ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III

Case No. 2011-CP-07-2176
Appellate Case No. 2013-000222

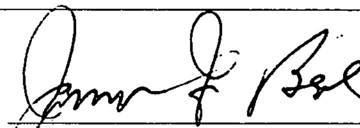
Bloody Point Property Owners Association, Inc., David L. Fingerhut, and Patricia M. Santry ....Respondents,

v.

William A. Ashton, Jr. and Michele C. Ashton..Appellants.

FINAL BRIEF OF APPELLANT

October 24, 2013



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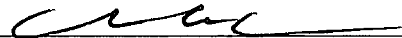

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STATEMENT OF THE CASE

The Appellants, William A. Ashton, Jr. and Michelle C. Ashton, on June 12, 2001, purchased Lot number 55 Daufuskie Island Club, Phase 1, Bloody Point, Beaufort County, South Carolina, also known as 42 Fuskie Lane, (hereafter the "Property") for the sum of $201,500.00. The Appellants maintained continuous ownership of the Property from that date through January of 2012. In the interim, the developer of Bloody Point, and the development itself, experienced significant financial issues to the point that a bankruptcy action was initiated relating to the development. As part of that financial difficulty, most if not all, of the services being provided to the Property Owners by the Bloody Point Property Owners Association, Inc. (hereinafter the "Association") were either significantly curtailed or eliminated completely. In conjunction therewith, Appellants received a letter from the Association informing them that Bloody Point had gone "belly up" and that the golf course had been shut down. Thereafter, the operations of the Association, including the collection of regime fees and the providing of services to the Property Owners for such fees, were discontinued for a period of time.

At some point subsequent thereto around about January 1, 2010, the Association apparently attempted to again start collecting regime fees from the property owners of Bloody Point, including the Appellants, commencing with a $1,150.00 assessment, which fees were not received from the Appellants. As a result thereof, a lien was filed on December 13, 2010, against the Property, and thereafter a foreclosure action was instituted on May 17, 2011, to foreclose that lien. At the time suit was instituted, the amount due and owing for regime fees and charges was Three Thousand Five Hundred Forty-Seven and

50/100 ($3,547.50) Dollars.

In that the Appellants were residents of Chester County, Pennsylvania, counsel for the regime made arrangements with the Chester County Sheriff's Office to attempt personal service of the Summons and Complaint upon the Appellants. A Deputy Sheriff, Kurt Hansen, from the Chester County Sheriff's Office, submitted Affidavits of Service (in reality non-service) to the Regime's counsel indicating that on three (3) different business days he had attempted service at the Appellants' residence, during business hours, without success. His Affidavits indicated that on one occasion there was a car in the driveway and the garage was open, but he was unable to locate anybody in or about the residence. His Affidavits also indicated that he made a second attempt at service on one of the other business days at approximately 7:08 p.m., but there was no one home at the residence at that time.

Counsel for the regime, Julie Serafino, upon receipt of the aforesaid Affidavits from the Chester County Sheriff's Department, undertook no further effort to effect personal service upon the Appellants, through either a private process server or registered mail, return receipt requested, or otherwise. Instead Julie Serafino filed an Affidavit with the Clerk of Court requesting an Order of Publication. The Affidavit failed to state, on its face, that the parties sought to be served by publication "cannot, after due diligence, be found within the state, and (a) that fact appears by Affidavit...", as required under the publication statute. Based on the aforesaid defective Affidavit, the Clerk of Court issued an Order of Publication allowing said publication to be made in the *Island Packet*, a local newspaper for Beaufort County, as opposed to a paper most likely to give notice to the Appellants, such as a local newspaper in Chester County, Pennsylvania, where the Appellants were known to reside.

After the publication ran three (3) times in the *Island Packet*, the Respondent, Bloody Point, thereafter filed an Affidavit of Default and sought a Default Judgment against the Appellants. The Appellants, residing in Pennsylvania and not in Beaufort County, South Carolina, were unaware of the publication of the Summons and Complaint, and therefore, never responded to the same. Thereafter, a hearing was held before The Honorable Marvin H. Dukes, III, Master in Equity for Beaufort County, on December 2, 2011, as a result of which the Master's Report and Judgment of Foreclosure and Sale was entered on December 6, 2011, and the Property was sold at public auction on January 3, 2012. The highest bidder at the auction, the Respondents herein, David L. Fingerhut and Patricia M. Santry, bid Eight Thousand Eight Hundred ($8,800.00) Dollars for the Property, an amount just slightly in excess of the amount then due and owing pursuant to the lien, by $133.00. The Property was thereafter conveyed to the Respondent by the Master's Deed dated January 6, 2012, and recorded January 11, 2012, in the Office of the Register of Deeds for Beaufort County, in Book 03111 at Page 1291.

On or about January 14, 2012, the Appellants received a letter from the Master in Equity, The Honorable Marvin H. Dukes, III, which indicated that the Property had been foreclosed by the Association and sold at a foreclosure sale. In response thereto, Appellants promptly contacted Judge Dukes' office, and after being advised that they needed to retain a lawyer, contacted Appellants' counsel in an effort to set aside the aforesaid foreclosure sale.

A Motion to Vacate/Set Aside Foreclosure Sale, Void Master in Equity Deed and Vacate/Set Aside Order was filed by Appellants' counsel on February 2, 2012. Respondents, David L. Fingerhut and Patricia M. Santry, filed a Memorandum in Opposition to the

aforementioned Motion dated May 9, 2012. Thereafter the matter was heard before the Master in Equity, The Hon. Marvin H. Dukes, III, on May 14, 2012. Judge Dukes issued his decision from said hearing on July 25, 2012. Thereafter, the Appellants filed a Motion for Reconsideration, on July 30, 2012, and a hearing thereon came to be heard on October 16, 2012. Judge Dukes issued his Order denying Appellants' Motion to Reconsider, but which did not end the case, on December 28, 2012, a copy of which was received on January 8, 2013, and which Judge Dukes subsequently supplemented with his Amended Order, ending the case, received on January 23, 2013. Thereafter, Appellants filed their Notice of Intent to Appeal on January 31, 2013, which was filed with the Court of Appeals on February 1, 2013.

ARGUMENT

I. WAS THE SERVICE OF THE SUMMONS AND COMPLAINT UPON THE APPELLANTS, WILLIAM C. ASHTON, JR. AND MICHELE C. ASHTON, BY PUBLICATION FATALLY DEFECTIVE?

The Appellants were not properly served with the Summons and Complaint in the underlying action, such that the Court did not have jurisdiction over them. This argument was raised by Appellants by way of several theories both at the original hearing in this matter, on Appellants' Motion to Vacate/Set Aside Foreclosure Sale, Void Master in Equity Deed, and Vacate/Set Aside Order (the transcript of hearing thereon is hereinafter referred to as "Transcript 1"), and in their Motion to Reconsider (the transcript of hearing thereon is hereinafter referred to as "Transcript 2"). See Transcript 1 (R. p. 62, line 14 –p. 67, line 1; R. p. 81, line 21 –p. 82, line 20; R. p. 83, line 7 –p. 87, line 21); and Transcript 2 (R. p. 90, line 2 –p. 96, line 13). An Order of Publication of known parties *must* direct the publication

be made in one newspaper ***most likely to give notice*** to the person to be served and for such length of time as may be deemed reasonable not less than once a week for three weeks. (Emphasis added.) S.C. Code Ann. §15-9-740 (1976). South Carolina Courts have repeatedly required strict compliance with publication statutes. Caldwell v. Wiquist, Op. No. 5105 (S.C. Ct. App. Filed March 27, 2013) (Shearhouse Adv. Sh. No. 14 at 99). To avoid resolving litigation by default, strict compliance with the publication statutes is appropriate. *Id.* It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or opportunity to be heard, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such fundamental rights. Webster v. Clanton, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972). A judgment by a court without jurisdiction of **both the parties and the subject matter** is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied upon. *Id.* (Emphasis added.)

The Master in Equity's Findings of Fact from the July 25, 2012, Order Denying Defendant's Motion to Vacate/Set Aside Foreclosure Sale, Void Master in Equity Deed, and Vacate/Set Aside Order, set forth at Page 2 that the Appellant's last known address was 120 Marlbrooke Way, Kennett Square, Pennsylvania. (R. p. 2). No party appealed this ruling; therefore, it is the law of the case. *See* ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling is law of the case and should not be reconsidered by the appellate court). The Master's July 25, 2012, Order further set forth in its Findings of Fact that publication was made by Plaintiffs in the *Island Packet*, which the Trial Court set forth in Footnote 1 is a newspaper circulated

in Beaufort County, South Carolina. (R. p. 2). No party has appealed this ruling either, such that it is also the law of the case. *See* ML-Lee Acquisition Fund at 241. The *Island Packet* is distributed primarily in Beaufort County. Caldwell at Footnote 2. No evidence was introduced that the *Island Packet* is distributed in Chester County, Pennsylvania, the County in which the Appellants' residence in Kennett Square is located. It is further undisputed that the Property at issue in this matter (Lot 55) is an undeveloped lot located at 42 Fuskie Lane, Daufuskie Island, South Carolina, 29915, which is located in Beaufort County.

S.C. Code Ann. §15-9-740 sets forth in relevant part that an Order of Publication ***must*** direct the publication be made in one newspaper ***most likely to give notice*** to the person to be served (Emphasis added). Nevertheless, the legislature elected not to define the terms "must" or "most likely." Where the legislature elects not to define a term in a statute, the courts will interpret the term in accord with its usual and customary meaning. Adoptive Parents v. Biological Parents, 315 S.C. 535, 542, 446 S.E.2d 404, 408 (S.C. 1994). If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision), 332 S.C. 551, 572, 505 S.E.2d 598, 609 (Ct. App. 1998). "Must" is mandatory language, setting forth that one must take or refrain from some action. *See* South Carolina Police Officers Retirement Sys. v. City of Spartanburg, 301 S.C. 188, 391 S.E.2d 239 (1990) ("must is mandatory"). As such, it is clear that the Order of Publication is absolutely required to direct publication in one newspaper *most likely to give notice* to the person to be served. *See* Brown v. Malloy, 345 S.C. 113, 127, 546 S.E.2d 195 (Ct. App. 2001).

("Superimposed upon the requirements of the Order of Publication is the mandate of section 15-9-740, which requires publication in a newspaper 'most likely to give notice to the person to be served.'")

The Appellants set forth that it is unreasonable to expect that a newspaper of general circulation in Beaufort County, South Carolina, would be the newspaper "most likely to give notice" to the Appellants. As such, Respondent, Bloody Point Property Owner's Association, Inc. (hereinafter "Bloody Point"), failed to strictly comply with S.C. Code §15-9-740 by publishing its Notice in the *Island Packet*, a newspaper of general circulation in Beaufort County, South Carolina, when attempting service upon ***known*** parties that resided out-of-state. (Emphasis added.) Respondent, Bloody Point, further knew, and public records, including the Beaufort County Assessor's records, showed that the Property in question was undeveloped and otherwise unimproved, such that it is difficult to fathom that one would reside at or about the subject Property. Moreover, the attorneys for the regime, the entity responsible for enforcing the Restrictions in Covenants applicable to Bloody Point, certainly knew that those Restrictions and Covenants prohibited the Appellants from utilizing their undeveloped lot for purposes of camping or other overnight activities, such that there was no chance whatsoever that the Appellants were residing on that Property, and thus likely to receive Notice through publication in the *Island Packet*. On the other hand, publication in *The Daily Local News,* a newspaper of general circulation in Chester County, Pennsylvania, would have given the Appellants proper Notice of the pending action, as it is a local newspaper most likely to give notice to them. The Caldwell Court recently wrote, in reference to one of the same South Carolina newspapers utilized herein for service by

publication, to-wit: The *Island Packet*, "A Plaintiff who has no other remedy than to effectuate service by publication is more likely to reach a Defendant not located in the County by publishing service in a publication with a broader distribution area." Caldwell at Footnote 2. The Court of Appeals' footnote follows the same common sense logic that Appellants have argued, to-wit: that to publish a Summons in a locally circulated South Carolina newspaper located hundreds of miles from the residence of those to be provided constructive notice regarding an action concerning an undeveloped lot is clearly not the newspaper most likely to give notice, especially when there is another newspaper in their home County which is certainly more likely to provide Notice. The Order of Publication is therefore facially inadequate and defective, as Bloody Point failed to strictly comply with the requirements of S.C. Code §15-9-740, such that due process and prior South Carolina precedents support the assertion the Trial Court lacked jurisdiction over the Appellants herein. Without jurisdiction over the Appellants, known and necessary parties, the judgments rendered are a nullity and must be treated as such.

Additionally, the Trial Court's decision was controlled by a fundamental error of law, as it was improper for the Court to rely on the procedures found in S.C. Code §15-9-720(B)(1) dealing with "unknown parties," as the basis for its decision and findings regarding proper service via publication. While the legislature did not define the term "unknown parties," common sense seems to dictate that these are parties who are not able to be identified utilizing reasonable prudence. In fact, Webster's Dictionary defines "unknown" in relevant part as: "not discovered, explored, identified, or ascertained." Webster's New Universal Unabridged Dictionary, 2079 (1996). Bloody Point clearly "knew" who the

parties to the action were, as they were named as Defendants in all pleadings from the beginning of the underlying case. Where the legislature elects not to define a term in a statute, the Courts will interpret the term in accord with its usual and customary meaning. Adoptive Parents v. Biological Parents, 315 S.C. 535, 542, 446 S.E.2d 404, 408 (S.C. 1994). If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision), 332 S.C. 551, 572, 505 S.E.2d 598, 609 (Ct. App. 1998). While S.C. Code § 15-9-720(B)(1) may direct proper methods to follow when dealing with "unknown" parties, one is not unidentified solely because he or she is not at home in order to receive personal service.

The Affidavits requesting service by publication are facially defective in that they failed to strictly comply with the statutory requirements set forth in S.C. Code §15-9-710, such that proper jurisdiction was not obtained. S.C. Code § 15-9-710 begins in relevant part, "When the person on whom the service of the summons is to be made cannot, **after due diligence, be found within the State and** (a) that fact appears by Affidavit..." (Emphasis added). Appellants would assert that this case is more factually similar to the recent decision in Caldwell v. Wiquist, Op. No. 5105 (S.C. Ct. App. Filed March 27, 2013) (Shearhouse Adv. Sh. No. 14 at 99), than to those cases distinguished therein.

The Order for Publication signed by the Beaufort County Clerk of Court was supported by three (3) separate documents: an Affidavit for Order of Publication signed by attorney Julie A. Serafino; an Affidavit of Service (in reality non-service) from a Chester

County, Pennsylvania; Sheriff's Deputy, as to Appellant William A. Ashton; and an Affidavit of Service (in reality non-service) from a Chester County, Pennsylvania, Sheriff's Deputy, as to Appellant Michele C. Ashton. (R. pp. 132-134). Attorney Julie A. Serafino's Affidavit is facially defective in that it fails to allege the Appellants could not be found within the State ***after due diligence***; the Affidavits utilized by Respondent, Bloody Point, to obtain the Order for Publication fail to allege that the Appellants are residents of South Carolina, or any state other than South Carolina, such that a proper newspaper for publication could not be determined by the issuing clerk or judge; and the Order for Publication made no finding of due diligence, such that it is distinguishable from prior South Carolina precedent, and facially defective. (R. pp. 132-136).

Attorney Julie A. Serafino's Affidavit for Order of Publication is facially defective in that it fails to allege the Appellants, **after due diligence**, could not be found within the State of South Carolina, a position supported by the South Carolina Court of Appeals' recent decision in Caldwell. (R. p. 132). South Carolina Courts have repeatedly required strict compliance with publication statutes. Caldwell at 104. The Caldwell Court found the case of Nash County v. Allen, 241 N.C. 543, 85 S.E.2d 921 (1955), persuasive as a basis for issuing its opinion. The Nash Court stated its decisions "uniformly hold that where service of [the] Summons is made by publication, the requirements of the statute must be strictly followed" and "that everything necessary to dispense with personal service of [the] Summons must appear by Affidavit." Caldwell at 104-105; citing Nash County at 924. The Caldwell Court further cited Nash, setting forth: "Moreover, 'a[n] Affidavit on which publication is predicated is facially defective in the absence of an allegation that the person

on whom the Summons is so served cannot, after due diligence, be found within the State.'" *Id.* at 105. Finding that the Trial Court erred, as a matter of law, in denying the Defendant's Motion to Set Aside Default Judgment, the Caldwell Court, referencing the Affidavit(s) utilized to obtain an Order of Service by Publication, held that, "the Affidavit must include some factual basis which the court issuing the order of service by publication can find that the defendant cannot, after due diligence, be found within the state." *Id.* At 106. "Must" is mandatory language. *See* South Carolina Police Officers Retirement Sys. v. City of Spartanburg, 301 S.C. 188, 391 S.E.2d 239 (1990) ("must is mandatory"). A review of Julie Serafino's Affidavit reveals: 1) that no assertion is included that due diligence was used to locate or find the Appellants herein within the State ("The said Defendants' present whereabouts are unknown and said Defendants cannot be found within this State"); and 2) this defect is not cured by the two (2) respective Affidavits of Service produced by the Chester County, Pennsylvania, Sheriff's office, as these documents show, at best, that service attempts were made at 120 Marlbrooke Way, Kennett Square, Pennsylvania 19348. (R. pp. 132-134). Even if the Chester County Sheriff's Office's efforts were held to satisfy Respondent, Bloody Point's, due diligence requirements, a disputed point, asserting that due diligence was exercised to serve a party ***out-of-state*** is not equal to an assertion that one cannot, after due diligence be found ***within*** the state. (Emphasis added.) If the South Carolina Legislature intended to make compliance with the plain language of S.C. Code Ann. §15-9-710 optional, they could have easily done so via omission of the word "must", or by using an optional term, such as "may." Appellants assert that any other reading or interpretation of the publication statute, S.C. Code Ann. §15-9-710, would fail to require

strict compliance with the statute in contravention of long-standing precedent; would require reversal of prior South Carolina case law setting forth that "must" is mandatory language; and would further require holding that "out-of-state" or its equivalent is the same as "within the state", an outcome that could indeed lead to some clearly absurd results.

The Affidavits utilized to request and obtain the Order for Publication fail to allege that the Appellants are residents of South Carolina, or any state other than South Carolina, such that it was impossible for a proper newspaper for publication to have been determined by the issuing Clerk of Court or Judge. An Order of Publication of known parties ***must*** direct the publication be made in one newspaper ***most likely to give notice*** to the person to be served and for such length of time as may be deemed reasonable not less than once a week for three weeks. (Emphasis added.) S.C. Code Ann. §15-9-740 (1976). Due to the lack of such an allegation, the Clerk of Court had no basis for her decision to order publication in the *Island Packet* as the one newspaper most likely to give notice. To the extent that a residence could be discovered from the face of the submitted affidavits, it is clear that the last known address of the Appellants was in the state of Pennsylvania, such that it was error for the Clerk of Court to select Beaufort County as the proper place for publication. Additionally, no Affidavits submitted by Respondent, Bloody Point, alerted the Beaufort County Clerk of Court (or other Officer or Judge able to issue an Order of Service by Publication) that the Property at issue was undeveloped, such that equity demands that Respondent, Bloody Point, bear the burden of any omissions in their own submissions. The Clerk of Court made no finding as to the current or former residence of the Appellants; therefore, her decision to order publication in the *Island Packet* was made without the

necessary factual basis sufficient for issuing an Order, and her decision failed to strictly comply with the requirements set forth in S.C. Code §15-9-740 (1976). (R. pp. 135-136).

The Order for Publication in the instant matter contained no finding of due diligence, or even the mention of diligence, such that it is distinguishable from prior South Carolina precedent, and facially defective. (R. pp. 135-136). While the Order of Publication in Montgomery v. Mullins, 325 S.C. 500, 480 S.E.2d 467 (Ct. App. 1997), clearly contained a finding that "due diligence" was exercised prior to the issuance of same, the instant matter is distinguishable as no such language was included in the Order for Publication. In short, Appellants assert that the Order of Publication is invalid and facially defective, as if a Clerk of Court, or issuing Judge, does not specifically find that due diligence was exercised, the Order for Publication may not be issued pursuant to S.C. Code §15-9-710.

II. WAS SERVICE OF THE SUMMONS VIOLATIVE OF THE DUE PROCESS RIGHTS OF APPELLANTS, WILLIAM C. ASHTON, JR. AND MICHELE C. ASHTON?

The Affidavits requesting service by publication were void of any reference to due diligence exercised so as to locate the Appellants within South Carolina; Respondent, Bloody Point, failed to exercise due diligence prior to requesting service by publication; and Respondent, Bloody Point, failed to strictly comply with the publication statutes, such that service of the Summons violated the due process rights of Appellants, William C. Ashton, Jr. and Michele C. Ashton, and their Default and resulting Judgments related thereto should be set aside.

The Affidavits requesting service by publication were void, for the reasons set forth in Section "I" above, such that service by publication violated Appellants' due process rights

and their Default and resulting Judgments related thereto should be set aside. The United States Constitution provides, in pertinent part" "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. U.S. Const. Amend. XIV, §1. The South Carolina Constitution provides that, [n]o person shall be finally bound by a judicial or quasi judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard.". S.C. Const. Art. I, § 22. Similarly, the Order for Publication signed by the Beaufort County Clerk of Court supported by defective Affidavits cannot stand. A common sense approach to this issue evidenced simply by reference to and a facial review of the above-referenced defective Affidavits reveals that: 1) Respondent, Bloody Point, believed, in good faith at the time of filing the initial action, that South Carolina was a proper place to file this action, as evidenced by the case caption; and 2) that Respondent, Bloody Point, had information from some source it deemed credible that Appellants herein were current residents of another state, to-wit, Pennsylvania. Nevertheless, Respondent, Bloody Point, submitted Affidavits, seeking an Order for Service by Publication, which do not attest to any attempts whatsoever to locate or otherwise serve Appellants within South Carolina, yet still offer the conclusive statement that Appellants "cannot be found within the State." North Carolina's Nash County Court stated its decisions "uniformly hold that where service of [the] Summons is made by publication, the requirements of the statute must be strictly followed" and "that everything necessary to dispense with personal service of [the] Summons must appear by Affidavit." Caldwell at 104-105; citing Nash County at 924. Appellants became at risk upon Respondent, Bloody Point's, initiation of suit against them in a South Carolina Court of losing a property interest

protected by our Nation's and State's Constitutions, and corresponding strong rule of law. Respondent, Bloody Point, was required by law to exercise due diligence in locating Appellants within the State of South Carolina prior to seeking an Order for service by publication, which is essentially a form of constructive service that has little practical chance of being read, and, if the Caldwell Court's approval of Nash County is any indication, Appellants assert that Respondent, Bloody Point, had a legal duty to set forth, via Affidavit, what due diligence was indeed exercised to satisfy this obligation. This was not accomplished and, in fact, the mention of due diligence was not even facially present as to South Carolina. Appellants assert that their purchase of the subject piece of Property entitled them to the protection of the law, not limited to State and Federal Constitutional protections, including sufficient and proper notice of any action that could deprive them of their legal interest. Searching for Appellants solely in Pennsylvania while legally required to utilize due diligence to look for them in South Carolina, and failing to set forth these efforts via Affidavit, or even that due diligence was exercised as to South Carolina, is constitutionally deficient under both Federal and State amendments in order to initiate an action depriving Appellants of their property interest.

Respondent, Bloody Point, failed to exercise due diligence in its efforts to personally serve Appellants, William C. Ashton, Jr. and Michele C. Ashton in the State of Pennsylvania, prior to requesting an Order for service by publication, such that service by publication violated their due process rights and their default and resulting judgments related thereto should be set aside. While Respondent, Bloody Point, retained the services of the Chester County, Pennsylvania, Sheriff's Office in its attempts to personally serve the

Appellants herein, it is undisputed that no personal service in compliance with South Carolina Court Rules was accomplished. However, after no personal service was accomplished, Respondent, Bloody Point, failed to utilize any other efforts to locate or personally serve the Appellants.

The two (2) respective Affidavits provided by the Chester County Sheriff's Office, filed in support of Respondent, Bloody Point's, Motion seeking an Order for service by publication, are improperly filled out, with the deponent's signature line clearly blank. (R. pp. 133-134). While four (4) attempts at personal service upon Appellants were made by the Sheriff's Office, only one attempt was made during non-business hours upon two (2) separate individuals that were both professionals in the Pennsylvania area – one a doctor, and the other a realtor. Furthermore, the only after-hours attempt was made on the same date as an unsuccessful business hours attempt. (R. pp. 133-134). The record reflects that at no time did the Chester County Sheriff's Office even leave a note or card indicating that the Appellants had a visit from an officer. (R. p. 166; R. p. 169). Respondent, Bloody Point, was also on notice, when it received the two (2) Affidavits of Service evidencing that service was not successful, but that it appeared that someone was likely residing in the home, as a vehicle was in the driveway with an open garage door, that a little additional effort could very likely have yielded personal service. (R. pp. 133-134). Additional efforts that could have been expended included hiring a private process server able to make additional after-hours attempts, utilizing a skip trace, requesting an address search through the local U.S. Postal Service office, or even conducting a basic internet search for either Appellant, such as William C. Ashton, a doctor in the area. Furthermore, Respondent, Bloody Point, had all

contact information for the Appellants in its membership database, such that a simple phone call could have been made to arrange service or locate Appellants. Despite the plethora of options and information available to Respondent, Bloody Point, no reference was made to any additional efforts exercised before jumping towards a form of service that is recognized as the least likely means to give notice to even the most diligent property owner or potential litigant, to-wit, service by publication. Appellants assert that Respondent, Bloody Point, failed to exercise necessary due diligence in its purported attempts at personal service upon Appellants, and that these efforts were constitutionally deficient under both Federal and State amendments in order to initiate an action depriving Appellants of their property interest.

Respondent, Bloody Point, of its own volition, failed to strictly comply with the publication statutes, particularly by publishing notice in a newspaper that was **not** the one most likely to give Appellants notice of the action pending against them, such that service of the summons violated the due process rights of Appellants William C. Ashton, Jr. and Michele C. Ashton, and their default and resulting judgments related thereto should be set aside. Respondent, Bloody Point, was required by law to publish notice in one newspaper most likely to give notice to the Appellants. In order to have the Clerk of Court, or presiding Officer, issue an Order for Service by Publication, Respondent, Bloody Point, needed to provide the facts necessary to the issuing party to select the appropriate forum and newspaper for publication, via Affidavit. In the case *sub judice*, no Affidavits submitted by Respondent, Bloody Point, alerted the Beaufort County Clerk of Court (or other Officer or Judge able to issue an Order of Service by Publication) that the Beaufort County property at

issue was undeveloped; that the Appellants' last known addresses were in Chester County, Pennsylvania; nor that all public records and membership records at Bloody Point indicated that Appellants were residents of Pennsylvania, such that publication in Beaufort County would amount to in essence a futile attempt to locate parties almost certainly beyond the bounds of the local publication, to-wit, The *Island Packet*. Publishing notice in a Beaufort County, South Carolina newspaper of limited circulation involving the property rights of out-of-state residents hundreds of miles outside the circulation of the South Carolina newspaper in direct contravention of a state statute is constitutionally deficient under both Federal and State amendments in order to initiate an action depriving Appellants of their property interest when the most likely newspaper for publication could have been easily determined but for Respondent Bloody Point's failure to sufficiently allege facts necessary for the issuing officer to make an informed decision. Respondent Bloody Point failed to strictly comply with the publication statutes, such that service of the summons violated the due process rights of Appellants William C. Ashton, Jr. and Michele C. Ashton, and their default and resulting judgments related thereto should be set aside.

III. DOES A JUDICIAL SALES PRICE SHOCK THE CONSCIENCE OF THE COURT WHEN SOLD FOR LESS THAN TEN PERCENT OF THE ORIGINAL PURCHASE SALES PRICE, THE PROPERTY'S TAX ASSESSED VALUE, AND APPELLANTS' APPRAISER'S ASSIGNED VALUE?

Appellants assert that the Trial Court erred by relying on defective information when it made the determination that the judicial sales price for the second-row ocean-view real property at issue *sub judice* did not shock the conscience of the court, and further assert that a lot selling for less than ten percent of its original purchase sales price, the property's tax

assessed value, and Appellants' appraiser's assigned value, should shock the conscience of the Court, such that the judicial sale should be set aside. A mortgage foreclosure is an action in equity. Wells Fargo Bank, N.A. v. Turner, 378 S.C. 147, 150, 662 S.E.2d 424, 425 (Ct. App. 2008). The Court of Appeals' scope of review of a case heard by a Master in Equity who enters a Final Judgment is to determine facts in accordance with its own view of the preponderance of the evidence. *See Id.* A judicial sale can be set aside for two reasons: 1) if the inadequacy of the price is so gross as to shock the conscience of the court; or 2) if the price is inadequate and this inadequacy is accompanied by other circumstances that warrant the interference of the Court. Eastern Sav. Bank, FSB v. Sanders, 373 S.C. 349, 356, 644 S.E.2d 802, 806 (Ct. App. 2007). South Carolina has not established a bright line rule for what percentage the sale value must be with respect to the actual value in order to shock the conscience of the court. *Id.* at 359, 807. Even though there is no bright line rule in South Carolina, when judicial sales are for less than ten percent of a property's actual value, South Carolina courts have consistently held the discrepancy to shock the conscience of the court. *See Id.* Fair market value is defined as, "the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's length transaction." *Black's Law Dictionary: Third Pocket Edition* 754 (2006). The amount of a foreclosed note and mortgage is evidence of the property's value. *See* Wells Fargo Bank, N.A. at 151, 426. The price paid for property at an actual, voluntary, and bonafide sale thereof is presumptive evidence of the property's value. 32A C.J.S. Evidence §1049 at 840 (1964).

The Property at issue *sub judice* is located on Daufuskie Island, South Carolina, in Beaufort County, which is close to and only accessible via boat and ferry to its fellow resort

community of Hilton Head Island, South Carolina. This undeveloped lot is known, collectively, by its plat number as Lot # 55, and by its street address of 42 Fuskie Lane. Daufuskie Island has both gated and non-gated communities; among these gated communities are Melrose, Haig Point, and Bloody Point, which are located at different portions of the island. Bloody Point subdivision, in which the Appellants' property is located, has its own golf course, clubhouse, and additional upscale amenities; however, one of its prime features adding value for property owners is the fact that a significant portion of its lots are either oceanfront or oceanview. Especially enhancing to the value of its second-row lots, which are ocean-view in nature, is the fact that they are "staggered" to the extent possible in relation to the oceanfront lots so that the middle of each of the 2nd row lots are situate in an extended line back from the property line dividing the two (2) oceanfront lots in front of it. Such is exactly the case with the subject Property. In short, one can choose to build a home on a second-row lot in Bloody Point and still have a view of the Atlantic Ocean from various parts of the home, depending on the design of the home itself. (R. p. 146).

It is undisputed that the Appellants herein, William C. Ashton, Jr. and Michele C. Ashton, purchased 42 Fuskie Lane (Lot 55) in 2001 for $201,500.00, and this Deed was recorded in the Beaufort County Register of Deeds office, such that it provided public notice of this transaction. (R. pp. 155-157). Appellants herein submit that they should be given credit for this purchase price of $201,500.00 as evidence of the value of the fair market value of the property as if they had borrowed the purchase funds and secured same with a mortgage note, and that it violates South Carolina public policy and concepts of equity to place a cash purchaser in an inferior or subordinate position to those that purchase utilizing

loans. The amount of a foreclosed note and mortgage is evidence of the property's value. *See* Wells Fargo Bank, N.A. at 151, 426. It was error for the Trial Court to give subordinate status to the cash purchase price paid for this property simply because no mortgage was utilized to assist in paying the purchase price. The original purchase price paid by Appellants was almost twenty-three times greater than the judicial sales price of $8,800.00. (R. pp. 195-197). This amounts to about 4.3% of the original sales price, which is extremely close and analogous to the 3.65% held to shock the conscience of the court in Wells Fargo Bank, N.A. To hold that a purchase price paid in cash is not equivalent to a price paid only after securing a loan could "chill" the market for cash purchases, and therefore violates South Carolina public policy. The determination of value made by the Trial Court was in error, as Wells Fargo Bank, N.A. suggests that the "fair market value" was a proper standard to utilize when determining value.

It was additionally error for the Trial Court to discount the evidentiary weight of the property's tax assessed value of $140,000.00. (R. p. 171). Despite the purchase price of $201,500.00 paid by the Appellants, the Beaufort County Assessor's office reassessed and thereafter taxed 42 Fuskie Lane at a value of $140,000.00 beginning in 2009, a reduction from $181,500.00 utilized during the "real estate boom." (R. p. 171). The Beaufort County Assessor's office had seemingly always undervalued the property, as it was valued at $85,000.00 in 2002, the year after Appellants herein purchased same for $201,500.00. (R. p. 171). It is therefore reasonable to expect that the property is actually worth more than the assessed value. Tax Assessor values are often lower than fair market value prices. In fact, Respondents, David L. Fingerhut and Patricia M. Santry, submitted the case of Eastern Sav.

Bank, FSB v. Sanders to the Trial Court, in support of the proposition that an assessed tax value is clearly relevant indicia of the value of property, which may be considered by the Court in determining the fair market value. The County tax appraisal in Eastern Sav. Bank, FSB was $324,940.00, while the Master found the value of the property to be $550,000.00, a value approximately 1.7 times higher. The Beaufort County Assessor's determined value is a public record. The sales price of $8,800.00 was approximately one-fifteenth, or 6.3%, of the property's assessed value. Even if the Court determined that the price used in its formulation was $11,593.00, this yields a purchase price amounting to only 8.2% of the assessed value. Though South Carolina courts are free to hold that a judicial sales price in excess of ten percent of the fair market value is so gross as to shock the conscience of the Court, South Carolina courts have **consistently** held the discrepancy to shock the conscience of the Court when judicial sales are for less than ten percent of a property's actual value (Emphasis added). *See* Eastern Sav. Bank, FSB v. Sanders. The Trial Court committed error when it failed to give proper and sufficient credit to the Beaufort County Assessor's value of the subject property, in combination with the original purchase price and appraisal submitted by Appellants herein, such that the judicial sale should be set aside as so gross as to shock the conscience of the Court.

The Trial Court committed error in failing to give proper and sufficient evidentiary weight to the appraisal dated April 2, 2012, submitted by Appellants, utilizing actual comparable properties in the Bloody Point subdivision, which assigned a value of $140,000.00 to the property *sub judice*. (R. pp. 139-154). The April 2, 2012, appraisal properly describes the subject Property as a golf-view **and** second-row ocean-view lot. (R.

p. 140). This contrasts starkly with the appraisal submitted by Respondents, David L. Fingerhut and Patricia M. Santry, relied upon by the Trial Court, which utilizes sales generated by banks, fails to mention the second-row nature of the lot in its description as to view, and utilizes as "comparable lots" inland golf course lots which are located over a mile away, in a totally separate subdivision. (R. pp. 260-269). Location and view make up a sizeable portion of the value of a lot – the Respondents' appraisal relied upon by the Trial Court was defective in this respect. Appellants submit that their April 2nd appraisal was actually conservative in nature, as a truly comparable lot located within Bloody Point, Lot 45 Bloody Point, located at 70 Fuskie Lane, as opposed to Melrose subdivision, was valued at $107,000.00 in the April 2, 2012, appraisal commission by appellants; however, this lot sold for $126,650.00 in September of 2012, an amount more than 18% higher than the conservative appraised value assigned it on April 2, 2012. (R. p. 140; R. p. 174). Utilizing this same formula based on an actual comparable sale of a similar second-row ocean-view lot with an inferior rear-view, the Property at issue would have yielded a sales price in excess of $165,500.00. A sale at $165,500.00 is almost 19 times higher than the $8,800.00 judicial sale price, and still more than 14 times higher than the $11,593.20 calculated when additional assessments due and sales taxes were included. Even if the subject Property only sold for the same as Lot 45, to wit: $126,500.00, the bid price was less than 9.2% of its value, and therefore should shock the conscience of the Court. It was also error for the Court to rely on a past property tax sale value of the subject Property when determining fair market value, as this price could not legally amount to a fair market value determination. Those who show up at tax sales are generally seeking to secure bargain basement purchases, to

secure a relatively high-interest return if the property is redeemed, or a combination of both. The owner of the property auctioned at a tax sale has not said they are willing to accept a value proposed by a bidder at a tax sale, such that it is not a willing transaction, and therefore facially cannot amount to the legal definition of a fair market value determination. If it was the intention of the Court of Appeals to use bids at a tax or foreclosure sale, then there would be no need to apply the "so gross as to shock the conscience" standard. Finally, Appellants assert that the most reliable evidence of the fair market value of the property at issue includes a combination of original purchase price, tax assessed value, and appraised value utilizing sales data from similarly situated lots in the same subdivision. The Respondents, David L. Fingerhut and Patricia M. Santry, were critical of and even felt that their appraisal for title insurance purposes was far lower than they expected when taking a financial risk by placing a bid at the judicial sale, as evidenced by their e-mail concerning the low appraised value. (R. pp. 270-271). The preponderance of the evidence is in favor of a fair market value finding between $140,000.00 and $201,500.00 for the property at issue *sub judice*, such that the sales price was well below the ten (10%) percent of fair market value point consistently held, but not required by prior precedent in past South Carolina cases as being so gross as to shock the conscience of the Court.

IV. <u>IS A PURCHASER AT A JUDICIAL SALE AFFECTED WHEN HE OR SHE FAILS TO MAKE PROPER AND SUFFICIENT INQUIRY AS TO THE JURISDICTION OF THE COURT AND THE PROPERTY OWNERS WERE NOT PROPERLY BEFORE THE COURT?</u>

Respondents, David L. Fingerhut and Patricia M. Santry, are not bonafide good faith purchasers for value of the subject Property, due to their failure to properly inquire as to the

jurisdiction of the Court that ordered the judicial sale, and due to their failure to properly and sufficiently inquire as to whether all parties were properly before the Court when the Order was made, such that the judicial sale should be set aside. South Carolina judicial "decisions have applied the general rule, . . ., that a purchaser in good faith at a judicial sale is not affected by irregularities in the proceedings or even error in the judgment under which the sale is made; but **is required, at his peril only to make inquiry as to the jurisdiction of the Court which ordered the sale, and whether all parties were before the Court when the Order was made.**" (Emphasis added). Cumbie v. Newberry, 251 S.C. 33, 37, 159 S.E.2d 915, 917 (1968). To "require" is to impose an obligation on; compel." The American Heritage Dictionary." Second College Edition, 1050 (1982). "The purchaser in good faith at a judicial sale is bound only to see that the Court had jurisdiction of the subject of the action and of the parties in interest." Bennett v. Floyd, 237 S.C. 64, 70, 115 S.E.2d 659, 662 (1960). A purchaser at a judicial sale is deemed to have notice of all things disclosed by the record. *See Ex Parte Keller*, 185 S.C. 283, 293, 194 S.E. 15, 19 (1937). A mortgage foreclosure is an action in equity. Wells Fargo Bank, N.A. v. Turner, 378 S.C. 147, 150, 662 S.E.2d 424, 425 (Ct. App. 2008). The Court of Appeals' scope of review of a case heard by a Master in Equity who enters a Final Judgment is to determine facts in accordance with its own view of the preponderance of the evidence. *See Id.*

As set forth above, there is no evidence in the underlying foreclosure action that the Appellants herein were ever served personally with the Summons and Complaint, nor that Notice was published in the newspaper most likely to give them notice. Respondents, David L. Fingerhut and Patricia M. Santry, were required to affirmatively make inquiry as to

whether the Court had jurisdiction of the subject of the action **and** of the parties in interest. According to his own Affidavit submitted to the Trial Court, the Respondent, David L. Fingerhut, is a self-described specialist in real estate law, and an attorney with over 25 years of real estate experience, and he is an investor in several foreclosed properties in Beaufort County. (R. p. 256). As such, Respondent, David L. Fingerhut, was qualified and otherwise sufficiently well-versed to make the above determinations, yet he failed to do so. In fact, Respondent, David L. Fingerhut, candidly admits that he did not review the Court's file prior to purchasing the property at issue in order to determine if the Court acted with jurisdiction. In his Affidavit, attached as Exhibit "M" to the Memorandum in Opposition to Defendant's Motion to Vacate/Set Aside Foreclosure Sale, Void Master in Equity Deed and Vacate/Set Aside Order, David L. Fingerhut wrote: "I reviewed the Notice of foreclosure sale for Lot # 55, Dafauskie Island Club Phase I, Bloody Point and attended the foreclosure sale held on January 3, 2012." (R. p. 256). David L. Fingerhut further wrote, "When I first learned of the [Appellants'] claims, **well after the closing of title to the Property, I personally conducted an investigation in order to learn . . . how they could have forfeit [sic] their rights to the Property**." (Emphasis added). (R. p. 258). A review of the closing statement, which was submitted as an exhibit by Respondents, David L. Fingerhut and Patricia M. Santry, to the Trial Court, indicates that a title abstract was not performed until **after** the foreclosure sale. (R. pp. 252-254). As set forth by prior precedent cited above, it was incumbent upon Respondents, David L. Fingerhut and Patricia M. Santry, to investigate **prior** to taking title to the Property; however, at his own "peril," David L. Fingerhut, a sophisticated party who was well-versed in such transactions and procedures, waited until

after he took title to make such an inquiry.

Respondents, David L. Fingerhut and Patricia M. Santry, are not good faith purchasers for value, such that the foreclosure sale should be vacated and otherwise set aside. Had Respondents, David L. Fingerhut and Patricia M. Santry, actually reviewed the Court's file prior to the sale, rather than after the sale, they would have known that the Appellants resided in Pennsylvania, and that Notice was improperly published in Beaufort County, South Carolina, due to the *Island Packet* not being the newspaper most likely to give Notice to Appellants, such that the Trial Court did not have jurisdiction over the Appellants. All of these points were disclosed by the Court record, of which Respondents, David L. Fingerhut and Patricia M. Santry, were deemed to have notice. Specifically, the Master in Equity's Report and Judgment of Foreclosure and Sale put the Respondents, David L. Fingerhut and Patricia M. Santry, on Notice to further investigate, at paragraphs 4 and 11 respectively, when it sets forth that an "Affidavit of Service" is in the file and the "Property is not the primary residence of the" Appellants. (R. p. 158; R. p. 160). In truth, as argued above, the only "Affidavit of Service" in the Court's file was tantamount to an Affidavit of **Non**-Service of out-of-state residents, living hundreds of miles away, who were known parties to the action, with publication in a newspaper of limited circulation only where Appellants owned an undeveloped lot on an island accessible solely via boat or ferry. Furthermore, there was no proof in the Court's file that the Order for Service by Publication was complied with as to mailing a copy of the Summons and Complaint to the Appellants due to the lack of any Certificate of Mailing or Service in the file. This missing Certificate of Service did not even exist until created by Respondent, Bloody Point's, counsel (see

Transcript No. 1, R. p. 64, line 14 –p. 66, line 11) after initiation of the proceedings to Set Aside the Default and Judicial Sale, and was thereafter submitted into evidence over the strong objection of Appellants. (R. p. 273). Respondents, David L. Fingerhut and Patricia M. Santry, cannot be considered bonafide purchasers when the public record contained adequate Notice that the foreclosure proceedings were defective.

CONCLUSION

Based on all of the above, the Appellants respectfully request this Court reverse the Beaufort County Master-in-Equity's Order dated July 24, 2012, denying the relief sought by Appellants, as affirmed by the Master-in-Equity after consideration of Appellant's Notice of Motion and Motion to Reconsider, filed January 22, 2013, and in its stead hold the following:

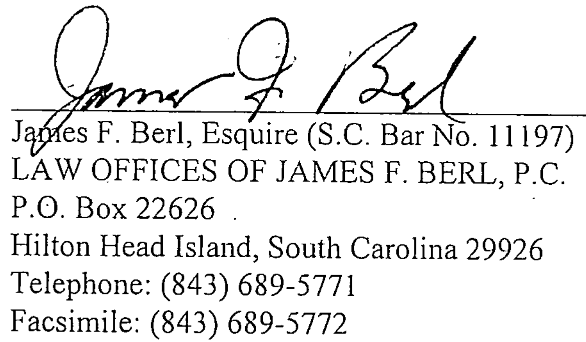
1) that the Trial Court should have vacated/set aside the foreclosure sale of January 3, 2012;

2) that the Trial Court should have voided the Master-in-Equity Deed dated January 6, 2012, which was recorded on January 11, 2012, in the Office of the Register of Deeds for Beaufort County, South Carolina, in Book 3111 at Page 1291; and

3) that the Order of The Honorable Marvin H. Dukes, III, dated December 2, 2011, should be set aside and/or vacated.

Respectfully submitted:

October 24, 2013



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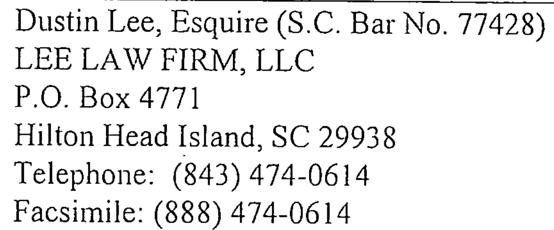

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III

Appellate Case No. 2013-000222

Bloody Point Property Owners Association, Inc., David L. Fingerhut, and Patricia M. Santry)..Respondents,

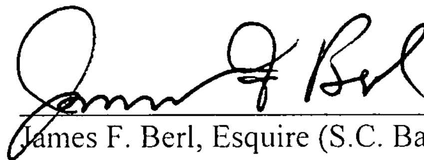
v.

William A. Ashton, Jr. and Michele C. Ashton....................................Appellants.

CERTIFICATE AND PROOF OF SERVICE

I hereby certify that the Final Brief of Appellants complies with Rule 211(b), and that I have served a copy of the Final Brief of Appellants upon the Respondents, by depositing a copy thereof in the United States Mail, postage prepaid, on this 24th day of October, 2013, addressed to: Matthew E. Tillman, Esquire, Womble, Carlyle, Sandridge & Rice, LLP, P.O. Box 999, Charleston, SC 29402, (843) 720-4629, Counsel of Record for Respondents, David L. Fingerhut and Patricia Fingerhut (a/k/a Patricia M. Santry).

October 24, 2013



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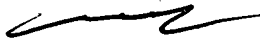

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