

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Hon. J.C. Nicholson, Jr., Circuit Court Judge

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	)

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities	2
Statement of Issues on Appeal	4
Statement of the Case	6
Facts relevant to the issues on Appeal	9
Argument	23
Conclusion	50

TABLE OF AUTHORITIES

Cases

<u>Baird v. Charleston County</u> , 333 S.C. 519, 511 S.E. 2d 69 (1999)	45, 46
<u>Blackmon v. Weaver</u> , 366 S.C. 245, 621 S.E.2d 42 (Ct. App. 2005)	38
<u>Brockbank v. Best Capital Corp.</u> , 341 S.C. 372, 534 S.E.2d 688 (2000)	24, 32
<u>Brown v. Butler</u> , 347 S.C. 259, 554 S.E. 2d 431 (Ct. App.2001)	36
<u>Bryan v. Bryan</u> , 220 S.C.164, 66 S.E.2d 609 (1951)	29, 30
<u>Chewning v. Ford Motor Co.</u> , 354 S.C. 72, 579 S.E. 2d 605 (2003)	31,49, 50
<u>County Council of Charleston v. Felkel</u> , 244 S.C. 480, 137 S.E.2d 577 (1964)	49
<u>Evans v. Gunter</u> , 294 S.C. 525, 366 S.E. 2d 44 (Ct. App.1988)	31
<u>Foreman v. Foreman</u> , 280 S.C. 461, 313 S.E. 2d 312 (Ct.App.1984)	50
<u>Gilliland v. Elmwood Properties</u> , 301 S.C. 295, 391 S.E.2d 577 (1990)	24
<u>Goldman v. RBC, Inc.</u> , 369 S.C. 462, 632 S.E.2d 850 (S.C. 2006)	23
<u>Graham v. Town of Loris</u> , 272 S.C. 442, 248 S.E. 2d 594 (1978)	37
<u>Hagy v. Pruitt</u> , 339 S.C. 425, 529 S.E.2d 714 (2000)	40
<u>Hazel- Alas Glass Co. v. Hartford-Empire Co.</u> , 322 U.S. 238 (1944)	34
<u>Helsel v. City of N. Myrtle Beach</u> , 307 S.C. 29, 413 S.E.2d 824 (1992)	50

<u>Hilton Head Ctr. of S.C. v. Public Service Comm.</u> , 294 S.C. 9, 362 S.E.2d 176 (1987)	32
<u>Marshall v. Marshall</u> , 282 SC 534, 320 S.E.2d 44 (Ct. App. 1984)	47
<u>Moriarty v. Garden Sanctuary Church</u> , 341 S.C. 320, 534 S.E.2d 672 (2000)	24
<u>National Surety Co. v. State Bank of Humboldt</u> , 120 Fed. 593 (8th Cir. 1903)	38
<u>Powell v. Immanuel Baptist Church</u> , 261 S.C. 219, 199 S.E.2d 60 (1973)	49
<u>Ray v. Ray</u> , 374 S.C. 79, 647 S.E. 2d 237 (2007)	50
<u>Smith Cos. of Greenville, Inc. v. Hayes</u> , 311 S.C. 358, 428 S.E.2d 900	
(Ct. App. 1993)	35, 36
<u>T v. T</u> , 378 S.C. 127, 662 S.E.2d 413 (Ct. App. 2008)	38, 39, 41, 45, 50
<u>Tench v. South Carolina Dept. of Educ.</u> , 347 S.C. 117, 553 S.E.2d 451 (2001)	35, 36
<u>Transcontinental Gas Pipe Line Corp. v. Porter</u> , 252 S.C. 478, 167 S.E. 2d 313 (1969)	50
<u>Tupper v. Dorchester County</u> , 326 S.C. 318, 487 S.E.2d 187 (1997)	24
<u>In re Whitney- Forbes</u> , 770 F. 2d 692 (7 th Cir. 1985)	30
<u>Zabinski v. Bright Acres Assocs.</u> , 346 S.C. 580, 553 S.E. 2d 110 (2001)	49

Statutes

S.C. Code Ann. Section 14-11-60	41
S.C. Code Ann. Section 15-61-25	41

Court Rules

Rule 12(b) (6), SCRCPP	20
Rule 12(b) (8), SCRCPP	7
Rule 56(c), SCRCPP	23
Rule 59(e), SCRCPP	9, 28
Rule 60(b), SCRCPP	40, 41, 45

Rule 60(b)(4), SCRCP	36
Rule 60(b)(5), SCRCP	36
Rules of Professional Conduct	
Rules of Professional Conduct 1.9	47
Other Authorities	
7A C.J.S. Attorney & Client § 181 (1980)	37

STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in granting summary judgment as to the First Count because there were disputed issues of fact?
 - a) Did the trial court correctly decide that there was no actual fraud based upon the record before the court?
 - b) Did the trial court correctly decide that the testimony in Middleton v. Doe was not material to the issue of fraud on the court based upon the record before the court?
 - c) Did the trial court err by failing to consider that the testimony was knowingly false and intended to mislead?
 - d) Did the trial court err by failing to consider that the Special Referee relied upon the false testimony relating to Monica Middleton?
 - e) Did the trial court correctly decide that the fraud was not extrinsic based upon the record before the court and were the facts in dispute?
 - f) Did the trial court err by finding that Simmons had failed to use due diligence when there was no evidence to support this finding and were the facts in dispute?
 - g) Did the trial court err by finding that Simmons should have found the fraud

- before the hearing and was this a disputed issue of fact ?
- h) Did the trial court err by finding that Simmons interest in Parcels 2, 3 and 4 was de minimus and was this a disputed issue of fact ?
- II. Did the trial court err in granting summary judgment on the Second Count based solely upon the dismissal of the prior Bailum appeal?
- a) Did the trial court correctly apply the law pertaining to post trial motions to a separate action to vacate a judgment ?
- b) Did the trial court correctly decide that Simmons appellate attorney's inaction causing dismissal of the appeal was to be imputed to Simmons ?
- c) Did the trial court err by failing to consider all of the circumstances alleged in the complaint including the fraud ?
- III. Did the trial court err by granting summary judgment solely on the basis of res Judicata?
- a) Did Simmons receive a full and fair hearing on the merits of his claims and was this a disputed issue of fact ?
- b) was there a disputed issue of fact as to whether all of the issues could have been addressed previously?
- IV. Did the trial court err by granting summary judgment on an incomplete record since it prevented discovery and no discovery had occurred?
- V. Did the trial court err by not disqualifying Attorney Berlinsky and denying the defendants motion to dismiss due to the conflict of interest?
- VI. Did the trial court err by denying Simmons motion for a temporary injunction ?

STATEMENT OF THE CASE

This appeal arises from the granting of summary judgment dismissing the complaint filed by Roosevelt Simmons in August 2009. R pp.1- 21. The Complaint seeks to vacate an Amended Order Quiet Title and Partition (“amended order”) entered by a Special Referee in Bailum v. Simmons, 2004-CP-1459 in March 2007 partitioning four parcels of heirs’ property on Johns Island (the “subject properties”) and certain deeds issued pursuant to that amended order. R p. 376 -393. In the First Count, Simmons asserted that the prior proceedings were marked by procedural irregularities, including an unauthorized appointment of a Special Referee to whom Simmons specifically objected and the lack of an full record of the proceedings; that certain defendants (hereinafter designated as the (“ Bailum heirs ”) committed fraud by testifying falsely about an alleged relative Monica Middleton, whose testimony in another case was contrary to theirs; that the Special Referee relied on the false testimony to deny Simmons an interest in some of the heirs property; that the Special Referee exhibited racial bias and wrongfully denied Simmons the right to acquire one of the parcels ; that Simmons appeal was dismissed because his attorney abandoned the appeal; as a result, Simmons did not have fair hearing on the merits of his claims. R p. 29, para. 11 to R 37, para. 43.

In the Second Count, Simmons alleged that there was a fraud on the court because the Bailum heirs acted in concert to submit false testimony, concealed their intent to submit false testimony by having the matter heard by a Special Referee to avoid the Master in Equity; filed inconsistent pleadings and changed their position at trial; testified by telephone to avoid detection, and that Monica Middleton facilitated this fraud by not appearing at the hearing. R pp. 34, para. 27 to 38, para. 52. In the Third Count,

Simmons seeks damages for fraud against the Bailum heirs for their testimony relating to their kinship to Fannie Middleton. R pp. 39, para. 55 to 40, para. 62. Simmons demanded judgment that the Special Referee's deed delivered to defendants Franklin Smith and LMC, LLC be set aside, that he be issued a deed to this property and that he be awarded his heirs interest in the other 3 parcels or allowed credit for same against the purchase price of the fourth parcel. R pp.40-41. The defendants herein include the Bailum heirs all of whom were all parties to the earlier case and the purchasers of the fourth parcel that Simmons sought to acquire. John Martin, Esq., the Bailum heirs' attorney in the prior case, was joined because he continues to hold money in escrow from the sale of the four parcels including the portion awarded to Monica Middleton. R p. 27, para. 6.

In lieu of an Answer, in September 2009, all defendants moved to dismiss the complaint based on Rule 12(b) (8), SCRCPP and res judicata. R pp. 45-49. All defendants except John Martin, Esq., who is pro se, were represented by Bruce Berlinsky, Esq. R p. 49. Defendants alleged that all of the issues raised in the Complaint had been previously decided by the Special Referee and by dismissal of the appeal. R pp. 45, 71. Simmons opposed the motion based upon a dispute whether all of the facts had been or could have been addressed in the appeal and that the attorney's failure to perfect the appeal should not be held against him. R pp. 86-93. Simmons contends that he did not have a full resolution of all of the issues. R pp. 92-93. Simmons also asserted that discovery was needed to establish all of the facts pertaining to his claims. R pp. 91-92. In December 2009, while the motion was pending unheard, Simmons filed a motion to disqualify attorney Berlinsky because Simmons had consulted with Berlinsky twice about representing him in a quiet title action on the same heirs' property several years before.

R p. 54, para. 2 & 4, p. 58, para. 2 , pp. 60-61. Simmons also moved for a temporary injunction against defendants taking any action to evict tenants from the 18 acre parcel or allowing it to become vandalized. R pp. 62-68.

The motions were heard on March 1, 2010. R p. 242, p. 245 line 12-15. The Hon. J.C. Nicholson, Jr. denied the motion to disqualify Berlinsky. R p. 258, line 7-9.

Following the court's decision, attorney Berlinsky voluntarily withdrew to avoid an appearance of impropriety and was replaced by Anastasios Chakeris, Esq. at the motion hearing. R p. 259, line 4-10. The court reserved decision on all other motions. R p. 300, line 20-25.

The court later requested reargument on the motion to dismiss which was heard on August 27, 2010. R pp. 306, 307, line 23-25. Defendants contended that all of the issues raised in the Complaint were addressed in the earlier case. R p. 308, line 3-7. John Martin, Esq. the Bailum heirs' attorney in the earlier case asserted that there was no factual basis for Simmons claim of a fraud on the court because the Monica Middleton who testified in Middleton v. Doe was not the same Monica Middleton identified as a Bailum heir in the case being challenged. R p. 338, line 9-14. The court expressed concern about the alleged lack of fraud, R p. 340, line 8-14, and converted the motion to dismiss to a motion for summary judgment and requested that the parties submit further affidavits. R pp. 342, line 15 to 343 line 10. The court also denied the motion for a temporary injunction. R p. 351, line 5-12.

Defendants submitted a Supplemental Memorandum in Support of their Motion to Dismiss in September 2010 asserting that the testimony of Monica Middleton was irrelevant since different property was involved. R p. 101, second paragraph, line 10-13.

In support of their position, they submitted the trial record and judgment in Middleton v. Doe. R pp. 113-127. Defendants contended that Simmons had already raised this issue in his appeal that was dismissed. R p. 97, first paragraph. They also contended that the Special Referee correctly decided the property issues and submitted two Death Certificates which were part of the trial record. R pp. 97, 98, 104 & 105. There were no affidavits from or concerning Monica Middleton. In a letter to the Court, attorney Martin withdrew his assertion that there were two separate Monica Middletons involved in the two cases. R p. 353. By short form order dated October 6, 2010, the court denied the defendants' motion to dismiss. R p. 222.

In October 2010, Simmons filed opposition based upon the evidence submitted and asserted that there were disputed issues of fact and a lack of discovery on the allegations of the complaint. R pp. 128-207.

By Order filed January 11, 2011, the court granted summary judgment dismissing the complaint. R pp. 1-21. On February 1, 2011, Simmons filed a Rule 59 (e), SCRCF motion for reconsideration or to alter and amend the judgment. R pp. 212-241. The motion was denied by Order filed March 2, 2011. R p. 25. A Notice of Appeal was served on March 29, 2011.

FACTS RELATING TO THE ISSUES ON APPEAL

The subject properties

The Complaint alleges and the Special Referee in Bailum v. Simmons found that in 1904, Samuel Balaam, Mary Balaam, Thomas Balaam, Toney Balaam and Fannie Middleton acquired approximately 54 acres on Johns Island and in 1905 divided it 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, Samuel Balaam acquired approximately 20

acres on Johns Island. R p. 26, para. 1, p. 361-363. The “subject properties” in Bailum v. Simmons consist of the 20 acre parcel acquired by Samuel Balaam in 1910 (parcel 1) and three parcels containing of 24, 5 and 5 acres which were the remainder of the 54 acres acquired in 1904 (parcels 2,3 & 4). Id.

Simmons efforts to protect his heir’s interest

The Complaint alleges and the Special Referee found that Simmons was the grandson of Hester Singleton, the second wife of Samuel Balaam. R p. 26, para. 2, p. 364.

The Complaint alleges and the Special Referee found that “Simmons has for several years served a vital role as caretaker of this heirs property. He watched over the property, collected rent, paid taxes .” R p. 370, fourth paragraph. Simmons also had a personal connection to the 18 acre parcel where he was raised as a child and had rebuilt the dwelling. R pp. 27-28, para.7.

The Complaint alleges and it was not disputed that in November 2000, Simmons retained Arthur McFarland, Esq. to quiet title on all the heirs properties and to obtain quitclaim deeds from other Hester Balaam heirs. R p. 28, para.8. 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 conveyed to Fannie Middleton in 1905. R p.28, para. 9, p. 113. Monica Middleton appeared before the Master in Equity and testified that her grandfather, Paul Middleton was the sole child of Fannie Middleton who acquired the 5 acres in 1905 and that her father, George, was the sole child of Paul and Sally Middleton. R pp. 114-116, 121-122. 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. R pp. 108-112. Simmons alleges that McFarland

knew or should have known that this five acre parcel was part of the heirs properties that Simmons had been looking after for many years but never disclosed the Monica Middleton action to Simmons. R p. 28, para. 9. Simmons had no knowledge of this action until after the appeal in Bailum v. Simmons was dismissed. R p. 167, para. 2. Because McFarland failed to commence a quiet title action after more than two years, Simmons discharged him. Id. 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. R p. 28, para.8.

After discharging McFarland, Simmons consulted with attorney Bruce Berlinsky about a quiet title action on the heirs property in June 2003. R p. 55, para. 4. Simmons told Berlinsky about his relationship to Samuel Balaam and the heirs property that Simmons had been protecting for many years. He told Berlinsky that he wanted to acquire the 20 acres where he had lived as a child. R p. 54 at para. 2. Berlinsky sent him a retainer agreement but Simmons decided not to hire him because of the fee. Id.

In early 2004, Simmons retained Ruth Cupp, Esq. to quiet title on the heirs properties. R p. 28, para. 10. Simmons told her that McFarland had not addressed all of them in his proposed complaint and Cupp assured Simmons that she would include all of them in the action she was preparing. Id. Cupp told Simmons that she felt the case should be handled by a former judge, Joseph Mendelsohn, Esq. Simmons strongly objected to anyone other than the Master in Equity deciding the case and in particular he objected to Joseph Mendelsohn. R p. 28, para. 10. Cupp contacted McFarland about the file but he never told her that the title to part of the heirs property had already been decided in favor of Monica Middleton. Id.

The Quiet Title litigation

While Simmons was waiting for attorney Cupp to file her quiet title action, he was served with a complaint, Bailum v. Simmons, 2004-CP-10-1459, filed by Bailum heirs, Hattie and Ruby Bailum, Verdone Gray and the estates of Clara Bailum and Thomas Bailum. R p. 423. The Complaint sought to quiet title on the 24 acres which Samuel Balaam acquired in 1904 and the 20 acres acquired in 1910. (“ the property”). Simmons and the other heirs of Hester Singleton Balaam, the second wife of Samuel Balaam were named as defendants. The Bailum heirs later amended their Complaint and admitted that the heirs of Hester Singleton were entitled to a statutory 1/3 interest in “ the property”. R p. 456, para. 25-29. The Bailum heirs named Monica Middleton as a defendant but did not allege that she had any interest as an heir of Sam Bailum. R p. 453.

On January 26, 2005 Simmons and Cupp attended a proceeding conducted by Joseph Mendelsohn, Esq. at the offices of John Martin, Esq. R p. 29, para. 14. At that time there was no order appointing Mendelsohn to act as Special Referee. No transcript of the proceeding was taken. During the conference, Simmons insisted that he wanted to purchase the 20 parcel acquired by Sam Balaam in 1910. Mendelsohn then made a disparaging racial remark directed at Simmons. Id. Simmons was not aware that Cupp had asked Mendelsohn to act as Special Referee. Id. Simmons later discharged attorney Cupp due to her failure to carry out his instructions and proceeded pro se. Id. While he was pro se, Simmons went back to attorney Berlinsky and asked him to represent him in the pending action but Berlinsky refused. R p. 55, Para. 4.

Mendelsohn held a conference in February 2006 to schedule an evidentiary hearing and to set the procedures of the hearing. There is no stenographic record or order evidencing

this proceeding. R p. 30, para. 17. Simmons appeared pro se and objected when attorney Martin asked that the Bailum heirs be allowed to testify on the telephone at the evidentiary hearing. Id. On February 14, 2006, attorney Martin filed a motion to refer the case to a Special Referee (Mendelsohn) which included a Consent Order previously signed by attorney Cupp although she had been discharged the year before. R pp. 357, 461. When the motion was filed, Simmons was pro se, did not consent and was not served with a copy of the motion. R pp. 29, para. 13, 357, 461. The Consent Order does not state the basis for the reference to a Special Referee in lieu of the Master in Equity. R p. 357.

The evidentiary hearing

An evidentiary hearing was held on May 15, 2006 at which Simmons was represented by attorney Louis Condon. At the hearing, the parties agreed that two 5 acre parcels remaining from the 54 acres divided in 1905 were to be included with the 20 and 24 acre parcels to be partitioned. R p. 360. The Bailum heirs testified by telephone. Id. Contrary to the admission in the Second Amended Complaint that the heirs of Hester Balaam were entitled to a 1/3 interest in the parcels acquired in 1904 and 1910 (and in the two 5 acre parcels), one of the Bailum heirs, Verdone Gray, claimed there were different Sam Balaams (Bailums) who acquired this property. She testified that she is the granddaughter of Samuel and Julia Bailum, that her uncle was Thomas and her father Samuel; that Samuel and Thomas had a sister named Fannie who was married to Paul Middleton and Fannie had a daughter named Monica. R pp. 148, line 16 to R 150, line 4. She testified that her grandfather Samuel was the son of another Sam Bailum who was married to Hester. R p. 150, line 17-19. 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. R p. 241, line 13 to 20. It

is undisputed that Julie Johnson also testified that Monica Middleton was the child of her aunt Fannie Bailum Middleton. R p. 31, para. 19. The Death Certificate of Verdone Gray's father, Samuel Bailum indicates he was 72 years old at his death in 1975 establishes that her father Sam Bailum I was born in 1902 and was two years old in 1904. R p. 104. Neither Ruby Bailum nor Monica Middleton appeared in person or testified by telephone. It is undisputed that no other evidence was introduced at the hearing that Monica Middleton claimed to be the relative of Fannie Bailum or that Fannie Bailum was known as Fannie Middleton in 1905. R p. 31, para. 19. It is not disputed that no evidence was introduced about the earlier proceedings involving Monica Middleton. Id. Simmons introduced a family tree which indicated that Samuel Balaam, who was married to his grandmother, Hester had a son Samuel from his previous marriage. R pp. 168, para. 3, 188. This Samuel also had a son named Samuel. R 188. It is not disputed that Simmons never conceded that different Sam Balaams owned any of the subject property.

The Order Quiet Title partition and Sale

On January 11, 2007, the Special Referee entered an Order Quiet Title Partition and Sale. The Special Referee found that Samuel Balaam a/k/a Bailum was married to Hester Singleton and acquired parcel 1 in 1910 He found that Hattie Bailum was the great granddaughter and Ruby Bailum was the granddaughter in law of Samuel Bailum. R p. 364. He awarded the Bailum heirs 2/3 of the sale proceeds of parcel 1, valued at \$220,000.00 (Monica Middleton was given 1/6) and awarded Simmons and the other Hester Singleton Balaam heirs the remaining 1/3. Simmons was given the right to buy parcel 1 for approximately \$163,000 after getting credit for his heirs interest and payments he made for taxes and maintenance. R pp. 371-372. Simmons had to present proof of financing within 10

days. R p. 371. The Special Referee also found that the children of Samuel Bailum, Samuel, Thomas, Toney, Mary and Fannie Bailum (Middleton) acquired the 54 acres in 1904. R pp. 363-364. He found that Monica Middleton was the daughter of Fannie Middleton, who acquired the 54 acres in 1904. R p. 364. The Special Referee awarded the Bailum heirs the entire proceeds from the sale of parcels 2,3 and 4 totaling \$337,000.00 of which Monica Middleton was awarded 1/4. R pp. 372-373.

Post Trial Proceedings

On January 19, 2007, Simmons filed a motion to alter or amend the order allowing Simmons only 10 days to present proof of financing and challenging the Special Referee's authority to hear and decide the case. R p. 464. 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 to amend the order to allow Marie Smith to purchase the fourth parcel. R p. 467. By Order filed March 6, 2007, the Special Referee denied Simmons motion, R p. 396, and issued an Amended Order Quiet Title partition and Sale allowing Marie Smith to purchase the fourth parcel. R pp. 376-393. The Amended Order contained the same requirement that Simmons provide proof of financing within 10 days. R p. 392. Simmons filed a Notice of Appeal pro se from the Order denying a new trial. R p. 470.

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. R pp. 168, para. 4 to 169, para. 6, 190-197, 514- 515. The Special Referee however refused to sign a deed of the fourth parcel to Simmons. R p. 169 para. 5 & 6.

Simmons retained new counsel, Charles Houston, Esq. who filed a motion on April 24, 2007 to stay the sale of parcel 1 pending appeal. R pp. 474-476. The motion was amended to request a new trial based upon newly discovered evidence concerning the Bailum heirs interest in the parcels 2, 3 and 4. R pp. 660, line 23 to 663, line 5. Based upon the testimony of the Bailum heirs at the hearing, Simmons did his own investigation and found Census Department records showing only one Samuel Balaam lived on Johns Island in 1900 and he had three children, Henry, Ellis and Fannie. R pp. 169 para. 5, 199 -204. Houston also filed an Amended Notice of Appeal from the amended order. R pp. 471-473.

Oral argument on the motion was heard on June 6, 2007. The Special Referee said he refused to issue a deed to Simmons because the proof of financial capability was given by third parties and not Simmons. R pp. 165, page 0087, line 20 to 166, page 0089, line 25. Houston argued for a new trial based on evidence newly discovered by Simmons that refuted the Bailum heirs' claims that the children of Samuel Balaam acquired the 54 acres and that Hester Singleton's heirs including Simmons had an interest in parcels 2,3 and 4. R pp. 162, page 0052, line 10 to 163, page 0053, line 8. By Order dated June 28, 2007, the Special Referee denied Simmons' motion for a new trial but ordered that 1/3 of the proceeds from the sale of parcels 2,3 and 4 be held in escrow by the attorney Martin pending the decision of Simmons' appeal. R pp. 405-406.

Appellate Proceedings

Attorney Houston filed a Motion for Supersedeas Relief in the Court of Appeals. R 485. 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. R p. 411. Simmons tried unsuccessfully to contact Houston while the appeal was pending. R p. 95, para. 6. The Court of Appeals issued other numerous orders of dismissal after attorney Houston failed to timely file the brief and record and finally dismissed the appeal and issued a Remittitur in 2008. R pp. 413, 417, 419, 421.

Following the dismissal of the appeal, in December 2008, the Special Referee conveyed the four parcels and released the proceeds in escrow to the Bailum heirs. Franklin Smith, Marie Smith's son acquired 1/2 of the parcel 1 and LMC, LLC a contract purchaser acquired the other 1/2. Attorney Martin still holds the sale proceeds awarded to Monica Middleton.

Background of the present action

Sometime after the appeal was dismissed, Simmons discovered that McFarland represented Monica Middleton in a case involving part of the property Simmons had been overseeing. R p. 167, para. 2. Simmons contends that McFarland delayed filing Simmons quiet title action for two years while he was working for Monica Middleton. Id. Although Simmons opposed Mendelsohn's appointment as Special Referee and Mendelsohn made a disparaging racial remark directed at Simmons during a status conference in January 2005, Simmons didn't realize that the Mendelsohn's bias against him affected the decision until after he refused to issue a deed to parcel 1. R p. 169 para. 6. Simmons filed a Judicial Grievance against Mendelsohn as a result of his behavior but it was not acted upon due to the pendency of the appeal. R pp. 169, para. 6, 206-207. Simmons filed the within complaint in August 2009 because he never had an opportunity to have full and fair hearing on his claims including the Special Referee's

bias and unreasonable refusal to issue a deed and the false Bailum heirs testimony. R pp. 94 para. 2, 95 para. 3.

Motion to disqualify Attorney Berlinsky

Simmons filed a motion to disqualify attorney Berlinsky based upon a conflict of interest. It is not disputed that Simmons consulted with Berlinsky about filing a quiet title action on the same property that was the subject of the later Bailum suit in 2003. R p. 54, para. 2. Simmons gave Berlinsky confidential information about his family history and told him he wanted to acquire title to the parcel 1. R p. 54, para. 2 & 3. Simmons also consulted Berlinsky about representing him after the Bailum heirs filed suit and defending his interests. R p. 55, para. 4. Berlinsky later represented another Hester Singleton heir, Marie Smith in that case. R p. 55, para. 5. Her interests were aligned with Simmons in that case and if Simmons succeeded on his claims in the present action, she would benefit. Id. Therefore, Berlinsky's current client heirs have materially adverse interests to Simmons and Marie Smith, Berlinsky's former clients involving the same subject matter. R p. 55, para. 6.

Motion for temporary injunction

After defendants Smith and LMC, LLC acquired title to parcel 1, they evicted the tenants. R p. 68, para. 3. Simmons believed that they intended to leave the property vacant and that it would be subject to vandalism. R pp. 67, para.2, 68, para. 3. In December 2009, he filed a motion for a temporary injunction to maintain this property which he had always wanted to acquire. R p. 62. He was concerned that the house which he had built could become vandalized and that he did not have the money to replace it. He had obtained a tax exemption for the property as a tree farm and wanted this to be

continued so that the taxes would not be increased. R pp. 67 para. 2 to 68, para. 3 . None of defendants including the current owners of parcel 1 filed any opposition.

Argument on the pending motions

All pending motions were scheduled for March 1, 2010. The motion to disqualify Berlinsky was heard on before any other pending motions. Berlinsky admitted that he had no recollection of ever meeting with Simmons. R p. 253, line 19-21. The trial judge said that there was nothing that Berlinsky may have learned that would prejudice Simmons case and denied the motion to disqualify him. R pp. 257, line 14 to 258, line 4, 7 -11. Attorney Berlinsky then stated he would voluntarily withdraw because of the appearance of impropriety . R p. 259, line 4-10. The Court said it was leaving that issue to the Ethics Committee. Id at line 11-15. The Court also denied plaintiff's motion to deny the motion to dismiss based on the ruling on the conflict of interest issue. R p. 259, line 16-20.

Counsel for the Bailum heirs argued for dismissal based upon the earlier proceedings in Bailum v. Simmons. Counsel asserted that there was nothing new in the complaint except for some allegations of conspiracy by the Bailum heirs. R pp. 264, line 16 to 265, line 7. Attorney Martin contended that each of the issues raised was fully vetted at trial, in post trial motions , or in the appellate courts by “attempted filings.” R pp. 265, line 25 to R 266, line 3, 9-10. Attorney Martin also contended that there was no false testimony. R p. 295, line 2-6. Attorney Martin denied that there was any racial prejudice against Simmons. R p. 298, line 16 -21.

Simmons counsel contended that an independent action to attack a prior judgment was permitted under Rule 60 (b) , SCRCF based upon exceptional circumstances and

fraud on the court. R p. 268, line 4 to 21. Simmons did not get a full and fair resolution of his claims and thus was not barred by res judicata. R pp. 268, line 24 to 269, line 2. Simmons counsel asserted that the fraud on the court was the result of a combination of events and actions by the Bailum heirs. R pp. 282, line 19 to 283, line 19. Simmons counsel stressed that discovery was needed to determine a complete picture of the circumstances and the Court agreed. R p. 289, line 5-16. Counsel also emphasized the need to examine the entire circumstances of the prior case. R p. 288, line 12-24. The Court reserved decision on the motion to dismiss and deferred decision on Simmons motion for a temporary injunction until it decided the motion to dismiss. R pp. 300, line 20-25, 302, line 14-17.

Reargument and Conversion of the Motion to Dismiss

The Court requested reargument on the defendants' motion to dismiss which was heard on August 27, 2010. During the hearing, the Court asked defense counsel whether the judgment in the earlier case [Middleton v. Doe] contradicted what was said during the Bailum v. Simmons case. R p. 332, line 16-19. Attorney Martin responded that there were different Monica Middletons involved in the two cases but that the Monica Middleton named in the Bailum v. Simmons case did not testify. R p. 338, line 9-14. The Court said that it was concerned about the inconsistency in the testimony and "if Mr. Martin was correct, [plaintiff] doesn't have a case." R pp. 340, line 8-14, 342, line 6-10. The Court then converted the motion to dismiss to a motion for summary judgment and said that instead of taking depositions, to submit affidavits "to substantiate what Mr. Martin is saying, if that is true or not." R p. 342, line 15-24.

Before the hearing was adjourned, Simmons counsel requested that the court issue a temporary injunction pending any decision on the motion. Simmons was concerned about vandalism because the tenants had been evicted and wanted the current owners to maintain the property in good order and not pursue any further development in the meantime. R pp. 348, line 9 to 349, line 8. Defendants had not submitted any opposition and their counsel could not say what their plans for development were. R p. 351, line 2-4. The Court denied the motion for a temporary injunction on the basis that Simmons could recover any damages to the property by an action for waste. R p. 351, line 5-13. Following the reargument, the trial court entered a short form order denying the defendants motion to dismiss under Rule 12(b) (6), SCRCF although defendants motion was not based on that rule. R p. 22.

Defendants submitted a Supplemental Memorandum in which they argued that the testimony was not contradictory and was not relevant to the Simmons claims to parcels 2, 3 and 4. R pp. 97-127. They enclosed the two Sam Bailum Death Certificates that were introduced into evidence in Bailum v. Simmons and the transcript of the Middleton v. Doe final hearing. R pp. 104, 106, 113-127. Attorney Martin advised the court by separate letter that he was in error about the existence of two Monica Middletons. R p. 353. In the interim Simmons counsel sent a discovery request to attorney Martin concerning his contacts with Monica Middleton, but Martin never responded. R p. 240, at para. 3.

Simmons opposed the motion on the basis that there were disputed issues of fact relating to the fraud on the court including the effect of the Monica Middleton testimony, the actions taken by the Bailum heirs to conceal the fraud and whether Simmons was

aware of the Middleton v. Doe case. R pp. 128,129,131-135,137. Simmons contended that the Bailums false testimony caused him to do his own research. He found Census Bureau records which indicated only one Sam Bailum was alive on Johns Island in 1900 which were submitted to the Special Referee to support a new trial motion. R p. 168, para. 5, pp.199-204. Simmons also contended that there were disputes of fact relating to his Simmons claim of extraordinary circumstances. Simmons didn't realize that the Mendelsohn's bias against him affected the decision until after he refused to issue a deed to parcel 1. R p. 169, para. 6. Simmons asserted that he did not receive a fair hearing because the Special Referee was biased, his appeal was dismissed and the issues were not resolved. R pp. 137-141, 168-169.

Order granting summary judgment

The Court issued an Order filed January 11, 2011 granting summary judgment. 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 2,3 and 4. R p. 12. 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. R p. 9. 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 not relevant to Simmons claims of fraud on the court. R p. 8. The Court found that Simmons counsel in Bailum v Simmons did no discovery and could have found out about the Middleton v. Doe case in order to raise it at trial. R p.7. The Court found that there was ample evidence in the record apart from the testimony to support the Special Referee's findings. R p. 12. The Court found that Simmons interest if any in parcels 2, 3

and 4 was trivial. R p. 17. The Court found that any false testimony which was given represented intrinsic fraud. R p. 15. The Court found that any relief from that Order denying him the right to complete the purchase could only be challenged by an appeal. R p. 8. 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(b). R p. 18. Finally, the Court found that res judicata barred Simmons from relitigating these issues. R pp. 19-20.

ARGUMENT

I. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT AS TO THE ISSUE OF FRAUD ON THE COURT

Simmons contends that the trial judge erred in granting summary judgment dismissing the claim of fraud on the court because: there was evidence on the record of actual fraud by the Bailum heirs on which the Special Referee relied; that evidence was material and relevant to Simmons contentions of fraud on the court; there were other undisputed facts evidencing an intent to mislead not just false testimony ; that the evidence in the record does not support the conclusion that the false testimony should have been detected prior to the final hearing as this was a disputed issue of fact and there was a need for discovery. Plaintiff also contends that the trial court erred as a matter of law in finding that the fraud was intrinsic and was not a basis for vacating the prior judgment.

As the Supreme Court noted in Goldman v. RBC, Inc., 369 S.C. 462, 632 S.E.2d 850 (S.C. 2006): “An action to . . . quiet title to land is one in equity. In an action in equity tried by a judge alone, the appellate court may find facts in accordance with its

view of the preponderance of the evidence. . . . Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. The evidence must be viewed in the light most favorable to the non-moving party. In reviewing a summary judgment motion, the appellate courts apply the same standards as the trial court under Rule 56(c), SCRPC.” 632 S.E.2d at 851-52 (citations omitted). 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). Simmons contends that the facts support his contention of a fraud on the court. Even if the court disagreed with Simmons contention as to the significance of the facts, disagreement as to the conclusion to be drawn from the facts requires that it should have denied summary judgment. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000); Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997); Gilliland v. Elmwood Properties, 301 S.C. 295, 391 S.E.2d 577 (1990).

a. There was evidence of actual fraud

The Reference Testimony in Middleton v. Doe, 2002 CP- 4883 indicates that the subject property was the five acre parcel deeded to Fannie Middleton in December 1905. R pp. 114-115,121-123. Monica Middleton testified 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. ”

R pp. 115-116. The deed to the 5 acres was in the name of Fannie Middleton, not Fannie

Bailum. R pp. 121-123. In contrast, Verdone Gray testified as follows before the

Special Referee:

“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 Balium [sic] who was married to Hester Bailum?**

A. Yes.

R pp. 148, line 25 to 149, line 3, 6-7, 17 to 150, line 4, 6-8, 17-19. (emphasis added)

The testimony is clearly contradictory. The court found that these inconsistencies were irrelevant since the subject properties were not at issue in the Middleton v. Doe. See Section b. below. That conclusion misses the point because Simmons' claim of fraud has to do with Monica Middleton's lineage to Fannie Middleton not the property at issue. Therefore the court erred by finding that there was no actual fraud.

b. The inconsistencies in trial testimony are material and relevant

The court found that "[a]ny factual disparity as to Monica Middleton's lineage is irrelevant to Simmons position." R p. 9. Simmons contends that the court erred by ignoring the inconsistent and false testimony because it erroneously accepted the Special Referee's findings as to two different Sam Bailums. R p. 10. Sam Bailum I, the court found, acquired parcel 1 in 1910 and Sam Bailum II with his siblings, Thomas, Toney Mary and Fanny Middleton acquired the fifty four acres in 1904. Id. The court stated that "there is ample evidence in the record apart from the testimony alone to support the Special Referee's findings." R p. 12. However, the court did not identify what other evidence supported the Special Referee's decision. The evidence that the Bailum heirs submitted to support summary judgment from the record in the Bailum case were two Death Certificates for two Sam Bailums. R pp. 104, 106. One of these Sam Bailums was born on May 19, 1902 and the other on August 28, 1928. Neither of them could have

acquired the 54 acres in 1904 since the first was 2 years old and the second was not yet born. These documents do not prove that there were two different Sam Bailums involved in the two transactions. The Bailum heirs had more than one year after they filed their motion to dismiss in September 2009 to provide the court with compelling evidence to support the Bailum decision . They produced Death Certificates which are inconclusive and actually rebut their position. Based upon the record before the lower court, this court must conclude that there was no objective evidence of two different Sam Bailums introduced before the Special Referee. Therefore it is reasonable to conclude that the Special Referee based his decision that there were two different Sam Bailums solely upon the testimony of the Bailum heirs including Verdone Gray.

Since the Special Referee relied upon the Bailum heirs testimony that Monica Middleton was the daughter of Fannie Middleton (who they identified as Fannie Bailum Middleton) to prove their claim of different Sam Bailums, the falsity of their testimony is clearly relevant. If as Simmons alleges (and his family tree corroborates) that the same Sam Balaam acquired all of the subject properties, the testimony given by the Bailum parties about the relationship between Fannie (Bailum) Middleton and Monica Middleton must be closely examined - not trivialized as the court below did.

The Bailum heirs Verdone Gray testified that Fannie Bailum was the daughter of Sam Bailum I. Monica Middleton testified in Middleton v. Doe that she is the great granddaughter of Fannie Middleton who acquired the 5 acres in 1904 not the daughter of Fannie Bailum Middleton. Therefore the record supports Simmons contention that they were different people.

Simmons contends and the record supports his contention that the Bailum heirs fabricated Monica Middleton's familial relationship to Fannie Bailum to obtain a 100% interest in the parcels 2,3 and 4. Monica Middleton facilitated the fraud (either knowingly or unknowingly) by failing to appear. As a result of the fraud, 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), R pp. 390, 391, based upon fabricated evidence of a familial relationship to Fannie Bailum. Because of her testimony in Middleton v. Doe, Monica Middleton cannot also be an heir to the children of this Sam Bailum. By the law of distribution, the children of Sam Balaam and his wife Hester Singleton (and her heirs) would acquire his property. Unless she was actually a descendant of one of the children of Sam Balaam (and there was no evidence before the Special Referee other than the Bailum heirs false testimony) she would not be entitled to any heirs interest in the proceeds in the Bailum case. Therefore, Simmons contends that the record clearly supports his contention that the false testimony was relevant and material to his claim of a fraud on the court.

c. The testimony was knowingly false and intended to mislead

Although the trial court did not address the issue, Simmons raised it in his Rule 59(e), SCRCF motion. Simmons contends that the record supports his contention that Verdone Gray knowingly gave false testimony in order to mislead the Special Referee. Verdone Gray testified that her aunt was Fannie Bailum Middleton and her cousin was Monica Middleton. It is reasonable to assume that Verdone Gray would know the

identity of her own aunt and cousin. Monica Middleton did not testify. Therefore, it is reasonable to conclude that Verdone Gray falsely testified that Fannie Middleton was her aunt to convince the Special Referee as to the relationship of Fannie Middleton to her father, Sam Bailum and in support of her claim of two Sam Bailums.

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

The trial court did not address the issue of the Special Referee's reliance upon the false testimony. Simmons raised this in his SCRCP 59(e) motion. Simmons contends that the record is clear that the Special Referee relied upon the false testimony. The Amended Order Quiet Title Partition and Sale states: " 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." R p. 381. Monica Middleton did not testify before the Special Referee and there was no other evidence in the record about the lineage of Monica Middleton other than the testimony of the Bailum heirs. Therefore, the record supports Simmons contention that the Special Referee relied upon Verdone Gray's false testimony

e. The record does not support the court's finding of intrinsic fraud

The court found that the Bailum heirs testimony even if false would be only intrinsic fraud and not fraud on the court, relying on Bryan v. Bryan, 220 S.C. 164, 66 S.E.2d 609 (1951). R p. 15. In Bryan, plaintiff's witness lied concerning the prior sale of farm produce to support plaintiff's claim for damages. 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 has alleged more than the giving of false testimony as the basis for equitable relief and thus this case is distinguishable from Bryan v. Bryan. As the trial court correctly noted: “Fraud on the court requires a showing that one 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 make it essential that there be a showing of conscious wrongdoing—what can properly be characterized as a deliberate scheme to defraud.” R pp. 12-13 (quoting In re Whitney-Forbes, 770 F. 2d 692, 698 (7th Cir. 1985)).

Simmons contends that the court ignored the numerous facts and inferences in the record which indicated a deliberate scheme to defraud by the Bailum heirs. The Bailum heirs filed pleadings in which they admitted that Simmons was entitled to share in all parcels held in the estate of Samuel Balaam. They joined Monica Middleton as a defendant because she did not have the same heirs interest as they did. They agreed to have the case heard by a Special Referee to avoid the Master in Equity who heard the Monica Middleton action. The Bailum heirs did not appear in South Carolina to testify due to their alleged infirmity. They all testified over the telephone which made it impossible for the Special Referee to judge their credibility or to cross examine. At the hearing, Verdone Gray and Julie Johnson claimed that there were different Sam Bailums and that Monica Middleton was the daughter of one of Sam Bailums children, Fannie. Monica Middleton did not answer the complaint or appear in any proceeding in South Carolina.

Simmons contends that the facts and inferences indicate that the Bailum heirs acted intentionally to deceive the court and to subvert the administration of justice. The fraud required the cooperation of several Bailum heirs to support the false testimony and the non appearance of Monica Middleton who by her absence, assisted the Bailum heirs to carry out their deception. In Evans v. Gunter, 294 S.C. 525, 529, 366 S.E. 2d 44 (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." Simmons contends that the conduct of the Bailum heirs clearly was an attempt to subvert the integrity of the court.

Simmons also alleged that attorney misconduct occurred which is relevant to establishing a fraud on the court. Attorney misconduct constitutes extrinsic fraud if proven by clear and convincing evidence and would constitute fraud on the court. Chewning v. Ford Motor Co., 354 S.C. 72, 86, 579 S.E. 2d 605 (2003) (Court affirmed the denial of a motion to dismiss an action to vacate a judgment based upon generalized allegations as to procuring false testimony and intentional concealment). Simmons contends that attorney McFarland intentionally delayed filing Simmons quiet title action on the same heirs property for two years because he was working on Monica Middleton's quiet title action. R p. 167, para. 2. Martin never told either Simmons or his attorney Cupp. Shortly thereafter, Attorney Martin commenced a quiet title action on the remaining property. The Second Amended Complaint acknowledged that Simmons had an interest in all of the subject property but did not allege that Monica Middleton had any interest as an heir of Sam Bailum . Then the Bailum heirs changed their position at trial.

Simmons asserted that there should be discovery as to all of the circumstances surrounding the former Bailum case before the court could determine whether to grant summary judgment See R pp. 91-92, 141-142, 289, line 11-16. Simmons contends that the court limited discovery to the allegations concerning two Monica Middletons. See Point IV. How and why their counsel changed his position is not known. What investigation Martin conducted about Fannie Middleton and whether it was suppressed at trial was not known. What discovery was provided to Simmons counsel is not known. How and why the Bailum parties reversed their position is not known. 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).

Simmons also contends there is a dispute of fact as to whether prior to the trial, he had reason to believe that he would not receive a statutory share in all of the heirs' property. See Sections f. & g. below. 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). Since there was a dispute of fact which affected the court's finding of intrinsic versus extrinsic fraud, the court should not have granted summary judgment. Brockbank v. Best Capital Corp., supra.

f. There was no evidence Simmons had failed to use due diligence.

The trial court found that there was no evidence in the record that Simmons prior counsel, Louis Condon, Esq. had conducted any discovery. R p. 7. The Bailum defendants never alleged that attorney Condon did no discovery in their Supplemental Memorandum. See R pp. 97-102. Simmons counsel did not have Condon's files and was not able to present evidence on this issue without further discovery. R p. 240. Therefore, there was no evidence in the record to support a finding of a lack of discovery.

The trial court recognized that Simmons trial counsel, Louis Condon, Esq. was a former Master in Equity. R p. 2. The reasonable inference is that attorney Condon was experienced in heirs' matters and would have conducted discovery. The lack of a record should have prevented the court from granting summary judgment until all of the facts were known. See Point IV below.

g. There was a disputed issue of fact that Simmons should have found the fraud before the hearing

Simmons asserts that the record does not support the court's conclusion that the Simmons could have found evidence of the Middleton v. Doe case before the hearing. Simmons contends that the evidence in the record and inferences arising from it support his contention that he wasn't unaware of it until later.

Prior to the hearing, the Bailum heirs admitted in the Second Amended Complaint that Simmons and the other the heirs of Hester Singleton were entitled to a statutory 1/3 interest in all the subject property and that Monica Middleton's interest was not aligned with theirs. Over Simmons objections, the Bailum heirs were allowed to testify by telephone. As the court below noted, the 5 acre parcel which was the subject of

Middleton v. Doe was not at issue. The Bailum heirs testified that Fannie Middleton was the daughter of Sam Bailum and Monica was her daughter. Monica Middleton did not appear at the Bailum final hearing. There is nothing in the record to explain Monica Middleton's failure to appear by telephone. Simmons was never told by his former counsel McFarland that title to the five acres had been resolved in Middleton v Doe.

After hearing their false testimony, Simmons did his own research and found Census Bureau records indicating there was only one San Bailum alive on Johns Island in 1900. Simmons didn't find the Middleton v Doe judgment until after the Bailum appeal was dismissed. R p. 168, para. 5. The facts and reasonable inferences support Simmons contention that prior to the trial he had no reason to believe that he would not receive a statutory share in all of the heirs' property. Therefore, there was a disputed issue of fact as to whether Simmons should have found the Middleton v. Doe case prior to the final hearing in the Bailum case.

h. There was a disputed issue of fact as to Simmons interest in Parcels 2, 3 and 4

The court found that Simmons had arguably only a de minimus interest in the sale proceeds of parcels 2, 3 and 4. R pp. 16-17. The court did not explain the significance of this finding. Id. Simmons asserts the court erred as a matter of law to rely upon this finding and that it is not supported by the record below. As a matter of law, fraud upon the court is an affront to the administration of justice and a litigant who has been defrauded need not establish prejudice. Hazel-Atlas Glass Co. v. Hartford-Empire Co. 322 US 238 (1944). Therefore, the extent of Simmons injury was not relevant to a decision on summary judgment.

However, Simmons does have substantial stake in the outcome. If there was only one Sam Balaam, all of the Hester Singleton heirs including Simmons had a 1/3 interest in the sale proceeds of parcels 2, 3 and 4 totaling \$337,000. R p. 390. The Bailum heirs contended that Simmons interest in parcels 2, 3 and 4 was de minimus, amounting to 1/19 of 18.87 acres, R 99-100, but Simmons disputed this. Simmons obtained quitclaim deeds from ten other surviving heirs of Hester Singleton relinquishing their interest in parcels 2, 3 and 4 in his favor. See R pp. 167 -168, para. 2, 172-182 . Therefore Simmons had a 2/9 interest in parcels 2, 3 and 4.

In summary, the trial court disregarded relevant and material evidence of fraud by the Bailum heirs and dismissed the claim of fraud on the court without considering the reasonable inferences from the evidence or the fact that no discovery had occurred to develop the record on the other critical issues.

II. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT BASED SOLELY UPON DISMISSAL OF THE APPEAL

Simmons contends that the court erred in granting summary judgment on the other count of the complaint based solely upon dismissal of the earlier Bailum appeal. “When the Plaintiff failed to perfect his appeal, he abandoned his right to relitigate issues under Rule 60.” R p. 18. The court relied on Smith Companies of Greenville, Inc. v. Hayes, 311 S.C. 358, 428 S.E.2d 900 (Ct. App. 1993) and Tench v. South Carolina Dept. of Educ., 347 S.C. 117, 553 S.E.2d 451 (2001).

a. The caselaw does not support the trial court's decision

Simmons contends that neither case applied to the facts alleged in his complaint and thus these cases 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, was 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. These cases did not deal with an independent action under Rule 60(b) or the circumstances where all of the issues could not have not been raised in the appeal. Therefore, the precedents on which the court relied to grant summary judgment as a matter of law do not support its conclusion.

b. Attorney misconduct should not have been imputed to Simmons

Simmons contends that the dismissal of the Bailum appeal should not bar this case for several reasons. First, 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, 554 S.E. 2d 431 (Ct. App. 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).

The facts were not in dispute. Attorney Houston filed an Amended Notice of Appeal in April 2007 but it was dismissed in June after the initial brief was not filed. An extension was granted at attorney's Houston's request. However, Houston's subsequent failure to file the brief and record resulted in the Court of Appeals issuing multiple dismissals. 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, 248 S.E. 2d 594 (1978). Accordingly, any conduct attributable to Houston resulting in dismissal of Simmons appeal should not have been used as a reason to bar Simmons' action to vacate that judgment.

c. The court failed to consider all of the circumstances

Simmons contends that the court failed to consider all of the other allegations of the complaint instead of relying solely on abandonment of the appeal by the appellate attorney. The complaint asserts that there are multiple circumstances justifying equitable relief including procedural irregularities, false testimony, bias by the Special Referee:

which affected the outcome and other misconduct some of which may not be susceptible to review on appeal. As the Court of Appeals noted in T v. T, 378 S.C.127, 662 S.E.2d 413 (Ct. App. 2008): “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.**” 378 S.C. at 135. See also National Surety Co. of N.Y. v. State Bank of Humboldt, 120 Fed. 593 (8th Cir. 1903). The court instead focused only on the fact that Simmons appeal had been dismissed.

Simmons was denied the right to have the Court of Appeals review the trial record which contained documentary evidence that supported his contention of a single Sam Bailum. The birth certificate of one of the Sam Bailums was in evidence. It clearly shows that one of the Sam Bailums alleged by the Bailum heirs as being a separate grantee was not old enough to acquire real property in 1904 and 1910. 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 (Ct. App. 2005).

Simmons alleged 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. R pp. 169, para. 6, 206-207. Simmons alleges that this bias was also exhibited as well when the Special Referee refused to issue a deed to parcel 1. Simmons 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. R pp. 168, para. 4, 190-197. Further, Simmons alleged 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. R p. 195, para. 4. 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 R p. 165, page 0087, line 20 to R 166, page 0089, line 9. 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 Court of Appeals in the Bailum v. Simmons case could have agreed with Simmons and found that the Special Referee arbitrarily refused to issue a deed to Simmons for parcel 1.

The false testimony regarding Monica Middleton was part of the exceptional circumstances justifying relief. The trial court ignored the testimony because it found that it was evidence only of intrinsic fraud. Simmons contends that the trial court erred as a matter of law by failing to consider the false testimony as part of the exceptional circumstances. In T v T, 378 S.C.127, 662 S.E.2d 413 (Ct. App. 2008) 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." 378 S.C. at 136. Therefore, the court erred as a

matter of law in granting summary judgment on the basis that dismissal of Simmons appeal barred an action under Rule 60(b), SCRCP.

In summary, Simmons contends that the trial court erred in granting summary judgment based solely on dismissal of the earlier appeal. By failing to consider all of the circumstances alleged in the Second Count, the trial court erred as a matter of law.

III. SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED BASED ON RES JUDICATA

The trial court found that all of the issues Simmons raised in his complaint could have been raised in the prior action and thus Simmons was barred from relitigating them. R pp. 19-20. Simmons contends that the trial court erred by granting summary judgment based upon the principle of res judicata. Simmons was denied a fair hearing because he did not have the opportunity to have this Court conduct an independent review of the Special Referee's amended order and decisions denying a new trial and refusing to issue a deed to parcel 1 because his attorney abandoned the appeal. Also, there is a dispute of fact as to whether all of the issue raised herein could have been considered by the Special Referee or the Court of Appeals. 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.

a. Simmons did not receive a full and fair hearing on the merits

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). Thus 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. Simmons contends that the record before the court established that he did not receive a full and fair determination of his rights to the heirs property.

The Complaint recites numerous procedural deficiencies concerning the Special Referee. R pp. 29, para. 13 to 31, para. 19, p. 34, para. 28. Simmons always asked to have the prior 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 only be appointed where the Master in Equity is unavailable or there is just cause shown. Since the Order appointing him does not establish any just cause, his appointment is void ab initio. The motion to have Mendelsohn appointed as Special Referee was filed while Simmons was pro se and he was not served with it. The motion contained an expired consent by Simmons former counsel, Ruth Cupp. The proceedings conducted by the Special Referee had many irregularities including: a hearing was held on January 26, 2005 even before an order was entered for his appointment at which he interviewed witnesses and no record was made; the February 20, 2006 pretrial hearing was not memorialized by any order pursuant to Rule 16, SCRPC.

Simmons alleged that the Special Referee exhibited bias and animosity toward him which affected the outcome 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; 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 ; and by unreasonably refusing to accept the proof of financial capability that Simmons presented to close title to the 18 acres. R pp. 34, para. 30 to

35, para. 31. The disparaging racial remark that Simmons alleges was made by the Special Referee 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 alleges that this bias was also evidenced in correspondence which is also not part of the record. 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.

In addition to these procedural deficiencies, the record of the Bailum proceedings does not support the Special Referee's decision that there were two different Sam Bailums who acquired the subject property. It does confirm that there were three Sam Bailums but that only one of them was old enough to be the grantee of all the property. The Death Certificate of a Samuel Bailum indicated he was 72 years old at his death in 1975 and that his parents were Samuel and Julia Bailum. R p. 104 . Defendant 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. R p. 241, line 13-17. 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. Neither Ruby Bailum nor Monica Middleton appeared in person

or testified by telephone. 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. R p. 31. Simmons had a viable appeal. As a result of dismissal of his appeal, Simmons was denied review of his claim to an heirs' interest in Parcels 2, 3 and 4 and the Special Referee's refusal to issue a deed to parcel 1. Therefore Simmons did not have full and fair hearing on the merits.

b. There is a dispute of fact as to whether all of the issues could have been previously addressed.

The Circuit Court found that Simmons claim to bias by the Special Referee was part of the appeal. Simmons contends that he didn't realize that the Special Referee's was affected by racial bias until he refused to issue the deed to Simmons for an arbitrary reason. R p. 169, para.6. Simmons ability to raise the issue on appeal was limited by the fact that there was no official record of the proceeding. Attorney Martin denied that it ever occurred. Thus, there is a dispute of fact as to whether this issue upon which Simmons seeks to vacate the judgment could have been previously addressed by the Special Referee or Court of Appeals.

Simmons contends that he didn't learn about the Monica Middleton testimony until after the appeal was dismissed. The Circuit Court found that he should have found it before. Whether the testimony in Middleton v. Doe should have come to light sooner is disputed. See Point I, section g. The record of the prior proceedings was not fully developed because discovery had not occurred. See Point IV.

In summary, res judicata should not preclude this case because the undisputed facts establish that Simmons did not receive a final resolution of some of the issues raised

in the complaint due to abandonment of the appeal. There is a dispute as to whether other issues could have even been raised before this court in the Bailum appeal.

IV. SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED BECAUSE DISCOVERY HAD NOT BEEN PERMITTED

Simmons contends that the court erred in granting summary judgment on the entire complaint because it limited discovery at the time it converted the motion to dismiss to summary judgment. Simmons raised the need for discovery in his initial opposition to defendants' motion to dismiss. At the March 1st hearing, Simmons urged the court to deny the motion to dismiss based upon the lack of discovery. Simmons counsel stated that the allegations of the complaint were incomplete because of a lack of discovery and the court agreed. See R p. 289, line 5-16. Because the court did not immediately deny the motion to dismiss, the defendants did not file an Answer and there was no formal period of discovery undertaken. At the August 27 hearing, because of statements made by attorney Martin about two different Monica Middletons, the court on its own motion converted defendants' motion to dismiss into a motion for summary judgment. The court directed that counsel supplement their submissions as to that issue. Simmons counsel understood the court to indicate there was to be no other discovery. R p. 239, para. 2. Counsel did send attorney Martin a subpoena for his records pertaining to the two Monica Middletons but Martin never responded. R p. 240, para. 3. In his response, Simmons counsel again noted that there was the need for discovery of the entire circumstances surrounding the prior case. R pp. 141-142.

Simmons contends that the trial court erred by granting summary judgment on the entire complaint before Simmons had the opportunity to conduct discovery on the circumstances surrounding the first Bailum case. “[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 S.C. 519, 529, 511 S.E. 2d 69 (1999).

Rule 60 (b), SCRCP provides that equitable relief may be granted based upon the totality of the circumstances. “In essence, the rule merely reflects many of the considerations attendant to an equitable analysis.” T v. T, 378 S.C.127, 135, 662 S.E.2d 413 (Ct. App. 2008). The Court of Appeals noted: “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). Id.

Simmons contends that the totality of the circumstances was not or could not have been previously addressed by the Special Referee or Court of Appeals in Bailum v. Simmons. Since Simmons was not fully aware of them until after the appeal was dismissed. Simmons should have been permitted to fully develop the facts including : 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; why McFarland chose to ignore the Simmons case while rapidly moving the Middleton case to judgment and not mentioning it to Simmons; why 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; why did

the Bailum heirs attorney Martin file pleadings saying Simmons was entitled to a share in all the subject property and then change his position at trial; what discovery was provided to Simmons attorney Condon? Discovery would enable Simmons to provide further support for his claims that the fraud on the court involved other circumstances in such as attorney misconduct.

Simmons contended that Mendelsohn was biased against him because he vehemently opposed his appointment as Special Referee and made a racial comment directed at Simmons during a conference. Attorney Martin denied that there was any evidence of bias. There was no transcript of the proceeding. Simmons did not realize that Mendelsohn's bias was affecting his decision until after Mendelsohn unreasonably refused to issue a deed to Simmons in June 2007. Simmons should be allowed the opportunity to develop the record on these allegations which are relevant to his claim that he did not receive a full and fair hearing on the merits.

"[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, supra, 333 S.C. at 529. The circumstances surrounding the prior case raise numerous issues that must be understood before the court can determine whether to grant relief. Therefore the court should have not granted summary judgment until Simmons had completed discovery.

**V. THE TRIAL COURT ERRED BY FAILING
TO DISQUALIFY ATTORNEY BERLINSKY
AND DISMISS DEFENDANTS' MOTION**

Simmons has appealed the Circuit Court's refusal to disqualify attorney Berlinsky. Simmons contends that this Court should reverse that court's order for summary judgment because of this decision. By not disqualifying Berlinsky and

dismissing the motion to dismiss, the court enabled the Bailum heirs to avoid filing an Answer and preventing Simmons from conducting discovery. Simmons contends that the court erred as a matter of law both because of the actual conflict of interest and by Berlinsky's admission of the appearance of a conflict.

The facts are undisputed that Simmons consulted with Berlinsky twice; first after he fired McFarland and wanted to proceed with his own action to quiet title on the heirs property and second after the Bailum heirs filed their own action for the purpose of defending against their claims. Berlinsky later represented Marie Smith another Hester Singleton heir in the Bailum case. Her interests are aligned with Simmons and if Simmons succeeds in this case, Marie Smith will benefit. 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. Therefore RPC 1.9 clearly prohibits Berlinsky from representing the Bailum heirs in another action involving the same subject matter where their interests are materially adverse to his former clients.

Simmons consultations with Berlinsky, even though he was not formally retained created an attorney client relationship which bars Mr. Berlinsky from further representation of the Bailum heirs in related matters about which he were consulted. The 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 S.C. 534, 539, 320 S.E.2d 44 (Ct. App.1984). Berlinsky's prior representation of Marie

Smith whose interest are aligned with Simmons and adverse to the Bailum heirs also bars Berlinsky from representing the Bailum heirs. Lastly, Berlinsky acknowledged that to remain in the case would constitute the appearance of impropriety. Therefore, the court erred by not disqualifying Berlinsky. The court refused to dismiss the motion based upon its ruling on the lack of a conflict.

The Bailum heirs were aware that Berlinsky represented Marie Smith in the prior case. They should not be allowed to benefit from the conflict of interest. Therefore Berlinsky's disqualification must necessarily lead to the court's dismissal of his motion to dismiss. Therefore, Simmons urges this court to reverse the summary judgment motion because it was the consequence of the court's erroneous ruling.

VI. THE COURT ERRED BY FAILING TO ISSUE A TEMPORARY INJUNCTION

Simmons has appealed the court's refusal to issue a temporary injunction. If this court reverses the lower court order, Simmons contends it should consider the imposition of a temporary injunction on remand to prevent any action being taken as to parcel 1. It is not disputed that the owner of parcel 1, that Simmons was attempting to purchase, evicted the tenants. The owner did not deny Simons allegation that they were attempting to develop the property. Simmons concerned that the house which he had built could become vandalized and that he did not have the money to replace it. He had obtained a tax exemption for the property as a tree farm and wanted this to be continued so that the taxes would not be increased. R pp. 67, para. 2 to 68, para. 3. None of defendants including the current owners of parcel 1 filed any opposition. Although defendants did not file any opposition to the motion, the court refused to stay any change

in the status of the property because if found that Simmons could proceed against the owners for waste if he succeeded on his claims. R p. 351. lines 5-12.

Simmons contends that the court erred by failing to preserve the status quo. "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, 553 S.E. 2d 110 (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 would prevent demolition of an existing structure and damage to an existing tree farm and loss of its tax exempt status. 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.

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). Simmons has made a prima facie showing for equitable relief under Rule 60(b), SCRCF by alleging fraud on the court and the existence of extraordinary circumstances. See Ray v. Ray, 374 S.C. 79 (2007); Chewning v. Ford Motor Co., 354 S.C. 72, 579 S.E. 2d 605 (2003); T v. T, 378 S.C. 127, 662 S.E.2d 413 (Ct. App. 2008).

Finally, 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, 313 S.E. 2d 312 (Ct. App. 1984). The equities clearly favor Simmons and the temporary injunction should have been granted.

Conclusion

For the reason set forth above, Simmons respectfully requests this court to reverse the Order dated January 21, 2011 granting summary judgment and remand for further proceedings below. Simmons also requests that this court reverse the Order filed November 3, 2010 denying disqualifying attorney Bruce Berlinsky and dismissing the motion he filed on behalf of defendants. Finally, upon remand this court should impose a temporary injunction as to any changes in parcel 1 pending a final hearing.

Respectfully submitted,

By: _____
Edward A. Bertele, Esq.

Dated: July 23, 2012
Charleston, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2009-CP-10-5343

Roosevelt Simmons.....Appellant,

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

of which,

Hattie Bailum, Ruby Bailum, Verdone Gray,
Julie B. Johnson, Monica Middleton, Melvin
Singleton, LMC, LLC, and John Martin, Esq.,
as Trustee, are.....

Respondents.

FINAL BRIEF OF RESPONDENTS

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I. Sonja Taylor, Esquire
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TABLE OF CONTENTS

STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE.....	1
FACTS.....	4
ARGUMENTS.....	17
I. Appellant's Appeal is Procedurally Barred.....	17
II. The Circuit Court properly determined that there was no evidence of fraud on the court, or rare, special, exceptional, unusual or extraordinary circumstances to warrant vacating the March 6, 2007 Amended Special Referee Order Quite Title, Partition and Sale, and correctly granted summary judgment to Respondents.....	18
III. The Circuit Court grant of summary judgment was appropriate and not premature as Appellant had sufficient time and opportunity for discover.....	39
IV. The Circuit Court did not err when it denied Appellant's Motion to disqualify Bruce Berlinksy, Esquire, and denied Appellant's subsequent request to dismiss Respondents' Motion to Dismiss.....	42
V. Appellant's Motion for Temporary Injunction was denied by the Circuit Court on November 3, 2010, and therefore, Appellant's Appeal is Time-barred.....	43
CONCLUSION.....	44

TABLE OF AUTHORITIES

CASES

<u>Bank of Florence v. Gregg</u> , 46 S.C. 169, 24 S.E. 64 (1896).....	17
<u>Brazell v. Windsor</u> , 384 S.C. 512, 682 S.E.2d 824 (2009).....	22
<u>Bryan v. Bryan</u> , 220 S.C. 164, 66 S.E.2d 609 (1951).....	20, 21, 22, 23, 24, 26, 27
<u>Chewning v. Ford</u> , 354 S.C. 72, 579 S.E.2d 605 (2003).....	20, 21 22, 24, 25
<u>City of Columbia v. Pic-A-Flick Video, Inc.</u> , 340 S.C. 278, 531 S.E.2d 518 (2000).....	44
<u>Epstein v. Coastal Timber Co., Inc.</u> , 393 S.C. 276, 711 S.E.2d 912 (2011).....	19
<u>Evans v. Gunter</u> , 294 S.C. 525, 366 S.E.2d 44 (Ct. App. 1988).....	20, 22
<u>FOC Lawshe v. International Paper</u> , 352 S.C. 408, 412, 574 S.E.2d 228, 231 (Ct. App. 2002).....	44
<u>Graham v. Town of Loris</u> , 272 S.C. 442, 248 S.E.2d 594 (1978).....	34, 35, 36
<u>Middleborough HPR v. Montedison S.p.A.</u> , 320 S.C. 470, 465 S.E.2d 765 (Ct.App.1995).....	39, 40, 41
<u>Mr. T v. Mrs. T</u> , 378 S.C. 127, 662 S.E.2d 413, (Ct. App. 2009).....	19, 27, 29, 39
<u>Moore v. Moore</u> , 376 S.C. 467, 657 S.E.2d 743 (2008).....	34
<u>Nat'l Sur. Co. v. State Bank of Humboldt</u> , 120 F. 593 (8th Cir.1903).....	27
<u>Perry v. Heirs at Law</u> , 357 S.C. 42, 590 S.E.2d 502 (Ct. App. 2003) reh'g denied (2004).....	19, 27
<u>Raby Const., L.L.P. v. Orr</u> , 358 S.C. 10, 594 S.E.2d 478 (2004).....	20, 21, 24
<u>Ray v. Ray</u> , 374 S.C. 79, 647 S.E. 2d 237 (2007).....	20, 21
<u>Roberts v. Union County Bd. of School Trustees</u> , 284 S.C. 299, 326 S. E. 2d 163 (Ct. App. 1985).....	44
<u>Simon v. Flowers</u> , 31 S.C. 545, 99 S.E.2d 391 (1957).....	36, 37
<u>Smith v. Lowery</u> , 56 S.C. 493, 35 S.E. 129 (1900).....	17

<u>State v. Tessnear</u> , 257 SC 290, 185 SE2d 611 (1971).....	18
<u>Stearns Bank Nat. Ass'n v. Glenwood Falls</u> , 373 S.C. 331, 644 S.E.2d 793 (Ct. App.2007).....	35, 36
<u>Tobias v. Rice</u> , 386 S.C. 306, 688 S.E.2d 552 (2010) reh'g denied (2010).....	34
<u>Wilder Corp. v. Wilke</u> , 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).....	25
<u>Wilson v. All</u> , 86 S.C. 586, 68 S.E. 824 (1910).....	17

STATUTES

S.C. Code Ann. § 14-3-330.....	44
--------------------------------	----

RULES

Rule 203 SCACR.....	44
Rule 60(b), SCRCPP.....	1, 14, 19, 26, 27, 35, 37, 38

OTHER AUTHORITIES

H. Lightsey and J. Flanagan, <u>South Carolina Civil Procedure</u> 408 (1985).....	20
J. Flanagan, <u>South Carolina Civil Procedure</u> 485 (2d ed., 1996).....	20, 21, 24
11 C. Wright, A. Miller and M. Kane, <u>Federal Practice & Procedure</u> § 2868 (2d ed.,1995).....	19

STATEMENT OF ISSUES ON APPEAL

1. Is Appellant's Appeal procedurally barred?
2. Did the Circuit Court err when it determined that there was no evidence of fraud on the court, or rare, special, exceptional, unusual or extraordinary circumstances to warrant vacating the March 6, 2007 Amended Special Referee Order Quite Title, Partition and Sale, or rescinding any deeds, and granted summary judgment to Respondents?
3. Did the Circuit Court err when it found that summary judgment was appropriate and not premature, and granted summary judgment to Respondents?
4. Did the Circuit Court err when it denied Appellant's Motion to Disqualify Bruce Berlinksy, Esquire and denied Appellant's subsequent request to dismiss Respondents' Motion to Dismiss?
5. Is Appellant's Appeal of the denial of his Motion for Temporary Injunction time-barred?

STATEMENT OF THE CASE

On August 24, 2009 the Appellant filed a Lis Pendens in the Charleston County of Commons Pleas pertaining to the following parcels: (1) TMS# 311-00-00-310, and (2) TMS# 311-00-00-024. (R. p. 43-p. 44). On that same date, Appellant filed the Summons and Complaint in Case Number 2009-CP-10-5343, against Respondents. (R. p. 26-p. 42). Appellant's underlying suit is essentially an independent action in equity pursuant to Rule 60(b), SCRCP, to set aside the judgment in two prior lawsuits involving the properties which were the subject of the Lis Pendens. (R. p. 26-p. 41). The first action was captioned Bailum v. Simmons, et al., Case No. 04-CP-10-1459 (the "Bailum '04 Case")(these deeds and properties hereafter referred to as "Parcels 1, 2, 3 and/or 4")¹. (R.

¹ The Bailum '04 Case quieted title to four properties: TMS# 311-00-00-024 (Parcel 1);

p. 26-p. 41). The second action was entitled Middleton v. Doe, et al., 02-CP-10-4883 (the "Middleton '02 Case") (this deed and property hereafter referred to as the "Middleton Parcel"). (R. p. 26-p. 41).

In lieu of filing an answer, Respondents filed a Motion to Dismiss on September 16, 2009. (R. p. 45-p. 49). The Motion argued that all issues raised in Appellant's Complaint were barred by the doctrine of res judicata.

Thereafter, on November 5, 2009, Appellant filed a Motion to Disqualify Bruce Berlinksy, Esq. ("Attorney Berlinsky") from the Representation of All Defendants. (R. p. 50-p. 53). Appellant filed an affidavit and a supplemental affidavit in support of that Motion. (R. p. 54-p. 61). Also on November 23, 2009, Appellant filed a Motion for a Temporary Injunction to prevent Defendants Franklin Smith and LMC, LLC, from taking any action regarding Parcel 1, and on December 10, 2009, an affidavit in support of that motion. (R. p. 62-p. 69).

On February 26, 2010, Respondents filed an affidavit by John F. Martin, Esq. ("Repondent Martin") with numerous exhibits, in support of their Motion to Dismiss. (R. p. 70-p. 79). On March 1, 2010, Appellant filed a memorandum in Plaintiff's Opposition to Defendants' Motion to Dismiss and a supporting affidavit by Appellant. (R. p. 80-p. 96).

The Honorable J.C. Nicholson, Jr., held a hearing on March 1, 2010 on Appellant's Motions to Disqualify and for Temporary Injunction, and Respondents' Motions to Make More Definite and Certain, and to Dismiss. (R. p. 245, l. 12-15).

TMS# 312-00-00-65 (Parcel 2); TMS#. 312-00-00-32 (Parcel 3), and TMS# 312-00-00-67 (Parcel 4). Parcel 1 was ultimately partitioned and now includes a second TMS#: 311-00-00-310.

Judge Nicholson denied Appellant's Motion to Disqualify, but permitted Attorney Berlinsky to voluntarily withdraw as counsel for the defendants to avoid any appearance of impropriety. Anastasios H. Chakeris, Esq., was substituted as defense counsel. (R. p. 258, l. 6-11). Judge Nicholson took the motion to dismiss under advisement in order to review all the affidavits, the exhibits and transcript. (R. p. 300, l. 20-25 ~~60-63~~). The parties agreed to delay a ruling on the two remaining motions until after a decision on the motion to dismiss. (R. p. 301, l. 7-p. 304, l. 15).

Judge Nicholson held a second hearing on August 27, 2010, to resolve the pending Motion to Dismiss. (R. p. 307, l. 20-25 ~~p. 59-63~~). Following oral arguments, Judge Nicholson and the parties agreed to convert the defendant's motion to dismiss to one for summary judgment. (R. p. 342-p. 343, l. 9). The judge allowed the parties additional time to submit further evidence, and indicated that he would either rule or hear additional oral arguments if he deemed it necessary. (R. p. 342-p. 344, l. 18).

At the end of that hearing, Appellant additionally requested that Judge Nicholson rule on his pending Temporary Injunction motion. (R. p. 347, l. 13-p. 351, l. 14; p. 62-p. 69). Judge Nicholson denied Appellant's motion on the grounds that Appellant had an adequate legal remedy in that monetary damages would compensate Appellant for damage to the property, if any. (R. p. 351, l. 5-15).

On September 23, 2010, Respondents filed a Supplemental Memorandum in Support of their Motion to Dismiss. (R. p. 97-p. 106). On that same date, Respondent Martin, sent a letter to Judge Nicholson to correct a misstatement he made during the August hearing. (R. p. 353). A week later on September 30, 2010, Respondents filed an Attachment to Supplemental Memorandum. (R. p. 107-p. 127). A Short Order

denying the Motion to Dismiss was filed on October 6, 2010. (R. p. 22).

On October 26, 2010, Appellant filed Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment along with a supplemental affidavit. (R. p. 128-p. 207). Two Form orders were filed on November 3, 2010: one denied Appellant's Motion to Disqualify B. Berlinksy, Esq., and one denied Appellant's motion for a TRO. (R. p. 23-p. 24).

On December 20, 2010, Appellant filed a second Plaintiff's Motion for Temporary Injunction asking the court to compel Defendant Franklin Smith to maintain utility service to Parcel 1 and protect it from vandalism. (R. p. 208-p. 211).

Judge Nicholson ruled and filed his Order granting summary judgment to Respondents on January 11, 2011. (R. p. 1-p. 21). On February 1, 2011, Appellant filed a Motion for Reconsideration and to Alter or Amend the Order Granting Summary Judgment to the Defendants with a supporting affidavit by Appellant's attorney, Edward A. Bertele. (R. p. 212-p. 241). By a Form 4 order, Judge Nicholson denied Appellant's Motion for Reconsideration and to Alter or Amend on March 2, 2011. (R. p. 25). Appellant then filed his Notice of Intent to Appeal with the Court of Appeals on March 30, 2011.

FACTS

In 2004, Respondent Martin filed the Bailum '04 Case to quiet title to two properties on Johns Island, South Carolina, known as TMS Nos. 312-00-00-065, and 311-00-00-024. The Bailum '04 Case named as Defendants a number of persons who might claim an interest in the properties, including Appellant, as well as persons unknown. (R. p. 423-p. 433). Thereafter, on July 29, 2004, Respondent Martin filed an amended Lis

Pendens and amended Complaint, along with the other associated amended pleadings, to add additional plaintiffs and defendants. (R. p. 434-p. 445).

On January 20, 2005, Ruth L. Cupp, Esquire, ("Attorney Cupp") filed an Answer and Counterclaim on of behalf of Appellant. (R. p. 446-p. 450). Appellant denied the material allegations of the Complaint and counterclaimed for the property taxes he allegedly paid for both parcels, claimed ownership as to both parcels through adverse possession, and that he had an heirs interest in Parcel 1. (R. p. 446-p. 450). Appellant's attorney and Respondent Martin, agreed on January 25, 2005, to refer the Bailum "04 Case to Joseph S. Mendelsohn, Esq. to serve as Special Referee. (R. p. 357). Respondent Martin answered Appellant's counterclaims by general denial filed March 3, 2005. (R. p. 451).

On September 13, 2005, Appellant's Attorney and Respondent Martin signed a consent order to again amend the complaint to include the names of additional heirs provided by Appellant and to realign the parties, and on that same date, filed the Second Amended Complaint. (R. p. 354 and p. 452-p. 458).

On November 10, 2005, Attorney Cupp filed a motion to be relieved as counsel for Appellant with a supporting affidavit. (R. p. 356 and p. 459-p. 460). In pertinent part Attorney Cupp's affidavit stated that "she was unable to explain to Roosevelt Simmons the prevailing law underlining this case nor am I able to explain to him what I believe I can and not do for him in this case." (R. p. 356 and p. 459). Attorney Cupp was relieved as Appellant's attorney by order on November 10, 2005, which order granted Appellant thirty days to obtain new counsel, or proceed *pro se*. (R. p.356). By letter filed on December 15, 2005, Appellant notified the Ninth Circuit Administrative Judge of his

intention to proceed *pro se*. (R. p. 664).

The trial before the Special Referee trial was held on May 15, 2006. At some point before the trial, Appellant retained Louis E. Condon, Esq., the former Charleston County Master-in-Equity, ("Attorney Condon") to represent him. (R. p. 359, p. 637 and 377). At trial, counsel for the parties, including Appellant, agreed to and entered into the record several stipulations including that:

1. the action (the Bailum '04 Case) involved the quieting of the title, partition and sale of Parcels 1, 2, 3 and 4;
2. "Hester" Bailum was sometimes referred to as "Esther" Bailum, and the parties agreed they were the same person and the caption should reflect "Hester Bailum a/k/a Esther Bailum";
3. the parties should be realigned such that the living heirs of Samuel Bailum appeared as Plaintiffs, and the living heirs of Hester Bailum, including Appellant, remained as defendants;
4. Hattie Bailum, James Bailum, Verdone Gray, Julie B. Johnson, Leon Singleton and Melvin Singleton would be allowed to testify by telephone;
5. the parties stipulated to the admissibility of previously marked exhibits which were submitted and reviewed by counsel and the Guardian ad Litem prior to trial; and
6. plaintiffs' prayer for relief was amended to have title to Parcels 1, 2, 3 and 4 quieted, and once title was established, that the Parcels be portioned and/or sold and the respective shares be distributed to the heirs of Samuel Bailum, Sam Bailum, Thomas Bailum, Tony Bailum, Mary Bailum and

Fanny Bailum, or the heirs of Hester Bailum, as determined appropriate by the Special Referee.

(R. p. 360-p. 361, and p. 378-p. 379).

Thus, ultimately, the parties, after amendment and realignment by consent, included all persons who might claim an interest in the property. For purposes of the present appeal, Hattie Bailum a/k/a Balaam, Ruby Bailum a/k/a Balaam, Verdone Gray, Julie B. Johnson and Monica Middleton, as plaintiffs, and Roosevelt Simmons, Melvin Singleton and Marie Smith, as defendants, were included in the amended caption. (R. p. 358-p. 359, p. 361-p. 364, p. 376-p. 377, p. 379-p. 382). Further, the quiet title action now involved Parcels 1, 2, 3 and 4. (R. p. 361-p. 363, and p. 379-p. 381).

On September 5, 2006, the Special Referee took supplemental testimony from Leon Singleton and Melvin Singleton, and further supplemental testimony was taken from Melvin Singleton on September 22, 2006. (R. p. 359 and p. 377). Appellant, on several occasions, was advised that he may be able to purchase Parcel 1. (R. p. 371 and p. 389).

On January 11, 2007, the Special Referee issued his Order to Quiet Title, Partition and Sale. (R. p. 358-p. 375 and p. 376-p. 393). The order found that the Samuel Bailum living heirs were Hattie Bailum, Ruby Bailum, Monica Middleton and Julie Bailum Johnson, and the Hester Singleton Bailum living heirs were Appellant, Marie Smith and Melvin Singleton. (R. p. 363-p. 364, and p. 381-p. 382). Walter Burns, Alonzetta Burns, Sheila Owens, Louise Canty and Mabell Hicks were also living heirs; however, they had already deeded their interest in Parcel 1 to Appellant and therefore no longer had an interest in the property. (R. p. 364 and p. 382).

As to Parcel 1, the Special Referee found that the Samuel Bailum heirs, as his blood descendants, shared a 2/3 interest, and the Hester Bailum heirs shared the 1/3 interest Hester Bailum received as Samuel Bailum's third wife. (R. p. 362-p. 363, p. 366, p. 370, p. 373, p. 380-p. 381, p. 384, p. 388 and p. 392). As to Parcels 2, 3 and 4, the Special Referee found the heirs of Hester Bailum had no claim or interest in these parcels as her husband, Samuel Bailum, had no interest in those parcels. (R. p. 363, p. 366, p. 381 and p. 384).

The Special Referee also denied Appellant's adverse possession counterclaim. (R. p. 375 and p. 393). The Special Referee found that Appellant, based on his own testimony, did not meet any of the required elements for adverse possession generally, or the additional element of ouster required to be proven by an heir claiming title by adverse possession, and therefore was not the owner of these parcels by adverse possession. (R. p. 366-p. 370, p. 373, p. 384-p. 388 and p. 391).

The Special Referee held that Hattie Bailum entered into a contract for sale for Parcel 1 in 2003, which contract necessitated the instigation of this action, and that the court-ordered appraisal set the value of Parcel 1 at \$220,000. (R. p. 371, p. 374, p. 389, and p. 392). Consequently, the Special Referee ordered the sale of Parcel 1. (Id.).

In response to the request by Appellant and Marie Smith, the Special Referee granted them the opportunity to purchase Parcel 1 with the following conditions: that the opportunity was only assignable to individuals related by blood or marriage to a party; that they had to provide to the Clerk of Court, for filing and date stamp within ten days from the date of service of the order, a loan approval letter for \$220,000 or proof of funds available by a licensed lender; and had to consummate the sale within thirty days of the

Order. (Id.). Failure to produce the required proof of ability to pay or close in time allotted would result in Parcel 1 being conveyed by the Special Referee in accordance with the contract. (Id.). Further, the Special Referee noted in the Order that on several occasions he had offered the Appellant the opportunity to buy out the remaining heirs interests in Parcel 1. (R. p. 371 and p. 389).

The Special Referee also recognized Appellant's efforts to preserve Parcels 1, 2, 3 and 4 for the benefit of all heirs, and concluded that he was entitled to \$10,000 from the proceeds of the sale of all four parcels, over and above his interest as an heir to Parcel 1. (R. p. 371-p. 372, p. 374, p. 390 and p. 392). The parties agreed that this sum was fair and equitable compensation for Appellant. (Id.).

Hattie Bailum also entered into a contract in 2003 for the sale of Parcels 2, 3 and 4. (R. p. 372-p. 373, p. 375, p. 390-p. 391 and p. 393). The parties to that contract amended to sell the parcels for the court-ordered appraisal amount of \$337,000. (Id.).

Further, the Special Referee determined that the sale of all the parcels was in the best interests of the heirs and concluded that the net proceeds from the sale of the parcels were to be distributed as follows:

Parcel 1

2/3 interest to Samuel Bailum Heirs:

Hattie Bailum	1/6
Ruby Bailum	1/12
Verdone Gray	1/12
Julie B. Johnson	1/6
Monica Middleton	1/6

1/3 to Hester Bailum Heirs:

Appellant	2/9
Melvin Singleton	1/18
Marie Smith	1/18

Parcels 2, 3 and 4

Entire interest to Samuel Bailum Heirs:

Hattie Bailum	1/4
Ruby Bailum	1/8
Verdone Gray	1/8
Julie B. Johnson	1/4
Monica Middleton	1/4

(R. p. 371-p. 375, and p. 389-p. 393).

Attorney Condon signed a Motion to Reconsider Order of Special Referee with an attached affidavit by Appellant, purportedly signed and notarized.² (R. p. 464-p. 466). Appellant requested the judgment be amended or a new trial granted based upon the following alleged errors: Appellant did agree to the appointment of a Special Referee; he was not given the customary thirty days to purchase the property; Appellant did not receive adequate advance notice of the purchase price was that he would have to pay (appraised value less the heirs sum paid to him); that the sum calculated and for his contributions and protection of the Parcels was inadequate, unreasonable and inequitable; and that the denial of his adverse possession claim as to all four parcels should be reversed. (*Id.*). On February 7, 2007, Attorney Berlinksy, filed a Motion of Defendant to Alter or Amend the January 11, 2007, Order because Marie D. Smith's name was inadvertently omitted from the Order. (R. p. 467).

The Special Referee, on February 16, 2007, heard both motions. Both Appellant

² It is assumed that the motion and affidavit were delivered directly to the Special Referee. The Charleston County Clerk of Court does not have a record of this motion or affidavit, and the copy produced by Appellant does not have a file stamp. However, the motion and affidavit were referred to in the Special Referee's March 6, 2007 Order dealing with Appellant's motion.

and Marie Smith were represented by counsel at the hearing. (R. p. 395). The Special Referee granted Marie Smith's motion to amend, and executed an Amended Special Referee's Order Quiet Title Partition and Sale with the requested change included. (R. p. 396). The Special Referee denied the Appellant's motion. (Id.). Specifically, the Special Referee found that the evidentiary hearing, testimony and documentary evidence were preserved by a court reporter and were available to any party who wished to order and pay for them; there was no error or law or procedure with regard to his findings and conclusions of Appellant's adverse possession claim; that the court-ordered appraisal for Parcel 1 was made available to counsel nearly two years before the January 11, 2007, final order confirmed the sales price and Appellant's right to purchase Parcel 1, and allowed Appellant ample time to secure a loan commitment or other acceptable financing; and any party making a claim for taxes paid during the pendency of the action was entitled to pro-rata reimbursement upon proof of payment produced to the Special Referee not less than 48 hours before disbursement of the sales proceeds. (R. p. 396-p. 397).

Appellant filed a *pro se* Notice of Appeal from the Special Referee's Order filed on March 6, 2007³. (R. p. 470). On April 24, 2007, Charles E. Houston, Jr., Esquire, ("Attorney Houston") appeared for Appellant and filed an Amended Notice of Appeal appealing the January 11, 2007 Special Referee's Order, the March 6, 2007, Amended Special Referee's Order, and the March 6, 2007 Order denying Appellant's Motion to Alter or Amend, or for new trial. (R. p. 471-p. 473). On May 4, 2007, Attorney Houston filed Appellant's Motion for Staying Judgment, For Sale or Delivery of Land in the

³ It is unclear from Appellant's Notice which March 6, 2007, Order of the Special Referee he is appealing.

Charleston County Court of Common Pleas. (R. p. 474-p. 476).

On May 31, 2007, the Court of Appeals dismissed Appellant's appeal for failure to provide proof of the transcript being ordered and/or failure to serve and file the Initial Brief. (R. p. 398-p. 399). On or about June 6, 2007, Attorney Houston responded to the Court of Appeals dismissal by filing a Motion for Reinstatement of Appeal and a supporting affidavit. (R. p. 477-p. 484).

The Special Referee held a hearing on June 6, 2007, for Appellant's Motion to Stay. (R. p. 401-p. 407). Attorney Houston requested that the Special Referee stay the delivery of deeds to Parcel 1, and to Parcels 2, 3 and 4 pending the outcome of his appeal. (R. p. 474-p. 476). Although his motion only addressed a stay, at the hearing Attorney Houston argued that Appellant should be again offered the opportunity to buy a part or all of Parcel 1, and Appellant's failure to comply and subsequent waiver of that right was discussed. (R. p. 401-p. 407, p. 474-p. 476, p. 649, l. 8-p. 655 and 666, l. 1-7). Attorney Houston also offered and argued 'newly discovered evidence' in the form of census reports. (R. p. 405, p. 657, l. 3-p. 663, and p. 667, l. 1-23). The Special Referee, over the objections of Respondent Martin and Attorney Berlinsky, accepted the census documents and made them part of the record for the motion. (R. p. 661, l. 24-p. 663 and p. 667, l. 1).

Later during the hearing, the parties, including Appellant, reached agreement on the record on several important issues which were subsequently memorialized by the Special Referee's Order filed June 28, 2007. (R. p. 403-p. 407). Specifically, Appellant agreed that:

1. his Motion to Stay would be denied and Parcel 1 would be sold with the net proceeds of such sale to be distributed in accordance with prior orders;

2. he would proceed with his appeal on the sole and exclusive grounds of adverse possession as to Parcel 1;
3. his Motion to Stay as to Parcels 2, 3 and 4 would be denied, and the parcels sold pursuant to a pending contract;
4. upon the consummation of the sale, the net proceeds would be distributed per the prior orders except that 1/3 of these proceeds would be escrowed pending the outcome of Appellant's appeal; and
5. as to Parcels 2, 3, and 4, he would proceed with his appeal on the exclusive issue of whether the Special Referee erred in concluding that he did not have any interest in Parcels 2, 3 and 4 by virtue of intestacy and distribution. If successful on appeal, that claim could affect the amount, if any, he would receive from the escrow fund. He agreed to waive any claim, suits or appeals alleging adverse possession, and any all claims affecting title to Parcels 2, 3 and 4.

(R. p. 163 (Transcript p. 54), l. 8-p.164 (Transcript p. 91), l. 14 and p. 403-p. 407).

The Special Referee's Order filed June 28, 2007, incorporated the agreements reached at the June 6th hearing. (R. p. 401-p. 407). Additionally, the Special Referee found that Appellant failed to timely exercise his option to purchase by filing with the Clerk the appropriate proof of financing as required by prior orders, and therefore, the parcel was being sold to Mark Goldberg, per a prior contract, and to Marie Smith, who did comply with the orders and preserve her right as an heir to purchase Parcel 1. (R. p. 165 (Transcript p. 87), l. 15-p. 166 (Transcript p. 90), l. 3 and p. 403). No appeal was taken from the June 28, 2007 Order.

On July 13, 2007, Attorney Houston filed a Motion for Supersedeas or Other Relief with the Court of Appeals seeking relief based on the following:

1. jurisdiction was not proper;
2. process was insufficient;
3. Appellant's right to purchase property was improperly denied due to an error of law, error fact or abuse of discretion;
4. a lack of due process and sanctions imposed;
5. the underlying facts as determined by the Special Referee were false or fraudulently presented;
6. the census reports and burial records should have been considered as newly discovered evidence for the purposes of granting a new trial and/or under Rule 60(b) for relief for judgment based on fraud;
7. the Special Referee failed to maintain itself as a court of record; and
8. whether the Special Referee had the authority to dictate and frame the scope of Appellant's appeal.⁴

(R. p. 485-p. 490). On that same date, Attorney Houston filed a Memorandum of Law, his affidavit and supporting exhibits. (R. p. 491-p. 527).

On July 18, 2007, the Court of Appeals granted the Bailum '04 Case Respondents an extension of time to file a return to Appellant's Motion, and temporarily stayed the sale of any property until further order of the court. (R. p. 408-p. 410). On July 31, 2007, the Bailum '04 Case Respondents filed their Return to Motion. (R. p. 528-p. 539).

⁴ Appellant's Motion for Supersedeas or Other Relief also requested relief on behalf of Deloris Singleton. In an effort to achieve some economy in this procedurally complex appeal, the references to Ms. Singleton have been omitted because Ms. Singleton is not a party to this case or to this appeal.

On September 4, 2007, the Court of Appeals denied Appellant's Motion for Supercedeas and Other Relief. (R. p. 411-p. 412). In response, on September 13, 2007, Attorney Houston filed a Petition for Full Appellate Review which appears to have been denied. (R. p. 540-p. 542).

On March 24, 2008, the Court of Appeals dismissed, for the second time, Appellant's appeal based on his failure to file and serve the Initial Brief and the Designation of Matter. (R. p. 413-p. 414). Attorney Houston filed a Motion for Reinstating Appeal, Securing Transcript Out of Time and for Filing Appellant's Brief Out of Time on March 24, 2008. (R. p. 547-p. 549).

In response to Appellant's request to reinstate his appeal, the Bailum '04 Case Respondents filed a Motion to Dismiss Appeal due to Appellant's failure to timely file and serve his Initial Brief on March 26, 2008. (R. p. 543-p. 545). On April 17, 2008, the Bailum '04 Case Respondents filed a Motion to File Return to Appellant's Motion to Reinstate the Appeal Out of Time. (R. p. 556-p. 558).

The Court of Appeals, on May 14, 2008, reinstated the appeal, granted Appellant thirty days to file his brief, and ordered no further extensions absent extraordinary circumstances. (R. p. 415-p. 416). Sometime thereafter, Appellant filed a Motion for Leave to File Late, and, it appears, a Motion for an Extension of Time. (R. p. 559-p. 561). The Bailum '04 Case Respondents filed a Return to Appellant's Motion for Leave to File Late on July 21, 2008, and a Return to Appellant's Motion for an Extension of Time on July 28, 2008, objecting to a reinstatement of Appellant's appeal. (R. p. 562-p. 571).

After the briefing deadline but prior to any ruling by the Court of Appeals, Attorney Houston filed Appellant's Initial Brief on August 7, 2008. (R. p. 572-p. ____)[sic

(the page between R. p. 618 and p.619)). By Order filed on August 21, 2008, the Court of Appeals dismissed the appeal for Appellant's failure to file and serve the Initial Brief by the deadline, and dismissed the pending motions to dismiss and for extension of time as moot. (R. p. 417-p. 418).

On August 28, 2008, Attorney Houston filed a Petition for Full Appellate Review. (R. p. 619-p. 621). The Bailum '04 Case Respondents filed a Return to Appellant's Motion to Reinstate Appeal on September 4, 2008. (R. p. 622-p. 625). The Court of Appeals denied a rehearing of the dismissal or reinstating the appeal on October 27, 2008. (R. p. 419-p. 420). Attorney Houston filed a Motion for Reconsideration on October 31, 2008, to which the Bailum '04 Case Respondents filed a Return to Appellant's Motion on November 10, 2008. (R. p. 626-p. 634). Sometime in November 2008, the Court of Appeals returned the Bailum '04 Case Respondents' Return to Appellant's Motion advising it was not going to consider either Appellant's Motion for Reconsideration, or the Bailum '04 Case Respondents' Return. (R. p. 665). On December 1, 2008, finding that no Petition for Certiorari was filed, the Court of Appeal remitted the appeal to the Clerk of Charleston County. (R. p. 421-p. 422).

Shortly thereafter, the property was sold pursuant to the Special Referee's prior orders. Respondent Martin sent Appellant's proceeds, as set forth in the prior orders, to Attorney Houston. (R. p. 294, l. 14-22). However, Attorney Houston returned the check advising he no longer represented Appellant. (Id.). Respondent Martin then mailed Appellant letters and advised him to claim his share of the proceeds. (Id.). Appellant never responded and Respondent Martin continues to hold in excess of \$50,000 in his trust account for Appellant. (Id.). No further action was taken by Appellant until almost

nine months later when he commenced this litigation.

ARGUMENT

I. Appellant's Appeal is Procedurally Barred

During the hearing on June 6, 2007, Petition agreed to permit the sale of all parcels with the proceeds to be placed in escrow and to limit his appeal to just two issues: did Appellant own Parcel 1 outright through adverse possession; and did Appellant acquire an interest in the remaining parcels under the intestacy statute. Those agreements were incorporated into the Special Referee's order dated June 28, 2007. No appeal was taken from that order. It is well settled an appeal will not be entertained from an order by consent. Smith v. Lowery, 56 S.C. 493, 35 S.E. 129 (1900). The right of appeal from such an order is regarded as waived. Wilson v. All, 86 S.C. 586, 68 S.E. 824 (1910). This is especially true when, as here, there is nothing in the record controverting the fact that the parties consented to the order. See Bank of Florence v. Gregg, 46 S.C. 169, 24 S.E. 64 (1896). Therefore, all issues raised by Appellant relating to the sale of the property were waived by his consent to permit the sales.

Additionally, all claims by Appellant relating to his right to repurchase the property are barred by his failure to take an appeal from the Special Referee's June 28, 2007 Order. The Special Referee found that Appellant failed to timely exercise his option to purchase by filing with the Clerk the appropriate proof of financing as required by prior orders. Further, the Special Referee approved the sale to Mark Goldberg, per a prior contract, and to Marie Smith, who did comply with the orders and preserve her right as an heir to purchase Parcel 1. Appellant was represented by counsel at the time, but

neither Appellant nor his attorney appealed those findings. Consequently, Appellant should not be permitted to collaterally attack those rulings of the Special Referee when he failed to take an appeal from that order while the Bailum '04 Case was pending.

Finally, Appellant's appeal should be dismissed because he abandoned the appeal of the prior case. Under appropriate circumstances, the failure to file a timely brief may be treated as abandonment of an appeal. See State v. Tessnear, 257 SC 290, 185 SE2d 611 (1971). Here, the Court of Appeals reinstated the Appellant's prior appeal twice after it had been dismissed for a failure to comply with time deadlines. However, Appellant failed to perfect that appeal even after the Court of Appeals issued its May 14, 2008, granting Appellant thirty days to file his brief with no further extensions absent extraordinary circumstances. Consequently, this Court should find that all of the issues raised in this appeal are barred by Appellant's waiver of those claims by his agreement during the June 6, 2007 hearing, his failure to appeal from Special Referee's finding that he did not exercise his right to repurchase, and his abandonment of the prior appeal.

II. The Circuit Court properly determined that there was no evidence of fraud on the court, or rare, special, exceptional, unusual or extraordinary circumstances to warrant vacating the March 6, 2007 Amended Special Referee's Order Quite Title, Partition and Sale, or rescinding any deeds, and correctly granted summary judgment to Respondents.

Summary Judgment Standard

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether any triable issues of fact exist, the trial court must

view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing the motion. An appellate court applies the same standard used by the trial court under Rule 56(c) when reviewing the grant of a motion for summary judgment. Epstein v. Coastal Timber Co., Inc., 393 S.C. 276, ___, 711 S.E.2d 912, 915 (2011) (internal quotations and citations omitted).

Independent Action in Equity to Set Aside Judgment under Rule 60(b)

A party may be relieved from a final judgment, order or proceeding, under Rule 60(b), SCRPC, by way of a motion, or through an independent action in equity. Mr. T v. Ms. T, 378 S.C. 127, 134-5, 662 S.E.2d 413, 416-7 (2009) (reh'g denied (2008) and cert. denied (2009)) (citing 11 C. Wright, A. Miller & M. Kane, Federal Practice. & Procedure § 2868 (2d ed.1995)). Relief in an independent action may only be based on two grounds: "1) one based on such rare, special, exceptional or unusual circumstances that may warrant equitable relief, including accident or mistake or 2) one based in equity for fraud upon the court." Id. at 132, 662 S.E.2d at 417. Relief may be sought generally under Rule 60(b), which the court may liberally construe as either a motion or an independent action. Id. at 132, 662 S.E.2d at 416 (internal citation omitted). "A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief." Perry v. Heirs at Law, 357 S.C. 42, 46-7, 590 S.E.2d 502, 503 (Ct. App. 2003)(internal citation omitted).

Rule 60(b) Independent Action in Equity for Fraud on the Court

Relying on South Carolina case law and analysis from other jurisdictions, the Supreme Court first defined fraud on the court in the context of setting aside a final judgment in Chewning v. Ford, 354 S.C. 72, 77-8, 579 S.E.2d 605, 608 (2003). The

Supreme Court stated that fraud upon the court is “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.” Id. (citing Evans v. Gunter, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (Ct.App. 1988)(citing H. Lightsey and J. Flanagan, South Carolina Civil Procedure, 408 (2nd ed.1985)); see also, Ray v. Ray, 374 S.C. 79, 85, 647 S.E. 2d 237, 240 (2007) (internal citation omitted). Fraud upon the court consists, generally, of

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. Fraud upon the court is a serious allegation involving corruption of the judicial process itself and, whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court.

Chewning at 78, 579 S.E.2d 608.

South Carolina law is clear that in order to obtain equitable relief vacating a final judgment on the basis of fraud, the fraud must be extrinsic. Chewning at 80, 579 S.E.2d at 610 (citing Bryan v. Bryan, 220 S.C. 164, 66 S.E.2d 609 (1951) (emphasis added); Raby Const., L.L.P. v. Orr, 358 S.C. 10, 19, 594 S.E.2d 478, 482-83 (2004) (internal citations omitted) (recognizing that the court had recently focused on the important distinction between extrinsic and intrinsic fraud, and reiterated in order to get equitable relief from final judgment on the basis of fraud, the fraud must be extrinsic); Ray v. Ray, 374 S.C. 79, 647 S.E. 2d 237 (2007) (quoting Bryan at 167-8, 66 S.E.2d at 610) (“Generally, the fraud must be “extrinsic or collateral to the question examined and determined in the action in which the judgment was rendered; intrinsic fraud is not

sufficient for equitable relief.”).

Examples of intrinsic fraud are perjury or false swearing by a witness or party, or presenting forged documents at trial. Raby at 19, 594 S.E.2d at 483 (referring to Bryan at 169, 66 S.E.2d at 611; J. Flanagan, South Carolina Civil Procedure at 485 (2d ed.1996)); see also, Chewning, 354 S.C. at 81, 579 S.E.2d at 610. Allegations that a party failed to disclose documents, including the failure to disclose to an adversary or court documents or information which would defeat one's own claim, is also intrinsic fraud. Raby at 19, 594 S.E.2d at 483 (citing Chewning, 354 S.C. at 82, 579 S.E.2d at 610-11).

“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” and such relief would undermine the stability of all judgments. Chewning, 354 S.C. at 82, 579 S.E.2d at 610 (internal quotations and citations omitted). Moreover, “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. Id. The essential distinction between intrinsic and extrinsic fraud for purposes of relief from judgment is the ability to discover the fraud during the litigation. Ray at 84, 647 S.E. 2d at 239. While the Supreme Court in Chewning affirmed the Court of Appeals’ reversal of the motion to dismiss and remand, it was quick to point out “that important benefits are achieved by the preservation of final judgments” and that this “opinion, with its unique facts, in no way altered “its longstanding policy towards final judgments.” Chewning at 86, 579 S.E.2d 613.

Appellant brought an independent action alleging fraud on the court regarding the Bailum '04 Case. The gravamen of Appellant's fraud on the court claim is that in the Bailum '04 Case, the Bailum heirs knowingly conspired and lied regarding certain family relationships and purposefully misled the Special Referee in order to divest Appellant of his interest in Parcels 2, 3 and 4. (R. p. 26-p. 41, p.80-p. 96, p. 128-p. 207 and p.212-p. 241).

Appellant's claims are easily distinguishable from the cases granting relief based on extrinsic fraud. In Chewning and two cases that followed Bryan and Evans, the appeals were taken from proceedings on motions to dismiss. Bryan, 220 S.C. 164, 66 S.E.2d 609; Evans, 294 S.C. 525, 366 S.E.2d 44. Chewning and Evans each lost at the motion to dismiss stage and appealed those rulings. While Bryan prevailed at the motion to dismiss stage, the denial was appealed by the defendants. The trial courts in those cases were obligated to deny the motions if the facts and inferences drawn from the facts alleged in the complaints, viewed in the light most favorable to the plaintiffs, would have entitled the plaintiffs to relief on any theory, and the appellate courts had to apply the same standard in deciding whether the trial courts' rulings were proper. Brazell v. Windsor, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009). Because the Chewning and Evans appellate courts concluded that plaintiffs' complaints alleged sufficient facts that if true would constitute fraud on the court, they reversed.

Appellant, unlike Chewning and Evans, cannot simply rely on a well-pleaded complaint. Appellant had to show that genuine issues of material fact exist regarding whether extrinsic fraud constituting a fraud on the court occurred in the Bailum '04 Case in order to survive Respondents' motion for summary judgment. He failed to do so. In

an effort to support his allegations of fraud upon the court, Appellant points to inconsistent testimony given almost three years apart in two different cases involving different property by two different people. Specifically the challenged testimony was regarding whether Monica Middleton was Fannie Middleton's daughter or great-granddaughter: (1) the reference testimony given by Monica Middleton on September 17, 2003, to the Master-in-Equity in the Middleton Action, and (2) the testimony provided by Verdone Gray on May 15, 2006, before the Special Referee in the Bailum Action. (R. p. 31-p. 40, paras. 19, 34, 35, 46, 47, 57 and 58, p. 82-p. 83, p. 88-p. 89 and p. 131-p. 134).

The Supreme Court in Bryan determined that even if Bryan's assertions of false testimony in his trial, by four witnesses now recanting, were true, it was not enough to survive a motion to dismiss because he only established intrinsic fraud. Appellant makes basically the same arguments as the Bryan plaintiff: that "witnesses gave false testimony on material issues at trial; at the time of trial he did not know it was false; he could not have discovered the falseness by the use of due diligence; he had only just discovered the falseness of the material testimony proffered; he had not known what testimony the defendants would offer; he had no way to anticipate perjured testimony; and except for such false witness, the defendants would not have obtained a judgment against him." Bryan, 220 S.C. 164, 66 S.E.2d 609 (1951). Appellant makes the same claim. (R. p. 31-p. 40, paras. 20, 37-40, 47-52 and 57-62, p. 82-p. 83, p. 88-p. 91, p. 131-p. 137, p. 145-p. 150, and p. 218-p. 229).

The inconsistent testimony relied on by Appellant is insufficient to prove false swearing or actual fraud. Viewing this evidence and all reasonable inferences that may

be drawn from it in the light most favorable to Appellant, the only thing this differing testimony could prove is that Verdone Gray believed that Monica Middleton was her cousin and the daughter of Fannie Middleton, while Monica Middleton believed that she was the great-granddaughter of Fannie Middleton. Dissimilar testimony by separate witnesses in different actions is, in and of itself, not evidence of lying, deceit, fraud or perjury.

Even if this Court assumes the truth of Appellant's position regarding this conflicting testimony, the most that Appellant has proven is that either Monica Middleton and/or Verdone Gray lied, falsely testified or perjured themselves with regard to Monica's descendency. False testimony and perjury are classic examples of intrinsic fraud. Chewning, 354 S.C. at 81, 579 S.E.2d at 610; Raby at 19, 594 S.E.2d at 483 (referring to Bryan at 169, 66 S.E.2d at 611; J. Flanagan, South Carolina Civil Procedure at 485 (2d ed.1996)). Thus, at most, Appellant has shown intrinsic fraud.

In an apparent attempt to convert the alleged intrinsic fraud claim into extrinsic fraud, Appellant claims the existence of "a deliberate scheme to defraud by the Bailum heirs," and makes numerous allegations to purportedly support his claims.

The record simply does not support several of Appellant's assertions, but even those that are accurate do not raise an issue of extrinsic fraud. Appellant was ably represented by at least three attorneys, including Attorney Condon, a former Master-in-Equity for Charleston County, from the inception of the Bailum '04 Case and until the dismissal of the appeal. None of the items enumerated by Appellant, even if true, show a subversion of the administration of justice, or that Appellant was deprived of the opportunity to be heard.

Additionally, Appellant argues for the first time on appeal that attorney misconduct by Arthur McFarland, Esquire, ("Attorney McFarland") occurred which constituted fraud on the court. Appellant relies on Chewning for his proposition that attorney misconduct, if proven by clear and convincing evidence, is fraud on the court. Appellant sets forth the following alleged 'misconduct' by McFarland amounting to fraud on the court: that McFarland intentionally delayed, for two years, filing a quiet title action for the same property for Appellant because McFarland was working a quiet title action for Monica Middleton for the 2002 Middleton Parcel; and that McFarland [sic] never told Appellant or Attorney Cupp, about the Middleton Action and that Monica Middleton received the Middleton Parcel as a result.

An issue raised for the first time on appeal is not preserved. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Nonetheless, even if the Court considers this new attempt by Appellant to establish fraud on the court, it still must fail.

In Chewning, the Court agreed that, if true, that Ford's attorneys engaged in suborning perjury and intentionally withholding critical documents, then the Ford attorneys' misconduct constituted extrinsic fraud. Chewning, 354 S.C. at 81, 579 S.E.2d at 610. The Supreme Court based this ruling on the fact that "numerous jurisdictions hold an attorney's subornation of perjury and/or the intentional concealment of documents constitute fraud upon the court." Chewning, 354 S.C. at 83, 579 S.E.2d at 610 (citations omitted).

Appellant has not alleged this type of misconduct, nor has he shown it. First, at

the time complained of, Attorney McFarland was Appellant's attorney. Second, Attorney McFarland's purported misconduct took place in 2000 – three years before the final judgment in the Middleton Action, and seven years before the final judgment in the Bailum '04 Case. McFarland did not suborn in perjury nor intentionally conceal documents. The Middleton Action and the deed for the Middleton Parcel are a matter of public record. Again, Appellant had to do more than plead sufficiently; he had to prove that level of attorney misconduct that amounted to extrinsic fraud. Again, even assuming the truth of all of Appellant's contentions and conclusions, they do not establish a deliberate scheme to defraud by the Bailum heirs, or that a fraud on the court occurred.

The Supreme Court's Bryan analysis is on point. The Bailum '04 Case Complaint, Amended Complaint and Second Amended Complaint "clearly disclosed" to Appellant that the interests of all possible heirs, known and unknown, to Parcels 1, 2, 3 and 4 would be determined. Bryan at 170, 66 S.E.2d at 611. (R. p. 423-p. 431, p. 434-p. 443, p. 452-p. 458 and p. 358-p. 393). Appellant "was not misled as to the nature of the evidence he would be required to meet." Bryan at 170, 66 S.E.2d at 611. Appellant has produced no evidence, beyond bald allegations, to show that he was prevented by from fully presenting his case, or that the Special Referee did not have a "full opportunity of passing on the credibility of the testimony now claimed to be false." Bryan at 170, 66 S.E.2d at 611. Although Appellant levies the above allegations as proof of his claims, his assertions are not evidence, and he did not and does not offer any evidence to substantiate his claims. "A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief." Perry at 46-7, 590 S.E.2d at 503 (internal citations omitted).

Appellant had to show extrinsic fraud in the Bailum 2004 Case in order to survive summary judgment. Appellant failed to present evidence of extrinsic fraud. The trial court found that the testimonial conflict relied on by Appellant is "at best intrinsic fraud for which he is entitled to no relief." (R. p. 15). While there may be exceptional cases justifying equitable relief on the ground that a judgment was procured by false testimony, there is certainly no showing in the instant case warranting a departure from the general rule. Bryan at 170, 66 S.E.2d at 611. Thus, the Circuit Court correctly concluded as a matter of law that there was no extrinsic fraud constituting a fraud on the court, and properly granted summary judgment to Respondents. (R. p. 15).

**A Rule 60(b) Independent Action in Equity based on
Rare, Special, Exceptional, Unusual, or Extraordinary
Circumstances that Warrant Equitable Relief**

The indispensable elements of the independent action based on such rare, special, exceptional or unusual circumstances are:

"1) a judgment which ought not, in equity and good conscience, to be enforced; 2) a good defense to the alleged cause of action on which the judgment is founded; 3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; 4) the absence of fault or negligence on the part of the defendant; and 5) the absence of any adequate remedy at law."

Mr. T at 135, 662 S.E.2d at 417 (citing Nat'l Sur. Co. v. State Bank of Humboldt, 120 F. 593 (8th Cir.1903)). Such an independent action is one in equity, and as such, the "court may consider equitable defenses such as laches, unclean hands, and whether an adequate legal remedy exists." Id.

In Mr. T v. Ms. T, Mr. T filed for divorce stating that two children were born of the marriage and that he was entitled to joint custody. The parties entered into settlement agreement which was approved by the family court and incorporated in the Final Divorce

Decree filed on October 18, 1999. Under the agreement and decree, Mr. T paid child support and had reasonable visitation, and Ms. T had sole custody. In 2005, Mr. T filed an independent action to vacate the prior divorce order alleging that until recently he was under the false and mistaken belief that he was the childrens' biological father. Mr. T amended his complaint alleging fraud on the part of Ms. T after she moved to dismiss and filed an answer. The family court granted Ms. T's motion to dismiss on the grounds that the original divorce decree made a clear finding of paternity and that it had no jurisdiction since the action was barred by res judicata/collateral estoppel. Mr. T appealed.

The Court of Appeals reversed the dismissal for lack of jurisdiction. In its opinion, the Court discussed the availability and elements of an independent action for fraud on the court, or for rare, special, exceptional or unusual circumstances, as well as various exceptions to preclusion principles and their equitable application, to vacate a prior judgment. The Court stated specifically that with its findings it was not creating a bright line test for such issues. It voiced its concern that nothing in the record suggested the childrens' interests were ever considered. Because of the possibility that Mr. T's prior case did not conclusively determine the his paternity, because of public policy considerations regarding State's obligation to protect and safeguard the welfare of its children, due to the absence of a well-developed record, and largely due to a child's fundamental right to know the identity of his biological parent, the Court of Appeals remanded to the family court for further development of the record on these issues, and for it to adequately balance the competing interests of all those involved as well as any equitable circumstances presented in the case.

The Court was very concerned in Mr. T that “where the interests of minors or incompetents are involved, procedural rules are subservient to the court's duty to zealously guard the rights of minors. Mr. T at 132, 662 S.E.2d at 416. This, it acknowledged the importance of finality with judgments, but noted that “the equities of a case may be just as significant in overriding such finality.” Mr. T at 135, 662 S.E.2d at 417. The Court of Appeals found this especially true “when the issue before the court is a determination of something so fundamental as the identity of a biological parent.” Mr. T at 139-40, 662 S.E.2d at 420 (emphasis added).

As opposed to Mr. T, Appellant appeals not from a motion to dismiss, but from a grant of summary judgment. In contrast to Mr. T, the record below was well-developed. Moreover, unlike Mr. T, the issue before the Court in Appellant's action and appeal is not a fundamental right – the issue is the correctness of the Special Referee's 2007 decisions which denied Appellant's claim based on adverse possession and ouster to four parcels of heirs property, and which ultimately found that Appellant waived his right, by virtue of his intestate interest, to exercise his right purchase part or all of Parcel 1 due to his failure to timely and properly comply with the instructions in the order. To the extent that Appellant seeks relief based on rare, special, exceptional or unusual circumstances, he must prove all five of the elements articulated in Mr. T to withstand Respondents' summary judgment motion. Appellant has not produced evidence sufficient to create a genuine issue of fact as to any of those elements.

The Judgment, in Equity and Good Conscience, Should Not Be Enforced.

Appellant has not shown that the judgments and the deeds from the Bailum '04 Case and the Middleton '02 Action, in equity and good conscience, should not be

enforced. These prior judgments determined the interests of the various heirs, partitioned property, enabled property to be sold, and distributed sale proceeds proportionally among the determined heirs to five different parcels. Pursuant to the Special Referee's orders, Marie Smith timely and properly exercised her right, by virtue of her intestate interest, to purchase a part Parcel 1. Appellant did not timely or properly exercise his right to purchase part or all of Parcel 1. Following the remitter of Appellant's appeal in the Bailum '04 Case, Parcel 1 was then partitioned and the remaining part sold to a third-party, Mark Goldberg (who transferred his interest to Respondent LMC, LLC). Also pursuant to the Special Referee's orders, Parcels 2, 3 and 4 were sold to another third-party, Hazel Goldberg. The proceeds from the sale of Parcels 1, 2, 3 and 4 were distributed to the determined heirs. Appellant's share of the proceeds from the sale of Parcel 1, the only parcel in which he was determined to have an interest by intestacy, remain in escrow for him. The Middleton Parcel may likewise have been sold and proceeds distributed. It would be inequitable to all the other determined heirs and good faith purchasers to vacate the Bailum '04 Case and the Middleton '02 Action judgments and to rescind the deeds issued as a result based Appellant's non-compliance. Appellant failed to show that equity and good conscience require that the judgments and deeds in the Bailum '04 Case should not be enforced.

**Appellant Does Not Have a Good Defense to the Alleged
Cause of Action on Which the Judgment is Founded.**

Appellant has not raised or shown a good defense to the causes of action raised in the Bailum '04 Case. In that matter, Appellant argued (and the Bailum plaintiffs and Special Referee agreed) that he was an intestate heir through his great-grandmother, Hester Bailum, whose heirs were entitle to a 1/3 share in Parcel 1. Despite significant

time and opportunity, Appellant failed to properly and timely exercise his right to buy a part or all of Parcel 1. Parcel 1 was sold and Appellant's resulting share of the proceeds from the sale of Parcel 1 is waiting in escrow, but he refuses to claim it. Appellant converts his failure to timely and properly comply with the orders to bias and prejudice against him by the Special Referee resulting in his arbitrary decision to deny Appellant

As to Parcels 2, 3 and 4, Appellant did not claim or argue a partial intestate interest – he claimed ownership of all three parcels based on adverse possession and ouster. Not until after the Special Referee ruled in the Bailum '04 Case denying his adverse possession and ouster claim, did Appellant make the claim that he was an intestate heir through his great-grandmother, Hester Bailum, and her heirs were also entitle to a 1/3 share in Parcel 2, 3 and 4. The Special Referee was clearly apprised of Appellant's new claim to Parcels 2, 3 and 4 during the June 6, 2007 hearing. Attorney Houston presented Appellant's 'new evidence', which consisted of unverified and unsubstantiated copies of consensus reports and burial records from Fielding Funeral Home, and argued that this evidence required a new trial. Appellant personally found this 'new evidence' after the Special Referee issued his Amended Special Referee's Order Quiet Title Partition and Sale on March 6, 2007. This 'new evidence,' some of which was a matter of public record, could easily have been found by Appellant during the pendency of the Bailum '04 Case. While the Special Referee accepted the 'new evidence' as part of the motion record, he did not vacate his prior judgment.

Appellant does not have a good defense – it is the same claim that he tried, specifically and in great detail, to the Special Referee, and to the Court of Appeals in the Bailum '04 Case. The Special Referee considered it, and refused to order a new trial.

Although Appellant's former appeal was not perfected and dismissed, during the 20 months it was pending Attorney Houston submitted a number of pleadings to the Court of Appeals which set forth in great detail and with specificity all of Appellant's issues, claims and concerns, which mirror those raised herein. Even though the Court of Appeals was well aware of all of Appellant's issues, claims and concerns, the Court nonetheless declined to reinstate Appellant's appeal and ordered remittitur in December 2008.

**No Fraud, Accident, or Mistake Prevented Appellant
From Obtaining the Benefit of His Defense.**

Three, Appellant has not shown fraud, accident or mistake which prevented him from obtaining the benefits of his defense in the Bailum '04 Case. Appellant claims fraud by pointing at the inconsistencies between the testimony of Verdone Gray in the Bailum '04 Case, and that of Monica Middleton in the Middleton '02 Action. Inconsistent testimony by different witnesses in different case is not evidence of fraud.

As described more fully above, Appellant was represented by experienced counsel throughout the prior litigation. To the extent Appellant argues that Attorney Houston's alleged abandonment of his former appeal deprived him of the opportunity to be heard, that is incorrect. As noted above, Attorney Houston filed many pleadings between April 2007 and November 2008 with the trial court and with Court of Appeals which detailed and argued Appellant's many issues, claims and concerns. Appellant was dissatisfied with the outcome of the Bailum '04 Case, both at the trial level and at the appellate level. His dissatisfaction, however, with the result is not proof that he was deprived the opportunity to be heard or from obtaining the benefit of his defense.

The Absence of Fault or Negligence on the Part of Appellant.

Four, Appellant has not and cannot show the absence of any fault or negligence on his part. Appellant claims that he should be permitted to present "new evidence" to support his claims in this action. However, the 'new evidence' that Appellate refers to is: census records; burial records from a funeral home; the inconsistent testimony set forth above; that Respondent Monica Middleton received the Middleton Parcel, property alleged also cared for by Appellant, during the Middleton '02 Action and he was not informed of that action or her claim to that parcel by Attorney McFarland; and that Attorney McFarland, represented Respondent Monica Middleton in the Middleton '02 Action, after and despite the fact that Attorney McFarland failed to file a quiet title action on Appellant's behalf.

All of this 'new evidence' could have easily been found through the exercise of due diligence, and presented during the Bailum '04 Case. It is unknown how Appellant obtained burial records from the funeral home, but he was able to, and they could also have easily been obtained by subpoena. The census records are public records which Appellant personally found in the time between his opportunity to purchase Parcel 1 expiring around March 16, 2007, and the June 6, 2007, hearing before the Special Referee. (R. p. 94-p. 96). Likewise, the pleadings for the Middleton '02 Action, which are public records, would have identified Respondent Monica Middleton's attorney as Attorney McFarland, and the property to be quieted as the Middleton Parcel. Further Respondent Monica Middleton's reference testimony, the basis of Appellant's fraud claim, is part of the Master's Order Quieting Title in the Middleton '02 Action and which has been a matter of public record since October 15, 2003, before the Bailum '04 Case was even commenced.

Appellant participated in a full hearing at the trial level in the Bailum '04 Case and filed an appeal. If, Appellant's former attorneys were negligent or dilatory in the performance of their due diligence, in their investigation of his claims, in the discovery process or during the examination of witnesses and evidence, that negligence is imputable to Appellant. And if, in fact, Appellant's former appeal was dismissed due to some fault or negligence of Attorney Houston, that fault and negligence is also imputed to Appellant. It is not attorney abandonment as Appellant argues.

In Tobias v. Rice, 386 S.C. 306, 688 S.E.2d 552 (2010) reh'g denied (2010), the Supreme Court reversed a judgment against Rice on the basis of attorney abandonment. Unbeknownst to Rice his attorney was suspended from the practice of law. The opposing attorney sent the trial notice to Rice's attorney, but he did not notify Rice personally. Neither Rice nor his attorney appeared at the final hearing. The trial judge entered judgment against Rice. On appeal, the Supreme Court concluded that Rice was deemed pro se by her attorney's suspension and was entitled to due process and notice of the final hearing. The Supreme Court pointed to Moore v. Moore, 376 S.C. 467, 657 S.E.2d 743 (2008), for the proposition that procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses.

In Graham v. Town of Loris, 272 S.C. 442, 248 S.E.2d 594 (1978), the residents of the Town of Loris ("town") brought suit to have the town's zoning ordinances declared null and void. The day before the hearing on the residents' summary judgment motion the town the city attorney announced his immediate resignation. The city attorney did not inform any town official of the impending summary judgment hearing. No one appeared

at the hearing on behalf of the town, and so summary judgment was entered against it. The trial court ultimately granted the town relief from judgment based on the town's excusable neglect because the town had no notice of the hearing and its attorney had resigned, and the town's prima facie showing of meritorious equitable defenses.

The Supreme Court recognized the general rule is

that the neglect of the attorney is the neglect of the client, and that no mistake, inadvertence or neglect attributable to an attorney can be successfully used as a ground for relief, unless it would have been excusable if attributable to the client. The acts and omissions of the attorney in such case are those of the client .

Graham, at 451-2, 248 S.E.2d at 599 (emphasis added). To overcome this general rule, the client must establish that its former attorney willfully and unilaterally abandoned it. Id. at 452, 248 S.E.2d at 599. The Supreme Court affirmed, noting that "under the rare circumstances of this case," the town "should not be charged with the abandonment of the case by its counsel." Id. at 452-3, 248 S.E.2d at 599.

Stearns Bank v. Glenwood Falls, 373 S.C. 331, 644 S.E.2d 793 (Ct. App. 2007), was a foreclosure action against Glenwood Falls and other defendants. The plaintiff's attorney advised Cisa, the attorney for Glenwood Falls, and another defendant of the trial date. Cisa acknowledged that he was taking over the representation of Glenwood Falls. Cisa did not appear at the trial on Glenwood Falls behalf, and the Master entered judgment against Glenwood Falls. Glenwood Falls moved pursuant to Rule 60(b) for relief from default judgment based on excusable neglect asserting willful abandonment by its attorney, Cisa. The master denied the motion and Glenwood Falls appealed. The Court of Appeals concluded that even if Cisa's failure to act was neglectful, it could not assume that it rose to the level of willful abandonment or withdrawal from the case. The

Court based that conclusion on the critical factual distinction between Simon v. Flowers, 31 S.C. 545, 99 S.E.2d 391 (1957), and Graham, *supra*:

In Simon, the attorney simply forgot to answer the complaint against his client, and the supreme court upheld the trial court's denial of relief of judgment because the attorney's conduct did not transcend mere neglect. In Graham, the moving party established that its attorney affirmatively withdrew by resigning on the eve of a summary judgment hearing leaving the client unaware of the imminent and dispositive motion hearing. Our supreme court upheld the trial court's decision to grant relief from judgment based on the fact that the attorney willfully abandoned his representation by resigning right before the summary judgment hearing.

Stearns Bank, at 345, 644 S.E.2d at 800 (internal citations omitted). The Court of Appeals denied the motion to set aside the judgment because Glenwood Falls did not establish that Cisa willfully abandoned or withdrew from the case, and it refused to speculate to in order to make the additional finding of willful abandonment.

It is clear from the record of the Bailum '04 Case record that all three of attorneys hired by Appellant were active participants in both the trial, and in Appellant's former appeal. To the extent Appellant now claims that Attorney Cupp or Attorney Condon made mistakes, omissions or were neglectful, if any were made they did not rise to the level of willful abandonment and are imputed to him. Likewise, while Attorney Houston may have been late in filing Appellant's initial brief, he filed numerous substantive motions, a memorandum of law, and albeit late, an initial brief. Like the attorney in Simon⁵, it appears Attorney Houston had personal and professional issues that caused at

⁵In Simon, the attorney, on behalf of his client, did not file an answer to the plaintiff's complaint. Plaintiff obtained a default judgment and the defendant appealed. The Supreme Court acknowledged that the attorney's mistake was due to "forgetfulness on [the attorney's] part which in turn was due to pressure of his business in the trial of cases and in attendance at hearings." 31 S.C. at 550-51, 99 S.E.2d at 394. Nonetheless, it held that "[i]n the crowded routine of a busy lawyer's life a mistake such as the record here discloses is understandable; but it entails the penalty of default under strict enforcement

least some of his delay in filing. (R. p. 562-p. 571). Thus, as in Glenwood Falls and Simon, Attorney Houston's acts were at most neglectful, mistakes or omissions, if at all, and would be imputed to Appellant. Even assuming Appellant has shown any actions by any or all of his attorneys that constitute neglect, such neglect is imputed to him and cannot be used as a ground for relief from the Bailum '04 Case judgment. There is no evidence that Appellant's attorneys willfully abandoned or withdrew from his case.

Appellate has an Adequate Remedy at Law

Fifth, if Appellant can establish that some or all of his attorneys in the Bailum '04 Case were negligent in their representation (which is not evident from the record in the Bailum '04 Case or this case), Appellant has an adequate remedy by way of legal claim against some or all of them. Thus, he cannot show that he does not have an adequate remedy at law.

"Totality of the Circumstances" or "Exceptional Circumstances" as defined by Appellant is not the Proper Standard for a Rule 60(B) Independent Action in Equity for Relief From Final Judgment

Appellant contends that the trial court failed to consider all the circumstances in ruling on the summary judgment motion. Specifically, Appellant asserts that he raised multiple circumstances which justify equitable relief: problems and irregularities concerning the Special Referee, including the Special Referee being appointed without his consent, procedural irregularities, and racial bias; false testimony; reliance on false testimony; the Bailum heirs conspiracy to give false testimony and to intentionally defraud the court; newly discovered evidence; misconduct by Attorney McFarland; and abandonment by Attorney Houston.

of the rule of procedure, and the trial court's refusal to forgive it affords no basis for reversal." Id.

Most, if not all, of these circumstances in some form were raised to, considered by and ruled on by the Special Referee and the Court of Appeals. (R. p. 165 (Transcript p. 87), l. 15-p. 166 (Transcript p. 90), l. 3, p. 358-p. 397, p. 401-p. 407, p. 464-p. 466 and p. 485-p. 527). Thus, while the Court of Appeals reviewed Appellant's arguments, it declined to provide relief. (R. p. 411-p. 412 and p. 421-p. 422). Importantly, as has been noted repeatedly, Appellant was represented by no less than three competent lawyers during the Bailum '04 Case and its appeal, and was not prevented from presented a defense.

Aside from bald, conclusory and inflammatory allegations, Appellant has not produced any evidence to support his contentions or the inferences he claims from them, or the record clearly refutes them. Even if Appellant's assertions are correct, he has not explained how any one, some or all of these complaints deprived him of the opportunity to be heard, or how they now, three years later, amount to an extraordinary circumstance warranting the equitable relief of setting aside a final judgment.

Appellant asserts that that the trial court failed to consider all the circumstances in ruling on the summary judgment motion, and seems to be trying to create a new ground for relief from a final judgment by asking the Court to vacate the Bailum '04 Case judgment on the equitable grounds of 'totality of the circumstances' or extraordinary circumstances, as he defines them. However, Appellant filed this independent action under Rule 60(b) which clearly permits collateral attack of a final judgment in only two ways: (1) fraud on the court, or (2) rare, special, exceptional or unusual circumstances that warrant equitable relief upon the establishment of the five indispensable elements set forth in Mr. T v. Ms. T.

Appellant has not shown either a fraud on the court or rare, special, exceptional or unusual circumstances to permit the vacating of a final judgment.

III. The Circuit Court grant of summary judgment was appropriate and not premature as Appellant had sufficient time and opportunity for discovery.

Appellant contends that summary judgment was improper because discovery had not been permitted, and that no formal discovery was undertaken due to Respondents' filing a motion to dismiss. In Middleborough HPR v. Montedison S.p.A., 320 S.C. 470, 465 S.E.2d 765 (Ct.App.1995), the regime brought action against the PVC manufacturer after leaks developed, and moved for partial summary judgment, which was granted by the circuit court. On appeal, Montedison argued that the trial court's grant of summary judgment was inappropriate as it had not had a full and fair opportunity to conduct discovery. The Court of Appeals disagreed noting that the regime commenced the action on October 26, 1992, filed its motion for summary judgment on February 8, 1993, and the motion was heard on June 14, 1993. The Court was also acknowledged that Montedison had contested personal jurisdiction and did not submit until one week before the summary judgment hearing. Nonetheless, Montedison advanced

no good reason why four months was insufficient time under the facts of this case to develop documentation in opposition to the motion for summary judgment. The Regime's motion had been rescheduled on at least three previous occasions. Thus, Montedison could not have been caught by surprise. Further, the record discloses Montedison made no formal motion for a continuance or pointed out in any specific manner how it would be prejudiced by its inability to conduct discovery. Finally, we observe Montedison had been a party to other suits involving roofs that addressed most of the same issues involved in this case.

Middleborough HPR, 320 S.C. at 479-80, 465 S.E.2d at 771-2. Consequently, the Court of Appeals found that summary judgment was not premature and affirmed the trial

court's decision on this issue.

Middleborough HPR is on point. Appellant filed his complaint on August 24, 2009, to vacate a 2007 judgment from an action commenced in 2004 and in which Appellant was actively engaged, including an appeal that was dismissed in 2008. Respondents filed their motion to dismiss, in lieu of an answer, on September 16, 2009. A hearing on the motion to dismiss, and other pending motions, was heard on March 1, 2010. Judge Nicholson took the motion to dismiss under advisement in order to read the numerous affidavits, transcript and any case law submitted. (R. p. 300, l. 20-25). On August 27, 2010, the parties reconvened and again argued the merits the motion to dismiss. During the hearing, based on the numerous affidavits and exhibits submitted, the judge converted the motion to one for summary judgment and liberally allowed counsel to supplement the record. (R. p. 342, l. 1-p. 42, l. 12).

Counsel for Appellant did not object to the conversion of the motion and instead "agreed wholeheartedly." (R. p. 342, l. 25). Appellant's counsel did not raise any concerns regarding the lack of discovery to the judge at the hearing. (R. p. 306-p. 352). Moreover, while Appellant's counsel noted at the first hearing on the motion to dismiss that his complaint was not complete due to the lack of discovery, he did nothing more. (R. p. 288, l. 25-p. 289, l. 16).

In Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment Appellant includes conclusory allegations to support his argument that summary judgment is premature and that "due to the number of issues which need to be addressed," Appellant should be allowed to "fully develop all of the facts", and he goes on to argue that the "complaint establishes a prima facie cause of action to vacate the

judgment under either “exceptional circumstances” or “fraud on the court” but due to the complexity of the issues, Appellant should be entitled to have discovery and to “establish further facts upon which to base his claims for relief.” (R. p. 141-42).

In Plaintiff’s Motion for Reconsideration, Appellant raises for the first time that he believed discovery was prohibited or limited. (R. p. 234-p. 235). Appellant argues this basis also in his Initial Brief, but therein also argues for the first time that because of the Respondents’ pending motion, no formal discovery was undertaken. Appellant, however, points to no rule or law which prohibits discovery in cases where a defendant files a motion to dismiss in lieu of an answer. Thus, any lack or restriction of discovery appears to have been self-imposed by Appellant.

As in Middleborough HPR, Appellant has provided no good reason why a year was insufficient time for him to develop documentation to oppose the motion for summary judgment. Appellant has been on notice of Respondents’ position since their motion to dismiss was filed, he could not have been surprised, and the motion was argued twice before it was converted to summary judgment. Like Montedison in Middleborough HPR, Appellant made no formal motion for a continuance nor pointed out in any specific manner how he was prejudiced by his alleged inability to conduct discovery. And also similar to Montedison, Appellant was a party in another suit and appeal, the Bailum ’04 Case, that addressed most, if not all, of the exact same issues and facts involved herein. Lastly, Appellant has not identified any specific discovery which he did not or could not obtain which would have affected the outcome of the summary judgment motion. For these reasons, the grant of summary judgment was not premature and the circuit court correctly granted judgment as a matter of law.

IV. The Circuit Court did not err when it denied Appellant's Motion to Disqualify Attorney Berlinsky, and denied Appellant's subsequent request to dismiss Respondents' Motion to Dismiss.

During the hearing on March 1, 2010, Appellant's Motion to Disqualify Attorney Berlinsky, the trial judge denied Appellant's Motion to Disqualify based on the testimony and affidavits, and specifically found no violations of any Canons of Ethics. (R. p. 257, l. 4-p. 260, l. 21). Nonetheless, despite such denial, Attorney Berlinsky voluntarily withdrew as counsel for Respondents to avoid any appearance of impropriety, and Anastasios H. Chakeris, Esquire, was substituted on the record during the hearing. (Id.). Appellant also moved as part of his Motion to Disqualify that the trial court dismiss any motions filed by Attorney Berlinsky on the grounds that he could not represent an "adverse party and file motion on their behalf if he has a conflict of interest." (R. p. 249, l. 25-p. 250, l. 6). The judge denied this motion also, in part because he had not found any conflict. (R. p. 260, l. 8-21).

Appellant now contends that the trial court erred in denying its motion to disqualify and its motion to dismiss Respondent's Motion to Dismiss, and failed to find a conflict of interest existed. Appellant stated that he met with Attorney Berlinsky sometime in July 2003 to discuss the possibility of his pursuing a quiet title action on Appellant's behalf. (R. p. 50-p. 61). Attorney Berlinsky wrote to Appellant after they met and provided an estimate of fees and costs for a quiet title action, and advised that after Appellant discussed the matter with his family and made a decision, he should contact Attorney Berlinsky. (R. p. 58-p. 61). Because of Attorney Berlinsky's estimate, Appellant instead hired Attorney McFarland. (R. p. 50-p. 61). Further, Appellant

asserted that he met with Attorney Berlinsky again during the pendency of the Bailum '04 Case before he hired Attorney Condon; however, Attorney Berlinsky refused to take his case. (R. p. 50-p. 61).

During the March hearing, Attorney Berlinsky testified that he did not recall meeting Appellant, but that it was his practice, when he meets regarding quiet title actions, to explain what a quiet title action is and why it is necessary but he never goes into specifics until he is retained. (R., p. 253, l. 19-p. 256, l. 24). He told Appellant that if he decided to hire him, Appellant had bring a retainer and provide a family history. (R. p. 254, l. 12-16 and p. 256, l. 15-24). It is undisputed that Appellant never retained Attorney Berlinsky, or that Appellant never provided Attorney Berlinsky with any confidential information. (R. p. 50-p. 61, p. 254, l. 3-11 and p. 256, l. 15-24). Appellant failed to prove an attorney-client relationship. Consequently, Judge Nicholson's finding that there was no conflict of interest is supported by the record. Further, Appellant failed to provide any law to support his position that when an attorney voluntarily withdraws to avoid the appearance of impropriety the pleadings previously filed by him must be dismissed.

V. Appellant's Motion for Temporary Injunction was denied by the Circuit Court on November 3, 2010, and therefore, Appellant's Appeal is Time-barred.

Appellant's Motion for Temporary Injunction, filed on December 12, 2009, was heard and denied by Judge Nicholson during the August 27, 2010, motions hearing. (R. p. 351, l. 5-15). On November 3, 2010, a Form 4 Order ordered that Motion for Temporary Injunction against further actions involving the subject property denied. (R. p. 24).

The decision to grant or deny temporary injunctive relief is within the sound discretion of the trial judge and will not be overturned absent an abuse of discretion. FOC Lawshe v. International Paper, 352 S.C. 408, 412, 574 S.E.2d 228, 231 (Ct. App. 2002) (citing City of Columbia v. Pic-A-Flick Video, Inc., 340 S.C. 278, 282, 531 S.E.2d 518, 520 (2000)). The grant or denial of a motion for temporary injunction is immediately appealable, and is waived if not appealed within thirty days. S.C. Code Ann. § 14-3-330; SCACR 203; Roberts v. Union County Bd. of School Trustees, 326 S. E. 2d 163 (S.C. Ct. App. 1985)(By statute an interlocutory order or decree in the court of common pleas granting, continuing, modifying, or refusing an injunction is immediately appealable to the South Carolina Supreme Court).

Appellant did not appeal the trial judge's denial of his motion for temporary injunction within the thirty day time limit and so any appeal from the denial is time-barred.

CONCLUSION

The Court of Appeals should dismiss this case as it is procedurally barred. If it is not procedurally barred, the Court of Appeals should affirm the Circuit Court's grant of summary judgment to Respondents on the grounds that there was no evidence of fraud on the court, or rare, special, exceptional, unusual or extraordinary circumstances to warrant vacating the March 6, 2007 Amended Special Referee Order Quite Title, Partition and Sale, or rescinding any deeds. Further, the Court of Appeals should affirm that the grant of summary judgment to Respondents was appropriate and not premature. The Court of Appeals should also affirm the Circuit Court's denial of Appellant's Motion to Disqualify

Bruce Berlinksy, Esquire, and the Circuit Court's denial of Appellant's request to dismiss Respondents' Motion to Dismiss. Last, the Court of Appeals should dismiss Appellant's Appeal of the denial of his Motion for Temporary Injunction as time-barred.



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July 19, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Hon. J.C. Nicholson, Jr., Circuit Court Judge

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	)

REPLY BRIEF OF APPELLANT

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Roosevelt Simmons

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TABLE OF CONTENTS

Table of Authorities.....	2
Reply to Statement of Facts.....	3
Reply Argument.....	7
Conclusion.....	28

TABLE OF AUTHORITIES

Cases

<u>Bryan v Bryan</u> , 220 S.C. 164, 66 S.E.2d 609(1951)	11
<u>Bunkum v. Manor Properties</u> , 321 S.C. 95, 467 S.E.2d 758 (Ct. App. 1996).....	20
<u>Chewning v. Ford Motor Co.</u> , 354 S.C. 72, 579 S.E. 2d 605(2003).....	9, 22
<u>Church of the Nativity of Our Lord v. WatPro, Inc.</u> , 491 N.W.2d 1 (Minn.1992).....	23
<u>Evans v Gunter</u> , 294 S.C.525, 366 S.E. 2d 44 (Ct. App. 1988).....	10
<u>Graham v. Loris</u> , 272 S.C.442, 248 S.E. 2d 594 (1978).....	18
<u>HHHunt Corp. v. Town of Lexington</u> , 389 S.C. 623, 699 S.E.2d 699 (Ct. App. 2010)...	19
<u>Marshall v Marshall</u> , 282 S.C. 534, 320 S.E. 2d 44 (Ct. App. 1984).....	27
<u>Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison</u> S.p.A., 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995).....	23, 24
<u>Nat'l Sur. Co. v. State Bank of Humboldt</u> , 120 F. 593 (8th Cir.1903).....	14
<u>Ray v. Ray</u> , 374 S.C.79, 647 S.E.2d 237(2007).....	12
<u>Riley v. Charleston Union Station Co.</u> , 67 S.C. 84, 45 S.E. 149(1903).....	18
<u>Roberts v. Union County Bd. of School Trustees</u> , 284 S.C. 299, 326 S.E.2d 163 (Ct. App. 1985).....	27
<u>Simon v. Flowers</u> , 231 S.C. 545, 99 S.E.2d 391 (1957).....	17
<u>Spence v. Wingate</u> , 385 S.C. 316, 684 S.E.2d 188 (Ct. App. 2009).....	27

<u>Stearns Bank Nat. Ass'n v. Glenwood Falls, LP</u> , 373 S.C. 331, 644 S.E.2d 793	
(Ct. App. 2007).....	17
<u>T v. T</u> , 378 S.C.127, 662 S.E.2d 413 (Ct. App. 2008).....	13, 14, 21
<u>Tobias v. Rice</u> , 386 S.C. 306, 688 S.E.2d 552 (2010).....	17
Statutes	
S.C. Code Ann. Section 14-3-330.....	27
S.C. Code Ann. Section 14-11-60.....	20
Rules	
R. 12(b)(8), SCRCP.....	24
R. 60(b), SCRCP.....	8,9,17
R. 203, SCACR.....	27
Other Authorities	
7A C.J.S. Attorney & Client, Section 181 at 285.....	18

REPLY TO STATEMENT OF FACTS

Respondents have omitted or misstated facts which are not subject to dispute and which are relevant to this appeal, as set forth herein. In discussing the Second Amended Complaint in Bailum v. Simmons, respondents mischaracterize that pleading as simply naming additional heirs and aligning the parties. Resp. Brief at 5. The Second Amended Complaint specifically recognized the interest of Hester Singleton who was married to “Sam Bailum I” and that her heirs, including appellant, Roosevelt Simmons, were entitled to a statutory 1/3 interest in “the property” consisting of the two parcels acquired by Sam Balaam in 1904 and 1910. R pp. 455, para. 22 to 456, para. 29. In the original complaint Simmons was alleged to have no interest. R p. 425, para. 12. Respondents also fail to mention that in the

Second Amended Complaint, Monica Middleton was still named as a defendant and the Bailum heirs did not allege that she had any interest as an heir of Sam Bailum. See R p. 453, para. 6. Therefore, the statement that the purpose of the Second Amended Complaint was to “align the parties”, Resp. Brief at 5, is incorrect. Monica Middleton remained a defendant and the Hester Singleton were still recognized as having a 1/3 interest in all of the properties at issue until the hearing. The respondents allege that Hester Singleton was Sam Balaam’s third wife, Resp. Brief at 8, but the Special Referee found that Hester Singleton was the second wife of Samuel Balaam. R pp. 362-363.

In referring to appointment of a special referee, Resp. Brief at 5, respondents do not deny that on February 14, 2006, attorney Martin filed a motion to refer the case to a special referee (Mendelsohn) which included a Consent Order previously signed by attorney Cupp although she had been discharged the year before; or that when the motion was filed, Simmons was pro se, did not consent and was not served with a copy of the motion. Appellant’s Brief at 12. See R pp. 29, 461,462. Respondents do not deny that the Consent Order does not state the basis for the reference to a Special Referee in lieu of the Master in Equity. Appellant’s Brief at 12.

With respect to the June 6, 2007 hearing for a stay of the sale of parcel 1, respondents assert that Simmons consented to denial of his stay and distribution of the sale proceeds of parcels 2, 3 and 4 according to prior orders ; and to proceed on a appeal as to parcel 1 on the issue of adverse possession. Resp. Brief at 13. Respondents cite 42 pages of transcript. Id. However, the referenced transcript does not support the contention that Simmons consented to denial of his stay and to proceed on a appeal as to parcel 1 on the issue of adverse possession. According to the June 6th transcript,

Simmons only consented to the sale of parcels 2, 3 and 4th and the escrow of 1/3 of the sale proceeds pending his appeal from the denial of his interest as an heir of Hester

Singleton. That is the extent of his consent as the following excerpts establish:

THE COURT: Well, if he wants the money, then we just need to go forward and sell the property and pay the money and either divide it up and be done with it, which is what I asked you, and you got me the answer. Because --

MR. HOUSTON: Let me do this, Your Honor. Is that correct, Mr. Simmons?

MR. SIMMONS: That's correct. Parcels 2, 3, and 4.

Transcript of June 6th, page 55, line 12 -20. Attorneys Martin and Berlinsky concurred.

Transcript of June 6th, page 74, line 16 to page 75 line 2; page 76, line 6 to 77, line 3

However, Simmons made it clear that he wished to protect his right to buy parcel 1.

THE COURT: Make sure I understand what I'm talking about here. If we go forward, if I deny your motion to stay and appeal, go forward and sell all property.

MR. BERLINSKY: Well, let me back up, because they're only talking about Parcels 2, 3, and 4. So what are they talking about on Parcel 1?

THE COURT: You're not talking about Parcel 1?

MR. HOUSTON: Well, what we understand on Parcel 1, Parcel 1 he wants to buy.

MR. SIMMONS: I want to buy, just like the judge give me the benefit for \$161,111.11, that's what I want to do.

MR. HOUSTON: But on two, three, and four he's willing to go along with the sale.

Transcript of June 6th, page 55, line 22 to page 56, line 12. Later in the hearing, the special referee stated: "I'm not trying to get him to give up anything, except two, three, and four." Id., page 79, line 3-5. When the issue came up again, it was addressed by the special referee: "And Mr. Simmons would agree to waive those rights to appeal on [the adverse possession] issue, two, three, four. It's got nothing to do with one." Id., page 8,

line 1- 3. Later at the hearing, the issue of adverse possession was discussed in the context of Simmons claims to parcels 2, 3 and 4. Id., page 74, line 15 to page 75 line 2. Simmons did not consent to the sale of parcel 1 but could not post a bond demanded by Attorney Martin equal to twice the sale price of the 4 parcels, in excess of 1 million. Id., page 41, lines 14-22. Therefore, only the sale of parcels 2, 3 and 4 had been resolved by consent.

THE COURT: All right. That's fine.
Consent order signed by everybody, the lawyers and
Mr. Simmons. I want to make sure. Okay. Make
sure he has his say-so. Now, what do we do about
number one?

Id., page 86, lines 5-9. (emphasis added). The balance of the discussion at the June 6th hearing dealt with the reasons for the special referee's denial of Simmons tender of financing to purchase parcel 1. See Id., page 86, line 10 to page 94, line 6. The Order entered on June 28th is not titled as a consent order and was not signed by Simmons attorney, Houston. As the transcript reflects, Simmons never consented to denial of a stay of the sale of parcel 1 or to limit his appeal.

Following entry of the June 28th order denying a stay of the sale of parcel 1, Simmons appellate attorney Houston filed a motion for Supersedeas to stay the sale of parcel 1 on various grounds including that the Special Referee's order improperly attempted to limit the appeal. R 489, Ninth. This motion contradicts respondents' assertion that Simmons waived the denial of a stay and limited his appeal.

REPLY ARGUMENT

I. SIMMONS DID NOT WAIVE HIS RIGHT TO APPEAL IN THE EARLIER CASE

Respondents claim that Simmons consented to waiving his right to appeal in the earlier case at the June 6th hearing. Resp. Brief at 17. Appellant denies that the original appeal he filed or the amended notice of appeal filed by Charles Houston was waived by consent. In the transcript of the June 6, 2007 hearing, there are many references to the sale of parcels 2,3 and 4 and the fact that Simmons was concerned only about his share of the sale proceeds and not about acquiring those properties. See Reply to Statement of Facts above. In the June 6th transcript, the court also discusses the preservation of Simmons claims to assert a right to an heirs interest in those properties on his pending appeal. The June 28th Order is not a “Consent Order” because it was never executed by attorney Houston. Further, in his supersedeas motion, he specifically objected to the language in the order by which the special referee attempted to limit the scope of the appeal. R p. 489, para. Ninth. Consequently, there is nothing in the record of the June 6th motion to support the contention of a knowing and deliberate waiver of appeal rights by Simmons. Respondents have not cited to a single statement made by Simmons at that hearing which can be interpreted as a voluntary waiver. The language in the order does not operate as consent but was entered in error and prompted the objections contained in the motion for supersedeas relief. Therefore, the record in *Bailum v Simmons* does not support respondents’ contention of a waiver of any right to appeal the special referee’s Amended Order Quiet Title Partition and Sale for which a timely Notice of Appeal was filed. R pp. 470,471.

Although respondents also contend that Simmons “abandoned” the prior appeal and therefore this appeal should be dismissed, Resp. Brief at 17-18, they do not provide any legal authority to support this argument. Appellant contended that the trial court’s decision below dismissing this case because of the dismissal of the prior appeal is not supported by case law. Appellant’s Brief at 34-35.

In addition, it is not disputed that Simmons was not aware of the contradictory testimony of Monica Middleton in Middleton v Doe, until after the appeal was dismissed. The abandonment of the appeal by attorney Houston together with the evidence of fraud on the court supports Simmons contention of exceptional circumstances for relief under R 60(b). See below.

II. FAILURE TO APPEAL DOES NOT PRECLUDE A COLLATERAL ATTACK ON THE JUDGMENT

Respondents also contend that Simmons should not be permitted to collaterally attack the special referee’s June 6th rulings because he failed to appeal them. Resp. Brief at 18. This is a variation of the respondents’ argument above that abandonment of the appeal prevents collateral attack on the judgment. Simmons contends that the failure to appeal a prior decision is not per se a bar to an independent action pursuant to R 60(b). Neither the trial court nor respondents have cited a single authority to support that conclusion. Moreover if this court accepts that interpretation as a matter to judicial policy, no independent action could ever be brought under R 60(b). A per se bar to a R 60(b) action based upon the failure to appeal or dismissal of the appeal would preclude all R 60(b) actions. Simmons contends that the court should recognize that the discovery of fraud on the court or other exceptional circumstances after the appeal period does not

per se preclude a R 60(b) independent action; that the most appropriate application of R 60(b) is for the court to review the entire circumstances before it determines whether relief should be granted. This is did not occur below and that the trial court erred.

III. THERE WAS EVIDENCE OF EXTRINSIC FRAUD

It is not disputed that R 60(b), SCRCP which provides for relief from a judgment due to “fraud on the court” refers to extrinsic fraud. Chewning v. Ford Motor Co., 354 SC 72, 579 S.E. 2d 605 (2003). Simmons contends that he has established sufficient evidence and inferences therefrom to meet this standard. Respondents claim that there was no evidence of extrinsic fraud, Resp. Brief at 22, but the burden was upon the Bailum heirs to establish the lack of material issues of disputed fact and they failed to do so.

The record below includes the Order Quieting Title containing the transcript of the Middleton v Doe case and portions of the May 15th transcript in Bailum v. Simmons case. In Middleton v Doe, Monica Middleton did not join any Bailum heirs in her quiet title action. R pp. 110, para. 3 to 111, para.11. In her testimony, Monica Middleton did not mention any ancestry with the Bailum heirs. The reasonable inference absent evidence to the contrary, is that Monica Middleton testified truthfully about her ancestry to Fannie Middleton and that there was no relationship to the Bailum heirs. In Bailum v Simmons, the testimony of Verdone Gray about the ancestry of Monica Middleton is directly contrary to Monica Middleton’s testimony about her own ancestry. Appellant’s Brief at p. 24-25. Respondents claim that “Dissimilar testimony in different actions is not . . . evidence of . . . fraud or perjury.” Resp. Brief at 24. However, Verdone Gray’s version of Monica Middleton’s ancestry was not just dissimilar but completely different.

If Verdone Gray was Monica Middleton's cousin, why wasn't Verdone Gray named in the Monica Middleton case as an heir of Fannie Middleton. Monica Middleton didn't bring Verdone Gray into her quiet title action presumably because there was no ancestral connection. Consequently, if there was no ancestral connection, Verdone Gray's testimony is false. Respondents assert that Verdone Gray "believed" that Monica Middleton was her cousin. Based upon her testimony, the special referee awarded Monica Middleton $\frac{1}{4}$ of the proceeds from the sale of parcels 2,3 and 4 (\$337,000) and $\frac{1}{6}$ of the proceeds from the sale of parcel 1 (\$220,000). R p. 375, para. 7 & 11.

However, why would anyone assert that there was another claimant to heirs property having such a substantial claim (approximately \$120,000.) to the proceeds as Monica Middleton was given, based upon a belief? The reasonable inference is that she fabricated the relationship with Monica Middleton to establish a lineage that supported their claim of two Sam Bailums, enabling the Bailum heirs to claim 100% of the proceeds from the sale of parcels 2,3 and 4 and eliminate Hester Singleton Balaam's heirs from receiving their statutory $\frac{1}{3}$ interest.

Apart from the fraud against Simmons and the Hester Singleton heirs by the Bailum heirs, Monica Middleton obtained approximately \$120,000. in the Bailum case to which she was not entitled or defrauded the Bailum and Hester Singleton heirs of their interest in the 5 acres to which she claimed a sole interest. The combination of inconsistent judgments in two related cases represents an example of "that species of fraud which does, or attempts to, subvert the integrity of the Court itself." Evans v. Gunter, 294 S.C. 525, 529, 366 S.E. 2d 44 (Ct. App.1988). Therefore, there was ample evidence of extrinsic fraud.

It cannot be disputed that Monica Middleton's ancestry as a descendant of Fannie Bailum was critical to the Bailum heirs case. There was no documentary evidence of their claim that two different Sam Bailum acquired the 54 acres in 1904 and the 20 acres in 1910. The birth certificates that they submitted did not establish the existence of another Sam Bailum who was alive and of age who could have acquired the 54 acres in 1904. The Bailum heirs testimony that Monica Middleton was their cousin and that she was the daughter of Fannie Bailum made their testimony that there were two different Sam Bailums plausible. Appellant has demonstrated that the special referee relied on this testimony. Therefore, based upon the transcript testimony and reasonable inferences, the Bailum heirs testimony about Monica Middleton was false, knowingly false, material and intended to deceive and did deceive the special referee who relied upon it.

Respondent also asserts that there is no evidence that the Bailum heirs changed their position at trial. Resp. Brief at 25. This is simply untrue. The Second Amended Complaint alleges that the Sam Bailum who acquired the 54 acres in 1904 is the same person who acquired the 20 acres in 1901. See R p. 455, para. 22 & 24. The Second Amended Complaint alleges that Sam Bailum was married to Hester Bailum who was entitled to a statutory 1/3 share of his estate. R p. 456, para. 25, 26 and 27. The Second Amended Complaint does not allege what interest Monica Middleton is entitled to. See R p. 453, para. 6. At trial, as demonstrated, their testimony was entirely different.

The argument that Simmons was represented by counsel at the hearing and could have cross examined the witnesses, Resp. Brief at 26, is another way of asserting that this was intrinsic versus extrinsic fraud. Respondent relies upon Bryan v Bryan, 220 S.C.

164, 66 S.E.2d 609 (1951) to support its contention of intrinsic fraud. Resp. Brief at 20, 24, 28. Bryan is distinguishable because it involved only false testimony. Simmons contends that in the Bailum case the Bailum heirs conspired to deprive him of an heirs interest in the 54 acres by fabricating the relationship with Monica Middleton who did not appear at the hearing to be cross examined. Her earlier testimony in Middleton v Doe was thus concealed. Simmons contends that there is a material issue of disputed fact as to whether he could have found out about the Middleton v Doe case earlier. The existence of that dispute of fact prevents the court from determining that there was extrinsic fraud. Therefore respondents contention of a lack of evidence, Resp. Brief at 29, ignores the record.

Moreover, Respondents cite to Ray v. Ray, 374 S.C.79, 647 S.E.2d 237(2007), for the proposition that the fraud must be extrinsic. Resp. Brief at 20. However, the holding supports Simmons position that there was prima facie evidence of extrinsic fraud on the record below. In Ray v. Ray the Supreme Court held that “an act or perjury or concealment . . . coupled with an intentional scheme to defraud the court justifies the setting aside of a judgment pursuant to R 60(b) due to extrinsic fraud.” Id. at 85-86. These facts are not subject to dispute: the Bailum heirs initially recognized Simmons as an heir to all of the property and then changed their position and created a fictitious relationship between them and Monica Middleton, which was contrary to her testimony in a prior case; and Monica Middleton did not appear at the hearing but nonetheless received a substantial portion of the sale proceeds. Simmons contends that there was prima facie evidence that Bailum heirs committed an act of perjury and concealment with the intent to defraud.

Respondents assert that Simmons own family tree indicates three Sam Bailums, Resp. Brief at 26, apparently to support their contention below of no fraud. However, Simmons family tree shows Sam Balaam married to Hester Singleton and that Sam Balaam had a son named "Sam" who had a son named "Sam." It does not support the claim of two different Sam Balaams acquiring the different parcels in 1904 and 1910.

Respondents also assert that Simmons raises misconduct by his first attorney McFarland as part of the fraud on the court for the first time on appeal. However, the facts surrounding McFarland's representation and his reprimand for delay are part of the record below. Simmons asserted before the trial court that McFarland intentionally delayed his case while prosecuting Middleton v Doe. R p. 167, para. 2. Therefore, this issue was presented below.

Finally, Simmons contends that the court should not have granted summary judgment on the issue of extrinsic fraud due to the need for discovery on this issue. None of the parties central to the earlier case were deposed. Monica Middleton resides out of state. The trial court was aware of the lack of discovery and asked counsel to address only what the Bailum heirs submitted to support their contention of two Monica Middletons. See below. Therefore, the Court should find that summary judgment as to extrinsic should not have been granted.

IV. THERE WAS EVIDENCE OF EXCEPTIONAL CIRCUMSTANCES

Respondents contend that appellant failed to produce evidence of the elements cited in T v. T, 378 S.C.127, 662 S.E.2d 413 (Ct. App. 2008) and thus his case was properly dismissed. Resp. Brief at 29-32. However, respondents misstate what this court said:

“the rule [in *Nat'l Sur. Co. v. State Bank of Humboldt*, 120 F. 593 (8th Cir.1903)] merely reflects many of the considerations attendant to an equitable analysis. Further, since the independent action referenced in the rule is one in equity, the court may consider equitable defenses such as laches, unclean hands, and whether an adequate legal remedy exists. . . we do not suggest this list is exclusive. However, 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.**”

662 S.E.2d at 417-418(emphasis added). Therefore, appellant's position that T v T required the court below to consider all of the circumstances correctly interprets the holding and respondents do not.

Respondents' contention that the circumstances of this case are different than T v. T, Resp. Brief at 31-32, is also unconvincing. Respondents appear to argue that T v T is limited to a child paternity case where the putative father failed to promptly determine paternity. Nothing in the language of the case supports the conclusion that the case is limited to its facts. Therefore, the state of the record or the nature of the rights involved do not alter the principle that exceptional circumstances justify equitable relief and that each case is to be judged on its own.

Despite the language in T v T that the 5 elements quoted from Nat'l Sur. Co. v. State Bank of Humboldt, 120 F. 593 (8th Cir.1903) were merely part of an equitable analysis, respondents try to evaluate this case solely within those 5 elements. Appellant contends that this case satisfies those elements nonetheless.

A. Judgment should not be enforced in equity and good conscience

Respondents contend that the proceedings in *Bailum v Simmons* were correct and that it would be inequitable to the other heirs if the judgment were vacated. Resp. Brief at 32-33. There is no evidence in the record to support this and none is cited. The evidence overwhelmingly favors Simmons.

The special referee found that Simmons had maintained the River Road property and awarded him an additional \$10,000 from the sale proceeds which he could use to purchase parcel 1. R p. 23 at 15. Simmons was denied the right to complete the purchase a property where he was raised because the special referee claimed that the two parties providing financing were straw purchasers. The violation if any, of the special referee's order to file the documentation was not significant and Simmons contended that he did deliver copies to the special referee and the other parties. The equities clearly favor Simmons .

B. Defense to Bailum heirs claims

Respondents claim that Simmons has no defense to the cause of action since his claim was only for adverse possession. Respondents has again misstated the pleadings. The original Bailum complaint alleged that Simmons claimed an adverse interest and that he has no interest in the title to the property. R p. 437, para. 12. In his Answer and Counterclaim, Simmons denied these allegations and asserted that he is the grandson of Lucinda Hester Sargent Balaam widow of Sam Balaam, the owner of the two properties at issue. R pp. 447, para. 1, 448, para. 4. Therefore, Simmons clearly alleged an heirs interest in the subject property. As noted above, the Second Amended Complaint admitted that Hester Singleton was the widow of Sam Bailum and that her heirs entitled to 1/3 statutory interest. Simmons did not file any further pleadings and the Bailum heirs are bound by theirs. Finally, the special referee's Order Quiet Title Partition and Sale addresses the claims of the Hester Singleton heirs to the subject property and determined that there were two different Sam Bailums who acquired the 54 acres in 1904 and the 20 acres in 1910 and that Hester Bailum was married to the one who acquired the 20 acres in

1910. In spite of his ruling that Simmons was not an heir of the Sam Bailum who acquired the 54 acres, the special referee denied Simmons claims for adverse possession on the remainder of the 54 acres on the basis that he could not oust another heir. R pp. 367-370. The transcript of the June 6th motion for a new trial is replete with references to Simmons appeal of the denial of his right to an interest in parcels 2, 3 and 4 representing the remainder of the 54 acres. Respondents cannot support their contention of a waiver based upon the record . Therefore, this court should find that there was no waiver of an heirs interest to all of the property at issue.

Respondents speculate that the Court of Appeals was well aware of these claims and failed to reinstate the appeal. However, the record is clear that dismissal of the appeal was due to attorney Houston's failure to file the Initial Brief . The orders entered by this court do not indicate any other reason for the decision. See R pp. 399,414,418. This court's refusal to reinstate the appeal is a determination only that the reasons given for the delay were not acceptable. It is not a decision on the merits.

C. Simmons defense was negated by the fraud on the court

Another of the 5 elements that respondents claim Simmons must satisfy is accident, fraud or mistake which prevented him from having a defense in the Bailum v Simmons case. Resp. Brief at 34-35. However, it is indisputable that the Bailum heirs admitted in their Second Amended Complaint that Hester Singleton was the widow of Sam Bailum and that her heirs were entitled to 1/3 interest in all of the property. As demonstrated above, the Bailum heirs testified at trial that there were two different Sam Bailums who acquired the property in the 1904 and 1910. It is undisputed that the Bailum heirs testified that they were related to Monica Middleton and that her ancestry

supported their claim of two different Sam Bailums. As demonstrated above, the reasonable inference is that the Bailum heirs lied about the lineage of Monica Middleton in order to support their claim that there were different Sam Bailums. The reasonable inference is that they acted in concert with Monica Middleton whose failure to appear is unexplained. The record before the trial court was incomplete due because discovery about the circumstances of the Bailums change in position had not occurred.

D. There was absence of fault

Respondents contend that Simmons trial and appellate attorneys were responsible to protect Simmons' interest and that their failure to do so is attributable to him. Resp. Brief at 35-38. As Simmons has argued in his appellant's Brief, whether Simmons attorneys should have found the decision in the Middelton v Doe case before the Bailum trial is a disputed fact.

Respondents also argue that Simmons appellate attorney was a fault for dismissal of the appeal and his fault is attributable to Simmons. Reps. Brief at 36. They cite several cases which are distinguishable. Tobias v. Rice, 386 S.C. 306, 688 S.E.2d 552 (2010) involved a R 60(b),SCRCP motion made after default was entered against defendant. The Supreme Court found that Rice had been denied due process because of her attorney was suspended when he failed to act on notices regarding the case. Id. at page 311. Stearns Bank Nat. Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 644 S.E.2d 793 (Ct. App. 2007) also arises from a R 60(b),SCRCP motion made after default was entered against defendant. The issue was whether an attorney's failure to answer was " excusable neglect". Id at 341-343. Simon v. Flowers, 231 S.C. 545, 99 S.E.2d 391

(1957) cited by respondents, involved a motion to vacate a default due to the attorney's failure to obtain an extension of time to answer. Id at 550-551. As the cited cases demonstrate, the general rule that attorney neglect will be imputed to the client is applied when there has been a single failure to protect the client's interest.

Simmons contends that the record of the Bailum appeal represents an example of attorney abandonment, not mere neglect. Respondents claim there is no evidence of abandonment. Resp. Brief at 45. However, the appeal record in Bailum v Simmons contains at least 3 dismissals of the appeal plus a final denial of a motion for reinstatement. R pp. 399, 414, 418, 420. The record indicates that Houston was given three opportunities to file the Initial Brief. R 400, 416. Houston's actions did not constitute mere neglect but represent his abandonment of Simmons appeal because it is outrageous and in violation of his duty to devote reasonable efforts to his client. 7A C.J.S. Attorney & Client Section 181 at 285. As the Supreme Court stated in Graham v. Loris, 272 S.C.442, 452-453(1978): "Conscience requires this court to charge the attorney alone with his gross dereliction of duty and not to visit the consequences upon an innocent client."

E. There was no adequate remedy

Respondents assert that Simmons has an adequate remedy in the form of a malpractice action against his former attorneys. Resp. Brief at 39. However, as Simmons has already argued, money damages are inadequate because Simmons was denied the right to complete the purchase of the 20 acres which he was raised and never had his case reviewed by this court. The loss of an interest in the real estate has always been considered an irreparable injury. Riley v. Charleston Union Station Co., 67 S.C. 84, 45

S.E. 149, 152 (1903). “Real estate has long been thought unique, and thus, injuries to real estate interests frequently come within the ken of the chancellor.” HHHunt Corp. v. Town of Lexington, 389 S.C. 623,641, 699 S.E.2d 699, 707 (S.C. App. 2010) (quotation omitted). Therefore, the inadequacy of money damages has been established.

F. Effect of procedural irregularities

Simmons has asserted that the procedural irregularities also represent part of the exceptional circumstances justifying relief. These irregularities include Simmons objection to appointment of a special referee, evidence of racial bias by the referee appointed and the jurisdictional defect in the appointment of the special referee. None of these were reviewed because of the dismissal of the appeal.

Respondents contend that there is no evidence that Simmons ever objected to the appointment of a special referee. Resp. Brief at 40. As far as objecting to appointment of the special referee, Simmons submitted an affidavit in this case that he did object. R p. 94, para. 3. It is undisputed that when the Bailum heirs filed a motion for appointment of the special referee, Simmons was pro se and was not served with this motion. Respondents claim that Simmons’ basis for a new trial was based on “Simmons not agreeing” and this is different than objecting. The difference is semantic. The consent was signed by his former attorney, Ruth Cupp, Esq. not Simmons who was pro se when the motion was filed. Furthermore, Simmons’ motion for a new trial was based in part on his objection to the appointment of Mendelsohn as special referee. R. p. 465, para. 4. Simmons later filed a judicial ethics complaint against Mendelsohn for among other things, making a racially disparaging remark. R pp. 169, para. 6, 206-207. Simmons asserted that he realized that Mendelsohn was biased against him when Mendelsohn

denied him the right to complete the purchase of the 20 acres. R p. 169, para. 6.

Simmons previously asserted that Mendelsohn conducted a proceeding on January 26, 2005 at which the racially disparaging remark was made. Respondents assert that attorney Martin “testified that he never heard the Special Referee make any disparaging remark to anyone.” Resp. Brief at 42. However, Martin was never sworn at the March 1, 2010 motion hearing when this statement was made. R p. 298, lines 16-24. Martin’s denial does not erase the claim of racial bias made by Simmons. This issue was never addressed due to dismissal of the appeal.

The jurisdictional defect in the appointment of the special referee is apparent on the face of the order appointing him. R p. 357. South Carolina Code Ann. 14-11-60 requires that a special referee can only be appointed where the Master in Equity is unavailable or there is just cause shown. Since the Order appointing him does not establish any just cause and there was a Master in Equity sitting in Charleston County, his appointment is void ab initio. In Bunkum v. Manor Properties, 321 S.C. 95, 99-100, 467 S.E.2d 758 (S.C. App. 1996), the plaintiff commenced an action pursuant to R60 (b) to vacate an earlier judgment. This court noted: “We are mindful of Bunkum's failure to appear before the master at the hearing on the motion, and her failure to directly appeal the master's order. Ordinarily, she would have been procedurally barred from challenging the order. However, issues relating to subject matter jurisdiction may be raised at any time, cannot be waived even by consent, and should be taken notice of by this court on our own motion.” Therefore, a jurisdictional defect can be raised at any time even if raised for the first time on appeal.

Respondents argue that the procedural irregularities were raised by Simmons appellate attorney but that this court declined to provide relief. Resp. Brief at 41,42. However, there is nothing in the prior appeal record which indicates a ruling on the merits. The denial of Houston's petition for supersedeas and stay of the sale of parcel 1 was endorsed on the motion and did not contain any findings and does not represent a ruling on other issues in the petition. R p. 411. The remainder of the appellate proceedings was administrative and concerned with the ordering of the transcript and filing of the Initial Brief. See R. pp. 399, 400, 412, 414, 416, 417, 420. Therefore, there is no factual basis to find that there was a determination of the merits before the appeal was dismissed.

Appellant also rejects respondents' position, Resp. Brief at 31, that Simmons right to due process including the right to appellate review is not a fundamental right. It is too well established to require citation that the right to due process including the right of appeal is fundamental.

G. Existence of Other Circumstances

Respondents also contend that false testimony even if given by the Bailum heirs does not rise to the level of exceptional circumstances. Resp. Brief at page 43. However, in T v T, 378 S.C.127, 662 S.E.2d 413 (Ct. App. 2008) the Court of Appeals 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 136. Consequently, false testimony which is intrinsic may be the basis for an independent action based upon exceptional circumstances.

Respondents claim that Simmons' trial attorney should have discovered it at the time of trial, Resp. Brief at page 44, but that is not established in the record and is in dispute. It is not disputed that the Bailum heirs changed their position at trial from what they had alleged in their Second Amended Complaint. It is not disputed that Monica Middleton did not testify at the Bailum trial. It is not disputed that the property which was the subject of the quiet title action did not include the 5 acres acquired by Fannie Middleton in 1904. It is not disputed that Simmons did not discover the Monica Middleton case until after the appeal was dismissed. The trial court below found that the Monica Middleton testimony was irrelevant to the claims in the Bailum case but then found that Simmons should have uncovered it before hand. However, the Monica Middleton testimony became relevant when the Bailum heirs made Monica Middleton's ancestry an issue at trial.

Where as here Monica Middleton's prior testimony never came to light until after Simmons appeal was dismissed, Simmons contends that the trial court erred in dismissing the case without considering all of the circumstances and allowing discovery to proceed.

Finally, respondents make the preposterous claim that even if the Bailum heirs gave false testimony and conspired to conceal their acts, that did not deprive Simmons of the opportunity to be heard because he was represented by counsel. Resp. Brief at page 44-45. Chewning and T v T amply refute that claim since both plaintiffs were represented by counsel at the trial of the first case.

Respondents raise the issue of the "newly discovered evidence" which attorney Houston presented to the special referee at the June 6th hearing to stay the sale of parcel

1. Resp. Brief at page 46. They assert that the census data was available to him in discovery or could have been found prior to trial. Id. That argument is another version of the argument rebutted above that the false testimony was intrinsic fraud and not a basis to vacate judgment under a separate action. Therefore even if the census data could have been discovered, that per se does not result in a summary dismissal of this action.

V. SUMMARY JUDGMENT WAS PREMATURE

Respondents assert that the trial court did not prematurely grant summary judgment, Resp. Brief at 47, and rely upon Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison S.p.A., 320 S.C. 470, 465 S.E.2d 765 (S.C. App. 1995). However, the facts in Middleborough H.P.R.C. are significantly different, as is the basis for the court's ruling. Therefore a detailed review of the facts is in order. The plaintiff condominium association sued the manufacturer of roofing materials installed on its condominiums for products liability, breach of warranty and negligence. Plaintiff moved for partial summary judgment as to liability. The motion was premised on the fact that the “ ‘underlying issues regarding the role, responsibility, and liability for the development, production, and marketing of the roofing material which failed [had] been previously adjudicated against [Montedison]’ who was collaterally estopped from relitigating those issues. . . . by the Minnesota Supreme Court's holding and findings of fact in Church of the Nativity of Our Lord v. WatPro, Inc., Montedison S.p.A. and Montedison U.S.A. Inc., et al., 491 N.W.2d 1 (Minn.1992), aff'g 474 N.W.2d 605 (Minn. Ct. App.1991) wherein Montedison was found liable for damages resulting from a failed Flagon roof.” 320 S.C. at 474. The trial court granted the Regime's motion for partial summary judgment as to liability against Montedison on the ground of non-mutual

offensive collateral estoppel. The Court of Appeals held that defendant was estopped from relitigating the issue of product liability and agency. Id at 476. The Court of Appeals found that Montedison had been a party to other suits involving Flagon roofs that addressed most of the same issues involved in this case and affirmed the lower court's decision. Id. at 479-480. However, the Court of Appeals reversed on the negligence claim for further development of the record. Id at 479. Therefore, the effect of the holding is limited since the allegations upon which summary judgment had been granted were addressed in an earlier case by which the defendant was bound.

This case is significantly different. Simmons filed this action to vacate the prior judgment because of a fraud on the court and exceptional circumstances. The fraud on the court was discovered after Simmons appeal was dismissed. Simmons was denied appellate review because his attorney abandoned the appeal. Unlike Middleborough, there was no earlier final judicial determination on the same issues raised in second case.

Respondents contended that the plaintiff failed to conduct discovery during the pendency of the motion to dismiss. However Simmons counsel made the court aware of his desire to conduct discovery in his opposition to the respondents 12(b) (8), SCRCPP motion to dismiss in September 2009. R pp. 91-92. The motion was heard on March 1, 2010. During oral argument, Simmons counsel asserted that the court should not grant the motion until there was a development of the record.

“MR. BERTELE : We need to find out some of the things that happened here and why they happened. The complaint is not complete with respect to all of the events that went on because obviously we've had—

THE COURT: Well, I understand that .

MR. BERTELE: --- no discovery.

R. p. 289, lines 11 -16. The court continued argument on the motion to dismiss which was finally heard on August 27th. During the course of the argument concerning the alleged fraud on the court, attorney Martin asserted: "There are two Monica Middletons." R. p. 338, line 9-12. Whereupon the court stated:

"THE COURT: The only thing that I was concerned about was the argument that the 2004 Monica Middleton , the results of that and the testimony of that were different than she testified to in the trial that we are here for today argument."

R p. 340, line 9-14. After Simmons counsel objected to the lack of a factual basis for the contention, R pp. 340, line 21 to 341, line 18, the court stated that it would convert the motion to dismiss to summary judgment. R p. 342, line 1-4.

"THE COURT: If he is correct, then that's—if there are two Monica Middleton and that —lets get some affidavits and let's find out. because if he—if Mr. martin is correct, you don't have claim."

R p. 342, line 6-10. Simmons counsel responded:

" MR. BERTELE: I may not have as much of a case. I believe that I still have case on the other claim of exceptional circumstances."

R p. 342, line 11-14. The court responded:

"THE COURT: So instead of me—and you'all taking depositions and you'all continue to litigate this thing, let's convert it to summary judgment motion. I give you so much time to substantiate what Mr. Martin is saying, if that is true or not."

...

I'll give you as much time as possible to submit the proper affidavits and whatever excerpts from the transcripts are necessary on any testimony."

R p. 342, line 18-20, R 343, line 6-9. Therefore, it is clear that the court preempted discovery in order to address the contention that there were two Monica Middletons.

Simmons attorney agreed to this limitation of what was to be submitted, not to forego any discovery on the allegations in the complaint. R p. 342, line 5, 25.

The record is clear that there was no period of discovery and that the court was aware of it and decided to proceed on summary judgment to dispose of the allegation of two Monica Middletons. Consequently, Simmons has a factual basis to assert that the granting of summary judgment as to the entire complaint was premature, due to a lack of discovery. The trial court acknowledged that it was at fault for prolonging decision on the motion to dismiss. R p. 343, line 20-24. Since the motion was based upon res judicata, the only concern was what was on the record below. The court granted respondents 45 days to submit the appropriate affidavits, R p. 346, line 14-15 and Simmons 30 days. R p. 346, line 2-3.

In summary, the procedure used by the court below was intended to address the limited issue of two Monica Middletons. Simmons' counsel followed the court's directive to submit affidavits in response to that issue. However, the trial court's decision was broader than it indicated at the motion hearing. Consequently, Simmons was not afforded an opportunity to conduct discovery on all of the issues raised in the pleadings.

VI. THE TRIAL COURT ERRED BY FAILING TO DISQUALIFY BERLINSKY

Respondents do not provide any support for their contention that there was no attorney client relationship established between Simmons and Berlinsky after Simmons consulted Berlinsky about representation in an heirs property case involving the 54 acres acquired by Sam Bailum in 1904. Resp. Brief at 51. The law is to the contrary. An

attorney client relationship is established if a person seeks legal advice by communicating in confidence with an attorney for the purpose of obtaining such advice. whether or not actual employment results. Marshall v. Marshall, 282 S.C. 534, 539, 320 S.E.2d 44 (Ct. App.1984). The trial court erred by not disqualifying Berlinsky. See Spence v. Wingate, 385 S.C. 316, 684 S.E.2d 188 (S.C. App. 2009) (trial court erred as a matter of law by dismissing claim of breach of fiduciary duty where facts in dispute as to representation)

The corollary to Berlinsky's disqualification is that the motion he prepared and filed should have been dismissed. It is contrary to the nature of the attorney client relationship to allow an attorney to act against the interests of a former client. In this case, that action consists of the filing of the motion to dismiss. Therefore, the motion to dismiss should have been dismissed.

VII. THE PRELIMINARY INJUNCTION SHOULD HAVE BEEN GRANTED

Respondents assert that failure to appeal the denial of a temporary injunction is waived if not appealed within 30 days citing Roberts v. Union County Bd. of School Trustees, 284 S.C. 299, 326 S.E.2d 163 (S.C. App. 1985). However, that case does not hold what respondents assert, rather it dealt with the trial court's decision to turn a hearing on a TRO into a decision on the merits. S.C. Code Ann. Section 14-3-330 only provides appellate jurisdiction to the Supreme Court from the denial of a TRO. Since the denial of a TRO was not a final order, R 203 SCACR does not prohibit a notice of appeal when it becomes a final order.

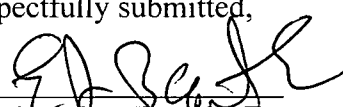
In addition, appellant filed a motion for a TRO in December 2010 which was never addressed by the trial judge. R pp. 208-211. Since the order granting summary judgment had the effect of dismissing the TRO, this court should consider it if it determines to reverse on the merits.

CONCLUSION

The record supports appellant's position that the trial court erred by granting summary judgment. Evidence of extrinsic fraud consisted of contradictory testimony in 2 heirs' property cases involving Monica Middleton, the approval by the Bailum heirs of her receipt of a substantial interest in the proceeds and her unexplained non appearance. There was a dispute of fact as to whether Simmons should have known about the earlier case based upon the respondents pleadings prior to trial. Even if false testimony by multiple Bailum heirs and the failure of Monica Middleton to appear is only evidence of intrinsic fraud, these circumstances together with the alleged bias by the special referee and abandonment of Simmons appeal by his appellate attorney evidence satisfy the requirements of exceptional circumstances

For the reasons set forth above, Simmons respectfully requests this court to reverse the Order dated January 21, 2011 granting summary judgment and remand for further proceedings below.

Respectfully submitted,

By: 

Edward A. Bertele, Esq.

July 23, 2012