THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

James E. Chellis, Master in Equity

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Appellate Case No. 2017-001393

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Stephen Dudek, Doreen Cross — Respondents

v.

Thomas Ferro, Lorraine Ferro — Respondents,

And

Molly M. Morphew, — Appellant,

v.

Stephen Dudek, Doreen Cross, Thomas Ferro and Lorraine Ferro — Respondents

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# APPELLANT'S REPLY BRIEF

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**FACTS**

Without restating all the facts and arguments which have been thoroughly set forth in its opening brief, the Appellant offers the following facts with arguments for clarification or defense in regards to this case and the Respondents' Brief.

**STATEMENTS OF THE CASE**

This appeal arises out of two separate cases brought in the Dorchester County Court of Common Pleas, *Stephen Dudek, et al. v. Thomas M Ferro, et al.*, Case No. 2013-CP-18-00074 and *Molly M Morphew v. Thomas Ferro, et al.,* Case No. 2013-CP-18-00183. On October 24, 2012, Respondents Stephen Dudek and Doreen Cross (collectively referred to as the "Dudeks" or Respondents") entered into a purchase contract with Thomas and Lorraine Ferro (collectively referred to as the "Ferros"), under which the Dudeks agreed to buy from the Ferros a home and real property ("Home"), located in Dorchester County, South Carolina. (See Summons and Complaint, Case No. 2013-CP-18-00074). On December 16th, 2012, sixteen (16) days after Dudeks' sales contract expired, and after the Ferros submitted a termination notice to Dudeks, Appellant Molly M. Morphew ("Morphew" or "Appellant") entered into a separate and successive contract. In its initial brief, the Dudeks misrepresent Morphew's sales contract or agreement to purchase with the Ferros. Contrary to the Dudeks' statement that it was a contingency contract, *"under which she agreed to buy the Home, if the Dudeks failed to close on the Home,"* Appellant clarifies she entered into a separate and successive contract, under which she agreed to buy the Home...PERIOD. There was no agreement that her willingness to purchase the property was based on the Dudek's failure to close on the home. Instead, the agreement clearly states that "the contract" itself was contingent to the seller's receiving the signed termination notice (release) from the Dudeks, and if said release was not signed and returned then either party to its contract would have "an escape clause"(i.e., the option of declaring the contract null and void on or before December 30, 2012 with no penalties or

repercussions) **(Respondents Summons and Complaint,** Case No. 2013-CP-18-00183, Exhibit B (and Addendum A).

Instead of signing the release, over forty-five (45) days later, and only when the Dudeks received notice from the Ferro's attorney that the Ferros have decided to sell to another buyer that they immediately filed a lis pendens on January 11, 2012, to prevent the closing (see **email dated January 14, 2013 Attorney Qualey to Thomas Ferro**). On January 15, 2013 they filed their complaint for Specific Performance. On January 31, 2013, Appellant filed its complaint for Specific Performance. Both cases were consolidated under Case No. 2013-CP-18-00183, by way of a consent order filed on September 18, 2013. (**Consent Order, September 18, 2013**, Case No. 2013-CP-18- 00183).

On June 11, 2014, and June 12, 2014, the cases were tried in front of the Honorable James E. Chellis, Master-In-Equity for Dorchester County ("Lower Court"). After discovering evidence that the Dudeks had seriously misled them –and the Master -- regarding their performance of the sales contract contingencies, and had, by their own hand, seriously breached their sales contract [specifically, they ultimately failed to obtain mortgage credit or were denied lending because of their own actions, not the Ferros], that their sales contract was null and void, and that the Ferros had every legal right to request and receive a signed cancellation request [in order for Morphew to close], the Ferros submitted a pleading statement and attached the newly discovered material evidence to support their claims. (**Pleading Statement,** September 10, 2014, Case No. 2013-CP-18-00183). The Master had refused to review or rule on this motion or pleading statement submitted, as he was only going to review the attorney's [closing] statements. (**Email dated September 18, 2016 from Ferro to Morphew**). No ruling or Order was filed on the issues presented on the Ferro pleading nor were the Ferros' allegations addressed or ruled on in its Order of November 6, 2014.

On November 6, 2014, the Lower Court issued an order awarding the Dudeks specific performance ("Specific Performance Order"). (**Specific Performance Order**, November 6, 2014,

Case No. 2013-CP-18-00183). Both Morphew and the Ferros appealed the Specific Performance Order. (See Stephen Dudek v. Ferro, Appellate Case No. 2014-002633). On January 11, 2017, this Court affirmed the Lower Court's award of specific performance to the Dudeks in an unpublished opinion, numbered 2017-CP-019. (**Opinion**, January 11, 2017, Appellate Case No. 2014-002633). Morphew initially petitioned for a rehearing, but she voluntarily dismissed the petition on February 9, 2017, at the request of the Ferros and only because they were in severe economic distress and the Appellant does not believe an innocent party should be harmed any further. (Mot. Dismiss Petition, February 9, 2017, Appellate Case No. 2014-002633). This Court granted the dismissal and issued remittitur on February 15, 2017. (Order Granting Dismissal, February 15, 2017; Remittitur, February 15, 2017, Appellate Case No. 2014-002633). Following remittitur, the Dudeks moved the Lower Court in March, 2017 for an order setting a schedule for them to close on the Home. (Mot. Set Closing, March 16, 2017, Case No. 2013-CP-18-00183). The Lower Court heard the motion on Monday, March 27, 2017, and allowed Morphew "to receive, in hand, proof of Dudeks' secured financing per their specific performance claim and their 2012 sales contract before being required to seek and secure alternate residence". It also allowed Morphew a total of 45 days, after receiving such proof in hand, to vacate, and if a closing took place within that 45 days, Morphew would pay a daily rate compared to her current rental agreement with the Ferros. Morphew stated in her proposal that she would vacate as soon as possible once receiving said proof, as she didn't trust the Dudeks due to the substantial evidence and allegations in her Fraud/fraud on the court complaint, proving they had been denied financing due to never completing their application. The Dudeks' stated they had not been denied. The Master claimed the fraud allegations/fraud complaint had no bearing on this case and continued. Additionally, the Ferros had objected to the damages being sought by the Dudeks and stated the Dudeks' had previously waived their right to damages, and even if they didn't waive their right, they were never served any accounting or request for damages for review. Moreover, the Dudeks had changed the sales contract purchase price in its proposed

Order for closing, which the Ferros also objected to. Because of the objections and questions to the validity of the damages, The Master allowed an Answer to be filed and reviewed by the court to address the objections by Morphew and the Ferros before making his ruling. The Lower Court issued an order on Monday, April 3, 2017, setting the terms of closing. (First Closing Order, April 3, 2017, Case No. 2013-CP-18-00183). Unfortunately, it erred by filing its Order before receiving and reviewing the Answer filed on April 6, 2017, by the Ferros and Morphew, therefore claiming it had no choice but to convert the Answer, sua sponte, to a Motion 59(e). Morphew objected, but was overruled. The lower court scheduled a hearing on the 'Answer/59(e) motion' for May 12, 2017. (Morphew/Ferro Answer to Closing Motion, April 6, 2017, Case No. 2013-CP-18-00183). The Dudeks erroneously state in its initial brief, "*Out of an abundance of caution, the Lower Court considered Morphew's "Answer" a Rule 59, SCRCP, motion to reconsider and issued a new Closing Order on May 17, 2017.* Morphew objects that the Answer was not "Morphew's Answer" but instead, Morphew's AND Ferros Answer, and should be referenced so. Further, it was not out of an abundance of caution or any consideration to Morphew or the Ferros that the lower court considered the Answer to be a Rule 59 motion, but instead it was only because the lower court erred by prematurely filing the Order before the Answer it requested was filed. The Master stated he had already informed all parties of its action prior to this hearing in an email, and explained again during the hearing that when an Order has already been issued he has no choice but to convert the Answer to a 59(e) Motion (**Transcript of [59E] Motion hearing**, pg. 7 lines 2-12).

COURT: *Well, let me back up, and I'll explain to you my position on the Motion, which I basically – I sent an e-mail to everybody and Explained to you what – the only way to interpret the Answer, because there's an order that's been entered, is that it must be construed as a Rule 59E motion to amend or alter that order. So the motion that we're hearing is that motion, the Answer, which it asserts in it a number of things.*

The 'motion' was heard, and again during this hearing and in the motion, the issue of whether or not the Dudeks had a valid contract at all, or that they failed to meet specific performance pre-requirements or that they had not nor were able or ready to perform their contract contingencies was again brought up. (Morphew/Ferro Answer to Closing Motion, April 6, 2017, Case No. 2013-CP-18-00183, pgs. 33 (lines 5-21); pg. 34 (lines 23-25) and pg-35 (lines 1-21); (Pg. 58 lines 9-25). The Master even questioned what did the bank having a [valid] contract have to do with ready, able and willing (Morphew/Ferro Answer to Closing Motion, April 6, 2017, Case No. 2013-CP-18-00183, pgs. 35 (lines 11-21). Morphew argues, having a valid and negotiable sales contract or ready and able to tender payment for closing has everything to do with "ready, able and willing" in order to compel specific performance; as does the fact the Dudeks were never approved for financing (and in fact, were denied lending) on said property per their sales contract. At a minimum, the Dudeks must demonstrate that they were ready and willing to perform their part of the contract on November 30, 2012, the date the lease expired, or on January 15, 2013, the date they brought the action for specific performance. The record indicates that the Dudeks were not in a position to pay the Ferros the purchase price for said property on either date, as indicated in *Ingrams v. Kasey's* below:

> "Specific performance should be granted only if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties. *King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (Ct.App.1984) (citing *Monteith v. Harby*, 190 S.C. 453, 3 S.E.2d 250 (1939)). In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract. *Gibson v. Hrysikos*, 293 S.C. 8, 358 S.E.2d 173 (Ct.App. 1987) (citing *Thomson v. Scott*, 6 S.C. Eq. (1 McCord Eq.) 32 (1825)). At a

minimum, Ingram must demonstrate that he was ready and willing to perform his part of the contract on February 28, 1994, the date the lease expired, or on March 14, 1994, the date he brought the action for specific performance. [1] The record indicates that Ingram was not in a position to pay Kasey's the purchase price for Remy's on either date."

Ingram admits that prior to February 28, 1994 he did not have the purchase money in any depository account either under his control, his attorney's control, or in any escrow account. Ingram also admits that in order to close on the property he would have to "scramble around and see if [he] could raise up the money." Although Ingram claims he had several sources who could provide the purchase money, as of March 14, 1994, none of his identified lenders officially agreed to loan him the money, and he had no written loan agreements. In fact, several lenders admitted they did not even have access to the money to loan Ingram. Specific performance is unsound in this case because Ingram lacked the ability to perform his part of the contract on the date the lease expired and on the date he sought specific performance. See 71 Am.Jur.2d Specific Performance § 201 (1973) ("[C]omplainant in an action for specific performance must aver that he has performed his part of the contract or that he is willing and ready to perform it, and that he has performed all conditions precedent to the taking effect of the obligation of the defendant, including the payment to be made thereon, or some valid excuse for his failure to perform or offer to perform.").

*INGRAM v. KASEY'S ASSOCIATES*, 531 S.E.2d.287, 340 S.C. 98 (2000).

The Supreme Court of South Carolina has upheld that a party (must be able to perform at the exact time he requested specific performance, not some "reasonable time" in the future). *INGRAM v. KASEY'S ASSOCIATES*, 531 S.E.2d.287, 340 S.C. 98 (2000). This clearly indicates there is a prerequisite to seeking specific performance, particularly as to the buyer's financial obligations and especially when the seller was to rely on the buyer's financial means in the future. Otherwise any

buyer to property could use specific performance as a means to buy more time to secure financing, or to disregard the terms of the contract (in this instance, specifically, apply for a loan or secure per contract terms or close escrow), or to indefinitely hold up a seller's property and/or to blackmail sellers into giving more than the contract allowed with the mere threat of holding up the sellers property for years in litigation. Therefore, concluding by a matter of law, Defendants Dudek and Cross ultimately failed to meet the pre-requisites to, lawfully and in good faith and fair dealings, compel specific performance.

Morphew and the Ferros had no knowledge of this fact until after trial, in which the Ferros submitted its petition to inform the Master of the Dudeks failings to meet Specific Performance requirements and their unlawful or bad faith and unfair dealings during trial. The petition was refused and the facts ignored. Morphew argues it appears the court of equity did not have a clear understanding of the minimum specific performance requirements and therefore erred not verifying with material documentation that the Dudeks' had indeed secured financing per their sales contract or pursuant to specific performance. It should have compelled the Dudeks to produce such material evidence, especially when facts and proof contrary to their testimony was presented, but instead declared the pertinent and material facts presented, first from the Ferros and then by Morphew, as moot or irrelevant to the case.

The Lower Court issued a new Closing Order on May 17, 2017. (Second Closing Order, May 17, 2017, Case No. 2013-CP-18-00183). Morphew has currently appealed the new Closing Order in this appeal.

On Wednesday, May 27, 2017, Morphew received a notice from Dudeks' attorney in this case, Mr. Smith, that a closing has been scheduled for Friday, June 2, 2017, and Appellant will need to vacate on or before Friday. Morphew requested proof of financing per the court Order (Second Closing Order, May 17, 2017, Case No. 2013-CP-18-00183, paragraph 13). The very next day, Morphew receives a notice from the Ferros, stating IF a closing takes place the buyers will contact

Morphew regarding the rent. If a closing does not take place then the Ferros will contact her. Morphew received no communication from either party. On Monday, Morphew contacted the Ferros and was informed a closing did take place and was assured the buyers would contact her regarding the rent due while she vacates. Instead of receiving said communication, Morphew received a Motion for Rule to Show Cause (Contempt)/Ejectment/Fees on or about Tuesday, June 6, 2017. On Tuesday, June 7, Morphew receives an email from the clerk that a hearing is scheduled for tomorrow morning, Wednesday, June 8, 2012, for Contempt/Ejectment. In order to not hold up the courts, or to waive her right to object to not being served the Rule, Morphew files an answer -- objecting to (including but not limited to) personal jurisdiction, Respondents' lack of affidavit, lack of justification for an "emergency" hearing, the ambiguity of the Lower Courts closing Orders, prejudice, and misrepresented facts in the Respondents Motion-- and attends the hearing. **("Plaintiff Morphew's Answer in Opposition to Defendants Dudek and Cross' Notice of Motion and Motion For Rule to Show cause (Contempt), Ejectment, and Attorney's Fees**, June 8, 2017 Case No. 2013-CP-18-00183) The Master opened the hearing by dissolving the Rule as improvidently granted [failed to contain the required affidavit establishing grounds for Court's issuance of a Rule to Show Cause] per Morphew's Answer and issued an Order for such on June 7, 2017, "*Upon presentation of an affidavit establishing grounds for the Court's issuance of a Rule to Show Cause, this court will reconsider the issuance of a Rule to Show Cause, and set a time for hearing the same accordingly.*" (**Order Dissolving Rule to Show Cause (Contempt)**, June 8, 2017, Case No. 2013-CP-18-00183) No Affidavit was or ever has been presented. The hearing was continued for the following week, June 12, 2017, to hear the final items on the motion.

Morphew argues the June 12th hearing was aggressive, one-sided or partial, and appeared to be a misguided reaction of the court. Though Morphew testified in its Answer and at trial that she honestly understood the Lower Courts May 17 Order to allow Morphew to obtain proof of financing as the Master/opposing party had previously agreed to in the March 27th hearing, that Morphew had

material documentation supporting her defense of Contempt and Ejectment-- and the Dudeks stated in the hearing they had no intention of holding Morphew in Contempt-- MR. SMITH: *What we really want is the ejectment part. We want her out pursuant to this Court's order. The contempt, the rule to show cause, honestly, I know you – probably, if you order an ejectment, you're going to not hold her in contempt; you're going to allow the contempt to be purged if she just gets out. I mean, that's all we want. .We don't want Ms. Morphew to do anything except leave us alone and get out of the house we bought. So what we are asking this Court to do is to issue an order of ejectment pursuant to your previous order that she needs to leave.* (**Transcript, Contempt/Ejectment Hearing**, June 12, 2017, Case No. 2013-CP-18-00183 - Pg. 4 lines 13-25; Pg. 5 line 1), the Lower Court, in its obvious frustration to end the case once and for all, decided Morphew was an obstructionist. Morphew argues this "finding of fact" opinion is based on error of facts presented by the Dudeks' to make Morphew look bad. Again, no documented proof was provided, only testimony from the Dudeks. The Lower Court ruled that "the Dudeks had a closing scheduled for May 3rd and canceled it because of their agreement with Morphew to give her 45 days to vacate first, and that she is still in the house, therefore she is an obstructionist trying to derail the closing". Morphew objected, and provided proof that it was not her fault it was canceled. Morphew further argued that she did not 'throw up her hands" in protest or stated, "oh, I haven't had my notice", and she was not the cause that prompted Mr. Smith to advise his clients not to close on that date and reschedule it. Instead, it was Ms. Ferro [informed Mr. Smith via e-mail] that the closing could not take place at that time because the damages issue was not yet heard and ruled on, which had everything to do with the closing papers and what they would be receiving back." Morphew provided those emails to the Lower Court. Ultimately and between those two communications -- communications that Attorney Smith was involved in or had complete knowledge of -- the cancellation of their [alleged] scheduled closing had nothing to do with the Appellant. Therefore the Master erred in his finding of fact Morphew was the cause of the Dudeks initial closing therefore

ruling her an obstructionist. Morphew also raised the issue of ambiguity or confusion in the conflicting actions of the opposing parties, and in the Master's rulings during hearings and its Orders. This an issue to abuse of discretion, as not only did the Lower Court allow for conflicting testimonies from the Dudeks and its attorney, it never required material evidence to prove their testimonies, and only required Morphew to provide evidence/proof. Even when material documentation was presented defending its position, the Master ultimately called Morphew a liar.

> THE COURT: *Ms. Morphew, let me make it specifically clear to you right now.*
> MS. MORPHEW: *Yes, sir.*
> THE COURT: *I do not find any of that testimony credible.*
> MS. MORPHEW: *What is that, Your Honor?*
> THE COURT: *Because I don't believe you.*
> MS. MORPHEW: *Your Honor, I took an oath, and I actually --*
> THE COURT*: I don't believe what you stated. Do you understand that?*
> **(Transcript, Contempt/Ejectment Hearing**, June 12, 2017 - Pg. 74 lines 18-25 and Pg. 75 lines 1-5)

The Appellant has cause to believe the Lower Court or Master has been partial, whether it's because of its frustration that Morphew has taken this case this far[1] or because Morphew is pro se, and throughout litigation has based its findings of facts on the opposing party's (including their attorney and its witnesses) testimony alone, and further have refused to review or address the material issues or proof provided by Morphew or the Ferros. Morphew contends the actions[2] by the opposing parties and within the Lower Court have been conflicting and without documented support, causing confusion and ambiguity. Take for example, on March 27th, 2017, the Lower court and the opposing party agreed to Morphew's proposed plan for vacating[3] ("Vacating Agreement"),

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[1] **(Transcript, Contempt/Ejectment Hearing**, June 12, 2017 (Pg. 72 lines 2-7)
[2] Motions, hearings, rulings, Orders, findings of fact, etc.
[3] Proof of financing in hand before Morphew was required to seek and secure alternate living arrangements. Once proof was in hand, then Morphew had 15 days to find and secure another place to live, then 30 more days to move

and allowed Morphew and Ferros to file an Answer to the Dudeks' Motion for closing schedule. Though no time limit was placed on its filing, the Answer was filed within 10 days of the hearing, but the Lower Court erred by filing its April 3rd Order before reviewing the Answer, therefore had to convert the Answer to a Rule 59(e) motion and schedule another hearing. Additionally, the premature Order did not address the ruling it made regarding the Vacating Agreement, but Morphew - and the Dudeks- continued to honor said agreement. Though the Vacating Agreement" has been distorted or misrepresented by the Dudeks to assist in their own defense at the hearing[i], causing further confusion to the litigation, it still demonstrates the Vacating Agreement was still in place between the parties [as of May 2, 2017]. The Order also stated Morphew was to vacate on or before closing after receiving notice from the Dudeks. (**First Closing Order**, April 3, 2017, Case No. 2013-CP-18-00183). Since there was no closing or scheduled closing, and the Vacating Agreement was still in place, Morphew had no legal or financial obligation to vacate until she was notified of a closing date AND proof of 2012 financing ability in hand. Morphew had only been acting to protect her rights and acting in line with the Vacating Agreement from the March 27th hearing.

Then to make matters even more confusing and prejudiced, at the hearing on May 12th, and without being raised by the opposing party, the Court "changed its mind" and denied or reversed the Vacating Agreement, "just because." But on its May 17th Order, it stated that Morphew demanded five (5) items, one (1) of which is fair, but the other four (4) she does not have any legal right to, and that its April 3rd Order did specifically address granting a right to approved financing. Morphew again thought the court was being fair and allowed her the one (1) item, "granting a right to approved financing," but not the other 4 items. Morphew did not feel asking for proof of their approved 2012 financing per Specific Performance or their sales contract was unfair or that it prejudiced the Dudeks, as this proof is supposedly in their possession or at their fingertips, and has been for 5 years. Morphew asserts that this simple proof would end this case, its Fraud Case, and

its Constructive Trust Case, and remove any claim that the Lower Court erred or abused its discretion in this litigation, with the exception of the Ejectment/Contempt/Fees Order. But she knows she won't get it as it doesn't exist. The Respondents know it, its witnesses know it, and its attorney(s) know it, and the only defense they have is to try to get this case closed by misrepresenting facts and painting Morphew into a bad or unfair person. It's clear all allegations regarding the Dudeks unlawful actions is true because not once have they denied them or offered proof to support or render those claims false. Combined with the fact the Lower Court also had knowledge of those fraudulent facts before filing his Order of November 6, 2014 leads one to believe there has been an abuse of discretion, and partiality towards the Dudeks, maybe for just the reason to "close this case" and be done with it.

Morphew contends that throughout the litigation of this case, and during the hearings on the issues on appeal, it appears the testimony only of the Dudeks and its witnesses is enough for the Lower Court to base its findings of facts in their favor. Though Morphew also provided testimony during the Contempt hearing(s), but also irrefutable proof to defend its position, she has been dismissed as an obstructionist with no rights to the property. Further, the Respondents have misrepresented facts to this case and attempt to paint Morphew into an unfair and contemptuous person, when all Morphew has done is protect her rights and tried to prevent an injustice. Morphew is not the one who frauded the court, or 'stole' someone else's property or claim to property, and only ask for justice where justice is deserved, as the "[T]he law favors discovery and correction of corruption of the judicial process even more than it requires an end to lawsuits." *Lockwood v. Bowles*, 46 F.R.D. 625, 634 (D.D.C. 1969). "There is no time limitation which would bar a civil court from granting relief from a final judgment upon ground of fraud upon the court under rule providing for relief from judgment and court could, at any time, set aside judgment for after-discovered fraud upon the court." Fed.Rules Civ. Proc. rule 60(b). 28 U.S.CA.

## ARGUEMENTS

### I. Appellant disputes the Respondents Position that the Specific Performance Order is the unappealed law of this case, requiring this Court to affirm the Lower Court's rulings.

A. An appellate courts mandate rule is a form of law of the case distinguished largely by its (almost-always) mandatory nature. Law of the case, a judge-made doctrine, generally refers to lower-court decisions that the court, in its discretion, may later change in subsequent rulings, although as "law of the case," such decisions generally are adhered to throughout the court proceedings. The mandate rule is more exacting. As its name suggests, it is "mandatory" that the court follow the appellate court's rulings. The court cannot take actions that are contrary to the mandate or revisit the appellate court's conclusions. Thus, the issues decided by the appellate court and within the scope of the judgment are deemed incorporated within the mandate and precluded from further adjudication unless specifically remanded to the court to address. *Engel Indus., Inc. v. Lockformer* Co., 166 F.3d at 1382–84. The court, however, has discretion to take actions consistent with or not covered by the mandate.

The actions brought forth in this appeal were not litigated and ruled on by the Lower Court, therefore the Mandate issued by this court does not address the action or issues of fraud/fraud on the court or conspiracy to commit fraud by the opposing party (including its attorney and its witnesses) in order to obtain the ruling for Specific Performance in their favor and can be reviewed by this court

Respondents declare that "law of the case" brings finality to the case. Morphew disagrees, and that finding reconsideration of an appellate determination appropriate if there is significant new evidence, or blatant error that would result in serious injustice.

> "But as is often the case, even the "mandatory" nature of the mandate rule has exceptions. In certain narrow circumstances, the court may revisit issues decided on appeal or covered by the mandate. For instance, the mandate may not preclude a court's reconsideration where

there are subsequent factual discoveries or changes in the law. *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414–15 (4th Cir. 2005) (finding reconsideration of an appellate determination appropriate if there is a dramatic change in law, significant new evidence, or blatant error that would result in serious injustice); *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 796 (7th Cir. 2005) (finding reconsideration of an appellate determination appropriate where there has been an intervening change in law). Thus, the judge-made mandate rule is not wholly inflexible. *United States v. Bell,* 988 F.2d 247, 251 (1st Cir. 1993) ("After all, the so-called 'mandate rule' . . . is simply a specific application of the law of the case doctrine and, as such, is a discretion-guiding rule subject to an occasional exception in the interests of justice.").

American Bar Association, "Why the Appellate Mandate Matters", Jennifer Swize – March 6, 2012

In this case, subsequent and substantial pertinent material evidence was discovered after trial by the prior Defendants/sellers ("Ferros") and presented to the Lower Court months before its Order was filed. The issues and evidence proved that the Respondents could not lawfully compel Specific Performance and had made false testimony in regards to all or the majority of their claim. These issues or claims were not heard and ruled on, but instead refused by the Master (**E-mail from Lorraine Ferro to Morphew dated September 18, 2014**). The same issues and evidence was presented to this court on appeal, but was not reviewed and ruled on (Appellate Opinion, January 11, 2017, Appellate Case No. 2014-002633). Again, these same issues and evidence were brought to the Lower Court during the hearing for a Closing Order, the additional hearing for second Closing Order, and in the Contempt/Ejectment hearing. Each time refused and dismissed as 'moot' or not relevant to this case.

The Lower Court had a duty to consider the Respondents unclean hands and fraudulent actions or non-actions. First, the power to set aside a judgment exists in every court. (CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, supra note 151). Second,

in whichever court the fraud was committed, that court should consider the matter. (Id.) (citing *Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575 (1946) (other citations omitted). Third, while parties have the right to file a motion requesting the court to set aside a judgment procured by fraud, the court may also proceed on its own motion. (*Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575 (1946).) Indeed, one court stated that the facts that had come to its attention "not only justify the inquiry but impose upon us the duty to make it, even if no party to the original cause should be willing to cooperate, to the end that the records of the court might be purged of fraud, if any should be found to exist."(*Root Refining Co. v. Universal Oil Prods. Co.*, 169 F.2d 514, 521–23 (3d Cir. 1948) (emphasis added). Fourth, unlike just about every other remedy or claim existing under the rules of civil procedure or common law, there is no time limit on setting aside a judgment obtained by fraud, nor can laches bar consideration of the matter.(See CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, supra note 151). The logic is clear: "[T]he law favors discovery and correction of corruption of the judicial process even more than it requires an end to lawsuits."(*Lockwood v. Bowles*, 46 F.R.D. 625, 634 (D.D.C. 1969). "There is no time limitation which would bar a civil court from granting relief from a final judgment upon ground of fraud upon the court under rule providing for relief from judgment and court could, at any time, set aside judgment for after-discovered fraud upon the court." Fed.Rules Civ. Proc. rule 60(b). 28 U.S.CA.[4] Therefore, the Master should have considered the fraud and facts presented before his court before issuing his Order of November 6, 2014 or demanding a closing on said property or attempting to 'close' or 'end' this case.

The Master had stressed-- in the name of justice-- the importance of parties to follow court orders and the affects when not strictly followed, particularly on the administration of justice.

> COURT: *The jail sentence will be for purposes of my -- the inherent power that I have and must exercise when parties fail to obey the Court's orders.*

[4] http://jfk.hood.edu/Collection/Civil%20Actions%20Procedures-Subjects/Citations/Citation%2005.pdf pg. 625

*It's imperative that our -- that parties to lawsuits abide by orders of the Court. And the failure to do so affects the administration of justice in ways that you cannot imagine right now, Ms. Morphew. But if I make an order and a party doesn't abide by it, then what's the next party going to do if not abide by the next order?* (**Rule to Show Cause Hearing Transcript**, Pg. 93 lines 8-19, Case No. 2013-CP-18-00183))

But what about a party's effect on the administration of justice when they fail to abide by the rules and laws in its filings or litigation? There are laws and rules against acting in bad faith and unfair dealings, knowingly filing frivolous claims, failing or intentionally failing to provide initial discovery, unlawfully continuing to litigate a frivolous claim, an attorney knowingly making false statements at hearings or trials, an attorney suborning its clients or witnesses to falsely testify or misrepresent pertinent material facts to the case, forgered material evidence, continuing to litigate the frivolous complaint, and misrepresenting/falsely testifying to the court(s) about the very core of its case or material facts – which also directly violates the oath taken in court "to tell the truth, the whole truth and nothing but the truth".

Besides the Respondents and its attorney's extensive disregard for the judicial rules, guidelines or statutes, the damages that have occurred because of the Respondents' years of unlawfulness is undue and substantial. Not only have they cost, and continue to cost, all parties (including the courts) extensive time, money and resources, but they have managed to sway the Lower Court into issuing a final closing Order and have unlawfully taken what they had no legal claim to from the beginning of litigation of this case. Further, the Lower Court had full knowledge of the Dudeks' failings or unlawful actions but did nothing to prevent this injustice, and instead rewarded the Dudeks. The Lower Court's errors or abuse of discretion and the opposing party's actions or non-actions affect the administration of justice far more than Morphew's alleged "intentional" failure to vacate her home per a court Order. If unlawfulness, bad faith and fair dealing or fraud/fraud on the court has been alluded to or presented to the court, especially before

an Order was issued, that court has the obligation to take notice and review the evidence before a further injustice to the courts and the innocent parties is done.

B. Respondents claim the alleged fraud went unchallenged because Morphew or the Ferros did not file a motion pursuant to Rule 60 (b) and therefore cannot be used to unsettle the law of the case.

Morphew disagrees. There is nothing in the Rules that states Morphew or the Ferros had to file a Rule 60(b) motion, only that Rule 60 *allows* for a party to move to set aside an order which was based on fraud or after the discovery of new evidence. Rule 60(b), SCRCP. Instead they appealed and presented the issues and evidence in the appeal. These issues were not heard and ruled on. Morphew filed an independent action pursuant to the saving clause Rule 60(d) in the civil court for fraud/fraud on the court with the remedy being damages. When fraud/fraud upon the court[5] has been committed on its court, whether intrinsic or extrinsic [in this independent action for fraud/fraud on the court], the impartial functions of the court have been directly corrupted.[6]

Based on the fact specific performance was fraudulently and unlawfully compelled, the prior Order is void and no longer equitable that the judgment should have prospective application. The South Carolina courts rely on the equity maxim: "He who seeks equity must do equity." *Norton v. Matthews*, 249 S.C. 71, 152 S.E.2d 680 (1967). S Schwartz, 'The Case for Specific Performance' (1979) 89 Yale Law Journal 271. In the specific performance case, equity did not favor the granting of specific performance as a matter of sound judicial discretion. The Respondents acknowledge the Lower Court had knowledge about the new evidence and alleged fraud, but still granted specific performance. Morphew claims she was unfairly prejudiced because the evidence does not otherwise support the Lower Courts Findings, and this evidence has been ignored over and over. If

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[5] Fraud upon the Court, is where a material misrepresentation has been made to the court, or by the court itself. The main requirement is that the impartiality of the court has been so disrupted that it can't perform its tasks without bias or prejudice

[6] As has been seen, the amendment to Federal Rule 60(b) introduced the term "fraud on the court" and no distinction was drawn between extrinsic and intrinsic fraud in the saving clause; Recall that the rule expressly provides that either intrinsic or extrinsic fraud can be ground for relief by motion to the court that rendered judgment.

the Respondents had acted in good faith and fair dealings and not committed fraud/fraud on the court or if the Lower Court had not erred or abused its discretion, its apparent the outcome of this case would not have taken place or have been a different outcome over three (3) years ago, and Morphew would not have been displaced from her home of four (4) years. For these reasons stated herein, this court should reverse the Lower Court's Orders.

## II. Morphew's disagrees that final issue on appeal lacks merit because she did not voluntarily submit to the jurisdiction of the Lower Court in the Respondents Motion for Rule to Show Cause for Contempt/Ejectment/Attorney's Fees.

In its Brief, the Respondents claim the Lower Court had personal jurisdiction over her in the Contempt proceedings, because she appeared in in the original case therefore subjected herself to the jurisdiction of the Lower Court. They further stated all post-remitter hearings and orders are in the same case, therefore the Lower Court had personal jurisdiction. Morphew disagrees. A contempt proceeding regarding contemptuous conduct outside the presence of the court, as here, must be commenced by service of process, which includes a rule to show cause. *State v. Johnson,* 249 S.C. 1, 152 S.E.2d 669 (1967). As stated in its Initial Brief, Morphew was never personally served the Rule to Show Cause, nor did she waive her right to object to service by attending the hearing, as she raised or objected in her Answer or during the hearing. When service is challenged, the record must affirmatively show that service of process was correctly made. *Jensen v. Doe,* 292 S.C. 592, 358 S.E.2d 148 (Ct.App.1987) citing *Matheson v. McCormac*, 186 S.C. 93, 195 S.E. 122 (1938). Objections to personal jurisdiction, unlike subject matter jurisdiction, are waived unless raised. *Shinn v. Kreul,* 311 S.C. 94, 427 S.E.2d 695 (Ct.App.1993); see also *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993). In its Initial Brief, Morphew attested the record did not affirmatively show that service of process was made or correctly made (reference Appellant's Initial Brief, pg. 16).

Further, an affidavit supporting a Rule to Show Cause was never presented, and the Lower Court ruled in its Order dissolving the Rule to Show Cause an affidavit was required for the Court to consider it again. In its Order Dissolving the Rule to Show Cause for Contempt, "*Upon presentation of an affidavit establishing grounds for the Court's issuance of a Rule to Show Cause, this court will reconsider the issuance of a Rule to Show Cause, and set a time for hearing the same accordingly.*" (**Order Dissolving the Rule to Show Cause for Contempt**, Case No. 2013-CP-18-00183). To decide a case, a court must have a combination of subject (subjectam) and either personal (personam) or territorial (locum) jurisdiction. Because the Lower Court did not have personal jurisdiction over Morphew during these proceedings on appeal, the issue of subject matter jurisdiction it is immaterial.

Morphew is not sure where the Dudeks found that Morphew was complaining of lack of notice for the closing hearings (March 27th and May 12th) or for the continued Contempt/Ejectment hearing (June 12, 2017), as she clearly did not raise issue in those regards. Therefore Morphew cannot defend an issue that she did not raise.

As to the Respondents claim the court "bent over backwards in an attempt to give due weight to Morphew's "Answer" to the Dudeks Motion to Set Closing, Morphew contends the Lower Court only scheduled an additional hearing because it erred by filing its Order before receiving the Ferro AND Morphew Answer. The Master explained to all parties previous to the hearing and during the hearing that because the Order was filed before the Answer, it had no choice but to rule the Answer a Rule 59(e) motion. This action was objected to by Morphew (and by Respondents' own attorney) during the May 12th hearing. This action was clearly not for the benefit of Morphew or the Ferros, but instead for the court to correct its own error. Further, it was clear the Master did not give due weight to the Ferros/Morphew's Answer as it found presumed allegations of fraud/fraud on the court as irrelevant or material facts that the Dudeks' failed to meet specific

performance requirements at all times material as being moot, both instances which should have had considerable weight in its issuing a closing order.

The Respondents further claim courts have wide latitude in its discretion [ordering Rules and Ejectment]. Morphew agrees but using wide latitude in its discretion 'just to close this case' appears as an abuse of that discretion.

Morphew never refused to vacate the home. She did not want to place herself in a position where the imposition, time and money it takes to secure alternate residence for her family and animals (horses included) was vast especially when a closing had not even been scheduled or was tentative, without proof they were able and ready to close.

The parties had an agreement that proof of financing would be received first and foremost. Morphew presented a valid argument to which her Vacating Agreement was based on: Based on past history, the Dudeks had lied about their closing ability in the past, hence the reason for Morphew's Vacating agreement. This agreement not only provided security to Morphew that she was not wasting her time, money and effort by vacating before a closing took place, but it provided a fair plan that did not prejudice the Dudeks or the Ferros, as the Judge was giving them 60 days from the March 27th hearing to close escrow. Moreover, this agreement to provide their 2012 proof of financing per their October 2012 sales contract was not only fair and non-prejudicial, but it would have ended any of the Appellant's additional claims [the Respondents continually complain about] that Morphew has on them. Morphew argues the additional actions against the Defendants, though all supported by the unlawful or fraudulent actions of the Dudeks, they are three (3) separate and different causes with three (3) separate remedies. This does not make her an obstructionist, as she has never prevented a closing. Instead it was the opposing party(s) and their own issues that prevented or delayed any closing scheduled or allegedly scheduled. In order to be an obstructionist preventing a closing, a closing would have to be scheduled AND it would have to be shown with clear and convincing evidence that Morphew was at fault for that closing to not have taken place.

As Morphew has demonstrated in its Answer to Contempt Motion and herein, only 2 closing dates (in 2017) were established and she did not prevent either from happening. Morphew was honest in her testimony, and testified the order to "Vacate on or before closing" was ambiguous and too broad or vague and put her in a position of being prejudiced. Morphew has also demonstrated she and the Dudeks were, at all times, acting on the Vacating agreement -- as the Dudeks never objected to and even partially quoted as an [alleged] reason they cancelled the May 2017 closing[7], stating they "cancelled the May closing in order to give Morphew her '45 days to vacate.'" Additionally, when receiving notice on May 30th, 2017 of the June 2nd, 2017 scheduled closing she again requested the proof of financing per the court order. The opposing party did not object to her reminder.

To confirm the Vacating agreement was still in place, and her rental agreement had not been terminated she received notice from the sellers on June 1st, 2017, that the Dudeks will get with her about the rent IF a closing takes place[8]. Morphew's lease was not terminated, was in place before the Order of Specific and years before the Closing Order. The Dudeks knew of this lease agreement, agreed to Morphew's Vacating agreement, knew she was still in place when they decide to close escrow, did not object or make an objection to the courts before closing, and were going to "get with Morphew" regarding the rent if the closing took place. Morphew was acting in correlation to the opposing parties' actions, and acting under the lawful rulings and contracts with the best of her intentions and abilities, all amidst the confusion and parties' lack of including Morphew in their communications, specifically in regards to closing. Morphew further contends it was next to impossible to balance her lease agreement, the courts ambiguous or flip-flop decisions or rulings, the actions [or lack of] action of the Dudeks and Ferros, and maintaining her legal rights

[7] The previous "alleged" and tentative closing on April 3rd, 2017, was 'noticed' to the parties only 7 days before it was to allegedly take place and never established as the Dudeks had to seek another closing attorney for the reason their title search came back clouded [by their own lis pendens]. This obviously had nothing to do with Morphew or her obstructing a closing.

[8] The Vacating agreement included a stipulation that "if a closing took place within the 45 days after receiving proof of financing, then Morphew would pay a daily rate compared to her current rent of $1600/month until vacancy."

[without waiving any] during the litigation of this case, and especially since the remitter. Therefore, the Lower Court erred in its finding of fact or ignored the evidence Morphew provided to support the fact Morphew neither refused to vacate but instead was acting upon legal rights or the Vacating agreement. Further, the Court erred in its finding of fact, or ignored evidence proving to the contrary, that Morphew tried to prevent a closing, as no closing scheduled or allegedly scheduled was ever cancelled due to any action of Morphew.

Again, as stated herein, the court lacked personal jurisdiction over the Defendant Morphew, for failure to be properly served a Rule to Show Cause (Contempt), therefore the Order for Contempt/Eviction/Attorney Fees and Costs should be rendered void and dissolved. "A judgment is void if a court acts without personal jurisdiction." *BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006).

The court has an obligation to make sure all parties come to its court with clean hands or in good faith and fair dealings, and have followed the judicial rules, guidelines and statutes, especially those applicable to the remedy being requested. Morphew contends when a court fails to address those issues when presented, that failure may be considered an abuse of discretion.

The Appellant argues there was no reasonable factual support in the initial decision reached by the Lower Court rewarding Specific Performance to the Dudeks, as the material or pertinent facts presented by the Dudeks and its attorney at trial were later discovered as false or severely misrepresented. Morphew contends the mandate or law of case should be flexible in this instance, particularly in the interests of justice. For these reasons stated herein, this court should reverse the Lower Court's Orders.

## III. This Court should not uphold the orders being appealed for any ground appearing in the record.

The Dudeks request this court affirm the Lower Court's orders for any ground appearing

in the Record [on Appeal], but fail to specify what Record on Appeal or what grounds appearing in that record the appellate court should use to affirm the Lower Court's ruling. Further, they fail to specify or indicate what 'ruling' their defense applies. Morphew argues this court should declare this defense as overbroad or ambiguous, therefore unattainable in its use for its ruling.

Even if the Dudeks declaration specified its defense, Morphew argues Fraud/fraud on the court are very serious charges, even rising to the level of criminal charges, and should not be ignored. She further argues rulings based on fraud on the court are not valid [therefore never final], and should be addressed on this appeal. Particularly as the Dudeks [initial] attorney in this case and also a defendant in Morphew's separate action for damages based on fraud/fraud on the court/conspiracy to commit fraud is on interim suspension by the Supreme Court per Rule 17b – a danger to the judicial system and the general public. He pleaded guilty and was charged with 'intent to defraud' in a separate case, a fact Morphew also raised to the Lower Court. Morphew claims the Lower Court erred or abused its discretion throughout the litigation of this case, and based on this reason and the reasons above or herein Morphew asks this court to reverse the Lower Court's Order of November 6, 2014, and any subsequent orders following, specifically its Closing Order, Rule 59(e) Order and Contempt/Ejectment/Attorney fees Order.

**CONCLUSION**

Plaintiff contends the court abused its discretion and/or processes as it had a duty, in fairness to all the parties and to protect the judicial system, to demand further consideration of the matters in this case due to the alleged fraud, but [as it had intentionally chose to ignore the material documentation supporting the legal failures of Dudek/Cross' complaint and trial testimony], it again chose to turn a blind eye to the possibility of fraud on its own court, which has severely prejudiced Morphew and prevented justice from being served. Therefore, the Appellant is asking the Order of November 6, 2014 should be rendered void and reversed, or as an alternate, void and vacated with this case remanded back for re-trial.

As to the June 14, 2017 Order for Contempt/Ejectment/Attorney Fees and cost, and the May 17, 2017 Order for Closing, Morphew did not intentionally disobey the court order, as she contended the Order was ambiguous, there was inconsistency of the parties and the court regarding the Vacating agreement, and she never refused to vacate just didn't want to waive her rights or an injustice be done. Moreover, the court did not have personal jurisdiction, and orders issued when a court does not have personal jurisdiction are void. Therefore Morphew is asking this court to void and vacate said Order(s), or in part, along with vacating any fees or damages awarded to Dudek/Cross. If any part of the Orders remain, Morphew is asking those parts be reconsidered based on the fraud presented, and overturned.

In addition, Morphew is asking this court to award costs to defend herself in these improper or unlawful actions, including but not limited to, loss of work, travel, cost of Ejectment, and any other damages this court may find acceptable.

Respectfully submitted,

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

April 22, 2017

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

James E. Chellis, Master in Equity

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Appellate Case No. 2017-001393

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Molly M. Morphew — Appellant

v.

Stephen Dudek, and Doreen Cross, Thomas Ferro, Lorraine Ferro — Respondents

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CERTIFICATE OF SERVICE

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I, Molly M. Morphew, Appellant [and pro se] for said case, hereby certify that I have, on this date indicated below, served counsel below with an Appellants Reply Brief and Designation of Matter to be included in Record on Appeal by mailing a copy of same via United States Mail, postage prepaid and return address clearly indicated on said envelope, to counsel at the following address:

Steven L. Smith, Esquire
7455 Cross County Rd., Suite 1
Charleston, SC 29423
Attorney for Respondents

Molly M. Morphew, pro se

April 27, 2018

April 27, 2018



The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29211

Re: **Appellate Case No. 2017-001393**
Stephen Dudek, Doreen Cross, Respondents v. Thomas Ferro, Lorraine Ferro, Respondents
AND
Molly M. Morphew, Appellant, v. Stephen Dudek, Doreen Cross, Thomas Ferro, Lorraine Ferro, Respondents

Dear Ms. Kitchings:

Please find enclosed a copy of the Appellant's Brief, including Appellant's Designation of Matter to be included in the Record on Appeal, and the Certificate of Service, to be recorded and filed.

Also enclosed is a said copy of above to be kindly recorded and returned in the self-addressed, stamped envelope.

Very truly yours,

Molly Morphew, pro se

Cc: Steven L. Smith, Esq.
Thomas and Lorraine Ferro

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