IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master in Equity

Case No. 2013-CP-10-4248

Belle Hall Plantation Homeowner's Association.....Respondent,

v.

John A. Murray, Trustee of the John E. Murray and
Gloria C. Murray Family Trust, Defendant

Of whom David Conor Keys & Karen Keys, Third Party Plaintiffs.....Appellants.

FINAL BRIEF OF APPELLANTS

November 22, 2015
Charleston, SC

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INTRODUCTION

This matter has a tortured procedural history, which resulted in a number of compounding motions and orders upon the same subject matter. At its core this Appeal is about the Respondent Trust's Motion to Vacate the Order of Foreclosure and Sale.[1] All issues and defenses concerning that Motion must have been raised before the Master by the end of the July 3, 2014 hearing. However, long after July 3, 2014, the Trust continued to request additional basis for relief and assert additional defenses. In response the Master continued to evolve and expand his initial ruling through additional orders. The substantive facts have never changed. The result is a collection of compounding orders dispensing relief which was either not requested and/or not timely request by the Trust. Many of the issues addressed herein were not raised nor preserved for appeal.

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[1] This Appeal also involves the denial of the Motion and Stay and for Order of Supercedeas; a denial of a Motion to Strike Certain Affidavits; and the granting of a Motion to Amend the Order Vacating the Order of Foreclosure and Sale.

STATEMENT OF THE CASE

Procedural and Factual History

October 26, 2011, John A. Murray as attorney-in-fact for John E. Murray and Gloria C. Murray deeded the property, at 378 Jardinere Walk, Mt. Pleasant, SC (hereinafter "the Property") to John A. Murray as Trustee for the John E. Murray and Gloria C. Murray Family Trust. (R. pp. 235-257). May 23, 2012, the Plaintiff, Belle Hall Plantation Homeowner's Association, Inc. (hereinafter "Belle Hall"), filed a notice of lien against the Property in the amount of $1,1103.28 R. pp. 210-212). July 22, 2013, Belle Hall filed the Lis Pendens, Summons and Complaint, in this action against the Defendant, John A. Murray, Trustee of John E. Murray and Gloria C. Murray Family Trust (hereinafter " the Trust") (R. pp. 54-66).

July 27, 2013, a process server, attempted to serve John A. Murray as Trustee of John E. Murray and Gloria C. Murray Family Trust (hereinafter "Trustee"), at 3100 Tradition Circle Apt. 1144, Mt. Pleasant, SC 29466. The Affidavit of Non-Service states: "[the apartment complex manager stated John A. Murray does not live there. . ." (R. p. 215) August 2, 2013, a process server, attempted to serve the Trustee at the Property. The Affidavit of Non-Service states: "[resident stated John A. Murray does not live there, they rent this house from him. They did not know his address, they deposited the rent payment in an account, his phone number is 843-[***-****]- called this number a recording states – number not in service." (R. p. 214). August 9, 2013, service was attempted a third time on the Trustee, at 937 Bowman Rd, Apt. 261, Mt. Pleasant, SC 29464. The Affidavit of Non-Service states: "[Manager at front desk stated John A. Murray does not live in apt 261. . ." (R. p. 213). September 30, 2013, Belle Hall filed an

Affidavit for Order of Publication (9/30/13 Aff.). October 4, 2013, the Clerk of Court issued an Order of Publication (R. pp. 216-220). Belle Hall published the summons and notice of this action in the Moultrie News on 10/16/13, 10/23/13, 10/30/13. An Affidavit of Publication was filed on November 4, 2013 (R. pp. 221-222).

December 18, 2013, Belle Hall filed an Affidavit of Default as to the Trust (R. p. 223). December 23, 2013, John A. Murray as trustee of John E. Murray and Gloria C. Murray Family Trust transferred the Property by quit claim deed to John A. Murray, individually which deed was recorded in the RMC Office for Charleston County in book 0380 at page 338 (R. pp. 224-227). December 27, 2013, the Order of Reference was filed (R. pp. 6-8). On or about February 27, 2014, Belle Hall mailed a Notice of Hearing to the Trustee at the Property as well as at 1090 Loyalist Lane Mt. Pleasant, SC 29464 (R. pp. 228-230). March 18, 2014, a final foreclosure hearing was held (R. pp. 9-19). March 26, 2014, the Trustee received the notice of hearing from his tenants for the Property (R. pp. 258-263). March 26, 2014, the Trustee sent Belle Hall's Counsel an email stating he had received the notice of foreclosure hearing and he would pay the debt[2] (R. pp. 258-263). The Trustee failed to pay the debt. April 8, 2014, the Master in Equity filed an Order of Foreclosure and Sale in this matter, which states: "Service was made upon all Defendant(s) as shown by the proof(s) of service filed herein. The Defendant(s) are in default." (R. pp. 9-19). The Trust did not challenge the Order of Foreclosure. April 24, 2014, Appellants, David Conor Keys and Karen Keys (hereinafter "Appellants") noticed the subject property listed on the auction List, and conducted a due diligence title search

[2] Belle Hall's Counsel during the July 3, 2014 hearing, searched her email and attested she did not have a record of the email, nor did her office receive any written or facsimile correspondence from the Trustee. (R. p. 136, lines 10-19).

on the property. During the due diligence title search Appellants reviewed the pleadings for this action, reviewed the RMC office records for Charleston County and the tax records for the subject property. Appellants search evidenced that at the time the action was commenced the property was owned by the Trust and then on December 23, 2013, the Trust quit claimed the Property to the Trustee individually.

May 6, 2014 the Property was sold by the Master at public auction where upon the Appellants were the successful bidders on the Property for the sum of $100,000.00. On the date of sale, the Appellants tendered the required deposit, with the remaining balance being paid on May 16, 2014 (R. pp. 396-399). May 16, 2014, the Master executed the Master's Deed to Appellants (R. pp. 231-234).

On or about May 13, 2014, the Trust's Counsel contacted the Employer of the Appellant, Mr. Keys and left a voice message. Or about May 15, 2014, the Employer returned the Trust's Counsel's phone call during which Trust's Counsel made reference to this matter. As a result of the phone conversation Appellants learned that the Trust had retained counsel. May 16, 2014, the Trust's Counsel email Appellants a copy of the Trust's yet unfiled Motion to Vacate.

May 19, 2014, the Trust made its initial appearance in this matter filing a Motion to Vacate the Entry of Default and Judgments and to set Aside the Sale pursuant to Rule 59 or alternatively Rule 60, SCRCP. (R. pp. 67-70). May 23, 2014, the Master's Deed was recorded in the RMC office for Charleston County in book 0406 at page 909 (R. pp. 231-234).

June 30, 2014, the Trustee, filed an affidavit which states: "I was never served with Summons and Complaint of Foreclosure *nor did I receive any notices* regarding the

foreclosure. *I only became aware of the foreclosure proceeding after the sale.*" (R. pp. 235-257). July 3, 2014, the Trustee filed an affidavit stating: "*My discovery of this action was on or about Mar 26, 2014.*" (R. pp. 258-263). July 3, 2014, Belle Hall filed an affidavit (R. pp. 266-316) and a Memorandum in Opposition. (R. pp. 317-320). July 3, 2014, Appellants' filed a Memorandum in Opposition (R. pp. 321-334).

The Trust's Motion to Vacate was heard on July 3, 2014. The Master stated:

> "I'm going to take this one under advisement. . . I'm going to tell you that Ms. Trotter sites the Yarborough case, which I think is probably the controlling law here. And that's not good for Mr. Murray. . . What gives me concern when I read the affidavit of Mr. Murray is that apparently around on or by the 28th of March, within ten days of the hearing date and probably prior to – I haven't checked the date of the order yet but probably prior to the date the order was entered he had some notice or knowledge of this thing going on." (R. p. 144, line 16 – R. p. 145, line 7).

July 22, 2014, the Master granted the Motion to Vacate based upon equity and good cause shown. (R. pp. 20-21).

July 22, 2014, Appellants filed a Motion to Stay or enjoining the Master from voiding, terminating or canceling the Master's Deed, as well as requesting an Order of Supersedeas whereby the Court would hold the proceeds of sale in bond. (R. pp. 71-78). August 1, 2014, Appellants filed a Motion to Reconsider the Order of July 22, 2014. (R. pp. 79-91).

August 4, 2014, the Trust filed a Motion to Amended the Order of July 22, 2014. The Motion requested the Master make additional findings of facts, and conclusions of law. (R. pp. 92-98). August 14, 2014, the Trust's Counsel caused to be filed in the RMC Office in Book 0423 at Page 008, a certified copy of the Order of July 22, 2014, which voided the title of Appellants. August 14, 2014, the Trust filed three affidavits: an affidavit of the Trust's Counsel, pursuant to Rule 59(c), SCRCP; an Affidavit of Libby

Castle; and Affidavit of Anna Howell (R. pp. 335-343). August 18, 2014, the Trust filed a Memorandum in Support of Motions. (8/18/14 Memo).

August 18, 2014, the Master held a hearing upon: the Trust's Motion to Amend the Order of July 22, 2014; Appellants Motion to Reconsider the Order; Appellants' Motion Stay the Order and requesting an Order of Supersedeas; and Appellants' oral Motion to Strike the Trust's Affidavits filed August 14, 2014. The Master stated:

> "***I don't find that there was fraud***, but I do find that there was negligence in the failure to notify Mr. Murray. . . I find that the man was denied due process, and it's on that basis that I overturned this sale.[3] . . Accordingly I am going to deny the Motion to Reconsider of August 1, 2014. I'm going to grant - - to the extent it's necessary I'm going to grant the Defendant's Motion to Amend the Order to support that decision, and I'm asking Ms. Reece to prepare an order to that effect. . . so that's my number one ruling. The other has to do with the motion to stay the order vacating the sale. That will be denied, and for an Order of Supersedeas I'm going to deny that as well." (R. p. 182, line 10-R. p. 184, line 1).

Then Master denied Appellants Motion to Strike the Affidavits. (R. p. 184, lines 5-24).

August 20, 2014, the Master filed a Form 4 Order, which states: "Keys' Motion to Reconsider is denied. Key's Motion to Strike the Affidavits is denied. Keys' Motion to Stay Vacating Sale and Order of f/c and for Supersedeas is denied. Defendant Murray's Motion to Amend the order is granted. Formal order to follow." (R. p. 22). September 2, 2014, Appellants filed a Motion to Reconsider the Order of August 20, 2014. (R. p. 99-117). September 19, 2014, Appellants served their Notice of Appeal. September 19, 2014, the Master filed an Order denying Appellant's September, 2, 2014, Motion to

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[3] At the hearing and in its Memorandum the Trust never raised the issue of due process, nor allegations under Rule (b)(4), SCRCP. The Trust Motion to Amend does make a conclusory statement that the motion should be vacated under Rule 60(b)(4) without providing any support for the assertion.

Reconsider. (R. p. 23). September 24, 2014, Appellants served an Amended Notice of Appeal to include the Order of September 19, 2014.

February 4, 2015, Appellants' initial appellate brief was filed. February 10, 2015, the Master filed the Formal Order referenced in the Form 4 Order of August 20, 2014. (R. pp. 42-50). The February 10, 2015, Order makes new factual and legal findings including but not limited to that Order of Foreclosure and Sale were vacated based upon the Master's inherent equitable powers; that service of process was defective; that Bell Hall was grossly negligent in servicing the Trust; that the Fraud and Collusion standard set forth in Yates v. Gridley, 16 S.C. 500 (1882) and it progeny should not be applied because the facts of this case are distinguishable; that the Master lacked personal jurisdiction over the Trust; that the Order of Foreclosure and Sale is VOID pursuant to 60(b)(4); that the Master's Deed to Appellants is void ab initio; and that "[i]n light its ruling, the Court does not find it necessary to rule on . . .Third-Party Purchaser's disputed status as a Bona Fide Purchaser for Value. The Court, however, as expressed at the hearing to the parties stands prepared to make a ruling as to the Bona Fide Purchaser for Value issue with further briefing of the matter." (R. pp. 42-50).

February 18, 2015, Appellants filed a Motion to Reconsider the Order of February 10, 2015. (R. pp. 118-126). February 26, 2015 Appellants served a Third Amended Notice of Appeal to include the Order of February 10, 2015. April 7, 2015, pursuant to the Master's request Appellants filed a memorandum further briefing the Master as to Appellants' status as BFPV (R. pp. 380-390). August 9, 2015 the Trust filed a Memorandum in Opposition. (R. pp. 391-395) The Master held a hearing on August 9, 2015, and filed an Order denying Appellants Motion to Reconsider, ruling that

Appellants are not BFPV. (R. pp. 51-53). On April 13, 2015, Appellants served a Fourth Amended Notice of Appeal to include the Order of April 9, 2015.

STANDARD OF REVIEW

There are four motions which resulted in multiple orders being reviewed in this Appeal. The Motions are: the Trust's Motion to Vacate the Sale and Order of Foreclosure (R. pp. 20-21); Appellants' Motion to Stay the Order Vacating the Sale and for Order of Supersedeas (R. pp. 22-23); the Trust's Motion to Amend the Order Vacating the Sale and Order of Foreclosure (R. pp. 22-23); and the Appellant's Motion to Strike the Affidavits filed by the Trust on August 14, 2014 (R. pp. 22-23).

Abuse of discretion is standard of review for all of the issues. "The determination of whether to set aside a foreclosure sale is a matter within the discretion of the trial court." Bloody Point Property Owner's Association, Inc. v. Ashton, 410 SC 62, 762 S.E.2d 729 (Ct. App. 2014). "The grant or denial of an injunction by the trial court will not be reversed absent an abuse of discretion." Levine v. Spartanburg Regional Services District, Inc., 367 S.C. 458, 463, 626 S.E.2d 38 (Ct. App. 2005) "The decision of whether to allow a party to amend a pleading to conform to the evidence is left to the sound discretion of the trial judge." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 27, 602 S.E.2d 772 (2004). "A decision about the admissibility or exclusion of evidence is left to the sound discretion of the trial judge whose decision will not be reversed on appeal absent an abuse of discretion." Allegro Inc. v. Scully, 400 S.C. 33, 733 S.E.2d 114 (Ct. App. 2012).

An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions" Carson v.

CSX Transp., Inc., 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012). "An abuse of discretion occurs when the circuit court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the circuit court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious." State v. McClinton, 369 S.C. 167, 170, 631 S.E.2d 895 (2006).

ARGUMENT

I. DID THE MASTER ERR IN DISREGARDING SOUTH CAROLINA PRECEDENT FOR VACATING A FORECLOSURE SALE.

A. THE MASTER ERRED IN GRANTING THE TRUSTS MOTION PURSUANT TO RULE 60(B) SCRCP.

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; and (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. Rule 60, SCRCP. "[I]t is significant to note that when considering whether to grant relief from final judgments, "a court must balance the interest of finality against the need to provide a fair and just resolution of the dispute. We recognized in *Chewning* both this Court's

longstanding policy towards final judgments and that important benefits are achieved by preservation of final judgments." Raby Construction, 358 S.C. 10, 594 S.E.2d 478; Bryan, 220 S.C. 164, 66, S.E.2d 609; Citing: Chewning, 354 S.C. 72, 579 S.E.2d 605.

1. The Master Erred in Granting the Trust's Motion Pursuant to Rule 60(b)(4)

a. The Trust did not appropriately request relief under Rule 60(b)(4), SCRCP.

"It is well settled that ordinarily a party may not receive relief not contemplated in his pleadings. While it is true that pleadings in the [ ] court must be liberally construed, this rule cannot be stretched so as to permit the judge to award relief not contemplated by the pleadings. Due Process requires that a litigant be placed on notice of the issues which the court is to consider." Heins v. Heins, 344 S.C. 146, 152, 543 S.E.2d 224 (Ct. App. 2001) A party cannot use Rule 59(e) to present an issue the party could have raised prior to judgment but did not. "Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier." Hickman, 301 S.C. 455, 392 S.E.2d 481 (quoting: Natural Resources Defense Council, 705 F. Supp. 698, 701 (D.D.C. 1989), vacated on other grounds, 707 F. Supp. 3 (D.D.C. 1989)). A party cannot request the Master amend his Order to make findings of fact and conclusions of law on issues not previously raised before the Master issued the Order. Id. A party cannot raise a defense to an asserted issue by way of a Rule 59(e) motion which could been raised prior to the order See Patterson, 456 S.E. 2d 436; In re Beard, 359 S.C. 351, 597 S.E.2d 835; Gainey, 382 S.C. 414 675 S.E.2d 792.

Here the Trust did not assert that the Order of Foreclosure and Sale should be vacated pursuant to Rule 60(b)(4) SCRCP, until after the Master had filed the Order of

July 22, 2014. The Trust's August 4, 2014, Motion to Amend is the only time the Trust ever made a reference to Rule (b)(4), SCRCP. The Motion simply states: "Conclusions of Law: 1) The Order of Judgment and Foreclosure dated [sic] is Void under SCRCP 60 (b)(4)."[4] (8/4/14 Mtn Am) The Trust did cite any facts or case law to support the assertion. The Trust's August 18, 2014, Memorandum does not reference Rule 60(b)(4), nor did the Trust ever reference Rule 60(b)(4) during *any* hearing in this matter. Additionally, Trust never asserted an issue as to personal jurisdiction or due process in any motion, memorandum, or hearing before the Court in this matter. In conclusion the Trust did not timely and appropriately move pursuant to Rule 60(b)(4), SCRCP and the Master abused his discretion in granting the Trust's Motion pursuant to Rule 60(b)(4).

b. Even if the Trust appropriately requested relief under Rule 60(b)(4), the Master erred in granting the relief.

Case law and precedent precluded the Master from amending his order to find: that the Judgment of Foreclosure and Sale void pursuant Rule 60(b)(4); that the Court lacked personal jurisdiction over the Trust; and that the trust had been deprived of due process. "The definition of void under the rule [60(b)(4)] only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction. . . The requirements of due process not only include notice, but also include an opportunity to be heard in a meaningful way, and judicial review." Universal Benefits, Inc. v. McKinney, 561 S.E.2d 659 (Ct. App. 2002).

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[4] The Motion also cites and conclusions of law that the Order of foreclosure should be granted pursuant to Rule 60(b)(1),(3), and (5) as well.

The Courts findings in McKinney are analogous to this matter. In McKinney the Court found that the order should not have been vacated under Rule 60(b)(4), SCRCP, based upon due process or personal jurisdiction because it was undisputed the party was afforded notice of the order, an opportunity to be heard and to receive judicial review of the order. The Court found the party received notice in time to move for reconsideration pursuant to Rule 59(e), SCRCP, and the party could have filed an appeal, but did not timely avail itself of either procedural remedy. The same is true in this case. On or about March 26, 2014, the Trust had actual notice that a foreclosure hearing had been held. (Murray Aff.) The Master did not file the Order of Foreclosure until April, 8, 2014. The Trust had plenty of time to avail itself of the procedural remedy provided by Rule 59, SCRCP, and if the Master denied the motion for reconsideration, the Trust could have sought further judicial review through the Court of Appeals. However, the Trust did not timely avail itself of these remedies. Therefore abused his discretion to Master when he amended his Order to state that Order of Foreclosure was void pursuant to Rule 60(b)(4).

c. The Court obtained personal jurisdiction over the Trust through service by Publication.

The Master found the service of the Trust to be defective based upon a lack of due diligence of Belle Hall in attempted personal service of the Trust. However service by publication provided the Court with personal jurisdiction over the Trust. Belle Hall properly advertised the summons and Complaint in the Moultrie News a newspaper which serves the Mount Pleasant area. Trustee is and was at the time of publication a resident of Mount Pleasant, South Carolina. Therefore personal jurisdiction over the trust was achieved through service by publication.

The Trust asserts that Belle Hall failed to strictly comply the publication statute S.C. Code Ann. § 15-9-730(3) and § 15-9-740. However the trust did not assert a violation of the publication statute until its memorandum filed on August 18, 2014. A "party may not receive relief not contemplated in his pleadings." Heins, 344 S.C. at 152. Here the Trust did not raise the issue in its Motion to Vacate; at the July 3, 2014 hearing, nor in its August 4, 2014, Motion to Amend. The Trust did not timely or appropriately assert a violation of the publication statute which would entitle it to said relief. Additionally the Master did not rule the Belle Hall failed to comply with the publication statute.

2. The Master Abused his Discretion in Overruling the Clerk of Court's Order of Publication Therefore the Sale Should Not Have Been Vacated.

On May 19, 2014, the Trust filed the Motion to Vacate. The Motion moves:

> "The grounds for this motion are that the plaintiff presented a false, misrepresentative or fraudulent, and fatally defective affidavit of due diligence to the court in obtaining the court's order for service of the summons and complaint by publication. The affidavit lacked evidentiary support. The address of the defendant's residence was readily available to the plaintiff and a matter of public record." (R. pp. 67-70).

At the July 3, 2014, Motion hearing the Trust stated:

> "Your Honor, we are here to ask the Court to set aside, to vacate the judgment of foreclosure and set aside the sale. We believe that we have grounds under Rule 60(b) in extraordinary circumstances where Mr. Murray was deprived of his ability to counter any arguments due to the service. The service was, there was an Affidavit of Service that was a misrepresentation to the Court. And that Misrepresentation to the Court we would argue was fatal." (R. p. 129, lines 11-19).

The Order of July 22, 2014, stated: "[t]he Court finds that in the interest of equity and for good cause shown that the Defendant's motion be granted."(R. pp. 20-21). The Master's Amended Order of February 10, 2015, found service was defective and that the fraud and

collusion standard required for overturning the Clerk of Courts findings as to due diligence did not be apply because the facts of this case are distinguishable. The Order states:

> "The Court is mindful of the standard set forth in Yates v. Gridley, 16 S.C. 496, 500 (1882) and subsequent cases regarding the finality of the finding of due diligence of the Officer issuing the Order of Publication in the absence of fraud or collusion. [citations omitted] The Court is also mindful of the volume of Motions for Orders of Publication that the Clerk of Courts reviews and makes note of the similarity of the Defendant's name and the name of his father, the party exhibited in the Westlaw address search which was incorporated into Plaintiff's Affidavit to obtain that Order of Publication. The Court further finds that *such indifference and gross negligence on the part of the Plaintiff is not normally contemplated and therefore remained virtually indiscernible to our Honorable Clerk of Court* prior to the evidentiary hearing of the matter. *To the extent that the Clerk of Court might have and not discover the grossly negligent effort to effectuate service, the Court views this as a structural defect in the constitution of the trial (defying) analysis by harmless error standards."* (R. pp. 42-51)

The Order concludes: "In light [sic] its ruling, the Court does not find it necessary to rule on Defendant's other 60(b) motions. . ." [5] (R. pp. 42-51)

a. There is No Finding of Fraud, Collusion, or a Facially Defective Affidavit.

"Generally absent fraud or collusion, once the issuing officer is satisfied with the supporting affidavit, the decision to order service by publication is final unless the order of publication is premised upon a facially defective affidavit." Brown v. Malloy, 546 S.E.2d 195 (Ct App 2001) (Citing: Wachovia Bank of S.C. v. Player, 341 S.C. 424, 535 S.E.2d 128 (2000)); Montgomery v. Mullins, 480 S.E.2d 467 (Ct. App. 1997) (in absence of fraud or collusion, the decision of the officer ordering service by publication is final.) Yarbrough v. Collins, 293 S.C. 290, 293 360 S.E.2d 300 (1987) (in the absence of fraud

[5] The Amended Order grants the Trust's Motion to vacate pursuant to Rule 60(b)(4).

or collusion it is final.). In *Player*, the Petitioner was held in default in a foreclosure action. The Petitioner sought to overturn the order of foreclosure and sale pursuant to Rule 60, SCRCP. The "motion was predicated on [Petitioner's] claim that substituted service by publication was improper, *and thus the court did not have personal jurisdiction over him. Petitioner claims the process server did not use "actual" due diligence because if she had, she would have easily found him.* He also points out that the petition for an order of publication contains an untrue statement . . . It is clear from reading the two documents together that the petition is inaccurate, but that the process server's affidavit reflects due diligence by her." Player, 341 S.C. 424, 535 S.E.2d 128. The master denied the petitioners motion holding the petitioner failed to present evidence of fraud or collusion in obtaining the order for service by publication. The Supreme Court affirmed the master's order. Id.

In this case that facts and pleadings are nearly identical to those in Player. The Trust's Motion to Vacate was based solely on Rule 60(b)(3), SCRCP, on the alleged ground Belle Hall made misrepresentations to the lower court in its affidavits of service and publication. Trust conceded there is a lack of fraud or collusion, stating: "This is the case where - -*I know we don't want to call it – I know the standard is suppose to be fraud collusion.* I'm not certain that we have any actual intent, and I'm pretty certain that we don't have actual intent obviously on the part of anybody." (R. p. 171, line 22 – R. p. 172, line 5). No assertion of collusion or a facially defective Affidavit is made by the Trust. *The Order of July 22, 2014, does not find fraud collusion, or a facially defective affidavit.* (R. pp. 21-22). During hearing on August 18, 2014, the Master clearly states "***I don't find that there was fraud***, but I do find that there was negligence in the failure to

notify Mr. Murray. (R. p. 182, lines 10-13). Thereafter the Trust asked: "Your Honor, I just wanted to clarify, in the amended order *I just wanted to be sure that there would be no findings of misrepresentation, fraud, or collusion* and specifically that you found - -"[6] To which the Master replied: "I find gross negligence. All right?" (R. pp. 184, line R. p. 185, line 7).

The Amended Order of February 10, 2015, again does not make a finding of fraud or collusion, or a facially defective affidavit. (R. pp. 42-50). Additionally, Order makes factual finds which support why the Master did not find that there was a facially defective affidavit when the Order states: "The Court is also mindful of the volume of Motions for Orders of Publication that the Clerk of Courts reviews and makes note of the similarity of the Defendant's name and the name of his father . . .The Court further finds that such indifference and gross negligence on the party of the Plaintiff is not normally contemplated and *therefore remained virtually indiscernible* to our Honorable Clerk of Court prior to the evidentiary hearing of the matter." By acknowledging that alleged defect in Plaintiff's Affidavit for Order of Publication[7], was *virtually indiscernible*, the Master made clear that the Affidavit was not defective on its face. (R. pp. 42-50)

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[6] On October 1, 2015, the Trust sent an Errata Sheet to the court report who produced the transcript for the Hearing on August 18, 2014. On October 1, 2015, the Court Reporter sent an affidavit which stated that the above referenced quote is attributable to Belle Hall not the Trust. The trust informed Appellants that they were going to move to amend their designation of matter to include the court reporter's affidavit, but no such motion was ever filed and as such the affidavit is not part of the Record on Appeal.

[7] The Affidavit for Publication states: "After due diligence, as demonstrated by the attached Exhibit A which is incorporated herein by reference Plaintiff's counsel has been unable to ascertain the location of Defendant, John *A.* Murray, Trustee of John *E.* Murray and Gloria C. Murray Family Trust." Exhibit A to the Affidavit contains a Westlaw search for John *E* Murray; and three affidavit of non-service of John *A.* Murray. (R. pp. 216-220)

The case law is clear, absent a finding of fraud, collusion or a facially defective affidavit, the Master lacked the authority to overrule the Clerk of Court's Order of Publication. The Trust did not allege fraud collusion or a facially defective affidavit. The Master did not find fraud, collusion or a facially defective affidavit. Therefore the Master abused his discretion in granting the trusts Motion to vacate the sale under Rule 60, SCRCP, based upon defective service of the Trust.

b. The Master Abused his Discretion in Overruling the Clerk of Court's Factual Findings on Bell Hall's Due Diligence of Attempted Service of the Trustee.

"An order for service by publication may be issued pursuant to Section 15-9-710 of the South Carolina Code when an affidavit, satisfactory to the issuing officer is made stating that the defendant, a resident of the state, cannot, after the exercise of due diligence, be found, and that a cause of action exists against him." S.C. Code Ann. §15-9-710(3). "We hold the trial court [is] without authority to overrule the find of the clerk of court that the [defendant] could not after due diligence be found in the County and State of their last known residence. Yarbrough makes it clear that in absence of fraud or collusion, the decision of the officer ordering service by publication is final. Therefore, to the extent the trial court concluded the publication was invalid, we reverse." Montgomery, 480 S.E.2d 467." Equity follows the law. Regions v. Wingard Properties, 394, S.C. 241, 715 S.E.2d 349 (Ct App. 2011). "When providing an equitable remedy, the court may not ignore statutes, rules, and other precedent." Id. at 254.

The July 22, 2014, Order, does not reference to fraud, collusion, or lack of due diligence or the affidavit of publication (R. pp. 20-21). During August 18, 2014, hearing the Master did provide subsequent insight into the basis for his ruling stating: "I find that

there was not service of process upon Mr. Murray individually as the trustee. . ." (R. pp. 183, lines 17-21). In the Amended Order of February 20, 2014, the Master found that "Service was the defective." The Order states: "The Defendant's dwelling house address. . . was available at www.charlestoncounty.org as the tax mailing address of the Subject Property at all relevant times and in the actual possession of the Plaintiff by virtue of the West search[8]. . . Under the attendant circumstances and facts of this case, the Plaintiff's efforts to notify the Defendant do not approximate any effort reasonably calculated to notify the Defendant of this action. . . reason would dictate attempting to serve the fourth address revealed on the Westlaw Search." (R. pp. 42-50)

In this case the Master found personal service of the Trust was defective based on a factual finding of a lack of due diligence in Belle Hall's attempted service of the Trustee. However, the Clerk of Court found Belle Halle performed due diligence in its attempted personal service of the Trust and executed the Order of Publication. The case law is clear, after the Clerk of Court executes the Order of Publication, the Master is without the authority to make a finding of lack of due diligence of service, unless the Master finds one of three essential elements are present, namely fraud, collusion, or a facially defective affidavit. The Master made no such finding. The Master may not ignore rules and precedent to make an equitable ruling. The Master's disregard of the case law was an abuse of discretion and the Master's Order Vacating the Sale was an error of law.

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[8] The fourth address listed on the Westlaw Search attached to the Affidavit for Publication is the Trustee's actual address but there is no evidence Belle Hall knew it was Trustee's address. Therefore Belle Hall did not have actual knowledge of the Trustee's address. (R. pp. 216-220)

c. The Master's Refusal to Apply the Fraud and Collusion Standard was an Abuse of Discretion.

The Master refused to apply the fraud and collusion standard set for in Player, instead electing to distinguish the facts of this case from those requiring the application of the standard. The Order of February 10, 2015, states: "[t]he Court is mindful of the standard set forth in Yates v. Gridley, 16. S.C. 496, 500 (1882) and subsequent cases regarding the finality of finding of due diligence of the Officer issuing the Order of Publication in the absence of fraud or collusion." (R. pp. 42-50) However, the distinction the Master makes is not recognized by the Courts of Appeals of this state. Additionally no party requested that a distinction be made in this matter.

In support of the distinction, the Master cites State v. Mouzon, 326 S.C. 199, 204, 485 S.E. 2d 918 (1997), and LaSalle Bank v. Davidson, 386 S.C. 276, 280, 688 S.E. 2d 121 (2009). Mouzon is a criminal matter where our state Supreme Court determined the trial court erred by not allowing the Defendant to make a closing argument, and that the harmless error standard did not apply in that instance. 326 S.C. 199, 204, 485 S.E. 2d 918 (1997). In Davidson, a Supreme Court case, the Court concluded the harmless error standard did not apply to an instance where the Master failed to attend the final hearing of a foreclosure proceeding, but nonetheless executed Plaintiff's proposed order. Neither of these cases is analogous or applicable to the present matter. The Master's has refused to apply fraud and collusion standard originated in 1882 with Yates v. Gridley, 16 S.C. 496, and has chosen to ignore Yates' numerous progeny, up to and including Player. The refusal to apply the fraud and collusion standard was an abuse of discretion.

d. Gross Negligence is not an Appropriate Standard for Determining Whether there was Due Diligence in Attempted Personal Service.

Gross Negligence is "the failure to exercise slight care." Steinke v. S.C. Dept. of Labor, Licensing, 336 S.C. 373, 395, 520 S.E.2d 142 (1999). It is "the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." Id.

In this case the law is clear that the appropriate standard to apply in determining whether the Master may overturn the Clerk of Court's finding of due diligence of attempted personal service is the fraud or collusion standard, not gross negligence. None the less it is also clear that Belle Hall lacked the requisite intent to fail to serve the Trust which would be required for a finding of gross negligence. The Trust even conceded as much "I'm not certain that we have any actual intent, and I'm pretty certain that we don't have actual intent obviously on the part of anybody." (R. p. 171, ln 22 – R. p. 172, ln 5). The Trust never plead or asserted Belle Hall was grossly negligent. Additionally Belle Hall's service by publication was properly conducted. It was an abuse of discretion and error of law for the Master to vacate the order of foreclosure and sale based upon a finding that Belle Hall was grossly negligent in their attempted personal service of the Trust.

3. Good Cause Shown is Not the Appropriate Standard for granting relief under Rule 60(b) SCRCP.

The Trust's Motion of May 19, 2014, moved "for an order pursuant to SCRCP Rule 59 or alternatively Rule 60, requesting that the court vacate its entry of default, its order of foreclosure, and set aside the sale. . ." (R. p. 21-22). "The standard for granting relief from an entry of default is good cause under Rule 55(c), SCRCP, while the standard is more rigorous for granting relief from a default judgment under Rule 60(b),

SCRCP." Richardson v. P.V., Inc., 383 S.C. 610, 616, 682 S.E.2d 263 (2009). Our Supreme Court noted in Sundown that:

> "Rule 55(a) provides that when a party fails to respond to a complaint, the clerk shall record an entry of default. However, Rule 55(c) permits a party to move to set aside the entry of default. The standard for granting relief from any entry of default under Rule 55(c) is mere "good cause." Rule 55(c), SCRCP. . . . Once a default judgment has been entered a party seeking to be relieved must do so under Rule 60(b), SCRCP. The standard for granting relief from a default judgment under Rule60, (b) is more rigorous than the "good cause" standard established in Rule 55(c). Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party." Rule 60(b), SCRCP. The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default." Sundown Operating Co., Inc. v. Intedge Indus., Inc., 383 S.C. 601, 607-08, 681 S.E.2d 885 (2009).

In this case, the Trust did not seek relief under Rule 55, SCRCP, until after the Order of July 22, 2014. (R. p. 92-98) The Trust's, Motion to Vacate makes no reference to Rule 55, SCRCP (Mtn Vacate), The Trust did not make reference to Rule 55, SCRCP, during the hearing on July 3, 2014 (R. pp. 127-147). The Order of July 22, 2014, states: "[t]he Court finds that in the interest of equity and for good cause shown that the Defendant's motion be granted." (R. pp. 20-21). "Good cause" is the incorrect standard for granting relief from a judgment under Rule 60, SCRCP. Moreover, in this matter the Master judged "Defendant(s) are in default" in the Order of Foreclosure. (R. pp. 9-19) The time for moving under the Rule 55, good cause standard had passed. Vacating the judgment under Rule 60 would require a more particularized showing. Good cause shown was not a proper ground to grant Trust's Motion to Vacate pursuant to Rule 60, SCRCP. The Master's Order of July 22, 2014, granting the Trust's Motion to Vacate for "good cause shown" was an abuse of discretion.

B. THE TRUST REQUESTED EQUITITABLE RELIEF FROM THE MASTER BUT CONTINUALLY SLEPT UPON ITS RIGHTS AND OBLIGATIONS.

The Court in Eldridge noted:

> "The equitable defense of laches follows the equitable maxim: "Equity aids the vigilant, not those who slumber on their right." Laches is defined as neglect for an unreasonable and unexplained length of time, under the circumstances affording opportunity for diligence, to do what in law should have been done. Under the doctrine of laches, if a party, knowing his rights, does not reasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights. Thus, the predicate for laches is an unreasonable and unexplained delay." Eldridge v. Eldridge, 398 S.C. 113,121-22, 728, S.E.2d 24 (2012)

In this case the Trust's failed to pay the homeowner's association assessments for at least two years prior to the sale of the Property. The Trust failed to provide Belle Hall with a correct mailing address in which to provide notice of the assessments. On December 23, 2013, the Trust transferred the Property to the Trustee by a deed it recorded in the RMC Office for Charleston County (R. pp. 231-234). However, the Trust failed to search or examine the public records while was transferring the Property. Had the Trust done a simple title or records search in December of 2013 it would have discovered the this action with plenty of time to resolve the matter prior to the Order of Foreclosure and Sale of the Property[9]. *More to the point, on or about March 26, 2014, the Trustee had actual knowledge of these foreclosure proceedings*, when it received a notice of the foreclosure hearing scheduled for March 18, 2014 (R. pp. 258-263). Here

[9] Trust has continually asserted that Belle Hall and the Appellants should have exerted more due diligence in searching the public records for the Trust and Trustee and that Belle Hall had constructive knowledge of the Trustee and his address as a result of the public records. However the Trust fails to acknowledge its own lack of due diligence in discovering this action through an examination of the public records as well as its own constructive knowledge of this action.

again the Trust could have made an appearance in this matter prior to the filing of the Order of Foreclosure and prior to the sale with plenty of time to resolve the matter but failed to do so. March 26, 2014, the Trustee sent Belle Hall's counsel an email stating that he received the notice of foreclosure hearing and he would pay the debt. (R. pp. 258-263). Order of February 10, 2015, states: "it is clear in light of the email the Defendant later sent to the Plaintiff's counsel that, had the Defendant had notice, he had the means and would have exercised his Right of Redemption and paid the small amount due the Plaintiff." (R pp. 42-50) The Master's Order ignores that at the time of the email the Trustee did have actual notice of the foreclosure action with plenty of time to resolve the matter, but still failed to pay the assessments as he always had in the past. Trustee never did pay the debt as he said he would, nor did the Trustee ever attempt to contact Belle Hall again. Had the Trust paid the debt at the time of the email it would have resolved the matter prior to the Order of Foreclosure and Sale of the Property. The Trust did not attempt to contact the Court when it gained knowledge of the foreclosure. Instead the Trust with actual knowledge that a foreclosure hearing had occurred on March 18, 2014, waited until May 9, 2014, to retain counsel in this matter. (R. pp. 258-263). May 9, 2014, the Trust learned that the sale had occurred on May 6, 2014, but again the Trust slept upon it rights not filing its Motion to Vacate until May 19, 2014.

During the hearing on the Motion to Vacate both Belle Hall and Appellants noted to the Court that the Trust had slept upon its rights and acted inequitably[10] (R. p. 136,

[10] Appellants again raise the issue in its motions to reconsider and during the hearing on August 18, 2014. (R. pp. 79-91; R. pp. 99-117) (R. p. 167, lines 3 – 25).

lines 10 – 25; R. p. 139, lines 3-20). Additionally, the Master noted: "What gives me concern when I read the affidavit of Mr. Murray is that apparently around on or by the 28th of March, within ten days of the hearing date and probably prior to – I haven't checked the date of the order yet but probably prior to the date the order was entered he had some notice or knowledge of this thing going on." (R. p. 144, line 16 – R. p. 145, line 7). However, the Master's Order of July 22, 2014 and the Amended Order of February 10, 2015, both state that Master is granting the Motion to Vacate based upon equity. The Amended Order of February 10, 2015, quotes Wingard Props. Inc., stating: Courts have the inherent powers to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible." 394. S.C. at 252. However, Appellants noted in their Motion to Reconsider said Order filed February 18, 2015, that Wingard Props. Inc., then goes on to state "[w]hen providing equitable remedy, the court may not ignore statutes, rules, and other precedent." Id. at 254.

The Trust and Trustee in this matter have time after time slept upon the Trust's rights and obligations. However, after an unreasonable delay the Trust nonetheless came before the Master requesting that he grant the Trust's motion in on the basis of equity, and the Master granted the request. The Trust's motion should have been barred by the doctrine of laches, as wells as statute, rules, case law and other precedent including but not limited to Player, 341 S.C. 424, 535. S.E.2d 128; Ashton, 410 S.C. 62, 762 S.E.2d 729; Rule 60, SCRCP; and S.C. Code § 15-39-870. The Master's Order granting the Trust's Motion to Vacate in the basis equity was an abuse of discretion.

C. THE APPELLANTS ARE BONA FIDE PURCHASERS FOR VALUE.

> "Upon the execution and delivery by the proper officer of the court of a deed for any property sold at a judicial sale under a decree of a court of competent jurisdiction that proceedings under which such sale is made shall be deemed res judicata as to any and all bona fide purchasers for value without notice, notwithstanding such sale may not subsequently be confirmed by the court." S.C. Code Ann. § 15-39-870 (2005). The rationale for the statute is the well established public policy of protecting good faith purchasers and upholding the finality of a judicial sale." Robinson v. Estate of Harris, 378 S.C. 140 662 S.E.2d 420 (Ct. App. 2008)

> "A purchaser may assert a plea in equity of a bona fide purchaser for value, without notice of defect in his title, by showing (1) he has actually paid in full the purchase money (giving security for the payment is not sufficient, nor is past indebtedness a sufficient consideration); (2) he purchased and acquired the legal title, or the best right to it; and (3) he purchased bona fide, *i.e.* ,in good faith and with integrity of dealing, without notice of a lien or defect. The bona fide purchaser must show all three conditions — actual payment, acquiring of legal title, and bona fide purchase — occurred before he had notice of a title defect or other adverse claim, lien, or interest in the property". Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006).

Equity follows the law. Wingard Properties, 394, S.C. 241, 715 S.E.2d 349. "When providing an equitable remedy, the court may not ignore statutes, rules, and other precedent." Id. at 254.

In this case Appellants filed a Memorandum on July 3, 2014 (R. pp. 321-334), asserting that they were BFPV. During the July 3, 2014, hearing Appellants asserted that they were BFPV. The Trust did not refute the assertion by Appellants. The Order of July 22, 2014, did not address whether Appellants are BFPV. August 1, 2014, Appellants filed a Motion for Reconsideration the Order of July 22, 2014 (R. p. 79-91). Appellants again asserted that they are BFPV. During the August 18, 2014, hearing Appellants again asserted they are BFPV. At the end of the hearing the Trust asked the Master "So no Bona Fide Purchaser for Value ruling?" The Master replied: "For me I find that - - you know, I don't know the answer to that question as I sit here right now. If you –all want to

brief me on that I will take a look at it. I will be glad to look at the law. What I'm finding is that Mr. Murray didn't get notice. . . I find the process to be defective. If the notice is defective I don't know what that means to a BFE for value. I don't know. If you-all can get me up to speed on that I'll give you a ruling on it." (R. p. 187, ln 11 – R. p. 188, ln 1)

Appellants cited the relevant BFPV case law in their Memorandum in opposition to Trust's, Motion to Vacate; during the hearing on the Motion to Vacate; in Appellants' Motion to Reconsider; and during the hearing on Appellant's Motion to Reconsider. On August 20, 2014, the Master filed an Order denying Appellants Motion to Reconsider (R. p. 22). On September 2, 2014, Appellants filed a Motion to Reconsider the Order of August 20, 2014. Appellants attached to the Motion to Reconsider a copy of Ashton, which was filed by the Court of Appeals the same day the Master's Order of August 20, 2014. (R. pp. 99-117). Appellants would assert that Ashton directly answers the question the Master asked the parties to brief him on when he said "If the notice is defective I don't know what that means to a BFE for value. I don't know. If you-all can get me up to speed on that I'll give you a ruling on it." (R. p. 187, ln 11 – R. p. 188, ln 1). Ashton states the alleged issues with service in this matter do not affect the Appellants' rights as BFPV because Appellants are entitled to the presumption that the Court adjudicated those matters prior to the sale[11]. Ashton, 410 S.C. 62, 762 S.E.2d. 729. On September 19, 2014, the Master denied Appellant's Motion to Reconsider without further a further hearing. Attached to the Order is a copy of Ashton (R. pp. 23-41).

[11] As will be explained more fully below.

Thereafter the Amended Order filed on February 10, 2015, states: "that Court does not find it necessary. . . to rule on Third-Party Purchaser's disputed status as Bona Fide Purchaser for Value. The Court, however, as expressed at the hearing to the parties, stands prepared to make a ruling as to the Bona Fide Purchaser for Value issue with further briefing of the matter." Appellants would assert that they had previously briefed the Master on the relevant case law as to BFPV. But Nonetheless, Appellants filed a Motion to Reconsider on February 18, 2015, citing Ashton. Id. Thereafter on April 7, 2015, Appellants filed a Memorandum in Support of their Motion to Reconsider, which stated: "Third-Party Purchasers would request that the Master rules as to all of Third-Party Purchaser's objections as set forth in their Motion to Reconsider. Third Party Purchaser's additionally submit this memorandum to the Court. . . pursuant to the Master's request for further briefing on the issue of Bona Fide Purchaser for Value.

April 9, 2015, the Master held a hearing on Appellants' Motion to Reconsider[12], and finally, on April 9, 2015, the Master filed an order ruling on Appellants' status as BFPV. The Order states:

> Todays question before the court arises from the case of Bloody Point v. Ashton, [citation omitted]. The Court of Appeals opinion confirmed an HOA foreclosure sale in Beaufort County, challenged by the defaulting homeowner *on virtually the same basis as the case before me today. . .* Ashton discussed several issues relevant to this court's decision including: 1) The public policy requiring the validity of judicial sales be upheld if, in reason and justice it can be done. 2) The Standard of Review to determine whether to set aside a foreclosure sale is within the discretion of the trial court. . . This Court finds that the Purchasers met the first two tests of a BFP: 1) they actually paid the purchase price; and 2) they acquired legal

[12] [12] Appellants Motions to Reconsider raised objections to the Order of February 10, 2015, in addition to Appellants status as BFPV. During the hearing Appellants asked the Master if his denial of the Motion to Reconsider was a denial of all objections Appellants asserted in the written Motion to Reconsider, and not just as to BFPV, to which the Master said it was. (R. p., lines 19-23)

> title to the property – by payment of the bid price to the Master-in-Equity of the amount owed and receipt of a Master's Deed to the Property. However, the Court finds, upon further inquiry that the Keys do not meet the third (3) prong of the test to qualify as a BFP because they did not "in good faith and with integrity of dealing, without notice of a lien or defect," acquire the deed. The record establishes that the Purchasers, with notice of a potential claim from the defaulting owner, rushed to the court to pay the balance due and then, after service of the Motion to Vacate the Sale, had the deed recorded at the RMC Office. Therefore, the Court finds that Keys did not act in good faith and with integrity of dealing, without notice of a lien or defect. In fact, the Keys had notice of a defect in the proceedings prior to paying the purchase price and acquiring legal title to the property. . . *Keys argues that the sales date – not the deed issuance date – determines when the notice of a defect should be known; however, this court finds, based upon its experience that no fixed date can determine when the interests of justice dictate a sale should be overturned.*"

The Master erred in ruling that Appellants are not BFPV.

1. The Trust Did not Raise a Defense to Appellants Assertion of BFPV Before the Order of July 22, 2014.

The Trust failed to raise a Defense to Appellants assertion that they are BFPV, until after the Order of July 22, 2014. A "party may not receive relief not contemplated in his pleadings." Heins, 344 S.C. at 152. A party cannot raise a defense to an asserted issue by way of a Rule 59(e) motion which could been raised prior to the order. See Patterson, 456 S.E. 2d 436; In re Beard, 359 S.C. 351, 597 S.E.2d 835 (Ct. App. 2004) (quoting Patterson); Gainey, 382 S.C. 414 675 S.E.2d 792 (citing Patterson). The Trust's August 4, 2014, Motion to Amend the Order of July 22, 2014 is the first time the Trust refuted Appellants assertion of BFPV. Thereafter the Trust sought to provide alleged supporting evidence of its defense by filing of Affidavits on August 14, 2014, and the filing of memorandums on August 18, 2014 and April 9, 2015. The Trust asserts Appellants had knowledge of a defect in title or adverse claim to title prior to making payment in full because Appellants had knowledge on May 15, 2014, that the Trust

intended to file a motion to vacate. On August 18, 2014, the Trust stated: To the extent that this should have been addressed at the last hearing I would argue that it was newly discovered evidence. While I attempted to find out when Mr. Keys had actually paid for the deed . . . I could not obtain that. I obviously could tell when it was executed. . ." (R. p. 168, lns 16-24).

In this case at the time the first motion hearing on July 3, 2014, the Trust had constructive and actual knowledge of the facts it asserts as evidence that Appellants are not BFPV, but did not raise the issue until after the Order of July 22, 2014. To the extent the statement "I obviously could tell when it was executed" refers to the executed Master's Deed, then deductive reasoning would establish Appellant's paid in full prior to the Master executing the Deed on May 16, 2014. Additionally, a notation in the public index for this matter states that the sale amount was paid in full May 16, 2014 at 12:03, and that the Deed was subsequently executed at 13:16. (R. pp. 396-399) The Trust is certainly deemed to have constructive notice of the public record of an action in which it had made an appearance. Spence, 368 S.C. 106, 628 S.E.2d 869. The alleged evidence is not new evidence. The Trust new or had reason to know of the information prior to the July 3, 2014 hearing, but failed to raise a defense to Appellants assertion until after the Order of July 22, 2014. The defense is not preserved.

2. The Unpreserved Defenses Raised by the Trust are Without Merit.

Nonetheless, for the sake of argument if the Trust preserved its defenses to Appellants' assertion they are BFPV, the Trust's defenses are still without merit. Appellants conducted a due diligence title search prior to the sale on May 6, 2014. Appellants did not discover notice of any liens on the Property during the title search, and

on May 6, 2014, Appellants had no notice of any adverse or allegedly adverse claim to the Property.

a. The Trustee's Claim to Title is Not Adverse to that of Appellants.

> "Upon the filing of the petition in the office of the clerk of court of common pleas, the clerk shall immediately enter it in the index to lis pedens affecting real property and from the time of the filing the pendency of the action or special proceedings is constructive notice to an assignee, pledgee, purchaser, or encumbrancer of the mortgage, and every person whose purchase, encumbrance, assignment, pledge, or hypothecation is subsequently executed or subsequently recorded is considered a subsequent purchaser or encumbrancer and is bound by all proceedings taken after the filing of the petition to the same extent as if he were made a party to the action or special proceedings taken after the filling of the petition to the same extent as if he were made a party to the action or special proceeding." S.C. Code Ann. § 29-3-400.

In this Case, On July 22, 2013, Belle Hall filed a Lis Pendens, Summons and Complaint, in this action against the Trust. (R. pp. 54-66). December 23, 2013, Trust transferred the Property to the Trustee by a quit claim deed recorded in the RMC office for Charleston County (R. pp. 224-227). As S.C. Code Ann. § 29-3-400, makes clear, because the Trust transferred the Property to the Trustee, after the Lis Pendens was filed the Trustee "is considered a subsequent purchaser or encumbrancer and is bound by all proceedings taken after the filing of the petition to the same extent as if he were made a party to the action." Id. The Order of Foreclosure extinguished the Trust's right to transfer title to the Trustee therefore the Trustee's deed is void. (R. p. 166, ln 9 –R. p. 167, ln 13.) The Trustee's individual claim to title is not adverse to that of Appellants. [13]

[13] The Trust in its April 9, 2015, memorandum additionally asserts that on April 24, 2014, Appellant's had notice of the adverse claim of the Trustee's Parents as a result of discovering tax records which stated the Trustee's parents owned the property. The Trustee's parents are not a party to this action, were deceased prior to the

b. Appellants Tendered Purchase Money Prior to Notice of Any Alleged Defect in Title or Adverse Claim.

May 6, 2014 is the date of sale and the relevant date for determining whether the Appellants' met the payment prior to notice element of BFPV. S.C. Code § 15-39-720 in collaboration with § 15-39-760 provide where a Plaintiff waives the right to a deficiency judgment prior to sale the bidding will not remain open and the sale will be closed the day of the auction. Bankruptcy Courts in South Carolina as well as the District Court of South Carolina have held "the actual foreclosure sale as the cut-off date for curing mortgage defaults." In re Watts, 273 B.R. 471, 476 (Bankr. D.C. 2000). *In re Watts*, speaking of the debtors right to cure or redemption noted: "The Court acknowledges that the foreclosure process may require steps following the auction sale in order to conclude the sale and make it effective; however, . . . [p]recedent in this Court and this District has found that upon the falling of the gavel, the debtor is left with bare legal title; thus, the fact that the sale procedure has yet to be completed does not alter the fact that the only right that debtor is left with is the right to raise questions regarding the sale procedure."[14] Id. The court went on to state: "[a]s the court in In re Bobo emphasized, [w]hatever process is used to bid up the property, the property is sold at the foreclosure sale once the rights and obligations vest in an entity to acquire the property as a result of making the highest bid. The additional steps of obtaining court approval . . .paying the purchase price, and recording the deed may be necessary to consummate the sale, but that does not alter the fact that the purchaser's right to acquire the property has intervened - - that the property has been sold at a foreclosure sale - - to the detriment of the debtor." Id.

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initiation of this action, and have never asserted an adverse claim. As there is no such claim, there can be notice of claim, this argument is without merit.

[14] No issues involving the sale procedure have been raised in this matter.

(quoting In re Bobo, 246 B.R. 453, 456 (Bankr. D.C. 2000). Our Bankruptcy Court has continually held "the sale is over when the hammer falls." In re Riverfront Props., LLC, 405 B.R. 570, 573 (Bankr. D.C. 2009) (Citing : In re Watts; In re Holmes, C/A No. 99-08796-W (Bankr, D. S.C. 11/23/1999); In re Brown, C/A No. 87-02507-B, Adv. Pro. 87-0281-B (Bankr. D. S.C. 1/28/1988); In re Agripen Grain Co., C/A No. 83-03606; Adv. Pro. 86-0413-D(Bankr. D.S.C. 7/31/1987).

In this case Appellants purchased the property from the Master at a public judicial auction on May 6, 2014, at which time Appellants tendered the initial required purchase-money deposit to the Court. On May 6, 2014, Appellants had no knowledge of an adverse claim to title, that the Trust intended to file a motion to vacate, or knowledge of any other alleged defect in the Appellant's title to the subject property[15].

c. The Trust's Motion to Vacate did Not Constitute Notice to Appellants of a Defect in Appellants' Title.

The Trust asserts its Motion to Vacate served as a notice to Appellants of a defect in Appellants title because it alleged the Trust had never properly been served.[16] Appellants assert there is a distinction between a defect in title to real property and an alleged defect in the procedure of a civil action.

> "It must be presumed from the judgment rendered that the Court considered and adjudicated the regularity and sufficiency of each and every step in the proceedings leading up to it, including the sufficiency of the complaint, the issuance and service of process upon the defendants,

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[15] The Trust did not even retain counsel until May 9, 2014. (R. pp. 258-263)

[16] Appellants gained knowledge of the Trust's intent to file a motion to vacate on May15, 2014. On May 16, 2014, at 12:03 p.m. Appellants tendered the balance of the purchase money to the Master. On May 16, 2014, at 1:16 p.m. the Master executed the Master's Deed to Appellants. On May 16, 2014, at 4:35 p.m. the Trust's Counsel served Appellants a copy of the Trust's Motion to Vacate via email. Prior execution of the Master's Deed Appellants only had notice the Trust intended to file a Motion to Vacate.

> and the rights and interests of the parties to the action under the allegations and evidence; and although the conclusions with respect to those matters, or any them, might have been erroneous, so that they would have been reversed on appeal they do not make the judgment void collaterally." Ashton, at 68 (quoting: Gladden v. Chapman, 106 S.C. 486, 91 S.E. 796, 797 (1917).
>
> "A sound public policy requires that the validity of judicial sales be upheld, if in reason and justice it can be done. In furtherance of this principle, our decisions have applied the general rule, applicable here, 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 proper parties were before the court when the order was made." Id. at 67 (quoting Cumbie v. Newberry, 251 S.C. 33, 159 S.E.2d 915 (1938)[17].

In this case the Trust asserts that Appellants had notice of an adverse claim or title defect due to its Motion to Vacate.[18] It is natural that the Trust would dispute Appellants claim to title because the Trust was foreclosed upon. However, Appellants as Purchasers at a Judicial Sale are entitled to rely upon the Courts rulings in the foreclosure action as to any claim to title asserted by the Trust. The Clerk of Court issued an Order of Publication and the Court determined that the Trust had properly been served by publication when the Order of Foreclosure stated service had been properly achieved. (R.

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[17] Appellants prior to sale undertook a title search of the Property, wherein Appellants examined the pleadings of the action, the RMC office records for Charleston County, and the tax records Charleston County. (R. pp. 321-334; R. p. 161, lns 5-15, R. p. 166, lns 20-25; R. pp. 380-391). Documents Appellants discovered during the title search include but are not limited to the December 2013 deed transferring the property to the Trust and an Tax record which appellants attached to their July 3, 2014, Memorandum. The Trust has asserted that Appellants attached the tax record to the Memorandum to evidence that Appellants believed the Property was owned by the Trustee's Parents at the time of sale (R. p. 200, line 15 – p. R. p. 201, line 7,). This is not correct. Appellants prior to the sale believed that the Trustee individually owned the property as a result of the December 2013 deed. (R. p. 201, ln 13 – R. p. 202, ln 1; R. p. 139, lines 3-20; R. p. 321-334) Appellants attached the tax record to their memorandum not as evidence of proper ownership of the property but as evidence that the Trustee's Address was not readily apparent.

[18] Again, Appellants had no notice of anything on May 6, 2014.

pp. 9-19) The Trust's Motion did not constitute a notice of and adverse claim or defect of title to Appellants.

The Order of April 9, 2015, ruled Appellants met the first two elements of BFPV, but Appellants did not acquire the deed without notice of lien or defect. The Master states: "The record establishes that the Purchasers, with notice of a potential claim from defaulting owner, rushed to the court to pay the balance due and then, after service of the Motion to Vacate the Sale, had the deed recorded at the RMC Office."[19] (R. pp. 9-19). The Master notes that Ashton discussed several issues relevant to the Court's ruling, but did not find controlling Ashton when Appellants quoted it stating: "It must be presumed from the judgment rendered that the Court considered and adjudicated the regularity and sufficiency of each and every step in the proceedings leading up to it, including . . . service of process upon the defendants. . . and although the conclusions with respect to those matters, or any them, might have been erroneous. . . they do not make the judgment void collaterally." Ashton, at 68; (R. p. 198, ln 22 – R. p 199, ln 19). Additionally the Master disagreed with Appellant's assertion that the sale date was the relevant date for determining whether Appellants had notice of adverse claim or defect. "Keys argues that the sales date – not the deed issuance date – determines when the notice of a defect should be known; however, this court finds, based upon its experience that no fixed date

[19] Appellants recorded the Deed the day the Master presented it to Appellants. Upon presentment of the deed the Master's Office asked Appellants if they knew about the Motion to Vacate. Therefore Master knew about the Motion to Vacate prior to presenting the deed to Appellants, but nonetheless the Master did present the deed to Appellants. Appellants took the presentment of the deed by the Master as evidence that the Deed was valid despite the filing of the Motion. Therefore, Appellants recorded the Deed in the RMC office as the law and public policy of this state strongly recommend be done.

can determine when the interests of justice dictate a sale should be overturned." (R. pp. 9-19).

Master erred in finding Appellants were not BFPV. The as the Master conceded Appellants paid in full, and received title by a Master's Deed. Additionally, Appellants had no notice of an adverse claim on the date of sale; the Trustee's deed is not an adverse claim to Appellants title because the Trustee's deed postdates the lis pendens; and the Trust's Motion to Vacate was not notice of an adverse claim because Appellants are entitled to a presumption that the Court judged service to have been affected upon the Trust with the Order of Foreclosure.

In conclusion Appellant's paid in full, received title by way of the Master's Deed, and did so without notice of a defect in title or adverse claim. Appellants are BFPV and the subject foreclosure proceedings were res judicata as to Appellants. The Master's ruling that Appellants are not BFPV was an abuse of discretion.

D. THE MASTER LACKED JURISDICTION TO RULE ON THE TRUST'S MOTION TO VACATE PURSUANT RULE 59, SCRCP.

"A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." Rule 59, SCRCP. The established case law is that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed. In re Beard, 597 S.E.2d 835 (Citing Pitman v. Republic Leasing Co., 351 S.C. 429, 579 S.E.2d 187 (Ct. App. 2002); Ness v. Eckerd Corp., 350 S.C. 399, 402, 566 S.E.2d 193, 195 (Ct. App. 2002) ("Although trial judges retain jurisdiction to alter judgments on their own initiative for ten days if a Rule 59(e) SCRCP, motion is filed, after ten days that jurisdiction is lost.").

In this case the Order of Foreclosure was filed April, 8, 2014. The Trust filed its Motion to Vacate pursuant Rule 59, SCRCP, on May 19, 2014. As of May 19, 2014, the Court had not retained jurisdiction to alter its Order of Foreclosure pursuant to Rule 59. The Order of July 22, 2014, is silent as to whether the Order was granted pursuant to Rule 59, SCRCP. (R. pp. 20-21). However, to the extent the Order was granted under Rule 59, SCRCP, it was an abuse of discretion.

II. DID THE MASTER ERR IN GRANTING THE TRUST'S MOTION TO AMENDED THE ORDER VACATING THE SALE, WHEN THE MOTION REQUESTED RELIEF WHICH HAD NOT BEEN REQUESTED BEFORE THE COURT ISSUED ORDER OF JULY 22, 2014.

"It is well settled that ordinarily a party may not receive relief not contemplated in his pleadings. While it is true that pleadings in the [ ] court must be liberally construed, this rule cannot be stretched so as to permit the judge to award relief not contemplated by the pleadings. Due Process requires that a litigant be placed on notice of the issues which the court is to consider." Heins at 152. A. party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." "Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier." Hickman, 301 S.C. 455, 392 S.E.2d 481 (quoting: Natural Resources Defense Council, 705 F. Supp. at 701, vacated on other grounds, 707 F. Supp. 3 (D.D.C. 1989)). A party cannot request that the Master amend his order to make findings of fact and conclusions of law not previously raised before the Master issued his order. Id. A party cannot raise a defense to an asserted issue by way of a Rule 59(e) motion which could been raised prior to the order See Patterson, 456 S.E. 2d 436; In re Beard, 359 S.C. 351, 597 S.E.2d 835; Gainey, 382 S.C. 414 675 S.E.2d 792.

In this case the July, 22, 2014, Order grants the Trust's Motion to Vacate on the basis that "in the interest of equity and for good cause shown that the Defendant's motion be granted" (R. pp. 20-21) That is the only basis asserted for the granting of the Trust's Motion to Vacate, and the Order makes no findings of fact. Prior to that Order, the only arguments the Trust had made were that the attempted personal service of the Trust by Belle Hall was defective due to a lack of due diligence, and that Belle had made misrepresentations to the Court within its affidavit for publication. August 1, 2014, Appellants filed a Motion to Reconsider the Order of July 22, 2014 (R. pp. 79-91). August 4, 2014, the Trust filed a Motion to Amend the Master's Order of July 22, 2014[20] (R. pp. 92-98). During the August 18, 2014, hearing upon the said Motions the Trust stated: "What started out essentially was - - quite honestly, I did not expect a Motion for Reconsideration on this. Essentially what we wanted to do is tidy it up for its impending appeals so we had some findings of fact and conclusions of law."(R. p. 171 lines 15-21). The Trust then goes on to state: "There's 60(b) language in there. There's 60(b)(1) that is excusable. There's 60(b)(5). Also in my memorandum, which I'll hand up to the Court, *I added independent action. It seems to have a slightly lesser standard* than 60(b)(5). . ." (R. p 175, line 2 – R. p.176, line 3).

At the August 18, 2014, hearing the Appellant's raised objections to a Number factual finding and conclusions of law asserted in the Trust's Motion to Amend. Specifically Appellants objected to the factual or legal findings found Paragraphs 7, 8, 12, 15, and 21 of the Trust's Motion to Amend. Additionally, the Appellants' objected to the Conclusion of Law asserted by the Trust in its Motions to Amend (R. p. 178, line 8 –

[20] The Motion to Amend takes the form of and could be interpreted as, a proposed order.

R. p. 180, line2). Appellants objected on the grounds that prior to the Order of July 22, 2014, the Trust had not presented evidence and/or sufficient evidence to support factual findings raised in the Trusts Motion to Amend. Additionally Appellants objected to the "Conclusions of Law" section of the Trust's Motion to Amend asserting that prior to the Order of July 22, 2014, the Trust had not raised arguments under Rule 60(b)(1),(4), and(5), therefore the issues where not preserved, because it was not appropriate to raise these issues for the first time through a motion to amend. (R. p. 178, line 8 – R. p. 180, line2). Finally, the defenses or legal arguments asserted for the first time in the Trust's August 18, 2014, Memorandum in support of its, Motion to Amend, including but not limited to public policy preclusion, violation of the publication statute, and independent action were not raised prior to the Order of July 22, 2014, nor in its Motion to Amend. During the August 18, 2014 hearing the Master stated: "to the extent it's necessary I'm going to grant the Defendant's Motion to Amend the Order to support that decision. . ." By a Form Four Order filed August 20, 2014, the Master granted the Trust's Motion to Amend.

Thereafter the Amended Order of February 10, 2015, makes additional new factual and legal findings including but not limited to that Bell Hall was grossly negligent in its attempted personal service of the Trust; that the Fraud and Collusion standard set forth in Yates v. Gridley, 16 S.C. 500 (1882) and it progeny should not be applied because the facts of this case are distinguishable; that the Master lacked personal jurisdiction over the Trust; that the Order of Foreclosure and Sale is VOID pursuant to 60(b)(4).

Additionally the Master stated in his Order of February 10, 2015, that he was declining to rule upon Appellant's assertion of BFPV, but then by the Order of April 9, 2015, the Master de facto amended his Order of July 22, 2014, a second time to state that Appellants' are not BFPV.

None of the issues were ever raised or preserved by the Trust prior to the Order of July 22, 2014. Even after the Order of July 22, 2014, the Trust never raised any issue as to the alleged gross negligence of Belle Hall; due process; personal jurisdiction, and distinguishing the case from one where the fraud and collusion standard applies. The Court cannot amend its order of July 22, 2014, to grant relief which was either not requested prior to the Order, or relief which was never requested at all. Therefore the Courts amendments of the Order of July 22, 2014, *twice* to grant unrequested and unpreserved relief was an abuse of discretion.

III. DID THE MASTER ERR IN DENYING THE APPELLANTS MOTION TO STAY WHERE THE EFFECT OF THE DENIAL IRREPARABLY HARMED APPELLANTS AND LEFT APPELLANTS SUCEPTIBLE TO FURTHER DAMAGE IN THE FORM OF WASTE UPON THE PROPERTY.

Generally injunctive relief is appropriate where the party can demonstrate he will suffer irreparable harm, has a likelihood of success on the merits, and an inadequate remedy at law. Scratch Golf v. Dunes West, 361 S.C.117, 603 S.E.2d 905 (2004); County of Richland v. Simpkins, 348 S.C. 664, 560 S.E.2d 902, 904 (Ct. App. 2002). In this case on July 22, 2014, the same date the Master filed his Order, Appellants filed a Motion to Stay the Order and for Order of Supersedeas. The Appellants moved pursuant to Rules 62 and 65, SCRCP, as well as Rule 241, SCACR, for a stay of the Order Vacating the Sale and further staying or enjoining the Master from voiding, terminating,

or canceling the Master's Deed which transferred the Property Appellants. Appellants further requested that the Master issue an Order of Supersedeas holding the proceeds from the Sale in bond. Appellants purpose for filing the motion was to request the provision of equal protection to the rights and interest in the Property for both the Appellants and Trust during the pendency of this Appeal. Had the Master granted Appellants Motion the Appellants would have remained in possession of the Property, protecting their rights and interest in the Property. Additionally, the Trust would have been protected by the Sale proceeds held in bond.

Under this scenario if the Court of Appeals were to Affirm the Master's Motion to Vacate, then the Property would have been returned to the Trust and the Trust would have been entitled to submit a claim for damages which could have been satisfied by the Sale proceeds held in bond. Damages could have easily been computed as the value of the Appellants use of the property during the pendency of the Appeal. The Sale proceeds are much greater than the value use of the Property during pendency of the Appeal[21], therefore there would have been sufficient bonded funds to compensate the Trust for its loss of use of the Property during the pendency of the Appeal.

However, the Master denied the Motion without even offering Appellants an opportunity to be heard orally on the matter. Additionally, that Master has continued to hold the proceeds of sale rather than returning them to Appellants as stated in the Order of July 22, 2014. The Master's and/or his office stated that he must hold the sale proceeds during the pendency of the Appeal, but refused to hold them in bond as

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[21] Both the Trust and the Appellants rented the property prior to the Appeal. Therefore Appellants would assert that the reasonable value of the use during pendency of this appeal would be determined to be the rental value of the property for the same period of time.

Appellants requested.[22] The result was that the Master stripped the Appellants of their possession of the property, but did not return the funds used to purchase the property to Appellants. Prior to losing possession Appellants had been renting the Property, and therefore losing the Property meant that Appellants also lost the monthly rental proceeds generated from the Property. The national real estate website www.zillow.com estimates that the rental value of the property is $2,084.00. Appellants have not received the benefit of renting the property since August of 2014. Using $2,084.00 as a barometer at present the Master's denial of the Appellants' Motion to Stay has irreparably harmed Appellants in the amount $20,840.00. Appellants will continue to suffer this irreparable harm during the pendency of the Appeal. Appellants have no remedy at law to make Appellants whole for the harm suffered, as there is no legal cause of action Appellants may assert to recover these damages. The harm to Appellants was caused not by the Trust but by the Master. Additionally Appellants would argue that because the Master denied Appellants Motion, Appellants are unprotected from suffering additional harm or waste at the hands of the Trust while the Trust is in possession of the Property during the pendency of the Appeal. Such harm or waste could include but is not limited to the Trust's failure to physically maintain the property.

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[22] Order of July 22, 2014, stated that the sale proceeds should be returned to Appellants. For whatever reason the check was lost transit. Appellants inquired about the check, and the Master's office canceled the check prior to it having been cashed. The money therefore remained in the Master's office trust account. Appellants moved for the Master to hold the money in bond which was denied. Appellants moved before the Court of Appeals which also denied the request. Thereafter Appellants requested a check from the Master's Office and were informed that the Master must hold the funds during the pendency of the appeal. (R. p. 164, line 21 – p. 166, line 7; R. pp. 118)

However, given that the Master presently holds the sale proceeds which the Trust would be entitled to if this Court overturns the Master's Order Vacating the Sale, then this Court could still make Appellants whole by overturning the Master's Order denying the injunctive relief which Appellants requested of the Master with Appellants Motion to Stay and for Order of Supersedeas. This Court could remand this matter to the Master to with the instruction to grant Appellants requested injunctive relief and to determine the amount of Appellants damages to be paid by the Trust through the proceeds of sale which are still being held by the Master. This remedy would put the parties on the equally protected footing which the Master should have placed the parties on upon by granting Appellants Motion to Stay and for Order of Supersedeas.

Appellants would assert that for the reasons stated above Appellants are likely to succeed on the merits of this action, Appellants have been irreparably harmed, and Appellants have no remedy at law to remedy their harm. The Master's denial of Appellant's Motion to Stay and for Order of Supersedeas was an abuse of discretion.

IV. DID THE MASTER ERR IN DENYING THE APPELLANTS MOTION TO STRIKE THE AFFIDAVITS, WHEN THE AFFIDAVITS SOUGHT TO INTRODUCE EVIDENCE WHICH THE TRUST EITHER HAD KNOWLEDGE OF OR SHOULD HAVE KNOWN PRIOR TO THE HEARING ON THE MOTION TO VACATE.

"The admission of evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. A motion to strike is likewise within the trial court's discretion and will not be reversed absent an abuse of discretion." Manios v. Nelson, Mullins, Riley & Scarborough, LLP, 389 S.C. 126, 697 S.E.2d 644 (2010).

A. party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." "Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier." Hickman, 301 S.C. 455, 392 S.E.2d 481 (quoting: Natural Resources Defense Council, 705 F. Supp. at 701, vacated on other grounds, 707 F. Supp. 3 (D.D.C. 1989)). A party cannot request that the Master amend his Order to make findings of fact and conclusions of law on issues of fact and law not previously raised before the Master issued his Order. Id. A party cannot raise a defense to an asserted issue by way of a Rule 59(e) motion which could been raised prior to the order See Patterson, 456 S.E. 2d 436; In re Beard, 359 S.C. 351, 597 S.E.2d 835; Gainey v. Gainey, 382 S.C. 414 675 S.E.2d 792. In order for an affidavit to be considered newly discovered evidence, the affidavit must contain evidence which has been discovered since the trial; could not have been discovered before the trial; is material to the issue; and is not merely cumulative or impeaching." See Lanier v. Lanier, 364 S.C.211, 612 S.E.2d 456 (2005).

In this case the Trust filed its Motion to Vacate on May 19, 2014 (R. pp. 67-78). During the July 3, 2014, hearing the Trust failed to raise a defense to Appellants assertion of BFPV (R. pp. 127-147). On July 22, 2014, the Master issued an Order granting the Trust's Motion to Vacate. The Order was silent as to Appellants assertion that they were BFPV. On August 1, 2014, Appellants filed a Motion to Reconsider the Order, again asserting Appellants were BFPV. On Thursday, August 14, 2014, the Trust filed three affidavits to provide evidentiary support to the Trust's subsequent and untimely assertion that Appellants were not BFPV (R. pp. 335-343). On Monday August 18, 2014, during the hearing upon Appellants' Motion to Reconsider the Order of July 22, 2014,

Appellants orally moved before the Master to Strike the August 14, 2014 Affidavits. The Master Denied the Appellants Motion to Strike (R. p. 22).

The three affidavits are an Affidavit of Trust's Counsel Amanda Reece, an Affidavit of Libby Castle, and an Affidavit of Anna Howell. All three Affidavits appear to be submitted to the Court for the purpose of providing evidence of when Appellants initially learned of the Trustee and when the Appellants originally received Notice of the Trust's intention to file a motion to vacate. Appellants would assert that all of the information or testimony presented in the Affidavits was either known by the Trust prior to the July 3, 2014 hearing, or should have been discovered prior to the hearing. After the hearing the Trust cannot raise for the first time, evidence which could have been presented to the Court at the hearing. The evidence submitted in the August 14, 2014, Affidavits was untimely and improper. The Master's Denial of Appellants Motion to Strike the Affidavits was an abuse of discretion.

CONCLUSION

For the reasons stated above, Appellants respectfully request that this Court reverse the rulings of the Master found in the Orders filed on July 22, 2014; August 20, 2014; February 10, 2015; and April 9, 2015.

RESPECTFULLY SUBMITTED,

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November 22, 2015
Charleston, SC

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
NOV 30 2015
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master in Equity

Case No. 2013-CP-10-4248

Belle Hall Plantation Homeowner's Association.....Respondent,

v.

John A. Murray, Trustee of the John E. Murray and
Gloria C. Murray Family Trust, Defendant

Of whom David Conor Keys & Karen Keys, Third Party Plaintiffs.....Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Brief Complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that on this 25 day of November 2015, I have served the Final Brief and Final Reply Brief of Appellants upon all counsel of record by depositing a copy in the United States Mail, postage prepaid addressed as follows:

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