

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

Jan 28 2021

APPEAL FROM ORANGEGURG COUNTY
James B. Jackson, Jr., Master-in-Equity

SC Court of Appeals

Appellate Case No. 2020-001006
Case No. 2010-CP-38-1749

Sara Gleaton, as Personal Representative
of the Estate of Wilton Gleaton, Appellant,

v.

Orangeburg County, a Political Subdivision
of the State of South Carolina, Respondent.

INITIAL BRIEF OF RESPONDENT

Andrew F. Lindemann
LINDEMANN & DAVIS, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

Jerrod A. Anderson
ANDERSON LAW OFFICE, P.A.
Post Office Box 2629
Orangeburg, South Carolina 29116
(803) 536-4751

Counsel for Respondent Orangeburg County

TABLE OF CONTENTS

Table of Authorities	ii
Statement of the Case.....	1
Standard of Review.....	4
Arguments.....	5
I. The Master-in-Equity correctly ruled that the Appellant’s slander of title claim is barred by sovereign immunity pursuant to Section 15-78-60(11) of the Tort Claims Act.....	5
II. The Appellant is incorrect in her arguments that the Master-in-Equity was constrained by the “law of the case” doctrine or the lack of an immediate appeal by the County to make findings of fact and conclusions of law in his 2019 Order that reconsidered or are “inconsistent” with rulings made in the 2014 Order.....	8
III. The Master-in-Equity correctly ruled that the Appellant failed to prove by a preponderance of evidence that any false statement in derogation of the Appellant’s property interests was made with the requisite malice	11
Conclusion	16

TABLE OF AUTHORITIES

Cases

Abu-Shawareb v. South Carolina State University,
364 S.C. 358, 613 S.E.2d 757 (Ct. App. 2005).

Culbertson v. Clemens,
322 S.C. 20, 471 S.E.2d 163 (1996).

Erickson v. Jones Street Publishers, LLC,
368 S.C. 444, 629 S.E.2d 653 (2006).

Ex parte Wilson,
367 S.C. 7, 625 S.E.2d 205 (2005).

Folkens v. Hunt,
290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986).

H&K Specialists v. Brannen,
340 S.C. 585, 532 S.E.2d 617 (Ct. App. 2000).

HHHunt Corp. v. Town of Lexington,
389 S.C. 623, 699 S.E.2d 699 (Ct. App. 2010),

Huff v. Jennings,
319 S.C. 142, 459 S.E.2d 886 (Ct. App. 1995).

I'On v. Town of Mt. Pleasant,
338 S.C. 406, 526 S.E.2d 716 (2000).

Johnston v. Bowen,
313 S.C. 61, 437 S.E.2d 45 (1993).

Jones v. Lott,
387 S.C. 339, 692 S.E.2d 900, 903 (2010).

New York Times Co. v. Sullivan,
376 U.S. 256 (1964).

Pond Place Partners, Inc. v. Poole,
351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002).

PPG Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc.,
297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1998).

Rogers v. Florence Printing Co.,
233 S.C. 567, 106 S.E.2d 258 (1958).

Shirley's Iron Works, Inc. v. City of Union,
403 S.C. 560, 743 S.E.2d 778 (2013).

Thornton v. South Carolina Electric & Gas Co.,
391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011).

Townes Associates, Ltd. v. City of Greenville,
266 S.C. 81, 221 S.E.2d 773 (1976).

Weil v. Weil,
299 S.C. 84, 382 S.E.2d 471 (Ct. App. 1989).

Wilder Corp. v. Wilke,
330 S.C. 71, 76, 497 S.E.2d 731 (1998).

Yaun v. Baldrige,
243 S.C. 414, 134 S.E.2d 248 (1964).

Rules and Statutes

S.C. Code Ann. § 12-51-40.

S.C. Code Ann. § 12-51-40(a).

S.C. Code Ann. § 14-3-330(2)(c).

S.C. Code Ann. § 15-78-60(11).

Rule 52(b), SCRCF.

Rule 59(e), SCRCF.

Rule 207(b)(2), SCACR.

Rule 220(c), SCACR.

STATEMENT OF THE CASE

This is a slander of title action filed by the Appellant Sara Gleaton, as Personal Representative of the Estate of Wilton Gleaton, against the Respondent Orangeburg County. This litigation involves real property located at 150 Country Acres Road located in North, South Carolina. The Appellant's decedent, Wilton Gleaton, acquired the property on August 4, 1999, from Bank of America Housing Services, a Division of Bank of America, FSB. Bank of America had foreclosed on the property which was previously owned by Debra Foxworth.

Prior to the purchase of the property by Wilton Gleaton, Orangeburg County had initiated delinquent tax proceedings against the property for taxes owed for 1998 and 1999, which had not been paid by Debra Foxworth. The property was sold at a tax sale on February 7, 2000, to the highest bidder, that being James Fields.¹ Following the one-year redemption period, a deed was recorded on May 10, 2001.

The Delinquent Tax Collector for Orangeburg County ultimately learned in 2006 that there was an issue with the tax sale because proper notice had not been provided to the owner of record of the property. Accordingly, steps were initiated to reverse the tax sale to James Fields. Fields thereafter conveyed the property by quitclaim deed back to Debra Foxworth as the defaulting taxpayer. That quitclaim deed was recorded on August 7, 2006.

On December 9, 2010, the Appellant's decedent filed a Complaint alleging a single cause of action for slander of title. The decedent alleged that he had contracted in October 2009, to sell the property to Donnie and Connie Hall. While checking the property's title, it was determined

¹ In her brief, the Appellant described Fields as an acquaintance of Shelton Sistrunk, who was then the Orangeburg County Delinquent Tax Collector. There is no evidence in the record to support that claim.

that there was a cloud on the title resulting from the quitclaim deed, and the sale did not proceed. The Appellant's decedent thus sued for damages resulting from the loss of the real estate sale.

By Order of Reference filed December 12, 2013, the matter was referred to the James B. Jackson, Jr., the Master-in-Equity for Orangeburg County. A hearing was held on September 17, 2014, and an Order was filed on December 31, 2014 (referred to as the "2014 Order"). In that order, the Master-in-Equity ruled that "the tax sale was flawed and not valid." (Order I, p. 3). He declared that "[t]he conveyance to James Fields and his subsequent conveyance to Debra Foxworth by Quit Claim Deed are null, void, and are of no effect to the marketable title of the subject property by Wilton Gleaton." (Order I, p. 3). The Master gave the Appellant's decedent four months to sell the property and "left open" the "issue of additional relief sought by either party to help with the sale of property." (Order I, p. 3). Additionally, the Master ruled that "the court will take under advisory the issue of liability and damage to the Plaintiff." (Order I, p. 3). Thus, the Master explicitly did not decide the issues of liability or damages, but instead granted only intermediate declaratory relief.

After the issuance of the 2014 Order, Wilton Gleaton passed away. The Appellant Sara Gleaton attempted to sell the property but was unable to do so. A second hearing was subsequently held on April 13, 2017. The Appellant, as personal representative, was substituted at that time for the decedent. On December 27, 2019, the Master-in-Equity issued an additional order (referred to as the "2019 Order"), in which he ruled for Orangeburg County and entered judgment in its favor. The Master ruled that the "there was no malice on behalf of the Defendant in this case" and "[c]learly, the Defendant made no publication that was intended to cause harm to the Plaintiff, nor was any statement made that was knowingly false or in reckless disregard of its truth or falsity." (Order II, p. 2). The Master further ruled that the County was entitled to

sovereign immunity pursuant to Section 15-78-60(11) of the South Carolina Tort Claims Act. (Order, p. 3). The Master accordingly dismissed the Appellant's claim for slander of title.

The Appellant thereafter filed a motion to alter or amend pursuant to Rule 52(b) and Rule 59(e), SCRCP. By Order filed June 11, 2020, the Master-in-Equity issued a summary order denying that motion. The Appellant thereafter filed an appeal to this Court.

STANDARD OF REVIEW

The standard of review for an action at law on appeal of a case tried without a jury requires the appellate court to not disturb the judge's findings of fact unless found to be without evidence which reasonably supports the judge's findings. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773, 775 (1976).

ARGUMENTS

I. The Master-in-Equity correctly ruled that the Appellant’s slander of title claim is barred by sovereign immunity pursuant to Section 15-78-60(11) of the Tort Claims Act.

In its Order filed December 27, 2019, the Master-in-Equity ruled that Orangeburg County’s conduct at issue was “focused on collecting taxes” which entitled the County to sovereign immunity under Section 15-78-60(11) of the Tort Claims Act. (Order II, pp. 2-3). The Appellant does not appeal from that ruling and, as a result, the judgment in the County’s favor should be affirmed based on the “two issue” rule.² In her opening brief, the Appellant made the deliberate decision *not* to appeal the Section 15-78-60(11) immunity ruling by pointing to the Master’s phrasing that the County “*may* be immune from liability.” (Order II, p. 3). (Emphasis added). The Appellant reads the use of the term “may” to suggest that the Master’s ruling is unclear and Section 15-78-60(11) was only a “potential defense.” The Appellant thus argues that the sovereign immunity defense is “not suitable for review.” *See*, Appellant’s Brief, p. 9.

However, the Appellant’s present position on appeal is contradicted by the Appellant’s own Rule 52 motion to alter or amend filed on January 13, 2020. In that motion, the Appellant wrote:

The Court incorrectly *holds* that the County is immune from liability pursuant to S.C. Code Ann. § 15-78-60(11). Subsection (11) is inapplicable to this action. At the time the County

² In applying the “two-issue” rule, the Supreme Court has explained that “where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.” *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 903 (2010). Similarly, in *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986), this Court held that “[a]n alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal.” 348 S.E.2d at 845.

conveyed the property to Fields in May 2001 the taxes were not delinquent so the activities did not relate to the collection of taxes.

(Rule 52 Motion, p. 4). (Emphasis added). Thus, in her Rule 52 motion, the Appellant was not confused by the Master's use of the term "may"; she actually referred to the Section 15-78-60(11) ruling as a "holding" by the Master. Moreover, if the Appellant believed that aspect of the December 27, 2019 Order was unclear in any respect, it was incumbent on her as the non-prevailing party to seek that clarification by way of a Rule 52(b) motion. The Appellant did file such a motion but did not assert any confusion or request for clarity about the Master's ruling on Section 15-78-60(11) immunity. To the contrary, as mentioned, the Appellant explicitly acknowledged that the Master had "held" that the County is immune under subsection (11).

At any rate, Section 15-78-60(11) is a critical issue to be adjudicated even if this Court finds that the Appellant should not be barred by operation of the two-issue rule given her failure to appeal from what she described post-judgment as a "holding" of the lower court. Orangeburg County raised that defense during the trial, and quite clearly, Section 15-78-60(11) bars the Appellant's claim for monetary relief. If this Court concludes there may be some question as to whether the Master actually ruled as a matter of law that the County is immune, that issue may, at the very least, still be heard on appeal as an additional sustaining ground.³

³ In the case of *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), the Supreme Court explained that a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." 526 S.E.2d at 723. "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* See also, Rule 220(c), SCACR ("[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record"); Rule 207(b)(2), SCACR ("[r]espondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)").

Section 15-78-60(11) provides: “The governmental entity is not liable for a loss resulting from assessment or collection of taxes or special assessments or enforcement of tax laws.” S.C. Code Ann. § 15-78-60(11). In *H&K Specialists v. Brannen*, 340 S.C. 585, 532 S.E.2d 617 (Ct. App. 2000), this Court explained that the county is immune if the plaintiff’s loss was “the result of the county’s assessment or collection or taxes or enforcement of tax laws.” 532 S.E.2d at 619. This Court further held that “the discernible purpose behind the immunity provision contained in subsection (11) is to afford a governing entity protection from suit by persons ... who lose property because of a faulty tax sale, not to shield the entity from liability for refunding money to the wrong party.” *Id.* This Court found Subsection (11) inapplicable in *H&K* because the county had failed to refund the purchase price paid by the tax sale purchaser when the tax sale was set aside. The Court recognized that the refunding of the purchase price to the purchaser was “a ministerial act separate and distinct from assessing, collecting or enforcing tax laws against a taxpayer.” *Id.*

However, in the case at bar, the County is not charged with the failure to perform a ministerial act that is separate and distinct from assessing, collecting, or enforcing tax laws against a taxpayer. Instead, the County is charged with the delinquent tax collector’s failure to give sufficient notice under the Section 12-51-40(a) because at the time of the tax sale on February 7, 2000, the Appellant’s decedent (Wilton Gleaton) had purchased the property from the defaulting taxpayer (Debra Foxworth). Section 12-51-40 expressly authorizes the delinquent tax collector “to collect delinquent taxes, assessments, penalties, and costs, requiring him to levy the execution by distress and sale of the defaulting taxpayer’s estate, real or personal, or both, or property transferred by the defaulting taxpayer, the value of which generated all or part of the tax, to satisfy the taxes, assessments, penalties, and costs.” S.C. Code Ann. § 12-51-40.

Consequently, the requirement to provide sufficient notice is part of the process for the “collection of taxes” and the “enforcement of tax laws,” which fall within the scope of Section 15-78-60(11). The same is true for the subsequent issuance of a tax deed to James Fields as well as the delinquent tax collector’s attempt to reverse the sale by having Fields quitclaim deed the property back to the defaulting taxpayer. While errors were made, as the Master found, those errors occurred as part of the process to collect delinquent taxes. This is precisely the purpose of Section 15-78-60(11) immunity, as this Court recognized in *H&K*, which bars the recovery of damages “because of a faulty tax sale.” *H&K*, 532 S.E.2d at 619.

In sum, the Master’s reliance on Section 15-78-60(11) immunity as one basis for entering judgment in favor of the County and denying monetary relief to the Appellant is correct. Thus, notwithstanding whether there may be legitimate confusion or not stemming from the Master’s use of the word “may,” the record clearly reflects that the County is entitled to Section 15-78-60(11) immunity, and on that basis, the judgment in favor of the County should be affirmed.

II. The Appellant is incorrect in her arguments that the Master-in-Equity was constrained by the “law of the case” doctrine or the lack of an immediate appeal by the County to make findings of fact and conclusions of law in his 2019 Order that reconsidered or are “inconsistent” with rulings made in the 2014 Order.

Throughout her opening brief, the Appellant continually takes the erroneous position that the Order filed December 31, 2014, establishes the “law of the case” and was binding on the Master with respect to his ultimate rulings as set forth in the Order filed December 27, 2019.

Although the 2014 Order was captioned as “Final Order,” that is a misnomer. The 2014 Order was not a “final order” as a matter of law and did not establish the law of the case.⁴

As an initial error, the Appellant contends that Orangeburg County was bound by the rulings in the 2014 Order because it did not file an immediate appeal after the order was issued. But clearly, that 2014 Order is interlocutory and was not subject to immediate appeal. “As a general rule, only final judgments are appealable.” *Ex parte Wilson*, 367 S.C. 7, 625 S.E.2d 205, 208 (2005). As the Supreme Court has explained “[a]ny judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final.” *Id.* See also, *Culbertson v. Clemens*, 322 S.C. 20, 471 S.E.2d 163, 164 (1996). A cursory review of the 2014 Order clearly shows that it is interlocutory and not a final, appealable order. In that order, the Master-in-Equity ruled that “the tax sale was flawed and not valid”; yet he also ruled that “the court will take under advisory the issue of liability and damage to the Plaintiff.” (Order I, p. 3). The Master gave the Appellant’s decedent four months to sell the property and “left open” the “issue of additional relief sought by either party to help with the sale of property.” (Order I, p. 3). Thus, the Master explicitly did not decide the issues of liability or damages, but instead granted only intermediate declaratory relief to the effect that the tax sale was flawed. Thus, substantial issues – including the County’s liability and the Appellant’s entitlement to damages – remained for later adjudication, thereby rendering the 2014 Order as being interlocutory.

⁴ In *Thornton v. South Carolina Electric & Gas Co.*, 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011), this Court explained that “a narrow construction of section 14-3-330(2)(c) requires us to focus on the effect of the order, not the label given to the motion or to the order granting it.” 705 S.E.2d at 478. Citing other cases, this Court also noted that “[o]ur courts have previously looked beyond the labels on motions and orders to discern their actual effect for purposes of appealability.” *Id.*, n.6.

As an additional error, the Appellant states throughout her opening brief, that the Master was bound by his rulings in the 2014 interlocutory order. That is obviously incorrect. South Carolina law recognizes that “[t]he trial court interlocutory orders are amendable.” *Johnston v. Bowen*, 313 S.C. 61, 437 S.E.2d 45, 47 (1993). In fact, trial judges are always free to reconsider earlier rulings and change their mind prior to entering final judgment. Thus, contrary to the Appellant’s position, the Master’s 2019 Order was not erroneously “inconsistent” with his 2014 Order. The Master was free to change his mind on any issue addressed by the interlocutory order. This Court recognized this very point in *Abu_Shawareb v. South Carolina State University*, 364 S.C. 358, 613 S.E.2d 757 (Ct. App. 2005), where this Court writes:

[Plaintiff] also contends the trial court’s denial of the university’s summary judgment motion was inconsistent with its grant of the university’s JNOV motion, because the former ruling was based on a finding the release was ambiguous while the latter found the release and order were clear. *It is not error for the trial court to change its mind* and reconsider a motion for summary judgment.

613 S.E.2d at 760. (Emphasis added). That is also true with respect to any other interlocutory orders which are always “amendable” per the Supreme Court in *Johnston*. *See also, PPG Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc.*, 297 S.C. 176, 375 S.E.2d 331, 335 (Ct. App. 1998) (“[t]he trial judge, under our procedure, is afforded many opportunities to change his mind”).

Finally, the Appellant’s reliance on the “law of the case” doctrine in an attempt to restrict the Master’s decision-making in the 2019 Order is equally flawed. In other words, the Appellant’s arguments to the effect that the 2014 Order established the law of the case is simply incorrect. In *Shirley’s Iron Works, Inc. v. City of Union*, 403 S.C. 560, 743 S.E.2d 778 (2013), the Supreme Court explained as follows:

The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right. ... Ordinarily an interlocutory order which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and *may be reconsidered and corrected by the court before entering a final order on the merits.*

743 S.E.2d at 785, *citing Weil v. Weil*, 299 S.C. 84, 382 S.E.2d 471, 472 (Ct. App. 1989).
(Emphasis added).

In sum, for each of these reasons, the Master was not constrained by the 2014 Order in making the rulings on liability and damages in his 2019 Order. The 2014 Order was clearly interlocutory, was subject to reconsideration, and did not establish the law of the case. Likewise, the County was not bound by the rulings in the 2014 Order but was free to pursue all legal and factual defenses available. Consequently, all arguments by the Appellant that the 2019 Order is erroneously “inconsistent” with the 2014 Order must be rejected. No error of law was committed by the Master when he addressed the remaining issues of liability and damages in his 2019 Order, even if there may be “inconsistencies” with the prior order.

III. The Master-in-Equity correctly ruled that the Appellant failed to prove by a preponderance of evidence that any false statement in derogation of the Appellant’s property interests was made with the requisite malice.

This action was tried by the Master-in-Equity and, as a result, was non-jury. The standard of review for an action at law on appeal of a case tried without a jury requires the appellate court to not disturb the judge’s findings of fact unless found to be without evidence which reasonably supports the judge’s findings. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773, 775 (1976). This standard of review requires an affirmance of the judgment entered below.

In *HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 699 S.E.2d 699 (Ct. App. 2010), this Court explained that a plaintiff “cannot transform an unsupported proposition of law into a statement of fact merely by stating that they are informed and believe it to be so.” 699 S.E.2d at 705. The converse of that is equally true. A party cannot transform an issue of fact into a question of law in order to obtain a *de novo* standard of review. The Appellant appears to attempt such a transformation where she argues that “‘finding of facts [sic] ... implicate legal errors.” See, Appellant’s Brief, p. 7. Findings of fact, however, are clearly subject to the “any evidence” standard of review.

The sole cause of action brought by the Appellant was for slander of title. No negligence claim was alleged by the Appellant nor adjudicated by the Master. “The term ‘slander of title’ is defined as a false and malicious statement, oral or written, made in disparagement of a person’s title to real or personal property, causing him injury.” *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881, 890 (Ct. App. 2002). To establish slander of title, the plaintiff must show: “(1) the publication of (2) a false statement (3) derogatory to plaintiff’s title (4) with malice (5) causing special damages (6) as a result of diminished value in the eyes of third parties.” *Huff v. Jennings*, 319 S.C. 142, 459 S.E.2d 886, 889 (Ct. App. 1995).

In his 2019 Order, the Master focused on the element of malice. On that issue, the Master writes:

The Court finds that there was no malice on behalf of the Defendant in this case. Clearly, the Defendant made no publication that was intended to cause harm to the Plaintiff, nor was any statement made that was knowingly false or in reckless disregard of its truth or falsity. The Defendant’s efforts were focused on collecting taxes for which they may be immune from liability. The slanderous statement made in this case was the deed from Mr. Fields to Ms. Foxworth. This statement was actually made by Mr. Fields. This action was taken at the request of the Defendant to return the property to the defaulting taxpayer, not to

damage the Plaintiff.

(Order II, pp. 2-3). (Citation omitted).

In challenging that finding of fact on appeal, the Appellant raises several issues that were not pled nor raised below. For example, the Appellant argues that the Master did not apply the proper definition of “malice” but rather conflated “common law malice” from defamation cases with the malice required for slander of title, which the Master did not do. In *Huff, supra*, the Supreme Court explained that “[i]n slander of title actions, the malice requirement may be satisfied by showing the publication was made in reckless or wanton disregard to the rights of another, or without legal justification.” 459 S.E.2d at 891. Under our jurisprudence, “[r]ecklessness implies the doing of a negligent act knowingly,” and “wanton” means “the conscious failure to exercise due care.” *Yaun v. Baldrige*, 243 S.C. 414, 134 S.E.2d 248, 251 (1964). They require a “consciousness of wrongdoing.” *Rogers v. Florence Printing Co.*, 233 S.C. 567, 106 S.E.2d 258, 263 (1958). In that regard, the Master found no intent by the County personnel to cause harm to the Appellant. The Master also appears to rely in part on the well-accepted constitutional malice standard under *New York Times Co. v. Sullivan*, which requires proof that the statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not.” *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 629 S.E.2d 653, 666 (2006), citing *New York Times Co. v. Sullivan*, 376 U.S. 256, 279-280 (1964). The Master found that the alleged publication was not knowingly false or in reckless disregard of its truth or falsity. That was a reasonable inference to be drawn from the evidence presented and should be affirmed. There was evidence from which the Master could conclude that the County was not consciously indifferent to the Appellant’s rights or her decedent’s rights.

The Appellant also argues that the Master failed to address whether the publication was

made “without legal justification.” That is not the case. The Master found that “the property taxes had not been paid which gave the Defendant the right to sell the property for non-payment of taxes” and that “Defendant’s efforts were focused on collecting taxes.” (Order II, pp. 2-3). That finding is supported by the trial record which includes evidence that the 1998 taxes were not paid by the defaulting taxpayer or by the Appellant after purchase. (Tr. 44:15 – 45:17; 81:10-17).

Nonetheless, it should also be noted that the Appellant pled the “malice” element in her Complaint as follows: “Defendant knew the statement regarding the validity of the title to be false, or acted with reckless disregard to its falsity.” *See*, Complaint, ¶ 18. (R. ____). Thus, the Master was simply ruling based on the Appellant’s allegations which incidentally incorporate the *New York Times* standard. Because the Appellant did not allege that the publication was “without legal justification,” there was no need for the Master to reach that unpled issue. Furthermore, to the extent that the Appellant intended to pursue the absence of “legal justification” basis for showing malice, she did not request the Master in her Rule 52(b) motion to address this issue. Instead, it is raised for the first time on appeal, and hence, is not properly preserved for appellate review. *See, Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review”). In short, if this Court concludes that the Master failed to consider or address the absence of “legal justification” basis for showing malice, that is not an issue preserved for appellate review and cannot serve as a basis for reversal.

The same is true with respect to the Appellant’s new argument that malice should be presumed. The Appellant never argued in the court below that the evidence gives rise to a

presumption of malice. That issue was not made in any pleading, at trial, nor in the Rule 52(b) motion. Hence, that issue is not preserved for appellate review. At any rate, these issues also fail on the merits because the Master did find that there was a legal justification that arose from the non-payment of the 1998 taxes which allowed for action to be taken to collect those taxes, including the sale of the property. The fact that errors were made – including a lack of sufficient notice to an owner of record as required by Section 12-51-40(a) -- does not negate the legal justification for engaging in the collection process as allowed by law. In fact, the Appellant takes unfair liberties with reciting the Master’s finding in the 2014 Order. The Appellant claims that the “law of the case” holds that “the tax sale was flawed, invalid, and without a legal basis.” *See*, Appellant’s Brief, p. 16. In actuality, the 2014 Order – which is not the law of the case – states that “the tax sale was flawed and not valid.” (Order I, p. 3). There was no ruling by the Master that the tax sale was “without a legal basis.”

In sum, the issue of malice presents a question of fact. There is sufficient evidence in the record from which the Master, as the fact finder, could readily conclude that any false statement in derogation to the Appellant’s title was not made by the County personnel with the requisite malice, including the reckless or wanton disregard to the rights of the Appellant. Given the standard of review in a non-jury action, the judgment in the favor of the County should be affirmed on this basis as well.

