311-00-00-024.

First and foremost, we are forwarding several records, pleadings, orders and transcripts which address the issue of Mr. Simmons purchasing the parcel. Experience has taught Bruce and me that Mr. Simmons frequently fails to provide newest counsel all relevant facts or documents. We have been through this issue with no less than five or six prior counsel.

Attached you will find the Special Referee's Order of January 11, 2007 wherein Mr. Simmons was again granted the opportunity to purchase Parcel 1. The hearing was in the fall of 2006. Mr. Simmons was advised at that time that he may purchase the property. He indicated a desire to do so but never took any steps toward that end.

As set forth in the Order, Mr. Simmons had ten (10) days to provide confirmation of a loan or funds available. The value was not an issue, as the Court in May 2005 ordered an appraisal. Mr. Simmons did not comply with the Order. A hearing on the Motion to Amend the January 11, 2007 Order was held on February 16, 2007. At that hearing, the issue of Mr. Simmons being permitted to purchase was addressed yet again.

On March 6, 2007 an Amended Special Referee's Order was filed. The only amendment was to add Marie Smith's name in the purchase provision allowing her to purchase the property with Mr. Simmons. Her name had inadvertently been omitted from the January 11, 2007 Order. All the terms and conditions of the January 11, 2007 Order remained the same.

Additionally, on March 6, 2007, a second Order was entered with regard to Mr. Simmons' Motion for Reconsideration. The Court in this Order again addressed Mr. Simmons' purchase of the property. Judge Mendelson, in his discretion, declined to reconsider the earlier ruling.

On March 29, 2007, Roosevelt Simmons filed a pro se appeal of the March 6 Order.

On April 24, 2007, Charles Houston filed an amended Notice of Appeal with regard to the amended Order.

R 75

On May 4, 2007 a Motion to Stay the Judgment for the sale of the property was filed by Charles Houston on behalf of Roosevelt Simmons.

On June 4, 2007 the Appeal was dismissed for failure to provide proof of the transcript being ordered and failure to serve and file the Initial Brief.

On June 6, 2007 a hearing was held on the May 4, 2007 Motion to Stay. Attached hereto is an excerpt of that transcript where you will see the issue of Mr. Simmons' purchase of the property was again fully vetted. The Motion was denied. The denial of the Motion was never appealed.

On July 18, 2007 Charles Houston was granted an extension to order the transcript and file his Initial Brief. On July 13, 2007 Charles Houston had filed a Motion for a Supersedeas or Other Relief. Judge Cureton's Order stayed the sale of the property until the Respondents filed their return. The Motion and attached Memorandum also raises as a ground for the relief sought the issue of Mr. Simmons' purchase of the property.

On July 31, 2007 the Respondents filed their return with the Court of Appeals. That return also addresses the sale issue.

On September 4, 2007 the Court of Appeals ruled on the Motion. The Supersedeas and Motion to Stay were denied. The Court of Appeals was fully aware of the issue of the purchase by Mr. Simmons.

On September 13, 2007 Charles Houston filed a Petition for Full Appellate Review. This Petition was denied and nothing more was heard from Mr. Houston or Mr. Simmons for several months.

On March 20, 2008 the Appeal was dismissed for failure to serve the Brief and Designation of Matter. Mr. Houston asked for leave to file late, and Respondents filed the appropriate return.

On May 14, 2008 he was again granted leave to file late by Justice Kaye Hearn. Her very specific Order is attached.

In July of 2008 Charles Houston again sought leave to file later. The Respondents objected.

On August 7, 2008 Charles Houston attempted to file his Brief late, without the approval of the Court. In that Brief, he again addresses the purchase issue.

On August 20, 2008 the Appeal was dismissed yet again.

On August 28, 2008 Charles Houston sought full appellate review of the dismissal of the Appeal. The Respondents filed an appropriate return.

On October 24, 2008, the Motion for Full Appellate Review was denied and the remittitur sent to the Clerk of Court for Charleston County.

On October 31, 2008 Charles Houston sought reconsideration. The Respondents filed their return; however the Court returned the Respondent's Reply indicating they were not going to address the Motion.

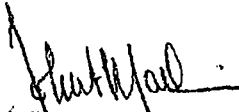
On December 1, 2008, no Petition for Certiorari having been filed, the Appeal was remitted. Shortly thereafter, Judge Mendelson's Orders were acted upon. The property was sold pursuant to the Order. Mr. Simmons' proceeds from the sale and pursuant to the Orders were sent to Mr. Houston. Mr. Houston returned the check and advised us to correspond directly with Mr. Simmons. We have written Mr. Simmons and advised him to call our office and schedule a time to pick up his check and sign a receipt. I presently have \$50,690.55 in my trust account for Mr. Simmons.

With regard to your threats to file suit, act as you see fit; however, in light of the record of trial, hearing, appeals, motions, all addressing the issue of his acquiring title, to TMS 311-00-00-024, we would view such act as a violation of the South Carolina Frivolous Proceedings Act and will counterclaim accordingly.

Simply stated, Mr. Simmons has no interest in TMS 311-00-00-024, as that interest was properly extinguished by a partition and sale action. Mr. Simmons' complaints, if he has any, are with his counsel who may or may not have protected his rights by not properly perfecting an Appeal. There is no legal basis to vacate the judgment.

All decisions on this issue at trial and post trial were made in the sound discretion of the Special Referee. The forum to address these decisions is the Appellate Court. That body has spoken and the law of the case established with finality.

Kind regards.

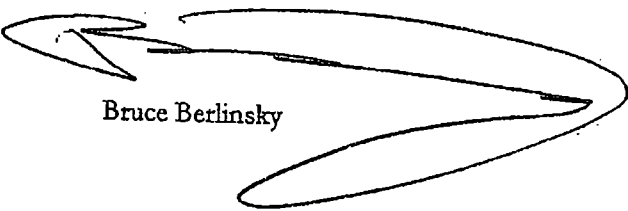

John F. Martin

JFM/smp

enclosures

cc: Bruce Berlinsky, Esquire

Very Truly Yours,


Bruce Berlinsky

- So as to not be duplicative, Bruce Berlinsky is also affixing his signature.

EXHIBIT 3

THE CONTENTS OF THIS EXHIBIT ARE REPRODUCED
ELSEWHERE AND OMITTED HERE TO AVOID DUPLICATION

12/2/08	Remittitur
11/18/08	Kenneth A. Richstad, Court of Appeals Clerk, November 18, 2008, letter to Responents –not considering return or motion
11/10/08	Respondents' Return to Appellant's Motion of Reconsideration
10/31/08	Appellant's Motion for Reconsideration
10/24/08	Order Denying Rehearing or Reinstatement of Dismissal
9/4/08	Respondents' Return to Appellant's Motion
8/28/08	Appellant's Motion for Full Appellant Review of Administrative Dismissal
8/20/08	Order for Administrative Dismissal
8/7/08	Appellant's Initial Brief
7/21/08	Respondents' Return to Appellant's Motion for Leave to File Late
5/14/08	Order Reinstating Appeal (30 days to brief and no other extensions absent extraordinary)
4/9/08	Respondents' Return to Appellant's Motion for Reinstating Appeal
3/20/08	Appellant's Motion to Reinstate the Appeal
3/24/08	Order of Dismissal (for failure to file and serve brief and DOM)
9/13/07	Appellant's Petition for Full Appellate Review (of dismissal)
7/31/07	Respondents' Return to Motion for Order of Supersedeas, Dismissal
7/18/07	Order Granting Respondents' Extension to file Return to Motion for Order of Supersedeas, Dismissal
7/12/07	Appellant's Motion for Order of Supersedeas, Dismissal
7/13/07	Appellant's Memorandum of Law for Motion for Order of Supersedeas, Dismissal
6/6/07	Portions of transcript from hearing
6/4/07	Order Dismissing Appeal (failure to file and serve brief and DOM)
5/4/07	Simmons' Motion for Staying Judgment, for Sale or Delivery of Land (CP)
4/24/07	Amended Notice of Appeal (Houston)
3/29/07	Notice of Appeal (Simmons)
3/6/07	Amended Referee Order Quiet Title, Partition and Sale
1/11/07	Referee Order Quiet Title, Partition and Sale

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Copy

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2009 - CP -10 -5343

ROOSEVELT SIMMONS)
Plaintiff)
Vs.)
HATTIE BAILUM, RUBY BAILUM)
VERDONE GRAY, JULIE B. JOHNSON)
MONICA MIDDLETON,)
MARIE SMITH, MELVIN SINGLETON,)
FRANKLIN SMITH, LMC, LLC,)
JOHN MARTIN, ESQ. as TRUSTEE)
Defendants)

FILED
2010 MAR -1 PM 3:30
JULIE J. ANDERSON
CLERK OF COURT

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

STATEMENT OF THE CASE

Plaintiff Roosevelt Simmons filed this action to vacate the March 6, 2007 Amended Order Quiet Title and Partition ("Amended Order") issued by the Special Referee in Bailum v. Simmons, 2004-CP-1459 and the Special Referee Deeds entered pursuant to that judgment which partitioned four (4) parcels of heirs' property. This complaint seeks equitable relief pursuant to SC Rule 60 (b) based upon: 1) exceptional circumstances and 2) a fraud on the court to restore Simmons' in kind interest in an 18 acre parcel and his share in the proceeds from the sale of the other three parcels.

Defendants moved to dismiss the complaint based on SC Rule 12(b)(8) and res judicata. Defendants generally allege that Simmons' claims in the present complaint were addressed and resolved in the earlier case. Defendants also assert that the Simmons' appellate attorney is at fault.

Simmons opposes this motion because he did not obtain a full and fair resolution of the issues as set forth below. The Special Referee exhibited bias and animosity against him and denied Simmons his right to a partition in kind of an 18 acre parcel where Simmons was raised. Other parties (the "Bailum heirs") perpetrated a fraud on the court which was not discovered until after the judgment was entered. Simmons' appellate attorney abandoned the appeal and it was dismissed. These claims have never been addressed and res judicata does not bar this case. The failure of Simmons's appellate attorney to file an appellate brief is not a valid basis to dismiss under SC Rule 12(b).

Furthermore, the complaint seeks equitable relief. Simmons' interest in heirs property can only be restored by vacating the prior judgment and Special Referee deeds and is not compensable by money damages. A malpractice claim cannot restore Simmons heir's property interests. The prior proceedings are central to the court's decision on this motion and are more fully discussed below.

THE BAILUM HEIRS PROCEEDINGS

In 2004, Hattie Bailum and other alleged heirs of Samuel Balaam (the "Bailum heirs") filed a partition action to compel the sale of two parcels of property, an 18 acre and 24 acre parcel on opposite sides of River Road titled in the estate of "Samuel Balaam" . Samuel Balaam had acquired the 24 acres in 1905 as part of a 54 acre tract and the 18 acres in 1910. The Bailum heirs had signed contracts of sale on these parcels which they wanted to complete. Named as defendants were the heirs of Hester Singleton Balaam, the second wife of Samuel Balaam, including Roosevelt Simmons, her grandson. The Bailum heirs admitted in their Second Amended Complaint that Hester Singleton and Simmons as her heir was entitled to a statutory 1/3 interest in both parcels. Simmons counterclaimed for his statutory interest and for adverse possession.

As Hester's grandson, Simmons tried to protect his interest in the River Road properties by paying taxes, redeeming some of the property from tax sale, posting the property, collecting rents and overseeing the management of the timber and other similar activities. Simmons was raised on the 18 acre parcel during his childhood and built the existing dwelling there. In November 2000, Simmons hired Arthur McFarland, Esq. to commence a quiet title action to the River Road properties and to obtain quitclaim deeds from the other Hester Balaam heirs. McFarland failed to commence a quiet title action for more than two years and Simmons discharged him. The Bailum heirs suit was started sometime thereafter.

After the Bailum heirs commenced their action, Simmons asked to have the case heard by the Master in Equity. He specifically objected to the appointment of Joseph Mendelsohn, Esq. as a special referee to his then attorney, Ruth Cupp, Esq. South Carolina Code Ann. 14-11-60 requires that a special referee can be appointed when the Master in Equity is unavailable or there is just cause shown. Complaint para. 28. Since the Master in Equity of Charleston County was always available to hear the Bailum case and the Order appointing the Special Referee does not establish any just cause, his appointment violates South Carolina law. The Special Referee conducted a hearing on January 26, 2005, even before an order was entered for his appointment, at which he interviewed witnesses but no record was made. The Special Referee conducted a February 20, 2006 pretrial hearing which was not memorialized by any order pursuant to SC Rule 16.

At the final hearing on May 16, 2006, the parties agreed that two other parcels of 5 acres each, also heirs' property in the estate of Samuel Balaam, would be included with the partition of the 24 acres for a total of 34 acres. All of the plaintiffs were allowed to testify over the telephone due to their alleged infirmity although some of them had been in South Carolina in the recent past. The Special Referee never had an opportunity to judge the credibility of their testimony in person.

Verdone Gray, Ruby Bailum's daughter, testified that the Samuel Balaam who acquired the 18 acre parcel in 1910 was not the same Samuel Balaam that acquired the 24 acres in 1905. She also testified that Monica Middleton, another plaintiff, was the daughter of her aunt Fannie Middleton who was the sister of her father Samuel Bailum. Another plaintiff, Julie Johnson testified that her father was Samuel Bailum by his second wife, Mary Warren and that Monica Middleton was the child of her aunt Fannie Bailum Middleton.

Previously, in 2002, while he was still representing Simmons, attorney McFarland filed a quiet title action on behalf of same Monica Middleton, Middleton v. Doe, 2002 CP-10-4883 to quiet title to the 5 acre lot conveyed to Fannie Middleton in 1905 as part of 54 acres acquired in 1904. When the case was heard by the Master in Equity, Monica Middleton testified that she was the great granddaughter of Fannie Middleton and the Master in Equity entered an order dated October 15, 2003 quieting title and issued a Master's deed to the 5 acres to her. McFarland knew that the five acre parcel was part of the 54 acres that Simmons had retained him to quiet title and had been administering for many years but never disclosed this to Simmons.

The Special Referee entered an Order Quiet Title Partition and Sale dated January 11, 2007 (the "Order"). The Order awarded the Bailum heirs 2/3 of the value of the 18 acre parcel (appraised at \$220,000.) and Simmons and the other Hester Singleton Balaam heirs the remaining 1/3, subject to Simmons' right to buy the 18 acres for approximately \$163,000; and awarded the Bailum heirs 100% of the value of 34 acres (appraised at \$337,000). Although all the parcels were considered as part of the "estate of Samuel Balaam", the Special Referee found that there were two different individuals of that name and partitioned the 18 and 34 acres separately. The Special Referee based his decision on the testimony of the Bailum heirs that the 34 acres were acquired by a different Samuel Balaam. The

Order states that other evidentiary hearings were also held on September 5 and 26, 2006 but there is no evidence of these and John Martin, Esq., the Bailums' prior attorney, has denied they occurred.

Following entry of the Order, Simmons' counsel, Louis Condon, Esq. filed a timely motion to alter or amend the judgment and for a new trial based on the limited time given to Simmons to establish financial capability and the Special Referee's authority to hear and decide the case. Defendant Marie Smith (another Hester Singleton Balaam heir) represented by the Bailums' current counsel, Bruce Berlinsky, Esq. also filed a motion challenging the authority of the Special Referee and his allocation of fees and to allow Ms. Smith the right to purchase the property. The Special Referee denied Simmons motion by Order dated March 6, 2007 but issued an Amended Order Quiet Title and Partition enforcing the 10 day time limit but also permitting Marie Smith to purchase the 18 acres.

On March 16th, Simmons delivered proof of financial capability to close title on the entire 18 acres to the Special Referee in the form of documentation from two friends, Frederick Fields and Christian Redell demonstrating that they could finance the purchase on his behalf. However, the Special Referee refused to allow Simmons to close title because of alleged doubts about the intentions of these individuals. Simmons, then pro se due to the withdrawal of Louis Condon, Esq. filed a timely Notice of Appeal on March 26, 2007.

Simmons retained new counsel, Charles Houston, Esq. to prosecute the appeal and Houston filed a motion to stay the impending sale of the 18 acres pursuant to SC Code Ann. Sections 18-9-160 & 170. At oral argument, the Special Referee justified his refusal to issue a deed to Simmons by stating that the proffered proof of financial capability was given by third parties and not Simmons. However, there was no evidence that these individuals intended to become the real purchasers or that Simmons was a "straw man" in the transaction. The Special

Referee did not conduct any hearing or try to “vet” these individuals . The Special Referee asserted that Simmons would have to put up a bond of twice the value of the real state, over \$1,000,000. Simmons admitted he could not do so and the Special Referee decided that Simmons had waived his claim for an in kind partition.

Houston also asked for a new trial based on newly discovered evidence by Simmons that refuted the Bailum heirs’ claims of a second Samuel Balaam, the basis on which the Special Referee denied Simmons an interest in the other three parcels, totaling 34 acres. The Special Referee denied Simmons’ motion for a new trial but ordered that 1/3 of the proceeds from the sale of the 34 acres be held in escrow by the Bailum heirs’ attorney, John Martin, Esq. pending the decision of Simmons’ appeal. See Order dated June 28, 2007,

Attorney Houston filed a Motion for Supersedeas Relief in the Court of Appeals. The Court of Appeals initially stayed the sale of the 18 acre parcel, pending the timely filing of the appellant’s brief and record by Order dated July 18, 2007 but subsequently vacated the stay by Order dated September 4, 2007 without deciding any of the issues. The Court of Appeals issued other orders after attorney Houston’s failed to timely file the brief and record and finally dismissed the appeal. See Orders of Dismissal dated March 24, 2008 and August 21, 2008 and the Remittitur dated October 24, 2008 and December 1, 2008.

Following the dismissal of the appeal, the Special Referee deeded the 18 acres equally to Marie Smith and a third party-contract purchaser, Mark Goldberg and the 1/3 of the sale proceeds of the 34 acres held in escrow were disbursed to the Bailum heirs, except for Monica Middleton’s interest, which attorney Martin still holds.

LEGAL ARGUMENT

I. Res judicata does not bar this action

The entry of final judgment in Bailum v. Simmons does not bar this action under the principle of res judicata. SC Rule 60(b) recognizes the "power of a court to entertain an independent action to relieve a party from a judgment. . . or to set aside a judgment for fraud upon the court". The structure of this rule and its use of the word "or" indicate two potential independent action attacks on a judgment, order or proceeding: 1) one based on unusual circumstances that may warrant equitable relief, including accident or mistake or 2) one based in equity for fraud upon the court. T v. T, 662 S.E.2d 413 (Ct. App. 2008). Plaintiff has alleged both a prima facie cause of action for equitable relief based upon exceptional circumstances (First Count) and fraud on the court (Second Count).

In addition, res judicata requires three elements be present: 1) a final, valid judgment on the merits; 2) identity of parties; and 3) the second action must involve matters properly included in the first suit. Stone v. Roadway Express, 367 S.C. 575, 580, 627 S.E.2d 695, 697 (2006). "The rule as to the conclusiveness of the prior adjudication has a different application where the prior and subsequent causes of action are identical and where the subsequent action is on a different cause of action." Lowe v. Clayton, 264 S.C. 75, 81, 212 S.E.2d 582, 586 (1975). Although res judicata may apply even though the plaintiff in the first suit proceeded under a different legal theory, Aliff v. Joy Mfg. Co., 914 F.2d 39, 43-44 (4th Cir.1990), "where the second suit is upon a different claim, the former judgment is conclusive **only as to those issues actually determined.**" Johnston-Crews Co. v. Folk, 118 S.C. 470, 483, 111 S.E. 15, 19 (1922)(emphasis added). The claims asserted in this action, equitable relief based upon exceptional

circumstances and fraud on the court were not resolved previously and are not barred by res judicata.

A. Fundamental Unfairness has not been addressed

In the present complaint, Simmons contends that the Special Referee exhibited bias and animosity toward him by making a disparaging racial remark toward Simmons; failing to enforce his own prior directives against the Bailum heirs to produce documents to support their claims and requiring Simmons to provide evidence of financial capability to complete the purchase within 10 days which are not required by and contrary to the provisions of South Carolina Code Ann. Section 15-61-25. This bias and animosity resulted in the Special Referee's refusal to allow Simmons to complete the purchase of the 18 acres by unreasonably rejecting the proof of financial capability that Simmons presented.

The disparaging racial remark that Simmons alleges occurred at a hearing for which no official transcript was made, at a time when there was no court order appointing him as Special Referee and when Simmons was represented by a different attorney. Simmons had already voiced great objection to the Special Referee's appointment and the Special referee was probably aware of this. Simmons alleges that this bias was also evidenced in correspondence which is also not part of the record.

Simmons should have been given a deed by the Special Referee because he complied with the Order by submitting proof of financial capability to complete the purchase of the 18 acre parcel within 10 days. The Special Referee had already recognized Simmons efforts to protect and preserve the property over many years by crediting him with additional funds toward the purchase price under the final judgment. At the hearing on Simmons new trial motion and to stay the sale to third parties, the Special Referee asserted that the documentation submitted would have permitted third parties not

Simmons to purchase the 18 acre parcel. The Special Referee ignored the plain language of these documents stating that they were providing these funds for Simmons to acquire the property. Notwithstanding his own findings as to Simmons efforts to preserve the property, the Special Referee denied Simmons right to buy the property without the benefit of any hearing or determination as to the intentions of Mr. Fields and Mr. Redell who had offered their help to Simmons in the form of their own assets and borrowing power. The actions of the Special Referee are patently wrong and the conclusion that the Special Referee was biased against Simmons is obvious. These incidents of bias was never addressed and decided in any appeal or motion. Together with the other alleged violations of the South Carolina Rules of Civil Procedure, the proceedings held by the Special referee lack due process and fundamental unfairness.

Defendants' claim that "all issues raised in plaintiff's present complaint were raised in the case entitled Bailum v. Simmons which involved identical claims and which were addressed at trial in post trial motions and in an appeal to the South Carolina Court of Appeals" is not supported in the record of the Bailum heirs case. There has not been any decision addressing the issues of due process and fundamental fairness of the proceedings in the Bailum heirs case Therefore, this court should not dismiss this case under the belief that Simmons had the opportunity to raise these issues on appeal and lost, when he clearly did not.

B. Fraud on the Court never addressed

In addition to the allegations of a lack of fundamental fairness, Simmons alleges that the Bailum heirs committed a fraud on the court and subverted the administration of justice as an independent basis for equitable relief. Simmons alleges that the Bailum heirs contrived to have the partition action heard by a Special Referee, even though there was no "good cause" as required by the statute and even though it was more costly to do so, in order to avoid the Master in Equity. If

Monica Middleton had appeared before the Master in the Bailum heirs case, the Master in Equity could have raised questions about her kinship to Fannie Middleton in the earlier case. By having the case heard by a special referee, they avoided the possibility of exposure. In furtherance of their scheme, the Bailum heirs admitted in the Complaint and then again in their Second Amended Complaint that Simmons was entitled to a statutory share in all of the parcels held in the estate of Samuel Balaam . The Bailum heirs concocted a family history for her which was completely different from what she had said under oath so as to give further credence to the Bailum heirs' claim of another Samuel Balaam. Either Monica Middleton lied in the first quiet title action and is not entitled to ownership of the 5 acre parcel or the Bailum heirs lied about her in the second action and she and they are not entitled to a 100% statutory interest in the sale proceeds from the 34 acres of the other River Road property. In either case there has been a subversion of justice.

The Bailum heirs fabricated a story that the Samuel Balaam who acquired the 18 acres in 1910 and was married to Simmons grandmother, Hester Singleton Balaam, was not the same Samuel Balaam who acquired the 34 acres in 1904 in order to deprive Simmons and other Hester Singleton Balaam heirs of their statutory interest, approximately \$112,000. The fraud on the court was not uncovered until after the amended final order was entered.

As a result of a fraud on the court, the Bailum heirs received the entire proceeds from the sale of 34 acres on the south side of River Road valued at \$337,000. Simmons was denied his statutory interest, approximately \$70,000. which could have been applied toward the purchase of the 18 acres. Therefore, he was prejudiced by the fraud on the court. Because fraud upon the court is an affront to the administration of justice, a litigant who has been defrauded need not establish prejudice. Hazel-Atlas Glass Co. v. Hartford-Empire Co. 322 US 238 (1944). Fraud on the court is not limited to misconduct by an attorney or an officer of the court. Ray v. Ray, 374

S.C. 79 (2007). In Chewning v. Ford Motor Co., 354 SC 72 (2003), the Supreme Court affirmed the denial of a motion to dismiss an action to vacate a judgment due to a fraud on the court based upon generalized allegations as to the procuring of false testimony.

Simmons contends that the evidence of the Bailums' fraud on the court could not have been discovered prior to trial because the Bailum heirs changed their story at the end of the case. In October 2005, they filed a Second Amended Complaint in which they admitted that Simmons had a statutory interest in the 24 acres. Simmons had no reason to know that Monica Middleton had obtained an earlier judgment claiming an interest in heirs' property that was inconsistent with her claims of lineage in the Bailum case. When Simmons asked for a new trial on the basis of limited census information contradicting the Bailum heirs testimony that there was a second Sam Balaam, the Special Referee decided that Simmons interest was minimal but disregarded the interest of the other Hester Balaam heirs who would all have shared in a statutory 1/3 interest in the proceeds, about \$112,000. Ironically, Marie Smith, a defendant herein because of her ownership of part of the 18 acres would receive some of those proceeds. Yet she seeks to dismiss the complaint. Therefore, the fraud on the court has not been corrected.

In summary, Simmons has not had the opportunity to assert that there was a fraud on the court because he only discovered it during the pendency of his appeal. Therefore, the court should consider that Rule 60 (b) permits this action to continue

II. Attorney fault is not a basis for a motion to dismiss

Defendants assert that "Simmons complaints, if he has any, are with his counsel who may or may not have protected his rights by not properly perfecting an appeal". First, this is not a proper basis for a motion to dismiss at the pleading stage of the case. Rule 12(b) sets forth the basis upon

which a complaint may be dismissed prior to defendant's pleading and this is not one of the permitted claims.

Second, any fault by Simmons appellate attorney, Houston, should not be imputed to Simmons. The Court of Appeals granted Houston numerous extensions to file the appellant's brief and Simmons repeatedly attempted to contact him without success. The rule that the neglect of an attorney will be imputed to the client "is not a hard and fast rule. Rather, it is one that is to be applied rationally, with a fair recognition that justice to the litigants is always the polestar." Brown v. Butler, 347 S.C. 259 (2001) (quotation omitted). It is not applicable when the attorney's neglect rises to the level of willful abandonment. Graham v. Town of Loris, 272 S.C. 442, 452 (1978); see also 7A C.J.S. Attorney & Client § 181, at 285 (1980) (where the conduct of counsel is outrageously in violation of his implicit duty to devote reasonable efforts in representing his client, his acts will not always be imputed to his client). Houston's failure to perfect the Simmons appeal after numerous extensions were granted rises to the level of abandonment since it is outrageous and in violation of his duty to devote reasonable efforts on behalf of his client. "Conscience requires this Court to charge the attorney alone with his gross dereliction of duty and not to visit its consequences upon an innocent client." Graham v. Town of Loris, 272 SC 442,452-453 (1978). The Court of Appeals never rendered a decision on the merits because Houston never filed a timely brief. Accordingly, any attorney fault attributable to Houston does not attach to Simmons.

III. The Record must be developed.

SC Rule 60 (b) provides that equitable relief may be granted based upon the totality of the circumstances arising theretofore. "In essence, the rule merely reflects many of the

considerations attendant to an equitable analysis.” T v. T, 662 S.E.2d 413, 417 (Ct. App. 2008).

See National Surety Co. of N.Y. v. State Bank of Humboldt, 120 Fed. 593 (8th Cir. 1903).

Simmons contends that the totality of the circumstances were not or could not have been previously addressed by the trial or appellate court in Bailum v. Simmons. Simmons urges this Court to deny the motion to dismiss based upon the pleadings because the record needs to be fully developed. As the Court of Appeals noted in T v. T, 662 S.E.2d at 417: “what we do suggest is that equity only intervenes when the circumstances so require, but to do so, **a court must be aware of all of the circumstances before it acts**. Thus, the parties must be allowed to develop the record accordingly.” (emphasis added). Simmons contends that the facts as alleged in the complaint establish a prima facie cause of action to vacate the judgment under either “exceptional circumstances” or “fraud on the court”. However, because of the complexity of the matter, Simmons should be entitled to have discovery in order to develop the record and establish all of the facts upon which to base his claims for relief.

IV. The interest of justice requires that this case proceed

Finally, Simmons contends that the interest of justice requires that this action be allowed to continue so that he can have a “fair and just resolution of the dispute”. When addressing collateral attacks on a final judgment, the court must balance the need for finality (underlying the principle of res judicata) against the need for a fair and just resolution of the dispute. Hagy v. Pruitt, 339 S.C. 425, 529 S.E.2d 714 (2000). Simmons has not received a full and fair determination of his rights to the heirs’ property which he maintained and preserved for so many years. Because the Special referee refused to allow Simmons to purchase the 18 acre

parcel, Simmons has no adequate remedy at law. Real estate is considered as unique and the court cannot award damages to replace it.

Conclusion

For the reason set forth above, Simmons respectfully requests this court deny defendants' motion to dismiss.

Edward A. Bertele, Esq.
1812 Pierce Street
Charleston, SC 29492
843-471-2082

By: 

Dated: February 24, 2010
Charleston, SC

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the within Plaintiff's Opposition to Defendants' Motion for More Definite Statement was served upon the defendants' attorney, Bruce Berlinsky, Esq. by regular mail postage prepaid at his last known mailing address.


Edward A. Bertele, Esq.

February 24, 2010
Charleston, SC

FILED

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

ROOSEVELT SIMMONS
Plaintiff

Vs.

HATTIE BAILUM, RUBY BAILUM
VERDONE GRAY, JULIE B. JOHNSON
MONICA MIDDLETON,
MARIE SMITH, MELVIN SINGLETON,
FRANKLIN SMITH, LMC, LLC,
JOHN MARTIN, ESQ. as TRUSTEE
Defendants

2010 MAR -1 AM 9: 38
IN THE COURT OF COMMON PLEAS
JULIE J. ARMSTRONG
CLERK OF COURT
THE NINTH JUDICIAL CIRCUIT
CASE NO. 2009 - CP -10 -5343

BY _____

AFFIDAVIT OF
ROOSEVELT SIMMONS

FILED
2010 FEB 25 PM 1:18
JULIE J. ARMSTRONG
CLERK OF COURT
Checked
Canceled

Roosevelt Simmons of full age being duly sworn according to law upon his oath deposes and says: .

1. I am the plaintiff in this action and submit this affidavit in opposition to defendants' motion to dismiss the complaint.
2. I am asking that the decision in the Hattie Bailum case be set aside because I never received a fair resolution of all of the issues due to circumstances that were not my fault. Throughout the earlier case, I hired what I believed to be competent and experienced counsel and relied on their judgment.
3. In the Hattie Bailum decision, the Special Referee ordered the sale of all of the heir's property but allowed me only 10 days to produce proof of financing in order to purchase the 18 acres. The letters I produced from Mr. Frederick Fields and Mr. Christian Redell made it clear that they were offering to lend me the money I needed to complete the sale, approximately \$165,000. But the Special referee refused to let me close title because he said he had doubts that this financing was intended for me. When this happened, I knew that the Special Referee

R94

had been biased against me from the beginning, partly because I tried to stop his appointment. As result, the Special Referee ordered the sale of the 18 acres where I was raised, paid the taxes and collected rents for many years and of the other 34 acres on which I had paid the taxes, had posted the property against trespassers and oversaw the management of the timber, to third parties. I was denied any share of the proceeds of the 34 acres because the Bailum heirs and Monica Middleton claimed another Samuel Balaam was the owner and that I was not an heir.

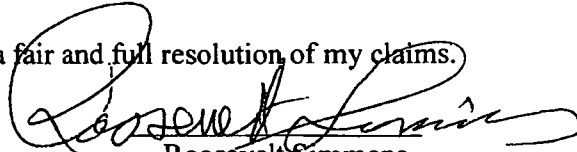
4. When I was told that the Special Referee wouldn't permit me to buy the 18 acres, I tried to stop the sale to Marie Smith and Mark Goldberg. The Special Referee wanted me to post a bond of \$1.0 million, twice the value of the 18 and the 34 acre parcels. I told him I couldn't. I was misled into believing that because I couldn't post the \$1.0 million bond, I was waiving my right to buy the 18 acres, but I never agreed to that and didn't voluntarily waive my right to buy the 18 acres in which I had invested so much time and money.

5. After the Special referee denied my right to buy the 18 acres, I found records which refuted the Bailum heir's claims of a second Samuel Balaam. I later discovered that my prior attorney, Arthur McFarland, Esq. represented Monica Middleton in a case involving a part of the same 54 acres that was involved in the Hattie Bailum case. Her testimony there contradicts the testimony in the Hattie Bailum case. As a result of their fraud on the court, the Bailum heirs prevented me from receiving a large share of the proceeds from the sale of the 34 acres, totaling \$330,000. I could have used this money to help pay for the purchase of the 18 acres. Most of the other Hester Singleton heirs had already relinquished all of their interest in the heir's property to me.

6. I hired attorney Charles Houston, Esq. to continue with the appeal I started. As time passed, I tried contacting him many times but couldn't get through to him to find out what was

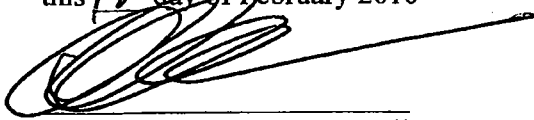
happening. I didn't know that the appeal had been dismissed until it was too late to do anything about it. My appeal was never heard because my attorney did not file the brief and it was dismissed.

7. This case is the first time that all of the important facts have been presented together. I am trying to recover the 18 acres where I was raised and this court should allow the case to continue to conclusion so that I can receive a fair and full resolution of my claims.


Roosevelt Simmons

Sworn and subscribed before me
this 18 day of February 2010

My Commission Expires February 01, 2015


Notary Public of South Carolina

South Carolina Charles County

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Roosevelt Simmons,)
)
Plaintiffs,)
VS.)
)
Hattie Bailum, Ruby Bailum,)
Verdone Bailum, Julie B. Johnson,)
Monica Middleton, Marie Smith,)
Melvin Singelton, Franklin Smith,)
LMC, LLC, John Martin, Esq.,)
as Trustee,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-10-5343

**SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS**

2016 SEP 23 PM 2:35
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

The Plaintiff herein, Roosevelt Simmons, is asking the Court to set aside the Special Referee's Orders and retry issues of fact, which issues were raised in the case in chief at trial and on appeal. On appeal, Plaintiff asserted the same fraud upon the court arguments asserted herein. His appeal was dismissed and this matter concluded with finality.

FACTS PER SPECIAL REFEREE'S ORDERS

As a matter of establishing Plaintiff's rights, if any, to property at issue herein, it is important to illustrate Plaintiff's status under the South Carolina Statute of Descent and Distribution.

Plaintiff alleged there was but one "Sam" Bailum (also spelled Balaam). However, based upon the exhibits at trial, the Special Referee concluded that there were not less than three Sam Bailums. Attached to this Memorandum are some of the many exhibits marked at trial.

Exhibit 1 hereto is the death certificate of Samuel Bailum who died in 1975. According to his death certificate, this Samuel Bailum's father was also Samuel Bailum.

Exhibit 2 hereto is the death certificate of the third Samuel Bailum ("Sammy") who died in 1999. According to his death certificate, his father was Samuel Bailum. Sammy was married to Ruby, who was a Plaintiff in the underlying action.

In short there was a Samuel Bailum (Samuel I) who married Julia. They had a number of children including Thomas, Tony, Fannie, Mary and Samuel (Samuel II). Samuel II married Lucille. They had a child named Samuel (Sammy). Sammy married Ruby, and they had a child Verdone – also a party and witness in the action below. Historically and for illustration purposes, there was also a fourth Sam Bailum who died in approximately 1912.

The Plaintiff herein is not related by blood to any lineal descendent of the Bailum family. The Plaintiff's grandmother, Hester Singleton, married Samuel Bailum (Samuel I) who was a widower. She had numerous children from prior marriage(s). The Plaintiff herein is a descendent of one of Hester Singleton's children. This fact is derived from a Plaintiff's exhibit detailing his family tree, which exhibit was introduced at trial. This exhibit also shows three "Sam Bailums". This is relevant because the underlying quiet title action involved multiple tracts of land. The Special Referee addressed each parcel in his Orders.

The Special referee concluded that Samuel I owned the parcel known by TMS# 311-00-024. He further concluded that the parcels known by TMS #'s 312-00-00-065, -067, and -032 were the residual parcels of a larger tract deeded in 1904 into Samuel II, Mary, Thomas, Tony and Fannie. These individuals were children of Samuel I and his first wife Julia.

The Special Referee found that the Plaintiff's interest herein was limited to the marital spousal interest of his grandmother, Hester Singleton Bailum, in TMS# 311-00-024. The Referee further found that the Plaintiff had no interest in TMS #s 312-00-00-

032, -065, and -067 since he is not a lineal descendent of any of the owners of those parcels.

In 1904 fifty-four acres were deeded unto Samuel II, Mary Thomas, Tony and Fannie. Subsequently parcels were deeded out to these individuals in the following approximate amounts, without the benefit of surveys or plats:

24 acres to Samuel

10 acres to Thomas

10 acres to Tony

5 acres to Mary

5 acres to Fannie.

Later, the property was platted to reflect acreages as those individuals began to sell their interests. Fannie's parcel came to be identified by TMS# 312-00-00-066; Tony's parcel came to be identified by TMS# 312-00-00-067. The parcels known by TMS# 312-00-00-032 and -065 were Sam's parcels.

By the time of the trial, only three of the original parcels remained. These parcels were 312-00-00-032, -065, and -067 with titles not yet quieted. Fannie's heirs quieted the title to her parcel some years earlier. The residual acreage in all three parcels totaled 22.2 acres. The county tax records indicate that -065 and -032 were owned by the Estate of Sam Bailum and that -067 was owned by the estate of Tony Bailum. The parcel -067 now consists of 3.33 acres. (7.14 acres of his original ten acres had been previously subdivided and sold.) Thus, the residual interest of Sam Bailum (II) was 18.87 acres.

Were the Plaintiff correct in his argument that he is entitled to an interest in property owned by Samuel II (18.87 acres) then he could not possibly have any interest in property owned by Samuel I. Again, he is not a lineal descendent. He only takes his pro-rata share of his grandmother's marital interest. His grandmother was only married

to one Sam Bailum; yet Plaintiff herein argued entitlement to all the property owned by any Sam Bailum.

ROOSEVELT SIMMONS' STATUTORY INTEREST

Roosevelt Simmons, the Plaintiff herein, was found to be an heir of Hester Singleton who had married Sam Bailum. At the time of his death, Sam held fee simple title to TMS# 312-00-00-024. At the time of trial, Final Orders and Appeal, Mr. Simmons' interest in this parcel was protected.

The Defendants herein deny the Plaintiff had any interest in the residual property and concur with the Referee's finding, but assuming solely for the sake of illustration and argument, that the Plaintiff herein had some right to or interest in the residual parcels, what then would that interest be? Upon "Sam's" death, under the Statute of Descent and Distribution in effect at the time of his death, Hester would have taken the 1/3 of Sam's property and his children by his first wife would have taken the rest. Hester died intestate in 1952 (per Plaintiff's herein trial exhibit). She had nineteen children from prior marriage(s) (per Plaintiff's herein exhibit at trial, Exhibit 3, Page 5. This exhibit was an article authored by Plaintiff's cousin Franklin O. Smith.) All of her children are now believed to be deceased. At the time of trial, four were known to be survived by children. Eugene Singleton was one of those four. Roosevelt Simmons is one of Eugene Singleton's fifteen children.

Thus, Hester Singleton Bailum would have, by intestate distribution taken 1/3 of "Sam's" 18.87 acres, or 6.284 acres. Upon Hester's death, assuming she did not remarry, each of her nineteen children, or their children, per stirpes, including Eugene Singleton, would have taken 1/19 of the 6.284 acres, or .331 acres each. Upon Eugene Singleton's death, each child by intestate distribution or per stirpes, including Roosevelt Simmons,

would take 1/12 of the .331 acres, or .028 acres (approximately 1200 square feet – a parcel not legally subdividable.)

The Court ordered appraisal on these combined parcels (-032, -065 and -067) was in the amount of \$300,000.00 or \$12,500.00 per acre. Thus, were the Plaintiff herein correct that he has an interest in -032 and -065 (“Sam’s”) parcels, his interest is \$337.50 (\$12,500.00 X .028 acres) based upon the Partition by Sale Order.

MONICA B. MIDDLETON

The Plaintiff herein attempts to argue that a fraud has been committed upon the Court, as it relates to Monica Middleton’s testimony in a prior case involving an entirely different parcel of land. Plaintiff argues that this information was not discovered until after the trial of this case and that it somehow impacts his statutory interest. The only matter which impacts Plaintiff’s statutory interest is the Statute of Descent and Distribution as it relates to Hester’s spousal share of the estate of the Sam Bailum she married. The Plaintiff’s interest is by marriage, not blood. Monica’s interest in this property or her lineage has no relevance to Roosevelt Simmons’ interest. The record in her quiet title action is and was since 2003 public record easily discoverable by counsel. The reason it was never mentioned in the trial underlying this matter is that it was not relevant to Mr. Simmons’ interest in property held by Sam Bailum’s estate, as Monica Middleton had already quieted title to her land that the Bailum siblings deeded to her mother Fannie nearly 106 years ago while Sam Bailum was living. By Sam’s deeding his interest to Fannie, he extinguished any claim Hester Singleton and her heirs would have to Fannie Bailum’s tract which is now known as Monica Middleton’s tract.

Plaintiff was ably represented by counsel throughout the process. The action by Monica Middleton that Plaintiff refers to emanated from a quiet title action brought by Ms. Middleton with regard to property owned by her mother Fannie Bailum Middleton.

Her testimony in the quiet title action, which is attached hereto, has no bearing or relevance to Plaintiff's claims to interests in property owned by one or more Sam Bailums. In 1905, the Bailum siblings, including Sam, deeded their interest in Fannie's five acres to Fannie. As such, her five acres was unaffected by the quiet title action from below. Further, Monica Middleton did not testify in the case from which this matter stems, as she had already quieted title to her mother's five acres in a prior case and her testimony as to her relationship to Sam Bailum would have merely been cumulative.

The position that Monica Middleton's testimony from her suit has relevance or is false is completely unfounded, as her suit did not touch upon property owned by any of the Sam Bailum's since Sam Bailum deeded his interest out to Monica's mother, Fannie, during his lifetime.

Respectfully Submitted,



Anastasios H. Chakeris
Chakeris Law Firm
P.O. Box 397
Charleston, South Carolina 29402
(843)853-5678
(843)853-5677 (fax)
ATTORNEY FOR DEFENDANTS

September 24, 2010
Charleston, South Carolina

EXHIBIT 1

NEW YORK

Doris L. Sheehan

REGISTRAR

NEW YORK STATE
DEPARTMENT OF HEALTH
BUREAU OF VITAL RECORDS
CERTIFICATE OF DEATH
TYPE ALL ENTRIES OR PRINT IN PERMANENT BLACK INK.

3144
REGISTER NUMBER
35

1. NAME: FIRST MIDDLE LAST
SAMUEL BAILUM

2. SEX
MALE ☒ FEMALE ☐

3A. DATE OF DEATH
MONTH DAY YEAR
1 19 75

3B. HOUR
2 50 P.

4. RACE: (WHITE, NEGRO, AMERICAN INDIAN, ETC.)
Negro

5. AGE
75 yrs.

6. IF UNDER 1 YEAR: MONTHS DAYS HOURS MIN.
IF UNDER 1 DAY: HOURS MIN.

7A. COUNTY (IN NY)
Suffolk

7B. TOWN
Brookhaven

7C. CITY OR VILLAGE
JEROME

7D. LENGTH OF STAY IN TOWN, CITY OR VILLAGE

7E. HOSPITAL OR OTHER INSTITUTION (IF NEITHER, GIVE STREET & NO.)
Mother Mary Hosp, etc

8. STATE OF BIRTH COUNTRY, IF NOT USA
S.C.

9. DECEDENT BORN MONTH DAY YEAR
5 19 02

10. CITIZEN OF WHAT COUNTRY
USA

11. MARITAL STATUS
Married

12. SURVIVING SPOUSE (IF WIFE, MAIDEN NAME)
Evelyn Oudem

13A. USUAL OCCUPATION (EVEN IF RETIRED)
Longshoreman

13B. KIND OF BUSINESS OR INDUSTRY
Retired

13C. SOCIAL SECURITY NO.
125-050280

14A. STATE
NY

14B. COUNTY
Suffolk

14C. TOWN
Brookhaven

14D. CITY OR VILLAGE
Carmen

14E. WITHIN THE CEMETERY LIMITS
YES ☐ NO ☒

14F. STREET AND NUMBER
100 North 4th St

15A. FATHER'S NAME FIRST MIDDLE LAST
SAMUEL R. BAILUM

15B. MOTHER'S MAIDEN NAME FIRST MIDDLE LAST
JULIA TAILUM

16A. INFORMANT'S NAME
Mrs Evelyn Oudem

16B. MAILING ADDRESS (INCLUDE ZIP CODE)
100 North 4th St Carmen NY 11711

PART I. DEATH WAS CAUSED BY ENTER ONLY ONE CAUSE PER LINE FOR (A), (B) AND (C):

17. IMMEDIATE CAUSE
(A) C. RD IAC ARREST.
DUE TO OR AS A CONSEQUENCE OF
(B) CONGESTIVE HEART FAILURE
DUE TO OR AS A CONSEQUENCE OF
(C) ARTERIO-SCLEROTIC HEART DISEASE

18. APPROXIMATE INTERVAL BETWEEN ONSET & DEATH

19. CONDITIONS, IF ANY, WHICH GAVE RISE TO IMMEDIATE CAUSE (A) STATING THE UNDERLYING CAUSE LAST
DIABETES MELLITUS

20. OTHER SIGNIFICANT CONDITIONS: CONDITIONS CONTRIBUTING TO DEATH BUT NOT RELATED TO CAUSE GIVEN IN PART I (A).
DIABETES MELLITUS

21. AUTOPSY?
YES ☐ NO ☒

22. IF YES, WERE FINDINGS CONSIDERED IN DETERMINING THE CAUSE OF DEATH?
YES ☐ NO ☒

19A. ACCIDENT, HOMICIDE, SUICIDE, UNDETERMINED
YES ☐ NO ☒

19B. MONTH DAY YEAR
1 19 75

19C. HOUR
1 14 75

19D. HOW DID INJURY OCCUR (ENTER NATURE OF INJURIES IN #17, 18, OR 19)

19E. INJURY AT WORK?
YES ☐ NO ☒

19F. PLACE OF INJURY, HOME, FACTORY, OFFICE BLDG., ETC.

19G. LOCATION (STREET & NO., CITY OR VILLAGE, TOWN, COUNTY, STATE)

20. PART I. TO BE COMPLETED BY CERTIFYING PHYSICIAN ONLY -OR-

A. TO THE BEST OF MY KNOWLEDGE, DEATH OCCURRED AT THE TIME, DATE AND PLACE AND DUE TO THE CAUSES STATED.
SIGNED: J. Nadler, MD 1 19 75

B. THE PHYSICIAN ATTENDED THE DECEASED
FROM: 4 15 71 TO: 1 19 75

C. LAST SEEN ALIVE
1 14 75

D. ATTENDING PHYSICIAN, IF OTHER THAN CERTIFIER
JEROME NADLER, M.D.

21. NAME AND ADDRESS OF CERTIFIER (PHYSICIAN, CORONER, MEDICAL EXAMINER, CORONER'S PHYSICIAN, MEDICAL DIRECTOR):
ROUTE 25, MIDDLE ISLAND, N.Y.

20. PART II. TO BE COMPLETED BY CORONER OR MEDICAL EXAMINER ONLY

A. ON THE BASIS OF EXAMINATION AND/OR INVESTIGATION, IN MY OPINION DEATH OCCURRED AT THE TIME, DATE AND PLACE AND DUE TO THE CAUSES STATED.
SIGNED: [Signature] TITLE: [Title]

B. PRONOUNCED DEAD
MONTH DAY YEAR

C. HOUR

D. DATE SIGNED
MONTH DAY YEAR

E. CORONER'S PHYSICIAN, IF OTHER THAN CERTIFIER:

22A. BURIAL CREMATION REMOVAL
☒ ☐ ☐ 1 23 75

22B. PLACE OF BURIAL, CREMATION OR REMOVAL
Washington Memorial Park

22C. LOCATION (CITY OR TOWN, STATE)
Carmen NY 11711

23A. NAME AND ADDRESS OF FUNERAL HOME
Hobbs-DeFuria 1 Home Trm 71 Becht to Carm NY 11711

23B. REGISTRATION NO.
00063

23C. REGISTRATION NO.
6031

24A. NAME OF FUNERAL DIRECTOR
L. F. 17, H. Green

24B. SIGNATURE OF FUNERAL DIRECTOR
Doris L. Sheehan

24C. SIGNATURE OF REGISTRAR
Doris L. Sheehan

25A. SIGNATURE OF REGISTRAR
Doris L. Sheehan

25B. DATE
1 23 75

25C. MONTH DAY YEAR
1 23 75

25D. SIGNATURE OF REGISTRAR
Doris L. Sheehan

EXHIBIT 2

2105

DATE FILED
NEW YORK CITY
DEPARTMENT OF HEALTH

CERTIFICATE OF DEATH

Certificate No.

15699-045506

1999 SEP 27 P 9:00

1. NAME OF DECEASED Samuel Bailum
(Type or Print) (First Name) (Middle Name) (Last Name)

MEDICAL CERTIFICATE OF DEATH (To be filled in by the Physician)

2. PLACE OF DEATH 2a. BOROUGH <u>Manhattan</u>	2b. Name of hospital or other facility (if not facility, street address) <u>Roosevelt Hospital</u>	2c. If in hospital or other facility 1 ☐ DOA 3 ☐ Outpatient 2 ☐ Emerg. 4 ☒ Inpatient	2d. If inpatient, date of current admission Month Day Year <u>09</u> <u>17</u> <u>99</u>
3a. Date and Hour of Death (Month) (Day) (Year) <u>September</u> <u>24</u> <u>1999</u>	3b. HOUR <u>7:20</u>	☒ AM ☐ PM	4. SEX <u>Male</u>
			5. APPROXIMATE AGE <u>71 years</u>

6. I HEREBY CERTIFY THAT: (Check One)

☐ I attended the deceased

☐ A staff physician of this institution attended the deceased

☐ Dr.

attended the deceased

from September 17 19 99 to September 24 19 99 and last saw him alive at 7:20 A M
on September 24 19 99. I further certify that traumatic injury or poisoning DID NOT play any part in causing death, and that death did not occur in any unusual manner and was due entirely to NATURAL CAUSES. See first instruction on reverse of certificate.

Witness my hand this 24 day of September 19 99 Signature [Signature] D.O.
Name of Physician Shun Katsaka Address 1000 10TH AVE NYC 10019 M.D.
(Type or Print) License No. _____

PERSONAL PARTICULARS (To be filled in by Funeral Director or, in case of City Burial, by Physician)

7. Usual Residence a. State <u>NEW YORK</u>	7b. County <u>KINGS</u>	7c. City, Town, or Location <u>BROOKLYN</u>	7d. Street & House No. <u>1601 BEVERLY ROAD</u>	Zip <u>11226</u>	Apt. No.	7e. Inside City Limits of 7c ☒ Yes ☐ No
8. Served in U.S. Armed Forces No Yes ☒ 1 ☐ From To	9. Marital Status (Check One) 1 ☐ Never Married 2 ☐ Widowed 3 ☒ Married or separated 4 ☐ Divorced	10. Name of Surviving Spouse (If wife, give maiden name) <u>RUBY MITCHELL</u>				
11. Date of birth (Month) (Day) (Year) of Decedent <u>AUGUST 29, 1928</u>	12. Age at last birthday <u>71</u>	If under 1 Year mos. days hours mins.		13. Social Security No.		
14a. Usual Occupation (Kind of work done during most of working lifetime. Do not enter retired) <u>REGISTER NURSE</u>			14b. Kind of business or industry <u>HOSPITAL</u>			
15. Birthplace (City & State or Foreign Country) <u>SOUTH CAROLINA</u>		16. Education (Specify only highest grade completed) Elementary/Secondary (0-12) College (1-4 or 5+) <u>17YRS</u>		17. Other name(s) by which decedent was known		
18. NAME OF FATHER OF DECEDENT <u>SAMUEL BAILUM</u>			19. MAIDEN NAME OF MOTHER OF DECEDENT <u>LUCILE WILSON</u>			
20a. NAME OF INFORMANT <u>RUBY BAILUM</u>		20b. RELATIONSHIP TO DECEASED <u>WIFE</u>	20c. ADDRESS (CITY) (STATE) (ZIP) <u>235 EAST 149th STREET BRONX, N.Y. 10451</u>			
21a. NAME OF CEMETERY OR CREMATORY <u>WASHINGTON MEMORIAL CEMETERY</u>		21b. LOCATION (City, Town, State and Country) <u>CORAM, N.Y.</u>		21c. DATE OF BURIAL OR CREMATION <u>SEPTEMBER 28, 1999</u>		
22a. FUNERAL ESTABLISHMENT <u>WALTER B. COOKE-KENNEDY FUNERAL HOME</u>		22b. ADDRESS <u>117 WEST 72nd STREET NEW YORK, N.Y. 10023</u>				

VR15 (1/94)

VITAL RECORDS

DEPARTMENT OF HEALTH

THE CITY OF NEW YORK

This is to certify that the foregoing is a true copy of a record on file in the Department of Health. The Department of Health does not certify to the truth of the statements made thereon, as no inquiry as to the facts has been provided by law.

DEATH TRANSCRIPT

Steven P. Schwartz
STEVEN P. SCHWARTZ
CITY REGISTRAR



Do not accept this transcript unless it bears the raised seal of the Department of Health. The reproduction or alteration of this transcript is prohibited by Section 3.21 of the New York City Health Code if the purpose is the evasion or violation of any provision of the Health Code or any other law.

VITAL RECORDS

DEPARTMENT OF HEALTH

THE CITY OF NEW YORK

DATE ISSUED

SEP 27, 1999

2106

DOCUMENT NO. E121753

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Roosevelt Simmons,)
)
Plaintiffs,)
VS.)
)
Hattie Bailum, Ruby Bailum,)
Verdone Bailum, Julie B. Johnson,)
Monica Middleton, Marie Smith,)
Melvin Singelton, Franklin Smith,)
LMC, LLC, John Martin, Esq.,)
as Trustee,)
)
Defendants.)
_____)

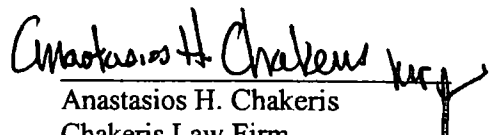
IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-10-5343

**ATTACHMENT TO SUPPLEMENTAL
MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS**

FILED
2010 SEP 30 AM 11:45
JULIE J. ARMSTRONG
CLERK OF COURT

Attached hereto is the Order Quieting Title in the matter of Monica S. Middleton
v John Doe, et al., case no. 02-CP-10-4883, which is referred to in the Supplemental
Memorandum in Support of Defendant's Motion to Dismiss in the above captioned
matter.

Respectfully Submitted,


Anastasios H. Chakeris
Chakeris Law Firm
P.O. Box 397
Charleston, South Carolina 29402
(843)853-5678
(843)853-5677 (fax)
ATTORNEY FOR DEFENDANTS

September 27, 2010
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
MONICA S. MIDDLETON,

Plaintiff,

vs.

JOHN DOE and MARY ROE being fictitious
names used to designate the unknown
heirs at law distributes, devisees,
legatees, widow, widowers, successors
and assigns, if any of FANNY MIDDLETON
(deceased), PAUL H. MIDDLETON (deceased)
SALLY MIDDLETON, (deceased), GEORGE
MIDDLETON, (deceased) GERALD MIDDLETON,
(deceased) ETHEL MIDDLETON, (deceased)
and all other persons unknown claiming
by, through or under them or having or
claiming any interest in the real
estate described in the Complaint,
whether infants, incompetents, insane
persons under any other disability,
Defendants.

IN THE COURT OF COMMON PLEAS
CIVIL CASE NO. 02-CP-10-4883

ORDER QUIETING TITLE

FILED
2003 OCT 15 PM 3:19
CLERK OF COURT
BY

THIS MATTER came before me pursuant to Sections 15-13-10, et
seq. of the South Carolina Code of Laws, 1976, quieting title to
the real estate which is the subject of this action.

The following pleadings were filed in the office of the
Clerk of Court:

1. Summons and Complaint;
2. Lis Pendens;
3. Notice Nisi
4. Notice of Filing;
5. Affidavit of publication and Order of
Publication;
6. Petition and Order Appointing Guardian ad Litem;
7. Answer of the Guardian ad Litem; &
8. Order of Reference with authority of the Master to
issue a final Decree.

MR8
#1

2108

All of the Defendants in the above captioned matter were served by publication. The record further contains no responsive pleadings except the Answer of the Guardian ad Litem submitting the rights of the Defendants who may be infants, incompetent, insane persons and those under any other disability to the protection of this Court. Robert L. Gailliard, Esquire was appointed Guardian ad Litem for all Defendants who may be infants, incompetent or under any other disability. It appears that after a diligent search was made by the Guardian ad Litem there are no such incompetent persons.

Upon hearing this matter, the Court finds the following salient facts:

1. The real property which is the subject of this lawsuit is more fully and accurately described as follows:

All that certain piece, parcel or lot of land, thereon situate, lying and being in Charleston County, South Carolina, containing 5.0 acres and known and designated TMS NO.: 312-00-00-066 on a plat entitled "BOUNDARY SURVEY OF LAND OWNED BY THE ESTATE OF FANNIE MIDDLETON, LOCATED ON JOHNS ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA" made by Paul C. Lawson, Jr., R.L.S., dated September 19, 2002 and in Charleston County RMC Office in Plat Book DD at page 750, reference to said plat is hereby craved for a more complete and accurate description.

TMS NO.: 312-00-00-066

2. The subject property was conveyed to Fanny Middleton by deed of Sam Balaam, Thomas Balaam, Tony Balaam and Mary Balaam dated December 15, 1905 and recorded June 21, 1911 in Charleston County RMC Office in Book W-25 at page 284.

Handwritten signature and initials, possibly "MS" and "JR", in the bottom right corner of the page.

3. Fanny Middleton died intestate on an unknown date in Charleston County, South Carolina seized and possessed of the premises described herein, leaving as her sole heir and distributee, one child, namely, Paul H. Middleton.

4. Paul H. Middleton, died intestate on January 18, 1988 and was survived by his wife, Sally Middleton and grandchildren, namely, Monica S. Middleton, George P. Middleton, Jr. and Anthony Middleton and daughter-in-law, Ethel Middleton, wife of George P. Middleton.

5. George Middleton died intestate in New York on February 21, 1974 and was survived by his wife, Ethel Middleton, and four children, namely, Monica S. Middleton, George P. Middleton, Jr., Anthony Middleton and Gerald Middleton.

6. Gerald Middleton died intestate in New York on August 1, 1987 without spouse or child.

7. Sally Middleton died intestate in New York on April 23, 1988 and was survived by her grandchildren, Monica S. Middleton, George P. Middleton, Jr. and Anthony Middleton and daughter-in-law, Ethel Middleton.

8. Ethel Middleton died intestate in New York on September 5, 1991 and was survived by her children, namely, Monica S. Middleton, George P. Middleton, Jr. and Anthony Middleton.

9. The sole heirs of Fanny Middleton are Monica S. Middleton, George P. Middleton, Jr. and Anthony Middleton and they are vested with fee simple interest in the subject property to the exclusion of all other claimants.

[Handwritten signature]
#3

10. George P. Middleton conveyed his undivided interest in the subject property to Monica Middleton by an unrecorded deed dated March 6, 1995. Anthony Middleton conveyed his undivided interest in the subject property to Monica S. Middleton by an unrecorded quitclaim deed dated October 17, 2001.

11. The estates of Fanny Middleton, Paul H. Middleton, George Middleton, Gerald Middleton, Sally Middleton and Ethel Middleton were never admitted to Probate and the failure of administration constitutes a cloud on Plaintiff's claim of title.

12. There are no outstanding liens or other claims against the property except the property taxes for the current year, which are not yet due and payable.

13. As a result of the relinquishment of the interest of George P. Middleton, Jr. and Anthony Middleton to Plaintiff, I find that Plaintiff the owner of the subject property in fee simple and all other claimants should be forever barred from any claim of title therein.

Based upon the above findings of fact, it is hereby

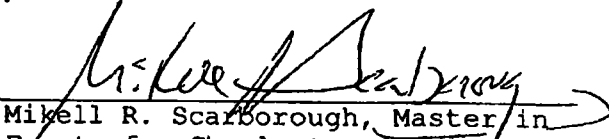
ORDERED that the subject property identified in Paragraph 1 shall be, and it hereby is, declared to be solely owned by Plaintiff in fee simple. It is further

ORDERED that title to the said property shall be, and it hereby is, quieted and confirmed in Plaintiff, Monica S. Middleton. It is further

ORDERED that a Master's Deed confirming title to the subject property shall be issued to Plaintiff.

[Handwritten signature]
12/4

AND IT IS SO ORDERED this 9th day of October, 2003 at
Charleston, South Carolina.


Mikell R. Scarborough, Master in
Equity for Charleston County

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
CIVIL CASE NO. 02-CP-10-4883

MONICA S. MIDDLETON,

Plaintiff,

vs.

JOHN DOE and MARY ROE being fictitious
names used to designate the unknown
heirs at law distributes, devisees,
legatees, widow, widowers, successors
and assigns, if any of FANNY MIDDLETON
(deceased), PAUL H. MIDDLETON (deceased)
SALLY MIDDLETON, (deceased), GEORGE
MIDDLETON, (deceased) GERALD MIDDLETON,
(deceased) ETHEL MIDDLETON, (deceased)
and all other persons unknown claiming
by, through or under them or having or
claiming any interest in the real
estate described in the Complaint,
whether infants, incompetents, insane
persons under any other disability,
Defendants.

REFERENCE TESTIMONY

REFERENCE was held in the above-captioned matter this 17th
day of September, 2003 in the Office of the Honorable Mikell R.
Scarborough, Master in Equity for Charleston County, State of
South Carolina. Appearing at the hearing were the following:

Arthur C. McFarland, Attorney for the Plaintiff; Robert
L. Gailliard, Esquire, Guardian ad Litem for such
Defendants as may be infants, incompetents, insane or
otherwise under any disability;

BY MR. MCFARLAND

May it please the Court? This is an action to quiet
the title to the within property in the Plaintiff and to determine

any and all adverse claims to the parcel of real estate which is the subject of this action.

This matter was referred to your Honor on June 4, 2003 for the purpose of taking testimony and making findings of fact and conclusions of law which will be determinative of the issues in this case. Plaintiff is ready to proceed.

The Court: You may call your first witness.

MONICA S. MIDDLETON SWORN:

BY MR. MCFARLAND:

Q. Please state your name and tell the Court where you live?

A. I am Monica S. Middleton. I live at 225 East 96th Street, Apt. 5-C, New York, New York

Q. Are you the Plaintiff in this case?

A. Yes, I am.

Q. Are you familiar with the parcel of land that is the subject of this lawsuit? If so, would you please describe it and its location?

A. Yes, the property contains approximately 5 acres of land located on River Road, Johns Island, S.C.

Q. Are there any buildings on this tract?

A. No, it is vacant land.

Q. Ms. Middleton, I show you this document can you tell me what it is?

A. Yes, this is a copy of the plat of my 5 acres which was made recently.

Mr. McFarland: Your Honor, I move the introduction of this document as Plaintiff's exhibit 1.

The Court: It is admitted without objection as Plaintiff's exhibit 1.

Q. Has the plat been recorded?

A. Yes, it has.

Q. Who is the listed owner of this property on the county property records?

A. My great grandmother, Fanny Middleton is the owner.

Q. Is she still alive?

A. No.

Q. When did Fanny Middleton die?

A. I don't know. She died before I was born.

Q. Do you know when she acquired the property?

A. I believe she got it in 1905.

Q. Let me show you this document. Can you tell the court what it is?

A. This is a copy of the deed from Sam Balaam, Thomas Balaam, Tony Balaam and Mary Balaam to my great grandmother, Fanny Middleton.

Mr. McFarland: Your Honor, I move the introduction of this document as Plaintiff's exhibit 2.

The Court: It is admitted without objection as Plaintiff's exhibit 2.

Q. Was your great grandmother married at the time of her death?

A. Not that I have been able to determine.

Q. Was the estate of your great grandmother admitted to probate?

A. No.

Q. Did your great grandmother have any children. If so, what are their names?

A. She had one (1) child, Paul H. Middleton, who was my grandfather.

Q. Is he still alive?

A. No. He died on January 18, 1988.

Q. Do you know if Paul H. Middleton was married?

A. Yes. He was married to my grandmother, Sally Middleton.

Q. Is your grandmother Sally Middleton still alive?

A. No. She died on April 23, 1988.

Q. Were the estates of your grandfather, Paul H. Middleton and grandmother, Sally Middleton admitted to probate?

A. No, their estates were not probated.

Q. Did they have any children?

A. Yes, they had one child.

Q. What is that child's name?

A. He is George Middleton, my father.

Q. Is your father still alive?

A. No, he died in 1974.

Q. Was your father married and how many children did he have?

A. Yes, he was married to my mother, Ethel Middleton, and they had four (4) children, Gerald Middleton, George P. Middleton, Jr., Anthony Middleton and me.

Q. Is your mother, Ethel Middleton, still alive?

A. No, she died on September 5, 1991.

Q. Are all of your brothers still living?

A. No. Gerald died on August 1, 1987.

Q. Did he have a wife or children?

A. No. He had neither wife or child.

Q. Do you know if the estates of your mother, Ethel Middleton, and brother, Gerald Middleton, were admitted to probate?

A. No, their estates were never probated.

Q. Are you, and your brothers, George P. Middleton, Jr. and Anthony Middleton the remaining heirs of your great grandmother, Fanny Middleton?

A. Yes, we are.

Q. Let me show you this document. Can you tell the court what it is?

A. These are deeds signed by my brothers, George P. Middleton, Jr. and Anthony Middleton to me. They have not been recorded.

Mr. McFarland: Your Honor, I move the introduction of this document as Plaintiff's exhibits 3 and 4.

The Court: They are admitted without objection as Plaintiff's exhibits 3 and 4.

Q. Who paid the property taxes on the property since the death of your great grandmother?

A. My grandfather, grandmother and my mother paid the taxes until they died. I started paying the taxes after the death of my mother, Ethel Middleton.

Q. Are there any mortgages or other liens against this property that you are aware of?

A. No, there are no liens on this property.

Q. Are you asking this Court to declare that you are the sole owner of this property based on the deeds from your brothers to you?

A. Yes I am.

Mr. McFarland: Your Honor, I have no further questions for Ms. Middleton.

SWORN TO BY:

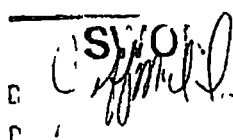
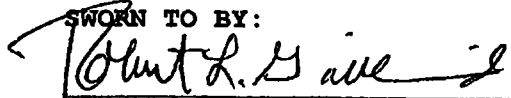
By SWORN
D: 3

Monica S. Middleton
MONICA S. MIDDLETON

By Robert L. Gailliard:

Your Honor, I was appointed the Guardian ad Litem for such Defendants who may be incompetent, insane or otherwise under any disability. Since my appointment, I have reviewed the pleadings and the title to this property and interviewed the Plaintiff. I have been unable to locate any Defendants who would

be represented by me. In addition, based upon the information from the pleadings and the testimony of the witness, there are no minor or incompetent persons and therefore, there was no interest for me to represent. I have, however, submitted a Return.


E
C
SWORN TO BY:

Robert L. Gailliard

By Mr. McFarland:

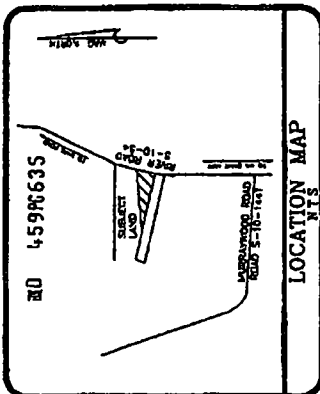
Your Honor, I have caused a search to be made of the record title to the subject property. We have admitted the relevant deed showing that Plaintiff's great grandmother, Fanny Middleton, is the record owner of the property. We have also admitted the deeds showing that Plaintiff's brothers, George P. Middleton, Jr. and Anthony Middleton conveyed their interest in the property to Plaintiff. Since there were no estates filed against the estates of Fanny Middleton and several of the other heirs, there is a cloud on the title. Plaintiff asks this court to find that based on the testimony and evidence submitted here, that she is sole owner of this property. We further request that a Master's Deed be issued to Plaintiff confirming her ownership of the property.

PLAINTIFF'S EXHIBIT

1

CURVE
1 DELTA 45.35 18' 30.53 68
2 97.22 08' 30.53 68
ARC
1 34.43 24' 53
2 24.53 24' 53
RADIUS
1 34.43 24' 53
2 24.53 24' 53
CHORD
1 49.12 22' 7
2 49.12 22' 7
TANGENT
1 19.22 12' 42
2 19.22 12' 42
CHORD BE
1 49.12 22' 7
2 49.12 22' 7

BEARING
1 N 49 12 22 W
2 N 49 12 22 W
DISTANCE
1 32.08
2 32.08



- NOTES:
- 1) AREA WAS DETERMINED BY THE COORDINATE METHOD
 - 2) THIS PROPERTY IS LOCATED IN FLOOD ZONE C
SEE FIRM COMMUNITY PANEL NO 155413 0350 F
NOV REVISED APRIL 11 1987

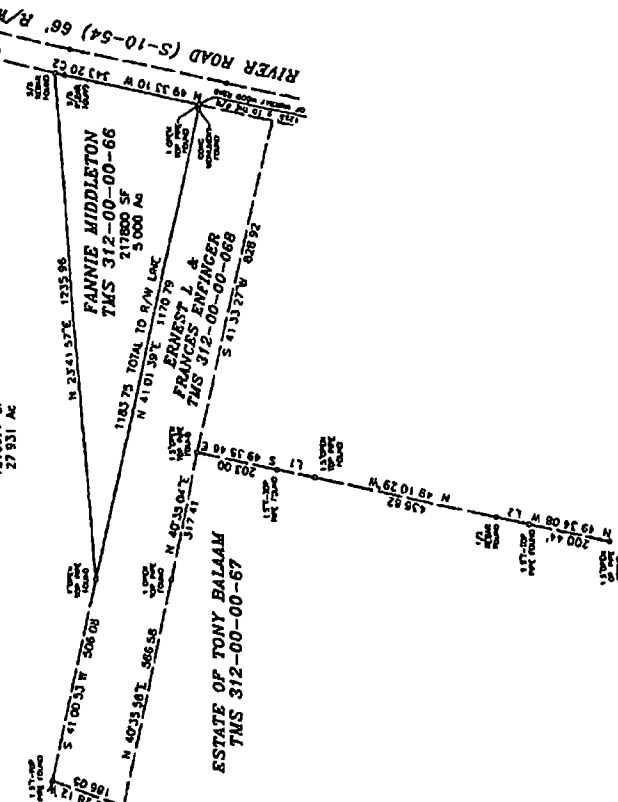
APPROVED PLAT

Wesley B Morris
Wesley B Morris
05.10.05 7-21-05
DATE

WESLEY B MORRIS &
DAVID P MORRIS, III
TMS 312-00-00-117

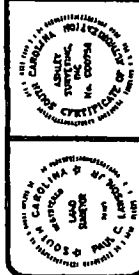
WESLEY B MORRIS
TMS 312-00-00-064

ESTATE OF TONY BALAAM
TMS 312-00-00-67
1216877 SF
27 931 AC



- REFERENCES
- 1) TMS NO 311-00-00-024 &
 - 2) TMS NO 312-00-00-064 & 067
 - 3) TMS NO 312-00-00-064 & 067
 - 4) TMS NO 312-00-00-064 & 067
 - 5) TMS NO 312-00-00-064 & 067
 - 6) TMS NO 312-00-00-064 & 067
 - 7) TMS NO 312-00-00-064 & 067
 - 8) TMS NO 312-00-00-064 & 067
 - 9) TMS NO 312-00-00-064 & 067
 - 10) TMS NO 312-00-00-064 & 067
 - 11) TMS NO 312-00-00-064 & 067
 - 12) TMS NO 312-00-00-064 & 067
 - 13) TMS NO 312-00-00-064 & 067
 - 14) TMS NO 312-00-00-064 & 067
 - 15) TMS NO 312-00-00-064 & 067
 - 16) TMS NO 312-00-00-064 & 067
 - 17) TMS NO 312-00-00-064 & 067

BOUNDARY SURVEY OF LAND
OWNED BY
ESTATE OF
FANNIE MIDDLETON
LOCATED ON JOHNS ISLAND
CHARLESTON COUNTY SOUTH CAROLINA



SCALE 1" = 200'
0 200 400
SEPTEMBER 19 2002

FOR BACKUP DATA, SEE OLD FILES
K VACON BETA BALAAM
K VACON BETA BALAAM
OLD FILE # 90127-1

ASHLEY
SURVEYING, INC.
SURVEYING • PROJECT MANAGEMENT • PLANNING
306 SANGAREE PKWY SUMMERVILLE SC 29483
TELEPHONE (843) 871-4416 FAX (843) 871-9538

The State of South Carolina.

KNOW ALL MEN BY THESE PRESENTS, THAT

*Mr. Sam Talbani, Thomas Talbani,
Tommy Talbani and Mary Talbani*

in the State aforesaid,

in consideration of the sum of

Five

Dollars,

to *the* in hand paid at and before the sealing of these presents by

Fanny Middleton

in the State aforesaid (the receipt whereof is hereby acknowledged,) have granted, bargained
sold and released by these Presents do grant, bargain, sell and release unto the said
Fanny Middleton All that certain piece
or parcel of land situate lying and being
on Johns Island in the County of Charleston
and State aforesaid measuring and containing
five (5) acres and being a part of lot No 24
of fifty four acres conveyed to me by *Arthur M.
Ely* Abtane by Deed bearing date the 20th day of
January 1905 and recorded in R. T. C. Office Charleston
County S. C. T. 24 page 137 December 1905. Said lot
No 24 being divided as follows: on the North by lots
25 & 27, on the East by lots 26, 27 & 28, on the South by lot
23, and in the West by *Pittin Road*, which said
boundaries are shown on a Plat made by *W. R.
Givens* Survey in Jan'y 1883

The State of South Carolina,
Charleston COUNTY.

PERSONALLY, appeared before me

Charleston COUNTY.
 PERSONALLY appeared before me Howard R. Polger
 and made oath that he saw the within named Paul Polger, Mary Polger
 sign, seal and _____ Act and Deed, deliver the within written Deed; and that

For with Alfred Bay

witnessed the execution thereof.

SWORN to before me this

Day of December A. D. 1894

Howard R. Bolger,

Freeman
Not Put

RENUNCIATION OF DOWER

The State of South Carolina,
COUNTY.

do hereby certify unto all whom it may concern, that Mrs.

the wife of the within named _____

did this day appear before me, and upon being privately and separately examined by me, did declare that she does freely, voluntarily, and without any compulsion, dread, or fear of any person or persons whomsoever, renounce, release and forever relinquish

unto the within named

Heirs and Assigns, all her interest and estate, and also all her right and claim of dower, of, in, or to all and singular the premises within mentioned and released.

Given under my Hand and Seal, this _____ day of _____

—Anno Domini 19—

DEAL

2122

TOGETHER, with all and singular the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining, TO HAVE AND TO HOLD, all and singular the said Premises before mentioned unto the said *Fanny Middleton*

her Heirs and Assigns forever

AND *we* do hereby bind *Ourself* and *our* Heirs, Executors and Administrators, to warrant and forever defend all and singular the said Premises unto the said *Fanny Middleton*, *her*

Heirs and *us* against *us* and *our* Heirs and all other Persons lawfully claiming, or to claim the same, or any part thereof

WITNESS *Our* Hand and Seals this *15th* day of *December*

in the year of our Lord one thousand nine hundred and *32* year of the Sovereignty

and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

J. M. Gay
Harriet Bolger

Samuel Bolger (L. S.)
Mary Bolger (L. S.)
Fanny + Bolger
Harriet Bolger

V. *James M. Webb*

June 21, 1911
State of South Carolina,

W. 23

Sum. Paterson

TO
James M. Webb

TITLE TO REAL ESTATE

2/1/11

Record

Book

Page

100

100

100

100

The State of NEW YORK

Form No 119 -- Quit Claim Deed
© Walker Evans & Cogswell Co. Chas & C
REVISED 1965



To All Whom These Presents May Come:

WHEREAS

I, George P. Middleton

NOW, KNOW ALL MEN BY THESE PRESENTS, That I the said

George P. Middleton

in consideration of the premises and also in consideration of the sum of (\$5.00) FIVE AND 00/100----- dollars
and Love and Affection for my sister
to her in hand paid at and before the sealing and delivery of these presents by Monica Middleton
225 East 95th Street # 5C, New York, New York 10128

(the receipt whereof is hereby acknowledged) have remised, released and forever quit-claimed, and by these presents
do remise, release and forever quit-claim unto the said Monica Middleton, her heirs and assigns

ALL THAT CERTAIN PIECE OF PARCEL OF LAND SITUATED LYING AND
BEING ON JOHNS ISLAND, IN THE COUNTY OF CHARLESTON AND IN THE
STATE OF SOUTH CAROLINA, MEASURING AND CONTAINING FIVE (5)
ACRES and being a part of lot No. 24 of fifty four acres
conveyed to us by Nettie M. and Eliza A. Haus by deed being
dated the 20th, day of January 1904 and recorded in R.M.C.
Office for Charleston County in deed Book T 24 page 137,
December 1905. Said Lot no. 24 being bounded as follow: on the
South by lots 25 & 27 on the East by lots 26, 27 & 28 on the
South by lot 23, and on the West by Public Road which said
boundaries are shown on a Plat made by W.D. Guernsey, survey in
July 1883.

TMS # 312-00-00-00-066

BEING the same property conveyed to Fannie Middleton by deed of
Sam Balaam, Thomas Balaam, Toney Balaam and Mary Balaam that is
recorded in deed dated December 15, 1905 in book W 24 at page
284 in the RMC Office.

2125

The State of NEW YORK

New York County }

PERSONALLY appeared before me the undersigned witness

and made oath that he/she saw the within named George P. Middleton

sign, seal, and as his act and deed, deliver the within written

Deed, and that he/she with the other witness

witnessed the execution thereof

SWORN to before me, this, the

6th day of March A.D. 1995 }

(SEAL)

Carole A. Weber
Notary Public

My Commission expires May 1, 1995

CAROLE A. WEBER
Commissioner of Deeds
City of New York No. 1-5607
Certificate Filed in New York County
Commission Expires May 1, 1995

The State of

County }

RENUNCIATION OF DOWER

I,

, A Notary Public for

do hereby certify unto all whom it may concern that Mrs

the wife of the within named

did this day appear before me, and upon being privately and separately examined by me, did declare that she does
freely, voluntarily, and without any compulsion, dread or fear of any person or persons whomsoever, renounce,
release and forever relinquish unto the within named

Heirs and Assigns, all her interest and estate, and also all her right and claim of dower, of, in or to all and singular the
premises within mentioned and released

Giver under my Hand and Seal, this

day of

Anno Domini, 19

Notary Public for

(SEAL)

My Commission expires

2126

QUITCLAIM DEED

PLAINTIFF'S
EXHIBIT

4

THE STATE OF NEW YORK
TO ALL WHOM THESE PRESENTS MAY COME:

I, Anthony Middleton, residing at 1851 Phelan Pl, Bx, NY, in consideration of the premises and in consideration of the sum of \$5 00 dollars and in further consideration of love and affection for my sister, Monica Middleton, in hand paid at and before the sealing and delivery of these presence by Monica Middleton, who resides at 225 East 95th Street, Apt 5C, New York, New York 10128 (the receipt whereof is hereby acknowledged) have remised, released and forever quitclaimed and by these presence do remise, release and forever quitclaim unto the said Monica Middleton, her heirs, successors and assigns

ALL that certain plot, piece or parcel of land, situated, lying and being on Johns Island, in the County of Charleston and in the State of South Carolina, measuring and containing five (5) acres and being a part of Lot No 24 of fifty four acres conveyed by Nettie M and Eliza A Haus by deed being dated the 20th day of January 1904 and recorded in RMC Office for Charleston County in Deed Book T 24 Page 137, December 1905 Said Lot No 24 being bounded as follows on the South by Lots 25 & 27 on the East by Lots 26, 27, 28 on the South by Lot 23, and on the West by Public Road which said boundaries are shown on a Plat made by WB Cuerard, survey in July 1883

TMS # 312-00-00-00-066

BEING the same property conveyed to Fannie Middleton by Deed of Sam Balaam, Thomas Balaam, Toney Balaam and Mary Balaam that is recorded in Deed dated December 15, 1905 in Book W 24 at Page 284 in the RMC Office

TOGETHER with all singular rights, members, hereditaments and appurtenance to the said premises belonging or in anywise incident or appertaining

TO HAVE AND TO HOLD all and singular the said premises before mentioned unto to the said Monica Middleton, her heirs and assigns forever - so that neither I, the said Anthony Middleton, nor my heirs, nor any other person or persons claiming under me or them, shall at any time hereafter, by any way or means, have, claim or demand any right or title to the aforesaid premises or any part thereof, forever

WITNESS my hand and seal this 17th day of October, 2001

Anthony Middleton
Anthony Middleton

Signed, Sealed and Delivered
In the presence of

[Signature]

STATE OF New York

SS
COUNTY OF New York

The foregoing instrument was acknowledged before me this 17th day of October, 2001 by Anthony Middleton

CAROLE A. WEBER

Commissioner of Deeds
City of New York No 1-6607
Certificate Filed in New York County
Commission Expires May 1, 2003

[Signature]
Notary Public

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2009 - CP -10 -5343

ROOSEVELT SIMMONS)
Plaintiff)
Vs.)
HATTIE BAILUM, RUBY BAILUM)
VERDONE GRAY, JULIE B. JOHNSON)
MONICA MIDDLETON,)
MARIE SMITH, MELVIN SINGLETON,)
FRANKLIN SMITH, LMC, LLC,)
JOHN MARTIN, ESQ. as TRUSTEE)
Defendants)

2010 OCT 26 PM 1:13
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

PRELIMINARY STATEMENT

As a result of allegations by defendants' counsel during the motion hearing that there were two Monica Middletons and that the issues raised in the Complaint had been addressed in the earlier Bailum v. Simmons case, the Court directed defendants to supplement their motion to dismiss and to proceed on the basis of a motion for summary judgment. Subsequently, Mr. Martin has recanted the statement concerning Monica Middleton in a letter to the Court. Defendants have filed a Supplemental Memorandum together with three exhibits from the Bailum v. Simmons trial and the transcript of the Middleton v. Doe case. Plaintiff submits this Memorandum and affidavits in opposition to summary judgment.

SUMMARY OF ARGUMENT

Plaintiff contends that summary judgment should be denied for several reasons. There are disputed issues of fact which must be resolved by a hearing. Defendants have not rebutted the plaintiff's allegations that sworn testimony in Middleton v. Doe was contradictory

to sworn testimony in Bailum v. Simmons. Defendants have not rebutted plaintiff's allegations that the Bailum defendants knowingly and willfully gave false testimony concerning Fannie Middleton in order to deprive Simmons of any interest in property acquired in 1905 (parcels 2,3 and 4 amounting to 30 acres). Defendants have not established that the Special Referee did not rely upon this false testimony. Defendants have not established that the issue of fraud on the Court was previously decided. Defendants have not established that plaintiff was even aware of the Middleton v. Doe case during the Bailum v. Simmons trial. In general, defendants have not shown that the material facts are undisputed. Plaintiff has submitted competent evidence to demonstrate that these facts and inferences derived from them support his claims. Consequently, defendants are not entitled to summary judgment on the issue of fraud on the Court so that this Court may not grant summary judgment as to that Count of the complaint.

Similarly, defendants are not entitled to summary judgment on the claim of extraordinary circumstances. The facts relating to fraud on the court are pertinent to this claim as well. In addition Simmons has sworn under oath that the Special Referee exhibited racial bias against him and ignored evidence that Simmons had the financial capability to close title on the 18 acres. Plaintiff alleges that but for this bias Simmons would have been allowed to complete the purchase. The Court of Appeals never decided these issues on appeal because Simmons appeal was dismissed after his attorney failed to perfect the appeal. In addition to the facts being in dispute, defendants are not entitled to summary judgment as a matter of law. The law is clear that res judicata bars a subsequent action only if plaintiff had a fair hearing on the merits of his claim in the earlier action.

Finally, plaintiff is entitled to conduct discovery on all of the relevant issues and this motion is premature.

LEGAL ARGUMENT

DEFENDANTS HAVE NOT MET THE STANDARD FOR SUMMARY JUDGMENT UNDER SCRPC 56

A. The Summary Judgment Standard

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. White v. J.M. Brown Amusement Co., 360 S.C. 366, 601 S.E.2d 342 (2004); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004); Redwend Ltd. Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct.App.2003). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct.App.1998). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

Under Rule 56(c), SCRPC, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Regions Bank v. Schmauch, 354 S.C. 648, 659 (Ct. App. 2003); Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125 (Ct.App.2001). Plaintiff contends that defendants have not met their burden under SCRPC 56 and that summary judgment should be denied.

B. The material facts are in dispute as to a Fraud on the Court.

The Complaint alleges that the Bailum defendants committed a fraud on the Court by conspiring to keep Monica Middleton's testimony in Middleton v. Doe secret by not calling her to testify; by avoiding a hearing on the merits before the Charleston County Master in Equity, instead asking for appointment of a Special Referee; falsely testifying about the lineage of Monica Middleton and the existence of another Sam Balaam, all done in order to deprive Simmons of his interest in real property acquired in 1905 (identified in the earlier case as parcels 2,3 and 4). Defendants' Supplemental Memorandum does not rebut any of these allegations with uncontroverted facts. Moreover, plaintiff contends that the facts as set forth below reasonably support his contention that there was a fraud on the Court.

1. There is only one Monica Middleton

Although defendants' former counsel, Mr. Martin asserted at the motion hearing on August 27th, that the Monica Middleton in the Bailum v. Simmons case was not the same Monica Middleton in Middleton v. Doe, he recanted that statement in a letter dated September 23, 2010. Therefore, the defendants acknowledge that there is only one Monica Middleton involved in both cases, as the plaintiff has contended from the very beginning. It is now undisputed that the Monica Middleton who testified in the Middleton v. Doe case is the same Monica Middleton who was a plaintiff in Bailum v. Simmons. Since the Court directed defendants to supplement their papers regarding the existence of another Monica Middleton, the Court should deny their motion for summary judgment because they failed to establish that the conflicting testimony was given about two different people.

2. The testimony is clearly contradictory

Defendants have failed to establish that the testimony given in the two cases was not contradictory. The record show that it clearly is. As part of their supplementation of the record,

defendants produced the Order Quieting Title and the Reference Testimony in Middleton v. Doe, 2002 CP- 4883. The subject property in that case was part of the 54 acres acquired in 1904 by Fannie Middleton, Sam Balaam, Thomas Balaam, Tony Balaam and Mary Balaam and consisted of a five acre parcel conveyed to Fannie Middleton in December 1905 by the other four co-owners. Plaintiff directs the Court to the Reference Testimony, page 3-4, attached to the Order Quieting Title in the case of Middleton v. Doe, 2002 CP- 4883 in which Monica Middleton testifies as to her relationship to Fannie Middleton.

“ Q. Who is the listed owner on this property?

A. My **great grandmother, Fannie Middleton** is the owner

Q. Do you know when she acquired the property?

A. I believe she got it in 1905

Q. Did your great grandmother have any children?

A. She had one **child, Paul H. Middleton**, who was my grandfather. ”

Plaintiff directs the Court to the testimony in Bailum v. Simmons given by plaintiff, Verdona Gray, on May 15, 2006 before Special Referee Mendelson at pages 148-149, Exhibit A , annexed to Affidavit of Edward A. Bertele, Esq.

“ Q. It that correct where it shows you as the daughter of Sammy and Ruby [Bailum] ?

A. Yes.

Q. And your **cousin** is Monica ?

A. Yes?

Q. And Thomas was your uncle?

A. Yes.

Q. And Sammie and Thomas , did they also have a sister named Fannie?

A. Yes.

Q. And was she married to a gentleman named Paul Middleton ?

A. Yes.

Q. And did Fannie have a daughter named Monica ?

A. Yes.

Q. And actually her name is Monica Middleton

Q. And up the chain above your father, your uncle and your aunt was Samuel who was married to Julia Morris Bailum.

A. Yes.

Q. **And Sammy, your grandfather, was the son of Sam Bailum who was married to Hester Bailum?**

A. Yes.

Therefore, the testimony in Middleton v. Doe was clearly contradictory to that given in Simmons v. Bailum regarding the lineage of Monica Middleton to Fannie Middleton.

3. The testimony was knowingly false and intended to mislead

Plaintiff contends that Verdone Gray gave false testimony that was knowingly false in order to mislead the Special Referee. It is reasonable to assume that Verdone Gray would know the identity of her own aunt. Verdone Gray's testimony that her aunt was Fannie Middleton and her cousin was Monica Middleton is contrary to Monica Middleton's testimony that her great grandmother was Fannie Middleton. It is reasonable to conclude that this testimony was knowingly false because there is no other explanation for it. Verdone Gray did not express any doubt or hesitation about her relationship to Fannie Middleton. Monica Middleton was not called to testify. Therefore, it is reasonable to conclude that Verdone Gray falsely testified that

Fannie Middleton was her aunt to mislead the Special Referee as to the relationship of Fannie Middleton to her father, Sam Bailum and in support of her claim of two Sam Balaams.

4. The Bailum heirs conspired to deprive Simmons of his heirs' interest

The complaint alleges that in addition to Verdone Gray's false testimony, the Bailum heirs conspired to defraud Simmons of an interest in parcels 2,3 and 4 by avoiding a hearing on the merits before the Charleston County Master in Equity who may have remembered Monica Middleton's testimony in Middleton v. Doe, instead asking for appointment of a Special Referee; and then not calling her to testify. The undisputed facts are as follows.

The Bailum heirs requested that a Special Referee be appointed to administer the case. By asking for appointment of a Special Referee, the Bailum heirs obligated themselves to pay substantial fees to whoever was appointed. The Order Quiet Title Partition and Sale at page 16 directs that the sum of \$6000. be withheld from the sale of the parcels to be paid to the Special Referee. These fees would not have been incurred if the case was heard by the Master in Equity. The appointment of a Special Referee when there is a sitting Master in Equity is highly unusual. South Carolina Code Section 15-60 et seq. requires that there be unusual circumstances for appointment of a Special Referee. The Order appointing the Special Referee does not make any such finding as required by statute. Finally, Simmons had specifically objected to the appointment of Joseph Mendelson as Special Referee. See Affidavit of Roosevelt Simmons.

5. The Special Referee relied upon the false testimony relating to Monica Middleton

Contrary to defendants' claim that testimony about Monica Middleton's lineage was not relevant, the trial record establishes that it clearly was. It is undisputed that Monica Middleton did not testify at the trial and that there was no other testimony about the lineage of Monica

Middleton from other Bailum heirs. With respect to the Bailum heirs claim that Simmons had no interest in parcels 2,3 and 4, the Order Quiet Title Partition and Sale at page 6 provides:

“ Sam Bailum, Thomas Bailum, Tony Bailum, Mary Bailum and Fannie Bailum Middleton, **the children of Samuel Bailum** acquired approximately fifty –four acres on Johns Island . . . on January 20, 1904.. . . The heirs of Hester Singleton Bailum have no claim or interest in [this property] as her husband had no interest in this property.”

Therefore, it is apparent that the Special Referee relied upon Verdone Gray’s false testimony in awarding the Bailum heirs the sale proceeds from parcels 2,3 and 4(\$337,000) of which Monica Middleton individually received a 25% interest. See Order Quiet Title Partition and Sale at page 15. No other conclusion is possible since there was no other evidence.

As part of their Supplemental Memorandum, defendants’ attached birth certificates for two Sam Bailums which they introduced into evidence before the Special Referee. See Exhibits 1 & 2. According to these birth certificates, one of these Sam Bailums was born on May 19, 1902 (Exhibit 1) and the other on August 28, 1928 (Exhibit 2). Neither of these Sam Bailums could have acquired the 54 acres in 1904 or the 18 acres in 1910 since the first was underage and the second was not yet born. The Special Referee could not have relied on these documents to find that there were two different Sam Bailums involved in the two transactions. Therefore it is reasonable to conclude that the Special Referee based his decision that there two different Sam Bailums based solely upon the testimony of Verdone Gray not because of any objective evidence of ancestry since none was introduced .

6. Simmons had an heirs interest in Parcels 2,3 and 4 and was deprived of the sale proceeds

Simmons had an heirs interest in parcels 2,3 and 4 because his grandmother, Hester Singleton was married to Sam Balaam, the person who acquired an interest in the 54 acres in 1904. During the hearing before the Special Referee, Simmons introduced a family tree

consistent with his claim as an heir of Hester Balaam showing the relationship of Hester's children to the children of Sam Balaam from his first marriage. See Exhibit 2, Supplemental Affidavit of Roosevelt Simmons . But for the fraud on the court, the Special Referee would have had no basis to deny Simmons heirs interest in parcels 2,3 and 4. Instead Simmons received nothing from the proceeds of sale. See Order at page 14-15.

Defendants assert that Simmons interest in parcels 2,3 and 4 was de minimis but this is disputed. During the trial, Simmons presented quitclaim deeds from other surviving heirs of Hester Balaam relinquishing their interest in the 18 acres acquired by Sam Balaam in 1910. See Order Quiet Title Partition and Sale at page 6. Due to the error/neglect of Simmons first attorney, Arthur McFarland, these deeds did not contain reference to parcels 2,3 and 4. Simmons later obtained quitclaim deeds for parcels 2,3 and 4 from the heirs who wanted him to have their interest in all of the heirs property . See Supplemental Affidavit of Roosevelt Simmons and Exhibit 1. Therefore Simmons had a substantial interest in parcels 2,3 and 4.

The defendants have also made other erroneous statements in their Supplemental Memorandum that must be corrected for the record. Defendants state that “ the residual acreage in all three parcels (TMS 312-00-00-032, 065 & 067) total 22.2 acres. However, the acres are much higher according to the records of the Charleston County Tax Assessor, copies of which are attached as Exhibit B, Affidavit of Edward A. Bertele as follows: TMS 312-00-00-032 contains 19.14 acres (estate of Sam Balaam) ; TMS 312-00-00-065 contains 5.0 acres estate of Sam Balaam); TMS 312-00-00-067 contains 4.98 acres (estate of Toney Balaam). Therefore , according to the Charleston County Tax Assessor, the total acreage of parcels 2, 3 and 4 is 29.12 not 22.2.

7. Simmons was unaware of the Middleton v. Doe case until after the Bailum decision

Simmons has sworn under oath that he told his first attorney Arthur McFarland to get quitclaim deeds for all of the heirs property including TMS 312-00-00-066 and was not aware that McFarland was also working for Monica Middleton at the same time on the same property. See Supplemental Affidavit of Roosevelt Simmons, para.2. He did not find out that McFarland did not obtain quitclaim deeds until after the Bailum case was decided and then Simmons found that a judgment had been entered awarding Monica Middleton title to TMS 312-00-00-066. Simmons acted reasonably under the circumstances and his testimony has not been rebutted by defendants.

Defendants contend that Monica Middleton's testimony in the Middleton v. Doe case was in the public record and that Simmons is chargeable with notice of it. However they also argue that Monica Middleton's testimony in that case was not relevant to a determination of the issues in the Bailum case. Therefore if it was not relevant then he had no reason to search the record.

In summary, most if not all of the plaintiff's contentions have factual support and defendants have not submitted competent evidence to rebut them.

C. There are disputed issues of fact regarding the claim of extraordinary circumstances

The Complaint alleges that the fraud on the Court was part of the extraordinary circumstances by which Simmons was denied the right to purchase the 18 acres of property under the Order Quiet Title Partition and Sale. Therefore all of the disputed issues of fact set forth above also are relevant to Count of the Complaint alleging unusual circumstances. Simmons also contends that he financially able to purchase the 18 acre parcel (parcel 1) but the Special Referee unreasonably refused to sign the deed due to the bias and failure to consider

Simmons proffer of the necessary financing. Simmons also presented evidence of a single Sam Balaam in support of a new trial motion. These issues were never heard or decided on appeal because Simmons appeal was abandoned by his appellate attorney .

Defendants assert that this is the fault of Simmons attorney and cannot be reviewed in this case because it would require the re- trial of all of the issues. The law is clear that res judicata does not bar a rehearing of facts which were previously decided unless there was a fair and adequate opportunity for the injured party to be heard. Plaintiff contends that he did not have such a fair and adequate opportunity to be heard.

1. The Special Referee was biased against Simmons and acted unreasonably in denying him the right to complete the purchase of Parcel 1

Simmons contends that the Special Referee was biased against him because the Special Referee made a disparaging racial remark directed at Simmons during a status conference in January 2005. Simmons filed a Judicial Grievance against him as a result of his behavior but it was not acted upon due to the pendency of the appeal. See Supplemental Affidavit of Roosevelt Simmons and Exhibit 6. Simmons has sworn under oath that he timely provided proof of financial capability to close title on parcel 1, consisting of a \$150,000. loan commitment made to Frederic Fields and a bank letter to Christian Redell confirming a deposit of \$15,000; and that both men had agreed to lend him this money to complete the purchase. See Supplemental Affidavit of Roosevelt Simmons and Exhibits 2 and 3. Further, Simmons alleges that the Special Referee ignored the fact that Christian Redell personally told the Special Referee that he was providing some of the purchase money to Simmons. Id at Exhibit 3. The Special Referee refused to believe that Simmons' friends, Frederic Fields and Christian Ridell were providing financing to Simmons. Without any evidence to support the conclusion, the Special Referee

decided that they were acting as purchasers instead. See Exhibit C at pages 37-38, Affidavit of Edward A. Bertele

2. Simmons was denied any review of the Special Referee's actions because his attorney abandoned the appeal

After the Special Referee refused to convey title to Simmons, he retained new counsel, Charles Houston, Esq. who filed a motion for new trial. At the hearing on this motion, Houston argued that the ages shown on the death certificates for the two Sam Balaams established that they were not old enough to have acquired either property in 1904 or 1910. See Exhibit C, transcript of June 6, 2006 motion hearing, at pages 22-23, Affidavit of Edward A. Bertele. Houston also referred to Census Bureau records which Simmons had recently found indicating that there was only a single Sam Balaam on Johns Island during the period in question. Id at page 23. This was relevant to the Order Quiet Title Partition and Sale denying Simmons any interest in parcels 2,3 and 4. Notwithstanding his denial of a new trial, the Special Referee ordered that 1/3 of the proceeds from the sale of parcels 2,3 and 4 be held in escrow pending completion of the appeal. Order dated June 28, 2007 at page 6.

It is undisputed that there was no review of the Special Referee's decision because the Court of Appeals dismissed the appeal granted Houston. It is also undisputed that the Court of Appeal granted numerous extensions to file the appellant's brief but that attorney Houston failed to do so. The rule that the neglect of an attorney will be imputed to the client "is not a hard and fast rule. Rather, it is one that is to be applied rationally, with a fair recognition that justice to the litigants is always the polestar." Brown v. Butler, 347 S.C. 259 (2001) (quotation omitted). It is not applicable when the attorney's neglect rises to the level of willful abandonment. Graham v. Town of Loris, 272 S.C. 442, 452 (1978); see also 7A C.J.S. Attorney

& Client § 181, at 285 (1980) (where the conduct of counsel is outrageously in violation of his implicit duty to devote reasonable efforts in representing his client, his acts will not always be imputed to his client). Houston's failure to perfect the Simmons appeal after numerous extensions were granted rises to the level of abandonment since it is outrageous and in violation of his duty to devote reasonable efforts on behalf of his client. "Conscience requires this Court to charge the attorney alone with his gross dereliction of duty and not to visit its consequences upon an innocent client." Graham v. Town of Loris, 272 SC 442,452-453 (1978). Simmons alleges that any attorney neglect attributable to Houston should not under these facts attach to him.

In summary, whether Simmons was denied a fair hearing on his claim to an heirs interest in Parcels 2,3 and 4 due to bias by the Special Referee because of his attorney's abandonment of the appeal presents a question issue of fact which precludes the granting of summary judgment.

D. Plaintiff has provided competent evidence of disputed issues of fact

Assuming but not conceding that defendants have proffered competent evidence that the material facts are not in dispute, plaintiff has offered evidence to show that a dispute of fact does exist. To survive a motion for summary judgment, the non-moving party must offer some evidence that a genuine issue of material fact exists as to each element of the claim. Steele v. Rogers, 306 S.C. 546, 552, 413 S.E.2d 329, 333 (Ct.App.1992). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank, supra, 354 S.C. at 660. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. SSI Med. Servs., Inc. v.

Cox, 301 S.C. 493, 392 S.E.2d 789 (1990); Peterson v. West American Ins. Co., 336 S.C. 89, 518 S.E.2d 608 (Ct.App.1999); SCRPC 56(c).

Plaintiff has offered the transcript of the testimony in Bailum v. Simmons about Fannie Middleton to show that there is a contradiction between that testimony and the testimony by Monica Middleton about her ancestor, Fannie Middleton in Middleton v. Doe which is arguably false and knowingly false. Plaintiff has offered evidence to support his claim that the Special Referee was biased, that he unreasonably refused to consider Simmons evidence of financial capability, that he did not receive a fair hearing on this issue. Therefore, the Court should find that there are disputed issues of fact and deny the defendants motion for summary judgment.

**SUMMARY JUDGMENT SHOULD NOT BE GRANTED
BECAUSE DISCOVERY IS NOT COMPLETE**

“[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” Baird v. Charleston County, 333 SC 519 (1999). The Court has permitted defendants to convert their R 12(b) (8) motion to dismiss into a motion for summary judgment. However, in view of the number of issues which need to be addressed, this Court should permit the plaintiff to fully develop all of the facts. As the Court of Appeals noted in T v. T, 662 S.E.2d at 417: “what we do suggest is that equity only intervenes when the circumstances so require, but to do so, **a court must be aware of all of the circumstances before it acts**. Thus, the parties must be allowed to develop the record accordingly.” (emphasis added). Simmons contends that the facts as alleged in the complaint establish a prima facie cause of action to vacate the judgment under either “exceptional circumstances” or “fraud on the

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2009 - CP -10 - 5343

ROOSEVELT SIMMONS)
Plaintiff)
Vs.)
HATTIE BAILUM, RUBY BAILUM)
VERDONE GRAY, JULIE B. JOHNSON)
MONICA MIDDLETON,)
MARIE SMITH, MELVIN SINGLETON,)
FRANKLIN SMITH, LMC, LLC,)
JOHN MARTIN, ESQ. as TRUSTEE)
Defendants)

AFFIDAVIT OF EDWARD A. BERTELE

Edward A. Bertele, of full age according to law upon his oath deposes and says:

1. I am an attorney at law of the state of South Carolina and have personal knowledge of the following.

2. Attached as Exhibit A is a true copy of the transcript of the May 15, 2006 hearing in Bailum v. Simmons, pages 147-149.

3. Attached as Exhibit B are true copies of the Charleston County Tax Assessor records concerning TMS 312-00-00-032, -065 and 067.

4. Attached as Exhibit C is a true copy of the transcript of the June 6, 2007 motion hearing in Bailum v. Simmons, pages 1-3, 22-25, 37-38.


Edward A. Bertele

Sworn and subscribed before me
This ___ day of October, 2010

Notary Public of South Carolina

¹
Exhibit A.
R 142

AFFIDAVIT OF EDWARD A. BERTELE

LIST OF EXHIBITS

- A. TRANSCRIPT OF MAY 15, 2006 HEARING
- B. CHARLESTON COUNTY TAX ASSESSOR RECORDS:
TMS 312-00-00-032,065 AND 067
- C. TRANSCRIPT OF JUNE 6, 2006 MOTION HEARING

A. TRANSCRIPT OF MAY 15, 2006 HEARING

Transcript of Special Referee Hearing

Page 1

IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
CHARLESTON COUNTY

HATTIE BAILUM, RUBY BAILUM,
VERDONE GRAY, ESTATE OF CLARA
BAILUM, and ESTATE OF THOMAS
BAILUM,

Plaintiffs,

vs.

CASE NO. 04-CP-10-1459

ROOSEVELT SIMMONS, JULIE JOHNSON,
MONICA MIDDLETON, PAUL MIDDLETON
(2), ESTATE OF JOSEPHINE SIMMONS
BAILUM, ESTATE OF ELLIS BAILUM,
ESTATE OF SAMUEL BAILUM (2), ESTATE
OF BUBSY BAILUM, ESTATE OF WALTER
BAILUM, ESTATE OF MARY BAILUM,
ESTATE OF TONY BAILUM, ESTATE OF
FANNIE BAILUM, ESTATE OF
EVELYN BAILUM, ESTATE OF ELIZA
MACK BAILUM, ESTATE OF SARAH
BAILUM, ESTATE OF SAMUEL BAILUM (3),
ESTATE OF PAUL MIDDLETON (1), ESTATE
OF ESTHER SINGLETON BAILUM, ESTATE
OF JULIA MORRIS BAILUM, LEON ELIJAH
SINGLETON, MABEL SINGLETON HICKS,
WALTER BURNS, ALONZETTA BURNS,
SHEILA BURNS OWENS, LOUISE CANTY
and J. DOE, adults, and M. ROE, infants,
insane persons, incompetents, being
fictitious names designating a class
of persons, known or unknown, who may be
heirs, distributees, devisees, legatees,
widow, widower, assignees, executors,
administrators, creditors, successors,
issue, and alienees of the ESTATE of
SAMUEL BAILUM, deceased, and ALL OTHER
PERSONS UNKNOWN, claiming any right,

Clark & Associates, Inc.
843.762.6294

R 146

565e526c-70cf-41ad-85eb-3fb7ac6b1549

Transcript of Special Referee Hearing

Page 2

1 title, estate, interest in or lien
2 upon the real property described in the
3 complaint, adverse to plaintiffs'
4 ownership, or any cloud on plaintiff's
title,
5 Defendants.

6 BEFORE THE HONORABLE JOE MENDELSON
7

8 DATE: MAY 15, 2006

9 TIME: 10:00 AM
10

11 LOCATION: MARTIN LAW FIRM
12 113 Wappoo Creek Drive
13 James Island, South Carolina
14
15
16
17
18
19
20

21 REPORTED BY:

22 ANGELA VANOY, ~~W. Menelsohn~~ *W. Menelsohn of*
COURT REPORTER
23 CLARK & ASSOCIATES, INC.
P.O. Box 73129
24 Charleston, SC 29415
25 843-762-6294

Clark & Associates, Inc.
843.762.6294

R 147

Transcript of Special Referee Hearing

Page 147

1 A. Yes.

2 Q. Did he frequently visit the property?

3 A. Yes.

4 Q. Did he receive and pay tax bills and pay
5 taxes?

6 A. Yes.

7 Q. And you have evidence of those taxes which
8 we just reviewed?

9 A. Yes.

10 Q. Now, since 1999, have Clara Bailum and
11 Hattie Bailum been dealing with the property?

12 A. Yes.

13 Q. And I've also sent you a copy of the
14 document marked the Bailum's family tree?

15 A. Uh-huh.

16 Q. To the best of your recollection and your
17 knowledge of your family, is that a true and accurate
18 reflection of the Samuel Bailum heirs?

19 A. Yes.

20 Q. Now, I see you on the left -- what I call
21 box of the chart where it says Verdone Bailum --

22 A. Yes.

23 Q. -- actually it's Verdone Gray --

24 A. Uh-huh.

25 Q. -- because you're married. But is that

Transcript of Special Referee Hearing

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1 correct where it shows you as the daughter of Sammy
2 and Ruby?

3 A. Yes.

4 Q. And then your cousin is Hattie?

5 A. Yes.

6 Q. And your cousin is Monica?

7 A. Yes.

8 Q. Hattie's parents were Thomas and Clara?

9 A. Uh-huh.

10 Q. And do you know this -- and you know of
11 your personal knowledge that Thomas and Clara were
12 married, and they were Hattie's parents?

13 A. Excuse me?

14 Q. Do you know of your personal knowledge
15 that Hattie's parents were Thomas and Clara?

16 A. Yes.

17 Q. And Thomas was your uncle?

18 A. Yes.

19 Q. And Sammy and Thomas, did they also have a
20 sister named Fannie?

21 A. Yes.

22 Q. And was she married to a gentleman named
23 Paul Middleton?

24 A. Yes.

25 Q. And did Fannie have a daughter named

Transcript of Special Referee Hearing

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1 Monica?

2 A. Yes.

3 Q. And actually her name is Monica Middleton
4 now. So is your mother still alive?

5 A. Yes.

6 Q. And up the chain above your father, your
7 uncle and your aunt was Samuel who was married to
8 Julia Morris Bailum?

9 A. Yes.

10 Q. Did he have brothers and sisters?

11 A. Yes.

12 Q. Was he the last surviving, in that line,
13 to have children?

14 A. Sammy, yes.

15 Q. He outlived everybody else?

16 A. That's correct.

17 Q. And Sammy, your grandfather, was the son
18 of Sam Balium who was married to Hester Bailum?

19 A. Yes.

20 Q. So as we speak now, there are only four
21 Bailums left, Ruby, Verdone, Hattie and Monica; is
22 that correct?

23 A. No.

24 Q. There's one more. There's Julie, right?

25 A. Yes.

B. CHARLESTON COUNTY TAX ASSESSOR RECORDS:
TMS 312-00-00-032,065 AND 067



Charleston County, South Carolina

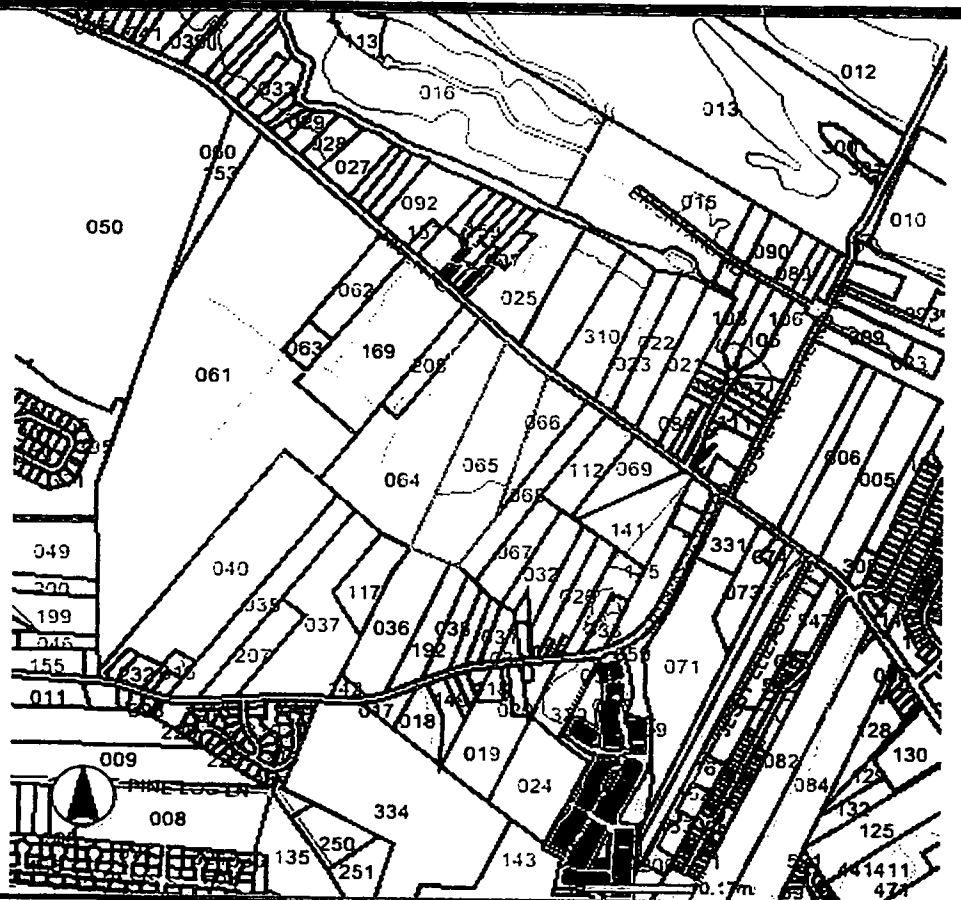
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 Charleston County GIS
 4045 Bridge View Drive
 North Charleston, SC 29405-7464

Legend

☐ Selected Features

Streets/Roads

☐ Parcels



PARCEL NUMBER : 3120000065

PARCEL ID: 3120000065

STREET NUMBER: 0

STREET NAME: RIVER RD

PROP UNIT:

PROP CITY:

PROP ZIP: 29455

SITE NAME: NW SIDE APPROX 1480 FT NW MURRAY WOOD R

GENERAL USE: AGR

MOBILE HOMES: 0

SUBDIVISION:

LEGAL DESCRIPTION:

LGL HI ACRES: 12.22

LGL MAR ACRES: 0

LGL WATER ACRES: 0

LGL SWAMP ACRES: 6.92

LGL TOTAL ACRES: 19.14

TAX DISTRICT: 51

JURISDICTION: CTA

PLAT BOOK: UNREC M

OWNER ON 1ST: LMC LLC

OWNER2 ON 1ST:

CURRENT OWNER1:

R152

CURRENT OWNER2:
SALE DATE: 12/9/2008
DEED BOOK: 0024-716
WILL CODE:
WILL DATE:
C O NAME:
MAIL STREET NUMBER: 2812
MAIL STREET NAME: MAYBANK HWY
MAIL UNIT:
MAIL CITY: JOHNS ISLAND
MAIL STATE: SC
MAIL ZIP: 29455-4839
MAIL COUNTRY:
MAIL POSTAL CODE:
SALE PRICE: 10
MULT LOT: 3
SPLIT CODE:
MLOD GROUP:
FINAL VALUE: 0
BUILD COUNT: 0
AG USE VAL: 5000
AG MARKET TOT: 300000
LR APPROVE: N
YEAR BUILT: 0
BEDROOMS: 0
FULL BATHS: 0
THREE QTR BATHS: 0
HALF BATHS: 0
TOTAL FINISH AREA: 0
LIVING AREA: 0
CONDO-BEDROOM: 0
CONDO FULL BATH: 0
CONDO H-BATH: 0
CONDO YR BUILT: 0



Charleston County, South Carolina

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Charleston County GIS

4045 Bridge View Drive

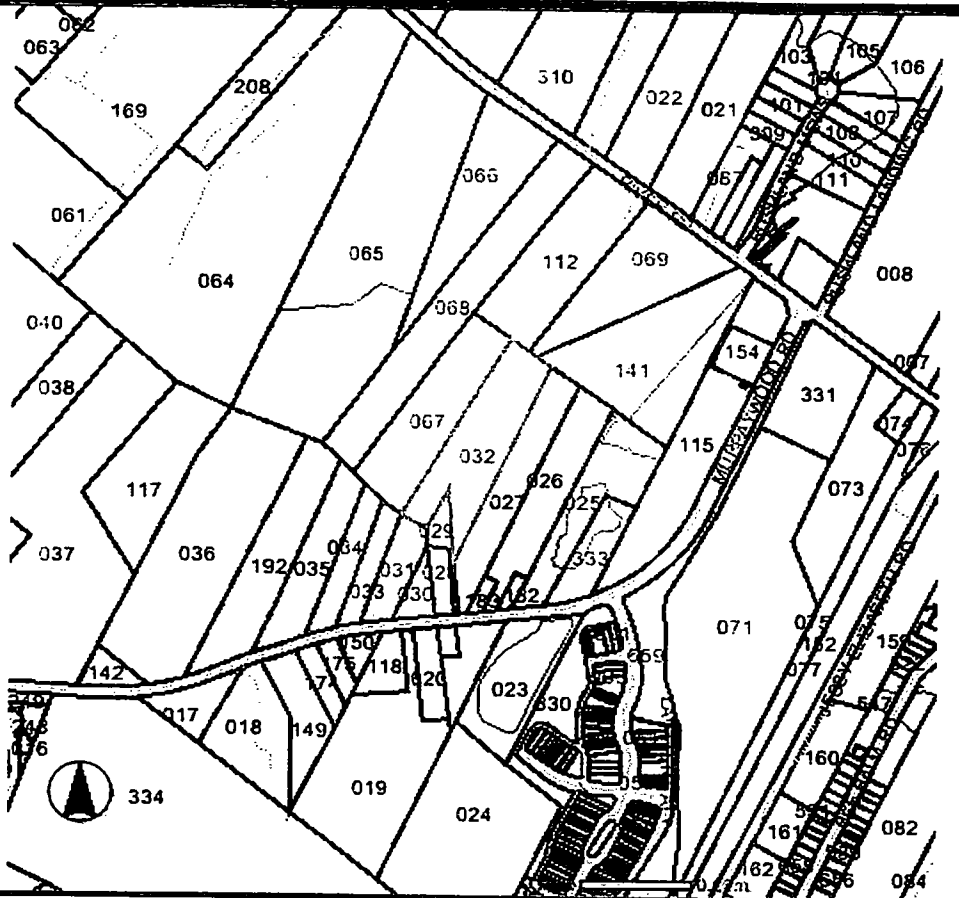
North Charleston, SC 29405-7464

Legend

☐ Selected Features

Streets/Roads

☐ Parcels



PARCEL NUMBER : 3120000032

PARCEL ID: 3120000032

STREET NUMBER: 0

STREET NAME: RIVER RD

PROP UNIT:

PROP CITY:

PROP ZIP: 29455

SITE NAME: APPROX 860 FT SW 190 FT NW MURRAY WOOD

GENERAL USE: AGR

MOBILE HOMES: 0

SUBDIVISION: MURRAY GIBBS

LEGAL DESCRIPTION: LT SE PT LT 24

LGL HI ACRES: 5

LGL MAR ACRES: 0

LGL WATER ACRES: 0

LGL SWAMP ACRES: 0

LGL TOTAL ACRES: 5

TAX DISTRICT: 51

JURISDICTION: CTA

PLAT BOOK: L08214

OWNER ON 1ST: LMC LLC

OWNER2 ON 1ST:

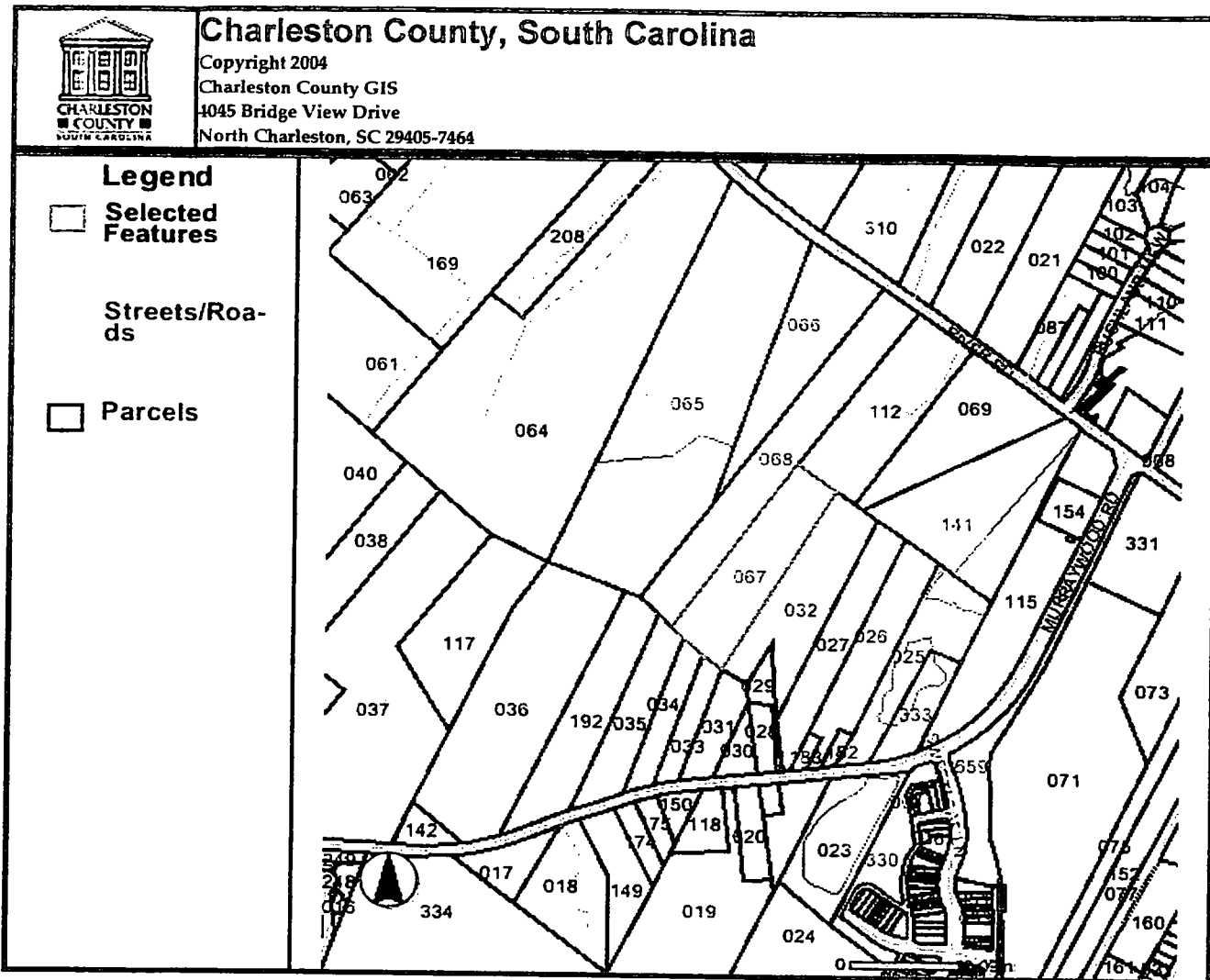
CURRENT OWNER1:

2154

CURRENT OWNER2:

SALE DATE: 12/9/2008
DEED BOOK: 0024-716
WILL CODE:
WILL DATE:
C O NAME:
MAIL STREET NUMBER: 2812
MAIL STREET NAME: MAYBANK HWY
MAIL UNIT:
MAIL CITY: JOHNS ISLAND
MAIL STATE: SC
MAIL ZIP: 29455-4839
MAIL COUNTRY:
MAIL POSTAL CODE:
SALE PRICE: 10
MULT LOT: 3
SPLIT CODE:
MLOD GROUP:
FINAL VALUE: 0
BUILD COUNT: 0
AG USE VAL: 1400
AG MARKET TOT: 20000
LR APPROVE: N
YEAR BUILT: 0
BEDROOMS: 0
FULL BATHS: 0
THREE QTR BATHS: 0
HALF BATHS: 0
TOTAL FINISH AREA: 0
LIVING AREA: 0
CONDO-BEDROOM: 0
CONDO FULL BATH: 0
CONDO H-BATH: 0
CONDO YR BUILT: 0

R155



PARCEL NUMBER : 3120000067

PARCEL ID: 3120000067

STREET NUMBER: 0

STREET NAME: RIVER RD

PROP UNIT:

PROP CITY:

PROP ZIP: 29455

SITE NAME: NW SIDE APPROX 1240 FT NW MURRAY WOOD R

GENERAL USE: AGR

MOBILE HOMES: 0

SUBDIVISION:

LEGAL DESCRIPTION:

LGL HI ACRES: 4.98

LGL MAR ACRES: 0

LGL WATER ACRES: 0

LGL SWAMP ACRES: 0

LGL TOTAL ACRES: 4.98

TAX DISTRICT: 51

JURISDICTION: CTA

PLAT BOOK: UNREC G

OWNER ON 1ST: LMC LLC

OWNER2 ON 1ST:

CURRENT OWNER1:

CURRENT OWNER2:

SALE DATE: 12/9/2008
DEED BOOK: 0024-716
WILL CODE:
WILL DATE:
C O NAME:
MAIL STREET NUMBER: 2812
MAIL STREET NAME: MAYBANK HWY
MAIL UNIT:
MAIL CITY: JOHNS ISLAND
MAIL STATE: SC
MAIL ZIP: 29455-4839
MAIL COUNTRY:
MAIL POSTAL CODE:
SALE PRICE: 10
MULT LOT: 3
SPLIT CODE:
MLOD GROUP:
FINAL VALUE: 0
BUILD COUNT: 0
AG USE VAL: 1400
AG MARKET TOT: 20000
LR APPROVE: N
YEAR BUILT: 0
BEDROOMS: 0
FULL BATHS: 0
THREE QTR BATHS: 0
HALF BATHS: 0
TOTAL FINISH AREA: 0
LIVING AREA: 0
CONDO-BEDROOM: 0
CONDO FULL BATH: 0
CONDO H-BATH: 0
CONDO YR BUILT: 0

C. TRANSCRIPT OF JUNE 6, 2006 MOTION HEARING

transcript (word)

0001

1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 CHARLESTON COUNTY
4 SPECIAL REFEREE HEARING
5 HATTIE BAILUM a/k/a HATTIE BALLAM; RUBY BAILUM a/k/a
RUBY BALAAM; VERDONE GRAY; JULIE B. JOHNSON; MONICA
MIDDLETON,
6 Plaintiffs, Respondents,
7 vs. CASE NO. 04-CP-10-1459
8 ROOSEVELT SIMMONS, LEON SINGLETON, MABEL SINGLETON HICKS
a/k/a MAYBELL HICKS, WALTER BURNS; SHEILA B. OWENS,
9 LOUISE CANTY; ALONZETTA BURNS; SHARON BURNS, MELVIN
SINGLETON, MARIE SMITH, ELMORE SINGLETON, THEODESIA
10 SINGLETON, MILDRED SINGLETON MAHONEY, ANDRE SINGLETON,
EUGENE LEON ELIJAH SINGLETON, ERNEST GREEN, JR., KAREN
11 GREEN, DELORIS GREEN, JOAN GREEN WELLS, DELBERT BURNS,
JOE LOUIS BURNS, JR., a/k/a JOE LEWIS BURNS, JR., VONIE
12 BURNS, SHELLY BURNS, ANASTACIA BURNS, TREMAYNE BURNS,
JOSHUA BURNS, JARRED BURNS, AMBER BURNS, if they be
13 alive, and JOHN DOE and MARY ROE, adults, and Richard
ROE and JANE DOE, infants, person under disability or
14 incompetence, if any, including those persons who might
be in the military covered under the Soldier's Relief
Act, fictitious names designating the unknown heirs,
15 devisees, distributees, issue, executors, administrators,
successors or assigns of the above named Defendants, and
16 also the following deceased persons: ESTATE OF SAMUEL
BAILUM a/k/a SAMUEL BAALUM, deceased or the ESTATE OF
17 HESTER SINGLETON BAILUM a/k/a ESTHER BAILUM a/k/a ESTHER
BAALUM, HESTER SINGLETON BAALUM, THOMAS BAILUM, SAMUEL
18 BAILUM, SAMMY BAILUM, FANNIE BAILUM MIDDLETON, MARY
BAILUM, JOSH SINGLETON, ELOUISE SINGLETON, CARRIE BURNS,
19 JERRY SINGLETON, ARTHUR SINGLETON, EUGENE SINGLETON,
RICHARDINE SINGLETON, EUGENE SINGLETON, JR., GARY
20 SINGLETON, CHRISTOPHER BURNS, JULIUS BURNS, ARTHUR LEE
BURNS, ARLENE GREEN, ERNEST GREEN, JOE LOUIS BURNS a/k/a
21 JOE LEWIS BURNS, EMILY BURNS, QUEEN SINGLETON, and
JULIUS BURNS, JR., and all other persons know or
22 claiming any right, title, estate in or lien upon the
real estate in or lien upon the real estate described in
23 the Complaint herein,
24 Defendant, Respondents,
of whom Roosevelt Simmons is the Defendant/Appellant.

25
0002

1 BEFORE: HON. JOSEPH S. MENDELSON, SPECIAL REFEREE
2 DATE: JUNE 6, 2007
3 TIME: 9:30 A.M.
4 LOCATION: MARTIN LAW FIRM
113 Wappoo Creek Drive
5 Charleston, South Carolina
6 REPORTED BY: DENISE MCCAULEY, RPR, IA-CSR, GA-CCR
CLARK & ASSOCIATES
7 P.O. Box 73129
North Charleston, South Carolina 29422
8 (843)762-6294
9
10
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12

transcript (word)

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0004

BEFORE: A P P E A R A N C E S:

HON. JOSEPH S. MENDELSON,
Special Referee
P.O. Box 250
Charleston, South Carolina 29402

ON BEHALF OF THE PLAINTIFFS:

MARTIN LAW FIRM
BY: JOHN F. MARTIN, ESQ.
113 Wappoo Creek Drive
Charleston, South Carolina 29412
(843)762-2121

ON BEHALF OF THE DEFENDANT, MARIE SMITH:

BY: BRUCE A. BERLINSKY, ESQ.
P.O. Box 206
Charleston, South Carolina 29402

ON BEHALF OF THE DEFENDANT, ROOSEVELT SIMMONS:

THE HOUSTON LAW FIRM
BY: CHARLES E. HOUSTON, JR.
Four Carriage Lane, Suite 206
Charleston, South Carolina 29407
(843)406-0101

ALSO PRESENT:

ROOSEVELT SIMMONS

I N D E X

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0005

(The hearing commenced at 9:47 a.m.)

THE COURT: This is a hearing in the matter of -- today is the 6th of June, D Day, 2007, and this is a case -- this is a hearing in the matter of Hattie Bailum, and et al. and Mr. Roosevelt Simmons, et al., and Mr. Berlinsky is here. Mr. Martin is here. Mr. Houston is here, and Mr. Simmons is here. And I am holding this hearing as the special referee.

Now, I think it would be probably appropriate if we recap from the order that I signed and was registered or filed with the court. And, Skip, can you or Bruce or Mr. Houston, Charles, can you all find -- I've got -- I've got a lot of that stuff here. We amended it. When was it ultimately filed.

MR. HOUSTON: April I gave my notice of appeal.

MR. MARTIN: I don't know if I've got your notice of appeal. I've got your recent motion. I can go on the Charleston County -- well, we served the amended order and the order to quiet title and the sale and order on March the 6th, and I believe that was a day or two after you signed it.

THE COURT: I signed it, because I've got

that right here. I signed it on February the 16th, 2007, the amended special referee's order to quiet the title partition and sell the property. Now, that's the date that I have of the order. Now --

MR. MARTIN: Actually, there was an original order that was filed.

THE COURT: There was an original order.

MR. MARTIN: And then Louie Condon filed a motion.

THE COURT: Louis filed a motion to reconsider, and, in fact, we did reconsider.

MR. MARTIN: We had a hearing in your office, and then that's from which the amended order and the second order denying his motions emanated. That order should have been dated the same date also.

THE COURT: All right. Here's the amended special referee's order, which is the last standing order in this case. This is the one, as far as I

transcript (word)
if a stay is granted. Okay? If a stay isn't granted, my lady isn't affected title-wise. But how my lady is affected is, just like Mr. Goldberg, is we wouldn't have the use of the property. We wouldn't have to convey it back, you know, under the order if Mr. Houston wins on appeal like the buyers for his heirs may end up be having to do. So I'm not affected from a real estate, from a title standpoint, but I am affected from a use standpoint.

THE COURT: Mr. Houston, what do you want to say to me?

MR. HOUSTON: What I want to say is this, Your Honor. Here again, one, there's nothing in the record pertaining to the irreparable harm to these people, so far as if they don't get the money

tomorrow, they're going to die in poverty. All right?

THE COURT: There's been nothing in the record?

MR. HOUSTON: No testimony. Nothing in the record that if this thing doesn't go through tomorrow that they're going to, you know, suffer any irreparable harm. Those are just words of counsel.

THE COURT: Well, Mr. Houston, I think you're asking the court to not consider the fact of the loss of use in the one instance of the property or in the other instance the loss of use of the money and the use time of money. I mean, you're asking me to be oblivious to what's a real world situation, and I don't see that as being realistic.

In terms of testimony, the representations by these lawyers, as well as you, about certain things, for instance, the census stuff, I think what's good for the goose is good for the gander, and I'll sort through it, but go ahead.

MR. HOUSTON: Well, we're putting it all on the table. We know that you're going to sort through it.

THE COURT: All right. What's the next issue?

MR. HOUSTON: Here again, what I'm going to say is, number one, in reference to that rent situation, nothing was provided in the order for the payment of over or nothing has been provided for his expenses in caring for the property. So that's a wash-out situation. I don't think there's any substantial rent being obtained from the property.

The basic thing again, and this is a reference to the -- we did have the -- this is not the official transcript, but I have read the transcript, so I'm familiar with the testimony. And this is why I brought it up before about the fact that the testimony presented even by the plaintiffs contradicts itself. If you read the testimony they produced so far as the death certificates, the birth certificates, and the weddings, you'll see that none of them were alive at the time this conveyance of the 54 acres was

transcript (word)

made. So they couldn't have been the grantees.
And, again, what we're saying is our new evidence according to the United States census will show that Sam, who has been designated as Sam one in this proceeding, had siblings, and that that

1905 conveyance was made to Sam and his siblings.

Now, what we're also saying, and this goes to, you know, how much the court should set bond, if any, for. Because that's entirely discretionary. He is tentatively claiming a one-third interest in the property on the other side of the road, in addition to what the property in Parcel 1.

THE COURT: Okay.

MR. HOUSTON: So, therefore, you know -- and it's not mandatory and it's in the judge's discretion how much bond should be required. I mean, basically, the bond is for the purpose of securing the fact that everybody is proceeding in good faith and that nobody is being dilatory or just, you know, holding up the thing for any particular type of reason.

We have stated to the court why we're taking this matter on appeal. We have a very germane and substantial issue for either the court of appeals or if we can, what we plan on doing to save time, is ask the court to remand it back to you so that you can address this matter of newly discovered evidence. You can also address the final motion for relief of judgment or on the right of

Mr. Simmons to purchase that property in reference to your motion on that particular issue.

So we're not talking about any extraordinary period of time. I think basically what we can do is see if within 30 days if we can get this court of appeals to remand the matter back before you make a decision on this matter.

THE COURT: I asked you about a month ago, three weeks ago what was it that you thought that Mr. Roosevelt Simmons, what his bottom line desire was in this case. And I'm going to ask you that again on the record with Mr. Simmons here. Tell me what it is that you think he wants, number one.

Does he want a greater percentage of the money or redistribution of the sale of the property, or is it his intention on what he wants is to own physically own the land? And I asked you that, and I'm going ask you that again, because I think that's important. So if you want to talk to him outside, that's fine with me, because I want to know.

MR. HOUSTON: All right.

(A break was taken.)

THE COURT: All right. What's the deal?

MR. HOUSTON: Your Honor, you have posed the question to us, that is to Mr. Simmons, and we understood the question to be that if and when his interest in the other property, that is Parcels, I think, 2, 3, and 4, the property on the other side of the road, were established, what would be his

transcript (word)
get additional deeds from them to cover Parcels 2, 3, and 4. But the only thing you would need to do is basically hold a third in escrow, and then that third would be parceled out between he and the other remaining heirs.

MR. MARTIN: Presuming on appeal it's determined that he has a right to that property.

MR. HOUSTON: Correct.

MR. MARTIN: So what you're saying is, so I

understand this, because I don't want to revisit the issue. We've been doing this almost coming on four years for me now. Bruce is new to the picture. We can sell the property for the \$537,000, Parcels 1, 2, 3, and 4. One-third of that money is held in escrow.

MR. HOUSTON: Let's say two, three, and four.

MR. MARTIN: No. This is, if we're going to resolve it, we're going to resolve it globally. Okay. He does not have the right to buy Parcel 1. He neglected to comply with two court orders. As far as I'm concerned, if he wants his two-ninths of that, Mr. Smith and Mr. Goldberg are going to buy Parcel 1 pursuant to the court order, because they have complied with the order. So --

MR. HOUSTON: We're going to file a motion on that particular part to ask the court to give us relief, but our position on one is that he wants to buy it.

MR. MARTIN: Forget one for now.

MR. HOUSTON: All right.

MR. MARTIN: Can we sell two, three, and four?

MR. HOUSTON: Correct.

MR. MARTIN: And escrow one-third of that money?

MR. HOUSTON: Right.

MR. MARTIN: And what I would suggest that we do is we put it in an interest-bearing account, and we'll figure out how to style the account. Okay. But we'll put it in interest-bearing. Let's take it to UBS or someplace and put it in a money market account where it will earn some interest for the benefit of --

MR. HOUSTON: Special referee's account.

MR. MARTIN: We'll call it Joseph S. Mendelsohn special referee for the benefit of this case. I don't have a problem recommending that. So we can at least get two, three, and four out of the equation. But I would like to get one resolved.

MR. HOUSTON: All right. Now --

MR. MARTIN: And I know Bruce wants to get one resolved, because I know his lady has actually made some reference to possibly moving to Charleston.

MR. HOUSTON: Now, even if he may be late in procuring the finances he needed for the property, what damage or harm has been done by letting him go

ahead and purchase it?

transcript (word)

MR. BERLINSKY: Correct.

THE COURT: And no assignment except to blood relatives.

MR. BERLINSKY: Blood relatives or marriage.

THE COURT: Blood relatives, whatever, marriage, I guess marriage. Okay. Those two things not happening, then the property gets sold

to the contract person, who in this instance is Mark Goldberg.

MR. MARTIN: Correct.

THE COURT: Are you with me, Bruce?

MR. BERLINSKY: I'm with you.

MR. MARTIN: And Marie Smith preserved and protected her interest under the order.

THE COURT: Right.

MR. MARTIN: So it would come out to --

THE COURT: So Marie Smith has done what she was supposed to do?

MR. BERLINSKY: Correct.

THE COURT: Is that right?

MR. BERLINSKY: Timely.

THE COURT: Timely. Mr. Simmons hasn't. So we're back to that. He has not done what he -- what the court ordered him to do.

MR. HOUSTON: How many days was he late, Your Honor?

THE COURT: Well, first of all, it's not just a matter of time. Let me tell you what I'm looking at. I've got Exhibit Number 4, which is a letter dated March the 16th. It's a letter from Hugh Lane, the president of the Bank of South Carolina, and it's dated to Mr. Frederick Fields.

To the best of my knowledge Mr. Fields is not Mr. Simmons, nor is Mr. Simmons' name mentioned in here.

MR. SIMMONS: Did you see the second page, Your Honor?

THE COURT: I don't have any second page.

MR. SIMMONS: There was a second page there in your office.

THE COURT: Mr. Simmons, I've only got what you all presented. I don't have anything else.

MR. HOUSTON: What page are you referring to?

MR. SIMMONS: You got a second page that both of those bank statements from Sun Trust and South Carolina.

THE COURT: I don't have that. I don't have any of them.

THE WITNESS: I just passed them on to you.

MR. HOUSTON: They were put in the records before. I think the court reporter has those other --

THE COURT: Oh, you're talking about the letter to Roosevelt Simmons. Okay. Attached please find a letter of intent from my bank, Bank of South Carolina, stating my commitment on behalf

of our purchase agreement for the property at River Road. That, again, doesn't comply, because it is an assignment of non-family, and I don't think it

Page 37

2165

transcript (word)

complies.

Here's a letter from Sun Trust, and it talks about Mr. Rodale, who has got a balance. Now, while I believe I met Mr. Rodale at my office, he doesn't have anything to do with this. And he's not a blood relative.

And then here's a letter from the Wachovia Bank that Mr. Smith -- maybe that's the guy I met. I don't know. He's got money.

MR. MARTIN: That's Marie Smith's son.

THE COURT: Oh, that's your letter.

MR. BERLINSKY: That's my letter.

THE COURT: So that's Marie Smith's letter. Then I got a letter, a clerk of court's, Number 7. This is motion Number 7 document, and it was delivered by the postal service on March the 29th, 2007.

So what I find is that Mr. Simmons has not met the burden as instructed by the court order in providing the necessary documentation to buy the property as per the court order within the ten days ordered concluded, and that's my finding. And

that's going to go in this court order also. And. Again, you certainly, you know, your right to appeal that is fine.

MR. SIMMONS: Excuse me, judge.

THE COURT: No. Hold on. And so Mr. Martin is going to, Mr. Martin then is going to prepare, so that means the deed goes to the two of you all.

MR. MARTIN: Two of us.

THE COURT: No. That --

MR. HOUSTON: No. He can purchase the whole thing, though.

MR. MARTIN: Well, we have an agreement to sell him half. Now, Bruce and I need to revisit that issue if he intends on purchasing all of it, because what he filed with the clerk of court was to buy half. So he's in compliance with the half part.

THE COURT: So Mr. Simmons is going to get money, but he ain't getting the land under the deal.

MR. HOUSTON: Here's what we're supposed to do. One, he can purchase the other half and assign it to Mr. Simmons.

THE COURT: Who? Berlinsky?

MR. HOUSTON: Berlinsky, right.

MR. MARTIN: He was given that opportunity to provide proof of financing in the amount of \$225,000. He provided proof of financing for half, which is 110.

MR. HOUSTON: That was the only thing that was offered to him at the time.

MR. MARTIN: No. He was offered the whole. In the order, he's offered the whole. So he's opted to submit financing for half. If wants to buy the other half, then again we're going to have to deal with Krell and Mr. Goldberg.

MR. HOUSTON: But how can two people be extended an offer for the whole thing?

MR. MARTIN: Either one could have exercised

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
)
ROOSEVELT SIMMONS)
Plaintiff)
)
Vs.)
)
HATTIE BAILUM, RUBY BAILUM)
VERDONE GRAY, JULIE B. JOHNSON)
MONICA MIDDLETON,)
MARIE SMITH, MELVIN SINGLETON,)
FRANKLIN SMITH, LMC, LLC,)
JOHN MARTIN, ESQ. as TRUSTEE)
Defendants)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2009 - CP -10 -5343

FILED

OCT 26 2010

JULIE J. ARMSTRONG
CLERK, C.P. & C.S.

SUPPLEMENTAL AFFIDAVIT OF
ROOSEVELT SIMMONS

Roosevelt Simmons of full age being duly sworn according to law upon his oath deposes and says:

1. I am the plaintiff in this action and submit this Supplemental Affidavit in opposition to defendants' motion for summary judgment. I have personal knowledge of the following.

2. In November 2000, I retained Arthur McFarland, Esq. to commence a quiet title action concerning all of the heirs property in which I had been involved including TMS 311-00-00-024 (18 acres) and TMS 312-00-00-032, 065, 66 and 067 and asked him obtain quitclaim deeds from the other Hester Balaam heirs for all of this property because they knew of my efforts to preserve the property and wanted me to have it. When McFarland failed to commence a quiet title action for more than two years, I fired him. I later learned that he prepared quitclaim deeds only for parcel 1 (the 18 acre lot, TMS 311-00-00-024). I believe that attorney McFarland did not prepare the quitclaim deed to cover the other properties because he was working for Monica Middleton at the same time and without my knowledge. I did not learn that attorney McFarland had obtained a judgment on behalf of Monica Middleton to quiet title on TMS 312-00-00- 66

until after the conclusion of the Bailum v. Simmons case. Subsequently, the other heirs of Hester Singleton Balaam signed off on their interest in parcels 2, 3 and 4 (TMS 312-00-00-032, 065 and 067) as they had promised me they would. Attached as Exhibit 1 is their quitclaim deed.

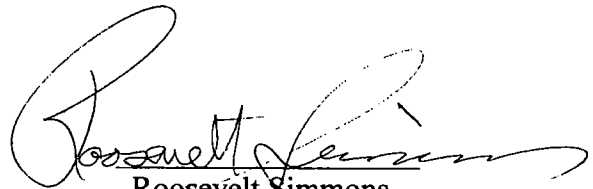
3. During the Bailum trial, my attorney Louis Condon, Esq. introduced a copy of my family tree into evidence. Attached as Exhibit 2 is a copy of this family tree. This shows that there was only one Sam Balaam that was married to my grandmother Hester Singleton and from whom the other Balaam heirs derived their interest.

4. After the Special Referee ordered me to provide proof of financial capability to purchase the 18 acres in January 2007, I asked for more time and was given to March 16, 2007. As ordered by the Special referee, on March 16, 2007, I delivered copies of a letter from Bank of South Carolina to Mr. Frederick Fields with a loan commitment for \$150,000. to purchase TMS 311-00-00-024(parcel 1) and a letter from Sun Trust Bank to Mr. Christian Redell confirming a deposit of \$15,000. to the Charleston County Clerk of Court and the Special Referee. Mr. Fields and Mr. Redell told me that they were making these funds available to me to purchase the 18 acres. However, the Special referee refused to believe them even though Mr. Ridell told the Special Referee he was doing this on my behalf in Court on February 2007. Attached as Exhibits 3 and 4 are copies of the Affidavits of Frederick Fields and Christian Redell in which they confirm that they were offering to lend me the money I needed to complete the purchase of the 18 acres, approximately \$165,000. These affidavits were submitted as part of my appeal of the Special Referee's June decision denying me the right to complete the purchase of the 18 acres.

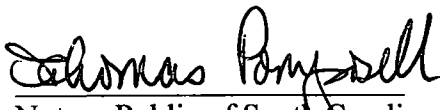
5. After the Special Referee decided that a different Sam Balaam acquired the 54 acres in 1904 who was not the same man that married my grandmother Hester Balaam, I researched this myself and found that the Census records indicated that there was only one Sam Balaam

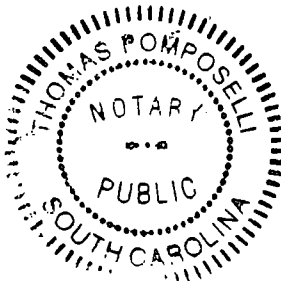
alive on Johns Island during the period in question. Attached as Exhibit 5 are copies of these records which were submitted to the Special Referee in June 2007 as part of my motion for a new trial and to stay the sale of the 18 acres. The Special Referee accepted these records into evidence but refused to grant a new trial on my claim to parcels 2,3 and 4 and ordered that 1/3 of the sale proceeds from parcels 2,3 and 4 (approximately \$112,000) be held in escrow pending my appeal. If I hadn't been denied my share of this money (approximately \$70,000), I would have used it as a credit toward purchasing the 18 acre parcel.

6. After the Special Referee refused to allow me to complete the purchase of the 18 acres in June 2007, I realized that he had been biased against me from the beginning, probably because I tried to stop his appointment. I hired attorney Charles Houston to appeal his decision. While the appeal was pending, I filed a grievance with the Committee on Judicial Conduct against the Special Referee. Attached as Exhibit 6 is a copy of the letter dated June 25, 2007 complaining of his prejudicial conduct. The Judicial Conduct Committee responded that the matter was part of the pending appeal and took no action. The appeal was dismissed and this issue was never addressed.


Roosevelt Simmons

Sworn and subscribed before me
this 25 day of October 2010


Notary Public of South Carolina



LIST OF EXHIBITS TO SUPPLEMENTAL AFFIDAVIT
OF ROOSEVELT SIMMONS

1. Quitclaim deed
2. Simmons Family History
3. Affidavit of Frederic Fields
4. Affidavit of Christian Ridell
5. Census data 1900-1930
6. Letter dated June 25, 2007 to Judicial Conduct Committee

EXHIBIT 1. Quitclaim deed

Grantee's Address
Roosevelt Simmons
3416 Kitford Road
Johns Island, SC 29455

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

TITLE TO REAL PROPERTY
QUIT CLAIM DEED

KNOW ALL MEN BY THESE PRESENTS: That We, LEON SINGLETON*, EARTHA LEE ROSS, THEODOSIA LEGARE, NANCY ANN ^{Cooper} ~~COPPER~~*, SHELIA BURNS OWENS, LOUISE CANTY, MABELL HICKS, ALONZETTA^C BURNS and SHARRON BURNS (hereinafter referred to as "Grantors") in the State aforesaid, for and in consideration of the sum of Ten (\$10.00) Dollars and no other valuable consideration to us in hand paid at and before the sealing of these presents by ROOSEVELT SIMMONS, (hereinafter referred to as "Grantee") in the State aforesaid the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said Grantee, as joint tenants with the right of survivorship, and not as tenants in common, their successors and assigns forever, the following described property, to wit:

TMS#: 312-00-00-065
312-00-00-066
312-00-00-067
312-00-00-032

SEE EXHIBIT 1 ATTACHED HERETO

TOGETHER with all and singular, the rights, members, herditaments and appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned, unto the said Grantee, as joint tenants with the right of survivorship, and not as tenants in common, their successors and assigns forever.

WITNESS THE Hand AND SEAL OF EACH GRANTOR AS IT HEREAFTER APPEARS BELOW:

This deed prepared without benefit of title examination See **Charleston County Case No.: 2004-CP-10-1459.**

The Houston Law Firm
4 Carriage Lane, Suite 206
Charleston, SC 29407

BA R 662PG565
June

WITNESS MY Hand and Seal this 10 day of ~~April~~, 2008

SIGNED, SEALED and DELIVERED

In the Presence of:

Aileen M. Singleton
Witness

Dennis Doyle
Witness

Leon E. Singleton
Leon E. Singleton
LEON SINGLETON
*AKA LEON E. SINGLETON

STATE OF NEW JERSEY)

COUNTY OF Burlington

ACKNOWLEDGMENT

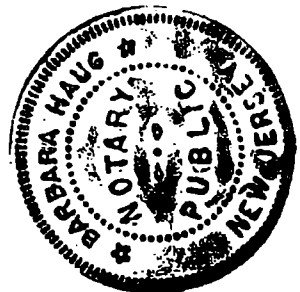
I, the undersigned Notary Public for the State of NEW JERSEY,
do hereby certify that the individual(s) executing the within document
personally appeared before me this date and acknowledged the due
execution of the foregoing instrument.

Witness my hand and official seal

This 10 day of June 2008.

Barbara Haug
Notary Public for New Jersey
My Commission Expires: _____

BARBARA HAUG
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires December 28, 2012



WITNESS MY Hand and Seal this 28 day of April, 2008

SIGNED, SEALED and DELIVERED

In the Presence of:

Albert J. Cooper Sr.
Witness

Asdely Thomas
Witness

Nancy A. Cooper
NANCY ANN COOPER
**AKA NANCY A. COOPER

STATE OF NEW JERSEY)

COUNTY OF CAMDEN)

ACKNOWLEDGMENT

I, the undersigned Notary Public for the State of NEW JERSEY,
do hereby certify that the individual(s) executing the within document
personally appeared before me this date and acknowledged the due
execution of the foregoing instrument.

Witness my hand and official seal

This 28 day of April 2008.

Tonia R. Harris
Notary Public for New Jersey
My Commission Expires: Aug 20, 2008

TONIA R. HARRIS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires August 20, 2008



WITNESS MY Hand and Seal this 28 day of April, 2008

SIGNED, SEALED and DELIVERED

In the Presence of:

Ray Johnson
Witness

Eartha Lee Ross
EARTHA LEE ROSS

Clara Daniel
Witness

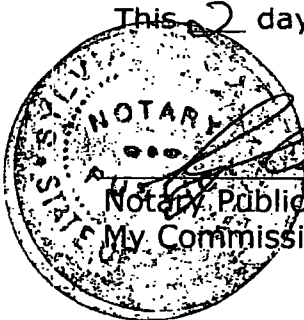
STATE OF NEW YORK)
COUNTY OF BRONX)

ACKNOWLEDGMENT

I, the undersigned Notary Public for the State of New York, do hereby certify that the individual(s) executing the within document personally appeared before me this date and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal

This 2 day of May 2008.



Sylvat Colon
Notary Public for New York
My Commission Expires: _____

SYLVAT. COLON
NOTARY PUBLIC, State of New York
No. 01005028020
Qualified in Bronx County
Commission Expires June 18, 2010

WITNESS MY Hand and Seal this ____ day of April, 2008

BK R 662PG568

SIGNED, SEALED and DELIVERED

In the Presence of:

Anthony J. [Signature]
Witness

Theodosia Legare
THEODOSIA LEGARE

[Signature]
Witness

STATE OF NEW YORK)
)
COUNTY OF BRONX)

ACKNOWLEDGMENT

I, the undersigned Notary Public for the State of New York, do hereby certify that the individual(s) executing the within document personally appeared before me this date and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal

This 1st day of May 2008.

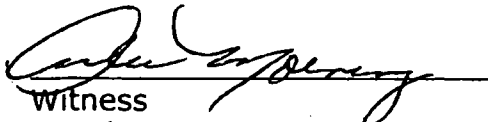
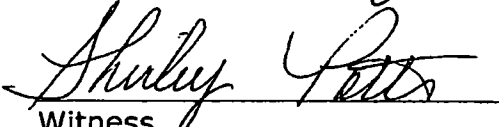
[Signature]
Notary Public for New York
My Commission Expires: 12/18/2011
NOTARY PUBLIC STATE OF NEW YORK
NO. 0174812312
COUNTY OF BRONX
12/18/2011

WITNESS MY Hand and Seal this ____ day of April, 2008

SIGNED, SEALED and DELIVERED

BK R 662PG569

In the Presence of:


Witness

Witness


MABELL HICKS

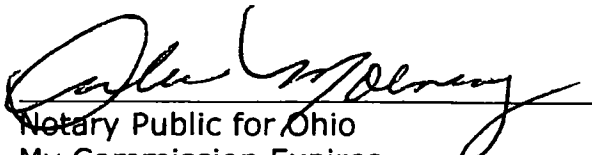
STATE OF OHIO)
COUNTY OF Allen)

ACKNOWLEDGMENT

I, the undersigned Notary Public for the State of Ohio, do hereby certify that the individual(s) executing the within document personally appeared before me this date and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal

This 29th day of April 2008.


Notary Public for Ohio
My Commission Expires: _____



AILEEN MOENING
Notary Public, State of Ohio
My commission expires 08-16-2009
Recorded in Allen County



WITNESS MY Hand and Seal this 29th day of April, 2008

2178

SIGNED, SEALED and DELIVERED

In the Presence of:

Glennetta C. Burns
Witness

Shelia Burns Owens
SHELIA BURNS OWENS

Maria F. Negrón
Witness

STATE OF NEW YORK)
)
COUNTY OF WESTCHESTER)

ACKNOWLEDGMENT

I, the undersigned Notary Public for the State of New York, do hereby certify that the individual(s) executing the within document personally appeared before me this date and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal

This 9th day of June 2008.

JACQUELINE SIMONE
Notary Public, State of New York
No: 01SI5083605
Qualified in Westchester County
Commission Expires August 18, 2009

Jacqueline Simone
Notary Public for New York
My Commission Expires: 8/18/2009

WITNESS MY Hand and Seal this ____ day of April, 2008

SIGNED, SEALED and DELIVERED

In the Presence of:

Glenn Mitchell
Witness

Alonzetta C. Burns
ALONZETTA BURNS

Livia Brown
Witness

STATE OF NEW YORK)
COUNTY OF WESTCHESTER)

ACKNOWLEDGMENT

I, the undersigned Notary Public for the State of New York, do hereby certify that the individual(s) executing the within document personally appeared before me this date and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal

This 4 day of June 2008.

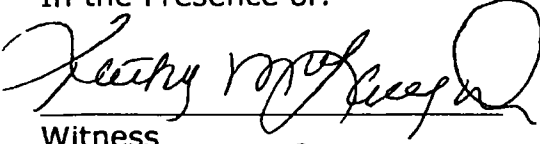
Suzanne Anderson
Notary Public for New York
My Commission Expires: 8/24/09

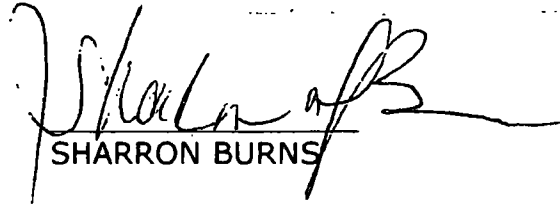
SUZANNE ANDERSON
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN KINGS COUNTY
JES 801AN8132425
EXPIRES AUG 28, 2009

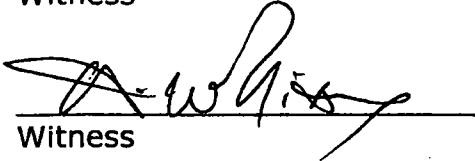
WITNESS MY Hand and Seal this 4th day of June 2008

SIGNED, SEALED and DELIVERED

In the Presence of:


Witness


SHARRON BURNS


Witness

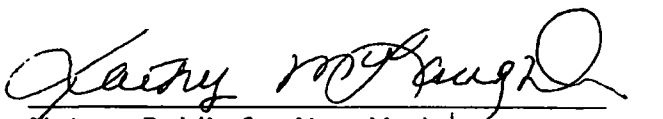
STATE OF NEW YORK)
)
COUNTY OF WESTCHESTER)

ACKNOWLEDGMENT

I, the undersigned Notary Public for the State of New York, do hereby certify that the individual(s) executing the within document personally appeared before me this date and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal

This 10 day of June 2008.


Notary Public for New York
My Commission Expires: April 25 2009

KATHY MCLAUGHLIN
Notary Public, State of New York
No. 01MC6126101
Qualified in Westchester County
Commission Expires April 25, 2009

WITNESS MY Hand and Seal this 10 day of June, 2008

SIGNED, SEALED and DELIVERED

In the Presence of:

Tawanna Kidd
Tawanna Kidd
Witness

Louise Canty
LOUISE CANTY

Rhonda
Witness

STATE OF NEW YORK)
)
COUNTY OF WESTCHESTER)

ACKNOWLEDGMENT

I, the undersigned Notary Public for the State of New York, do hereby certify that the individual(s) executing the within document personally appeared before me this date and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal

This 9th day of June 2008.

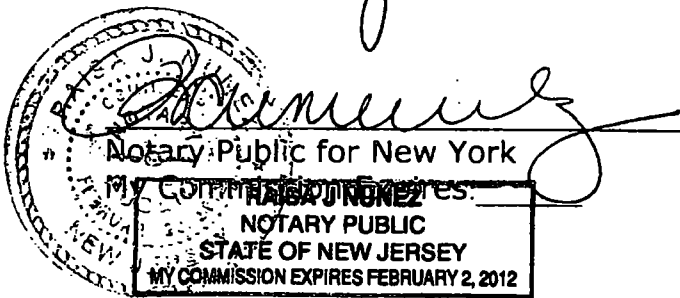


Exhibit 1

Parcel A

All that certain piece, parcel or lot of land, thereon situate, lying and being in Charleston County, South Carolina containing 5.0 acres and known and designated TMS NO. 312- on a plat entitled "BOUNDARY SURVEY OF LAND OWNED BY THE ESTATE OF FANNIE MIDDLETON, LOCATED ON JOHNS ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA" made by Paul C. Lawson, Jr., R.L.S., dated September 19, 2002 and in Charleston County RMC Office in Plat Book DD at page 750, reference to said plat is hereby craved for a more complete and accurate description.

TMS NO. 312-00 - 00 66

Parcel 1

All that lot, piece or parcel of land situate and lying and being on Johns Island. in the County of Charleston and State of South Carolina, measuring and containing twenty (20) acres more or less; butting and bounding on the north by Lots No. 3 and 4; east by Lot. No. 10; south by a public road and west by Lot No, 12. Said lot being known and recorded on the plat of the Gibbs-Murray tract on Johns Island, Lot #11 The current TMS number for this property is **311 -00-00-024**.

(Note This parcel now is reflected as 15 acres on the Charleston County Tax Rolls, by appraisal, and by survey)

Parcel 2:

All that certain piece or parcel of land situate and lying and being on Johns Island in the County Of Charleston and State of South Carolina, measuring and containing twenty-four (24) acres and being a part of Lot No, 24 of fifty-four acres conveyed in 1905 by Nettie and Eliza Hane on January 20, 1904 and recorded in the R.M.C. office in Charleston County in Book J24, page 137, December 1905. Lot 24 being bounded as follows: on the north by lot No. 25 and No. 27 on the east by Lot 26, 27, and 28 on the south by Lot 23, and on the west by a public road., which said boundaries shown on a plat made by W.B. Guerard in January 1883 The current FMS m for this property is

312-00-00-165

065

Parcel 3:

All that certain piece or parcel of land situate and lying and being on Johns Island in the County of Charleston and State of South Carolina, measuring and containing five (5) acres and being apart of Lot No. 24 of fifty-four (54) acres conveyed in 1905 by Nettie and Eliza Hane on January 20, 1904, and recorded in the RMC. Office in Charleston

County in Book J24, page 137, December 1905. The current TMS number for this property is **3124)0-00-067**.

Parcel 4:

All that certain piece or parcel of land situate and lying and being on Johns Island in the County of Charleston and State of South Carolina, measuring and containing five (5) acres and being a part of Lot No. 24 of fifty-four (54) acres conveyed by Nettie and Eliza Hane on January 20, 1904, and recorded in the R.M.C, office in Charleston County in Book J24, page 137, December 1905. The current TMS number for this property is **312-00-00-032**

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this Affidavit and I understand such information.

2. The property is being transferred BY **Leon Singleton, Eartha Lee Ross, ETAL**

TO **Roosevelt Simmons**

ON **June 10, 2008**

3. The DEED is (check one of the following)

- (A) subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
- (B) subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as distribution to a trust beneficiary.
- (C) ☒ EXEMPT from the deed recording fee because (Exemption # 12).
(Explanation If required) Q/Claim
(If exempt, please skip items 4-6, and go to item 7 of this affidavit.)

4. Check one of the following if either item 3(a) or item 3(b) above has been checked.

- (A) The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$ _____.
- (B) The fee is computed on the fair market value of the realty which is \$ _____.
- (C) The fee is computed on the fair market value of the realty as established for property tax purposes which is \$ _____.

5. Check YES or NO ☒ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES," the amount of the outstanding balance of this lien or encumbrance is \$ _____.

6. The DEED Recording Fee is computed as follows:

- (A) _____ the amount listed in item 4 above
- (B) _____ the amount listed in item 5 above (no amount place zero)
- (C) _____ Subtract Line 6(b) from Line 6(a) and place the result.

7. As required by Code Section '12-24-70, I state that I am a responsible person who was connected with the transaction as: Grantee

8. Check if Property other than Real Property is being transferred on this Deed.

- (A) _____ Mobile Home
- (B) _____ Other

9. I understand that a person required to furnish this affidavit who wilfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Sworn this 19th Day of June, 20 08
Leah P. Shaw
Notary Public for South Carolina
My Commission Expires: 2-17, 20 12

Signed Roosevelt Simmons
Grantor, Grantee, or Attorney that prepared this form
Roosevelt Simmons
Print or Type Name Here

BK R 662PG577

RECORDER'S PAGE

NOTE: This page MUST remain
with the original document



FILED

June 19, 2008

3:56:11 PM

BK R 662PG563

Charlie Lybrand, Register
Charleston County, SC

Filed By:

ROOSEVELT SIMMONS
3416 KITFORD RD
JOHNS ISLAND SC 29455

Number of Pages:

15

AMOUNT

DESCRIPTION	Q/Claim
Recording Fee	\$ 20.00
State Fee	<Exempt>
County Fee	<Exempt>
Postage	\$ 1.00

TOTAL	\$ 21.00

\$ Amount (in thousands):

DRAWER:

C - slw

AUDITOR STAMP HERE

RECEIVED FROM RMC

JUN 24 2008

PEGGY A. MOSELEY
CHARLESTON COUNTY AUDITOR

PID VERIFIED BY ASSESSOR

REP

DATE

JUN 24 2008

312-00-00-067

IS 3.33 Ac.

DO NOT STAMP BELOW THIS LINE

2. Simmons Family History

3. Affidavit of Frederic Fields

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
Case No.: 2004-CP-10-1459

HATTIE BAILUM a/k/a HATTIE BALLAM;)
RUBY BALIUM a/k/a RUBY BALAAM;)
VERDONE GRAY; JULIE B. JOHNSON;)
and MONICA MIDDLETON,)

Plaintiffs, Respondents)

versus)

ROOSEVELT SIMMONS, LEON)
SINGLETON, MABEL SINGLETON HICKS)
a/k/a MAYBELL HICKS, WALTER BURNS;)
SHEILA B. OWENS, LOUISE CANTY;)
ALONZETTA BURNS; SHARON BURNS,)
MELVIN SINGLETON, MARIE SMITH,)
ELMORE SINGLETON, THEODESIA)
SINGLETON, MILDRED SINGLETON)
MAHONEY, ANDRE SINGLETON, EUGENE)
LEON ELIJAH SINGLETON, ERNEST)
GREEN, Jr., KAREN GREEN, DELORIS)
GREEN, JOAN GREEN WELLS, DELBERT)
BURNS, JOE LOUIS BURNS, JR., a/k/a)
JOE LEWIS BURNS, JR., VONIE BURNS,)
SHELLY BURNS, ANASTACIA BURNS,)
TREMAYNE BURNS, JOSHUA BURNS,)
JARRED BURNS, AMBER BURNS, if they)
be alive, and JOHN DOE and MARY ROE,)
adults, and Richard ROE and JANE DOE,)
infants, person under disability or)
incompetence, if any, including those)
persons who might be in the military)
covered under the Soldier's Relief Act,)
fictitious names designating the)
unknown heirs, devisees, distributes,)
issue, executors, administrators,)
successors or assigns of the above)
named Defendants, and also the)
following deceased persons: ESTATE OF)
SAMUEL BAILUM a/k/a SAMUEL)

AFFIDAVIT OF
FREDERICK FIELDS

BAALUM, deceased or the ESTATE OF)
 HESTER SINGLETON BAILUM a/k/a)
 ESTHER BAILUM a/k/a ESTHER BAALUM,)
 HESTER SINGLETON BAALUM, THOMAS)
 BAILUM, SAMUEL BAILUM, SAMMY)
 BAILUM, FANNIE BAILUM MIDDLETON,)
 MARY BAILUM, JOSH SINGLETON,)
 ELOUISE SINGLETON, CARRIE BURNS,)
 JERRY SINGLETON, ARTHUR SINGLETON)
 EUGENE SINGLETON, RICHARDINE)
 SINGLETON, EUGENE SINGLETON, JR.,)
 GARY SINGLETON, CHRISTOPHER)
 BURNS, JULIUS BURNS, ARTHUR LEE)
 BURNS, ARLENE GREEN, ERNEST)
 GREEN, JOE LOUIS BURNS a/k/a JOE)
 LEWIS BURNS, EMILY BURNS, QUEEN)
 SINGLETON, and JULIUS BURNS, JR.,)
 and all other persons know or claiming)
 any right, title, estate in or lien upon the)
 the real estate in or lien upon the real)
 estate described in the Complaint herein,)
)
 Defendant. Respondents)
)
 Of whom)
 Roosevelt Simmons is the)
)
 Defendant/Appellant)
)

STATE OF SOUTH CAROLINA }
 COUNTY OF CHARLESTON }

PERSONALLY appeared before me Frederick Fields, who upon
 first being duly sworn upon oath, states the following:

1.

I am a resident of Charleston, SC, residing at 3129 River Road,
 John's Island, SC.

R 191

2.

That I know Roosevelt Simmons and informed him by letter dated March 16, 2007 that I had the money available for him to purchase his family property on River Road that is subject to this action.

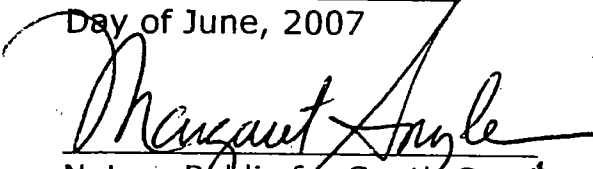
3.

That this Affidavit is to correct any misunderstandings that the money from the Bank of South Carolina was for me to purchase the property. I am borrowing the money for Roosevelt Simmons to have to purchase the property. Additionally, the funds remain available to purchase the entire 15-18 acre tract referred to as Parcel 1 and TMS-311-00-00-024.

That I have read this Affidavit and am familiar with the contents stated therein and have retained a copy of the same in my possession.


Frederick Fields

Sworn to and subscribed
Before me this 13th
Day of June, 2007


Notary Public for South Carolina
My Commission expires. Feb. 15, 2017

R 192

The Bank of South Carolina
CHARLESTON

Hugh C. Lane, Jr.
President

March 16, 2007

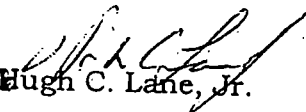
Mr. Frederick Fields
3129 River Road
Johns Island, SC 29455

Dear Fred:

This confirms our conversation today that The Bank of South Carolina is prepared to loan you up to \$150,000 to purchase your percentage interest in 18.44 acres off River Road, identified on the tax map as parcel 311-00-00-024.

We appreciate the opportunity to assist you with this transaction. This commitment is valid for one year. Naturally, based on our relationship, we'd be pleased to extend it if that is required.

Sincerely,


Hugh C. Lane, Jr.

HCLjr/jbs

EX #4

4. Affidavit of Christian Ridell

STATE OF SOUTH CAROLINA

AFFIDAVIT

COUNTY OF CHARLESTON

I, Christian Redell, upon first being duly sworn, deposes and state the following facts as my own personal knowledge:

1.

I am a citizen and resident of Charleston County residing at 2340 Herndon Drive, Charleston SC. Phone: 843-571-4306.

2.

I attended one court hearing in this case with Mr. Roosevelt Simmons at the law office of Joseph Mendelsohn on Broad Street, Charleston, SC. This was during the month of February, 2007. Present were Judge Mendelsohn, Atty. Martin, Atty. Berlinsky, Mr. Simmons, Atty. Condon and myself. There was no court reporter present at this session.

3.

Atty. Louis E. Condon, Roosevelt Simmons attorney at that time, argued his positions upon his Motion for Reconsideration before Judge Mendelsohn. One of the points he raised was that all of the proceeding had not been recorded. Atty. Condon stated that the law requires the recording of all Court of Common Pleas proceedings as being mandatory; especially this being a court of record. Nevertheless, Judge Mendelsohn denied his Motion.

4.

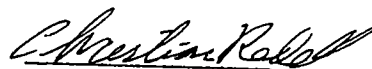
Near the end of the session Judge Mendelsohn indicated that he was ready to rule on the case. At that time I asked the judge's permission to speak and he said yes. Then I asked Judge Mendelsohn if Mr. Simmons still has the right to purchase the property. The judge said yes and that Mr. Simmons would have 10 days to get the money or to show documentation from financial institutions that he has the money available and would have 30 days more to purchase the property. I stated that I would make the money available to Mr. Simmons if necessary and if he so desired.

5.

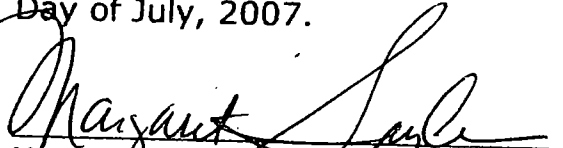
12195

Within 10 days, on Friday the 16th of March, Mr. Simmons, myself and my wife faxed/e-mailed Judge Mendelsohn and Mr. Condon respectively the required documentations showing the availability of the funds for the purchase of the property. On Monday, the 19th of March, Mr. Condon responded with an e-mail confirming the receipt of the documents. Exact and genuine reproduced copies of those documents are annexed hereto and incorporated as part of this affidavit and identified as Exhibit 1.

I have read this Affidavit and retained a copy for my possession.


Christian Redell

Sworn to before me this 11th
Day of July, 2007.


Notary Public for South Carolina

My Commission expires: Feb. 17, 2015



To Whom it may concern:

Christian H. Redell, a SunTrust client has a balance in excess of \$15,000 on March 13, 2007. If you have any further questions regarding this account, we would be happy to assist at Mr. Redell's request.

Mitch McCoin

Financial Services Representative
SunTrust Bank
3125 Bees Ferry Rd
Charleston, SC 29414
843 573 3163

2197

5. Census data 1900-1930

TWELFTH CENSUS OF THE UNITED STATES.

SCHEDULE No. 1.—POPULATION.

State North Carolina
County Charlotte

Supervisor's District No. 202 Sheet No. 9
Enumeration District No. 128

Township or other division of county John's Island Township

Name of incorporated city, town, or village within the above-named division

Name of institution

Enumerated by me on the 8

day of June, 1900.

Adam C. Dayson Enumerator.

Ward of city, X

LOCATIONS		NAME		RELATION		PERSONAL DESCRIPTION										RACE			CITIZENSHIP			OCCUPATION, TRADE, OR PROFESSION			EDUCATION			OTHER					
OF CITY		OF STATE		OF CITY		AGE		SEX		COLOR		HEIGHT		WEIGHT		EYES		HAIR		SKIN		TALL		BROAD		THICK		THIN		OTHER			
OF CITY		OF STATE		OF CITY		AGE		SEX		COLOR		HEIGHT		WEIGHT		EYES		HAIR		SKIN		TALL		BROAD		THICK		THIN		OTHER			
Brown, Belle		Wife		2		F		40		Mar.		1860		South Carolina		1860		12		24		1860		12		24		1860		12		24	
— Abby		Wife		2		F		35		Mar.		1865		South Carolina		1865		12		24		1865		12		24		1865		12		24	
— Martha		Wife		2		F		30		Mar.		1870		South Carolina		1870		12		24		1870		12		24		1870		12		24	
— Emma		Wife		2		F		25		Mar.		1875		South Carolina		1875		12		24		1875		12		24		1875		12		24	
— Sarah		Wife		2		F		20		Mar.		1880		South Carolina		1880		12		24		1880		12		24		1880		12		24	
— Anna		Wife		2		F		15		Mar.		1885		South Carolina		1885		12		24		1885		12		24		1885		12		24	
— John		Wife		2		F		10		Mar.		1890		South Carolina		1890		12		24		1890		12		24		1890		12		24	
— Mary		Wife		2		F		5		Mar.		1895		South Carolina		1895		12		24		1895		12		24		1895		12		24	
— William		Wife		2		F		0		Mar.		1900		South Carolina		1900		12		24		1900		12		24		1900		12		24	
— Elizabeth		Wife		2		F		45		Mar.		1855		South Carolina		1855		12		24		1855		12		24		1855		12		24	
— James		Wife		2		F		40		Mar.		1860		South Carolina		1860		12		24		1860		12		24		1860		12		24	
— Mary		Wife		2		F		35		Mar.		1865		South Carolina		1865		12		24		1865		12		24		1865		12		24	
— John		Wife		2		F		30		Mar.		1870		South Carolina		1870		12		24		1870		12		24		1870		12		24	
— William		Wife		2		F		25		Mar.		1875		South Carolina		1875		12		24		1875		12		24		1875		12		24	
— Elizabeth		Wife		2		F		20		Mar.		1880		South Carolina		1880		12		24		1880		12		24		1880		12		24	
— James		Wife		2		F		15		Mar.		1885		South Carolina		1885		12		24		1885		12		24		1885		12		24	
— Mary		Wife		2		F		10		Mar.		1890		South Carolina		1890		12		24		1890		12		24		1890		12		24	
— William		Wife		2		F		5		Mar.		1895		South Carolina		1895		12		24		1895		12		24		1895		12		24	
— Elizabeth		Wife		2		F		0		Mar.		1900		South Carolina		1900		12		24		1900		12		24		1900		12		24	
— John		Wife		2		F		45		Mar.		1855		South Carolina		1855		12		24		1855		12		24		1855		12		24	
— Mary		Wife		2		F		40		Mar.		1860		South Carolina		1860		12		24		1860		12		24		1860		12		24	
— William		Wife		2		F		35		Mar.		1865		South Carolina		1865		12		24		1865		12		24		1865		12		24	
— Elizabeth		Wife		2		F		30		Mar.		1870		South Carolina		1870		12		24		1870		12		24		1870		12		24	
— James		Wife		2		F		25		Mar.		1875		South Carolina		1875		12		24		1875		12		24		1875		12		24	
— Mary		Wife		2		F		20		Mar.		1880		South Carolina		1880		12		24		1880		12		24		1880		12		24	
— William		Wife		2		F		15		Mar.		1885		South Carolina		1885		12		24		1885		12		24		1885		12		24	
— Elizabeth		Wife		2		F		10		Mar.		1890		South Carolina		1890		12		24		1890		12		24		1890		12		24	
— James		Wife		2		F		5		Mar.		1895		South Carolina		1895		12		24		1895		12		24		1895		12		24	
— Mary		Wife		2		F		0		Mar.		1900		South Carolina		1900		12		24		1900		12		24		1900		12		24	
— John		Wife		2		F		45		Mar.		1855		South Carolina		1855		12		24		1855		12		24		1855		12		24	
— Mary		Wife		2		F		40		Mar.		1860		South Carolina		1860		12		24		1860		12		24		1860		12		24	
— William		Wife		2		F		35		Mar.		1865		South Carolina		1865		12		24		1865		12		24		1865		12		24	
— Elizabeth		Wife		2		F		30		Mar.		1870		South Carolina		1870		12		24		1870		12		24		1870		12		24	
— James		Wife		2		F		25		Mar.		1875		South Carolina		1875		12		24		1875		12		24		1875		12		24	
— Mary		Wife		2		F		20		Mar.		1880		South Carolina		1880		12		24		1880		12		24		1880		12		24	
— William		Wife		2		F		15		Mar.		1885		South Carolina		1885		12		24		1885		12		24		1885		12		24	
— Elizabeth		Wife		2		F		10		Mar.		1890		South Carolina		1890		12		24		1890		12		24		1890		12		24	
— James		Wife		2		F		5		Mar.		1895		South Carolina		1895		12		24		1895		12		24		1895		12		24	
— Mary		Wife		2		F		0		Mar.		1900		South Carolina		1900		12		24		1900		12		24		1900		12		24	
— John		Wife		2		F		45		Mar.		1855		South Carolina		1855		12		24		1855		12		24		1855		12		24	
— Mary		Wife		2		F		40		Mar.		1860		South Carolina		1860		12		24		1860		12		24		1860		12		24	
— William		Wife		2		F		35		Mar.		1865		South Carolina		1865		12		24		1865		12		24		1865		12		24	
— Elizabeth		Wife		2		F		30		Mar.		1870		South Carolina		1870		12		24		1870		12		24		1870		12		24	
— James		Wife		2		F		25		Mar.		1875		South Carolina		1875		12		24		1875		12		24		1875		12		24	
— Mary		Wife		2		F		20		Mar.		1880		South Carolina		1880		12		24		1880		12		24		1880		12		24	
— William		Wife		2		F		15		Mar.		1885		South Carolina		1885		12		24		1885		12		24		1885		12		24	
— Elizabeth		Wife		2		F		10		Mar.		1890		South Carolina		1890		12		24		1890		12		24		1890		12		24	
— James		Wife		2		F		5		Mar.		1895		South Carolina		1895		12		24		1895		12		24		1895		12		24	
— Mary		Wife		2		F		0		Mar.		1900		South Carolina		1900		12		24		1900		12		24		1900		12		24	
— John		Wife		2		F		45		Mar.		1855		South Carolina		1855		12		24		1855		12		24		1855		12		24	
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— William		Wife		2		F		35		Mar.		1865		South Carolina		1865		12		24		1865		12		24		1865		12		24	
— Elizabeth		Wife		2		F		30		Mar.		1870		South Carolina		1870		12		24		1870		12		24		1870		12		24	
— James		Wife		2		F		25		Mar.		1875		South Carolina		1875		12		24		1875		12		24		1875		12		24	
— Mary		Wife		2		F		20		Mar.		1880		South Carolina		1880		12		24		1880		12		24		1880		12		24	
— William		Wife		2		F		15		Mar.		1885		South Carolina		1885		12		24		1885		12		24		1885		12		24	
— Elizabeth		Wife		2		F		10		Mar.		1890		South Carolina		1890		12		24		1890		12		24		1890		12		24	
— James		Wife		2		F		5		Mar.		1895		South Carolina		1895		12		24		1895		12		24		1895		12		24	

Supervisors District No. _____
EVALUATION DISTRICT NO. _____

WAGE OF CITY _____

DATE _____

EVALUATOR _____

DEPARTMENT OF COMMERCE AND LABOR: BUREAU OF THE CENSUS
THIRTEENTH CENSUS OF THE UNITED STATES: 1910—POPULATION

NAME	SPURIA, CAROLINE
COUNTY	(See back of card)
TOWNSHIP OR OTHER DIVISION OF COUNTY	
NAME OF INSTITUTION	Johns Hopkins
DATE	

[illegible]

DEPARTMENT OF COMMERCE—BUREAU OF THE CENSUS
CENSUS OF THE UNITED STATES: 1920—POPULATION

NAME OF INCORPORATED PLACE:

ENUMERATED BY ME ON THE 30

INVESTMENT AND MOTIVATION

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

[illegible]

FOURTEENTH CENSUS OF THE UNITED STATES: 1920—POPULATION

NAME OF INSTITUTION	TOWNSHIP OR OTHER DIVISION OF COUNTY
...	...

THE UNITED STATES
NAME OF INCORPORATED PLACE:

EMUMERATION DISTRICT NO. 84
 WARD OF CITY - X 0944
 TOWN US C. HALL
 EMUMERATOR 5

Trina, W.S.C. Hilla

[illegible]

2202

POPULATION SCHEDULE

April 5, 1900. Mrs. Clark & Reeburgh, Esqrs.

[illegible]

NOTHING BUT THE BEST
FOR YOUR BUSINESS

6. Letter dated June 25, 2007 to Judicial Conduct Committee

Roosevelt Simmons
3416 Kitford Road, Johns Island, SC 29455
Telephone: (843) 559-1351

June 25, 2007

Commission on Judicial Conduct
1015 Sumter St., Suite 111
Columbia, SC 29201
Attn: Debbie McKeown

Dear Ms. McKeown,

I, Roosevelt Simmons, would like to file a grievance against

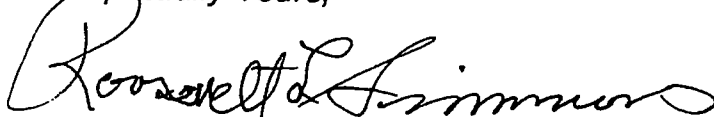
Judge Joseph Mendelsohn of Charleston and
John F. Martin Esq. of Charleston, SC

concerning case No. 2004CP10-1459 of Charleston County, SC. My grievance is based on the following:

1. All proceedings were not recorded as required by law. This was stated by my attorney (Louise Condon) at one of the sessions.
2. Evidence presented by plaintiff (by telephone) was not true.
3. Property was not advertised as required by law stating specific descriptions of all properties such as size, locations and TMS numbers. It is the responsibility of the judge (since he is the jury also in this case) to ensure evidence presented is true, proper and legal.
4. Judges' order did not afford me 45 days to purchase property (Judges order afforded me 10 days for proof of finances and 30 days to purchase). Financial data was provided within 10 days and Mr. Louis Condon was advised to contact Judge Mendelsohn to purchase property TMS 311-00-00-024 immediately. Mr. Condon stated to me I could not buy the property since I filed an appeal (Pro se), yet Judge Mendelsohn was moving forward to sell the property to the Goldberg before the appeal was finalized.
5. I was advised by Mr. Martin and Judge Mendelsohn I would have to post a One Million Dollar bond to continue with the appeal. I made the decision to sell the property under duress because I understood I would have to pay 1 Million Dollars to continue the appeal. After the fact I discovered that it would cost approximately \$3,000 to obtain such a bond which would allow the appeal to go forward. Again it is not understood why the Judge would burden me with such a cost other than to discourage me from continuing my effort to retain and protect my families properties.

6. *John F. Martin ESQ stated at one session that he did not represent Mark Goldberg, but instead represented Hattie Balaam. At a later session (6 June, 2007) Mr. Martin stated he did not represent Hazel Goldberg, but instead represented Mark Goldberg. If this be the case then Hattie Balaam was not being represented.*
7. *Judge Mendelsohn referred to me as "you people" which denotes prejudice. His bias was evident throughout the hearings.*
8. *All records that I have show that I am a heir to all parcels of land covered by the case. Judge Mendelsohn ruled I am a heir to only one parcel TMS #311-00-00-024 depriving me to right as a heir to purchase properties TMS # 312-00-00-065, TMS 312-00-00-067, TMS 312-00-00-032*
9. *To date, the court proceeding limited the sale of the property TMS 311-00-00-024 to one individual (Mark Goldberg). This prohibits obtaining a fair market price.*
10. *Judge Mendelsohn stated he was going to deed (TMS 312-00-00-065) to Hazel Goldberg who is not part of this case proceedings and also not represented by council at any of these hearings. What right does she have to buy the property over me (a heir).*
11. *Judge Mendelsohn is chairman on the board for Heirs' Property Preservation in Charleston County. In this capacity it would be reasonable to expect expert interpretation of the law to ensure my rights are not violated.*
12. *I was advised that I would have to pay \$220,000 for TMS 311-00-00-024 minus my share of heirs ownership which would result in \$161,111. Yet Judge Mendelsohn was going to sell the property to Mark Goldberg for \$150,000.*

Respectfully Yours,



Roosevelt Simmons

cc: Rev. Jesse Jackson
Rev. Al Sharpton
NAACP (Charleston Chapter)

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2009 - CP -10 -5343

ROOSEVELT SIMMONS)
Plaintiff)
Vs.)
HATTIE BAILUM, RUBY BAILUM)
VERDONE GRAY, JULIE B. JOHNSON,)
MONICA MIDDLETON,)
MARIE SMITH, MELVIN SINGLETON,)
FRANKLIN SMITH, LMC, LLC,)
JOHN MARTIN, ESQ. as TRUSTEE,)
Defendants)

PLAINTIFF'S MOTION FOR
A TEMPORARY INJUNCTION

FILED
2019 DEC 20 PM 3:14
JULIE J. HENNING
CLERK OF COURT

PLEASE TAKE NOTICE that on the tenth day following service of the within NOTICE of MOTION or as soon thereafter as counsel may be heard, plaintiff Roosevelt Simmons , by his attorney, Edward A. Bertele, Esq. shall move before the Presiding Judge of the Court of Common Pleas for the Ninth Judicial Circuit at the Charleston County Courthouse, 100 Broad Street, Charleston, SC 29401 for a temporary injunction pursuant to South Carolina Rules of Civil Procedure 65(a) to compel the defendant, Franklin Smith to maintain utility service to the real property known as TMS 311-00-00-310 and secure it from vandalism.

BASIS FOR THIS MOTION

In August 2009, Simmons commenced this action to vacate the final judgment and the deeds issued by the special referee in Bailum v. Simmons, 2004-CP-10-1459 based upon subsequently acquired evidence that the Bailum plaintiff s committed a fraud on the court. Defendants filed a motion to dismiss based upon the res judicata effect of the earlier proceedings. In December 2009, plaintiff filed a motion for a temporary injunction against defendants

Franklin Smith and LMC, LLC to prevent waste to the property they received as a result of the final judgment in the Bailum case. Defendant Franklin Smith was the record owner of TMS 311-00-00-310 and LMC, LLC was the record owner of TMS 311-00-00- 024. Both motions were heard on March 1 and continued to August 27th when the Court denied the motion to dismiss and the motion for a temporary injunction against defendants Franklin Smith and LMC. The Court directed that defendants supplement their submission with evidence to rebut the allegation that there was a fraud on the Court involving Monica Middleton and that the issue would be considered for summary disposition. Thereafter the parties submitted supplemental pleadings and that matter is awaiting disposition by the Court.

Plaintiff now seeks to renew his application for a temporary injunction due to changed circumstances. Simmons has recently learned that the utilities to the dwelling have been turned off for a substantial time and that dwelling is being vandalized. Unless the utilities are restored promptly, the utility provider may require that the electrical service be upgraded to current building code standards which would entail substantial expense that Simmons cannot afford. Also the property is being severely vandalized, the door has been kicked in and windows have been broken.

The temporary injunction is necessary to protect Simmons legal rights during the pendency of this litigation. See Transcontinental Gas Pipe Line Corp. v. Porter, 252 S.C. 478, 480-481 (1969). "The sole purpose of a temporary injunction is to preserve the status quo and thus avoid possible irreparable injury to a party pending litigation." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 601 (2001). Powell v. Immanuel Baptist Church, 261 S.C. 219, 221(1973). "[A] temporary injunction is [used] to preserve the subject of controversy in the condition which it is at the time of the Order until opportunity is offered for full and deliberate

investigation and to preserve the existing status during litigation...." County Council of Charleston v. Felkel, 244 S.C. 480, 483-84, 137 S.E.2d 577, 578 (1964) (citations omitted).

The temporary injunction seeks to prevent waste to an existing structure which Simmons is not financially able to rebuild. The defendant Franklin Smith is not a resident of South Carolina, teaches college in New Jersey and may not have any financial capacity to pay damages for waste to the dwelling. Consequently, there is the threat of irreparable harm.

It is well settled that, in determining whether a temporary injunction should issue, the merits of the case are not to be considered, except in so far as they may enable the court to determine whether a prima facie showing has been made. When a prima facie showing has been made entitling plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits. Transcontinental Gas Pipe Line Corp., supra, 252 S.C. at 481; Helsel v. City of N. Myrtle Beach, 307 S.C. 29, 32 (1992).

The South Carolina Supreme Court has allowed evidence of fraud on the court as the basis for equitable relief from a final judgment. See Ray v. Ray, 374 S.C. 79 (2007); Chewning v. Ford Motor Co., 354 SC 72 (2003); T v. T, 662 S.E.2d 413 (Ct. App. 2008). Simmons has filed a Supplemental memorandum in Opposition to Summary Judgment detailing how the Bailum heirs acted intentionally to deceive the court and to subvert the administration of justice. They caused false testimony to be submitted concerning Monica Middleton's ancestry. This family history was completely different from what Monica Middleton herself said under oath in a different case unbeknownst to Simmons. The purpose was to give credence to their claim that Simmons' ancestor named Samuel Balaam was a different Sam Balaam than the person who owned three parcels of real estate they claimed an interest in. Because of the fraud on the court, Simmons was denied any proceeds from the sale of the three parcels which he could have used

to purchase another parcel. The defendants have conceded that the Monica Middleton in the two cases was the same person. Therefore, Simmons has made out a prima facie case of fraud on the court. See Evans v. Gunter, 294 S.C. 525, 529 (Ct. App.1988)(fraud which does, or attempts to, subvert the integrity of the Court itself).

In conclusion, the court should be guided by general principles of equity and balance the equities between the parties in determining what if any relief to give. Foreman v. Foreman, 280 S.C. 461, 464-465(Ct.App.1984) (citations omitted). The equities clearly favor Simmons and the temporary injunction should be granted.

Edward A. Bertele, Esq.
1812 Pierce Street
Charleston, SC 29492
843-471-2082

By: 
Attorney for Roosevelt Simmons

Dated: December 17, 2010
Charleston, SC

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2009 - CP -10 - 5343

ROOSEVELT SIMMONS)
Plaintiff)
Vs.)
HATTIE BAILUM, RUBY BAILUM)
VERDONE GRAY, JULIE B. JOHNSON)
MONICA MIDDLETON,)
MARIE SMITH, MELVIN SINGLETON,)
FRANKLIN SMITH, LMC, LLC,)
JOHN MARTIN, ESQ. as TRUSTEE)
Defendants)

2011 FEB -1 PM 3:57
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

**PLAINTIFF'S MOTION FOR
RECONSIDERATION AND TO
ALTER OR AMEND THE
JANUARY 11 ORDER GRANTING
SUMMARY JUDGMENT
TO DEFENDANTS**

PLEASE TAKE NOTICE that on the tenth day following service of the within
NOTICE of MOTION or as soon thereafter as counsel may be heard, plaintiff Roosevelt
Simmons, by his attorney, Edward A. Bertele, Esq. shall move before the Circuit Court for the
Ninth Judicial Circuit at the Charleston County Courthouse, 100 Broad Street, Charleston, SC
29401 for reconsideration and to alter and amend the Order granting Summary Judgment to
defendants dated January 11, 2011.

BASIS FOR THIS MOTION

Plaintiff respectfully urges the Court to reconsider its decision granting summary
judgment on all counts of the complaint by Order dated January 11, 2011. The Court's Order
contained findings of fact and conclusions of law regarding the allegations of the Complaint that
defendants have committed a fraud on the court. The Court found that there was no fraud
because the record of the Bailum case supported the Special Referee's findings that Simmons

had no heirs interest in parcels known as TMS -032, -065 and 067. The Court found that the decision in the Middleton v. Doe case was irrelevant to Simmons claims because Simmons had no interest in that property. The Court found that any inconsistency between Monica Middleton's testimony in Middleton v. Doe and what was proffered about her relationship to Fannie Bailum in the Bailum case was trivial and not relevant to Simmons claims of fraud on the court. In addition, the Court found that Simmons prior counsel did no discovery and could have found out about the Middleton v. Doe case in order to raise it at trial. The Court found that there was ample evidence in the record apart from the testimony to support the Special Referee's findings. The Court found that Simmons interest if any in the three parcels appraised at \$300,000. was trivial. The Court found that there was no evidence in the trial record to support Simmons' fraud claim. The Court found that any false testimony which was given could have been discovered and represented intrinsic fraud. The Court found that Simmons failed to comply with court orders allowing him to purchase TMS -024 (the 18 acres acquired in 1910). The Court found that any relief from that Order denying him the right to complete the purchase could only be challenged by an appeal. The Court found that Simmons was represented by able counsel, Louis Condon, Esq., former Master in Equity of Charleston County. The Court found that every issue raised herein was raised on appeal and by failing to perfect the appeal, Simmons abandoned his right to seek relief under Rule 60. Finally, the Court found that res judicata barred Simmons from relitigating these issues.

Plaintiff contends that the critical aspects of the Order are not supported by the motion record and require reconsideration; and that the applicable law concerning the granting of summary judgment was not applied correctly. The facts and the inferences support Simmons position and did not support a dismissal of the case. The Court's decision was premature

because meaningful discovery had not occurred. Further, the Order does not address the allegations of Count Two requesting relief under an alternate provision of SC Rule 60(b). These and other reasons for reconsideration are more fully set forth below.

STATEMENT OF PRIOR PROCEEDINGS

Plaintiff filed this action seeking equitable relief under SC R 60 (b) from a prior judgment entered in a quiet title action, Bailum v. Simmons, 2004 CP-10-1459, wherein a Special Referee awarded him an heirs interest in an 18 acre parcel held in the estate of Sam Balaam, but refused to allow him to complete the purchase; and denied him an heirs interest in three parcels also held in the estate of Sam Balaam totaling approximately 30 acres because his ancestor, Hester Singleton did not have any relationship to the grantee. Plaintiff alleged that some of the Bailum defendants committed a fraud on the court involving another defendant, Monica Middleton, allowing a collateral attack on that judgment; and that there were exceptional circumstances also which justified relief . The Complaint sought to rescind the Special Referee's conveyance of the 18 acres to two of the defendants and obtain his heirs interest in the sale proceeds of the 30 acres. Defendants filed a motion to dismiss under SC R 12(b)(8), asserting that the matter was res judicata based upon the record of the prior case and a motion for a more definite statement. The motions were originally heard on March 1, 2010. The Court subsequently requested reargument which was held on August 27th . During reargument, defendants counsel in the prior case asserted that the fraud on the Court was without factual basis since there were two different Monica Middletons. Plaintiff had alleged that the defendants had given false testimony involving defendant Monica Middleton's lineage to Fannie Bailum Middleton in order to support their claims that Simmons had no heirs interest in the 30 acre parcel. The Court converted the motion to summary judgment as to the defendants allegations of

no fraud. Defendants were given leave to supplement the record in support of these allegations and plaintiff was allowed the opportunity to respond. The Court subsequently denied the defendants motion to dismiss by Order dated October 6, 2010.

**DEFENDANTS ARE NOT ENTITLED
TO SUMMARY JUDGMENT**

Plaintiff respectfully asks the Court to reconsider its findings because the material facts and inferences from them upon which the Court granted summary judgment support the plaintiff's position. Moreover, the record does not contain all of facts needed for a just resolution of the case because only limited discovery was conducted in light of the Court's comments at the motion hearing. The complaint contains sufficient allegations to support an independent cause of action for fraud on the court or exceptional circumstances because the Court previously denied defendants motion to dismiss. The Court failed to view the pleadings and the plaintiff's allegations in opposition to summary judgment in the light most favorable to his case. There were sufficient facts alleged to support a claim of fraud on the court or the Court should have allowed the plaintiff leave to amend instead of dismissal. The Court failed to consider the Second Count alleging exceptional circumstances. Assuming that only intrinsic fraud could be proven, the law nonetheless allows that to be the basis for equitable relief as part of exceptional circumstances. The dismissal of Simmons appeal in the Bailum case is not dispositive of this case because he was not afforded the opportunity to challenge the Special Referee's refusal to complete the sale of the 18 acres or his arbitrary decision as to the 30 acres. These issues are discussed below.

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. White v. J.M. Brown Amusement Co., 360 S.C. 366, 601 S.E.2d 342 (2004) In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct.App.1998). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

A. There is prima facie evidence of fraud in the record

Simmons contends that the Court did not fully appreciate the significance of the facts in the record and inferences to be drawn from them in determining that there was no evidence of fraud. In its January 11 Order, the Court found that the Special Referee had correctly concluded there were different Sam Balaams who acquired the 18 acres in 1910 and the 54 acres in 1904. Order at page 12. Based on that finding, the Court concluded that there was no evidence in the record to support Simmons' allegations of fraud on the Court. Id. This finding is the basis upon which the remainder of the Court's decision is predicated and thus critical to the determination of summary judgment and to this motion.

1. The evidence regarding Sam Bailum I contradicts the Special Referee's findings

In its January 11th decision, the court stated: "In short, there was a Samuel Bailum (Samuel I) who married Julia. They had a number of children including Thomas, Mary, Toney, Fannie, Mary and Samuel (II)." Order at page 10. Sam Bailum I, the decision finds, acquired the 18 acres in 1910 and Sam Bailum II with his siblings acquired the fifty four acres in 1904. Id. However, as asserted in plaintiff's opposition, the trial record contradicts the Special Referee's and this Court's finding. Defendants' Supplemental Memorandum attached birth certificates for two Sam Bailums which they introduced into evidence before the Special Referee. According to these birth certificates, one of these Sam Bailums was born on May 19, 1902 . Verdone Johnson testified that that Sam Bailum was married to Julia Morris. Julie Ann Johnson testified that she was born in 1955, that her father Sam Bailum was then 53 and that he was the same Sam Bailum who was married to Julia Morris. Transcript of May 15, 2006 hearing at page 171, Exhibit A to Bertele Affidavit. Her testimony is consistent with the birth certificate that her father Sam Bailum I was born in 1902 and was two years old in 1904. Therefore the other Sam Bailum born on August 28, 1928 (Exhibit 2) was Sam Bailum II. Neither of these Sam Bailums could have acquired the 54 acres in 1904 or the 18 acres in 1910 since the first was underage and the second was not yet born. That also means that the Sam Bailum I was not the person who acquired the 18 acres in 1910 and Sam Bailum II was not the person who acquired the fifty four acres with Toney, Mary and Thomas Balaam and Fannie Middleton in 1904. Therefore the record does not support the Bailum defendants argument or this Court's conclusion that there were two different Sam Bailums who acquired the property at issue. It does confirm that there were three Sam Bailums but that only one of them was old enough to be the grantee and source of the heirs property.

If as plaintiff alleges (and his family tree corroborates) they are the same person, then the testimony given by the Bailum parties about the relationship between Fannie (Bailum) Middleton and Monica Middleton must be reexamined . The Court must therefore consider: how can the Fannie Bailum, daughter of Sam Bailum I be the same person as the Fannie Middleton who acquired part of the 54 acres in 1904. The only logical conclusion is that they are two different persons. If as plaintiff alleges Fannie Middleton (who acquired part of the 54 acres and Fannie Bailum, daughter of Sam I (too young to acquire any interest) were two different persons, and the Bailum parties, as alleged, falsely created the existence of two different Sam Balaam/Bailums by asserting that Fannie Middleton was Fannie Bailum, i.e. there was only one Fannie Middleton, Simmons contends that this supports his contention of an actual fraud on the court.

As the facts and inferences establish, there are distinct persons known as Fannie Middleton and Fannie Bailum. The former is the grantee of the 54 acres in 1904 and 5 of the 54 acres in 1905, the latter is the daughter of the same Sam Balaam who acquired the 54 acres and the 18 acres several years later. If as she testified in Middleton v. Doe, Monica Middleton is the great granddaughter of Fannie Middleton, she cannot also be an heir to the children of Sam Bailum. By the law of distribution, the children of Sam Balaam and his wife (Hester Singleton) would acquire his property. Unless she was actually a descendant of one of the children of Sam Balaam she would not be entitled to any heirs interest in the proceeds in the Bailum case.

Plaintiff contends and the evidence supports the contention that the Bailum parties fabricated Monica Middleton's familial relationship to Fannie Bailum to serve their own ends and to obtain an unjustified heirs interest for her, possibly to secure her silence. It is not

uncontroverted that she did not appear in the case or testify at the trial. The fraud as apparent from the record simply stated is: Monica Middleton received a 100% heirs interest in the 5 acres acquired by her **great grandmother**, Fannie Middleton in 1904 in Middleton v. Doe; and she received a 1/6 heirs interest in the proceeds of sale of the 18 acres (\$220,000) and a 1/4 interest in the sale proceeds of the 30 acres (\$330,000), Special Referee Amended Order Quiet Title at pages 14-15, based upon fabricated evidence of a familial relationship to Fannie Bailum.

As demonstrated in Simmons Opposition Brief, two Bailum witnesses intentionally and falsely testified to support their contention that the Fannie Bailum , daughter of Sam Bailum I was the same person as the Fannie Middleton who acquired part of the fifty four acres. Their testimony about Monica Middleton is part of their scheme to defraud. It was no accident that they testified about their relationship to her since it reinforced their claim of a separate lineage from Sam Bailum I. Based upon the trial testimony of Monica Middleton at the Middleton v. Doe case, it is clear (assuming her testimony to be truthful) that she is the lawful heir of Fannie Middleton who was her great grandmother and not the heir of a daughter of the Sam Balaam, holder of separate property interests.

2. The false testimony regarding Monica Middleton was material to the Special Referee's decision to award the Bailum heirs all of the 34 acres.

Plaintiff respectfully urges the Court to reconsider its decision that the testimony Monica Middleton's lineage was not material and relevant to the Special Referee's decision. Plaintiff contends that the trial record establishes that the Special Referee relied on the false testimony both in determining that there were two Sam Bailums and in awarding Monica Middleton an heirs interest to which she was not legally entitled. It is undisputed that Monica

Middleton did not testify at the Bailum trial and that other Bailum heirs including Verdone Gray testified about her family relationship, i.e. that she was Verdone Gray's cousin. See transcript of May 15, 2006 at pages 148-149 annexed to Affidavit of Edward A. Bertele, Esq. The Special Referee's Order Quiet Title Partition and Sale at page 6 provides:

“ Sam Bailum, Thomas Bailum, Tony Bailum, Mary Bailum and **Fannie Bailum Middleton**, the children of Samuel Bailum acquired approximately fifty –four acres on Johns Island . . . on January 20, 1904.. . . The heirs of Hester Singleton Bailum have no claim or interest in [this property] as her husband had no interest in this property.” (emphasis added)

The testimony given by Verdone Gray (and others) was material to the Special referee in determining that Fannie Middleton was Fannie Bailum, the sister of her father and that Monica was her cousin. There was no other documentary evidence of Monica Middleton's familial connection to Fannie Bailum in the record. By calling her aunt Fannie Bailum Middleton, and using Monica Middleton as the link, Verdone Gray was able to create the subterfuge of two Sam Bailums. Clearly someone has to know who their cousin is so this testimony was knowingly false. Therefore, it is apparent that the Special Referee relied upon Verdone Gray's false testimony in awarding the Bailum heirs the sale proceeds from parcels 2,3 and 4 (\$337,000) of which Monica Middleton individually received a 25% interest. See Order Quiet Title Partition and Sale at page 15. No other conclusion is possible since there was no other evidence.

3 . The Middleton v. Doe decision is relevant to Simmons claims

Plaintiff respectfully requests that the Court reconsider its decision that the Middleton v. Doe decision is not relevant to his claims. Plaintiff has alleged that the Bailum parties fabricated a relationship between their family and her to reinforce their claim that there were two Sam Bailums; that she failed to appear during the hearing and their testimony was accepted by the Special Referee. The fact that Monica Middleton did not appear to testify at the trial is

supportive of plaintiff's claims of a conspiracy and a fraud on the court. To support Simmons claim that Monica Middleton was not related to the Bailum parties, he produced the transcript from the Middleton v. Doe case that established that Monica Middleton was the great granddaughter of Fannie Middleton, who acquired the 54 acres in 1904. The Bailum parties stated that Monica Middleton was their cousin because she was the daughter of Fannie Bailum, daughter of Sam Bailum and the also was Fannie Middleton because she married Paul Middleton. This statement was also contradicted by Monica Middleton's testimony. By intentionally combining the real Fannie Middleton and Fannie Bailum, defendants hoped (successfully) to convince the Special Referee that they were the same. That meant that Fannie Bailum, their aunt was the purchaser of part of the 54 acres , adding credence to their contention that their father was Sam Bailum II and his father , their grandfather was Sam Bailum I. Monica Middleton's testimony that Fannie Middleton was her great grandfather destroys this argument and affected the final decision in two ways. Not only did the Special Referee exclude Hester Singleton's heirs from any interest in the 34 acres but he gave Monica Middleton an heirs interest she did not deserve.

4. The inconsistencies in trial testimony are material and relevant

In light of the demonstrated relevancy and materiality of the testimony regarding Monica Middleton, plaintiff contends that the Court should reconsider its finding that " Any factual disparity as to Monica Middleton's lineage is irrelevant to Roosevelt Simmons position." Order at page 9. The differences between the Monica Middleton testimony in the Middleton v Doe case (that she was the great granddaughter of Fannie Middleton) and the trial testimony of the Bailums that she was the daughter of Fannie Bailum Middleton is not trivial or incidental to the plaintiff's case. The record in Middleton v. Doe supports the conclusion that Monica

Middleton was not the daughter of Fannie Bailum, allegedly Fannie Middleton but the great granddaughter of Fannie Middleton . This testimony is completely relevant to the claim of fraud on the court since it involves a separate proceeding of which Simmons had no notice or knowledge. More importantly, the Monica Middleton testimony was never presented to the Special Referee to determine how he would have ruled on the issue.

5. The reasons for the lack of discovery are unknown and must await discovery.

This Court found that the evidence of Sam Balaam's actual ancestry could have been discovered before trial so that Simmons is precluded from raising the prior occurrence of fraud in this action. Clearly the issue of Sam Balaam's ancestry was decided at trial but the Bailum parties had not made it an issue until then. In prior pleadings they acknowledged that Simmons was an heir to all of the property at issue. Plaintiff's counsel has the file in the Bailum case but it is incomplete and does not contain evidence of what discovery if any was conducted. See Bertele Affidavit. What was proffered and what was produced by counsel has a bearing on Simmons claims of fraud on the court and exceptional circumstances. See below. Discovery on this issue needs to be completed . Trial documents clearly showed that the two Sam Bailums whose birth certificates were presented were not old enough to acquire property in 1904 and 1910. The Census Records found by Simmons were additional evidence of the age discrepancy. The fact that the Census Records were available does not by itself justify dismissal of the complaint .

In summary, plaintiff urges this Court to reconsider its finding of no fraud. The testimony and inferences all support the conclusion that a fraud occurred which was relevant and had a material effect on the decision. The Court should not have granted summary judgment and should have allowed the plaintiff to fully develop the record before concluding that there was no

fraud on the court to justify vacating the earlier judgment in the Bailum v. Simmons case. This is more fully discussed below.

B. The trial record does not support the Special Referee's findings

Simmons respectfully requests that this Court reconsider its finding that the trial record supports the Special Referee decision. Defendants have not produced a single document or testimony in their Supplemental Memorandum to confirm the decision as to two Sam Bailums. Defendants attached birth certificates for two Sam Bailums which they introduced into evidence before the Special Referee. See Exhibits 1 & 2. According to these birth certificates, one of these Sam Bailums was born on May 19, 1902 (Exhibit 1) and the other on August 28, 1928 (Exhibit 2). Neither of these Sam Bailums could have acquired the 54 acres in 1904 or the 18 acres in 1910 since the first was underage and the second was not yet born. The Special Referee could not have relied on these documents to find that there were two different Sam Bailums involved in the two transactions. The conclusion is that the Special Referee relied on testimony, which has been shown to be false. The trial record devoid of the false testimony does not support the Special Referee's decision as shown by the contested facts and inferences .

This Court's Order referred to a Simmons exhibit representing his family tree in which there were three Sam Balaams shown. This is completely consistent with Simmons claim that the same Sam Balaam acquired the property in 1904 and 1910 since the later generations were too young for title to be legally conveyed to them or were not then alive. It does not represent adverse evidence. It was the Bailum parties who contested Simmons ancestry and created the fiction of another Sam Bailum by connecting Fannie Middleton, the great granddaughter of Fannie Middleton to their relative Fannie Bailum. There is no reliable documentary evidence in the trial record to support the Bailums contention of two Sam Bailums who were the grantees of

the property at issue in the form of birth certificates or other historical records and none was cited to this Court. Their family tree was fabricated to support their false testimony and cannot be considered as reliable evidence.

The Census Bureau records which Simmons personally found after the judgment was entered in 2007 and used as the basis for a motion to reopen/new trial is further support for plaintiff's assertion. These confirmed that the children of Sam Balaam / Bailum I would have been too young to own property acquired in 1904 and that one of his children was "Fannie Bailum" then aged 9 months. These Census Bureau records were accepted by the Special Referee for purposes of the record on appeal after he denied Simmons motion for a new trial or to set aside the judgment pursuant to R 60 (b) (2). The Court of Appeals never decided whether these records were newly discovered evidence or would justify a new trial because the appeal was dismissed due to Simmons attorney's failure to perfect the appeal. Plaintiff addresses the Court's decision concerning the effect of Simmons appeal on this action below.

C. The discovery in the Bailum case was not part of the record

Simmons contends that supplementation of the record on the motion for summary judgment was limited to matters concerning the lineage of Monica Middleton. Thus there was no discovery or supplementation regarding what information was available to Simmons prior counsel, Louis Condon in the Bailum case. This Court's finding that there was no discovery done is a supposition not based upon facts or pleadings submitted. Moreover, this Court concluded that prior counsel could have discovered the facts upon which Simmons present case was based. That is another supposition not based upon the record.

Simmons' present counsel was not involved in the prior case and had no opportunity to develop the circumstances concerning how the prior case was tried or why, as found by this

Court, an experienced attorney, who served as Charleston County's Master in Equity did not conduct adequate inquiry into the background of the Bailum parties or Monica Middleton. See Bertele Affidavit. There are other facts which needed to be developed: the basis for the filing of the original complaint and second amended complaint which alleged that Simmons was entitled to an heirs interest in all the property; the basis for the Bailums changed position at trial and what discovery was produced which may have induced Simmons attorney to accept this position. The role of Simmons prior attorney , Ruth Cupp, Esq. is also an issue since she over Simmons strenuous objections signed a Consent Order to allow a Special Referee to hear the case when there was no statutory basis and the costs would be higher because of his fees. As discussed below there are important facts which need to be developed before this case is ripe for disposition. The Court should not have dismissed this case until it was fully aware of all of the facts and circumstances.

D. Simmons was unaware of the Middleton v. Doe decision and the significance is in dispute

The Court determined that the decision in Middleton v. Doe was a matter of public record and thus available for use in the Bailum case. However that is not necessarily a reason upon which the Court should base a dismissal. Plaintiff asserts that the Middleton v. Doe case only became relevant because the Bailum heirs testified falsely about their relationship to Monica Middleton i.e. that she was the daughter of Fannie Bailum. As the Court pointed out, the real property in Middleton v. Doe was not a part of the property at issue in the Bailum case. Therefore someone searching the public record would not necessarily have reason to know that the testimony in that case would later be important to the Bailum case.

Another reason for the Court to reconsider this point is that the Bailum parties asserted that Monica Middleton was their cousin and daughter of Fannie Bailum. Before making this contention, did they not confirm this familial relationship with her and why wouldn't they be on the same notice as Simmons about the Middleton case. If the Bailums and their attorney knew about the Middleton case and concealed it that would constitute a fraud on the court. Discovery has not yet occurred on this issue.

Simmons contends the facts surrounding the change in the Bailums position at trial and whether they knew about the Middleton case is material to his claims for equitable relief. The availability of the Middleton case on the public record does not represent a fact which is unequivocally negative to Simmons claims.

Finally, it is not disputed that Simmons did not have actual knowledge of the Middleton Case until after the trial had been concluded and the appeal dismissed. He did not have the opportunity to bring this case to the court's attention before this independent action was filed. Simmons actual knowledge is relevant under these circumstances when the public record would not have been pertinent until the fraud was perpetrated. Plaintiff asks for the opportunity to develop all of the facts before the Court determines the effect to the availability of the Middleton v. Doe case.

E. Simmons interest in the fifty four acres was not minimal

This Court found that Simmons had arguably only a de minimus interest in the sale proceeds of the 34 acres. Order at page 17. To the extent that this finding is material to the Court's determination to grant summary judgment, plaintiff seeks reconsideration. If as plaintiff alleges, there was only one Sam Balaam married to Hester Singleton, then all of her heirs including Simmons had a 1/3 interest in the sale proceeds of parcels 2,3 and 4 totaling \$330,000.

The Hester Singleton heirs therefore had the right to 1/3 or \$110,000 of the sale proceeds which would otherwise be distributed to the Bailum heirs. An important aspect of the Special Referee's Order denying the new trial was the provision requiring that 1/3 of the sale proceeds representing the statutory share of Hester Singleton's heirs be held in escrow pending appeal and that Simmons would be able to establish his rights if any to same thereafter. Order Dated June 20, 2007 at page 6. That escrow was released after the appeal was dismissed. Even if Simmons had been awarded only a nominal amount as the Court indicated, the balance would remain in escrow for distribution to those who did not participate in the case. As Simmons has stated in a Supplemental Affidavit, he obtained quitclaim deeds from ten other surviving heirs of Hester Singleton relinquishing their interest in parcels 2, 3 and 4 in his favor. See Supplemental Affidavit of Roosevelt Simmons and Exhibit 1. Therefore Simmons had a substantial interest in parcels 2, 3 and 4.

F. Significance of the false testimony is in dispute

Plaintiff asserts that the significance of the false testimony given by the Bailum heirs cannot be fully established from the limited discovery available and that the Court should reconsider its decision declaring the testimony is intrinsic fraud and not the basis for a fraud on the Court. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

This Court found that the assuming the Bailum heirs gave false testimony, that would be only intrinsic fraud and not fraud on the court relying on Bryan v. Bryan, 220 SC 164 (1951)

Order at 15. This case contains more than the giving of false testimony as the basis for equitable relief and thus it is distinguishable from Bryan v. Bryan, supra. Bryan involved an award of damages against defendant for intimidation of plaintiff's tenant farmers. Plaintiff's witness had lied concerning their prior sale of farm produce to support plaintiff's claim for damages resulting from the intimidation. The defendant did not discover the truth that there were no prior sales until after judgment was entered. The Supreme Court decided that relief from such fraud was not available in a subsequent action to vacate the damages award.

Simmons asserts that the Bailum parties committed a fraud on the Court through numerous methods not just the giving of false testimony. These include the fact that none of the Bailum heirs appeared in South Carolina to testify due to their alleged infirmity although some of them had been in South Carolina in the recent past. They all testified over the telephone which made it impossible for the Special Referee to judge their credibility. Monica Middleton did not answer the complaint or appear in any proceeding in South Carolina. Considering that she stood to gain a 1/6 share in the sale proceeds from the 18 acres and a 1/4 share of sale proceeds of the 34 acres (totaling over \$550,000) if the Bailums were successful, this is peculiar behavior. The alleged conspiracy was the fabrication that the Samuel Balaam who acquired the 18 acres and was married to Simmons grandmother, Hester Singleton Balaam was not the Samuel Balaam whose estate held the 34 acres on the other side of River Road. This fabrication was intended to eliminate Simmons and the other Hester Singleton heirs of their 1/3 statutory interest. The matter was presented before a Special Referee to avoid contact with the Master in Equity who had heard the Middleton v. Doe case. Defendants' Supplemental Memorandum does not rebut any of these allegations with uncontroverted facts.

Rather than applying the rule in Bryan v. Bryan, supra, this Court should have been guided by T. v. T., 662 S.E.2d, 413(S.C.App. 2008) and Chewning v. Ford Motor Co., 354 SC 72 (2003) . These cases establish that false testimony even if intrinsic can be the basis to support an independent action for equitable relief. In Chewning v. Ford Motor Co., 354 SC 72 (2003), the Supreme Court affirmed the denial of a motion to dismiss an action to vacate a judgment due to a fraud on the court based upon generalized allegations as to the procuring of false testimony and the intentional concealment by the attorneys for Ford Motor of test results . The Court found that attorney misconduct would constitute extrinsic fraud and if proven by clear and convincing evidence would constitute fraud on the court. Id at 86.

Plaintiff's complaint also contained numerous allegations concerning the attorneys involved in the case. Arthur McFarland did not file Simmons quiet title action as requested but instead filed Monica Middleton's quiet title action instead and shortly thereafter the Bailum parties commenced their own. Further as alleged in the complaint, the Bailums' prior counsel filed a Second Amended Complaint which acknowledged that Simmons was an heir to the 34 acres but at trial the Bailum parties asserted the existence of a separate Sam Bailum. How and why the Bailum parties reversed their position is not known. How and why their counsel changed his position is not known. What investigation the Bailum parties counsel conducted and whether it was suppressed at trial was not known. What discovery was provided to Louis Condon, Esq. is not known. All of the foregoing is the subject of further inquiry through discovery and not able to be determined at this stage of the proceedings. This Court found that Simmons prior counsel, Louis Condon, Esq. "was neither induced not to present his case nor deprived of the opportunity to be heard. However, there was nothing upon which this Court should have made such a finding. Considering that Louis Condon, Esq. was a former Master in Equity, the lack of a record

should have compelled this Court to deny dismissal of this action until a definitive conclusion could be drawn.

In T v T., supra, the Court of Appeals reversed a judgment dismissing an independent action to set aside a prior paternity judgment where paternity was not contested. The Court noted: “Even if we were to assume based on precedent that any fraud is intrinsic, the judgment is nonetheless vulnerable to attack outside the fraud context . . . and through an independent action if the appropriate circumstances are present.” Id at 418.” Based on T v. T , plaintiff should be able to proceed with discovery as to his action based upon exceptional circumstances, see below, and the Court’s decision that the fraud is intrinsic not extrinsic fraud does not require dismissal at this stage of the proceedings. See T v. T, 662 SE 2d at 481 (order of dismissal reversed to allow parties to develop the record).

Therefore, the record requires development before any determination of the significance of the false testimony can be determined.

G. The Court should consider less severe alternatives

The plaintiff contends that the complaint contains sufficient allegations to support an independent cause of action for fraud on the court or exceptional circumstances because the Court previously denied defendants motion to dismiss. However, if there are any deficiencies in the pleadings upon which this Court concluded that only intrinsic fraud was present, plaintiff urges reconsideration because the Court could have been addressed in less severe manner. If the Court concluded that the allegations were insufficient to meet its test of fraud on the Court, it should have granted plaintiff leave to amend within a reasonable time. South Carolina Rule of Procedure 15 allows for pleadings to be freely amended in the interest of justice. The Court had an available remedy less severe than dismissal.

H. Simmons had the right to challenge the Special Referee's refusal to complete the purchase

As part of its Order, this Court adopted the Special Referee's finding that Simmons failed to comply with court orders allowing him to purchase TMS -024 (the 18 acres acquired in 1910). The Special Referee refused to allow Simmons to close title because he found that Simmons financing sources were in reality third party purchasers who did not qualify to acquire Simmons interest under the Special Referee's decision. See Exhibit C, Transcript of the June 6, 2007 motion hearing, 1-3, 22-25, 37-38. Simmons has sworn under oath that the Special Referee exhibited racial bias against him and ignored evidence that Simmons had the financial capability to close title on the 18 acres. This Court found that any relief from that Order denying him the right to complete the purchase could only be challenged by an appeal. This is an issue which Simmons was prepared to raise on appeal. As addressed below, Simmons appeal was never heard because it was abandoned by his appellate counsel.

I. Simmons appeal was abandoned but Rule 60 still provides for relief

This Court's Order also discusses the Simmons appeal and concludes that the dismissal of the appeal precluded Simmons from seeking relief under SC R 60. Order at page 18. The Court relied on Smith Companies of Greenville, Inc. v. Hayes, 311 S.C. 358, 428 S.E.2d 900 (S.C. App. 1993) and Tench v. South Carolina Dept. of Educ., 347 S.C. 117, 553 S.E.2d 451 (S.C. 2001). Plaintiff respectfully disagrees with the application of either case to the facts alleged in the complaint because they are distinguishable. Smith Companies of Greenville, Inc. v. Hayes, supra involved a post trial motion under Rule 60(b) (4) and (5) requiring that the motion be filed in a reasonable time after judgment. The court found that there was no justifiable reason to excuse the 1 ½ year delay in seeking to set aside the judgment. In dicta the court noted that a

Rule 60 post trial motion should not be considered a substitute for appeal when the party seeking relief could have litigated at trial and on appeal the claims he now makes by motion. Similarly, Tench v. South Carolina Dept. of Educ., supra, a post trial motion under Rule 60(b)(1) and Rule 60(b)(5). Again the court held that the motion was untimely since it was filed well more than a year after the judgment. Further, the court denied relief under Rule 60(b) (5) where the relief could have pursued the issue on appeal. The Smith Companies and Tench cases are factually different because both involved post trial motions subject to time limitations and neither party filed an appeal in which they could have raised the same issues.

Plaintiff here filed an independent action based upon fraud on the court and exceptional circumstances including abandonment of the appeal by the appellate attorney. The Court must consider all of the circumstances in determining whether to grant equitable relief in a separate action. Simmons was denied the opportunity to have an appellate court rule on the Special Referee's arbitrary decision to refuse to complete the sale of the 18 acres. Simmons was denied the right to have an appellate court review the trial record which contained documentary evidence that supported his contention of a single Sam Bailum. The significance of the Middleton v Doe testimony did not come to light until after the appeal was dismissed so that the fraud on the court was not discovered in time for it to be included in any appeal. Plaintiff asserts that dismissal of his appeal is but one of the many factors affecting his right to seek equitable relief in an independent action.

If as the Court Order indicates, all of the issues raised here could have been the subject of an appeal, the merits of the appeal are of particular significance. Simmons could have contended that the Special referee had arbitrarily denied him the right to complete the purchase because he did not have a factual basis to find that Simmons financing was really third party purchasers. The

Special Referee's order found that Simons has protected the property over many years and gave him a substantial credit toward the purchase price for money he had spent on taxes and repairs. Why then would he challenge Simmons financing without conducting some evidentiary hearing to establish that the financing was to conceal a third party purchaser. Simmons could have asserted that the trial record even without the Census records clearly shows that the two Sam Bailums contrived by the Bailum heirs as separate grantees were not old enough to acquire any real property in 1904 and 1910. The Court of Appeals has the ability to conduct its own review of evidence from a Special Referee and could have completely agreed with Simmons. In an equitable action tried without a jury, the appellate court can correct errors of law and may find facts in accordance with its own view of the preponderance of the evidence. Blackmon v. Weaver, 366 S.C. 245, 248-49, 621 S.E.2d 42, 43-44 (Ct. App. 2005).

Simmons was not at fault for the dismissal of the appeal. He didn't even know it happened until much later. The rule that the neglect of an attorney will be imputed to the client "is not a hard and fast rule. Rather, it is one that is to be applied rationally, with a fair recognition that justice to the litigants is always the polestar." Brown v. Butler, 347 S.C. 259 (2001) (quotation omitted). It is not applicable when the attorney's neglect rises to the level of willful abandonment. Graham v. Town of Loris, 272 S.C. 442, 452 (1978); see also 7A C.J.S. Attorney & Client § 181, at 285 (1980) (where the conduct of counsel is outrageously in violation of his implicit duty to devote reasonable efforts in representing his client, his acts will not always be imputed to his client).

After the trial court denied Simmons motion for a stay and a new trial, attorney Charles Houston filed a Motion for Supersedeas Relief in the Court of Appeals. The Court of Appeals initially stayed the sale of the 18 acre parcel, pending the timely filing of the appellant's brief

and record by Order dated July 18, 2007 but subsequently vacated the stay by Order dated September 4, 2007. All subsequent actions by the Court of Appeals were in response to attorney's Houston's failure to file the brief and record as ordered. These include the Orders of Dismissal dated March 24, 2008 and August 21, 2008 and the Remittitur dated October 24, 2008 and December 1, 2008. Houston's failure to perfect the Simmons appeal after numerous extensions were granted rises to the level of abandonment since it is outrageous and in violation of his duty to devote reasonable efforts on behalf of his client. "Conscience requires this Court to charge the attorney alone with his gross dereliction of duty and not to visit its consequences upon an innocent client." Graham v. Town of Loris, 272 SC 442,452-453 (1978). Accordingly, any attorney neglect attributable to Houston does not attach to Simmons.

Therefore, this Court should reconsider its finding that the dismissal of his appeal bars Simmons from bringing an independent action. Simmons had no other recourse but to bring this action. Because the Special Referee refused to allow Simmons to purchase the 18 acre parcel, Simmons has no adequate remedy at law. Real estate is considered as unique and Simmons cannot be compensated by money damages.

I. Discovery must be conducted and a decision on the merits was premature.

Plaintiff has not conducted full discovery on the allegations of the complaint based upon the proceedings at the motion hearing on August 27th. The Court indicated that it wanted to resolve the facts about the alleged false testimony relating to Monica Middleton after defendants' former counsel asserted there was no fraud because there were two Monica Middletons. Plaintiff's counsel conducted limited discovery on that issue which became moot when defendants counsel later withdrew his contention. Plaintiff's counsel proceeded on the basis that

further discovery would await the outcome of the Court's decision and asserted in his Supplemental Response that such was required to develop all of the issues. See Bertele Affidavit.

Plaintiff has previously asserted that facts yet to be developed are : the circumstances under which attorney McFarland "happened" to undertake representation of Monica Middleton, a New York resident to quiet title on the 5 acre parcel , while he was representing Simmons and why McFarland chose to ignore the Simmons case while rapidly moving the Middleton case to judgment and not mentioning it to Simmons; also, how did the Bailum heirs "happen" to join Monica Middleton in their case as an heir of Samuel Balaam and use her alleged kinship as support for their claims when she had already established herself as an heir to Fannie Middleton, not Samuel Balaam; also why did the Bailum heirs file pleadings saying Simmons was entitled to a share in everything and then renounce their position at trial. How and why the Bailum parties reversed their position is not known. How and why their counsel changed his position is not known. What investigation the Bailum parties counsel conducted and whether it was suppressed at trial was not known. What discovery was provided to Louis Condon, Esq. is not known. All of the foregoing is the subject of further inquiry through discovery and not able to be determined at this stage of the proceedings. This Court found that Simmons prior counsel, Louis Condon, Esq. " was neither induced not to present his case nor deprived of the opportunity to be heard. However, there was nothing upon which this Court should have made such a finding. and discovery is needed. Considering that Louis Condon, Esq. was a former Master in Equity, the lack of a record requires this Court to deny dismissal of this action until a definitive conclusion could be drawn. All of these are considerations in the larger aspect of the case based on fraud on the court and exceptional circumstances which require elaboration.

J. The Court did not address the second basis for relief

Simmons respectfully requests that the court reconsider its Order because it does not address the Second Count of the complaint that exceptional circumstances justify equitable relief. The Order mainly considers the fraud issue and the dismissal of Simmons appeal but does not make any findings on which to dismiss the Second Count. It does not address the entirety of the facts and circumstances alleged in the complaint which led to the filing on an independent action. Moreover, plaintiff contends that the record is incomplete and discovery must occur even before the case is ripe for disposition. See Above.

K. Res Judicata does not bar this case.

Plaintiff respectfully requests that this court reconsider its finding that res judicata bars this action. First the record is not fully developed and there is a dispute of fact as to whether the totality of the circumstances was or could have been previously addressed by the trial or appellate court in Bailum v. Simmons. Plaintiff asserts that whether the significance of the testimony in Middleton v. Doe should have come to light sooner is unclear and discovery is needed to establish whether defendants were aware of it and concealed it.

Second, Simmons never had a fair hearing on the overall merits of his claims. When addressing collateral attacks on a final judgment, the court must balance the need for finality (underlying the principle of res judicata) against the need for a fair and just resolution of the dispute. Hagy v. Pruitt, 339 S.C. 425, 529 S.E.2d 714 (2000). Simmons alleged that the Special Referee arbitrarily refused to complete the purchase, in part due to racial animus. Simmons was never opportunity to challenge this action and lost the property for which he had struggled for many years to protect. Simmons has not received a full and fair determination of his rights to the heirs property which he maintained and preserved for so many years.

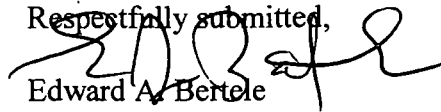
CONCLUSION

Plaintiff requests reconsideration because: the evidence supports the plaintiff's contention that actual fraud occurred; there was knowing and intentionally false testimony given that Fannie Bailum was Fannie Middleton in order to deprive Simmons of any interest in property acquired in 1905 (parcels 2,3 and 4 amounting to 30 acres) and provide Monica Middleton a windfall; the Special Referee relied upon this false testimony; plaintiff was unaware of the Middleton v. Doe case during the Bailum v. Simmons trial; all of the facts and circumstances surrounding the false testimony need to be developed before the Court can determine whether a fraud on the court occurred. Plaintiff has submitted competent evidence to demonstrate that these facts and inferences derived from them support his claims. Consequently, defendants were not entitled to summary judgment on the issue of fraud on the Court.

Similarly, defendants are not entitled to summary judgment on the claim of extraordinary circumstances. The evidence of fraud (whether intrinsic or extrinsic) is pertinent to this claim as well. In addition Simmons has sworn under oath that the Special Referee exhibited racial bias against him and ignored evidence that Simmons had the financial capability to close title on the 18 acres. Plaintiff alleges that but for this bias Simmons would have been allowed to complete the purchase. The Court of Appeals never decided these issues on appeal because Simmons appeal was dismissed after his attorney failed to perfect the appeal. In addition to the significance of facts being in dispute, defendants are not entitled to summary judgment as a matter of law. The law is clear that res judicata bars a subsequent action only if plaintiff had a fair hearing on the merits of his claim in the earlier action.

Finally, plaintiff was entitled to conduct discovery on all of the relevant issues and this motion is premature. For the reasons expressed, plaintiff respectfully requests that the Court deny this motion for summary judgment.

Respectfully submitted,



Edward A. Bertele
Attorney for Plaintiff

January 29, 2011
Charleston, SC

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the within Plaintiff's motion for reconsideration was served upon the defendants' attorney, Anastasios Chakeris, Esq. by regular mail postage prepaid at his last known mailing address.



Edward A. Bertele, Esq.

January 31, 2011
Charleston, SC

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2009 - CP -10 - 5343

ROOSEVELT SIMMONS)
Plaintiff)
Vs.)
HATTIE BAILUM, RUBY BAILUM)
VERDONE GRAY, JULIE B. JOHNSON)
MONICA MIDDLETON,)
MARIE SMITH, MELVIN SINGLETON,)
FRANKLIN SMITH, LMC, LLC,)
JOHN MARTIN, ESQ. as TRUSTEE)
Defendants)

2011 FEB -1 PM 3:57
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

AFFIDAVIT OF EDWARD A. BERTELE

Edward A. Bertele, of full age according to law upon his oath deposes and says:

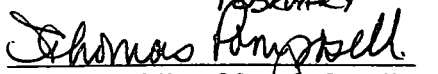
1. I am an attorney at law of the state of South Carolina and have personal knowledge of the following.
2. I attended the motion hearing in this case on August 27th which the court had scheduled for reargument of defendants' motion to dismiss, originally heard on March 1. At the hearing, defendants' prior counsel, Thomas Martin, Esq. asserted that the alleged false testimony about Monica Middleton had no factual basis since there were two different Monica Middletons involved in the Middleton v. Doe and Bailum v. Simmons cases. The court gave defendants leave to supplement their motion to include such supporting evidence and allowed me time to respond. I did not understand that any other discovery on issues raised by the pleadings would be needed.

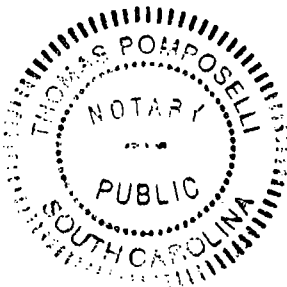
3. I subsequently sent Mr. Martin a subpoena for all of his records pertaining to the second Monica Middleton to which he never responded. Mr. Martin later withdrew his contention that there was a second Monica Middleton.

4. The files in my possession from the prior case are incomplete and do not allow me to make any more detailed allegations regarding the prior attorneys involved in the case. Further discovery is necessary to fully develop the circumstances which are alleged in the complaint relating to Simmons prior attorneys as well as appointment the Special Referee. The files concerning the discovery conducted by prior counsel are not in my possession. I do not know whether there was any meaningful discovery conducted or the basis on which the Bailum parties changed their position at trial. These and many other issues set forth in the motion need to be resolved before the Court can make a reasoned decision.

5. Attached as Exhibit A is a true copy of the Transcript of the May 15, 2006 hearing in Bailum v. Simmons, page 171. This testimony is supportive of plaintiff's position as to fraud and was presumably part of the motion record.


Edward A. Bertele

Sworn and subscribed before me
This 1 day of ~~January~~ ^{February} 2011

Notary Public of South Carolina



Transcript of Special Referee Hearing

Page 171

1 Q. And that was her maiden name, Mary Warren
2 Bailum?

3 A. Yes.

4 Q. And how old was she at the time of your
5 birth?

6 A. 19.

7 Q. Was your mother a second wife for Mr.
8 Bailum?

9 A. Yes, it certainly was.

10 Q. And this is the Sam Bailum who was married
11 to Verdone's father, Sammy?

12 A. Yes.

13 Q. Oh, excuse me. Let me back up. I got
14 myself confused there. This is the Sammy -- your
15 father was the Sam Bailum, the same one that was
16 married to Julia Morris Bailum?

17 A. Yes.

18 Q. That was his first wife. His second wife
19 was Mary Warren, your mother?

20 A. Yes.

21 Q. So you are Verdone's aunt?

22 A. Yes.

23 Q. Even though you're younger than her,
24 you're her aunt?

25 A. Yes, I am.

Clark & Associates, Inc.
843.762.6294

EXHIBIT A

565e526c-70cf-41ad-85eb-3fb7ac6b1549

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON) IN THE COURT OF COMMON PLEAS
) 2009-CP-10-5343

ROOSEVELT SIMMONS,)
)
) PLAINTIFF,) TRANSCRIPT OF RECORD
)
VS.) March 1, 2010
)
HATTIE BAILUM, ET AL) Charleston, South Carolina
)
DEFENDANTS.)
_____)

B E F O R E:

THE HONORABLE J.C. NICHOLSON, JR., Judge

A P P E A R A N C E S:

EDWARD BERTELE, Esquire
Attorney for the Plaintiff

BRUCE BERLINSKY, Esquire
Attorney for the Defendants

ANASTASIOS CHAKERIS, Esquire
Attorney for the Defendants

JOHN MARTIN, Esquire
Self-Represented Litigant

MISSY BROWN
Court Reporter

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
MOTION HEARING	4			
CERTIFICATE OF REPORTER	64			

E X H I B I T S

<u>NO.</u>	<u>DECRPTION</u>	<u>ID</u>	<u>EV</u>

NO EXHIBITS PRESENTED DURING HEARING

R 244

1 P R O C E E D I N G S

2 MARCH 1, 2010

3 (Whereupon, Court convened when the following matters
4 were had:)

5 THE COURT: All right. This is Simmons versus
6 Bailum. Who's here for who?

7 MR. BERTELE: Edward Bertele for Roosevelt
8 Simmons.

9 THE COURT: Okay.

10 MR. BERLINSKY: And Bruce Berlinsky here for the
11 defendants.

12 THE COURT: Okay. So you've got a motion to make
13 more definite and certain, to dismiss, and a motion to
14 disqualify Mr. Berlinsky, and a motion for temporary
15 injunction relief. Which one do y'all want to hear first?

16 MR. BERTELE: Your Honor, ---

17 THE COURT: I guess we need to hear the motion to
18 disqualify first.

19 MR. BERLINSKY: Disqualify me.

20 MR. BERTELE: Yes, Judge.

21 MR. BERLINSKY: Because if I get dis -- If I get
22 disqualified my clients have got Mr. Anastasios Chakeris to
23 argue the remaining motions. And if I'm not disqualified,
24 well then I'll argue them.

25 THE COURT: You've made your motion for him to be

1 disqualified?

2 MR. BERTELE: Yes, I did, Your Honor.

3 THE COURT: All right. Let's hear that first.

4 MR. BERTELE: Thank you, Judge.

5 The basis of the motion is that Mr. Simmons had talked
6 with Mr. Berlinsky in 2003 concerning the same property
7 which is the subject of this lawsuit. Mr. Simmons had then
8 -- had consulted with a prior attorney, Mr. McFarland. And
9 ---

10 THE COURT: Let me back up. Tell me briefly what
11 the lawsuit's about.

12 MR. BERTELE: Yes, Judge.

13 This is a case for equitable relief to vacate an
14 earlier judgment entered in a case called Bailum, B-A-I-L-
15 U-M, versus Simmons.

16 THE COURT: All right.

17 MR. BERTELE: That -- That was started in 2004.
18 And that case went to a judgment. There was an appeal
19 filed. The appeal was dismissed because of lack of
20 diligence by the attorney who filed the merits brief. And
21 I filed this separate action under Rule 60(b) based upon
22 two independent causes of action.

23 THE COURT: That's subject to default in the
24 second one?

25 MR. BERTELE: No, it's a separate action, Judge.

R246

1 THE COURT: All right.

2 MR. BERTELE: Basically to vac -- to vacate the
3 earlier judgment and ---

4 THE COURT: Okay. Vacate this judgment.

5 MR. BERTELE: And some deeds that were entered
6 pursuant to that judgment, yes, sir.

7 THE COURT: All right. So Mr. Berlinsky had
8 talked to Mr. Simmons about the property?

9 MR. BERTELE: Yes, yes. Exactly. Mr. -- Mr.
10 Simmons spoke to Mr. Berlinsky. We submitted two
11 affidavits from Mr. Simmons to that effect.

12 THE COURT: Are they in the file?

13 MR. BERTELE: Yes, sir. Yes, Your Honor.

14 The second of which, attaches as exhibit A, a letter
15 dated July 17th 2003. So this was Simmons, and it says, ---

16 THE COURT: You've got an affidavit from
17 Roosevelt Simmons and you have one -- What's the other one?

18 MR. BERTELE: It's a supplemental affidavit from
19 Roosevelt Simmons.

20 THE COURT: Give me a chance to look at them very
21 briefly.

22 MR. BERTELE: Absolutely, Judge.

23 (Whereupon, the Court reviewed the affidavits.)

24 THE COURT: So basically Mr. Berlinsky met with
25 him and wrote him a letter concerning his employment,

1 possible employment, what needed to be done and his
2 retainer agreement; is that correct?

3 MR. BERTELE: Yes. And particularly, in the
4 second paragraph of the letter, he referred to the 54 acres
5 that Mr. Simmons was concerned about, property that he had
6 consulted with a private attorney, Mr. McFarland, and which
7 was later the subject of the -- of the Bailum case in which
8 he was a Defendant.

9 So I believe that it's clear that an attorney/client
10 relationship was established. The case I cited indicates
11 that there need not be a -- a retainer signed as long as
12 there's legal advice sought with a view towards employing
13 him professionally, whether or not active employment
14 results. That's the Marshall case, Your Honor.

15 The -- the -- the matter about which Mr. Berlinsky was
16 consulted and now represents the Defendants, who are all of
17 the other side of the family, so to speak, their interest
18 is certainly material and adverse to Mr. Simmons' in this
19 case.

20 THE COURT: Why do you think it's adverse to Mr.
21 Simmons in this case to vacate a judgment against him?

22 MR. BERTELE: Well, the judgment which ---

23 THE COURT: What would -- what would the letter
24 that he wrote have to do with me vacating the judgment?

25 MR. BERTELE: Well, Judge, ---

1 THE COURT: It's two separate matters.

2 MR. BERTELE: The property and the relationship
3 that was created between Mr. Simmons and Mr. Berlinsky
4 relates to the family history, the property that was the
5 later subject ---

6 THE COURT: Well what's your basis to vacate?

7 MR. BERTELE: The basis -- the basis to vacate
8 the judgment is that there was a fraud on the Court, that
9 one of the heirs of the property obtained relief in another
10 case based upon inconsistent testimony, and that that was
11 not discovered until subsequent to the judgment that was
12 entered in the previous case.

13 THE COURT: Well how does that -- Mr. Berlinsky
14 know that?

15 MR. BERTELE: Well we're alleging that he's now
16 representing a party whose interest is adverse to Mr.
17 Simmons.

18 THE COURT: Is that the party related to Mrs.
19 Middleton?

20 MR. BERTELE: Yes.

21 THE COURT: Okay.

22 Anything else?

23 MR. BERTELE: With respect to that motion, no,
24 Your Honor.

25 But I would add that if the Court agrees that Mr.

1 Berlinsky should be disqualified, then I would ask that any
2 motions which he has filed on behalf of the Defendants
3 should also be denied on the basis that he can't be
4 representing an adverse party and filing motions on their
5 behalf if he has a conflict of interest.

6 Thank you.

7 THE COURT: Okay.

8 Well let me ask you a question if I may, before I hear
9 from Mr. Berlinsky. I mean I don't know if he has a
10 conflict of interest or not under the professional Canons
11 of Ethics. Generally isn't that a -- that's a position for
12 the Bar Grievance to take up, not for the courts.

13 Let's assume for -- and I'm not trying to take the
14 position whether he did or he didn't, but assume for
15 purpose of my question that he did violate, I believe you
16 quote Professional Canon 1.9, I believe you quote one
17 more, I believe, let's assume he did, why should the Court
18 disqualify him because he violated a Canon of Ethics?
19 That's for the grievance committee to decide, not for the
20 circuit court.

21 MR. BERTELE: Your Honor, I -- I would
22 respectfully disagree. I -- I think it's fundamental to
23 the prosecution of a lawsuit that the -- that the Canons
24 of Professional Ethics be maintained. And he might be ---

25 THE COURT: I understand, but I mean I could

1 write a report to the Grievance Committee and say this man
2 violated a Cannon of Ethics, but that's their bailiwick,
3 not the court of -- not the circuit court's.

4 MR. BERTELE: But, Judge, if Mr. Berlinsky has a
5 conflict of interest, then as we allege there was a
6 confidential relationship, he's in a position to use that
7 against Mr. Simmons in this case.

8 THE COURT: Well ---

9 MR. BERTELE: I think that the Court should not
10 ---

11 THE COURT: I mean that's a different -- that's a
12 different thing, but your affidavit doesn't necessarily
13 address that issue.

14 MR. BERTELE: Well ---

15 THE COURT: It just says that they talked to him.

16 MR. BERTELE: Well, I mean, the confidential
17 relationship is established. Once there is a showing that
18 there is a confidential relationship, then the conflict of
19 interest rule applies, Your Honor. Once there is a
20 confidential relationship established, Mr. Berlinsky ---

21 THE COURT: What's the authority you are citing?

22 MR. BERTELE: That's the Marshall case, Judge.
23 It's on page ---

24 THE COURT: Have you got an extra copy of it?

25 MR. BERTELE: I didn't bring it. I cite it in my

1 brief.

2 THE COURT: All right. It's provided in the
3 brief. Is it in your motion?

4 MR. BERTELE: Yes, sir. It's page 3.

5 THE COURT: Page 3.

6 Marshall?

7 MR. BERTELE: Yes, Your Honor. I believe that
8 that case dealt with disqualification of a lawyer in a
9 matrimonial case.

10 THE COURT: That's just whether he employed him
11 or not.

12 MR. BERTELE: The point that I'm making, Your
13 Honor, is that ---

14 THE COURT: I'll agree with you if -- if he has
15 received some advantage or it's derogatory or, excuse me,
16 discriminatory towards you or put you at a disadvantage I
17 agree that would disqualify him. But I'm just trying to
18 find something that he discussed that could put you at a
19 disadvantage.

20 MR. BERTELE: Well he -- he discussed ---

21 THE COURT: I agree with what the Simmons case
22 says -- I mean the Marshall case. But I don't think that's
23 really on point with what we're talking about now.

24 MR. BERTELE: Well, the -- the point is that once
25 there is a confidential relationship established, and there

1 was here, Mr. Simmons went to Mr. Berlinsky with the object
2 of retaining him to quiet title on 54 acres ---

3 THE COURT: Right.

4 MR. BERTELE: --- and discussed the particulars
5 of his claim.

6 Now, to me that is material and adverse and creates a
7 conflict of interest for any future representation by Mr.
8 Berlinsky of some -- someone whose interest in those 54
9 acres is material and adverse to Mr. Simmons, which these
10 defendants in this case that Mr. Berlinsky represents is
11 clearly.

12 THE COURT: Okay.

13 Okay. Mr. Berlinsky?

14 MR. BERLINSKY: Thank you, Your Honor. I've got
15 -- Copies have been provided to Mr. Bertele, but we have
16 not filed them yet. But, an affidavit.

17 (Whereupon, Mr. Berlinsky handed documents up to the
18 Court.)

19 MR. BERLINSKY: Apparently -- I had no
20 recollection of ever meeting with Mr. Roosevelt Simmons
21 until they filed this motion. He came to my office. As is
22 my practice and custom because of the potential, when I
23 meet with people in quiet title actions all I do is tell
24 them why it's heirs' property, why a quiet title action
25 needs to be done, a clear and marketable title for a 62-

1 year period of time, the break in the chain. That's what
2 creates the heirs' property and the need for the lawsuit.

3 I never, ever go into any specifics of the case until
4 I've been retained so that I don't know anything about it.
5 The only thing that I knew is he gave me the tax map
6 number, I printed off the property-record card from the
7 Internet, and -- or looked on the Internet while he was in
8 my office, knew it was a 54-acre tract, did not discuss the
9 family history, did not discuss any matters of a
10 confidential nature, none of which he's alleged in his
11 complaint.

12 And I told him, if you want to hire me, here's what
13 you need to bring me, which was the retainer, and provide
14 me with the family history and then we'll sit down and talk
15 about the specifics of your case. That's all I ever did
16 with the man.

17 Number two, the allegations of this fraudulent
18 testimony, I was not hired by the Smiths until it was
19 necessary to file any motion to alter or amend the initial
20 final order in this Court. All the testimony had already
21 been done. I didn't even participate in that part, the
22 trial. So I couldn't possibly have perpetuated some fraud
23 on the Court as he alleges.

24 The other thing is, since my motion to alter or amend,
25 through all the post-trial motions, through all the

1 hearings that I attended, which were at least two and
2 possibly three, through the entire appeal process this was
3 never alleged because -- or I was never asked to disqualify
4 myself.

5 THE COURT: You handled the appeal, but not the
6 trial level?

7 MR. BERLINSKY: The trial was handled -- my
8 clients were pro se in the trial.

9 THE COURT: Okay.

10 MR. BERLINSKY: And then after the initial order
11 was issued Franklin Smith and Marie Smith, Marie is the
12 real heir and Franklin is the son, called me and asked me
13 if I would look at the order and they had some concerns and
14 I filed a Rule 59, Rule 60 motion. That was my first
15 involvement in this case.

16 THE COURT: Then what was your involvement after
17 that?

18 MR. BERLINSKY: Then there were some motions
19 filed by Mr. Simmons' prior counsel.

20 After that -- after that motion to alter or amend was
21 heard the judge did grant the relief -- certain relief for
22 my client as well as for other parties.

23 So a new -- a supplemental or amended final order was
24 entered. And then Mr. Simmons filed some post-trial or his
25 counsel filed post-trial motions to alter or amend that

1 order. Those ---

2 THE COURT: Those were appealed?

3 MR. BERLINSKY: And that's what was appealed.

4 THE COURT: But the appeal was never perfected,
5 correct?

6 MR. BERLINSKY: Well, the appeal was perfected.
7 The appeal was dismissed based on a varied number of
8 reasons; lack of Mr. Simmons' attorney obtaining
9 transcripts, lack of timely filings of different motions
10 for extension before the Court of Appeals, and after, what
11 a year, year and a half, motions in the Court of Appeals,
12 the Court of Appeals' language said we're dismissing the
13 appeal and the final order will stand.

14 THE COURT: Okay. Do you have a ---

15 MR. BERLINSKY: So I just don't know -- I have no
16 confidential information from them. All I did was
17 basically sit down with the man, look on the computer at
18 the property-record card, determined if it was a 54-acre
19 tract, and I gave him the Hornbook lesson on what's heirs'
20 property, and what a quiet title action is, and said, if
21 you want to hire me, this is what you need.

22 And there's no allegations in any of his affidavits
23 that he discussed it with me or gave me confidential
24 information. But if you feel I shouldn't go forward we
25 have a new lawyer who's sitting right here and he's

1 prepared to argue all the remaining motions.

2 THE COURT: But what I want to ask you, do you
3 want to go forward?

4 MR. BERLINSKY: Well, I'd like to represent my
5 clients, but to avoid any appearance of impropriety I'll --
6 I'll sit back and let Mr. Chakeris ---

7 THE COURT: That's sort of what I'm asking you.

8 MR. BERLINSKY: Yeah.

9 THE COURT: Do you want to go forward?

10 MR. BERLINSKY: I would like to go forward to
11 represent these clients because of the relationship. But
12 in light of the appearance of impropriety I'll let Mr.
13 Chakeris -- If you feel I should not go forward ---

14 THE COURT: I think I told -- like I said, I
15 think that's an issue for the grievance. I've seen nothing
16 so far in my opinion that would prejudice -- give you
17 information that would prejudice the other side. And I
18 think that's the only reason I could issue an injunction.
19 Because I think whether you violated the Canon of Ethics
20 is a question for the Bar, not the Court.

21 Now I agree that if it goes so far as to prejudice his
22 client with inside information, you should be enjoined from
23 the proceedings. So far I haven't seen anything that would
24 indicate that you gained some type of information. I
25 disagree that just because you talked to him -- possibly

1 the attorney/client relationship began and I should -- I
2 should issue an injunction for you to proceed in the
3 lawsuit.

4 Now that's sort of where I'm coming from. Okay?

5 MR. BERLINSKY: Well, okay. I'll go forward.

6 THE COURT: Okay.

7 I'm going to deny granting the injunction enjoining
8 him from continuing the lawsuit based on the affidavits of
9 the parties. Okay? If he wants to proceed that's up to
10 him. If he wants to withdraw, because of the appearance of
11 impropriety, that's fine too.

12 MR. BERTELE: I -- I understand Your Honor's
13 ruling. I -- I would just like to have the opportunity to
14 -- to direct a comment to the Court about something that
15 Mr. Berlinsky said earlier.

16 I don't believe I accused him of being involved in any
17 fraud on the Court. If he understood me to say that, then
18 I wanted to clarify that.

19 THE COURT: I understood him to say he hadn't
20 heard anything about any fraud upon the Court and I didn't
21 take it that you were indicating he was involved in the
22 fraud. I took it that some witness lied on the witness
23 stand is what I took him to say.

24 MR. BERTELE: Yes, Your Honor.

25 THE COURT: Mr. Berlinsky, did you hear what was

1 said? He didn't mean to indicate that you were involved in
2 any fraud on the Court, okay, and the Court did not take it
3 that way.

4 MR. BERLINSKY: Okay.

5 Your Honor, after discussing it with the other lawyers
6 who were previously involved in this matter, I think I'm
7 going to let Mr. Chakeris, who's had no involvement in this
8 case, so that there's no appearance of impropriety. I can
9 tell you I ain't had no -- I never discussed anything with
10 Mr. Simmons.

11 THE COURT: Okay. Well I've -- I've already
12 denied that motion. But I mean you've still got the
13 problem of -- the appearance problem. And that's not -- as
14 I said, that's not -- I don't think that's for the Court to
15 decide. That's for the people in Columbia.

16 Okay. Now, as far as your motion to dismiss all his
17 motions, no, I'm not going to do that. But do you want to
18 proceed with the other motions today in light of my ruling
19 on Mr. Berlinsky or do you want to just not move forward
20 with them?

21 MR. BERTELE: Well, Judge, I -- I want to answer
22 your question. I would like to inquire as to whether Mr.
23 Berlinsky's staying in the case or is just ---

24 THE COURT: He says he's going to get out of the
25 case.

1 MR. BERTELE: Okay.

2 THE COURT: He says he's going to voluntarily
3 withdraw from the case.

4 MR. BERTELE: I appreciate that. I appreciate
5 your clarification, Your Honor.

6 THE COURT: Is that correct, Mr. Berlinsky?

7 MR. BERLINSKY: That's correct.

8 THE COURT: He's going to voluntarily withdraw
9 because he doesn't want to have to show -- have any
10 appearance of impropriety involved in the lawsuit.

11 So I'm specifically finding this Court is not finding
12 he's violated any Cannons of Ethics.

13 MR. BERTELE: Understood, Your Honor.

14 THE COURT: You understand?

15 MR. BERTELE: Yes, sir.

16 THE COURT: Okay.

17 MR. BERTELE: Now, with -- with respect to the
18 second part of your ruling, I understand that you've --
19 you've denied my -- the second part of my request, which is
20 to deny his motions because of that conflict?

21 THE COURT: Right. That's right.

22 MR. BERTELE: Thank you, Judge.

23 All right. We'll -- May I speak to Mr. Simmons just
24 for one second?

25 THE COURT: Yeah, that's -- first of all that

1 leaves, what, the motion to make more definite and certain,
2 the motion to dismiss, correct?

3 MR. BERTELE: And a motion for a temporary
4 restraining order.

5 THE COURT: Okay. All right.

6 MR. BERTELE: Your Honor, before we get into
7 these other motions, may I hand up to the Court my
8 opposition to the motion to dismiss? I'm not sure it made
9 it into the file.

10 THE COURT: Let me see. Yeah, that's fine. You
11 can hand that up. I've got a Plaintiff's opposition to
12 more definite and certain and I've got -- but that's all I
13 have. I've got a notice of motion -- no, I don't have
14 that.

15 (Whereupon, Mr. Bertele handed documents up to the
16 Court.)

17 MR. BERTELE: Thank you, Judge.

18 THE COURT: Thank you so very much.

19 You want to talk to your client for a few minutes, you
20 said?

21 MR. BERTELE: Please.

22 THE COURT: Okay. Feel free.

23 Mr. Berlinsky, are you leaving?

24 MR. BERLINSKY: I'm just going to sit in the
25 back. I'm not going to leave, but I am going to ---

1 THE COURT: Come here and let me tell you
2 something real quick.

3 (Whereupon, Mr. Berlinsky approached the bench and an
4 unrelated off-the-record discussion was had.)

5 THE COURT: All right. Now who is appearing for
6 the Defendant now?

7 MR. CHAKERIS: May it please the Court, Your
8 Honor?

9 THE COURT: Mr. Berlinsky, if you'll type me up a
10 short order dismissing you from the case, I will be happy
11 to do that and that's -- you may voluntarily withdraw.

12 MR. BERLINSKY: Thank you, Judge.

13 THE COURT: I can use this short order if you
14 want me to.

15 MR. BERLINSKY: Go ahead. If you don't mind, go
16 ahead.

17 THE COURT: I'll use the short order.

18 MR. BERLINSKY: I think ---

19 THE COURT: All right. Now who is here in place
20 of Mr. Berlinsky now?

21 MR. CHAKERIS: May it please the Court, Your
22 Honor? Anastasios Chakeris.

23 THE COURT: What?

24 MR. CHAKERIS: And I'm going to hand my name to
25 the court reporter so she can get the full spelling.

1 THE COURT: Oh, okay.

2 MR. CHAKERIS: It's Chakeris.

3 THE COURT: Chakeris?

4 MR. CHAKERIS: Chakeris, C-H-A---

5 THE COURT: C-H-A---

6 MR. CHAKERIS: --- K-E-R-I-S.

7 THE COURT: Thank you, Mr. Chakeris.

8 MR. CHAKERIS: May it please the Court, Your
9 Honor? We would like to be heard first of course on the
10 motion to dismiss.

11 THE COURT: Okay.

12 MR. CHAKERIS: Your Honor, as Mr. Berlinsky
13 mentioned I'm brand new to the case, which has been ongoing
14 for several years now, Your Honor.

15 And if I could direct Your Honor to the motion. I
16 think my newness to the case to argue this motion will
17 actually be a benefit ---

18 THE COURT: Do you want to reschedule the
19 motions? I mean I'll be happy to reschedule it if neither
20 party's ready for it.

21 MR. CHAKERIS: No, Your Honor. I think we're
22 ready for it. I just -- I wanted to run Your Honor through
23 the -- through the litany of the case ---

24 THE COURT: Okay. All right. That's fine.

25 MR. CHAKERIS: --- so that Your Honor can see

1 exactly where this motion stems from.

2 Your Honor, the initial case was heard and decided on
3 by a special referee and the special referee's order was
4 issued January 11th 2007.

5 Subsequently the -- Mr. Simmons filed a pro se appeal
6 and then thereafter hired counsel, Charles Houston, who
7 made an appearance and filed an amended notice of appeal
8 dated April 24th 2007. From that time there were several --
9 several extensions to that motion with the Court of
10 Appeals, all of which were subsequently denied by the Court
11 of Appeals.

12 And through to March 20th 2008 you see there's four or
13 five paragraphs in the litany of the case, the appeal was
14 subsequently dismissed, and the order upheld by the Court
15 of Appeals.

16 So here we are, Your Honor, with the Plaintiff in our
17 new case filing a brand new case, but essentially not
18 bringing any new allegations to this Court.

19 Your Honor, the Defendants have submitted this
20 affidavit of Mr. Martin, who's in the courtroom, which
21 essentially -- which essentially confirmed, the litany of
22 the case, confirms that the order was upheld by the Court
23 of Appeals, and -- and further confirms that there are no
24 new issues that this Court -- before this Court with the
25 exception of some potential allegations of conspiracy and

1 some potential allegations of misconduct by Mr. Simmons'
2 own attorney, none of which would warrant a new action.

3 With the evidence before the Court, Your Honor, in all
4 of the matters pertinent to the whole case having been
5 argued, heard before not only the special referee, but the
6 Court of Appeals as well, his new case is precluded by res
7 judicata for certain.

8 And with that, Your Honor, we respectfully submit to
9 the Court that this new lawsuit be dismissed since there's
10 nothing new about it.

11 THE COURT: Okay. Is that all you have? Is that
12 all your argument?

13 MR. MARTIN: Your Honor, -- Your Honor, John
14 Martin, I'm a defendant in this action by virtue of the
15 fact that I'm still holding funds in my trust account. But
16 I am the attorney that handled this case from the beginning
17 of 2004 through the disbursement of funds at a closing in
18 December of 2008.

19 I submitted an affidavit to the Court which responds
20 to all of the issues that are before the Court in the
21 complaint. And I think that if Your Honor takes a moment
22 and looks at my affidavit, it's only about two pages long,
23 but I've attached for you all of the various excerpts from
24 the transcripts of the trial or the appeal.

25 I think you will see that each issue raised in the new

1 complaint was fully vetted at trial, post-trial motions, or
2 in the appellate courts by attempted filings of brief for
3 the reasons noted.

4 The issue is that at trial Mr. Simmons was represented
5 by Louis Condon, former Master-In-Equity of Charleston
6 County. And before that it was Ms. Ruth Cupp, who was an
7 extremely talented and experienced attorney here in
8 Charleston County.

9 All of those issues that are now before the Court were
10 fully vetted at trial or certainly could have been. Many
11 of the issues in the complaint were vetted at the time of
12 the appeal. And so I'm of the opinion, Your Honor, that I
13 can support the motion to dismiss again because I'm a pro
14 se Defendant in that regard.

15 In all the matters that they seek to refile again,
16 there's an appeal that has been fully vetted.

17 And again, if you look at my affidavit you will see
18 the litany of all of the issues that were raised and how
19 they were dealt with by the trial court and the appellate
20 court. And I would join in the prayer for relief also.

21 THE COURT: Okay. Thank you very much.

22 (Whereupon, the Court reviewed documents.)

23 THE COURT: What was the date of the final
24 resolution in the Court of Appeals? Do you remember?

25 MR. BERTELE: Your Honor, the last thing that was

1 issued by the Court of Appeals I believe was a letter of
2 November 18th stating to ---

3 THE COURT: Of what year?

4 MR. BERTELE: 2008. Excuse me, Your Honor.

5 THE COURT: Okay.

6 MR. BERTELE: --- concerning a motion for
7 reconsideration that was being returned unheard. And
8 before that there was an order denying full appellate
9 review. There is -- there is certainly a multitude of
10 appellate decisions in the case, none of which -- none of
11 which deals with the merits of the claims that we have
12 raised in this -- in this complaint.

13 THE COURT: I was just trying to look at your
14 complaint. And I will be glad to hear you just as soon as
15 I look at it -- finish looking at your complaint.

16 (Whereupon, the Court continued to review documents.)

17 THE COURT: Mr. Bertele?

18 MR. BERTELE: Yes, Your Honor.

19 THE COURT: I guess my question to you, I've read
20 your complaint and I was looking at Rule 60, which is
21 relief from judgment or order, and you were under motion
22 must be within a reasonable time, 1, 2, and 3. Apparently
23 you feel like you have not filed this under Rule 60. You
24 tried to file an entirely new lawsuit; is that correct?

25 MR. BERTELE: Yes, under ---

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1 THE COURT: Is that your position?

2 MR. BERTELE: Under 60(b).

3 THE COURT: Do you have to do it under 50 or 60?

4 MR. BERTELE: Your Honor, 60(b) provides for an
5 independent action.

6 THE COURT: Sixty what?

7 MR. BERTELE: 60(b).

8 THE COURT: B, right?

9 MR. BERTELE: Yes, Judge.

10 THE COURT: So you're trying to say it's a fraud
11 under the Court under 60; is that correct?

12 MR. BERTELE: Correct, Your Honor.

13 THE COURT: Under 60?

14 MR. BERTELE: We have -- we have two bases,
15 exceptional circumstances and fraud on the Court. They're
16 independent grounds we believe ---

17 THE COURT: I understand you can -- the power of
18 the Court to entertain an independent action of either
19 party to set aside judgment for fraud.

20 And what's your other reason?

21 MR. BERTELE: Exceptional circumstances.

22 THE COURT: What are the exceptional
23 circumstances?

24 MR. BERTELE: Well, the exceptional circumstance
25 is that because of things which happened in this case that

1 were not due to Mr. Simmons' fault, he did not get a full
2 and fair resolution of his case.

3 THE COURT: Tell me -- tell me specifically what
4 we're talking about because apparently you come here,
5 testimony was taken, a special referee ruled, an appeal, a
6 dismissal of appeal because the appeal wasn't perfected.

7 MR. BERTELE: Correct.

8 THE COURT: So tell me what he wasn't entitled to
9 and why it shouldn't be res judicata. The same issues
10 you're raising here were raised in that trial, except --
11 possibly except for the fraud. But first of all let's talk
12 about the res judicata. Why isn't it res judicata?

13 MR. BERTELE: Well, Judge, I understand the
14 argument. And it seems to me that the structure of the
15 rule allows for a separate action that deals with the prior
16 case.

17 THE COURT: I won't even argue with you on that.

18 MR. BERTELE: Okay.

19 THE COURT: I read your complaint. The complaint
20 sounds like you're just relitigating what's been
21 relitigated.

22 MR. BERTELE: No. Judge, I'm not here to do
23 that, respectfully. And I understand counsel's position
24 that they believe that all of this has been resolved
25 before.

1 I've gone through the -- I've gone through the orders
2 of -- of the special referee. I've looked at the findings
3 -- his findings of fact. I've looked at what the Court of
4 Appeals did and what it was called upon to do. And I don't
5 believe that it dealt with the specific issues that
6 resulted in an unfair outcome.

7 These are ---

8 THE COURT: Okay.

9 MR. BERTELE: These are ---

10 THE COURT: Hold on. Let me make a list.

11 MR. BERTELE: Okay.

12 THE COURT: But -- but see you're going back to
13 relitigate. I mean even though you disagree with the
14 findings and you disagree with what the special referee
15 did, you want to relitigate that. And the way I rule --
16 read Rule 60 it's just got to be based on fraud. And then
17 you've got to get leave to -- the Court can entertain the
18 independent action and that's what we're doing.

19 MR. BERTELE: Yeah.

20 THE COURT: So it's a fraudulent reason to reopen
21 it. And that's the only reason the way I rule reads --
22 rule -- read Rule 60. That's a mouthful. Read Rule 60.
23 Okay?

24 MR. BERTELE: Your Honor, I respectfully disagree
25 ---

1 THE COURT: All right. Tell me where I'm wrong.

2 MR. BERTELE: --- with that. Okay. There's --
3 there's a case which we -- which we cited in our brief on
4 page 7. It's called T -- it's called T vs. T.

5 THE COURT: All right. Let me get your brief so
6 we're on the same page.

7 Well, go ahead and tell me. I can find it later.

8 MR. BERTELE: Yes, Judge. That case, which was
9 -- which was a Court of Appeals case of last -- 2008 ---

10 THE COURT: Was it a Rule 60 case?

11 MR. BERTELE: Yes.

12 THE COURT: Okay.

13 MR. BERTELE: Yes. It says that Rule 60
14 recognizes the equitable power of the Court to look at an
15 entire situation, set of circumstances, and vacate a
16 judgment based upon the fact that there was not -- that
17 there was an unfair result, or that if there was a fraud on
18 the court apart from anything else, that gives the trial
19 court the opportunity also to vacate that judgment.

20 Now, I think that with -- with the language of 60
21 being an opportunity for a trial judge to consider what's
22 fair and reasonable and to consider whether there's a fraud
23 on the court is within the spirit of the rule certainly as
24 the Court of Appeals has -- has decided that one.

25 And I believe that we have both sets of circumstances

1 here, a fraud on the court, I'll get to that first because
2 I think it's -- it's important in the overall context of
3 considering this app -- this application.

4 THE COURT: So you're saying that under Rule
5 60(b) they give you five reasons where you can attack the
6 judgment and number three says fraudulent representation by
7 the adverse party.

8 MR. BERTELE: Correct.

9 THE COURT: That would cover your situation,
10 number three. Now you're telling me that the Court in an
11 equitable situation can set aside the judgment because the
12 results were improper. Is that what you're telling me?

13 MR. BERTELE: That's ---

14 THE COURT: Isn't that more of a 59 type of
15 argument?

16 MR. BERTELE: No, it isn't, Judge.

17 THE COURT: The equitable argument.

18 MR. BERTELE: I'm base -- I'm basing what I'm --
19 what I'm telling Your Honor on my reading, which I think is
20 reasonable, of the T vs. T case. T -- T ---

21 THE COURT: Have you got a copy of it?

22 MR. BERTELE: I'm afraid I don't. I apologize.

23 THE COURT: What's the name of the case?

24 MR. BERTELE: The letter "T" versus "T". It's
25 probably a matrimonial.

1 THE COURT: Okay.

2 MR. BERTELE: And it's 662 S.E. 2d 413.

3 THE COURT: Would you mind -- Would you mind
4 dropping a copy off to my attention with the Clerk?

5 MR. BERTELE: I'll be happy to.

6 THE COURT: And what does that case say according
7 to you?

8 MR. BERTELE: It says that under 60(b) there is
9 the opportunity to show a trial judge, apart from a motion
10 to alter or amend a judgment under the other part of the
11 rule, which I ---

12 THE COURT: That's rule 59, to alter or amend.

13 MR. BERTELE: Yeah. I'm -- I'm very familiar
14 with that. I've done a lot of those kind of applications
15 and I understand the hurdles and the barriers and the fine
16 lines. This is not that though, respectfully, Judge.

17 And as you said a moment ago that Rule provides
18 vacating judgment due to fraud. That's a different type of
19 fraud. The Rule 60(b) motion is -- is intended to address
20 a fraud on the court, which I don't think ---

21 THE COURT: That's in the paragraph. I agree
22 that's there, ---

23 MR. BERTELE: Okay.

24 THE COURT: --- fraud on the court ---

25 MR. BERTELE: Which is -- which is ---

1 THE COURT: --- versus fraud of an adverse party.

2 MR. BERTELE: Correct. Which I think is a higher
3 burden for a Plaintiff such as us in this case, but I think
4 we can meet that. So ---

5 MR. CHAKERIS: Your Honor, if I may just
6 interject one quick thing. Obviously we disagree with his
7 argument, but even taken at face value it should be pointed
8 out to the Court that Mr. Simmons, by way of this order,
9 actually received his statutory share of the proceeds from
10 the sale of the property. But even if taken at face value,
11 he was not disadvantaged in any way.

12 THE COURT: Well, I understand that. I
13 appreciate you telling me that.

14 MR. CHAKERIS: Yes, sir.

15 THE COURT: All right. I'll agree with you that
16 the fraud under subsection 3 is different from the fraud on
17 the court. I've read two separate standards.

18 MR. BERTELE: I struggled with that a lot myself,
19 Judge, before I got to the point of feeling comfortable
20 filing this action.

21 So, if Your Honor would just consider this. There was
22 -- there was a hearing before a special referee. There was
23 an amendment to a final order which recognized Mr. Simmons'
24 right to purchase 18 acres out of all the parcels that were
25 partitioned in the case. There were -- there were four

1 parcels. He was given the right to file -- excuse me -- to
2 purchase the 18. That's why -- that's what this case is
3 about. He believes he still should have been able to buy
4 those 18 acres.

5 The other property was ---

6 THE COURT: Well, they ruled against him in the
7 other trial on that issue, didn't they?

8 MR. BERTELE: Judge, the special referee allowed
9 him the right to purchase the property and then took it
10 away from him for reasons which we contend give us the --
11 the ---

12 THE COURT: Well why did the master take it away?

13 MR. BERTELE: It was a special referee, Judge.

14 THE COURT: All right. Special referee.

15 MR. BERTELE: The special referee made a racial
16 comment to Mr. Simmons early on in the case. He did other
17 things which indicated he had some animosity toward Mr.
18 Simmons. And then at the -- at the ---

19 THE COURT: Was that the fraud on the court
20 you're talking about?

21 MR. BERTELE: No, no. That's something else.

22 THE COURT: Okay.

23 MR. BERTELE: That's something else.

24 Then, when he gave Mr. Simmons the right to buy the 18
25 acres, when Mr. Simmons showed up with financial

1 information from two friends of his that were going to back
2 him up and buy -- and lend him the money to buy the
3 property, the special referee said, no, you can't do that.

4 So it's completely inconsistent with everything that
5 happened up to that point. And it makes -- it's evidence
6 that there was some animosity towards Mr. Simmons.

7 THE COURT: But didn't they -- didn't they -- but
8 if he made a mistake why didn't he perfect the appeal?
9 That was an appellate issue.

10 MR. BERTELE: Judge, that takes us to the second
11 part of the appeal.

12 THE COURT: All right. What's your second
13 argument?

14 MR. BERTELE: The second part of the argument is
15 that Mr. Simmons hired what he believed to be experienced
16 appellate counsel. Now, I can go through the litany of all
17 the things that happened in this case. I think that Mr.
18 Martin has attached all the various orders and so on to his
19 affidavit.

20 The point is there was never any decision on the
21 merits of the case. The Court of Appeals dismissed the
22 decision ultimately after giving Mr. Houston, the appellate
23 attorney, several extensions. Mr. Houston kept asking for
24 more time because he was busy with other clients, or he was
25 sick, or he had a family problem ---

1 THE COURT: But how does that affect -- why does
2 that give you the right to relitigate it? That may give
3 him a cause of action for legal malpractice against ---

4 MR. BERTELE: Your Honor, ---

5 THE COURT: --- the attorney.

6 MR. BERTELE: Okay.

7 THE COURT: But why does that give you the right
8 to relitigate the issues?

9 MR. BERTELE: Your Honor, that's what -- why
10 we're here. Mr. Simmons did not have an opportunity to
11 have a final resolution of his claim. We believe -- we
12 urge the Court to find that what Mr. Houston did or didn't
13 do represents an abandonment. He did not carry out his
14 duty to his client to spend the time and the energy which
15 was called for under the circumstances after many
16 extensions and further opportunities were given to him.

17 Now, under various circumstances a court will find
18 that the neglect or the conduct of an attorney is not to be
19 attributable to his client. We suggest, and we urge Your
20 Honor to find, that this is one of those circumstances,
21 where a lawyer abandons his client, doesn't do what's
22 required of him, the abandonment doesn't prejudice the
23 rights of the client as a result of the attorney's conduct.

24 Mr. Houston, in failing to file a timely brief, which
25 would have brought some, but not all of these issues to the

1 Court of Appeals, should not be attributed to Mr. Simmons.

2 The reason why I filed this action is because there
3 has never been an appellate determination ---

4 THE COURT: But he's got -- he's got a civil
5 remedy for that.

6 MR. BERTELE: Judge, he can't get the 18 acres
7 back. That's why we're here. The 18 acres is very
8 important to him. It's his family property.

9 THE COURT: He got a monetary return. I
10 understand he's already been paid for the 18 acres.

11 MR. BERTELE: He never collected the money. It's
12 still in Mr. -- Mr. Martin's trust account.

13 THE COURT: Okay. Well, so the 18 acres have
14 already been sold. So how are you going to undo that even
15 if you get to relitigate it based upon your argument of the
16 abandonment by his appellate attorney.

17 MR. BERTELE: Very simple, Judge. Equity can do
18 what should have been done. Mr. -- the special referee
19 should have allowed Mr. Simmons to buy the 18 acres. He
20 had the money available. All we want is the opportunity to
21 complete that transaction. The only ---

22 MR. CHAKERIS: Your Honor, ---

23 MR. BERTELE: The only ---

24 THE COURT: Don't interrupt. Don't interrupt
25 him. I'll listen to y'all when he finishes. Make a note

1 of what you want to say and I'll listen to you, but don't
2 interrupt anymore, ---

3 MR. CHAKERIS: I apologize.

4 THE COURT: --- please.

5 MR. CHAKERIS: I thought he was finished.

6 THE COURT: I won't let him interrupt you.

7 MR. CHAKERIS: Yes, sir.

8 THE COURT: Have a seat.

9 MR. BERTELE: The 18 acres was subsequently
10 conveyed by the special referee to a Marie Smith, who is
11 one of the heirs on the side of Mr. Simmons' family.

12 THE COURT: So you would have to ask the Court
13 also to set that deed aside.

14 MR. BERTELE: That's in my complaint. Yes,
15 correct.

16 The other part of the 18 acres was acquired by this
17 stranger in title, somebody who's not -- who has no heirs'
18 interest. The -- the original complaint, going back to
19 2004, asks the Court to allow the sale of all of this
20 property to be -- to be completed.

21 The -- part of the heirs had entered into contract. I
22 don't know how they did that, but they did, with strangers
23 in title. And they came to both of these contracts and
24 that's what -- that was the starting point of these
25 proceedings.

1 Now, the special referee found and his findings
2 indicate that Mr. Simmons had made extremely necessary
3 contributions and paid taxes, looking after the property.
4 He lived on the 18 acres when he was a child and gave him
5 the right, a partition in kind, to buy the 18 acres
6 provided that he could prove financial capability, which we
7 say he did, which the special referee disregarded, never
8 conducted a hearing.

9 I mean, imagine, Your Honor, Mr. Simmons is -- has
10 scraped together \$163,000 that his friends have been --
11 been willing to contribute so he can buy this 18 acres.
12 And the special referee looked at it and said, Well, this
13 -- this financing is in the name of other people, not you,
14 and I'm not going to let you complete the transaction.

15 If he were concerned that -- that these individuals
16 were straw purchasers or that Mr. Simmons was trying to
17 dupe the Court and sell the property to somebody else and
18 make some money, he could have easily had a hearing or done
19 something to establish that this -- that this was not a
20 bona fide transaction. In fact it was a bona fide
21 transaction.

22 That's all Mr. Simmons wants, the right to buy the 18
23 acres where he was raised as a child, where he had the
24 money to complete the sale, and which at the last minute
25 was taken -- taken away from him.

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1 THE COURT: Okay. All right.

2 Tell me now, you talked about the abandonment and I
3 understand your argument on that. Just talk to me about
4 where the fraud is, specifically on the court.

5 MR. BERTELE: Yes, Judge. Okay. This is, and I
6 don't mean to be long-winded, but I'm ---

7 THE COURT: That's all right.

8 MR. BERTELE: --- just afraid this is -- this is
9 a little complicated. Now, I'm not suggesting that you're
10 not up to it. It is 4:30 and I'll do my best to keep it to
11 the point.

12 Here's the thing. All of this goes back to some land
13 that was acquired by Sam Balaam, B-A-L-A-A-M, in the early
14 1900s. We say that the same Sam Balaam acquired 24 acres
15 and 15 acres -- 18 acres -- excuse me -- within a few years
16 of one another. And that's the crux of this, is it the
17 same Sam Balaam or not.

18 Now, the property's in close proximity. The Sam
19 Balaam, whose name appears on the deed, it's got the same
20 spelling, it's almost contemporaneous and such.

21 But in 2003 a person by the name of Monica Middleton,
22 Middleton, brought a quiet title action. Ms. Middleton was
23 represented by Mr. McFarland who Mr. Simmons had gone to
24 two years earlier asking him to start a quiet title --
25 quiet title action on that same par -- that same parcel of

1 property.

2 Mr. McFarland filed this action. Ms. Middleton comes
3 to court, testifies that she's the great-granddaughter of
4 Fannie Middleton. Fannie Middleton's name was on this deed
5 going back to 1904.

6 Fast forward two years later, these other individuals
7 claiming to be heirs of Samuel Balaam, but they spelled
8 their name differently, come to court and they claim that
9 there is another sib -- another -- they claim at the
10 hearing, after filing pleadings that say Mr. Simmons is
11 entitled to a statutory interest of not only 18 acres, but
12 also the 24 acres, they change their tune, they get on the
13 stand and say, no, there's two Sam Balaams, and by the way,
14 Monica Middleton is the -- is a cousin of ours and her
15 relationship supports our contention that there's two Sam
16 Balaams.

17 Now, Monica Middleton can't be the granddaughter and
18 the daughter of the same person at the same time. It's
19 impossible. We contend that the Balium, B-A-I-L-U-M,
20 Plaintiffs in the other case, knew that they couldn't take
21 their case before the Master-In-Equity because Mon --
22 Monica Middleton had already been there two years before.
23 So they decided to try to have it handled by a special
24 referee. They conspired to come up with this second Sam
25 Balaam, which would have -- because of the chain of title

1 ---

2 THE COURT: Mr. Simmons was involved in it at
3 that time before the special referee, right?

4 MR. BERTELE: Yes, sir.

5 THE COURT: He didn't know all of this at the
6 time?

7 MR. BERTELE: No, he did -- he found out about
8 the Monica Middleton -- Mr. McFarland never told him.
9 That's in our complaint. He found out about the Monica
10 Middleton case after the appeal had been perfected and
11 quite some time later.

12 So the fraud on the court is this combination of
13 events of Ms. Middleton coming to court in 2003 claiming
14 she's one relative of a Fannie Middleton and then in 2006
15 and 7 coming to court and people saying that she's -- has a
16 different relationship to the same family and therefore Mr.
17 Simmons doesn't get any statutory interest to the -- to the
18 24 acres that was part of the -- part of his family
19 property.

20 THE COURT: But that's not what the referee
21 ruled. He ruled he did have an interest and he got paid
22 some money, right?

23 MR. BERTELE: Judge, again, there's four pieces
24 of property. There's -- he gave Mr. Simmons a one-third
25 interest in the 18 acres.

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1 THE COURT: Okay.

2 MR. BERTELE: Okay. He used that one-third
3 interest as a down payment to buy the 18 acres.

4 THE COURT: Okay.

5 MR. BERTELE: The other three properties, when
6 you add them up, are 34 acres. They were part of a tract
7 that was acquired in 1904, 1905, with Monica Middleton and
8 Sam Balaam and other people. So the -- the -- the
9 significance of -- of the B-A-I-L-U-M Plaintiffs denying
10 the existence or excuse me -- the significance of their
11 asserting that there's two Sam Balaams is that they kept
12 all the \$337,000 which they got from the sale of the 34
13 acres. Mr. Simmons got nothing.

14 In addition, Marie Smith, who is on this side of the
15 table now is -- stands to benefit if we succeed because
16 she's also on Mr. Simmons' side of the family. And so if
17 we -- this case goes forward and we win, she gets money
18 even though she's standing here trying to dismiss this
19 case.

20 So, to -- the fraud on the court is different --
21 different than a witness lying under oath. I'm well aware
22 of that. I know how the Supreme Court looks at these kind
23 of cases and doesn't want to open up, you know, the whole
24 process of relitigating cases if a witness lies on the
25 stand. That's not what we're saying.

1 We're saying that it's more than that. There's
2 another case which Monica Middleton got title to five acres
3 of property and then a subsequent date she got an interest
4 in 34 acres of property. She can't be entitled to both.
5 There had to be something going on between those heirs and
6 Ms. Middleton.

7 And the result is that someone has upset the entire
8 administration of justice here by -- by what they did.
9 It's more than mere perjury. I think Your Honor can
10 appreciate that. It's not just perjury; there's more than
11 that.

12 Finally, and I'm just trying to say this by way of
13 conclusion, there have been some recent decisions and I
14 invite the Court to -- to look at them in -- in -- in my
15 brief. Fraud on the court in the case of Ray v. Ray,
16 that's a Supreme Court decision of 2007, it's not just
17 limited to misconduct by an attorney. It can be any type
18 of misconduct. I think in that case it was an expert
19 witness.

20 And Chewning v. Ford Motor Company, Supreme Court case
21 again, affirmed the denial of a motion to dismiss, the
22 denial of a motion to dismiss. They -- they -- an action
23 to vacate a judgment, which is exactly the facts that we
24 have here. It's a Rule 60 complaint based upon generalized
25 allegations of procuring false testimony.

1 So I think -- I think that Chewning, that involved an
2 expert who was giving false testimony in a number of
3 automobile design cases, I think that was essentially it.

4 So obviously the Supreme Court is concerned that it
5 doesn't want to prevent legitimate actions being brought to
6 deal with a conspiracy or -- or something more than mere
7 perjury. And so that's what it said in the Chewning case,
8 that as long as there's generalized allegations of a
9 conspiracy, which we have made in our complaint, Your
10 Honor, we believe and the facts seem to support that these
11 heirs and Ms. Middleton somehow had to get together to come
12 up with this story which would have led...

13 And we believe that the special referee was misled.
14 We don't have any reason to think that he somehow was
15 trying to do an injustice to Mr. Simmons. The testimony of
16 them was -- and there were three of them that testified
17 essentially that Ms. Middleton was related to an uncle or
18 aunt I believe and that would have supported their
19 allegations of a -- of a divergence of the -- of the family
20 tree and have two individuals who bought property and so
21 on.

22 Your Honor, I know this is a difficult case. I -- I
23 have filed motions of one type or another dealing with
24 judgments and orders. And this certainly has such a
25 complexity of problems and issues in it dealing with the --

1 the full -- of the attorney and whether that's attributable
2 -- attributable to the client, the -- the procurement of
3 false testimony and the combination of circumstances which
4 led to the special referee at the last minute, for no
5 apparent reason, Judge, after finding that Mr. Simmons had
6 done a good job of shepherding and maintaining that
7 property, to at the last minute, without any good reason to
8 keep them from completing the transaction.

9 There has to be more to it. And we have alleged that
10 -- what we believe is the basis for that decision.

11 THE COURT: What really bothers me about your
12 position is the remedy that you're asking the Court to
13 provide, i.e., set aside two deeds that have gone to bona
14 fide purchasers, or one of them's a bona fide purchaser, I
15 believe, and I -- I'm just not sure that that remedy is
16 justified in the situation where he can be paid money.
17 He's already been paid money for some of the interest.

18 Just the fact that he wants the property and likes the
19 property doesn't wash it in my opinion. I mean just
20 because he's particularly in love with that 18 acres,
21 there's other 18 acres all over Charleston County.

22 MR. BERTELE: It's one ---

23 THE COURT: I just don't think his -- his
24 attachment to the 18 acres justifies possibly the remedy
25 that you want the Court to provide even if I buy your

1 argument.

2 MR. BERTELE: Well, Your Honor, respectfully, I
3 think you're -- I think you're looking ahead. One -- one
4 of the things ---

5 THE COURT: I think I've got to look ahead with
6 all of this going on.

7 MR. BERTELE: Your Honor, respectfully, I -- I --
8 I would suggest that you shouldn't. All right. And I'm
9 trying to be fair to everybody because I do understand the
10 -- the arguments that these attorneys have raised about
11 what -- what's happened already.

12 One of the -- One of the things which we learn from
13 the T v. T case is that the Court should have the
14 opportunity to look at all of the circumstances.

15 Now, in that case the Court specifically said we must
16 be aware of all of the circumstances before we make a
17 decision. So I would -- I would encourage Your Honor to
18 just consider that a motion to dismiss based upon
19 allegations that some of the things which have been alleged
20 in the complaint were dealt with earlier or could have been
21 dealt with earlier or the Court of Appeals dismissed the
22 appeal so it's the lawyer's fault, I respectfully ask Your
23 Honor to think about whether this Court should be ruling in
24 effect on -- in this matter as if it were summary judgment.

25 If we came before you with affidavits and briefs and

1 transcripts of everything that we were able to find out
2 about what went on, and after looking at it Your Honor were
3 to decide that equitable relief could not be granted, then
4 I -- I would certainly respect and accept that decision.

5 But at this stage of the proceeding on a motion to
6 dismiss where our appellate courts have told us that this
7 -- that this type of an action can occur and that the court
8 should be careful and should be aware of all the
9 circumstances, I think -- I think leaps to a different
10 conclusion.

11 We need to find out some of the things that happened
12 here and why they happened. The complaint is not complete
13 with respect to all of the events that went on because
14 obviously we've had ---

15 THE COURT: Well, I understand that.

16 MR. BERTELE: --- no discovery.

17 THE COURT: I was referring -- Let me see. See,
18 I was referring to relief that you had requested about
19 rescinding these deeds, ---

20 MR. BERTELE: Yes, Judge.

21 THE COURT: --- as part of your complaint that I
22 need to consider. I was talking about your relief where
23 you want to set aside these deeds. That's what I was
24 referring to and that's in your complaint.

25 MR. BERTELE: That's correct.

1 THE COURT: It doesn't have anything to do with
2 the allegations, that's just the relief you're requesting.
3 And I question that very strongly, what relief ---

4 MR. BERTELE: Well, ---

5 THE COURT: -- you're asking.

6 MR. BERTELE: I believe that -- that if -- if --
7 if the Court addresses ultimately the merits of the case,
8 then equity would justify vacating the deeds.

9 Now, I put everybody on notice previously that I
10 intended to bring this action. Title is still being held
11 in the name of Marie Smith or her son, I can't remember
12 which, Billy Smith, and in the name of an LLC, I believe
13 it's called LNC. They're on notice of the action. They
14 were participating in the earlier case. There hasn't been
15 a further transfer of title. We have a lis pendens. The
16 parties are before the Court. It's I believe for the trial
17 judge to decide if the circumstances justify vacating those
18 deeds.

19 It's an appropriate remedy when a court of equity
20 decides that the right result has not occurred.

21 THE COURT: Okay. All right. You've answered
22 the question. Thank you very much.

23 MR. BERTELE: Thank you, sir.

24 THE COURT: Yes, sir? I'll be glad to hear you.

25 MR. CHAKERIS: Thank you, Your Honor.

1 THE COURT: I hope you remember what you wanted
2 to tell me.

3 MR. CHAKERIS: Your Honor, I apologize for
4 earlier, to Mr. Bertele as well. I thought he was
5 finished.

6 And I will not speak to the earlier trial. Mr. Martin
7 will speak to the earlier trial.

8 But as we see it, Your Honor, this motion boils down
9 to essentially is the Court going to allow this entire
10 action to be retried. Is it equitable for these five, six,
11 seven defendants, including a representative, Ellen Sealla
12 [phonetics], who's here today, who is the bona-fide good-
13 faith purchaser, is that that would call for them to be
14 dragged back into court after having this matter heard on
15 several levels.

16 THE COURT: It's applicable if there's been a
17 fraud on the court under rule 60. Okay.

18 MR. CHAKERIS: Yes, Your Honor.

19 THE COURT: That's my question.

20 MR. CHAKERIS: Yes, Your Honor.

21 And I would just say in -- in keeping with Mr.
22 Bertele's argument on the T and T case regarding the Court
23 considering all the circumstances.

24 I would just ask the Court to please note number 8 in
25 Mr. Martin's affidavit and supporting documents wherein he

1 delineates that Mr. Simmons was given the opportunity more
2 than three times to purchase this property or his share of
3 the property, his 18 acres on his own, and failed to do so
4 every time.

5 Then I would also -- I would also ---

6 THE COURT: I thought he said he had somebody
7 that was going to give him the money, loan him the money
8 and they turned him -- the special referee said no.

9 MR. CHAKERIS: I think it was more than ---

10 THE COURT: Is that incorrect? Is that not ---

11 MR. CHAKERIS: I think it was more than just that
12 one circumstance, Your Honor, where he had the opportunity
13 to do so. And Mr. Martin will expound on that as he was
14 part of the trial. And I will -- I would just ask the
15 Court to consider the fact that -- the fact that Mr.
16 Bertele, as he -- as he argued, evaluated the record,
17 evaluated the order, evaluated the trial, or excuse me, the
18 appeal, evaluated the motion to extend the appeal, and came
19 to that conclusion that it was not all done properly. It's
20 not ---

21 THE COURT: Obviously it wasn't because the Court
22 of Appeals dismissed it for not perfecting the appeals.
23 Obviously it wasn't done properly.

24 MR. CHAKERIS: Yes, Your Honor.

25 THE COURT: I can take judicial recognition of

1 that.

2 MR. CHAKERIS: I would just suggest, Your Honor,

3 ---

4 THE COURT: My question is does that abandonment

5 run to the client? Can he use that to reopen it is the

6 first question. My second question, have you got

7 perpetuation of fraud with the two people with the same

8 names?

9 MR. CHAKERIS: Yes, Your Honor. I think you made
10 my argument for me. That's exactly where I was headed.

11 Does -- Does that allow his client to throw res judicata
12 out?

13 THE COURT: Right.

14 MR. CHAKERIS: And, secondly, to the point of the
15 two different names, Mr. Simmons was certainly a part of
16 that trial, Mr. Simmons was represented at that trial by a
17 former Master-In-Equity. When that testimony came to light
18 and was given regarding the two separate Bailums, he
19 certainly had his opportunity at trial to either object to
20 the testimony as being fraudulent at that time or present
21 some kind of rebuttal testimony that the -- that there was
22 being perpetuated a fraud on the Court. He certainly had
23 an opportunity, Your Honor, at that time, during the trial,
24 not some three years later, to make this argument. And he
25 didn't for whatever reason.

1 So I would defer to Mr. Martin to expound on the trial
2 itself.

3 THE COURT: All right. Mr. Martin, I'll be gald
4 to hear you.

5 Mr. Martin, are you a party to the lawsuit?

6 MR. MARTIN: I'm sorry?

7 THE COURT: Are you a party to the lawsuit?

8 MR. MARTIN: I've been named a Defendant in the
9 lawsuit.

10 THE COURT: Why are you a Defendant? Why are you
11 ---

12 MR. MARTIN: Because I still have ---

13 THE COURT: --- why are you a Defendant?

14 MR. MARTIN: I still have Mr. Simmons' funds in
15 my trust account.

16 THE COURT: Okay. All right!

17 MR. MARTIN: I sent the check to Mr. Houston at
18 the time of the transaction when the property was sold.
19 Mr. Houston sent it back and said I don't represent
20 Roosevelt anymore. I sent letters to Mr. Simmons advising
21 him I have the money, please come get it, please come sign
22 a release for it. He has never come to pick it up. So
23 they named me a Defendant.

24 THE COURT: All right.

25 MR. MARTIN: But I -- I'm perfectly happy for him

1 to have his money.

2 But, Your Honor, with regard to the arguments made by
3 counsel, you know, he says there was false testimony. When
4 you look at my affidavit and you look at the transcripts
5 and the record you will find that there was no false
6 testimony.

7 Judge Mendelsohn gave weight to testimony that he
8 believed fully what certain witnesses said over and above
9 what other witnesses said based upon over 70 exhibits that
10 were at trial; birth certificates, marriage records, death
11 records.

12 What Mr. Bertele may not know because he didn't
13 participate in the trial, I think he's Mr. Simmons' seventh
14 attorney, is that there are two Sam Balaams. There's Sam,
15 the father, who bought the 18-acre parcel. There's Sam,
16 the son, who had four siblings, from which Monica comes.
17 They bought a 34-acre parcel across the road.

18 Several years later that parcel was subdivided. In
19 Monica Middleton's quiet title action, which is on one
20 parcel of the big parcel that had been subdivided by the
21 family -- As Your Honor may well be aware many times heirs
22 don't go through the quiet title process. They take a plat
23 and they divide it up.

24 Monica quieted the title in 2002, 2003, to her five
25 acres. We quieted the title to the remaining acreage, but

1 to the extent that she was a blood heir of one of the
2 Balaam siblings of Sam she had to be named, her interest
3 had to be protected, because she did have an interest by
4 being a blood heir of the parcel.

5 So, the fact that Monica already had a piece of land
6 and she was in this action, she is an heir here, she's a
7 Balaam heir, her interest needed to be extinguished and
8 protected.

9 That's not false testimony. That goes to the weight
10 of the testimony. Judge Mendelsohn heard all this
11 testimony, he had all of the records, and he chose the
12 course of action that he took based upon the testimony that
13 was before him.

14 So, as it relates -- as it relates to Sam Balaam, Mr.
15 Roosevelt Simmons is a step-heir. He's not a blood heir.
16 My clients are five all -- elderly African American females
17 who are also Bailums according to birth certificates,
18 marriage certificates, death records. There was no
19 question as to Balaam with two A's and Bailum as U-I-M.
20 [sic] That was all set forth on the exhibits. And again,
21 all of that is before you in the record. It is very clear.

22 With regard to there's some conspiracy or some
23 shenanigans going with going to special referee versus the
24 Master-In-Equity, Mr. Simmons' counsel, Ruth Cupp,
25 suggested a special referee as a means to expedite this

1 matter.

2 Standing before you today I humbly regret ever having
3 agreed to that because we have six, seven, years out and
4 we're still relitigating who Sam, Toni, Fannie, and Monica
5 Middleton are.

6 But not only did she suggest that we go to special
7 referee, she picked Mr. Mendelsohn. I consented. Even
8 adding to that, Mr. Simmons' counsel at trial was Louis
9 Condon, the Master-In-Equity for Charleston County who had
10 just recently retired. He could not have been more ably
11 represented by a former judge that dealt with heirs'
12 property issues.

13 And, again, all of the issues that there's a synch
14 between Sam, the father, Sam, the son, all of that was
15 fully litigated at trial.

16 I feel like that counsel just merely wants to
17 relitigate because he disagrees with that ruling and his
18 prior counsel did not perfect an appeal and he wants to
19 come back.

20 I think I'm an agent of my client. I think if I agree
21 to accept a settlement, my client's bound to it. Likewise,
22 I think that if I fail and fumble the ball, my client is
23 also bound. It should not prejudice the other party who
24 went through the process, made his evidentiary hearing, met
25 his burden of proof, and prevailed at trial.

1 We won at trial. It was a supplemental hearing and
2 numerous matters. So the merits of the case have been
3 fully vetted and fully discovered.

4 With regard to Mr. Simmons buying the property, again,
5 my affidavit lists forth probably five or six different
6 paragraphs where he was given opportunity to buy the
7 property. There was an order as to specifically what he
8 was required to do. He failed to meet those requirements;
9 he failed to provide proof of financing.

10 He brought a letter which was given to Mr. Fields that
11 said Mr. Fields qualified for the loan, but Mr. Bertele may
12 not recall or what he does not know, is that the order made
13 it as a statute, non-assignable. Meaning Mr. Simmons had
14 to buy the property; he could not assign it to someone
15 else.

16 With regards to racial comments, I don't know where
17 they're coming from. I was present the entire trial.
18 Clearly there was no bias or prejudice against Mr. Simmons.
19 My clients are African American. I've been through the
20 entire transcript. I was there the entire time. I have
21 never seen anything of a racial or derogatory manner. Mr.
22 Simmons was always treated professionally and with respect,
23 given numerous opportunities to buy the property at the
24 pre-trial conference.

25 At the conclusion of the trial, by the referee's first

1 order, there was a motion that was filed where he sought
2 leave to buy the property. There was a hearing on that.
3 You have the transcript attached to my affidavit. And then
4 that issue was brought forth in the proposed briefs that
5 counsel tried to file in the Court of Appeals, which were
6 rejected.

7 So, he was never kept by the Master from purchasing
8 the property. He never complied with at least three court
9 orders setting forth the mechanism for him to do it.

10 So, again, the merits of the case have been fully
11 decided. The Monica Middleton versus Sam Balaam issue was
12 an issue that was fully vetted. There were 70 exhibits at
13 trial. We're just trying to open the door to a case that's
14 been fully resolved.

15 If he has a complaint -- The -- the people who
16 subsequently bought the property -- the five Bailum heirs
17 that I represented bought property. There was -- well
18 actually they had it under contract. The property has
19 since changed hands again. It has gone from Mrs. Goldberg
20 and Mr. Goldberg, who are neighbors actually with adjoining
21 property, they have subsequently sold to an LLC. So, not
22 only did it go from the Master ---

23 THE COURT: Where is this property located?

24 MR. MARTIN: It's on John's Island off of River
25 Road.

1 THE COURT: What's it worth?

2 MR. MARTIN: Today?

3 THE COURT: Yeah, today.

4 MR. MARTIN: I would venture to guess maybe 15,
5 \$20,000 an acre.

6 THE COURT: All right.

7 MR. MARTIN: I -- I haven't done much out that
8 way, but I venture that's probably what it is.

9 THE COURT: Okay.

10 MR. MARTIN: So, again, Your Honor, I think if
11 you would, you know, you'd take just a moment, or take the
12 time and look through my affidavit and all of those
13 pleadings and all of the exhibits, and all those orders, I
14 think you will find that every issue that is raised in his
15 complaint is either a matter that was addressed below or
16 should have been addressed below. And if it was failed to
17 do so, the Defendant should not be responsible for the
18 counsel's failure. That's between Mr. Simmons and his
19 counsel.

20 THE COURT: Okay. Thank y'all very much. I'm
21 going to take it under advisement to give me an opportunity
22 to read the numerous affidavits and transcript. If you
23 want to give me any cases to read, put them in an envelope
24 called to my attention, give them to the Clerk and I'll
25 pick them up downstairs.

1 MR. BERTELE: I'll be happy to do that, sir.

2 Thank you.

3 THE COURT: Thank y'all so very much.

4 MR. BERTELE: Thank you for your time Your Honor.
5 I appreciate it.

6 MR. CHAKERIS: Thank you, Judge.

7 MR. MARTIN: Judge, I think there's two other
8 motions pending.

9 THE COURT: Oh, there are? All right.

10 MR. MARTIN: The ruling on this one, for example,
11 one of them I think it --

12 MR. CHAKERIS: I think the other two mote --
13 moot.

14 MR. MARTIN: I think it makes the other two moot.

15 THE COURT: Well the other two or what, motions
16 to make more definite and certain?

17 MR. BERTELE: Yes. Yes.

18 MR. MARTIN: Which of course if it's dismissed
19 ---

20 THE COURT: Well if it's dismissed it won't be
21 more definite and certain to it, will it?

22 MR. CHAKERIS: That's correct, Your Honor.

23 MR. MARTIN: And then the other is I believe ---

24 MR. BERTELE: And the TRO, Judge.

25 MR. MARTIN: --- with me with regard to the

1 money, that part, Mr. Bertele.

2 MR. BERTELE: I beg your pardon?

3 MR. MARTIN: With regard to me holding the money.

4 MR. CHAKERIS: No, we're not arguing the
5 eviction.

6 MR. MARTIN: Okay.

7 MR. BERTELE: A sale or a disposition or eviction
8 on ---

9 THE COURT: Okay.

10 MR. BERTELE: Anything else affecting the real
11 estate.

12 MR. CHAKERIS: Again, I think that would be
13 rendered moot as well if Your Honor ---

14 THE COURT: Well, I mean, there's no -- Let me
15 make a decision on this and if need be we can expedite
16 those others, especially the TRO. We can expedite that if
17 you think we need it.

18 MR. BERTELE: That's fine, Your Honor. I would
19 suggest that based upon, you know, obviously the motion to
20 dismiss is the key. You can decide the motion for more
21 definite statement if necessary on the papers. I have no
22 problem with that. And I would like to be heard, if the
23 case continues, on a TRO when it's opportune for -- for the
24 Court.

25 THE COURT: Okay. Well we can accept that. We

1 can expedite that and set that up rather quickly.

2 MR. BERTELE: Thank you. Thank you very much.

3 THE COURT: Okay.

4 MR. CHAKERIS: Thank you.

5 THE COURT: Is the TRO -- is the TRO for the
6 eviction of someone?

7 MR. BERTELE: No, Your Honor.

8 And let me -- let me just clarify if I can, I don't
9 need to delay the Court anymore, but Mr. -- Mr. Martin is
10 holding not only Mr. Simmons' money, but Monica Middleton's
11 money. Now, we say she's not entitled to it and therefore
12 we want him to hold on to it. That's part of our main
13 case. The TRO is to prevent the sale and disposition of
14 the 18 acres. That's what the TRO's for, Your Honor.

15 THE COURT: Okay. The only reason you got Mr.
16 Martin in the lawsuit is for him to hold on ---

17 MR. BERTELE: Yes.

18 THE COURT: --- to the money?

19 MR. BERTELE: He's a -- he's a -- Yes,
20 absolutely. I don't have any allegations that he's ---

21 THE COURT: Well what if I just issued an order
22 that he's to hold the money in his trust account pending
23 ---

24 MR. BERTELE: Fine.

25 THE COURT: --- further order of the court and

1 let him out of this.

2 MR. BERTELE: That's -- that's absolutely
3 acceptable, yes.

4 THE COURT: Have you got any problem with that?

5 MR. MARTIN: None whatsoever.

6 THE COURT: If you'll type me up an order I'll
7 sign it just ordering you to hold the money, no
8 disbursement of money pending further order of the court.

9 MR. BERTELE: That's perfectly acceptable.

10 THE COURT: There's no sense in him wasting his
11 time coming up here.

12 MR. MARTIN: That's fine, Your Honor.

13 MR. BERTELE: I would have agreed to that at any
14 point, yes.

15 THE COURT: Okay. All right.

16 Thank y'all very much.

17 MR. CHAKERIS: Thank you, Your Honor.

18 ***END OF REQUESTED TRANSCRIPT OF RECORD***

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CERTIFICATE OF REPORTER

1
2 I, the undersigned Missy Brown, Official Court
3 Reporter for the Ninth Judicial Circuit of the State of
4 South Carolina, do hereby certify that the foregoing is a
5 true, accurate and complete transcript of record of all the
6 proceedings had and evidence introduced in the hearing of
7 the captioned case, relative to appeal, in the Court of
8 Common Pleas for Charleston County, South Carolina, on the
9 1st day of March 2010.

10 I do further certify that I am neither of kin,
11 counsel, nor interest to any party hereto.

12 May 22, 2011

13
14
15 Missy Brown
16 Court Reporter

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
Roosevelt Simmons, et al	)	
/	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 09-CP-10-5343
	)	
Hattie Bailum,	)	
	)	
Defendant.	)	

TRANSCRIPT OF HEARING

The within Hearing was held on August 27, 2010, before The Honorable J.C. Nicholdson, in Courtroom 3B of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by Counsel, as follows:

APPEARANCES:

Edward Bertele, Esq.
Appearing for Plaintiff

Tasso Chakaris, Esq.
Appearing for Defendant

John F. Martin, Esq.
Appearing *Pro Se*

DEBORAH GARRISON
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 901
Johns Island, South Carolina 29457
dGarrison@sccourts.org

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1 THE COURT: All right, who is going
2 to go first?

3 MR. BERTLE: Your Honor, before we
4 begin, may I address the Court briefly?

5 THE COURT: Yes, sir.

6 MR. BERTLE: Your Honor, I would like
7 to apologize to you and to Mr. Chakaris if I
8 was in any way less than respectful when we
9 were here yesterday. I had just returned the
10 night before from the west coast and I was
11 under the impression from conversations that it
12 was a different -- a different Motion was to be
13 heard other than the one that was begun to be
14 discussed when we were here. So I apologize if
15 I was in any way less than respectful to either
16 you or to counsel.

17 THE COURT: No problem. I mean,
18 that's fine. I appreciate it but it's not
19 necessary. Thank you anyhow.

20 MR. CHAKARIS: Thank you, Your
21 Honor, I will be brief. I know it's been a
22 long day for the Court.

23 We, of course, are before you this
24 afternoon on a Motion to Dismiss, Case Number
25 2009-5343. We are moving to have dismissed --

1 Your Honor, the Complaint reads more like an
2 appeal than it does a Complaint on a new
3 matter. Every issue claimed or matter brought
4 out in that Complaint is for a review of the
5 case, the 2004 case, Bailum v. Simmons, which,
6 uh, was a quiet Title action and a partition
7 action involving some heirs to the property.

8 If I could briefly, Your Honor, I am
9 just going to run through the Complaint, very
10 straightforward, very simply:

11 The first count is entitled Vacating
12 Special Referee's Deed.

13 The second count is entitled Vacating
14 Special Referee's Order, and that's the Order
15 in the case that I just mentioned.

16 The third count is fraud, and the
17 second and third counts are related ---

18 THE COURT: What was the third
19 count?

20 MR. CHAKARIS: Fraud.

21 THE COURT: Fraud on the court?

22 MR. CHAKARIS: Yes, Your Honor.

23 THE COURT: Okay.

24 MR. CHAKARIS: And that third
25 count essentially purports to prove the second

1 count, Your Honor.

2 Before I address each one
3 specifically, you can see that it reads much
4 like prayers to an appeals court rather than
5 the Circuit Court.

6 I would simply give the Court a brief
7 overview of the quit Title action. It was from
8 '04. It was, I believe, a day-and-a-half long
9 trial. A trial in which Mr. Simmons was not
10 only a named defendant but he was a very active
11 participant in the trial. He was represented
12 by an attorney to start with who initiated the
13 Consent Order for this matter to be heard by a
14 Special Referee, which was Judge Mendelsohn.
15 He was subsequently represented at trial by
16 Lewis Condon. Judge Condon was a master in
17 equity for Charleston County for many years,
18 who was certainly well-versed in quiet Title
19 actions and partition actions.

20 Mr. Simmons, through this counsel,
21 certainly not only had the opportunity to
22 object to evidence, to cross-examine witnesses,
23 make appropriate Motions, to participate in
24 evidentiary hearings -- not only did he have
25 the opportunity to do that, Your Honor, he

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1 availed himself of his rights at every turn of
2 the trial. It's all in the record Your Honor
3 that, through his attorney, he made Motions and
4 participated in the trial.

5 He actually filed an appeal, which
6 appeal was subsequently denied.

7 THE COURT: It was denied because it
8 wasn't perfected. Right?

9 MR. CHAKARIS: That's correct,
10 Your Honor.

11 THE COURT: Not on the merits.

12 MR. CHAKARIS: Not on the merits.
13 You're right, Your Honor.

14 THE COURT: All right.

15 MR. CHAKARIS: But I guess my
16 point to the court is that not only did he have
17 the opportunity to avail himself of due
18 process, that he most certainly did avail
19 himself, at every turn, of all his
20 opportunities.

21 I'd like to point that out because I
22 know Mr. Bertle is going to argue that the
23 reason that this court should rehear all these
24 matters is because of some cases which talk
25 about the party not having the opportunity to

1 cross-examine witnesses and to participate in
2 a trial. That simply is not the case in this
3 matter.

4 Specifically, Your Honor, for the
5 first count, Mr. Simmons -- the thrust of that
6 count is that he claims that he was deprived of
7 an opportunity to purchase one of the parcels
8 at-issue in that original case because, he
9 claims, Judge Mendelsohn's Order placed too
10 restrictive a timeframe on him to comply. He
11 was in fact in the Order granted a right to
12 purchase the parcel but he claims in his
13 lawsuit that that Order was improper because
14 of the time ---

15 THE COURT: You said that he had the
16 -- I think in your brief the judge thought that
17 there were straw purchasers or something.

18 MR. CHAKARIS: The judge was
19 concerned not only about the circumstances but
20 also about the fact that this case had been
21 ongoing for several years. But, yes, Your
22 Honor, he wanted proof that Mr. Simmons,
23 himself, had the wherewithal to purchase the
24 property. He specifically put in the Order
25 that his interest or his right to purchase was

1 not assignable to any other third party, only a
2 family member or a spouse.

3 Back to the timeframe, I just want to
4 point out, Your Honor, that the Order does say
5 that there was a ten-day timeframe for him to
6 produce the proof that he had the wherewithal
7 to purchase; then thirty days from the date of
8 the service of the Order for him to actually
9 consummate the transaction.

10 I just want to point out, Your Honor,
11 that while the ten days is in the Order that
12 day-by-day of actual literal time, that first
13 Order was January 11th, 2007, and immediately
14 thereafter there was a Motion filed to amend
15 the Order because one of the heirs, who also
16 had the right to purchase, was inadvertently
17 excluded from the original Order. So there was
18 a Motion and Judge Mendelsohn allowed leave to
19 add the other heir who was going to purchase
20 the property, had rights to purchase the
21 property along with Mr. Simmons. That
22 subsequent Amended Order was not filed until
23 March the 6th. So there was over six weeks in
24 there of actual time for Mr. Simmons to produce
25 the proof that he had the wherewithal and he

1 didn't comply with the Order.

2 The Order also very specifically said
3 that 'if you don't comply, this...' -- Mr.
4 Goldberg, whose contract had been approved by
5 the Court, who was the actual third-party
6 purchaser, "will be substituted for whichever
7 heir...", or both, "...does not comply with the
8 Order."

9 I just want to point out also, Your
10 Honor, that while he says that timeframe was
11 too restrictive, that timeframe was not
12 exclusive to him. It was to both heirs and
13 Marie Smith, who had the same timeframe,
14 complied.

15 Irrespective of all of that, Your
16 Honor, we feel and would argue that it was
17 within Judge Mendelsohn's discretion to hear
18 that evidence, to take into consideration all
19 of the circumstances that surrounded the
20 purchase and to issue the Order that he saw
21 fit.

22 Also in that first count, I would just
23 briefly point out, he objects to the procedures
24 of sale by the Special Referee, including the
25 appointment; when, in actuality, at the time

1 his attorney initiated the Consent Order to
2 have Judge Mendelsohn hear the entire matter.
3 So I would just point out that he initiated
4 that entire process.

5 Secondly, Your Honor, on the second
6 count it reads, dated March 6, 2009, the Order
7 from Judge Mendelsohn, uh, in this count Mr.
8 Simmons, the thrust of it is that he claims
9 that he was deprived of his interest in two
10 other people's properties that were -- excuse
11 me -- that were the subject of the original
12 quiet Title action.

13 In his claim, and I will just briefly
14 give you the gist of it, he claims that in the
15 quiet Title action that the family tree that
16 was presented was inaccurate and ---

17 THE COURT: You said that it was two
18 parties, right?

19 MR. CHAKARIS: Two different; yes,
20 sir.

21 THE COURT: Right.

22 MR. CHAKARIS: And, again, I will
23 just point out, Your Honor, that not only was
24 he a participant but he ---

25 THE COURT: He also said, I believe,

1 that he didn't discover that that was a
2 falsehood until after that action, is correct
3 or incorrect?

4 MR. CHAKARIS: I don't know when
5 he claims to have found out about that, Your
6 Honor. I am not sure.

7 THE COURT: Okay.

8 MR. CHAKARIS: But I will say that
9 most of the evidence that was presented at
10 trial came from their family. Your Honor,
11 there were six witnesses who came to testify as
12 to the family tree. Obviously he had an
13 opportunity to cross-examine those witnesses.
14 He claims that those witnesses perjured
15 themselves, in his Complaint.

16 So, Your Honor, there were some
17 seventy exhibits, I believe, admitted into
18 evidence, including birth certificates, death
19 certificates, marriage licenses. It was a
20 quiet involved trial. Certainly it is within
21 Judge Mendelsohn's discretion to evaluate the
22 evidence, to give it the appropriate weight,
23 to give the veracity to certain witnesses
24 testimony as he sees fit.

25 Again, Your Honor, it is not as if Mr.

1 Simmons wasn't given notice of this trial. He
2 was obviously a very active participant, he had
3 very able counsel, Judge Condon at that time,
4 who was more than familiar with quiet Title and
5 partition actions. He certainly availed
6 himself of all of his rights throughout that
7 entire first case.

8 There is no matter of act, there is no
9 claim, there is no prayer in the prayer section
10 of this Complaint that has not already been
11 addressed, adjudicated fully and administered
12 by Judge Mendelsohn.

13 Yes, he -- he availed himself of the
14 Court of Appeals, the appeals process. Yes,
15 the appeal was denied because it was not
16 properly perfected.

17 That certainly does not give Mr.
18 Simmons to begin anew with new counsel and a
19 new Complaint on the same old set of facts that
20 have already been adjudicated.

21 In summation, Your Honor, the prayer
22 section of the Complaint prays to this court to
23 set aside Judge Mendelsohn's Deed, to declare
24 his Order invalid, to award money damages from
25 the other heirs to him for those other two

1 parcels that he claimed that he had an interest
2 in, which Judge Mendelsohn found that he did
3 not, and then ask this court to actually
4 declare which heirs own what. Every single one
5 of these items that he's prayed for, the relief
6 had already been administered by Judge
7 Mendelsohn.

8 The simple fact that he does not like
9 the outcome of the case and the appeals process
10 does not give him the right to start afresh,
11 file a new lawsuit under a new caption, a new
12 case, on the same exact matters. We
13 respectfully move, Your Honor, that you would
14 dismiss the Complaint with prejudice.

15 THE COURT: Thank you very much.
16 Yes, sir?

17 MR. BERTLE: Thank you, Your Honor.
18 With all due respect to Mr. Chakaris, I think
19 Rule 60(b) does give me the right to bring this
20 independent action to vacate an earlier
21 judgment. I ---

22 THE COURT: Rule 60-what?

23 MR. BERTLE: Rule 60(b), Your Honor.

24 THE COURT: Okay.

25 MR. BERTLE: I believe that when we

1 were here earlier that Your Honor requested or
2 inquired about this, the limit of 60(d) --
3 60(b), excuse me -- to void. To reiterate, it
4 allows the bringing of an independent action
5 based upon either the existence of exceptional
6 circumstances or a fraud on the court. I
7 believe our Complaint, when read in its
8 entirety, will establish that we have alleged
9 both grounds under Rule 60(b) and that a
10 dismissal of the Complaint would ignore the
11 authority under our Rules to bring an
12 independent action without issues of the type
13 that we have made.

14 Now, the basis for ---

15 THE COURT: Well, your Complaint
16 doesn't really -- the problem is that the
17 Complaint doesn't really address by
18 specifically arguing. But -- go ahead.

19 MR. BERTLE: I believe that it does,
20 Your Honor.

21 THE COURT: You do?

22 MR. BERTLE: (Affirmative nod).

23 THE COURT: Oh, okay.

24 MR. BERTLE: It alleges a fraud on
25 the court and it alleges exceptional

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1 circumstances. I can refer specifically to
2 the allegations of the Complaint if Your Honor
3 would like.

4 THE COURT: Well, tell me what --
5 just tell me what you think the exceptional
6 circumstances would be.

7 MR. BERTLE: Well, to start with, a
8 fraud on the court.

9 THE COURT: Okay. You can start
10 with fraud on the court. Tell me what those
11 are.

12 MR. BERTLE: (Affirmative nod), if
13 you don't mind. I think it really goes to the
14 heart of the argument here about 'this is the
15 same case as the original.'

16 The fraud on the court is the
17 occurrence of testimony in an earlier case, in
18 2004, brought by a Monica Middleton. She was
19 a plaintiff in a quiet Title action involving
20 property that was part of the original grant of
21 real estate which was the subject of this
22 present action brought by the Bailum people in
23 2004-2005.

24 Miss Monica Middleton testified, and
25 Judge Scarborough so found, that she the great-

1 granddaughter of Fanny Middleton. That was the
2 basis upon which Monica Middleton was entitled
3 to sole interest, all other heirs having waived
4 or passed on; sole interest in five acres of
5 property. This is extremely significant.

6 The five acres was part of fifty-four
7 acres of which thirty-four acres was the
8 subject of the case which involved Mr. Simmons.
9 It is also central because the fifty-four acres
10 was derived from a purchase by a number of
11 people including Sam Bailum and other relatives
12 of the same name: Tony, Mary, etcetera, and a
13 Fanny Middleton. In 1904, those five people
14 acquired fifty-four acres which they
15 subsequently divided amongst themselves,
16 including Sam Bailum. Sam Bailum received a
17 large portion of the fifty-four acres.

18 Now, the significance of this
19 testimony by Monica Middleton is that she
20 testified, before Judge Scarborough, that she
21 was the great granddaughter of Fanny Middleton.
22 She received five acres out of the fifty-four
23 acres.

24 In 2006 when this matter was before
25 Special Referee Mendelsohn, the other heirs

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1 testified that Monica Middleton was actually
2 the daughter of Fanny Middleton and that this
3 person was an heir to the thirty-four acres of
4 which the five acres was part and that her
5 father was Sam Bailum, who was different than
6 the Sam Bailum that acquired adjacent property
7 five years later.

8 The facts are complicated, Judge. The
9 simply fact is that the testimony in the Monica
10 Middleton case is that she was the great-
11 granddaughter of Fanny Middleton. The
12 testimony in the Bailum case was that Monica
13 Middleton was the daughter of Fanny Middleton,
14 who was related to Sam Bailum. That led to
15 Judge Special Referee Mendelsohn's decision to
16 exclude this defendant.

17 In other words, the two Sam Bailums
18 who were found to have existed in -- excuse me.
19 Two Sam Bailums were found to be alive in 1910.
20 There was a Sam Bailum who acquired property in
21 1905, which was something that Mr. Simmons had
22 relation to because of his grandmother, and
23 there was a different Sam Bailum who bought the
24 property in 1910.

25 Now, the fraud on the court was not

1 discovered by Mr. Simmons until, as you
2 suggested earlier, after the case before Judge
3 Mendelsohn was over. It was not discovered
4 until the case was over.

5 THE COURT: How was it discovered?

6 MR. BERTLE: He went to the court-
7 house to search the title, the Deed to the
8 separate parcels and he found that there was
9 this earlier case involving the Title to the
10 five acres that was previously held in the name
11 of Fannie Middleton.

12 Now, the argument that this was all
13 decided before does not -- can't be sustained
14 because this fraud on the court would not have
15 occurred until afterwards. The fact that a
16 witness perjures themselves, it could be argued,
17 doesn't rise to a fraud on the court. But here
18 we have a judgment, we have a judgment in the
19 name of Monica Middleton, in 2004, -- I believe
20 that the docket number is in our position
21 papers -- which says one thing and then we have
22 a judgment by Judge Mendelsohn that says
23 something very different. The fraud on the
24 court is a special reason for sitting aside the
25 earlier case because it does violence to the

1 entire administration of justice. It is not
2 merely that there was perjury by the other
3 people, it is that the results implicate
4 another case and could not have been discovered
5 and was not discovered until afterwards. So it
6 is simply not a *res judicata* effect upon Mr.
7 Simmons.

8 THE COURT: Let's assume that you're
9 correct. Okay. Let's assume that you are
10 correct that it was a fraud on the court.

11 MR. BERTLE: Yes, Judge.

12 THE COURT: What remedy do you think
13 that you're entitled to as a result of that?

14 MR. BERTLE: Well, the remedies that
15 I am asking for are those which ---

16 THE COURT: No. I know you've asked
17 for a lot of them but I am -- what -- under
18 Rule 60 what do you think would be your remedy?

19 MR. BERTLE: Yes. I think the
20 appropriate remedy would to vacate Judge
21 Mendelsohn's decision, which would allow Mr.
22 Simmons to obtain title to the eighteen acres.
23 Now, that goes to ---

24 THE COURT: You don't think that
25 you have to relitigate everything that Special

1 Referee Mendelsohn heard?

2 MR. BERTLE: No.

3 THE COURT: Why is that your only --
4 why is that your remedy?

5 MR. BERTLE: (No verbal response).

6 THE COURT: You would go back --
7 I mean, you'd go back and retry what he has
8 already tried.

9 MR. BERTLE: Well, Your Honor, ---

10 THE COURT: Present new evidence
11 that you now call a fraud on the court.

12 MR. BERTLE: (No verbal response).

13 THE COURT: What other remedy could
14 you have if you can't modify the judgment. I
15 mean, it is not a monetary judgment, so you
16 can't modify that. It's just a judgment about
17 who owned what property.

18 MR. BERTLE: Well, Judge Mendelsohn
19 found -- he awarded money as well as dividing
20 the property. As I said earlier, the identifi-
21 cation -- the argument, the contention that
22 there are two different Sam Bailums resulted
23 in this defendant being allowed the right to
24 purchase property which Judge Mendelsohn said
25 was derived from his grandmother, the eighteen

1 acres. But he excluded Mr. Simmons as being
2 one of the heirs of the thirty-four acres,
3 against based upon an arbitrary, we say,
4 decision supported by perjury.

5 Now, the results of that is this, that
6 the Court ordered the sale of the thirty-four
7 acres, which yielded about \$330,000. Mr.
8 Simmons would be entitled to a statutory
9 interest of slightly less than one-third. I
10 compute it to be about \$70,000-some-odd
11 dollars. It's not one-third, it's less than
12 one-third. Therefore, the \$70,000 could have
13 been applied against his right to purchase the
14 eighteen acres and it would have affected his
15 ability to have to finance the full amount of
16 purchase price of the eighteen acres, which was
17 about \$155,000.

18 Now, it seems to me, Judge, that the
19 remedy which I am seeking is to put him in the
20 possession as if his right had been absolutely
21 protected. I think that the law is pretty
22 clear and I submit, Your Honor, that the case
23 that I cited earlier, Teague v. Teague
24 (phonetic), states it very succinctly, that if
25 it is an issue that is actually litigated and

1 determined by a valid judgment, relitigation of
2 the issue in a subsequent action is not
3 precluded because the party sought to be
4 concluded has the conduct of his adversary, in
5 this case the plaintiff, the earlier plaintiff,
6 where special circumstances did not give him an
7 adequate opportunity to obtain a full and fair
8 adjudication.

9 So we need not relitigate everything.
10 We do want to bring out that there was an
11 earlier judgment on Monica Middleton which is
12 contradicted -- contradicts the testimony in
13 the second case. That's easy to present. And
14 other evidence showing that the plaintiffs in
15 the earlier case were not entitled to all of
16 this money and for Ms. Simmons to be eligible
17 to purchase the eighteen acres.

18 Now, the fraud on the Court is ---

19 THE COURT: Has the property been
20 sold, or what is the status of the property?

21 MR. BERTLE: No, we have a pending
22 Motion to enjoin any activity and I've also
23 filed a notice of *lis pendens*. Both the
24 eighteen acres and the thirty-four acres, as
25 far as we are aware, are still intact. They're

1 held by the parties to this litigation.

2 THE COURT: Okay.

3 MR. BERTLE: So that the Court is
4 able to grant the relief which we request,
5 namely allow him to purchase the eighteen
6 acres.

7 Now, if I could just add to that
8 point. The fraud on the court relates to Mr.
9 Simmons being denied an interest in the thirty-
10 four acres.

11 The other aspect of the case, which is
12 also important and falls under, I think, the
13 category of exceptional circumstances, and
14 which was not decided earlier, relates to the
15 entire conduct of the proceedings. We allege
16 that Mr. Simmons vehemently objected to the
17 appointment of ---

18 THE COURT: I read all that.

19 MR. BERTLE: Okay. We allege that
20 his attorney, Ms. Culp, was not authorized to
21 consent to that. She signed that Consent Order
22 before she was dismissed as his counsel. That
23 Order could well be stale. She was dismissed
24 in November of 2005. She signed that Order in
25 January of -- the Consent Order in January '05,

1 -- and the Motion wasn't filed until some time
2 later.

3 In addition, the question of a special
4 referee's impartiality goes to the heart of
5 this, and is something that Mr. Chakaris
6 brought up. The Special Referee found in his
7 decision, which was very lengthy, that Mr.
8 Simmons had gone out of his way to protect his
9 interest in family property over time, that he
10 had paid taxes, that he'd put up No Trespass
11 signs, that he had developed the property as a
12 tree farm to lower taxes, etcetera, etcetera,
13 over the course of many years.

14 In recognition of that, he -- as part
15 of the eighteen acres, he allowed Mr. Simmons
16 the right to purchase the property, all of part
17 of it, directly. Now, he gave Mr. Simmons ten
18 days. A timely Motion to extend was made. At
19 the same time that that Motion to extend was
20 made, a Motion to disqualify or set aside that
21 decision based on the qualifications of the
22 Special Referee was made. Mr. Chakaris
23 mentioned that. So there was a challenge by
24 Judge Condon to the qualifications of the
25 special referee in connection with that final

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1 judgment. So that decision was denied. The
2 Special Referee denied the Motion to challenge
3 his qualifications.

4 Then two months later -- and, you
5 know, there was no decision on whether was
6 going to be rescinded -- the Special Referee
7 decides that he's going to extend the time to
8 provide financial proof by another ten days.
9 So up to March 6th, Mr. Simmons had no idea
10 what was going to happen.

11 On March 16th, he produces statements
12 from third parties. There is no doubt about
13 that, no doubt about that.

14 But Judge Condon, on the record, says
15 that he is not satisfied with that. But had he
16 found that Mr. Simmons had protected property
17 all these years, he should have made some
18 inquiry beyond just on the face of the thing,
19 that he thought without any -- without anything
20 more -- that this letters from people that were
21 going to help Mr. Simmons buy the property, he
22 should have done more to decide that this was a
23 sham transaction. This defendant needed the
24 financing from the friends but he is adamant
25 about owning the property. He's not about to

1 sell it or give it away, as far as he is
2 capable.

3 So we allege that the controversy and
4 the circumstances leading up to Special Referee
5 Mendelsohn's appointment and his decision,
6 evidence of bias and unfairness against this
7 defendant would cause him to abruptly, without
8 really giving any reason, to deny Mr. Simmons
9 the right to complete the transaction. So that
10 is the allegation that we made.

11 We've also alleged that a racially
12 discriminatory remark was made by the Special
13 Referee and that, in substance, there was not a
14 fair hearing of Mr. Simmons' claim and ruling
15 on his ability to purchase property which he
16 has protected over all these years.

17 The legal framework for our complaint,
18 I believe, is valid. Rule 60(b) allows for
19 this action. We've alleged separate and
20 independent causes of action. The fraud on the
21 court is apparent based on what's shown in a
22 judgment in another case. The inference, we
23 believe, is there. We believe that we have
24 alleged sufficient facts upon which this case
25 should proceed and a determination should be

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1 made that Mr. Simmons did not get a fair
2 hearing of his claim.

3 This is a Motion to dismiss. It's not
4 a Motion for summary judgment. Mr. Chakaris
5 has argued that everything was dealt with by
6 the Special Referee. Well, it hasn't been.

7 The fraud on the Court wasn't dealt
8 with.

9 The evidence of bias wasn't dealt
10 with.

11 The appeal was dismissed because the
12 appellate attorney did not do his job. If he
13 had and all of those issues had been addressed
14 and resolved by the court of appeals, then the
15 case would be in repose. That didn't happen.

16 We respectfully urge the Court to deny
17 the Motion to dismiss and allow this case to
18 proceed to a determination on the merits.

19 Thank you.

20 THE COURT: Very briefly, anything
21 that you would like to add?

22 MR. CHAKARIS: Your Honor, if I
23 may ---

24 THE COURT: In reply.

25 MR. CHAKARIS: In reply, briefly,

1 to the fraud on the Court, I just want to point
2 out to the Court that Marie Smith and Melvin
3 Singleton, who Mr. Simmons is suing in this
4 action, ---

5 THE COURT: What? I'm sorry.

6 MR. CHAKARIS: Who Mr. Simmons is
7 suing in this new action.

8 THE COURT: All right.

9 MR. CHAKARIS: They are similarly-
10 situated heirs, they are on the same branch as
11 he is. If his allegations were correct, they
12 would have had the same new claims to these
13 other parcels as he does. They're not joining
14 with him on this fraud on the court, because
15 there isn't any. If we ---

16 THE COURT: Do you think an earlier
17 judgment, back in 1905 or 1910, whenever it
18 was, contradicts what Ms. Middleton said at
19 this trial before Judge Mendelsohn?

20 MR. CHAKARIS: If it is okay, Your
21 Honor, I'll let ---

22 THE COURT: I mean, do you think
23 that it does contradicts it?

24 MR. CHAKARIS: Well, I don't know
25 if it contradicts it, Your Honor, because I

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1 wasn't involved in the original trial. That is
2 why Mr. Martin is here. He was the defense
3 attorney in the original trial. He actually
4 handled the closing of the sale or the
5 transaction -- the property has been sold --
6 and can better speak to that evidence and
7 testimony ---

8 THE COURT: Okay. I'll be glad to
9 hear from you, Mr. Martin. I notice that there
10 is an affidavit that you submitted.

11 MR. MARTIN: Yes, Your Honor. Your
12 Honor, in response to the question, the
13 property has been sold subsequent to the
14 dismissal by the Court of Appeals and the
15 filing of this action. So there is a third
16 party who is now having the title to its
17 property affected by this action. The property
18 was subsequently sold.

19 With regard to Monica Middleton, in
20 the '04 case -- there were two '04 cases: one
21 involving eighteen acres of property on one
22 side of River Road and twenty-four acres on the
23 other side of the road and the case that Monica
24 Middleton brought on a separate five-acre
25 piece, which back in the 1900s emanated from

1 the same piece of property.

2 What Mr. Bertle is doing is he is
3 offering, standing up and testifying to what
4 Monica Middleton said in the first trial.
5 Monica Middleton did not testify in the trial
6 of this case because she had those five acres.
7 However, there are two Monica Middletons.
8 There is a Monica Middleton that I communicate
9 with who is in her fifties. There is also a
10 Monica Middleton who is in her eighties, who is
11 the mother of the Monica Middleton that ---

12 THE COURT: Which one was in the
13 trial in '04?

14 MR. MARTIN: It was the elder Monica
15 Middleton.

16 THE COURT: The elder Monica.

17 MR. MARTIN: (Affirmative nod), but
18 we named Monica Middleton in this case as to
19 the residual property to clear up any interest
20 that she may have in the residential by being a
21 Balium heir. Their mother is Fanny Middleton,
22 Fanny, uh, uh, -- you've got me doing it now --
23 Fanny Middleton. So Mr. Bertle is offering
24 testimony but -- my point of that is, Judge
25 Mendelsohn heard all this testimony from all

1 the witnesses, a day and a half worth of trial,
2 worth of trial. He made the determination on
3 the facts.

4 THE COURT: There's no transcript
5 for that.

6 MR. MARTIN: Yes, there is a
7 transcript.

8 THE COURT: Oh, there is?

9 MR. MARTIN: Yes, there is. There is
10 a transcript of the trial and of the post-trial
11 Motion hearing. There is a transcript for both
12 of them. All this was on the record in the
13 2004 case.

14 All right. Now, uh, the transcript --
15 I've got three bankers boxes full. If the
16 Court would like to the transcript, I'll be
17 happy to bring you a copy of it.

18 THE COURT: I would just like to see
19 the transcript of Monica Middleton's testimony.
20 But you said that she didn't testify.

21 MR. MARTIN: She didn't testify in
22 this case.

23 THE COURT: Okay.

24 MR. MARTIN: There is a whole
25 separate lawsuit that neither one of us had any

1 involvement in on a different piece of
2 property.

3 THE COURT: Okay. How about the
4 1904, 1910? You say that was the Monica
5 Middleton, the mother?

6 MR. MARTIN: Fanny is the
7 grandmother.

8 THE COURT: The grandmother?

9 MR. MARTIN: Right.

10 THE COURT: Neither one of them
11 testified in the trial here?

12 MR. MARTIN: No, because Fanny was
13 dead.

14 THE COURT: Pardon?

15 MR. MARTIN: Fanny was dead.

16 THE COURT: Okay.

17 MR. MARTIN: Also let me explain to
18 you that Sam -- there are three Sam Bailums:
19 Sam Bailum, the senior, had five children, one
20 of whom was named Sam -- Tony, Thomas, Fanny
21 and then I can't remember the other one but
22 there were five children. One of those Sam
23 Bailums had a Sam Bailum son who was actually
24 married -- was married to one of the original
25 plaintiffs in this lawsuit. Judge Mendelsohn

R336

1 heard all that testimony. He determined as a
2 matter of facts and circumstances that Mr.
3 Roosevelt Simmons, Mr. Simmons, that he is not
4 a blood heir, that he is a stepheir. He would
5 only take his grandmother's small portion
6 because at one point in her life she was
7 married to one of the Bailum family members.
8 So he is not a blood heir, taking through his
9 grandmother, who married a Bailum.

10 THE COURT: Right.

11 MR. MARTIN: But Judge Mendelsohn
12 heard all that testimony. He made a
13 determination as to who were the appropriate
14 heirs and their percentage of ownership.

15 THE COURT: You're throwing a lot of
16 names at me.

17 MR. MARTIN: Right.

18 THE COURT: And I admire you for
19 remembering all these names but let me make
20 sure now if I understand what Mr. Bertle was
21 telling me. He is saying that the lawsuit in
22 1904, ---

23 MR. MARTIN: There wasn't a lawsuit
24 in 1904.

25 THE COURT: 2004. That the results

R337

1 of that were different than what transpired in
2 this trial. I am not so sure how. You are
3 telling me that Monica Middleton didn't
4 testify, he said that she did. I don't know.

5 MR. MARTIN: She did not testify in
6 our case. I handled that trial. I know that
7 she didn't testify.

8 THE COURT: Okay. All right.

9 MR. MARTIN: There are two Monica
10 Middletons, five acres, twenty-four acres, two
11 different pieces of property, so in that regard
12 -- but, again, all of that being said, all of
13 this testimony as to who the heirs were was all
14 before Judge Mendelsohn and he ---

15 THE COURT: And he had an
16 opportunity to purchase the property?

17 MR. MARTIN: Well, yes, he did but
18 these all the different dates, different
19 hearing, all of which is in the letter attached
20 to my affidavit. That is ---

21 THE COURT: All right.

22 MR. MARTIN: And just very quickly,
23 another point that I want to make, let's say
24 for the sake of argument that we have to start
25 all over again. He gets the statutory

1 percentage of an heir of an intestate
2 grandmother. The percentage that Judge
3 Mendelsohn gave him is the statutory interest.
4 He got better than what he's got, so he can't
5 get any better than what he's got.

6 THE COURT: From his grandmother.

7 MR. MARTIN: He got the statutory ---

8 THE COURT: How was that, Mr.
9 Martin?

10 MR. MARTIN: I don't remember
11 definitively the dollar amount, it's in my
12 affidavit, I believe, -- the money is sitting
13 in my trust account. I've tried to give it to
14 various attorneys, I can't seem to get rid of
15 it. Nothing would make me happier than to get
16 it out of my trust account and give it to
17 somebody.

18 Ending this -- and I'm going to be
19 brief because I know it's late on Friday.
20 The appellate attorney, not doing his job by
21 not ---

22 THE COURT: I don't think that
23 affects this at all. I don't think that even
24 affects the Motion. I mean, that's the problem
25 with him and his attorney.

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1 MR. MARTIN: Right.

2 THE COURT: That doesn't have
3 anything to do with this, in my opinion.

4 MR. MARTIN: But all of these issues
5 that we are here before you today on are issues
6 that were properly before the Court of Appeals
7 with regard to judicial discretion of ---

8 THE COURT: I understand that. I
9 understand that. The only thing that I was
10 concerned about was the argument that the 2004
11 Monica Middleton, the results of that and the
12 testimony of that were different than she
13 testified to in the trial that we are here for
14 today.

15 MR. MARTIN: Right.

16 THE COURT: You're telling me that
17 she didn't even testify.

18 MR. MARTIN: Didn't testify, two
19 different occasions, two different ---

20 THE COURT: Okay. All right.

21 MR. BERTLE: Judge, that's fine for
22 Mr. Martin to stand here and say that now but
23 they had months and months lead -- certainly
24 had plenty of time to provide that information
25 to me, that they claim that there were two

1 different Monica Middletons.

2 This -- anything that Mr. Martin said,
3 there's not a basis to grant their Motion to
4 dismiss. If they want to make those arguments,
5 then we need a record, we need an affidavit by
6 the Monica Middleton, whoever they said she is,
7 who is alive, or not alive.

8 I am hearing now information for the
9 first time dealing with the basis of my
10 Complaint, which should have been ---

11 THE COURT: Well, ---

12 MR. BERTLE: Excuse me. --- which
13 should have been properly presented in their
14 Motion to dismiss or in some reply. So I
15 really object to him trying to put facts on the
16 record when the record already exists from the
17 earlier case. I'm sorry, Your Honor, I
18 interrupted you.

19 THE COURT: Well, it's a 12(b)
20 Motion, right?

21 MR. BERTLE: Yes.

22 THE COURT: Well, -- I mean, the
23 problem with it, I can't -- technically I am
24 not even supposed to consider affidavits, with
25 all kinds of affidavits in the file.

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1 Now, if you want to convert this to a
2 summary judgment Motion, you'all submit
3 affidavits to that effect and I'll be happy to
4 convert it. Let's get to the bottom of it.

5 MR. BERTLE: Okay.

6 THE COURT: If he is correct, then
7 that's -- if there were two Monica Middletons
8 and that -- let's get some affidavits and let's
9 find out. Because if he -- if Mr. Martin is
10 correct, you don't have a case.

11 MR. BERTLE: I may not have as much
12 of a case. I believe that I still have a case
13 on the other claim of exceptional
14 circumstances.

15 THE COURT: So instead of me -- and
16 you'all taking depositions and you'all continue
17 to litigate this thing, let's convert it to a
18 summary judgment Motion. I'll give you so much
19 time to get the affidavits to substantiate what
20 Mr. Martin is saying, if that is true or not.
21 Then if you'all want to come back with some
22 oral arguments after that, I'll be happy to
23 hear you. I mean, I just think that we need to
24 resolve it in an orderly fashion because ---

25 MR. BERTLE: I agree wholeheartedly.

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1 That's why I am saying that at this point this
2 Motion to dismiss should be denied because they
3 haven't presented ---

4 THE COURT: What I am going to do is
5 I am going to convert it to a summary judgment
6 Motion. I'll give you'all as much time as
7 possible to submit the proper affidavits and
8 whatever excerpts from the transcript are
9 necessary on any testimony. How much time do
10 you need?

11 MR. BERTLE: Well, I assume -- if I
12 could ask some questions of Your Honor -- that
13 they will initiate whatever paperwork ---

14 THE COURT: They will initiate and
15 you will have time to do reply affidavits.

16 MR. BERTLE: Yes, sir. Well, I think
17 because so much time has passed already that
18 they should do so within thirty days and I will
19 reply within thirty days.

20 THE COURT: Well, I'm not sure -- a
21 lot of that time that passed was my fault.
22 Okay? I am not going to impose my fault on
23 them. Okay? I will take the blame for the
24 time passed and I apologize for that. How much
25 time will it take to get this together?

1 MR. CHAKARIS: I just want to be
2 clear, Your Honor. You want affidavits, ---

3 THE COURT: If you think that it is
4 appropriate. I'm not trying to tell you how to
5 try your case. I am just going to give you an
6 opportunity to submit whatever affidavits that
7 you want concerning the Middletons, or whatever
8 you want to submit to me. I am not trying to
9 tell you what to submit to me. You try your
10 case.

11 MR. CHAKARIS: Sure.

12 THE COURT: You submit whatever
13 affidavits that you want to submit. I'll
14 receive them. Give them to Mr. Bertle. After
15 that, give him an opportunity to submit counter
16 affidavits. Then if I think I need to hear
17 oral arguments, we will reconvene and I will
18 listen to you after I've read those.

19 MR. CHAKARIS: Thank you, Your
20 Honor.

21 THE COURT: I don't know if that
22 answered your question or not.

23 MR. CHAKARIS: Well, we'll get a
24 -- try to get as much as we can from the record
25 in the other four cases.

1 THE COURT: I know that he -- I know
2 that he disagrees but to me the Rule 60 fraud
3 is if there was a prior hearing and then she
4 changed her testimony as a result of that.
5 You'all tell me that she didn't even testify.
6 So I -- I understand his argument. He thinks
7 that there are some other conditions that I --
8 that I should allow it to continue. Right now,
9 that -- if that -- if that happened, my gut
10 reaction is that it was a fraud on the court.
11 If there is a prior lawsuit and then they turn
12 around and change the testimony in the second
13 lawsuit, that is a fraud and he may be entitled
14 to some relief. I'm not sure what the relief
15 would be at this point in time.

16 MR. CHAKARIS: So you would like
17 for us just to show the Court that Monica
18 Middleton did not testify in our case and
19 therefore ---

20 THE COURT: Either of them.

21 MR. CHAKARIS: That if she did
22 that she wasn't the same one as the other ---

23 THE COURT: That's correct. That's
24 my concern at this point in time based on his
25 argument. Now, he can submit any affidavits

1 that he wants to submit to substantiate any
2 other facts that you think are sufficient to
3 get you in court on summary judgment. Okay?

4 MR. CHAKARIS: Very well.

5 MR. BERTLE: Thank you, Your Honor.

6 THE COURT: How much time do you
7 need?

8 MR. MARTIN: Your Honor, I think --
9 I've got the transcript, as far as needing any
10 other time I think -- any other evidence,
11 submitting an affidavit, I believe that I could
12 do it within thirty days, with the caveat that
13 if I run into a problem that ---

14 THE COURT: How about forty-five
15 days?

16 MR. MARTIN: That would be fine.

17 THE COURT: How much time do you
18 (Mr. Bertle) need after they submit their
19 information to submit counter affidavits or
20 anything else that you want to submit?

21 MR. BERTLE: Without having seen it,
22 Judge, I would say that thirty days should be
23 sufficient but I would ask for the possibility
24 of leeway on that.

25 THE COURT: That's fine, I will be

1 happy to give you leeway. Just e-mail if you
2 need it. They've got forty-five days, you've
3 got thirty days. If you need any additional
4 time, let me know. So we're looking at two-
5 and-a-half months, so September, October,
6 sometime in November.

7 MR. CHAKARIS: Very good,
8 (affirmative nod).

9 THE COURT: I will review it all,
10 review the affidavits. If I need any
11 additional arguments, I'll reschedule a
12 hearing.

13 MR. BERTLE: Thank you, Your Honor.
14 Before we adjourn, could I raise an additional
15 point?

16 THE COURT: Yes, sir.

17 MR. BERTLE: It concerns our Motion
18 for temporary relief. Earlier we had decided,
19 I believe, that that would await your decision
20 on a Motion to dismiss. Since we are now
21 moving into another phase of the case, I would
22 like the Court to consider my Motion to enjoin
23 any further sale or development or any activity
24 on the property until we get to the bottom of
25 what we're going to get to the bottom of.

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1 THE COURT: I don't know what's
2 going on with the property. I mean, if the
3 bottom is that you -- if I grant the summary
4 judgment motion, you're not entitled to any
5 temporary relief.

6 MR. BERTLE: Well, Your Honor, ---

7 THE COURT: What's going on with the
8 property. What are you concerned about?

9 MR. BERTLE: Yes. I'll address that.
10 The eighteen acres had a house on it that Mr.
11 Simmons lived in and rented out after he moved
12 out. The current owners, a Mr. Billy Smith,
13 and another defendant, Ellen Seas (phonetics),
14 evicted the tenant. So the property has been
15 vacated. Mr. Simmons is concerned about
16 vandalizing and other things going on. We
17 would request that the current owners maintain
18 the property, keep it in good order, that they
19 be barred from any further sale or development
20 of the property because that would, in effect,
21 undermine his claim that he wanted to purchase
22 the property as-is, with the house.

23 As far as the thirty-four acres, I
24 believe that Mr. Chakaris or Mr., uh, or the
25 other counsel indicated that that property was

1 part that was sold. We have a lis pendens on
2 it. I guess if that is sold then we have to
3 just deal with the third party. I like to
4 ensure at least that there is no further
5 development, that the buildings are standing,
6 that the property be maintained. That should
7 suffice until we have a final decision on the
8 Motion.

9 THE COURT: Well, if any of that
10 happens and you wind up winning your lawsuit,
11 you'd have a lawsuit against the people for
12 waste. I mean, so why should I grant a
13 temporary injunction when you would have
14 monetary relief if that happens? I don't know
15 if it is going to happen or not.

16 MR. BERTLE: The purpose of the TRO
17 is to maintain the status quo. That's all that
18 we want. We don't want the property to be
19 vandalized, destroyed or other things happening
20 to it.

21 THE COURT: Okay. What's the --
22 what is your position?

23 MR. CHAKARIS: Obviously our
24 position is that this heirs and these
25 defendants have been through this since 2004.

1 It's 2010. Now the defendant in the original
2 action is filing a brand new action clouding
3 their title again, one of which has a good
4 faith purchaser for value, unrelated to the
5 family at all. Now they're being restricted
6 again, not only by a cloud on the title but
7 ---

8 THE COURT: I understand. All we're
9 talking about is two months, two and a half
10 months, three months at the most.

11 MR. CHAKARIS: I understand, Your
12 Honor. It's just ---

13 THE COURT: Is there anything going
14 on in the next three months?

15 MR. CHAKARIS: I don't know, Your
16 Honor.

17 THE COURT: All right.

18 MR. CHAKARIS: I don't know what
19 all the defendants plans are. I do know that
20 the house, as we speak, is -- the eighteen
21 acres was subdivided by two purchasers. One of
22 them is a ---

23 THE COURT: Right. All he is asking
24 that they do is not waste the property or cause
25 any damage. That's all that he is really

1 asking.

2 MR. CHAKARIS: Right and, Your
3 Honor, I just don't know if -- there could be a
4 bulldozer out there now. I have no idea.

5 THE COURT: Okay. All right. I am
6 not going to grant the temporary relief because
7 I feel like if in fact your client is entitled
8 to the property, ultimately obtains the
9 property, if they destroyed something or
10 reduced the value of the property you can get
11 monetary damages. I will let you modify your
12 lawsuit to include that if that's happened.
13 Okay?

14 MR. BERTLE: I understand.

15 THE COURT: Thank you.

16 (HEARING CONCLUDED)

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CERTIFICATE OF REPORTER

I, the undersigned, Deborah Garrison,
official court reporter for the 9th Judicial
Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true,
accurate and complete transcript of the hearing
held before The Honorable J.C. Nicholson, Jr.,
on August 27th, 2010;

I further certify that I am neither kin
nor counsel to any of the parties and have no
interest in the outcome of this action.



Deborah Garrison

Circuit Court Reporter

9th Judicial Circuit

Charleston, South Carolina

March 25, 2011

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September 23, 2010

The Honorable J. C. Nicholson, Jr.
Tenth Judicial Circuit
P.O. Box 8002
Anderson, SC 29622

RE: Simmons v Bailum
Case No. 2009-CP-10-5343

Dear Judge Nicholson:

Taso Chakeris is submitting a Supplemental Memorandum, per your request. During our last hearing, the subject of Monica Middleton arose. Taso has addressed that issue in his Memorandum. That hearing was the first time any question had ever been raised regarding Monica Middleton or her interest, if any, in property subject to the underlying litigation.

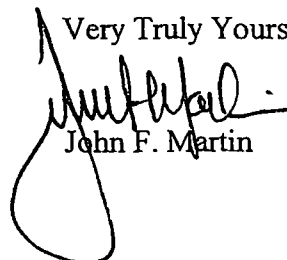
During that hearing, I misspoke. During the seven plus years that this matter has been pending, I have spoken or met with many heirs or other interested parties. In this case many people in the family or the family tree had the same or similar names. (There are several Sams, two Julies, two Fannies.) At the hearing, I stated I had spoken with Monica and her daughter "Monica". After the hearing, I reviewed my file. I have spoken with relatives of Monica and have corresponded directly with Monica, but I do not see any notes indicating I spoke with a daughter of hers also named Monica. I apologize for mistakenly stating there were two Monicas. There may be, but my notes do not reflect a second Monica.

All that being said, the Monica Middleton issue raised by Mr. Simmons' counsel has been addressed by Mr. Chakeris.

Attached to this letter are emails and correspondence regarding the transcript of the underlying trial. We are diligently attempting to secure this transcript for your review.

Kind regards.

Very Truly Yours,



John F. Martin

JFM/smp
enclosures

cc: Taso Chakeris
Ed Bertele

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