

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas  
The Honorable Marvin H. Dukes, Master-in-Equity

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FILED  
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SC COURT OF APPEALS

Case No.: 2011-CP-07-2176  
Appellate Case No.: 2013-000222

Bloody Point Property Owners Association, Inc., David L. Fingerhut,  
and Patricia M. Santry.....Respondents,

v.


William A. Ashton, Jr. and Michele C. Ashton.....Appellants.

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FINAL BRIEF OF RESPONDENT

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Respectfully submitted,



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STATEMENT OF ISSUES ON APPEAL

- I. DID THE MASTER-IN-EQUITY ABUSE HIS DISCRETION IN HOLDING THAT THE FINGERHUT RESPONDENTS ARE BONA FIDE PURCHASERS FOR VALUE UNDER S.C. CODE ANN. § 15-39-870? .....5
- II. DID THE MASTER IN EQUITY ABUSE HIS DISCRETION IN HOLDING THAT THE FORECLOSURE SALE PRICE WAS NOT SO INADEQUATE SO AS TO SHOCK THE CONSCIENCE OF THE COURT? .....10
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- IV. DID THE MASTER IN EQUITY ABUSE HIS DISCRETION IN HOLDING THAT THE APPELLANTS' DUE PROCESS RIGHTS WERE NOT VIOLATED?....20

## STATEMENT OF THE CASE

This matter arises from the foreclosure sale of Lot number 55 Daufuskie Island Club, Phase 1, Bloody Point, Beaufort County, South Carolina, also known as 42 Fuskie Lane (the "Property"). The foreclosure action was commenced by Respondent Bloody Point Property Owners Association, Inc. (the "Association") on May 17, 2011. The Association asserted claims for foreclosure of a lien against Appellants for payment of homeowners' association dues and fees. The Association properly served the Appellants by publication under South Carolina Code Ann. § 15-9-710(4). On September 27, 2011, the action was referred to Beaufort County Master-in-Equity Marvin H. Dukes, III. The Master-in-Equity conducted a hearing on the matter and, on December 2, 2011, entered a Master's Report and Judgment of Foreclosure and Sale. On January 3, 2012, the Master in Equity conducted a foreclosure sale. Respondents David L. Fingerhut and Patricia Santry ("Fingerhut Respondents") purchased the Property for Eight Thousand Eight Hundred and 00/100 Dollars (\$8,800.00). The Master in Equity issued a Master-in-Equity Deed to the Fingerhut Respondents on January 6, 2012.

On or about February 2, 2012, nearly one month after the Master-in-Equity Deed was issued, Appellants filed a Motion to Vacate/Set Aside Foreclosure Sale, Void Master in Equity Deed, and Vacate/Set Aside Order ("Motion to Vacate"). In the Motion to Vacate, Appellants contend that the foreclosure sale should be set aside because the sales price was so low so as to "shock the conscience" of the Court. Appellants further asserted that the Association improperly served the Lis Pendens, Summons and Complaint by publication, and that the improper service violated the Due Process clause

of United States Constitution. Notably, the Appellants have not disputed the validity of the debt or their repeated failure to pay dues and fees to the Association.<sup>1</sup>

On May 4, 2012, the Fingerhut Respondents filed a Motion to Intervene as Plaintiffs in the action. On May 9, 2012, the Fingerhut Respondents filed a Memorandum in Opposition to the Motion to Vacate, in which they contended that they are good faith purchasers for value under South Carolina Code Ann. § 15-39-870. The Fingerhut Respondents further contended that taxes and fees that were unpaid by the Appellants should be added to the bid sales price, that the foreclosure sale price did not “shock the conscience” of the Court, and that the Association properly served the Appellants under South Carolina Code Ann. § 15-9-710.

The Master-in-Equity granted the Fingerhut Plaintiffs’ Motion to Intervene, with no objection from Appellants. That order was never appealed and is the law of the case. On July 24, 2012, the Master in Equity issued an Order Denying the Motion to Vacate, holding that (1) the Fingerhut Respondents are good faith purchasers for value under South Carolina Code Ann. § 15-39-870; (2) the Fingerhut Respondents paid \$11,593.20 for the Property; (3) the foreclosure sales price did not “shock the conscience” of the Court; (4) the Association complied with the Order for Publication; and (5) the Appellants were properly served pursuant to the publication statute. The Appellants did not appeal the finding that the Fingerhut Respondents paid \$11,593.20 for the Property, and that finding is the law of the case.

On or about July 25, 2012, the Appellants served a Motion for Reconsideration of the Master-in-Equity’s Order Denying the Motion to Vacate, in which they raised the

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<sup>1</sup> The Appellants make the unsupported claim in their brief that the collection of fees was suspended by Respondent Bloody Point for a period of time. This inaccurate statement is not part of the record and was never made in the Court below.

same arguments propounded in the initial Motion to Vacate. On December 28, 2012, the Master-in-Equity issued a form order denying Plaintiffs' Motion to Reconsider.

On January 31, 2013, the Appellants served their Notice of Appeal. The Notice of Appeal was filed on February 1, 2013.

#### STATEMENT OF FACTS

The Fingerhut Respondents purchased the Property at the foreclosure sale on January 3, 2012 for \$8,800. (R. pp. 198-199). In addition, the Fingerhut Respondents paid an additional \$2,793.20 for back assessments due and property taxes, such that the amount they actually paid for the Property was \$11,593.20. (R. pp. 252-254); (R. pp. 3-4). At the time of the foreclosure sale, the court file contained documents evidencing all of the indicia of proper service of a foreclosure action. (R. pp. 135-136); (R. pp. 188-194). Thus, the record reflected that the Appellants had been properly served, and that the Master-in-Equity had proper jurisdiction over the claims and parties.

The Property is an interior, golf view lot in the Bloody Point neighborhood on Daufuskie Island in Beaufort County.<sup>2</sup> (R. p. 262). At the time of the foreclosure sale, sales activity had decreased in the area, causing an oversupply of inventory and a substantial decline in lot prices due to high levels of foreclosures and motivated sellers. (R. p. 262). Three comparable lots had sold for \$15,000, \$22,500 and \$17,500, respectively. (R. p. 265). Therefore, the Property, like all similarly-situated properties on Daufuskie Island and in Bloody Point, had substantially declined in value from the date on which Appellants purchased the Property.

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<sup>2</sup> Appellants make the incorrect statement that prior to the foreclosure sale they maintained "continuous ownership" of the Property since their purchase. In fact, they lost and subsequently redeemed their title after the property was sold at the Beaufort County 2010 Tax Auction for \$10,000. (R. p. 255).

## ARGUMENT

It is respectfully submitted that this appeal must be determined using an abuse of discretion standard of review. The determination regarding whether a judicial sale should be set aside is a matter within the discretion of the trial court. Bonney v. Granger, 300 S.C. 362, 387 S.E.2d 720 (Ct. App. 1990). The abuse of discretion standard is clearly set forth in Wells Fargo Bank, N.A. v. Turner, 378 S.C. 147, 150, 662 S.E.2d 424, 425 (Ct. App. 2008)<sup>3</sup> (“However, the determination of whether a judicial sale should be set aside is a matter left to the sound discretion of the trial court.”). The abuse of discretion standard applies in the present fact scenario even when the case has been referred to and decided by the Master-in-Equity. Arrow Bonding Co. v. Warren, 399 S.C. 603, 732 S.E.2d 622 (2012).

The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988). An abuse of discretion occurs when the judge issuing the order was influenced by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. In Re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997). Therefore, unless the Master-in-Equity made an error of law or his ruling was made without evidentiary support, his ruling must be affirmed.

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<sup>3</sup> Appellants incorrectly cite Turner for the proposition that the appellate court may determine the facts in accordance with the preponderance of the evidence.

**I. THE MASTER-IN-EQUITY DID NOT ABUSE HIS DISCRETION IN HOLDING THAT THE FINGERHUT RESPONDENTS ARE GOOD FAITH PURCHASERS FOR VALUE UNDER S.C. CODE ANN. § 15-39-870.**

The State of South Carolina has a well established policy of protecting good faith purchasers and upholding the finality of a judicial sale. Robinson v. Estate of Harris, 378 S.C. 140, 144, 662 S.E.2d 420, 422 (Ct. App. 2008) (aff'd Robinson v. Estate of Harris, 390 S.C. 272, 701 S.E.2d 740 (2010) (citing Cumbie v. Newberry, 251 S.C. 33, 37, 159 S.E.2d 915, 917 (1968) ("a sound public policy requires the validity of judicial sales be upheld, if in reason and justice it can be done"); Wooten v. Seanch, 187 S.C. 219, 222, 196 S.E. 877, 878 (1937) (upholding a foreclosure sale in which the mortgagee purchased the property and further stating that, to set aside a sale, "there must be such irregularity in the proceedings as to show that the sale was not fairly made, or that appellant was defrauded or misled to his injury and loss"). This policy is embodied in S.C. Code Ann. § 15-39-870, which provides that judicial sales are *res judicata* as to innocent purchasers:

Upon the execution and delivery by the proper officer of the court of a deed for any property sold at a judicial sale under a 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 for value without notice, notwithstanding such sale may not subsequently be confirmed by the court. Judicial sales shall be *res judicata* as to innocent purchasers, even without confirmation.

Id. Upon delivery of the Master-in-Equity Deed to the Fingerhut Respondents, the foreclosure sale and issuance of the deed became *res judicata* and unassailable, so long as the Fingerhut Plaintiffs are bona fide purchasers for value. This is true even if the Appellants contend they were improperly served. Robinson, 378 S.C. at 144, 662 S.E.2d at 422 (holding that foreclosure deed was *res judicata* as to bona fide purchasers despite the fact that the former owners of the subject property claimed they were improperly

served). Thus, if the Court determines that the Fingerhut Respondents are bona fide purchasers for value, it need not reach issues concerning service on the Appellants.

In order to establish their status as bona fide purchasers for value, the Fingerhut Respondents need only prove the following elements: “(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.” Id. The Appellants do not contest that the Fingerhut Respondents made an actual payment of the purchase price of the property and acquired legal title by way of the Master’s Deed. Therefore, the Fingerhut Respondents need only prove that they made a bona fide purchase without notice of lien or defect.

The cases interpreting S.C. Code Ann. § 15-39-870 set forth the requirements for proving that a foreclosure purchase is made without notice of lien or defect. In Cumbe, the Court noted 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.” Cumbe, 251 S.C. at 37, 159 S.E.2d at 917. The Robinson court expounded on this ruling by holding that a subsequent purchaser was entitled to summary judgment where he submitted documents “indicating the judgment of foreclosure and sale and subsequent exchanges of title to the Duggan property were properly executed.” Robinson, 378 S.C. at 145, 662 S.E.2d at 423. The Court further noted that “[i]ncluded in the documents was the judgment of foreclosure and sale [, which] stated (1) service was made upon defendants, Kathleen and Bobbie; (2) both Kathleen and Bobbie were in

default; (3) the attorneys of record were notified of the hearing; and (4) neither Kathleen nor Bobbie was in the United States military service.” Id. In the present case, all of the items set forth in Robinson were included in the Masters’ Report and Judgment of Foreclosure and Sale. (R. pp. 188-194).

The Appellants propose a contorted reading of the Cumbie case, the application of which would result in an unwarranted expansion of the inquiry requirements imposed upon prospective foreclosure purchasers. The Appellants state that the Fingerhut Respondents were “required to *affirmatively* make inquiry as to whether the Court had jurisdiction of the subject of the action and of the parties in interest.” See Appellants Brief at p. 25 (emphasis added). In other words, Appellants incorrectly argue that in addition to confirming the lower Court’s subject matter jurisdiction, the Fingerhut Respondents were required to evaluate and confirm whether the Court properly ruled that it had personal jurisdiction over the named parties. That is the difference between the phrase, as stated by the Court in Cumbie, that *the proper parties were before the Court* (*i.e.*, the owners of record), rather than, as Appellants’ erroneously argue, that the parties were *properly before the Court* (*i.e.*, personal jurisdiction was obtained).<sup>4</sup>

Appellants take this incorrect interpretation of case law even further, alleging that Respondent David Fingerhut stated that he did not review the file before purchasing the Property, and waited until after the foreclosure sale to order a title search. Id. at 25-26.<sup>5</sup>

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<sup>4</sup> As set forth herein, Respondent Bloody Point Property Owners’ Association properly served the Appellants. Therefore, the Court actually had personal jurisdiction over the Appellants.

<sup>5</sup> Mr. Fingerhut never stated that he did not review the case file before attending the hearing as claimed by the Appellants. (R. pp. 256-259). Mr. Fingerhut merely states that he reviewed the notice of foreclosure sale and attended the sale. (R. p. 256 ¶ 3). Appellants’ argument concerning the timing of the title search is a red herring. First, Mr. Fingerhut testified that he purchased title insurance “to protect his interest in the Property,” and not for the purpose of belatedly checking the jurisdiction of the lower Court. (R. p. 257 ¶ 7). Second, a title search would have only revealed what was already contained in the court record concerning the foreclosure sale.

Indeed, the Appellants argue that prospective foreclosure sale purchasers must delve into the court file, second-guess the ruling of the trial court and make their own determination concerning whether the trial court has personal jurisdiction over the parties. See Appellants Brief at pp. 26-27 (Contending that the Fingerhut Respondents were on notice of improper service because the Notice of Mailing was not filed and the pleadings were published in a newspaper that was not to Appellants' liking, despite the fact that the Master-in-Equity ruled that service was proper in the Judgment). This is not the level of inquiry required under Robinson and Cumbie.

Neither S.C. Code Ann. § 15-39-870 nor any of the applicable case law place the burden of an affirmative legal inquiry or a title search on a prospective purchaser. Rather, the purchaser is simply deemed to be on notice of documents contained in the court's file. As set forth in Robinson, where the judgment of foreclosure and sale contains findings concerning jurisdiction, service and notice, the purchaser takes title to the property without notice of lien or defect. The foreclosure purchaser is entitled to a presumption that the Court considered and properly adjudicated issues of service:

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.

Gladden v. Chapman, 106 S.C. 486, 492, 91 S.E. 796, 797 (1917) (affirming partition sale to good faith purchaser for value)<sup>6</sup>; Bennett v. Floyd, 237 S.C. 64, 71, 115 S.E.2d

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<sup>6</sup> The Court further notes:

659, 663 (1960) ("Even though proof of service were wholly lacking, it would be presumed that the court that rendered the judgment would not have done so without proper proof of service of the summons in the cause.") (citations omitted).

A review of the court file at the time of the foreclosure sale did not and would not have revealed any jurisdictional deficiencies. First, the Appellants do not dispute that the Court below had jurisdiction over the subject matter of this case. Instead, they argue that the Fingerhut Respondents had an affirmative duty to investigate the details of the lower Court's personal jurisdiction over the Appellants. In this regard, the Appellants' position that the Fingerhut Respondents, as a result of professional affiliation or educational level, must be held to a higher standard should be rejected in its entirety. Indeed, the court file contained an Affidavit of Service referencing the diligent efforts undertaken by the Association's counsel to serve the Appellants in Pennsylvania, including four unsuccessful attempts at personal service, along with an Order for Publication and an Affidavit of Publication. (R. pp. 180-183, 185). Finally, the court file contained the Master's Report and Judgment of Foreclosure and Sale, which recited that the Appellants had been properly served. (R. p. 188).

The Master-in-Equity made the determination that the Appellants were properly served. At the time of the foreclosure sale, the court file contained his order, as well as

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No doubt a wrong was done them; but they were not altogether without fault. Their conduct, in remaining absent from the State so long, without communicating with their relatives or friends here, made it possible; and they have no just ground to complain because the Court declines to correct the wrong done them by doing a greater wrong to the defendants, and, in so doing, set a mischievous precedent.

Id. at 494, 492, 91 S.E. at 798. In the present case, the Appellants claim to have lived in Pennsylvania for several years. Despite that fact, they lost the subject property in a tax sale in 2010, could not be located for service despite four attempts by local Sherriff's deputies in the County in which they claim to reside, and did not appear in or respond to the present action until nearly one month after the foreclosure sale.

the documentation supporting that order. S.C. Code Ann. § 15-39-870 precludes the trial court from vacating a foreclosure deed unless the court file contained notice that the court lacked subject matter jurisdiction or that all proper parties were not before the court. As in the cases cited herein, the court file contained no such notice to the Fingerhut Respondents. Therefore, the Master-in-Equity did not abuse his discretion in holding that the Fingerhut Respondents are bona fide purchasers for value under S.C. Code Ann. § 15-39-870 and the Master's Deed may not be overturned by collateral attack.

**II. THE MASTER IN EQUITY DID NOT ABUSE HIS DISCRETION IN HOLDING THAT THE FORECLOSURE SALE PRICE WAS NOT SO INADEQUATE SO AS TO SHOCK THE CONSCIENCE OF THE COURT.**

“Inadequacy of price, unless so gross as to shock the conscience of the court or accompanied by circumstances from which fraud may be clearly inferred, will not justify the overthrow of a judicial sale.” Bennett v. Floyd, 237 S.C. 64, 73, 115 S.E.2d 659, 664 (1960). There is no bright line rule for determining what percentage of the sale value must be with respect to the actual value in order to satisfy the “shock the conscience” standard. Eastern Savings Bank, FSB v. Sanders, 373 S.C. 349, 359, 644 S.E.2d 802, 807 (Ct. App. 2007). “However, a search of South Carolina jurisprudence reveals only when judicial sales are for less than ten percent of a property's actual value, have our courts consistently held the discrepancy to shock conscience of the court.” Id.

Appellants and Respondents have cited the same legal standard for determining whether a foreclosure sale is so gross as to shock the conscience of the court. See Appellants' Brief at p. 18. In general, where the judicial sale amounts to less than ten percent of the actual value of the property, courts have held that the discrepancy “shocks the conscience.” The legal standard propounded by the Appellants is the same legal standard that the Master-in-Equity applied, and therefore, there is no error of law. (R. pp.

3-4). Therefore, the Master-in-Equity's order may be reversed only if his ruling lacks any reasonable evidentiary support.

The Master-in-Equity must first determine the amount that the successful foreclosure bidders paid for the Property. The Master in Equity ruled that the Fingerhut Respondents paid \$11,593.20 at the foreclosure sale. (R. pp. 3-4). This holding was not appealed, and is the law of the case. Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (Unchallenged rulings are deemed abandoned by the court). Based on the foregoing, to consider the sales price so low as to shock the conscience of the Court, the actual value of the Property as of January 3, 2012 would have to be in excess of \$115,992.

The Fingerhut Respondents provided the Master-in-Equity with superior evidence concerning the actual value of the Property on the date of the foreclosure sale. The most compelling evidence was an appraisal commissioned by the Fingerhut Respondents for the sole purpose of obtaining title insurance shortly after the foreclosure sale. (R. pp. 260-269). The Whitton Appraisal establishes the value of the Property as of January 19, 2012, just 16 days after the foreclosure sale. (R. pp. 260-262). Further, the Whitton Appraisal was commissioned prior to the date on which the Appellants filed the Motion to Vacate, and was done for the sole purpose of establishing a value to obtain title insurance. (R. p. 262); (R. pp. 257-258). This appraiser used actual sales data of comparable lots when reaching the conclusion that the fair market value of the Property on January 17, 2012 was \$17,000. (R. p. 265). In addition, the Fingerhut Respondents submitted undisputed evidence that the Property was purchased for \$10,000 at a

competitive bid tax sale approximately one year prior to the foreclosure sale.<sup>7</sup> (R. p. 255). The South Carolina courts have looked to competitive bid tax sales when evaluating the efficacy of a sales price. Bennett, 237 S.C. at 73, 115 S.E.2d at 664 (noting that the subject property “brought substantially the same price as when sold for taxes [three years prior].”). The Fingerhut Respondents further produced evidence of two additional sales of lots within the Bloody Point subdivision that occurred months after the Whitton Appraisal, one for \$75,000 and the other for \$23,000. (R. pp. 298-301).

In contrast, the Appellants submitted their own deed from over ten years prior to the foreclosure sale. They also cite their own appraisal, which was commissioned solely to “rebut the 01/06/2012 sale and sales price of the subject property at \$8,800.” (R. pp. 282-297). This appraisal used actual sales on incomparable oceanfront lots and only *real estate listings* on comparable interior lots. (R. pp. 283-285). In fact, the totality of the Accent Appraisal demonstrates that the market for interior, golf view lots on Daufuskie Island had collapsed as of January 6, 2012 (the date the Fingerhut Respondents closed on the Property). That appraisal ignored actual comparable sales of interior golf view lots used by the Whitton Appraisal and instead sought to create a fictitious market using real estate listings for unsold properties and applying a contrived formula to demonstrate what properties might be worth *if* there were any buyers.<sup>8</sup>

The Appellants further cite the sale of 70 Fuskie Lane as evidence of valuation. That sale occurred nine months after the foreclosure sale and the January 12, 2012 announcement of the sale of the golf course and related amenities and upcoming

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<sup>7</sup> It is noteworthy that after redeeming title to the property in late 2010, the Appellants never paid Beaufort County property taxes again. The Fingerhut Respondents were required to pay 2011 County property taxes to Beaufort County at closing due to the Appellants’ failure to make payment.

<sup>8</sup> At the Master-in-Equity auction on January 3, 2012, the room was filled with willing real estate investors, yet the Fingerhut Respondents were the only bidders for the Property. (R. p. 257).

improvements and renovations in and around Bloody Point. (R. p. 286). In addition, 70 Fuskie Lane is roughly 20% larger than the Property. (R. p. 283) (noting that the Property is .53 acres, while Lot 70 is .63 acres).

Appellants' own appraiser valued Lot 70 at \$107,000 as of April 2, 2012.<sup>9</sup> If the \$126,650 actual sales price of Lot 70 is reduced by 20% to account for the disparity in size as compared to the Property, the implied value of the Property as of the September, 2012 sales date, would be approximately \$101,320 – still less than the \$115,932 threshold required to deem the actual purchase price some nine months earlier as one that “shocks the conscience.” Lastly, the Appellants make the erroneous argument that this interior, golf course lot has an “ocean view.” This argument is not supported by the evidence submitted in the trial court below. In addition, this claim is noticeably absent from the Accent Appraisal as well as the Appellants' affidavits; it can only be found in their attorney's arguments.

The Master-in-Equity considered all of the evidence presented, including the competing appraisals. He correctly concluded that the “appraisal provided by the [Fingerhut Respondents] and 2010 tax sale data are more reliable than the valuation information provided by the [Appellants].” (R. p. 4). In so holding, the Master-in-Equity ruled that “the actual value of the Property is consistent with the [Fingerhut Respondents'] appraisal [\$17,000] and the actual sales price at the 2010 Beaufort County Delinquent Tax Sale [\$10,000] and, accordingly, is far less than the \$115,932.00 required to ‘shock the conscience’ of the Court.” (R. p. 4).

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<sup>9</sup> The Accent Appraisal never attempted to value the property as of the date of the sale, January 3, 2012.

The Master-in-Equity's ruling was clearly supported by credible evidence of the actual value of the Property on the date of the foreclosure sale. His denial of the Appellants motion was not an abuse of discretion, and his ruling must be affirmed.

**III. THE MASTER-IN-EQUITY DID NOT ABUSE HIS DISCRETION IN HOLDING THAT THE APPELLANTS WERE PROPERLY SERVED.**

The standard for setting aside an order of publication issued by a statutory officer of the court is stringent. Indeed, “[w]hen the issuing officer is satisfied by the affidavit, his decision to order service by publication is final absent fraud or collusion.” Wachovia Bank of South Carolina, N.A. v. Player, 341 S.C. 424, 428-429, 535 S.E.2d 128, 130 (2000) (citations omitted). This standard has been upheld and applied where, as here, a party asserts that an order of publication is defective due to a lack of diligence in attempting to locate the party to be served. Montgomery v. Mullins, 325 S.C. 500, 505-506, 480 S.E.2d 467, 470 (Ct. App. 1997) (“As to the determination of whether the order of publication was valid based on Montgomery's lack of diligence in attempting to locate the Mullinses, we hold the trial court was without authority to overrule the finding of the clerk of court that the Mullinses could not, ‘after due diligence, be found in the County and State of their last known residence.’”). In the present case, the Clerk of Court for Beaufort County determined that the affidavit, including the statements concerning diligence, complied with requirements of S.C. Code. § 15-9-710 and -740. There are no allegations of fraud or collusion. Therefore, the Clerk of Court's determination is final and the Master-in-Equity was without authority to overrule her.

**A. The Master-in-Equity did not abuse his discretion in holding that the Association complied with S.C. Code Ann. § 15-9-740.**

The Association hired the Chester County, Pennsylvania Sherriff's Office to serve the Appellants at 120 Marlbrooke Way, Kennet Square, Pennsylvania – the address

which the Appellants now claim is and has been their address. (R. pp. 180-181); (R. p. 165); (R. p. 168). The Chester County Sherriff's Office unsuccessfully attempted to perfect service on the Appellants at that address on four separate occasions. (R. pp. 180-181). The Association then petitioned for and received an Order for Publication from the Clerk of Court for Beaufort County, South Carolina. (R. pp. 182-183). The Order for Publication specifically noted that the pleadings should be "served upon the said Defendants by publication of the same in the *The Island Packet*, a newspaper published in Beaufort County, South Carolina, State aforesaid, which newspaper is designated most likely to give notice to said Defendants . . . ." (R. p. 182).

The Clerk of Court and later the Master-in-Equity were confronted with documentation confirming that the Chester County, Sheriff's Office was unable to serve the Appellants despite four attempts.<sup>10</sup> After considering that the Sherriff's Office in Chester County was unable to locate and serve the Appellants in that County and the fact that the Association and court knew they owned property in Beaufort County, both the Clerk of Court and the Master-in-Equity deemed that the Island Packet was the newspaper most likely to give notice to the Appellants. (R. pp. 182-182); (R. p. 5). While the Appellants may disagree with the conclusion reached by both the Clerk of Court and the Master-in-Equity, that conclusion was not reached through an error of law and was plainly supported by the evidence introduced in the case that was known at the time.<sup>11</sup> Therefore, the Master-in-Equity did not abuse his discretion in holding that the Association complied with S.C. Code Ann. § 15-9-740.

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<sup>10</sup> It was not until nearly two months after the foreclosure sale that William and Michele Ashton appeared and contended that they live in Pennsylvania (R. p. 169, ¶8); (R. p. 166, ¶8).

<sup>11</sup> The Master-in-Equity also properly concluded that Respondent Bloody Point Property Owners Association, Inc. mailed the pleadings in accordance with the Order of Publication. (R. p. 5). The

**B. The Master-in-Equity applied the correct statute in holding that the Appellants had been properly served by publication.**

The Master-in-Equity never ruled that the Appellants were served pursuant to S.C. Code Ann. § 15-9-720. Rather, the Master's Report and Judgment of Foreclosure and Sale provided only that service was made upon the Appellants, as shown by the affidavits in the court file. (R. p. 188). Further, in the Order Denying the Motion to Vacate, the Master-in-Equity based his holding on compliance with S.C. Code Ann. § 15-9-740 and the Order for Publication. (R. pp. 4-5). The Master-in-Equity never cited S.C. Code Ann. 15-9-720 as a basis for his decision, either in the original Order or the Order Denying the Motion to Reconsider. (R. pp. 1-13). Therefore, Appellants' contention that the Master-in-Equity committed an error of law is erroneous. Further, the issue was not preserved for appellate review.

**C. The Appellants' argument concerning the propriety of the Affidavit for Publication was not preserved for appellate review.**

Appellants briefed and argued three issues concerning service by publication in their original Motion to Vacate: (1) the court's alleged failure to comply with the S.C. Code Ann. § 15-9-740; (2) the court's allegedly application of S.C. Code § 15-9-720 instead of S.C. Code § 15-9-710; and (3) the Associations alleged failure to comply with the Order for Publication. (R. pp. 16-17); (R. pp. 21-27). First, the Affidavit for Publication was never admitted into evidence. In addition, the first time that Appellants raised the issue concerning the viability of the affidavit in support of the petition for service by publication was during oral argument on Appellants' Rule 59(e) Motion to

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Appellants failed to introduce any evidence supporting their allegation that Bloody Point failed to mail the pleadings in accordance with the Order of Publication.

Reconsider. (R. p. 95, lines 16-23).<sup>12</sup> Therefore, this was not preserved for appeal. Johnson v. Sonoco Prods. Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (“An issue may not be raised for the first time in a motion to reconsider.”); Patterson v. Reid, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995)(same).

**D. Even assuming the Appellants’ argument concerning the propriety of the Affidavit for Publication was preserved, the Master-in-Equity did not err in denying the motion.**

The Affidavit for Publication submitted by the Association’s counsel provides as follows:

A diligent search to perfect service upon [Appellants] proved unsuccessful as is shown by the Affidavits of Non-Service filed herein. The said [Appellants’] present whereabouts are unknown and said Defendants cannot be found within this State.

(R. pp. 180-181); (R. p. 273). As set forth above, the Affidavits of Service detail four unsuccessful attempts to serve the Appellants. The Clerk of Court for Beaufort County determined that this affidavit complied with the publication statute and issued the Order for Publication.

As long as the affidavit supporting a request for service by publication reflects due diligence in attempting to serve the party, the officer’s decision to issue an order of publication is final and unassailable. Wachovia Bank of South Carolina, N.A. v. Player, 341 S.C. 424, 428-429, 535 S.E.2d 128, 130 (2000). In Wachovia Bank, the Supreme Court of South Carolina determined that the required diligence may be determined by reading the petition and affidavits of non-service together. Id. at 428, 535 S.E.2d at 130 (“It is clear from reading the two documents together that the petition is inaccurate, but

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<sup>12</sup> Appellants characterized their Motion to Reconsider as a motion under Rule 59(a)(2), SCRPC. However, a Rule 59(a)(2) motion was barred because it was not filed within 10 days after Appellants’ receipt of the Master’s Report and Judgment of Foreclosure and Sale. See Rule 59(b), SCRPC. Rather, Appellants’ motion was properly characterized as a Motion to Alter or Amend under Rule 59(e), SCRPC.

that the process server's affidavit reflects due diligence by her.”). In the present case, the Association filed an affidavit that affirmed that a diligent search had been performed and specifically referenced the Affidavits of Service, which had been previously filed and were accessible to the Clerk of Court. (R. pp. 180-181); (R. p. 273). Therefore, the Association’s affidavit was nearly identical to the affidavit upheld in Wachovia Bank, and supported the Clerk of Court’s decision to issue the Order for Publication.

The Appellants’ reliance on Caldwell v. Wiquist, 402 S.C. 565, 741 S.E.2d 583 (Ct. App. 2013) is misplaced. The Caldwell decision did not alter the controlling precedent concerning affidavits for publication, but rather distinguished the facts of that case from those set forth in Montgomery and Wachovia Bank. Id. at 586-587. In Caldwell, this Court considered an affidavit that merely recited: "The Defendant who is a non-resident of Beaufort County, South Carolina, cannot be served a copy of the Summons in Beaufort County, and it is necessary and proper to serve her by publication." Id. at 587. The Court noted that the affidavit did not contain any information regarding whether or not [the party to be served] could be found in the State. Id. Further, it noted that “[t]he affidavits requesting publication are defective on their face because they state the Caldwells tried to serve a non-resident of Beaufort County only in Beaufort County [and] . . . do not contain any statements regarding the due diligence undertaken and, in fact, do not even contain the phrase ‘due diligence.’” Id.

The subject affidavit contains no similar infirmities. It specifically notes that a diligent search to perfect service was conducted, and the Appellants cannot be found in the State. Further, the affidavit makes specific reference to the Affidavits of Service,

which, under Wachovia Bank, is sufficient to demonstrate the factual basis for issuing the order for publication.

Indeed, the Caldwell decision specifically cited the language in Wachovia Bank concerning the Supreme Court's reading of the petition for publication and the affidavits of non-service together when distinguishing the affidavit considered in that case from prior precedent. Id. at 586. It also distinguished Yates v. Gridley, a Supreme Court decision which upheld an affidavit which read:

[T]he above defendants, are non-residents of this [State], but are residents of the State of New York, and . . . their post-office is unknown to deponent, and cannot be ascertained, notwithstanding due diligence has been employed, nor can they be found in this State after due search for them.

Id. (citing Yates v. Gridley, 16 S.C. 496, 498-99 (S.C. 1882)). In the present case, the Association properly submitted an affidavit that referenced the Affidavits of Service detailing the diligent efforts made to serve the Appellants in Pennsylvania. The Clerk of Court was correct in reading the documents together. She was also correct in determining from those documents that the Appellants could not be located, in South Carolina or otherwise. Therefore, under the controlling precedent set forth in Yates, Montgomery and Wachovia Bank, the documents presented to the Clerk of Court were not defective, and she properly issued the Order for Publication. Her decision is final, and the Master-in-Equity did not abuse his discretion by upholding her decision and finding that the affidavit in support of the petition for publication complied with S.C. Code Ann. § 15-9-710.

**IV. THE MASTER-IN-EQUITY DID NOT ABUSE HIS DISCRETION IN HOLDING THAT THE APPELLANTS' DUE PROCESS RIGHTS WERE NOT VIOLATED.**

**A. The Appellants failed to preserve their Due Process argument.**

The Appellants briefed and argued their claim that the alleged failure to properly serve them violated their Due Process rights under the United States Constitution and South Carolina Constitution. The Master-in-Equity never ruled on this issue, either in his original order or order denying the Appellants' motion to reconsider. (R. pp. 1-13). Therefore, this issue was not preserved for appeal. Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012).

**B. The Master-in-Equity did not abuse his discretion in ruling that the Appellants' Due Process rights were not violated.**

The Appellants' argument that their Due Process rights were violated due to the allegedly improper service by publication is nearly a verbatim repeat of their argument that Respondent Bloody Point Property Owners Association, Inc. failed to comply with the service by publication statute. Appellants cite no additional case law, nor do they argue that the alleged violation involves a standard that is any different than those applied in their earlier arguments.

There appear to be no South Carolina appellate decisions on point. However, the Wachovia Bank case is instructive. As set forth above, in Wachovia Bank, the Supreme Court of South Carolina affirmed the master-in-equity's ruling that a party may demonstrate the due diligence required for securing an order for service by publication by referring to affidavits of non-service filed in the case. Wachovia Bank, 341 S.C. at 428, 535 S.E.2d at 130. The Supreme Court held that although appellants' constitutional Due

Process arguments were not preserved for appeal, “we perceive no constitutional problem here.” Id. at 429, 535 S.E.2d at 130.

Further, South Carolina courts have held that a judgment is void under Rule 60(b)(4), SCRPC where a court failed to provide proper due process or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction. The definition of "void" under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction. McDaniel v. U.S. Fidelity & Guar. Co., 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996). However, any argument concerning due process violations has no merit where the trial court has determined that the aggrieved party was properly served. Fassett v. Evans, 364 S.C. 42, 50, 610 S.E.2d 841, 845 n.4 (Ct. App. 2005) (dicta). Therefore, the Appellants’ service argument – whether phrased as a statutory or constitutional violation – turns on whether Respondent Bloody Point Property Owners Association, Inc. complied with the publication statute. As set forth above, it did comply.

#### CONCLUSION

For the reasons set forth above, Respondents David Fingerhut and Patricia Santry respectfully request that this Court affirm the Beaufort County Master-in-Equity’s July 24, 2012 Order Denying Defendants’ Motion to Vacate/Set Aside Foreclosure Sale, Void Master-in-Equity Deed, and Vacate/Set Aside Order, as affirmed in the Master-in-Equity’s December 28, 2012 Order Denying Appellants’ Motion for Reconsideration.

Respectfully submitted,

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October 23, 2013  
Charleston, South Carolina

STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas  
The Honorable Marvin H. Dukes, Master-in-Equity

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Case No.: 2011-CP-07-2176  
Appellate Case No.: 2013-000222

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Bloody Point Property Owners Association, Inc., David L. Fingerhut,  
and Patricia M. Santry..... Respondents,

v.

William A. Ashton, Jr. and Michele C. Ashton..... Appellants.

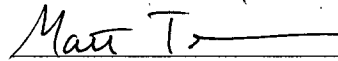
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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Brief of Respondents complies with Rule  
211(b), SCACR.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

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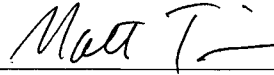
I certify that I have served a copy of RESPONDENTS' FINAL BRIEF by depositing a copy in the United States Mail, postage prepaid on October 24, 2013 to the following:

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