

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

RECEIVED

APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas

JAN 20 2016

SC Court of Appeals

Diane S. Goodstein, Circuit Court Judge

Case No. 2008-CP-38-1024

Appellate Case No. 2014-001683

Wells Fargo Bank, N.A., ..... Respondent,

v.

Dorothy Sistrunk, ..... Appellant.

**Final Brief of Respondent**

Michael J. Anzelmo  
Nelson Mullins Riley & Scarborough, LLP  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, South Carolina 29201

Elizabeth Scott Moïse  
Nelson Mullins Riley & Scarborough, LLP  
151 Meeting Street / Sixth Floor  
Post Office Box 1806 (29402-1806)  
Charleston, South Carolina 29401-2239

Attorneys for Respondent Wells Fargo Bank, N.A.

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

---

Case No. 2008-CP-38-1024

Appellate Case No. 2014-001683

---

Wells Fargo Bank, N.A., ..... Respondent,

v.

Dorothy Sistrunk, ..... Appellant.

---

**Final Brief of Respondent**

---

Michael J. Anzelmo  
Nelson Mullins Riley & Scarborough, LLP  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, South Carolina 29201

Elizabeth Scott Moïse  
Nelson Mullins Riley & Scarborough, LLP  
151 Meeting Street / Sixth Floor  
Post Office Box 1806 (29402-1806)  
Charleston, South Carolina 29401-2239

Attorneys for Respondent Wells Fargo Bank, N.A.

**Table of Contents**

Statement of the Issue on Appeal..... 1

Statement of the Case and Facts..... 2

ARGUMENT..... 5

I. This Court should affirm because the circuit court properly denied Sistrunk’s June 9th Motion for a New Trial. .... 5

    a. This Court lacks jurisdiction to consider an appeal of the order denying June 9th motion because it was successive and did not toll the time for appeal. .... 5

    b. The circuit court properly denied the June 9th Motion for a New Trial because it was untimely. .... 8

    c. Even if Sistrunk’s appeal of the denial of the June 9th motion were properly before this Court, the circuit court correctly denied the motion. .... 9

II. This Court should affirm because the circuit correctly denied Sistrunk’s Rule 60(b), SCRCF, motion to vacate. .... 9

    a. This Court should affirm because Rule 60(b),SCRCF, cannot be used as a substitute to an appeal of an adverse order. .... 10

    b. This Court should affirm because Rule 60(b), SCRCF, does not allow for the relief sought by Sistrunk. .... 11

    c. This Court should affirm because Sistrunk failed to carry her burden for Rule 60(b), SCRCF, relief for her failure to present evidence to support her claims of fraud on the court. .... 14

    d. This Court should affirm because Sistrunk failed to establish the existence of a meritorious defense. .... 15

Conclusion ..... 15

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<u>Bankers Trust Co. v. Braten,</u> 317 S.C. 547, 455 S.E.2d 199 (Ct. App. 1995) .....	12, 13
<u>Bowers v. Bowers,</u> 304 S.C. 65, 403 S.E.2d 127 (Ct. App. 1991).....	14, 15
<u>Chewning v. Ford Motor Co.,</u> 354 S.C. 72, 579 S.E.2d 605 (2003) .....	11, 13, 14
<u>Collins Music Co., Inc. v. IGT,</u> 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002) .....	6, 7
<u>Coward Hund Constr. Co. v. Ball Corp.,</u> 336 S.C. 1, 4-6, 518 S.E.2d 56, 58-59 (Ct. App. 1999).....	6
<u>Elam v. South Carolina Department of Transportation,</u> 361 S.C. 9, 602 S.E.2d 772 (2004) .....	6
<u>Evans v. Günter,</u> 294 S.C. 525, 366 S.E.2d 44 (Ct. App. 1988).....	12
<u>Fields v. Reg'l Med. Ctr. Orangeburg,</u> 363 S.C. 19, 28 n.3, 609 S.E.2d 506, 511 n.3 (2005) .....	6
<u>Gainey v. Gainey,</u> 382 S.C. 414, 675 S.E.2d 792 (Ct. App. 2009) .....	11
<u>Mr. G v. Mrs. G,</u> 320 S.C. 305, 465 S.E.2d 101 (Ct. App. 1995) .....	12
<u>Perry v. Heirs at Law of Gadsden,</u> 357 S.C. 42, 590 S.E.2d 502 (Ct. App. 2003).....	14
<u>Quality Trailer Prods., Inc. v. CSL Equip. Co.,</u> 349 S.C. 216, 219-21, 562 S.E.2d 615, 617-18 (2002) .....	6
<u>Raby Constr., L.L.P. v. Orr,</u> 358 S.C. 10, 594 S.E.2d 478 (2004) .....	11, 12
<u>Reading v. Ball,</u> 291 S.C. 492, 354 S.E.2d 397 (Ct. App. 1987) .....	13

<u>Sadisco of Greenville, Inc. v. Greenville Cnty. Bd. of Zoning Appeals,</u> 340 S.C. 57, 530 S.E.2d 383 (2000) .....	10
---	----

<u>Tench v. S.C. Dep't of Educ.,</u> 347 S.C. 117, 553 S.E.2d 451 (2001) .....	10
---	----

**Rules**

S.C. App. Ct. Rule 203.....	5
S.C. App. Ct. Rule 203.....	6
S.C. App. Ct. Rule 203(b)(1).....	6
S.C. Rule Civ P. 38 .....	4
S.C. Rule Civ P. 50 .....	6
S.C. Rule Civ P. 52 .....	6
S.C. Rule Civ P. 59 .....	4, 5, 6, 7, 8, 9, 10
S.C. Rule Civ P. 59(e).....	3, 6, 7, 11
S.C. Rule Civ. P. 60 .....	4, 10, 11
S.C. Rule Civ. P. 60(b).....	3, 4, 9, 10, 11, 13, 14, 15
S. C. Rule Civ. P. 60(b)(3) .....	12, 14, 15

Statement of the Issue on Appeal

- I. This Court should affirm because the circuit court properly denied Sistrunk's June 9th motion for a new trial.
  
- II. This Court should affirm because the circuit correctly denied Sistrunk's Rule 60(b), SCRCP, motion.

### Statement of the Case and Facts<sup>1</sup>

Respondent Wells Fargo Bank, N.A. (“Wells Fargo”) commenced this action by the filing of a foreclosure complaint against Appellant Dorothy Sistrunk (“Sistrunk”) on June 27, 2008. {Complaint dated June 27, 2008; R. 62-67}. Sistrunk filed a *pro se* answer. {Answer dated July 17, 2008; R. 68-83}. Sistrunk then amended her answer and included numerous counterclaims based on the alleged actions of the seller of the home and the appraiser. {Amended Answer and Counterclaims dated July 31, 2008; R. 84-148}.

Sistrunk based each of her counterclaims on the two assumptions. First, Sistrunk claimed that the persons who sold and appraised her home—not Wells Fargo—conspired to mislead her to believe that those persons would perform certain repairs and other improvements to the home before closing, and if such repairs were not completed, then the sale price for the home would be reduced at closing. {Amended Answer and Counterclaims dated July 31, 2008; R. 84-148}. Second, Sistrunk claimed that the appraisal was fraudulent. {*Id.*; R. 84-148}. Notably, Sistrunk admitted that Wells Fargo had no knowledge or participated in the alleged fraud. {Order Granting Partial Summary Judgment filed March 31, 2014; R. 40, 41, 42; Dep. of Dorothy Sistrunk at 214:16-23; 98:13-1, Wells Fargo’s Motion for Summary Judgment dated June 28, 2013, at Exhibit 1; R. 204}.

---

<sup>1</sup> Because the procedural history and facts of this matter overlap substantially, Wells Fargo combines the Statement of the Case and Statement of Facts to eliminate repetition in this brief and for ease of reference.

On June 28, 2013, Wells Fargo filed a motion for summary judgment seeking judgment on each of Sistrunk's counterclaims. {Motion for Summary Judgment dated June 28, 2013; R. 198-223}. After a hearing on the motion, the circuit court entered an order granting partial summary judgment, finding that no genuine issues of material fact existed, and Wells Fargo was entitled to judgment as a matter of law on each of Sistrunk's counterclaims. {Order Granting Partial Summary Judgment filed March 31, 2014; R. 39-45}. Sistrunk has not appealed the summary judgment order.

Sistrunk filed her first post-trial motion seeking reconsideration of the order granting partial summary judgment. {Motion styled as "Defendant Dorothy Sistrunk Objects to Order Granting Partial Summary Judgment, Due to the Plaintiff's Misstatement of Facts, Mischaracterization of Facts and in Some Instances Outright Lies" dated April 7, 2014; R. 1070-1123}. In that motion, Sistrunk again presented her fraud arguments. {Id.}. The circuit court construed the motion as a motion to alter or amend pursuant to Rule 59(e), SCRCP, and denied the motion. {Order Denying Motion to Alter or Amend filed April 11, 2014; R. 46}. Sistrunk did not appeal the order denying the April 7th Rule 59(e) motion. {Notice of Appeal dated July 30, 2014; R. 57}.<sup>2</sup>

Instead of filing an appeal, Sistrunk filed a second post-trial motion—a Rule 60(b), SCRCP, motion ("the Motion to Vacate")—with the circuit court on May 28, 2014. {Motion styled as Notice of Motion and Motion to Vacate [Well Fargo's] Partial Summary Judgment Order Pursuant to Rule 60(b), SCRCP for Extrinsic Fraud; R. 231-

---

<sup>2</sup> Sistrunk confirmed that she did not appeal the granting of partial summary judgment or the order denying the April 7th Rule 59(e), SCRCP, motion by letter to this Court dated September 22, 2014. {Letter dated September 22, 2014; R. \_\_\_\_ (Note: Sistrunk failed to include this letter in the Record on Appeal. The letter can be located in this Court's file)}.

237}. In the motion, Sistrunk made unsupported claims of fraud and bias by the circuit court judge and Wells Fargo's counsel. {Id.}.

Sistrunk also filed a third post-trial motion on June 9, 2014. {Motion styled as Notice of Motion and Motion for a New Trial; R. 238-244}. Sistrunk relied on Rules 38, 59, and 60 in the June 9th motion. {Id.; R. 238}. In that motion, Sistrunk sought a new trial, again based on the same unsupported allegations of bias and fraud by the circuit court and Wells Fargo's counsel. {Id.; R. 238-244}. The circuit court denied the May 28th and June 9th motions on July 17, 2014. {Order Denying Motion for New Trial and Motion to Vacate [Wells Fargo's] Partial Summary Judgment Order dated July 17, 2014; R. 48}.

Sistrunk filed a notice of appeal only as to the July 17th order denying the motion to vacate and June 9th new trial motion. {Notice of Appeal dated July 30, 2014; R. 57}. Via letter to this Court, Sistrunk confirmed that she limited her appeal to the denial of those motions in the July 17th Order. {Letter dated September 22, 2014; R. \_\_\_\_ (Note: Sistrunk failed to include this letter in the Record on Appeal. The letter can be located in this Court's file)}. Thus, this appeal does not concern the unappealed order granting partial summary judgment on each of Sistrunk's counterclaims or the Rule 59 Motion dated April 7, 2014.

## ARGUMENT

### **I. This Court should affirm because the circuit court properly denied Sistrunk's June 9th Motion for a New Trial.**

In her brief, Sistrunk claims the circuit court improperly denied her June 9th Motion for a New Trial without considering Sistrunk's allegations of fraud. {Initial App. Br. p. 43-44}. This argument lacks merit, and the circuit court properly denied Sistrunk's motion. This Court should affirm for three reasons. First, this Court lacks jurisdiction to consider the circuit court's denial of the June 9th motion for a new trial because it constituted an improper successive new trial motion that did not toll the time to appeal. Second, the June 9th motion for a new trial was untimely. Third, the evidence introduced to the circuit court established that Wells Fargo was entitled to judgment as a matter of law because no genuine issue of fact existed on the fraud and bias claims alleged by Sistrunk.

#### **a. This Court lacks jurisdiction to consider an appeal of the order denying June 9th motion because it was successive and did not toll the time for appeal.**

This Court lacks the jurisdiction necessary to address Sistrunk's appeal of the denial of her June 9th motion because that motion constituted a successive Rule 59, SCRPC, motion. Such a motion did not toll the time to appeal. Because Sistrunk failed to appeal from the order denying her initial Rule 59, SCRPC, motion in a timely fashion, her appeal of the second motion to reconsider must be dismissed.

Rule 203 of the South Carolina Appellate Court Rules controls the timely filing of a notice of appeal. The rule provides, in relevant part, as follows:

A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.

Rule 203(b)(1), SCACR (emphasis added). That rule allows the filing of a timely post-trial motion to toll the thirty-day time limit to file the notice of appeal. Id.

This Court and our Supreme Court have construed the tolling provision of this rule in the context of a party filing successive post-trial motions, which is the situation in this appeal. The filing of a successive post-trial motion does not toll the time to file an appeal under Rule 203 when the successive post-trial motion merely reargues the issues previously raised to the trial court in the initial post-trial motion.

This Court's precedent in Collins Music Co., Inc. v. IGT, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002), is analogous to this matter and establishes that Sistrunk's appeal is untimely.<sup>3</sup> In Collins Music, the jury returned a verdict in favor of the plaintiff. Id. at 560, 579 S.E.2d at 524. The defendant then timely filed written post-trial motions for JNOV, new trial, and new trial *nisi remittitur*. Id. at 560-61, 579 S.E.2d at 524. The trial court denied all of defendant's post-trial motions. Id. at 560, 579 S.E.2d at 524. The defendant did not appeal from that order. Instead, the defendant served a Rule 59(e), SCRCP, motion to alter or amend the judgment that was

---

<sup>3</sup> The South Carolina Supreme Court has followed the holding in Collins Music. See Elam v. South Carolina Department of Transportation, 361 S.C. 9, 14, 602 S.E.2d 772, 775 (2004); see also Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 28 n.3, 609 S.E.2d 506, 511 n.3 (2005) (acknowledging the rule regarding successive motions for reconsideration set forth in Coward Hund Constr. Co. v. Ball Corp., 336 S.C. 1, 4-6, 518 S.E.2d 56, 58-59 (Ct. App. 1999), and reaffirming the holding in Collins Music and Quality Trailer Prods., Inc. v. CSL Equip. Co., 349 S.C. 216, 219-21, 562 S.E.2d 615, 617-18 (2002)).

“virtually identical” to the initial post-trial motions. Id. at 563, 579 S.E.2d at 526. This Court held that the defendant’s Rule 59(e) motion only restated the same grounds and arguments previously presented to the trial court in the defendant’s prior post-trial motions. Id. at 565, 579 S.E.2d at 526-27.

This Court concluded that because the trial court denied the initial post-trial motions, the successive Rule 59(e) post-trial motion did not toll the time to file a notice of appeal. Id. at 566, 579 S.E.2d at 527. As a result, the time to appeal began from the date the defendant received written notice of the order denying its initial post-trial motions. Id. Consequently, this Court dismissed the appeal because the defendant failed to timely serve a notice of appeal from the denial of the initial post-trial motion. Id.

This is precisely what Sistrunk did in this matter. Sistrunk filed her first post-trial motion seeking reconsideration of the order granting partial summary judgment on April 7, 2014. The circuit court construed the motion as a motion to alter or amend pursuant to Rule 59(e), and denied the motion on April 11, 2014. Sistrunk did not appeal that denial. Instead, Sistrunk filed a successive post-trial motion on June 9, 2014, pursuant to Rule 59. The June 9th motion reargued the same grounds—unsupported allegations of fraud—that were presented in her initial new trial motion. Sistrunk did not file and serve her notice of appeal until July 30, 2014.

As a result, the successive June 9th motion did not toll the time limits for Sistrunk to file a notice of appeal. The circuit court denied Sistrunk’s initial post-trial motion on April 7, 2014. Sistrunk did not serve her notice of appeal until July 30,

2014. Thus, Sistrunk's appeal is untimely, and this Court lacks jurisdiction over the appeal of her motion to reconsider.

**b. The circuit court properly denied the June 9th Motion for a New Trial because it was untimely.**

Even if this Court has jurisdiction to consider the appeal from the June 9th motion for a new trial, this Court should affirm because the circuit court properly denied the motion because it was untimely. Rule 59 sets forth the deadline to file a motion for a new trial and requires the moving party to file such a motion "not later than 10 days after the receipt of written notice of the entry of the judgment or of the filing of an order disposing of the action . . . ." Rule 59(b), SCRCP. Sistrunk failed to file her June 7th motion for a new trial within this deadline.

The circuit court entered the order granting partial summary judgment on March 31, 2014. {Order Granting Motion for Partial Summary Judgment; R. 39-45}. Wells Fargo served the order on Sistrunk that same day. {Letter dated March 31, 2014, serving Order Granting Motion for Partial Summary Judgment on Sistrunk; R. Appendix p: 47}. Sistrunk filed her motion for a new trial on June 9, 2014.<sup>4</sup> {Motion styled as Notice of Motion and Motion for a New Trial; R. 238-244}. Even allowing for mailing days, the June 9th motion for a New Trial was untimely pursuant to Rule 59, SCRCP. Therefore, the circuit court correctly denied the motion, and this Court should affirm.

---

<sup>4</sup> Sistrunk only appealed the denial of this June 9th motion for a new trial. Sistrunk did not appeal the April 7th motion that the circuit court construed as a motion for a new trial under Rule 59.

- c. **Even if Sistrunk's appeal of the denial of the June 9th motion were properly before this Court, the circuit court correctly denied the motion.**

Throughout the six years of litigation Sistrunk consistently made allegations to the circuit court of alleged fraud of Wells Fargo's counsel and bias of the circuit court. The circuit court considered and rejected Sistrunk's arguments in granting Wells Fargo's motion for summary judgment as to the counterclaims. Specifically, the circuit court stated that it considered "the pleadings, the parties' written submissions, and oral argument of the parties." {Order Granting Motion for Partial Summary Judgment (emphasis added); R. 39-45}. Sistrunk again raised that issue in both Rule 59 motions. However, Sistrunk did not raise any new arguments in those motions, present any new evidence, and was not denied an opportunity to be heard on that issue. Therefore, Sistrunk's June 9th motion was not sufficient to set aside the order granting summary judgment.

Moreover, Sistrunk has presented no evidence of Wells Fargo's counsel's alleged fraud or the circuit court's bias other than speculation and conjecture on her part. Thus, the circuit court properly denied the June 9th motion, and this Court should affirm.

**II. This Court should affirm because the circuit correctly denied Sistrunk's Rule 60(b), SCRCP, motion to vacate.**

In the motion dated May 28, 2015, Sistrunk also sought relief based on fraud upon the court because of the alleged bias and fraud of the circuit court and Wells Fargo's counsel. Sistrunk's argument lacks merit as follows. First, Sistrunk improperly sought relief via a Rule 60(b) motion rather than initiating an appeal from

the circuit court's order granting summary judgment. Second, Rule 60(b) does not allow the relief sought by Sistrunk. Third, Sistrunk failed to carry her burden under Rule 60(b). Fourth, Sistrunk failed to establish the existence of a meritorious defense.

- a. **This Court should affirm because Rule 60(b), SCRPC, cannot be used as a substitute to an appeal of an adverse order.**

Well-settled South Carolina law does not allow a party to pursue relief under Rule 60(b) in lieu of an appeal. See, e.g., Sadisco of Greenville, Inc. v. Greenville Cnty. Bd. of Zoning Appeals, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000) (stating that Rule 60(b) is not a substitute for a timely appeal, and the filing of a Rule 60(b) motion cannot extend the time in which an appeal must be filed for the underlying action); Tench v. S.C. Dep't of Educ., 347 S.C. 117, 121, 553 S.E.2d 451, 453 (2001) (“A party may not invoke [Rule 60(b)] where it could have pursued the issue on appeal.”).

Sistrunk's counterclaims against Wells Fargo were based on the alleged fraud of the seller and appraiser. Wells Fargo moved for summary judgment on all counterclaims, and on March 31, 2014, the circuit court granted summary judgment to Wells Fargo on the counterclaims.

Sistrunk did not appeal that adverse summary judgment order. Instead, she filed two Rule 59 motions and a Rule 60(b) motion. In the Rule 60(b) motion, Sistrunk improperly alleged that Wells Fargo obtained summary judgment through use of fraudulent filings and motions. {Sistrunk's Statement of Facts related to Rule 60 motion; R. 309-11}. In support of her claim, Sistrunk relied on the same filings that she submitted in response to Wells Fargo's motion for summary judgment and in

support of her counterclaims. {Id.} The circuit court previously considered and rejected such claims. As a result, Sistrunk's Rule 60 motion constituted an improper attempt to seek review of an adverse order.

Here, the circuit court granted Wells Fargo's motion for summary judgment on Sistrunk's counterclaims. At that time, Sistrunk should have pursued relief from the adverse judgment on the fraud counterclaims by initiating an appeal to this Court. Sistrunk failed to do so.<sup>5</sup> Instead, she filed a Rule 60(b) motion to challenge the circuit court's ruling on the fraud, which constituted an improper Rule 60(b) motion. Therefore, the circuit court properly denied the motion. This Court should affirm.

**b. This Court should affirm because Rule 60(b), SCRPC, does not allow for the relief sought by Sistrunk.**

Sistrunk's Rule 60(b) motion seeks relief based on alleged intrinsic fraud rather than extrinsic fraud. Rule 60(b) does not allow for relief based on intrinsic fraud. Thus, the circuit court properly denied the motion. This Court should affirm.

South Carolina only allows for relief under Rule 60(b) for extrinsic fraud. See Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 20, 594 S.E.2d 478, 483 (2004); Gainey v. Gainey, 382 S.C. 414, 425, 675 S.E.2d 792, 798 (Ct. App. 2009). "Extrinsic fraud is fraud that induces a person not to present a case or deprives a person of the opportunity to be heard." Raby Constr., 358 S.C. at 20, 594 S.E.2d at 483 (quoting Chewning v. Ford Motor Co., 354 S.C. 72, 80, 579 S.E.2d 605, 609 (2003)). On the other hand, intrinsic fraud is distinguished from extrinsic fraud in that intrinsic fraud "is fraud which misleads a court in determining issues and induces the court to find for the party

---

<sup>5</sup> Sistrunk confirmed that she did not appeal the granting of partial summary judgment or the order denying the April 7th Rule 59(e) motion by letter to this Court dated September 22, 2014. {Letter dated September 22, 2014}.

perpetrating the fraud.” Id. “The classic case of intrinsic fraud is perjured testimony or presenting forged documents at trial.” Id.

In South Carolina, “a party may not prevail on a Rule 60(b)(3) motion on the basis of fraud where he or she has access to disputed information or has knowledge of inaccuracies in an opponent’s representations at the time of the alleged misconduct.” Id. at 21, 594 S.E.2d at 484. Intrinsic fraud “should be discovered during the litigation itself, and to permit such relief undermines the stability of all judgments.” Id. at 20, 594 S.E.2d at 483 (quoting Mr. G v. Mrs. G, 320 S.C. 305, 308, 465 S.E.2d 101, 103 (Ct. App. 1995)).

In Bankers Trust Co. v. Braten, 317 S.C. 547, 455 S.E.2d 199 (Ct. App. 1995), the defendant sought to avoid enforcement of a judgment by alleging that extrinsic fraud by an attorney was used to procure the judgment. Id. at 550, 455 S.E.2d at 200. Specifically, the defendant claimed that the plaintiff’s counsel fraudulently misrepresented that all of the defendant’s causes of action had been dismissed when they had not. Id. at 550-51, 455 S.E.2d at 200. On appeal, this Court stated that “[e]xtrinsic fraud is ‘collateral or external to the matter tried such as misleading acts which prevent the movant from presenting all of his case.’” Id. at 550, 455 S.E.2d at 200-01 (quoting Evans v. Gunter, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (Ct. App. 1988)). The court concluded that “perjured testimony is the ‘classic’ example of intrinsic fraud because the materiality of the testimony, and opportunity to attack it, was open at trial.” Id. at 551, 455 S.E.2d at 201. The court reasoned that because the defendant had ample opportunity to bring attention to any misstatements or fraudulent representations made by the plaintiff’s counsel, no evidence was present that

the alleged fraud prevented the defendant from presenting his case in full. Id. at 551-52, 455 S.E.2d 201-02.

Based on the above, fraud cannot be extrinsic unless it deprived the party of the right to be heard. Sistrunk failed to prove this requirement. Sistrunk continually raised the issue of fraud to the circuit court. At some point during the pendency of this action Sistrunk alleged fraud by the seller, the appraiser, the mortgage broker, the closing attorney, various representatives of Wells Fargo, counsel for Wells Fargo, and the presiding circuit court judge.<sup>6</sup> Such allegations established that Sistrunk's motion was based on unsupported allegations of intrinsic fraud, which are not sufficient for relief under Rule 60(b). Thus, Sistrunk was not deprived of the opportunity to be heard on her unsupported claims of fraud.

Further, fraud upon the court requires more than just a misrepresentation; there must be intent to deceive. To establish fraud upon the court a party must provide:

[A] showing that one has acted with an intent to deceive or defraud the court. A proper balance between the interests of finality on the one hand and allowing relief due to inequitable conduct on the other makes it essential that there be a showing of conscious wrongdoing—what can properly be characterized as a deliberate scheme to defraud—before relief from a final judgment is appropriate . . . . Thus, when there is no intent to deceive, the fact that misrepresentations were made to a court is not of itself sufficient basis for setting aside a judgment for 'fraud on the court.

Chewning, 354 S.C. at 78-79, 579 S.E.2d at 608-09 (internal quotations omitted). To prove extrinsic fraud, the Defendant must do so by "clear and convincing evidence."

---

<sup>6</sup> Sistrunk's allegation of judicial bias is simply without merit. "Adverse rulings, even if erroneous, are insufficient to establish a trial judge's bias or prejudice." Reading v. Ball, 291 S.C. 492, 494, 354 S.E.2d 397, 398 (Ct. App. 1987).

Id. at 86, 579 S.E.2d at 612. Here, Sistrunk has provided no evidence of intent to defraud or of judicial bias. Therefore, the circuit court properly denied the motion, and this Court should affirm.

- c. **This Court should affirm because Sistrunk failed to carry her burden for Rule 60(b), SCRPC, relief for her failure to present evidence to support her claims of fraud on the court.**

“A party making a motion under Rule 60(b) has the burden of presenting evidence proving the facts essential to entitle [them] to relief.” Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991) (emphasis added). Further, a party seeking to set aside a judgment under Rule 60(b)(3) has the burden of presenting sufficient evidence of the extrinsic fraud and fraudulent intent thereby entitling him to the requested relief. Perry v. Heirs at Law of Gadsden, 357 S.C. 42, 46-47, 590 S.E.2d 502, 504 (Ct. App. 2003). To prove extrinsic fraud, the Defendant must do so by “clear and convincing evidence.” Chewning, 354 S.C. at 86, 579 S.E.2d at 612.

The record is devoid of any evidence to suggest, much less prove, that Wells Fargo or officers of the court engaged in fraud or that the Court did not consider everything in the record prior to issuing its summary judgment order. Moreover, there is no evidence that Wells Fargo or officers of the court intended to deceive Sistrunk. Sistrunk failed to present any of the required evidence for her all-encompassing fraud allegations. Instead, Sistrunk relies solely on her own incorrect and inflammatory allegations. Therefore, the circuit court correctly denied Sistrunk’s motion. This Court should affirm.

**d. This Court should affirm because Sistrunk failed to establish the existence of a meritorious defense.**

The party seeking to set aside a judgment under Rule 60(b), SCRPC, must make a showing of a meritorious defense, and “[a] party making a motion under Rule 60(b) has the burden of presenting evidence proving the facts essential to entitle [them] to relief.” Bowers, 304 S.C. at 67, 403 S.E.2d at 129 (emphasis added) (refusing to set aside a judgment under Rule 60(b)(3) for the moving party’s failure to present evidence to support a finding of a meritorious defense).

Sistrunk failed to introduce any evidence of a valid, meritorious defense. Sistrunk presented no evidence in opposition to Wells Fargo’s motion for summary judgment, nor did she present any evidence in support of her Rule 60(b) motion. Instead, Sistrunk continued to rely solely on her own incorrect, unsupported, and inflammatory allegations. Therefore, the circuit court correctly denied Sistrunk’s motion. This Court should affirm.

**Conclusion**

Based on the foregoing, this Court should affirm the July 11, 2014 order of the circuit court denying Sistrunk’s motions.

{Signature Page Follows}

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Michael J. Anzelmo

SC Bar No. 72933

E-Mail: michael.anzelmo@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, South Carolina 29201

803.799.2000

Elizabeth Scott Moïse

SC Bar No. 012945

E-Mail: scott.moise@nelsonmullins.com

151 Meeting Street / Sixth Floor

Post Office Box 1806 (29402-1806)

Charleston, South Carolina 29401-2239

Attorneys for Wells Fargo Bank, N.A.

Columbia, South Carolina

January 20, 2015

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

**RECEIVED**

JAN 20 2016

APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas

**SC Court of Appeals**

Diane S. Goodstein, Circuit Court Judge

Case No. 2008-CP-38-1024

Appellate Case No. 2014-001683

Wells Fargo Bank, N.A., ..... Respondent,

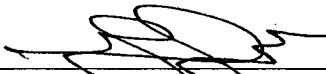
v.

Dorothy Sistrunk, ..... Appellant.

**CERTIFICATE OF COUNSEL**

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Michael J. Anzelmo  
SC Bar No. 72933  
E-Mail: michael.anzelmo@nelsonmullins.com  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, South Carolina 29201  
803.799.2000

Elizabeth Scott Moise  
SC Bar No. 012945  
E-Mail: scott.moise@nelsonmullins.com  
151 Meeting Street / Sixth Floor  
Post Office Box 1806 (29402-1806)  
Charleston, South Carolina 29401-2239

Attorneys for Wells Fargo Bank, N.A.

January 20, 2015

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

**RECEIVED**

JAN 20 2016

APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas

**SC Court of Appeals**

Diane S. Goodstein, Circuit Court Judge

Case No. 2008-CP-38-1024  
Appellate Case No. 2014-001683

Wells Fargo Bank, N.A., ..... Respondent,

v.

Dorothy Sistrunk, ..... Appellant.

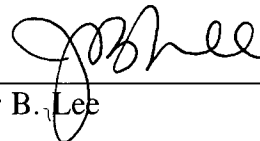
**Proof of Service**

I, the undersigned administrative assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent Wells Fargo Bank, N.A., do hereby certify that I have served all parties in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by certified United States Mail, return receipt requested, postage prepaid, to the following address(es):

Pleadings: **Final Brief of Repondent**

Party Served:

*pro se* Defendant  
Ms. Dorothy Sistrunk  
423 Bayne Street  
Orangeburg, SC 29115



\_\_\_\_\_  
Jennifer B. Lee

1-20, 2016