THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2019-001676
Trial Court Case No. 2018-CP-07-1559

Charles E. Houston, Jr. .....Appellant,

v.

Shirley J. Boone, as Administrator of the Estate of Dean B. Bell, individually;
Law Offices of Dean B. Bell, LLC; and
B. Hammel Properties, LLC, ... Defendants,

Of which Law Offices of Dean B. Bell, LLC and
B. Hammel Properties, LLC are the..... Respondents.

BRIEF OF RESPONDENT B. HAMMEL PROPERTIES, LLC

March 5, 2021

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STATEMENT OF ISSUES ON APPEAL

Respondent restates the issues on appeal as follows:

I. Did the Lower Court err by not deciding that the Partition Order exceeded the jurisdiction of the court awarding the relief and involved extrinsic fraud, thereby voiding the Partition Order?

II. Did the Lower Court err by applying laches and time bars to Appellant's claim that the Partition Order is void?

III. Did the Lower Court violate the Appellant's constitutional rights?

As an additional sustaining ground, Respondent proposes the following:

I. Appellant has failed to perfect his appeal of the Lower Court's decision that Appellant's claims are barred by collateral estoppel, rendering that ruling the law of the case.

STATEMENT OF THE CASE

Appellant filed a Lis Pendens, Summons, and Complaint on July 31, 2018 as a "collateral attack" on the final judgment in Civil Action No. 2011-CP-07-0541 issued on July 19, 2013 ("the Partition Action").

Appellant's Complaint sets out challenges to the jurisdiction of the Lower Court to award the relief set out in the final judgment entered in the Partition Action and the process in the Lower Court leading up to that final judgment. As such, the Statement of the Case involves matters from the Partition Action and the specific action from which Appellant has filed this appeal.

Cornelia H. Hall, Jeanne H. Hampton, and Mary A. Houston ("the Partition Plaintiffs") are sisters. The Partition Plaintiffs, with their brother, Appellant, jointly owned property on Hilton Head Island that is commonly referred to as 31 Marshland Road (the "Property"). (R. pp. 424-425).

On December 7, 2011 Respondent Dean B. Bell, as an attorney with the Respondent, The Law Offices of Dean B. Bell, LLC (collectively "Bell"), acting as attorney for the Partition Plaintiffs, filed the Complaint in the Partition Action against Appellant seeking the partition by sale of the Property. (R. pp. 424-431).

Appellant, an attorney licensed to practice law in South Carolina, appeared pro se in that matter and filed his Answer. (R. pp. 432-433).

On June 4, 2012, Partition Plaintiffs filed a Motion for Order of Reference and a Motion for Summary Judgment in the Partition Action with a Certificate of Mailing indicating service on Appellant by mail on June 1, 2012. (R. pp. 446-447; R. pp. 450-459).

Appellant provides that he did not receive a copy of the Motion for Order of Reference or a copy of the Motion for Summary Judgment because the address for service by mail was a

former address used by Appellant. (R. p. 293, line 24 – p. 294, line 1; p. 299, line 16 – p. 300, line 18; R. p. 182, ¶ 9).

A hearing was held on the Motion for Order of Reference and the Motion for Summary Judgment August 10, 2012. At the hearing the Court heard an outstanding discovery motion filed by the Plaintiffs and the Motion for Order of Reference. The Court did not hear the Summary Judgment Motion. Appellant was present at the hearing and made an oral Motion to Dismiss the Complaint.

By Order dated August 20, 2012, and filed September 4, 2012 (the "Order of Reference"), the Court granted the Motion for Order of Reference, referring the matter to the Master in Equity for Beaufort County and allowed the Partition Plaintiffs to amend their Complaint. (R. pp. 422-423).

Appellant contends that the Court, at the August 10, 2012 hearing, determined that any partition of the Property would be by a public auction and that the Partition Plaintiffs could amend their Complaint but they were restricted as to what they could allege in that Amended Complaint. (R. p. 120, ¶ 16). The Order of Reference contains neither of these determinations. (R. pp. 422-423).

The Partition Plaintiffs filed a Summons and First Amended Complaint on October 4, 2012. (R. pp. 434-439). The First Amended Complaint included claims against Appellant for rent and an action for contribution for taxes, insurance and other expenses associated with maintenance of the Property. The First Amended Complaint also specifically alleged that the partition sale of the Subject Property should be by sale secured through the use of a private real estate agent. (R. pp. 436-437, ¶¶ 28-32).

Appellant responded to the First Amended Complaint with an Answer dated November 15, 2012 that specifically denied the Partition Plaintiffs' allegations concerning Appellants' responsibility for rent, taxes, insurance and other expenses associated with the maintenance of the Property. The Answer also denied the request that the Property be listed and sold in the manner proposed by the Partition Plaintiffs. Appellant's Answer included a Motion to Dismiss based on Rule 12(b)(6), SCRCP *res judicata,* and failure to join indispensable parties pursuant to Rule 19, SCRCP, and no other affirmative defenses. (R. pp. 440-441).

The Lower Court conducted the trial in the Partition Action on May 22, 2013. Appellant was present at the trial and argued his positions. (R. pp. 414-419; R. pp. 183-184, ¶15).

The Lower Court did not issue a decision at the May 22, 2013 trial. On June 24, 2013, Respondent Dean B. Bell communicated with the Master-in-Equity for Beaufort County by electronic mail and requested a status of the Lower Court's decision. The electronic mail shows that Bell sent Appellant a copy of the communication, but Appellant claims that the address used was the wrong electronic mail address. (R. p. 318, line 7 – p. 319, line 7). The Lower Court responded on the same date asking Bell to prepare a proposed order. The Lower Court copied Appellant on that communication to the same electronic address Appellant claims is incorrect. Bell presented a proposed order to the Lower Court on July 9, 2013 by electronic mail and provided a copy to Appellant at the same address Appellant claims to be incorrect. (R. p. 171, ¶8).

The Lower Court entered final judgment in the Partition Action by executing the Partition Order dated July 15, 2013 and recorded on July 19, 2013 ("Partition Order"). (R. pp. 414-419).

Appellant filed a Motion for Reconsideration of the Partition Order on July 30, 2013 challenging it on the following grounds:

i. Bell submitted a proposed order without being requested;

ii. Error in allowing testimony concerning an accounting from Appellant, conversion, and partition by private sale because those claims were allegedly dismissed by the Order of Reference;

iii. Failure to consider the Property to be "heirs title";

iv. Lack of jurisdiction concerning issues relating to contribution among heirs to decedent's estate; and

v. Improper determination of attorney's fees to be paid to Bell.

(R. pp. 442-444).[1]

The Court denied Appellant's Motion to Reconsider on September 11, 2013. (R. pp. 420-421).

On September 23, 2013, Appellant served his Notice of Appeal of the Partition Order. (R. pp. 467-468). Appellant did not pursue the appeal and the matter was remitted to the circuit court on March 10, 2014. (R. p. 412).

On June 23, 2015, Cornelia H. Hall (one of the Partition Plaintiffs), in accordance with the terms of the Partition Order, made, executed and delivered a General Warranty Deed (the "Partition Deed") conveying the Subject Property to Respondent B. Hammel Properties, LLC ("Hammel"). The Partition Deed was recorded in the Office of the Register of Deeds for Beaufort County on July 17, 2015 in Book 3412 at page 462. (R. pp. 460-462).

On July 22, 2015, Respondent Bell, as counsel for the Partition Plaintiffs, filed a Satisfaction of Judgment dated July 20, 2015, in the Partition Action acknowledging that the judgment against the Appellant was paid in full. (R. p. 466).

Hammel combined the Property with other real property in Beaufort County and transferred title to the properties to DMS Funding I, LLC ("DMS"). Hammel accomplished that transfer by

[1] R. pp. 442-445 is represented to be Appellant's Motion to Reconsider in the Partition Action. The last page of the document (R. p. 445) is actually the signature page of Appellant's Affidavit in Opposition to Motion for Summary Judgement (sic) that appears at R. pp. 180-186. The Record on Appeal omits the final page of Appellant's Motion to Reconsider filed in the Partition Action, but that page only contained the Appellant's signature.

making, executing and delivering a Title to Real Estate to DMS dated May 22, 2018 and recorded in the Office of the Register of Deeds for Beaufort County on June 4, 2018 in Book 3672 at page 263. (R. pp. 463-465).

Appellant filed his Complaint in this action on July 31, 2018 setting forth seven (7) causes of action:

1. to declare the Partition Order void and declare it invalid pursuant to Rule 60 (b)(4), SCRCP because of lack of jurisdiction of the Lower Court;

2. to set aside the Partition Order because it was inconsistent with prior rulings of the Lower Court in the Partition Action;

3. to set aside the Partition Order because extrinsic fraud prevented Appellant from meaningful and effective participation in the Partition Action;

4. to set aside the Partition Order as an abuse of power by the Lower Court and an *ultra vires* act of the Lower Court;

5. to declare the deed issued pursuant to the Partition Order was ineffective to convey title;

6. an action for wrongful ouster against Bell; and

7. an action to recover damages for waste to the real property and theft of personal property against Hammel Properties, LLC.

(R. pp. 115-132).

Appellant did not join the Partition Plaintiffs as parties to his collateral attack of the Partition Order. Rather, he filed the action against the Partition Plaintiffs' legal counsel, Bell, and the purchaser at the partition sale, Hammel. (R. pp. 115-132).

Hammel and Bell timely filed pleadings responsive to the Complaint and conducted discovery, including the deposition of Appellant.

Hammel filed a Motion for Summary Judgment on February 13, 2019 and Bell filed a Motion for Summary Judgment on April 3, 2019.

The hearing on the two Motions for Summary Judgment was held on June 10, 2019. Everything in the Court's file prior to the hearing was made a part of the record before the Court on Summary Judgment. (R. p. 385, line 12 – p. 387, line 19).

The Lower Court issued separate Orders on the two Motions for Summary Judgment on September 4, 2019, granting the relief requested in each of the Respondents' Motions and ending the case. (R. pp. 94-114)

Appellant filed his Notice of Appeal on October 3, 2019 as to both orders granting summary Judgment with the Supreme Court and indicated in the transmittal letter that the appeal involved a constitutional challenge to a state statute. (R. pp. 7-9).

The Clerk of the Supreme Court sent a letter to Appellant on October 8, 2019 advising that he did not see a Lower Court ruling on a constitutional challenge to a state statute in the Orders appealed and requested an explanation. (R. pp. 10-11). Appellant responded to this request filing a Brief on Venue on October 22, 2019 (R. pp. 12-16) and a revised Brief on Venue on October 22, 2019. (R. pp. 17-93).

On October 24, 2019, the Supreme Court issued an Order transferring the appeal to the Court of Appeals because Appellant failed to "make a sufficient showing that the principal issue in this appeal will involve a ‘challenge on state or federal grounds to the constitutionality of a state law."' (R. p. 6).

STANDARD OF REVIEW

"Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Rule 56(c), SCRCP; *see also Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). "To determine whether any triable issues of fact exist, the reviewing court must consider the

evidence and all reasonable inferences in the light most favorable to the non-moving party." *McLaughlin v. Williams,* 379 S.C. 451, 455-56, 665 S.E.2d 667, 670 (Ct. App. 2008). "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, ... the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Id.* (citation omitted); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 89 L.Ed.2d 538 (1986) (the opposing party must "do more than simply show that there is some metaphysical doubt as to the material facts").

When reviewing an order granting summary judgment, the appellate court applies the same standard applied by the trial court. *Fleming v. Rose,* 350 S.C. 488, 567 S.E.2d 857 (2002); *Stinney v. Sumter Sch. Dist. 17,* 391 S.C. 547, 707 S.E.2d 397 (2011).

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Bankers Trust of South Carolina v. Benson,* 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976). In that way, "[a] motion for summary judgment is akin to a motion for a directed verdict" because "[i]n each instance, one party must lose as a matter of law." *Main v. Corley,* 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984) (emphasis added).

When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *USAA Property and Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 661 S.E.2d 791 (2008). "On summary judgment motion, a court must view the facts in the light most favorable to the non-moving party… Nonetheless, a court 'cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be reasonably

possible under the facts.'" *Bloom v. Ravoira*, 339 S.C. 417, 423, 529 S.E.2d 710, 713, (2000) (citations omitted).

"The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." *Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571, 579, 556 S.E.2d 732, 736 (Ct. App. 2001). On a motion for summary judgment, "a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 671 S.E.2d 79 (Ct. App. 2008). Where the non-moving party has the burden of proof, the moving party may demonstrate the lack of a genuine issue of material fact "by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case." *Lanham v. Blue Cross and Blue Shield of South Carolina, Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Once the party moving for summary judgment carries its initial burden of showing the absence of evidentiary support for nonmoving party's case, the non-moving party may not simply rest on mere allegations or denials in its pleadings. Rule 56(c), SCRCP, *see also NationsBank v. Scott Farm*, 320 S.C. 299, 465 S.E.2d 98 (Ct. App. 1995).

The principal focus of Appellant's argument is a request to provide relief based on Rule 60(b)(4) or (b)(5), SCRCP. "Whether or not McDaniel made his Rule 60 motion within a reasonable time is a matter addressed to the trial judge's sound discretion, and an appellate court will not disturb that determination absent abuse of discretion." *McDaniel v. United States Fid. & Guar. Co.*, 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996).

ARGUMENT

Appellant and his sisters inherited real estate in Beaufort County, South Carolina. (R. p. 415, ¶ 2). Appellant's sisters lived in other states and Appellant occupied the inherited property as his law office and as his residence. (R. pp. 434-435, ¶¶ 1-7; R. p. 440, ¶ 2; R. pp. 415-416, ¶ 4). Appellant treated the property as his own, but would not share in the expenses of maintaining the property and refused to compensate his sisters for his exclusive use of the property. (R. pp. 415-416, ¶ 4). Ultimately, Appellant's sisters succeeded in partitioning the property. (R. pp. 414-419).

Unhappy with the partition of the property, Appellant has launched multiple efforts to delay and punish those involved. He initiated the appeal of the Partition Order and abandoned that effort. He refused to vacate the property, requiring his sisters to file actions to evict him. Appellant filed complaints with disciplinary counsel against Bell (R. p. 98, ¶ 22; R. p. 108, ¶ 23) and assisted his son in filing an action against a family trust. (R. p. 98, ¶ 21; R. p. 108, ¶ 22). This action – challenging the integrity of the Lower Court and Bell – is his latest effort.

Despite his best effort to argue to the contrary, Appellant participated fully in the Partition Action and his positions concerning the partition were considered and rejected. The Master-in-Equity was within its authority to grant the relief set out in the Partition Order. The door on these arguments closed when Appellant abandoned his appeal of the Partition Action. He has pried that door open again, but Appellant's arguments are as empty today as they were the first time he presented them.

Appellant launched his latest effort to challenge the Partition Action with no goal beyond interference and delay. After waiting for more than three years after the partition sale, he failed to examine title to the property at issue before filing the Lis Pendens in this action. Had he performed that examination, he would have understood that Hammel conveyed its interest in the Property

prior to the filing of the Lis Pendens. Appellant claims to be collaterally attacking the Partition Order, but he failed to join as parties to this action any of the parties to the Partition Action.

Appellant's presentation of the issues on appeal is confusing. They overlap and are repetitive. The common denominator for all of his arguments is that the Master-in-Equity in the Partition Action lacked jurisdiction, and extrinsic fraud prevented Appellant from fully participating in the Partition Action. He asserts this lack of jurisdiction and extrinsic fraud render the Partition Order void and violate his constitutional rights. He further submits the Lower Court did not address the substance of these claims because it improperly applied the defenses of statute of limitations and laches when granting the Motions for Summary Judgment.

Hammel has restated the Issues on Appeal to align with these common arguments and provide clarity. Additionally, Hammel asserts an additional sustaining ground relating to Appellant's failure to appeal the Lower Court's grant of summary judgment on the doctrine of collateral estoppel.

Careful consideration of each of the Appellant's Arguments makes it clear that the Orders Granting Summary Judgment entered by the Lower Court should be affirmed.

I. <u>The Partition Order is not void.</u>

All of Appellant's arguments on appeal focus on two positions - (1) Appellant was denied his right to fully and meaningfully participate in the Partition Action by extrinsic fraud and (2) the Master-in-Equity could only sell the partitioned property by judicial sale. Appellant asserts that because of the extrinsic fraud (Appellant's Argument III) and because the Master-in-Equity exceeded the bounds of its jurisdiction (Appellant's Arguments IV and V), there is evidence that the Partition Order is void and the Lower Court should not have granted summary judgment. Close consideration of each of the Appellant's arguments yields but one conclusion: there was no

extrinsic fraud, and the Master in Equity had the authority to order the sale process set out in the Partition Order.

A. There was no extrinsic fraud.

Appellant believes that the Partition Order must be declared void because of fraud. To secure that equitable relief, the fraud must be extrinsic. *Chewning v. Ford Motor Credit Company*, 354 S.C. 72, 80, 579 S.E.2d 605, 610 (2003) (citing *Bryan v. Bryan*, 220 S.C. 164, 66 S.E.2d 609 (1951)). Appellant points to the following conduct in the Partition Action that he describes as extrinsic fraud:

1. Bell intentionally did not serve Appellant with the Motion for Summary Judgment and the Motion for Order of Reference to the Master-in-Equity at his correct address.
2. Bell submitted the Order of Reference to the Master-in-Equity without including the complete ruling of the Circuit Court and without providing a copy of the Order of Reference in its proposed form to Appellant.
3. Bell did not serve a copy of the Order of Reference on Appellant.
4. The Order of Reference was not in the records maintained by the Clerk of Court.
5. The Master-in-Equity failed to recite the Order of Reference in the Partition Order.
6. The Partition Plaintiffs failed to file their Amended Complaint with the Clerk of Court.
7. The Clerk of Court's file contains Bell's notes and "mathematical calculations" not in evidence.
8. The Partition Plaintiffs' Amended Complaint was an exact duplicate of the original Complaint.
9. Bell's ex parte communications with the Master-in-Equity related to the preparation of the Final Order.

10. Bell refused to provide Appellant with the identity of the court reporter for the trial. App. Brief, pp. 10-16.

Appellant's arguments fail because none of the identified conduct is fraudulent. Further, even if the described conduct amounts to fraud, it is not extrinsic fraud.

1. None of the alleged conduct is fraudulent.

Appellant's extrinsic fraud claim first fails because there is no fraud. "Fraud is an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to [that person] or to surrender a legal right." *Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 444 (Ct. App. 2003) (quoting Black's Law Dictionary 660 (6th ed. 1990)). In the context of this case, to prove fraud, Appellant must demonstrate (1) a representation; (2) its falsity; (3) its materiality; (4) knowledge by the maker of the representation of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) Appellant's ignorance of its falsity; (7) Appellant's reliance on its truth; (8) Appellant's right to rely thereon; and (9) Appellant's consequent and proximate injury. *Id*. at 672, 582 S.E.2d at 445. Appellant must set forth each element of fraud and provide proof by clear, cogent, and convincing evidence. *Id*.; *see also Hagy v. Pruitt*, 339 S.C. 425, 529 S.E.2d 714 (2000) (stating the standard of proof required for extrinsic fraud). The record establishes that Appellant cannot meet this burden on any of the allegations of fraud.

a. Service of the Motion for Summary Judgment and the Motion for Order of Reference to the Master-in-Equity at incorrect address.

Appellant complains that Bell did not serve notice of these motions at the address Appellant provided in his responsive pleadings. Instead, Bell used an old, expired address. (R. 182, ¶ 9). Even assuming these allegations to be true, there was no fraud because there was no detriment or

injury to Appellant. Appellant appeared at, and participated in, the hearing on both motions.[2] (R. pp. 422-423; R. pp. 182-183, ¶¶ 9-12).

b. Bell submitted the Order of Reference to the Master-in-Equity without including the complete ruling of the Circuit Court and without providing a copy of the Order of Reference in its proposed form to Appellant.

Appellant contends that, during the hearing on the Motion for Reference and the Motion for Summary Judgment, the Circuit Court made determinations restricting the relief that the Partition Plaintiffs could request in their Amended Complaint, specifically that the partition sale must be public, and limiting the Partition Plaintiffs' ability to raise issues concerning rents, occupancy of the Property, and payment of taxes. (R. p. 290, line 8 – p. 313, line 20). Appellant offers only his memory to support these allegations. He did not order the transcript of the Circuit Court hearing at issue and, as evident from his deposition testimony, Appellant has an imperfect recollection of what transpired at that hearing. (R. p. 290, line 8 – p. 313, line 20).

Regardless, because Appellant had no injury resulting from the alleged fraudulent conduct, his fraud claim fails. He responded to the Amended Complaint denying the challenged allegations and had the opportunity to advance his claims at trial. There is no evidence that he raised this alleged fraudulent conduct in those responsive pleadings or at trial.

c. Bell did not serve a copy of the Order of Reference on Appellant.

According to sworn statements made by Appellant, he did not review a copy of the Order of Reference until he was provided a copy of it in this action. (R. p. 308, line 2 – p. 310, line 13).

[2] The Order of Reference indicates that the hearing on the Motion for Summary Judgment and the Motion for Order of Reference was held on August 10, 2012. The Affidavit In Reply to Affidavit of Dean B. Bell signed by Appellant on December 10, 2018 and filed December 11, 2018 suggests that the hearing on the Motions was on June 4, 2012. The Affidavit of Appellant dated June 6, 2019 states that the Lower Court conducted the hearing on June 12, 2012. Hammel uses the date of the hearing stated in the Order of Reference in its argument.

This assertion does not align with information in the record.

The records maintained by the Clerk of Court indicate that the Order of Reference was filed on September 4, 2012. Filed with the Order of Reference is a Motion and Order Information Form and Coversheet prepared by the Partition Plaintiffs' counsel on August 30, 2012. The Form identifies Appellant as the Partition Defendant's attorney and provides an address for Appellant that he acknowledges was his address at the time. Also filed with the Order of Reference is a cover letter from a paralegal in the law office of Partition Plaintiffs' counsel stating that she mailed Appellant a copy of the Order. (R. pp. 422-423; R. pp. 448-449)

Appellant states he reviewed the physical file in the Clerk of Court's Office after the entry of the Partition Order to prepare his appeal of the Partition Order, but that the Order of Reference was not in the file. (R. p. 296, line 20 – p. 297, line 16). He reviewed the Court's file again online when he prepared the Complaint in this action. During that review of the file, he inquired with the Clerk of Court as to the Order of Reference and was told that there was only a "memorandum order." (R. p. 295, line 10 – p. 296, line 2). Appellant does not recall the identity of the person in the Clerk of Court's office who provided this information. (R. p. 296, line 20 – p. 297, line 16). When asked to explain why the Order was not in the Clerk of Court's file more than a year following its entry, Appellant offered the explanation that there is sometimes a delay between the filing of an Order and when it actually appears in the file. (R. p. 302, line 25 – p. 305, line 10).

Appellant attached a case index sheet for the Partition Action from the Beaufort County Clerk's Office as Exhibit 1 to his Complaint. (R. pp. 130-132). On the first page of that index sheet, the Order of Reference is identified as "Order re: motion to Compel, Motion for Summ Jmt and Ord" (sic) with a filing time "9-4-2012 14:17." (R. pp. 130-132).

On October 24, 2018, Bell provided Appellant with a copy of the Order of Reference as an

attachment to Bell's affidavit in support of Bell's Motion to Strike the affidavit of default that Appellant filed in this action (R. pp. 198-199). Appellant partially read the two-page Order of Reference when he received it, but did not completely read it until his deposition on December 12, 2018. (R. pp. 308, line 9 – p. 311, line 8). At his deposition, Appellant testified that he recalled the events of the hearing on the Motion for Summary Judgment and the Motion for Reference differently from what is set out in the Order of Reference. (R. p. 308, line 2 – p. 315, line 20).

Appellant claims that the Order of Reference was not in the Clerk of Court's file on the Partition Action at the time the Motions for Summary Judgment were argued in June 2019. App. Brief, p. 12.

Appellant's recollection, which directly conflicts with the record of the Partition Action, does not provide the clear and convincing evidence needed to prove fraud. Even if there were sufficient proof that Appellant never received the Order of Reference, that fact alone does not constitute fraud. There is no evidence that Bell intended to deceive Appellant, or that Appellant lacked knowledge of the substance of the Order of Reference, or of any injury resulting from the alleged conduct. What is clear from the record, however, is that Appellant knew the Partition Plaintiffs were allowed to file an Amended Complaint, he had the opportunity to file an Answer to the Amended Complaint, and Appellant appeared before the Master-in-Equity for Beaufort County and actively participated in the trial.

d. <u>The Order of Reference was not in the records maintained by the Clerk of Court.</u>

The factual inaccuracies of this argument are addressed above. It is clear that the Order of Reference is in the file on this matter. It is referenced on the index sheet that Appellant attached to his Complaint and the recorded copies indicate direct evidence that it is part of the file.

Appellant's recollection of his review of the file and the conversation that he recalls having with an unidentified employee of the Clerk of Court's Office is not clear and convincing evidence of fraud. Further, Appellant has not offered a sufficient showing that he can prove all the elements of fraud, especially his reliance and resulting injury proximately caused by the alleged conduct.

e. The Master-in-Equity failed to recite the Order of Reference in the Partition Order.

The Order of Reference is part of the file maintained by the Clerk and is part of the case. Appellant cites no authority or analysis for his position that a Master-in-Equity must recite the Order of Reference in all orders he issues. As such, Appellant has abandoned this argument. *First Savings Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) ("Mere allegations of error are not sufficient to demonstrate an abuse of discretion. On appeal, the burden of showing abuse of discretion is on the party challenging the trial court's ruling.") Even assuming such a requirement exists, the omission does not rise to the level of a fraudulent act. Appellant appeared before the Master-in-Equity, argued his case, challenged the Partition Order with a Motion to Reconsider and appealed the Partition Order issued by the Master-in-Equity. Appellant has not, and cannot, argue that the omission of the reference to the Order of Reference misled him or proximately caused any damage.

f. The Partition Plaintiffs failed to file their Amended Complaint with the Clerk of Court.

There is no substance to this claim. The Clerk of Court for Beaufort County placed its filing stamp on the Amended Summons and Complaint on October 4, 2012 at 12:55 p.m. and attached an Action Cover Sheet to those pleadings. (R. pp. 434-439). Regardless, Appellant filed his Answer to the Amended Complaint, demonstrating that the Appellant did not rely on the

alleged non-filing and was not proximately damaged because of it. (R. pp. 440-441).

g. The Clerk of Court's file contains Bell's notes and "mathematical calculations" not in evidence that improperly influenced the Master-in-Equity.

This allegation was first raised in Appellant's Complaint attacking the Partition Order. During his deposition, Appellant identified the documentation as "notes like you would make for a pretrial brief, there were certain, I think mathematical calculations." (R. p. 314, lines 18-20). Appellant recalls that these notes were not presented at trial in the Partition Action. (R. p. 315, lines 7-8). Appellant copied the documents and has them in his file, but, as of the time of the deposition, had not produced the documents in response to discovery requests. At his deposition, Appellant promised to produce the documents. (R. p. 314, line 18 – p. 317, line 17).

At the hearing on the Motions for Summary Judgment, Appellant again made reference to "notes left in the file by opposing counsel that should not have been in the file that were available for the judge to see, which would influence, potentially influence his decision on the case." (R. p. 396, line 16 – p. 397, line 3). Appellant never produced the described documents to any party and did not provide a copy to the Lower Court at the June 10, 2019 hearing.

Appellant has never specifically identified or produced the documentation that he suggests supports his position. Hammel does not know how many documents are referenced, what information they contain, who prepared them, when they were prepared, or how they came to be in the Master-in-Equity's file, if that is in fact where they are located. Nevertheless, Appellant cannot use evidence not presented in the Lower Court in support of his appeal. Rule 207(b)(4), SCACR (requiring appellate briefs to reference Record on Appeal to support allegations of fact); Rule 210(c), SCACR (providing that the Record on Appeal shall not include matter not presented

to the Lower Court); *State v. White*, 372 S.C. 364, 367, 642 S.E.2d 607, 619 (Ct. App. 2007).

h. The Partition Plaintiffs' Amended Complaint was an exact duplicate of the original Complaint.

Appellant is wrong. The Amended Complaint contained an additional paragraph numbered 33 which alleges "[a]lternatively, Plaintiffs are informed and believe that they are entitled to an order for partition by sale in accordance with SC Code §15-61-10 et seq." (R. p. 437, ¶ 33). Appellant argued to the Lower Court that the manner of the partition sale proposed in the Partition Plaintiffs' Complaint was not appropriate. By making this additional allegation, Partition Plaintiffs requested the same form of partition sale set out in their original Complaint, but alternatively asked the Master-in-Equity to order whatever type sale may be appropriate pursuant to the partition statutes.

Moreover, Appellant responded to this new allegation in the Amended Complaint. In his Answer to the Amended Complaint, Appellant provided "[t]he Defendant denies Paragraph 33 of the Complaint as the property may be devisable in kind." (R. p. 441, ¶ 9).

i. Bell's ex parte communications with the Master-in-Equity related to the preparation of the Final Partition Order.

Appellant claims following the trial on the Partition Action, Bell excluded him from communications with the Master-in-Equity concerning the preparation of a proposed order. Appellant contends that, while Bell's electronic mail to the Master-in-Equity and the Master-in-Equity's electronic mail to Bell post-trial showed that a copy was sent to an electronic mail address for Appellant, that particular electronic mail address was incorrect. Appellant has offered only his affidavit as proof.

Appellant fails to show how the described conduct constitutes fraud because Appellant has

not alleged that he suffered damages proximately caused by the alleged fraud. Appellant responded to the entry of the Partition Order with a Motion to Reconsider in which he raised his concerns about the inadvertent ex parte communications between Bell and the Lower Court. (R. p. 442, ¶ 1).

j. Bell's refusal to provide Appellant with the identity of the court reporter for the trial.

Hammel was not a party to the Partition Action and is not aware of any evidence of Appellant's efforts to secure a transcript of any proceeding in the Partition Action. Hammel is only aware of Appellant's assertion that he did not know the identity of the court reporter for the trial or the identity of the court reporter for the August 10, 2012, hearing. Appellant advised the Lower Court that he was waiting for Bell to identify the court reporters in response to discovery requests. (R. p. 395, line 7 – p. 396, line 14). There is nothing in the record to demonstrate that Appellant made any effort to secure the transcripts as part of the Partition Action. The Order dismissing Appellate Case Number 2013-002166 merely states that Appellant failed to provide information regarding any transcript and/or failed to file his initial brief. (R. p. 411). Nonetheless, Bell's delay or failure to respond to discovery in this action is not evidence of fraud related to the Partition Action.

Further, evidence as to the reason Appellant gives for withdrawing his appeal of the Partition Action is new and was not considered by the Lower Court. The representation that Appellant withdrew his appeal because Bell would not disclose the identity of the court reporter differs from the reasoning Appellant gave the Lower Court at the hearing on the Motions for Summary Judgment. At the hearing, Appellant advised the Lower Court he withdrew the appeal because it was premature in that the Partition Action was not over until the property was sold. (R.

p. 377, lines 16-19). Appellant is bound by the evidence presented to and ruled on by the Lower Court and cannot offer new evidence on appeal. Rules 207(b)(4) and 210(c), SCACR; *White*, 372 S.C. at 387, 642 S.E.2d at 619.

2. Even if the identified conduct was fraudulent, there is no 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." *Chewning*, 354 S.C. at 81, 579 S.E.2d at 610 (citing Hilton Head *Ctr. of South Carolina v. Public Serv. Comm'n*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). It differs from intrinsic fraud, which "is fraud which was presented and considered in the trial." *Id*. Actually deterring a party from appearing in court is extrinsic fraud. For example, fraud involved in the execution of a document that waived the right to notice and the right to appear in adoption proceedings was determined to be extrinsic fraud. *Hagy*, 339 S.C. at 433-34, 529 S.E.2d at 714-15. However, "[f]raud is intrinsic and not a valid ground for setting aside a judgment when [a] party has been given notice of the action and has had an opportunity to present his case and to protect himself from any mistake or fraud of his adversary but has unreasonably neglected to do so." *Mr. G v. Mrs. G*, 320 S.C. 305, 308, 465 S.E.2d 101, 103 (Ct. App. 1995). "Relief is granted for extrinsic but not intrinsic fraud on the theory that the latter deceptions should be discovered during the litigation itself, and to permit such relief undermines the stability of all judgments." *Id*.

None of the conduct identified by Appellant caused him to miss a hearing, discouraged him from filing a pleading, or deprived him of his day in Court. He responded to every filing in the Partition Action. He appeared at every hearing and argued his position. He claims that he did not receive notice of the Partition Plaintiff's Motion for Summary Judgment and Motion for Reference, yet he appeared at the hearing when both were presented to the Circuit Court. He complains about not receiving the Order of Reference that allowed for the Amended Complaint,

but he filed an Answer to the Amended Complaint and appeared before the Master-in-Equity for trial. Appellant believes that he was prejudiced because the Partition Plaintiffs did not file the Amended Complaint with the Clerk of Court, despite having filed a response to the Amended Complaint. Appellant suggests harm from the *ex parte* communications between the Master-in-Equity and Bell, but he was able to file a motion requesting that the Master-in-Equity reconsider the Partition Order and address the *ex parte* communications. Nor was Appellant prevented from timely filing an appeal of the Partition Order.

It is apparent that Appellant's perceived injury is not that he was deprived of the opportunity to present his position; it is that none of the various courts he appeared before adopted any of his positions. Appellant explains this in his own words:

> [A]t the commencement of the hearing held before the Master-in-Equity, affiant advised the Master-in-Equity that the Circuit Court had ruled that the action for partition could only proceed by public sale and that the other issues were to be determined by the Probate Court and that he remained opposed to the partitioning and the private sale. This was not adhered to by the Master-in-Equity.

(R. p. 184, ¶ 18).

If what Appellant has described is fraud, it is intrinsic fraud. The issues raised by Appellant do not amount to extrinsic fraud.

B. <u>The Master-in-Equity had the authority to order a partition sale to be conducted as it was.</u>

Appellant also offers that the Partition Order is void because it is beyond the jurisdiction of the Court to provide for a private partition sale. In the Partition Order, the Master-in-Equity determined that a private sale through a real estate broker was in the best interest of all parties. The Master-in-Equity designated the real estate broker and, because Appellant had been uncooperative, gave one of the Partition Plaintiffs the authority to act for the other Partition

Plaintiffs and Appellant with respect to the anticipated sale. Appellant's arguments concerning the Master-in-Equity's lack of jurisdiction are scattered throughout his Brief. Viewing them all together, it is clear that Appellant's offered authorities are misstated, that no authority is otherwise provided for the position advanced, and that the Master-in-Equity had jurisdiction to order the manner of sale set out in the Partition Order.

1. Appellant misstates authority.

Although the jurisdiction of the Master-in-Equity in the Partition Action, or lack thereof, is central to Appellant's positions on appeal, his authority is scant. He relies on S.C. Code Ann. §§ 27-5-10 through -100 (2007); S.C. Code Ann. §§ 27-7-10 through -40 (2007)[3]; and S.C. Code Ann. § 14-11-160 (2017). Appellant offers no court decisions to support his argument concerning the extent of the court's jurisdiction.

Sections 27-5-10[4] through -100 of the South Carolina Code do not address the jurisdiction of South Carolina Circuit Courts. Those statutes address estates in real property and construction of documents creating those estates. Nor do S.C. Code Ann. §§ 27-7-10 through -40 address the jurisdiction of South Carolina Courts. These statutes concern the form of conveyances of real property.

Section 14-11-160 of the South Carolina Code does concern the power of a Master-in-Equity to sell real property, but it does not limit the Master-in-Equity's jurisdiction as Appellant suggests. Rather, § 14-11-160 is one of several statutes that establish the Master-in-Equity Court. *See* S.C. Code Ann §§ 14-11-10 through -320 (2017). Appellant isolates one of the provisions in

[3] The actual reference is to "§27-5-1-100 and §27-7-10-40." Hammel assumes the reference is to the code sections stated in its argument.
[4] There is no S.C. Code Ann. "§ 27-5-1," so Hammel assumes Appellant refers to S.C. Code Ann. §27-5-10.

that statutory scheme and suggests that it defines the entirety of the jurisdiction of any Master-in-Equity. This statement is misleading.

Section 14-11-15 clarifies that Masters-in-Equity are judges in the equity courts, a division of circuit court. Masters-in-Equity are appointed to preside in particular counties. S.C. Code § 14-11-10. Section 14-11-150 allows Masters-in-Equity to sell real property in counties other than the county for which they are appointed, if the Court of Common Pleas for the county where the Master-in-Equity presides has jurisdiction over the real property. The provision that Appellant cites, § 14-11-160, extends the ability of the Master-in-Equity to sell property outside of the county in which he presides to any county in the State if the parties consent.

To further complicate his position, Appellant states, without any supporting authority, that "[t]he required practice….in partitioning proceedings is for each person to convey their title interest into a trust or mutually quit-claim their interest when done by allotment or each tenant in common convey their interest to a third-party grantee." App. Brief, p. 20. Sections 15-61-10 through -110 of the South Carolina Code (2005 & Supp. 2019)[5] and Rule 71(f), SCRCP, set out the general provisions and procedures for the partition of real property. Nothing in these statutes or in this rule resembles the procedure Appellant describes.

In this action, the Master-in-Equity ordered the sale of real property in the county where he was appointed to preside, that being the County of Beaufort. As such, § 14-11-160 has no application. Further, the partition procedures Appellant identifies are inapplicable and contradict the statutory partition provisions and procedures. Accordingly, Appellant therefore has no valid support for his jurisdictional challenge.

2. Appellant has abandoned his jurisdictional challenge.

[5] Provisions of the Clementa C. Pinkney Uniform Partition of Heirs Property Act, S.C. Code §§ 15-61-310 through 15-61-420 (2016) did not take effect until January 2, 2017, a point in time beyond the end of the Partition Action.

Because Appellant has failed to recite any authority for his position on the jurisdiction of the Master-in-Equity in the Partition Action, he should be deemed to have abandoned that position. *First Savings Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994).

3. The Master-in-Equity in the Partition Action had jurisdiction to order a sale.

Although not specifically articulated in his argument on appeal, Appellant argued to the Lower Court that all partition sales must be public and cited *Zimmerman v. Marsh*, 365 S.C. 383, 618 S.E.2d 989 (2005) and *Pruitt v. Pruitt*, 298 S.C. 411, 380 S.E.2d 862 (Ct. App. 1989) as authority for that position. (R. p. 120, ¶ 17; R. pp. 183-184, ¶ 15).

Equity courts are a division of the circuit court and Masters-in-Equity are judges in the equity courts. S.C. Code Ann. § 14-11-15. Circuit courts have jurisdiction to partition real property among tenants in common and to sell real estate in the partition process. S.C. Code Ann. §§ 15-61-50 and -100.

The circuit court's power to fashion the manner of sale is intrinsic to their statutory authority. Neither *Zimmerman n*or *Pruitt* stand for the proposition that partition sales must be public. The decisions in both cases state only that the sale must be fair and equitable to all parties, and a public sale will occur if equity requires it. Additionally, neither the South Carolina partition statutes nor the South Carolina Rules of Civil Procedure require a public partition sale. Neither do the Rules of Civil Procedure. *See* S.C. Code Ann. § 15-61-100; Rule 71(f)(5), SCRCP.

In the Partition Action, the Master-in-Equity determined that a private sale was in the best interest of all parties, in that it would allow the parties to realize the best sales price. (R. p. 416, ¶ 7; p. 418, ¶ 14, and p. 419, ¶ 16). The manner of sale adopted by the Partition Order is allowed by law and warranted under the facts of this case.

Viewing the facts in the light most favorable to Appellant as the nonmoving party, he failed to present genuine issue of material fact concerning either the jurisdiction of the Master-in-Equity or of the existence of extrinsic fraud that require the Lower Court's decision to be altered in any way.

II. Appellant's claims are subject to the timing requirements of Rule 60(b), SCRCP, and the doctrine of laches.

Appellant challenges the Lower Court's application of the timing provisions of Rule 60(b), SCRCP, and the doctrine of laches to bar his claims. App. Brief pp. 1-7. He argues that void judgments can be challenged at any time and are not limited by any statute or rule of limitation or by the doctrine of laches. Appellant suggests that this rule applies to an analysis under Rule 60(b), SCRCP and to equitable claims of extrinsic fraud.

Appellant seeks to have the Partition Order set aside pursuant to Rule 60(b)(4) and (5). App. Brief pp. 5-7. In his Complaint, Appellant alleges the Partition Order is void pursuant to Rule 60(b)(4), SCRCP, because there was no order referring the Partition Action to the Master-in-Equity. (R. pp. 117-119, ¶¶ 7-14). Appellant also submits the Partition Order should be "set aside" because it was induced by extrinsic fraud in violation of his constitutional rights and that it should be declared void because the relief awarded exceeded "the Jurisdictional (sic) and statutory powers of the Equity Court." (R. p. 123, ¶ 30; R. p. 124, ¶ 34. Appellant did not cite Rule 60(b), SCRCP in setting out these last two arguments.

While Appellant specifically mentions Rule 60(b)(5) in his Brief, he did not mention Rule 60(b)(5) in his Complaint and he does not provide any argument or supporting authority for the application of the Rule. Rule 60(b)(5), SCRCP provides relief from final judgment if "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based

has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Rule 60(b)(5), SCRCP. Because Appellant merely mentions the rule and provides no analysis of the application of the rule, any argument under Rule 60(b)(5), SCRCP should be deemed abandoned. *First Savings Bank v. McLean*, 314 S.C. at 363, 444 S.E.2d at 514.

The focus of Appellant's challenge appears to be to the Lower Court's application of the Rule 60(b)(4) time limitation and laches to bar Appellant's collateral attack on the Partition Order. He offers that there are no time constraints on a challenge to a void judgment. To support his position, he relies on authority from other jurisdictions that, according to Appellant, stand for the proposition that "the affirmative defenses of laches, estoppel, waiver, bona fide purchaser for value, res judicata, collateral estoppel and the otherwise statute of limitations (sic) do not apply to and (sic) action to set aside a judgment void on its face that may be collaterally attacked at any time." App. Brief, p. 3. Appellant resorts to authority from other jurisdictions because "there are no reported cases in South Carolina that has (sic) addressed this point" and because "it has been well established and consistently upheld and adhered to in every jurisdiction" that has addressed the issue. App. Brief, p. 3.

Based on this theory, Appellant assigns error to the Lower Court's determination that his claims are time-barred by the time requirements set out in Rule 60(b), SCRCP and under the doctrine of laches. Appellant alternatively argues that if there is a time bar, the bar did not begin to run until one of these dates – either (1) the date of the Partition Deed, (2) the date of the final

filing in the Partition Action,[6] or (3) some date in August 2015 when he discovered that the Property had been sold. He suggests that by using these dates his claims are not time-barred.

Appellant's arguments have no merit. First, there is South Carolina authority concerning the timing of challenges to void judgments that does not align with the authority Appellant provides. Next, the Lower Court's use of the date of the Remittitur of the Partition Action is the appropriate date against which to measure the timeliness of Appellant's challenge to the Partition Order. Finally, Appellant's delay in advancing his allegations was unreasonable and damaging to Hammel.

A. South Carolina courts have imposed time limits on the challenge to a judgment as being void.

In *McDaniel v. U.S. Fidelity and Guar. Co.*, 324 S.C. 639, 478 S.E.2d 868 (Ct. App. 1996), one of the authorities on which the Lower Court relied, this Court acknowledged an inconsistency among South Carolina appellate court decisions on the application of the reasonable time requirements of Rule 60(b)(4), SCRCP. The Court noted that some decisions applied the reasonable time requirement; while other decisions adopted the position advanced by Appellant – that void judgments are a nullity and can be attacked at any time. The *McDaniel* Court resolved that inconsistency and declared that the reasonable time requirement applies to Rule 60(b)(4), SCRCP. *Id*. at 643-44, 478 S.E.2d at 870-71 ("We believe we are bound to follow *Sijon* and *Hayes's* statements that the reasonable time requirement applies to Rule 60(b)(4).").

[6] Appellant references an "Order ending case filed on July 20, 2015" in his argument. App. Brief, p. 6. In his Second Brief on Venue filed with the Supreme Court on October 22, 2019, Appellant represents that "the Order ending the case was filed on July 31, 2015." (R. p. 25). The Beaufort County Clerk's Index of the Partition Action does not identify such an order. (R. pp. 130-132). That Index makes reference to a Satisfaction of Judgment signed by Bell as counsel for the Partition Plaintiffs on July 20, 2015 that was recorded July 22, 2015. Since this is the only filing in the Partition Action post Remittitur, Hammel assumes that this is the document to which Appellant makes reference.

Similarly, the South Carolina Supreme Court in *Robinson v. Estate of Harris*, 389 S.C. 360, 698 S.E.2d 801 (2010) determined that if a party can establish extrinsic fraud, the claim may be time-barred under the doctrine of laches. *Robinson* involved an action filed in 2005 to quiet title to real property. The claim involved allegations that a deed to the property executed in 1946 and a quiet title action filed in 1966 were fraudulent. Among the defenses raised to the quiet title action were laches and the statute of limitations for challenging judgments quieting or determining title set out in S.C. Code Ann. § 15-67-90 (1976). Those advancing the claim argued that it was not barred by the cited statute of limitations because the 1966 quiet title action involved extrinsic fraud. The *Robinson* Court concluded that providing adequate evidence of extrinsic fraud was not sufficient alone to withstand a summary judgment challenge when there is evidence of unreasonable delay that prejudices the adversary. *Id*. at 372, 698 S.E.2d at 807.

Therefore, even if Appellant were able to provide proof of extrinsic fraud, his claims must also withstand legitimate challenges based on Appellant's delay.

B. The Lower Court's use of the Partition Order date to measure Appellant's delay was appropriate.

In considering the Appellant's delay in asserting his claims, the Lower Court measured and considered Appellant's conduct from the date of the entry of the Remittitur of Partition Action, which ended the appeal of the Partition Order. (R. p. 101, ¶ 35). Appellant suggests that his delay in bringing the Complaint should only be considered from either (1) July 7, 2015, the date of the Partition Deed[7]; (2) July 22, 2015, the date of the filing of the Satisfaction of Judgment in the Partition Action; or (3) some date in August 2015 when Appellant discovered that the property had been sold.

[7] The date or recording of the Deed into Hammel is July 7, 2015, not July 17, 2015 as set out in Appellant's Brief.

Appellant challenges the Partition Order, which was the final judgment in the Partition Action. He does not challenge the Partition Deed or the Satisfaction of the Judgment. The deed and satisfaction are acts incident to the administration of the Partition Order and are of no consequence to the appropriate timing of the Appellant's challenge to the Partition Order. Further, the timing of Appellant's discovery of the Partition Deed has no bearing on when he should have challenged the Partition Order.

An order is a final judgment if there is no further act that must be done by a court prior to a determination of the rights of the parties. *Hooper v. Rockwell*, 334 S.C. 281, 513 S.E.2d 358 (1999). "In other words, a final judgment is one that operates to divest some right in such a manner as to put it beyond the power of the Court making the order to place the parties in their original condition after the expiration of the term; that is, it must put the case out of Court, and must be final in all matters within the pleadings." *Good v. Hartford Acc. & Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209, 212 (1942). Although the Partition Order contains provisions incident to its administration and for disposition of the proceeds of the sale, it is conclusive as to all matters that were, up until then, at issue between the parties. As an analogy, the case of *Bartles v. Livingston*, 282 S.C. 448, 319 S.E.2d 707 (Ct. App. 1984) supports the proposition that an order for foreclosure and sale constitutes a "final judgment," even if the sale has yet to occur and the amount of the deficiency remains uncertain. The Court of Appeals held in *Bartles* that a decree of foreclosure and a finding that a party is entitled to a deficiency constitutes a final adjudication thereof, and unless an appeal is taken of the foreclosure order, the lower court's findings as to the debt are binding in any subsequent proceedings between the parties. *Id.*

The Partition Order was the Master-in-Equity's final determination of the issues among the parties. Appellant believes that Order is void because of extrinsic fraud and the Master-in-Equity's

lack of jurisdiction. How he reacted, or failed to react, to that final order is the issue before the Court on appeal.

C. Appellant's claims are barred by the doctrine of laches.

In his argument to this Court, Appellant offers no reason for his delay between the issuance of the Remittitur of the Partition Action on March 10, 2014, and the filing of this action on July 31, 2018, more than four years later. Similarly, Appellant offered no reason for the delay in his Complaint, in any filing with the Lower Court, or at the summary judgment hearing (R. pp. 101-102, ¶ 36).

It is clear that Appellant knew of the Partition Order based on the fact that he filed and argued the Motion to Reconsider and from the Supreme Court's subsequent dismissal of his appeal. Appellant argued the same positions in his Motion to Reconsider as those he set out in his Complaint. Appellant knew everything he set out in his Complaint when he filed his Motion to Reconsider, but he decided to wait for over four and one half (4 ½) years to bring his challenge.

During that delay many parties relied on the finality of the Partition Order. Hammel purchased the property for $385,000.00 on June 23, 2015, and the proceeds of the sale were disbursed to the parties. (R. pp. 460-462). Some of those funds were disbursed to pay for Appellant's obligations. (R. pp. 416-418, ¶¶ 8-12). The Partition Plaintiffs noted the payment of Appellant's obligations under the Partition Order by filing the Satisfaction of Judgment. Hammel held the Property for almost three years, combined it with other real property in Beaufort County, and sold it to DMS Funding I, LLC for $1,242,000.00 on May 22, 2018. (R. pp. 463-465).

By Appellant's own admission, he learned that Hammel purchased the Property at some point in August 2015. App. Brief, p. 7. Yet, Appellant waited an additional three (3) years to attack the order authorizing the Partition Deed.

Appellant directs this Court's attention to *Robinson* on this issue. Hammel agrees that *Robinson* is helpful precedent. After establishing that the doctrine of laches should be considered in determining if a claim based on extrinsic fraud is time-barred, *Robinson* holds "[t]he equitable doctrine of laches is defined as 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence to do what in law should have been done.'" *Robinson,* 389 S.C. at 370, 698 S.E.2d at 807 (citing *Hallums v. Hallums*, 296 S.C. 195, 198, 372 S.E.2d 525, 527 (1988)). The *Robinson* court further states, "'[u]nder the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights.'" *Id.* at 372, 698 S.E.2d at 807 (citing *Chambers of S.C., Inc. v. County Council for Lee County*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993)). After announcing these principles, the *Robinson* court outlined the elements required to establish laches: "(1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice." *Id*.

McDaniel dictates that the reasonable time determination "is a matter addressed to the trial judge's sound discretion, and an appellate court will not disturb that determination absent abuse of discretion." *McDaniel*, 324 S.C. at 644, 478 S.E.2d at 871 (citing *Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992)). Here, the Lower Court determined that Appellant's delay in challenging the Partition Order was greater than four (4) years, was unreasonable in that it was without explanation and with full knowledge, and that it prejudiced Hammel. Appellant's only challenge to these findings is that he should be allowed to assert his claims at any time without regard to the doctrine of laches or any statute of limitations.

Appellant has provided no reason for this Court to disturb the Lower Court's application of the doctrine of laches. The Order Granting Summary Judgment to Hammel should be affirmed.

III. Appellant's claims are barred by the doctrine of collateral estoppel.

Although he mentions the terms estoppel and collateral estoppel in his Statement of Issues on Appeal and in his argument headings, Appellant never articulates any error in the Lower Court's finding that his Complaint is barred by the operation of collateral estoppel within the body of his argument. Rule 208(b)(1)(B), SCACR, requires that Appellant set forth a concise and direct statement of each issue on appeal. The rule precludes "[b]road general statements," which "may be disregarded by the appellate court." Rule 208(b)(1)(B), SCACR. "Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." *Forest Dunes Assocs. v. Club Carib, Inc.*, 301 S.C. 87, 89, 390 S.E.2d 368, 370 (Ct. App. 1990).

Pursuant to the two issue rule, Appellant's failure to appeal that portion of the Lower Court's decision finding that Appellant's claims are barred by the doctrine of collateral estoppel makes that ruling the law of the case. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (abrogated on other grounds by *Repko v. Cty. of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018)) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.").

If this Court determines that Appellant has adequately assigned error to the Lower Court's collateral estoppel ruling, Hammel urges the Court to conclude that Appellant has abandoned the issue. *First Savings Bank v. McLean*, 314 S.C. at 363, 444 S.E.2d at 514.

Even in the absence of such a conclusion, the Lower Court's ruling should be affirmed. It is clear that the issues raised by Appellant in the Complaint were fully resolved in the Partition Action. These matters were fully litigated by Appellant, a fact that is apparent from a review of the pleadings in the Partition Action, Appellant's attendance at hearings and trial, the Motion to Reconsider, and his effort to appeal the Partition Order. All of the issues raised by Appellant in this action were actually litigated and directly determined in the Partition Action and were necessary to support the Partition Order. *See Beall v. Doe*, 281 S.C. 363, 371, 315 S.E.2d 186, 191 (Ct. App. 1984) (stating the party asserting collateral estoppel "must show that the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment"). Therefore, the doctrine of collateral estoppel stands as a bar to the relief demanded by the Appellant in this action.

Appellant decided not to join the other parties to the Partition Action in this action. Instead, he chose to attack the partition sale purchaser and the attorney who represented the Partition Plaintiffs. However, the doctrine of collateral estoppel does not require mutuality of the parties in the actions compared. South Carolina recognizes non-mutual collateral estoppel. *Id*. at 370, 315 S.E.2d at 190.

There is authority for the position that collateral estoppel will not serve as a bar to an attack on a judgment as being void because of extrinsic fraud. *See Mr. G v. Mrs. G*, 320 S.C. 305, 465 S.E.2d 101 (Ct. App. 1995); *Evans v. Gunter*, 294 S.C. 525, 366 S.E.2d 44 (Ct. App. 1988); Arnold v. Arnold, 285 S.C. 296, 328 S.E.2d 924 (Ct. App. 1985). However, in those matters, the fraudulent conduct was not actually litigated in the action presented as the bar to the subsequent action. Where the extrinsic fraud is raised and addressed in the first action, collateral estoppel may serve to bar the same claim of extrinsic fraud in a second action. *Melton v. Melton*, 229 S.C. 85,

91 S.E.2d 873 (1956). Here, Appellant raised his extrinsic fraud claims to the court in the Partition Action through his Answer to the First Amended Complaint, by his arguments at trial, and on his challenges raised through the Motion to Reconsider the Partition Order. Because Appellant actually litigated his claims of extrinsic fraud, the doctrine of collateral estoppel bars Appellant from litigating the same claims again.

For the myriad of reasons stated, the Lower Court's determination that Appellant's causes of action are barred by the doctrine of collateral estoppel should be affirmed.

IV. Appellant's constitutional due process rights were not violated.

Appellant seeks to recover his interest in the Property. He did not want to sell his interest in the Property and he has challenged his sisters' efforts to pursue their partition rights as co-tenants at every opportunity and with vengeance. Appellant's constitutional challenges to the Partition Order (Appellant's Arguments V and VI) are additional examples of Appellant's misguided revenge.

The only mention of a constitutional challenge in the Complaint is found in Appellant's "Third Cause of Action (Due Process Violations)". (R. p. 121, ¶ 21 – p. 123, ¶ 31). In that Cause of Action, he enunciates the due process violations of his rights under the South Carolina Constitution as: (1) the trial judge's failure to follow the law of the case; (2) Bell's placement of documents in the record of the case that were not in evidence; (3) Bell's *ex parte* submission of a proposed order after the trial; and (4) not being served with a copy of the Partition Order. (R. p. 121, ¶ 21 – p. 123, ¶ 31). From a comprehensive reading of the Complaint, it is apparent that Appellant's allegation that the Master-in-Equity failed to follow the law is a challenge to the manner of the sale that is set out in the Partition Order. Although there is nothing in the record to support Appellant's memory, he recalls that the Circuit Court ruled, at a motions hearing prior to

trial, that Partition Plaintiffs could only proceed with a request for the relief of a public partition sale of the Property, and that became the law of the case.

In his written response to the Motions for Summary Judgment, Appellant made only vague references to due process violations under the South Carolina Constitution. (R. pp. 180-186). When Appellant argued against the Summary Judgment motions, he raised, for the first time, violations of his rights under the United States Constitution. (R. p. 377, lines 2-10). That argument was also vague, only referring generally to the United States Constitution and the South Carolina Constitution.

Appellant filed his Notice of Appeal with the Supreme Court and represented that the appeal involved a constitutional challenge to a state statute (R. p. 9). In response to the Notice of Appeal, the Clerk of the Supreme Court asked Appellant to explain the reference to the constitutional challenge, in that his review of the orders appealed did not reveal a ruling by the Lower Court on a constitutional challenge to a state statute. (R. pp. 10-11). Appellant responded with a Brief on Venue filed October 18, 2019, and a second Brief on Venue file October 22, 2019.[8] In those Briefs on Venue, Appellant, for the first time, identified S.C. Code Ann, § 14-11-160 (2017) as the subject of his constitutional challenge. (R. pp. 12-93). Appellant argues that the Master-in-Equity applied § 14-11-160 in the Partition Action to deny his property rights guaranteed by the United States Constitution and the South Carolina Constitution. He also claimed that Bell's extrinsic fraud deprived him of those rights.

[8] Ironically, Appellant did not serve any Respondent with a copy of either Brief on Venue. Appellant's reason was that the letter from the Clerk of the Supreme Court was an *ex parte* communication by the Court to him requesting a brief on jurisdiction and he responded in kind. (*Appellant's Reply to Return of Respondent Hammel to Appellant's Motion to File Initial Brief Out of Time*, dated March 6, 2020, Appellate Case No. 2019-001676). Contrary to Appellant's representation, the Clerk of Court provided a copy of his letter to each of Respondents' counsel. (R. pp. 10-11).

Appellant continues the same argument concerning § 14-11-160 in his Brief to this Court. App. Brief p. 19. However, simply inserting the word "constitutional" into a challenge does not make it so. Appellant fails to clearly articulate any constitutional challenge to the Partition Order or to the procedure in the Partition Action. For that reason alone, this Court should determine that Appellant has abandoned any constitutional challenge. *First Savings Bank v. McLean*. However, even picking out the hints that Appellant offers as to what his argument could be, it is clear that he presents no viable constitutional challenge here.

First, it is uncertain whether Appellant's claims point to procedural or substantive due process violations, although his claims of extrinsic fraud suggest that Appellant may be attempting a claim of procedural due process. *See Sloan v. South Carolina Bd. Of Physical Therapy Examiners*, 370 S.C. 452, 484-485, 636 S.E.2d 598, 615 (2006) ("The requirements of procedural due process, usually deemed to apply in a contested case or hearing which affects an individual's property or liberty interest, generally include adequate notice, the opportunity to be heard at a meaningful time and in a meaningful way, the right to introduce evidence, the right to confront and cross-examine witnesses whose testimony is used to establish facts, and the right to meaningful judicial review.") (overruled on other grounds by *Joseph v. S.C. Dep't of Labor, Licensing & Regulatio*n, 417 S.C. 436, 790 S.E.2d 763 (2016)). However, Appellant's statement to the Supreme Court upon the filing of this Appeal and his argument in his brief concerning § 14-11-160 also hint at an attempt to argue substantive due process. *See Id*. at 483, 636 S.E.2d at 614; *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002) ("The purpose of the substantive due process clause is to prohibit government from engaging in arbitrary or wrongful acts regardless of the fairness of the procedures used to implement them.").

If Appellant is asserting a substantive due process claim, it fails because the challenged

statute is misstated and because Appellant's claim is not that the statute is unconstitutional, but that it was improperly applied. As explained previously above, § 14-11-160 concerns a Master-in-Equity's ability to sell property in any county in the State of South Carolina with the consent of the parties to that action. It does not address a Master-in-Equity's jurisdiction to order a partition sale of the property in the County for which he is appointed, as Appellant suggests. Further, Appellant argues that the Lower Court did not determine that the Master-in-Equity's jurisdiction in the Partition Action was limited by § 14-11-160. In other words, Appellant complains that the Lower Court did not enforce the statute; he does not suggest that the statute is unconstitutional.

From its reading of Appellant's brief, Hammel believes he can only be raising a procedural due process violation. "Procedural due process requirements are not technical, no particular form of procedure is necessary." *Sloan*, 370 S.C. at 485, 636 S.E.2d at 615 (citing *In re Vora*, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003)). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id*. at 483, 636 S.E.2d at 615 (citing *S.C. Dept. of Soc. Servs. v.* Wilson, 352 S.C. 445, 452, 574 S.E.2d 730, 733 (2002)).

Appellant had every opportunity to appear and argue his positions at each point in the Partition Action. Despite his claims of lack of notice, Appellant attended every hearing and presented his arguments to the Master-in-Equity. Appellant does not suggest that the Master-in-Equity deprived him of his ability to introduce evidence. His complaint is that the Master-in-Equity did not adopt his position when advanced at the trial of the Partition Action and again on his Motion to Reconsider. That is not a denial of procedural due process. Appellant has failed to identify a single occurrence in the Partition Action that offends Appellant's procedural due process rights.

CONCLUSION

Appellant was aware of his challenges to the Partition Order when he set them out in his Motion to Reconsider in the Partition Action. For reasons that do not appear in the record, Appellant sat on those challenges, watching as others took action in reliance on the Partition Order. Without explanation, Appellant did not join the other parties from the Partition Action to his action collaterally attacking the Partition Order. Instead, he seeks that relief from his adversaries' attorney and the party that purchased the Property at the partition sale. Appellant's conduct defies explanation.

Similarly, Appellant's arguments on appeal do not make sense. He provides a list of concerns, but offers no analysis or supporting authority to demonstrate the Lower Court's error in dismissing his claims. The statutory and common law authority he does offer is either misstated or improper.[9]

Appellant has made the arguments set out in his appeal since 2012 and the relief he requests has been repeatedly denied. It is time for this matter to be put to rest. The Order Granting Summary Judgment to Hammel should be affirmed.

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[9] As an additional example, Appellant improperly cites a trial court decision (*Treon et.al. v. Drryvit Systems, et al.* No. 2002-CP-071377 (S.C. Com. Pl. filed Jan. 7, 2009) and an unpublished decision (*Lewis –Murray v. Murray*, No. 2005-UP-555 (S.C. Ct. App. Filed Oct. 17, 2005). Rule 268(d)(2), SCACR ("unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved."); *Ford v. Beaufort Cty. Assessor*, 398 S.C. 508, 515 n.3, 730 S.E.2d 335, 339 n.3 (Ct. App. 2012) ("Trial or inferior court decisions are not precedents binding other courts, including appellate courts or other judges of the same trial court.") (citing 21 C.J.S. *Courts* § 212 (2006)).

Respectfully submitted,

March 5, 2021

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2019-001676
Trial Court Case No. 2018-CP-07-1559

Charles E. Houston, Jr. .....Appellant,

v.

Shirley J. Boone, as Administrator of the Estate of Dean B. Bell, individually;
Law Offices of Dean B. Bell, LLC; and
B. Hammel Properties, LLC, ... Defendants,

Of which Law Offices of Dean B. Bell, LLC and
B. Hammel Properties, LLC are the..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Respondent's Brief complies with Rule 211(b), SCACR.

March 5, 2021

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