THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

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APPEALS FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable James E. Chellis
Master of Equity

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Appellate Case No. 2014-002633

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Stephen Dudek, Doreen Cross, Respondents,

v.

Thomas M. Ferro and Lorraine B. Ferro, Appellants.

And

Molly M. Morphew, Appellant,

v.

Stephen Dudek, Doreen Cross, Thomas Ferro and Lorraine Ferro, Defendants,

Of whom Stephen Dudek and Doreen Cross are Respondents.

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# APPELLANT'S FINAL REPLY BRIEF

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## I. FACTS

Without restating the all facts and arguments which have been thoroughly set forth in their opening brief, the Appellants offer the following facts with arguments for clarification in regards to the Respondents Reply Brief, and specifically to the question in fact of the Respondents failure to obtain financing per said Contract, which led to their failure to close escrow, and whether these breach of contract failures are excusable.

1. Respondents agreed to the Time Is of the Essence Contract date with the understanding the Ferros gave them a $27,000 discount on the purchase price to close quickly[1]. Respondents agreed to this but still failed to recognize the Time is of the Essence contingency by refusing to comply with their contract terms.

2. Respondents entered into a Time is of the Essence Contract with the Appellants Ferro on October 24th, 2012. Respondents were, by law, required to apply for lending[2] within 10 days of contract ratification per said contract terms. That date was on or before November 3, 2012. They refused to comply. But instead purposefully waited until December 5th, after the Home Inspection[3], then for a Structural Inspection[4] [contingency not included in said contract], then for the Structural Engineer's report to come back[5] [also see arguments provided in Appellants Initial Brief].

3. Respondents were required to obtain "**satisfactory**" loan approval [not to be confused with "unconditional" loan approval] and provide such in writing to the Appellants

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[1] R. pg 135 lines 8-21.

[2] FDIC Regulation B (Equal Opportunity Act) defines a loan application as: "… an oral or written request for an extension of credit that is made in accordance with the **procedures established** by a creditor for the type of credit requested (12 C.F.R. § 202.5(f) ). (Emphasis added.)

[3] R. pg. 361 - e-mail dated Oct. 24, 2012 10:59am, Respondent Cross to Allison Williams (First Federal Lending Officer)

[4] R. pg. 123 line 17 – pg. 125 line 18.

[5] R. pg. 123 line 17 – pg. 125 line 18.

Ferro within 20 days of contract ratification. That date was on or before November 13th, 2012. They refused to comply by not performing #2 contingency above.

4. When Respondents finally made application via telephone on December 5th, 2012, they were requested to sign and return the e-mailed application and all banking disclosure within 48 hours in order to meet the estimated closing date of <u>January 4, 2013</u>[6]. The Respondents signed said application and documents <u>5</u> days later, on12-10-12. First Federal received the required documents on December 11th, 2012[7]. The Respondents failed to observe their Time is of the Essence contingency by not returning all documents to their lender as requested and in a timely fashion per the financing contingency of said Contract.

5. The Respondents [Stephen Dudek and Doreen Cross] had their application for financing declined due to their failure to complete their application (R. pg. 295 -letter of declination from FF dated 1-31-13; R. pg. 278 -Memos for Loan entry dated 1-23-13 10:40am "MARGIE: PLR; FILE TO 2ND REV—SINGLE FEMALE[8] **DECLINE FOR INCOMP APP**.") The Appellants argue the Respondents application was never accepted by First Federal because it was incomplete. "When a bank receives an incomplete application, it may send one of two alternative notifications to the applicant. One is a notice of adverse action; the other is a notice of incompleteness. The notice of incompleteness must be in writing and must specify the information the bank needs **if it is to <u>consider</u> the application.** It must also provide a reasonable period of time for the applicant to furnish the

[6] R. pg. 308- Customer Loan Application Checklist dated December 5, 2012.
[7] R. pg. 278 & pg. 326- Memos for Loan entries 12/11/12 and Underwriting Approval Conditions entries dated 12/11/12.
[8] Appellant Morphew points out that the Respondent Cross is not single. She is currently married to Wayne Cross. Also note that the State of South Carolina does not recognize "legal separation". http://www.scbar.org/publicservices/lawline/legalseparation.

missing information." Equal Credit Opportunity Act (ECOA) of 1974, Reg. B § 202.9(c). The 10-day notice letter specifically called out the fact that the Respondents were told the day they made application they were to provide a Contract Extension within 10 days of application. "*We* [First Federal] *must receive all the above documentation* [signed Contract Extension and verbal verification of employment] *within 10 days from the date of this letter. Otherwise, First Federal will regrettably be unable to give further consideration to your credit request* [financing request] *and any interest rate lock agreements*[9]." Appellants argue that the Respondents' application was never completed. So how could the financing per contract have been "approved"? Therefore, the Appellants question the legal applicability of the approval letter produced by FF on December 12th. They also question the integrity of the Respondents claim that they "*have complied with all terms of the contract and remain ready, willing and able to comply with the contract terms*"[10], "*have repeatedly demanded to close the transaction* [though no closing date ever set] *but have been unable to due to the refusal of the Appellants Ferro*[11]".

6. The Respondents were contractually required to close escrow on or before the Contract date of November 30, 2012. Because they refused to comply with their financing contingencies -- instead chose to wait until after their home inspection and repair negotiations—they, by their own hand, made it impossible to perform their own closing of escrow contingency.

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[9] R. pg. 301- 10-day Notice letter dated 1-3-13.
[10] R. pg. 21 - Respondents Complaint, paragraph 16.
[11] R. pg. 21- Respondents Complaint, paragraph 7.

By the facts presented in paragraphs 1-5 above, it wouldn't have mattered if the Ferros completed all agreed-to repairs within a week of receiving the repair list (by 11-11-12) and had a CL-100 report weeks earlier than the contract called for, the Respondents still wanted satisfaction of the structural integrity of the house. For one, the completion of the repairs and the CL-100 had absolutely no bearing on the Respondents meeting their application obligation at that point of the process, and two, the Respondents still had decided they were going to wait until their structural engineers report came back before committing to purchase[12] . Unfortunately, the Respondent's Time is of the Essence Contract did not afford them that luxury to wait until they decided to fully commit to start their financing process (i.e., "apply"). **Note:** Most real estate contracts, regardless of the Time is of the Essence contingency, do not allow for the buyers to hold off on their financing until all inspections are approved and all repairs are completed and approved by the buyers (unless this verbiage is specifically spelled out in the contract). If it was the case, this action would make home Sellers at the complete mercy of every buyer.

The Appellants argue the trial court erred by lawfully excusing the Respondents intentional and serious material breach of contract.

7. Respondents had a Home Inspection Contingency. Under this Contingency, there was an expiration date [of 11-20-12] to perform all Buyer inspections[13]. Respondents were required to properly ask for an extension to this contingency if they weren't sold on the structural integrity as they so claimed. If the Inspection Period specified in the Sale

[12] R. pg. 124 and pg. 125 line 18; R. pg. 127 line 19 – pg. 130 line 14.
[13] R. pg. 229 - Respondents Contract, paragraph 19(B).

Agreement is not properly extended, Buyer's failure to provide written disapproval of Buyer's Home Inspection report(s) by midnight on the last day of the Inspection Period could be deemed acceptance of the condition of the Property. Respondents did not exercise their rights under this contingency, therefore they waived their right to use this contingency to back out of their obligation **to close escrow** [not to be confused with their "financing obligation"] and retain their earnest money. Also, per said Contract, paragraph 19(H), the sellers were under no obligation to make repairs under any circumstances until proof of lending."

8. The trial court concluded that the Appellants Ferro are in default of said contract for 3 reasons [**Appellants argument in **bold**]: (1) the detailed list of repairs [the Ferros agreed to perform] violated the Ferros obligation to deal in good faith and fairly with the Respondents by failing to address each item of critical concern and hindered the Respondents to evaluate facts in regards to their due diligence. **The Appellants dispute that the said Contract does not call out for a specific format when answering the request for repairs, therefore how can this opinion place a label, such as "lack of good faith" or "unfair dealing", on the Appellants Ferro, when the Ferros were honestly responding as clear and precise as they knew how. The Appellants Ferro initially answered within 48 hours of receiving said request. They immediately answered their clarification requests. The Appellants Ferro stated specifically what they were willing to perform. Also, testimony of Susan Nicholson admits that the list was specific and the only issue was that the e-mail didn't have the Appellants Ferro signature on it. Rick Willis then sent another version, with the list copied into the body of his e-mail, but the**

**Respondents were still not satisfied because there was no [Ferro] signature on it,[14] though the e-mail clearly was from Appellant Thomas Ferro[15]. The Appellants would like to point out that they were still going back and forth in repair negotiations at this time, so a signature should not have been the issue. Ms. Nicholson even testifies that the Ferros were already making the repairs before she had a chance to provide the Respondents with the Ferro's list[16]. If that isn't clearly showing good faith and fair dealing - AND intent to close from the Ferros, then what is??..** (2) The Appellants Ferro failed to provide an approved subdivision plat until effectively four days prior to the November 30th contract date. ***The trial court erred in its observation that it was only 4 days prior to Contract end when the Appellants Ferro gave the Respondents the recorded plat, when in actuality it was 8 days prior to the Contract end date when the Respondents received it[17]. The Appellants Ferro and the Respondents staked out the land for the surveyor the day the Contract was signed (Oct. 24th). The survey was performed on Oct. 25th. At that point it was out of Appellants Ferros' hands. The plat was recorded on November 20th (Plaintiff Ex. 6). The Appellants Ferro received it and forwarded it to their agent on November 21st. Rick Willis forwarded it to Susan Nicholson on November 22nd and again on the 23rd. Susan Nicholson forwarded it to the Respondents on Friday November 23rd. First Federal received it from the Respondents on Monday, November 26th. By reviewing the Ferros actions and their applicable dates, the Appellants Ferro demonstrated their Time is of the Essence**

[14] R. pg. 211 line 6 - 18. (SN)
[15] R. pg. 347- E-mail from Rick Willis to Susan Nicholson dated 11-12-12 6:48am.
[16] Transcript. pg. 274 line 8 thru 16.
[17] R. pg. 350- E-mail from Susan Nicholson to Rick Willis dated 11-28-12 1:18pm.

**contingency, and contrary to the trial court's findings, had not "failed" in any sense of the word. The Ferros worked as quickly and diligently as possible to perform their Contract contingency in order to comply with their closing of escrow. (But again, this contingency did not waive the Respondents obligation to apply [not to be confused with "obtain"] for financing per Contract). Though the Respondents received the recorded plat they so vehemently (and falsely) stated was holding their loan process up, the Respondents STILL did not immediately go out and apply for their financing[18]— though she reversed her testimony during cross examination by her lawyer[19]. Instead the Respondents waited 13 more days from the date they received the recorded plat to make initial application for their financing.[20] Note: the Respondents waited 42 days after contract ratification to apply for financing on a Time is of the Essence Contract. Appellants argue that these actions from the Respondents indisputably again demonstrated their failure to observe their Time is of the Essence contingency, and to show fair and faithful dealing towards the Ferros.** (3) The Appellants Ferro utter failure to provide a timely "clear" CL-100. **Appellants contend that the said Contract did not contain a legal requirement for the Appellants Ferro to provide a "clear" CL-100, but instead the Contract called for the Ferros to obtain [not to be confused with "provide"] a CL-100 on or before November 30th. The Appellants Ferro performed this contingency per Contract and are not in default. If there was an issue that the Respondents wanted or needed the CL-100 sooner than the Contract required they**

[18] R. pg. 104 lines 22-25.
[19] R. pg. 120 lines 8-15.
[20] R. pg. 124 lines 17-25.

**should have addressed it as such. The Appellants Ferro state they never received a request to obtain the report any sooner, never received an Contract Amendment to change the CL-100 date, and the first time that the Respondents even mentioned the Cl-100 to them was on November 28th [in response to an e-mail sent by Charlene Willis (wife of Sellers agent) dated 11-26-12 to Susan Nicholson informing her of the CL-100 inspection date]. There was no sense of urgency from the Respondents on the 28th when her only question was, "...did you get anything back on the CL100.....?". (R. pg. 350- E-mail from Susan to Rick Willis dated 11-28-12 3:18pm). The Appellants Ferro re-confirm that the Respondents never mentioned the CL-100 to them or that it was a critical item that was a "deal breaker". The only time the Respondents listed the CL-100 [besides in the Contract] was on the condensed critical repair list they sent to the Appellants Ferro on 11-27-12, which stated, "*CL-100: Seller to have licensed pest company to perform the CL-100 with moisture readings. THIS NEEDS TO BE DONE PER OUR CONTRACT*."[21]**

**As for the clearing of the CL-100, though Rick Willis and Appellants Ferro agreed to pay for the CL-100 clearance inspection (R. pg. 204 lines 9-11), Ms. Nicholson testified that she had been tasked to arrange her client's contractor to come back to inspect, which she tried to do but was afraid if she scheduled it she would be left holding the bill. Ms. Nicholson testified that she "*sent an e-mail to Mr. Vasco [contractor] and gave him their [Sellers] contact information because everything had to be through the Ferros in order to get access to the property and appointments confirmed.***

[21] R. pg. 351-E-mail from Susan Nicholson to Rick Willis dated 11-27-13 12:56pm; R. pg. 256, Paragraph H.

***Again, I didn't want to be the one that actually set it up because I didn't want to be held to pay if nobody paid, which was an agreement that Mr. Willis and Mr. Ferro decided on*"** **(R. pg. 204 lines 16-22 and pg. 300 line 24 thru pg. 301 line 6). Ms. Nicholson also testified that she "*left it up to the contractor to call him* [Ferro]...." (R. pg. 205, lines 14-15). The Appellants Ferro had clearly understood they were not required to clear the CL-100 only they agreed to pay for it to be cleared, so how could the Appellants be held liable to the Respondents failure to clear the CL-100 as agreed upon?**

**Ms. Nicholson admits that it was her responsibility to change the date required of the Sellers to obtain a CL-100, to give her clients more time by stating, "*Well, it depends. On this particular deal because they changed the date, we [herself/Cross/Dudek] probably should have changed the date on the Cl-100 to bump that up as well to give us plenty of time*" (R. Amended pg. lines 16-19). The Appellants argue that they complied per contract, and cannot be held liable that the Respondents didn't get the CL-100 earlier. The Respondents set the date in said Contract, and they were the ones responsible to communicate if they needed the CL-100 earlier per contract terms.**

The trial court found these 3 failures hindered the ability of the Respondents to complete their evaluation of the property as the Contract provides. Therefore, trial court found the Appellants Ferro's failures excuse the obligation of the Respondents to close escrow on or before November 30th, 2012, and found Appellants Ferro in default per these reason stated above. **Appellants dispute any failings by the Appellants Ferro [as factually evidenced above], therefore the Appellants are not in default. The Respondents refused to apply and obtain financing on or before November 30th, that is why they failed to close escrow on or before November 30th, 2012, therefore the**

**Appellants compel the Appellate Court to reverse the trial courts order to excuse the Respondents obligation to close escrow on or before November 30th, 2012.**

9. The Appellants Ferro had every intent to close with the Respondents. The Appellants Ferro have never refused to close escrow with Respondents because a closing date was never offered/scheduled for them to refuse.

The Ferros had completed their move to Kentucky and started construction on a new home and "really needed to close"[22]. Appellants Ferro maintain that, if the Appellants Ferro had no intention to close as the trial court concluded,[23] then why didn't the Appellants Ferro cancel the Contract when the Respondents failed to give them proof of lending per contract. And when the Respondents gave the Ferros a 2 ½ page list of repair requests and continued to go back and forth, seemingly never satisfied, the Appellants Ferro didn't terminate but continued to make repairs though they were under no contractual obligation to do so (per Paragraph 19(H) of said Contract). And when the Respondents didn't close escrow per their Contract, Appellants Ferro didn't cancel but instead agreed to the Time Is of the Essence "no fault" extension clause the Respondents stated they were automatically entitled to. Appellants Ferro allowed this even though they felt the Respondents weren't going to close since they hadn't heard from them in several days, despite several attempts to get in touch with them[24]. Appellant Thomas Ferro even stated to Ms. Nicholson on December 3rd that he felt that the Respondents weren't going to close[25]. It wasn't until the second closing expiration date came and went without any correspondence/communication from the

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[22] R. pg. 142-145 (**TR**)

[23] R. pg. 1- Trial Court Order, Findings of Fact para. 25 "The Court finds Defendants Ferro acted without intent to fulfill the contract according to its plain terms."

[24] R. pg. 142 lines 20-25 (**TF**)

[25] R. pg. 219 lines 21-24 (**SN**)

Respondents in regards to a closing date that Appellants Ferro submitted the cancellation request. **Note**: even when the Respondents received the cancellation request they did not provide a closing date, but only placed blame and threatened legal action. This did nothing to relieve the already nervous tension of the Appellants Ferro.

And just as importantly at this time, the Respondents failed to mention a critical material fact…that the Extension Addendum was [the only document] First Federal required to accept their initial financing request and to move forward on the lending process[26]. They did not require a CL-100 or a "cleared" CL-100 as the Respondents keep falsely representing. Neither were the repair receipts required by FF as the Respondents again falsely claimed[27] . **Note**: there is not one piece of FF documentation that even mentions the CL-100 or a cleared CL-100 except for in the questions that Ms. Cross submitted to FF on February 13, 2013[28] to complete at the request of her attorney[29]; which FF specifically answered the question "*Were there any CL-100 issues mentioned on the December 12th approval letter*?" The answer was "NO".

10. The Respondents Contract is not a Repair Contingency Contract, but the Respondents actions demonstrated they were treating it as such. The Respondents further attempted to have the Ferros sign a Repair Addendum on November 30th, which would have converted the said Contract to a Repair Addendum Contract. Note that on December 20th, 2012 the unsigned Repair Addendum somehow "appeared" in the Underwriter's file. FF noted that "this document was not in the original submission", and then noted they were

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[26] First Federal from here on out will be substituted as "FF".
[27] R. pg. 338, sp. Cross/Dudek questions to FF.
[28] R. pg. 338.
[29] R. pg. 116 lines 18-22.

now requiring all the repair receipts (R. pg. 326- Underwriting notes, entry dated 12/20/12), but obviously sometime afterwards that requirement was removed when the reviewer realized the Addendum was not signed by the Sellers.

11. Respondents did not disclose to the Ferros over 2 years ago [nor at the trial] that the Extension Addendum was REQUIRED by FF in order for the Respondents to obtain financing on said Contract[30], but on the contrary at the trial proceedings, the Respondents gave false representation by attesting the Extension Addendum wasn't needed,[31] when Respondent Cross knew full well that it was critical, and knew full well it was the reason her financing was denied.[32]

- ATTORNEY MASSALON: If you were ready to go on the 14th, do you know why the extension was requested?
- DOREEN CROSS: It was requested because Mr. Willis suggested it to Ms. Nicholson.
- ATTORNEY MASSALON: But you all didn't need it [because you were all ready to go on the 14th]?
- DOREEN CROSS: Obviously not.

Instead Respondent Cross gave specific direction to FF NOT to answer any of the financing questions the Appellants Ferro agent had been asking [1-18-13) but to refer him to her attorney[33]. Furthermore, the Respondents refused to answer any of the specific

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[30] FF issued a requirement for a "signed Contract Extension" at the time of Respondent's request for financing on December 5, 2012, with an anticipated closing date of 1/4/2013. Allison Williams asked Cross again for it on 12-12-12 and FF sent a 10-day notice asking Respondents for it again (R. pg. 308. Customer Loan Application Checklist 12-5-12; R. pg. 278- Memo for Loan entry dated 12-12-12 10:56am; R. pg. 301- 10-day notice letter dated 1-3-13.)

[31] R. pg. 111 line 24 thru pg. 112 line 14.

[32] R. pg. 308- Customer Loan Application Checklist dated 12-5-12; R. pg. 301- 10-day letter dated January 3, 2013; R. pg. 295 – 300- Letter of Credit Denial dated 1-31-13 due to incomplete application.

[33] R. pg. 309- E-mail dated January 30th 9:18am between Respondent Cross and Kay Rode, First Federals Mortgage Processing Team Leader.

financing questions the Appellants Ferro pointedly asked for on the Appellants Ferro Answer to the Respondents Complaint. Instead the Respondents stood by their initial claims in their Complaint that they had obtained [which would mean they had "applied" for] lending, had complied with their contract contingencies per Contract terms, and were still able to close on said Contract. **Note**: at the time, the Respondents financing has been denied and their contract no longer valid, therefore they were not "able" to perform on said Contract but still continued their lawsuit against the Ferros. Appellants argue that the contract is not enforceable and has not been enforceable since 2012, and compel the court to reverse the trial courts Conclusion of Law that the Respondents contract is valid.

12. The Extension Addendum was never provided to FF by the Respondents. The said Contract had expired, and the only way to move forward on the financing request was to obtain a signed Extension Addendum[34]. Furthermore, the Respondents failed to answer FF's 10-day letter requesting (for the 3rd time) a signed Extension Addendum and FF declined the Respondents' financing. Separate written notices were sent to both Doreen Cross and Stephen Dudek. This declination legally made the Respondents' expired Contract invalid, therefore unenforceable. The Respondents failure to answer a notice from their lender displays bad faith and unfair dealings and is considered a default under the Respondents financing contingency. "*Buyer also agrees to provide all documents or information requested by the lending company in a prompt and timely manner.*" (R. pg. 229, paragraph 8)

[34] R. pg. 181 lines 1-6. (**AW**)

13. The trial court concluded that the Respondents acted in good faith to consummate the sale and that the Appellants Ferro's acts and omissions demonstrated unfair dealing. The Appellants argue to the contrary. As demonstrated and substantiated with considerable material evidence and law, it was the Respondents who acted unfairly and unfaithfully. And it was the Respondents, not the Appellants, who omitted critical material facts which caused the said Contract to not close escrow per its terms.

As to the Respondents statement that after the trial court Order, the Ferros did not transfer ownership and have allowed Morphew to move into the home, Appellant Morphew contends that she did not move in after the Order but had been already occupying the home as a renter for a year and a half before the Order was even issued. Appellants also recognize that the trial court Order, Finding of Fact- Paragraph 18, states the Cross/Dudek Contract will be reset when the Order has become the Law of the Case. It is Appellant Morphew's understanding, after confirming with the Appeal Case Officer at the Appellate Court, that this Order under appeal has not become Law of the Case, and will not until the Appellate court reviews the appeal and files their opinion. Therefore, under the trial court Order, if the Respondents Contract has not been reset per the terms outlined in the Order, the Contract is not yet enforceable, therefore the Ferros are not obligated to transfer ownership.

## II. ARGUMENT

### 1. *Appellant Morphew disputes the Respondents Position that She Lacks Standing to Argue the Merits of the Contract between Respondents and Appellants Ferro, Sellers of the Property.*

In regards to the Respondents observation that the Appellants' Initial Brief was not signed by Appellants Ferro, Appellant Morphew confirms the Appellants' Initial Brief submitted to the Appellate Court did indeed contain the signatures of Appellants Ferro, but to be fair to the Respondents, Appellant Morphew confirms, with further review, the copy of the brief received by Respondents was an unsigned copy. Under the South Carolina Rules of the Appellate court, Appellate Morphew and Appellants Ferro may join in a single brief [SC Rule 208(b)(6)][35], and that the appeals filed by Appellant Morphew and Appellants Ferro have been consolidated for consideration under the South Carolina Court Rules (SCACR)[36], therefore Appellants Ferro were not required to file a separate Initial Brief, and the expiration for the Ferros to submit a separate initial brief as stated by Respondents is not applicable in this instance.

Respondents stated that Ms. Morphew is not an attorney and cannot represent anyone but herself. Appellant Morphew confirms that she is aware she is not an attorney, hence the *pro se* title, and would like it to be observed that the joining of both Appellants in the single brief does not demonstrate Appellant Morphew as representing Appellants Ferro.

Respondents state that Appellant Morphew has not the right to challenge the validity of the Respondents Contract and that she has not the ability to challenge any of the terms of or conclusions drawn from the examination of that contract, that she overall lacks standing and the right to argue the position advocated by the Ferros with respect to their contract. Appellant Morphew argues that in her Complaint, and at the trial court, she challenged that

[35] SC Rule 208(b)(6): Joining in Briefs: In cases involving more than one appellant or respondent, including cases consolidated for appeal, any number of parties may join in a single brief, and any party may adopt by reference all or any part of the brief of another.
[36] See January 20th, 2015 letter from the Clerk of the SC Court of Appeals.

very same contract and those very same issues in which the Respondents state she has no claim to do, and that was no motion was presented by the Respondents during the proceedings to prevent her from doing such.

Appellant Morphew claims that not only does she have a substantial stake (vast amounts of time, money and mental stress, and the possibility of losing her current home) in the outcome of the appeal of the combined order, but as the primary Appellant she has a legal obligation to submit all briefs and corresponding documents per the Appellate Court rules and time constraints, again making her a direct party to this litigation. Also, Appellant Morphew's Complaint specifically addresses the Respondents breach of contract and their lack of obtaining financing. This breach directly corresponds to the release of the Respondents Contract, at which time Appellant Morphew's Contract becomes the enforceable contract.[37] For reasons stated herein, Appellant Morphew has such privity to said Contract and begs to differ with the Respondents claims she doesn't. Appellant Morphew defends her position and ability to bring suit upon and defend the contract between the sellers of the property and the original purchase, and respectfully asks for the Appellate court to understand the direct correlation between the Appellant Morphew Contract and the Respondents Contract, and to acknowledge the critical privity this connection provides.

Even if Appellant Morphew cannot defend the Contract between the Sellers [Ferro] and the Respondents, she can defend her Complaint which, as previously argued above, makes her party to this litigation. Appellant Morphew Complaint claims: (1) the Appellants

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[37] R. pg. 36- Appellant Morphew Complaint, see First Cause of Action, paragraph 17,

Ferro are not in breach of contract with the Respondents, (2) but that the Respondents unlawfully breached their contract and did not obtain financing on said Contract.

As all stated above combined with the fact the outcome of Appellant Morphew's contract is solely based on the outcome of the Ferro-Dudek/Cross litigation, again this clearly demonstrates her as a party in interest to the Respondents Contract.

Appellant Morphew and Appellants Ferro further endorse they stand by their individual arguments, and combined arguments, demonstrated in the Appellants Initial Brief, signed by all parties.

Respondents claim that Appellant Morphew lacks standing to make any arguments with respect to the validity or the invalidity of the original contract. Appellant Morphew strongly disagrees with this assessment. In United States law, the Supreme Court of the United States has stated, "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[38] There are a number of requirements that a plaintiff must establish to have standing before a federal court. Some are based on the case or controversy requirement of the judicial power of Article Three of the United States Constitution, § 2, cl.1. As stated there, "The Judicial Power shall extend to all Cases . . .[and] to Controversies . . ." The requirement that a plaintiff have standing to sue is a limit on the role of the judiciary and the law of Article III standing is built on the idea of separation of powers.[39] Federal courts may exercise power only "in the last resort, and as a necessity".[40]

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[38] *Warth v. Seldin, 422 U.S. 490, 498 (1975).*
[39] *Allen v. Wright, 468 U.S. 737, 752 (1984)*
[40] *Allen v. Wright, 468 U.S. 752 (1984)*

There are 3 requirements of "standing": (1) Injury-in-fact[41], (2) Causation[42 43], and (3) Redressability[44 45]. (Federal Practice Manual, Ch. 3, rev. date 2013) As stated previously herein, Appellant Morphew has suffered and will imminently suffer injury both economically (i.e., past loss of wages, future loss of income, moving expenses [for 2 families], attorney fees, court cost fees) and non-economically (i.e., pain and suffering), has clearly shown a "causal connection between the injury and the conduct complained of", and that it is more than likely "that a favorable court decision will redress the injury."

2. ***The Trial Court Erred in its Findings of Fact that the Appellants Ferro had breached their Contract, were in default and had acted without good faith and unfairly, therefore its Conclusion of Law is Inaccurate.***

Based on the substantial material facts and evidence provided by the Appellants in regards to the errors in the trial courts Findings of Fact, this Court should review *De Novo* the Findings of Facts.

2(a) Appellants are not disagreeing on all the trial courts Findings of Fact and its Conclusions of Law. The Appellants agree that the items, that are being argued, would be in essence correct if the applicable Findings of Fact were accurate and/or reasonably supported by evidence. "The appellate court will not disturb the trial court's findings of fact as long as they are reasonably supported by the evidence." Epworth, 365 S.C. at 164, 616 S.E.2d at

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[41] The plaintiff must have suffered or imminently will suffer injury—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent (that is, neither conjectural nor hypothetical; not abstract). The injury can be either economic, non-economic, or both.

[42] There must be a causal connection between the injury and the conduct complained of, so that the injury is fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party who is not before the court.

[43] Massachusetts v. Environmental Protection Agency, 549 U.S. 497 (2007) (global warming caused by EPA's refusal to regulate carbon dioxide emissions satisfied element of causation for Massachusetts's alleged injury of loss of coastland).

[44] It must be likely, as opposed to merely speculative, that a favorable court decision will redress the injury.

[45] *Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).*

714. As an example, one of the Appellant's arguments in their Initial Brief, is that the trial court used testimony that was "unreliable" and "false". The trial court referenced a majority of Allison Williams [First Federal's lending officer] testimony to determine ultimate facts for critical matters in question, specifically if the said Contract financing terms were impossible to achieve and if the Respondents diligently pursued their financing per contract. First of all, the Contract was written by the Respondents and their agent, not the Ferros. So if there was any question as to the unfairness or "impossibility" of the financing terms it should have fallen on the Respondents shoulders, not the Ferros[46]. Second, though the trial court appears to define in its Order that Ms. Williams is a mortgage processer/expert witness. She is not a mortgage processor, was not sworn as a mortgage processor or even as an expert witness[47], and by her own testimony confirms she does not know what happens during the Underwriting process[48]--which includes ordering and obtaining an appraisal-- nor has experience or knowledge of the mortgage processing[49]. Also note that Ms. Williams was giving expert advice and even legal contract advice on a contract that she had not seen nor had possession of during the life of the Contract[50], and had neither an application[51] nor a banking/client agreement. Even if Ms. Williams was an expert witness, she clearly defines her lack of knowledge and experience during the trial proceedings, therefore her opinions should be inadmissible. "Expert opinion concerning an ultimate fact is not inadmissible if

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[46] Also note when the Respondents finally applied, neither Ms. Williams nor the Underwriters objected to those <u>very same financing terms</u> that were deemed "impossible" by the trial court; but instead were prepared to Underwrite a loan <u>per the Contract</u>.—but only after receipt of a signed Contract Extension.
[47] R. pg. 185 lines 23 thru pg. 186 line 15. (AW)
[48] R. pg. 170 line 22 thru pg. 172 line 6; R. pg. 190 -191. (AW)
[49] R. pg. 147-194, testimony of Allison Williams.
[50] R. pg. 159 line 10 thru pg. 161 line 5; R. pg. 160 line 3 thru pg. 161 line 5 (**AW**)
[51] Ms. Williams references a pre-qual app that was from May 2012;It was not property specific and had no signatures. The pre-qual app was over 200 days old—expired per FDIC—and since no credit was pulled until 12-5-12, this application was invalid and clearly did not meet any legal requirements per said Contract.

the matter in question is not of common experience or knowledge". Parris v. Johnson, 3 Wn. App. 853, 479 P.2d 91 (1970). A trial judge is afforded wide discretion in determining whether expert opinion testimony should be considered. Tokarz v. Ford Motor Co., 8 Wn. App. 645, 508 P.2d 1370 (1973). Such determination will be overruled on appeal only for an abuse of discretion. Myers v..

As per the Appellants Initial Brief [and as substantially supported herein], the Appellants have supplied significant material evidence, definition to the SC Residential [Time is of the Essence] contract, and provided trial testimony, all of which significantly supports that the Respondents were solely responsible for their failings and breach of contract, and in turn respectfully discovers inaccuracy in the trial courts Finding of Facts--which led to an error in its Conclusion of Law.

2(b) All Arguments within the Appellants Initial Brief, including Appellant Morphew's, are proven to have significance.

In answer to the Respondents claim that section V of the Appellants Initial Brief is "moot", the Appellant Morphew disagrees. Any conclusion the trial court Judge included in its Order has significance, otherwise he wouldn't have addressed it in his Order. The particular item on Appeal that is being defined as "having no significance" by the Respondents is not the Appellant Morphew's "internal feeling", but on the contrary, a Preface in the Trial Court Order.[52] Appellant Morphew argues the preface [that the Appellants Ferro were championing the Morphew Contract was because she was seeking

[52] R. pg. 1-Trial Court Order, pg. 2, paragraph 2: "Plaintiff Morphew alternatively seeks damages against Defendants Ferro on breach...Hence, Defendants Ferro champion the Morphew Contract."

damages from the Appellants Ferro] was based on an undefined fact[53] that implied, first, a question as to the integrity of Appellant Morphew, and then, second, and most importantly, questions the fair and faithful dealings of the Appellants Ferro towards the Respondents. Appellants Ferro admit they champion the Morphew Contract --despite taking a $23K reduction in the sale-- but only for the reason the Respondents failed to close escrow per said Contract, even though they had every opportunity to do so. The Appellants Ferro admit that during the trial their position was confirmed after discovering the Respondents had dealt so unfairly and unfaithfully with them.

The trial court ruled that-- though the Respondents were indeed in breach of contract-- it was the defaults and failures of the Appellants Ferro (specifically failing to act in good faith and fair dealings) that caused the Respondents breach, therefore it excused the Respondents breach. The above argument is not "moot" and bears enough significance, in regards to the Trial Courts conclusion that the Ferros "acted" in bad faith and unfairly, to be on Appeal.

Appellants [Ferro and Morphew] affirm that under no circumstance was Appellant Morphew ever seeking any damages from them, only Specific Performance. The alternative was seeking damages from the Defendants Dudek and Cross [due to their "conduct/unlawful objections"][54].

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[53] R. pg. 35- Morphew Complaint, Fourth Cause of Action, pg.4, paragraph 34&35: ".Defendants Ferro have been unable to close [with Morphew] due to the unlawful objections of Defendants Dudek and Cross....As a direct and proximate result of Defendants' conduct as set forth herein......Plaintiff is entitled to recover damages against Defendants in an amount....".

[54] R. pg. 35- Morphew Complaint, Fourth Cause of Action, pg.4, paragraph 34&35: ".Defendants Ferro have been unable to close [with Morphew] due to the unlawful objections of Defendants Dudek and Cross....As a direct and proximate result of Defendants' conduct as set forth herein......Plaintiff is entitled to recover damages against Defendants in an amount....".

The Appellant Morphew agrees that the Trial Court found her contract enforceable, but disagrees with the Respondents that "*if the Respondents close on the property, Morphew is free to pursue damages against the Ferros at that time, if damages are appropriate.*" The Court Order makes no such reference in his Conclusion of Law, but instead only states the Morphew contract terminates at the Respondents closing of escrow.[55]

### *3. Appellants Ferro have not sold the said property to Appellant Morphew.*

Appellants Ferro and Appellant Morphew state that the property still belongs to the Ferros and has not, nor has ever, been sold [specifically to Appellant Morphew], contrary to the Respondents claim. The Respondents have had a Lis Pendens attached to such property since January 11th, 2013, which prevented the Appellants Ferro from selling their home to Ms. Morphew. The Lis Pendens is still in effect.

### *4. The Appellants Ferro are not in default and did not make it impossible for the Respondents to obtain lending per their Contract terms.*

(As previously defended herein) and defended in the Appellants Initial Brief, by referencing the substantial material facts [Exhibits] and the trial transcripts, it clearly proves the Respondents were responsible, <u>by their own hand</u>, for not obtaining financing within the contract terms, and for not closing escrow. The material facts also show the Appellants Ferro had completed <u>all</u> repairs agreed to without a closing date or proof of lending, and had provided all documents per contract and in a timely manner.

[55] R. pg. 1- Trial Court Order, pg. 13 paragraphs 1-23, specifically paragraph 16.

**CONCLUSION:**

As a conclusion - and it cannot be stressed enough - nothing prevented the Respondents from applying for their financing except the Respondents themselves. Nothing prevented the Respondents from closing on or before November 30th except for the Respondents own failure to perform their contingencies. Nothing prevented the Respondents from closing on or before December 15th except for the Respondents failure to provide First Federal with a signed Extension Addendum due to making application on an expired contract.

Pertinent material facts that the Respondents were legally required to provide to the Appellants Ferro over 2 years ago were purposefully never disclosed and which would have prevented extensive cost, time and mental stress on both Respondents and all Appellants, their agents and to FF Bank and Carolina One.

The Respondents were obligated to disclose such information to the Sellers [Appellants Ferro] and if they had focused on their own obligations instead of the Appellants Ferros' AND if they had treated the Ferros with fairness and honesty a closing would have taken place over 2 years ago and would have prevented extensive cost, time and mental stress on both the Respondents and all Appellants, their agents and to FF Bank and Carolina One.

The Respondents were well aware they failed to comply with their financing contingencies [as the trial court also concluded[56]], but were more focused on the Sellers contingencies and lost sight of their own legal contract requirements.

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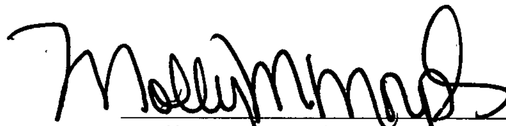
[56] R. pg. 198 lines 15-20.

The trial court erred in excusing the Respondents from their breach by concluding the Appellants Ferro are in default and because of their actions hindered the Respondents from performing their closing of escrow contingency.

The initial actions of the Appellants is an action at law. Since the trial court determined that both parties were at fault, it was concluded the only appropriate remedy was in equity—although the Order also provided for monetary damages to be paid to the Respondents by the Appellants Ferro. The Trial Court concluded the failure to close escrow on said Contract was first and foremost in the failures of the Appellants Ferro, hence the Order of Specific Performance [and damages] to the Respondents. The Appellants argue there is no fault on the Appellants Ferro, but instead several unlawful failures on the Respondents, therefore the ruling should have been an action at law. The Appellants compel the court to review De novo and reverse the Trial Courts Order of specific performance and damages against the Appellants Ferro and in turn reward (1) Specific Performance to Appellate Morphew and, (2) damages against Respondents Dudek and Cross to both Appellants Ferro and Appellant Morphew in an amount to be proven at the trial of this matter.[57]

Respectfully Submitted,



Molly M. Morphew, pro se
788 E. Butternut Rd.
Summerville, SC 29483
(843-514-7299)

[57] In the case of De novo standard of review, the appeals court looks at the case anew, as if the earlier trial had never occurred and the case is effectively re-tried in the appellate forum. (Black's Law Dictionary, 2nd Edition)

Thomas Ferro and Lorraine Ferro, pro se
5501 Carson St.
Denver, CO 80239

March 10, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEALS FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable James E. Chellis
Master of Equity

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Appellate Case No. 2014-002633

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Molly M. Morphew, Thomas M. Ferro and Lorraine B. Ferro....... Appellants

v.

Stephen Dudek and Doreen Cross........................................ Respondents

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CERTIFICATE OF COUNSEL

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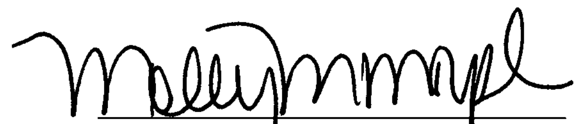
The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.



Molly M. Morphew, *pro se*
788 E Butternut Rd.
Summerville, SC 29483
morphew.wyas@gmail.com
(843) 514-7299

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