THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2009-CP-10-5343

Roosevelt Simmons,.....Appellant,

v.

Hattie Bailum, Ruby Bailum, Verdone Gray, Julie B. Johnson, Monica Middleton, Marie Smith, Melvin Singleton, Franklin Smith, LMC, LLC, John Martin, Esq., as Trustee

of which,

Hattie Bailum, Ruby Bailum, Verdone Gray, Julie B. Johnson, Monica Middleton, Melvin Singleton, LMC, LLC, and John Martin, Esq., as Trustee, are.....Respondents.

FINAL BRIEF OF RESPONDENTS

John A. Massalon, Esquire
I. Sonja Taylor, Esquire
Wills Massalon & Allen, LLC
97 Broad Street
Charleston, South Carolina 29401
843-727-1144
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. Is Appellant's Appeal procedurally barred?

2. Did the Circuit Court err when it determined that there was no evidence of fraud on the court, or rare, special, exceptional, unusual or extraordinary circumstances to warrant vacating the March 6, 2007 Amended Special Referee Order Quite Title, Partition and Sale, or rescinding any deeds, and granted summary judgment to Respondents?

3. Did the Circuit Court err when it found that summary judgment was appropriate and not premature, and granted summary judgment to Respondents?

4. Did the Circuit Court err when it denied Appellant's Motion to Disqualify Bruce Berlinksy, Esquire and denied Appellant's subsequent request to dismiss Respondents' Motion to Dismiss?

5. Is Appellant's Appeal of the denial of his Motion for Temporary Injunction time-barred?

STATEMENT OF THE CASE

On August 24, 2009 the Appellant filed a Lis Pendens in the Charleston County of Commons Pleas pertaining to the following parcels: (1) TMS# 311-00-00-310, and (2) TMS# 311-00-00-024. (R. p. 43-p. 44). On that same date, Appellant filed the Summons and Complaint in Case Number 2009-CP-10-5343, against Respondents. (R. p. 26-p. 42). Appellant's underlying suit is essentially an independent action in equity pursuant to Rule 60(b), SCRCP, to set aside the judgment in two prior lawsuits involving the properties which were the subject of the Lis Pendens. (R. p. 26-p. 41). The first action was captioned Bailum v. Simmons, et al., Case No. 04-CP-10-1459 (the "Bailum '04 Case")(these deeds and properties hereafter referred to as "Parcels 1, 2, 3 and/or 4")[1]. (R.

[1] The Bailum '04 Case quieted title to four properties: TMS# 311-00-00-024 (Parcel 1);

p. 26-p. 41). The second action was entitled Middleton v. Doe, et al., 02-CP-10-4883 (the "Middleton '02 Case") (this deed and property hereafter referred to as the "Middleton Parcel"). (R. p. 26-p. 41).

In lieu of filing an answer, Respondents filed a Motion to Dismiss on September 16, 2009. (R. p. 45-p. 49). The Motion argued that all issues raised in Appellant's Complaint were barred by the doctrine of res judicata.

Thereafter, on November 5, 2009, Appellant filed a Motion to Disqualify Bruce Berlinksy, Esq.("Attorney Berlinsky") from the Representation of All Defendants. (R. p. 50-p. 53). Appellant filed an affidavit and a supplemental affidavit in support of that Motion. (R. p. 54-p. 61). Also on November 23, 2009, Appellant filed a Motion for a Temporary Injunction to prevent Defendants Franklin Smith and LMC, LLC, from taking any action regarding Parcel 1, and on December 10, 2009, an affidavit in support of that motion. (R. p. 62-p. 69).

On February 26, 2010, Respondents filed an affidavit by John F. Martin, Esq. ("Repondent Martin") with numerous exhibits, in support of their Motion to Dismiss. (R. p. 70-p. 79). On March 1, 2010, Appellant filed a memorandum in Plaintiff's Opposition to Defendants' Motion to Dismiss and a supporting affidavit by Appellant. (R. p. 80-p. 96).

The Honorable J.C. Nicholson, Jr., held a hearing on March 1, 2010 on Appellant's Motions to Disqualify and for Temporary Injunction, and Respondents' Motions to Make More Definite and Certain, and to Dismiss. (R. p. 245, l. 12-15).

TMS# 312-00-00-65 (Parcel 2); TMS#. 312-00-00-32 (Parcel 3), and TMS# 312-00-00-67 (Parcel 4). Parcel 1 was ultimately partitioned and now includes a second TMS#: 311-00-00-310.

Judge Nicholson denied Appellant's Motion to Disqualify, but permitted Attorney Berlinsky to voluntarily withdraw as counsel for the defendants to avoid any appearance of impropriety. Anastasios H. Chakeris, Esq., was substituted as defense counsel. (R. p. 258, l. 6-11). Judge Nicholson took the motion to dismiss under advisement in order to review all the affidavits, the exhibits and transcript. (R. p. 300, l. 20-25 60-63). The parties agreed to delay a ruling on the two remaining motions until after a decision on the motion to dismiss. (R. p. 301, l. 7-p. 304, l. 15).

Judge Nicholson held a second hearing on August 27, 2010, to resolve the pending Motion to Dismiss. (R. p. 307, l. 20-25 p. 59-63). Following oral arguments, Judge Nicholson and the parties agreed to convert the defendant's motion to dismiss to one for summary judgment. (R. p. 342-p. 343, l. 9). The judge allowed the parties additional time to submit further evidence, and indicated that he would either rule or hear additional oral arguments if he deemed it necessary. (R. p. 342-p. 344, l. 18).

At the end of that hearing, Appellant additionally requested that Judge Nicholson rule on his pending Temporary Injunction motion. (R. p. 347, l. 13-p. 351, l. 14; p. 62-p. 69). Judge Nicholson denied Appellant's motion on the grounds that Appellant had an adequate legal remedy in that monetary damages would compensate Appellant for damage to the property, if any. (R. p. 351, l. 5-15).

On September 23, 2010, Respondents filed a Supplemental Memorandum in Support of their Motion to Dismiss. (R. p. 97-p. 106). On that same date, Respondent Martin, sent a letter to Judge Nicholson to correct a misstatement he made during the August hearing. (R. p. 353). A week later on September 30, 2010, Respondents filed an Attachment to Supplemental Memorandum. (R. p. 107-p. 127). A Short Order

denying the Motion to Dismiss was filed on October 6, 2010. (R. p. 22).

On October 26, 2010, Appellant filed Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment along with a supplemental affidavit. (R. p. 128-p. 207). Two Form orders were filed on November 3, 2010: one denied Appellant's Motion to Disqualify B. Berlinksy, Esq., and one denied Appellant's motion for a TRO. (R. p. 23-p. 24).

On December 20, 2010, Appellant filed a second Plaintiff's Motion for Temporary Injunction asking the court to compel Defendant Franklin Smith to maintain utility service to Parcel 1 and protect it from vandalism. (R. p. 208-p. 211).

Judge Nicholson ruled and filed his Order granting summary judgment to Respondents on January 11, 2011. (R. p. 1-p. 21). On February 1, 2011, Appellant filed a Motion for Reconsideration and to Alter or Amend the Order Granting Summary Judgment to the Defendants with a supporting affidavit by Appellant's attorney, Edward A. Bertele. (R. p. 212-p. 241). By a Form 4 order, Judge Nicholson denied Appellant's Motion for Reconsideration and to Alter or Amend on March 2, 2011. (R. p. 25). Appellant then filed his Notice of Intent to Appeal with the Court of Appeals on March 30, 2011.

FACTS

In 2004, Respondent Martin filed the Bailum '04 Case to quiet title to two properties on Johns Island, South Carolina, known as TMS Nos. 312-00-00-065, and 311-00-00-024. The Bailum '04 Case named as Defendants a number of persons who might claim an interest in the properties, including Appellant, as well as persons unknown. (R. p. 423-p. 433). Thereafter, on July 29, 2004, Respondent Martin filed an amended Lis

Pendens and amended Complaint, along with the other associated amended pleadings, to add additional plaintiffs and defendants. (R. p. 434-p. 445).

On January 20, 2005, Ruth L. Cupp, Esquire, ("Attorney Cupp") filed an Answer and Counterclaim on of behalf of Appellant. (R. p. 446-p. 450). Appellant denied the material allegations of the Complaint and counterclaimed for the property taxes he allegedly paid for both parcels, claimed ownership as to both parcels through adverse possession, and that he had an heirs interest in Parcel 1. (R. p. 446-p. 450). Appellant's attorney and Respondent Martin, agreed on January 25, 2005, to refer the Bailum "04 Case to Joseph S. Mendelsohn, Esq. to serve as Special Referee. (R. p. 357). Respondent Martin answered Appellant's counterclaims by general denial filed March 3, 2005. (R. p. 451).

On September 13, 2005, Appellant's Attorney and Respondent Martin signed a consent order to again amend the complaint to include the names of additional heirs provided by Appellant and to realign the parties, and on that same date, filed the Second Amended Complaint. (R. p. 354 and p. 452-p. 458).

On November 10, 2005, Attorney Cupp filed a motion to be relieved as counsel for Appellant with a supporting affidavit. (R. p. 356 and p. 459-p. 460). In pertinent part Attorney Cupp's affidavit stated that "she was unable to explain to Roosevelt Simmons the prevailing law underlining this case nor am I able to explain to him what I believe I can and not do for him in this case." (R. p. 356 and p. 459). Attorney Cupp was relieved as Appellant's attorney by order on November 10, 2005, which order granted Appellant thirty days to obtain new counsel, or proceed *pro se*. (R. p.356). By letter filed on December 15, 2005, Appellant notified the Ninth Circuit Administrative Judge of his

intention to proceed *pro se*. (R. p. 664).

The trial before the Special Referee trial was held on May 15, 2006. At some point before the trial, Appellant retained Louis E. Condon, Esq., the former Charleston County Master-in-Equity, ("Attorney Condon") to represent him. (R. p. 359, p. 637 and 377). At trial, counsel for the parties, including Appellant, agreed to and entered into the record several stipulations including that:

1. the action (the Bailum '04 Case) involved the quieting of the title, partition and sale of Parcels 1, 2, 3 and 4;
2. "Hester" Bailum was sometimes referred to as "Esther" Bailum, and the parties agreed they were the same person and the caption should reflect "Hester Bailum a/k/a Esther Bailum";
3. the parties should be realigned such that the living heirs of Samuel Bailum appeared as Plaintiffs, and the living heirs of Hester Bailum, including Appellant, remained as defendants;
4. Hattie Bailum, James Bailum, Verdone Gray, Julie B. Johnson, Leon Singleton and Melvin Singleton would be allowed to testify by telephone:
5. the parties stipulated to the admissibility of previously marked exhibits which were submitted and reviewed by counsel and the Guardian ad Litem prior to trial; and
6. plaintiffs' prayer for relief was amended to have title to Parcels 1, 2, 3 and 4 quieted, and once title was established, that the Parcels be portioned and/or sold and the respective shares be distributed to the heirs of Samuel Bailum, Sam Bailum, Thomas Bailum, Tony Bailum, Mary Bailum and

Fanny Bailum, or the heirs of Hester Bailum, as determined appropriate by the Special Referee.

(R. p. 360-p. 361, and p. 378-p. 379).

Thus, ultimately, the parties, after amendment and realignment by consent, included all persons who might claim an interest in the property. For purposes of the present appeal, Hattie Bailum a/k/a Balaam, Ruby Bailum a/k/a Balaam, Verdone Gray, Julie B. Johnson and Monica Middleton, as plaintiffs, and Roosevelt Simmons, Melvin Singleton and Marie Smith, as defendants, were included in the amended caption. (R. p. 358-p. 359, p. 361-p. 364, p. 376-p. 377, p. 379-p. 382). Further, the quiet title action now involved Parcels 1, 2, 3 and 4. (R. p. 361-p. 363, and p. 379-p. 381).

On September 5, 2006, the Special Referee took supplemental testimony from Leon Singleton and Melvin Singleton, and further supplemental testimony was taken from Melvin Singleton on September 22, 2006. (R. p. 359 and p. 377). Appellant, on several occasions, was advised that he may be able to purchase Parcel 1. (R. p. 371 and p. 389).

On January 11, 2007, the Special Referee issued his Order to Quiet Title, Partition and Sale. (R. p. 358-p. 375 and p. 376-p. 393). The order found that the Samuel Bailum living heirs were Hattie Bailum, Ruby Bailum, Monica Middleton and Julie Bailum Johnson, and the Hester Singleton Bailum living heirs were Appellant, Marie Smith and Melvin Singleton. (R. p. 363-p. 364, and p. 381-p. 382). Walter Burns, Alonzetta Burns, Sheila Owens, Louise Canty and Mabell Hicks were also living heirs; however, they had already deeded their interest in Parcel 1 to Appellant and therefore no longer had an interest in the property. (R. p. 364 and p. 382).

As to Parcel 1, the Special Referee found that the Samuel Bailum heirs, as his blood descendants, shared a 2/3 interest, and the Hester Bailum heirs shared the 1/3 interest Hester Bailum received as Samuel Bailum's third wife. (R. p. 362-p. 363, p. 366, p. 370, p. 373, p. 380-p. 381, p. 384, p. 388 and p. 392). As to Parcels 2, 3 and 4, the Special Referee found the heirs of Hester Bailum had no claim or interest in these parcels as her husband, Samuel Bailum, had no interest in those parcels. (R. p. 363, p. 366, p. 381 and p. 384).

The Special Referee also denied Appellant's adverse possession counterclaim. (R. p. 375 and p. 393). The Special Referee found that Appellant, based on his own testimony, did not meet any of the required elements for adverse possession generally, or the additional element of ouster required to be proven by an heir claiming title by adverse possession, and therefore was not the owner of these parcels by adverse possession. (R. p. 366-p. 370, p. 373, p. 384-p. 388 and p. 391).

The Special Referee held that Hattie Bailum entered into a contract for sale for Parcel 1 in 2003, which contract necessitated the instigation of this action, and that the court-ordered appraisal set the value of Parcel 1 at $220,000. (R. p. 371, p. 374, p. 389, and p. 392). Consequently, the Special Referee ordered the sale of Parcel 1. (Id.).

In response to the request by Appellant and Marie Smith, the Special Referee granted them the opportunity to purchase Parcel 1 with the following conditions: that the opportunity was only assignable to individuals related by blood or marriage to a party; that they had to provide to the Clerk of Court, for filing and date stamp within ten days from the date of service of the order, a loan approval letter for $220,000 or proof of funds available by a licensed lender; and had to consummate the sale within thirty days of the

Order. (Id.). Failure to produce the required proof of ability to pay or close in time allotted would result in Parcel 1 being conveyed by the Special Referee in accordance with the contract. (Id.). Further, the Special Referee noted in the Order that on several occasions he had offered the Appellant the opportunity to buy out the remaining heirs interests in Parcel 1. (R. p. 371 and p. 389).

The Special Referee also recognized Appellant's efforts to preserve Parcels 1, 2, 3 and 4 for the benefit of all heirs, and concluded that he was entitled to $10,000 from the proceeds of the sale of all four parcels, over and above his interest as an heir to Parcel 1. (R. p. 371-p. 372, p. 374, p. 390 and p. 392). The parties agreed that this sum was fair and equitable compensation for Appellant. (Id.).

Hattie Bailum also entered into a contract in 2003 for the sale of Parcels 2, 3 and 4. (R. p. 372-p. 373, p. 375, p. 390-p. 391 and p. 393). The parties to that contract amended to sell the parcels for the court-ordered appraisal amount of $337,000. (Id.).

Further, the Special Referee determined that the sale of all the parcels was in the best interests of the heirs and concluded that the net proceeds from the sale of the parcels were to be distributed as follows:

Parcel 1

2/3 interest to Samuel Bailum Heirs:

Hattie Bailum	1/6
Ruby Bailum	1/12
Verdone Gray	1/12
Julie B. Johnson	1/6
Monica Middleton	1/6

1/3 to Hester Bailum Heirs:

Appellant	2/9
Melvin Singleton	1/18
Marie Smith	1/18

Parcels 2, 3 and 4

Entire interest to Samuel Bailum Heirs:

Hattie Bailum	1/4
Ruby Bailum	1/8
Verdone Gray	1/8
Julie B. Johnson	1/4
Monica Middleton	1/4

(R. p. 371-p. 375, and p. 389-p. 393).

Attorney Condon signed a Motion to Reconsider Order of Special Referee with an attached affidavit by Appellant, purportedly signed and notarized.[2] (R. p. 464-p. 466). Appellant requested the judgment be amended or a new trial granted based upon the following alleged errors: Appellant did agree to the appointment of a Special Referee; he was not given the customary thirty days to purchase the property; Appellant did not receive adequate advance notice of the purchase price was that he would have to pay (appraised value less the heirs sum paid to him); that the sum calculated and for his contributions and protection of the Parcels was inadequate, unreasonable and inequitable; and that the denial of his adverse possession claim as to all four parcels should be reversed. (Id.). On February 7, 2007, Attorney Berlinksy, filed a Motion of Defendant to Alter or Amend the January 11, 2007, Order because Marie D. Smith's name was inadvertently omitted from the Order. (R. p. 467).

The Special Referee, on February 16, 2007, heard both motions. Both Appellant

[2] It is assumed that the motion and affidavit were delivered directly to the Special Referee. The Charleston County Clerk of Court does not have a record of this motion or affidavit, and the copy produced by Appellant does not have a file stamp. However, the motion and affidavit were referred to in the Special Referee's March 6, 2007 Order dealing with Appellant's motion.

and Marie Smith were represented by counsel at the hearing. (R. p. 395). The Special Referee granted Marie Smith's motion to amend, and executed an Amended Special Referee's Order Quiet Title Partition and Sale with the requested change included. (R. p. 396). The Special Referee denied the Appellant's motion. (Id.). Specifically, the Special Referee found that the evidentiary hearing, testimony and documentary evidence were preserved by a court reporter and were available to any party who wished to order and pay for them; there was no error or law or procedure with regard to his findings and conclusions of Appellant's adverse possession claim; that the court-ordered appraisal for Parcel 1 was made available to counsel nearly two years before the January 11, 2007, final order confirmed the sales price and Appellant's right to purchase Parcel 1, and allowed Appellant ample time to secure a loan commitment or other acceptable financing; and any party making a claim for taxes paid during the pendency of the action was entitled to pro-rata reimbursement upon proof of payment produced to the Special Referee not less than 48 hours before disbursement of the sales proceeds. (R. p. 396-p. 397).

Appellant filed a *pro se* Notice of Appeal from the Special Referee's Order filed on March 6, 2007[3]. (R. p. 470). On April 24, 2007, Charles E. Houston, Jr., Esquire, ("Attorney Houston") appeared for Appellant and filed an Amended Notice of Appeal appealing the January 11, 2007 Special Referee's Order, the March 6, 2007, Amended Special Referee's Order, and the March 6, 2007 Order denying Appellant's Motion to Alter or Amend, or for new trial. (R. p. 471-p. 473). On May 4, 2007, Attorney Houston filed Appellant's Motion for Staying Judgment, For Sale or Delivery of Land in the

[3] It is unclear from Appellant's Notice which March 6, 2007, Order of the Special Referee he is appealing.

Charleston County Court of Common Pleas. (R. p. 474-p. 476).

On May 31, 2007, the Court of Appeals dismissed Appellant's appeal for failure to provide proof of the transcript being ordered and/or failure to serve and file the Initial Brief. (R. p. 398-p. 399). On or about June 6, 2007, Attorney Houston responded to the Court of Appeals dismissal by filing a Motion for Reinstatement of Appeal and a supporting affidavit. (R. p. 477-p. 484).

The Special Referee held a hearing on June 6, 2007, for Appellant's Motion to Stay. (R. p. 401-p. 407). Attorney Houston requested that the Special Referee stay the delivery of deeds to Parcel 1, and to Parcels 2, 3 and 4 pending the outcome of his appeal. (R. p. 474-p. 476). Although his motion only addressed a stay, at the hearing Attorney Houston argued that Appellant should be again offered the opportunity to buy a part or all of Parcel 1, and Appellant's failure to comply and subsequent waiver of that right was discussed. (R. p. 401-p. 407, p. 474-p. 476, p. 649, l. 8-p. 655 and 666, l. 1-7). Attorney Houston also offered and argued 'newly discovered evidence' in the form of census reports. (R. p. 405, p. 657, l. 3-p. 663, and p. 667, l. 1-23). The Special Referee, over the objections of Respondent Martin and Attorney Berlinsky, accepted the census documents and made them part of the record for the motion. (R. p. 661, l. 24-p. 663 and p. 667, l. 1).

Later during the hearing, the parties, including Appellant, reached agreement on the record on several important issues which were subsequently memorialized by the Special Referee's Order filed June 28, 2007. (R. p. 403-p. 407). Specifically, Appellant agreed that:

1. his Motion to Stay would be denied and Parcel 1 would be sold with the net proceeds of such sale to be distributed in accordance with prior orders;

2. he would proceed with his appeal on the sole and exclusive grounds of adverse possession as to Parcel 1;

3. his Motion to Stay as to Parcels 2, 3 and 4 would be denied, and the parcels sold pursuant to a pending contract;

4. upon the consummation of the sale, the net proceeds would be distributed per the prior orders except that 1/3 of these proceeds would be escrowed pending the outcome of Appellant's appeal; and

5. as to Parcels 2, 3, and 4, he would proceed with his appeal on the exclusive issue of whether the Special Referee erred in concluding that he did not have any interest in Parcels 2, 3 and 4 by virtue of intestacy and distribution. If successful on appeal, that claim could affect the amount, if any, he would receive from the escrow fund. He agreed to waive any claim, suits or appeals alleging adverse possession, and any all claims affecting title to Parcels 2, 3 and 4.

(R. p. 163 (Transcript p. 54), l. 8-p.164 (Transcript p. 91), l. 14 and p. 403-p. 407).

The Special Referee's Order filed June 28, 2007, incorporated the agreements reached at the June 6th hearing. (R. p. 401-p. 407). Additionally, the Special Referee found that Appellant failed to timely exercise his option to purchase by filing with the Clerk the appropriate proof of financing as required by prior orders, and therefore, the parcel was being sold to Mark Goldberg, per a prior contract, and to Marie Smith, who did comply with the orders and preserve her right as an heir to purchase Parcel 1. (R. p. 165 (Transcript p. 87), l. 15-p. 166 (Transcript p. 90), l. 3 and p. 403). No appeal was taken from the June 28, 2007 Order.

On July 13, 2007, Attorney Houston filed a Motion for Supersedeas or Other Relief with the Court of Appeals seeking relief based on the following:

1. jurisdiction was not proper;
2. process was insufficient;
3. Appellant's right to purchase property was improperly denied due to an error of law, error fact or abuse of discretion;
4. a lack of due process and sanctions imposed;
5. the underlying facts as determined by the Special Referee were false or fraudulently presented;
6. the census reports and burial records should have been considered as newly discovered evidence for the purposes of granting a new trial and/or under Rule 60(b) for relief for judgment based on fraud;
7. the Special Referee failed to maintain itself as a court of record; and
8. whether the Special Referee had the authority to dictate and frame the scope of Appellant's appeal.[4]

(R. p. 485-p. 490). On that same date, Attorney Houston filed a Memorandum of Law, his affidavit and supporting exhibits. (R. p. 491-p. 527).

On July 18, 2007, the Court of Appeals granted the Bailum '04 Case Respondents an extension of time to file a return to Appellant's Motion, and temporarily stayed the sale of any property until further order of the court. (R. p. 408-p. 410). On July 31, 2007, the Bailum '04 Case Respondents filed their Return to Motion. (R. p. 528-p. 539).

[4] Appellant's Motion for Supersedeas or Other Relief also requested relief on behalf of Deloris Singleton. In an effort to achieve some economy in this procedurally complex appeal, the references to Ms. Singleton have been omitted because Ms. Singleton is not a party to this case or to this appeal.

On September 4, 2007, the Court of Appeals denied Appellant's Motion for Supercedeas and Other Relief. (R. p. 411-p. 412). In response, on September 13, 2007, Attorney Houston filed a Petition for Full Appellate Review which appears to have been denied. (R. p. 540-p. 542).

On March 24, 2008, the Court of Appeals dismissed, for the second time, Appellant's appeal based on his failure to file and serve the Initial Brief and the Designation of Matter. (R. p. 413-p. 414). Attorney Houston filed a Motion for Reinstating Appeal, Securing Transcript Out of Time and for Filing Appellant's Brief Out of Time on March 24, 2008. (R. p. 547-p. 549).

In response to Appellant's request to reinstate his appeal, the Bailum '04 Case Respondents filed a Motion to Dismiss Appeal due to Appellant's failure to timely file and serve his Initial Brief on March 26, 2008. (R. p. 543-p. 545). On April 17, 2008, the Bailum '04 Case Respondents filed a Motion to File Return to Appellant's Motion to Reinstate the Appeal Out of Time. (R. p. 556-p. 558).

The Court of Appeals, on May 14, 2008, reinstated the appeal, granted Appellant thirty days to file his brief, and ordered no further extensions absent extraordinary circumstances. (R. p. 415-p. 416). Sometime thereafter, Appellant filed a Motion for Leave to File Late, and, it appears, a Motion for an Extension of Time. (R. p. 559-p. 561). The Bailum '04 Case Respondents filed a Return to Appellant's Motion for Leave to File Late on July 21, 2008, and a Return to Appellant's Motion for an Extension of Time on July 28, 2008, objecting to a reinstatement of Appellant's appeal. (R. p. 562-p. 571).

After the briefing deadline but prior to any ruling by the Court of Appeals, Attorney Houston filed Appellant's Initial Brief on August 7, 2008. (R. p. 572-p. ___[*sic*

(the page between R. p. 618 and p.619)]). By Order filed on August 21, 2008, the Court of Appeals dismissed the appeal for Appellant's failure to file and serve the Initial Brief by the deadline, and dismissed the pending motions to dismiss and for extension of time as moot. (R. p. 417-p. 418).

On August 28, 2008, Attorney Houston filed a Petition for Full Appellate Review. (R. p. 619-p. 621). The Bailum'04 Case Respondents filed a Return to Appellant's Motion to Reinstate Appeal on September 4, 2008. (R. p. 622-p. 625). The Court of Appeals denied a rehearing of the dismissal or reinstating the appeal on October 27, 2008. (R. p. 419-p. 420). Attorney Houston filed a Motion for Reconsideration on October 31, 2008, to which the Bailum '04 Case Respondents filed a Return to Appellant's Motion on November 10, 2008. (R. p. 626-p. 634). Sometime in November 2008, the Court of Appeals returned the Bailum '04 Case Respondents' Return to Appellant's Motion advising it was not going to consider either Appellant's Motion for Reconsideration, or the Bailum '04 Case Respondents' Return. (R. p. 665). On December 1, 2008, finding that no Petition for Certiorari was filed, the Court of Appeal remitted the appeal to the Clerk of Charleston County. (R. p. 421-p. 422).

Shortly thereafter, the property was sold pursuant to the Special Referee's prior orders. Respondent Martin sent Appellant's proceeds, as set forth in the prior orders, to Attorney Houston. (R. p. 294, l. 14-22). However, Attorney Houston returned the check advising he no longer represented Appellant. (Id.). Respondent Martin then mailed Appellant letters and advised him to claim his share of the proceeds. (Id.). Appellant never responded and Respondent Martin continues to hold in excess of $50,000 in his trust account for Appellant. (Id.). No further action was taken by Appellant until almost

nine months later when he commenced this litigation.

ARGUMENT

I. Appellant's Appeal is Procedurally Barred

During the hearing on June 6, 2007, Petition agreed to permit the sale of all parcels with the proceeds to be placed in escrow and to limit his appeal to just two issues: did Appellant own Parcel 1 outright through adverse possession; and did Appellant acquire an interest in the remaining parcels under the intestacy statute. Those agreements were incorporated into the Special Referee's order dated June 28, 2007. No appeal was taken from that order. It is well settled an appeal will not be entertained from an order by consent. Smith v. Lowery, 56 S.C. 493, 35 S.E. 129 (1900). The right of appeal from such an order is regarded as waived. Wilson v. All, 86 S.C. 586, 68 S.E. 824 (1910). This is especially true when, as here, there is nothing in the record controverting the fact that the parties consented to the order. See Bank of Florence v. Gregg, 46 S.C. 169, 24 S.E. 64 (1896). Therefore, all issues raised by Appellant relating to the sale of the property were waived by his consent to permit the sales.

Additionally, all claims by Appellant relating to his right to repurchase the property are barred by his failure to take an appeal from the Special Referee's June 28, 2007 Order. The Special Referee found that Appellant failed to timely exercise his option to purchase by filing with the Clerk the appropriate proof of financing as required by prior orders. Further, the Special Referee approved the sale to Mark Goldberg, per a prior contract, and to Marie Smith, who did comply with the orders and preserve her right as an heir to purchase Parcel 1. Appellant was represented by counsel at the time, but

neither Appellant nor his attorney appealed those findings. Consequently, Appellant should not be permitted to collaterally attack those rulings of the Special Referee when he failed to take an appeal from that order while the Bailum '04 Case was pending.

Finally, Appellant's appeal should be dismissed because he abandoned the appeal of the prior case. Under appropriate circumstances, the failure to file a timely brief may be treated as abandonment of an appeal. See State v. Tessnear, 257 SC 290, 185 SE2d 611 (1971). Here, the Court of Appeals reinstated the Appellant's prior appeal twice after it had been dismissed for a failure to comply with time deadlines. However, Appellant failed to perfect that appeal even after the Court of Appeals issued its May 14, 2008, granting Appellant thirty days to file his brief with no further extensions absent extraordinary circumstances. Consequently, this Court should find that all of the issues raised in this appeal are barred by Appellant's waiver of those claims by his agreement during the June 6, 2007 hearing, his failure to appeal from Special Referee's finding that he did not exercise his right to repurchase, and his abandonment of the prior appeal.

II. The Circuit Court properly determined that there was no evidence of fraud on the court, or rare, special, exceptional, unusual or extraordinary circumstances to warrant vacating the March 6, 2007 Amended Special Referee's Order Quite Title, Partition and Sale, or rescinding any deeds, and correctly granted summary judgment to Respondents.

Summary Judgment Standard

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether any triable issues of fact exist, the trial court must

view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing the motion. An appellate court applies the same standard used by the trial court under Rule 56(c) when reviewing the grant of a motion for summary judgment. Epstein v. Coastal Timber Co., Inc., 393 S.C. 276, ___, 711 S.E.2d 912, 915 (2011) (internal quotations and citations omitted).

Independent Action in Equity to Set Aside Judgment under Rule 60(b)

A party may be relieved from a final judgment, order or proceeding, under Rule 60(b), SCRCP, by way of a motion, or through an independent action in equity. Mr. T v. Ms. T, 378 S.C. 127, 134-5, 662 S.E.2d 413, 416-7 (2009) (reh'g denied (2008) and cert. denied (2009)) (citing 11 C. Wright, A. Miller & M. Kane, Federal Practice. & Procedure § 2868 (2d ed.1995). Relief in an independent action may only be based on two grounds: "1) one based on such rare, special, exceptional or unusual circumstances that may warrant equitable relief, including accident or mistake or 2) one based in equity for fraud upon the court." Id. at 132, 662 S.E.2d at 417. Relief may be sought generally under Rule 60(b), which the court may liberally construe as either a motion or an independent action. Id. at 132, 662 S.E.2d at 416 (internal citation omitted). "A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief." Perry v. Heirs at Law, 357 S.C. 42, 46-7, 590 S.E.2d 502, 503 (Ct. App. 2003)(internal citation omitted).

Rule 60(b) Independent Action in Equity for Fraud on the Court

Relying on South Carolina case law and analysis from other jurisdictions, the Supreme Court first defined fraud on the court in the context of setting aside a final judgment in Chewning v. Ford, 354 S.C. 72, 77-8, 579 S.E.2d 605, 608 (2003). The

Supreme Court stated that fraud upon the court is "that species of fraud which does, or attempts to, subvert the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." Id. (citing Evans v. Gunter, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (Ct.App. 1988)(citing H. Lightsey and J. Flanagan, South Carolina Civil Procedure, 408 (2nd ed.1985)); see also, Ray v. Ray, 374 S.C. 79, 85, 647 S.E. 2d 237, 240 (2007) (internal citation omitted). Fraud upon the court consists, generally, of

> only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated will constitute fraud on the court. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court. Fraud upon the court is a serious allegation involving corruption of the judicial process itself and, whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court.

Chewning at 78, 579 S.E.2d 608.

South Carolina law is clear that in order to obtain equitable relief vacating a final judgment on the basis of fraud, the fraud must be extrinsic. Chewning at 80, 579 S.E.2d at 610 (citing Bryan v. Bryan, 220 S.C. 164, 66 S.E.2d 609 (1951) (emphasis added); Raby Const., L.L.P. v. Orr, 358 S.C. 10, 19, 594 S.E.2d 478, 482-83 (2004) (internal citations omitted) (recognizing that the court had recently focused on the important distinction between extrinsic and intrinsic fraud, and reiterated in order to get equitable relief from final judgment on the basis of fraud, the fraud must be extrinsic); Ray v. Ray, 374 S.C. 79, 647 S.E. 2d 237 (2007) (quoting Bryan at 167-8, 66 S.E.2d at 610) ("Generally, the fraud must be "extrinsic or collateral to the question examined and determined in the action in which the judgment was rendered; intrinsic fraud is not

sufficient for equitable relief.").

Examples of intrinsic fraud are perjury or false swearing by a witness or party, or presenting forged documents at trial. Raby at 19, 594 S.E.2d at 483 (referring to Bryan at 169, 66 S.E.2d at 611; J. Flanagan, South Carolina Civil Procedure at 485 (2d ed.1996)); see also, Chewning, 354 S.C. at 81, 579 S.E.2d at 610. Allegations that a party failed to disclose documents, including the failure to disclose to an adversary or court documents or information which would defeat one's own claim, is also intrinsic fraud. Raby at 19, 594 S.E.2d at 483 (citing Chewning, 354 S.C. at 82, 579 S.E.2d at 610-11).

"Equitable relief from a judgment is denied in cases of intrinsic fraud, on the theory that an issue which has been tried and passed upon in the original action should not be retried in an action for equitable relief against the judgment, and that otherwise litigation would be interminable" and such relief would undermine the stability of all judgments. Chewning, 354 S.C. at 82, 579 S.E.2d at 610 (internal quotations and citations omitted). Moreover, "relief is granted for extrinsic fraud on the theory that by reason of the fraud preventing a party from fully exhibiting and trying his case, there never has been a real contest before the court of the subject matter of the action. Id. The essential distinction between intrinsic and extrinsic fraud for purposes of relief from judgment is the ability to discover the fraud during the litigation. Ray at 84, 647 S.E. 2d at 239. While the Supreme Court in Chewning affirmed the Court of Appeals' reversal of the motion to dismiss and remand, it was quick to point out "that important benefits are achieved by the preservation of final judgments" and that this "opinion, with its unique facts, in no way altered "its longstanding policy towards final judgments." Chewning at 86, 579 S.E.2d 613.

Appellant brought an independent action alleging fraud on the court regarding the Bailum '04 Case. The gravamen of Appellant's fraud on the court claim is that in the Bailum '04 Case, the Bailum heirs knowingly conspired and lied regarding certain family relationships and purposefully misled the Special Referee in order to divest Appellant of his interest in Parcels 2, 3 and 4. (R. p. 26-p. 41, p.80-p. 96, p. 128-p. 207 and p.212-p. 241).

Appellant's claims are easily distinguishable from the cases granting relief based on extrinsic fraud. In Chewning and two cases that followed Bryan and Evans, the appeals were taken from proceedings on motions to dismiss. Bryan, 220 S.C. 164, 66 S.E.2d 609; Evans, 294 S.C. 525, 366 S.E.2d 44. Chewning and Evans each lost at the motion to dismiss stage and appealed those rulings. While Bryan prevailed at the motion to dismiss stage, the denial was appealed by the defendants. The trial courts in those cases were obligated to deny the motions if the facts and inferences drawn from the facts alleged in the complaints, viewed in the light most favorable to the plaintiffs, would have entitled the plaintiffs to relief on any theory, and the appellate courts had to apply the same standard in deciding whether the trial courts' rulings were proper. Brazell v. Windsor, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009). Because the Chewning and Evans appellate courts concluded that plaintiffs' complaints alleged sufficient facts that if true would constitute fraud on the court, they reversed.

Appellant, unlike Chewning and Evans, cannot simply rely on a well-pleaded complaint. Appellant had to show that genuine issues of material fact exist regarding whether extrinsic fraud constituting a fraud on the court occurred in the Bailum '04 Case in order to survive Respondents' motion for summary judgment. He failed to do so. In

an effort to support his allegations of fraud upon the court, Appellant points to inconsistent testimony given almost three years apart in two different cases involving different property by two different people. Specifically the challenged testimony was regarding whether Monica Middleton was Fannie Middleton's daughter or great-granddaughter: (1) the reference testimony given by Monica Middleton on September 17, 2003, to the Master-in-Equity in the Middleton Action, and (2) the testimony provided by Verdone Gray on May 15, 2006, before the Special Referee in the Bailum Action. (R. p. 31-p. 40, paras. 19, 34, 35, 46, 47, 57 and 58, p. 82-p. 83, p. 88-p. 89 and p. 131-p. 134).

The Supreme Court in Bryan determined that even if Bryan's assertions of false testimony in his trial, by four witnesses now recanting, were true, it was not enough to survive a motion to dismiss because he only established intrinsic fraud. Appellant makes basically the same arguments as the Bryan plaintiff: that "witnesses gave false testimony on material issues at trial; at the time of trial he did not know it was false; he could not have discovered the falseness by the use of due diligence; he had only just discovered the falseness of the material testimony proffered; he had not known what testimony the defendants would offer; he had no way to anticipate perjured testimony; and except for such false witness, the defendants would not have obtained a judgment against him." Bryan, 220 S.C. 164, 66 S.E.2d 609 (1951). Appellant makes the same claim. (R. p. 31-p. 40, paras. 20, 37-40, 47-52 and 57-62, p. 82-p. 83, p. 88-p. 91, p. 131-p. 137, p.145-p. 150, and p. 218-p. 229).

The inconsistent testimony relied on by Appellant is insufficient to prove false swearing or actual fraud. Viewing this evidence and all reasonable inferences that may

be drawn from it in the light most favorable to Appellant, the only thing this differing testimony could prove is that Verdone Gray believed that Monica Middleton was her cousin and the daughter of Fannie Middleton, while Monica Middleton believed that she was the great-granddaughter of Fannie Middleton. Dissimilar testimony by separate witnesses in different actions is, in and of itself, not evidence of lying, deceit, fraud or perjury.

Even if this Court assumes the truth of Appellant's position regarding this conflicting testimony, the most that Appellant has proven is that either Monica Middleton and/or Verdone Gray lied, falsely testified or perjured themselves with regard to Monica's descendancy. False testimony and perjury are classic examples of intrinsic fraud. Chewning, 354 S.C. at 81, 579 S.E.2d at 610; Raby at 19, 594 S.E.2d at 483 (referring to Bryan at 169, 66 S.E.2d at 611; J. Flanagan, South Carolina Civil Procedure at 485 (2d ed.1996)). Thus, at most, Appellant has shown intrinsic fraud.

In an apparent attempt to convert the alleged intrinsic fraud claim into extrinsic fraud, Appellant claims the existence of "a deliberate scheme to defraud by the Bailum heirs," and makes numerous allegations to purportedly support his claims.

The record simply does not support several of Appellant's assertions, but even those that are accurate do not raise an issue of extrinsic fraud. Appellant was ably represented by at least three attorneys, including Attorney Condon, a former Master-in-Equity for Charleston County, from the inception of the Bailum '04 Case and until the dismissal of the appeal. None of the items enumerated by Appellant, even if true, show a subversion of the administration of justice, or that Appellant was deprived of the opportunity to be heard.

Additionally, Appellant argues for the first time on appeal that attorney misconduct by Arthur McFarland, Esquire, ("Attorney McFarland") occurred which constituted fraud on the court. Appellant relies on Chewning for his proposition that attorney misconduct, if proven by clear and convincing evidence, is fraud on the court. Appellant sets forth the following alleged 'misconduct' by McFarland amounting to fraud on the court: that McFarland intentionally delayed, for two years, filing a quiet title action for the same property for Appellant because McFarland was working a quiet title action for Monica Middleton for the 2002 Middleton Parcel; and that McFarland [sic] never told Appellant or Attorney Cupp, about the Middleton Action and that Monica Middleton received the Middleton Parcel as a result.

An issue raised for the first time on appeal is not preserved. 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."). Nonetheless, even if the Court considers this new attempt by Appellant to establish fraud on the court, it still must fail.

In Chewning, the Court agreed that, if true, that Ford's attorneys engaged in suborning perjury and intentionally withholding critical documents, then the Ford attorneys' misconduct constituted extrinsic fraud. Chewning, 354 S.C. at 81, 579 S.E.2d at 610. The Supreme Court based this ruling on the fact that "numerous jurisdictions hold an attorney's subornation of perjury and/or the intentional concealment of documents constitute fraud upon the court." Chewning, 354 S.C. at 83, 579 S.E.2d at 610 (citations omitted).

Appellant has not alleged this type of misconduct, nor has he shown it. First, at

the time complained of, Attorney McFarland was Appellant's attorney. Second, Attorney McFarland's purported misconduct took place in 2000 – three years before the final judgment in the Middleton Action, and seven years before the final judgment in the Bailum '04 Case. McFarland did not suborn in perjury nor intentionally conceal documents. The Middleton Action and the deed for the Middleton Parcel are a matter of public record. Again, Appellant had to do more than plead sufficiently; he had to prove that level of attorney misconduct that amounted to extrinsic fraud. Again, even assuming the truth of all of Appellant's contentions and conclusions, they do not establish a deliberate scheme to defraud by the Bailum heirs, or that a fraud on the court occurred.

The Supreme Court's Bryan analysis is on point. The Bailum '04 Case Complaint, Amended Complaint and Second Amended Complaint "clearly disclosed" to Appellant that the interests of all possible heirs, known and unknown, to Parcels 1, 2, 3 and 4 would be determined. Bryan at 170, 66 S.E.2d at 611. (R. p. 423-p. 431, p. 434-p. 443, p. 452-p. 458 and p. 358-p. 393). Appellant "was not misled as to the nature of the evidence he would be required to meet." Bryan at 170 , 66 S.E.2d at 611. Appellant has produced no evidence, beyond bald allegations, to show that he was prevented by from fully presenting his case, or that the Special Referee did not have a "full opportunity of passing on the credibility of the testimony now claimed to be false." Bryan at 170, 66 S.E.2d at 611. Although Appellant levies the above allegations as proof of his claims, his assertions are not evidence, and he did not and does not offer any evidence to substantiate his claims. "A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief." Perry at 46-7, 590 S.E.2d at 503 (internal citations omitted).

Appellant had to show extrinsic fraud in the Bailum 2004 Case in order to survive summary judgment. Appellant failed to present evidence of extrinsic fraud. The trial court found that the testimonial conflict relied on by Appellant is "at best intrinsic fraud for which he is entitled to no relief." (R. p. 15). While there may be exceptional cases justifying equitable relief on the ground that a judgment was procured by false testimony, there is certainly no showing in the instant case warranting a departure from the general rule. Bryan at 170, 66 S.E.2d at 611. Thus, the Circuit Court correctly concluded as a matter of law that there was no extrinsic fraud constituting a fraud on the court, and properly granted summary judgment to Respondents. (R. p. 15).

A Rule 60(b) Independent Action in Equity based on Rare, Special, Exceptional, Unusual, or Extraordinary Circumstances that Warrant Equitable Relief

The indispensable elements of the independent action based on such rare, special, exceptional or unusual circumstances are:

> "1) a judgment which ought not, in equity and good conscience, to be enforced; 2) a good defense to the alleged cause of action on which the judgment is founded; 3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; 4) the absence of fault or negligence on the part of the defendant; and 5) the absence of any adequate remedy at law."

Mr. T at 135, 662 S.E.2d at 417 (citing Nat'l Sur. Co. v. State Bank of Humboldt, 120 F. 593 (8th Cir.1903)). Such an independent action is one in equity, and as such, the "court may consider equitable defenses such as laches, unclean hands, and whether an adequate legal remedy exists." Id.

In Mr. T v. Ms. T, Mr. T filed for divorce stating that two children were born of the marriage and that he was entitled to joint custody. The parties entered into settlement agreement which was approved by the family court and incorporated in the Final Divorce

Decree filed on October 18, 1999. Under the agreement and decree, Mr. T paid child support and had reasonable visitation, and Ms. T had sole custody. In 2005, Mr. T filed an independent action to vacate the prior divorce order alleging that until recently he was under the false and mistaken belief that he was the childrens' biological father. Mr. T amended his complaint alleging fraud on the part of Ms. T after she moved to dismiss and filed an answer. The family court granted Ms. T's motion to dismiss on the grounds that the original divorce decree made a clear finding of paternity and that it had no jurisdiction since the action was barred by res judicata/collateral estoppel. Mr. T appealed.

The Court of Appeals reversed the dismissal for lack of jurisdiction. In its opinion, the Court discussed the availability and elements of an independent action for fraud on the court, or for rare, special, exceptional or unusual circumstances, as well as various exceptions to preclusion principles and their equitable application, to vacate a prior judgment. The Court stated specifically that with its findings it was not creating a bright line test for such issues. It voiced its concern that nothing in the record suggested the childrens' interests were ever considered. Because of the possibility that Mr. T's prior case did not conclusively determine the his paternity, because of public policy considerations regarding State's obligation to protect and safeguard the welfare of its children, due to the absence of a well-developed record, and largely due to a child's fundamental right to know the identity of his biological parent, the Court of Appeals remanded to the family court for further development of the record on these issues, and for it to adequately balance the competing interests of all those involved as well as any equitable circumstances presented in the case.

The Court was very concerned in Mr. T that "where the interests of minors or incompetents are involved, procedural rules are subservient to the court's duty to zealously guard the rights of minors. Mr. T at 132, 662 S.E.2d at 416. This, it acknowledged the importance of finality with judgments, but noted that "the equities of a case may be just as significant in overriding such finality." Mr. T at 135, 662 S.E.2d at 417. The Court of Appeals found this especially true "when the issue before the court is a determination of something so fundamental as the identity of a biological parent." Mr. T at 139-40, 662 S.E.2d at 420 (emphasis added).

As opposed to Mr. T, Appellant appeals not from a motion to dismiss, but from a grant of summary judgment. In contrast to Mr. T, the record below was well-developed. Moreover, unlike Mr. T, the issue before the Court in Appellant's action and appeal is not a fundamental right – the issue is the correctness of the Special Referee's 2007 decisions which denied Appellant's claim based on adverse possession and ouster to four parcels of heirs property, and which ultimately found that Appellant waived his right, by virtue of his intestate interest, to exercise his right purchase part or all of Parcel 1 due to his failure to timely and properly comply with the instructions in the order. To the extent that Appellant seeks relief based on rare, special, exceptional or unusual circumstances, he must prove all five of the elements articulated in Mr. T to withstand Respondents' summary judgment motion. Appellant has not produced evidence sufficient to create a genuine issue of fact as to any of those elements.

The Judgment, in Equity and Good Conscience, Should Not Be Enforced.

Appellant has not shown that the judgments and the deeds from the Bailum '04 Case and the Middleton '02 Action, in equity and good conscience, should not be

enforced. These prior judgments determined the interests of the various heirs, partitioned property, enabled property to be sold, and distributed sale proceeds proportionally among the determined heirs to five different parcels. Pursuant to the Special Referee's orders, Marie Smith timely and properly exercised her right, by virtue of her intestate interest, to purchase a part Parcel 1. Appellant did not timely or properly exercise his right to purchase part or all of Parcel 1. Following the remitter of Appellant's appeal in the Bailum '04 Case, Parcel 1 was then partitioned and the remaining part sold to a third-party, Mark Goldberg (who transferred his interest to Respondent LMC, LLC). Also pursuant to the Special Referee's orders, Parcels 2, 3 and 4 were sold to another third-party, Hazel Goldberg. The proceeds from the sale of Parcels 1, 2, 3 and 4 were distributed to the determined heirs. Appellant's share of the proceeds from the sale of Parcel 1, the only parcel in which he was determined to have an interest by intestacy, remain in escrow for him. The Middleton Parcel may likewise have been sold and proceeds distributed. It would be inequitable to all the other determined heirs and good faith purchasers to vacate the Bailum '04 Case and the Middleton '02 Action judgments and to rescind the deeds issued as a result based Appellant's non-compliance. Appellant failed to show that equity and good conscience require that the judgments and deeds in the Bailum '04 Case should not be enforced.

Appellant Does Not Have a Good Defense to the Alleged Cause of Action on Which the Judgment is Founded.

Appellant has not raised or shown a good defense to the causes of action raised in the Bailum '04 Case. In that matter, Appellant argued (and the Bailum plaintiffs and Special Referee agreed) that he was an intestate heir through his great-grandmother, Hester Bailum, whose heirs were entitle to a 1/3 share in Parcel 1. Despite significant

time and opportunity, Appellant failed to properly and timely exercise his right to buy a part or all of Parcel 1. Parcel 1 was sold and Appellant's resulting share of the proceeds from the sale of Parcel 1 is waiting in escrow, but he refuses to claim it. Appellant converts his failure to timely and properly comply with the orders to bias and prejudice against him by the Special Referee resulting in his arbitrary decision to deny Appellant

As to Parcels 2, 3 and 4, Appellant did not claim or argue a partial intestate interest – he claimed ownership of all three parcels based on adverse possession and ouster. Not until after the Special Referee ruled in the Bailum '04 Case denying his adverse possession and ouster claim, did Appellant make the claim that he was an intestate heir through his great-grandmother, Hester Bailum, and her heirs were also entitle to a 1/3 share in Parcel 2, 3 and 4. The Special Referee was clearly apprised of Appellant's new claim to Parcels 2, 3 and 4 during the June 6, 2007 hearing. Attorney Houston presented Appellant's 'new evidence', which consisted of unverified and unsubstantiated copies of consensus reports and burial records from Fielding Funeral Home, and argued that this evidence required a new trial. Appellant personally found this 'new evidence' after the Special Referee issued his Amended Special Referee's Order Quiet Title Partition and Sale on March 6, 2007. This 'new evidence,' some of which was a matter of public record, could easily have been found by Appellant during the pendency of the Bailum '04 Case. While the Special Referee accepted the 'new evidence' as part of the motion record, he did not vacate his prior judgment.

Appellant does not have a good defense – it is the same claim that he tried, specifically and in great detail, to the Special Referee, and to the Court of Appeals in the Bailum '04 Case. The Special Referee considered it, and refused to order a new trial.

Although Appellant's former appeal was not perfected and dismissed, during the 20 months it was pending Attorney Houston submitted a number of pleadings to the Court of Appeals which set forth in great detail and with specificity all of Appellant's issues, claims and concerns, which mirror those raised herein. Even though the Court of Appeals was well aware of all of Appellant's issues, claims and concerns, the Court nonetheless declined to reinstate Appellant's appeal and ordered remittitur in December 2008.

No Fraud, Accident, or Mistake Prevented Appellant From Obtaining the Benefit of His Defense.

Three, Appellant has not shown fraud, accident or mistake which prevented him from obtaining the benefits of his defense in the Bailum '04 Case. Appellant claims fraud by pointing at the inconsistencies between the testimony of Verdone Gray in the Bailum '04 Case, and that of Monica Middleton in the Middleton '02 Action. Inconsistent testimony by different witnesses in different case is not evidence of fraud.

As described more fully above, Appellant was represented by experienced counsel throughout the prior litigation. To the extent Appellant argues that Attorney Houston's allege abandonment of his former appeal deprived him of the opportunity to be heard, that is incorrect. As noted above, Attorney Houston filed many pleadings between April 2007 and November 2008 with the trial court and with Court of Appeals which detailed and argued Appellant's many issues, claims and concerns. Appellant was dissatisfied with the outcome of the Bailum '04 Case, both at the trial level and at the appellate level. His dissatisfaction, however, with the result is not proof that he was deprived the opportunity to be heard or from obtaining the benefit of his defense.

The Absence of Fault or Negligence on the Part of Appellant.

Four, Appellant has not and cannot show the absence of any fault or negligence on his part. Appellant claims that he should be permitted to present "new evidence" to support his claims in this action. However, the 'new evidence' that Appellate refers to is: census records; burial records from a funeral home; the inconsistent testimony set forth above; that Respondent Monica Middleton received the Middleton Parcel, property alleged also cared for by Appellant, during the Middleton '02 Action and he was not informed of that action or her claim to that parcel by Attorney McFarland; and that Attorney McFarland, represented Respondent Monica Middleton in the Middleton '02 Action, after and despite the fact that Attorney McFarland failed to file a quiet title action on Appellant's behalf.

All of this 'new evidence' could have easily been found through the exercise of due diligence, and presented during the Bailum '04 Case. It is unknown how Appellant obtained burial records from the funeral home, but he was able to, and they could also have easily been obtained by subpoena. The census records are public records which Appellant personally found in the time between his opportunity to purchase Parcel 1 expiring around March 16, 2007, and the June 6, 2007, hearing before the Special Referee. (R. p. 94-p. 96). Likewise, the pleadings for the Middleton '02 Action, which are public records, would have identified Respondent Monica Middleton's attorney as Attorney McFarland, and the property to be quieted as the Middleton Parcel. Further Respondent Monica Middleton's reference testimony, the basis of Appellant's fraud claim, is part of the Master's Order Quieting Title in the Middleton '02 Action and which has been a matter of public record since October 15, 2003, before the Bailum '04 Case was even commenced.

Appellant participated in a full hearing at the trial level in the Bailum '04 Case and filed an appeal. If, Appellant's former attorneys were negligent or dilatory in the performance of their due diligence, in their investigation of his claims, in the discovery process or during the examination of witnesses and evidence, that negligence is imputable to Appellant. And if, in fact, Appellant's former appeal was dismissed due to some fault or negligence of Attorney Houston, that fault and negligence is also imputed to Appellant. It is not attorney abandonment as Appellant argues.

In Tobias v. Rice, 386 S.C. 306, 688 S.E.2d 552 (2010) reh'g denied (2010), the Supreme Court reversed a judgment against Rice on the basis of attorney abandonment. Unbeknownst to Rice his attorney was suspended from the practice of law. The opposing attorney sent the trial notice to Rice's attorney, but he did not notify Rice personally. Neither Rice nor his attorney appeared at the final hearing. The trial judge entered judgment against Rice. On appeal, the Supreme Court concluded that Rice was deemed pro se by her attorney's suspension and was entitled to due process and notice of the final hearing. The Supreme Court pointed to Moore v. Moore, 376 S.C. 467, 657 S.E.2d 743 (2008), for the proposition that procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses.

In Graham v. Town of Loris, 272 S.C. 442, 248 S.E.2d 594 (1978), the residents of the Town of Loris ("town") brought suit to have the town's zoning ordinances declared null and void. The day before the hearing on the residents' summary judgment motion the town the city attorney announced his immediate resignation. The city attorney did not inform any town official of the impending summary judgment hearing. No one appeared

at the hearing on behalf of the town, and so summary judgment was entered against it. The trial court ultimately granted the town relief from judgment based on the town's excusable neglect because the town had no notice of the hearing and its attorney had resigned, and the town's prima facie showing of meritorious equitable defenses.

The Supreme Court recognized the general rule is

> that the neglect of the attorney is the neglect of the client, and that no mistake, inadvertence or neglect attributable to an attorney can be successfully used as a ground for relief, unless it would have been excusable if attributable to the client. The acts and omissions of the attorney in such case are those of the client .

Graham, at 451-2, 248 S.E.2d at 599 (emphasis added). To overcome this general rule, the client must establish that its former attorney willfully and unilaterally abandoned it. Id. at 452, 248 S.E.2d at 599. The Supreme Court affirmed, noting that "under the rare circumstances of this case," the town "should not be charged with the abandonment of the case by its counsel." Id. at 452-3, 248 S.E.2d at 599.

Stearns Bank v. Glenwood Falls, 373 S.C. 331, 644 S.E.2d 793 (Ct. App. 2007), was a foreclosure action against Glenwood Falls and other defendants. The plaintiff's attorney advised Cisa, the attorney for Glenwood Falls, and another defendant of the trial date. Cisa acknowledged that he was taking over the representation of Glenwood Falls. Cisa did not appear at the trial on Glenwood Falls behalf, and the Master entered judgment against Glenwood Falls. Glenwood Falls moved pursuant to Rule 60(b) for relief from default judgment based on excusable neglect asserting willful abandonment by its attorney, Cisa. The master denied the motion and Glenwood Falls appealed. The Court of Appeals concluded that even if Cisa's failure to act was neglectful, it could not assume that it rose to the level of willful abandonment or withdrawal from the case. The

Court based that conclusion on the critical factual distinction between Simon v. Flowers, 31 S.C. 545, 99 S.E.2d 391 (1957), and Graham, *supra*:

> In Simon, the attorney simply forgot to answer the complaint against his client, and the supreme court upheld the trial court's denial of relief of judgment because the attorney's conduct did not transcend mere neglect. In Graham, the moving party established that its attorney affirmatively withdrew by resigning on the eve of a summary judgment hearing leaving the client unaware of the imminent and dispositive motion hearing. Our supreme court upheld the trial court's decision to grant relief from judgment based on the fact that the attorney willfully abandoned his representation by resigning right before the summary judgment hearing.

Stearns Bank, at 345, 644 S.E.2d at 800 (internal citations omitted). The Court of Appeals denied the motion to set aside the judgment because Glenwood Falls did not establish that Cisa willfully abandoned or withdrew from the case, and it refused to speculate to in order to make the additional finding of willful abandonment.

It is clear from the record of the Bailum '04 Case record that all three of attorneys hired by Appellant were active participants in both the trial, and in Appellant's former appeal. To the extent Appellant now claims that Attorney Cupp or Attorney Condon made mistakes, omissions or were neglectful, if any were made they did not rise to the level of willful abandonment and are imputed to him. Likewise, while Attorney Houston may have been late in filing Appellant's intial brief, he filed numerous substantive motions, a memorandum of law, and albeit late, an initial brief. Like the attorney in Simon[5], it appears Attorney Houston had personal and professional issues that caused at

[5]In Simon, the attorney, on behalf of his client, did not file an answer to the plaintiff's complaint. Plaintiff obtained a default judgment and the defendant appealed. The Supreme Court acknowledged that the attorney's mistake was due to "forgetfulness on [the attorney's] part which in turn was due to pressure of his business in the trial of cases and in attendance at hearings." 31 S.C. at 550-51, 99 S.E.2d at 394. Nonetheless, it held that "[i]n the crowded routine of a busy lawyer's life a mistake such as the record here discloses is understandable; but it entails the penalty of default under strict enforcement

least some of his delay in filing. (R. p. 562-p. 571). Thus, as in Glenwood Falls and Simon, Attorney Houston's acts were at most neglectful, mistakes or omissions, if at all, and would be imputed to Appellant. Even assuming Appellant has shown any actions by any or all of his attorneys that constitute neglect, such neglect is imputed to him and cannot be used as a ground for relief from the Bailum '04 Case judgment. There is no evidence that Appellant's attorneys willfully abandoned or withdrew from his case.

Appellate has an Adequate Remedy at Law

Fifth, if Appellant can establish that some or all of his attorneys in the Bailum '04 Case were negligent in their representation (which is not evident from the record in the Bailum '04 Case or this case), Appellant has an adequate remedy by way of legal claim against some or all of them. Thus, he cannot show that he does not have an adequate remedy at law.

"Totality of the Circumstances" or "Exceptional Circumstances" as defined by Appellant is not the Proper Standard for a Rule 60(B) Independent Action in Equity for Relief From Final Judgment

Appellant contends that the trial court failed to consider all the circumstances in ruling on the summary judgment motion. Specifically, Appellant asserts that he raised multiple circumstances which justify equitable relief: problems and irregularities concerning the Special Referee, including the Special Referee being appointed without his consent, procedural irregularities, and racial bias; false testimony; reliance on false testimony; the Bailum heirs conspiracy to give false testimony and to intentionally defraud the court; newly discovered evidence; misconduct by Attorney McFarland; and abandonment by Attorney Houston.

---

of the rule of procedure, and the trial court's refusal to forgive it affords no basis for reversal." Id.

Most, if not all, of these circumstances in some form were raised to, considered by and ruled on by the Special Referee and the Court of Appeals. (R. p. 165 (Transcript p. 87), l. 15-p. 166 (Transcript p. 90), l. 3, p. 358-p. 397, p. 401-p. 407, p. 464-p. 466 and p. 485-p. 527). Thus, while the Court of Appeals reviewed Appellant's arguments, it declined to provide relief. (R. p. 411-p. 412 and p. 421-p. 422). Importantly, as has been noted repeatedly, Appellant was represented by no less than three competent lawyers during the Bailum '04 Case and its appeal, and was not prevented from presented a defense.

Aside from bald, conclusory and inflammatory allegations, Appellant has not produced any evidence to support his contentions or the inferences he claims from them, or the record clearly refutes them. Even if Appellant's assertions are correct, he has not explained how any one, some or all of these complaints deprived him of the opportunity to be heard, or how they now, three years later, amount to an extraordinary circumstance warranting the equitable relief of setting aside a final judgment.

Appellant asserts that that the trial court failed to consider all the circumstances in ruling on the summary judgment motion, and seems to be trying to create a new ground for relief from a final judgment by asking the Court to vacate the Bailum '04 Case judgment on the equitable grounds of 'totality of the circumstances' or extraordinary circumstances, as he defines them. However, Appellant filed this independent action under Rule 60(b) which clearly permits collateral attack of a final judgment in only two ways: (1) fraud on the court, or (2) rare, special, exceptional or unusual circumstances that warrant equitable relief upon the establishment of the five indispensable elements set forth in Mr. T v. Ms. T.

Appellant has not shown either a fraud on the court or rare, special, exceptional or unusual circumstances to permit the vacating of a final judgment.

III. The Circuit Court grant of summary judgment was appropriate and not premature as Appellant had sufficient time and opportunity for discovery.

Appellant contends that summary judgment was improper because discovery had not been permitted, and that no formal discovery was undertaken due to Respondents' filing a motion to dismiss. In Middleborough HPR v. Montedison S.p.A., 320 S.C. 470, 465 S.E.2d 765 (Ct.App.1995), the regime brought action against the PVC manufacturer after leaks developed, and moved for partial summary judgment, which was granted by the circuit court. On appeal, Montedison argued that the trial court's grant of summary judgment was inappropriate as it had not had a full and fair opportunity to conduct discovery. The Court of Appeals disagreed noting that the regime commenced the action on October 26, 1992, filed its motion for summary judgment on February 8, 1993, and the motion was heard on June 14, 1993. The Court was also acknowledged that Montedison had contested personal jurisdiction and did not submit until one week before the summary judgment hearing. Nonetheless, Montedison advanced

> no good reason why four months was insufficient time under the facts of this case to develop documentation in opposition to the motion for summary judgment. The Regime's motion had been rescheduled on at least three previous occasions. Thus, Montedison could not have been caught by surprise. Further, the record discloses Montedison made no formal motion for a continuance or pointed out in any specific manner how it would be prejudiced by its inability to conduct discovery. Finally, we observe Montedison had been a party to other suits involving roofs that addressed most of the same issues involved in this case.

Middleborough HPR, 320 S.C. at 479-80, 465 S.E.2d at 771-2. Consequently, the Court of Appeals found that summary judgment was not premature and affirmed the trial

court's decision on this issue.

Middleborough HPR is on point. Appellant filed his complaint on August 24, 2009, to vacate a 2007 judgment from an action commenced in 2004 and in which Appellant was actively engaged, including an appeal that was dismissed in 2008. Respondents filed their motion to dismiss, in lieu of an answer, on September 16, 2009. A hearing on the motion to dismiss, and other pending motions, was heard on March 1, 2010. Judge Nicholson took the motion to dismiss under advisement in order to read the numerous affidavits, transcript and any case law submitted. (R. p. 300, l. 20-25). On August 27, 2010, the parties reconvened and again argued the merits the motion to dismiss. During the hearing, based on the numerous affidavits and exhibits submitted, the judge converted the motion to one for summary judgment and liberally allowed counsel to supplement the record. (R. p. 342, l. 1-p. 42, l. 12).

Counsel for Appellant did not object to the conversion of the motion and instead "agreed wholeheartedly." (R. p. 342, l. 25). Appellant's counsel did not raise any concerns regarding the lack of discovery to the judge at the hearing. (R. p. 306-p. 352). Moreover, while Appellant's counsel noted at the first hearing on the motion to dismiss that his complaint was not complete due to the lack of discovery, he did nothing more. (R. p. 288, l. 25-p. 289, l. 16).

In Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment Appellant includes conclusory allegations to support his argument that summary judgment is premature and that "due to the number of issues which need to be addressed," Appellant should be allowed to "fully develop all of the facts", and he goes on to argue that the "complaint establishes a prima facie cause of action to vacate the

judgment under either "exceptional circumstances" or "fraud on the court" but due to the complexity of the issues, Appellant should be entitled to have discovery and to "establish further facts upon which to base his claims for relief." (R. p. 141-42).

In Plaintiff's Motion for Reconsideration, Appellant raises for the first time that he believed discovery was prohibited or limited. (R. p. 234-p. 235). Appellant argues this basis also in his Initial Brief, but therein also argues for the first time that because of the Respondents' pending motion, no formal discovery was undertaken. Appellant, however, points to no rule or law which prohibits discovery in cases where a defendant files a motion to dismiss in lieu of an answer. Thus, any lack or restriction of discovery appears to have been self-imposed by Appellant.

As in Middleborough HPR, Appellant has provided no good reason why a year was insufficient time for him to develop documentation to oppose the motion for summary judgment. Appellant has been on notice of Respondents' position since their motion to dismiss was filed, he could not have been surprised, and the motion was argued twice before it was converted to summary judgment. Like Montedison in Middleborough HPR, Appellant made no formal motion for a continuance nor pointed out in any specific manner how he was prejudiced by his alleged inability to conduct discovery. And also similar to Montedison, Appellant was a party in another suit and appeal, the Bailum '04 Case, that addressed most, if not all, of the exact same issues and facts involved herein. Lastly, Appellant has not identified any specific discovery which he did not or could not obtain which would have affected the outcome of the summary judgment motion. For these reasons, the grant of summary judgment was not premature and the circuit court correctly granted judgment as a matter of law.

IV. The Circuit Court did not err when it denied Appellant's Motion to Disqualify Attorney Berlinksy, and denied Appellant's subsequent request to dismiss Respondents' Motion to Dismiss.

During the hearing on March 1, 2010, Appellant's Motion to Disqualify Attorney Berlinsky, the trial judge denied Appellant's Motion to Disqualify based on the testimony and affidavits, and specifically found no violations of any Cannons of Ethics. (R. p. 257, l. 4-p. 260, l. 21). Nonetheless, despite such denial, Attorney Berlinsky voluntarily withdrew as counsel for Respondents to avoid any appearance of impropriety, and Anastasios H. Chakeris, Esquire, was substituted on the record during the hearing. (Id.). Appellant also moved as part of his Motion to Disqualify that the trial court dismiss any motions filed by Attorney Berlinsky on the grounds that he could not represent an "adverse party and file motion on their behalf if he has a conflict of interest." (R. p. 249, l. 25-p. 250, l. 6). The judge denied this motion also, in part because he had not found any conflict. (R. p. 260, l. 8-21).

Appellant now contends that the trial court erred in denying its motion to disqualify and its motion to dismiss Respondent's Motion to Dismiss, and failed to find a conflict of interest existed. Appellant stated that he met with Attorney Berlinsky sometime in July 2003 to discuss the possibility of his pursuing a quiet title action on Appellant's behalf. (R. p. 50-p. 61). Attorney Berlinsky wrote to Appellant after they met and provided and estimate of fees and costs for a quiet title action, and advised that after Appellant discussed the matter with his family and made a decision, he should contact Attorney Berlinsky. (R. p. 58-p. 61). Because of Attorney Berlinsky's estimate, Appellant instead hired Attorney McFarland. (R. p. 50-p. 61). Further, Appellant

asserted that he met with Attorney Berlinsky again during the pendency of the Bailum '04 Case before he hired Attorney Condon; however, Attorney Berlinsky refused to take his case. (R. p. 50-p. 61).

During the March hearing, Attorney Berlinsky testified that he did not recall meeting Appellant, but that it was his practice, when he meets regarding quiet title actions, to explain what a quiet title action is and why it is necessary but he never goes into specifics until he is retained. (R., p. 253, l. 19-p. 256, l. 24). He told Appellant that if he decided to hire him, Appellant had bring a retainer and provide a family history. (R. p. 254, l. 12-16 and p. 256, l. 15-24). It is undisputed that Appellant never retained Attorney Berlinsky, or that Appellant never provided Attorney Berlinsky with any confidential information. (R. p. 50-p. 61, p. 254, l. 3-11 and p. 256, l. 15-24). Appellant failed to prove an attorney-client relationship. Consequently, Judge Nicholson's finding that there was no conflict of interest is supported by the record. Further, Appellant failed to provide any law to support his position that when an attorney voluntarily withdraws to avoid the appearance of impropriety the pleadings previously filed by him must be dismissed.

V. Appellant's Motion for Temporary Injunction was denied by the Circuit Court on November 3, 2010, and therefore, Appellant's Appeal is Time-barred.

Appellant's Motion for Temporary Injunction, filed on December 12, 2009, was heard and denied by Judge Nicholson during the August 27, 2010, motions hearing. (R. p. 351, l. 5-15). On November 3, 2010, a Form 4 Order ordered that Motion for Temporary Injunction against further actions involving the subject property denied. (R. p. 24).

The decision to grant or deny temporary injunctive relief is within the sound discretion of the trial judge and will not be overturned absent an abuse of discretion. FOC Lawshe v. International Paper, 352 S.C. 408, 412, 574 S.E.2d 228, 231 (Ct. App. 2002) (citing City of Columbia v. Pic-A-Flick Video, Inc., 340 S.C. 278, 282, 531 S.E.2d 518, 520 (2000)). The grant or denial of a motion for temporary injunction is immediately appealable, and is waived if not appealed within thirty days. S.C. Code Ann. § 14-3-330; SCACR 203; Roberts v. Union County Bd. of School Trustees, 326 S. E. 2d 163 (S.C. Ct. App. 1985)(By statute an interlocutory order or decree in the court of common pleas granting, continuing, modifying, or refusing an injunction is immediately appealable to the South Carolina Supreme Court).

Appellant did not appeal the trial judge's denial of his motion for temporary injunction within the thirty day time limit and so any appeal from the denial is time-barred.

CONCLUSION

The Court of Appeals should dismiss this case as it is procedurally barred. If it is not procedurally barred, the Court of Appeals should affirm the Circuit Court's grant of summary judgment to Respondents on the grounds that there was no evidence of fraud on the court, or rare, special, exceptional, unusual or extraordinary circumstances to warrant vacating the March 6, 2007 Amended Special Referee Order Quite Title, Partition and Sale, or rescinding any deeds. Further, the Court of Appeals should affirm that the grant of summary judgment to Respondents was appropriate and not premature. The Court of Appeals should also affirm the Circuit Court's denial of Appellant's Motion to Disqualify

Bruce Berlinksy, Esquire, and the Circuit Court's denial of Appellant's request to dismiss Respondents' Motion to Dismiss. Last, the Court of Appeals should dismiss Appellant's Appeal of the denial of his Motion for Temporary Injunction as time-barred.

John A. Massalon, Esquire
I. Sonja Taylor, Esquire
Wills Massalon & Allen, LLC
97 Broad Street
Charleston, South Carolina 29401
843-727-1144
Attorneys for Respondents

July 19, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2009-CP-10-5343

Roosevelt Simmons,.....Appellant,

v.

Hattie Bailum, Ruby Bailum, Verdone Gray, Julie B. Johnson, Monica Middleton, Marie Smith, Melvin Singleton, Franklin Smith, LMC, LLC, John Martin, Esq., as Trustee

of which,

Hattie Bailum, Ruby Bailum, Verdone Gray, Julie B. Johnson, Monica Middleton, Melvin Singleton, LMC, LLC, and John Martin, Esq., as Trustee, are.....Respondents.

CERTIFICATE OF COUNSEL

I certify that Respondents' Final Brief complies with Rule 211(b), SCACR, except as modified to comply with the Court's Orders issued between the filing of the Initial Brief and the Final Brief.

John A. Massalon, Esquire
I. Sonja Taylor, Esquire
Wills Massalon & Allen LLC
97 Broad Street
Charleston, South Carolina 29401
843-727-1144
Attorneys for Respondents

July 19, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2009-CP-10-5343

Roosevelt Simmons,.....Appellant,

v.

Hattie Bailum, Ruby Bailum, Verdone Gray, Julie B. Johnson, Monica Middleton, Marie Smith, Melvin Singleton, Franklin Smith, LMC, LLC, John Martin, Esq., as Trustee

of which,

Hattie Bailum, Ruby Bailum, Verdone Gray, Julie B. Johnson, Monica Middleton, Melvin Singleton, LMC, LLC, and John Martin, Esq., as Trustee, are.....Respondents.

PROOF OF SERVICE

I certify that I have served Respondents' Final Brief by depositing a copy of it in the U.S. Mail, postage prepaid, on July 23rd, 2012 addressed to Appellant's attorney of record, Edward A. Bertele, Esquire, 1812 Pierce Street, Charleston, SC 29492.

July 23rd, 2012

D. Bell for

John A. Massalon, Esquire
I. Sonja Taylor, Esquire
Wills Massalon & Allen, LLC
97 Broad Street
Charleston, South Carolina 29401
843-727-1144
Attorneys for Respondents

WMA
WILLS MASSALON & ALLEN LLC
97 Broad Street • Charleston, SC 29401 • Post Office Box 859 • Charleston, SC 29402
Phone: 843-727-1144 • Fax: 843-727-7696 • www.wmalawfirm.net

July 23, 2012

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29211

RE: Roosevelt Simmons v. Hattie Bailum, Ruby Bailum, Verdone Bailum, Julie B. Johnson, Monica Middleton, Marie Smith, Melvin Singleton, Franklin Smith, LMC, LLC, John Martin, Esquire, as Trustee
Case No.: 2011189009
Our File No.: 785-1

Dear Ms. Gee:

Enclosed please find:

1. the original and sixteen copies (one unbound) of Respondent's Final Brief.

2. the original and one copy of the Certificate of Counsel; and

2. the original and one copy of the Proof of Service.

Please file and return one file-stamped copy of each in the enclosed envelope.

By copy of this letter, I am serving a copy of the same to Mr. Bertele, attorney for the Appellant.

If you have any questions, please call me. With kind regards, I am

Sincerely,

WILLS MASSALON & ALLEN LLC

D. B. Hill for

I. Sonja Taylor
staylor@wmalawfirm.net

Enclosures
c: Edward A. Bertele, Esquire
John F. Martin, Esquire (without enclosures)
Mr. Mark Goldberg (without enclosures)