IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master in Equity

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~~ Petitioners.

PETITION FOR WRIT OF CERTIORARI

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Certification of Counsel

The undersigned hereby certifies that Petitioners, David Conor Keys and Karen Keys (hereinafter "Petitioners") filed a petition for rehearing with the Court of appeals and the Court of Appeals ruled on the petition with finality on May 26, 2017 (App. 544-45).

Questions Presented for Review

I. Did the Court of Appeals err in holding Petitioners were not Bona Fide Purchasers because Respondent's Motion to Vacate the Order of Foreclosure and Sale constituted a notice to Petitioners of defect in title to real property.

II. Did the Court of Appeals err in holding Petitioners did not preserve for appellate review the issue of whether Respondent raised and preserved any defense to Petitioners assertion of Bona Fide Purchaser.

III. Did the Court of Appeals err in affirming the Master's Order Vacating the Order pursuant to Rule 60(b)(4), SCRCP, based partially upon alternative sustaining grounds not requested or ruled in the lower court.

IV. Did the Court of Appeals err in failing to apply the Petitioners defense of laches despite the Court being "troubled by Murray's delay in formally responding to the foreclosure action."

V. Did the Court of Appeals fail to address the Master's Order denying Petitioners Motion for Stay and Order of Supersedeas, on the basis that the Order affirming the Master's Order to Vacate was dispositive of Petitioner's Motion.

Statement of the Case

Pursuant to Rule 242, SCRAP, Petitioner seeks certiorari regarding the Court of Appeals decision in *Belle Hall Plantation Homeowner's Association, Inc. v. John A. Murray, Trustee of the John E. Murray & Gloria C. Murray Family Trust*, Op. No. 5467, (S.C. Ct. App. filed February 8, 2017; Shearouse Adv. She. No. 6 at 49), *reh'g denied* (May 26, 2017). (App. 544-45).

There are special and important reasons certiorari should be granted including novel questions of law as what constitutes notice of a defect in title to real property. Additionally, the

Court of Appeals holding in this matter, is in conflict with prior decisions by this Court and the Court of Appeals own precedents.

These issues arise out of an order of foreclosure and sale of the real property for past do homeowners association dues. At the initiation of the action the subject real property hereinafter "Subject Property") was titled in the name of John A. Murray as Trustee of the John E. Murray and Gloria C. Murray Family Trust (hereinafter "Respondent"). Prior to and during the pendency of the foreclosure action Respondent rent the Subject Property rather than residing therein.

For years prior to the action Respondent never provided Plaintiff notice of his correct mailing address for the purpose of receiving annual home owners association assessment notices despite having known or should having known Respondent was responsible to timely payment of annual assessments. Process servers unsuccessfully attempted service upon John *A.* Murray three times. (App. 217-19). The most notable affidavit of non-service states: "Resident (white female, approx.. 42 yrs old) stated John A. Murray does not live there, they rent this house from him. They did not know his address, they deposit the rent payment in account, his phone number is 843-316-1266 – called the number – a recording states – number not in service." (App. 218) Service was subsequently achieved on the Respondent by publication (App. 6, 16, 550), the Respondent was held in default (App. 16). The Respondent received written notice of the trial in foreclosure action on March 26, 2014 (App. 262). The Master filed the Ordered Foreclosure on April 8, 2014 (App. 16) and sold the Subject Property on May 6, 2014 to Petitioners[1] (App. 47). Petitioners paid the Master five percent of the purchase price of the property on the May 6, 2014, pursuant to the terms of sale with the lower court. (App. 86, 551). On May 9, 2014, Respondent retained counsel as to

[1] The Masters ledger for the case states, by way of clerical error, that the property was sold on May 7, 2014 (App. 402)

the action of foreclosure and learned that the property had been sold on May 7, 2014.[2] (App. 263). On May 15, 2014, Respondent's counsel contacted one of the Petitioners employer at the time and discussed this matter. May 15, 2014, Petitioners learned Respondent was going to file a motion to vacate (App. 164-66, 381). May 16, 2014, Petitioners tendered the remainder of the of balance owed for the sale. May 16, 2014, Master executed the deed, but did not deliver the deed. (App. 402). Thereafter on May 16, 2014, Petitioners received a copy of Respondent's Motion via email. (App. 381, 387, 391). May 19, 2014, Respondent filed its Motion to Vacate. (App. 72). The Master's Ledger by notation dated May 22, 2014, states: "Post-Sale documents mailed to TPB." (App. 402). On May 23, 2014, after receiving communication from the Master's office that the deed was ready, Petitioners went to the Master's office where Petitioners were delivered the deed and thereafter Petitioners walked across the courthouse straight to the register of deeds and recorded the deed. (App. 107).

On July 3, 2014, a hearing on Respondent's Motion to Vacate was held wherein Respondent asserted under Rule 60(b), SCRCP, that sale should be set aside because service upon Respondent was defective as a result of a misrepresentation of Plaintiff's counsel as found in an affidavit submitted to the lower court in petition for an order of publication. (App. 133-34). Plaintiff asserted absent fraud or collusion the Master could not overturn the Clerk of Courts findings as to due diligence of attempted service and further that Respondent slept upon his rights. (App. 138-40). Petitioners, by way of memorandum reiterated Plaintiffs assertion (App. 332-33),

[2] The Court of Appeals states in its Opinion that Respondent "retained an attorney on May 9, 2014. Murray's counsel checked the court's docket, which reflected that house was not to be sold before May 20, 2014." The Court then goes on to state in a footnote that "Neither party could provide a reason the master sold the property before provided in the court's docket. (App. 550-51). The Courts alleged recitation of the facts is a misconception of those facts. The Master's ledger for the case states all of the following: by notation dated 3/31/14 "Hearing Held – No Sale before May 20, 2014"; by notation dated 4/17/14 "Sale: May 6, 2014"; by notation dated 4/21/14 "Master/Sale before the Master"; by notation dated 5/7/14 "Sold to David Conor Keys & Karen Keys for $100,000.00" (App. 398). The property actually sold on May6, 2017, and the Respondent by his own Affidavit was aware on May 9, 2014, that the property had sold just days prior. (App. 263)

and further argued before the Master that Petitioners were bona fide purchasers for value (hereinafter "BFP") and that Respondent had knowledge of the action nearly two months prior to the sale and slept upon his rights (App. 142-43). Thereafter, Respondent did not dispute Petitioners assertion of BFP (App. 145).

The Master by Order filed July 22, 2014, vacated the foreclosure and sale, without providing a basis for his ruling or ruling on Petitioners assertion of BFP (App. 24-25). On July 22, 2014, Petitioners filed on Motion to Stay the Order and request for Order of Supercedeas. (App. 76-91). Petitioners filed a Motion to Reconsider the Order on August 1, 2014. (App. 84-95) Respondent filed a Motion to Amend the Order on August 4, 2014. (App. 97-101). The Master Denied Petitioners Motion to Stay and Motion to Reconsider by form four order dated August 20, 2014. (App. 26). September 2, 2014, Petitioners filed a Motion to Reconsider the Order of August 20, 2014, which the Master denied by Form Four Order filed September 19, 2014. (App. 27-45). Petitioners served their Notice of Appeal in this matter on September 19, 2014. (App. 401). On October 9, 2014, Petitioners filed with the Court of Appeals a Motion to Stay and Motion for Order of Supersedeas pursuant to Rule 241, SCRAP. (App. 507-47). The Court of Appeals denied Petitioners motion by Order filed October 15, 2014. (App. 548).

Thereafter, the Master amended his Order by Amended Order filed February 10, 2015, holding that Plaintiff was grossly negligent in its attempted service of Respondent violating Respondent's due process rights, therefore service was defective and the Order of Foreclosure and Sale was void pursuant to Rule 60(b)(4), SCRCP. The Master again declined to rule on Petitioners assertion of BFP. (App. 54). Thereafter, the Master in denying Petitioners Motion to Reconsider the Order of February 10, 2015, amended is Order a second time by Order filed April 9, 2015, finally addressing Petitioners assertion of BFP, holding Petitioners did not obtain BFP status

because though they actually paid the purchase price and acquired title they did not do so without notice of a lien or defect in title to the property because Petitioners "with notice of a potential claim from the defaulting owner, rushed to the court to pay the balance due and then, after service of the Motion to Vacate the Sale, had the deed recorded in the RMC Office." (App. 55-57).

By published opinion filed February 8, 2017, the Court of Appeals affirmed the Master's Orders, holding: under alternative sustaining grounds, Plaintiff violated to the publication statute because it attempted service on the wrong defendant and therefore the Master had the authority to overrule the Clerk of Court's Order of Publication; holding that despite the Respondent having the opportunity to file a motion to reconsider and failing to do so, relief under Rule 60(b)(4), SCRCP was appropriate because the Master never had personal jurisdiction over the Respondent; holding "Murray's actions were not sufficient to establish a defense of laches" despite the fact that the Court noted "We are troubled by Murray's delay in formally responding to the foreclosure action after receiving notice in late March 2014. . . We do not believe this delay was unreasonable"; holding Petitioners did not achieve BFP status because before Petitioners paid the entire purchase price after they received actual knowledge that there could be a claim or defect that would affect title to the property; holding Petitioners did not preserve for appellate review the issue of whether Respondent preserved a defense to Petitioners assertion of BFP status; and declining to address the issue of whether the Master erred in denying Petitioners Motion to Stay and for Order of Supersedeas because disposition of prior issues are dispositive.(App. 549-562).

Petitioners filed a Petition for Rehearing on February 23, 2017. Petitioners made assertions including but not limited to: that Petitioners had submitted a brief and argued before the Court of Appeals that the Motion to Vacate did not constitute notice of defect in title to real property; that the effect of the Courts holding that notice of a motion to be filed and/or that a motion itself

constitutes notice in defect to title will create quite title issues in a significant number of foreclosure cases; that the Court of Appeals holding as to BFP stands in direct conflict with its prior decisions and this Court's decisions including, *Gladden v. Chapman*, 106 S.C. 486, 91 S.E. 796 (1917), *Cumbie v. Newberry*, 251 S.C. 33, 159 S.E.2d 915 (1968), *Robinson v Estate of Harris*, 378 S.C. 140, 662 S.E.2d 420 (Ct. App. 2008) *aff'd* 390 S.C. 272, 701 S.E.2d 740 (2010), and *Bloody Point Property Owners Association, Inc. v. Ashton*, 410 S.C. 62, 762 S.E.2d 729 (2014); that Petitioners preserved for appellate review the issue of whether Respondent preserved a defense to Appellants assertion of BFP status; that Respondents delay was unreasonable and laches should bar relief; that Plaintiff did not violate the publication statute and the case is akin to *Wachovia Bank of SC, NA v. Player*, 341 S.C. 424 535 S.E.2d 128 (2000); that the Court's affirmation of the Master's relief under Rule 60(b)(4), SCRCP was not in conformity with its holding in *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 561 S.E.2d 659 (Ct. App 2002); and that the Court erred in declining to rule on whether the Master erred in denying Petitioners Motion to Stay and for Order of Supersedeas. The Petition for Rehearing was denied on May 26, 2017

Consise arguments in support of the Petition for *Writ of Certiorari*

I. The Court of Appeals erred in holding that Petitioners had "actual knowledge that there could be a defect that would affect title to the property" prior to satisfying all three conditions to BFP Status.

The Court of Appeals affirmed the Masters finding of law that Petitioners did not meet the actual payment of the purchase price element prior to notice of a defect in title by stating: "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 a bona fide purchaser for value." (App. 560-61).

The Court by its ruling created a powerful new precedent. First, the effect of the ruling is that a motion in a civil action now constitutes notice of a defect in title to real property. Second, the Court ruled mere knowledge that a motion is to be filed constitutes notice of a defect in title. Therefore, it is not the substance of the Motion which according to the Court of constitutes notice, rather it is Motion in and of itself regardless of the Motion's content. The Court of Appeals did not address why the motion constitutes notice of defect in title. Nor did the Court of Appeals acknowledge in its opinion that Petitioners in brief and oral argument asserted that the Motion did not constitute a notice of defect in title to real property. However, it is clear from the holding that now the law of this state is that a motion does constitute notice of defect in title to real property. Petitioners would assert the effect of this precedent will be an increased number of clouded title issues regarding property sold at a foreclosure sale.

A. Notice, the Motion was to be filed did not constitute notice to Petitioners of a defect title. Nor did the Motion itself.

Respondents Motion asserted that service was not properly achieved on the Respondent therefore the foreclosure and sale should be vacated. Respondents motion to vacate mirrors motions in the following cases: *Yates v. Gridley*, 16 S.C. 496 (1882), *Yarbough v. Collins*, 293 S.C. 290, 360 S.E.2d 300 (1987) *Wachovia Bank of SC, NA v. Player*, 341 S.C. 424 535 S.E.2d 128 (2000), *Robinson v Estate of Harris*, 378 S.C. 140, 662 S.E.2d 420 (Ct. App. 2008) *aff'd* 390 S.C. 272, 701 S.E.2d 740 (2010), and *Bloody Point Property Owners Association, Inc. v. Ashton*, 410 S.C. 62, 762 S.E.2d 729 (2014). In all of these cases our Courts of Appeal held that irregularities of service even if in error did not make the judgment void collaterally and therefore does not overturn the purchasers status as a BFP.

"A purchaser may assert a plea in equity of a bona fide purchaser for value, without notice of defect in his title, by showing (1) he has actually paid in full the purchase money (giving security for the payment is not sufficient, nor is past indebtedness a sufficient consideration); (2) he purchased and acquired the legal title, or the best right to it; and (3) he purchased bona fide, *i.e.,* in good faith and with integrity of dealing, without notice of a lien or defect. The bona fide purchaser must show all three conditions — actual payment, acquiring of legal title, and bona fide purchase — occurred before he had notice of a title defect or other adverse claim, lien, or interest in the property. . . in the context of a real estate transaction, a purchaser of real property has actual notice of a title defect or other claim, lien, or interest adverse to his own in a particular property when he actually knows about the defect or claim, or when a reasonable person, if made aware of the same information known to the buyer, would be charged with actual notice of the defect or claim." *Spence v Spence* 368 S.C. 106, 117-18, 628 S.E.2d 869 (2006).

A reasonable person should not be required to assume the court erred in adjudicating the issue of service in the Order of Foreclosure, nor does the law require a reasonable person to make that assumption. 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.[3] *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

[3] 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.

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). The Court of Appeals, 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, the decision of the Court of Appeals stands in conflict with the opinions in *Gladden, Cumbie, Yarborough* , *Robinson,* and *Bloody Point Property Owner's Ass'n* . Petitioner respectfully requests that this Court resolve the conflict between the Court of Appeals holding in this matter and the above referenced precedents, by reversing the Court and holding that the Respondent's Motion to Vacate did not constitute a notice to Petitioners of a defect in title to real property.

B. If the Motion constituted notice then petitioners did not meet any of the 3 BFP elements prior to notice.

1. If the Motion constituted notice of a defect in title, then the sale was not bona fide and Petitioners 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 "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 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*, 378 S.C. at 144. (emphasis added.)

In this Case, the sale was not bona fide, nor did Appellants acquire title prior to notice of the motion. The Court of Appeals 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 Petitioners until May 23, 2014 and thereafter Appellants walked straight to the RMC office and recorded the deed, as recommended in a race-state. (App. 88, 107, 351-52, 402, 444, 465). The Master who is seller in this instance, did not complete the transaction by delivering the deed to Petitioners 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. Petitioners did note acquire title to the real property prior to both the Master and Petitioners having notice of Respondent's filed Motion. The Court of Appeals new precedent could call into question the validity of every 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.

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. Petitioners assert that in a significant number foreclosure actions in this state a post-sale motion 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. The Court of Appeals 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. So in 429 instances a purchaser at a foreclosure sale is not entitled to BFP status.

2. The Court of Appeals created a new obligation third party purchasers must undertake to insure that their interest in the property.

If a motion constitutes a notice of a defect in title, then to meet the "actual purchase" element of BFP a third-party purchaser must tender the entire purchase price on the date of sale to protect his interest in the property against future events of which he has no knowledge or control. By emphasizing tender of the entire purchase price on the sale date to the Court establishes a new obligation which has the potential for significant adverse effects on the sale process by limiting the number bidders at a sale. 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 obligation. If the successful bidder wants to obtain BFP status he must tender the entire purchase price to protect

himself against the Defendant filing a motion prior to the remainder of the purchase price being paid. Petitioners 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.

II. The Court of Appeals erred in holding Petitioners did not preserve for appellate review the issue of whether Respondent raised and preserved any defense to Petitioners assertion of BFP Status.

The Court of Appeals in a footnote held "The Keys assert Murray's arguments opposing their status as bona fide purchasers are not preserved because Murray failed to assert them during the motion to vacate the foreclosure sale. We disagree. *See Smith v. NCCI, Inc.*, 369 S.C. 236, 247-48, 631 S.E.2d 268, 274 (Ct. App. 2006). (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 appellate court may not address the issue.)" (App. 559-60).

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 Petitioners status as BFP. The issue is whether Petitioners, filed a Rule 59(e), SCRCP, motion, to preserve their argument that the Respondent did not preserve a defense to Petitioners assertion of BFP status. Petitioners filed four motions pursuant to Rule 59(e), SCRCP. Petitioners 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 Petitioners "beat the proverbial dead horse" and the Court of Appeals own recitation of the facts acknowledges that. (App 549-554) The Court of Appeals erred in ruling Petitioners did not address the issue in a Rule 59(e), SCRCP motion.

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

III. The Court of Appeals erred in affirming the Master's Amended Vacating Order pursuant to Rule 60(b)(4), SCRCP, and based upon alternative sustaining grounds not requested or ruled on by the lower court.

Petitioners argued before the Court of Appeals that as a result of Plaintiffs actions with regard to attempted service there was no fraud, collusion, nor a facially defective affidavit. The Master did not make a finding of fraud, collusion, or a facially defective affidavit. Therefore, Petitioners asserted that the Master lacked the authority to overturn the Clerk of Court's Order of

Publication finding due diligence of attempted service on the part of Plaintiff. The Court of Appeals held: "As evidenced by its own affidavit, Belle Hall failed to comply with the publication statute because the attached search demonstrates it attempted service on the wrong defendant. . . Accordingly, we find the master had the authority to overrule the Clerk of Court's order of publication because Belle Hall failed to comply with the publication statute." (App. 556).

A. Plaintiff did not violate the publication statute.

The Court of Appeals erred in ruling the affidavits of service were facially defective. 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.

The Court of Appeals 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." (App. 556). Petitioners 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. The Affidavit the Court of Appeals references is not an affidavit of service. It was part of a petition for publication. Further in this case, the process server's affidavits', unlike the affidavits in *Caldwell*, evidence that in this case the process servicers did use due diligence.

In *Caldwell*, the process server's affidavit was facially defective because on its face the affidavit stated that the process server attempted to serve a known non-resident of Beaufort County only in Beaufort County. *Caldwell* at 571. The 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 the Court of Appeals takes issue with the Affidavit of Publication of Plaintiff's Attorney. Plaintiff's Affidavit of Publication is analogous to the petition requesting service by publication in *Player*. It is not an affidavit of service and like in *Player,* 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 actual affidavits service 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." (App. 224).

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. The Court of Appeals erred in ruling the Affidavits were facially defective and violated the publication statute because service was attempted upon the wrong defendant.

2. The Court of Appeals erred in affirming based upon, an alternative sustaining ground which was not ruled on by the Master nor raised by Respondent.

Respectfully, the Court of Appeals failed to comply with Rule 220(c), SCARCP, or at least affirmed the Master's ruling based upon a reasoning which could be viewed as unjustly applied given that it 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), SCARCP, 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;" (App. 50, 54).

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. (App. 56).

The Court of Appeals 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." (App. 556). 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.[4] (App. 50). But that is not the reason the Court of Appeals asserts for violation of the Publication Statute.

Respectfully the Court of Appeals 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.[5] At the very least, given that the reasoning was not ruled on by the Master nor raised by the Respondent, it was unjust for the Court of Appeals to affirm based upon the alternative sustaining ground.

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

1. The Court of Appeals' circular argument regarding Rule 60(b)(4), SCRCP, is in conflict with its own precedent in *Universal Benefits* and this Courts precedent in *Thomas & Howard Co.*

"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.*

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[4] Respondent cited *Caldwell* but only for the assertion Plaintiff did not strictly comply with the publication statute by mailing the summons and complaint to the *correct* last known address of Respondent. (App 473).

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

(quoting *Thomas & Howard Co. v. T.W. Graham and Co.*, 318 S.C.286, 291, 457 S.E.2d 340, 343 (1995). "Further to be kept in mind is the distinction between jurisdiction and the exercise of jurisdiction. "The authority to decide a cause at all, and not the decision rendered therein, is what makes up jurisdiction; and when there is jurisdiction of the person and subject matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction." *Piana v. Piana*, 239 S.C. 367, 372, 123 S.E.2d 297 (1961).

In this case The Court Appeals' 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." (App. 558). The Court of Appeals 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 analogous to those in *Universal Benefits*. The Court seemingly acknowledged this, but then refused to apply its own applicable precedent. Further the Court did have jurisdiction over the Respondent because service upon the Respondent was properly achieved through publication. As the Court of Appeals stated "Belle Hall published

the notice as required." (App. 550). The Court of Appeals erred in affirming relief pursuant to Rule 60(b)(4), SCRCP.

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 provides five distinct forms of relief within each individual subsection. These are very distinct and separate grounds of relief and they must be plead with specificity.

In the present matter the Court of Appeals 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 of Appeals contends that was sufficient to put the Master on notice of the specific relief the Respondent was seeking given the context of the case. (App. 557). 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." (App. 72). 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."

(App. 133). Respondent did not make clear to the Master that it was seeking relief pursuant to Rule 60(b)(4). Petitioners interpreted the relief requested to be under Rule 60(b)(3), SCRCP.[6] The Respondent's Motion to Vacate failed to comply with Rule 7, SCRCP, and further the Respondent failed to specifically request relief under Rule 60(b)(4), SCRCP prior to the Order of July 22, 2014. The Court of Appeals erred in ruling Respondent preserved relief sought under Rule 60(b)(4), SCRCP.

IV. The Court of Appeals erred in failing to apply laches despite being "troubled by Murray's delay in formally responding to the foreclosure action."

"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 of Appeals acknowledged Respondent's delay but 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). (App. 559). The Court, omits 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

[6] Additionally, Respondent's Motion to Amend did not add clarity moving pursuant "Rule 8(f), 52(a), 52(b), 55(c), (59)a, 59(e), 60(b), and all other applicable rules." (App. 97) The motion goes to 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.

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. Further, Respondent failed to take constructive notice of this action while transferring title to the Subject Property in December of 2013. (App. 228 -30, 143). 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 over two years. The Court of Appeals erred in ruling Respondent's delay was not unreasonable and the doctrine of laches did not apply.

V. The Court of Appeals erred in failing to address the Master's Order denying Petitioners Motion for Stay and Order of Supersedeas, on the basis that affirming the Master's Order to Vacate was dispositive of Petitioner's Motion.

On July 22, 2014, Petitioners filed a Motion requesting that the Master stay the Order of July 22, 2014, 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.

Petitioners 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 Petitioners Motion to Stay and request for an Order of Supersedeas. The orders are separate and distinct 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 Petitioners. Petitioners simply requested that they be afforded the same opportunity and protection which Respondent would have been afforded if the tables had been turned. Petitioners 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 Petitioners Motion to Stay and request for an Order of Supersedeas.

CONCLUSION

For the reasons stated above, Petitioners respectfully request this Court reverse the Court of Appeals affirmation of the Master and issue a decision that that Petitioners 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,

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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 26th day of June 2017, mailed a true and correct copy of the Petition for Writ of Certiorari and Appendix to the following counsel of record:

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