

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

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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 )

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SC COURT OF APPEALS

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**BRIEF OF APPELLANT**

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

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### 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), SCRPC 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, Verdona 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 16<sup>th</sup>, 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 ) , SCRPC 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), SCRCP.” 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, Verdona Gray testified as follows before the Special Referee:

“Q. Is 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 Verdona Gray knowingly gave false testimony in order to mislead the Special Referee. Verdona Gray's testified that her aunt was Fannie Bailum Middleton and her cousin was Monica Middleton. It is reasonable to assume that Verdona Gray would know the

identity of her own aunt and cousin. Monica Middleton did not testify. Therefore, it is reasonable to conclude that Verdona 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 SCRC 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 Verdona 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 ( 7<sup>th</sup> 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, Verdona 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), SCRPC.

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 Verdona 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 1<sup>st</sup> 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), SCRPC 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

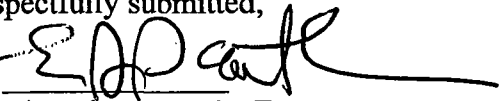
without regard to the ultimate termination of the case on the merits. Transcontinental Gas Pipe Line Corp., supra, 252 S.C. at 481; Helsel v. City of N. Myrtle Beach, 307 S.C. 29, 32 (1992). Simmons has made a prima facie showing for equitable relief under Rule 60(b), SCRCP by alleging fraud on the court 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