THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-in Equity

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SC Court of Appeals

Case No. 2012-CP-40-06579

Wilmington Savings Fund Society, FSB, as Trustee of Upload Mortgage Loan Trust A,

Respondent,

vs.

The Personal Representatives, if any, whose names are unknown, of the Estates of Frank Lucas aka Frank M. Lucas; Carole S. Lucas aka Carole Sunny Goodson-Lucas,

Appellants.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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2. **IS THE JUDGMENT OF FORECLOSURE VOID AS A MATTER OF LAW BECAUSE THE TRIAL COURT DID NOT HAVE PERSONAL JURISDICTION OVER THE APPELLANTS' ESTATES?**

STATEMENT OF THE CASE

This foreclosure action was commenced on October 2, 2012, by Household Finance Corporation II ["Household Finance"] against Frank Lucas a/k/a Frank M. Lucas and Carole Sunny Lucas et. al. Frank M. Lucas died on December 16, 2012. Carole Lucas died on April 04, 2017. *Original Complaint.* Carole Lucas was represented by counsel during her lifetime, and her counsel was defending the action on her behalf during her lifetime, and she filed an Answer and Counterclaims on October 25, 2012. *Answer and Counterclaims of Carole Lucas.* No party was substituted for Carole Lucas after her death. Consequently, Respondent filed a Motion to Dismiss Carole Lucas' Counterclaims on October 24, 2018. *Motion to Dismiss Counterclaims.* By order dated February 26, 2019, the Honorable L. Casey Manning entered a written order dismissing Carole Lucas' counterclaims, but the order did not dismiss Carole Lucas from the case nor did the order substitute a party for Carole Lucas. Judge Manning granted the Motion to Dismiss because no one moved to substitute a party for Carole Lucas who passed on April 4, 2017. *Order of Judge Manning dated April 4, 2017.*

After Carole Lucas's counterclaims were dismissed, Respondent amended its Summons and Complaint on April 11, 2019.[1] *See, Amended Summons and Amended Complaint.* The Amended Summons and Complaint removed Household as the Respondent and added Wilmington

[1]No order authorizing the amendment is visible in the file.

Savings Fund Society, FSB, as Trustee of Upload Mortgage Loan Trust A as the Plaintiff. *Id.* The Amended Summons and Complaint also deleted Frank and Carole Lucas as defendants and added their estates Defendants as follows: "The Personal Representatives, if any, whose names are unknown, of the Estates of Frank Lucas aka Frank M. Lucas; Carole S. Lucas aka Carole Sunny Goodson-Lucas." *Id.*

On October 21, 2019, Respondents filed a Notice of Default against Defendants, but Appellants were not included among the parties held in Default. *See, Notice of Default.* There is no evidence in the record to show that the Appellants were ever served the Amended Summons and Complaint. Thereafter, on June 18, 2020, the Master-in-Equity held a final merits hearing. *Record of Hearing.* At the final hearing, only the Respondent's attorneys appeared. *Id.* As a result of the final hearing, a Judgment of Foreclosure was entered and filed on June 18, 2020. *Judgment of Foreclosure.*

Initially, the foreclosed property was scheduled for judicial sale on August 3, 2020 but the sale was cancelled at the Plaintiff's request on July 16, 2020. *See, Authorization to Withdraw Sale.* Thereafter, it was set for sale for September 08, 2020. On August 24, 2020, Appellants filed a Motion to Set Aside Judgment of Foreclosure. *See, Motion to Set Aside Judgment of Foreclosure.* The Master-in-Equity unilaterally and without a hearing dismissed the Motion to Set Aside Judgment of Foreclosure by written order dated September 01, 2020. *Id.*

On September 4, 2020, Appellants appealed the Order Denying the Motion to Set Aside Judgment of Foreclosure, and they contemporaneously filed a Petition for Writ of Supersedeas to stay the September 8, 2020 planned sale. On September 04, 2020, this Honorable Court granted Appellants a five-day stay of sale to enable the Appellants to present their Motion for Stay to the trial court.

On September 08, 2020, the Appellants filed a Motion for Stay of the Judgment of Foreclosure in the trial court, and the said Motion is still pending.

In addition to the procedural history as outlined above, Appellants will cite additional procedural history as relevant throughout the arguments contained herein.

STANDARD OF REVIEW

This appeal deals with the denial of a motion to set aside judgment pursuant to *Rule 60, SCRCP*. "Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. Our standard of review, therefore, is limited to determining whether there was an abuse of discretion." *Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 17-18, 594 S.E.2d 478, 482 (2004)* (citation omitted). "An abuse of discretion arises where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." *Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990)*.

FACTS

The relevant facts are included in the discussion of each argument.

ARGUMENTS

1. THE TRIAL COURT ERRED IN SUMMARILY DISMISSING, WITHOUT A HEARING, THE APPELLANTS' MOTION TO SET ASIDE THE JUDGMENT OF FORECLOSURE.

Teri Lucas, the Personal Representative of the Estate of Frank Lucas and the "Estate of Carole Lucas filed a Notice of Motion and Motion to Set Aside the Order of Judgment of Foreclosure Sale that was entered in this matter by the Master-in-Equity. *See, Motion to Set Aside Judgment of Foreclosure*. The Motion to Set Aside the Judgment of Foreclosure was filed and served on the attorneys of record and the Master-in-Equity on August 24, 2020. On September 1, 2020, Judge Strickland, the Richland County Master-in-Equity, issued an order, without a hearing

and without any findings of fact or conclusions of law, denying the Appellants' Motion to Set Aside the Judgment.[2] "The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge." *Roberson v. S. Fin. of S.C., Inc., 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005) (citing Thompson v. Hammond, 299 S.C. 116, 119, 382 S.E.2d 900, 902–03 (1989))*. "The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Id. (citing Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 160, 163, 375 S.E.2d 321, 323 (Ct.App.1988))*. However, there is absolutely no authority giving Judge Strickland the discretion as to whether to hold a hearing on a Rule 60 Motion. To the contrary, our controlling rules of civil procedures and federal constitutional principle of due process required Judge Strickland to schedule the matter for a hearing.

First, a hearing was required under Rule 6(d), SCRCP, required Judge Strickland to schedule a hearing on Appellants' Rule 60 Motion. *Rule 6(d), SCRCP* states as follows:

> **For Motions--Affidavits.** A **written motion** other than one which may be heard *ex parte*, **and notice of the hearing thereof**, shall be served not later than , unless a different period is fixed by these rules or by an order of the court. Such an order may for cause shown be made on *ex parte* application. When a motion is to be supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), additional or opposing affidavits may be served not later than **two days before the hearing**, unless the court permits them to be served at some other time. The moving party may serve reply affidavits at any time **before the hearing commences**. . .

Rule 6(d)(1), SCRCP [emphasis added]. Appellants filed their written Motion subject to the requirements of Rule 6(d(1). *See, Motion to Set Aside Judgment of Default.* Clearly, the verbiage of Rule 6(d)(1) presupposes a mandated hearing on a written motion. Granted, Judge Strickland

[2]As an officer of the court, the undersigned counsel states that he received a call from Judge Strickland's office on September 1, 2020, asking whether he could have a hearing on the Motion on the phone at that moment. Counsel was en-route to try a case away from his home county. Counsel informed the staff member that he was not prepared to argue the case from the car because (1) he was driving and (2) he was not prepared to argue because he did not have the file with him. After the call, counsel was under the impression that a hearing would be scheduled.

had the authority under this rule to shorten the time for the hearing, but this rule did not give him the authority to summarily decide the Appellants' Rule 60 Motion without a hearing.

Even though the Rule 60 Motion would not stay the judgment of foreclosure, *see, e.g. Rule 60(b), SCRCP,* Appellants had a right to be heard on the Motion to Set Aside the Judgment of Foreclosure. Judge Strickland's unilateral and summary resolution of the Rule 60 Motion deprived the Appellant's of their fundamental rights to fairness in this proceeding.

The method in which Judge Strickland decided the Rule 60 Motion also deprived the Appellants of their constitutional rights to due process civil context[3]. The federal common law is replete with cases to establish that a litigant has a fundamental right to a fair trial in a civil context. *Goldberg v. Kelly, 397 U.S. 254, 271 (1970)*; *see also, e.g., Anderson Nat'l Bank v. Luckett, 321 U.S. 238 (1944)* ("The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." Id. at 246); *Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963)* ("Due process . . . implies notice and a hearing." Id. at 338); *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)* ("[T]he Due Process Clause ... at a minimum ... require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id. at 313*).

Win, lose, or draw, the Appellants were entitled to their day in Court, and trial court's summary denial of their Motion was an egregious constitutional error.

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[3] As litigants, Appellants are entitled to fundamental fairness in the judicial proceeding. Fundamental-Fairness is considered synonymous with due process. The due process guarantees under the Fifth and Fourteenth Amendments to the U.S. Constitution Clause provide that the government shall not take a person's life, liberty, or property without due process of law. *Fuentes v. Shevin, 407 U.S. 67 (1972)* (invalidating replevin statutes which authorized the authorities to seize goods simply upon the filing of an ex parte application and the posting of bond); *see also, Sniadach v. Family Finance Corp.,* 395 U.S. 337, 342 (1969) (Harlan, J., concurring). Moreover, in this judicial foreclosure matter, Appellants right to a fair trial is also guaranteed by section 1 of the *Fourteenth Amendment to the Constitution of the United States.*.

2. THE JUDGMENT OF FORECLOSURE IS VOID AS A MATTER OF LAW BECAUSE THE TRIAL COURT DID NOT HAVE PERSONAL JURISDICTION OVER THE APPELLANTS' ESTATES.

In a foreclosure proceeding, a Plaintiff has the option of pursuing the claim through the probate process, or the mortgagee Plaintiff can foreclose on the property by suing the decedent's estate. *See, S.C. Code § 62-3-803(b)(1) (2012)*[this provision carves out an exception for the mortgagor creditor and allows it to sue to foreclose on the property rather than pursuing the claim through the probate procedural statutory scheme as long as it does not seek a deficiency judgment]. When the case was initially filed, both Frank Lucas and Carole Lucas were alive. After the filing of the action, both Frank Lucas and Carole Lucas died. When the Respondent filed the Amended Summons and Complaint on April 11, 2019, it deleted Frank Lucas and Carole Lucas as individuals from the lawsuit. However, it opted to pursue its lawsuit by adding the estates as defendants—even though the estates had not been opened. Plaintiff failed to have a Personal Representative or Special Administrator for either estate appointed. Consequently, neither estate was served the Amended Summons and Amended Complaint, and neither estate was represented in the proceeding.

Admittedly, *S.C. Code § 62-3-803(b)(1)* does not expressly require a party to have a personal representative or Special Administrator appointed for the estate. However, Appellants contend that such statutory requirement implies that a special administrator or personal representative must be appointed because without such appointment no such legal entity would exist to be named as a party under *S.C. Code § 62-3-803(b)(1)*. Application of the rules of statutory construction easily supports Appellants' logical position.

"A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Browning v. Hartvigsen, 307 S.C. 122,*

125, 414 S.E.2d 115, 117 (1992). "The real purpose and intent of the lawmakers will prevail over the literal import of the words." *Id.* "Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." *Id.* (citing *Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994))*. "A court should not consider a particular clause in a statute as being construed in isolation [sic] but should read it in conjunction with the purpose of the whole statute and the policy of the law." Id. "The language must also be read in a sense which 'harmonizes with its subject matter and accords with its general purpose.'" *Municipal Ass'n of South Carolina v. AT&T Communications of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004) (citing Hitachi Data Sys. Corp., 309 S.C. at 178, 420 S.E.2d at 846).*

To interpret *S.C. Code § 62-3-803(b)(1)* without the implicit requirement that the party suing the estate must have a special administrator or personal representative appointed would lead to a impractical, unreasonable, and unfair interpretation because to allow an estate to sued, which this statutory provision clearly allows, without having an estate created would be tantamount to allowing an opponent to name an opposing party to play at an adversarial game but to allow the party to proceed without legally constituting the team. This conclusion simply does not make sense because unless an estate has a personal representative or special administrator, it does not have any person or entity to legally act on its behalf. By suing the estates in this case, who did the Respondent expect to show up in defense, when it knew no one had the legal authority to show up in defense? To that end, the only logical conclusion is that the Respondent was required to have a special administrator or personal representative appointed if it chose the option of suing the estates—the only way to legally constitute an estate.

Respondents could have used the procedures under *Rule 25, SCRCP*, to remedy the defect of not having a proper party for the estates. Appellants contend that once Frank Lucas and Carole Lucas died, the Court lost personal jurisdiction over them because the Plaintiff failed to follow the procedures outlined in *Rule 25, SCRCP*, that would have enabled the Court to maintain personal jurisdiction in the original action by the way of substitution of a party for each of them. Rule 25, SCRCP provides as the follows:

RULE 25
SUBSTITUTION OF PARTIES

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made **by any party** or by the successors or representatives of the deceased party and, together with the notice of hearing shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided by Rule 4 for the service of summons. If substitution is not made within a reasonable time, the action may be dismissed as to the deceased party. Counsel of record for such deceased party shall give notice to all other parties of the death of such party as soon as practicable after obtaining such knowledge and of the name and address of the proper parties who should be substituted.

Rule 25(a)(1), SCRCP. After Frank Lucas and Carole Lucas died, Respondent had the option under *Rule 25(a)(1), SCRCP* to either to move to substitute "proper parties" for the deceased defendants or extinguish the action. The Respondent chose to extinguish the action by dismissing Frank and Carole Lucas from the litigation. Respondent then added the estates that did not exist under the circumstances. There is no order in the file establishing that the Court dismissed the deceased Defendants. However, after the Defendants died, the Court allowed the Respondent to amend the Complaint and deleted both deceased Defendants from the caption of the lawsuit. This is *de facto* proof that the original matter that was filed was dismissed as to the deceased Defendants. Consequently, once the matter was implicitly dismissed against the deceased Defendants, the Court did not have personal jurisdiction over the Defendants to allow an Amended Complaint to

be filed against them in their representative capacities, i.e., because the procedural requirements in Rule 25, SCRCP had not been followed..

Respondent cannot contend that the Estates were substituted for the deceased Defendants because no motion was made and served as required by *Rule 25(a)(1), SCRCP*. Nor can the Respondents argue that the Estates are unknown defendants because the estates did not exist, or they existed in their known existence without legal sufficiency.

Having said all the above, the inescapable conclusion is that the Court did not have personal jurisdiction over the deceased Defendants' Estates because the Respondents, as known defendants, were not served process or appointed a representative. Therefore, the trial abused its discretion by committing a clear error of law in denying the Motion to Set Aside the Judgment of Foreclosure. "Without service of summons as required by the law, when not dispensed with by acceptance, appearance, or in some other way, the court has no jurisdiction of the party, and the judgment in such case is a nullity; and where the want of jurisdiction appears the judgment may be treated as a nullity wherever it is met with." *Ferguson & Miller v. Gilbert & Co., 17 S.C. 26, 31 (1882).* In that the Court did not have personal jurisdiction over The Estates of Frank and Carole Lucas, the Judgement of Foreclosure that was entered by the Court on June 18, 2020 is void and relief should have been granted under Rule 60(b)(4).

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

At Orangeburg, SC

Dated: September 24, 2020

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Appellants.

PROOF OF SERVICE

I, Glenn Walters, certify that I have served the INITIAL BRIEF OF APPELLANT Respondent Wilmington Savings Fund Society, FSB, as Trustee of Upload Mortgage Loan Trust A, Respondent, by depositing a copy of it in the United States Mail, postage prepaid, on September 25, 2020, addressed to its attorneys of record Heidi B. Carey, Esquire PO Box 11412 Columbia SC 29211 and Richard L. Farley, Esquire, 550 S. Tryon St. Suite 2900 Charlotte NC 28202.

I also certify that I have served the INITIAL BRIEF OF APPELLANT on other interested parties on September 25, 2020, by depositing a copy of it in the United States Mail, postage prepaid, on September 25, 2020, addressed to their attorneys of records as follows:

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