

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Oct 17 2022

APPEAL FROM SALUDA COUNTY
Court of Common Pleas
R. Knox McMahon, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2022-000369

Stephen Wilkinson, as Trustee of George B. Buchanan, Jr.
Irrevocable Family Trust Dated the 15th day of July, 2001, ... Respondent,

v.

Redd Green Investments, LLC, Anderson North Augusta, LLC,
Herbert Anderson, Jr., A. Bruce Green, Herbert Keith Anderson,
and L. Cliff Redd, ... Defendants,

Of which Redd Green Investments, LLC, A. Bruce Green,
and L. Cliff Redd are Petitioners.

**APPENDIX
VOLUME II OF II**

Wallace K. Lightsey
William M. Wilson III
WYCHE, P.A.
PO Box 728
Greenville, South Carolina 29602
(864) 242-8200
Attorneys for Petitioners

Other Counsel of Record:

Roy R. Hemphill, Esq.
McDonald Patrick Poston Hemphill & Roper, LLC
414 Main Street (29646)
P.O. Box 1547
Greenwood, South Carolina 29648
(864) 229-2511
Attorneys for Herbert Keith Anderson, Anderson North Augusta, and Herbert Anderson, Jr.

Erik T. Norton, Esq.
John T. Moore, Esq.
1320 Main Street, 17th Floor
P.O. Box 11070
Columbia, South Carolina 29211-1070
(803) 799-2000
Attorneys for Stephen Wilkinson, as Trustee of George B. Buchanan, Jr. Irrevocable Family Trust Dated the 15th day of July, 2001

M. Alan Peace, Esq.
Harrell, Martin & Peace, P.A.
P.O. Box 1000
Chapin, SC 29036
(803) 345-3353
Attorneys for Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd

Gene Trotter, Esq.
2 Cedarwood Lane
Columbia S.C. 29205
(803) 254-5320
Attorneys for Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd

INDEX

Appendix

1. Record on Appeal	1
2. Final Brief of Appellants	382
3. Final Brief of Respondent	416
4. Final Reply Brief of Appellants	450
5. Petition For A Writ of Certiorari	482
6. Return To Petition For A Writ of Certiorari	512
7. Petitioners' Reply To Return To Petition For A Writ of Certiorari ..	542
8. Opinion of Court of Appeals	562
9. Appellants' Petition For Rehearing and Memorandum in Support ..	572
10. Return to Petition For Rehearing	583
11. Order Denying Rehearing	597

RECEIVED

Mar 28 2022

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Opinion No. 5880 (S.C. Ct. App. filed December 15, 2021)

Stephen Wilkinson, as Trustee of George B. Buchanan, Jr.
Irrevocable Family Trust Dated the 15th day of July, 2001, ... Respondent,

v.

Redd Green Investments, LLC, Anderson North Augusta, LLC,
Herbert Anderson, Jr., A. Bruce Green, Herbert Keith Anderson,
and L. Cliff Redd, ... Defendants,

Of which Redd Green Investments, LLC, A. Bruce Green,
and L. Cliff Redd are Petitioner.

PETITION FOR A WRIT OF CERTIORARI

Wallace K. Lightsey
William M. Wilson III
WYCHE, P.A.
PO Box 728
Greenville, South Carolina 29602
(864) 242-8200
Attorneys for Petitioners

Other Counsel of Record:

Roy R. Hemphill, Esq.
McDonald Patrick Poston Hemphill & Roper, LLC

414 Main Street (29646)
P.O. Box 1547
Greenwood, South Carolina 29648
(864) 229-2511

Attorneys for Herbert Keith Anderson, Anderson North Augusta, and Herbert Anderson, Jr.

Erik T. Norton, Esq.
John T. Moore, Esq.
1320 Main Street, 17th Floor
P.O. Box 11070
Columbia, South Carolina 29211-1070
(803) 799-2000

Attorneys for Stephen Wilkinson, as Trustee of George B. Buchanan, Jr. Irrevocable Family Trust Dated the 15th day of July, 2001

M. Alan Peace, Esq.
Harrell, Martin & Peace, P.A.
P.O. Box 1000
Chapin, SC 29036
(803) 345-3353

Attorneys for Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd

Gene Trotter, Esq.
2 Cedarwood Lane
Columbia S.C. 29205
(803) 254-5320

Attorneys for Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd

INDEX

INTRODUCTION	1
CERTIFICATE OF COUNSEL	2
QUESTIONS PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	2
ARGUMENTS	10
I. This Court should grant certiorari to resolve the novel question of whether violation of the statutory prohibition on the mortgagee bidding at the second sale may operate as a valid defense in a subsequent action against a guarantor.	11
CONCLUSION	22

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<i>Allegro, Inc. v. Scully</i> , 418 S.C. 24, 791 S.E.2d 140 (2016).....	14
<i>Commercial Credit Corp. v. Nelson Motors, Inc.</i> , 247 S.C. 360, 147 S.E.2d 481 (1966).....	18
<i>E.A. Prince & Son, Inc. v. Selective Ins. Co.</i> , 818 F. Supp. 910 (D.S.C. 1993).....	21
<i>H.G. Hall Construction Co. v. J.E.P. Enterprises</i> , 283 S.C. 196, 321 S.E.2d 267 (Ct. App. 1987)	20, 21
<i>Hawkins v. Greenwood Dev. Corp.</i> , 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997)	14
<i>Hill v. City of Hanahan</i> , 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984)	14
<i>Holliday v. McFadden</i> , 188 S.C. 187, 198 S.E. 392 (1938).....	12
<i>In re Estate of Brown</i> , 430 S.C. 474, 846 S.E.2d 342 (2020).....	22
<i>In re Marriage of Hein</i> , 52 Cal. App. 5th 519 (Ct. App. 2020).....	16
<i>In re S.N.A. Nut Co.</i> , 215 B.R. 1004 (1997)	18
<i>Pye v. Aycock</i> , 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997)	18
<i>Rookard v. Atlantic & C. Air Line Ry. Co.</i> , 84 S.C. 190, 65 S.E. 1047 (1909).....	21
<i>Tadlock Painting Co. v. Maryland Cas. Co.</i> , 322 S.C. 498, 473 S.E.2d 52 (1996).....	18
<i>Venture Eng'g, Inc. v. Tishman Constr. Corp. of S.C.</i> , 360 S.C. 156, 600 S.E.2d 547 (Ct. App. 2004)	18

<i>Waites v. S.C. Windstorm & Hail Underwriting Ass’n</i> , 279 S.C. 362, 307 S.E.2d 223 (1983).....	14
---	----

<i>Wilkinson v. Redd Green Invs., LLC</i> , 868 S.E.2d 406 (S.C. Ct. App. 2021).....	10
---	----

Statutes

S.C. Code § 15-39-720	<i>passim</i>
S.C. Code § 15-39-760	1, 4
S.C. Code Ann. § 33-44-202	5

Other Authorities

27 S.C. Jur. <u>Mortgages</u> § 128	12
7 Cal. Law Revision Com. Rep. [(1965)].....	16
88 C.J.S. Trial § 267	5

Rules

Rule 242, SCACR.....	10
----------------------	----

INTRODUCTION

Petitioners are guarantors of a commercial loan made by Respondent Buchanan Trust (“Trust”) to an entity ultimately owned by the guarantors and secured by real property. The Trust initially sued its borrower for foreclosure of the real property but did not name the guarantors in that initial action. The Trust bid on the property at the first foreclosure sale, which was held open for thirty days in order for the Trust to claim a deficiency judgment in accordance with the terms of S.C. Code § 15-39-720 (the “**Deficiency Statute**”). Under the Deficiency Statute, a lender may obtain a deficiency judgment only if it submits a single bid on the first day of the foreclosure sale and does not participate in a second “upset sale” held thirty days later, when the property is auctioned to the highest bidder. *Id.* § 15-39-720, -760. **The Deficiency Statute forbids the mortgagee, or “all persons acting in his behalf,” from bidding a second time or offering an upset bid at the final auction.** *Id.* § 15-39-720 (emphasis added).

In this manner, a lender that desires a deficiency judgment necessarily must enter its highest and best bid at the first sale because it is not allowed to bid at the second upset sale. However, the Trust blatantly violated the Deficiency Statute by sending a representative to bid at the second upset sale. This representative won the property and assigned its winning bid to the Trust, which also obtained a deficiency judgment against its borrower. It is undisputed and assumed for purposes of this appeal that the Trust violated the Deficiency Statute.

This appeal involves a second lawsuit filed by the Trust against the guarantors (which includes the Petitioners) seeking to recover the unpaid deficiency

judgment entered against the borrower in the prior foreclosure action. The guarantors defended the lawsuit on the basis that the Trust could not enforce the guaranties when it violated the Deficiency Statute. The theories proffered by the guarantors were that such a violation constituted a breach of the guaranty's implied covenant of good faith and fair dealing and/or created a defense by way of estoppel, waiver, illegal act, or unclean hands. The Trust moved for a direct verdict on the basis that a violation of the Deficiency Statute could not serve as a defense to payment on the guaranty, which was granted by the trial court and affirmed on appeal. This Petition for Certiorari follows the denial of Petitioner's Petition for Rehearing.

CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the petition for rehearing was made and finally ruled upon by the Court of Appeals on February 24, 2021.

QUESTIONS PRESENTED FOR REVIEW

1. When a mortgagee/lender obtains a deficiency judgment in a foreclosure action against its borrower (but not against the guarantor), is the mortgagee/lender's breach of the Deficiency Statute in that prior action a valid defense to payment of the deficiency judgment in a subsequent action filed by the mortgagee/lender against the guarantor? This issue presents a novel question of law.

STATEMENT OF THE CASE

This case involves a loan by the Trust to Springs North Augusta, LLC (the "Borrower") in the amount of \$8,728,500, which was secured by 1400 acres of

commercial property valued at \$30 Million and guaranteed by the Defendants. (Tr. pp. 68, 85 & Pl. Exs. 6-9) (R. pp. 161, 178, 266-81). One of the guaranties (“Guaranties”) was executed by Appellant/Petitioner Redd Green Investments, LLC and Defendant Anderson North Augusta, LLC, and the other was executed by Appellants/Petitioners A. Bruce Green and L. Cliff Redd and the other individual Defendants (Defendants, including Petitioners, are referenced as “Guarantors”). (Pl. Exs. 8-9) (R. pp. 276-81). The two Guaranties are identical and provide, in part, that the Guarantors will guaranty the debts “of Borrower . . . in accordance with the terms of any such notes . . . or agreements”; that the Lender may surrender or compromise collateral “with reasonable notice” to the Guarantors; that the Guarantors have a “right of recourse to security for the debts and obligations of the Borrower to Lender” if the Guarantors pay the debts in full; and that “the high bid at the judicial foreclosure sale will be applied to the debt” in the event that the Trust were to foreclose on the collateral. (*Id.*) (R. pp. 276-81).

Prior to the instant action against the Guarantors, the Trust initiated a foreclosure action against the Borrower, but not against the Guarantors. (Tr. pp. 68, 87) (R. pp 161, 180). The Borrower did not defend the action and defaulted. (*Id.* p. 70 & Pl. Ex. 1) (R. pp. 163, 230). The court entered a default judgment of foreclosure against the Borrower and ordered the property to be sold at a foreclosure auction with the proceeds to be applied to a total debt of \$9,450,662.50. (*Id.* p. 70 & Pl. Ex. 1) (R. pp. 163, 229-36). Because the Trust claimed a deficiency judgment, (*id.*) (R. pp. 163, 234-35), it would be allowed under S.C. Code Ann. § 15-

39-720 to bid only one time, with the sale then being held open for thirty days to receive upset bids.¹

At the foreclosure sale, the Trust bid \$6.6 Million, which was \$2.9 Million less than the debt and well below the \$30 million value that the Appellants/Petitioners assigned to the property. (Tr. pp. 52, 85, 88) (R. pp. 145, 178, 181).² The sale was then held open for thirty days for upset bids. (*Id.* pp. 52, 88) (R. pp. 145, 181). At the close of thirty days, Mr. Buchanan himself appeared at the auction, bid against other bidders, and won. (*Id.*) (R. pp. 145, 181). Mr. Buchanan indicated that his bid was made on behalf of a wholly owned LLC, Second Avenue Holdings, and he assigned his bid back to the Trust. (*Id.* pp. 52-53) (R. pp. 145-46). As outlined by the Trust in its opening statement at trial:

[T]he way that the two sales work is that at the first sale the person who is owed the money can put in a bid for the property. . . . There's then a second sale, what might be referred to as the upset bid, okay? **At the second sale, the person who's owed the money is not allowed to bid, nor is that party's representative allowed to bid, and the reason for that is to try to encourage the party who is owed the money to put in the highest bid possible,** okay?
....

¹ Under Section 15-39-760, the provisions of Section 15-39-720 do not apply when the lender “expressly waives” a deficiency judgment against the borrower, in which case the sale is not held open for thirty days, and compliance with the bid must be made immediately. *Id.* § 15-39-760. In this manner, a lender who wants to retain a deficiency judgment against the borrower (*i.e.*, a judgment in the amount that the debt exceeds the high bid at the foreclosure sale) must comply with Section 15-39-720 and hold the bidding open for thirty days.

² The Trust itself valued the Property at \$15 Million in the days following the sale. (Tr. p. 32) (R. p. 125). Even at this value, the Property was worth well above the debt of \$9.5 Million.

What happened in this case is at the first sale the trust put in a bid for 6.6 million. . . . [A]nd then after that Mr. Buchanan, who was concerned that someone else might come in and take this property and leave the trust in a bad position, losing some money, decided that it would be better for one of his companies to own it rather than the -- rather than somebody other than the trust. So Mr. Buchanan, on behalf of a company he owned called Second Avenue Holdings, LLC, it was a company he had set up to hold some property previously, went to the second sale and there were other bidders there and multiple bids were put in. In the end, Second Avenue Holdings, LLC, won the bid and held the property.

After that point, Mr. Buchanan after consulting with some others and the trustee decided that it would be better from a tax perspective and from his children's perspective for the trust to hold onto that property rather than Second Avenue Holdings, LLC. So Second Avenue Holdings, LLC, assigned the bid that it won back to the trust so the trust could hold on to the property.

(Tr. pp. 52-53) (R. pp. 145-46 (emphasis added)).³

Second Avenue Holdings was solely owned by Mr. Buchanan, (*id.* p. 111) (R. p. 204), and it was created six days after the Trust's bid at the first sale on September 4, 2012, (*id.* pp. 96-97 & Green Ex. 1) (R. pp. 189-90, 283-84).⁴ Its winning bid was for \$7,160,000. (*Id.* p. 69 & Pl. Ex. 5) (R. pp. 162, 265). That same day it deposited \$500,000 toward its bid and, on October 24, 2012, assigned its bid to the Trust for no consideration. (Tr. pp. 100-101 & Green Ex. 2) (R. pp. 193-94,

³ A party is bound by the admissions of counsel at opening statement. 88 C.J.S. Trial § 267.

⁴ Mr. Buchanan contended at trial that he created this company several years earlier, but he was impeached with the Articles of Organization revealing that it came into existence on September 10, 2012. S.C. Code Ann. § 33-44-202(b) ("Unless a delayed effective date is specified, the existence of a limited liability company begins when the articles of organization are filed.").

285-86).⁵ The property then was deeded from the Master in Equity to the Trust, and **the Trust claimed an exemption from the deed recording fee on the basis that it obtained the deed as mortgagee pursuant to foreclosure proceedings.** (Tr. pp. 71-72 & Pl. Ex. 3) (R. pp. 164-65, 252, 261-62).

The Court then entered an Order of Deficiency against the Borrower in the amount of \$2,484,163.95 on October 26, 2012, which was amended to \$2,753,192.70, plus 15% annual interest, on February 13, 2013. (Tr. pp. 71-72 & Pl. Exs. 2, 4) (R. pp. 164-65, 249-51, 263-64). The net result was that the Trust, which *was not allowed to bid at the upset sale*, ended up with the property (valued at \$15 to \$30 Million) *as a result of a bid at the upset sale*, and it also ended up with a deficiency judgment of \$2.8 Million (\$4,781,882.55 at the time of trial⁶) even though the value of the property exceeded the total debt owed by the Borrower. (Tr. pp. 32, 52-53, 71-73, 85 & Pl. Exs. 2-4, 10) (R. pp. 125, 145-46, 164-66, 178, 249-64, 282).

After it obtained a Deficiency Judgment against the Borrower in the Foreclosure Action, the Trust brought the instant action against the Guarantors seeking to recover on the Guaranties. The Guarantors contended at trial that when Mr. Buchanan appeared at the upset sale and presented the winning bid, he violated the Deficiency Statute, S.C. Code Ann. § 15-39-720, because he was acting

⁵ The Assignment of Bid noted that the deposit would be returned to Second Avenue Holdings less the Master's commission and other court costs, and those costs were reimbursed by the Trust. (Tr. p. 101 & Green Ex. 2) (R. pp. 194, 285). Thus, Second Avenue Holdings netted zero dollars, and so there was no consideration.

⁶ (Trial Ex. 10; Court Ex. 1) (R. pp. 282, 289-90).

on behalf of the Trust who was forbidden from bidding at the upset sale, and therefore that the Trust is precluded from recovery on the Guaranties because it violated the implied covenant of good faith and fair dealing with the Guarantors (and/or because of unclean hands, waiver, and/or unlawful act). (Tr. pp. 123, 129; Amended Motion) (R. pp. 216, 222, 294-95).

At trial, the Guarantors presented a great deal of evidence supporting their contention that Mr. Buchanan, and in turn his wholly owned entity, Second Avenue Holdings, was acting on behalf of the Trust at the second foreclosure sale. Mr. Buchanan's own testimony established that he regularly and routinely acted on behalf the Trust in its operations. He testified that he set up the Trust and funded it out of his own assets, (*id.* pp. 93-94) (R. pp. 186-87); that he holds the title of "financial advisor" of the Trust, (*id.* p. 111) (R. p. 204); and that he routinely identifies properties to be put into the Trust, (*id.* p. 110) (R. p. 203). He further testified that he was the one who identified the loan opportunity to the Borrower and met with the Guarantors on behalf of the Trust—without the Trustee—in order to initiate the transaction. (*Id.* p. 110) (R. p. 203). The Trustee also obtained his consent before proceeding with the foreclosure action in this matter. (*Id.* p. 95) (R. p. 188).

The Trustee, Mr. Wilkinson, concurred that the assets held by the Trust have "all been put in there by Mr. Buchanan" in order to eliminate estate taxes and to benefit Mr. Buchanan's children. (*Id.* pp. 65-66, 74) (R. pp. 158-59, 167). He explained that his role as Trustee is to make "distributions for the health, education

and welfare” of Mr. Buchanan’s children. (*Id.* p. 65) (R. p. 158). He agreed that Mr. Buchanan gives financial advice to the Trust, brings most of the investments to the table, and makes recommendations about buying or selling property. (*Id.* pp. 76, 78) (R. pp. 169, 171). The Trustee conceded that he has never turned down one of Mr. Buchanan’s recommendations. (*Id.* p. 79) (R. p. 172). He even referred to the Trust loaning money to the Borrower as if it were Mr. Buchanan himself loaning the money: “Mr. Buchanan was contacted by someone . . . [who] told him there was an opportunity” and that “if he wanted to loan some money, you know, there was an opportunity to make some money.” (*Id.* pp. 66-67 (emphasis added)) (R. pp. 159-60).

After both sides rested their case, the Trust moved for a directed verdict. The Defendant Guarantors opposed the Trust’s motion for directed verdict on the basis that the Trust was precluded from recovery under the Guaranties because its violation of the Deficiency Statute constituted a breach of the implied covenant of good faith and fair dealing, unclean hands, waiver, and/or unlawful act. (Tr. pp. 123, 129; Amended Motion) (R. pp. 216, 222, 294-95). The trial court directed a verdict against Guarantors based on the court’s ruling that a violation of the Deficiency Statute was not a defense to the payment obligation on the Guaranty. After outlining the standard of review for a directed verdict, the court’s reasoning and decision are set forth in full as follows:

Although I think there is more than one inference that can be drawn from parts of the testimony, I do not think they are significant. Even if -- and that -- I say it like that because I’m not interested in the weight of the evidence but the existence of the evidence. If we’re looking at the evidence in the light most favorable to the Defendants, there was a violation of Section 15-39-720, upset bid within thirty days

on foreclosure or execution sale. That's an inference that can be drawn. To this Court that makes not a whit of difference. Not a whit of difference. I look at Plaintiff's Exhibit Number 8, Plaintiff's Exhibit Number 9, which [are] the guaranty agreements that are the documents upon which this lawsuit has been brought. I do not think a violation of the statute that I just cited is a defense on a guaranty of a debt. Again, tight-roping -- not tight-roping, but following the standard of directed verdict, drawing that inference, it would be in the light most favorable to the Defendant and I do not think there was a violation. I don't think you can turn Rambo into Superman or Superman into Rambo. Second Avenue Holdings is not the irrevocable trust. They're two separate and distinct legal existing entities so for that reason I will direct a verdict for the Plaintiff in the amount of the deficiency judgment and the interest for that \$4,781,882.65.

(Tr. pp. 132-33) (R. pp. 225-26).

Following a question by Appellants' counsel, the trial judge clarified that he assumed a violation of the Deficiency Statute for purposes of the directed verdict:

And I understand and I cited the statute. As I say, I don't want to weigh the evidence and say it's -- based on my ruling that there wasn't a violation; I assume there was a violation of the statute for purposes of my ruling.

(*Id.* p. 133) (R. p. 226) (emphasis added).

Thus, the trial judge entered a directed verdict for the Trust on the basis that, assuming a violation of the Deficiency Statute, such a violation would not provide a defense to the Defendant's guaranties on the debt. (Tr. pp. 132-33) (R. pp. 225-26). On September 7, 2017, the trial court issued a Form 4 Order directing a verdict against Defendants in the amount of \$4,781,882.65. (Order dated September 7, 2017) (R. pp. 10-11). Nonetheless, the court did not set forth the specific basis as to why or how it ruled that such a violation could not operate as a

defense to the Trust's claims on the Guaranties. Following denial of their motion for a new trial, the Petitioners appealed. (R. pp. 12-13, 291-96,365-69).

On December 15, 2021, the Court of Appeals issued an opinion affirming the circuit court's granting of the Trust's motion for directed verdict. *Wilkinson v. Redd Green Invs., LLC*, 868 S.E.2d 406 (S.C. Ct. App. 2021) ("Opinion"). On February 24, 2022, the Court of Appeals denied rehearing.

ARGUMENTS

This case presents a novel issue of law warranting review. *See* Rule 242(b)(1), SCACR. There is no case law in South Carolina that addresses the issue of whether a guarantor may assert as a defense to enforcement of the guaranty that the lender/mortgagee violated the Deficiency Statute in a prior foreclosure action by improperly bidding at the second upset sale (thereby depriving the guarantor of the lender's highest and best bid at the first sale). In other words, may a lender "get away" with a blatant violation of South Carolina law in a prior proceeding that did not even involve the guarantor? Or may the guarantor assert the violation as a defense in a subsequent action? This issue has yet to be decided, and no case law supporting the decision was cited by the trial court or the Court of Appeals.

It stands to reason that this Court must not allow lenders to violate a South Carolina statute with impunity in order to obtain a deficiency judgment and then enforce the ill-gotten deficiency against a guarantor in a subsequent action, particularly when the guarantor was not a party to the initial action where the violation took place. A ruling overturning the decision of the Court of Appeals supports public policy, fairness, and general notions of justice and fair play. If this

Court were to decline granting certiorari, then the Respondent will get away with a great injustice that would promote the violation of South Carolina law by future lenders and be grossly unfair to Petitioners and future guarantors.

For these reasons, the Supreme Court of South Carolina should exercise its discretion to grant certiorari.

I. This Court should grant certiorari to resolve the novel question of whether violation of the statutory prohibition on the mortgagee bidding at the second sale may operate as a valid defense in a subsequent action against a guarantor.

The Court of Appeals held that the Guarantors could not assert a violation of the statute as a defense to the Trust's action to enforce the guaranties for the reasons that (1) the Guarantors were barred by res judicata, and (2) even assuming a violation of the statute, the Guarantors failed to show that they were prejudiced. Both of these bases to affirm the trial court are erroneous as a matter of law. These two issues are discussed in reverse order.

A. Prejudice

The Court of Appeals held that, even assuming a violation of the bidding statute, the Guarantors could not raise such a violation as a defense to the guaranty without a showing of prejudice (*i.e.*, evidence that the fair market value of the property was higher than Second Avenue Holding's bid). (Opinion at 8-9). As an initial matter, assuming prejudice is required, this holding fails to appreciate the inherent prejudice in denying the Guarantors the benefit of the Trust's highest and best bid. It is vital to understand that the entire purpose of the Deficiency Statute is to protect borrowers and guarantors by requiring the mortgagee to make its

highest and best bid on the first day of the sale, which in turn minimizes or even eliminates any deficiency. See 27 S.C. Jur. Mortgages § 128 (“This effectively forces the mortgagee to enter his highest and best bid at the initial sale.”); see also *Holliday v. McFadden*, 188 S.C. 187, 198 S.E. 392, 394 (1938) (“[T]he policy of the Statute is to prevent property being sold at judicial sales for sacrifice prices.”).

Indeed, the Trust admitted in its opening statement at trial that the purpose of this bidding scheme “is to try to encourage the party who is owed the money to put in the highest bid possible.” (Tr. p. 52) (R. p. 145). By forcing the mortgagee to only bid one time at the initial sale, the mortgagee risks being outbid by a third party if the bid is under fair market value, thereby in essence taking from the mortgagee what the mortgagee could have received in payment for the debt. Because the provisions allowing for a deficiency judgment do not apply when a mortgagee waives the deficiency and competes with other bidders, the mortgagee should not gain the benefit of a deficiency when it (or someone on its behalf) violates those provisions by bidding at the second sale and thereby deprives the guarantor of the mortgagee being forced to make its highest and best bid at the beginning of the sale rather than the end of the sale.

That said, whether a showing of prejudice is required in order for a guarantor to assert a violation of the bidding process as a defense to a guaranty is a novel issue of South Carolina law. The Court of Appeals assumed that a showing of prejudice must be made by Guarantors, but it did not cite to any legal precedent

that a showing must be made at all, much less that the Guarantors bear the burden of proof as opposed to the Trust, which is the one that violated the statute.

The statute itself, S.C. Code Ann. § 15-39-720, does not incorporate any requirement of prejudice. It straightforwardly declares: “But the mortgagee or his representative shall enter such bid as he desires at the time the sale is made, and he and all persons acting in his behalf shall be precluded from entering any other bid in any amount at any other time except the single or last bid made by him or in his behalf at the sale.” *Id.* (emphasis added). This language is absolute and makes very clear that the Trust was not allowed to violate the statute by bidding a second time regardless of whether there would be any prejudice. Accordingly, a showing of prejudice is not required.

In addition, even if a showing of prejudice were deemed required, this requirement is satisfied by the fact that the Guarantors were inherently prejudiced by the violation because they were deprived of the highest and best bid of the Trust (as discussed above). Such a deprivation could not be cured by the fact that the Bank’s representative (Second Avenue Holdings) outbid other bidders at the second upset sale because it fails to establish whether the Trust would have bid even higher at the first sale without having the knowledge of how high competing bidders might bid at a second sale.

Regardless of whether this Court agrees that Guarantors made a showing of inherent prejudice, the Petitioners did produce direct evidence from which it could be inferred that the value of the property exceeded Second Avenue Holding’s bid.

Although the Court of Appeals concluded that “there is no evidence—other than the amount of the highest bid at the foreclosure sale—of the fair market value of the Property at the time of the foreclosure sale,” (Opinion at 9), there was at the very least evidence that would support a reasonable jury conclusion that the fair market value of the Property exceeded the Trust’s bid. A motion for directed verdict “should be denied if the evidence yields more than one reasonable inference or its inference is in doubt.” (*Id.* at 5 (quoting *Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016))).

Here, there is evidence in the record⁷ that allows for the reasonable inference that the fair market value of the property exceeded the Trust’s high bid. A property owner is competent to testify to the value of his own real property. *See, e.g., Waites v. S.C. Windstorm & Hail Underwriting Ass’n*, 279 S.C. 362, 366, 307 S.E.2d 223, 225 (1983); *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 594-95, 493 S.E.2d 875, 880 (Ct. App. 1997); *Hill v. City of Hanahan*, 281 S.C. 527, 531-32, 316 S.E.2d 681, 684 (Ct. App. 1984). The specific testimony as to the value of the subject real property includes:

- Mr. Green testified that the property initially was worth “over \$30 Million” when initially acquired. (Tr. p. 85) (R. p. 178).

⁷ The Court of Appeals expressed that it was unwilling to consider the evidence offered outside the jury’s presence concerning the value of the Property, including the admission of Trust’s counsel that “[T]he property is worth an awful lot more than what was paid at the foreclosure sale. I think we all know it was. It’s not a big secret.” (Tr. p. 33 (emphasis added)) (R. p. 126). Even without counsel’s candid admission that the property was worth substantially more than the high bid at the foreclosure sale, reasonable inferences may be made from evidence in the record before the jury that the bid was below fair market value.

- Mr. Green testified that the value of the property was “several times more than the loan” and that as a result his guaranty “never seemed to be a problem.” (Tr. p. 86) (R. p. 179) (emphasis added).

The jury could reasonably have inferred from this testimony that a property valued over \$30 Million when acquired would be worth over \$7,160,000 at a later point in time (when the foreclosure sale occurred). In addition, the testimony that the value was several times the amount of the loan, when combined with the temporal aspect of the word “never,” allows for the reasonable inference that at all times – including the time of the foreclosure sale – the value of the property exceeded the debt amount and therefore exceeded the winning bid of \$7,160,000 (which was less than the debt amount). Accordingly, the Court overlooked the above testimony when it concluded there was “no evidence” that the fair market value of the property exceeded the debt amount at the time of the foreclosure sale.

But even if the Guarantors failed to produce sufficient evidence of prejudice (whether direct or implied/inherent), the Court of Appeals erred by placing this burden upon the Guarantors rather than placing a burden of showing a lack of prejudice upon the Trust. For reasons of public policy, prejudice at the very least should be a rebuttable presumption, with the burden on the at-fault mortgagee to demonstrate that its bid exceeded the fair market value of the property. The law allows for the shifting of the burden of proof for reasons of public policy:

“In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: [1] the knowledge of the parties concerning the particular fact, [2] the availability of the evidence to the parties, [3] the most desirable result in terms of public policy in the absence of proof of the particular fact,

and [4] the probability of the existence or nonexistence of the fact.” (7 Cal. Law Revision Com. Rep. [(1965)], p. 89.)

One way for a court to reallocate the burden of proof on a particular issue is to adopt a presumption. The Evidence Code defines a “presumption” as “an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in [an] action.” (Evid. Code, § 600, subd. (a).) Presumptions are either conclusive or rebuttable. (Evid. Code, § 601.) Rebuttable presumptions are “either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof.” (Ibid.; see Evid. Code, §§ 110 [burden of producing evidence defined], 115 [burden of proof defined].)

A presumption affecting the burden of proof is a rebuttable presumption “established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied.” (Evid. Code, § 605.) Conversely, a presumption affecting the burden of producing evidence is used “to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied.” (Evid. Code, § 603.) “It is the existence of this further basis in policy that distinguishes a presumption affecting the burden of proof from a presumption affecting the burden of producing evidence.” (7 Cal. Law Revision Com. Rep., supra, at p. 99.)

In re Marriage of Hein, 52 Cal. App. 5th 519, 537 (Ct. App. 2020) (emphasis added).

Between two parties—where one is at fault for the violation of a statute to the detriment of the other innocent party—it is only logical, just, and fair that the at-fault party should bear the burden of proof as to whether its violation of the statute was prejudicial to the innocent party. This conclusion is particularly true here where the Guarantors were absolutely deprived of the Trust’s high bid due to the Trust’s violation of the statute. As discussed above, we can never know what the Trust’s high bid would have been—if it had been forced to make a high bid at the first sale without knowing what would be bid at the second upset sale (as

opposed to sending a representative to the second upset sale so as to know how high it must bid)—and so the deprivation of this statutory protection taints the entire bidding process.

In conclusion, the Deficiency Statute reflects the public policy of this State, and in order to protect this public policy, prejudice for violation of the bidding statute should be presumed and/or the burden shift to the Trust. In short, when a mortgagee violates the bidding statute in order to obtain a deficiency judgment that it subsequently seeks to apply against a person who was not party to the proceeding, then it is the at-fault mortgagee who should bear the burden of demonstrating a lack of prejudice—not the innocent third party who should bear the burden of demonstrating prejudice.

B. Res Judicata

The Court of Appeals incorrectly held that “[t]he Guarantors’ attempt to challenge the amount of the deficiency judgment is barred by *res judicata*.” (Op. at 7). However, the Guarantors do not challenge the amount of the deficiency judgment that was entered in the prior foreclosure action against Springs North Augusta. As asserted in the Appellants’ Reply Brief:

...[T]he Guarantors do not seek to challenge the amount of the judgment in the foreclosure suit. This judgment was entered against the Borrower, and the Guarantors are not seeking to undo it. Instead, the Guarantors are contending that they have a defense to the Trust’s enforcement of the guaranties because the Trust violated South Carolina law when it obtained the deficiency.

(App. Reply at 21). This distinction is vitally important because it demonstrates that the second and third elements of *res judicata*—namely the identity of the

subject matter and adjudication on the merits—do not apply.⁸ The Guarantors simply are not attacking the deficiency judgment against the Borrower. This judgment stands and may be pursued by the Trust against the Borrower.

Instead, the Guarantors contend that the Trust’s violation of the Deficiency Statute operates as a defense to the Guarantors’ obligations under their guaranties. The Guarantors’ position is that the deficiency judgment—although enforceable against the Borrower—is not enforceable against the Guarantors in a subsequent action because it violates the Guaranty itself, namely the implied obligation of good faith and fair dealing. *See, e.g., Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 500, 473 S.E.2d 52, 53 (1996) (holding that the implied covenant of good faith and fair dealing prohibits a party from doing anything taking any action that would “impair the other’s rights to receive benefits under the contract.” (internal quotations omitted)); *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360,

⁸ As noted by the Court of Appeals, res judicata requires identity of parties and subject matter, as well as prior adjudication of the issue:

“The doctrine of res judicata provides that final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were or could have been raised in that action.” *Venture Eng’g, Inc. v. Tishman Constr. Corp.* of S.C., 360 S.C. 156, 162, 600 S.E.2d 547, 550 (Ct. App. 2004) (quoting *In re S.N.A. Nut Co.*, 215 B.R. 1004, 1008 (1997)); *see also Pye v. Aycock*, 325 S.C. 426, 432, 480 S.E.2d 455, 458 (Ct. App. 1997) (“To establish res judicata, three elements must be shown: (1) the identities of the parties is the same as a prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction.”).

(Opinion at 7.)

362–70, 147 S.E.2d 481, 481–85 (1966) (holding that a breach of the implied covenant of good faith and fair dealing is a valid defense to a guaranty agreement).⁹

The issues presented in the first action were whether the Borrower defaulted under the loan and whether the property could be sold with the proceeds applied to the debt. The enforceability of the guaranties was not at issue and was not addressed in the first action. The issue in the present action is whether the Trust may enforce under the Guaranties or whether the Trust’s violation of the Deficiency Statute operates to bar such a recovery. Because this issue was not addressed in the initial foreclosure action—nor could it have been addressed—there is neither an identity of issues in the two actions nor an adjudication on the merits of the Guarantors’ liability in the first action. Stated another way, the amount of the deficiency judgment against the Borrower was adjudicated in the first action, but whether such amount could be collected against the Guarantors under the terms of their guaranties was *not* resolved or addressed in the first action. These are entirely separate issues, and it follows that *res judicata* does not bar the defenses raised by the Guarantors in the second action.

In addition, there is no identity of parties that supports application of the doctrine of *res judicata*. The Court of Appeals held that the Guarantors were privies with the Borrower because they both “had a shared interest in obtaining the lowest deficiency judgment possible because Guarantors were responsible for any

⁹ Alternative theories for the defense include the doctrines of unclean hands, waiver, or not being able to gain from an illegal act.

unpaid debt of Springs North Augusta.” (Op. at 8). However, the Court of Appeals did not cite to any case law or other legal authority that a guarantor and a borrower are privies for purposes of the application of *res judicata*. The Court of Appeals cites to the relationship between the Guarantors and the Borrower (with the individual Guarantors being owners of an entity with an ownership interest in the Borrower) as a basis for notice of the proceeding, (*id.*), but neither the Court of Appeals nor the Respondent has cited to case law supporting the conclusion that such a relationship, or that notice of the proceeding, equates to being privies.

In fact, there is precedent to the contrary. In *H.G. Hall Construction Co. v. J.E.P. Enterprises*, 283 S.C. 196, 321 S.E.2d 267 (Ct. App. 1987), the Court of Appeals held that common ownership of two corporations, both of which were parties to a contract at issue in prior litigation against one of the companies, did not suffice to make those corporations privies for purposes of applying *res judicata* in a second action against the other company. The court explained:

Both corporations are owned by the same person, H.G. Hall, Jr. Both were parties to the contract for the Beaufort project. According to J.E.P., H.G. Hall, Jr., as president of Associates, Inc., controlled the conduct of the first lawsuit. Hall is also president of Hall Construction.

While South Carolina courts have not addressed the precise issue presented here, courts in both North Carolina and Georgia have ruled that no privity exists between commonly owned corporations. Similarly, it has been held there is no privity between a corporation and a shareholder merely because the latter controls the former.

...

We find these cases persuasive. Although Hall Construction and Associates, Inc., are both corporations owned by H.G. Hall, Jr., they

are different corporations. On the facts of this case common ownership is not enough to establish privity for the purposes of *res judicata*.

Id. at 204-05, 321 S.E.2d at 272. Thus, the direct or indirect ownership of the Borrower by Guarantors does not put them in privity for purposes of *res judicata*. At the very least, the Court of Appeals' decision in this appeal creates patently contradictory court precedent, which requires action by this Court to resolve.

Similarly, the United States District Court for the District of South Carolina, applying South Carolina law, held that a principal-agent relationship and the vicarious liability of the principal for the acts of the agent are not sufficient to create privity for purposes of *res judicata* so as to bind the principal on a judgment against the agent: "A judgment on the merits in favor of the agent is a bar to an action against the principal for the same cause, because the principal's liability is predicated upon that of the agent. But a judgment against the agent is not conclusive in an action against the principal." *E.A. Prince & Son, Inc. v. Selective Ins. Co*, 818 F. Supp. 910, 915 (D.S.C. 1993) (emphasis in original) (quoting *Rookard v. Atlantic & C. Air Line Ry. Co.*, 84 S.C. 190, 65 S.E. 1047 (1909)).

Here, the relationship between the Guarantors and Borrower is analogous to that of principal and agent, with the former's liability being predicated on the latter's. Under *H.G. Hall Construction* and *E.A. Prince & Son*, the fact that two parties are under common control or that one controls the other, that one has liability contingent on the other's, and that their interests are aligned is not sufficient to make them privies for purposes of *res judicata*. Accordingly, it was error for this Court of Appeals to hold that the Guarantors were privies of the

Borrower. Again, at the very least, the Court of Appeals' holding on this issue creates a direct conflict in South Carolina legal authority, which requires resolution by this Court.

In addition, the Court of Appeals overlooked the fact that the Borrower was in default in the foreclosure action and did not defend it. The Court asserted that the "Guarantors could have challenged Second Avenue's participation in the bidding process in the prior action," (*id.*), but there is no basis for such a conclusion when the Borrower was in default and not participating in the foreclosure action. As this Court held in *In re Estate of Brown*, "[c]ollateral estoppel does not apply to default judgments because the factual issues were never actually litigated." 430 S.C. 474, 488, 846 S.E.2d 342, 349 (2020). For the same reason, the doctrine of *res judicata* does not preclude Guarantors from defending the instant action on the basis of a defense that was not litigated in the prior default judgment.

CONCLUSION

This case warrants review because the Court of Appeals' decision incorrectly disposes of a novel issue of South Carolina law. Petitioners ask the Court to grant this petition for a writ of certiorari and clarify for South Carolina lenders and guarantors that a mortgagee's violation of section § 15-39-720 may serve as a defense to a claim against a guarantor when that claim is premised upon the violation.

Respectfully submitted,

s/William M. Wilson III

Wallace K. Lightsey

William M. Wilson III

Wyche, P.A.

200 East Broad Street

Greenville, SC 29601

Telephone: 864-242-8200

Facsimile: 864-235-8900

E-Mail: bwilson@wyche.com

Date: March 28, 2022

Attorneys for Petitioners

RECEIVED

Mar 28 2022

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Opinion No. 5880 (S.C. Ct. App. filed December 15, 2021)

Stephen Wilkinson, as Trustee of George B. Buchanan, Jr.
Irrevocable Family Trust Dated the 15th day of July, 2001, ... Respondent,

v.

Redd Green Investments, LLC, Anderson North Augusta, LLC,
Herbert Anderson, Jr., A. Bruce Green, Herbert Keith Anderson,
and L. Cliff Redd, ... Defendants,

Of which Redd Green Investments, LLC, A. Bruce Green,
and L. Cliff Redd are Petitioner.

PROOF OF SERVICE

I, William M. Wilson, III, of Wyche, P.A., attorneys for the Petitioners in the
within action, do hereby certify that I have this date served upon opposing
counsel the foregoing **PETITION FOR A WRIT OF CERTIORARI** by Email
and first class U.S. mail, addressed to the following:

John T. Moore, Esq.
Nicholas Andrew Charles, Esq.
A. Mattison Bogan, Esq.
Nelson Mullins
1320 Main Street, 17th Floor
Columbia, SC 29201

s/William M. Wilson III

Wallace K. Lightsey

William M. Wilson III

Wyche, P.A.

200 East Broad Street

Greenville, SC 29601

Telephone: 864-242-8200

Facsimile: 864-235-8900

E-Mail: bwilson@wyche.com

Attorneys for Petitioners

March 28, 2022

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2022-000369

RECEIVED

May 16 2022

S.C. SUPREME COURT

Stephen Wilkinson, as Trustee of George B. Buchanan,
Jr. Irrevocable Family Trust Dated the 15th day of July,
2001, ...

Respondent,

v.

Redd Green Investments, LLC, Anderson North Augusta,
LLC, Herbert Anderson, Jr., A. Bruce Green, Herbert
Keith Anderson, and L. Cliff Redd, ...

Defendants,

Of which Redd Green Investments, LLC, A. Bruce
Green, and L. Cliff Redd are

Petitioners.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

John T. Moore
A. Mattison Bogan
Nicholas A. Charles
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

*Attorneys for Stephen Wilkinson, as Trustee of George B.
Buchanan, Jr. Irrevocable Family Trust Dated the 15th day
of July, 2001*

Introduction

This case presents no valid, novel issue of law for this Court to decide. Although the petitioners (the “Guarantors”) attempt to manufacture a novel question, their attempt to evade their obligations under the guaranty agreements is barred by res judicata and waiver, the plain language of the agreements, and by their failure to show that any alleged violation of the bidding statute caused them to suffer any prejudice. The Guarantors contracted to pay any debt Springs North Augusta, LLC owes. They concede the debt—now in the form of a deficiency judgment—is valid and owed by Springs North Augusta. The Guarantors therefore must pay the deficiency judgment. The Court need not and should not consider their attempted maneuver around their contractual obligations. Regardless of whether their purported novel question could be a valid one in the abstract, it is not viable in this case. The trial court properly granted a directed verdict in favor of the Trust, and the Court of Appeals properly affirmed. The Court should therefore deny certiorari.

Counter-Statement of the Questions Presented

- I. Whether the Court of Appeals properly found the Guarantors’ attempted collateral attack on the deficiency judgment is barred by res judicata.
- II. Whether the Court of Appeals properly found the Guarantors are not relieved of their contractual obligations because they did not show any prejudice from the alleged violation of South Carolina Code section 15-39-720.
- III. Whether additional sustaining grounds preclude a reversal of the Court of Appeals and trial court and therefore support a denial of certiorari.

Statement of the Case

This appeal arises out of a foreclosure deficiency judgment involving two guaranty agreements. The Trustee of the George B. Buchanan, Jr. Irrevocable Family Trust, dated the 15th

Day of July, 2001 (the “Trust”),¹ seeks to enforce the guaranty agreements. In the foreclosure action, the Trust foreclosed on a mortgage securing a loan the Trust made to Springs North Augusta, LLC in 2009. (R. 229). At the conclusion of the foreclosure action, the master in equity sold the property in September 2012. (R. 265). Because the property sold for less than the total amount of the debt, the master entered a deficiency judgment against Springs North Augusta. (R. 251).

The Trust filed this action on March 5, 2013, against Redd Green Investments, LLC; Anderson North Augusta, LLC; Herbert Anderson, Jr.; A. Bruce Green; William Otha Bodie;² Herbert Keith Anderson; and L. Cliff Redd. (R. 16). The petitioners in this case are Redd Green Investments, LLC; A. Bruce Green; and L. Cliff Redd (the “Guarantors”). In the complaint, the Trust alleged the Guarantors and other defendants breached two guaranty agreements they entered into with the Trust in which they guaranteed the loan that was the subject of the foreclosure action. *See generally* (R. 16–21). The Guarantors contend they should be relieved of their contractual obligations under the guaranty agreements on the ground that the Trust allegedly violated South Carolina Code section 15-39-720 (the “bidding statute”)³ when 2nd Avenue Holdings, LLC

¹ When the Trust filed the complaint, the Trustee was Harry P. Sakellaris. (R. 16). The caption in the case was amended on March 1, 2016, after the current Trustee, Stephen Wilkinson, replaced Sakellaris. (R. 1).

² William Otha Bodie never answered the complaint and eventually was removed from the caption.

³ Section 15-39-720 provides,

In all judicial sales of real estate for the foreclosure of mortgages and sales in execution the bidding shall not be closed upon the day of sale but shall remain open until the thirtieth day after such sale, exclusive of the day of sale. Within such thirty day period any person other than the highest bidder at the sale or any representative thereof in foreclosure and execution suits may enter a higher bid upon complying with the terms of sale by making any necessary

submitted the winning bid at the foreclosure sale because Buchanan is the owner of 2nd Avenue Holdings. *See* (R. 89–91).

The case proceeded to trial on September 5, 2017. (R. 94). At the close of all the evidence, the Trust moved for directed verdict on the grounds that the Guarantors cannot collaterally attack the foreclosure orders, that the bidding statute was not violated as a matter of law, and that any violation of the bidding statute was not a material breach of the guaranty agreements because the Guarantors received the benefit of the loan. (R. 217–20). The trial court granted the Trust’s motion on the grounds that a violation of the bidding statute is not a defense on a guaranty of a debt and no violation of the bidding statute occurred. (R. 225–26). The Guarantors appealed, and the Court of Appeals affirmed.

I. The Underlying Loan

In November 2009, the Trust and Springs North Augusta, LLC executed a promissory note for a \$7,590,000 loan from the Trust to Springs North Augusta. *See* (R. 266–72). Springs North Augusta was owned by Redd Green Investments, LLC and Anderson North Augusta, LLC. (R. 266; R. 177). Those owners formed Springs North Augusta for the purpose of holding title to 1,420 acres of commercial real estate in Aiken County, South Carolina. (R. 178). The individual

deposit as a guaranty of his good faith, and thereafter within such period any person, other than such highest bidder at the sale or any representative thereof, in foreclosure suits may in like manner raise the last highest bid, and the successful purchaser shall be deemed to be the person who submitted the last highest bid within such period and made the necessary deposit or guaranty. But the mortgagee or his representative shall enter such bid as he desires at the time the sale is made, and he and all persons acting in his behalf shall be precluded from entering any other bid in any amount at any other time except the single or last bid made by him or in his behalf at the sale.

S.C. Code Ann. § 15-39-720.

appellants in this case, Bruce Green and Cliff Redd, owned Redd Green Investments, LLC, which they formed solely to hold their ownership interest in Springs North Augusta. (R. 177). The loan was secured by a mortgage on the 1,420 acres of commercial real estate, which the Guarantors intended to sell “and pay the note off and hopefully make some money off it.” (R. 178).

As consideration for the Trust to loan the money, the Guarantors executed two guaranty agreements—one signed by Redd Green Investments, LLC and Anderson North Augusta, LLC; and the other signed by appellants Bruce Green, Cliff Redd, and the other individual defendants. *See* (R. 276, 279). The two guaranty agreements contained identical terms. *See (id.)*. All parties executed another agreement (the “Loan Agreement”) memorializing additional aspects of their relationships. (R. 22).

In November 2010, the parties amended the Loan Agreement and promissory note. *See* (R. 273–75; R. 160–61). The amendments extended the maturity date by one year and added the capitalized interest to the principal, making the new principal amount \$8,728,500. (*Id.*). The guaranty agreements remained unchanged.

III. The Foreclosure Action

After Springs North Augusta defaulted on the loan, the Trust filed an action to foreclose on the mortgage. (R. 179–80). The Trust named Springs North Augusta—the only other party to the mortgage—as the sole defendant in the foreclosure action. *See* (R. 229). Springs North Augusta failed to answer, and the master in equity entered a default judgment in favor of the Trust and ordered the property to be sold at auction with the proceeds to be applied to the debt, which then totaled \$9,450,662.50. (R. 232). The Trust bid \$6,600,000 at the initial foreclosure sale. (R. 189). Pursuant to section 15-39-720, the master in equity held the sale open for thirty days to receive additional bids (sometimes referred to as “upset” bids). At the close of the thirty days, 2nd

Avenue Holdings, LLC submitted a winning bid of \$7,160,000. (R. 265). Subsequently, 2nd Avenue Holdings assigned its winning bid to the Trust. (*Id.*). On March 20, 2013, the master issued his report memorializing that 2nd Avenue Holdings assigned its bid to the Trust and that the master conveyed the property to the Trust. (*Id.*). The Guarantors never sought to intervene in the foreclosure action and never objected to the foreclosure sale or the master's conveyance of the property to the Trust pursuant to the assignment of bid from 2nd Avenue Holdings.

Because the property sold for less than the amount of the debt, the master entered a deficiency judgment against Springs North Augusta in the amount of \$2,484,163.95, which it later amended to \$2,753,192.70, plus 15% annual interest. (R. 263–64). At the time of trial on the guaranty agreements and deficiency judgment, the Trust still owned the property and had not received any written offers to purchase the property. (R. 171). Nor had the Guarantors satisfied the deficiency. (*Id.*).

IV. The Guaranty Action

The Trust filed this action to collect the deficiency judgment from the Guarantors. *See generally* (R. 16–21). The Guarantors asserted they are not obligated to pay the deficiency judgment because 2nd Avenue Holdings is a representative of the Trust and was therefore prohibited from bidding at the upset sale pursuant to South Carolina Code section 15-39-720. *See* (R. 90, 327–32). Although the Guarantors initially asserted counterclaims against the Trust, they withdrew those counterclaims at trial “as counterclaims, but not as the factual basis for the defenses.” (R. 174). However, they maintained as a defense that the bidding statute and the implied covenant of good faith and fair dealing required the Trust to submit a bid of at least fair market value for the property at the initial foreclosure sale. *See, e.g.*, (R. 303–04).

At trial, the Trustee testified that he is responsible for managing the Trust, which Buchanan established “for the health, education[,] and welfare” of his children. (R. 158). The trustee testified that Buchanan has contributed all the assets of the Trust but cannot take assets out of the Trust nor receive any disbursements from the Trust. (*Id.*). Finally, the Trustee established the existence of the debt and the guaranty agreements. (R. 159–66).

The Guarantors presented three witnesses: Bruce Green, Cliff Redd, and George Buchanan. (R. 155–215). Bruce Green testified that, pursuant to the loan documents, the Trust advanced approximately \$6,000,000 in cash to Springs North Augusta. (R. 179); *see also* (R. 187). The \$7,590,000 figure represented in the promissory note included the \$6,000,000 cash outlay, plus prepaid interest and additional amounts. (*Id.*). Bruce Green also testified that, although he was a guarantor of the loan, he thought “that never seemed to be a problem” because he believed the property was worth several times more than the loan. (R. 179). Bruce Green further testified as to his knowledge of various events in the foreclosure process, including his assumption that the Trust would not pursue the guaranty agreements because it did not name the Guarantors as defendants in the foreclosure action. (R. 180–81). Finally, Bruce Green acknowledged that he would have been liable for the debt as a guarantor, but he believed he did not have to pay the deficiency judgment because “it was acquired the way it was.” (R. 183). Cliff Redd testified that his answers would be identical to those offered by Bruce Green. (R. 185). Neither Bruce Green nor Cliff Redd testified that any other party attempted to bid at the foreclosure sale, and the Guarantors presented no evidence that 2nd Avenue Holdings’ participation in the sale thwarted any other party’s attempt to participate.

At the close of all the evidence, the trial court granted a directed verdict in favor of the Trust on the grounds that (1) any violation of the bidding statute is not a defense to the Guarantors’

performance pursuant to the guaranty agreements, and (2) no violation of the bidding statute occurred. (R. 225–26). The Court of Appeals affirmed on two grounds. *Stephen Wilkinson v. Redd Green Invs., LLC*, Op. No. 5880 (S.C. Ct. App. filed Dec. 15, 2021) (Howard Adv. Sh. No. 44 at 27). First, the Court of Appeals held the Guarantors’ attempt to challenge the deficiency judgment is barred by res judicata. *Id.* at 33–36. Second, the Court of Appeals held, even assuming a violation of the bidding statute, the Guarantors failed to show any prejudice from the violation “such that they should be relieved from their responsibilities under the guaranty agreement.” *Id.* The Guarantors now seek certiorari. This Court should deny the petition.

Argument

The Court of Appeals properly affirmed the trial court’s directed verdict in favor of the Trust, and the Guarantors present no novel question of law worthy of this Court’s consideration nor any other grounds warranting certiorari. See Rule 242(b), SCACR. First, the Guarantors’ attempted collateral attack on the deficiency judgment is barred by res judicata. Second, the Guarantors failed to show they suffered any prejudice from the alleged violation of the bidding statute. Instead, they ask this Court to rewrite section 15-39-720 to provide that a guarantor is automatically relieved of his contractual guaranty obligation if a mortgagee allegedly violates the bidding statute, regardless of whether any evidence exists showing the guarantor was harmed in any way by the bidding and regardless of whether the terms of his guaranty agreement contradict the relief he seeks. Finally, several additional sustaining grounds, not addressed by the Guarantors, support the denial of certiorari: (1) the plain language of the guaranty agreements contradicts the “implied” terms the Guarantors seek to add to the agreements, (2) the Guarantors waived any purported defenses based on the conduct of the foreclosure sale by failing to defend the foreclosure

or challenge the conduct of the sale before entry of the deficiency judgment, and (3) the Trust in fact did not violate the bidding statute.

I. The Court of Appeals properly found the Guarantors’ attempted collateral attack on the deficiency judgment is barred by res judicata.

The Court of Appeals properly held the Guarantors’ attempt to challenge the deficiency judgment in this action is barred by the res judicata doctrine. Res judicata “defines the effect a valid judgment may have on subsequent litigation between the same parties *and their privies*.” *Duckett v. Goforth*, 374 S.C. 446, 464–65, 649 S.E.2d 72, 81–82 (Ct. App. 2007) (emphasis added). It bars subsequent actions by the same parties or their privies “when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties,” *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 108–09 (1999) (citing *Sub–Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 417 S.E.2d 569 (1992)), and it “ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues,” *Duckett*, 374 S.C. at 464–65, 649 S.E.2d at 81–82. Under the res judicata doctrine, “[a] litigant is barred from raising any issues which were adjudicated in the former suit *and any issues which might have been raised in the former suit*.” *Plum Creek Dev. Co.*, 334 S.C. at 34, 512 S.E.2d at 108–09 (emphasis added) (quoting *Hilton Head Center of S.C., Inc. v. Pub. Serv. Comm’n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). The party seeking to establish res judicata must prove three elements: (1) identity of the parties, (2) identity of the subject matter, and (3) adjudication of the issue in the former suit. *Id.* The Court of Appeals properly found all three elements of res judicata are present in this case, and the Guarantors’ defense is therefore barred.

A. The foreclosure action and this action involve the same subject matter.

The Court of Appeals properly found the subject matter of the foreclosure action and this action—Springs North Augusta’s debt to the Trust and the foreclosure sale—is the same. The

Guarantors' obligation to pay Springs North Augusta's debt, along with their alleged contractual defenses, arose out of the same transaction as the debt itself and the mortgage on which the Trust foreclosed. *See* (R. 276, 279; R. 22). In an effort to avoid the Court's *res judicata* ruling and distinguish the subject matter of the foreclosure action from the subject matter of this action, the Guarantors concede a valid, enforceable deficiency judgment exists against Springs North Augusta and attempt to frame the issue as whether the guaranty agreements remain enforceable in light of the alleged violation of the bidding statute.

The Guarantors' concession is fatal to their arguments, and the arguments are contradicted by the plain language of the guaranty agreements. If the deficiency judgment is valid, the Guarantors must pay it as they agreed when they signed the guaranty agreements. (R. 276, 279) (agreeing to "absolutely and unconditionally guarantee[] to [the Trust] and its successors and assigns the due and punctual payment of any and all notes, drafts, debts, obligations and liabilities . . . of [Springs North Augusta] at any time, now or hereafter, incurred with or held by [the Trust]"). They seek to evade their obligations by arguing the deficiency judgment "violates the Guaranty itself"—not by violating any express provisions of the guaranty agreements, because the express terms contradict their arguments, but by violating the implied covenant of good faith and fair dealing. (Pet. at 18). However, the plain, express terms of the guaranty agreements preclude the Guarantors' arguments as a matter of law.

The guaranty agreements expressly provide that the Guarantors waived any right to challenge the creation of Springs North Augusta's debts:

It is understood that any such notes, drafts, debts, obligations and liabilities may be accepted or created by or with [the Trust] at any time and from time to time without notice to the [Guarantors], and the [Guarantors] hereby express waive[] presentment, demand, protest, and notice of dishonor of any such notes, drafts, debts,

obligations and liabilities or other evidences of any such indebtedness, obligation or liability.

(R. 276, 279). The Guarantors also waived any right to argue the sale price was insufficient:

Waiver of Appraisal Rights. The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. **TO THE FULLEST EXTENT PERMITTED BY LAW AND AS A MATERIAL INDUCEMENT FOR LENDER TO MAKE THE LOAN, GUARANTOR HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.**

(R. 278, 281).

The Trust performed its obligations under the guaranty agreements by issuing a loan to Springs North Augusta, but the Guarantors now want to avoid their own obligations because, as Bruce Green testified, they never thought they would have to actually pay Springs North Augusta's debt. (R. 179). Springs North Augusta performed its obligations and has not impaired the guarantors' rights under the agreements, because they expressly have no rights other than for the loan to be issued. *See Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (explaining there is no breach of the implied covenant "where a party to a contract has done what provisions of the contract expressly gave him the right to do"); *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 500, 473 S.E.2d 52, 53 (1996) (explaining the implied covenant of good faith and fair dealing prohibits a party from doing anything "to impair the other's rights to

receive benefits under the contract”). Consequently, if the deficiency judgment is valid, as the Guarantors concede, they are obligated to perform their end of the bargain and pay the judgment.

Nothing in the guaranty agreements allows the Guarantors to argue an alleged statutory violation during the foreclosure bidding process as a defense to their guaranty obligations. If a valid deficiency judgment exists against Springs North Augusta, then Springs North Augusta owes a debt to the Trust, and the Guarantors are required to pay the debt. The Guarantors cannot concede the validity of the deficiency judgment as to Springs North Augusta—thus conceding the Trust did not breach the implied covenant of good faith and fair dealing in the loan agreement with Springs North Augusta—yet challenge whether it was obtained in good faith when the Trust demands reciprocate its performance by performing their own obligations under the guaranty agreements. Either they are challenging the existence and validity of the deficiency judgment, and their defense is therefore barred by *res judicata*, or they concede the validity of the judgment and are therefore obligated under the guaranty agreements to pay the judgment. The Court of Appeals properly found the subject matter of both actions is the same—Springs North Augusta’s debt to the Trust, which the Guarantors and Springs North Augusta are each independently obligated to pay, and the conduct of the foreclosure sale, which the master in equity approved in the foreclosure action and which the Guarantors failed to challenge. Op. No. 5880 (Howard Adv. Sh. No. 44 at 34).

B. The identity of the parties is the same in the foreclosure action and this action for purposes of *res judicata*.

The Court of Appeals properly found Guarantors are privies with Springs North Augusta, and thus the identity of the parties element of *res judicata* is satisfied. For purposes of *res judicata*, privity depends not on the relationship between the parties but instead on each party’s relationship to the subject matter of the litigation. *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012). The Guarantors and Springs North Augusta had an identical interest in obtaining a

smaller deficiency judgment because the Guarantors were obligated to pay the deficiency judgment if Springs North Augusta could not do so.

Contrary to the Guarantors' arguments, they are privies with Springs North Augusta under the facts of this case for res judicata purposes. The cases that the Guarantors rely upon do not compel a different conclusion. Those cases make clear that whether parties are privies for purposes of res judicata depends on the facts of each case, not on bright-line rules regarding common ownership of corporations or principal-agent relationships. *H.G. Hall Constr. Co. v. J.E.P. Enters.*, 283 S.C. 196, 205, 321 S.E.2d 267, 272 (Ct. App. 1984) (“**On the facts of this case** common ownership is not enough to establish privity for the purposes of res judicata.” (emphasis added)); *E.A. Prince & Son, Inc. v. Selective Ins. Co. of Se.*, 818 F. Supp. 910, 915 (D.S.C. 1993) (“**Under the facts before the court**, the theory of *res judicata* does not apply and is not a bar to this action.” (emphasis added)). The cases also provide “[t]he term ‘privity’ when applied to a judgment or decree, **means one so identified in interest with another that he represents the same legal right.**” *H.G. Hall Constr. Co.*, 283 S.C. at 204, 321 S.E.2d at 271 (emphasis added). The Guarantors and Springs North Augusta shared an identical interest and legal right in the foreclosure action. Each is independently obligated to pay Springs North Augusta’s debts to the Trust, including any deficiency judgment. Therefore, the Guarantors and Springs North Augusta had the same interest in obtaining the smallest deficiency judgment possible. Accordingly, under the facts of this case, the Guarantors and Springs North Augusta are “so identified in interest with [one] another that [they] represent[] the same legal right” and are therefore privies for purposes of res judicata. See *H.G. Hall Constr. Co.*, 283 S.C. at 204, 321 S.E.2d at 271.

C. The validity and amount of the deficiency judgment were adjudicated in the foreclosure action.

Finally, the Court of Appeals correctly held the master in equity adjudicated the amount of Springs North Augusta's remaining debt to the Trust when he entered the deficiency judgment. The master also was aware of 2nd Avenue Holdings' assignment to the Trust, and he approved of that assignment when he conveyed the property to the Trust. (R. 265, 285–86). It cannot be disputed that the Guarantors are required by contract to pay Springs North Augusta's debts to the Trust. Rather than perform their contractual obligation, they argue the amount of the debt would be lower or extinguished altogether but for the actions of 2nd Avenue Holdings at the foreclosure sale. The amount of the remaining debt (i.e., the deficiency judgment) was adjudicated by the master in equity. The Guarantors cannot assert that the deficiency judgment should have been smaller in this subsequent action. They could have asserted their rights in the foreclosure action and raised the issue of 2nd Avenue Holdings' participation in the sale, but they chose not to do so. Accordingly, the Guarantors' defense is now barred by res judicata.⁴ Thus, the purported novel question the Guarantors attempt to raise now need not be decided in this case—regardless of whether it is a valid question—because the Guarantors' assertion of the question is barred by res judicata and the plain language of the guaranty agreements.

II. The Guarantors bear the burden of proof on their affirmative defenses and did not show that they suffered prejudice from any alleged violation of the deficiency statute.

The Court of Appeals properly held the Guarantors failed to show the alleged violation of the bidding process caused them to suffer any prejudice because “no evidence shows what the

⁴ The case relied upon by the Guarantors to assert res judicata cannot apply to a deficiency judgment is inapplicable. It addresses collateral estoppel, which requires an analysis of different elements than res judicata. See *In re Est. of Brown*, 430 S.C. 474, 488, 846 S.E.2d 342, 349 (2020). The amount of the deficiency judgment was adjudicated by the master in the foreclosure action.

winning bid would have been had Second Avenue not placed the highest bid.” Op. No. 5880 (Howard Adv. Sh. No. 44 at 35). Even if a violation of the bidding statute could otherwise be a valid defense to a guaranty obligation, the Guarantors cannot be relieved of their obligation to perform under the guaranty agreements unless they can show that the sale price would have been higher but for Buchanan’s actions. They failed to do so. The fact that the winning bid was \$7,160,000 proves no party was willing to bid more than \$7,160,000, and the Guarantors suffered no prejudice from 2nd Avenue Holdings’ purchase as a matter of law because they would be in no better position if 2nd Avenue Holdings had not submitted a bid and instead a third party had purchased the property. *See Peoples Fed. Sav. & Loan Ass’n v. Myrtle Beach Ret. Grp., Inc.*, 302 S.C. 223, 233 & n.1, 394 S.E.2d 849, 855 & n.1 (Ct. App. 1990) (Cureton, J., concurring) (“[T]he developers here are not prejudiced by allowing the lender the discount because they would have been in no better position if a third party had purchased the property at the judicial sale. . . . *Indeed, it is assumed that because a third party did not buy the property at the foreclosure sale no one else was interested in purchasing the property at the price paid by the lender.*” (emphasis added)).

The Guarantors instead ask the courts to extinguish their debt on the hypothetical and illogical ground that a mortgagee would necessarily bid fair market value if it submits only one bid. No provision of South Carolina law supports such a remedy, and no evidence presented at trial supports the Guarantors’ hypothetical. Moreover, the Guarantors benefitted from 2nd Avenue Holdings’ bid at the upset sale. The property would have sold for less than \$7,160,000 if 2nd Avenue Holdings had not bid, and the deficiency judgment would therefore be larger.

Recognizing the lack of evidence that the Trust or any third party was willing to bid more than \$7,160,000, the Guarantors ask this Court to write new law that if the bidding statute is violated, then any guarantors of the debt are relieved of their contractual guaranty obligations,

regardless of the terms of their guaranty contracts—all based on the fiction that their debt would necessarily have been extinguished if the mortgagee submitted its “highest and best bid.” However, the Guarantors’ assumption that the Trust would have bid fair market value but for its alleged violation of the statute is speculation unsupported by any evidence. The Guarantors presented no evidence and cite no evidence that any bidders existed other than the Trust and 2nd Avenue Holdings. Moreover, the Guarantors presented no evidence that Buchanan and the Trust hatched a plan to bid at the upset sale before the Trust submitted its original bid. The record thus contains no evidence that the alleged improper second bid had any impact on the amount of the Trust’s original bid, and the Guarantors therefore cannot, as a matter of law, prove the critical question whether the winning bid would have been higher—and the deficiency judgment smaller—but for the alleged bidding statute violation.

The Guarantors contend the Court should assume the absence of the word “prejudice” in the statute must mean a guarantor is entitled to a presumption of “inherent prejudice” if a mortgagee allegedly violates the statute. Nothing in the statute supports this argument. The statute only explains the required process for the conduct of foreclosure sales. *See* S.C. Code Ann. § 15-39-720. It does not promise or guarantee any bid amount, provide a remedy to borrowers (much less to guarantors) in the event of an improper bid, require or support a presumption of “inherent prejudice,” relieve the Guarantors of any obligation to show prejudice, or shift the burden of proof on the Guarantors’ affirmative defenses to the Trust. It is an inappropriate logical leap to assume the absence of the word “prejudice” from the bidding statute means the statute somehow provides that a guarantor is relieved of his separate, contractual obligation to pay the debt if the mortgagee breaches the requirement that it bid only once at a foreclosure sale. The Guarantors ask this Court to write new law extending well beyond the parameters of the bidding statute. That is the duty of

the General Assembly, not the courts. The Court should therefore decline to address the purported novel question raised by the Guarantors.

The Guarantors also seek to rewrite the guaranty agreements to provide that the Guarantors must pay any deficiency judgment only if the property sells for fair market value and a deficiency remains after the sale. That is not what they agreed. The Guarantors contracted away their appraisal rights and agreed to have the winning bid apply, regardless of whether the bid exceeded fair market value. (R. 278, 281). The guaranty agreements acknowledged that South Carolina law provides statutory appraisal rights,⁵ but provided that each Guarantor “hereby waives and relinquishes the statutory appraisal rights which means the high bid at the judicial foreclosure sale will be applied to the debt regardless of any appraised value of the mortgaged property.” (R. 278, 281). The Guarantors now ask the Court to rewrite the guaranties and require the foreclosure auction to result in a sale for fair market value. However, by the plain language of the guaranty agreements, the Guarantors unconditionally agreed to pay any debt owed by Springs North Augusta. The Court cannot and should not rewrite a contract to require the opposite of the parties’ agreement.

Moreover, notwithstanding the impropriety of the Guarantors’ request to rewrite the statute and guaranty agreements, the Court of Appeals properly found the Guarantors presented no evidence of the fair market value at the time of the foreclosure sale and thus failed to prove the deficiency would have been eliminated or reduced by a bid of fair market value. Op. No. 5880

⁵ See *id.* (recognizing “that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgage property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction.”); see also S.C. Code Ann. §§ 29-3-680 through -740 (providing a deficiency judgment may be reduced or extinguished by an appraisal)

(Howard Adv. Sh. No. 44 at 35). Although Mr. Green testified the property was worth \$30,000,000 in 2009, his self-serving testimony that he did not think he would have to perform under his guaranty agreement because he thought the property was still worth some unidentified value greater than the total debt several years later is not evidence a reasonable juror could rely upon to determine the fair market value of the property—much less to determine the winning bid would have been higher than \$7,160,000 but for the alleged bidding statute violation. (*Id.*); (R. 178) (testifying “at one time [the property] was worth over \$30 million . . . when we initially owned it”).⁶ The record lacks any evidence that the fair market value of the property at the time of the sale was greater than the sale price.⁷ Accordingly, the Guarantors cannot even show the sale price was less than the fair market value of the property.

The Guarantors failed to present any evidence of prejudice, and they raise no valid basis to rewrite the bidding statute or the guaranty agreements—actions which are prohibited by law in any event. *See Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) (“When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature’s language.”); *Hardee v. Hardee*, 355 S.C. 382, 387, 585 S.E.2d

⁶ The cases the Guarantors rely upon primarily address the **admissibility** of a property owner’s testimony as to the diminution in value caused by damages to his property. *See Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 594–95, 493 S.E.2d 875, 880 (Ct. App. 1997); *Waites v. S.C. Windstorm & Hail Underwriting Ass’n*, 279 S.C. 362, 366, 307 S.E.2d 223, 225 (1983); *see also Hill v. City of Hanahan*, 281 S.C. 527, 531–32, 316 S.E.2d 681, 684 (Ct. App. 1984) (addressing the admissibility of testimony as to the value of land in a takings case). The admissibility of Bruce Green’s testimony is not at issue.

⁷ The Guarantors’ assertion that “[t]he Trust itself valued the Property at \$15 Million in the days following the sale,” (Pet. at 4 n.2), is not based on **evidence**. Rather, the Guarantors cite to a statement made by their own counsel during argument on an evidentiary issue regarding the admissibility of “testimony related to any negotiations for the subsequent sale of the property that did not result in a written contract or a purchase agreement.” (R. 120–28); *see also* (R. 128) (finding the testimony inadmissible).

501, 503 (2003) (“The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous.”). The Court therefore should not reach the Guarantors’ “novel” question.

III. Additional sustaining grounds preclude a reversal of the Court of Appeals and trial court and therefore support the denial of certiorari.

A. The plain language of the guaranty agreements precludes the Guarantors’ efforts to evade their contractual obligations to pay the deficiency judgment.

By their plain, express terms, the guaranty agreements, read as a whole as all contracts must be read, contradict the Guarantors’ arguments. The Guarantors ask this court to add implied terms that contradict the plain, express terms of the guaranty agreements. This court cannot rewrite the guaranty agreements. The guaranty agreements are contracts subject to standard rules of contract interpretation. *TranSouth Fin. Corp. v. Cochran*, 324 S.C. 290, 294, 478 S.E.2d 63, 65 (Ct. App. 1996) (“A guaranty is a contract and should be construed based on the language used by the parties to express their intention.”). Therefore, the question whether a violation of the bidding statute constitutes a defense to payment on the guaranty agreements is an issue of contract interpretation. When a contract’s language is unambiguous, the court must interpret the contract based on the language alone. *First S. Bank v. Rosenberg*, 418 S.C. 170, 180, 790 S.E.2d 919, 925 (Ct. App. 2016) (citing *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 615, 732 S.E.2d 626, 628 (2012)). The court must read contractual terms in the context of the whole contract and “may not create an ambiguity by pointing out a single sentence or clause.” *Id.* (quoting *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). “This court’s duty is to enforce the contract made by the parties regardless of the parties’ failure to carefully guard their rights.” *Id.*

The guaranty agreements are personal obligations running directly from the Guarantors to the Trust and were immediately enforceable against the Guarantors upon default of the borrower, if the Trust chose to enforce them. *TranSouth Fin. Corp.*, 324 S.C. at 295, 478 S.E.2d at 66. The Guarantors' rights are determined solely by the terms of the guaranty agreements, and the guaranty agreements do not support their position. *See Citizens & S. Nat. Bank of S.C. v. Lanford*, 313 S.C. 540, 544, 443 S.E.2d 549, 551 (1994) ("We adhere to the principle that the guaranty of payment and the promissory note are two separate contracts. We conclude that [the guarantor] is not a party to the note and cannot avail himself of defenses based on impairment of collateral under S.C. Code Ann. § 36-3-606 (1976).").

The guaranty agreements clearly provide that the Trust was making a loan in consideration for an unconditional guarantee of payment by the Guarantors. (R. 276, 279) (providing the Guarantors "absolutely and unconditionally" guarantee payment of the loan "[a]s an inducement to [the Trust] to extend credit to and to otherwise deal with **SPRINGS NORTH AUGUSTA, LLC** . . . and in consideration thereof."). The guaranty agreements are therefore absolute guaranties or guaranties of *payment*; they are not guaranties of *collection*. *See Peoples Fed. Sav. & Loan Ass'n*, 300 S.C. at 281, 387 S.E.2d at 674 ("Under an absolute guaranty of payment, the creditor may maintain an action against the guarantor immediately upon default of the debtor. A guaranty of collection conditions liability of the guarantor upon prosecution of the primary debtor without success." (citations omitted)); *see also* (R. 276, 279) ("providing the guaranty agreements are guarantees "of payment and not of collection"). As guaranties of payment, the Trust is not obligated to take any particular action or accomplish any requirement before demanding that the Guarantors pay the debt, and it is not required to somehow protect the Guarantors by minimizing the amount of the debt they owe. The Guarantors expressly contracted away any such protection.

See Lanford, 313 S.C. at 543, 443 S.E.2d at 551 (finding a guaranty agreement imposed no obligation on the lender to pursue or exhaust the collateral and, instead, “unambiguously places all guarantors, jointly and severally, under liability for 100% of the contract debt”).

The express terms of the guaranty agreements provide (1) the Trust is not required to foreclose on the mortgage prior to pursuing payment from the Guarantors; (2) the loan is not conditional on the Trust taking *any* particular steps related to the mortgage prior to seeking payment of the remaining debt from the Guarantors; and (3) the Guarantors have no right of subrogation unless and until the borrower’s debt is paid in full. (R. 276, 279) (providing the Guarantors’ obligation is “payable immediately upon demand without recourse having been had by [the Trust] against the Borrower or any other guarantor, person, firm, or corporation, and without first resorting to any property held by [the Trust] as collateral security”).

The guaranty agreements further allow the Trust discretion to foreclose on the property first and to pursue the Guarantors if the debt still has not been fully satisfied after the foreclosure. Because the Guarantors cannot escape the plain terms of the guaranty agreements, they ask this court to rewrite the agreements by adding implied terms that contradict the express terms of the agreements. The implied covenant of good faith and fair dealing cannot require the Trust to submit a single bid for fair market value at a foreclosure sale before enforcing a deficiency judgment against the Guarantors when the Trust is not required to pursue foreclosure or a deficiency judgment at all. *See Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (explaining there is no breach of the implied covenant “where a party to a contract has done what provisions of the contract expressly gave him the right to do”). Moreover, the master-in-equity approved the sale and entered a judgment in the foreclosure action. It cannot be an act of bad faith to do something with the permission and approval of a court. The Guarantors also now concede

the deficiency judgment is valid and enforceable against Springs North Augusta. Therefore, the deficiency judgment was necessarily procured in good faith.

The Guarantors have already received the benefit of the guaranty agreements. There is no dispute that the Trust extended credit to Springs North Augusta. Thus, the Trust performed under the agreements in 2009, and the Guarantors received the benefit for which they bargained. The Trust's alleged actions in enforcing its own rights pursuant to the express terms of the guaranty agreements, long after it performed its obligation, cannot be a breach of the implied covenant of good faith and fair dealing. *Adams*, 320 S.C. at 277, 465 S.E.2d at 85; *Tadlock Painting Co.*, 322 S.C. at 500, 473 S.E.2d at 53 (explaining the implied covenant of good faith and fair dealing prohibits a party from doing anything “to impair the other’s rights to receive benefits under the contract”). Similarly, the Guarantors’ miscalculation of the risk does not excuse them from their contractual obligations. *See* (R. 179) (explaining the Guarantors thought they would never have to pay under the guaranty agreements because they believed the property was worth more than the amount of the loan); *see also Rosenberg*, 418 S.C. at 180, 790 S.E.2d at 925.

The Guarantors expressly waived their right to argue the sale price was insufficient, as explained above. (R. 278, 281). The “Waiver of Appraisal Rights” clause expressly provides that, as an inducement for the Trust to make the loan, the winning bid at any foreclosure sale is final and the Guarantors do not have the right to assert that the bid should be higher. (*Id.*). The Guarantors also contracted away any rights to challenge the creation of Springs North Augusta’s debts. (R. 276, 279). Thus, the conduct of the foreclosure sale—and the accusation that it resulted in a sale for less than fair market value—cannot be a defense to the Guarantors’ performance of their contractual obligations. By the plain language of the guaranty agreements, the Guarantors must pay the deficiency judgment—a debt of Springs North Augusta—regardless of how it was

created, and they cannot avoid their obligations on the ground that the deficiency judgment was created by a foreclosure sale allegedly involving more than one bid by the Trust.

The plain language of the guaranty agreements does not include any requirement that the property sell for the full amount of the debt at a foreclosure sale or for fair market value before the Trust may pursue recovery from the Guarantors. The guaranty agreements are *absolute* guaranties, and the Guarantors are liable for whatever the borrower failed to pay. The Guarantors ask this court to create new law and add new, implied terms to the guaranty agreements providing them with greater rights than those for which they contracted. Courts cannot rewrite contracts to change the parties' agreement, and this Court should therefore deny certiorari.

B. The Guarantors waived their purported defense by failing to defend the foreclosure action or challenge the conduct of the foreclosure sale before entry of the deficiency judgment.

The Guarantors' purported defense is barred by laches and waiver. They controlled Springs North Augusta. (R. 177–78). Redd Green Investments LLC, a petitioner here, is one of two owners of Springs North Augusta LLC. (R. 177). Cliff Redd and Bruce Green, also petitioners here, are the only owners of Redd Green. (*Id.*). Thus, the Guarantors had notice of the foreclosure action, and they controlled whether Springs North Augusta defaulted in the foreclosure action and whether Springs North Augusta challenged the conduct of the foreclosure sale.⁸ See (R. 180–82) (explaining the Guarantors' knowledge and assumptions at various points in the foreclosure process).

The Guarantors cannot allow Springs North Augusta to go into default, sit on their purported rights as the foreclosure action proceeds to a sale and deficiency judgment while taking no action to protect those purported rights, then assert in this action that they are not bound by the

⁸ Moreover, the sale in this case was publicly noticed. See (R. 265).

outcome of the foreclosure action because Springs North Augusta did not contest the action. *See Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994) (“Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay suffers his adversary to incur expenses or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce these rights.”); *Lawrimore v. Am. Health & Life Ins. Co.*, 276 S.C. 112, 114, 276 S.E.2d 296, 297 (1981) (“Waiver is defined as an intentional relinquishment of a known right.”). Such an outcome is inequitable and would reward the Guarantors for failing to defend their own interests. The Guarantors could have also requested to intervene in the foreclosure action to protect their rights, but they did not. *See* Rule 24, SCRCPP (providing criteria for intervention). This Court should affirm the judgment in favor of the Trust.

Rather than defend the foreclosure, intervene, or object to the conduct of the sale when the master in equity could have resolved any alleged issues in the sale process, the Guarantors chose not to participate in the foreclosure proceedings and launched a collateral attack when the Trust attempted to collect the deficiency judgment. Although the Guarantors carefully avoid describing their defense as a collateral attack on the deficiency judgment, there is no other description for the defense. If the deficiency judgment is valid as the Guarantors concede, it is enforceable by the Trust against the Guarantors. The Guarantors unreasonably delayed in objecting to the conduct of the foreclosure sale and now seek to use that delay to the prejudice of the Trust by avoiding their obligations under the guaranty agreements. The Guarantors waived their defenses. *See Lawrimore*, 276 S.C. at 114, 276 S.E.2d at 297. This court should deny certiorari. Regardless of whether their novel question is a valid one, they waived their right to pursue it.

C. The Trust did not violate the bidding statute.

As an additional sustaining ground, this Court should affirm the trial court's finding that no violation of the bidding statute occurred. Although the Guarantors contend it is "undisputed" that "the Trust blatantly violated the Deficiency Statute," (Pet. at 1), the Trust in fact did not violate the bidding statute. The trial court stated it assumed for purposes of its directed verdict ruling that a violation of the statute occurred, but it also found that 2nd Avenue Holdings is not a representative of the Trust. (R. 225–26). If 2nd Avenue Holdings is not a representative of the Trust, no violation of the statute occurred, and if no violation of the statute occurred, the Guarantors have no defense to payment of the deficiency judgment, regardless of the answer to their purported novel question.

To prove a violation of section 15-39-720, the Guarantors must prove the winning bid of \$7,160,000 was entered by a representative of the Trust. See S.C. Code Ann. § 15-39-720. The winning bid at the upset sale was submitted by 2nd Avenue Holdings, LLC. (R. 162). The Trust does not dispute that Buchanan is the sole owner of 2nd Avenue Holdings. However, there is no legal relationship between 2nd Avenue Holdings and the Trust. Moreover, the Trust is an irrevocable trust set up for the benefit of Buchanan's children, and Buchanan has no legal right to make decisions for the Trust. (R. 158–59, 169–71). The fact that Buchanan set up the Trust—but has no legal control over the Trust's actions—and is the sole owner of 2nd Avenue Holdings does not establish that 2nd Avenue Holdings is a representative of the Trust. Additionally, Buchanan's decision, made after the foreclosure sale, to transfer the property to the Trust does not retroactively transform his bid on behalf of 2nd Avenue Holdings into a bid on behalf of the Trust. Buchanan is free to acquire property and transfer it to the Trust. Doing so does not render any transaction by which he acquired the property an action taken by the Trust, and his occasional role as "advisor"

to the Trust does not render every action he takes an action by the Trust. The statute does not prohibit a mortgagee from ultimately owning the property; it only prohibits the mortgagee from submitting a second bid. The Trust submitted only one bid. Therefore, no violation of the statute occurred, and the Guarantors are obligated to pay the deficiency judgment.

Conclusion

The Court of Appeals properly affirmed the trial court on the grounds that the Guarantors' challenge to the deficiency judgment is barred by res judicata and that the Guarantors cannot show any prejudice resulting from the conduct of the foreclosure sale. Moreover, the plain language of the guaranty agreements precludes the Guarantors' allegations that the Trust breached the implied covenant of good faith and fair dealing, and the Guarantors waived any right to challenge the deficiency judgment. Finally, the Trust did not violate the bidding statute. This case presents no novel question of law for this Court to decide. Accordingly, the Court should deny the petition for writ of certiorari.

(signature page attached)

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Nicholas A. Charles

John T. Moore

SC Bar No. 004056

E-Mail: john.moore@nelsonmullins.com

A. Mattison Bogan

SC Bar No. 72629

E-Mail: matt.bogan@nelsonmullins.com

Nicholas A. Charles

SC Bar No. 101693

E-Mail: nick.charles@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

*Attorneys for Stephen Wilkinson, as Trustee of George B.
Buchanan, Jr. Irrevocable Family Trust Dated the 15th day of
July, 2001*

Columbia, South Carolina

May 16, 2022

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2022-000369

Stephen Wilkinson, as Trustee of George B. Buchanan,
Jr. Irrevocable Family Trust Dated the 15th day of July,
2001, ...

Respondent,

v.

Redd Green Investments, LLC, Anderson North Augusta,
LLC, Herbert Anderson, Jr., A. Bruce Green, Herbert
Keith Anderson, and L. Cliff Redd,.....

Defendants,

Of which Redd Green Investments, LLC, A. Bruce
Green, and L. Cliff Redd are.....

Petitioners.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough, L.L.P., attorneys for Stephen Wilkinson, as Trustee of George B. Buchanan, Jr. Irrevocable Family Trust Dated the 15th day of July, 2001, do hereby certify that I have served all counsel and/or parties in this action with a copy of the pleading(s) hereinbelow by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

Pleading(s): Return to Petition for a Writ of Certiorari

RECEIVED

May 16 2022

S.C. SUPREME COURT

Parties Served:

apeace@hmp-law.com

M. Alan Peace, Esquire
Harrell Martin & Peace, P.A.
P. O. Box 1000
Chapin, SC 29036

Wlightsey@wyche.com

Wallace K. Lightsey, Esquire
bwilson@wyche.com
William M. Wilson III, Esquire
Wyche P.A.
P.O. Box 728
Greenville, SC 29602



Roxanne Englin
Administrative Assistant

Columbia, South Carolina
May 16, 2022

Roxanne Englin

From: Roxanne Englin
Sent: Monday, May 16, 2022 11:55 AM
To: 'apeace@hmp-law.com'; 'wlightsey@wyche.com'; 'bwilson@wyche.com'
Cc: Nick Charles; Matt Bogan; John Moore
Subject: Stephen Wilkinson v. Redd Green Investments, Appellate Case No. 2022-000369 *
Attachments: Wilkinson v. Redd Green Investments - Return to Petition for Writ of Certiorari.pdf;
Wilkinson - Proof of Service.pdf

Counsel, attached for service upon you in the above matter is the respondent's Return to Petition for Writ of Certiorari. Thank you.



ROXANNE ENGLIN **SENIOR ADMINISTRATIVE ASSISTANT**
roxanne.englin@nelsonmullins.com

MERIDIAN | 17TH FLOOR
1320 MAIN STREET | COLUMBIA, SC 29201
T 803.255.9356 F 803.256.7500
NELSONMULLINS.COM

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Jun 13 2022

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

S.C. SUPREME COURT

R. Knox McMahon, Circuit Court Judge

Opinion No. 5880 (S.C. Ct. App. filed December 15, 2021)

Stephen Wilkinson, as Trustee of George B. Buchanan, Jr.
Irrevocable Family Trust Dated the 15th day of July, 2001, ... Respondent,

v.

Redd Green Investments, LLC, Anderson North Augusta, LLC,
Herbert Anderson, Jr., A. Bruce Green, Herbert Keith Anderson,
and L. Cliff Redd, ... Defendants,

Of which Redd Green Investments, LLC, A. Bruce Green,
and L. Cliff Redd are Petitioner.

PETITIONERS' REPLY TO RETURN TO PETITION FOR A WRIT OF
CERTIORARI

Wallace K. Lightsey
William M. Wilson III
WYCHE, P.A.
PO Box 728
Greenville, South Carolina 29602
(864) 242-8200
Attorneys for Petitioners

Other Counsel of Record:

Roy R. Hemphill, Esq.
McDonald Patrick Poston Hemphill & Roper, LLC
414 Main Street (29646)
P.O. Box 1547
Greenwood, South Carolina 29648
(864) 229-2511
Attorneys for Herbert Keith Anderson, Anderson North Augusta, and Herbert Anderson, Jr.

Erik T. Norton, Esq.
John T. Moore, Esq.
1320 Main Street, 17th Floor
P.O. Box 11070
Columbia, South Carolina 29211-1070
(803) 799-2000
Attorneys for Stephen Wilkinson, as Trustee of George B. Buchanan, Jr. Irrevocable Family Trust Dated the 15th day of July, 2001

M. Alan Peace, Esq.
Harrell, Martin & Peace, P.A.
P.O. Box 1000
Chapin, SC 29036
(803) 345-3353
Attorneys for Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd

Gene Trotter, Esq.
2 Cedarwood Lane
Columbia S.C. 29205
(803) 254-5320
Attorneys for Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd

INDEX

ARGUMENTS.....	1
CONCLUSION.....	14

TABLE OF AUTHORITIES

	Page(s)
 <u>Cases</u>	
<i>Adams v. G.J. Creel & Sons, Inc.</i> , 320 S.C. 274, 465 S.E.2d 84 (1995).....	3
<i>Jackson v. Bi-Lo Stores, Inc.</i> , 313 S.C. 272, 437 S.E.2d 168 (Ct. App. 1993)	2
<i>Peoples Fed. Sav. & Loan Ass’n v. Myrtle Beach Ret. Grp., Inc.</i> , 300 S.C. 277, 387 S.E.2d 672 (1989).....	8
<i>Peoples Fed. Sav. & Loan Ass’n v. Myrtle Beach Ret. Grp., Inc.</i> , 302 S.C. 223, 394 S.E.2d 849 (Ct. App. 1990)	6
<i>Provident Life & Acc. Ins. Co. v. Driver</i> , 317 S.C. 471, 451 S.E.2d 924 (Ct. App. 1994)	2
<i>Tadlock Painting Co. v. Maryland Cas. Co.</i> , 322 S.C. 498, 473 S.E.2d 52 (1996).....	3
<i>Wachovia Bank, NA v. Coffey</i> , 389 S.C. 68, 698 S.E.2d 244 (S.C. Ct. App. 2010)	2
<i>Yelsen Land Co. v. State</i> , 397 S.C. 15, 723 S.E.2d 592 (2012).....	4
 <u>Statutes</u>	
S.C. Code § 15-39-720	10, 14
S.C. Code Ann. § 33-44-202	11

ARGUMENTS

I. ***Res Judicata* presents a novel issue of South Carolina law.**

In its Return, the Trust contends that *res judicata* operates as a bar because (1) the same subject matter is involved in the present action as in the prior foreclosure action, (2) the same parties are involved, and (3) the matter was actually adjudicated in the prior foreclosure action. This issue is novel under South Carolina law in the context of a foreclosure action and a subsequent action against a guarantor. The failure of any one of the Trust's arguments is fatal to the Trust. As discussed below, each of the three arguments fails.

A. **Different subject matter is involved in the present action.**

The Trust contends that the same subject matter is involved, namely the establishment of the debt against Springs North Augusta. However, the issue in the present case is not the debt against Springs North Augusta but instead is whether that debt may be enforced against the Guarantors pursuant to the terms of the Guaranty. The Guaranty agreement simply was not at issue in the foreclosure action. Nor did the court in the foreclosure action consider or rule upon whether the Deficiency/Bidding Statute was violated. This issue never was raised because the sole defendant, Springs North Augusta, was in default and therefore did not contest the foreclosure sale.

The Trust further contends that the Guarantors' concession (that the deficiency judgment is valid as against Springs North Augusta) is fatal to their position because the Guaranty agreements "absolutely and unconditionally" guarantee payment. However, this argument begs the question of what the

Guaranty requires and whether the violation of the Deficiency/Bidding Statute operates as a defense to payment under the Guaranty. The Trust argues that “[n]othing in the guaranty agreements allows the Guarantors to argue an alleged statutory violation during the foreclosure bidding process as a defense to their guaranty obligations.” (Return at 11). However, this argument ignores the express language of the Guaranty, indicating (in bold, all caps) that **“THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT,”** (R. p. 278, 281), which of course is a reference to the high bid in accordance with the Deficiency/Bidding Statute. Accordingly, the Guaranty expressly, or at the very least impliedly, required the Trust not to violate the statute. Alternatively, the doctrines of waiver, unlawful act, and/or unclean hands bar the Trust from enforcing the ill-gotten deficiency judgment by way of a separate action against the guarantors.¹

The Trust also cites to language in the Guaranty that it contends waives any right to challenge the creation of the debt. However, the cited language merely indicates that the debt may be established without notice to the Guarantors without

¹ See, e.g., *Wachovia Bank, NA v. Coffey*, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010), (“The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.”), *aff’d as modified*, 404 S.C. 421, 746 S.E.2d 35 (2013); *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 928–29 (Ct. App. 1994) (“Acts that are inconsistent with the continued assertion of a right may also give rise to a waiver.”); *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 276, 437 S.E.2d 168, 170 (Ct. App. 1993) (“It is a well-founded policy of law that no person be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act.”).

in any way indicating that the Guarantors waive the Trust's violation of South Carolina law.

The Trust also cites to language in the Guaranty that it contends waives any right to argue that the sale price was sufficient. However, Guarantors argument is not one of sufficiency of the sale price but instead is one of the implications of violating the Deficiency/Bidding Statute. Regardless, the cited language refers to the waiver of appraisal rights as opposed to the waiver of legal defenses.

The Trust also contends that the Guarantors have no rights under the Guaranty other than for the loan to be issued, citing to *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (explaining there is no breach of the implied covenant "where a party to a contract has done what provisions of the contract expressly gave him the right to do"); *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 500, 473 S.E.2d 52, 53 (1996) (explaining the implied covenant of good faith and fair dealing prohibits a party from doing anything "to impair the other's rights to receive benefits under the contract"). These cases support the Guarantors, not the Trust. The Trust did not do what it had a right to do when it violated the Deficiency/Bidding Statute, as there is no right to violate South Carolina law. In addition, the Trust impaired the Guarantors' rights to receive benefits under the Guaranty, namely the benefit of the entry of a high bid in accordance with South Carolina law. The Guarantors would not have agreed to waive appraisal rights without the fair consideration in return that the Trust would

enter a high bid in accordance with the Deficiency/Bidding Statute as required by both South Carolina law and the language in the Guaranty itself.

B. The identity of the parties is not the same.

The Guarantors were not named in the prior foreclosure action, and so the identity of the parties was not the same. The Trust therefore contends that the Guarantors are “privies” to the borrower, Springs North Augusta, because of their identical relation to the subject matter of the litigation, namely an interest in obtaining a smaller deficiency judgment. The Trust does not cite to any case holding that a guarantor and a borrower are privies on the basis that they both share an interest in obtaining a smaller deficiency judgment. Instead, the Trust cites to *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012), which addressed real estate title issues and determined that a later owner of property was barred from relitigating title issues that an earlier owner in the chain of title previously litigated. A bar against subsequent owners in the chain of title from relitigating title issues by their predecessors in title has no relation or bearing to the present circumstance, and so this case is inapposite.

C. The foreclosure action did not adjudicate the enforceability of the Guaranty.

Finally, the Trust contends that the validity and amount of the deficiency judgment was adjudicated in the foreclosure action. As noted above, the foreclosure action merely entered a default deficiency judgment that was enforceable against Springs North Augusta; but it did not adjudicate whether the Deficiency/Bidding Statute was violated, nor did it adjudicate whether such violation could serve as a

defense to enforcement of the Guaranties. Accordingly, the issues in the present action were not adjudicated in the prior action.

D. The *res judicata* effect of a ruling against a borrower in relation to a subsequent action against a guarantor is a novel issue of South Carolina law.

Moreover, the Trust does not cite to any authority holding that the entry of a deficiency judgment against a borrower in a foreclosure action is *res judicata* with respect to a subsequent action against a guarantor. This novel issue of law should be addressed by this Court.

II. Any requirement to show prejudice was met.

In its Return, the Trust contends that the winning bid of \$7,160,000 by 2d Avenue Holdings proves that no party was willing to bid higher and therefore proves that there was no prejudice. However, this argument fails to recognize that the prejudice is inherent because the Trust itself never presented its highest and best bid as required by the Deficiency/Bidding Statute. Instead, its bid at the first sale was *less* than its highest bid, as demonstrated by the fact that its representative, 2d Avenue Holdings, bid a higher amount at the second sale. If a mortgagee could test the market for a highest bid by bidding at the second sale, there would be no need for two sales but only one. The obvious purpose of having two sales is to force the mortgagee to bid “blind” at the first sale and therefore be incentivized to make the highest bid possible—one that could be higher than it would make if other bidders were present.

It is unknown what amount the Trust would have bid at the first sale if it had made its true high bid. It follows that the Guarantors were prejudiced as a

matter of law. The Trust cites to a concurring opinion in *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Ret. Grp., Inc.*, 302 S.C. 223, 233 & n.1, 394 S.E.2d 849, 855 & n.1 (Ct. App. 1990), for the proposition that it must be assumed no one was interested in purchasing the property at a higher price than the lender when a third party did not buy the property. But this case has absolutely no bearing on the present issue because it involved a foreclosure sale where the lender made a single bid and where *there were no upset bidders*. Accordingly, it did not involve a violation of the Deficiency/Bidding Statute.

The Trust further contends, incorrectly, that “[t]he Guarantors . . . ask the courts to extinguish their debt on the hypothetical and illogical ground that a mortgagee would necessarily bid fair market value if it submits only one bid.” This contention unfairly mischaracterizes the Guarantors’ position. First, the Guarantors do not seek to extinguish the debt but instead seek to assert a defense to the enforcement of the Guaranty. Second, the Guarantors never contended that a mortgagee is required to bid fair market value or that it necessarily would do so if it were to comply with the statute and submit only one bid. Instead, the Guarantors contend that the design and purpose of the statute is to incentivize a mortgagee to make its highest and best bid by only allowing it to bid one time and to do so “blind” as to the presence of other bidders, which logically would have the result of maximizing such a bid and producing a higher likelihood of the bid approaching fair market value. The Guarantors were prejudiced because they were deprived of such a bid.

The Trust further contends that the Guarantors offered no evidence of other bidders at the second sale. But the Trust itself admitted there were other bidders in its opening statement at trial: “So Mr. Buchanan, on behalf of . . . Second Avenue Holdings . . . went to the second sale **and there were other bidders there and multiple bids were put in**. In the end, Second Avenue Holdings, LLC, won the bid and held the property.” (R. p. 145 (emphasis added)).² Furthermore, if there were no other bidders, then there would have been no need for 2d Avenue Holdings to bid higher than the Trust and then assign its higher bid back to the Trust. (R. pp. 193-94, 285-86).

III. The additional sustaining grounds asserted by the Trust lack merit.

A. The plain language of the Guaranty supports the Guarantors argument.

The Trust contends that the plain language of the Guaranty contradicts their arguments. However, the plain language indicates that the “HIGH BID” under the Bidding/Deficiency Statute would be applied to the debt. (R. p. 278, 281). Accordingly, there is no contradiction. Moreover, it only makes sense to read the Guaranties as requiring the Trust to follow South Carolina law in a foreclosure proceeding, not to violate it.

The Trust further contends that a violation of the Deficiency/Bidding Statute cannot serve as a defense to the Guaranty because the Guaranty was an “absolute guaranty of payment” as opposed to a guaranty of collection. This distinction has no

² A party is bound by the admissions of counsel at opening statement. 88 C.J.S. Trial § 267.

relevance here because an absolute guaranty of payment simply means that an action could have been maintained against the Guarantors immediately upon default of the borrower. *See Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Ret. Grp., Inc.*, 300 S.C. 277, 281, 387 S.E.2d 672, 674 (1989). But in no way does it mean that the Trust had the right to violate the Deficiency/Bidding Statute if it chose to pursue an action against the borrower first. Indeed, the *Peoples* case (relied upon by the Trust) recognized that “[t]he guarantors [under an absolute guaranty of payment] are entitled to have the proceeds of foreclosure applied to reduce the debt owed by the guarantor. *See id.*” *Id.* Such an entitlement necessarily includes an entitlement to the mortgagee complying with the Deficiency/Bidding Statute that governs foreclosures and deficiencies. Simply put, a requirement that a lender comply with the Deficiency/Bidding Statute during the foreclosure process is consistent with the enforcement of an absolute guaranty of payment and necessarily a requisite of the lender’s obligations under the Guaranty.

The Trust further contends that the master-in-equity approved the sale and entered a judgment in the foreclosure sale, but as noted above, the issue of whether the Trust complied with the Deficiency/Bidding Statute never was raised or ruled upon during the foreclosure action. The master-in-equity’s entry of a deficiency judgment following a foreclosure sale when the borrower was in default was nothing more than a ministerial action and cannot be viewed as a ruling on whether the Trust complied with the Deficiency/Bidding Statute.

The Trust further contends that the Guarantors already received the benefit of the Guaranty agreements and that the Trust fully performed when it funded the loan. However, this argument fails to appreciate that the Guarantors did not receive the benefit of the Trust's high bid at the foreclosure sale as expressly provided within the Guaranty and as further provided by the Deficiency/Bidding Statute; nor does it appreciate that the Trust's performance under the Guaranty agreements not only included funding the loan but also included complying with the Deficiency/Bidding Statute.

The Trust further contends that Guarantors waived the right to argue the sale price was insufficient because they waived appraisal rights. However, the Guarantors are not arguing about the sufficiency of the price. Instead, they are arguing that the Trust violated the Deficiency/Bidding Statute and that such a violation may serve as a defense to the enforcement of the Guaranty.

The Trust further contends that the Guarantors waived the right to challenge the creation of the debt. Under this reasoning, the Guarantors could not challenge a fraudulently created note. Regardless, it is not the creation of the debt that is at issue; it is whether a violation of the Deficiency/Bidding Statute may serve as a defense to the enforcement of the Guaranty.

B. The Guarantors did not waive their defense by failing to defend the foreclosure action.

The Trust contends that the Guarantors waived a defense under the Deficiency/Bidding Statute by failing to defend the foreclosure action or challenge the foreclosure sale before the deficiency judgment was entered. But they were not

named in the foreclosure action, and the foreclosure sale occurred after the borrower was in default. The Trust cites to no legal precedent requiring a guarantor to appear in a foreclosure action and/or challenge a lender's violation of the Deficiency/Bidding Statute within the foreclosure action when the guarantor was not named in the action. These issues are nothing more than restatements of the *res judicata* argument, which is addressed above.

C. The Trust violated the Deficiency/Bidding Statute.

The Trust incorrectly contends that it did not violate the Deficiency/Bidding Statute, which ignores the trial court's assumption for purposes of granting a directed verdict that there was a violation: "If we're looking at the evidence in the light most favorable to the Defendants, there was a violation of Section 15-39-720, upset bid within thirty days on foreclosure or execution sale." (R. p. 225). Although the judge did state that he did not think the Trust violated the statute, he was clear that "there is more than one inference that can be drawn from parts of the testimony" but that "following the standard of directed verdict," he was "drawing that inference . . . in the light most favorable to the Defendant." (R. pp. 225-26). When asked for clarification for the record concerning the ruling, the judge clarified: "I assume there was a violation of the statute for purposes of my ruling." (R. p. 226) (emphasis added).

The Trust also argues that 2nd Avenue Holdings was not a representative of the Trust. This argument is irrelevant because the trial court's ruling was based upon the assumption that it was a representative and that there was a violation of the statute. To the extent this Court were to review the sufficiency of evidence in

the record for a jury to find that 2nd Avenue Holdings was a representative of the Trust, there is ample evidence supporting such a factual conclusion or inference, including the following:

- Mr. Buchanan was the sole owner of 2nd Avenue Holdings. (Tr. p. 111) (R. p. 204). Mr. Buchanan, acting on behalf of his wholly owned 2nd Avenue Holdings, “went to the second sale and there were other bidders there and multiple bids were put in” and “[i]n the end, Second Avenue Holdings, LLC, won the bid and held the property.” (*Id.* p. 52) (R. p. 145). *Given that this was a single member LLC solely owned and controlled by Mr. Buchanan, 2nd Avenue Holdings should not be viewed as having interests distinct from Mr. Buchanan’s interests. Thus, to the extent he was operating as a representative of the Trust, so was 2nd Avenue Holdings.*
- Mr. Buchanan falsely testified that 2nd Avenue Holdings was created three or four years prior to the foreclosure sale, when the Articles of Organization revealed that they were signed on September 4, 2012, and filed on September 6, 2012,³ only a few days following the first sale. (Tr. p. 97 & Green Ex. 1) (R. pp. 190, 283-84). *A reasonable inference from the creation of the entity immediately following the first sale indicates that it was created to be used as an instrumentality in carrying out the unlawful violation of the Deficiency/Bidding statute. His false testimony impeaches any testimony he may have given contrary to the Guarantors’ position.*
- Both the Trustee (Stephen Wilkinson) and Mr. Buchanan testified concerning Mr. Buchanan’s keen interest and active role as a participant and advisor with respect to the Trust. Mr. Wilkinson testified that all of the assets held by the Trust have “all been put in there by Mr. Buchanan” for the benefit of “Mr. Buchanan’s children.” (*Id.* pp. 65-66) (R. pp. 158-59). He further explained that as Trustee he makes “distributions for the health, education and welfare” of the children and that the establishment of the Trust allows Mr. Buchanan to avoid estate taxes. (*Id.* pp. 65, 74) (R. pp. 158, 167). *This testimony shows that Mr. Buchanan often acted on behalf of the Trust, playing an active role as a participant and advisor with respect to the business of the Trust. This is evidence that he acted at the upset sale as a representative.*

³ “Unless a delayed effective date is specified, the existence of a limited liability company begins when the articles of organization are filed.” S.C. Code Ann. § 33-44-202(b).

- Additionally, Mr. Buchanan testified that he set up the Trust and funded it out of his own assets, (Tr. pp. 93-94) (R. pp. 186-87); that he holds the title of “financial advisor” in the current structure of the Trust, (*Id.* p. 111) (R. p. 204); and that he routinely identifies properties to be put into the trust, (*id.* p. 110) (R. p. 203). He further conceded that he was the one who identified the loan opportunity at issue in this action and met with the Appellants on behalf of the Trust, without the Trustee, to initiate the transaction. (*Id.* p. 110) (R. p. 203). The Trustee also obtained Mr. Buchanan’s consent before proceeding with the foreclosure action. (*Id.* p. 95) (R. p. 188). *This testimony shows that Mr. Buchanan often acted on behalf of the Trust, playing an active role as a participant and advisor with respect to the business of the Trust.*
- The Trustee, Mr. Wilkinson, agreed that Mr. Buchanan gives financial advice as needed, (*id.* p. 76) (R. p. 169), and that Mr. Buchanan makes recommendations about either buying property or selling property and brings most of the Trust’s investments to the table. (*Id.* p. 78) (R. p. 171). Mr. Wilkinson agreed that he listens to Mr. Buchanan’s advice and has never turned down one of his recommendations. (*Id.* p. 79) (R. p. 172). He testified that the genesis of the loan at issue was when “Mr. Buchanan was contacted by someone . . . [who] told him there was an opportunity” and that “if he wanted to loan some money, you know, there was an opportunity to make some money and we had done this on -- or they had done this on a previous property in Wyoming and it worked out well.” (*Id.* pp. 66-67 (emphasis added)) (R. pp. 159-60). *This testimony shows that Mr. Buchanan often acted on behalf of the Trust, playing an active role as a participant and advisor with respect to the business of the Trust. And the Trust’s own Trustee referred to Mr. Buchanan himself loaning money that was being loaned by the Trust.*
- In the opening statement, the Trust’s counsel noted that the Trust bid \$6.6 Million at the first sale but that afterwards Mr. Buchanan “was concerned that someone else might come in and take this property and leave the trust in a bad position, losing some money.” (Tr. p. 52) (R. p. 145). *Mr. Buchanan’s concern for the Trust losing money indicates that he was operating on its behalf in connection with the bidding.*
- Mr. Buchanan “decided that it would be better for one of his companies to own it rather than the -- rather than somebody other than the trust.” (*Id.*) (R. p. 145). *This statement implicitly acknowledges that the interests of Mr. Buchanan and 2nd Avenue Holdings effectively were the same as the Trust and that they were operating for the benefit of the Trust in the bidding; and it further acknowledges that 2nd Avenue Holdings did not fall into the category of “somebody other than the trust” (i.e., it was a representative of the Trust).*

- 2nd Avenue Holdings assigned the bid to the Trust because “Mr. Buchanan after consulting with some others and the trustee decided that it would be better from a tax perspective and from his children’s perspective for the trust to hold onto that property rather than Second Avenue Holdings, LLC.” (*Id.* p. 53) (R. p. 146). *Mr. Buchanan’s concern for taxes and for his children’s interests demonstrates that he was acting on behalf of the Trust, which was established to avoid estate taxes and to benefit his children. Mr. Buchanan need not be acting for his own personal benefit in order to be a representative of the Trust.*
- 2nd Avenue Holdings deposited \$500,000 toward its bid and, on October 24, 2012, assigned its bid to the Trust, with the deposit to be returned less the master-in-equity’s commission and other court costs. (*Id.* p. 100 & Green Ex. 2) (R. pp. 193, 285). There was no consideration for the assignment other than a reimbursement of costs. (*Id.* p. 101) (R. p. 194). *An arm’s length transaction necessarily would require substantial consideration for such a transaction, and the lack of consideration indicates that Mr. Buchanan was operating on behalf of the Trust.*
- The property was deeded from the master-in-equity to the Trust following 2nd Avenue Holdings’ assignment of bid back to the Trust, and the Trust claimed an exemption from the deed recording fee on the basis that the mortgagee obtained the property pursuant to foreclosure proceedings. (Tr. pp. 71-72 & Pl. Ex. 3) (R. pp. 164-65, 252-62). *The fact that 2nd Avenue Holdings assigned its bid to the Trust is irrefutable evidence that it acted on behalf of the Trust. Further, the Trust could only claim the exemption if 2nd Avenue Holdings were deemed to be acting on its behalf.*
- An order in the foreclosure proceeding amending the interest amount of the Deficiency Judgment to 15% noted that 2nd Avenue Holdings “paid interest on its bid at the rate of \$3,587.05 per day through the compliance date.” (Tr. p. 72 & Pl. Ex. 4) (R. pp. 165, 263-64). *2nd Avenue Holdings paid interest on a bid that it ultimately assigned to the Trust, and this payment of interest benefitted only the Trust, which indicates that 2nd Avenue Holdings was acting on behalf of the Trust. In other words, 2nd Avenue Holdings spent money for the sole benefit of the Trust, necessarily showing that it was acting as a representative of the Trust.*

Under the standard for a directed verdict, the question is whether there was *any* evidence and/or reasonable inference that a jury might reasonably construe as establishing that 2nd Avenue Holdings acted as a representative for the Trust at

the upset sale. The evidence recited above establishes that there was ample evidence for a jury to conclude or infer that 2nd Avenue Holdings acted on behalf of the Trust at the upset sale. Indeed, given that 2d Avenue Holdings assigned its bid to the Trust without consideration, the court could have so concluded as a matter of law. Accordingly, this Court must reverse the ruling of the trial court granting the directed verdict and remand for a new trial or entry of judgment for Appellants.

CONCLUSION

This case warrants review because the Court of Appeals' decision incorrectly disposes of a novel issue of South Carolina law. Petitioners ask the Court to grant this petition for a writ of certiorari and clarify for South Carolina lenders and guarantors that a mortgagee's violation of Section § 15-39-720 in a prior foreclosure action against the borrower may serve as a defense in a subsequent action against a guarantor.

Respectfully submitted,

s/William M. Wilson III

Wallace K. Lightsey

William M. Wilson III

Wyche, P.A.

200 East Broad Street

Greenville, SC 29601

Telephone: 864-242-8200

Facsimile: 864-235-8900

E-Mail: bwilson@wyche.com

Date: June 13, 2022

Attorneys for Petitioners

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS**

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Opinion No. 5880 (S.C. Ct. App. filed December 15, 2021)

Stephen Wilkinson, as Trustee of George B. Buchanan, Jr.
Irrevocable Family Trust Dated the 15th day of July, 2001, ... Respondent,

v.

Redd Green Investments, LLC, Anderson North Augusta, LLC,
Herbert Anderson, Jr., A. Bruce Green, Herbert Keith Anderson,
and L. Cliff Redd, ... Defendants,

Of which Redd Green Investments, LLC, A. Bruce Green,
and L. Cliff Redd are Petitioner.

PROOF OF SERVICE

I, William M. Wilson, III, of Wyche, P.A., attorneys for the Petitioners in the within action, do hereby certify that I have this date served upon opposing counsel the foregoing **PETITIONER'S REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI** by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

john.moore@nelsonmullins.com

John T. Moore, Esq.

nick.charles@nelsonmullins.com

Nicholas Andrew Charles, Esq.

RECEIVED

Jun 13 2022

S.C. SUPREME COURT

matt.bogan@nelsonmullins.com

A. Mattison Bogan, Esq.
Nelson Mullins
1320 Main Street, 17th Floor
Columbia, SC 29201

s/William M. Wilson III

Wallace K. Lightsey
William M. Wilson III
Wyche, P.A.
200 East Broad Street
Greenville, SC 29601
Telephone: 864-242-8200
Facsimile: 864-235-8900
E-Mail: bwilson@wyche.com

Attorneys for Petitioners

June 13, 2022

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Stephen Wilkinson, as Trustee of George B. Buchanan,
Jr. Irrevocable Family Trust Dated the 15th day of July,
2001, Respondent,

v.

Redd Green Investments, LLC, Anderson North Augusta,
LLC, Herbert Anderson, Jr., A. Bruce Green, Herbert
Keith Anderson, and L. Cliff Redd, Defendants,

Of which Redd Green Investments, LLC, A. Bruce
Green, and L. Cliff Redd are Appellants.

Appellate Case No. 2018-001388

Appeal From Saluda County
R. Knox McMahon, Circuit Court Judge

Opinion No. 5880
Heard March 3, 2021 – Filed December 15, 2021

AFFIRMED

Wallace K. Lightsey and William Marvin Wilson, III,
both of Wyche Law Firm, of Greenville; and M. Alan
Peace, of Harrell, Martin, & Peace, P.A., of Chapin, all
for Appellants.

John T. Moore, Allen Mattison Bogan, and Nicholas
Andrew Charles, all of Nelson Mullins Riley &
Scarborough, LLP, of Columbia; and Erik Tison Norton,

of Harrell, Martin, & Peace, P.A., of Chapin, all for Respondent.

LOCKEMY, C.J.: In this action to enforce a guaranty agreement, Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd (collectively, Guarantors) appeal the trial court's grant of a directed verdict in favor of Stephen Wilkinson as Trustee of the George B. Buchanan, Jr. Irrevocable Family Trust dated the 15th of July, 2001 (the Trust). Guarantors argue the trial court erred in finding that as a matter of law the Trust's violation of section 15-39-720 of the South Carolina Code (2005)¹ could not operate as a defense to its enforcement of the guaranty agreements. We affirm.

FACTS

In 2001, George B. Buchanan, Jr. (Buchanan), created and funded the Trust for the benefit of his children. On November 18, 2009, the Trust entered into a loan agreement with Springs North Augusta, LLC, in which the Trust agreed to loan it \$7,590,000 to purchase 1,420 acres of real property in Aiken County (the Property). Springs North Augusta executed a promissory note agreeing to repay the loan in full with interest of 15% per annum and executed a mortgage on the Property in favor of the Trust to secure the loan. On November 16, 2010, Springs North Augusta and the Trust signed an amendment to the loan agreement, which capitalized the interest to the principal, bringing the new principal to \$8,728,500. Springs North Augusta also signed a modification to the promissory note and agreed to repay the new balance of the loan plus 15% interest per annum.

The loan agreement named Herbert Anderson, Jr., Herbert Keith Anderson, A. Bruce Green, William Otha Bodie, L. Cliff Redd, Redd Green Investments, LLC, and Anderson North Augusta, LLC, as guarantors, and they signed two separate guaranty agreements guaranteeing repayment of the loan. The guaranty agreements gave the Trust the right to obtain payment from Guarantors to satisfy any unpaid debt of Springs North Augusta. Redd Green Investments, LLC and Anderson North Augusta, LLC, signed one agreement; Herbert Anderson, Jr., Herbert Keith Anderson, A. Bruce Green, William Otha Bodie, and L. Cliff Redd signed the other. Redd Green Investments, LLC, and Anderson North Augusta,

¹ Section 15-39-720—also referred to as the "bidding" statute—provides that a "mortgagee or his representative" is permitted to bid only once at a judicial foreclosure sale.

LLC, owned Springs North Augusta, which they formed to hold title to the Property. A. Bruce Green and L. Cliff Redd formed Redd Green Investments, LLC to hold their ownership interest in Springs North Augusta.² The guaranty agreements contained a "Waiver of Appraisal Rights" provision,³ which stated:

**TO THE FULLEST EXTENT PERMITTED BY
LAW AND AS A MATERIAL INDUCEMENT FOR
LENDER TO MAKE THE LOAN, GUARANTOR
HEREBY WAIVES AND RELINQUISHES THE
STATUTORY APPRAISAL RIGHTS WHICH
MEANS THE HIGH BID AT THE JUDICIAL
FORECLOSURE SALE WILL BE APPLIED TO
THE DEBT REGARDLESS OF ANY APPRAISED
VALUE OF THE MORTGAGED PROPERTY.**

Springs North Augusta defaulted under the terms of the Note, and the Trust filed an action to foreclose its lien on the Property. The Trust named Springs North Augusta—the only other party to the mortgage—as the sole defendant in the action. Springs North Augusta failed to answer, and the circuit court entered an order of default and mandatory order of reference. The master-in-equity entered an order of foreclosure and sale, ordering the Property to be sold at auction and the proceeds applied to the outstanding principal and interest totaling \$9,450,622.50.

On September 4, 2012, the Trust bid \$6.6 million at the foreclosure sale. The master held the sale open for thirty days for upset bids. The master held the deficiency sale on October 4, 2012, and Second Avenue Holdings, LLC (Second Avenue)—of which Buchanan was the sole member and manager—was the successful bidder in the amount of \$7,160,000 and made a deposit of \$500,000 towards the bid. Second Avenue and the Trust then "reached an agreement" pursuant to which Second Avenue assigned the bid back to the Trust "for value received." The master entered an order of deficiency against Springs North Augusta for \$2,484,163.95 on October 26, 2012, which was amended on February 13, 2013, to \$2,753,192.70, plus 15% annual interest.

² Herbert Anderson Jr. and Herbert Keith Anderson owned Anderson North Augusta, LLC. The Andersons and their company are not parties to this appeal.

³ See S.C. Code Ann. § 29-3-680 (2007) (providing "a defendant against whom a personal judgment may be taken on a real estate secured transaction may waive the appraisal rights as provided by this section").

Thereafter, the Trust brought this action to collect the deficiency judgment from Guarantors. Guarantors asserted several defenses and counterclaims. First, they claimed Second Avenue was created six days after the Trust entered its bid, that it was created for competitive bidding on behalf of the Trust, and that the Trust controlled it. Guarantors alleged the Trust's claims were barred by the equitable doctrines of laches and unclean hands, equitable estoppel, judicial estoppel, and waiver because the Trust violated the provisions of section 15-39-720 by bidding through a "straw man" at the second foreclosure sale. In addition, Guarantors alleged counterclaims for civil conspiracy, constructive fraud, and fraud and deceit. After the trial court denied the Trust's motions to dismiss and for summary judgment, the case proceeded to a jury trial on September 5, 2017. At trial, Guarantors withdrew their counterclaims "as counterclaims, but not as the factual basis for the defenses."

Stephen Wilkinson, who took over as the trustee of the Trust in August 2013, testified Buchanan established the Trust, which was an irrevocable trust, to put aside assets for his children and to eliminate estate taxes. He stated Buchanan could give him financial advice concerning the Trust as needed and could add funds to the Trust but had no other control of the Trust. Wilkinson explained that as of the time of trial, the Property was actively on the market but the Trust had not received any written offers to purchase.

Green testified that when Springs North Augusta first acquired the Property it was worth \$30 million. He agreed Springs North Augusta was unable to pay off the loan because the real estate values had been "tanking" and they had no means to repay the loan as a result. Green testified that when the Trust filed the foreclosure action, he assumed the value of the land satisfied the Trust and he believed that he, Redd, and Redd Green Investments were "clear." Redd testified that if asked the same questions, his testimony would be the same as Green's.

Buchanan maintained he formed Second Avenue three or four years before the foreclosure sale. He acknowledged, however, that Second Avenue filed its articles of incorporation with the State of South Carolina on September 10, 2012.

Buchanan testified he met with the trustee after the foreclosure sale and the trustee stated he would like to have the Property back as a long-term investment for the Trust. Second Avenue therefore assigned the bid back to the Trust, and in exchange, the Trust repaid Second Avenue the amount of the \$500,000 deposit.

At the conclusion of the testimony, the Trust moved for a directed verdict, arguing (1) Guarantors could not collaterally attack the foreclosure sale, (2) whether the

Trust violated the bidding statute was a question of law, (3) a violation of the statute did not excuse the debt, (4) such a violation would only result in an offset, which Guarantors had not established, and (5) at best, the jury could conclude a subsequent breach occurred after the Guarantors were already in default of the guaranty agreement, which would not excuse their performance. Although the trial court initially noted that viewing the evidence in the light most favorable to Guarantors, the jury could infer a violation of section 15-39-720 occurred, the trial court concluded a violation of section 15-39-720 was not a defense on a guaranty of a debt. It therefore directed a verdict in favor of the Trust for \$4,781,882.65.⁴ Guarantors filed a motion for a new trial, which the trial court denied. This appeal followed.

ISSUE ON APPEAL⁵

Did the trial court err in ruling that as a matter of law a mortgagee's violation of section 15-39-720 in a prior foreclosure action cannot serve as a defense to a subsequent action for breach of guaranty when the guarantor was not a party to the prior foreclosure action?

STANDARD OF REVIEW

"In reviewing a motion for directed verdict, the appellate court applies the same standard as the circuit court. The court must view the evidence and the inferences that can reasonably be drawn in the light most favorable to the nonmoving party." *Coake v. Burt*, 391 S.C. 201, 205-06, 705 S.E.2d 453, 455 (Ct. App. 2010) (citation omitted). "Motions for directed verdict or JNOV should be denied if the evidence yields more than one reasonable inference or its inference is in doubt." *Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016). "An appellate court will reverse only whe[n] there is no evidence to support the trial judge's ruling, or whe[n] the ruling was controlled by an error of law." *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 491, 649 S.E.2d 494, 498 (Ct. App. 2007).

⁴ This figure accounted for the additional \$2,028,689.85 in interest that had accrued since the foreclosure sale.

⁵ Guarantors' stated issues on appeal are virtually identical; thus, we address both issues as one.

LAW AND ANALYSIS

Guarantors argue the Trust breached the implied obligation of good faith and fair dealing when it violated section 15-39-720, thereby precluding the Trust from collecting a deficiency from Guarantors. They assert section 15-39-720 protects borrowers by permitting a mortgagee to bid only once, on the first day of the foreclosure auction, and by forbidding the mortgagee or anyone acting on its behalf from bidding a second time or offering an upset bid at the final auction.

Guarantors contend the Trust's violation of the statute deprived them of the Trust's high bid. Guarantors therefore argue the trial court erred in concluding section 15-39-720 did not provide a defense to a suit to collect a payment obligation on the guaranty. We disagree.

Section 15-39-720 states:

In all judicial sales of real estate for the foreclosure of mortgages and sales in execution the bidding shall not be closed upon the day of sale but shall remain open until the thirtieth day after such sale, exclusive of the day of sale. Within such thirty day period *any person other than the highest bidder at the sale or any representative thereof in foreclosure and execution suits may enter a higher bid* upon complying with the terms of sale by making any necessary deposit as a guaranty of his good faith, *and thereafter within such period any person, other than such highest bidder at the sale or any representative thereof, in foreclosure suits may in like manner raise the last highest bid*, and the successful purchaser shall be deemed to be the person who submitted the last highest bid within such period and made the necessary deposit or guaranty. *But the mortgagee or his representative shall enter such bid as he desires at the time the sale is made, and he and all persons acting in his behalf shall be precluded from entering any other bid in any amount at any other time except the single or last bid made by him or in his behalf at the sale. . . .*

The bidding shall be reopened by the officer making the sale on the thirtieth day after the sale, exclusive of the day of the sale, at eleven o'clock in the

forenoon and the bidding shall be allowed to continue until the property shall be knocked down in the usual custom of auction to the successful highest bidder complying with the terms of sale. The sales officer shall announce the sales about to be closed and shall receive the final bids in such sales in the order determined by him.

(emphases added).

We decline to address the question of whether the Trust violated section 15-39-720 because the trial court acknowledged evidence existed from which the jury could find a violation. Nevertheless, we conclude the trial court did not err in ruling Guarantors could not assert a violation of the statute as a defense to the Trust's action to enforce the guaranty. The Guarantors' attempt to challenge the amount of the deficiency judgment is barred by res judicata and even assuming a violation of the statute, Guarantors failed to show such violation prejudiced them such that they should be relieved from their responsibilities under the guaranty agreement.

"The doctrine of res judicata provides that final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were or could have been raised in that action." *Venture Eng'g, Inc. v. Tishman Constr. Corp. of S.C.*, 360 S.C. 156, 162, 600 S.E.2d 547, 550 (Ct. App. 2004) (quoting *In re S.N.A. Nut Co.*, 215 B.R. 1004, 1008 (1997)); *see also Pye v. Aycock*, 325 S.C. 426, 432, 480 S.E.2d 455, 458 (Ct. App. 1997) ("To establish *res judicata*, three elements must be shown: (1) the identities of the parties is the same as a prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction."). "The concept of privity rests not on the relationship between the parties asserting it, but rather on each party's relationship to the subject matter of the litigation." *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012). "The term 'privity,' when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right. One in privity is one whose legal interests were litigated in the former proceeding." *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994).

"A guaranty of payment is an absolute or unconditional promise to pay a particular debt if it is not paid by the debtor at maturity. Under an absolute guaranty of payment, the creditor may maintain an action against the guarantor immediately

upon default of the debtor." *Citizens & S. Nat'l Bank of S.C. v. Lanford*, 313 S.C. 540, 543, 443 S.E.2d 549, 550 (1994) (citation omitted).

A guaranty is a contract and is to be construed by the principles governing contracts. The construction of a guaranty calls for a reasonable interpretation of the language used in the instrument, and a court has the duty to ascertain the intention of the parties at the time the contract was made. The intention of the parties as expressed in the guaranty should guide the court.

Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Ret. Grp., Inc., 300 S.C. 277, 280, 387 S.E.2d 672, 673 (1989) (citation omitted).

This action and the foreclosure action involved the same subject matter: Springs North Augusta's debt to the Trust and the foreclosure sale. In addition, both actions arose from Springs North Augusta's default on the note and mortgage. The master held a foreclosure sale, and no one challenged the foreclosure proceedings. Following the sale, the master entered the deficiency judgment, which determined Springs North Augusta's remaining debt to the Trust. Therefore, the master decided the issue of the amount of the unpaid debt in the prior foreclosure action. Although the Trust did not name Guarantors in the foreclosure action, Guarantors were privies with Springs North Augusta. Both parties had a shared interest in obtaining the lowest deficiency judgment possible because Guarantors were responsible for any unpaid debt of Springs North Augusta. *See Lanford*, 313 S.C. at 543, 443 S.E.2d at 550 ("A guaranty of payment is an absolute or unconditional promise to pay a particular debt if it is not paid by the debtor at maturity."). Green and Redd owned Redd Green Investments, and Redd Green Investments was one of two companies that owned Springs North Augusta. Moreover, Green acknowledged he was aware that Springs North Augusta defaulted on the loan and that there was a pending foreclosure action. As direct or indirect owners of Springs North Augusta, Guarantors had notice of the foreclosure action yet failed to participate in those proceedings. Guarantors could have challenged Second Avenue's participation in the bidding process in the prior action but did not do so. *Res judicata* bars Guarantors' attempt to challenge the process by way of a defense in this action. Because Guarantors cannot collaterally attack the foreclosure sale, we conclude the trial court did not err in directing the verdict in favor of the Trust.

Further, even assuming a violation, Guarantors have failed to show the alleged violation of the bidding process prejudiced them when no evidence shows what the

winning bid would have been had Second Avenue not placed the highest bid. Guarantors concede they did not challenge the amount of the judgment in the foreclosure suit and do not seek to undo the sale. The express terms of the guaranty provided it was an absolute guaranty of payment and that Guarantors waived their right to an appraisal. *See Peoples Fed. Sav. & Loan Ass'n*, 300 S.C. at 280, 387 S.E.2d at 673 ("A guaranty is a contract and is to be construed by the principles governing contracts. The construction of a guaranty calls for a reasonable interpretation of the language used in the instrument, and a court has the duty to ascertain the intention of the parties at the time the contract was made. The intention of the parties as expressed in the guaranty should guide the court." (citation omitted)). Although Green testified the Property was worth about \$30 million in 2009, there is no evidence—other than the amount of the highest bid at the foreclosure sale—of the fair market value of the Property at the time of the foreclosure sale. Guarantors argue evidence shows the Trust valued the Property at \$15 million following the foreclosure sale and it was therefore reasonable to conclude the Trust would have bid the full debt amount of \$9.5 million if it had acted in compliance with the bidding statute. Guarantors mentioned this \$15 million figure during the parties' pretrial discussions with the trial court, but no evidence in the record supports this value. The original loan was for \$7,590,000, which Springs North Augusta used to purchase the Property. The winning bid of \$7,160,000 demonstrated no party was willing to bid more than \$7,160,000 for the Property and there was no evidence Guarantors would have been in a better position had a third party purchased the Property. *See Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Ret. Grp., Inc.*, 302 S.C. 223, 234 n.1, 394 S.E.2d 849, 855 n.1 (Ct. App. 1990) (Cureton, J., concurring) (noting "it is assumed that because a third party did not buy the property at the foreclosure sale no one else was interested in purchasing the property at the price paid by the lender"). Even assuming the Trust violated the statute, Guarantors failed to demonstrate the sale price would have been higher but for Second Avenue's actions and thus failed to show the alleged violation prejudiced them. We therefore conclude the trial court did not err in determining that even assuming the Trust violated section 15-39-720, such violation could not serve as a defense to the enforcement of the guaranty. Thus, the trial court did not err in granting the Trust's motion for a directed verdict.

CONCLUSION

For the foregoing reasons, we affirm the trial court's grant of a directed verdict in favor of the Trust.

AFFIRMED.

HUFF and HEWITT, JJ., concur.

RECEIVED

Dec 29 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SALUDA COUNTY
COURT OF COMMON PLEAS

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2018-001388

Stephen Wilkinson, as Trustee of George B. Buchanan, Jr.
Irrevocable Family Trust Dated the 15th day of July, 2001, ...Respondent,

v.

Redd Green Investments, LLC, Anderson North Augusta, LLC,
Herbert Anderson, Jr., A. Bruce Green, Herbert Keith Anderson,
and L. Cliff Redd, ... Defendants,

Of which Redd Green Investments, LLC, A. Bruce Green,
and L. Cliff Redd are Appellants.

APPELLANTS' PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT

Wallace K. Lightsey (S.C. Bar Id. No. 6476)
William M. Wilson III (S.C. Bar Id. No. 15808)
WYCHE P.A.
PO Box 728
Greenville, SC 29602-0728
(864) 242-8200

Attorneys for Appellants

Pursuant to SCACR 221, Appellants Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd respectfully petition the Court of Appeals for rehearing of the Court’s Opinion in this matter No. 5880, filed December 15, 2021. In affirming the trial court’s decision, this Court overlooked or misapprehended the following particular points.

I. THE COURT MISTAKENLY APPREHENDED THAT THE GUARANTORS CHALLENGED THE AMOUNT OF THE DEFICIENCY JUDGMENT AND THEREFORE MISAPPLIED THE SECOND AND THIRD ELEMENTS OF RES JUDICATA.

The Court held that “The Guarantors’ attempt to challenge the amount of the deficiency judgment is barred by res judicata.” (Op. at 7). However, the Guarantors do not challenge the amount of the deficiency judgment that was entered in the prior foreclosure action against Springs North Augusta. As asserted in the Appellants’ Reply Brief:

...[T]he Guarantors do not seek to challenge the amount of the judgment in the foreclosure suit. This judgment was entered against the Borrower, and the Guarantors are not seeking to undo it. Instead, the Guarantors are contending that they have a defense to the Trust’s enforcement of the guaranties because the Trust violated South Carolina law when it obtained the deficiency.

(App. Reply at 21). This distinction is vitally important because it demonstrates that the second and third elements of *res judicata*—namely the identity of the subject matter and adjudication on the merits—do not apply. The Guarantors simply are not attacking the deficiency judgment against the Borrower. This judgment stands and may be pursued by the Trust.

Instead, the Guarantors contend that the Trust’s violation of the bidding statute operates as a defense to the Guarantors’ obligations under their guaranties. The Guarantors’ position is that the deficiency judgment—although enforceable against the Borrower—is not enforceable against the Guarantors in a subsequent action because it violates the Guaranty itself, namely the

implied obligation of good faith and fair dealing.¹ The issues presented in the first action were whether the Borrower defaulted under the loan and whether the property could be sold with the proceeds applied to the debt. The Guarantors' guaranties were not at issue and were not addressed in the first action. The issue in the present action is whether the Trust may recover under the Guaranties or whether the Trust's violation of the bidding statute operates to bar such a recovery. Because this issue was not addressed in the initial foreclosure action—nor could it have been addressed—there is neither an identity of issues in the two actions nor an adjudication on the merits of the Guarantors' liability in the first action.

Stated another way, the amount of the debt and the amount of the deficiency judgment against the Borrower was adjudicated in the first action, but whether such amount could be collected against the Guarantors under the terms of their guaranties was NOT resolved or addressed in the first action. These are entirely separate issues, and it follows that *res judicata* does not bar the defenses raised by the Guarantors in the second action.

II. THE COURT MISTAKENLY APPREHENDED THAT THE GUARANTORS AND BORROWER WERE PRIVIES.

The Court held that the Guarantors were privies with the Borrower because they both “had a shared interest in obtaining the lowest deficiency judgment possible because Guarantors were responsible for any unpaid debt of Springs North Augusta.” (Op. at 8). However, the Court has not cited to any case law or other legal authority that a guarantor and a borrower are privies for purposes of the application of *res judicata*. The Court cites to the relationship between the Guarantors and the Borrower (with the Guarantors being direct or indirect owners of the Borrower) as a basis for notice of the proceeding, (*id.*), but neither the Court nor the

¹ Alternative theories for the defense include the doctrines of unclean hands, waiver, or not being able to gain from an illegal act.

Respondent has cited to case law supporting its conclusion that such a relationship, or that notice of the proceeding, equates to being privies.

In fact, this Court's precedent is to the contrary. In *H.G. Hall Construction Co. v. J.E.P. Enterprises*, 283 S.C. 196, 321 S.E.2d 267 (Ct. App. 1987), this Court held that common ownership of two corporations, both of which were parties to a contract at issue in prior litigation against one of the companies, did not suffice to make those corporations privies for purposes of applying *res judicata* in a second action against the other company. The Court explained:

Both corporations are owned by the same person, H.G. Hall, Jr. Both were parties to the contract for the Beaufort project. According to J.E.P., H.G. Hall, Jr., as president of Associates, Inc., controlled the conduct of the first lawsuit. Hall is also president of Hall Construction.

While South Carolina courts have not addressed the precise issue presented here, courts in both North Carolina and Georgia have ruled that no privity exists between commonly owned corporations. Similarly, it has been held there is no privity between a corporation and a shareholder merely because the latter controls the former.

...

We find these cases persuasive. Although Hall Construction and Associates, Inc., are both corporations owned by H.G. Hall, Jr., they are different corporations. On the facts of this case common ownership is not enough to establish privity for the purposes of *res judicata*.

Id. at 204-05, 321 S.E.2d at 272. Thus, the direct or indirect ownership of the Borrower by Guarantors does not put them in privity for purposes of *res judicata*.

Similarly, the United States District Court for the District of South Carolina, applying South Carolina law, held that a principal-agent relationship and the vicarious liability of the principal for the acts of the agent are not sufficient to create privity for purposes of *res judicata* so as to bind the principal on a judgment against the agent: "A judgment on the merits in favor of the agent is a bar to an action against the principal for the same cause, because the principal's liability is predicated upon that of the agent. But a judgment against the agent is not conclusive

in an action against the principal.” *E.A. Prince & Son, Inc. v. Selective Ins. Co.*, 818 F. Supp. 910, 915 (D.S.C. 1993) (emphasis in original) (quoting *Rookard v. Atlantic & C. Air Line Ry. Co.*, 84 S.C. 190, 65 S.E. 1047 (1909)).

Here, the relationship between the Guarantors and Borrower is analogous to that of principal and agent, with the former’s liability being predicated on the latter’s. Under *H.G. Hall Construction* and *E.A. Prince & Son*, the fact that two parties are under common control or that one controls the other, that one has liability contingent on the other’s, and that their interests are aligned is not sufficient to make them privies for purposes of *res judicata*. Accordingly, it was error for this Court to hold that the Guarantors were privies of the Borrower.

In addition, the Court has overlooked the fact that the Borrower was in default in the foreclosure action and did not defend it. The Court asserts that the “Guarantors could have challenged Second Avenue’s participation in the bidding process in the prior action,” (*id.*), but there is no basis for such a conclusion when the Borrower was in default and not participating in the foreclosure action. As the South Carolina Supreme Court held in *In re Estate of Brown*, “[c]ollateral estoppel does not apply to default judgments because the factual issues were never actually litigated.” 430 S.C. 474, 488, 846 S.E.2d 342, 349 (2020). For the same reason, the doctrine of *res judicata* should not preclude Guarantors from defending the instant action on the basis of a defense that was not litigated in the prior default judgment.

III. THE COURT MISAPPREHENDED THAT THE GUARANTORS WERE REQUIRED TO SHOW PREJUDICE.

The Court alternatively held that, even assuming a violation of the bidding statute, the Guarantors could not raise such a violation as a defense to the guaranty without a showing of prejudice (*i.e.*, that the fair market value of the property was higher than Second Avenue’s bid). (*Id.* at 8-9). Whether or not a showing of prejudice is required in order for a guarantor to assert a

violation of the bidding process as a defense to a guaranty is a novel issue of South Carolina law. There simply is no legal precedent one way or the other. The Court has assumed that a showing of prejudice must be made by Guarantors, but it has not cited to any legal precedent that a showing must be made at all, much less that the Guarantors bear the burden of proof as opposed to the Trust, which is the one who violated the statute.

The statute itself, S.C. Code Ann. § 15-39-720, does not incorporate any requirement of prejudice. It straightforwardly declares: “But the mortgagee or his representative shall enter such bid as he desires at the time the sale is made, and he and all persons acting in his behalf shall be precluded from entering any other bid in any amount at any other time except the single or last bid made by him or in his behalf at the sale.” *Id.* (emphasis added). This language is absolute and makes very clear that the Trust was not allowed to violate the statute by bidding a second time regardless of whether there would be any prejudice. Accordingly, a showing of prejudice is not required.

In addition, even if a showing of prejudice were deemed required, for reasons of public policy such prejudice at the very least should be a rebuttable presumption, with the burden on the at-fault mortgagee to demonstrate that its bid exceeded the fair market value of the property. The law allows for the shifting of the burden of proof for reasons of public policy:

“In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: [1] the knowledge of the parties concerning the particular fact, [2] the availability of the evidence to the parties, [3] the most desirable result in terms of public policy in the absence of proof of the particular fact, and [4] the probability of the existence or nonexistence of the fact.” (7 Cal. Law Revision Com. Rep. [(1965)], p. 89.)

One way for a court to reallocate the burden of proof on a particular issue is to adopt a presumption. The Evidence Code defines a “presumption” as “an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in [an] action.” (Evid. Code, § 600, subd. (a).) Presumptions are either conclusive or rebuttable. (Evid. Code, § 601.)

Rebuttable presumptions are “either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof.” (Ibid.; see Evid. Code, §§ 110 [burden of producing evidence defined], 115 [burden of proof defined].)

A presumption affecting the burden of proof is a rebuttable presumption “established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied.” (Evid. Code, § 605.) Conversely, a presumption affecting the burden of producing evidence is used “to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied.” (Evid. Code, § 603.) “It is the existence of this further basis in policy that distinguishes a presumption affecting the burden of proof from a presumption affecting the burden of producing evidence.” (7 Cal. Law Revision Com. Rep., supra, at p. 99.)

In re Marriage of Hein, 52 Cal. App. 5th 519, 537 (Ct. App. 2020) (emphasis added).

Between two parties—where one is at fault for the violation of a statute to the detriment of the other innocent party—it is only logical, just, and fair that the at-fault party should bear the burden of proof as to whether its violation of the statute was prejudicial to the innocent party. This conclusion is particularly true here where the Guarantors were absolutely deprived of the Trust’s high bid due to the Trust’s violation of the statute. As extensively discussed in the Appellants’ briefs, we can never know what the Trust’s high bid would have been, and so the deprivation of this statutory protection taints the entire bidding process.

The statute reflects the public policy of this State, and in order to protect this public policy, prejudice for violation of the bidding statute should be presumed. In short, when a mortgagee violates the bidding statute in order to obtain a deficiency judgment it subsequently seeks to apply against a person who was not party to the proceeding, then it is the at-fault mortgagee who should bear the burden of demonstrating a lack of prejudice—not the innocent third party who should bear the burden of demonstrating prejudice.

IV. THE COURT OVERLOOKED EVIDENCE OF PREJUDICE.

Even if the Guarantors are held to have the burden of showing prejudice, the Court overlooked such evidence in the record when it stated that “there is no evidence—other than the amount of the highest bid at the foreclosure sale—of the fair market value of the Property at the time of the foreclosure sale.” (Op. at 9). However, as noted by the Court with respect to the Standard of Review, a motion for directed verdict ““should be denied if the evidence yields more than one reasonable inference or its inference is in doubt.”” (*Id.* at 5 (quoting *Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016))).

Here, there is evidence in the record before the jury² that allows for the reasonable inference that the fair market value of the property exceeded Second Act’s bid. A property owner is competent to testify to the value of his own real property. *See, e.g., Waites v. S.C. Windstorm & Hail Underwriting Ass’n*, 279 S.C. 362, 366, 307 S.E.2d 223, 225 (1983); *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 594-95, 493 S.E.2d 875, 880 (Ct. App. 1997); *Hill v. City of Hanahan*, 281 S.C. 527, 531-32, 316 S.E.2d 681, 684 (Ct. App. 1984). The specific testimony as to the value of the subject real property, as noted in the prior briefs, includes:

- Mr. Green testified that the property initially was worth “over \$30 Million” when initially acquired. (Tr. p. 85) (R. p. 178).
- Mr. Green testified that the value of the property was “several times more than the loan” and that as a result his guaranty “never seemed to be a problem.” (Tr. p. 86) (R. p. 179).

² The Court expressed that it was unwilling to consider the evidence offered outside the jury’s presence concerning the value of the Property, including the admission of Trust’s counsel that “[T]he property is worth an awful lot more than what was paid at the foreclosure sale. I think we all know it was. It’s not a big secret.” (Tr. p. 33 (emphasis added)) (R. p. 126). Even without counsel’s candid admission that the property was worth substantially more than the high bid at the foreclosure sale, reasonable inferences may be made from evidence in the record before the jury that the bid was below fair market value.

The jury could reasonably have inferred from this testimony that a property valued over \$30 Million when acquired would be worth over \$7,160,000 at a later point in time (when the foreclosure sale occurred). In addition, the testimony that the value was several times the amount of the loan, when combined with the temporal aspect of the word “never,” allows for the reasonable inference that at all times – including the time of the foreclosure sale – the value of the property exceeded the debt amount and therefore exceeded the winning bid of \$7,160,000 (which was less than the debt amount). Accordingly, the Court overlooked the above testimony when it concluded there was “no evidence” that the fair market value of the property exceeded the debt amount at the time of the foreclosure sale.

CONCLUSION

For the reasons set forth herein, this Court should reconsider its decision and reverse the trial court’s directed verdict.

Respectfully submitted,

s/William M. Wilson III

Wallace K. Lightsey (S.C. Bar Id. No. 6476)
William M. Wilson III (S.C. Bar Id. No. 15808)
Wyche P.A.
200 East Camperdown Way
Greenville, SC 29601
Telephone: 864-242-8200
Facsimile: 864-235-8900
E-Mail: bwilson@wyche.com

Date: December 29, 2021

Attorneys for Appellants

RECEIVED

Dec 29 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SALUDA COUNTY
Court of Common Pleas
R. Knox McMahon, Circuit Court Judge

Lower Case No. 2015-CP-41-00172

Stephen Wilkinson, as Trustee of George B. Buchanan, Jr.
Irrevocable Family Trust Dated the 15th day of July, 2001, ...Respondent,

v.

Redd Green Investments, LLC, Anderson North Augusta, LLC,
Herbert Anderson, Jr., A. Bruce Green, Herbert Keith Anderson,
and L. Cliff Redd, ... Defendants,

of Whom

Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd
are..... Appellants.

PROOF OF SERVICE

The undersigned certifies that the **APPELLANTS' PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT** were served upon Respondent by causing a copy of the same to be deposited in the United States mail, postage prepaid, and emailed, addressed as follows:

John T. Moore, Esq. (john.moore@nelsonmullins.com), Nicholas Andrew Charles, Esq. (nick.charles@nelsonmullins.com), A. Mattison Bogan, Esq. (matt.bogan@nelsonmullins.com), Nelson Mullins, 1320 Main Street, 17th Floor, Columbia, South Carolina 29201, as *Attorneys for Stephen Wilkinson, as Trustee of George B. Buchanan, Jr. Irrevocable Family Trust Dated the 15th day of July, 2001*

This 29th day of December, 2021.

s/William M. Wilson III
William M. Wilson III

W Y C H E

Attorneys at Law

RECEIVED

Dec 29 2021

SC Court of Appeals

December 29, 2021

VIA ELECTRONIC SUBMISSION & US MAIL

Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29201
E-mail: ctappfilings@sccourts.org

RE: Stephen Wilkinson, as Trustee of George B. Buchanan, Jr. Irrevocable Family Trust Dated the 15th day of July, 2001 vs. Redd Green Investments, LLC, Anderson North Augusta, LLC, Herbert Anderson, Jr., A. Bruce Green, Herbert Keith Anderson, and L. Cliff Redd,

Of which Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd are Appellants.
Appellate Case No. 2018-001388

Dear Ms. Kitchings:

Enclosed for filing is Appellants Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd's Petition for Rehearing and Proof of Service in the above matter. The required filing fee of \$50.00 is being mailed to the Court. We are serving all counsel of record via email and U.S. mail.

With highest regards,



William M. Wilson III
(864) 242-8294
bwilson@wyche.com

cc: John T. Moore, Esq.
Nicholas Andrew Charles, Esq.
A. Mattison Bogan, Esq.

W Y C H E
PROFESSIONAL ASSOCIATION

PO Box 728, Greenville, SC 29602-0728
p: 864.242.8200 | f: 864.235.8900
www.wyche.com

RECEIVED

Feb 03 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2018-001388

Stephen Wilkinson, as Trustee of George B. Buchanan,
Jr. Irrevocable Family Trust Dated the 15th day of July,
2001, ...

Respondent,

v.

Redd Green Investments, LLC, Anderson North Augusta,
LLC, Herbert Anderson, Jr., A. Bruce Green, Herbert
Keith Anderson, and L. Cliff Redd,.....

Defendants,

Of which Redd Green Investments, LLC, A. Bruce
Green, and L. Cliff Redd are.....

Appellants.

RETURN TO PETITION FOR REHEARING

This Court should deny the petition for rehearing filed by Appellants Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd (collectively, “the Guarantors”). The Court correctly affirmed the trial court’s directed verdict on the grounds that the Guarantors are barred from challenging the deficiency judgment and that the Guarantors failed to present any evidence that they suffered prejudice as a result of the alleged violation of the bidding statute.¹ The Guarantors have not identified any point of law or fact overlooked or misapprehended by this Court. The Court should deny the petition for rehearing.

¹ See S.C. Code Ann. § 15-39-720.

ARGUMENT

The Guarantors continue to seek an escape from their agreement to guarantee payment of the debt Springs North Augusta, LLC owes to the George B. Buchanan, Jr. Irrevocable Family Trust, dated the 15th day of July, 2001 (the “Trust”). After failing to defend Springs North Augusta or intervene to protect their own rights in the foreclosure action, the Guarantors attempted a collateral attack on the deficiency judgment held by the Trust as a defense to their obligation to pay. This Court properly found the Guarantors are barred by res judicata from collaterally attacking the deficiency judgment.

Having failed in their collateral attack, the Guarantors attempt a different strategy. They now concede the deficiency judgment is valid and enforceable against Springs North Augusta. Yet, they simultaneously continue to argue the deficiency judgment was somehow obtained in bad faith, at least to the extent they are obligated to pay it. The Guarantors cannot have it both ways. Their collateral attack is barred by res judicata. If the deficiency judgment is valid as they now concede, however, they are obligated to pay it pursuant to their guaranties that the Trust receives full payment of the debt.

Regardless of whether they are barred from challenging the deficiency judgment, the Guarantors still cannot identify any evidence showing the deficiency judgment would be smaller (or nonexistent) if the Trust had not allegedly violated the bidding statute. Although the Guarantors wish the Trust or a third party had bid either the full amount of the debt or the unidentified fair market value of the property at the foreclosure sale, the law did not require the Trust to do so and the Guarantors presented no evidence that any third party would have bid more than \$7,160,000—the highest bid submitted at the public auction—if 2nd Avenue Holdings, LLC did not bid.

This Court properly found the Guarantors’ attempted collateral attack is barred by res judicata and the record contains no evidence that the Guarantors suffered any prejudice from the conduct of the foreclosure sale. This Court did not overlook or misapprehend any facts or issues, and it should therefore deny the Guarantors’ petition for rehearing.

I. The Court correctly recognized the Guarantors presented no evidence that the winning bid would have been higher but for the alleged violation of the bidding statute.

The Guarantors argue they presented evidence from which a reasonable juror could find the fair market value of the property exceeded 2nd Avenue Holdings’ \$7,160,000 bid. (Petition at 7–8). The Guarantors miss the point. The question is not whether the fair market value of the property exceeded the winning bid. The only question related to prejudice is whether, but for the alleged violation of the bidding statute, the winning bid would have been higher than \$7,160,000. This Court answered the correct question and properly found “[e]ven assuming the Trust violated the statute, Guarantors failed to demonstrate *the sale price would have been higher but for Second Avenue’s actions* and thus failed to show the alleged violation prejudiced them.” *Stephen Wilkinson v. Redd Green Invs., LLC*, Op. No. 5880 (S.C. Ct. App. filed Dec. 15, 2021) (Howard Adv. Sh. No. 44 at 35–36) (emphasis added). The Court did not overlook or misapprehend any points related to the Guarantors’ failure to present evidence of prejudice. Critically, the Court did not find any violation of the statute in any event, and there was no violation. The Court went further, to say even if a violation occurred, the failure to show prejudice was dispositive. This all remains true now.

First, the Guarantors’ focus on the fair market value of the property is misplaced. The fair market value is immaterial. No rule exists—and the Guarantors fail to cite any—requiring the winning bid to exceed fair market value. *See* (Petition at 4, 7–8). Instead, the Guarantors ask this

Court to invent such a rule. (*Id.*). The Court should not do so, particularly in the absence of any supporting authority. Moreover, the Guarantors’ argument is inconsistent with the arguments in their briefs, in which they admitted “it is not the Guarantors’ position that the Trust had an obligation to ensure the highest possible bid ***or that the property must sell for fair market value or for the amount of the debt***” because “[s]uch a position would be unreasonable.” (Reply Br. 8) (alteration in original) (second emphasis added). The plain language of the statute also undermines the Guarantors’ position. They have not challenged the statute, nor could they do so at this stage as such an attack would be untimely. Nor have the Guarantors ever requested to argue against precedent.

Notwithstanding whether the fair market value of the property is material, the Court properly found the Guarantors presented no evidence of the fair market value at the time of the foreclosure sale. Op. No. 5880 (Howard Adv. Sh. No. 44 at 35). Although Mr. Green testified the property was worth \$30,000,000 in 2009, his self-serving testimony that he did not think he would have to perform under his guaranty agreement because he thought the property was worth some unidentified value greater than the total debt is not evidence a reasonable juror could rely upon to determine the fair market value of the property—much less that the winning bid would have been higher than \$7,160,000 but for the alleged bidding statute violation. (*Id.*); (R. 178) (testifying “at one time [the property] was worth over \$30 million . . . when we initially owned it”). Moreover, the cases the Guarantors rely upon primarily address the admissibility of a property owner’s testimony as to the diminution in value caused by damages to his property. *See Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 594–95, 493 S.E.2d 875, 880 (Ct. App. 1997); *Waites v. S.C. Windstorm & Hail Underwriting Ass’n*, 279 S.C. 362, 366, 307 S.E.2d 223, 225 (1983); *see also Hill v. City of Hanahan*, 281 S.C. 527, 531–32, 316 S.E.2d 681, 684 (Ct. App. 1984)

(addressing the admissibility of testimony as to the value of land in a takings case). The admissibility of Mr. Green's testimony is not at issue.

Second, the flaw in the Guarantors' argument about the effect of 2nd Avenue Holdings' bid is self-evident. No entity or individual was willing to bid more than \$7,160,000 for the property. That fact is proven by the public auction resulting in a sale to the highest bidder for \$7,160,000. (R. 265). Although the Guarantors claim they were "absolutely deprived of the Trust's high bid," they concede that they cannot prove the Trust's purported "high bid" would have been higher than \$7,160,000. (Petition at 6) ("[W]e can never know what the Trust's high bid would have been."). Their assumption that the Trust would have bid fair market value if not for its alleged violation of the statute, *see* (App. Br. 19–20), is speculation unsupported by any evidence. The Guarantors presented no evidence and cite no evidence as to the critical question whether the winning bid would have been higher but for the alleged bidding statute violation. This Court properly found the Guarantors failed to show they were prejudiced by the conduct of the foreclosure sale. Op. No. 5880 (Howard Adv. Sh. No. 44 at 35–36).

Third, the Guarantors contracted away their appraisal rights and agreed to have the winning bid apply, regardless of whether the bid exceeded fair market value. (R. 278, 281). The guaranty agreements acknowledged that South Carolina law provides,

that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgage property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction.

(*Id.*); *see also* S.C. Code Ann. §§ 29-3-680 through -740 (providing a deficiency judgment may be reduced or extinguished by an appraisal). However, the guaranty agreements also provided that each Guarantor "hereby waives and relinquishes the statutory appraisal rights which means the

high bid at the judicial foreclosure sale will be applied to the debt regardless of any appraised value of the mortgaged property.” (R. 278, 281). The Guarantors now ask the Court to rewrite the guaranties and require the foreclosure auction to result in a sale for fair market value or higher. The Court cannot and should not rewrite a contract to require the opposite of the parties’ agreement.

Finally, the Guarantors also argue that, because the bidding statute does not speak of prejudice, they are not required to show prejudice. (Petition at 5). However, the bidding statute also does not provide a remedy or suggest a violation may be asserted as a defense to a guarantor’s contractual obligation to pay a debt. *See* S.C. Code Ann. § 15-39-720. In fact, the statute does not address guaranty agreements or the rights of guarantors in any manner. *Id.* It is an inappropriate logical leap to assume the absence of the word “prejudice” from the bidding statute means the statute—which only explains the required process for the conduct of foreclosure sales—somehow provides that a guarantor is relieved of his separate, contractual obligation to pay the debt if the mortgagee breaches the requirement that it bid only once at a foreclosure sale. Moreover, the statute says nothing about the amount a mortgagee is required to bid, much less that a mortgagee is required to bid at least fair market value, as the Guarantors now suggest. *Id.*

This Court did not overlook or misapprehend any issues in holding the Guarantors failed to show they were prejudiced by the alleged bidding statute violation. The Court should deny the Guarantors’ petition for rehearing.

II. The Court properly found the Guarantors’ collateral attack on the deficiency judgment is barred by res judicata.

The Guarantors raise the same arguments as to the elements of res judicata that they raised in their reply brief. *See* (Petition at 1–4); *see also* (Reply Br. 20–23). The Court therefore already considered and rejected the arguments, and it did not overlook or misapprehend any issues.

In an effort to avoid the Court’s res judicata ruling and distinguish the subject matter of the foreclosure action from the subject matter of this action, the Guarantors now concede a valid, enforceable deficiency judgment exists against Springs North Augusta but contend they should be relieved of their agreement to pay the judgment. (Petition at 1) (conceding the deficiency judgment “stands and may be pursued by the Trust” and is “enforceable against [Springs North Augusta]”). The Guarantors’ concession is fatal to their arguments. The Guarantors agreed to guaranty the payment of any debt owed to the Trust by Springs North Augusta. (R. 276–81). Thus, if a valid deficiency judgment exists against Springs North Augusta, then Springs North Augusta owes a debt to the Trust, and the Guarantors are required to pay the debt. (*Id.*). The Guarantors cannot concede the validity of the deficiency judgment as to Springs North Augusta—thus conceding the Trust did not breach the implied covenant of good faith and fair dealing in the loan agreement with Springs North Augusta—yet challenge whether it was obtained in good faith when the Trust demands they satisfy the judgment. Either they are challenging the existence and validity of the deficiency judgment, and their defense is therefore barred by res judicata, or they concede the validity of the judgment and are therefore obligated under the guaranty agreements to pay the judgment. The Court properly found the subject matter of both actions is the same—Springs North Augusta’s debt to the Trust, which the Guarantors and Springs North Augusta are each independently obligated to pay. Op. No. 5880 (Howard Adv. Sh. No. 44 at 34).

Contrary to the Guarantors’ arguments, they are privies with Springs North Augusta under the facts of this case for res judicata purposes. The cases that the Guarantors rely upon do not compel a different conclusion. Those cases make clear that whether parties are privies for purposes of res judicata depends on the facts of each case. *H.G. Hall Constr. Co. v. J.E.P. Enters.*, 283 S.C. 196, 205, 321 S.E.2d 267, 272 (Ct. App. 1984) (“***On the facts of this case*** common ownership is

not enough to establish privity for the purposes of res judicata.” (emphasis added)); *E.A. Prince & Son, Inc. v. Selective Ins. Co. of Se.*, 818 F. Supp. 910, 915 (D.S.C. 1993) (“***Under the facts before the court***, the theory of *res judicata* does not apply and is not a bar to this action.” (emphasis added)). The cases also provide “[t]he term ‘privity’ when applied to a judgment or decree, ***means one so identified in interest with another that he represents the same legal right.***” *H.G. Hall Constr. Co.*, 283 S.C. at 204, 321 S.E.2d at 271 (emphasis added). The Guarantors and Springs North Augusta shared an identical interest and legal right in the foreclosure action. Each is independently obligated to pay any deficiency judgment. Therefore, the Guarantors and Springs North Augusta had the same interest in obtaining the smallest deficiency judgment possible. Accordingly, under the facts of this case, the Guarantors and Springs North Augusta are “so identified in interest with [one] another that [they] represent[] the same legal right” and are therefore privies for purposes of res judicata. *See H.G. Hall Constr. Co.*, 283 S.C. at 204, 321 S.E.2d at 271.

The Guarantors cited no authority in their reply brief supporting their argument that a default judgment is not an adjudication on the merits for purposes of res judicata. *See* (Reply Br. 23). Consequently, the Guarantors abandoned the argument and cannot resurrect it in their petition for rehearing. *S.C. Dep’t of Soc. Servs. v. Mother ex rel. Minor Child*, 375 S.C. 276, 283, 651 S.E.2d 622, 626 (Ct. App. 2007) (“[W]e note this issue is abandoned because Mother makes a conclusory argument without citation of any authority to support her claim.”). Moreover, the Guarantors’ attempt to avoid this result is barred by laches and waiver. They controlled Springs North Augusta. (R. 177–78). They cannot allow Springs North Augusta to go into default, watch idly as the foreclosure action proceeds to a sale and deficiency judgment while taking no action to protect their rights, then assert in this action that they are not bound by the outcome of the

foreclosure action because Springs North Augusta did not contest the action. *See Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994) (“Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay suffers his adversary to incur expenses or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce these rights.”); *Lawrimore v. Am. Health & Life Ins. Co.*, 276 S.C. 112, 114, 276 S.E.2d 296, 297 (1981) (“Waiver is defined as an intentional relinquishment of a known right.”). Such an outcome is inequitable and would reward the Guarantors for failing to defend their own interests. The Court should reject the Guarantors’ arguments and deny the Guarantors’ petition for rehearing.

III. Additional sustaining grounds support a denial of the Guarantors’ petition for rehearing.

The Court should deny the Guarantors’ petition for rehearing for several additional reasons. First, the Trust did not violate the bidding statute. The winning bid at the upset sale was submitted by 2nd Avenue Holdings. (R. 162, 265). There is no legal relationship between 2nd Avenue Holdings and the Trust and, therefore, 2nd Avenue Holdings is not a representative of the Trust as a matter of law. *See* (R. 158–59, 169–71). Accordingly, the Trust did not violate the bidding statute.

Second, the implied covenant of good faith and fair dealing cannot require the Trust to comply with the requirements of the bidding statute before enforcing a deficiency judgment against the Guarantors when the plain language of the guaranty agreements does not require the Trust to pursue foreclosure or a deficiency judgment at all. *See Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (explaining there is no breach of the implied covenant “where a party to a contract has done what provisions of the contract expressly gave him the right to do.”). Moreover, the master-in-equity approved the sale and entered a judgment in the foreclosure action.

It cannot be an act of bad faith to do something with the permission and approval of a court. The Guarantors also now concede the deficiency judgment is valid and enforceable against Springs North Augusta. Therefore, the deficiency judgment was necessarily procured in good faith.

Third, the Guarantors received the benefit for which they bargained. The guaranty agreements provided that the Guarantors “absolutely and unconditionally” guarantee payment of the loan “[a]s an inducement to [the Trust] to extend credit to and to otherwise deal with **SPRINGS NORTH AUGUSTA, LLC** . . . and in consideration thereof.” (R. 276, 279). The Trust performed its obligations and made the loan to Springs North Augusta. *See* (R. 266–72). The Guarantors therefore received the benefit for which they bargained, and they cannot escape their own obligations to perform under the agreements. *See, e.g., First S. Bank v. Rosenberg*, 418 S.C. 170, 180, 790 S.E.2d 919, 925 (Ct. App. 2016) (“This court’s duty is to enforce the contract made by the parties regardless of the parties’ failure to carefully guard their rights.”). This Court should deny the Guarantors’ petition for rehearing.

Finally, the Guarantors contracted away any rights to challenge the creation of Springs North Augusta’s debts:

It is understood that any such notes, drafts, debts, obligations and liabilities may be accepted or created by or with [the Trust] at any time and from time to time without notice to the [Guarantors], and the [Guarantors] hereby expressly waive[] presentment, demand, protest, and notice of dishonor of any such notes, drafts, debts, obligations and liabilities or other evidences of any such indebtedness, obligation or liability.

(R. 276, 279). By the plain language of the guaranty agreements, the Guarantors must pay the deficiency judgment—a debt of Springs North Augusta—regardless of how it was created and cannot avoid their obligations on the ground that the deficiency judgment resulted from an alleged violation of the bidding statute. The Court should therefore deny the Guarantors’ petition for

rehearing. *See* Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”).

CONCLUSION

The Court did not overlook or misapprehend any facts or issues. It properly held the Guarantors’ collateral attack on the deficiency judgment is barred by res judicata and, regardless, the record contains no evidence that the Guarantors suffered any prejudice. Accordingly, the Court should deny the petition for rehearing.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ A. Mattison Bogan

John T. Moore

SC Bar No. 004056

E-Mail: john.moore@nelsonmullins.com

A. Mattison Bogan

SC Bar No. 72629

E-Mail: matt.bogan@nelsonmullins.com

Nicholas A. Charles

SC Bar No. 101693

E-Mail: nick.charles@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

*Attorneys for Stephen Wilkinson, as Trustee of George B.
Buchanan, Jr. Irrevocable Family Trust Dated the 15th day of
July, 2001*

Columbia, South Carolina

February 3, 2022

RECEIVED

Feb 03 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2018-001388

Stephen Wilkinson, as Trustee of George B. Buchanan,
Jr. Irrevocable Family Trust Dated the 15th day of July,
2001, ...

Respondent,

v.

Redd Green Investments, LLC, Anderson North Augusta,
LLC, Herbert Anderson, Jr., A. Bruce Green, Herbert
Keith Anderson, and L. Cliff Redd, ...

Defendants,

Of which Redd Green Investments, LLC, A. Bruce
Green, and L. Cliff Redd are

Appellants.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough, L.L.P., attorneys for Stephen Wilkinson, as Trustee of George B. Buchanan, Jr. Irrevocable Family Trust Dated the 15th day of July, 2001, do hereby certify that I have served all counsel and/or parties in this action with a copy of the pleading(s) hereinbelow by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

Pleading(s): Return to Petition for Rehearing

Parties Served:

apeace@hmp-law.com

M. Alan Peace, Esquire
Harrell Martin & Peace, P.A.
P. O. Box 1000
Chapin, SC 29036

erik@hmp-law.com

Erik T. Norton, Esquire
Harrell Martin & Peace, P.A.
P. O. Box 1000
Chapin, SC 29036

Wlightsey@wyche.com

Wallace K. Lightsey, Esquire

bwilson@wyche.com

William M. Wilson III, Esquire
Wyche P.A.
P.O. Box 728
Greenville, SC 29602



Jessica Trautman
Administrative Assistant

Columbia, South Carolina
February 3, 2022

Jessica Trautman

From: Jessica Trautman
Sent: Thursday, February 3, 2022 11:01 AM
To: 'wlightsey@wyche.com'; 'bwilson@wyche.com'; 'apeace@hmp-law.com'; 'erik@hmp-law.com'
Cc: John Moore; 'Nick Charles'; Matt Bogan
Subject: Stephen Wilkinson v. Redd Green Investments-Appellate Case No. 2018-001388
Attachments: Return to Petition for Rehearing.pdf

Counsel,

Attached for service upon you in the above matter please find Respondent's Return to Petition for Rehearing. Service is made via email pursuant to the Supreme Court Order 2021-08-25-02.

Thank you.



JESSICA TRAUTMAN SENIOR ADMINISTRATIVE ASSISTANT
jessica.trautman@nelsonmullins.com

MERIDIAN | 17TH FLOOR
1320 MAIN STREET | COLUMBIA, SC 29201
T 803.255.5535 F 803.256.7500
NELSONMULLINS.COM

The South Carolina Court of Appeals

Stephen Wilkinson, as Trustee of George B. Buchanan,
Jr. Irrevocable Family Trust Dated the 15th day of July,
2001, Respondent,

v.

Redd Green Investments, LLC, Anderson North Augusta,
LLC, Herbert Anderson, Jr., A. Bruce Green, Herbert
Keith Anderson, and L. Cliff Redd, Defendants,

Of which Redd Green Investments, LLC, A. Bruce
Green, and L. Cliff Redd are Appellants.

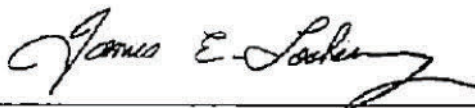
Appellate Case No. 2018-001388

ORDER

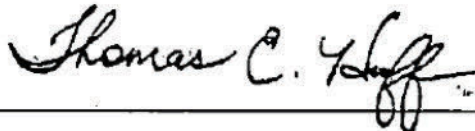
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



A.J.



A.J.

Columbia, South Carolina

cc:

Wallace K. Lightsey, Esquire

William Marvin Wilson, III, Esquire

Erik Tison Norton, Esquire

John T. Moore, Esquire

M. Alan Peace, Esquire

Nicholas Andrew Charles, Esquire

Allen Mattison Bogan, Esquire

FILED
Feb 24 2022