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
App. Case No. 2014-002018

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SC Court of Appeals

Belle Hall Plantation Homeowner's Association, Inc.....Plaintiff,

v.

John A. Murray, Trustee of John E. Murray & Gloria C. Murray Family Trust.....Respondent,

David Conor Keys & Karen Keys, Third-Party Plaintiff,.....Appellants.

PETITION FOR REHEARING EN BANC

This Petition is filed pursuant to Rules 219, 221 and 240 of the South Carolina Appellate Court Rules. Rule 219, SCACR governs petitions for rehearing en banc. Rule 221, SCACR governs rehearing. Rule 240, SCACR governs motions and petitions generally.

This Court issued the decision in this matter on February 8, 2017. *See* Op. No. 5467 (Ct. App. Filed February 8, 2017). Petitioner received this Court's Opinion No. 5467 on February 10, 2017. This Petition is therefore timely. *See* Rule 221(a), SCACR.

Appellants moving pursuant to Rule 219, SCACR, respectfully assert that this Court's Opinion in this matter does not maintain uniformity with this Court's decisions in cases including but not limited to *Bloody Point Property Owner's Ass'n, v. Ashton,* 410 S.C. 62, 762 S.E.2d 729 (Ct. App. 2014), *Caldwell v. Wiquist*, 402 S.C. 565, 741 S.E.2d 583 (Ct. App. 2013), *and Universal*

Benefits, Inc. v. McKinney, 349 S.C. 179, S.E.2d 659 (Ct. App. 2002). Appellants further moving pursuant to Rule 219, SCACR, respectfully assert this Opinion could have a negative effect on alienability of real property leading to an increase in issues of clouded title and quiet title actions initiated by property owners.

A principle purpose of this Petition is to preserve Appellants' ability to request further review of the arguments Appellants offered to this Court on the merits. To that end, Appellants wish to incorporate by reference all arguments made before the Court and contained in Appellants' Final Brief and Reply Brief. Appellants strongly but respectfully disagree with this Court's decision to affirm and this Court's declining to rule upon the Order denying appellants motion to and request to hold the proceeds in bond.

INTRODUCTION

This case is about the uniform application of the law. This Court held, because Appellants learned a Motion to Vacate was to be filed in the future, then Appellants acquired notice that there *could be* a defect in title to the subject real property. The Court *did not* hold that knowledge of a motion to be filed was notice of defect in title. Instead, it held that said knowledge *could be* a defect in title. However, because Appellants acquired that knowledge, the Court held Appellants cannot claim to be Bona Fide Purchaser for Value (hereinafter "BFP"). The Court has created a new precedent where a party is deemed to have notice of things that have not yet occurred, and may never occur. The Precedent is akin to a party being put on notice of all things which *could* possibly occur in the universe. Appellants recognize the grandiosity of that statement, but make it to emphasize how much they disagree with the Court's ruling and to impart the magnitude of impact this Precedent will have upon our laws. Appellants would respectfully request this Court

grant their petition for rehearing and apply the facts of the case in uniformity with this Court and the Supreme Court's relevant case law and precedent.

ARGUMENT

1. APPELLANTS ARE BONA FIDE PURCHASERS FOR VALUE.

To be declared a bona fide purchaser for value "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." *Robinson v. Estate of Harris*, 378 S.C.140, 146, 662 S.E.2d 420, 423 (Ct. App. 2008) (quoting *Spence v. Spence*, 368 S.C. 106, 117, 628 S.E.2d 869, 875 (2006)).

This Court held Appellants were not Bona Fide Purchasers for Value (hereinafter "BFP") because Appellants did not meet all three elements of BFP prior to receiving "actual knowledge that there *could* be a claim or defect that would affect title to the property" and that the date for determining whether notice occurred should not be the date of sale. Opinion No. 5467. The Court held because Appellants learned of Respondent's *intent* to file a Motion to Vacate prior to tendering the remainder of the purchase price, Appellants failed to "actually pay" prior to learning of a defect in the title to the real property. The Court has created a new precedent that a motion constitutes notice of a defect in title to real property. Though, Court focuses on the payment element of BFP, its clear in applying the new precedent that Appellants did not meet any of the elements of BFP prior to receiving notice the Motion was to be filed. Appellants would respectfully, assert that it is not uncommon in a foreclosure sale in this state that a third-party purchaser would not meet one of the three BFP elements prior to a motion being filed in the case.

A. The Court Omitted Addressing Why The Motion Constituted a Notice of Defect in Title.

Appellants argued Respondent's Motion to Vacate did not constitute notice to Appellants of a defect in title to the real property. The Court does not address why the motion constitutes notice of a defect in title. However, the new precedent, respectfully, is going to have a noticeably negative impact upon the alienability of real property.

According to Core Logic, a nationally recognized company that maintains annual statistics on real estate transactions including foreclosure sales, the number of South Carolina completed foreclosure sales for the 12 month period ending in October of 2016, totaled 8,581 sales. http://www.corelogic.com/research/foreclosure-report/national-foreclosure-report-october-2016.pdf, page 8. Appellants assert that a significant number foreclosure actions in this state a post-sale motions is filed by a defendant prior to the third party purchaser tendering the remainder of the purchase price and/or prior to the court delivering the deed to a third party purchaser. If five percent of foreclosure actions fit this scenario then pursuant to the Core Logic statistic this would have occurred 429 times last year. Therefore, the new precedent that a motion constitutes notice of a defect in title to real property could have clouded title to property sold in 429 sales last year.[1] In a case where the motion is denied and the defendant appeals but no bond is posted[2], even if title remains with the third party purchaser that title would be clouded until the conclusion of the appeal process. These are the facts of Wachesaw Plantation East Community Services Association, Inc. v. Todd C. Alexander [3] Appellate Case No. 2011-198986.

[1] The Court ruled that only knowledge of a parties intent to file a motion constituted notice, not actual knowledge of the substance of the motion. Therefor the motion itself and not the substance of a motion is what constitutes notice of a defect in title to real property.

[2] Pursuant to South Carolina Code Ann. §18-9-170, if a bond is not posted to stay a foreclosure judgment then the sale shall proceed.

[3] Appellants would request that this Court take judicial notice of the facts of the case currently pending before this Court. Wachesaw Plantation v. Alexander, Todd, Appellate Case No. 2011-198986.

In *Wachesaw*, an HOA initiated a foreclosure against the defendant. The defendant received notice of the action prior to the order of foreclosure, but failed to respond prior to the order of foreclosure and sale. Immediately after the sale on June 7, 2011, the defendant was contacted by the third party purchaser. The defendant attempted to pay the outstanding debt on June 16, 2011. The defendant filed a motion to vacate on June 17, 2011. On June 21, 2011 the Motion to Vacate was heard. The third-party purchaser tendered the remainder of the purchase price on June 24, 2011. On August 9, 2011 an order denying the motion was filed. Thereafter, the master delivered the deed to the third party purchaser. *Wachesaw* Record on Appeal, http://ctrack.sccourts.org/public/caseView.do?csIID=40893. The defendant appealed the order without posting a bond and this Court dismissed the matter by order dated May 25, 2012. Thereafter the Supreme Court overturned this Court, and at present, the case is waiting to be heard on oral argument by this Court. *Wachesaw Plantation East Community Services Association, Inc. v. Todd C. Alexander*, 414 S.C. 355, 778 S.E.2d 898 (2015). In *Wachesaw* because the third-party purchaser did not tender the remainder of the purchase price or acquire title prior to the motion to vacate being filed this precedent means the purchaser has held clouded title to the property for nearly six years at present. The Court erred in holding notice of an intent to file the Motion constituted notice of a defect title to real property.

1. This Opinion Is Out Of Uniformity With The Court's Opinion In *Bloody Point.*

In *Bloody Point Property Owner's Ass'n,* the appellant citing *Cumbie v. Newberry* asserted the third-party purchaser was not a bona fide purchaser arguing 1) the purchaser failed to inquire as to the jurisdiction of the court, 2) whether appellants where properly before the court, and 3) that the order of publication did not comply with the publication requirements of South Carolina

Code Ann. §15-9-740.[4] *Bloody Point*, 410 S.C. at 67-68. *Cumbie* states: "that a purchaser in in good faith at a judicial sale *is not affected by irregularities in the proceedings or even error in 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 68 (quoting *Cumbie*, 251 S.C. at 37.) (emphasis added.) In *Bloody Point* the third party purchaser responded to the defendant by citing *Gladden v. Chapman*, which states: "*It must be presumed from the judgment rendered that the Court considered and adjudicated . . . the issuance of service of process upon the defendants,* and the rights and interests of the parties . . . *and although the conclusions* with respect to those matters, or any of them, *might have been erroneous, so that they would have been reversed on appeal, they do not make the judgment void collaterally.*" *Id.* (quoting *Gladden*, 106 S.C. 486, 91 S.E. 796, 797 (1917). (emphasis added). This Court, in response to the parties arguments, ruled the third-party purchasers where bona fide purchasers and noted "[w]hile the [a]ppellants assert the master lacked jurisdiction to sell the Property because of defect in service, the *Robinson* court held the *foreclosure purchaser was a bona fide purchaser for value without notice such that claims of defective service in the foreclosure action did not affect the purchaser's title.*" *Id.* at 68-69. (emphasis added).

In Case at hand, this Court held

> "There is no question the Keys paid a portion of their bid to the master and did not know at that time there was any adverse claim against the property. Before the Keys paid the entire purchase price, however, they received actual knowledge that *there could be* a claim or defect that would affect title to the property. Accordingly, the Keys cannot claim status as bona fide purchaser for value." Op. 5467. (emphasis added).

[4] The facts of *Bloody Point* are nearly identical to this case except in this case the third party purchasers are the appellants rather than the defendant.

The Court notes that Appellants only received "actual notice of Murray's *intent* to file a motion to vacate the sale." *Id.* (emphasis added). By taking such a stance, this Court creates a precedent that the motion itself NOT the substance of the motion, constitutes notice of a defect in title to real property[5]. The Court does not address why notice that a motion was to be filed constitutes notice of a defect in title to the real property. The decision stands in conflict with the opinion in *Bloody Point*, and the omission has the effect of overruling *Bloody Point* by implication. The ruling and analysis set forth in *Bloody Point* are *the* argument and citation Appellants raised to support their assertion that Respondent's Motion did not constitute notice to Appellants of a defect in title, and respectfully, the Court erred in ruling it did.

2. If The Motion Constituted Notice Of A Defect In Title, Then The Sale Was Not Bona Fide And Appellants Did Not Acquire Title Prior To Notice.

Black's Law Dictionary does not define a "bona fide purchase." *Blacks Law Dictionary*, Abridged 6th Ed. Appellants define a bona fide purchase as a purchase at a bona fide sale. A "purchase" is the "transmission of property from one person to another by voluntary act and agreement, founded on a valuable consideration. To own by paying or by promising to pay an agreed upon price which is enforceable by law . . .relative to land, generally means the acquisition of real estate by any means whatever except by descent" *Id.* A "bona fide sale" is "a completed transaction in which seller makes sale in good faith, for valuable consideration without notice of any reason against the sale." *Id.* To complete a real property transaction, the deed must be delivered. "The proper execution *and delivery* of a deed is effective to convey real property from a grantor to grantee." *Spence* 368 S.C. at 119. (emphasis added). "South Carolina Code section 15-39-870 provides: Upon the execution *and delivery* by the proper officer of the court of a deed

[5] Additionally the Court stated only that the motion constituted notice that *there could* be a defect in title, not that there actually was. However, the Court ruled that sufficient to preclude BFP status.

for any property sold at a judicial sale under 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 . . ." *Robinson v. Estate of Harris*, 378 S.C. 140, 662 S.E.2d 420 (Ct. App. 2008) (emphasis added.)

In this Case, the sale was not bona fide, nor did Appellants acquire title prior to notice of the motion. The Court misstated when the property was conveyed to Appellants, stating "[o]n May 16, 2014, the Keys paid the remaining balance of their bid amount. That same day, the Master issued a deed to the Keys conveying the property." The Deed was executed May 16, 2014, however the Master did not deliver the deed to until May 23, 2014 and thereafter Appellants walked straight to the RMC office and recorded the deed, as recommended in a race-state.[6] The Master, the seller in this instance, did not complete the transaction by delivering the deed to the Appellants until four days after the Respondent's Motion was filed. By not delivering the deed, the Master did not complete the sale in good faith without notice of any reason against the sale. Appellants did note acquire title to the real property prior to both the Master and Appellants having Notice of Respondent's filed Motion. This Precedent could call into question the validity of every

[6] *See. Appellants Final Brief footnote 19, p. 34* (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. The Master knew about the Motion to Vacate prior to presenting the deed to Appellants, but nonetheless present the deed. Therefore, Appellants recorded the Deed.); *Respondent's Final Brief p. 6* (The Respondent, by and through his counsel, asserts with a great degree of confidence that the Master would not have executed the deed three weeks early had he been aware of the circumstances let alone approved its release to the Appellant on May 23, 2015 (sic).") *Appellants' 8/1/14 Mtn. Reconsider, R. p. 84* ("The following Friday on May 23, 2014, the Master's Office contacted Third-Party Purchasers to inform them they could now pick up the Deed from the Master's Office. On May 23, 204, the Third-Party Purchaser recorded the Deed in the RMC Office. . . Further the deed was not delivery to the Third-Party Purchasers by the Court until after the Master had actual knowledge of the Defendant's Motion to Vacate."); *Appellants' 9/2/14, Mtn. Reconsider, R.p. 103* (Appellants repeated verbatim the previous quotation from Appellants' 8/1/14 Motion to Reconsider); *Respondent's 8/18/14 Memorandum, R.p. 347-48* ("30. On May 23, 2014, pursuant to his Motion to Reconsider the Order Vacating the Judgment of Foreclosure and Setting Aside the Sale, Third Party Purchaser accepts the deed from the Court and causes it to be recorded in the RMC Office for Charleston County.");

foreclosure sale where a master or court fails to deliver a deed to a third party purchaser prior to a motion to vacate being filed.

3. The Court Has Created A New Standard Third Party Purchasers Must Undertake To Protect Their Interest In Property.

If a motion constitutes a notice of a defect in title, then a third party purchaser, to protect his interest in a property against future events of which he has no knowledge or control must tender to entire purchase on the date of sale in order to ensure meeting the "actual purchase" element of BFP. By requiring the tender of the entire purchase price on the sale date this Court establishes a new precedent which has the potential for significant adverse effects on the sale process. Most, if not all, of the courts in this state practice a standard of requiring the winning bidder to pay five percent on the purchase price on the day of sale and tender the remainder within 30 days. However, this new precedent has created a heighted standard. If the successful bidder wants to obtain BFP status to protect his newly acquired interest in the property the purchaser must tender the entire purchase price on the date of sale or risk losing his BFP status if the Defendant files a motion prior to the remainder of the purchase price being paid. Appellants would respectfully assert that the date of purchase which is the date of sale should be the date for determining whether the "actual payment" element of BFP has been met prior to receiving notice of a defect in title.

B. The Court Erred In Ruling Appellants Did Not Preserve For Appellate Review The Issue Of Whether Respondent Preserved Its Defenses To Appellants' Assertion Of BFP Status.

The Court erred in finding Appellants failed to file a motion pursuant to Rule 59(e), SCRCP, requesting the Master issue a ruling after the Master declined to rule whether Respondent preserved the right to raise defenses to Appellants assertion of BFP status. Op. 5467.

"When a trial court does not explicitly rule on an argument raised and the appellant makes no Rule 59(e), SCRCP, motion to obtain a ruling, the appellant court may not address the issue."

Smith v. NCCI, Inc., 369 S.C. 236, 247-48, 631 S.E.2d 268, 274 (Ct. App. 2006). However, "this Court does not require parties to engage in futile actions in order to preserve issues for appellate review." *Staubes v. City of Folly Beach*, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000); *Fettler v. Gentner*, 396 S.C. 461, 469, 722 S.E.2d 26 (Ct. App. 2012) (Once a party moves for a directed verdict on an issue, and that motion is denied, the party is not required to object again to the subsequent jury instruction regarding that issue.) "If a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review. But in filing the motion, he may unwittingly forfeit the right to an appeal if an appellate court later determines the Rule 59(e) motion was unnecessary because he already had raised the issue and obtained a ruling. We strive to avoid an interpretation of procedural rules which routinely would place a party between the proverbial rock and a hard place. *Elam v. South Carolina Dept. of Transportation*, 361 S.C. 9, 25, 602 S.E.2d 772 (2004). The "losing litigant is not entitled to return to trial court indefinitely hoping for change of heart or a more sympathetic judge, or string out arguments one at a time over months because "[t]here must be finality, a time when the case in the trial court is really over and the loser must appeal or give up" *Id.* at 20 (citation omitted).

The issue is not whether the Master eventually, after multiple orders, ruled upon Appellants status as BFP. The issue is whether Appellants, filed a Rule 59(e), SCRCP, motion, to preserve their argument that the Respondent did not preserve a defense to Appellants assertion of BFP status. In the present matter, Appellants filed four motions pursuant to Rule 59(e), SCRCP. Appellants asserted the issue in successive Rule 59(e), SCRCP, motions and at successive motion hearings. The Master did not address the issue in any of the five orders he issued in which it would have been appropriate for him to address the issue. As to this issue Appellants "beat the proverbial

dead horse" and this Court's own recitation of the facts acknowledges that. The Court erred in ruling Appellants did not address the issue in a Rule 59(e), SCRCP motion.

To the extent the Court is asserts that to preserve the issue for appellate review, Appellants were required to file a fifth Rule 59(e), SCRCP, motion in response to the April 9, 2015, Order, Appellants would respectfully assert it would have been futile to file a fifth motion to reconsider in this matter. Appellants already properly preserved the issue for appeal.

2. THE MASTER ERRED IN VACATING THE FORECLOSURE SALE.

A. Laches

"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." *Eldridge v. Eldridge*, 398 S.C. 113, 121-22, 728, S.E.2d 24 (2012). The party seeking to establish laches must show (1) delay, (2) unreasonably delay, and (3) prejudice." Op. 5467 (quoting *Emery v. Smith*, 361 S.C. 2017, 216, 603 S.E.2d 598, 602 (Ct. App. 2004)).

In this case, the Court ruled "[w]e find Murray's actions were not sufficient to establish a defense of laches. *We are troubled by Murray's delay* in formally responding to the foreclosure action after receiving notice in late March 2014. However, by May 2014, Murray hired an attorney who filed a motion to vacate the foreclosure judgment. We do not believe this delay was unreasonable." (emphasis added). Op. 5467. The Court, omits to address that the Respondent's delay in formally responding to the foreclosure was the last in a pattern of unreasonable delays which prejudiced multiple parties involved in this foreclosure action. For years prior to making an appearance in this matter, the Respondent failed to pay the assessments he owed to the Plaintiff and failed to provide the Plaintiff with his mailing address despite having known or having should

known his obligations to Plaintiff. Plaintiff was prejudiced by this unreasonably delay and incurred the expense of hiring an attorney and initiating this action. Thereafter on March 26, 2014, Respondent obtained actual knowledge that a hearing of foreclosure had been held the week before, and yet Respondent waited nearly two months after the hearing was held before obtaining counsel and formally appearing in this matter. Respondents delay in appearing was unreasonable under the circumstances. Respondent's unreasonable delay prejudiced the Plaintiff and the Court who had to undertake the time and expense of advertising the sale and selling the property. Finally, Appellants as a result of Respondent's unreasonable delay were prejudiced in ways including: having entered into an obligation with the Court, paying the purchase price for the property, obtaining insurance upon the property, hiring and attorney to undertake a title search, incurring the costs of litigating this matter, and losing the benefit and use of both the property and the purchase money held by the Master for the last two and a half years. This Court erred in ruling that Respondent's delay was not unreasonable and the doctrine of laches did not apply.

B. Plaintiff Did Not Violate The Publication Statute.

Appellants argued the affidavits were not facially defective. The Court erred in ruling they were. Moreover, the Court erred in ruling Plaintiff attempted service on the wrong defendant.

"Where a party contests the validity of an order of publication based on a lack of diligence in attempting to locate the party, this court has held that the trial court is without authority to overrule the finding of the clerk of court" absent fraud collusion or a facially defective affidavit of service in violation of the publication statute. *Caldwell v. Wiquist*, 402 S.C. 565, 569-72, 741 S.E.2d 583 (Ct. App. 2013). South Carolina Code Ann. §15-9-710, states:

> When the person on whom the service of the summons is to be made cannot, after due diligence, be found within the State and (a) that fact appears by affidavit to the satisfaction of the court or judge thereof, the clerk of the court of common pleas, the master, or the probate judge of the county in which the cause is pending and (b)

> it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made or that he is a proper party to an action relating to real property in this State, the court, judge, clerk, master or judge of probate may grant an order that service be made by the publication of the summons in any one or more of the following cases. . . (3) when the defendant is a resident of this State and after diligent search cannot be found;. S.C. Code Ann. §15-9-710.

1. The Affidavits Of Service Were Not Facially Defective And Did Not Violate The Publication Statute.

This Court held "[t]his case is similar to *Caldwell* because the affidavit presented to the Clerk of Court was facially defective. . . Belle Hall failed to comply with the publication statute because the attached search demonstrates it attempted service on the wrong defendant." Op. 5467. Appellants argued before this Court during oral argument that this case is distinguishable from *Caldwell* and in this case the affidavits of the process servers show that attempted service was made upon the Respondent. Further in this case the process servers affidavits, unlike the affidavits in *Caldwell*, evidence that in this case the process servicers did use due diligence.

In *Caldwell*, the process servers affidavits were facially defective because on their face affidavits stated that the process server attempted to serve a known non-resident of Beaufort County only in Beaufort County. *Caldwell* at 571. This Court found the affidavits violated the publication statute because they did not attempt to find and serve the Defendant throughout the state, and that the affidavits did not evidence due diligence in attempted service. *Id.* at 571-72. The Court noted *Caldwell* was distinguishable from *Yates v. Gridley*, 16 S.C. 496 (1882); *Montgomery v. Mullins*, 325 S.C. 500, 480 S.E.2d 467 (Ct. App. 1997); and *Wachovia Bank of S.C., N.A. v. Player*, 341 S.C. 424, 535 S.E.2d 128 (2000), "because those cases involved affidavits that included at least some facts concerning efforts to locate the defendant." *Id.* at 570.

This case is also distinguishable from *Caldwell* because in this case the process servicers affidavits of attempted service evidence efforts of due diligence to locate the Respondent. This

case is analogous to *Player*. The Court notes in *Caldwell* that in *Player* the "court affirmed the master's refusal to set aside service of process despite the fact that the petition requesting service by publication contained an untrue statement. . . Our supreme court reviewed the petition requesting service by publication and affidavit of non-service together, finding it is clear from the reading the two documents together that the petition is inaccurate, *but that the process server's affidavit reflects due diligence by her.*" *Id.* at 51. (emphasis added). The same is true in this case, here this Court takes issue with the Affidavit of Publication of Plaintiff's Attorney, which is analogous to the petition requesting service by publication in *Player*. Like in *Player,* here the petition contains an inaccuracy, namely an exhibit containing potential addresses for John *E* Murray instead of the Respondent John *A* Murray. However, when read together with the affidavits of the process servers it is clear that the process servers attempted to serve John *A* Murray. The Court erred in ruling Plaintiff "attempted service on the wrong defendant." Additionally, here like in *Player* the affidavits of attempted service evidence due diligence on the part of the process servers. For example the affidavit of attempted service by the process server dated August 2, 2013, states "checked property address above, resident (white female, approx.. 42 yrs old) stated John *A.* Murray does not live here, they rent this house from him. They did not know his address, they deposit the rent payment in an account, his phone number is 843-316-1266- Called this number – a recording states – number is not in service." (R.p. 220)

Here, a collective reading of the petition/affidavit for publication in combination with the process servers affidavits of attempted service, evidence that the process servers attempted to serve the Respondent and they used due diligence in attempting to do so. Respectfully, this Court erred in ruling the Affidavits were facially defective and violated the publication statute because service was attempted upon the wrong defendant.

2. To Affirm, This Court Used An Alternative Sustaining Ground Which Was Not Ruled On By The Master Nor Raised By Respondent.

Respectfully, the Court failed to comply with Rule 220(c), SCACR, or at least affirmed the Master's ruling based upon a reasoning which could be viewed as unjust applied given that is wasn't raised, ruled on, or requested.

> "The appellate court may affirm any ruling, order, decision or judgment upon any grounds(s) appearing in the Record on Appeal." Rule 220(c), SCACR. "Under the present rules, a respondent – the "winner" in the lower court – may raise on appeal any additional reasons the appellate court should have affirmed the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. . . The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record, or when the court believes it would be unwise or unjust to do so in a particular case." *I'On, LLC v. Town of Mt. Pleasant,* 338 S.C. 406, 419-20, 526 S.E.2d 716 (2000).

In this case this Court upheld the Master's Order as to attempted service on an alternative sustaining ground. The Master by order filed February 10, 2015, states:

> "the Court . . . finds most disturbing and relevant certain facts. The Plaintiff, in spite of conducting a Westlaw Address search on a prior holder and not the Defendant, had actual notice of Defendant's address. The Plaintiff had five possible addresses and attempted to service at the first three . . . Plaintiff did not attempt to serve the fourth address or the fifth address. . . The fourth address was the dwelling place of the Defendant and was not served. The Plaintiff did not mail the Summons to address last known to them pursuant to the Order of Publication and South Carolina Code §15-9-740, but instead mailed it to the fifth address, an address at which service was not attempted. . . this Court Amends it Order of July 22, 2014 to include the following conclusions of law" . . 2) Service was defective;" (R.p. 46, 50).

The Master by order filed April 9, 2015 states:

> Here, the Plaintiff attempted service at three of the five addresses it had available to it before they pursued Service by Publication on the local Charleston County owner. This was a significant factor in this Court's Court Determination. (R.p. 52).

This Court held "the affidavit presented to the Clerk of Court was facially defective. . . Belle Hall failed to comply with the publication statute because the attached search demonstrates it attempted service on the wrong defendant." Op. 5467. However, the process servers affidavits of service evidence attempted service of the Respondent. The Master never held the affidavits were facially defective and never ruled service was attempted on the wrong Defendant. The Respondent never raised before the Master or subsequently raised as an alternative sustaining ground, that the affidavits of service were facially defective. The master did not hold the publication statute was violated. He and the Respondent did raise a potential violation, that after publication the Plaintiff failed to mail a copy of the summons and complaint to the *correct* last known address in compliance with the statute.[7] (R.p. 46). But that is not the reason this Court asserts for violation of the Publication Statute.

Respectfully this Court did not Comply with Rule 220(c), SCACR. The Courts reasoning for affirming the Master is not found in the Master's Order, nor did Respondent argue the reasoning before the Master or raise it in his brief as an alternative sustaining ground.[8] At the very least Appellants would assert that given that reasoning was not ruled on by the Master nor raised by the Respondent.

C. Relief Should Not Have Been Granted Under Rule60(b)(4), SCRCP

1. In The Present Matter This Court's Circular Argument Regarding Rule 60(b)(4), SCRCP, Lacks Uniformity With *Universal Benefits*, To The Point Of Overturning That Opinion By Implication.

[7] Respondent cited *Caldwell* in its brief but not for purpose this Court cites, rather Respondent asserted Plaintiff did not strictly comply with the publication statute by mailing the summons and complaint to the *correct* last known address of Respondent. (Respondent's Brief, p. 14).

[8] The Respondent's brief does contain a section for an alternative sustaining ground, but the groundeds cited by the Respondent are Rule 60(b)(1),(3), or (5), SCRCP.

"There is a difference between a want of jurisdiction, in which case the court has no power to adjudicate, and a mistake in the exercise of undoubted jurisdiction, in which case the court's action is not void, but is subject to direct attack on appeal. The failure of Universal to invoke the procedural remedies provided under Rule 59 and the SCACR is a result of its own inaction and not a denial of due process." *Universal Benefits, Inc.*, 349 S.C. at 184. "A judgment will not be vacated for mere irregularity which does not affect the justice of the case, and which the party could have availed himself, but did not do so until judgment was rendered against him." *Id.* (quoting *Thomas & Howard Co. v. T.W. Graham and Co.*, 318 S.C.286, 291, 457 S.E.2d 340, 343 (1995).

In this case This Court's factual recitation acknowledges the Respondent had actual notice of this action nearly two weeks prior the filing of the Order of Foreclosure. The Court in its analysis of the relief granted pursuant Rule 60(b)(4), SCRCP, states "[w]e acknowledge Murray had an opportunity to request reconsideration of the order of foreclosure," but then goes on in a circular argument to state that the relief pursuant to 60(b)(4), SCRCP was appropriate because the court never had personal jurisdiction over Murray. Op. 5467. This Court in *Universal Benefits*, made it clear that where a defendant has actual notice of a proceeding in time to file a motion to reconsider and if necessary a subsequent appeal then the individuals due process rights were protected. Subsequent relief for such an individual who did not avail himself of such remedies is improper under rule 60(b)(4), SCRCP. The Court in *Universal Benefits*, notes that though in such an instance there may have existed an irregularity or mistake as to personal jurisdiction of the defendant which could be subject to attack on appeal, nonetheless the defendant's due process rights remained in tacked. The mistake or irregularity did not make the order of the court void abinitio. Here the facts are nearly identical to those in *Universal Benefits*. The Court seemingly

acknowledged this, but then refused to apply its own applicable precedent. Respectfully, the Court erred, the precedent of this case will have the effect of overturning *Universal Benefits* by implication.

2. Respondent Did Not Preserve Relief Sought Under Rule 60(b)(4), SCRCP.

The Respondent did not request relief under Rule 60(b)(4), until after the Order of July 22, 2014. "While it is true that pleadings in the [ ] court must be liberally construed, this rule cannot be stretched so as 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. "Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advance earlier." *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990). A motion "shall be in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Rule 7, SCRCP. Rule 60(b), SCRCP covers a number of distinct forms of relief within each individual subsection, (b)(1) is relief for mistake, (b)(2) is relief after newly discovered evidence, (b)(3) is relief due fraud or misrepresentation, (b)(4) relief because is judgment is void, and (b)(5) is relief because a judgment has be satisfied. Rule 60(b), SCRCP. These are very distinct and separate grounds of relief and they must be plead with specificity.

In the present matter this Court held that Respondent did preserve its ability to seek relief under Rule 60(b)(4), SCRCP because "[d]uring the hearing on the motion to vacate, Murray requested the master set aside the order of foreclosure pursuant to Rule 60(b), SCRCP." The Court contends that was sufficient to put the Master on notice of the specific relief the Respondent was seeking given the context of the case. Op. 5467. The Respondent's Motion requested relief "pursuant to SCRCP Rule 59 or, alternatively Rule 60. . . The grounds for this motion are that the

plaintiff presented a false, misrepresentative or fraudulent, and fatally defective affidavit of due diligence." (R.p. 68.) Thereafter at the Motion hearing the Respondent stated: "We believe that we have grounds under Rule 60(b). . . 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). Respectfully, the Respondent did not make clear to the Master that it was seeking relief pursuant to Rule 60(b)(4). If anything the relief sought would presume to be under Rule 60(b)(3), SCRCP.[9] For purposes of seeking relief Pursuant to Rule 60(b)(4), SCRCP, the Respondent's Motion failed to comply with Rule 7, SCRCP, and further the Respondent failed to raise the relief sought prior to the Order of July 22, 2014. The Court erred in ruling that the Respondent preserved relief sought under Rule 60(b)(4), SCRCP.

3. THIS COURT ERRED IN DECLINING TO RULE ON MASTER'S ORDER DENYING APPELLANT'S MOTION FOR STAY AND REQUEST THAT THE MASTER HOLD THE PROCEEDS OF SALE IN BOND.

On July 22, 2014, Appellants filed a Motion requesting that Master stay the Order of July 22, 2014, vacating the Order of Foreclosure and Sale and further an Order of Supersedeas, holding the proceeds of sale in bond. The Master denied the Motion without out even hearing oral argument on the matter. This Court affirmed the Master's denial, stating that the Court declined to reach the issue because the Court's ruling affirming the Order Vacating the Sale was dispositive and the Court did not need to address the remaining issue.

Appellants' would respectfully assert that the affirmation of the Order Vacating the Order of Foreclosure and Sale is not dispositive as to whether the Master should have denied Appellants Motion to Stay and request for an Order of Supersedeas. The orders are separate and distinct

[9] Respondent did not clarify the relief it was asking for from the Master with its amended order moving pursuant to "Rule 8(f), 52(a), 52(b), 55(c), (59)a, 59€, 60(b), and all other applicable rules." (R.p. 93) The motion then goes on request relief in a conclusory remark pursuant to Rule 60(b)(1)(3)(4) and (5) without citation, support, or presenting a basis for the relief requested.

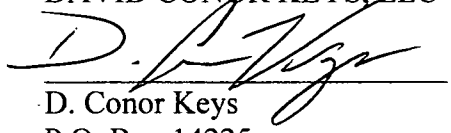
Orders which were each appealed. The damages claimed Appellants pursuant to each issue and/or order are separate and distinct as well. South Carolina Code Ann. §18-9-170 states: "If the judgment appealed from direct the sale or delivery of possession or real property, the execution of the judgment shall not be stayed unless a written undertaking be executed on the party of the appellant, with two sureties, to the effect that during the possession of such property by the appellant, with two sureties, to the effect that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon and that if the judgment be affirmed he will pay the value of the use and occupation of the property." S.C. Code Ann. §18-9-170. This is what appellants requested the Master grant. Had the Motion to Vacate been denied then the Respondent would have been required to post a bond to stay the sale and prevent delivery of possession of the property to Appellants. Appellants simply requested that they be afforded the same opportunity and protection which Respondent would have been afforded if the tables had been turned. Appellants' would respectfully assert that the affirmation of the Order Vacating the Order of Foreclosure and Sale is not dispositive as to whether the Master should have denied Appellants Motion to Stay and request for an Order of Supersedeas.

CONCLUSION

For the reasons stated above, Appellants request the Court withdraw its previous decision and issue a decision that that Appellants are BFP, the Master Erred in Vacating the Order of Foreclosure and Sale, and the Master Erred in denying Appellants Motion to Stay and request for an Order of Supersedeas.

RESPECTUFLLY SUBMITTED,

THE LAW OFFICE OF
DAVID CONOR KEYS, LLC



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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
App. Case No. 2014-002018

Belle Hall Plantation Homeowner's Association, Inc.....Plaintiff,

v.

John A. Murray, Trustee of John E. Murray & Gloria C. Murray Family Trust.....Respondent,

David Conor Keys & Karen Keys, Third-Party Plaintiff,.....Appellants.

PROOF OF SERVICE

I, the undersigned do hereby certify that I have on this 22nd day of February 2017, mailed a true and correct copy of the Appellants' Petition for Rehearing to the following counsel of record:

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Mount Pleasant, SC 29464
Attorney for Respondent

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DAVID CONOR KEYS, LLC

D. Conor Keys

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February 22, 2017

Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Belle Hall Plantation v. John Murray (David Keys)
Appellate Case No. 2014-002018

With regard to the above referenced matter, please find enclosed an Original Petition for Rehearing and six copies of the same along with a check for the petition fee.

With kind regards,

THE LAW OFFICE OF
DAVID CONOR KEYS, LLC

D. Conor Keys

Enclosures:
(as stated)

CC:
Amanda Reece