THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master in Equity

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Case No. 2015-CP-40-02203

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Appellate Case No. 2017-002164

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SC Court of Appeals

Wells Fargo Bank, N.A.,........................................................................ Appellant,

v.

Gwendolyn Ladson a/k/a Gwendolyn H. Ladson,........................................... Defendant,

Stuart Arnold,.................................................................................. Respondent.

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# BRIEF OF RESPONDENT

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## STATEMENT OF ISSUES ON APPEAL

I. **DID THE MASTER IN EQUITY CORRECTLY RULE THAT, FOLLOWING THE ENFORCEMENT OF THE UNAPPEALED FORECLOSURE JUDGMENT, WHICH ORDERED THAT WELLS FARGO'S SENIOR MORTGAGE BE CANCELLED, NO RELIEF WAS AVAILABLE TO THE PLAINTIFF?**

II. **DID THE MASTER IN EQUITY CORRECTLY RULE THAT MR. ARNOLD WAS A BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE OF THE DEFECT IN TITLE?**

III. **DID MR. ARNOLD HAVE THE RIGHT TO RELY ON THE REPRESENTATIONS MADE IN THE FORECLOSURE JUDGMENT?**

IV. **HAS WELLS FARGO SATISFACTORILY ADDRESSED THE FACTORS OBTAINING RELIEF UNDER RULE 60(b)?**

## STATEMENT OF THE CASE AND FACTS

This case involves a mortgage foreclosure action instituted by Appellant, Wells Fargo Bank, N.A. (hereinafter referred to as "Wells Fargo"). Appellant, Stuart Arnold (hereinafter referred to as "Mr. Arnold"), was the purchaser of the mortgaged property, known as 4226 Chesterfield Drive, Columbia, South Carolina, which property was sold at the foreclosure sale on July 5, 2016. Mr. Arnold had no involvement whatsoever in this action or the subject real property prior to his becoming the successful bidder at the foreclosure sale.

There were two mortgages on the subject real property when Wells Fargo instituted this foreclosure action. Importantly, Wells Fargo owned both of these mortgages.

Wells Fargo, in its Complaint, described its mortgage as a "second lien" (R.p. 36) and stated an intention to foreclose "subject to that certain mortgage given to Wells Fargo Bank, N.A. s/b/m to Wachovia Bank, N.A. by John Ladson and Gwendoly (sic) Ladson . . . recorded in the Richland County records on September 16, 2003 in Book 852 at Page 958." (R.p. 38)

The case was referred to the Master in Equity for Richland County; and following a hearing, the Master in Equity issued a Master in Equity's Order and Judgment of Foreclosure and Sale ("Foreclosure Judgment"), which was filed on June 22, 2016. (R.p. 10) The Foreclosure Judgment and the Record of Hearing for Foreclosure Case ("Record of Hearing") (R.p. 51) specifically addressed Wells Fargo's prior ("first" or "senior") mortgage as follows:

> The Defendant(s), Wells Fargo Bank, N.A. s/b/m to Wachovia Bank, N.A., has or may claim to have some interest in the Property by virtue of a mortgage given by John Ladson and Gwendolyn Ladson, in the original principal amount of $73,848.50, which mortgage was recorded/filed in the Richland County Records on 09/16/2003 in Book 852 at Page 958. Upon information and belief, said lien has been paid in full but never satisfied of record and should be removed from the title to the Property upon the entry of a judicial order. (R.pp. 13 and 53)

Mr. Arnold was interested in purchasing a property at a foreclosure sale. He saw the advertised Master's Sale notice in this case (R.p. 99), and he visited the subject property and became interested in bidding on it at the foreclosure sale on July 5, 2016.

As the Master in Equity correctly found, "[i]n preparing to bid on the subject property at the foreclosure sale, Mr. Arnold reviewed the Foreclosure Judgment and concluded that the sale of the property was not subject to a prior (senior) mortgage." (R.pp. 99-100) From his review, Mr. Arnold determined that, based upon the quoted provision in the Foreclosure Judgment, which directed that Wells Fargo's first mortgage "be removed from the title to the Property," there would be no surviving, senior mortgage. (R.p. 100)

As the Master in Equity correctly found, "[t]he sale was conducted without notice to the public that there was a senior mortgage. . . [and] no announcement was made [at the auction] that the property was offered for sale subject to an outstanding senior mortgage." (R.pp. 20-21)

At the foreclosure sale on July 5, 2016, Mr. Arnold raised Wells Fargo's (or an intervening bidder's) bid on the property to $5,001.00, and he became the successful bidder at that amount.

Mr. Arnold timely complied with his bid, and he received a Deed from the Master in Equity conveying the subject real property to him. Said Deed was dated June 7, 2016, and was recorded in the Office of the Register of Deeds for Richland County on August 16, 2016, in Record Book 2138 at page 653. (R.p. 73)

As the Master in Equity correctly stated, the conveyance to Mr. Arnold was "intended to be good, unencumbered title." (R.pp. 21-22).

The Master's Report on Sale and Disbursements and Order of Confirmation was filed on August 2, 2016. (R.p. 17) This Report/Order was issued over four months after the merits hearing (when the Foreclosure Judgment was presented to the Court by Plaintiff's counsel), and the error (primarily, but also stemming from, the above-quoted provision) had still not been caught. Even then, as the Master in Equity stated, "the Court was unaware that the above-quoted provision was erroneous." (R.p. 22)

Nothing in the Master's Sale notice, the announcement at the foreclosure sale, the Master's Deed or the Report on Sale mentioned anything about the sale being subject to a senior mortgage, which would survive the foreclosure sale.

Upon becoming the owner of the property, Mr. Arnold commenced repairing and rehabilitating the house, still having no knowledge of the alleged surviving lien of Wells Fargo. (R.p. 100) Mr. Arnold first learned of Wells Fargo's claim to have an outstanding lien on November 29, 2016 – almost five (5) months after the foreclosure sale – when he was served with the suit papers in Wells Fargo's second foreclosure suit (foreclosing the alleged first mortgage). (R.p. 100)

By that time, Mr. Arnold had expended $64,382.60 on the property (R.p. 113) in rehabilitating the house (in addition to the $5,001.00 purchase price). (R.pp. 119-120)

As the Master in Equity correctly found, Mr. Arnold made such improvements "believing in good faith, that he held good, fee simple title to the subject property." (R.p. 22)

Following receipt of Mr. Arnold's Answer in Wells Fargo's subsequent foreclosure suit, Wells Fargo, in the present suit, served and filed a Motion for Relief (R.p. 92), to which Mr. Arnold filed Stuart Arnold's Return to Plaintiff's Motion for Relief. (R.p. 96)

A hearing on the Motion for Relief was held on April 19, 2017. The Master in Equity denied this Motion by Order Denying Plaintiff's Motion for Relief, filed on May 8, 2017. (R.p. 20)

The Master in Equity correctly concluded that, "there is no realistic way to reverse the sale at this point to place all interested persons in the position they were in prior to the sale . . . [and therefore] there is no relief available to the Plaintiff." (R.p. 22)

Wells Fargo then served, and filed on May 18, 2017, a Motion to Alter or Amend Order. (R.p. 102) The Master in Equity summarily denied this second Motion by Order Denying Plaintiff's Motion to Alter or Amend Order filed on September 19, 2017 (R.p. 26), again concluding "there is no relief available to Plaintiff."

These Orders are the subjects of the Notice of Appeal filed by Wells Fargo.

## STANDARD OF REVIEW

As stated in *BB&T v. Taylor*, 369 S.C. 546, 551, 633 S.E.2d 501, 502-03 (2006),

> Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). Our standard of review, therefore, is limited to determining whether there was an abuse of discretion. An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support. Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990).

"A mortgage foreclosure is an action in equity." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). "In an appeal from an action in equity, the appellate court may find facts in accordance with its own view of the preponderance of the evidence." *Lowcountry Open Land Trust v. Charleston S. Univ.*, 376 S.C. 399, 407, 656 S.E.2d 775, 779 (Ct. App. 2008). Nevertheless, "the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." *U.S. Bank Trust Nat. Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009). "The burden is on the party appealing from the order to demonstrate the trial court abused its discretion." *Halverson v. Yawn*, 328 S.C. 618, 621, 493 S.E.2d 883, 884 (Ct. App. 1997).

## ARGUMENTS

### I. THE MASTER IN EQUITY CORRECTLY RULED THAT, FOLLOWING THE ENFORCEMENT OF THE UNAPPEALED FORECLOSURE JUDGMENT, WHICH ORDERED THAT WELLS FARGO'S SENIOR MORTGAGE BE CANCELLED, NO RELIEF WAS AVAILABLE TO THE PLAINTIFF.

The Master in Equity's Order, filed on May 8, 2017, made the following findings:

1. "[T]he first mortgage, which was also held by the Plaintiff, was paid in full and was, by the Judgment, removed from the title." (R.p. 20)

2. "When the property was auctioned-off, no announcement was made that the property was offered for sale subject to an outstanding senior mortgage." (R.p. 21)

3. "I intended [for the deed to Mr. Arnold] to be good, unencumbered title." (R.pp. 21-22)

4. "[Mr. Arnold] did not have any notice of Wells Fargo Bank's claim to have a surviving, enforceable mortgage . . . [and] is a bona fide purchaser for value without notice of any lien (defect) affecting the title to the subject property." (R.p. 22)

Based upon the only provision referring to Wells Fargo's senior mortgage in the Foreclosure Judgment and the Record of Hearing (both prepared by Plaintiff's counsel), which provision is again quoted:

> The Defendant(s), **Wells Fargo Bank, N.A. s/b/m to Wachovia Bank, N.A.,** has or may claim to have some interest in the Property by virtue of a mortgage given by John Ladson and Gwendolyn Ladson, in the original principal amount of $73,848.50, which mortgage was recorded/filed in the Richland County Records on 09/16/2003 in Book 852 at Page 958. Upon information and belief, **said lien has been paid in full but never satisfied of record and should be removed from the title to the Property upon the entry of a judicial order**. (R.pp. 13 and 53) (emphasis added),

the Master in Equity correctly held that "there is no realistic way to reverse the sale at this point to place all interested persons in the position they were in prior to the sale." (R.p. 22)

Coupled with the clear directive that the properly-cited first mortgage of Wells Fargo "should be removed from the title to the Property upon entry of a judicial order," the absence of any mention in the Master's Sale notice or at the foreclosure sale that the sale was subject to a senior mortgage, which would survive the foreclosure sale, it would be unreasonable to expect any bidder to conclude or even to assume that this directive (and the absence of notice) is unreliable information.

**A. Wells Fargo was the holder of both mortgages.**

Wells Fargo, the entity which held the second mortgage being foreclosed, was the identical entity which held the first mortgage (mentioned in the Complaint, the Record of Hearing and the Foreclosure Judgment).

As such, the entity which held both of the mortgages was before the court in this litigation as the Plaintiff.

Routinely, *res judicata* would apply under these circumstances; and as there was a final

judgment on the merits, both of Wells Fargo's mortgages would be bound by the terms of the Foreclosure Judgment.

**B. Wells Fargo seeks only to "un-remove" its first mortgage *nunc pro tunc*.**

Wells Fargo seeks only to reattach ("un-remove") its first mortgage to the title to the subject property. Its counsel stated, "Plaintiff is requesting relief nunc pro tunc simply to correct this mistake and to clarify the priority." (R.p. 111, lines 23-25) When the Master in Equity inquired of Wells Fargo's counsel whether Wells Fargo sought to vacate the sale and start over, it was made clear that, no, Wells Fargo's request was to keep the sale valid (and just retract the erroneous provision). (R.p. 119, lines 4-14) This relief is simply not appropriate.

> *Nunc pro tunc* orders can only be used to place in the record evidence of judicial action that has actually taken place. "A prerequisite for a *nunc pro tunc* order . . . is some previous action by the court that is not adequately reflected in its record." *Dewees v. Sweeney*, 947 S.W.2d 861 (Tenn. Ct. App. 1996), *app. den'd* (1997); see also *Simmons v. Atlantic Coast Line R.R. Co.*, 235 F. Supp. 325, 330 (D.S.C. 1964) (*nunc pro tunc* entry cannot be made to serve the office of correcting a decision or of supplying non-action on the part of the court); *Carroll v. Carroll*, 338 S.W.2d 694, 695 (Ky. 1960) ("The error could not be corrected by *nunc pro tunc* order because such an order can be used only for the purpose of placing in the record evidence of judicial action that has actually been taken, not to correct an error or supply an omission of judicial action."); 20 Am.Jur. *Courts* § 29 (1995) (the order cannot supply the record with action that the court failed to take).

*Ex parte Strom*, 343 S.C. 257, 264-65, 539 S.E.2d 699, 702-03 (2000).

The relief requested by Wells Fargo would require that the deficiencies in the advertisement and the conducting of the sale (without notice of a surviving lien) be ignored altogether. It would also ignore that Mr. Arnold (an innocent purchaser), who would retain ownership of the property, would be caused to incur the expense of paying the debt secured by Wells Fargo's first mortgage. This result would, of course, deny Mr. Arnold the benefit of his

bargain.

"[U]nder the laws of this state the legal rights of purchasers at judicial sales cannot be disregarded . . . . " *Brownlee v. Miller*, 208 S.C. 252, 263, S.E.2d 658, 663 (1946).

To grant the relief requested by Plaintiff would completely compromise the integrity of the foreclosure sale.

**C. The *nunc pro tunc* relief requested by Wells Fargo would violate statute.**

The *nunc pro tunc* relief requested by Wells Fargo would be violative of S.C. Code Ann. §29-1-30, which imposes criminal sanctions. That statute states, "[a]ny person who shall willfully and knowingly sell and convey real or personal property on which any lien exists without first giving notice of such lien to the purchaser of such real or personal property shall be guilty of a misdemeanor . . . ." Should Wells Fargo's request for said *nunc pro tunc* relief be granted (that is, that Wells Fargo's senior mortgage be retroactively "un-removed"), the result would be that the sale of property (by or on behalf of Wells Fargo), which was conducted while knowingly and willfully failing to disclose in advance an existing lien (also applied retroactively), would constitute a misdemeanor under said statute.

**D. This was Wells Fargo's mistake.**

Wells Fargo's counsel admits in the Motion for Relief (R.p. 93) that, "through mistake and inadvertence counsel for the Plaintiff unintentionally added language to the proposed Order removing the senior mortgage from the subject property in Paragraph Nineteen (19(c))."

The problem here is that Wells Fargo's counsel failed to comply with Rule 71(b), SCRCP, which requires that, "[t]he judgment shall also contain . . . notice of any senior liens . . . to which

the property to be sold is subject."

Mistakes happen, and ordinarily mistakes are either inconsequential (and may be ignored) or they are corrected before any damage is done. In this case, Wells Fargo's mistake was not inconsequential, as the debt allegedly secured by Wells Fargo's senior mortgage inolves the principal sum of $29,628.60 plus interest from June 3, 2014, advances, late charges and costs of collection, including attorney's fees. (R.p. 83) The mistake was not timely corrected, and damage was done. If the sale is nullified or if the terms of the sale are retroactively revised (as Wells Fargo requests), Mr. Arnold will be severely damaged. If the sale is upheld (as the Master in Equity correctly ruled), Wells Fargo will be severely damaged.

Which party should incur the damages caused by this mistake: (a) an innocent purchaser, who was misled to believe that he purchased the property free of encumbrances at the foreclosure sale; or (b) the foreclosing mortgage holder, which directly caused the court to declare that its own senior mortgage to be "removed from the title to the Property"?

Wells Fargo elected to foreclose upon and sell its collateral; and in undertaking to do this, it was instrumental in seeing that the purchaser at the foreclosure sale acquired good title. Mr. Arnold was not a party to the foreclosure suit, and he therefore had no involvement in the case, which resulted in the Foreclosure Judgment and the Master's Sale notice, both of which were prepared by Plaintiff's counsel. If there happened to be ". . . a misunderstanding, surely this could not be held to affect the rights of the [Respondent, for he was] in nowise responsible for such a supposed misunderstanding. The rights of the purchasers at judicial sales would indeed rest upon an insecure basis if they could lose the property thus acquired by them because of any such controversy, to which they were in no sense parties." *Brownlee v. Miller, supra.*

## E. Wells Fargo is the party most responsible for inadequate performance of due diligence.

Wells Fargo claims that Mr. Arnold should have protected himself by performing better, more extensive due diligence. ("The Court should not protect Respondent where he did not protect himself by further investigating the status of the senior lien." (Brief of Appellant, p. 9).) Even assuming that Mr. Arnold should have discovered that the Foreclosure Judgment contained conflicting comments (raising "red flags") with regard to Wells Fargo's first mortgage, such alleged failure to discover by Mr. Arnold pales in comparison to the admitted mistakes of Wells Fargo, all of which were completely of its own making (and entirely avoidable by simply paying attention).

Wells Fargo's mistakes could have been avoided altogether or timely discovered and remedied if:

1. Wells Fargo had foreclosed both of its mortgages in a single suit, as both mortgage loans defaulted in July 2014;

2. The mistake in the Foreclosure Judgment (and perpetuated elsewhere) had been caught and corrected during the three full months between the final hearing (March 29, 2016) and the sale (July 5, 2016); or

3. Wells Fargo had not waited until after the subject foreclosure sale (it actually delayed until November 2016 – over 28 months after default) to foreclose its first mortgage.

The mistakes by Wells Fargo were not simple, typographical errors (both the Foreclosure Judgment and the Record on Hearing contain the same finding and directive regarding Wells Fargo's first mortgage). Wells Fargo should be expected to perform due diligence and to correct its own errors before an innocent person relied upon these errors. Since it was the party at fault, Wells Fargo must have the utmost obligation to correct promptly (timely), its mistakes.

## F. Wells Fargo is responsible for the ambiguity in the Foreclosure Judgment.

Wells Fargo points to "contradictory" language in the Foreclosure Judgment. By this, it means (without saying it) is that the Foreclosure Judgment is ambiguous.

In support of this position, Wells Fargo cites Paragraph 11 of the Foreclosure Judgment, which states: "This mortgage constitutes a valid second lien on the subject property." That's it. A "second lien" behind what other lien? As real property taxes are always senior-most liens, one must ask if these taxes are the prior lien implied in said Paragraph.

There is no mention whatsoever in the Foreclosure Judgment of a senior lien which encumbers the title – oh, except for Paragraph 19, which makes clear that Wells Fargo's first mortgage would not survive foreclosure sale. (R.p. 13)

Wells Fargo's counsel prepared the Foreclosure Judgment and the Record of Hearing, both of which contain the erroneous paragraph. As they prepared these documents on behalf of their client, any ambiguous language should be construed against Wells Fargo.

> Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage. (citations omitted)

*Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 500-01, 649 S.E.2d 494, 502 (Ct. App. 2007).

## G. The foreclosure sale created a contractual obligation on the part of Wells Fargo as well as on the part of Mr. Arnold.

The relationship between a plaintiff and successful bidder at a foreclosure sale is akin to a typical contract of sale between a seller and a purchaser. In a typical mortgage foreclosure action, the court facilitates the offering for sale of the mortgaged property upon which the plaintiff holds a proven lien, and the judgment of foreclosure and sale provides the guidance for the sale. See

*Parrott v. Dickson*, 151 S.C. 114, 121, 148 S.E. 704, 706 (1929).

The purchaser (higher bidder) "became indebted to [the plaintiff] for the balance of the purchase price," and he must comply with the terms of his bid unless he can "show by the greater weight of the evidence a valid reason or reasons why he should not be made to comply with the terms of his bid." *Id.*, pp. 121-22.

A plaintiff-mortgagee, under a judgment directing a sale, acting through the court, should logically be bound to see to the compliance with the seller's part of the transaction, in accordance with the terms and conditions of the judgment.

If a purchaser is bound by the terms of sale, why wouldn't a plaintiff-mortgagee be equally bound (indebted to the purchaser) just as though it had contracted, by a typical real estate sales contract, to sell the property free and clear of encumbrances?

**H. The validity of judicial sales should be upheld.**

As stated in *Cumbie v. Newberry*, 251 S.C. 33, 37, 159 S.E.2d 915, 917 (1968),

> **A sound public policy requires that the validity of judicial sales be upheld**, if in reason and justice it can be done. In the furtherance of this principle, our decisions have applied the general rule, applicable here, that **a purchaser in good faith at a judicial sale is not affected by irregularities in the proceedings or even error in the judgment**, under which the sale is made; but is required at his peril only to make inquiry as to the jurisdiction of the court which ordered the sale, and whether all proper parties were before the court when the order was made. (citations omitted) (emphasis added)

As stated in *Brownlee v. Miller, supra*, p. 265,

> It is undoubtedly the policy of the law to maintain judicial sales, whenever it can be done without violating principles or doing injustice; and in this view it is held that **a purchaser at such sale is in no way responsible for mere irregularities in the proceedings, or even error in the judgment**, under which the sale is made. (citations omitted) (emphasis added)

"The determination of whether to set aside a foreclosure sale is a matter within the

discretion of the trial court . . . ." *Belle Hall Plantation Homeowner's Ass'n vs. Murray*, 419 S.C. 605, 615, 799 S.E.2d 310, 315 (Ct. App. 2017).

"Courts do not sit for the purpose of relieving parties who refuse to exercise reasonable diligence or discretion to protect their own interest. . . The court will not protect the person who, with full opportunity to do so, will not protect himself." *King v. Oxford*, 282 S.C. 307, 312, 318 S.E.2d 125, 128 (Ct. App. 1984).

**I. The assertion of a claim to Betterments would negate any benefit to Wells Fargo if relief were granted.**

If the Court were to require that the property be re-sold at foreclosure, this time with proper notices, this result would be inequitable to Mr. Arnold, who has not been shown to have acted otherwise than with complete good faith and appropriate motives; but let's say, for purposes of argument, that Wells Fargo deserves more protection than does an innocent purchaser. Mr. Arnold could then invoke the Betterments statutes (S.C. Code Ann. §§27-27-10, *et seq.*), which would entitle him to the value of the betterments, which he made to the property "supposing at the time of such purchase or acquisition such title to be good in fee." (§27-27-10).

Mr. Arnold's betterments claim would not be limited to the monies he expended to make improvements to the property, as the measure of his entitlement is the enhancement in value (§27-27-20). Wells Fargo's counsel agrees. (". . . having put $5,000.00 into it, he's gonna get a return on his investment for the $64,000.00, or whatever else he puts in, he's gonna garner a return for that . . . ." (R.p. 137).) This entitlement would be a lien on the subject property (§27-27-80) "in preference to all other liens" (§27-27-50), including Wells Fargo's first mortgage.

It should be clear that Wells Fargo has little or nothing to gain, even if Mr. Arnold were to lose the title to the subject property.

## II. THE MASTER IN EQUITY CORRECTLY RULED THAT MR. ARNOLD WAS A BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE OF THE DEFECT IN TITLE.

The Master in Equity correctly concluded that Mr. Arnold was a bona fide purchaser for value without notice of Wells Fargo's claim (defect in title).

> To qualify as a bona fide purchaser, a party must show "(1) actual payment of the purchase price of the property, (2) acquisition of legal title to the property, or the best right to it, and (3) a bona fide purchase, 'i.e., in good faith and with integrity of dealing, without notice of a lien or defect'" . . . "In addition, '[t]he 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.'"

*Belle Hall Plantation Homeowner's Ass'n vs. Murray, supra*, at 620.

There is no issue regarding actual payment by Mr. Arnold of the purchase price. The Report on Sale and Disbursements (R.p. 17) clearly indicates that he complied (in full) with his bid. There is also no issue regarding Mr. Arnold's acquisition of title. The Master's Deed (R.p. 73) clearly conveyed title to the subject real property to Mr. Arnold.

The final issue (good faith purchase before he had notice of a defect in title or adverse lien) is the remaining condition which Mr. Arnold must show. In that regard, Mr. Arnold explained that, before he bid at the foreclosure sale, he reviewed the Foreclosure Judgment and concluded that, ". . . the property was <u>not</u> being sold subject to a senior mortgage (also held by Wells Fargo Bank, N.A.), which was still open of record, but that said mortgage was satisfied and was, by the Judgment, removed from the title." (R.p. 100)

No evidence has been presented to show that Mr. Arnold had actual knowledge of the alleged conflict in the wording of the Foreclosure Judgment or other knowledge (from any other source) demonstrating that he was acting in any manner other than in good faith.

Likewise, there is no evidence that Mr. Arnold did not rely on the specific wording in the

Foreclosure Judgment (that Wells Fargo's senior mortgage would be removed from the title).

The Master in Equity concluded that Mr. Arnold's actions were taken in reliance upon the Foreclosure Judgment and that neither Mr. Arnold nor himself was aware that the above-quoted provision (cancelling the first mortgage) was erroneous. (R.pp. 21-22)

Mr. Arnold satisfied all three of the requirements to be satisfied in order that he be deemed a bona fide purchaser without notice; and the Master in Equity's determination that Mr. Arnold was a bona fide purchaser was well within his discretion.

According to S.C. Code Ann. §15-39-870, upon delivery by the court of a deed to a bona fide purchaser for value without notice, who purchased property at a judicial sale, the proceedings of such sale should be res judicata.

## III. MR. ARNOLD HAD THE RIGHT TO RELY ON THE REPRESENTATIONS MADE IN THE FORECLOSURE JUDGMENT.

Wells Fargo points to two facts (two statements which were inconsistent with conclusions in the Foreclosure Judgment), which it claims raises "red flags," which should have alerted Mr. Arnold to a mistake, a potential title defect or an adverse claim. First, that the Complaint asserts that the mortgage being foreclosed is a second lien subordinate to that certain senior mortgage given to Wells Fargo Bank, N.A. (R.pp. 8 and 17); and, second, that Paragraph 11 of the Foreclosure Judgment indicates that the subject mortgage constitutes a second lien on the property (R.p. 11).

Neither of these facts would prompt a reasonable person to conduct further inquiry, for the following reasons: First, the Complaint is "trumped" by the Foreclosure Judgment, and there is no reason for a person (a non-party to the suit) reviewing the foreclosure file to look beyond the Foreclosure Judgment; and second, the Foreclosure Judgment (prepared by Plaintiff's counsel)

makes it abundantly clear, in Paragraph 19, that Wells Fargo's senior mortgage "has been paid in full but never satisfied of record" and, importantly, orders that said senior mortgage "is hereby removed from the title to the Property upon the entry of a judicial order." (This is the identical wording included in the Record of Hearing (also prepared by Plaintiff's counsel), and it must be assumed that the Foreclosure Judgment is the "judicial order" contemplated by this provision.)

> [T]he purchaser in good faith at a judicial sale is bound only to see that the Court had jurisdiction of the subject of the action and of the parties in interest. He is **not affected by irregularities or errors in the record** for which the judgment might have been vacated in a direct attack, or reversed on appeal, or by secret vices affecting the judgment, which are not disclosed by examination of the record. (emphasis added)

*Gladden v. Chapman*, 106 S.C. 486, 490, 491 S.E. 796, 797 (1917) (citations omitted).

> It must be presumed from the judgment rendered that the Court considered and adjudicated the regularity and sufficiency of each and every step in the proceedings leading up to it, including the sufficiency of the complaint, the issuance and service of process upon the defendants, and the rights and interests of the parties to the action under the allegations and evidence; and although the conclusions with respect to those matters, or any of them, might have been erroneous, so that they would have been reversed on appeal, they do not make the judgment void collaterally.

*Id.*, at 492.

> In furtherance of [public policy] . . . a purchaser in good faith at a judicial sale is **not affected by irregularities in the proceedings or even error in the judgment under which the sale is made**; but it 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. (emphasis added)

*Robinson v. Estate of Harris*, 378 S.C. 140, 145, 662 S.E.2d 420, 422 (Ct. App. 2008) (citing *Cumbie v. Newberry, supra*).

> If there are circumstances sufficient to put a party upon the inquiry, he is held to have notice of everything which that inquiry, properly conducted, would certainly disclose; but constructive notice goes no further. It stands upon the principle that the party is bound to the exercise of due diligence, and is assumed to have the knowledge to which that diligence would lead him; but he is not held to have notice

> of matter which lies beyond the range of that inquiry and which that diligence might not disclose. There must appear to be, in the nature of the case, such a connection between the facts disclosed and the further facts to be discovered, that the former could justly be viewed as furnishing a clue to the latter.

*Spence v. Spence*, 368 S.C. 106, 120-21, 628 S.E.2d 869, 876 (2006).

### A. Wells Fargo's reliance on *Poco-Grande* is misplaced.

Wells Fargo, in the Brief of Appellant, pp. 8-9, relies upon *Poco-Grande Investments v. C&S Family Credit*, 301 S.C. 323, 391 S.E.2d 735 (Ct. App. 1990). This reliance is misplaced.

That case had to do with a bidder's ability to rely on the amount of the senior lien (which was to survive the sale), which amount was stated in the notice of sale. The present case had no "subject to" wording in the Master's Sale notice and certainly no alleged amount of the debt of an identified senior, surviving lien. If said notice had stated anything about the sale being "subject to" another mortgage or other prior lien, we wouldn't be here today.

In *Poco-Grande*, there were two different mortgagees. The holder of the foreclosing second mortgage was not the same entity as the holder of the surviving, senior mortgage. In the present case, both mortgages were held by the identical entity – an important distinction.

As an aside, Mr. Arnold submits that, if the circumstances in *Poco-Grande* had involved a quote of the first mortgage debt owed to the same entity that was foreclosing its second mortgage, a bidder would have had the right to rely on such quote.

In the same vein, Wells Fargo's quote from 27 S.C. Jur. Mortgages §108 that, "[a] foreclosure decree cannot affect the rights of a party having priority over the Plaintiff's mortgage whether is it made a party to the action or not," should be inapplicable where the "party" is the same person or entity as the plaintiff. It makes complete sense that a junior mortgage holder cannot compromise the interests of another, unrelated mortgage holder, but this logic fails when the same

party holds both mortgages, as in this case.

## IV. WELLS FARGO HAS FAILED TO ADDRESS SATISFACTORILY THE FACTORS FOR OBTAINING RELIEF UNDER RULE 60(b).

As stated in *Rouvet v. Rouvet*, 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010) (citations omitted),

> The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle [it] to relief. . . In determining whether to grant relief under Rule 60(b)(1), the court must consider the following factors: (1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party.

"The power to open, modify or vacate a judgment is possessed solely by the court that rendered the judgment. 46 Am.Jur.2d Judgments, §681 (1969). . . Whether to grant or deny a motion under SCRCP 60(b) is within the sound discretion of the judge." *Coleman v. Dunlap*, supra, at 494 (citations omitted). "Absent an abuse of discretion, the decision . . . should be upheld on appeal." *Id.* at 495.

> The decision to deny or grant a motion made pursuant to Rule 60(b), SCRCP is within the sound discretion of the trial judge. *BB&T Taylor*, 369 S.C. 548, 633 S.E.2d 501 (2006). An abuse of discretion occurs when the order of the court is controlled by an error of law or where the order is based on factual findings that are without evidentiary support. *Id.* at 551, 633 S.E.2d 502-03.

*Ware v. Ware*, 404 S.C.1, 11-12, 743 S.E.2d 817, 822 (2013).

### A. Wells Fargo failed to act promptly to correct its mistakes.

There is an issue of Wells Fargo's failure to correct its mistakes during the three full months before the foreclosure sale. Wells Fargo's mistakes (negligence) should have been corrected before the sale, but that didn't happen. Wells Fargo, arguably, could have corrected the mistakes shortly after the foreclosure sale, before Mr. Arnold invested monies to repair the property, but it did not. Once Mr. Arnold commenced the rehabilitation of the house, it was too late. Any opportunity to

correct the mistake was lost. Simply stated, Wells Fargo failed to act promptly.

According to *Coleman v. Dunlap*, *supra*, at 495, a party must show that ". . . failure to avoid the mistake was justified." Wells Fargo's failure to avoid the mistakes and to correct its mistakes in a timely fashion was not justified.

According to *Regions Bank v. Schmauch*, 354 S.C. 648, 663-64, 582 S.E.2d 432, 440 (Ct. App. 2003), a party is charged with learning the contents of a document before it signs it, that is, it must exercise care to protect itself. Under the facts of this case, this proposition should be extended to "before it submits a proposed order to the court for issuance."

**B. Wells Fargo has failed to address the prejudice to Mr. Arnold.**

The Master in Equity correctly analyzed the circumstances and questioned:

> But wouldn't Mr. Jordan's client be prejudiced by and order post-judgement now . . . [and] you come to him and say, well, you're responsible for a senior lien that you should have known was there, and we find documents prepared by a law firm with incorrect information and . . . what was on the record was what he relied on? (R.pp. 151, lines 21-22; 152, lines 1-5 and 12-13)

Following his purchase of the property and receipt of the Master's Deed, Mr. Arnold spent $64,382.60 (as of April 19, 2017) to rehabilitate the property. (R.p. 113, lines 3-6) Unquestionably, Mr. Arnold would be prejudiced if the terms of the sale were altered post-sale to deny him the benefit of his bargain.

At both of the post-sale motion hearings, the Master in Equity raised the issue of prejudice to Mr. Arnold (R.pp. 119, lines 15-20; 151, lines 21-25). At no time did Wells Fargo's counsel deny that Mr. Arnold would be prejudiced, if the relief requested by Wells Fargo were granted.

Wells Fargo has failed to address satisfactorily Mr. Arnold's obvious prejudice or potential prejudice.

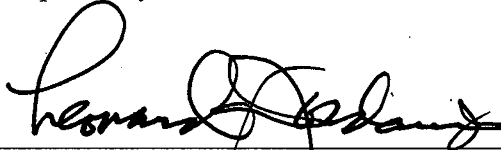
Considering specifically the factors of Wells Fargo's failure to act promptly and Mr.

Arnold's obvious prejudice, relief under Rule 60(b) should be denied.

## CONCLUSION

For the reasons stated, this Court should affirm the appealed Orders, which denied any relief to Wells Fargo.

Respectfully submitted,

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