THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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SC Court of Appeals

Charles B. Simmons, Jr., Master-in-Equity

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Common Pleas Case No. 2010-CP-23-1622
Appellate Case No. 2012-212447

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JP Morgan Chase Bank, National Association,.....Respondent,

v.

Brian Adrian Tucker, Jessica C. Tucker, and Half Mile Lake Homeowner's Association, Inc., Defendants,

Of whom Brian Adrian Tucker and Jessica C. Tucker are.....Appellants.

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# INITIAL BRIEF OF APPELLANTS

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## STATEMENT OF ISSUES

I. **Was the lower court's denial of Appellants' motion under Rule 60(b), SCRCP, the result of a flawed analysis?**

II. **Were the lower court's orders directing ejectment produced by a structurally defective proceeding that violates Due Process?**

III. **Did the lower court misapprehend the requirements of the Home Affordable Modification Program and administrative orders of the Supreme Court of South Carolina?**

## STATEMENT OF THE CASE

Chase Home Finance, LLC[1] filed this action to foreclose a mortgage on the house where the Appellants (hereinafter "the Tuckers") live on March 1, 2010. (R. pp. _____; Summons and Complaint.) Chase filed affidavits on March 17, 2010, that say that a process server served the Tuckers with the summons and complaint on March 9, 2010. (R. pp. _____; Affidavits of Service.) (The Tuckers later filed affidavits and presented testimony that noted they were not served.) (R. pp. _____; First Affidavits of Brian A. Tucker and Jessica C. Tucker; Second Affidavit of Jessica Cape Tucker p. 1; Second Affidavit of Brian Adrian Tucker pp. 1-2; Transcript p. 7 ln. 3-5, p. 25 ln. 20 – p. 26 ln. 8.) Chase filed an affidavit of default on April 20, 2010, and the case was referred to the master-in-equity on the same day. (R. pp. _____; Affidavit of Default; Motion and Order of Reference.)

After a foreclosure hearing on July 7, 2010, the master-in-equity issued an order directing a foreclosure sale. (R. pp. _____; Record of Hearing p. 1; Foreclosure Order.) The Tuckers did not attend the hearing. The Tuckers later presented affidavits and testimony that they never received any notice of this hearing. (R. pp. _____; First Affidavits of Brian A. Tucker and Jessica C. Tucker; Second Affidavit of Jessica Cape Tucker p. 1; Second Affidavit of Brian Adrian Tucker pp. 1-2; Transcript p. 7 ln. 3-5, p. 25 ln. 20 – p. 26 ln. 8.) The Tuckers presented uncontraverted testimony that they "constantly get mail delivered to [them] at Half

[1] The caption in this action was amended by order filed May 26, 2011, which substituted JPMorgan Chase Bank, National Association for Chase Home Finance, LLC due to merger of those two entities. (R. p. ____; Order Amending Caption.) Accordingly, "Chase" is used herein to refer to both these entities.

Mile *Place*; mail meant for Half Mile *Way*." (R. pp. _____; Second Affidavit of Brian Adrian Tucker p. 1.)

Chase was the successful bidder at the foreclosure sale on September 7, 2010. (R. pp. _____; Order on Sale of Real Estate.) On November 29, 2010, Chase filed an assignment of bid, noting that it assigned its bid to "Fannie Mae a/k/a Federal National Mortgage Association[.]" (R. pp. _____; Assignment of Bid.) The master issued a deed to "Fannie Mae a/k/a Federal National Mortgage Association" that same day. (R. pp. _____; Master's Title.)

Upon Chase's motion, but with no hearing, the master issued an "ejectment" order (actually a writ of assistance) directing the Sheriff of Greenville County to put *Chase* "in full, peaceful and quiet possession of the premises without delay[.]" (R. pp. _____; Ejectment Order.) This was despite the fact that the master's deed had issued to Fannie Mae, not Chase. (R. pp. _____; Master's Title.) In fact, the master's deed to Fannie Mae is referenced in this order, though the order gave as its basis that "Plaintiff [Chase] is entitled to possession of the subject premises." (R. pp. _____; Ejectment Order p. 1, Master's Title.) Rather than hold a hearing to determine whether Chase was entitled to such an order, in the ejectment order the master put the burden on the Tuckers to file "a Motion to Stay Writ of Ejectment" to challenge "Plaintiff's right to possession[.]" (R. pp. _____; Ejectment Order p. 2.)

The Tuckers did receive notice of the ejectment order. (R. pp. _____; First Affidavit of Brian A. Tucker; First Affidavit of Jessica C. Tucker; Second Affidavit of Jessica Cape Tucker p. 1; Second Affidavit of Brian Adrian Tucker; pp. 1-2.) They took immediate action after that: they engaged an attorney, filed affidavits

noting that the first time they received any process concerning the foreclosure case was when they got the ejectment order, and filed an "Emergency Motion to Stay Ejectment from Home." (R. pp. _____; Emergency Motion to Stay Ejectment from Home; First Affidavit of Brian A. Tucker; First Affidavit of Jessica C. Tucker.) The Tuckers followed that with a "Motion to Set Aside and Vacate Default" and a later motion clarifying and expanding the grounds on which they sought relief. (R. pp. _____; Motion to Set Aside and Vacate Default; Motion to Set Aside for Lack of Personal Jurisdiction, etc.) These filings focused on the Tuckers never having been served with the summons and complaint and on the fact that Chase led the Tuckers to believe that there were no foreclosure proceedings and that they were being processed for a modification of their mortgage loan. (R. pp. _____; Emergency Motion to Stay Ejectment from Home; Motion to Set Aside and Vacate Default; Motion to Set Aside for Lack of Personal Jurisdiction, etc.; First Affidavit of Brian A. Tucker; First Affidavit of Jessica C. Tucker.)

The master held a hearing on the motions at which the Tuckers testified about the assurances Chase made to them that there were no foreclosure proceedings and that they were being processed for a modification, as well as that the Tuckers were not served with any process in the foreclosure case until they received a copy of the master's ejectment order. (R. pp. _____; Transcript p. 6 ln. 2 – p. 24 ln. 8, p. 24 ln. 24 – p. 33 ln. 20.) Chase presented its process server, who testified that he delivered the summons and complaint to Mr. Tucker. (R. pp. _____; Transcript p. 40 ln. 19 – p. 41 ln. 9.) Apparently due to time constraints, the Court did not hear argument at the hearing but relied on the parties' written submissions and off-the-record

communications, both before and after the hearing, as to what their legal arguments were concerning the motions. (R. pp. _____; Order Denying 60(b) Motions pp. 1, 3; Transcript p. 3 ln. 4 – p. 4 ln. 8, p. 45 ln. 22 – p. 46 ln. 3.)

The master issued an order that denied the Tuckers' motions. (R. pp. _____; Order Denying 60(b) Motions.) The order discussed post-hearing talks with counsel concerning modification and foreclosure assistance program efforts. (R. pp. _____; Order Denying 60(b) Motions p. 4.) The order stated that the master analyzed the Tuckers' motion for relief from the judgment under a four-factor test, the factors being 1) the promptness with which relief was sought, 2) the reasons for failure to act promptly, 3) the existence of a meritorious defense, and 4) the prejudice to Chase. (R. pp. _____; Order Denying 60(b) Motions p. 4.) The order states that "each of these factors weigh <u>against</u> granting the Motion." (R. pp. _____; Order Denying 60(b) Motions p. 4.)

The master's decision that the Tuckers did not act promptly was based on the passage of 10 months between when the foreclosure hearing was had and when the Tuckers moved for relief from the judgment. (R. pp. _____; Order Denying 60(b) Motions p. 4.) The order does not discuss the Tuckers' uncontradicted testimony that they received no notice of the foreclosure hearing. (R. pp. _____; Order Denying 60(b) Motions.) The order also summarily states, without analysis, that the Tuckers "have failed to prove any reasons for their failure to act promptly." (R. pp. _____; Order Denying 60(b) Motions p. 5.)

Despite the Tuckers' direct testimony that they never received any process, the master found that the Tuckers had been served with the summons and complaint

and characterized the evidence they offered as "circumstantial[.]" (R. pp. _____; Order Denying 60(b) Motions p. 5; First Affidavits of Brian A. Tucker and Jessica C. Tucker; Second Affidavit of Jessica Cape Tucker p. 1; Second Affidavit of Brian Adrian Tucker pp. 1-2; Transcript p. 7 ln. 3-5, p. 25 ln. 20 – p. 26 ln. 8.) The order notes as the basis for this conclusion that the process server "specifically identified Brian Tucker in the courtroom as being the person he served[.]" (R. pp. _____; Order Denying 60(b) Motions p. 5.) The order does not mention that the process server only made this identification after Mr. Tucker had taken the stand and been identified by the Tuckers' counsel. (R. pp. _____; Order Denying 60(b) Motions; Transcript p. 24 ln. 11-21, p. 37 ln. 15 – p. 38 ln. 1, p. 40 ln. 20-23.)

The master also concluded that "perhaps most important to the court, the Defendants have no meritorious defense." (R. pp. _____; Order Denying 60(b) Motions p. 5.) The order does not mention the Tuckers' uncontradicted testimony that Chase instructed the Tuckers not to make mortgage payments, promised them a loan modification, and assured them foreclosure would not happen, except to say that "the alleged conduct cited in Defendants' motion occurred <u>after</u> the judgment was already entered of record." (R. pp. _____; Order Denying 60(b) Motions pp. 5, 7; Transcript p. 8 ln. 5-13, p. 9 ln. 2-18, p. 10 ln. 10-15, p. 11 ln. 14 – p. 13 ln. 21, p. 14 ln. 10-18, p. 17 ln. 5 – p. 19 ln. 25, p. 22 ln. 19 – p. 23 ln. 25, p. 29 ln. 19 – p. 30 ln. 1.) The order does not mention Mrs. Tucker's testimony that Chase's assurances to the Tuckers that they would receive a loan modification began in 2008, before the foreclosure action was ever brought. (R. pp. _____; Transcript p. 9 ln. 11-18.)

The order concluded that "Chase would be prejudiced if the judgment was vacated." (R. pp. _____; Order Denying 60(b) Motions p. 6.) The master's analysis that led to this conclusion was that "Chase has already advertised and purchased the property at judicial sale. Fannie Mae received a deed which has been recorded. Furthermore, since the deed was delivered to Fannie Mae, the judicial sale is *res judicata* under the provisions of S.C. Code Ann. § 15-39-870." (R. pp. _____; Order Denying 60(b) Motions p. 6.) The order did not mention that no evidence was adduced tending to establish that Fannie Mae was a bona fide purchaser for value without notice. (R. pp. _____; Order Denying 60(b) Motions p. 6.)

The order states that "HAMP [the Home Affordable Modification Program] is not a defense or cause of action. It is a matter to be decided by the court if raised in the pleadings, which it was not." (R. pp. _____; Order Denying 60(b) Motions p. 5.) The order further states that "as shown by Chase's affidavit and the Tuckers' payment history, the Defendants had earlier entered into a repayment plan and had then failed to timely make their HAMP trial payments. The Tuckers failed to offer evidence at the hearing to contradict Chase's affidavit by proving they timely made these payments." (R. pp. _____; Order Denying 60(b) Motions pp. 5-6.) Mrs. Tucker testified at the motions hearing that the Tuckers made all three of the HAMP trial payments. (R. pp. _____; Transcript p. 17 ln. 20 – p. 18 ln. 3.)

The master found that "[t]he Tuckers' current income is too low and their mortgage arrearage is too high for them to qualify" for a loan modification. (R. pp. _____; Order Denying 60(b) Motions p. 6.) The order states that "[a]ccording to Chase's analysis the Tuckers' mortgage payment to income ratio would be over 216%

and would not meet the guidelines." (R. pp. _____; Order Denying 60(b) Motions p. 6.) This comment is not further explained. (R. pp. _____; Order Denying 60(b) Motions p. 6.)

The master ruled that the Tuckers were required to show that Chase "acted with intent to defraud" in order to prevail on Rule 60(b)(3) grounds and held "there is no evidence of any extrinsic fraud sufficient to overturn or vacate the judgment." (R. pp. _____; Order Denying 60(b) Motions p. 7.) The court concluded that Chase's misrepresentation subject of the Tuckers' motion "would be intrinsic fraud (fraud submitted to the court as part of the litigation process) for which relief from a judgment is not available." (R. pp. _____; Order Denying 60(b) Motions p. 8.) The order does not set out what the master believed supported that conclusion. (R. pp. _____; Order Denying 60(b) Motions p. 8.)

In analyzing the Tuckers' motion for relief, the master accepted as true all the allegations of Chase's complaint. (R. pp. _____; Order Denying 60(b) Motions p. 8.) The order denying the Tuckers' motions states that "the Defendants waived any objections and are deemed to have admitted the allegation by failing to present their objections to this court in a timely fashion. Allegations made in a complaint that are not denied in the answer are **deemed admitted** under Rule 8(d)." (R. pp. _____; Order Denying 60(b) Motions p. 8.)

The order also directs the Sheriff of Greenville County "to place Fannie Mae aka Federal National Mortgage Association in peaceful possession of the property." (R. pp. _____; Order Denying 60(b) Motions pp. 8-9.) The order does not otherwise

discuss any issues related to the ejectment order. (R. pp. _____; Order Denying 60(b) Motions.)

The Tuckers moved for reconsideration. (R. pp. ____; Motion to Reconsider.) The master denied that motion without a hearing. (R. pp. _____; Order Denying Motion to Reconsider.)

This appeal followed.

## STATEMENT OF FACTS

The Tuckers were never served with the summons and complaint in this case, or even with any document referencing this case until they received the ejectment order. (R. pp. _____; First Affidavit of Jessica C. Tucker; First Affidavit of Brian A. Tucker; Second Affidavit of Jessica Cape Tucker p. 1; Second Affidavit of Brian Adrian Tucker pp. 1-2; Transcript p. 7 ln. 3-5, p. 25 ln. 20 – p. 26 ln. 8, p. 29 ln. 7-16.) They did, however, have direct communications with Chase about being processed for a loan modification since 2008, and these communications continued essentially unchanged after this foreclosure action was filed and after the foreclosure judgment was filed. (R. pp. _____; Second Affidavit of Jessica Cape Tucker pp. 3-5; Second Affidavit of Brian Adrian Tucker pp. 3-5; Transcript p. 8 ln. 5-13, p. 9 ln. 2-18, p. 10 ln. 10-15, p. 11 ln. 14 – p. 13 ln. 21, p. 14 ln. 10-18, p. 17 ln. 5 – p. 19 ln. 25, p. 22 ln. 19 – p. 23 ln. 25, p. 29 ln. 19 – p. 30 ln. 1.) Chase personnel told the Tuckers that they should stop making payments in order to get a loan modification. (R. pp. _____; Second Affidavit of Jessica Cape Tucker p. 4; Second Affidavit of Brian Adrian Tucker p. 3; Transcript p. 19 ln. 2 – p. 20 ln. 3.) This is entirely believable; across the country, "a seriously underwater homeowner with good credit

and a solid mortgage payment history who responsibly calls his lender to work out a loan modification is likely to be told by his lender that it will not discuss a loan modification until the homeowner is thirty days or more delinquent on his mortgage payment." Brent T. White, Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis 45 Wake Forest L. Rev. 971 (Winter 2010). When Mrs. Tucker got a phone call from a friend saying that a notice of foreclosure sale had been published in the newspaper, Chase personnel told her it was a mistake, that Chase had a modification in place for the Tuckers, and for the Tuckers to "wait on them" to get the modification processed because "[t]hey were so backed up" that "[i]t could take up to six months" to implement the modification. (R. pp. _____; Transcript p. 10 ln. 10-13, p. 11 ln. 18-19, p. 13 ln. 8-20, p. 14 ln. 10-16; Second Affidavit of Jessica Cape Tucker p. 4.)

When the Tuckers got a copy of the ejectment order, they engaged an attorney within 24 hours and began raising the issues that are the subject of this appeal. (R. pp. _____; Emergency Motion to Stay Ejectment from Home; Motion to Set Aside and Vacate Default; Motion to Set Aside for Lack of Personal Jurisdiction, etc.; First Affidavit of Brian A. Tucker; First Affidavit of Jessica C. Tucker; Second Affidavit of Jessica Cape Tucker; Second Affidavit of Brian Adrian Tucker; Transcript p. 15 ln. 15 – p. 16 ln. 1.) The reason that they did not appear and contest the foreclosure case before that is simple: they did not know about it. (R. pp. _____; Memorandum in Support of Motion to Reconsider p. 5; Second Affidavit of Jessica Cape Tucker p. 1; Second Affidavit of Brian Adrian Tucker pp. 1-2; Transcript p. 15 ln. 23 – p. 16 ln.

1.) Neither Chase nor the master ever offered any other explanation. (R. pp. _____; Memorandum in Support of Motion to Reconsider p. 5.)

## STANDARD OF REVIEW

The denial of a Rule 60(b) motion will be reversed where the lower court has abused its discretion in denying the motion. Tri-County Ice and Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779 (1991). "An abuse of discretion arises where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." Id.

## ARGUMENT

### I. The lower court applied a flawed analysis to produce its denial of the Tuckers' 60(b) motion.

#### a. The master did not apply the correct analysis.

In deciding a motion under Rule 60(b), SCRCP, the court hearing the motion is charged with deciding whether the party seeking relief has shown, by the preponderance of the evidence, that the conditions of a subsection of the Rule are met and, ordinarily, that he has a meritorious defense. See Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d 456, 458 (Ct. App. 2005); Bowers v. Bowers, 304 S.C. 65, 67-68, 403 S.E.2d 127 (Ct. App. 1991). "To establish a meritorious defense, a party is not required to show an absolute defense." Mictronics, Inc. v. S.C. Dept. of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001). In examining whether there is a meritorious defense, the appropriate assessment of this factor is whether the defense in question "is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence." Id. (quoting Graham v.

Town of Loris, 272 S.C. 442, 453, 248 S.E.2d 594 (1978)). To require more would essentially substitute the motion hearing for a trial on the merits, and one in which the burden has shifted to the defendant to disprove the plaintiff's allegations. Cf. id.

The subsections of Rule 60(b) provide for relief from judgments for the following:

> (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;
>
> (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(b), SCRCP.

**i. The analysis differs where the issue is whether a judgment is void for lack of jurisdiction.**

An exception to the usual requirement of showing of a meritorious defense exists where relief is sought under Rule 60(b)(4), SCRCP; if the judgment is void, relief must be granted, and there is no need for further analysis. BB&T v. Taylor, 369 S.C. 548, 552 n. 1, 633 S.E.2d 501, 503 n. 1 (2006). "A judgment is void if a court acts without personal jurisdiction. A court generally obtains personal jurisdiction by the service of a summons." Id. at 551.

The master erred in applying extra analytical steps to the decision of whether relief from the judgment should be granted on the ground that the judgment is void for lack of personal jurisdiction. (R. pp. _____; Order Denying 60(b) Motions pp. 4-6.) The lower court increased the Tucker's burden on this point beyond what the law requires of a movant seeking relief under Rule 60(b)(4). Id. at 552 n. 1.

**ii. The decision below is grounded in a misconception of the intrinsic/extrinsic distinction.**

A party may achieve relief from a final judgment where the party demonstrates "fraud, misrepresentation, or other misconduct of an adverse party." Rule 60(b)(3), SCRCP. In South Carolina, in order for a party to be entitled to relief under this subsection, the moving party must demonstrate that the fraud, misrepresentation, or other misconduct was extrinsic. Raby Constr., LLP v. Orr, 358 S.C. 10, 20-21, 594 S.E.2d 478, 484 (2005); Hagy v. Pruitt, 339 S.C. 425, 431, 529 S.E.2d 714, 717 (2000) ("A judgment may be set aside on the ground of fraud only if the fraud is 'extrinsic' and not 'intrinsic.'"). Misrepresentation and misconduct is extrinsic when it is collateral to the issues tried in a case and effectively deprives the litigant of a fair hearing or the opportunity to present its case. Id. (citing Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C., 294 S.C. 9, 362 S.E.2d 176 (1987); Mr. G. v. Mrs. G., 320 S.C. 305, 465 S.E.2d 101 (Ct. App. 1995). "Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." Chewning v. Ford Motor Co., 354 S.C. 72, 81, 579 S.E.2d 605, 610 (2003) (citing Hilton Head, 294 S.C. at 11, 362 S.E.2d at 177). "Intrinsic fraud, on the other hand, is fraud which was presented and considered in the

trial. It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud." Id. For example, perjury is usually intrinsic in character. Id. Intrinsic misrepresentations are usually made in court, while extrinsic misrepresentations are usually made outside of court. See id.

Under South Carolina law, fraud is not the only species of misrepresentation or misconduct that can provide a basis to relieve a party from a judgment. Rule 60(b)(3), SCRCP. If only out-and-out actual fraud did so, there would be no reason for Rule 60(b)(3), SCRCP, to state that relief may be granted for "fraud, *misrepresentation, or other misconduct* of an adverse party." (emphasis added).

Here, the Tuckers' argued and presented evidence that Chase actively led them to believe that there were no pending foreclosure proceedings when, in fact, there were. (R. pp. _____; Transcript p. 10 ln. 10-13, p. 11 ln. 18-19, p. 13 ln. 8-20, p. 14 ln. 10-16; Second Affidavit of Jessica Cape Tucker p. 4; Motion to Reconsider p. 4; Memorandum in Support of Motion to Reconsider p. 3; Emergency Motion to Stay Ejectment from Home p. 1; Motion to Set Aside and Vacate Default pp. 1-2; Motion to Set Aside, etc. pp. 1-2.) This activity by Chase falls within the ambit of extrinsic misrepresentation, as it induced the Tuckers to take no action to appear in or contest the foreclosure action. (R. pp. _____; Motion to Reconsider p. 4; Memorandum in Support of Motion to Reconsider p. 3; Emergency Motion to Stay Ejectment from Home p. 1; Motion to Set Aside and Vacate Default pp. 1-2; Motion to Set Aside, etc. pp. 1-2; Transcript p. 10 ln. 10-13, p. 11 ln. 18-19, p. 13 ln. 8-20, p. 14 ln. 10-16; Second Affidavit of Jessica Cape Tucker pp. 4-5.) The master erred in the way he conceptualized Chase's representations and the Tuckers' position on them.

These representations occurred outside of court and induced the Tuckers not to contest this foreclosure action by lulling them into believing there was no foreclosure action. That is quintessentially extrinsic. Id.

**iii. The master's analysis under Rule 60(b)(1) was flawed.**

Also, in the face of Chase's promises that there would be no foreclosure, any neglect of the Tuckers to defend this action was excusable. (R. pp. _____; Memorandum in Support of Motion to Reconsider pp. 3-4; Emergency Motion to Stay Ejectment from Home p. 1; Motion to Set Aside and Vacate Default pp. 1-2; Motion to Set Aside, etc. pp. 1-2; Transcript p. 10 ln. 10-13, p. 11 ln. 18-19, p. 13 ln. 8-20, p. 14 ln. 10-16; Second Affidavit of Jessica Cape Tucker pp. 4-5.) Mistakes of fact are sufficient to support relief under Rule 60(b)(1), SCRCP, where the moving party "make[s] a showing that failure to avoid the mistake was justified." Coleman v. Dunlap, 306 S.C. 491, 495, 413 S.E.2d 15 (1992). This is not limited to mistakes about the underlying facts of the action but may extend to mistakes about procedural facts as well. Mictronics, 345 S.C. at 508 (relief proper under 60(b)(1) where party mistaken about hearing date). Here, the Tuckers' mistake was to believe there was no foreclosure action, a mistake they made by relying on what Chase told them. If the Tuckers cannot excusably rely on the denial by Chase – their mortgage lender – that there was any foreclosure action, that begs the question of what it is they might be able to excusably rely on. (R. pp. _____; Memorandum in Support of Motion to Reconsider p. 4.) The master set the burden to achieve relief under Rule 60(b)(1) at a level that was artificially high.

**iv. The master applied the wrong reasoning to measure how promptly the Tuckers acted.**

The method the master used to assess whether the Tuckers acted promptly was to calculate the length of time between when the foreclosure judgment was rendered and the time the Tuckers appeared and began to move for relief. (R. pp. _____; Order Denying 60(b) Motions p. 4.) In this case, that was a flawed reckoning. (R. pp. _____; Motion to Reconsider p. 4.)

Whether a 60(b) movant takes prompt action to seek relief from a default judgment is ordinarily determined by examining how long the movant took to seek relief after he discovered the existence of the judgment, or at least the existence of the case against him. See Lowe's of Georgia, Inc. v. Costantino, 288 S.C. 106, 110, 341 S.E.2d 382, 384 (Ct. App. 1986) (60(b) movants "were reasonably prompt in seeking relief on discovering the default"). A party cannot be expected to move for relief from a judgment in a case he does not know exists. Cf. id. Here, one could not say that the Tuckers delayed in seeking relief once they discovered the ejectment order (and, thus, the foreclosure action itself); rather, they took immediate action to bring the matter to the court's attention. (R. pp. _____; Emergency Motion to Stay Ejectment from Home; Motion to Set Aside and Vacate Default; Motion to Set Aside for Lack of Personal Jurisdiction, etc.; First Affidavit of Brian A. Tucker; First Affidavit of Jessica C. Tucker.) The master erred in analyzing this factor by simply measuring the time between when the judgment was rendered and the time the motions were made rather than looking to how long the Tuckers knew of the foreclosure judgment before they sought relief.

**v. The master's prejudice analysis was based on an assumption, not fact.**

The master erred in the way he analyzed whether Chase would be prejudiced if the Tuckers' motion were granted. (R. pp. _____; Order Denying 60(b) Motions p. 6.) The master's reasoning was that "since the [master's] deed was delivered to Fannie Mae, the judicial sale is *res judicata* under the provisions of S.C. Code Ann. § 15-39-870." (R. pp. _____; Order Denying 60(b) Motions p. 6.)

The Code section cited by the master provides that where the court has jurisdiction to issue the foreclosure decree, a judicial sale "shall be deemed res judicata as to any and all bona fide purchasers for value without notice[.] S.C. Code Ann. § 15-39-870 (2005). The law does not assume the existence of bona fide purchaser status; rather, the burden is on the party seeking to show such status to prove it affirmatively. Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 875 (2006). The master simply assumed that Fannie Mae was a bona fide purchaser of the property for value and without notice, and that assumption was the total of his inquiry into whether Chase would be prejudiced by the grant of the Tucker's motion. (R. pp. _____; Order Denying 60(b) Motions p. 6.) The master's decision was controlled by an error of law.

**vi. It was error for the master to treat Chase's allegations as facts.**

The master's analysis of the Tucker's motion for relief from the judgment accepted as true all the allegations of Chase's complaint. (R. pp. _____; Order Denying 60(b) Motions p. 8.) The master believed that the Tuckers "waived any objections and are deemed to have admitted the allegation by failing to present their

objections to this court in a timely fashion. Allegations made in a complaint that are not denied in the answer are **deemed admitted** under Rule 8(d)." (R. pp. _____; Order Denying 60(b) Motions p. 8.) The master's analysis was thus controlled by an error of law.

Our courts have never deemed the allegations of a plaintiff's complaint as admitted for the purpose of analyzing a motion for relief from a default judgment. See, e.g., Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 608-09, 681 S.E.2d 885, 888-89 (2009) (discussing 60(b) analysis); Lowe's of Georgia, 288 S.C. at 107-11 (relief from default judgment with no mention of deeming plaintiff's allegations admitted in motion's analysis). The availability of a challenge to a default judgment under Rule 60(b), SCRCP, is one of the primary reasons the Rule exists. See Winesett v. Winesett, 287 S.C. 332, 334, 338 S.E.2d 340 (1985) ("default judgment may not be appealed"; correct practice is to move for relief from judgment); Belue v. Belue, 276 S.C. 120, 121, 276 S.E.2d 295 (1981) ("no appeal lies for a default judgment"; correct practice is to move for relief from judgment); Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 99 (2d ed. 2002). If a court were to have to consider all of a plaintiff's allegations as admitted in the context of a motion for relief from a default judgment, the only defenses that would qualify as "meritorious defenses" for the analysis would be affirmative defenses – which existing law tells us is not true. See Mictronics, 345 S.C. at 511. Here, by deeming all allegations of the complaint admitted for the purpose of analyzing the motion, the master used circular reasoning to make the

burden of achieving relief from a judgment practically impossible to meet. This is not the proper analysis and not what is intended by Rule 60(b). See id.

The master's analysis of the motion for relief was controlled by errors of law. These were fundamental errors about what the proper reckoning is when deciding a 60(b) motion. These errors stacked the deck against the Tuckers, and reversal is required.

**b. When the appropriate analysis is applied, it shows the Tuckers are entitled to relief from the foreclosure judgment.**

The master applied the wrong analysis to the Tuckers' motion for relief from the judgment. When the correct analysis is applied, that analysis demonstrates that the Tuckers are entitled to relief.

**i. The Tuckers met their burden to show the judgment is void.**

Rule 60(b)(4), SCRCP, provides for relief from a judgment where the judgment is void. "A judgment is void if a court acts without personal jurisdiction. A court generally obtains personal jurisdiction by the service of a summons." BB&T, 369 S.C. at 551 (internal citations omitted). The movant in a Rule 60(b) motion has the burden to present evidence proving the facts essential to entitle him or her to relief. Id. at 552. An affidavit of service is "*prima facie* evidence of service which may be impeached by extrinsic evidence." Richardson Construction Co., Inc. v. Meek Engineering and Construction Inc., 274 S.C. 307, 311, 262 S.E.2d 913 (1980).

Here, the Tuckers did present specific facts, through affidavits and live testimony, contravening Chase's process server's assertion that he served the Tuckers with the summons and complaint. (R. pp. _____; First Affidavit of Jessica C. Tucker;

First Affidavit of Brian A. Tucker; Second Affidavit of Jessica Cape Tucker p. 1; Second Affidavit of Brian Adrian Tucker pp. 1-2; Transcript p. 7 ln. 3-5, p. 25 ln. 20 – p. 26 ln. 8, p. 29 ln. 7-16.) While the process server's testimony did offer some more detail than his affidavit of service, it is insufficient to trump the Tuckers' detailed showing that they were not served. (R. pp. _____; Affidavits of Service; First Affidavit of Jessica C. Tucker; First Affidavit of Brian A. Tucker; Second Affidavit of Jessica Cape Tucker p. 1; Second Affidavit of Brian Adrian Tucker pp. 1-2; Transcript p. 7 ln. 3-5, p. 25 ln. 20 – p. 26 ln. 8, p. 29 ln. 7-16, p. 38 ln. 21 – p. 43 ln. 3, p. 44 ln. 2 – p. 45 ln. 19.) While the master relied on the process server "specifically identif[ying] Brian Tucker in the courtroom as being the person he served," the master failed to account for the fact that the process server only made this identification after Mr. Tucker had taken the stand and been identified by the Tuckers' counsel. (R. pp. _____; Order Denying 60(b) Motions p. 5; Transcript p. 24 ln. 11-21, p. 37 ln. 15 – p. 38 ln. 1, p. 40 ln. 20-23.) Further, the process server said he heard no dogs bark when he knocked on the Tuckers' door, though Mr. Tucker's mother's dog barks furiously when anyone knocks on the door. (R. pp. _____; Transcript p. 42 ln. 11 – p. 43 ln. 1, p. 44 ln. 2 – p. 45 ln. 6.) The process server's statements were self-serving and were contradicted by the other evidence. (R. pp. _____; Transcript p. 42 ln. 11 – p. 43 ln. 1, p. 44 ln. 2 – p. 45 ln. 6.) Particularly in light of the fact that Mr. Tucker had already been identified by his counsel when the process server testified, it was error for the master to conclude the Tuckers were served solely because the process server "specifically identified Brian Tucker in the

courtroom as being the person he served[.]" (R. pp. _____; Order Denying 60(b) Motions p. 5; Transcript p. 24 ln. 11-21, p. 37 ln. 15 – p. 38 ln. 1, p. 40 ln. 20-23.)

As in Richardson Construction, the following is true here:

> The proof by affidavit in this case is insufficient when confronted with the other facts and circumstances attending it. When these factors are coupled with [a] counter affidavit denying service, the cumulative effect entitled [the Tuckers] to relief from judgment as a matter of right[.]

Id. (internal citation omitted).

Further, the Tuckers' explanation for why they took no action to oppose the foreclosure case – because they did not know about it – makes sense. (R. pp. _____; First Affidavit of Jessica C. Tucker; First Affidavit of Brian A. Tucker; Second Affidavit of Jessica Cape Tucker p. 1; Second Affidavit of Brian Adrian Tucker pp. 1-2; Transcript p. 15 ln. 23 – p. 16 ln. 1.) Neither Chase nor the master offered any alternative explanation. (R. pp. _____; Memorandum in Support of Motion to Reconsider p. 5.) Accordingly, the Tuckers proved by a preponderance of the evidence that they were not served, and their motion should have been granted.

**ii. The Tuckers met their burden under 60(b)(1) and (3).**

Here, the Tuckers presented specific (and uncontradicted) testimony that Chase's employees denied on multiple occasions that there were any foreclosure proceedings. (R. pp. _____; Transcript p. 10 ln. 10-13, p. 11 ln. 18-19, p. 13 ln. 8-20, p. 14 ln. 10-16; Second Affidavit of Jessica Cape Tucker p. 4.) This is the only evidence in the record on this point. The Tuckers met their burden to prove entitlement to relief under subsections (1) and (3) of Rule 60(b). Relying on what Chase told them, they believed there was no foreclosure action to oppose. (R. pp.

_____; Transcript p. 10 ln. 10-13, p. 11 ln. 18-19, p. 13 ln. 8-20, p. 14 ln. 10-16; First Affidavit of Jessica C. Tucker; First Affidavit of Brian C. Tucker; Second Affidavit of Jessica Cape Tucker p. 4.) Chase's misrepresentations induced the Tuckers not to act and were, thus, extrinsic. (R. pp. _____; Transcript p. 10 ln. 10-13, p. 11 ln. 18-19, p. 13 ln. 8-20, p. 14 ln. 10-16; First Affidavit of Jessica C. Tucker; First Affidavit of Brian C. Tucker; Second Affidavit of Jessica Cape Tucker p. 4.) In light of the Plaintiff's representations, any neglect of the Tuckers to defend the foreclosure action is indeed excusable. (R. pp. _____; Motion to Set Aside, etc. pp. 1-3; Motion to Reconsider p. 3; Memorandum in Support of Motion to Reconsider pp. 4, 5.)

The record also shows the Tuckers have meritorious defenses based on the Plaintiff's conduct: unclean hands, estoppel, waiver of acceleration, and defenses based on the settlement of the underlying loan default. (R. pp. _____; First Affidavit of Jessica C. Tucker; First Affidavit of Brian C. Tucker; Second Affidavit of Jessica Cape Tucker pp. 3-5; Second Affidavit of Brian Adrian Tucker pp. 3, 4-5; Memorandum in Support of Motion to Reconsider pp. 4-5; Transcript p. 8 ln. 5-13, p. 9 ln. 2-18, p. 10 ln. 10-15, p. 11 ln. 14 – p. 13 ln. 21, p. 14 ln. 10-18, p. 17 ln. 6 – p. 19 ln. 25, p. 22 ln. 19 – p. 23 ln. 25, p. 27 ln. 14-22, p. 29 ln. 19 – p. 30 ln. 1); Rakestraw v. Dozier Assocs., Inc., 285 S.C. 358, 360, 329 S.E.2d 437, 438 (1985) (waiver of acceleration by accepting payments); Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010) (unclean hands); Quail Hill, LLC v. County of Richland, 379 S.C. 314, 665 S.E.2d 194 (Ct. App. 2008) (estoppel); Cisson Const., Inc. v. Reynolds & Assocs., Inc., 311 S.C. 499, 503, 429 S.E.2d 847, 849 (Ct. App. 1993) ("mortgagee can be held to have waived his right to accelerate a note

upon default by accepting payments after default"). It was error for the master not to grant the Tuckers' motion for relief from the judgment.

As discussed above, the master erred in the way he analyzed whether Chase would be prejudiced if the Tuckers' motion were granted. (R. pp. _____; Order Denying 60(b) Motions p. 6.) Here, there was no evidence adduced tending to show that Fannie Mae was a bona fide purchase for value without notice. (R. pp. _____; Motion to Reconsider pp. 3-4.) Fannie Mae was simply the assignee of Chase's credit bid at the foreclosure sale, and what little there is in the record on this point would tend to indicate, if anything, that Fannie Mae may not have paid anything at all for the bid assignment. (R. pp. _____; Order Denying 60(b) Motions p. 2; Master's deed & affidavit attachment; Assignment of Bid; Order on Sale of Real Estate; Order for Deficiency Judgment.) In the absence of any supporting evidence, it was improper for the master to assume that Fannie Mae was a bona fide purchaser of the property for value and without notice. (R. pp. _____; Order Denying 60(b) Motions p. 6.)

The master's denial of their motion lacked evidentiary support and, crucially, was controlled by errors of law.

## II. The proceedings that resulted in the orders for ejectment of the Tuckers shifted the burden of proof to the Tuckers and were structurally defective.

### a. The lower court's ejectment order procedure violated Due Process.

Without ever holding a hearing or providing the Tuckers with advance notice, the master issued an "ejectment" order (more properly termed a writ of assistance), and then in that order shifted the burden of proof from Chase to the Tuckers about

whether such an order should be issued. (R. pp. _____; Order Denying 60(b) Motions p. 3; Ejectment Order.) This was a structural defect that infected the entire procedure on this issue, and it was error for the master to issue this order in favor of Chase, as well as error for the master to then summarily order such relief for Fannie Mae, which never sought such relief to begin with. (R. pp. _____; Order Denying 60(b) Motions pp. 8-9; Ejectment Order; Memorandum in Support of Motion to Reconsider pp. 7-9.)

Our state Supreme Court has discussed writs of assistance as follows:

> A writ of assistance is undoubtedly an appropriate process to issue from a court of equity to place a purchaser of mortgaged premises under its decree in possession after he has received the commissioner's or master's deed, as against parties who are bound by the decree, and who refuse to surrender possession pursuant to its direction or other order of the court. The power to issue the writ results from the principle that the jurisdiction of the Court to enforce its decree is coextensive with its jurisdiction to determine the rights of the parties, and to subject to sale the property mortgaged. But . . . the writ of assistance can only issue against parties bound by the decree, which is only saying that the execution cannot exceed the decree which it enforces, and that the owner of the property mortgaged, which is directed to be sold, can only be bound when he has notice of the proceedings for its sale, if he acquired his interest previous to their institution, it is too obvious to require either argument or authority. *It is a rule as old as the law that no man shall be condemned in his rights of property, as well as in his rights of person, without his day in Court – that is, without being duly cited to answer respecting them, and being heard or having an opportunity of being heard thereon.*"

James v. Graham, 114 S.C. 107, 78 S.E. 82 (1912) (emphasis and ellipsis added, internal citations and quotation marks omitted). Our Supreme Court has also stated:

> It is commonly declared that the issuance of a writ of assistance rests in the sound discretion of the Court, *and that it is issued only when the right is clear and free from doubt—when there is no equity or appearance of equity in defendant, and when the decree, and the sale and proceedings thereunder, are beyond suspicion*; and it is certainly not customary to issue the writ where there is a bona fide contest as to the right to the possession of the land under the sale, or where the occupant claims by a new and independent right or title, or where the rights of the respective parties have not been fully and finally adjudicated in the principal suit.
>
> . . .
>
> It will never be issued when there is any reasonable prospect that the party in possession may make a successful defense of his possession, either at law or by the aid of a court of equity. And it will never be exercised in a case of doubt[.]

Griggs v. Griggs, 205 S.C. 272, 31 S.E.2d 505 (1944) (emphasis added, internal citations and quotation marks omitted).

In other words, particularly since a foreclosure sale brings about a change in ownership, not possession, a writ of assistance ordinarily may not issue without a hearing first being held on whether it should issue. (R. pp. _____; Memorandum in Support of Motion to Reconsider p. 8.) Indeed, this has been the process followed across this state for quite some time. (R. pp. _____; Memorandum in Support of Motion to Reconsider p. 8); see Susan B. Berkowitz, et al., South Carolina Foreclosure Law Manual 53 (2d ed. 2009). While it is a summary process, it does adjudicate a right not determined by the underlying foreclosure action: the right of possession. (R. pp. _____; Memorandum in Support of Motion to Reconsider p. 80); Griggs, 205 S.C. 272; James, 114 S.C. 107. When a foreclosure action is brought, as well as when a foreclosure judgment is rendered, there is no way to know who the

successful purchaser at the foreclosure sale will be. The identity of that purchaser, along with any right that purchaser may have to possession of the property, only becomes known once the purchaser has bought the property. "The rights and liabilities of the parties, that is, their rights to an action for judgment or relief, depend upon the facts as they existed at the time of the commencement of the action," and, at the commencement of a foreclosure action, the mortgagee plaintiff has no right to possession of the premises. American Agricultural Chemical Co. v. Thomas, 206 S.C. 355, 360, 34 S.E.2d 592, 594 (1945). It is only after the property has been purchased at the foreclosure sale that there can be any live controversy for a court to decide about whether the foreclosure sale purchaser or (former) mortgagor is entitled to possession of the land. Hearings are held about whether writs of assistance should issue because such a writ decides, for the first time, the issue of who among the parties involved has the right to possession of the land. See Griggs, 205 S.C. 272; James, 114 S.C. 107.

"[D]ue process of law requires that a person shall have a reasonable opportunity to be heard before a legally appointed and qualified tribunal before any binding decree, order, or judgment can be made affecting his rights to life, liberty, or property." LaSalle Bank Nat'l. Ass'n. v. Davidson, 386 S.C. 276, 279, 688 S.E.2d 121, 122-23 (2009) (quoting State v. Brown, 178 S.C. 294, 300, 182 S.E. 838, 841 (1935)). Possession of real property is a constitutionally protected interest that triggers the requirements of due process. Moore v. Moore, 376 S.C. 467, 474-75, 657 S.E.2d 743, 747 (2008). "Procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the

right to confront and cross-examine witnesses." Id. at 473. The master issued the ejectment order without providing the Tuckers with any of these due process requirements. (R. pp. _____; Order Denying 60(b) Motions pp. 8-9; Ejectment Order; Memorandum in Support of Motion to Reconsider pp. 7-9.) Due process was not afforded here. (R. pp. _____; Order Denying 60(b) Motions pp. 8-9; Ejectment Order; Memorandum in Support of Motion to Reconsider pp. 7-9.)

"The law recognizes two kinds of errors: trial errors and structural defects. The former are subject to 'harmless error' analysis while the latter are not. . . . [S]tructural defects in the constitution of the trial mechanism defy analysis by harmless error standards." LaSalle Bank, 386 S.C. at 280 (internal quotation marks omitted). Structural defects are errors in the very way that the process of deciding the issue is set up. Id. When a proceeding is structurally defective, the court administering it weighs out justice using tilted scales, and nothing but reversal can cure such a defect. See id.

In accordance with the general principle that in a civil action the plaintiff bears the burden of proof, it is incumbent upon the party seeking the issuance of a writ of assistance to prove that it is entitled to have such a writ issue. See Baugh & Sons Co. v. Graham, 150 S.C. 398, 401, 148 S.E. 220 (1926) (plaintiff bears burden of proof in civil case). Here, the master inverted that process, first granting Chase the relief it sought without requiring any proof to support it, then making it incumbent on the Tuckers to "challenge Plaintiff's right to possession." (R. p. _____; Ejectment Order p. 2.) This is a structural defect.

The master's ejectment order against the Tuckers violates due process and was controlled by an error of law. The ejectment order and master's decision not to stay its operation "defy analysis by harmless error standards." LaSalle Bank, 386 S.C. at 280. They require reversal. Id.

**b. The grantee of the master's deed has never sought ejectment of the Tuckers.**

If there had been a hearing on whether a writ of assistance should issue in favor of Chase, Chase could not have prevailed at it. (R. pp. ___; Memorandum in Support of Motion to Reconsider p. 9.) As shown by the very deed attached to the ejectment order (presumably submitted by Chase in support of the order being issued), Chase does not own the property subject of this case. (R. pp. ___; Master's deed.) The grantee of the master's deed was "Fannie Mae a/k/a Federal National Mortgage Association," not Chase. (R. pp. ___; Master's deed.) Chase was never entitled to any order purporting to authorize the sheriff "to put the Plaintiff in full, peaceful and quiet possession of the premises[.]" (R. pp. ___; Ejectment Order.)

Fannie Mae never sought a writ of assistance. It was error for the master to order that "the Sheriff of Greenville County is hereby ordered to place Fannie Mae aka Federal National Mortgage Association in peaceful possession of the property." (R. pp. _____; Order Denying 60(b) Motions pp. 8-9.) Fannie Mae never looked for such relief, and Chase lacked standing to seek such relief for Fannie Mae.

"Standing refers to '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'" Powell ex rel. Kelley v. Bank of America, 665 S.E.2d 237, 241 (Ct. App. 2008) (quoting Black's Law Dictionary 1413 (7th ed.

1999)). Standing "consists of the following three elements" as noted by the South Carolina Supreme Court:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Sea Pines Assn. for the Protection of Wildlife, Inc. v. S.C. Dept. Natural Resources, 345 S.C. 594, 601, 550 S.E.2d 287 (2001) (internal quotation and quotation-related punctuation marks omitted).

"The first element requires *the plaintiff* to suffer an injury in fact, or a particularized harm." Id. (emphasis added). While there is no "plaintiff" in the strict sense with regard to a writ of assistance, basic standing principles still dictate that the party seeking the issuance of the writ must be entitled to, and deprived of, possession of the premises in order for the writ to issue. See id.; Griggs, 205 S.C. 272; James, 114 S.C. 107.

The party that sought a writ of assistance here was Chase, which was not the grantee of the master's deed and was not entitled to possession of the premises. (R. pp. ___; Ejectment Order; Master's deed.) In his order denying the Tuckers' motions, the master basically just issued a writ of assistance in favor of Fannie Mae; however, Fannie Mae never sought for the court to do anything about the Tuckers' possession of the property, and Chase did not have standing to seek a writ of assistance for

Fannie Mae. (R. pp. _____; Order Denying 60(b) Motions pp. 8-9.) Indeed, Chase *did not* ask the master to issue a writ of assistance in favor of Fannie Mae. That the Master's order contains no analysis of this issue whatsoever is telling: no analysis would have supported the decision to issue such an order. (R. pp. _____; Order Denying 60(b) Motions pp. 8-9.)

The master's decision to order ejectment of the Tuckers was controlled by an error of law and is without evidentiary support. It is prejudicial error that must be reversed.

## III. The lower court misapprehended HAMP and did not follow the directives of the Administrative Orders.

HAMP was created to provide a reduction in monthly mortgage payment amounts to 3 to 4 million American homeowners. It was enacted pursuant to the Emergency Economic Stabilization Act of 2008, which states its purpose as follows:

> The purposes of this Act are –
> (1) to immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States; and
> (2) to ensure that such authority and such facilities are used in a manner that –
>  (A) **protects home values, college funds, retirement accounts, and life savings**;
>  (B) **preserves homeownership** and promotes jobs and economic growth;
>  (C) maximizes overall returns to the tax payers of the United States; and
>  (D) provides public accountability for the exercise of such authority.

12 U.S.C. § 5201 (emphasis added).

The program concerns residential loans owned, securitized, or guaranteed by the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac) as well as residential loans to which Fannie Mae and Freddie Mac have no such relationship but which are serviced by the mortgage servicers that have entered into agreements to implement the program. HAMP came into being when the U.S. Treasury Department issued guidelines for the program on March 4, 2009.

The master ruled that "HAMP is not a defense or cause of action. It is a matter to be decided by the court if raised in the pleadings, which it was not." (R. pp. _____; Order Denying 60(b) Motions p. 5.) This ruling was error in at least two respects. (R. pp. _____; Motion to Reconsider pp. 2-3, 4; Memorandum in Support of Motion to Reconsider pp. 6-7.)

First, both the 2009 and 2011 South Carolina Supreme Court Administrative Orders concerning mortgage foreclosure actions provide that the court with jurisdiction over the foreclosure action is to decide *any* dispute concerning HAMP or the applicability of or process under the Administrative Orders. In re: Mortgage Foreclosure Actions, 396 S.C. 209, 214, 720 S.E.2d 908, 910 (2011); In re: Mortgage Foreclosures and the Home Affordable Modification Program (HMP), 2009-05-22-01 (S.C. Sup. Ct. dated May 22, 2009). There is no requirement that disputes concerning HAMP be raised by a mortgagor defendant in pleadings. Id. Further, the words of the master's order show how the reasoning it employed is flawed: if "HAMP is not a defense or cause of action[,]" then why would it need to be "raised in the pleadings[?]" (R. pp. _____; Order Denying 60(b) Motions p. 5); see Rule 8, SCRCP

(generally providing that claims and defenses are what must be stated in pleadings). This sort of Catch-22 reasoning pervades the master's order.

The master's decision is underpinned by his perception that he could not properly hear issues relating to Chase's compliance with HAMP or the Administrative Orders. That perception was wrong as a matter of law.

Second, the HAMP agreements entered into by HAMP servicers and the United States government (through Fannie Mae as its agent) are made for the benefit of mortgage loan borrowers who are behind on their mortgage payments; these people, people like the Tuckers, are third-party beneficiaries of those agreements. (R. pp. ____; Memorandum in Support of Motion to Reconsider p. 6); see Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 554 (7th Cir. 2012) (HAMP implemented "to help homeowners avoid foreclosure"); Sampson v. Wells Fargo Home Mortg., Inc., No. CV 10-08836 DDP (SSx), 2010 WL 5397236, at *3 (C. D. Cal. Nov. 19, 2010) ("Here, the court is persuaded that Plaintiff – an individual facing foreclosure of her home – has made a substantial showing that she is an intended beneficiary of the HAMP, a federal agreement entered into by Defendants"). "[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than incidental or consequential, benefit to such third person." Hardaway Concrete Co., Inc. v. Hall Contracting Corp., 374 S.C. 216, 225, 647 S.E.2d 488, 492 (Ct. App. 2007). Violation of such an agreement can provide a borrower with a substantive claim or defense. (R. pp. ____; Memorandum in Support of Motion to Reconsider p. 6); id. At least one circuit judge has refused to dismiss claims against a servicer by borrowers based on breach of the

servicer's duties under its HAMP agreement. (R. pp. ____; Order attached to Memorandum in Support of Motion to Reconsider – U.S Bank, etc. v. Love, Case No. 2009-CP-32-5511 pp. 2-3.)

In addition, a number of courts have found borrowers made legally valid claims for substantive relief based on lender misconduct with regard to HAMP application processing and lender failure to abide by trial period plan agreements. Wigod, 673 F.3d at 559, n. 4, 560-66, 568-71, 574-75 (discussing treatment of HAMP-related claims in federal district courts; upholding claims for breach of contract (trial period plan), promissory estoppel, fraudulent misrepresentation, and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act); In re JPMorgan Chase Mortgage Modification Litigation, No. 11-md-02290-RGS (D. Mass. July 27, 2012) (upholding borrowers' HAMP-related claims); Dixon v. Wells Fargo Bank, N.A., 798 F.Supp.2d 336, 348 (upholding promissory estoppel claim based on lender's promise to modify loan) (D. Mass. 2011); Stagikas v. Saxon Mortg. Services, Inc., 795 F.Supp. 2d 129, 136 (D. Mass. 2011) (trial period plan constituted contract; claim under Massachusetts Consumer Protection Act, Mass. Gen Laws ch. 93A upheld); Boyd v. U.S. Bank, N.A., 787 F.Supp.2d 747, 753 (N. D. Ill. 2011) (servicer's failure to comply with HAMP obligations "can be a hallmark of unfairness" under Illinois Consumer Fraud and Deceptive Business Practices Act); Morris v. BAC Home Loans Servicing, L.P., 775 F.Supp.2d 255, 259 (D. Mass. 2011) (under Massachusetts law, "a violation of HAMP that is deceptive or unfair could create a viable claim for relief under Chapter 93A"); Bosque v. Wells Fargo Bank, N.A., 762 F.Supp.2d 342, 352-53 (D. Mass. 2011) (trial period plan meets

elements of contract); Flagstar Bank, FSB v. Walker, 946 N.Y.S.2d 850 (2012) (compliance with HAMP guidelines a benchmark of good faith under New York law); Wells Fargo Bank, N.A. v. Meyers, 913 N.Y.S.2d 500, 504 30 Misc.3d 697, 701 (2010) (foreclosing plaintiff ordered to execute a final modification in accordance with its own prior proposed modification under HAMP). Both the 2009 and 2011 South Carolina Supreme Court Administrative Orders also provide that a mortgagor/borrower foreclosure defendant has a right, enforceable by a court, to have the foreclosing plaintiff (or its applicable servicer) process his or her application for a modification in good faith, including in compliance with the HAMP guidelines. In re: Mortgage Foreclosure Actions, 396 S.C. at 214; In re: Mortgage Foreclosures and the Home Affordable Modification Program (HMP), 2009-05-22-01. The master erred in concluding that Chase's misconduct concerning HAMP could not provide the Tuckers with a claim or defense.

The master's order also placed all the burden of demonstrating Chase's noncompliance with HAMP and the Administrative Orders on the Tuckers, which is neither required nor intended by the Administrative Orders. (R. pp. _____; Order Denying 60(b) Motions p. 5); In re: Mortgage Foreclosure Actions, 396 S.C. at 214; In re: Mortgage Foreclosures and the Home Affordable Modification Program (HMP), 2009-05-22-01. This was an error of law.

The master also erred in his factual determination that the Tuckers are ineligible for a HAMP modification. The facts in the record only tend to show that they are eligible for one. Basically, a borrower is eligible to be processed for a HAMP modification if his monthly mortgage payment exceeds 31 percent of his

monthly income. (R. pp. ___; Memorandum in Support of Motion to Reconsider p. 6); Home Affordable Modification Program Handbook for Servicers of Non-GSE Mortgages § 1.1.2, available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_40.pdf. Here, the master's order states that "to qualify [for a HAMP modification], the Tuckers had to have a mortgage debt to income ratio of 31% or less after application of the funds [from the SC help program]. In this case, because of the large arrearage, even after applying the $20,000 from SC Help, the Tuckers mortgage debt to income ratios would still exceed the guidelines." (R. pp. _____; Order Denying 60(b) Motions p. 4.) The order also states that "[a]ccording to Chase's analysis" – which is not in the record – "the Tuckers mortgage payment to income ratio would be over 216% and would not meet the guidelines." (R. pp. _____; Order Denying 60(b) Motions p. 6.)

The first step of a HAMP modification and, indeed, its overall purpose, is to *lower* a borrower's mortgage payments to 31 percent or less of his or her gross monthly income. (R. pp. ___; Memorandum in Support of Motion to Reconsider p. 7); Home Affordable Modification Program Handbook for Servicers of Non-GSE Mortgages § 1.1.2. Obviously, a borrower who already has "a mortgage debt to income ratio of 31% or less" does not qualify for a modification; indeed, a borrower *must* have a monthly mortgage payment that is greater than 31 percent of his or her monthly income in order to qualify for a HAMP modification. Home Affordable Modification Program Handbook for Servicers of Non-GSE Mortgages § 1.1.2. Per the master's own findings, it is difficult to see how the Tuckers are anything but plainly eligible for a HAMP modification. (R. pp. ___; Memorandum in Support of

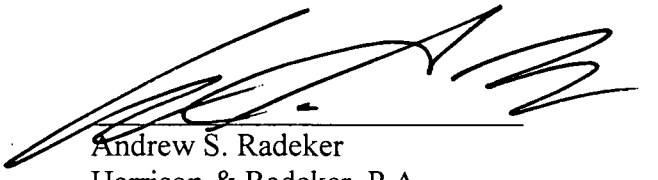
Motion to Reconsider p. 7); Home Affordable Modification Program Handbook for Servicers of Non-GSE Mortgages § 1.1.2. The master's order is based on a perception of the facts that lacks evidentiary support. Reversal – at the very least for a new hearing or decision that correctly applies the actual law to the actual facts – is required.

## CONCLUSION

The master did not apply the correct analysis to the Tucker's motions. In applying the analysis he did use, the master stacked the deck against the Tuckers. The analysis that was applied seems designed to resolve the motion against the Tuckers – not simply to resolve the motion. The Tuckers were entitled to a fair hearing on their motions, and they were entitled to have the court hearing them apply the correct analysis to those motions. They received neither. A correct analysis of the record shows the Tuckers were entitled to prevail on their motions. The lower court's analysis prevented that from happening. That is the essence of prejudicial error.

This Court should reverse the decision below, vacate the foreclosure judgment and ejectment orders, and remand this case with leave for the Tuckers to serve a responsive pleading to the complaint. In the alternative, the Court should remand for a new hearing on the motions or a new decision by the master in which he must apply the correct analysis.

Respectfully submitted,



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September 26, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master-in-Equity

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Common Pleas Case No. 2010-CP-23-1622
Appellate Case No. 2012-212447

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JP Morgan Chase Bank, National Association,.....Respondent,

v.

Brian Adrian Tucker, Jessica C. Tucker, and Half Mile Lake Homeowner's Association, Inc., Defendants,

Of whom Brian Adrian Tucker and Jessica C. Tucker are.....Appellants.

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PROOF OF SERVICE

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I certify that I served the foregoing document on counsel for the Respondent by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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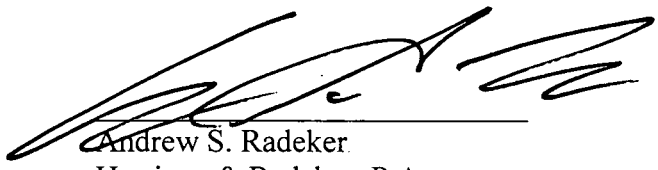

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**VIA HAND DELIVERY**
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**RE: JP Morgan Chase Bank, etc. v. Brian Adrian Tucker, et al.**
**Ct. App. Case No. 2012-212447**

Dear Ms. Kitchings:

Enclosed herewith for filing in the above-referenced case are an original and one copy of Appellants' Initial Brief and Designation of Matter to be Included in Record on Appeal, with attached proof of service thereof..

Kindly file these documents and return a file-stamped copy thereof to the bearer of this letter. Of course, if you or your staff have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am,

Very truly yours,
**HARRISON & RADEKER, P.A.**

Andrew S. Radeker

ASR/

Enclosures

RECEIVED
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SC Court of Appeals

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