

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable James E. Chellis, Master-In-Equity

Case No. 2013-CP-18-00074
Appellate Case No. 2017-001393

Stephen Dudek, Doreen Cross, Respondents,

v.

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

And

Molly M. Morpew, Appellant,

v.

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

RECEIVED
AUG 13 2018
SC Court of Appeals

FINAL BRIEF OF RESPONDENTS STEPHEN DUDEK AND DOREEN CROSS

SMITH | CLOSSER, P.A.

Steven L. Smith (SC Bar No.: 05173)
Samuel M. Wheeler (SC Bar No.: 101008)
7455 Cross County Road, Suite 1
P.O. Box 40578
Charleston, SC 29423-0578
843-760-0220
843-552-2678

TABLE OF CONTENTS

Table of Authorities ii

Statement of the Case 1

Arguments:

- 1. Morphew’s first four issues seek to contest the unappealed law of this case, requiring this Court to affirm the Lower Court’s orders.....4
 - A. The Specific Performance Order is the unappealed law of this case, requiring this Court to affirm the Lower Court’s rulings4
 - B. Morphew never properly challenged the alleged fraud on the Lower Court, rendering any rulings following it the law of the case.....6
- 2. Morphew’s final issue on appeal lacks merit because she is challenging jurisdiction, when she in fact voluntarily submitted to the jurisdiction of the Lower Court.....7
- 3. This Court should further uphold the orders being appealed for any ground appearing in the record.....10

Conclusion10

TABLE OF AUTHORITIES

CASES

<i>Atlantic Coast Builders and Contractors, LLC v. Lewis</i> , 398 S.C. 323, 730 S.E.2d 282 (2012).....	5
<i>Bakala v. Bakala</i> , 352 S.C. 612, 576 S.E.2d 156 (2003).....	4
<i>Buckner v. Preferred Mutual Insurance Company</i> , 255 S.C. 159, 177 S.E.2d 544 (1970).....	5
<i>Charleston Lumber Co., Inc. v. Miller Housing Corp.</i> , 338 S.C. 171 , 525 S.E.2d 869, (2000).....	5
<i>Dudek v. Ferro</i> , Appellate Case no. 2014-002633.....	2, 5
<i>Eaddy v. Eaddy</i> , 283 S.C. 582, 324 S.E.2d 70 (1984).....	7
<i>First Union National Bank of South Carolina v. Soden</i> , 333 S.C. 554, 511 S.E.2d 372 (1998).....	5
<i>Long v. McMillan</i> , 226 S.C. 598, 86 S.E.2d 477 (1955).....	8, 9
<i>I'On, L.L.C. v. Town of Mt. Pleasant</i> , 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).....	10
<i>McEachern v. Black</i> , 329 S.C. 642, 496 S.E.2d 659 (1997).....	8
<i>State v. Blanton</i> , 278 S.C. 597, 300 S.E.2d 286 (1983).....	8
<i>Transp. Ins. Co. v. Second Injury Fund</i> , 389 S.C. 422, 699 S.E.2d 687 (2010).....	5
<i>Wilder Corp. v. Wilke</i> , 330 S.C. 71, 497 S.E.2d 731 (1998).....	4

STATUTES AND COURT RULES

Rule 60, SCRCF.....	6, 7
Rule 220, SCACR.....	10

SECONDARY SOURCES

17 C.J.S. Contempt § 63 (1963).....	9
-------------------------------------	---

STATEMENT 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. 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 R. pp. 86-97). Appellant Molly M. Morphew (“Morphew” or “Appellant”) entered into a separate and subsequent contingency contract, under which she agreed to buy the Home, if the Dudeks failed to close on the Home. (see R. pp. 98-127). A dispute then arose over whom, the Dudeks or Morphew, was entitled to purchase the Home, resulting in each the Dudeks and Morphew filing the above cases. Both the Dudeks and Morphew sought specific performance. Given that both parties were claiming the same relief, they consolidated the cases under Case No. 2013-CP-18-00183, by way of a consent order filed on or about September 18, 2013. (R. pp. 21-24).

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”). On September 10, 2014, the Ferros filed a “Pleading Statement” in which they asserted alleged fraud perpetrated on the Lower Court at trial. (R. pp. 128-194). On November 6, 2014, the Lower Court issued an order awarding the Dudeks specific performance (“Specific Performance Order”). (R. pp. 1-20). Neither the Ferros nor Morphew filed a Rule 60, SCRPC, motion on the grounds that the Lower Court was influenced by the fraud outlined in the Pleading Statement when it issued the Specific Performance Order, as would have been their right under Rule 60, SCRPC. (see Filing History,

Case No. 2013-CP-18-00183). Instead, both Morphew and the Ferros appealed the Specific Performance Order. (see 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-UP-019. (R. pp. 27-30). Morphew initially petitioned for a rehearing, but she voluntarily dismissed the petition on February 9, 2017. (R. pp. 278-305). This Court granted the dismissal and issued remittitur on February 15, 2017. (R. pp. 31-32, pp. 33).

Following remittitur, the Dudeks moved the Lower Court in March, 2017 for an order setting a schedule for them to close on the Home. (R. pp. 309-311). The Lower Court heard the motion and ultimately issued an order on April 3, 2017, setting the terms of closing ("First Closing Order"). (R. pp. 34-42). On April 6, 2017, after the First Closing Order was issued, Morphew filed an "Answer" to the Dudeks' Motion to Set Closing. (R. pp. 341-364). Out of an abundance of caution, the Lower Court considered Morphew's "Answer" a Rule 59, SCRPC, motion to reconsider and issued a new Closing Order on May 17, 2017 ("Second Closing Order"). (R. pp. 43-54). Morphew has currently appealed the Second Closing Order in this appeal. The Dudeks then closed on the Home pursuant to this Court affirming the Specific Performance Order and the subsequent issuance of the Second Closing Order, but Morphew, who has been in possession of the Home since trial in 2014, refused to vacate the Home. After additional hearings on this occupancy issue were held on June 12, 2017, the Lower Court issued an order on June 14, 2017, holding Morphew in contempt for failing to vacate the Home and ordering Morphew to vacate the Home by June 16, 2017 ("Contempt Order"). (R. pp. 62-75). Morphew has also appealed the Contempt Order in this appeal.

At various points in between this Court considering the original appeal and the present, Morphew has filed two separate cases in Dorchester County. In the first, Morphew sued the

Dudeks and virtually every realtor, attorney and bank that touched the original transaction that would have sold the Home to the Dudeks. (see *Molly M. Morphew v. Stephen Dudek, et al.*, Case No.2016-CP-18-1706). In her complaint and proposed amended complaint, she alleges dozens of causes of action, most of which are grounded in fraud stemming from the sale of the Home to the Dudeks and occurring at the trial in June of 2014. (R. pp. 210-277). On the very day, June 12, 2014, that the Lower Court heard the motion that led it to issue the Contempt Order, Morphew filed a third case, with a corresponding *lis pendens*, against the Dudeks in which she sought ownership of the Home through constructive trust. (R. pp. 316-340). After a dismissal of that case by way of an order issued by the Honorable Diane S. Goodstein on June 20, 2018, Morphew filed Appeal No. 2018-000507. In total, Morphew has pending three cases and two appeals, all related to the Home, her alleged ownership of the Home, or alleged fraud perpetrated by the Dudeks on either Morphew or the Lower Court at trial in June, 2014.

ARGUMENTS

In her initial brief, Morphew has listed five issues, masked as an appeal of the Second Closing Order and Contempt Order. (see Morphew Br.). In fact, Morphew has actually raised no new issues for this Court to consider; instead, Morphew's appeal is nothing more than her attempt to relitigate the Specific Performance Order, which is the law of the case.

Morphew's brief is a little difficult to dissect, as it jumps around from landlord-tenant laws to Constitutional claims, relying mostly on non-binding precedent from Arizona, federal

circuits other than the Fourth Circuit, and an unidentified source labeled WRIGHT ET AL. (see Morphew Br.).¹

Based on her issues and her conclusion section, Morphew is arguing three things: (1) that the Specific Performance Order should be overturned and that she is entitled to a new trial; (2) that the Lower Court failed to consider fraud before issuing the Second Closing Order; and (3) that the Lower Court did not have personal or subject matter jurisdiction to issue the Second Closing Order or the Contempt Order. (Id.). The first two of these three arguments are found in issues one through four in Morphew's brief. The third argument is found in her fifth and final issue on appeal.

I. Morphew's first four issues seek to contest the unappealed law of this case, requiring this Court to affirm the Lower Court's orders.

A. The Specific Performance Order is the unappealed law of this case, requiring this Court to affirm the Lower Court's rulings.

In the Conclusion section of her initial brief, Morphew makes it abundantly clear what relief she is requesting. She attacks the alleged fraud on the court, then she states, "the Appellant is asking the Order of November 6, 2014 [i.e., the Specific Performance Order] should be rendered void and reversed, or as an alternative, void and vacated with this case remanded back for retrial." (Morphew Br., p. 19). Only then does she mention the Lower Court's failures with respect to the Second Closing Order and Contempt Order, which will be discussed below. She

¹ These new arguments and non-binding precedent should not be considered. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *Bakala v. Bakala*, 352 S.C. 612, 625, 576 S.E.2d 156, 163 (2003) ("A due process claim raised for the first time on appeal is not preserved.")

reiterated this request for the Specific Performance Order to be vacated under her first three issues on appeal. (Id. at pp. 6, 9, 11). And in her discussion of her third issue on appeal, Morpew is actually challenging whether the Dudeks met the elements of Specific Performance. (Id. at pp. 9-11).

Morpew already appealed the Specific Performance Order, and this Court already upheld it. (R. pp. 27-30). Morpew chose to voluntarily dismiss her petition for a rehearing, leading this Court to issue remittitur. (R. pp. 31-33). It is well established that an “unappealed ruling is the law of the case and requires affirmance.” *Transp. Ins. Co. v. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687 (2010) (citing *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000)); see also *Buckner v. Preferred Mutual Insurance Company*, 255 S.C. 159, 177 S.E.2d 544 (1970); *Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012); *First Union National Bank of South Carolina v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (1998).

Morpew has used an appeal of the Second Closing Order and Contempt Order as an attempt to have this Court overturn the Specific Performance Order. These actions were taken by the Lower Court after this Court upheld the Specific Performance Order and purely to give effect to this Court’s decision to affirm the Specific Performance Order. If the Lower Court did not take these actions, then the Dudeks, the parties determined by the Lower Court and this Court as the rightful owners of the Home, would still not be in possession of the Home. Instead, Morpew would be in the possession of the Home, a result contrary to the outcome of years of litigation and a subsequent appeal.

The Specific Performance Order is the law of the case, requiring this Court to affirm the Lower Court’s orders, which were issued to bring finality to this case.

B. Morphew never properly challenged the alleged fraud on the Lower Court, rendering any rulings following it the law of the case.

In her first four issues on appeal, Morphew argues that the Specific Performance Order, the Second Closing Order, and the Contempt Order should be vacated because the lower court issued these orders without first considering fraud perpetrated by the Dudeks on both Morphew and the Lower Court at trial in June, 2014. (see Morphew Br.). This alleged fraud went unchallenged, and it cannot now be used to unsettle the law of the case.

By her own admission, the fraud that forms the basis of her first four issues, and her other pending cases in Dorchester County for that matter, was discovered by her and the Ferros in September, 2014, when the Ferros filed a “Pleading Statement” with the lower court, which alleged new evidence of fraud on the court at trial. (R. pp. 128-194). In her initial brief, Morphew admits this fact, stating, “[t]he Ferros petitioned the court to consider this new evidence before making his ruling...and eventually, the evidence discovered led to a separate action for fraud/fraud on the court against Dudek/Cross, their agent, lending officer, and attorney....” (see Morphew Br., p. 7). The “separate action” she referred to is *Molly M. Morphew v. Stephen Dudek, et al.*, Case No.2016-CP-18-1706.

This new evidence and supposed fraud was known to Morphew and the Ferros after trial but before the lower court issued the Specific Performance Order, in November, 2014. Yet, at no point either after issuance of the Specific Performance Order or the filing of their first appeal did Morphew or the Ferros file a motion pursuant to Rule 60, SCRCF, to have the Specific Performance Order set aside for fraud. (see Filing History, Case No. 2013-CP-18-00183). Rule 60(b), SCRCF, 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), SCRCF. The rule even allows for a party to request

leave from the appellate court. *Id.* Despite knowing of alleged new evidence and fraud by the Dudeks, Morphew neither filed a Rule 60, SCRPC, motion after the Specific Performance Order was issued nor sought leave from this Court to file that motion.

This alleged fraud, which forms the basis of her first four issues on appeal, went unchallenged and cannot now be used to unsettle the law of the case (i.e., the Specific Performance Order). Moreover, she currently has pending an entirely new case in Dorchester County that make the exact same allegations of fraud. (R. pp. 210-277). For these reasons, this Court should affirm the Lower Court's orders.

II. Morphew's final issue on appeal lacks merit because she is challenging jurisdiction, when she in fact voluntarily submitted to the jurisdiction of the Lower Court.

In her only issue that discusses neither the Specific Performance Order nor fraud, which are the law of this case and cannot be appealed again, Morphew claims that the Second Closing Order and Contempt Order should be vacated because the Lower Court lacked personal jurisdiction over her and subject matter jurisdiction over the case to issue these orders. (Morphew Br., pp. 15-16, 19).

Morphew brought one of the original specific performance cases that were consolidated. By doing so, she voluntarily appeared and subjected herself to the jurisdiction of the Lower Court. See *Eaddy v. Eaddy*, 283 S.C. 582, 324 S.E.2d 70 (1984). She cannot now challenge the personal jurisdiction of the lower court in issuing orders that followed this Court's remittitur. All post-remittitur hearings and orders are in the same case...that she brought. In effect, she, as the plaintiff, is challenging personal jurisdiction, an argument completely contrary to the law. Her challenge of subject matter jurisdiction is equally as frivolous. As argued above, in issuing the

Second Closing Order and Contempt Order, the Lower Court was attempting to take steps necessary to close this case, following this Court's remittitur. The Home, which is the subject of the original cases, the original appeal, and the Closing Order and Contempt Order, is located in Dorchester County, within the jurisdiction of the Lower Court. At no point did anyone challenge the subject matter jurisdiction of the Lower Court. Again, Morpew brought one of the original cases that forms the basis of the appeal. And, again, in doing so, she admitted that the Lower Court had subject matter jurisdiction.

What Morpew appears to be complaining of is a lack of notice of hearings that led to the Closing Order and Contempt Order. There were three separate hearings, on March 27, 2017, May 12, 2017, and June 12, 2017, and Morpew attended all of these hearings, so notice must not have been an issue. (R. pp. 440-489; Br. P. 17). Moreover, the Lower Court essentially bent over backwards in an attempt to give due weight to Morpew's "Answer" to the Dudeks Motion to Set Closing, which she filed after the Lower Court issued the First Closing Order. The Lower Court considered her "Answer" a Rule 59, SCRCPC, motion to reconsider, and it went on to issue the Second Closing Order.

Morpew's challenges of personal or subject matter jurisdiction are without merit, and she appeared at all hearings leading to the orders she now appeals, requiring this Court to uphold the orders being appealed.

In this final issue, Morpew also challenges the Lower Court's *sua sponte* finding of contempt, and she makes a sympathetic plea based on the hardship she endured when she was ordered to vacate the Home on such short notice. First, judges have wide latitude to act as the Lower Court did in this instance. *McEachern v. Black*, 329 S.C. 642, 649, 496 S.E.2d 659, 663 (1997) (citing *State v. Blanton*, 278 S.C. 597, 300 S.E.2d 286 (1983); *Long v. McMillan*, 226

S.C. 598, 86 S.E.2d 477 (1955); 17 C.J.S. Contempt § 63 (1963) (“The court, without complaint, may of its own motion, institute proceedings to punish for offenses against its dignity and authority, although the contempt was not, strictly speaking, committed in the presence of the court.”)). Second, while it is true that the Contempt Order gave Morphew three days to vacate the Home, such a myopic argument by Morphew fails to consider the duration of time that had passed between this Court upholding the Specific Performance Order and the Lower Court issuing the Contempt Order, as well as the number of hearings that took place in that time frame. For four months, from this Court’s February 15, 2017, remittitur to the Lower Court’s June 14, 2017, Contempt Order, Morphew lived in the Home knowing that the Dudeks were entitled to own the Home. After the Dudeks in fact closed on the Home, Morphew still refused to vacate the Home. Furthermore, such an argument is undermined by Morphew’s filing of Case No. 2017-CP-18-0987 the same day, June 12, 2017, of the hearings that led to the Contempt Order. This coincidence suggests that Morphew knew in advance of the hearings that she would be ordered to vacate the Home. Her reaction: Spend time not preparing to vacate the home but drafting a third lawsuit against the Dudeks. It should be noted that she also filed a *lis pendens* in connection with that case. This action by Morphew not only puts a cloud on the Dudeks’ title, thus preventing transfer, it underscores Morphew’s continued misguided belief that she is entitled to own the Home. After that case was dismissed, Morphew’s reaction was to file yet another appeal. The Lower Court has had numerous occasions to judge Morphew’s actions, gauge her character, and assess her supposed plight. It has bluntly stated that she is “so emotionally invested in this case that she cannot ‘see the forest for the trees’” and that her actions “raise the inference that she is an obstructionist, who seeks to de-rail the real estate sale to Dudek and Cross.” (R. p. 70 n. 7; R. p. 52 ¶ 13).

In its efforts to effectuate this Court's Opinion upholding the Specific Performance Order, the Lower Court set a schedule for the Dudeks to close on the Home, which they did. When Morphew refused to vacate the Home, it ordered her to vacate the Home. In taking these actions, it held three hearings and issued numerous orders, all giving due credit to Morphew's arguments. For these reasons, this Court should affirm all orders being appealed.

III. This Court should further uphold the orders being appealed for any ground appearing in the record.

“Under the present rules, a respondent—the ‘winner’ in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.” *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). “The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.” Rule 220(c), SCACR. As the prevailing party, the Dudeks would request that this Court affirm the Lower Court's orders for any ground appearing in the record.

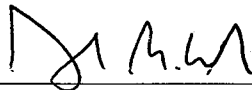
CONCLUSION

Morphew has used another appeal to challenge what is the law of this case. Each time she confronts an unfavorable ruling, she either appeals or simply files a new action, always arguing the same grounds – fraud or the Dudeks failure to meet the elements of specific performance. This is evidenced by the fact that she currently has pending three cases and two appeals. This appeal is nothing more than her attempt to yet again complain about the Dudeks being awarded specific performance in 2014. Her actions would never be taken by a licensed attorney, for fear of being sanctioned or reprimanded. Worse yet, they are costing the Dudeks

substantial sums of money in attorney's fees. They are defending multiple cases, simply because they were awarded specific performance of the Home years ago.

This Court should affirm the Lower Court's order because Morphew is appealing issues that are the law of the case, because the Lower Court at all times had jurisdiction to hear post-appeal and remittitur motions, and because the Lower Court issued the two orders being appealed to effectuate finality of this case, after this Court upheld the Specific Performance Order.

SMITH | CLOSSER, P.A.



Steven L. Smith (SC Bar No.: 05173)

Samuel M. Wheeler (SC Bar No.: 101008)

7455 Cross County Road, Suite 1

P.O. Box 40578

Charleston, SC 29423-0578

843-760-0220

Attorneys for Stephen Dudek and Doreen Cross

August 10, 2018