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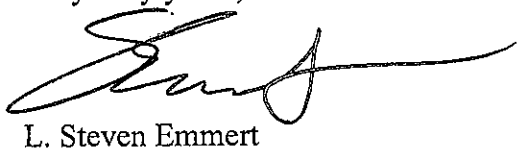
August 17, 2022

Dinwiddie Circuit Court
14008 Boydton Plank Road
Dinwiddie, Virginia 23841
Attn: Terri R. Driskill, Judicial Assistant

Dear Ms. Driskill:

I'm enclosing a courtesy copy of a reply brief that we filed in the Virginia Beach obscenity litigation, CL22-1985. I'm also enclosing a copy of an unpublished Supreme Court Order. I'd be grateful if you would forward these to Judge Baskervill. Kind regards.

Very truly yours,



L. Steven Emmert

LSE/kl
Enclosure

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

In re: Gender Queer, A Memoir

CASE NO: CL22-1985

MAIA KOBABE'S REPLY BRIEF

1. Altman declines to address the "considered as a whole" aspect of obscenity analysis.

In the opening brief, author Maia Kobabe explained that a court considering an obscenity petition must evaluate whether a challenged work, "considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex," etc. Code §18.2-372 (defining *obscene*); *see* §18.2-384(H). Obscenity analysis requires an evaluation of the whole work, not isolated excerpts. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 248 (2002) (reaffirming the "considered as a whole" requirement).

Kobabe's brief mentioned this requirement prominently, on p. 1; it then explored its contours in detail at pp. 4, 5, 6, and 7. The brief served as a roadmap, alerting Altman to what he must establish to further his aims.

But Altman chose to ignore the map. His brief leaves the road and sets off in other directions, deigning not to evaluate the whole book, but only those few slivers of it that displease him.

The word *whole* appears nine times in Altman's brief. The first five, on pp. 14-15, and the seventh, at p. 19, merely acknowledge the requirement. The sixth, at the

very bottom of p. 15, asserts with no analytical support at all that the seven pages he dislikes "encompass the theme of the book as a whole – portraying sexual conduct in a potentially offensive way with respect to what is suitable for minors or adults." This new assertion, absent from the petition, invites the Court to extrapolate blindly instead of actually considering the entire book. The eighth and ninth, on pp. 20 and 21, contain a citation to a case that Altman contends eliminates the need to consider the work as a whole.

Throughout all this, Altman never addresses the rest of the book. He never explains why the whole book is objectionable. He never tries to show the Court how the whole book appeals to a prurient interest in sex. He focuses solely on seven pages, invites the Court to speculate that the rest of the book is about sex instead of inclusiveness, and quietly closes his brief at the page limit.

When called upon to condemn an award-winning work of literature as obscene, a court deserves better. By declining even to present argument on the book as a whole, Altman leaves the Court with no grounds to rule in his favor. He effectively says to the Court, "*You* do the work. I'm not going to."

This is why the Court should grant Kobabe's motion to dismiss at this stage. A petition must state a claim for which relief can be granted; if it does not allege sufficient facts to establish a right to relief, there is no need for further proceedings. Because the petition does not rise to this first hurdle, never addressing the book as a whole, the Court should vacate the show-cause order and dismiss the case.

A. Changing times do not require changing the law.

To justify his refusal to address the totality of the book, as *Miller* requires, Altman contends that "as times have changed the law must evolve." Altman brief at p. 7; see also p. 1 ("times have changed, and that standard is no longer effective"). He seeks to persuade the Court to circumvent established First Amendment protections by describing what he views as key areas of cultural and legal change.

But this Court cannot simply rewrite constitutional law in this way. The Supreme Court of the United States reserves to itself "the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Lower courts must adhere to direct holdings until the high Court expressly revises them. *Id.*

Altman is correct that times have changed since the mid-twentieth century, when displaying contraceptives, depicting inter-racial intimacy, publishing images of same-sex intercourse, and distributing a sexually explicit satire of the Bible could provide a legal basis for sanctions under obscenity laws or laws applicable to disturbing the peace. *See, e.g., Mishkin v. New York*, 383 U.S. 483, 487 (1966) (Douglas, J., dissenting re obscenity classification of interracial intimacy photographs); *Terry v. State*, 152 Ga.App. 344 (1979) (upholding conviction for films depicting "interracial homosexual activities"); (*ACLU v. City of Chicago*, 13 Ill.App.2d 278 (1957) (reversing decision to withhold license for showing Rossellini's *The Miracle*). His pleading is akin to the beliefs of those who, after the Supreme Court's

rulings in *Loving v. Virginia*, 388 U.S. 1 (1967), falsely asserted that depicting interracial romance was nonetheless inappropriate in mass media.

The fact that such images as those culled from *Gender Queer* are now widely available throughout the country, including Virginia Beach, reflects recognition that the Due Process Clause, the Equal Protection Clause, and federal civil rights law all protect sexual expression. At a time when the Supreme Court has declared sexual expression, including gender fluidity, to be a protected element of American civic life, public morality does not provide a colorable basis for declaring the visual depiction of sexual diversity to be inherently obscene as to minors. *See, e.g., Bostock v. Clayton County and Harris Funeral Homes v. EEOC*, 590 U.S. ___ (2020).

B. Graphic novels enjoy no less protection than other media.

Altman claims that graphic novels, ostensibly "a relatively new concept that exploded in popularity beginning in 2020," fuse visual and verbal thinking in a way that "increases high-risk behaviors." Here, too, is an example of how cultural and legal changes expose Altman's claims as groundless.

This case is a reboot of the great comic-book scare of the mid-twentieth century, one of a series of failed attempts at content regulation by those who fear emerging media. *Brown v. Entertainment Merchants Ass'n,* 564 U.S. 786, 797 (2011). The article that Altman cites to prove the pernicious influence of graphic novels, at n.15 of his brief, is not, as he claims, from 1996. It is a 1948 opinion piece typifying the long-discredited moral panic in which comic books were seen as a leading cause

of juvenile delinquency. Martin L. Blumberg, "The Practical Aspects of the Bad Influence of Comic Books," *American Journal of Psychotherapy* 2:47-48 (1948).

A more modern scholarly view of graphic novels is in Altman's own n.14, which links to a 2017 Arizona State University discussion of the scientific, artistic, and literary "importance of the medium as a tool for literacy in an increasingly visual culture." The graphic novel's power as a form of expression testifies to its need for equally strong First Amendment protection. Contrary to Altman's florid warnings about risks that the comic arts pose for mirror neurons and the youthful neural cortex, the Supreme Court has long established that the "unquantified potential" for subsequent harm to juveniles does not provide adequate grounds for setting aside the *Miller* test. *Free Speech Coalition*, 535 U.S. at 250.

Graphic novels have the same First Amendment protection as movies, television shows, animation, streaming video, computer games, virtual reality, and other means of communication that fuse words and images. The *Miller* test applies across all expressive media without no exceptions for specific art forms.

C. *Ferber* does not apply here.

As noted above, Altman tries to evade the black-letter "considered as a whole" requirement by claiming, pp. 20-21 of his brief, that an excerpt can suffice; that considering the whole is now unnecessary. The case that he cites is fatal to his cause. *New York v. Ferber*, 458 U.S. 747 (1982) was about child pornography, an entirely different analytical category, "separate from the obscenity standard." *Id.* at 764.

In explaining the comparison between obscenity and child pornography, the Supreme Court ended any hope that Altman could rely on the *Ferber* test here. To evaluate child pornography,

> [t]he *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole.

Id. Thus, in the context of child pornography – an issue that Altman does not assert here – a factfinder need not address the whole work. But in an obscenity case, a court must evaluate the whole of the work, by statute and by constitutional law.

The *Ferber* Court explained this distinction in its discussion of the harms of child pornography, including the harm it can cause to children thus exploited. *Id.* at 756-60. There is no such victim in a hand-drawn depiction of an imagined scene. *See also U.S. v. Williams*, 553 U.S. 288, (2008) ("the child-protection rationale for speech restriction does not apply to materials produced without children"). *Gender Queer* is a hand-drawn work; no children were harmed or at risk of being exploited in it.

This is the case that Altman relies upon for his otherwise–unsupported assertion that a court may consider only fragments, instead of the work as a whole. Kobabe's book – even the pages that so offend Altman – is a literary and artistic memoir, and accordingly "retains First Amendment protection." In any event, resolution of this case undeniably requires consideration of the book as a whole, something that Altman has never even attempted to address.

2. Altman has no right to relief under Code §18.2-384.

In his brief at 24-25, Altman disavows any reliance on Code §18.2-391. He insists that §18.2-384 empowers the Court to make a finding only as to juveniles, despite their not being mentioned anywhere in that statute.

A plain reading of §18.2-384 shows otherwise. The statute addresses all citizens' access to books – and via §18.2-385, movies – while §18.2-391 addresses juveniles' access to a full range of media, from discrete pictures, photos, and sculptures to entire books, games, and films. This is how the legislature addressed the Supreme Court's recognition in *Ginsberg v. New York* of material obscene as to minors, with §18.2-384 covering books and films that could be subject to a general restraining order and §18.2-391 for the narrower class of material deemed harmful to juveniles.

Altman tries to make this inapposite statute fit anyway. He asserts that under subsection J, a court can find a book to be obscene generally, but may identify "a restricted category of persons to whom the book is not obscene." Brief of petitioner at 1. To suit his purposes, he proposes a remarkable approach to statutory construction: The "restricted category" here, he proposes, is adults.

This turns the statute on its head. *Restricted* in this context means "not general; limited." *Merriam-Webster's Collegiate Dictionary*, 11th ed. (2005) at 1063. But adults comprise the overwhelming majority of Virginia Beach's citizenry. *See* census.gov/quickfacts/fact/table/virginiabeachcityvirginia (last accessed August 10, 2022), showing that in the 2020 census, 22.2% of the Virginia Beach population

were under 18 years of age.[1] That means that adults made up 77.8% of the city's population – hardly a "restricted category."

"The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow or strained construction." *City of Charlottesville v. Payne*, 299 Va. 515, 527 (2021). A rule that applies to "everyone, except for 78% of the population" is not restricted. This statute does not permit this linguistic reengineering.

3. Altman cannot amend or augment his petition on brief.

Kobabe has argued that the petition fails to allege that the book offends relevant community values. *See, e.g.*, opening brief at 8. Perhaps sensing the importance of this omission, Altman inserts two pages of discussion in his brief, at 12-13, on community standards. But this passage never states what Virginia Beach community standards are; neither the petition nor the brief alleges that the book violates them.

More fundamentally, Altman cannot supply in a brief an essential component that is missing from his pleading. The Supreme Court has forbidden this practice, which would otherwise permit amendment of pleadings without leave of court. *Moore v. Fuller*, Record No. 160585, 2017 Va. Unpub. LEXIS 11 at *5 (May 4, 2017) ("... Fuller filed a motion to enforce the settlement agreement, which referenced a brief that attempted to plead the fraud claim for the first time. A brief, however, is

[1] Code §8.01-388 directs courts to take judicial notice of official government publications, of which the Census is unquestionably one.

not a pleading."). Because Altman has never *pleaded* that the book violates community standards, the Court cannot address that factor in this litigation.

Separately, in considering the sufficiency of Altman's petition, the Court should constrain its analysis to the facts asserted in that document. In his brief, he cites many extrinsic documents. Kobabe has filed a motion to dismiss for failure to state a claim, based on omissions in the petition; other parties have filed equivalent demurrers. In ruling on such challenges, courts are limited to the allegations in the original pleading. K. Sinclair, *Virginia Civil Procedure* (7th ed. 2020) at §9.6 ("Only matters stated on the face of the pleading demurred to or exhibited therewith may be reached by demurrer ....").

CONCLUSION

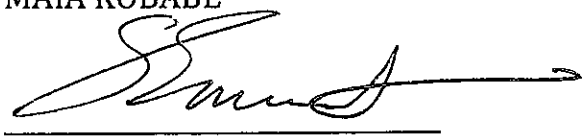
Altman's brief asserts that "times have changed" (p. 1), echoing a passage in Kobabe's opening brief at 4 ("The world portrayed in *Fun Home*, and in *Gender Queer*, has arrived, while Altman was looking the other way."). We no longer live in the 1950s; visual depictions of sexuality and gender identity are now commonplace. Altman's petition asks the Court to turn the clock back to that earlier era, shunning the fact that society has moved on.

Times have indeed changed, and expressions of sexual and gender identity are fully recognized by the U.S. Supreme Court in its privacy and protected-class

jurisprudence; but obscenity law has not. Challenged works like Kobabe's book must still be analyzed as a whole, a legal tenet that Altman refuses to accept.

The petition is facially defective. For the reasons stated here and in Kobabe's opening brief, the Court should vacate the show-cause order and either dismiss this case or enter an order declaring that *Gender Queer: A Memoir* is not obscene.

MAIA KOBABE

By: 

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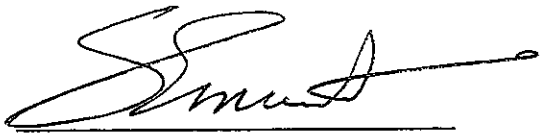
CERTIFICATE

I certify that I served a copy of this brief on all counsel of record this 15th day of August, 2022.



L. Steven Emmert

Moore v. Fuller

Supreme Court of Virginia

May 4, 2017, Decided

Record No. 160585

Reporter

2017 Va. Unpub. LEXIS 11 *

Donald Lee Moore, et al., Appellants, against Douglas W. Fuller, Trustee, et al., Appellees.

Notice: PURSUANT TO THE APPLICABLE VIRGINIA CODE SECTION THIS OPINION IS NOT DESIGNATED FOR PUBLICATION.

Prior History: **[*1]** Circuit Court Nos. CL14-5428 and CL15-609. Upon an appeal from a judgment rendered by the Circuit Court of the City of Virginia Beach.

Moore v. Fuller, 2016 Va. LEXIS 116 (Va., Sept. 9, 2016)

Counsel: For MOORE, DONALD LEE, TALBERT, JEFFREY T., (CO-TRUSTEE), RULOFF, ROBERT E., (CO-TRUSTEE), Appellant: EMMERT, LAWRENCE STEVEN, (ESQ.).

For FULLER, DOUGLAS W., (TRUSTEE), MOORE, ROBERT RAY, Appellee: KAHLE, DOUGLAS EUGENE, (ESQ.); ROBERTSON, GLEN MICHAEL, (ESQ.).

Opinion

This appeal arises from a judgment of the Circuit Court of the City of Virginia Beach that enforced a settlement agreement resolving a family dispute over two inconsistent trusts created by Frances Moore. The order also made express factual findings about representations made by appellants, Donald Lee Moore, Jeffrey T. Talbert, and Robert E. Ruloff, during the mediation that led to the settlement agreement.

I.

Robert and Donald Moore are the two sons of Frances Moore.[1] In 2012, Frances created two trusts for her assets, a September 2012 trust naming Robert as trustee and a December 2012 trust naming Donald, along with licensed Virginia attorneys, Robert Ruloff and Jeffrey Talbert, as co-trustees. Robert later named Douglas Fuller as co-trustee of the September 2012 trust that he controlled. Fuller **[*2]** initially filed in the circuit court a "Bill for Aid and Guidance," which was subsequently amended with leave of court. This pleading requested "aid and guidance" on whether assets originally placed in the September 2012 trust remained assets of that

[1] For the sake of convenience, we refer to Frances, Robert, and Donald Moore by their first names.

trust after the creation of the December 2012 trust. J.A. at 5. Donald instituted a separate action by filing a petition seeking the appointment of a guardian and conservator for Frances, which sought to have Robert removed as Frances's agent under an existing power of attorney and to have Ruloff appointed as her guardian and conservator. Both of these actions were consolidated by the circuit court, and after several months of litigation, the parties submitted to mediation to resolve the dispute.

The mediation resulted in a settlement agreement that, among other things, awarded Robert an interest in a piece of property, which is referred to as "the Edinburgh property." *Id.* at 15. The settlement agreement also required all parties to execute "full and complete releases" of "any and all claims" against the other parties. *Id.* Two weeks after the mediation, appellants filed a complaint in a separate action to enforce the settlement agreement, and shortly **[*3]** thereafter in the existing consolidated case, Fuller filed a motion to enforce the settlement agreement. In Fuller's brief in support of his motion to enforce the agreement, he asserted a fraud claim, arguing that appellants had misrepresented to Robert the value of the Edinburgh property as $1.6 million and had provided false financial documentation listing the property as an asset of the December 2012 trust. Fuller did not seek rescission of the settlement agreement, but instead, he affirmed it and requested that the court find that appellants had committed fraud against Robert and order appellants to either convey the Edinburgh property to Robert or pay Robert the $1.6 million that they had represented as the value of the property. Based upon his fraud allegation, Fuller also sought an award of $350,000 in punitive damages, $3,300 in mediation fees, and attorney fees.

The court convened an evidentiary hearing to resolve the issues regarding the enforcement of the settlement agreement a few weeks after Fuller filed his motion to enforce it. After receiving testimony and evidence at the hearing, the court entered a final order on January 20, 2016, ordering the enforcement of the settlement **[*4]** agreement, as both parties had requested. The order also made express factual findings that appellants had "committed actual fraud against Robert" by misrepresenting the value of the Edinburgh property interest, which the court found to be worthless and non-existent. *Id.* at 469. The court also found that Robert had "justifiably relied on the[se] material false representations." *Id.* at 470.

In February 2016, the court issued a rule to show cause for appellants to demonstrate why they should not be held in contempt for failing to comply with the court's order to enforce the settlement agreement. At a

telephonic hearing, appellants maintained that they would comply with the order only after Fuller and Robert executed full releases of their claims against appellants as provided in the settlement agreement. Fuller argued that the order should have expressly excluded the fraud claim from the release provision of the settlement agreement. The court then entered an order that amended the final order by excepting from the settlement agreement's release provision any claim that Robert may have against appellants as a result of "(I) the actual fraud they committed in procuring the Settlement Agreement, and (2) their failure **[*5]** to convey title, not a quit claim, to the Edinburgh property." *Id.* at 481. The court entered this order on February 24, 2016 — 35 days after the January 20, 2016 final order. The court stated that this amendment corrected "a scrivener's error" and "that equity require[d] such a correction to the Order." *Id.* at 480-81.[2]

The appellants filed this appeal challenging various aspects of the circuit court's January 20, 2016 order, which contained the findings of fraud, and its subsequent February 24, 2016 order, which amended the prior order to fix the purported scrivener's error. We find it necessary to address only two of these challenges.[3]

II.

A. THE FACTUAL FINDINGS OF FRAUD & JUSTIFIABLE RELIANCE IN THE JANUARY 20, 2016 ORDER

We first address appellants' challenge to the circuit court's factual findings of fraud and justifiable reliance, as this challenge is a threshold question for several of appellants' other assignments of error. In its January 20, 2016 order, the circuit court expressly found that appellants had "committed actual fraud against Robert" by making false representations to him about the value of the Edinburgh property interest and that Robert had "justifiably relied on the[se] material false representations." **[*6]** *Id* at 469-70.

The court made these fraud findings, comprising two paragraphs of the order, in response to Fuller's attempt to plead a fraud claim in his brief filed in support of his motion to enforce the settlement agreement, which the motion merely referenced. The brief also requested certain relief for appellants' alleged fraud, including specific performance, compensatory damages of $1.6 million, $350,000 in punitive damages, $3,300 in mediation fees, and attorney fees.[4]

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[2] The February 24, 2016 order also included a paragraph that enforced the settlement agreement by directing appellants to pay Robert $400,000, to convey title to another piece of property, which is referred to as the "Elbow Road" property, and to "execute a mutual release consistent with the terms of this order." J.A. at 481.

[3] *See infra* note 8.

[4] Fuller ultimately waived his request for $350,000 in punitive damages. J.A. at 420.

Appellants contend that Fuller's fraud claim and requested relief were not properly pleaded, and therefore, the circuit court could not make any findings concerning fraud or grant any of the relief requested. We agree.

Proper pleading "is the *sine qua non* of every judgment or decree. No court can base its decree upon facts not alleged, nor render its judgment upon a right, however meritorious, which has not been pleaded and claimed." *Potts v. Mathieson Alkali Works, 165 Va. 196, 207, 181 S.E. 521, 525 (1935)*. As we have often said, "[p]leadings are as essential as proof." *Ted Lansing Supply Co. v. Royal Aluminum & Constr. Corp., 221 Va. 1139, 1141, 277 S.E.2d 228, 229 (1981)* (citation omitted). *See generally* Kent Sinclair & Leigh B. Middleditch, Jr., Virginia Civil Procedure § 8.1[A], at 695 (6th ed. 2014). Not just any pleading will do; it must be a *"valid* pleading." *Harrell v. Harrell, 272 Va. 652, 657-58, 636 S.E.2d 391, 394-95 (2006)* (emphasis added). After a pleading has been filed, **[*7]** it may only be amended by leave of court and within any applicable time frame after leave to amend has been granted. *See Rule 1:8*. "An amendment made without leave of court has no legal efficacy, and the court does not have [active] jurisdiction to adjudicate any causes of action alleged in the amended [pleading]." 1 Charles E. Friend & Kent Sinclair, Friend's Virginia Pleading and Practice § 6.07[1], at 6-15 (2d ed. 2007).

At the evidentiary hearing on Fuller's motion to enforce the settlement agreement, the circuit court stated that it had no authority to grant the relief requested by Fuller on the fraud claim. After receiving evidence and oral argument, the circuit court concluded: "[T]his case before me is simply a case in which a court of equity is being asked to give aid and guidance in determining which of these trusts predominates .. . . That's all that was prayed for. That's all that was pled by either party." J.A. at 410. The circuit court further observed that "[t]otally different relief [was] being asked" for in Fuller's brief in support of the motion to enforce the settlement agreement and emphasized that courts do not "have the authority to give relief that wasn't prayed for." *Id.* at 411.

On appeal, Fuller concedes **[*8]** that the circuit court's refusal to *grant relief on* the fraud claim was "in strict accord with the principles found in *[Ted Lansing Supply Co.],"* Appellees' Br. at 20, but he claims that the court had the authority to *adjudicate* (without granting relief) the fraud claim. We find this distinction illusory in this context.

In the consolidated proceeding, Fuller's initial affirmative pleading was a Bill for Aid and Guidance, which he properly amended once with leave of court. Fuller never requested leave to amend this pleading *after* the facts allegedly supporting the fraud claim arose as a result of the

mediation. Instead, Fuller filed a motion to enforce the settlement agreement, which referenced a brief that attempted to plead the fraud claim for the first time.[5] A brief, however, is not a pleading. *See* Rule 3:18(a) (defining pleadings as "[a]ll motions in writing, including a motion for a bill of particulars and a motion to dismiss"). And even if the brief could be considered part of the motion to enforce the settlement agreement by reference, Fuller did not seek leave for this motion to serve as an amendment to his initial pleading, the Bill for Aid and Guidance. Just as a court cannot consider an amended **[*9]** complaint filed without leave of court, it cannot consider a lesser pleading, such as the motion filed in this case, as an amendment to the initial affirmative pleading without leave of court. *See* Harrell, 272 Va. at 657, 636 S.E.2d at 394-95 (dismissing an amended bill of complaint for failure to obtain leave to amend pursuant to Rule 1:8).

Even though Fuller never properly pleaded fraud, he contends that the circuit court's fraud findings are nevertheless justified. This is true, he reasons, because adjudication of the fraud allegation was an "essential" factual predicate to the court's denial of Fuller's request for specific performance. Appellees' Br. at 20. We disagree with this reasoning.

As Fuller recognizes in his brief on appeal, the "trial court reasoned that it did not have the authority to grant this relief' because, he concedes, "it was beyond the scope of what was properly before the court and would require the court to re-write the Settlement Memorandum, something the trial court refused to do." *Id.* at 19-20. Far from being essential to the court's ruling, the unpleaded fraud allegation was irrelevant to the court's stated rationale. The only essential issue was whether the court could order specific performance **[*10]** — enforcing the agreement by requiring a conveyance of property — against a party that did not own the property. A collateral issue was whether the court could rewrite the settlement agreement to require a party to first purchase the property prior to being ordered to convey it. The court ruled against Fuller on both issues.[6] It did not

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[5] When a party asserts fraud, "the *pleading* must show *specifically* in what the fraud consists, . . . and since fraud must be clearly proved it must be distinctly stated." Mortarino v. Consultant Eng'g Servs., 251 Va. 289, 295, 467 S.E.2d 778, 782 (1996) (emphases added) (alterations and citation omitted).

[6] No objection to these holdings was made at the evidentiary hearing, and no assignment of cross-error was assigned to either holding on appeal. Thus, they are now the law of the case and may not be addressed further. *See* Kondaurov v. Kerdasha, 271 Va. 646, 658, 629 S.E.2d 181, 188 (2006) ("Under the law of the case doctrine, a legal decision made at one stage of the litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time." (alterations and citation omitted)). Therefore, the remedy of specific performance based on fraud is now unavailable as Fuller has waived any right to challenge the court's refusal to grant specific performance. As

matter, for the purpose of answering either question, whether the putative owner misrepresented an ownership interest or the value of the property. For these reasons, the circuit court erred in making factual findings concerning an unpleaded fraud claim.[7] We thus vacate the two paragraphs containing factual findings of fraud and justifiable reliance in the circuit court's January 20, 2016 order.[8]

B. THE FEBRUARY 24, 2016 ORDER'S AMENDMENTS TO THE JANUARY 20, 2016 ORDER

Appellants also challenge the circuit court's February 24, 2016 order, which purported to correct "a scrivener's error" in the January 20, 2016 final order by adding additional language to the circuit court's holding that the settlement agreement be enforced. J.A. at 480. This additional language excepted from the settlement agreement's release provision **[*11]** any claim that Robert may have against appellants as a result of "(1) the actual fraud they committed in procuring the Settlement Agreement, and (2) their failure to convey title, not a quit claim, to the Edinburgh property" interest awarded to Robert in the settlement agreement. *Id.* at 481. Appellants contend that certain provisions of the February 24, 2016 order violate *Rule 1:1* because the court entered that order more than 21 days after the January 20, 2016 final order and because the changes made to the final order were substantive and not mere corrections of clerical mistakes as permitted by *Code § 8.01-428(B)*. We agree.

"All final judgments, orders, and decrees . . . shall remain under the control of the circuit court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." *Rule 1:1*. *Code § 8.01-428(B)* runs parallel with *Rule 1:1* and permits a circuit court, at any time, to correct "[c]lerical mistakes in all judgments . . . arising from oversight or from an inadvertent omission." But this

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for the monetary relief Fuller requests in support of his fraud claim, neither party raises on appeal the effect, if any, of res judicata on a subsequent action brought on a properly pleaded fraud claim. *See generally Funny Guy, LLC v. Lecego, LLC, 293 Va. 135, 154 n.19, 795 S.E.2d 887, 897 n.19 (2017)*. We offer no opinion on this issue.

[7] Because [a]ll parties stipulated that the Settlement Memorandum was enforceable" and requested that the circuit court enforce it, J.A. at 468, we will not disturb the circuit court's holding to enforce the settlement agreement in the January 20, 2016 order.

[8] Relying on *Metrocall of Delaware, Inc. v. Continental Cellular Corp., 246 Va. 365, 437 S.E.2d 189, 10 Va. Law Rep. 433 (1993)*, and *Murayama 1997 Trust v. NISC Holdings, LLC, 284 Va. 234, 727 S.E.2d 80 (2012)*, appellants also challenge the circuit court's finding that Robert justifiably relied on material false representations during the settlement negotiations. Because this order vacates the court's findings of fraud and, by extension, justifiable reliance, we need not address that portion of Assignment of Error 1. Assignments of Error 2, 3(b), and 4 further challenge the admissibility of statements made during the mediation, the absence of due process in an evidentiary hearing on the fraud claim conducted after only a two-week notice, and Fuller's standing to assert a fraud claim on Robert's behalf. These assignments of error are moot because this order vacates the circuit court's factual findings of fraud and justifiable reliance, and we need not address them.

"power to amend should not be confounded with the power to create," and amendments made pursuant to *Code § 8.01-428(B)* "should not be made to supply an error of the court or to show what the court should have done as distinguished from **[*12]** what actually occurred." *Council v. Commonwealth, 198 Va. 288, 292, 94 S.E.2d 245, 248 (1956)*. Rather, the court's authority "extends no further than the power to make the record entry speak the truth." *Id.; see also Davis v. Mullins, 251 Va. 141, 149, 466 S.E.2d 90, 94 (1996)* (acknowledging that "the statutory power granted by *Code § 8.01-428* is to be narrowly construed and applied").

The circuit court erred in entering the February 24, 2016 order. Because the court had no authority to make factual findings of fraud in the January 20, 2016 order, it likewise had no authority in its February 24, 2016 order to rule that those fraud findings survived the waiver provision in the settlement agreement or that the alleged fraud consisted, in part, of appellants' "failure to convey title, not a quit claim, to the Edinburgh property." J.A. at 481. The February 24, 2016 order thus fails for the same reason that the January 20, 2016 order fails: They both adjudicate a fraud claim that was not properly pleaded. The record also confirms that the circuit court entered the February 24, 2016 order outside the court's 21-day window of active jurisdiction even though the amendments did not correct scrivener's errors, technical clerical errors, mere oversights, or inadvertent omissions as *Code § 8.01-428(B)* contemplates. Rather, the amendments included substantive **[*13]** revisions of the final order and were made more than 21 days after its entry in violation of *Rule 1:1*. We thus vacate the February 24, 2016 order.

III.

In sum, we vacate the two paragraphs containing factual findings of fraud and justifiable reliance and the dismissal of the cases in the circuit court's January 20, 2016 order. We also vacate in its entirety the February 24, 2016 order and remand this case for further proceedings.[9]

This order shall be certified to the Circuit Court of the City of Virginia Beach.

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[9] Appellants request that we enter final judgment on appeal, "direct[ing] the parties to carry out the settlement memorandum as it is written, including full releases by all parties of any and all claims they have against each other and delivery of a quitclaim deed to the Edinburgh property, thus bringing this litigation to an end." Appellants' Br. at 27. We decline the invitation to do so, however, because that would require us to offer advisory opinions on matters not ripe for appellate resolution. We will instead rely upon the circuit court to address these residual issues on remand and to determine the most prudent process of bringing this case to closure. The court's authority includes the power to stay entry of its final judgment on remand based on the pendency of collateral litigation, if any, involving the previously unpleaded fraud allegations.

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