THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Hon. Deadra L. Jefferson
Presiding Circuit Court Judge

Trial Court Case No. 2018-CP-07-02378
Appellate Case No.: 2019-001884

Eddie B. Lewis. . . . . Respondent

v.

Saul, LLC and Wells Fargo Bank National Association, ...

Of Whom Saul, LLC is the Appellant and

Of Whom Wells Fargo Bank National Association is also the Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE ON APPEAL

Whether the Trial Court abused its discretion by granting Wells Fargo's Motion to Set Aside Judgement when the record establishes that the Plaintiff conceded Saul's Motion for Summary Judgment and Wells Fargo waived any arguments to the same?

STATEMENT OF THE CASE

On or about May 23, 2016, Respondent, Eddie R. Lewis, (hereinafter "Plaintiff") entered the parking lot/premises located at 401 Port Republic Street, Beaufort, S.C. as a customer to Respondent Wells Fargo (hereinafter "Wells Fargo"). Am. Compl. ¶ 9. While exiting the parking lot, Lewis allegedly tripped and fell causing him injuries. Am. Compl. ¶ 11. Appellant, Saul, LLC, (hereinafter "Saul") owns the premises located at 401 Port Republic Street, Beaufort, S.C. Am. Compl. ¶ 7. Said property was leased by Saul to Wells Fargo, who exercised complete control and responsibility of the property pursuant to the terms of the Lease. (*See gen*. Mot. for Summ. J., Ex. A.). Plaintiff brings this action against Saul on the theory of negligence and premises liability. Am. Compl. ¶¶ 9-21. Plaintiff alleges that Saul had a duty to "warn invites and/or business visitors of the hazardous, unsafe, and unreasonably dangerous condition of the sidewalks" and breached its duty by "failing to maintain said premises in a reasonably safe condition for invitees and/or business visitors." Am. Compl. ¶ 12, subsection A-L. Wells Fargo has not asserted any direct claims against Saul. (*See* Wells Fargo's Answer to P. Compl.). Saul moved for Summary Judgment ("Motion") as to the Plaintiff's Amended Complaint on January 20, 2020, based on the terms of the Lease. (*See* Mot. for Summ. J.). Attached to this Motion as an exhibit was a full and complete copy of the Lease. (*Id.*, at Ex. A.).

On March 13, 2020, the prior counsel for Wells Fargo emailed counsel for Plaintiff and Saul requesting a continuance for the Motion because she was leaving her firm and that Charles

Blackburn would be taking the case over. (*See* Saul Memo. in Reply, Ex. 1.). In response, the same day, counsel for Saul informed then-counsel for Wells Fargo that he could not consent to the request for continuance and wanted the motion heard because of the impending scheduled mediation and trial not before date. (*See Id.*). On March 16, 2020, Charles G. Blackburn filed a Notice of Appearance on behalf of Wells Fargo. (*See Id.*, Ex. 3.). That same day, counsel for the Appellant, Morgan S. Templeton, received a phone call from Mr. Blackburn at or around 2:37 p.m. on March 16, 2020, in which he advised that he would be appearing on behalf of Wells Fargo but would not be appearing at the hearing. (*See Id.* Ex. 2.). During this call, Mr. Blackburn informed the undersigned that he had read the Motion, that he did not believe he had a basis to oppose the Motion. (*See Id.*).

On March 17, 2020, the Honorable Judge Deadra Jefferson (hereinafter "Trial Court") heard arguments on the Motion. Counsel for both the Plaintiff and Saul were present for this hearing; however, ***counsel for Wells Fargo failed to appear***. (*See* Saul's Memo. in Opp. to Mot. to Set Aside.). During the hearing, Plaintiff's counsel informed the Trial Court that counsel for Wells Fargo informed Plaintiff's Counsel that he was not going to attend the hearing on the Motion. (*See* Hearing Transc. p. 2:12-17; *see also* Pl. Memo. in Resp. at pg. 3.). Wells Fargo received notice of the hearing and willfully elected and/or failed to file a Motion for Continuance or any Memorandums in Opposition. (*See* Saul's Memo. in Opp. to Mot. to Set Aside at Ex. 1, 2, 3.).

During the hearing on March 17, 2020, counsel for the Plaintiff informed the Trial Court that he believed the determination of the Motion would be important to the absent Wells Fargo, despite its absence. (*See* Hearing Transc. p. 2:22-3:19.). The Trial Court questioned Plaintiff's counsel whether he conceded to Saul's motion or whether it needed to be continued. (*Id.* p. 10:18-

25.). In direct response to this question, Plaintiff's counsel conceded that Saul's Motion was supported by the law and by the facts. (*Id.* p. 10:18-25.). Specially, the hearing transcript evidences the following colloquy between the Trial Court and Plaintiff's Counsel:

> **THE COURT**: Well, you haven't filed anything. And you can't have it both ways. Either you concede the motion or it needs to be continued. But I am not going to straddle that line with you.
>
> **MR. FLEMING**: I understand. Well, I concede then, Your Honor. I concede that Saul is -- that their position, I believe, is most supported by the law and by the facts as we have gathered throughout this litigation.
>
> **THE COURT**: Based on that concession, Mr. Dodds, if you will prepare an order for the Court granting the summary judgment.

Id.

Based on the Plaintiff's concession, the the Trial Court granted Appellant's Motion for Summary Judgment. (*See Id.* p. 11:1-6; *see also* Order Granting Saul's Mot. for Summ. J.). On March 18, 2020, Saul submitted its proposed Order to the Trial Court, which a Notice of Electronic file was sent to all parties of record as instructed by the Court. (*See* Saul's Memo. in Opp. to Mot. to Set Aside, Ex. 4.).

On March 24, 2020, the Trial Court, after careful consideration of the record, granted Saul's Motion. (Order Granting Summ. J., filed Mar. 24, 2020.) The Trial Court made multiple changes (a total of approximately 15) to the proposed Order before signing it. (*See* Saul's Reply Memo., Ex. 1 and 2).[1] Neither the Plaintiff nor Wells Fargo filed a Motion to Reconsider. (*See*

[1] A side-by-side review of Saul's Proposed Order and the Trial Court's Order highlights the edits and revisions made by the Trial Court prior to entering the Order. The Trial Court made a total of fifteen (15) changes/revisions to Saul's Proposed Order. Theses revisions included the following: 1) a Header was added, which included six additional lines; 2) The opening paragraph was completely changed; 3) a Footnote was added; 4) the words "**Applicable Law"** was struck; 5) The **Finding of Facts** section was moved to the front of the Order; 6) The first line of the Find of Facts section of the Proposed Order was struck; 7) the numbering of the paragraphs in the **Findings of Facts** section were

Saul's Memo. in Opp. to Mot. to Set Aside.). Wells Fargo did not appeal the Trial Court's Order. (*See Id.*). On March 26, 2021, counsel for Wells Fargo sent an email evidencing his knowledge of Saul's dismissal from this matter. (*See* Saul's Memo in Reply, Ex. 7.). On March 19, 2021, almost a year to the date of the entry of the Trial Court's Order, Wells Fargo first challenged the Trial Court's Order pursuant to Rules 60(b)(2) and (b)(3), SCRCP. (*See* Wells Fargo's Mot. to Set Aside.). Wells Fargo's five paragraph Motion to Set Aside presented vague claims of "misrepresentation" and "newly discovered evidence;" however, it was devoid of any specific evidence, facts, or exhibits that supported these claims. (*See gen. Id.*; *see also* Memo. in Opp. to Mot. to Set Aside.). Further, Wells Fargo's Motion to Set Aside failed to cite to a single case upon in support of its arguments. (*See Id.*).

On March 31, 2021, Saul filed its Memorandum in Opposition to Wells Fargo's Motion to Set Aside (hereinafter "Saul's Memorandum in Opposition"), which made arguments: that Wells Fargo's Motion to Set Aside violated Rule 7(b), SCRCP, lacked standing, Wells Fargo waived its rights to make arguments, the motion was a veiled Rule 59, SCRCP, motion, and the parole evidence rule barred any newly discovered evidence in interpreting a lease. (*See* Saul's Memo. in Opp. to Mot. to Set Aside.).

On July 2, 2021, Plaintiff submitted his Memorandum in Response to Wells Fargo's Motion to Set Aside, which highlighted Wells Fargo's counsel's failure to participate in the

struck; 8) throughout the Order the introductory signals were struck by Judge Jefferson; 8) the words "This Court makes the following conclusions of law" were struck; 9) The applicable legal standards sections were moved under the **Conclusions of Law**; 10) the numbering of the paragraphs in the **Conclusions of Law** section was struck; 11) The Summary Judgment Standard was completely revised which consisted of two paragraphs; 12) Additions to the citations under the Premises Liability Standard, which consisted of seven additions of the South Carolina Reporter citations; 13) A clerical edit was made on page 5 of the Order, which consisted in the addition of the word "Further;" 14) A conclusory sentence and paragraph was added which accounted for five additional sentences; and finally 15) the **Order** section was struck by the Court.

litigation of this matter. (*See gen.* P. Mem. in Resp.). Further, Plaintiff's Memorandum exemplified that at the time of filing the Memorandum: Wells Fargo had not identified which arguments constituted misrepresentation, presented any affidavits or other filings supporting their Motion to Set Aside, which had placed the Plaintiff in a position of being unable to address Wells Fargo's assertions. (*See Id.*, at pg.4-5.).

On July 6, 2021, for the first time, Wells Fargo finally submitted its memorandum in support of its Motion to Set Aside, with exhibits. (*See* Wells Fargo's Memo. in Supp.). Pursuant to the Trial Court's direction, three days later, Saul submitted its Reply Memorandum to Wells Fargo's Memorandum of Law in Support (hereinafter "Saul's Reply Memo."). (*See* Saul's Memo. in Reply.). Saul's Reply set out arguments that Wells Fargo's Memorandum of Law was full of errors, misstatements, and incorrect statements; that the Memorandum did not reach the difficult standards under Rule 60, SCRCP because it lacked newly discovered evidence, that Wells Fargo has no evidence of fraud upon the court, and that Wells Fargo has attempted to shift the burden of proof which deprived Saul of its due process rights.

Nonetheless, despite the Plaintiff and Saul's arguments and the record being unequivocally one sided, on September 21, 2021, the Trial Court granted Respondent Wells Fargo's Motion to Set Aside pursuant to Rule 60, SCRCP. (*See* J. Jefferson's Order Granting Mot. to Set Aside.). The Trial Court's Order misstates the following: 1) that Wells Fargo was not afforded an opportunity to be heard, which for the reasons set out above and below is erroneous; 2) it was represented to the Trial Court at the hearing that Wells Fargo was not a necessary party, when the hearing transcript clearly establishes otherwise. (*See* Hearing Transc. p. 2:22-3:19.); and 3) the Trial Court made fifteen (15) edits to the proposed Order, which counsel for Wells Fargo had notice of and made no edits or objections. For these reasons, this appeal follows:

STANDARD OF REVIEW

An order granting a motion vacating a judgment is only appealable if there was *an erroneous exercise of discretion on the part of his honor,* the circuit court judge. *See Winslow Bros. & Smith Co. v. Gossett*, 120 S.C. 164, 112 S.E. 825 (1922) (emphasis added), *see also* S.C. Const. art V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents.") and *Campbell v. Robinson*, 398 S.C. 12, 18, 726 S.E.2d 221, 225 (Ct. App. 2012) (stating that the Court of Appeals "may not overrule supreme court precedent"). Abuse of discretion means that the ruling of the trial court was without reasonable factual support, which resulted in prejudice to the rights of the appellant, and therefore, in the circumstances, amounted to error of law. *See Bridges v. Wyandotte Worsted Co.*, 239 S.C. 37, 40, 121 S.E.2d 300, 302 (1961).

ARGUMENT

1. Wells Fargo was not a party to the Order and therefore the Trial Court erroneously exercised discretion by granting a motion made by a party that lacked standing

In its most basic sense, "[s]tanding refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." *See Preservation Society of Charleston v. SCDHEC*, 430 S.C. 200, 209, 845 S.E.2d 481, 486 (2020). The Trial Court's Order dealt entirely and solely with the claims asserted by Plaintiff. (*See* J. Order Granting Saul's Mot. for Summ. J.). In fact, the Order does not contain any final judgment as to any claims asserted by Wells Fargo against Saul, *because there are none*. Wells Fargo never brought claims against Saul in this matter. (*See* Wells Fargo's Answer to P. Compl.). At the hearing, Plaintiff's counsel conceded that Saul's Motion was supported by the law and by the facts. (Hearing Transc. p. 10:18- 11:1-3.). The hearing transcript states as follows:

> **THE COURT**: Well, you haven't filed anything. And you can't have it both ways. Either you concede the motion or it needs to be continued. But I am not going to straddle that line with you.
>
> **MR. FLEMING**: I understand. Well, I concede then, Your Honor. I concede that Saul is -- that their position, I believe, is most supported by the law and by the facts as we have gathered throughout this litigation.
>
> **THE COURT**: Based on that concession, Mr. Dodds, if you will prepare an order for the Court granting the summary judgment.

Id.

As shown, the Trial Court granted Appellant's Motion for Summary Judgment, based on the Plaintiff's concessions. (*See Id.*; *see also* Order Granting Saul's Mot. for Summ. J.). The Plaintiff even filed a Memorandum in opposition to Wells Fargo's Motion to Set Aside. (*See* P. Mem. in Resp.). The granting of Saul resulted in dismissing only the claims asserted by the Plaintiff against Saul, ***as Wells Fargo has not asserted any claims against Saul***. (*See* Wells Fargo's Answer to P. Compl.).

Nevertheless, the Trial Court set aside its Order dismissing claims of the Plaintiff against Saul, made by a co-defendant who has no direct claims against Saul. (*See* J. Order Granting Saul's Mot. for Summ. J.). The Order did not dismiss any claims made by Wells Fargo against Saul, as there are none. Rule 60(b), SCRCP, provides that "the court may relieve a party or his legal representative from a final judgment, order or proceeding…." Pursuant to the plain terms of Rule 60(b), SCRCP, Wells Fargo is not a party or the legal representative of a party to the Trial Court's Order, which was issued only ***as to the Plaintiff's claims against Saul***. *See gen. Narruhn v. Alea London Ltd.*, 404 S.C. 337, 745 S.E.2d 90 (2013).

Simply put, the Plaintiff conceded Saul's arguments made in its Motion and has not raised any issues with the Trial Court's Order. (*See* Hearing Transc. ⁋ 10:18-25; *see also* P. Mem. in Resp.). However, the Trial Court was without reasonable factual support by granting a motion made by a non-party, Wells Fargo, to an Order. Wells Fargo has stepped into the shoes of the Plaintiff, when it had no right to do so. Therefore, the Trial Court's Order was based on a motion made by a party with no standing which resulted in prejudice to Saul and amounted to an abuse of discretion. *See gen. Bridges*, 239 S.C. 37, 40, 121 S.E.2d 300, 302. As such, the Trial Court was without reasonable factual support by granting a non-party to an Order's motion to set aside when it had no standing which has prejudiced Saul, and amounted in an error of law. *See Id*. For this reason, the Trial Court's Order should be reversed.

2. In Granting the Motion to Set Aside the Trial Court erred in construing the record which clearly evidences that Wells Fargo had an opportunity to be heard on the Motion and intentionally waived this opportunity

The Trial Court's Order states that Wells Fargo was not afforded an opportunity to be heard on Saul's Motion. (*See* J. Jefferson's Order Granting Mot. to Set Aside.). Nowhere in the record is there any factual support for this holding. The procedural history of this matter encapsulates the utter failure by Wells Fargo's counsel to raise any argument at the appropriate time to Saul's Motion. More specifically, it shows that Wells Fargo clearly had every opportunity to be heard yet it waived to do so at the appropriate time. Waiver is a voluntary and intentional abandonment of a known right. *SPUR at Williams Brice Owners Ass'n v. Lalla*, 415 S.C. 72, 91, 781 S.E.2d 115, 125 (Ct. App. 2015). Acts inconsistent with the continued assertion of a right may give rise to waiver. *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 928 (Ct. App. 1994).

First, on January 20, 2020, Saul filed its Motion with the Beaufort County Clerk of Court. (*See* Mot. for Summ. J.). Then counsel for Wells Fargo, Laura Robinson, received notice of this

Motion through the Notice of Electronic Filing. (*See* Jan. 21, 2020, NEF.). On March 13, 2020, Laura Robinson emailed counsel for Plaintiff and Saul requesting a continuance for the Motion because she was leaving her firm and that Charles Blackburn would be taking the case over. (*See* Saul Memo. in Reply, Ex. 1.). That same day, counsel for Saul informed Ms. Robinson that he could not consent to the request for continuance and wanted the motion heard because of the impending mediation scheduled. (*See Id.*). On March 16, 2020, Charles G. Blackburn filed a Notice of Appearance on behalf of Wells Fargo. (*See Id.*, Ex. 3.). That same day, counsel for the Appellant, Morgan S. Templeton, received a phone call from Mr. Blackburn at or around 2:37 p.m. on March 16, 2020, in which he advised that he would be appearing on behalf of Wells Fargo but would not be appearing at the hearing. (*See Id.* Ex. 2.). During this call, Mr. Blackburn informed the undersigned that he had read the Motion, that he did not believe he had a basis to oppose the Motion, and that he would not be attending the hearing on the Motion. *Id.*

On March 17, 2020, the Trial Court heard arguments on the Motion. Counsel for the Plaintiff and Saul were present for this hearing; however, ***counsel for Wells Fargo failed to appear***. (*See* Saul's Memo. in Opp. to Mot. to Set Aside.). Wells Fargo failed to file a Motion for Continuance or any Memorandums in Opposition, despite having notice of the Motion since January 20, 2020. (*See Id.*). During the hearing, Plaintiff's counsel informed the Trial Court that counsel for Wells Fargo informed Plaintiff's Counsel that he was not going to attend the hearing on the Motion. (*See* Hearing Transc. p. 2:12-17; *see also* Pl. Memo. in Resp. at pg. 3.). After the Motion was granted, counsel for Wells Fargo received notice that the proposed Order was electronically filed on March 18, 2020. (*See* Saul's Memo. in Opp. to Mot. to Set Aside, Ex. 4.). Counsel for Wells Fargo did not raise any objections to the proposed Order.

On March 24, 2020, the Trial Court, after careful consideration of the record, granted Saul's Motion. (*See* Order Granting Summ. J., filed Mar. 24, 2020.) Neither the Plaintiff nor Wells Fargo filed a Motion to Reconsider. (*See* Saul's Memo. in Opp. to Mot. to Set Aside.). Wells Fargo did not appeal the Trial Court's Order. (*See Id.*).

On March 5, 2021, present counsel for Wells Fargo, Douglas E. Leadbitter, filed a Notice of Appearance in this matter. (*See* March 5, 2021, NEF.). On March 19, 2021, almost a year to the date of the entry of the Trial Court's Order, Wells Fargo first challenged the Trial Court's Order pursuant to Rules 60(b)(2) and (b)(3), SCRCP. (*See* Wells Fargo's Mot. to Set Aside.). Further, and most telling, Wells Fargo fails to make any argument or excuse as to why its counsel did not argue against Saul's Motion, file a motion or appeal the Trial Court's Order granting Saul's Motion. Given this, there is nothing in the record to indicate that Wells Fargo did not have an opportunity to be heard. Rather the record is replete with support for the exact opposite: ***Wells Fargo had every opportunity to be heard and waived this opportunity.***

It is undisputed that Wells Fargo was represented by counsel during the entire aforementioned procedural history. It is also undisputed that Wells Fargo's counsel had notice of the Motion, proposed Order, and final Order. Yet, it made no arguments. Still, the Trial Court erroneously concludes that Wells Fargo was not afforded an opportunity to be heard on Saul's Motion. This clearly ignores the facts of the case: ***Wells Fargo's counsel failed to appear at the hearing, despite being on notice***. Wells Fargo failed to do even the bare minimum to argue against Saul's Motion. Despite being put on notice of Saul's Motion on January 20, 2020, Wells Fargo's counsel did nothing until March 19, 2021. Wells Fargo has waived any rights to raise any arguments that should have been made at the time of the hearing. *See gen. SPUR at Williams Brice Owners Ass'n*, 415 S.C. 72, 91, 781 S.E.2d 115, 125.

The Trial Court's Order that former Wells Fargo's counsel's requests for a continuance, via email, should have been relayed onto the Court; (*See* J. Jefferson's Order Granting Mot. to Set Aside) ignores the fact that Mr. Blackburn, ***counsel of record for Wells Fargo at the time of the hearing***, informed both parties of his intent not to appear at the hearing. (*See* Saul Memo. in Reply, Ex. 2; *see also* Pl. Memo. in Resp. at pg. 3.). Further, Wells Fargo's counsel, at the time of the hearing, informed counsel for Saul that he had read the Motion, that he did not believe he had a basis to oppose the Motion, and that he would not be appearing at the hearing. (*See* Saul Memo. in Reply, Ex. 2.). Additionally, it was relayed onto the Trial Court that Wells Fargo would indeed not be present based on Mr. Blackburn's conversation with the Plaintiff. (*See* Hearing Transc. p. 2:12-17). In fact, and most telling, the Wells Fargo very own memorandum simply states: "…for reasons unknown, Mr. Blackburn, did not attend the hearing on March 17, 2020, and did not file a response to the Order after it was entered." (*See* Wells Fargo's Memo. in Supp.).

There is nothing in the record which evidences or even hints to any support that Wells Fargo did not have an opportunity to be heard on Saul's Motion. The Trial Court's holding that Wells Fargo was not afforded an opportunity to be heard on the matter is an erroneous exercise of discretion which is unsupported by any supporting facts which has amounted in Saul being severely prejudiced in having to relitigate this matter and therefore constitutes an error of law. *See Bridges*, 239 S.C. 37, 40, 121 S.E.2d 300, 302.

3. The Trial Court's holding that it was not informed Wells Fargo was a necessary party is contrary to the hearing record.

The Trial Court's Order states that it was represented to the Trial Court that "Wells Fargo was not necessary for the disposition of Saul, LLC's Motion for Summary Judgment." (*See* J. Jefferson's Order Granting Motion to Set Aside.). The hearing transcript establishes that counsel for the Plaintiff informed the Court that Wells Fargo ***indeed*** was a necessary party for these

motions, despite not having standing. (*See* Hearing Transc. p. 2:22-3:19.). Specifically, the following was stated at the hearing:

> **THE COURT**: So in a roundabout way, are you telling me you can't go forward because Wells Fargo is absent, or they are not necessary for these motions?
>
> **MR. FLEMING**: I can't speak for Wells Fargo. I personally believe that it's very important to Wells Fargo, because they will be the sole defendant. They have not filed any kind of indemnity or cross-claim back towards Saul. And as such, I don't know they technically have any direct standing in the motion. So I can't assert to the Court that they are necessary to argue the motion.
>
> **THE COURT:** Are you seeking some relief against them?
>
> **MR. FLEMING**: Against Wells Fargo?
>
> **THE COURT**: Yeah.
>
> **MR. FLEMING**: They are the primary defendant. Saul is the property owner of the site of the bank where this injury occurred. And the -- I won't speak for Saul except to say Saul's motion for summary judgment is predicated on the terms of the lease. And the terms of the lease tend to support the notion that the landlord, Saul, granted all control of the property, including inspection and/or inspection, discovery and remedy of any dangerous conditions, which is very clearly laid out in their brief.

Id.

Clearly, the Trial Court's holding that the parties withheld any information that Wells Fargo was not a necessary party to the motion is not supported by the hearing transcript and as such no fraud, misrepresentation, or other misconduct of an adverse party was made amounting in any relief pursuant to Rule 60(b)(3), SCRCP. As such, the Trial Court exercised erroneous discretion in holding otherwise and granting Wells Fargo's Motion to Set Aside on this reason. *See gen. Bridges*, 239 S.C. 37, 40, 121 S.E.2d 300, 302.

Notwithstanding the above argument, Plaintiff's counsel conceded that Saul's Motion was supported by the law and by the facts. (*See* Hearing Transc. ⁋⁋ 10:18- 11:1-3.). The Trial Court granted Saul's Motion, based on the Plaintiff's concessions. (*See Id.*; *see also* Order Granting Saul's Mot. for Summ. J.). In addition is the fact that the Trial Court was made aware of the fact that Wells Fargo's then-counsel, called Saul's counsel and informed him that he had read the Motion, that he did not believe he had a basis to oppose the Motion, and he would not be attending the hearing. (*See* Saul Memo. in Reply, Ex. 3). Nevertheless, the Trial Court ignored these key facts, which were presented to it, which resulted in an abuse of its discretion by granting Wells Fargo's Motion to Set Aside without reasonable factual support.

4. The Trial Court erroneously exercised discretion by granting the Motion to Set Aside when there was no reasonable support in the record establishing relief pursuant to Rule 60, SCRCP, was proper

Rule 60(b), SCRCP, requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party. *Rouvet v. Rouvet*¸ 388 S.C. 301, 696 S.E.2d 204, 208 (Ct. App. 2010). In determining whether to grant relief under Rule 60(b)(1), SCRCP, the court must consider the following factors: 1) the promptness with which relief is sought; 2) the reasons for the failure to act promptly; 3) the existence of a meritorious defense; and 4) the prejudice to the other party. *Id.* The party requesting relief in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief. *See BB&T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006).

A. Wells Fargo's Motion pursuant to Rule 60, SCRCP was not made within a reasonable amount of time

As argued above, it is undisputed that Wells Fargo had counsel throughout this matter. Further, there has been no excuse as to why Wells Fargo's counsel failed to file a motion pursuant

to Rule 60(b), SCRCP. (*See* Wells Fargo's Memo. in Supp.). Rather, it is asserted by the Trial Court that the motion was made within a reasonable time because with the transition of Wells Fargo's representation that occurred, Mr. Leadbitter sought relief as soon as he discovered this judgment had been entered against Wells Fargo. (*See* J. Jefferson's Order Granting Motion to Set Aside, pg. 6). As mentioned before, Wells Fargo had counsel throughout this matter, who had notice of the Order granting Saul's Motion on March 24, 2020. (*See* Order Granting Summ. J., filed Mar. 24, 2020.). On March 26, 2021, counsel for Wells Fargo even sent an email evidencing his knowledge of Saul's dismissal from this matter. (*See* Saul's Memo in Reply, Ex. 7.). Wells Fargo did not file a Motion to Reconsider. (*See* Saul's Memo. in Opp. to Mot. to Set Aside.). Wells Fargo did not appeal the Trial Court's Order. (*See Id.*). To sum the argument up: Mr. Blackburn, counsel for Wells Fargo, had notice of the hearing, the proposed Order, and the Trial Court's Order and did not make any arguments at the appropriate time.

The assertion that there has not been unreasonable delay because there was transition of Wells Fargo's representation is unsupported by the record because this transition did not occur until March 5, 2021, with the filing of Mr. Leadbitter's Notice of Appearance, almost a year after the filing of the Trial Court's Order granting Saul's Motion. (*See* March 5, 2021, NEF.). On March 19, 2021, for the first time, almost a year to the date of the entry of the Trial Court's Order, Wells Fargo first challenged the Trial Court's Order pursuant to Rules 60(b)(2) and (b)(3), SCRCP. (*See* Wells Fargo's Mot. to Set Aside.). There is nothing in the record which evidences that Mr. Blackburn had left the firm and that Wells Fargo was unrepresented or transitioning from Mr. Blackburn to another attorney. The moving party has the burden of proof and in this matter, there was no support presented regarding why there was an undue delay in making the Rule 60, SCRCP, motion. *See gen. BB&T*, 369 S.C. 548, 552, 633 S.E.2d 501, 503. For this reason, the Trial Court

exercised erroneous discretion in granting Wells Fargo's Motion to Set Aside on this reason with no factual basis in support. *See gen. Bridges*, 239 S.C. 37, 40, 121 S.E.2d 300, 302.

B. The record is devoid of any explanation as to why Wells Fargo was unable to act promptly

For the same reasons set out above, the record is devoid of any factual basis or arguments as to why Wells Fargo did not act promptly. Rule 60(b), SCRCP, provides that a motion pursuant to this rule be made within a reasonable time. As shown above, Wells Fargo waited Three-Hundred and Sixty days since the Trial Court's Order was entered to first raise its Motion to Set Aside pursuant to Rule 60(b), SCRCP, while it had counsel of record. **Nowhere in the record is there any explanation for this delay**. Wells Fargo has not provided a single argument as to why there has been such a delay to the filing of its Motion to Set Aside or Memorandum of Law in Support.

Once again, Wells Fargo, as the moving party, had the burden of proof and none was presented regarding why there was an undue delay in making the Rule 60, SCRCP, motion. *See gen. BB&T*, 369 S.C. 548, 552, 633 S.E.2d 501, 503. For this reason, the Trial Court exercised erroneous discretion in granting Wells Fargo's Motion to Set Aside on this reason with no factual basis in support. *See gen. Bridges*, 239 S.C. 37, 40, 121 S.E.2d 300, 302.

C. Wells Fargo provided no supporting facts or admissible evidence which would constitute the existence of a meritorious defense

To establish that meritorious defense, a complainant need not show that he would prevail on the merits, but only that his defense is meritorious. *See Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989).

> [A] meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence.

Id. (quoting *Graham v. Town of Loris*, 272 S.C. 442, 248 S.E.2d 594 (1978)). A party making a motion under Rule 60(b) has the burden of presenting evidence proving the facts essential to entitle him to relief. *See Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991).

i. The Trial Court's holding regarding the meritorious defense element is unsupported by the record

In regards to this factor, the Trial Court held the following:

> "With respect to the meritorious defense factor, as stated above, Saul, LLC's Order contained findings of fact that interpreted a lease, determined culpability for the Plaintiff's cause of action and assigned liability for the Plaintiff's injuries to Wells Fargo without the knowledge or consent of Wells Fargo. As such, this Court finds that Wells Fargo has shown the existence of a meritorious defense."

(*See* J. Jefferson's Order Granting Motion to Set Aside, pg. 6).

First, the record is clear that it was not "Saul's Order" that was entered by the Trial Court, rather it was the Trial Court's Order. Pursuant to the Trial Court's instructions, Saul submitted a proposed Order. (*See* Hearing Transc. p. 10:18- 11:1-3.). The Trial Court took it upon itself to correctly make multiple changes (a total of approximately 15) to the proposed Order before signing it. (*See* Saul's Reply Memo., Ex. 1 and 2).[2] Given this, there is ample evidence that the Trial Court inquired into the legal questions raised in Saul's proposed Order and does not need to further

[2] A side-by-side review of Saul's Proposed Order and the Trial Court's Order highlights the edits and revisions made by the Trial Court prior to entering the Order. The Trial Court made a total of fifteen (15) changes/revisions to Saul's Proposed Order. Theses revisions included the following: 1) a Header was added, which included six additional lines; 2) The opening paragraph was completely changed; 3) a Footnote was added; 4) the words "**Applicable Law"** was struck; 5) The **Finding of Facts** section was moved to the front of the Order; 6) The first line of the Find of Facts section of the Proposed Order was struck; 7) the numbering of the paragraphs in the **Findings of Facts** section were struck; 8) throughout the Order the introductory signals were struck by Judge Jefferson; 8) the words "This Court makes the following conclusions of law" were struck; 9) The applicable legal standards sections were moved under the **Conclusions of Law**; 10) the numbering of the paragraphs in the **Conclusions of Law** section was struck; 11) The Summary Judgment Standard was completely revised which consisted of two paragraphs; 12) Additions to the citations under the Premises Liability Standard, which consisted of seven additions of the South Carolina Reporter citations; 13) A clerical edit was made on page 5 of the Order, which consisted in the addition of the word "Further;" 14) A conclusory sentence and paragraph was added which accounted for five additional sentences; and finally 15) the **Order** section was struck by the Court.

investigate or discuss the same. Saul made its Motion as to the Plaintiff's Amended Complaint based on the terms of the Lease. (*See* Mot. for Summ. J.). Attached to this Motion as an exhibit was a full and complete copy of the Lease. (*Id.*, at Ex. A.). Additionally, the Trial Court held a hearing on the very meritorious defense that the Trial Court now holds should be reheard. This hearing was held on March 17, 2020, where counsel for the Plaintiff and Saul appeared, while counsel for Wells Fargo did not. (*See* Saul's Memo. in Opp. to Mot. to Set Aside.). As explained thoroughly above, Wells Fargo had every opportunity to assert its arguments at the time of the hearing but failed to do so and waived its arguments.

Importantly, Plaintiff's counsel conceded that Saul's Motion was supported by the law and by the facts. (Hearing Transc. p. 10:18-25.).[3] On March 24, 2020, the Trial Court issued her Order which explicitly stated that she reviewed the record, which contained a full copy of the Lease, when she made her ruling. (*See* Order Granting Summ. J., filed Mar. 24, 2020.). Courts will interpret contracts in accordance with its plain, ordinary, and popular meaning, except with technical language or where the context requires another meaning. *See M and M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 701 S.E.2d 33, (2010). The interpretation of the lease will not change at a rehearing as the Trial Court properly interpreted the lease already, and the Plaintiff has conceded to this interpretation. (*See* Order Granting Summ. J., filed Mar. 24, 2020.). As such, there is no evidence in the record which supports any contention that Wells Fargo has a valid meritorious defense. *See Thompson*, 299 S.C. 116, 382 S.E.2d 903.

[3] *Assuming arguendo* that this matter Appeal is denied, the Plaintiff, who is the only party to have asserted claims against Saul has conceded on the record that Saul's interpretation of the lease is supported by the law and by the facts of this case. As such, Plaintiff has agreed that Saul cannot be liable under any claims asserted by the Plaintiff in the underlying case. Given this, a rehearing on Saul's Motion will do nothing more than to lead to the same conclusion: Saul should be dismissed.

ii. The record lacks any newly discovered evidence.

A trial court may relieve a party from a final judgment, order, or proceeding if "newly discovered evidence which by due diligence could not have been discovered in time to move from a new trial under Rule 59(b)" is presented to the trial court. Rule 60(b)(2), SCRCP. Trial courts are empowered to grant a new trial if a party establishes the newly discovered evidence (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching. *See Morin v. Innegrity, LLC*, 424 S.C. 559, 819 S.E.2d 131 (Ct. App. 2018). Evidence is not "newly discovered" if it is known to the party at trial and in the party's possession. *Lanier v. Lanier*, 364 S.C. 211, 218, 612 S.E.2d 456, 459 (Ct. App. 2005).

Wells Fargo submitted its "newly discovered evidence" as affidavits from Ervin H. Weatherly and Gerald Scott Wooten, both employees of Wells Fargo. (*See* Wells Fargo's Memo. in Supp.). The overwhelming majority of the information contained in these newly discovered Affidavits concern information relating to issues with the Lease, Esther S. Harnett's Affidavit, and the Belthoff emails, ***all of which were available to Wells Fargo at the time of the hearing***. (*See Id.*). There is no explanation in either Affidavits which explain why the sworn testimony was not known to the party at the time of the hearing on the Motion in 2020. (*See id.*). Further the record supports the fact that the Lease, Esther S. Harnett's Affidavit, and the Belthoff emails were filed on January 20, 2020 and were available to Wells Fargo. (See Saul's Memo. in Reply.). The record presented to the Trial Court established that the majority of the arguments presented in these Affidavits were known to Wells Fargo at the time of the hearing on the Motion and were in Wells Fargo's possession as they were filed with the Court. (*See Id.*). Nevertheless, the Trial Court abused its discretion by ignoring the record which evidenced that Wells Fargo did not have any

explanation as to why the "new evidence" was recently discovered and that Wells Fargo did not possess the Lease, Esther S. Harnett's Affidavit, and the Belthoff emails which resulted in an error of law, which is contrary to the record in this matter and resulted in an error of law.

Nevertheless, Saul will break down the two affidavits in order to show they are not newly discovered evidence:

a. Affidavit of Gerald Scott Wooten is not newly discovered evidence.

Mr. Wooten's affidavit states that a) he has personal knowledge of the lease and disagrees with Esther Harnett's affidavit; and b) he has issues relating to matters that occurred on April 25, 2018, including the Belthoff emails. (*See* Wells Fargo's Memo. in Supp, Ex. C.).

First, Mr. Wooten's affidavit violates the Parole Evidence Rule. The parole evidence rule states that a valid written contract, which is complete, and the terms of which are not ambiguous, cannot be contradicted, added to, altered, or varied by extrinsic evidence. *Garnett v. WRP Enterprises, Inc.*, 380 S.C. 206, 669 S.E.2d 591 (2008). The full and unambiguous Lease was provided to the Trial Court at the time of the filing of the Motion and at the hearing. (*See* Mot. for Summ. J., Ex. A.). Nothing in Mr. Wooten's affidavit will change the result if a new hearing is granted as his affidavit cannot be used to interpret the terms of the Lease. *See Garnett*, 380 S.C. 206, 669 S.E.2d 591. Indeed, Wells Fargo does not even argue ambiguity.

Second, Mr. Wooten's affidavit concerns issues that were known or should have been known to Wells Fargo prior to the date of the hearing. Despite Wells Fargo obtaining the Affidavit on April 21, 2021, and of course, only presenting it to the Court on July 6, 2021, which is 109 days after filing the instant motion, there remains no evidence or testimony from anyone as to why this was not discovered before. (*See* Wells Fargo's Memo. in Supp, Ex. C.). In fact, nowhere in Wells

Fargo's Memorandum of Law or supporting Affidavits does it explain why Mr. Wooten's Affidavit was not available prior to the hearing. (*See Id.*).

Third, Mr. Wooten's affidavit is simply cumulative and impeachment testimony. The Trial Court was presented with the entire Lease. (*See* Mot. for Summ. J., Ex. A.). Mr. Wooten's Affidavit is simply that he disagrees with Ms. Harnett's affidavit, which was filed on January 20, 2020. (*See* Wells Fargo's Memo. in Supp, Ex. C.). This could have been presented in 2020 prior to the hearing. It was not. ***Nothing in Mr. Wooten's affidavit changes the terms of the Lease***. *See Garnett*, 380 S.C. 206, 669 S.E.2d 591. Mr. Wooten's Affidavit is not newly discovered and any reliance by the Trial Court in granting Wells Fargo's Motion to Set Aside is an abuse of discretion which amounted in an error of law.

b. Affidavit of Ervin H. Weatherly is not newly discovered evidence.

Weatherly's affidavit states that a) he has personal knowledge of the lease and disagrees with Esther Harnett's affidavit; b) arguments relating to his interpretation regarding an alleged interaction with Esther Harnett on February 22, 2021; and c) issues relating to matters that occurred on April 25, 2018, including the Belthoff emails. (*See* Wells Fargo's Memo. in Supp, Ex. F.).

First, and once again, Mr. Weatherly's affidavit violates the Parole Evidence Rule for the same reasons set forth above with Mr. Wooten's affidavit. *See gen. Garnett*, 380 S.C. 206, 669 S.E.2d 591. Any sworn statements by Mr. Weatherly in his Affidavit regarding the lease violates the parole evidence rule. *See Id.* The full and unambiguous Lease has been provided to this Honorable Court at the time of the filing of the Motion and at the hearing. (*See* Mot. for Summ. J., Ex. A.). Any reliance by the Trial Court that Mr. Weatherly's affidavit would change the result of a new hearing is an erroneous error as his affidavit cannot be used to interpret the terms of the Lease. *See gen. Garnett*, 380 S.C. 206, 669 S.E.2d 591.

Second, Mr. Weatherly's Affidavit concerns matters that were known or should have been known to Wells Fargo prior to the date of the hearing: i.e. the Belthoff emails. (*See* Wells Fargo's Memo. in Supp, Ex. F.). As already explained, these emails were made an exhibit to the Motion at the time of filing and were available to Wells Fargo at the time of the hearing. (*See* Mot. for Summ. J., Ex. C.). Any argument that the Belthoff emails were misrepresented by Saul should have been made at the time of the hearing. Additionally, Mr. Weatherly's Affidavit contains a self-serving conclusory assertion that Ms. Harnett was bragging that "she misrepresented the content of the Belthoff letters, the lease provisions, and the facts of her sworn affidavit". (*See* Wells Fargo's Memo. in Supp, Ex. F.). Other than the alleged statements that "she was able to use the Belthoff 'nasty letters' against Wells Fargo," the Affidavit fails to explain how/why this statement is a misrepresentation. (*See* Wells Fargo's Memo. in Supp.). Indeed, Saul did rely on the Belthoff email and presented it to the Court. (*See* Mot. for Summ. J., Ex. C.). The Belthoff emails unequivocally take the position that the parking area is Wells Fargo's dominion and under its control. (*See Id.*). Regardless, the Belthoff emails were filed with Saul's Motion on January 20, 2020 and were available to Wells Fargo on March 17, 2020. (*Id.*).

Third, Mr. Weatherly's affidavit was filed simply in an effort to create an issue of fact to revisit summary judgment. The Trial Court was presented with the entire lease, the Belthoff emails, and the Affidavit of Esther S. Harnett at the hearing of the Motion. (*See* Mot. for Summ. J., Ex. A, C, and D.). Wells Fargo received them when the Motion was electronically filed as well and did nothing. (*See* Saul's Memo. in Opp. to Mot. to Set Aside at Ex. 1 and 3.). Mr. Weatherly's Affidavit is simply an attempt to create a material issue of fact under the guise of a Rule 60(b) Motion. All that is being attempted is an effort to impeach Ms. Harnett. Nothing in Mr. Weatherly's affidavit changes the terms of the lease, nor does it demonstrate that the Trial Court's

prior conclusion was incorrect. Mr. Weatherly's Affidavit is not newly discovered and Wells Fargo's Motion to Set Aside should be denied.

D. Wells Fargo's assumed defenses were information that were known at the time of the hearing on the Motion.

Assuming arguendo that the arguments set forth in Wells Fargo's Memorandum of Law in Support are considered Wells Fargo's asserted "meritorious defenses," these arguments are baseless. (See Wells Fargo's Memo. in Supp.). Wells Fargo's asserted the following "arguments" regarding information that was known at the time of the hearing, namely:

1. Issues relating to Esther S. Harnett's Affidavit, which was filed as an exhibit to Saul's Motion on January 20, 2020, and was available at the hearing on March 17, 2020;

2. Issues relating to the terms of the Lease, which was filed as an exhibit to Saul's Motion on January 20, 2020, and was available at the hearing on March 17, 2020;

3. Issues relating to the Deposition of Plaintiff Eddie B. Lewis, which took place on November 14, 2019, and was available to Wells Fargo; and

4. Issues relating to the emails sent by Rich Belthoff, which were made as an exhibit to Saul's Motion on January 20, 2020, and were available at the hearing on March 17, 2020. (*See Id.*).

A majority of the arguments set forth by Wells Fargo relate entirely to documents and affidavits which were available at the time of the hearing. (*See* Saul's Memo. in Reply.). Once again, it is undisputed that despite having counsel of record, Wells Fargo neglected to make even the most basic argument against Saul's Motion. Nevertheless, in the context of a Rule 60(b) Motion to Set Aside, Wells Fargo was allowed to take its second bite of the proverbial apple, even though it ignored its first opportunity. The appropriate approach would have been to address these concerns *at the time of the hearing.* The Trial Court erred by allowing Wells Fargo to bring its

arguments regarding a Motion for Summary Judgment that was heard on March 17, 2020. This stands for the proposition that litigation has no end, counsel and clients who do nothing in response to a properly filed motion and who later determine they are dissatisfied with the outcome can come back to Court and hit "reset" flies in the face of the notion of time deadlines/limitations. As has been stated by another court, "[i]f procrastination is the thief of time, as the philosophers moralize, it is also the pillager and despoiler of rights, privileges and prerogatives." *Gloeckner v. School Dist. of Baldwin*, 175 A.2d 73, 76 (Pa. 1961).

Wells Fargo sat on its hands for an unreasonable amount of time and now come to the Trial Court in an improper attempt suggest impropriety on the part of Saul, so as to reargue Summary Judgment because they are now dissatisfied with the result. Wells Fargo's Motion to Set Aside Judgment should be denied.

iii. There has been no fraud on the part of Saul as Wells Fargo failed to appear and argue at the appropriate time and thus has not established their inability to counter the arguments and supporting documents submitted by Saul

A claim of fraud upon the court, as a ground for relief from judgment, requires proof by clear and convincing evidence. *See Sanders v. Smith*, 431 S.C. 605, 848 S.E.2d 604 (Ct. App. 2020). A party may not prevail on a motion for relief of judgment on the basis of fraud where he or she has access to disputed information or has knowledge of inaccuracies in an opponent's representations ***at the time of the alleged misconduct***. *Raby Const., L.L.P. V. Orr*, 358 S.C.10, 594 S.E.2d 478 (2004) (emphasis added). A judgment may be set aside on the ground of fraud only if the fraud is "extrinsic" and not "intrinsic." *See Corley v. Centinnial Const. Co.*, 247 S.C. 179, 188, 146 S.E.2d 609, 613-14 (1966). The *Corley* Court stated that:

> '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; 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. *See Ray v. Ray*, 474 S.C. 79, 647 S.E.2d 237 (2007).

a. Wells Fargo failed to raise the arguments regarding fraud at the time of the hearing

Wells Fargo's Motion to Set Aside fails to identify by clear and convincing evidence of extrinsic fraud upon the Court. (*See* Wells Fargo's Mot. to Set Aside.). Virtually all of the arguments set forth by Wells Fargo relate to arguments made by Saul in its Motion, which could have been presented by Wells Fargo at the time of the hearing. (*See Id.*). All of the materials presented by Saul were made available to Wells Fargo prior to the hearing on Saul's Motion for Summary Judgment. (*See* Saul's Memo. in Opp. to Mot. to Set Aside at Ex. 1 and 3.). Nowhere in the record has there been any argument made by Wells Fargo to the otherwise. (*See* Wells Fargo's Mot. to Set Aside; *see also* Wells Fargo's Memo. in Supp.). Saul did not hide any of its evidence or information. Nowhere in Wells Fargo's Motion to Set Aside or Memorandum of Law in Support is there any reason given as to why Wells Fargo failed to file a responsive memorandum, appear at the hearing, file a motion to reconsider, or appeal the Trial Court's Order. (*See Id.*).

A party may not prevail on a motion for relief of judgment on the basis of fraud where he or she has access to disputed information or has knowledge of inaccuracies in an opponent's representations ***at the time of the alleged misconduct***. *Raby Const., L.L.P. V. Orr*, 358 S.C.10, 594 S.E.2d 478 (2004). (emphasis added). Wells Fargo's baseless arguments that a fraud was committed upon the Court is entirely based on information and supporting documents that were available to Wells Fargo at the time of the alleged misconduct. *See Id.* Any reliance by the Trial

Court regarding fraud upon the Trial Court set forth by Wells Fargo are unsupported by the record and resulted in an abuse of discretion amounting in an error of law.

b. There has been no showing of extrinsic fraud in this matter

Wells Fargo asserts that Esther S. Harnett bragged about misrepresenting the contents of the Belthoff emails, the lease provisions, and the facts of her sworn testimony. (*See* Wells Fargo's Memo. in Supp.). Saul's Motion, which was supported by the lease, the Belthoff emails, and the Affidavit of Esther S. Harnett were filed on January 20, 2020. (*See* Mot. for Summ. J., Ex. A, C, and D.). Nowhere has it been explained or even argued that Wells Fargo was unable to discover the alleged fraud that was committed by Saul. (*See* Wells Fargo's Mot. to Set Aside; *see also* Wells Fargo's Memo. in Supp.). Simply put, there is no extrinsic fraud in this matter. *See gen. Ray v. Ray*, 474 S.C. 79, 647 S.E.2d 237 (2007). Statements made by Esther S. Harnett regarding Saul's dismissal after the fact based on exhibits and arguments that were available to Wells Fargo at the time of the hearing is not extrinsic fraud. Wells Fargo has the burden of proof to establish a claim of fraud upon the court, as a ground for relief from judgment, by clear and convincing evidence. *See Sanders v. Smith*, 431 S.C. 605, 848 S.E.2d 604 (Ct. App. 2020). The record is devoid of any argument, documents, or information that explains how or why Wells Fargo could not have discovered the alleged fraud at the time of the hearing. Wells Fargo failed to appear or argue its position at the time of the hearing. (*See* Saul's Memo. in Opp. to Mot. to Set Aside.). Wells Fargo has failed to prove by clear and convincing evidence that extrinsic fraud was committed. (*See Id.*).

c. Saul has been severely prejudiced by the Trial Court's Order Setting Aside Judgment

The Trial Court's Order has severely prejudiced Saul in that it has incurred significant costs and fees litigating a matter which has been conceded to by the Plaintiff on the record (Hearing

Transc. p. 10:18-25.). Further, Wells Fargo has not put forth any argument or supporting documents which refute Saul will be prejudiced, which it had the burden to do. *See BB&T*, 369 S.C. 548, 552, 633 S.E.2d 501, 503.

Nevertheless, Saul identifies the following manners in which it will be prejudiced: First, given the Plaintiff's concessions on the record, a rehearing on this matter will only reach the same conclusion: Saul being dismissed. Additionally, Saul has been prejudiced by not having an opportunity to participate in a year of discovery and depositions that have been undergoing since it was dismissed. As such, Saul will undertake significant legal fees and costs in re-noticing depositions and reviewing discovery due to Wells Fargo's unreasonable delay in making even a basic argument at the appropriate time. Wells Fargo, as the moving party, had the burden of proof and in this matter and there was none presented in making the Rule 60, SCRCP, motion. *See gen. BB&T*, 369 S.C. 548, 552, 633 S.E.2d 501, 503.

For this reason, the Trial Court exercised erroneous discretion in granting Wells Fargo's Motion to Set Aside with no factual basis in support. *See gen. Bridges*, 239 S.C. 37, 40, 121 S.E.2d 300, 302.

5. Wells Fargo has not come to Court with clean hands and has attempted to shift the burden of proof in deprivation of Saul's due process rights

Since Wells Fargo sought relief from judgment, it had the burden of presenting evidence proving facts essential to entitle relief. *Sanders v. Smith*, 431 S.C. 605, 848 S.E.2d 604 (Ct. App. 2020). Wells Fargo filed its Motion on March 19, 2021, which asserted that it will be supported with "sworn Affidavits of Wells Fargo representatives, and a Memorandum of Law…." (*See* Mot. to Set Aside.). As evidenced by the Plaintiff's Memorandum in response, the responding parties were left to guess as to what Wells Fargo's allegations and evidence presented was going to be. (*See* Pl. Memo. in Resp.). On July 6, 2021, one-hundred nine (109) days after the filing of its

Motion to Set Aside, Wells Fargo filed its affidavits and Memorandum of law. (*See* Memo. in Supp. Mot. to Set Aside.). Wells Fargo's Memorandum in Support of its Motion to Set Aside attempted to reargue the Motion for Summary Judgment in the context of a Rule 60(b) Motion. (*See Id.*). Pursuant to Rule 60(b), SCRCP, the burden of proof rested entirely on Wells Fargo, not Saul. *See Sanders*, 431 S.C. 605, 848 S.E.2d 604. However, Saul and the Plaintiff were left guessing as to what exactly were Wells Fargo's arguments when it made its Motion to Set Aside. (*See* Saul's Memo. in Opp. to Mot. to Set Aside, *see also* Pl. Memo. in Resp.). As the maxim goes, "he who seeks equity must do equity". *Provident Life & Accident v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (1994). Wells Fargo has not done equity in this instance. It sat on its hands and does not come to Court with clean hands. *See gen. Associate Spring Corp v. Roy F. Wilson*, 410 F. Supp. 967, 978 (D.S.C. 1976) (applying SC law and collecting cases noting parties who seek equity must come with clean hands).

Wells Fargo has caused this entire situation by its own failure to appear, oppose a motion, and its decision to make baseless accusations in an effort to avoid the consequences of its own inaction and omissions. Wells Fargo's original motion was devoid of articulable information, facts, law, etc. (*See* Mot. to Set Aside.). Saul and the Plaintiff have articulated that they were unable to address Wells Fargo's allegations in their original filings. (*See gen.* P. Memo. in Resp.; *see also* Saul's Memo. in Opp.). Finally, when Wells Fargo was forced to provide a more meaningful motion (well after the one-year requirement), Saul was given three-days to respond. (*See* Saul's Memo in Reply.). Despite Wells Fargo bearing the burden of proof, Saul has essentially had to defend itself in the "dark," while the impression that Saul has done something improper. Saul requested a hearing on the matter so as to make a full and complete record of this matter; however, the Trial Court denied this request. (*See Id.*). Wells Fargo had over a year,

beyond the provided one year timeframe of Rule 60, SCRCP, to provide clear and convincing evidence that Saul acted improperly. It failed to do so within the one-year time period contemplated by Rule 60, SCRCP. As such, the Trial Court erroneously exercised discretion in relying on any arguments and memorandum made by Wells Fargo which were made beyond the one-year timeframe laid out by Rule 60(b), SCRCP.

Conclusion

For these reasons, the Trial Court's Order granting Wells Fargo's Motion to Set Aside was an exercise of erroneous discretion and should be reversed.

Dated this 12th day of November, 2021. Respectfully,

WALL TEMPLETON & HALDRUP, P.A.

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