THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Jr.
Master in Equity

Appellate Case No. 2019-001821
Circuit Court Case No. 2018-CP-23-3124

Rallis Holdings, LLC and Oriole Properties, LLC, ...	Third-Party Petitioners,
In RE: Clear Skies Restoration, LLC,.....	Plaintiff,
v.	
Ivan Martinez and Paula A. Martinez	Defendants,
of which	
Oriole Properties, LLC and Rallis Holdings, LLC, are the	Appellants,
and	
Ivan Martinez, Paula A. Martinez, and Clear Skies Restoration, LLC, are the	Respondents.

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

The General Assembly has statutorily protected the finality of judicial sales, and this Court has previously reinforced that finality in the face of the exact circumstances of this case. In both *Bloody Point Property Owners Ass'n, Inc. v. Ashton*, 410 S.C. 62, 762 S.E.2d 729 (Ct. App. 2014), and *Robinson v. Estate of Harris*, 378 S.C. 140, 662 S.E.2d 420 (Ct. App. 2008), *aff'd* 390 S.C. 272, 701 S.E.2d 740 (2010), this Court squarely rejected the same "alleged improper service of the complaint renders a judicial sale void" argument that the Martinezes and Clear Skies jointly present here. Tellingly, the Respondents do not address, much less analyze or attempt to distinguish, these controlling decisions in their respective briefs. But these decisions should be dispositive of this appeal, and the Court should reject the Respondents' invitation to reframe the bona fide purchaser analysis based on information offered months after a judicial sale has closed.

Likewise, the Respondents fail to provide any legitimate basis for rewriting the terms of the judicial sale three and a half months after it had closed and a master's deed had been issued and recorded. They attempt to frame the post-sale altering of the judicial sale's material terms—alterations which resurrected two mortgage liens that were supposed to be paid off with the proceeds of the judicial sale, as unambiguously stated in the foreclosure judgment—as a mere "clerical error," and they rely solely on information that is not found anywhere in the record in support of this position that flies in the face of every norm of appellate procedure.

At bottom, this appeal asks the Court to enforce South Carolina Code § 15-39-870 according to its plain terms and preserve the finality of judicial sales as the Legislature has prescribed. Doing so would protect not only the Appellants' interests in the property at issue in this case, but would signal to the general public that it may rely on court orders and judgments when engaging in the judicial-sales process, just as the General Assembly intended.

ARGUMENTS AND AUTHORITIES

I. As a matter of South Carolina law, post-sale objections to service of the underlying foreclosure complaint cannot disrupt a judicial sale or impair the Appellants' status as the bona fide purchaser of real property from the judicial sale.

The Appellants' opening brief explained in full why they are entitled to the statutory protections of being bona fide purchasers of the property at issue in this case through a judicial sale. *See* S.C. Code Ann. § 15-39-870 (providing that a deed issued as part of a judicial sale "shall be deemed res judicata as to any and all bona fide purchasers for value without notice" and that "[j]udicial sales shall be res judicata as to innocent purchasers, even without confirmation"); Appellants' Br. at 10–12 (listing the Appellants' process for acquiring the subject property, including statements found in the foreclosure order, successfully bidding on the property, and recording the Master's Deed transferring ownership).

In response, the Respondents argue these statutory protections should not apply because Ms. Martinez allegedly was not served with process of the underlying foreclosure suit. (*See* Martinez Br. at 7–13 (arguing extensively that the judicial sale must be set aside due to an alleged lack of service despite the fact that such an issue was not raised until well ***after*** the judicial sale had closed); Clear Skies Br. at 1 (adopting the Martinezes' argument as its own).)

The Respondents' argument is in direct contradiction to this Court's controlling precedent. Twice before, this Court has reviewed this exact argument to avoid the application of Section 15-39-870. And twice before, this Court has rejected this exact argument and held that a post-sale objection to service of the underlying complaint could not disrupt the sale's results. *See Bloody Point*, 410 S.C. at 67–69, 762 S.E.2d at 732–33 (rejecting a challenge to a judicial sale based on an alleged lack of service of the underlying foreclosure complaint and concluding that the buyers were "bona fide purchasers and their title to the Property was not affected by Appellant's claims

of defective service of process in the foreclosure action"); *Robinson*, 378 S.C. at 146–47, 662 S.E.2d at 423 (rejecting an attack on a judicial sale based on an alleged lack of service of the underlying foreclosure complaint because no challenge to service had been raised "at the time of the foreclosure sale," and holding that the buyer's "title is not affected by Appellants' claims of defective service of process sin the foreclosure action" (citing S.C. Code Ann. § 15-39-870)).

The Respondents never address the controlling effect of these cases on this appeal. The Martinezes cite both only in passing—they cite *Bloody Point* three times with the same quote each time regarding the standard of review (Martinez Br. at 7, 9, 14), while they cite *Robinson* once for the elements of a bona fide purchaser (*id.* at 10). Clear Skies does not cite either in its return brief. There is no attempt to explain away, distinguish, differentiate, or otherwise put distance between this case and the Court's prior examinations of, and rejections of, their argument. The Respondents' collective silence regarding *Bloody Point* and *Robinson* confirms the error below.

Instead of addressing the cases that control the analysis here, the Martinezes attempt to sidestep them by arguing that the Appellants had notice that Ms. Martinez allegedly had not been served with process because she and Mr. Martinez were previously divorced. But this is unavailing for several reasons.

First, the fact that the Martinezes were divorced in 2016 does not speak in any way to the issue of where Ms. Martinez lived at the time Clear Skies commenced the underlying foreclosure proceedings in 2018. In fact, when Clear Skies filed its motion for entry of default, it attached property tax records and motor vehicle registration records demonstrating that she still lived at the property. (Exhibits to Motion for Entry of Default; R. pp. ___–___.) That is what anyone examining the circuit court's records at the time of the judicial sale would have seen, and there is certainly nothing in the foreclosure file to forecast in any way that Ms. Martinez would challenge

the judgment nearly two months after the judicial sale. The existence of a previous divorce decree is simply irrelevant to the Appellants' status as bona fide purchasers.

Second, the General Assembly has directed divorcing parties to put third parties on notice that divorce proceedings may impact martial real property by filing a "Notice of Pendency of Action" regarding the property. *See* S.C. Code Ann. § 20-3-670(A)(1)(a) (providing that "[t]he rights and interests of each spouse in the other's property created by this article are not effective against third parties . . . until a Notice of Pendency of Action is filed"). The statute sets forth what the Martinezes should have done so that third parties—such as the Appellants—performing a title search would have notice of the divorce decree. But there is no dispute that the Martinezes did not make such a filing here, voiding any potential "constructive notice" argument. (Aff. Brady ¶ 12; R. p. ___.)[1]

Third and finally, third parties must be able to rely on the foreclosing court's file regarding the status of proceedings leading into a judicial sale. It would be untenable to require third parties to re-examine the documents in the foreclosing court's file and conduct an independent investigation to verify the contents of each; indeed, this Court has rejected such a contention. *See, e.g.*, *Bloody Point*, 410 S.C. at 68–69, 762 S.E.2d at 733 (rejecting the objecting party's post-sale argument that a deeper examination of the trial court's records may have revealed a defect in service because "[a]t the time of the foreclosure sale, the court file reflected Appellants had been

[1] The Martinezes suggest that this statute does not apply here because this case is not their divorce proceeding. (Martinez Br. at 13.) Their argument misses the mark. The point of the statute is to prompt divorcing parties to put the world on notice that something is happening with their marriage that could impact title to real property. As such, when (as here) notice is not filed, third parties (like the Appellants here) cannot be held to have had notice of the divorce proceeding's impact on real property.

served, were in default, had received notice, and were not in the military," which is all that was needed to trigger the protections of the bona fide purchaser statute).

This Court has previously rejected the Respondents' argument that Ms. Martinez's post-sale objection to service could somehow impair the Appellants' status as bona fide purchasers and the statutory protection against post-sale challenges that accompany that status. It did so in *Robinson*, which the Supreme Court subsequently affirmed, and again in *Bloody Point*. If the Respondents' position were accepted now, every judicial sale would live in limbo and be subject to future collateral attacks. This is directly contrary to the General Assembly's goal of preserving the finality of such sales. *See Robinson*, 378 S.C. at 144, 662 S.E.2d at 422 ("The rationale for the statute [S.C. Code Ann. § 15-39-870] is the well established public policy of protecting good faith purchasers and upholding the finality of a judicial sale.").

Accordingly, the Court should follow both the plain language of Section 15-39-870 and its prior holdings in *Robinson* and *Bloody Point*, reverse the circuit court's ruling, and reinstate the Master's Deed that was issued following the Appellants' purchase of property at a judicial sale.

II. Off-the-record conversations and statements made by counsel are insufficient as a matter of law to support a Rule 60 motion or an appellate argument.

In addition to ignoring the law that governs the bona fide purchaser analysis, the Respondents do not present any legitimate argument in support of the circuit court's decision to rewrite the foreclosure judgment several months after the judicial sale had closed, and to do so in a way that resulted in the Appellants taking title to the real property subject to, rather than free and clear of, two mortgage liens. If allowed to stand, this post-sale alteration means that if the Appellants retain the property, they would do so subject to approximately $75,000 of liens, rather than having those liens paid in full with the proceeds from the judicial sale as provided in the foreclosure judgment. (Aff. Rallis ¶ 6(a), (c); R. p. ___; Second Aff. Custer ¶ 6(a), (c); R. p. ___.)

Both the Martinezes and Clear Skies dismissively characterize this material, prejudicial change to a core term of the foreclosure judgment as simply correcting a "clerical error" under Rule 60(a), SCRCP. (Martinez Br. at 15; Clear Skies Br. at 1, 3.) This is a remarkable position to take.

The foreclosure judgment—on which the Appellants based their bidding at the judicial sale (Aff. Rallis ¶ 6(d); R. p. ___; Second Aff. Custer ¶ 6(d); R. p. ___)—unambiguously stated that the sales proceeds would be used first to pay off two mortgage liens:

> 7. The Master-in-Equity will apply the proceeds of the sale as follows:
>
> FIRST: To the payment of the Mortgage liens;
>
> NEXT: To the payment of the amount of the costs and expenses of this action, including any Guardian *ad Litem* fee or fees of attorneys appointed under Order of Court;
>
> NEXT: To the payment to the Plaintiff or Plaintiff's attorney, of the amount of Plaintiff's debt and interest, or so much thereof as the purchase money will pay on the

(Order for Judgment and Decree of Foreclosure Sale at 4 (May 8, 2019); R. p. ___.)

Nor was this a mistake or unintentional, as the mortgage liens referenced in the above-quoted passage are acknowledged elsewhere in the foreclosure order as being senior to Clear Skies' mechanic's lien:

> 8. Plaintiff's Mechanic's Lien is junior to the following mortgage liens: (a) Mortgage to Wells Fargo Bank, N.A. dated April 6, 2011, and filed in the Greenville County Register of Deeds Office on May 4, 2011 in Book MO 5117 at Page 5827; and (b) Mortgage to SunTrust Bank dated November 25, 2014, and filed in the Greenville County Register of Deeds Office on December 19, 2014 in Book MO 5278 at Page 3522.

(*Id.* at 2; R. p. ___.)

In other words, the schedule for paying the liens secured by the subject property was ***correctly stated*** in the foreclosure judgment, which was in place at the time of the judicial sale. There is no way that the substantive post-sale alteration to the foreclosure judgment can fairly be

characterized as a clerical error, as it fundamentally alters the scope of that judgment and the judicial sale. *See, e.g.*, *Dion v. Ravenel, Eiserhardt Assocs.*, 36 S.C. 226, 230, 449 S.E.2d 251, 253 (Ct. App. 1994) (reversing a circuit court's alteration of a judgment to correct a supposed clerical error and holding that Rule 60(a)'s provision for correcting clerical errors could not be used to "change the scope of the judgment").

Nor does the argument that this material, prejudicial change to the foreclosure judgment was merely a "clerical error" find any support in the record below—a point that the Respondents even concede. (*See* Martinezes' Br. at 14 ("The court and counsel for Clear skies discussed this matter ***off the record***.") (emphasis added); Clear Skies' Br. at 2 (speculating that "this discussion must have occurred during the ***off-the-record discussion***") (emphasis added).) To rehabilitate their failure to marshal any evidence in support of their argument, the Respondents rely on their own counsel's representations about off-the-record conversations as the evidentiary basis of this argument. (Clear Skies' Br. at 2–3.) This fails for several well-established reasons.

For one, it is settled law that "[a]rguments made by counsel are not evidence." *S.C. DOT v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003); *see also Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) ("It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence. Consequently, the family court may not base necessary findings of fact and conclusions of law solely on counsel's statements of fact or arguments." (citations omitted)).

It is also settled law that when a judge reduces a ruling to writing, the written order controls over anything contrary he or she may have orally indicated. *See Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 149, 714 S.E.2d 537, 540 (2011) ("It is well settled that when there is a discrepancy between an oral ruling of the court and its written order, the written order controls.").

And, as an overarching point, it is settled law that this Court cannot consider anything on appeal that does not appear in the record. *See* Rule 210(h), SCACR (stating the appellate court will not consider any fact that does not appear in the record on appeal).

The absence of anything in the record to support the Respondents' "clerical error" argument fundamentally distinguishes this case from the authorities cited in their return briefs. In each of those cases, a trial court was authorized to fix calculation errors or to fix typographical errors based on the correct information being contained elsewhere ***in the record***. *See, e.g.*, *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 562, 614 S.E.2d 611, 615 (2005) (finding a "mere scrivener's error" existed where the circuit court's order referred to the insurance policy's $1 million limit several times, but "the order's final paragraph" required indemnification of $1.25 million); *Lee v. Thermal Eng'g Corp.*, 352 S.C. 81, 88, 572 S.E.2d 298, 301–02 (Ct. App. 2002) (holding that the trial court mistakenly omitted mandatory prejudgment interest from a final order because the interest was "easily ascertainable" from the record, which included a trial exhibit with calculations of the prejudgment interest); *Koontz v. Thomas*, 333 S.C. 702, 708, 511 S.E.2d 407, 411 (Ct. App. 1999) (holding that a trial court's summary judgment order mistakenly said "Defendants" when the court meant "Plaintiffs" after reviewing the record below).

Because Rule 60(a) cannot apply here, the Respondents' attempt to justify the trial court's prejudicial post-sale alteration of the foreclosure judgment fails as a matter of law. Nor do the Respondents even attempt to defend the trial court's ruling under Rule 60(b), abandoning any argument on that point. Accordingly, the circuit court's decision to modify the foreclosure judgment months after a judicial sale is an error of law and should be vacated.[2]

[2] The Respondents do not dispute that the judicial sale has a res judicata effect pursuant to South Carolina Code § 15-39-870. Thus, if the Court determines that the Appellants are bona fide purchasers, the Court would not need to rule on the trial court's improper alteration of the

CONCLUSION

As a matter of law, the bona fide purchaser analysis is to be conducted through the eyes of the purchaser at the time of the judicial sale, not after months of litigation posturing and motions practice following the sale. This Court recently reiterated this exact point. *See Shirey v. Bishop*, Op. No. 5718, 2020 S.C. App. LEXIS 38, at *18 (Ct. App. Apr. 22, 2020) ("[O]ur courts have indicated that a party may acquire bona fide purchaser status if the party acquires 'the best right to' the title before receiving notice of any outstanding encumbrances or equities in the property.").

Here, there is nothing in the record to suggest that the Appellants had knowledge of any defect in the underlying foreclosure judgment at the time of the judicial sale at issue; in fact, they had none. The circuit court therefore erred as a matter of law when it attempted to unwind and alter the terms of the judicial sale several months after it had closed.

The issues of this case are not novel, but affirming the circuit court's rulings would turn the process of judicial sales on its head. The finality of judicial sales and protections that the Appellants are supposed to enjoy have been prescribed by the General Assembly in South Carolina Code § 15-39-870. The Respondents' service-based arguments designed to undercut those protections have been rejected by this Court in both *Bloody Point* and *Robinson*. And the Respondents' reliance on off-the-record conversations as the basis for rewriting a judgment several months after the Appellants acted in reliance on it is rejected by both the Appellate Court Rules and numerous decisions excluding arguments that find no basis in the appellate record.

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foreclosure judgment, as a finding that the Appellants are bona fide purchasers should reinstate the status quo prior to the trial court's post-sale rulings. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (finding an appellate court need not address remaining issues on appeal when decision of a prior issue is dispositive).

Accordingly, the Appellants respectfully request that this Court vacate the circuit court's orders of September 4, 2019, and September 19, 2019, and reinstate the Appellants' rights in the property as they were when the Appellants acquired the property through judicial sale: free and clear of any pre-existing liens or encumbrances, which should be fully paid through the proceeds of the judicial sale.

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellants, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specified below by emailing a copy of the same to the email addresses for each of the below-listed counsel pursuant to the email addresses currently listed in the AIS database:

Pleading(s): Reply Brief of Appellants

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By: /s/ M. Todd Carroll

June 1, 2020

Carroll, Todd

From: Carroll, Todd
Sent: Monday, June 1, 2020 11:10 AM
To: michael@thedoddlawfirm.com; Stokely Holder; Anna Bullington
Cc: Caldwell, Bryant; Johnson, Debbie (US)
Subject: Appellants' reply brief in Rallis/Oriole appeal
Attachments: filing letter accompanying Appellants' Reply Brief to the Court of Appeals.pdf; Appellants' Reply Brief to the Court of Appeals (June 1, 2020).pdf

Counsel,

Please find attached and served on you the Appellants' reply brief, which we are e-filing today in *Rallis Holdings, LLC and Oriole Properties, LLC v. Martinez, Martinez, and Clear Skies Restoration, LLC* (Appellate Case No. 2019-001821). As always, please let us know if you have any trouble opening these materials. Best regards,

Todd

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June 1, 2020

Via Electronic Filing
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Re: Rallis Holdings, LLC, and Oriole Properties, LLC v. Ivan Martinez, Paula Martinez, and Clear Skies Restoration, LLC
Appellate Case No. 2019-001821
Appellants' Reply Brief

Dear Ms. Kitchings:

Please find accompanying this letter the Appellants' Reply Brief in the above-referenced matter. This brief is being e-filed pursuant to Section (c)(5) of Supreme Court Order 2020-05-29-02.

We have also served this filing via email on counsel for the Respondents, as permitted by Section (g)(3) of Order 2020-05-29-02.

We appreciate the Court's consideration of this reply brief. If the Court has any difficulty opening these electronically-submitted materials, please let us know, and we will be pleased to submit them via an alternate method.

Best regards,

/s/ M. Todd Carroll

Attachment
cc: All Counsel of Record