

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Master-in-Equity

The Honorable Ellis B. Drew, Jr., Master-in-Equity, Circuit Court Judge

Case No. 2012-CP-04-02157

Marsha P. Wright and Richard A. Wright, Appellants,

v.

Pinnacle Bank, SC, Respondent.

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. APPELLANTS DO NOT APPEAL FROM THE MASTER'S FINDING THAT HE NEVER EXERCISED JURISDICTION OVER PARCEL 2 IN THE PARCEL 1 ACTION, AND THEREFORE, THAT FINDING IS THE LAW OF THE CASE.

- II. THE MASTER DID NOT ERR IN DENYING APPELLANTS' RULE 60(B)(4) MOTION.
 - A. No authority in South Carolina holds that a mortgage lender must foreclose on all parcels securing a mortgage at the same time.

 - B. In the Parcel 1 action, the Master-in-Equity did not make any rulings or adjudicate any rights as to Parcel 2, and therefore *in rem* jurisdiction over Parcel 2 was not required in the Parcel 1 action.

 - C. Additional sustaining grounds support the denial of the Wrights' Rule 60 motion.
 1. The Wrights' motion purports to arise under Rule 60(b)(4), but it is actually a Rule 59(e) motion in disguise and is therefore time-barred.

 2. The Appellants cannot meet the "upon such terms as are just" requirement of Rule 60.

 3. The Appellants' motion does not meet the "judgment is void" requirement of Rule 60(b)(4).

 4. The Rule 60(b) motion was not made within a reasonable time and is therefore barred.

STATEMENT OF THE CASE

The Respondent largely concurs with the Appellants' Statement of the Case, with the following additions and clarifications:

1. The action which Pinnacle Bank SC ("Pinnacle Bank") commenced on July 11, 2011, was to foreclose on just one parcel of property that served as collateral for its mortgage (referred to herein as "Parcel 1"). **(R., p. 77-88)**. Pinnacle Bank's mortgage also covered an additional piece of property, which was the subject of a subsequent and separate foreclosure action (referred to herein as the "Parcel 2" action.)

2. The Appellants did not merely default in the Parcel 1 action; they intentionally did not answer the Summons and Verified Complaint in the Parcel 1 action. **(R., p. 94, lines 11-15)**.

3. The Verified Complaint in the Parcel 1 action attached and incorporated by reference to the Mortgage, which covered both Parcels 1 and 2, which was Exhibit "B" to the Verified Complaint. The Mortgage was specifically referred to and incorporated at Paragraph 13 of the Verified Complaint, and elsewhere. **(R., p. 77-88)**.

4. The Anderson County Master-in-Equity's Order and Judgment of Foreclosure and Sale, filed on September 13, 2011, was served upon the Appellants on September 22, 2011. **(R., p. 106)**.

5. Subsequent to the Master-in-Equity's September 13, 2011 Order and Judgment of Foreclosure and Sale, on November 7, 2012, Pinnacle Bank commenced a separate action to foreclose on Parcel 2. This action is currently pending.

STATEMENT OF THE FACTS

This action arises out of a loan transaction between Pinnacle Bank and Appellant Marsha Wright, initially entered into on January 31, 2007. **(R., p. 71-75)**. Pinnacle Bank loaned Ms. Wright the principal sum of \$468,912.00, secured by two separate parcels of real property in Anderson County, South Carolina. **(Id.)** Ms. Wright executed a Note, payable to Pinnacle Bank, in the amount of the loan (plus interest). **(Id.)** Both Ms. Wright and her husband, Richard A. Wright, owned the two properties that secured the Note, and therefore both Wrights executed a Mortgage in favor of Pinnacle Bank, covering the two parcels. **(Id.)** The Mortgage specifically identified the two separate parcels (denominated as Parcels 1 and 2 in the Mortgage itself) as the mortgaged properties. **(Id.)**

Ms. Wright failed to make payment on the Note, despite four loan extensions. **(R., p. 77-88)**. On July 12, 2011, Pinnacle Bank commenced a foreclosure action against the Wrights in the Anderson County Circuit Court, bearing Civil Action No.2011-CP-04-2157, seeking to foreclose on Parcel 1.¹ **(Id.)** The Verified Complaint in the Parcel 1 action made specific reference to the Mortgage, and attached and incorporated the Mortgage, which itself described the two parcels which were subject to the mortgage. This action was referred with finality to the Master-in Equity for Anderson County on August 31, 2011. **(R., p. 90-91)**. The Wrights intentionally made no appearance and asserted no defenses in the Parcel 1 action, and defaulted. **(R., p. 94, lines 11-15)**. By Order dated September 13, 2011, the Master-in-Equity for Anderson County issued an

¹ Pinnacle Bank agreed to restrict the first foreclosure action to Parcel 1 at the request of the Wrights, who hoped to be able to sell Parcel 2 and resolve their indebtedness. **(R., p. 113-116)**.

Order and Judgment of Foreclosure and Sale. This Order found that Pinnacle Bank had a valid mortgage lien, described the property that comprised Parcel 1, found that Ms. Wright was in default under the Note, and ordered a judgment of foreclosure and sale with respect to Parcel 1.

The Master's Order specifically noted that Pinnacle Bank's mortgage was secured by additional collateral, and that the bank reserved the right to pursue the additional secured parcel at a later date. **(R., p. 2-10)**. The Master's specific language appears at footnote 1 on Page 3 of his Order, as follows: "The Mortgage also encumbers additional property that is not included in this foreclosure action. Accordingly, the Mortgage shall remain a lien on the property not included in this foreclosure action. The Plaintiff reserves the right to pursue the remaining property at a later date."

The Master's Order was served upon the Wrights on September 22, 2011. **(R., p. 106)**. The Wrights did not, at the time, seek a rehearing, make any motion, file an appeal, or take any action whatsoever with respect to the Master's Order.

Parcel 1 was ultimately acquired by Pinnacle Bank at a foreclosure sale, and a Partial Release of its mortgage lien (covering Parcel 1) was recorded on February 13, 2012. **(R., p. 108)**. Pinnacle Bank currently owns the property. An Order of Deficiency Judgment was entered in February, 2012, establishing Ms. Wright's indebtedness to Pinnacle Bank in the amount of \$411,000.00 as of November 2, 2011, with interest accruing at an annual rate of 4.5% until satisfied. **(R., p. 110-111)**.

The following August, after nearly a year had passed since the Master issued his Order and Judgment of Foreclosure and Sale, the Wrights filed a Motion For Relief From Judgment pursuant to Rule 60(b)(4) of the South Carolina Rules of Civil Procedure. **(R.,**

p. 49-60). In this Motion, the Wrights contended that the Master did not have jurisdiction to make any rulings on Parcel 2, that the Master's Order was void, and that the Wrights were entitled to relief from that portion of the Master's Order which referred to "additional property." The Master denied the Motion, stating:

I conclude that the Master in Equity's Order and Judgment neither purported to, nor did, adjudicate the Plaintiff's right to foreclose on Parcel 2, but instead expressly reserved any adjudication of the Plaintiff's right to foreclose on Parcel 2 for a later action, which is now underway. It was, therefore, not necessary for this Court to acquire jurisdiction over Parcel 2 in the Parcel 1 action. This Court merely acknowledged the Plaintiff's reservation of rights as to Parcel 2.

No Rule 59(e), SCRCF motion was filed, but this appeal followed.

ARGUMENTS

I. **THE APPELLANTS DO NOT APPEAL FROM THE MASTER'S FINDING THAT HE NEVER EXERCISED JURISDICTION OVER PARCEL 2 IN THE PARCEL 1 ACTION, AND THEREFORE, THAT FINDING IS THE LAW OF THE CASE.**

As a threshold matter, the Wrights' argument on appeal utterly fails to address the actual basis upon which the Master-in-Equity denied their Rule 60(b), SCRCF, motion, which was: that the Master's did not need or require *in rem* jurisdiction over Parcel 2 in the Parcel 1 action, because the Master-in-Equity's September 13, 2011 Order and Judgment of Foreclosure and Sale did not determine any party's rights with respect to Parcel 2, or adjudicate the bank's right to foreclose on Parcel 2, but merely acknowledged that Pinnacle Bank was reserving the right to seek foreclosure on additional collateral in the future.

The Appellants' brief, however, does not address the question of whether the Master did or did not need jurisdiction over Parcel 2 in the Parcel 1 action. Instead, the

Appellants' brief simply assumes that the Master needed to have jurisdiction over Parcel 2, argues that the Master failed to acquire this necessary jurisdiction, and restates its contention that the Master's Order should therefore be voided.

By failing to appeal from (or even address) the specific ruling which served as the basis for the Master's denial of the Rule 60 Motion, that ruling has now become the law of the case, and the Master's ruling should be summarily affirmed. See *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding that an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance"); see also, *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("[T]he appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case.").

In *Jones v. Lott*, the Court of Appeals affirmed the Circuit Court's grant of a directed verdict based on the "two-issue" rule and the law of the case doctrine. 379 S.C. 285, 665 S.E.2d 642 (Ct. App. 2008). In *Jones*, the Circuit Court granted a directed verdict to the Sheriff, who was being sued in his official capacity by the estate of a man who was shot and killed by deputies as he was trying to escape their custody. The Circuit Court directed a verdict based on four grounds: (1) the deputies did not have a duty to secure the man in custody in such a way that it would have been impossible for him to escape; (2) any negligence of the deputies was outweighed by the deceased's actions in attempting to escape; (3) the deputies' use of force was objectively reasonable; and (4) the Sheriff's Department was immune from liability under section 15-78-60(6) of the South Carolina Code. *Id.* at 289, 665 S.E.2d at 644. In its brief on appeal, the Estate failed to appeal from the Circuit Court's ruling that the Sheriff's Department was

immune under section 15-78-60(6). Accordingly, that ruling was deemed the law of the case, and the directed verdict was affirmed. *Id.* at 290, 665 S.E.2d at 645.

The Supreme Court granted certiorari to review the Court of Appeals' decision. *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010). In the Supreme Court, the Estate argued that it *had* appealed the trial court's grant of a directed verdict on the issue of immunity under section 15-78-60(6), because that argument was subsumed in the central issue of the case, which addressed the trial judge's ruling that the officers were not negligent or grossly negligent. The Supreme Court rejected this argument, pointing out:

The statement of each issue on appeal shall be concise and direct, and broad general statements of issues may be disregarded by this Court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal. Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to grope in the dark to ascertain the precise point at issue.

Id. at 346, 692 S.E.2d at 903 (internal quotations and citations omitted).

Ultimately, the Supreme Court affirmed the Court of Appeals, agreeing that the Estate had failed to raise the issue of immunity on appeal and therefore, it became the law of the case under the "two issue rule." *Id.* at 348; 692 S.E.2d at 905.

Similar to the failings of the Estate's brief in *Jones v. Lott*, the Wrights' brief fails to address the actual basis upon which the Master-in-Equity denied their Rule 60(b) Motion. When, as here, the Appellants fail to point out the specific error of the lower court, the appellate courts will not "grope in the dark" to ascertain the precise point at issue, but instead will affirm the ruling below because the unappealed findings become the law of the case.

II. THE MASTER DID NOT ERR IN DENYING THE WRIGHTS' RULE 60(B) MOTION.

A. No authority in South Carolina holds that a mortgage lender must foreclose on all parcels securing a mortgage at the same time.

Underlying the Appellants' argument is the assumption that a Mortgagee that is secured by multiple properties is required to foreclose on all the properties securing its mortgage at the same time, in the same action. There is no authority in South Carolina supporting this proposition, however. In fact, such a proposition directly contradicts the South Carolina Supreme Court's Administrative Order No. 2011-05-02-01, which seeks to promote cooperation between lenders and borrowers in crafting approaches to loss-mitigation in the mortgage foreclosure arena. Unfortunately, it was ultimately impossible for the Appellants here to cure the default, and it became necessary to pursue the second piece of collateral. But the position advanced by the Appellants in this appeal would prevent lenders that hold multiple pieces of collateral from using the multiple properties as a way of giving borrowers the opportunity to work out their mortgage debts, and would instead force lenders to foreclose on all parcels at the same time. As noted, this would be a new requirement under South Carolina law, and would undermine the intent and benefits of the referenced Administrative Order.

B. In the Parcel 1 action, the Master-in-Equity did not make any rulings or adjudicate any rights as to Parcel 2, and therefore *in rem* jurisdiction over Parcel 2 was not required in the Parcel 1 action.

As noted, the Appellants maintain that the Master lacked *in rem* jurisdiction in the Parcel 1 action to decide any issues associated with Parcel 2. This argument misses the point, however, because (as the Master's Order notes), he did not adjudicate any rights with respect to Parcel 2, and therefore was not required to have jurisdiction over Parcel 2.

The Appellants cite authority for the proposition that *in rem* jurisdiction is required in order for a property to be subject to a partition action or a foreclosure action. Pinnacle Bank agrees with this general statement of the law. *Bartles v. Livingston*, 282 S.C. 448, 454, 319 S.E.2d 707, 710 (Ct. App. 1984). However, this general statement of law does not apply here. Of course, the property to be partitioned or foreclosed upon must be before the Court. But, Parcel 2 was not being foreclosed upon in the Parcel 1 action. *In rem* actions are actions that seek to subject a person's interest in specific property to claims of the plaintiff, or otherwise affect the status, ownership, or liability of specific property as between the parties. *Campbell v. Jordan*, 382 S.C. 445, 455, 675 S.E.2d 801, 806 (Ct. App. 2009) (citing 59A Am.Jur2d Partition §100 (2008)). This is not what happened to Parcel 2 in the Parcel 1 action. Pinnacle Bank's foreclosure action as to Parcel 1 did not subject Parcel 2 to any claims or affect the status, ownership, or liabilities with respect to Parcel 2. In fact, the Master's Order in the Parcel 1 action explicitly set aside for possible future determination any and all questions as to Parcel 2. Pinnacle Bank did not attempt to divest the Appellants' of their ownership interest in Parcel 2. The Master's Order only addressed the Appellants' status, ownership, and liability as to Parcel 1. Accordingly, there was no requirement or necessity that the Master have *in rem* jurisdiction over Parcel 2, as the Master did not decide any issues with regard to Parcel 2 or even purport to decide any such issues. All issues concerning rights and liabilities with respect to Parcel 2 will be resolved in the pending Parcel 2 action.

Alternatively, if jurisdiction over Parcel 2 was required, the Master had it. Rule 10(c) of the South Carolina Rules of Civil Procedure provides that "a copy of any plat,

photograph, diagram, document, or other paper which is an exhibit to a pleading is a part thereof for all purposes if a copy is attached to such a pleading.” (emphasis added.) The Mortgage, which fully described Parcel 2 and set forth its legal description, was attached as an Exhibit to the Verified Complaint in the Parcel 1 action, and it was specifically referred to and incorporated into the Verified Complaint. Thus, although the Master did not need jurisdiction over Parcel 2, the Master had such jurisdiction; he just did not exercise that jurisdiction to adjudicate any rights or liabilities with respect to Parcel 2.

The Appellants cite to *Matthews, et al. v. Monts*, 61 S.C. 385, 39 S.E. 575 (S.C. 1901), and *National L.&E. Bank v. Argo Development Co.*, 141 S.C. 72, 139 S.E. 183 (S.C. 1927), to support their contention that the Mortgage was, in effect, not part of the Complaint in the Parcel 1 action. Both of these cases involved the issue of whether a mechanics’ lien claimant had complied with certain specialized statutory pleading requirements. In those cases, the Court found that the claimants’ had either filed or attached as exhibits to the Complaint a “statement” which, read with the Complaints, met the pleading requirements. Thus, to the extent that these cases are significant here (both having arisen decades before Rule 10(c), SCRPC even existed), they do not advance the Appellants’ position. Further, the case law which has emerged under the Rules of Civil Procedure recognizes that, by virtue of Rule 10(c), an attachment incorporated into a Complaint becomes “a part and parcel of the Complaint.” *Lee v. Kelley*, 298 S.C. 155, 378 S.E.2d 616 (Ct. App. 1989); *see also Brazell v. Windsor*, 384 S.C. 512, 682 S.E.2d 824 (2009); *HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 699 S.E.2d 699 nil (Ct. App. 2010); *Burns v. Gardner*, 328 S.C. 608, 493 S.E.2d 356 (Ct. App. 1997).

C. Additional sustaining grounds support the denial of the Wrights’ Rule 60 motion.

It is well-established that an Appellate Court may affirm an Order of the lower Court on any sustaining grounds that appear in the record. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (holding that when a trial court rules in favor of one party, it is not necessary for preservation purposes for the winning party to ask the court to rule on the remaining issues and arguments it put forth). The following grounds, argued in Pinnacle Bank's legal brief in opposition to the Appellant's Motion, provide additional grounds for affirming the Master's Order.

- 1. The Wrights' motion purports to arise under Rule 60(b)(4), but it is actually a Rule 59(e) motion in disguise, and is therefore time-barred.**

The Appellants are proceeding under the wrong rule. They filed their Motion under Rule 60(b) – which is a mechanism for voiding orders and judgments – but are not actually seeking to void the Master's Order and Judgment of Foreclosure and Sale. To do so would entail unwinding everything that flowed from the Master's Order: entry of the deficiency judgment, the partial release of lien on Parcel 1, the foreclosure sale of Parcel 1, and Pinnacle Bank's acquisition of Parcel 1 through the foreclosure sale. A close reading of the Appellants' brief shows that they are not actually proposing to “void” the Master's Order and Judgment. Instead, they are merely seeking to alter or amend a small portion of the Master's Order, to erase Footnote 1. This kind of altering or amending – which is far different from “voiding” an order – falls under Rule 59(e), SCRCP. In other words, revising incorrect portions of orders is achieved through Rule 59(e), not Rule 60(b), and a Rule 59(e) motion must be filed within ten days after written notice of entry of the Order. Here, the Appellants were served with the Master's Order on September 22, 2011. The time has long passed to file a 59(e) motion, which is why the Appellants had to file a motion under Rule 60; however,

that rule does not provide them with the type of relief they actually seek. The Master's Order should be affirmed because the type of relief the Appellants seek is not available under Rule 60.

2. The Appellants cannot meet the “upon such terms as are just” requirement of Rule 60.

The Appellants deliberately chose not to file an Answer, did not appear at the foreclosure hearing despite notice, and failed to file any motion or any appeal following the Master's Order or at any other step in the proceedings. They took no action subsequent to the Master's Order until the Court in the Parcel 2 action stated its intention to deny their motion to dismiss. This sequence of events unfolded against a backdrop of Pinnacle Bank having limited its first foreclosure action to just Parcel 1, in an effort to allow the Appellants every chance to sell parcel 2 and resolve their debt. Under these circumstances, it would be unjust to now afford the Appellants protection under Rule 60 because “[h]e who seeks equity must do equity.” *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 259, 715 S.E.2d 348, 357 (Ct. App. 2011). The Appellants cannot meet this standard in this case.

3. The Appellants' motion does not meet the “judgment is void” requirement of Rule 60(b)(4).

Rule 60(b)(4), SCRC, provides that the Court may relieve a party from a final judgment or order if “the judgment is void.” The definition of void includes judgments from Courts which failed to provide proper due process, or judgments from courts which lacked subject matter or personal jurisdiction. *Linda MC Company, Inc. v. Shore*, 390 S.C. 543, 552, 703 S.E.2d 499, 503 (2010). The Wrights contend that Footnote 1 in the Master's Order to Parcel 2 is void because the Master lacked jurisdiction over Parcel 2. But they have not asserted that the Court lacked jurisdiction with regard to the

foreclosure of Parcel 1, which was the only issue upon which a judgment was rendered. As has been discussed above, the Master made no rulings as to the status, ownership, or liability of these parties with regard to Parcel 2. A Court is simply not required to have jurisdiction over an issue which it does not decide. Because the Master did not need jurisdiction over Parcel 2, the Appellants cannot meet this prong of Rule 60(b)(4), and the Master's Order should be affirmed.

4. The Rule 60(b) motion was not made within a reasonable time and is therefore barred.

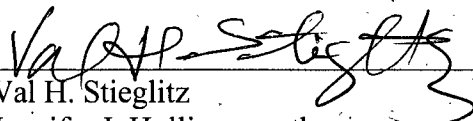
Rule 60(b), SCRPC, provides that a motion "shall be made within a reasonable time . . ." (except for three circumstances not relevant here). Rule 60(b) is not a substitute for appeal from a final judgment, particularly when it is clear that the party seeking relief could have litigated at trial and on appeal the claims now sought in the motion. *The Smith Companies of Greenville, Inc. v. Hayes*, 311 S.C. 358, 359, 428 S.E.2d 900, 902 (Ct. App. 1993). The Court of Appeals clarified, in *McDaniel v. U.S. Fidelity & Guar. Co.*, 324 S.C. 639, 478 S.E.2d 868 (Ct. App. 1996), that this "reasonable time" requirement applies to Rule 60(b)(4).

Here, the Appellants did not take action within a reasonable time, much less protect their interests at trial or on appeal when they had the opportunity to do so in the Parcel 1 action. They were served with the Master's Order on September 22, 2011. They took no action whatsoever at the time to contest the reservation of further action as to the additional collateral. They took no action as Parcel 1 went to judicial sale; they took no action as a deficiency judgment was entered; they took no action even when the subsequent action was filed to foreclose on Parcel 2.

Only now, months after the Master's Order was entered, months after a deficiency judgment was entered, months after Parcel 1 was conveyed to Pinnacle Bank, and months after the Parcel 2 foreclosure action was filed, did the Appellants for the first time raise a Rule 60(b) issue. Rule 60(b) is simply not available to parties who deliberately sit on their hands and watch opportunities to assert their interests pass them by.

CONCLUSION

For the reasons set forth above, the Order of the Master-in-Equity denying the Motion for Relief from Judgment/Order should be affirmed.



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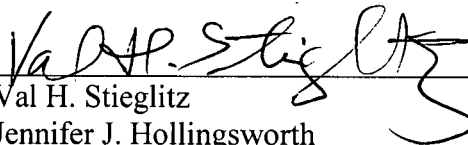
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Respondent's Final Brief complies with Rule 211(b), SCACR, and the Supreme Court Order dated August 13, 2007, regarding personal identifiers and sensitive information.



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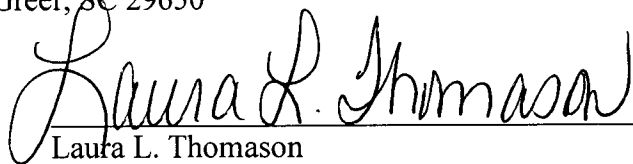
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PROOF OF SERVICE

The undersigned hereby certifies that on the 22nd day of February, 2013, she did serve **Respondent's Final Brief** on the Appellants by depositing a copy of the same in the United States Mail, sufficient first class postage prepaid, addressed to Appellant's attorney as follows:

Wendell L. Hawkins, Esquire
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