

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Honorable Diane S. Goodstein, First Judicial Circuit

Appellate Case No. 2018-000507

Molly M. Morpew

Appellant

v.

Stephen Dudek, and Doreen Cross

Respondents

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITES	2
ISSUES ON APPEAL	4
FACTS	4
STATEMENTS OF THE CASE	4
STANDARD OF REVIEW	9
ARGUMENTS	10
I. APPELLANT DISAGREES WITH THE REPSONDENTS CLAIM THAT THE LOWER COURT DID NOT ERR IN DISMISSING THIS ACTION BASED ON RES JUDICATA AND BASED ON RULE 12(B)(8), SCRPC	10
II. APPELLANT DISAGREES WITH THE RESPONDENTS THAT THE LOWER COURT SHOULD AFFIRM THE ORDER OF THE LOWER COURT BASED ON ANY GROUND APPEARING IN THE RECORD	26
CONCLUSION	27

TABLE OF AUTHORITES

CASES

<i>All v. Prillaman</i> , 200 S.C. 279, 20 S.E. (2d) 741 (1942)	22
<i>Bank of Williston v. Alderman</i> , 91 S.E.2d 296 (1917)	9
<i>Beatty v. Liberty Mut. Ins. Group</i> , 893 N.E.2d 1079, 1084 (Ind .App.Ct.2008).....	26
<i>Campbell v. Carr</i> , 361 S.C. 258, 262, 603 S.E.2d 625, 627 (Ct. App. 2004).....	7
<i>Campbell</i> , 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008)	10
<i>Comm'n v. City of Rock Hill</i> , 268 S.C. 405, 408, 234 S.E.2d 228, 229 (1977).....	26
<i>Crowder v. Crowder</i> , 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965).....	9, 21
<i>Evans v. Gunter</i>	11
<i>Fesmire v. Digh</i> , 385 S.C. 296, 303, 683 S.E.2d 803, 807 (Ct. App. 2009)	7
<i>First Union Mortg. Corp. v. Thomas</i> , 317 S.C. 63, 74, 451 S.E.2d 907, 914 (Ct.App. 1994).....	20
<i>Futch v. McAllister Towing of Georgetown, Inc.</i> , 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999)	14
<i>Gray v. South Carolina Pub. Serv. Auth.</i> , 284 S.C. 397, 325 S.E. (2d) 547 (1985).....	9, 21
<i>Hartley v. Hartley</i> , 292 S.C. 245, 355 S.E. (2d) 869 (Ct. App. 1987).....	14
<i>Jeter v. S.C. Dep't of Transp.</i> , 369 S.C. 433, 438, 633 S.E.2d 143, 146 (2006).....	10
<i>Lewis v. Premium Inv. Corp.</i> , 351 S.C. 167, 170 n. 2, 568 S.E.2d 361, 362 n. 2 (2002)	9
<i>Lockwood v. Bowles</i> , 46 F.R.D. 625, 634 (D.D.C. 1969)	16
<i>Miami Sand & Gravel, LLC v. Nance</i> , 849 N.E.2d 671, 676 (Ind.Ct.App.2006).....	26
<i>Miami Sand & Gravel, LLC v. Nance</i> , 849 N.E.2d 671, 676 (Ind.Ct.App.2006).....	10
<i>Norton v. Matthews</i> , 249 S.C. 71, 152 S.E.2d 680 (1967).	16
<i>Porter v. Labor Depot</i> , 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct.App.2007).....	10
<i>Ramantanin v. Poulos</i> , 240 S.C. 13, 124 S.E. (2d) 611 (1962).....	10
<i>Ramantanin v. Poulos</i> , 240 S.C. 13, 124 S.E. (2d) 611 (1962).....	21
<i>Riedman Corp. v. Greenville Steel Structures, Inc.</i> , 308 S.C. 467, 419 S.E.2d 217 (1992)	12
<i>Root Refining Co. v. Universal Oil Prods. Co.</i> , 169 F.2d 514, 521-23 (3d Cir. 1948).....	16
<i>Sanders v. McAfee</i> , 42 Ga. 250.	13
<i>Spicer v. Waters</i> , 05 Barb. (N. Y.)	13
<i>Townes Associates, Ltd. v. City of Greenville</i> , 266 S.C. 81, 221 S.E. (2d) 773 (1976).....	9, 21
<i>Townes Assocs., Ltd. v. City of Greenville</i> , 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)	9
<i>Universal Oil Prods. Co. v. Root Refining Co.</i> , 328 U.S. 575 (1946)	16
<i>Whitmire v. Adams</i> , 273 S.C. 453, 257 S.E. (2d) 160 (1979)	21
<i>Whitmire v. Adams</i> , 273 S.C. 453, 2857 S.E.2d 160 (1979)	10

Wright v. Trask, 329 S.C. 170, 176, 495 S.E.2d 222, 225 (Ct.App.1997)9

OTHER AUTHORITIES

BALLENTINE'S LAW DICTIONARY 1105 (3d ed. 1969).....21
BLACK'S LAW DICTIONARY 1312 (7th ed. 1999).....21
Black's Law Dictionary 2nd Ed.....14
CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, supra note 151.....17
S Schwartz, 'The Case for Specific Performance' (1979) 89 Yale Law Journal 27117

RULES

Federal Rules Civil Procedure Rule 60(b)17
Rule 12(b), SCRCP13
Rule 60(b) SCRCP20

ISSUES ON APPEAL

- 1) The lower court err in awarding Respondents Motion to Dismiss based on Rule 12(b)(6) and res judicata.
- 2) The lower court err in awarding Respondents Motion to Dismiss based on Rule 12(b)(8).

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

Appellant ("Morphew"), proceeding *pro se*, filed the above-captioned action against Stephen Dudek and Doreen Cross (collectively, "Dudeks") on or about June 12, 2017, seeking the remedy of Constructive Trust due to Respondents' unlawful purchase of property located at 788 E. Butternut Rd., Summerville, SC 29483 ("property"). Morphew claims the Dudeks acquired or purchased said property by means of an unlawful ruling for Specific Performance, making the Order for Specific Performance, thus the Order for closing, void. Morphew further claims the Dudeks are not bona fide purchasers, they had intentionally taken the property from its rightful claimant, Morphew, and are required to transfer such property to Morphew who, with the Dudeks having complete knowledge of such, has had a claim on said property since December 16, 2012.

In 2012, the Dudeks had a contract to purchase said property from the owners/ sellers, Thomas and Lorraine Ferro (collectively, "Ferros") (Sales Contract, Dudek and Cross, October 24, 2012). On December 16, 2012, over 2 weeks after their sales contract expired, and after the Dudeks were issued a termination request for failure to close on or before said Contract expired (November 30, 2012), Morphew ratified a sales contract with the Ferros, allowing Morphew an 'out' contingency if the Dudeks failed to sign the termination request (Sales Contract, Morphew,

December 16, 2012).

Almost a month later and upon knowledge the Sellers Ferro had a backup buyer, the Dudeks filed a lis pendens to prevent such sale (Email, from Attorney Qualey to Ferro, January 14, 2013)(Lis Pendens, January 11, 2013- Case No. 2013-CP-18-074). Four days later they filed a complaint for specific performance (Complaint, Stephen Dudek and Doreen Cross v. Thomas and Lorraine Ferro, Case No. 2013-CP-18-074). 2 weeks later, Morphew files its complaint for specific performance against the Ferros with a separate cause of action against the Dudeks for tortious interference with contractual relations. In Morphew's complaint she claimed the Dudeks had failed to apply and secure lending per their sales contract (i.e., on or before November 30, 2012), therefore had breached their contract and were legally liable to sign the termination request. (Complaint, Morphew v. Thomas Ferro, et al., Case No. 2013-CP-18-183). Through discovery, attorney meetings and numerous subpoenas and requests to the Dudeks and their lending bank for proof of financing per their Specific Performance claim, Morphew and the sellers were told/provided the "Dudeks had financing but could not close due to the sellers failure to obtain a CL-100 or cleared CL-100", or "they have no information".

Both the Dudeks' case and Morphew case were combined into Case No. 2013-CP-18-00183 in September 2013. The two cases were heard separately in front of the Honorable James E. Chellis, Master- In-Equity for Dorchester County on June 11 and 12, 2014, at which the Respondents, their attorney and their witnesses (sales agent and loan officer) all testified or supported that the Dudeks, ultimately, were 'ready, able and willing' to close escrow but could not because of the Ferros.

In September 2014, the Ferros discovered evidence that completely contradicted the Respondents and its privies' testimony or evidence at trial, and that the Respondents clearly had such evidence in their possession or had knowledge of before filing its complaint for Specific

Performance. This evidence clearly proved beyond a reasonable doubt that the Dudeks, AT THEIR OWN HAND, were never ready or able to close escrow in order to lawfully compel such an extreme remedy of Specific Performance. Maybe more important, the new evidence specifically contradicts the lower Courts findings that the sellers Ferro were at fault for the Dudeks' breach or failure to close escrow, and/or contradicts the Dudeks met the special rules and laws of equity in order to compel Specific Performance. The Ferros provided the discovered material and documented evidence to the Master by submitting a Petition to the lower court to review the documented material evidence and testimony discovered before making its ruling. (Pleading, September 10, 2014- Case No. 2013-CP-18-183). Instead of taking notice, the Master informed the Ferros that he will not consider the new evidence [or facts], but only the attorney's statements in its ruling (Email, Ferro to Morphew, September 18, 2014). The Ferros were representing themselves, pro se.

The Master filed its Order two months later on November 6, 2014. No ruling was made on the petition or its evidence provided in its Order (Order, November 6, 2014- Case No. 2013-CP-18-183). In its Order of November 6, 2014, the Master stated it was guided by [specific] principals of law and equity, including good faith and fair dealings, excusing one breach due to another party's breach, and that the discretion of the court to grant specific performance is a judicial discretion to be exercised in accordance with special rules of equity AND with regard to the facts and circumstances of each case. It stated it found the Dudeks acted with good faith and fair dealing, and were at all times ready, able and willing to close escrow, but that the Ferros with unclean hands prevented the Dudeks from closing per their sales contract. The discovered evidence clearly reveals the Dudeks acted with bad faith and unfair dealings, had filed a frivolous and/or unlawful complaint for Specific Performance, could not be forgiven for their breach per the specific principals of law and equity, and that the lower court could not grant Specific Performance

as a matter of justice or judicial discretion as the Dudeks neither met the special rules and laws of equity nor should have been granted on the facts and circumstances of the case. If the Master had considered the new evidence discovered in its ruling, the prior case would have had a completely different outcome.

The Ferros and Morphew appealed, and within its appeal, again raised the issues stated in the Ferros' September 2014 Petition.

On August 24, 2016, Morphew filed an independent action against the Respondents, but also included its attorney, loan officer and sales agent, and several others for Fraud/Fraud on the Court and conspiracy to commit fraud/fraud on the court seeking the remedy of damages. This action is currently pending.

On January 11, 2017 this Court filed its Opinion affirming to the lower court's ruling on the overall authority, "As to whether the master properly ordered specific performance of the Contract: *Campbell v. Carr*, 361 S.C. 258, 262, 603 S.E.2d 625, 627 (Ct. App. 2004) ("An action for specific performance is one in equity."); *Fesmire v. Digh*, 385 S.C. 296, 303, 683 S.E.2d 803, 807 (Ct. App. 2009) ("In an action in equity, the appellate court may resolve questions of fact in accordance with its own view of the preponderance of the evidence."); *id.* ("However, this broad scope of review does not require this [c]ourt to disregard the findings at trial or to ignore the fact that the master was in a better position to assess the credibility of the witnesses." It did not review or rule on the fraudulent issues or evidence presented, but instead chose to affirm the lower courts Order on the above authority (Opinion, January 11, 2017- Appellate Case No. 2014-002633). Morphew filed a motion for a rehearing but withdrew its motion. The Ferros were in dire economic distress; therefore Morphew withdrew its request to prevent any further injustice to the Ferros. Further, Morphew had an independent action for fraud/fraud on the court pending. On February 15, 2017, this Court remitted the matter back to the lower court, "The above referenced

matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.” (Remittitur, February 15, 2017- Appellate Case No. 2014-002633).

On March 27, 2017 a hearing was held on the Respondents Motion for Closing and attorney’s fees and costs against the Ferros. At said hearing, the Court was informed of the independent action for fraud/fraud on the Court against the Dudeks, with the Master stating that has no bearing on this case. Additionally, because the Ferros objected to the attorney fees and costs and that they were never presented with the fees and costs before the hearing, and that the Respondents were attempting to change the price of the house within its sales contract, the Master allowed an Answer to be filed to review before making his ruling.

Instead, on April 3, 2017 the Court prematurely filed its Order therefore had to convert the Ferro/Morphew Answer filed on April 6, 2017, to a Rule 59(e) Motion and scheduled a hearing for said Motion on May 12, 2017 (Motion/Answer, 59(e) Motion, April 6, 2017- Case No. 2013-CP-18-183). In its April 6th 59(e)Motion/Answer and at the May 12th hearing, the Ferros and/or Morphew once again objected to compelling specific performance and a closing, presented evidence that the Respondents failed to meet Specific Performance, at all times material had no valid sales contract, had been denied lending by their own hand, were required to inform the court at any time of their inability to secure financing, were fraudulent [committed fraud on the court] and its award may be unlawful, Morphew and the Ferros’ Constitutional right or due process was violated (were prevented from fully presenting their case(s))and that this case requires further review by the lower court to support or uphold the judicial machinery of the court, stating the court can only be effective, fair and ‘just’ if is allowed to function as the laws proscribe.

On May 17, 2017, the lower court issued its Order, stating all items [regarding the fraudulent or unlawful actions of the Respondents or their complete failure to meet Specific Performance requirements] has no merit (Order, May 17, 2017- Case No. 2013-CP-100183) Morphew has

appealed the Order of May 17, 2017.¹

On June 2, Respondents acquired/closed on the property. Upon the Dudeks closing on the property at issue, Morphew filed its Constructive Trust complaint on June 12, 2017, in which this appeal arises from. The Respondents filed a Motion to Dismiss pursuant Rule 12(b)(6) SCRCF based on the fact the Plaintiff has failed to state facts sufficient to constitute a cause of action against the Defendants on June 27, 2017 (Motion, Motion to Dismiss Rule 12(b)(6), June 27, 2017- Case No. 2017-CP-18-987), and a separate Motion to Dismiss pursuant Rule 12(b)(8) SCRCF based on the fact that an action has been adjudicated between the same parties for the same claim (Motion, Motion to Dismiss Rule 12(b)(8), June 27, 2017- Case No. 2017-CP-18-987), in which the Plaintiff recently filed an appeal on both Motions.

Based on the actions of the Dudeks, Morphew alleges in this instant complaint that she is the equitable owner of the Property and claims right to the property. Morphew seeks restitution to recover the property and obtain legal title by constructive trust, or as the alternate, damages equivalent to the loss of the property and any costs associated with this claim (Complaint, Constructive Trust, June 12, 2017- Case No. 2017-CP-1800987)

STANDARD OF REVIEW

1. An action for specific performance is one in equity. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 170 n. 2, 568 S.E.2d 361, 362 n. 2 (2002); *Wright v. Trask*, 329 S.C. 170, 176, 495 S.E.2d 222, 225 (Ct.App.1997). In an action in equity, tried by the judge alone, without a reference, on appeal the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).
2. "It is now well settled that this court has jurisdiction in appeals in equity cases to find the facts in accord with our view of the preponderance or greater weight of the evidence, in the absence of a

¹ The Order of May 17, 2017 and the Order of June 12th, 2017 have been combined into one appeal.

verdict by a jury; and may reverse a factual finding by the lower court in such cases when the appellant satisfies this court that the finding is against the preponderance of the evidence."

Crowder v. Crowder, 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965).

3. An action to declare a constructive trust is in equity, *Bank of Williston v. Alderman*, 91 S.E.2d 296 (1917), and this Court finds facts in accordance with its own view of the evidence. *Gray v. South Carolina Pub. Serv. Auth.*, 284 S.C. 397, 325 S.E. (2d) 547 (1985); *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E. (2d) 773 (1976). In order to establish a constructive trust, the evidence must be clear, definite, and unequivocal. *Whitmire v. Adams*, 273 S.C. 453, 257 S.E.2d 160 (1979); *Ramantanin v. Poulos*, 240 S.C. 13, 124 S.E. (2d) 611 (1962).
4. While the Appellate Court utilizes the same standard of review as the circuit court in scrutinizing the application of Rule 12(b)(8), each of the components of the rule are determined as a matter of law and thus it applies a de novo standard of review to the grant or denial of this motion. See *Miami Sand & Gravel, LLC v. Nance*, 849 N.E.2d 671, 676 (Ind.Ct.App.2006). In other words, the Appellate Court may determine whether there is another action involving the same parties, claims (or subject matter), and remedies as a matter of law.
5. "The question of subject matter jurisdiction is a question of law." *Porter v. Labor Depot*, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct.App.2007) (citations omitted). "The issue of interpretation of a statute is a question of law for the court." *Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 438, 633 S.E.2d 143, 146 (2006) (citation omitted). An appellate court may decide questions of law with no particular deference to the trial court. In re *Campbell*, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008) (citation omitted).

ARGUMENTS

I. APPELLANT DISAGREES WITH THE RESPONDENTS CLAIM THAT THE LOWER COURT DID NOT ERR IN DISMISSING THIS ACTION BASED ON RES JUDICATA AND BASED ON RULE 12(B)(8), SCRPC.

It appears the sole question to be decided here is whether the prior unsuccessful action of appellant for specific performance now precludes, on the ground of res judicata and Rule 12(b)(8), SCRPC, the maintenance of the present action to declare the Respondents a Constructive Trust to

Appellant and/or to set aside the Respondents Order of Specific Performance on the ground of fraud.

First, this court has held that a final order based on fraud may be vacated or set aside because of fraud in the procurement of the judgment, and that doctrines of res judicata and collateral estoppel will not bar a collateral attack on a judgment based on extrinsic fraud. *Evans v. Gunter*, 294 S.C. 525, 366 S.E.2d 44 (Ct.App.1988).

Second, res judicata is an affirmative defense and in order to raise the affirmative defense of res judicata in a motion to dismiss, it must be plead under Rule 12(b)(6). As stated in its Initial Brief, Morpew contends the Dudeks did not plead res judicata in their Motion(s) to Dismiss Rule, specifically in its Rule 12(b)(6) Motion. Instead, its Motion states only, "*Plaintiff has failed to state facts sufficient to constitute a cause of action against the Defendants*". Additionally, when a Motion to Dismiss is filed, information supporting the grounds for dismissal must be included in the motion (Answer, Plaintiff's Brief in Opposition to Motion 12(b)(6), July 13, 2017- Case No. 2017-CP-18-987). No affidavit, memorandum or information [supporting the grounds for dismissal pursuant Rule 12(b)(6)] was included in Dudek motion (Motion, Motion to Dismiss 12(b)(6), June 27, 2017- Case No. 2017-CP-18-987) nor presented at the hearing. The Dudeks have failed to meet the requirement to raise res judicata in a motion to dismiss and therefore waived their right to raise res judicata in its defense on appeal.

Even if res judicata was properly asserted in its Motion and an Answer was filed that specifically plead the affirmative defense of res judicata, or if res judicata was found properly asserted and pleaded, Morpew contends dismissal based on res judicata should not have been awarded. The lower court Order on this appeal ruled res judicata also bars this instant action for Constructive Trust because "*In the original action between these parties, Case No. 2013-CP-18-00183, Morpew could have brought her constructive trust or equitable ownership claim against*

the Dudeks” and that “*Morphew has more than had her day in court on the issue of ownership of the Property*” (Order, Constructive Trust, February 21, 2018- Case No. 2017-CP-18-987).

Morphew disagrees that ‘a claim for Constructive Trust against the Dudeks could have been brought in the original action, as the Dudeks were not the property owners in the original action.

Constructive Trust: A relationship by which a person who has obtained title to property has an equitable duty to transfer it to another, to whom it rightfully belongs, on the basis that the acquisition or retention of it is wrongful and would unjustly enrich the person if he or she were allowed to retain it.²

Equitable Owner: Beneficiary of a property being held in a trust;

Equitable ownership: where the relevant interest arises under a trust.

A Constructive Trust action can only be claimed against a party who holds title, and only a title holder can hold property in a trust for an Equitable Owner, which the relevant interest arises under a trust (in this case, Constructive Trust). Moreover, only a legal title holder has the ability to transfer said property to another, therefore Morphew could not have brought this Constructive Trust action/remedy or its claim as equitable owner against the Dudeks in the original action as they did not hold legal title until June 2017. A constructive trust only applies when the defendant owns the property at issue.

Also, the actual purchase of the property and ejectment of Morphew from such changed the legal position of the parties, therefore it complaint cannot be barred by res judicata.

In order for res judicata to operate as a bar to a lawsuit, the following elements need to be proven: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 419 S.E.2d 217 (1992). "Under the doctrine of res judicata, a litigant is barred from raising any issues

² <https://legal-dictionary.thefreedictionary.com/constructive+trust>

which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Id.*

The prior action between the parties involved only the rights of appellant Morphew and Respondents Dudeks to specific performance of their sales contracts [or damages as an alternate]; while present action seeks to set establish a constructive trust based on the Dudeks' unlawful obtainer of the property on the ground of fraud. The two actions were not based upon the same cause of action and, if the present action is barred, it must be upon the ground that the identical issue now presented was determined in the prior action. Constructive Trust, fraud and abuse of process are the issues now presented differing greatly from the original action³. This court should recognize that the two actions involved different causes of action. The question then is whether the precise issue, now presented in this action, was determined in the prior action. If it was, appellant is estopped to maintain the present action; if not, this action can be maintained and dismissal should not have been granted.

Additionally, the lower court ruled in the original action that Morphew had equitable interest in the said property, as she had a valid pending sales contract. Nowhere or at any time was ownership an issue, litigated or ruled on. In this instant action, Morphew is claiming she was the only party that, at all times material, had a legal claim to the property, and that the Dudeks had knowingly and unlawfully purchased said property with notice of an adverse claim [outstanding fraud claim] or interest in the property by Morphew. Hence, were not bona fide purchasers.⁴ This was not an issue or claim that could have been raised in the original action or in the second action

³ Note: Morphew's original action for specific performance and breach of contract was against Defendants Thomas and Lorraine Ferro, who are not parties to this current action.

⁴ One who acts without coven, fraud, or collusion; one who, in the commission of or connivance at no fraud, pays full price for the property, and in good faith, honestly, and in fair dealing buys and goes into possession. *Sanders v. McAfee*, 42 Ga. 250. A bona fide purchaser is one who buys property of another without notice that some third person has a right to, or interest in, such property, and pays a full and fair price for the same, at the time of such purchase, or before he has notice of the claim or interest of such other in the property. *Spicer v. Waters*, 05 Barb. (N. Y.) 231. Black's Law Dictionary 2nd Ed.

as the Dudeks did not purchase the property until June 2017, therefore Morphew's complaint should not have been dismissed.

Also, in the Order on this appeal, the lower court stated, "*After losing at the trial court level, Morphew appealed, and the Court of Appeals affirmed the order awarding the Dudeks specific performance,*" that "*Not happy with the Court of Appeals decision, Morphew filed her second action, Case No. 2016-CP-18-1706, as well as this action.*" Morphew agrees the Court of Appeals affirmed the lower court's decision, but only affirmed it based on 'faith in the lower courts better ability to evaluate the testimony at trial', not on the newly discovered evidence presented by Morphew and the Ferros on appeal; otherwise it would have surely found the lower court findings of fact were not or could not be supported by any evidence or that specific performance was not a remedy available to the Dudeks.

"While this court in equity matters has jurisdiction to find facts based on its own view of the preponderance of the evidence, we are not required to disregard the findings of the trial judge who saw and heard the witnesses and who is in a better position to evaluate the testimony." *Hartley v. Hartley*, 292 S.C. 245, 355 S.E. (2d) 869 (Ct. App. 1987).

As to all other issues: *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

(Opinion, January 11, 2017- Appellate Case No. 2014-002633)

In its Order, the lower court stated that Morphew filed its second action for Fraud on the Court and this instant action for Constructive Trust against Dudek and Cross because she was "not happy with the Court of Appeals decision" (Order, Constructive Trust, February 21, 2018- Case No. 2017-CP-18-987). Morphew objects to these allegations asserted by the Defendants or this Court as it is speculative or subjective, and without evidentiary support. In fact such an assumption would be technically impossible since Morphew filed her second action for Fraud/Fraud on the Court months before the Appellate Court had even placed the original action

on their calendar for review or made their decision.

Further, Morphew filed this instant action for Constructive Trust against the Dudeks only after they had filed and were awarded a motion for closing⁵ even though the lower court was again presented with fraud on the court by the Dudeks and their witnesses and attorney, and after they had purchased the property. Again, the Lower Court ignored the evidence stating it was not relevant to the case (Motion/Answer, 59(e) Motion, April 6, 2017- Case No. 2013-CP-18-183) (Order, May 17, 2018- Case No. 2013-CP-18-183). Filing the second action and this action was not because the Appellant was unhappy with the Appellate Court's decision, but instead it was because the Dudeks and its privies committed fraud/fraud on the court, has cost her undue stress, time and money, fraudulently took or stole property they had no legal right to, especially with notice of her claim to the property and/or pending fraud complaint against them, and unlawfully ejected her and her family from their home. Morphew has only filed its additional two complaints in order to correct an injustice and protect her rights against fraud and/or due process, the first for the fraud on the court and the second for having her home unlawfully or fraudulently taken away, all accomplished by the Respondents and their privies' unlawful or fraudulent behavior and the lower courts abuse of discretion in the original action.

Morphew contends this court should also be alarmed at the prior and/or continuing perjury and fraud/fraud on the court or unlawful acts of the Respondents and the Lower Court's alleged abuse of discretion in its failure to review the evidence presented, and that the Respondents had come to court with unclean hands and unlawfully sought Specific Performance. At the minimum, the court had a duty to consider that the Dudeks failed to meet the minimum requirements to compel Specific Performance and the Respondents unclean hands and fraudulent actions or non-

⁵ Even though they and the lower court had full knowledge of the Respondents' fraud and/or complete and utter failure to meet the specific performance rules, laws or statues required in order for the remedy of specific performance to be available and/or for the lower court to lawfully compel such an extreme remedy.

actions before making its ruling or awarding a closing order. Morphew contends there is a jurisdictional failing appearing on the face of the record, that the prior Order is void, subject to vacation with damages, and can never be time barred.

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 original specific performance case, equity did not favor the granting of specific performance as a matter of sound judicial discretion. 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.” Federal Rules Civil Procedure Rule 60(b). 28 U.S.C.A. Therefore, the lower court should have considered the fraud and facts presented before issuing the Order of November 6, 2014 or awarding a closing on said property or attempting to ‘close’ or ‘end’ this case.

Maybe even more critical, 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. 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. Morpew. 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 actions in the litigation in the first place? 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, providing false answers or documents in 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, forged material evidence, and extensive misrepresentation/false testimony from the parties and all their witness about the very core of its and Morpew’s case or issues – which also directly violates the oath taken in court “to tell the truth, the whole truth and nothing but the truth”. All this was alleged and presented to the lower

court in the original action, but did not seem to be a relevant issue. The only issue imperative to the Master was closing its case. Should a party's unlawful behavior be continuously overlooked at the prejudice of another party? Should a case be dismissed or closed just "to be done with it"?

The original case raises an extraordinarily important question, the constitutionality of ignoring evidence, especially documented material evidence that substantially contradicts or contradicts all the testimony of the Dudeks and its privies at trial and beyond, or the lower court's findings of fact in its Order. The Lower Court in this instant action acknowledged Morphew and the Sellers Ferro had discovered the evidence after the trial and presented the evidence to the Master in Equity before his ruling, which he refused to consider. Instead, in its ruling the lower court found, by the laws and statutes of equity, that granting specific performance to the Dudeks was proper. Even though she and the sellers appealed the Order and presented the same evidence to this court, it was again not considered. Morphew had, in several subsequent actions, presented the allegations and evidence to the lower court, but it was considered irrelevant or with no significance to the case and ignored. Morphew claims she was unfairly and severely prejudiced in the original action because the evidence does not substantially support the lower court's ruling, instead the Dudeks were awarded for their bad faith/unfair dealings, or unlawful or fraudulent behavior.

The lower court in this instant action stated, "*Morphew has more than had her day in court on the issue of ownership of the Property.*" Morphew disagrees. There was never any issue of ownership in the prior case(s), only now in this instant action. A Specific Performance case in real property decides if a party to a contract has a right to compel the performance of that contract not ownership.

Further, the lower court in his action stated Morphew had legal mechanisms to bring the alleged fraud and abuse of process to the court's attention. It specifically suggested Rule 60,

SCRCP, stating neither Morphew nor the Ferros, despite knowing of the alleged fraud by the Dudeks, filed a motion pursuant to Rule 60, SCRCP. Morphew argues nowhere during the hearing for Constructive Trust did the lower court determine Morphew was required to file a Rule 60(b) in the prior case in order to bring the fraud or abuse of process to the court's attention. Moreover, the lower court stated that if any fraud was committed on the court that it doesn't mean it cannot be brought in the other cases rather some sort of collateral attack, or the fraud claim should be brought in the case where the fraud on the court occurred (Transcript, Constructive Trust, November 3, 2017- Case No. 2017-CP-18-987). Morphew argues neither she nor the Ferros were required to file a Rule 60(b) Motion, as the rule clearly states, "*This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court.*" Rule 60(b) SCRCP

Morphew contends fraud was properly presented to the Court of Equity and this Court in the original action but was neither heard nor ruled on but should have been, particularly in the court in which the fraud was committed (Email, Ferro to Morphew, September 18, 2014) (Order, November 6, 2014- Case No. 2013-CP-18-183) (Opinion, January 11, 2017). Res judicata can only bar an action that was litigated and adjudicated. Even though the issue was presented to the Court(s), it was not ruled on, therefore fraud cannot be barred by res judicata in this action.

Additionally, the lower court stated Morphew brought the same claims in the second action she filed against the Dudeks, Case No. 2016-CP- 18-1706, and that by way of an order issued on January 31, 2017, the court dismissed Morphew's fraud-based claims against the Dudeks. For these reasons, her fraud and abuse of process causes of action are dismissed and barred by res judicata. Morphew disagrees. Again, as argued above and repeated herein, Morphew contends the Respondents have waived their right to apply the doctrine of Res Judicata in this action or to Morphew's complaint as they have not asserted or properly asserted it in its Motion(s) and/or

pleaded said affirmative defense in an Answer, or properly asserted and pleaded res judicata. Therefore any claim within Morpew's Complaint, but specifically here for fraud and abuse of process, cannot be barred by res judicata.

Even if res judicata could be applied, the cause of action "Abuse of Process" against the Dudeks in this instant action was neither brought in the original action nor the second action, therefore the application of res judicata cannot bar Morpew's cause of action for abuse of process in this action, and its case should not have been dismissed.

Further, the Respondents claim Morpew is alleging the complete opposite of what the essential elements of abuse of process is, specifically an ulterior purpose. "An ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process." *First Union Mortg. Corp. v. Thomas*, 317 S.C. 63, 74, 451 S.E.2d 907, 914 (Ct.App. 1994). "[T]here is no liability when the process has been carried to its authorized conclusion." *Id.* at 74-75, 451 S.E.2d at 914. Morpew contends her statement the Dudeks "utilized the legal process to unlawfully or fraudulently obtain the [P]roperty" is exactly what ulterior purpose is defined as. Meaning, the remedy of specific performance was not available to them as they critically and legally failed to meet those strict requirements, therefore the Dudeks had no legitimate or legal right to use the legal process to compel specific performance. The process was legitimate, but their use of it was not, and should not have been authorized.

Further, Res judicata does not bar a separate suite based upon an existing final judgment rendered upon the merits with fraud or collusion. Res judicata is also defined as the principal that an existing final judgment rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. *BALLENTINE'S LAW DICTIONARY* 1105 (3d ed. 1969). *Black's Law Dictionary*

1312 (7th ed. 1999).

Moreover, the cause of action for fraud/fraud on the court in the second action was fraud which induced a ruling for Specific Performance. In this instant action, Morphew asserts the Dudeks 'stole' or prevented her from purchasing the property by unlawfully or fraudulently purchasing the property and knowing of Morphew's claim to said property, therefore are liable under a constructive trust to transfer said property to Morphew.

Material documented evidence is provided in this instant action to this Court proving the Dudeks had completed knowledge they critically failed to meet the strict requirements, rules and guidelines of Specific Performance even before they filed their action Specific Performance in 2013, and/or their Motion for Closing in 2017. Meaning, the Dudeks were denied lending because their sales contract was invalid at application. It was never remedied, therefore the lending bank denied them lending and closed their file in January 2013. As a whole, and at all times material, the Dudeks sales contract was void due to their own hand as of December 1, 2012. Morphew asserts in this action the Dudeks failed to have valid legal claim to the property as of December 1, 2012, knew of Morphew's claim by constructive notice or express notice, therefore unlawfully purchased or obtained said property.

Morphew argues as a matter of law or in an action to declare a constructive trust, the Court of Appeals can find facts in accordance with its view of the evidence.

"It is now well settled that this court has jurisdiction in appeals in equity cases to find the facts in accord with our view of the preponderance or greater weight of the evidence, in the absence of a verdict by a jury; and may reverse a factual finding by the lower court in such cases when the appellant satisfies this court that the finding is against the preponderance of the evidence." *Crowder v. Crowder*, 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965).

"An action to declare a constructive trust is in equity, *Bank of Williston v. Alderman*, 106 S.C. 386, 91 S.E. 296 (1917), and this Court finds facts in accordance with its own view of the

evidence.” *Gray v. South Carolina Pub. Serv. Auth.*, 284 S.C. 397, 325 S.E. (2d) 547 (1985); *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E. (2d) 773 (1976). In order to establish a constructive trust, the evidence must be clear, definite, and unequivocal. *Whitmire v. Adams*, 273 S.C. 453, 257 S.E. (2d) 160 (1979); *Ramantanin v. Poulos*, 240 S.C. 13, 124 S.E. (2d) 611 (1962).

For the reasons stated above, the lower court should not have granted the Dudeks’ Motion to Dismiss based on Rule 12(b)(6) and/or res judicata, therefore Morphew respectfully asks this Court to reverse the lower court Order to dismiss the Dudeks’ Motion to Dismiss pursuant 12(b)(6) with prejudice.

Though Appellant agrees this lawsuit and the original lawsuit involves the same parties, it disagrees the subject matter is the same. Subject matter is the cause, the object, the thing in dispute; or the thing in controversy, or the matter spoken or written about. In the original case, the ‘cause’ or ‘thing’ in dispute was not the “property” itself as the Respondents claim, but instead the breach of the parties to the contract(s), thus leading to the remedies available in the two breach of contract cases, as each case specifically asked for the sellers to specifically perform their contract. In the current case, the ‘cause’ or dispute is whether - under the circumstances- the Respondents obtained the property unlawfully [through unlawful acts and the unlawful use of a lawful process to obtain the property], therefore making it unfair or unjust for the Respondents to keep possession of it. A constructive trust ...arises entirely by operation of law without reference to any actual or supposed intention of creating a trust. It is resorted to by equity to vindicate right and justice or frustrate fraud. *All v. Prillaman*, 200 S.C. 279, 20 S.E. (2d) 741 (1942). Plaintiff in its case is merely maintaining or defending its claim the Respondents unlawfully prevented Morphew from performing her contract, took the property from its rightful claimant (Morphew), and obtained the property only by their extensive fraud, bad faith or violation of a fiduciary duty.

Respondents state in its Brief that Morphew claims the alleged fraud or fraud on the courts

by the Dudeks was unknown to her until recently. Morphew is unsure of Dudek's definition of 'recently', but clarifies the facts. The Ferros in their pleading, and both the Ferros and Morphew on appeal of the original case, never specifically stated or claimed "fraud" because they had not known the actions as 'fraud'⁶. It is an indisputable fact that if Morphew had known of the 'fraud' she would have specifically claimed such. Also, there is no law that states a party has to file a Motion 60(b) when discovering such fraud, but instead the Rule clearly states, "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court," which Morphew did in its independent action for Fraud/Fraud on the Court filed August 24, 2016. Res judicata cannot bar this action as the alleged fraud was not heard and ruled on in the original case. Though Judge Chellis was presented with newly discovered material and documented evidence two (2) months before his ruling unequivocally proving the Dudeks critically breached their contract at their own hands, had actually been denied lending due to their failure to apply for financing before their sales contract expired (rendering the sales contract invalid and non-negotiable), and they had never been 'ready or able' to close escrow, therefore the extreme remedy of specific performance was not legally available to the Dudeks, he ignored the very pertinent, critical and material evidence and ordered the Ferros to specifically perform the sales contract with the Dudeks first, and if they fail, to specifically perform the sales contract with Morphew⁷. It also proved without a doubt that the Dudeks, their lawyer, the loan officer whose testimony the Order was substantially based on, and their sales agent all had complete knowledge of the Dudeks failures but all falsely testified to material facts to the case(s). Further, they presented forged documents as proof of application

⁶ The lower Court in this current action ruled the evidence produced in 2014 and on appeal in 2015 alleged 'fraud' (see Order, Constructive Trust, Case No. 2017-CP-18-987, pg. 2, para. 2). Neither in the original case nor on appeal was the alleged 'fraud' heard and/or ruled on.

⁷ Such evidence proves the court of equity could not legally order specific performance in favor of the Dudeks if that remedy was not available to them, therefore. Instead, the lower court abused its discretion and ignored such controversial and fraudulent evidence, and failed to take into consideration the statement of a pro se party.

for mortgage credit per the sales contract, when in fact they had not make initial application such until 45 days later, and 5 days AFTER their contract had expired. Clearly, the Dudeks and their lawyer had in its possession such information but filed a frivolous and unlawful complaint, continued to litigate and suborned perjury in order to cover up its own unlawful acts in hopes to prevent Morphew from closing and eventually obtain the property for themselves. In effect, such evidence proves the fraud perpetrated by the Dudeks and their parties to obtain a ruling in their favor AND that the court of equity could not legally order specific performance in favor of the Dudeks since that remedy was not legally available to them. Instead, the lower court abused its discretion and ignored such controversial and fraudulent evidence, and failed to take into consideration the statement of a pro se party.

Therefore this court should render the prior judgment of November 6, 2012 void based on loss of subject matter jurisdiction, abuse of discretion and/or fraud.

In its Order, the lower court dismissed Morphew's complaint because "*another action is pending between the same parties for the same or substantially the same claim. Specifically, the second action filed by Morphew, Case No.2016-CP-18-1706, is pending. It is between Morphew and the Dudeks. And it is for the same or substantially the same claim. For these reasons, Morphew's complaint is dismissed pursuant to Rule 12(b)(8)*".

Morphew contends the lower court erred in ruling its complaint dismissed pursuant to Rule 12(b)(8). First, the Dudeks' Motion to Dismiss pursuant 12(b)(8) "*is based on the fact that an action has been adjudicated between the same parties for the same claim in which the Plaintiff recently filed an appeal (see Stephen Dudek...v... Thomas Ferro...and Molly Morphew v. Stephen Dudek....Case No. 2013-CP-074 consolidated with Case No. 2013-CP-183.*" Nowhere does it mention Case No 2016-CP-18-1706 as claimed in its Brief. No affidavit, memorandum or information [supporting the grounds for dismissal pursuant Rule 12(b)(8)] was included in Dudek

motion (Motion, Motion to Dismiss 12(b)(8), June 27, 2017- Case No. 2017-CP-18-987) nor presented at the hearing. The Dudeks Motion pursuant 12(b)(8) fails or is improper as it is not based on a pending case, therefore is improper and the lower court erred in awarding its Motion to Dismiss pursuant 12(b)(8). Further, the Dudeks have failed to meet the requirement to raise res judicata in a motion to dismiss and therefore their Motion to Dismiss should be denied, and a constructive trust established based on the evidence provided.█

Even if its Motion was proper, and as stated above, during the hearing the lower court did not rule on the effect of the pending second action (Case No. 2016-CP-18-1706) for Fraud/Fraud on the Court, but instead made a ruling that it found that a cause of action for Constructive Trust cannot survive under the current circumstances, the matters of Constructive Trust have been litigated, and specifically, none of the elements of constructive trust can be met or are met in this instance (Transcript, Constructive Trust, November 3, 2017- Case No. 2017-CP-18-987), making a ruling based on a 'pending action' improper.

Also, Morphew argues the matters or claims raised in this action to declare a constructive trust are that the Dudeks unlawfully acquired or purchased said property based on fraudulent acts or fraud on the court, are not bona fide purchasers, therefore stole the property from Morphew who had a legal claim or the only legal claim to it, therefore the Dudeks are lawfully required to transfer the property [being held in trust]. While Morphew respectfully recognizes that the pending Fraud claim may have some relationship or impact upon this circuit court action, Morphew would also respectfully ask this court to also recognize that the pending Fraud/Fraud on the Court action and this Constructive Trust action are fundamentally and structurally different from each other, and/or each action's subject matter and remedies are not precisely the same, or are not substantially the same, therefore the drastic remedy of dismissal was inappropriate under Rule 12(b)(8). South Carolina Appellate Court:

“In South Carolina, dismissal under Rule 12(b)(8) may be proper when there is (1) another action pending, (2) between the same parties, (3) for the same claim. Rule 12(b)(8), SCRC. The rule has historic ties to a former statute providing a defendant a similar opportunity to demur; our supreme court traditionally interpreted that statute narrowly, stating that it only applied when there was identity of parties, causes of action and relief. S.C. Public Serv. Comm'n v. City of Rock Hill, 268 S.C. 405, 408, 234 S.E.2d 228, 229 (1977); see also James F. Flanagan, South Carolina Civil Procedure 96-97 (2d ed.1996). We find this approach consistent with modern day practice under rules similar to our Rule 12(b)(8). See, e.g., Beatty v. Liberty Mut. Ins. Group, 893 N.E.2d 1079, 1084 (Ind. App.Ct.2008) (applying 12(b)(8) dismissal " where the parties, subject matter, and remedies are precisely the same, and it also applies when they are only substantially the same."). Accordingly, we interpret the rule narrowly such that the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8).

While we utilize the same standard of review as the circuit court in scrutinizing the application of Rule 12(b)(8), each of the components of the rule are determined as a matter of law and thus we apply a de novo standard of review to the grant or denial of this motion. See *Miami Sand & Gravel, LLC v. Nance*, 849 N.E.2d 671, 676 (Ind.Ct.App.2006).

In other words, this Court may determine whether there is another action involving the same parties, claims (or subject matter), and remedies as a matter of law.

II. APPELLANT DISAGREES WITH THE RESPONDENTS THAT THE LOWER COURT SHOULD AFFIRM THE ORDER OF THE LOWER COURT BASED ON ANY GROUND APPEARING IN THE RECORD

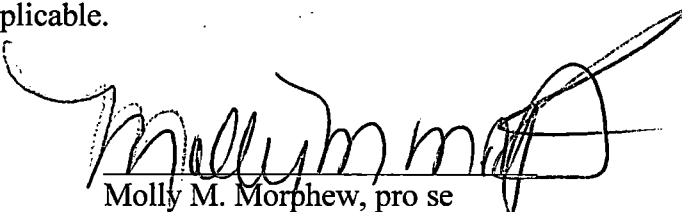
Morphew disagrees that the lower court should affirm the order of the lower court based on any ground appearing in the record due to the claims of fraud or fraud on the court, the amount of error in the Order of the lower court, and for all reasons stated above. Instead, Morphew asks this Court to reverse the Order of the Lower Court or based on any ground appearing in the record.

CONCLUSION

Morphew contends the Dudek's Motions pursuant Rule 12(b)(6) and/or 12(b)(8) ultimately fail or fail on its face, therefore Morphew's action for Constructive Trust should not have been dismissed. Even if their Motion(s) were proper, Morphew argues, based on the reasons stated herein, its complaint should not have been dismissed, and particularly the Constructive Trust, right of possession, right of property, and cause of action for "Abuse of Process" against the Dudeks as it was neither brought in the original action nor the second pending action, therefore the application of res judicata cannot bar Morphew's causes of action for right of possession/ right of property and abuse of process in this instant action. For this reason alone, Morphew's action for Constructive Trust should not have been dismissed.

Based on the reasons or defenses within this Brief, Morphew respectfully requests this Court to reverse the lower court's Order to dismiss Dudeks' Motions with prejudice, and either reverse and rule as a matter of law on the issue of constructive trust or remand this action back to the lower court for further proceedings as this Court finds applicable.

Respectfully submitted,



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