

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

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Edward W. Miller, Circuit Court Judge

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Case No. 2018-000142

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Ronald J. Ferguson, Appellant,

v.

Mill Creek, LP, John Hatcher, Michael Stehney, Rachel Shaluly, James  
Gilbert, Molly Miller, individually and as members of the Architectural  
Committee of Mill Creek Estates, Respondents.

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FINAL BRIEF OF APPELLANT

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SC Court of Appeals

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE.....	1
ISSUES.....	1
STATEMENT OF THE FACTS.....	1
SUMMARY OF THE ARGUMENT.....	3
ARGUMENT.....	3
DEFAULT JUDGMENT.....	4
SCRCP, RULE 55.....	4
INTERVENORS LACK STANDING.....	5
SCRCP, RULE 55(c).....	6
TIMING OF MOTION.....	6
COMPULSORY CLAIMS.....	7
RESTRICTIVE COVENANTS.....	8
ERROR OF LAW.....	9
ERROR OF FACT.....	9
AMBIGUITY.....	10
CONCLUSION.....	11

## TABLE OF AUTHORITIES

### Cases

Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005).....	5
Mid-State Distribs., Inc. v. Century Imps., Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993).....	5
Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208(2005).....	5
Duncan v. Gov't Emps. Ins. Co., 331 S.C. 484, 485, 449 S.E.2d 580, 580 (1994).....	5
Knowles v. Standard Sav. & Loan Ass'n, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979).....	5
Thompson v. Hammond, 299 S.C. 116, 382 S.E.2d 900 (1989).....	6
Wham v. Shearson Lehman Bros., Inc. 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989).....	6
In Re Estate of Weeks, 329 S.C. 251, 495 S.E.2d 454 (Ct. App. 1997).....	6
Tisdale v. Amer. Life Ins. Co., 216 S.C. 10, 56 S.E.2d 580 (1950).....	6
Dinkins v. Robbins, 203 S.C. 199, 26 S.E.2d 689 (1943).....	6
Cathcart v. Hopkins, 119 S.C. 190, 212, 112 S.E. 64, 71 (1922).....	7
5B C.J.S. Appeal and Error § 1852, 290 (1958).....	7
Hilton Head Ctr. Of S.C. v. Public Serv. Comm. 294 S.C. 9, 362 S.E.2d 176 (1987).....	7
Hagy v. Pruitt, 339 S.C. 425, 529 S.E.2d 714 (2000).....	7
Evans v. Gunter, 294 S.C. 525, 366 S.E.2d 44 (Ct. App. 1988).....	7
Davis v. Jennings, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991).....	9
Ex Parte Reichlyn, 310 S.C. 495, 427 S.E.2d 661(1993).....	9

**Statutes and Rules**

S.C. Code § 14-3-330(1)

S.C. Code. Ann. § 14-3-330(2)(a)

SCRCP, RULE 5

SCRCP, RULE 8

SCRCP RULE 24

SCRCP, RULE 60

SCACR, RULE 407

SCACR, RULE 501(3)(B)(7)

SCACR, RULE 501(3)(d)

## STATEMENT OF THE CASE

On September 20, 2013 the Appellant brought this action against the developer and architect of the Residential Protective Covenants Mill Creek, Mill Creek, LP. On December 16, 2014 the Honorable Judge Verdin entered default judgment against Mill Creek, LP. Subsequent to that Order, Appellees filed a Motion to Intervene on December 22, 2014 and following hearing on February 13, 2014, Judge J. Cordell Maddox granted such. Mr. Ferguson timely filed a Notice of Appeal. The South Carolina Court of Appeals declined to review the appeal alleging the matter was interlocutory in nature and remanded the case to the trial court. Appellant subsequently filed a motion to vacate the grant of intervention which went unaddressed over a period of more than six months while Respondents filed one set of motions, which were denied, and then filed a second motion which granted the case be dismissed despite an existing order of default against a defendant issued by another judge who has been set to hold a damages hearing. Appeal follows.

## ISSUES

*Did the trial court err in adjudicating the case be dismissed and Appellant shall have thirty (30) days to file a new complaint naming different defendants when another judge had already issued an Order of Default against Defendant Mill Creek, LP?*

*Was the Respondent's motion based upon Extrinsic Fraud?*

*Did the lower court afford due process by picking and choosing which motions to hear?*

## STATEMENT OF THE FACTS

Appellant, Ronald J. Ferguson, filed the case at bar against Defendant Mill Creek, LP, a South Carolina partnership, on September 20, 2013.

The South Carolina Secretary of State accepted service on September 26, 2013, pursuant to 33-42-220. Secretary of State attempted to provide notice to Defendants via USPS Certified Mail, mailed September 27, 2013, which was returned as undeliverable.

Appellant provided the Secretary of State Acknowledgment of Service, USPS Certified Mail record as well as the returned envelope with Affidavit of Service to the Clerk of Court on October 23, 2013.

The Secretary of State verified that Defendant Mill Creek, LP, was still legally operating within the State of South Carolina by virtue of Certificate of Existence on October 31, 2013.

Following hearing in June 13, 2014, Honorable Robin B. Stilwell issued an Order directing Plaintiff complete service by publication. This occurred Wednesday, July 9, 2014; Wednesday, July 16, 2014; and Wednesday July 23, 2014.

Upon receiving the affidavits from the service by publication, such were filed with the Clerk of Court on August 6, 2014.

Plaintiff's Motion for Declaratory and Summary Judgment was filed on October 22, 2014.

Annette Butts, acting on behalf of Rodney Brown, contacted Judge Simmons via email on October 27, 2014, seeking to have this case (2013-CP-23-05102) consolidated with others before him. A copy of that email was later mailed to the Plaintiff via USPS First Class Mail.

Judge Verdin held a status hearing in the matter on November 3, 2014 and reaffirmed the Motion hearing date of December 16, 2014.

Judge Simmons issued an Order dated November 6, 2014, which consolidated 2013-CP-23-01715 and 2013-CP-30-3179 and included Brown's filing of 2013-CP-23-01810 for discovery purposes only; as Brown had objected to the case being consolidated. That Order in no way applied to this case.

During the hearing held by Judge Verdin on December 16, 2014, the Court called the parties then directed the bailiff to inquire of any other parties appearing in the case outside of the courtroom as well. Plaintiff's Affidavit and Memorandum brief were filed, documents examined and a determination that default judgment was proper with further direction that a damages hearing would be held at a future date. Though the Order was signed December 16, 2014, the Clerk did not file such until

December 30, 2014.

On December 24, 2014, Appellees filed a Motion to Intervene which bears at least one signature of Annette Butts.

Though previously scheduled for February 12, 2015, the court rescheduled a hearing for the Motion to Intervene before Honorable J. Cordell Maddox, Jr. on February 13, 2015.

Acting on the Court's instructions the Appellant was given notice of the Order prior to the Judiciary's signing such, though he declined noting the conduct and appeal.

The Order for Intervention was signed by Judge Maddox on February 19, 2015. Subsequent to the order being signed Appellant duly filed a Notice of Appeal with the South Carolina Court of Appeals which was assigned Appellate Case #2015-000593. The Court dismissed the appeal and remanded the matter to the trial court on April 12, 2017. Appellees filed a Motion to Vacate Summary Judgment on May 2, 2017 while Appellant filed a Motion to Vacate Grant of Intervention on May 16, 2017.

June 14, 2017, the Honorable Robin B. Stilwell presided over a hearing on the motions and adjudicated that the Motion to Vacate Grant of Intervention was not within his authority to address and should be heard by Judge Cordell Maddox and Appellees Motion to Dismiss should be denied because the Interveners/Defendants in this matter are separate Defendants from Mill Creek, LP, ad their attorney, Rodney M. Brown, does not represent the Defendant Mill Creek, LP. Accordinly, the Motion to Vacate the Order is continued and the Motion to Vacate the Default is Denied.

Upon being told by Judge Stilwell that Appellees lacked standing to seek vactur of the Default Judgment against Mill Creek, LP, that same date they filed a Motion to dismiss pursuant to Rule 12(b)(8). While the Chief Judge for administrative purposes, Robin Stilwell, was advised that the motion to set aside grant of intervention be continued for Judge Maddox still was not heard, he set the Motion to Dismiss to be heard by Judge Edward W. Miller on December 7, 2017. In a matter of

minutes Miller Ordered the complaint be stricken, case dismissed and directed that Appellant may file a new complaint naming different defendants in an existing proceeding.

### **SUMMARY OF THE ARGUMENT**

Judge Letitia Verdin held a hearing in the matter on December 16, 2014, and determined pursuant to SCRCP, Rule 55, an Order of Default be entered against the Defendant and a hearing be set to determine damages. Following the entry of default, Appellees moved to intervene and Judge Maddox, Jr. issued an Order granting intervention. Following the Court of Appeal's refusal to address the extrinsic fraud, judicial misconduct and deviation from case precedent along with rules of civil procedure, Respondents filed a motion to set the judgment against Mill Creek, LP aside and when that was denied they filed another motion seeking to dismiss the case under Rule 12. Judge Miller granted such by striking the pleadings and directing that the case be refiled naming different parties. Appellant meanwhile filed a motion to vacate the order granting intervention which Judge Maddox never heard, Judge Stilwell declined to address and continued, and Judge Miller failed to even acknowledge. Appellant holds the lower court(s) erred in finding that Respondents have any standing to address a legal contract for which they had no part in executing and expressly deny any liability thereunder, were not party to the original matter, had knowledge of the case and pending hearings but chose not to act until after judgment had issued, then communicated ex parte with judiciary involved in the matter and those parties failed to disclose the communications. Moreover, the Respondents and judiciary deliberately acted in contravention of established precedent and multiple applicable rules. The sheer fact that Judge Verdin issued an order of default against defendants Mill Creek, LP, and none of the respondents are members of or represent that company rendered the Order of Judge Miller dismissing the judgment, complaint and directing a new one be filed in another case to be done without authority.

## JURISDICTION

"An appeal ordinarily may be pursued only after a party has obtained a final judgment." Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) (citing Mid-State Distribs., Inc. v. Century Imps., Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993)). "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005).

Absent some specialized statute, the immediate appealability of an interlocutory order depends on whether the order falls within section 14-3-330 of the South Carolina Code (1977). Under section 14-3-330(1), this court may review any intermediate order that involves the merits of the action. "An order involving the merits must finally determine some substantial matter forming the whole or a part of some cause of action or defense in the case in which the order is entitled." Duncan v. Gov't Emps. Ins. Co., 331 S.C. 484, 485, 449 S.E.2d 580, 580 (1994) (quoting Knowles v. Standard Sav. & Loan Ass'n, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979)). Further, an interlocutory order that affects a substantial right and in effect determines the action and prevents a judgment from which an appeal may be taken or discontinues the action may be reviewed by this court. See S.C. Code. Ann. § 14-3-330(2)(a).

Appellant asserts that Judge Miller's order striking the complaint, dismissing the case, directing that a complaint may be refiled naming different parties, and preventing the damages hearing against Mill Creek, LP, of whom an Order of Default had already issued and that Respondents deny being, representing, or having any liability on behalf of "affects a substantial right and in effect determines the action and prevents a judgment from which an appeal may be taken or discontinues the action" and vests this Court with jurisdiction to adjudicate the appeal.

## ARGUMENT

### A. Standard of Review

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. *Thompson v. Hammond*, 299 S.C. 116, 119, 382 S.E.2d 900, 902-903 (1989); *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 502 (Ct. App. 1989). This decision will not be reversed absent an abuse of that discretion. *Thompson*, 299 S.C. at 119, 382 S.E.2d at 902-903; *In Re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997). An abuse of discretion occurs when the order was controlled by an error of law or when the order is without evidentiary support.

### TRIAL COURT STRIKES COMPLAINT AND ENDS CASE INVOLVING DEFAULT JUDGMENT BY ANOTHER JUDGE

In the case at bar Appellant filed the Complaint on September 20, 2013 (R. 2) and following a hearing by Judge Letiticia Verdin on December 16, 2014, an Default Order was issued against Mill Creek, LP. Respondent's, who admittedly are not owners, members or agents of Mill Creek, LP, and expressly deny any liability of such entity, lack any standing to challenge such order, just as Judge Edward Miller lacked authority to vacate the complaint and direct Appellant to file a new complaint naming the Respondents as defendants. "Ron Ferguson filed the case that's before you today asking that the only defendant he named was the developer of the subdivision, Mill Creek LP which has long since been dormant and doing anything asking to terminate and abandon the restrictive covenant [sic]. Nobody else was joined in that case. He went and got a default judgment." (R. 26, page 2, Lines 24-25 – P23 Lines 1-6). There is a long-standing rule in this State that one judge of the same court cannot overrule another. *Tisdale v. Amer. Life Ins. Co.*, 216 S.C. 10, 56 S.E.2d 580 (1950); *Dinkins v. Robbins*, 203 S.C. 199, 26 S.E.2d 689 (1943). Appellant asserts that since Judge Verdin issued the Order of Default against Defendants Mill Creek, LP, in December 2014, and is still sitting, Judge Miller

lacks authority to dismiss the order and case against Mill Creek, LP as well as directing that Appellant name different defendants in a new complaint. *Cathcart v. Hopkins*, 119 S.C. 190, 212, 112 S.E. 64, 71 (1922); 5B C.J.S. Appeal and Error § 1852 at 290 (1958).

### **EXTRINSIC FRAUD**

Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard." *Hilton Head Ctr. of S.C. v. Public Serv. Commn.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). "Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." *Id.* On the other hand, intrinsic fraud is fraud which was presented and considered at trial. *Hagy v. Pruitt*, 339 S.C. 425, 431-32, 529 S.E.2d 714, 718 (2000) (citing *Evans v. Gunter*, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (Ct. App. 1988)). It is fraud which misleads and induces the court to find in favor of the party perpetrating the fraud. *Hilton Head Ctr.*, 294 S.C. at 11, 362 S.E.2d at 177.

"Ron Ferguson filed the case that's before you today asking that the only defendant he named was the developer of the subdivision, Mill Creek LP which has long since been dormant and doing anything asking to terminate and abandon the restrictive covenant [sic]. Nobody else was joined in that case. He went and got a default judgment. We found out about it." (R. 26 page 2, Lines 24-25- page 3 Lines 1-6). One of the email between Simmons, Respondent's and their counsel is dated October 27, 2014, and states, in part, "The case is entitled Ronald J. Ferguson vs. Mill Creek, LP 2013-CP-23-05102. It is supposedly on the trial roster for the week of November 3<sup>rd</sup>. I would ask that this case be joined with the rest of the cases in your Court so you can have all of the cases and the total picture of what Mr. Ferguson is attempting to do. Therefore, I request this case be joined with the other cases with jurisdiction being in your Court." (R. 3) Not only was this not presented to Judge Maddox for the February 2015 hearing, a required element to be addressed and for which a motion is pending, but

Respondent's and their counsel also failed to present that to Judge Stilwell in the June 2017 hearing and Judge Miller at the December 2017 hearing.

Ferguson: I'm also of the opinion this is a successive motion. Their original Motion to Intervene should have addressed all of this material. It did not comply with Rule 24(c). It did not comply with Rule 8. It did not comply with Rule 5. They also had spoken to Judge Simmons more than 45 days and two hearings prior to the default judgment. So, there is an outstanding motion from last May that's still not been heard to address the Rule 60 for fraud and having that set aside. (R. 27), page 5, L12-20.

Brown: "I have no idea what this 60(b) Motion is that he's addressing." (R. 28), page 6, L11-12. The Clerk of Court shows the Motion to Vacate Order Granting Intervention was filed May 16, 2017. The Order from Judge Stilwell's hearing June 14, 2017 denying Brown's Motion to Vacate the Order of Default explicitly states the Motion to Vacate is continued (R. 9). And following the filing of Respondent's next motion to dismiss (R. 10), an email exchange involving Respondent's, their counsel, Non-jury Coordinator, Judge Stilwell, and Appellant began around November 15, 2017 addressing the fact the Motion to vacate Order Granting Intervention was still pending; per Chief Judge's prior Order the matter needed to be resolved by Judge Maddox (R. 9).

### **Attorney Misconduct**

Rule 407, SCACR, Rule 3.3 provides, in part:

*"(a) A lawyer shall not knowingly:*

*(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;*

*(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or*

*(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony*

*of a defendant in a criminal matter, that the lawyer reasonably believes is false.*

*(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.*

*The duties stated in paragraphs (a) and (b) apply when the lawyer is representing a client before a tribunal as well as in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. These duties continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."*

Asserting Brown's representation to Judge Miller is less than candid is much more polite than what another judiciary has termed the conduct of Respondent's counsel.

### **Judicial Misconduct**

Appellant has a well developed record in the motion to vacate order granting intervention demonstrating that Respondents originally knew of the matter nearly two months before Judge Verdin held the hearing for default judgment and granted same against Mill Creek, LP. Respondents and their counsel contacted Master-in-Equity Charles B. Simmons, Junior, regarding the matter and attempting to get the case transferred to him. (R. 3) South Carolina courts have adopted a four-part test for determining timeliness: (1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; and (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial. *Davis v. Jennings*, 304 S.C. 502, 504 405 S.E.2d 601, 603 (1991). Failure to satisfy any one of the four requirements precludes intervention. *Ex Parte Reichlyn*, 310 S.C. 495, 427 S.E.2d 661 (1993). In the matter at bar, Respondent's had engaged in ex parte communication with Master-in-Equity Charles B. Simmons, Junior, nearly two months prior to the hearing for default against Mill Creek, LP, and at the time of the hearing before Judge Maddox in February, nearly four months later, neither Respondents, their counsel or Master-in-Equity had disclosed the ex parte communications. Based on South Carolina precedent, the time when Respondents knew of the matter

or should have known, as well as their reason for delay, are two factors which Judge Maddox was required to address before granting intervention. In this case, precedent would have precluded joinder. Moreover, even though Respondents and their counsel failed to disclose their communications, Simmons had a duty to disclose such.

Rule 501, SCACR, Canon 3(B)(7) provides, in part, “*A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:*

*(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:*

*(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and*

*(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.”*

In the case at bar, Simmons has not only refused to provide those records but hired counsel of his own accord to fight the required of such communications.

#### **Order Dismissing 2013-CP-23-05102 and directing a new complaint goes to - Simmons**

Appellant notes for the record that the failure of Judge Robin Stilwell to set the motion to vacate grant of intervention and/or Judge Cordell Maddox's failure to adjudicate, while allowing multiple other motions by Respondents to proceed – the Order dismissing this action and directing Appellant to file a new complaint naming different defendants puts the matter directly before – Charles B. Simmons, Junior.

#### **Due Process**

Former South Carolina Supreme Court Chief Justice Jean Hoefler-Toal adjudicated that it is possible for a trial court judge to violate a party's constitutional due process rights during the pre-trial process. In this case, a complaint was filed, the matter proceeded more than fifteen (15) months through the courts with multiple hearings, publication in the newspapers, and even involved ex parte communications

between a proposed judge and the parties seeking to be the defendants without having the liability of being a defendant before Judge Verdin issued a Default order against Mill Creek, LP on December 16, 2014.

It was only after the order was entered that Respondents sought to intervene in the matter. The ex parte communications with their proposed not disclosed by them or the judge, despite rules requiring such, as it would preclude joinder per precedent.

Though the matter was appealed at that point to Court of Appeals, and a judge who has knowledge or belief of misconduct is obligated to report such (Rule 501, SCACR, Cannon 3(D)), the matter was remanded back to the trial courts where the motion involving attorney and judicial misconduct went without resolution, but proceeded to allow Respondents and their counsel to have a trial court judge vacate an order he lacked authority to vacate, vacate a complaint he lacked authority to vacate, and direct Appellant to refile a new complaint before the Master-in-Equity naming the parties that were discussed before Judge Verdin ever held a hearing and found Mill Creek, LP in default.

### CONCLUSION

Respondent's and their counsel had knowledge of this pending case on at least October 27, 2014, and prior to two hearings and Judge Letitia Verdin's Default Order issued against Mill Creek, LP on December 16, 2014. They knew of their ex parte communications with Defendant Simmons, and failed to disclose their conduct to Judge Maddox in February 2015. This continued with their motions to vacate the Order against Mill Creek, LP heard by Judge Stilwell, and again in the motion before

<sup>1</sup> Rule 501, SCACR, Cannon 3(d):

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge\* that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority.\*

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct contained in Rule 407, SCACR, should take appropriate action. A judge having knowledge\* that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.\*

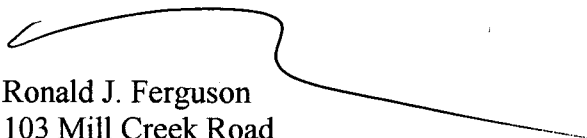
Judge Miller.

However, Judge Miller did have full knowledge that there was an outstanding motion to address Respondent's previous conduct as well as the fact Judge Verdin had issued an Order of Default against Mill Creek, LP. Just as Judge Simmons told Respondent's only months earlier, they not only lack standing to vacate an Order against a party that is not them and they do not represent, He lacked authority to overturn the Order of Default against Mill Creek, LP by Judge Verdin. Likewise, Judge Miller wholly lacked authority to dismiss the Order of Default by Judge Verdin or the complaint against Mill Creek, LP, and direct other parties be named in a different case.

Wherefore, premises considered, Appellant submits the Order issued by Judge Miller be vacated, the matter reinstated, and applicable proceedings be commenced to address the conduct of Respondent's in this matter.

October 11, 2018

Respectfully submitted,



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**Certificate of Compliance**

I HEREBY CERTIFY that this Final Reply Brief complies with the requirements of Rule 211(b) of the South Carolina Appellate Court Rules.



Ronald J. Ferguson

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