

RECEIVED

Nov 16 2022

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

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.

BRIEF OF RESPONDENT

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*

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE..... 1

STATEMENT OF FACTS 4

 I. The Underlying Loan 4

 II. The Foreclosure Action..... 5

 III. The Guaranty Action..... 6

STANDARD OF REVIEW 8

ARGUMENT 8

 I. The Court of Appeals properly found the Guarantors’ attempted collateral attack on the deficiency judgment is barred by res judicata..... 10

 A. The foreclosure action and this action involve the same subject matter... 11

 B. The identity of the parties is the same in the foreclosure action and this action for purposes of res judicata. 13

 C. The validity and amount of the deficiency judgment and the conduct of the foreclosure sale were adjudicated in the foreclosure action. 15

 II. The Guarantors bear the burden of proof on their affirmative defenses and did not show they suffered prejudice from any alleged violation of the bidding statute. . 17

 III. The plain language of the guaranty agreements precludes the Guarantors’ efforts to evade their contractual obligations to pay the deficiency judgment..... 24

 IV. Additional sustaining grounds preclude a reversal of the Court of Appeals and trial court and therefore support the denial of certiorari. 28

 A. 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. 28

 B. The Trust did not violate the bidding statute. 29

 C. This Court cannot dismiss the Trust’s claims. 30

CONCLUSION..... 31

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Adams v. G.J. Creel & Sons, Inc.</i> , 320 S.C. 274, 465 S.E.2d 84 (1995)	12, 26, 27
<i>Citizens & S. Nat. Bank of S.C. v. Lanford</i> , 313 S.C. 540, 443 S.E.2d 549 (1994).....	25, 26
<i>Countrywide Home Loans, Inc. v. Umbarger</i> , Op. No. 2011-MO-001, 2011 WL 11748257.....	16
<i>Duckett v. Goforth</i> , 374 S.C. 446, 649 S.E.2d 72 (Ct. App. 2007).....	10
<i>E.A. Prince & Son, Inc. v. Selective Ins. Co. of Se.</i> , 818 F. Supp. 910 (D.S.C. 1993)	14
<i>First S. Bank v. Rosenberg</i> , 418 S.C. 170, 790 S.E.2d 919 (Ct. App. 2016).....	24, 27
<i>Guffey v. Columbia/Colleton Reg'l Hosp., Inc.</i> , 364 S.C. 158, 612 S.E.2d 695 (2005).....	8, 20
<i>H.G. Hall Constr. Co. v. J.E.P. Enters.</i> , 283 S.C. 196, 321 S.E.2d 267 (Ct. App. 1984)	14, 15
<i>Hawkins v. Greenwood Dev. Corp.</i> , 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997).....	20
<i>Hill v. City of Hanahan</i> , 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984).....	20
<i>Hilton Head Center of S.C., Inc. v. Pub. Serv. Comm'n of S.C.</i> , 294 S.C. 9, 362 S.E.2d 176 (1987)	10
<i>Hoffman v. Greenville Cty.</i> , 242 S.C. 34, 129 S.E.2d 757 (1963)	17
<i>Hopkins v. S.C. Dep't of Social Servs.</i> , 313 S.C. 322, 437 S.E.2d 542 (1993).....	23
<i>Hotel & Motel Holdings, LLC v. BJC Enters., LLC</i> , 414 S.C. 635, 780 S.E.2d 263 (Ct. App. 2015)	17
<i>In re Est. of Brown</i> , 430 S.C. 474, 846 S.E.2d 342 (2020).....	16
<i>In re Marriage of Hein</i> , 52 Cal. App. 5th 519 (2020)	23
<i>Landry v. Landry</i> , 430 S.C. 153, 843 S.E.2d 491 (2020)	20
<i>Lawrimore v. Am. Health & Life Ins. Co.</i> , 276 S.C. 112, 276 S.E.2d 296 (1981).....	28, 29

<i>McGill v. Moore</i> , 381 S.C. 179, 672 S.E.2d 571 (2009).....	24
<i>Morris v. Jones</i> , 329 U.S. 545 (1947).....	16
<i>Orca Yachts, L.L.C. v. Mollicam, Inc.</i> , 287 F.3d 316 (4th Cir. 2002)	16
<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)	18, 25
<i>Pike v. S.C. Dep’t of Transp.</i> , 343 S.C. 224, 540 S.E.2d 87 (2000)	17, 22
<i>Plum Creek Dev. Co. v. City of Conway</i> , 334 S.C. 30, 512 S.E.2d 106 (1999).....	10
<i>Provident Life & Acc. Ins. Co. v. Driver</i> , 317 S.C. 471, 451 S.E.2d 924 (Ct. App. 1994)	28
<i>S. Bank & Trust Co. v. Harley</i> , 292 S.C. 340, 356 S.E.2d 410 (Ct. App. 1987), <i>aff’d as modified</i> , 295 S.C. 423, 368 S.E.2d 908 (1988)	19
<i>Steinke v. S.C. Dep’t of Labor, Licensing & Reg.</i> , 336 S.C. 373, 520 S.E.2d 142 (1999).....	8
<i>Stephen Wilkinson v. Redd Green Invs., LLC</i> , Op. No. 5880 (S.C. Ct. App. filed Dec. 15, 2021)	7, 13, 14, 17, 19
<i>Stevens v. Allen</i> , 336 S.C. 439, 520 S.E.2d 625 (Ct. App. 1999), <i>aff’d</i> , 342 S.C. 47, 536 S.E.2d 663 (2000)	8
<i>Sub-Zero Freezer Co. v. R.J. Clarkson Co.</i> , 308 S.C. 188, 417 S.E.2d 569 (1992)	10
<i>Tadlock Painting Co. v. Maryland Cas. Co.</i> , 322 S.C. 498, 473 S.E.2d 52 (1996).....	12, 27
<i>TranSouth Fin. Corp. v. Cochran</i> , 324 S.C. 290, 478 S.E.2d 63 (Ct. App. 1996)	24
<i>Waites v. S.C. Windstorm & Hail Underwriting Ass’n</i> , 279 S.C. 362, 307 S.E.2d 223 (1983).....	20
<i>Whitlock v. Stewart Title Guar. Co.</i> , 399 S.C. 610, 732 S.E.2d 626 (2012).....	24
<i>Wolf v. Colonial Life & Acc. Ins. Co.</i> , 309 S.C. 100, 420 S.E.2d 217 (Ct. App. 1992)	23
<i>Yelsen Land Co. v. State</i> , 397 S.C. 15, 723 S.E.2d 592 (2012)	14
Rules	
Rule 24, SCRCF.....	29

Statutes

S.C. Code Ann. §§ 29-3-680 through -740.....27

S.C. Code Ann. § 36-3-606.....25

S.C. Code Ann. § 15-39-720.....1, 2, 5, 6, 22, 29

STATEMENT OF ISSUES ON APPEAL

- 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 the plain language of the guaranty agreements precludes the Guarantors' purported defenses.
- IV. Whether additional sustaining grounds preclude a reversal of the Court of Appeals and trial court, including the grounds that the Guarantors waived their right to assert their purported defenses, that the Trust did not violate the bidding statute, and that the relief sought by the Guarantors is procedurally barred.

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

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.

Herbert Keith Anderson; and L. Cliff Redd. (R. 16). The appellants 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 filed counterclaims for civil conspiracy, constructive fraud, and fraud and deceit, alleging the Trust violated South Carolina Code section 15-39-720 (the “bidding statute”)³ when 2nd Avenue Holdings, LLC submitted the winning bid at the foreclosure sale because Buchanan is the owner of 2nd Avenue Holdings. *See* (R. 89–91).

On April 15, 2014, the Trust moved for summary judgment on its claims and the Guarantors’ counterclaims. (R. 310). The Trust submitted affidavits from Stephen Wilkinson, Harry Sakellaris, and 2nd Avenue Holdings asserting that Buchanan did not have control over or

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 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.

represent the Trust and, therefore, his winning bid at the foreclosure sale did not violate the bidding statute. (R. 312–14; R. 322–24; R. 325–26). Cliff Redd and Bruce Green submitted affidavits in opposition to the Trust’s summary judgment motion on October 19, 2015, asserting Buchanan controlled the decisions of the Trust and used 2nd Avenue Holdings to bid at the foreclosure sale and circumvent the requirements of the bidding statute. (R. 327–29; R. 330–32). The circuit court denied the Trust’s summary judgment motion on March 1, 2016, and ordered that the issues may be raised at the directed verdict stage. (R. 6).

On March 1, 2017, the Trust moved to dismiss the Guarantors’ counterclaims for lack of subject matter jurisdiction, arguing the trial court did not have jurisdiction to entertain a collateral attack on the master in equity’s order granting a deficiency judgment in the foreclosure action. (R. 333; R. 335). The trial court denied the Trust’s motion on June 2, 2017. (R. 7–9).

The case proceeded to trial on September 5, 2017. (R. 94). At the close of all the evidence, the Trust moved for a 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 moved for a new trial on September 18, 2017, and amended their motion on September 19, 2017. (R. 291; R. 294). The other defendants did not challenge the trial court’s ruling and are not appellants in this case. The Guarantors submitted a memorandum in support of their motion for a new trial on May 29, 2018. (R. 302). The Trust filed a memorandum in opposition, (R. 297), and the trial court denied the motion in a Form 4 order issued on June 29,

2018, (R. 12). The Guarantors appealed the directed verdict and the order denying their motion for a new trial.

STATEMENT OF FACTS

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 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 promissory note. *See* (R. 273–75; R. 160–61). The amendment 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.

II. 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 mortgage⁴—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

⁴ The mortgage is a public record and can be found as Exhibit D to the complaint in the foreclosure action, Civil Action No. 2012-CP-02-00173 (Aiken County), which was filed on January 20, 2012. The first paragraph of the mortgage reads as follows:

THIS MORTGAGE AND SECURITY AGREEMENT (this "Mortgage") is made and entered into as of November 18, 2009, by and among SPRINGS NORTH AUGUSTA, LLC, a South Carolina limited liability company (hereinafter referred to as "Mortgagor") whose address is 133 Joe Bernat Drive, Greenwood, SC 29649 and D. RICHARD CRUMPLER, AS TRUSTEE OF THE GEORGE B. BUCHANAN, JR. IRREVOCABLE FAMILY TRUST, DATED THE 15TH DAY OF JULY, 2001 (hereinafter referred to as "Mortgagee") whose address is 4728 Jenn Drive, Myrtle Beach, SC 29577.

amended to \$2,753,192.70, plus 15% annual interest. (R. 263–64). At the time of trial on the guaranty agreements, 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.*).

III. The Guaranty Action

The Trust filed this action to enforce the guaranty agreements and collect the deficiency judgment from the Guarantors pursuant to the agreements. *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; R. 327–29; R. 330–32). 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 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 seek to enforce 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. 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.* This Court should affirm the Court of Appeals and trial court.

STANDARD OF REVIEW

A directed verdict should be granted where the evidence raises no issue for the jury as to the defendant's liability. *Guffey v. Columbia/Colleton Reg'l Hosp., Inc.*, 364 S.C. 158, 163, 612 S.E.2d 695, 697 (2005). In ruling on a motion for directed verdict, the trial court must view the evidence and the inferences which reasonably can be drawn therefrom in the light most favorable to the nonmoving party. *Steinke v. S.C. Dep't of Labor, Licensing & Reg.*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

“The grant or denial of [a] new trial motion[] rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.” *Stevens v. Allen*, 336 S.C. 439, 446, 520 S.E.2d 625, 628–29 (Ct. App. 1999), *aff'd*, 342 S.C. 47, 536 S.E.2d 663 (2000).

ARGUMENT

The Guarantors seek this Court's assistance in escaping the guaranty agreements they voluntarily entered into with the Trust. To complete their escape from their own contractual agreements, they ask this Court to create new law providing them a way out of their contracts. This Court should reject the Guarantors' requests.

First, the Guarantors' collateral attack on the deficiency judgment is barred by res judicata. The validity and amount of the deficiency judgment, and the conduct of the foreclosure sale, were adjudicated by the master in equity in the foreclosure action. The Guarantors could have defended their interests in the foreclosure action, either via Springs North Augusta or by intervening as individuals, but they failed to do so. Consequently, the propriety of the foreclosure sale and the validity of the resulting deficiency judgment are settled by the master in equity's final judgment,

which is not subject to attack by the Guarantors or reconsideration by another court. The Guarantors' arguments about the deficiency judgment and foreclosure sale are therefore barred.

Second, the Guarantors failed to present any evidence that they suffered prejudice caused by the alleged violation of the bidding statute. They presented no evidence that the winning bid would have been higher but for the alleged violation of the statute and no evidence of the fair market value of the property at the time of the sale.

Third, the plain language of the guaranty agreements precludes the Guarantors' defenses. The guaranty agreements are unconditional and impose no prerequisites on the Trust's collection of the remaining debt from the Guarantors. Moreover, the Guarantors expressly contracted away their statutory right to reduce or eliminate any deficiency via the statutory appraisal process. Thus, by their own agreement, they have no right to argue they are not obligated to perform their contractual obligations under the guaranty agreements on the ground that the foreclosure sale price was insufficient.

This Court should affirm the Court of Appeals and trial court. The Guarantors presented no evidence showing they were prejudiced by the conduct or outcome of the foreclosure sale. They are therefore not entitled to relief from their contractual obligations. Regardless, this Court should reject the Guarantors' request to rewrite South Carolina law. Even if the Guarantors' desired law existed, the Guarantors would not be able to take advantage of it because their defenses are barred by res judicata and their contractual waiver of the defenses.

Finally, the Court cannot grant the Guarantors' request that the Court "direct that the action against the guarantors be dismissed due to the statutory violation." (Pet. Br. 12). The Guarantors did not move for a directed verdict based on the alleged violation of the bidding statute. *See* (R. 215–22). The trial court granted the Trust's motion for a directed verdict at the close of all the

evidence and denied the Guarantors' post-trial motion for a new trial. (R. 225–26; R. 12). The Guarantors appealed only those two rulings. Accordingly, even if this Court rules in the Guarantors' favor, it can only reverse the directed verdict and remand the case for a new trial on the Trust's claim that the Guarantors are contractually obligated to pay the deficiency judgment and the affirmative defenses the Guarantors asserted against that claim.

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' defenses are 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. Br. 20). 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 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). 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). The Trust 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 have no choice but to concede the validity of the deficiency judgment as to Springs North Augusta, and thus concede the Trust did not breach the implied covenant of good faith and fair dealing in the loan agreement with Springs North Augusta. They cannot now challenge whether the deficiency judgment was obtained in good faith when the Trust demands the Guarantors reciprocate its performance by performing their own obligations under the guaranty agreements. Either they are attempting a collateral attack on the existence and validity of the deficiency judgment, and their defenses are 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 the 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). It is thus a fact-specific question. As the Court of Appeals properly held, under the facts of this case, the Guarantors and Springs North Augusta “had a shared interest in obtaining the lowest deficiency judgment possible because Guarantors were responsible for any unpaid debt of Springs North Augusta.” Op. No. 5880 (Howard Adv. Sh. No. 44 at 34).

The Guarantors fail to explain how the facts of this case contradict the Court of Appeals' holding. They make only general arguments about whether common ownership of corporations or principal-agent relationships establish privity for res judicata purposes. (Pet. Br. 22–25). However, the Court of Appeals did not make such a general holding. It held that the interests of these Guarantors and Springs North Augusta in the foreclosure action were the same, and therefore the Guarantors and Springs North Augusta are privies under the facts of this case. *See* Op. No. 5880 (Howard Adv. Sh. No. 44 at 34). The Guarantors do not explain how their interests and Springs North Augusta's interests in the outcome of the foreclosure action were different. The Court of Appeals thus properly held that the Guarantors and Springs North Augusta are privies for res judicata purposes in this case.

Moreover, the cases that the Guarantors rely upon do not compel a different conclusion. *See* (Pet. Br. 23–24). 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 ‘privy’ 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 and the conduct of the foreclosure sale were adjudicated in the foreclosure action.

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. The Guarantors controlled Springs North Augusta and admitted they had

notice of the foreclosure action. (R. 180–81). They could have defended their own interests in the foreclosure action—either by having Springs North Augusta defend the action or by intervening on their own behalf—and raised the issue of 2nd Avenue Holdings’ participation in the sale, but they elected not to do so. They cannot hide behind the fact that Springs North Augusta “did not defend” the foreclosure action and “was in default and not participating in the foreclosure action,” (Pet. Br. 24–25), when they controlled whether Springs North Augusta defended the action. Their defenses are now barred.

Finally, the Guarantors incorrectly argue *res judicata* does not apply to default judgments. It is well-settled that default judgments have a *res judicata* effect. *See, e.g., Morris v. Jones*, 329 U.S. 545, 550–51 (1947) (“A judgment of a court having jurisdiction of the parties and of the subject matter operates as *res judicata*, in the absence of fraud or collusion, even if obtained upon a default.” (citation omitted)); *Orca Yachts, L.L.C. v. Mollicam, Inc.*, 287 F.3d 316, 319 (4th Cir. 2002) (“Even though the judgment in Florida was a default judgment, the doctrine of *res judicata* remains applicable.”).⁵ The Guarantors cite no case law supporting their contention, instead relying only on a case addressing a different doctrine that does not apply here. *See* (Pet. Br. 24–25) (quoting *In re Est. of Brown*, 430 S.C. 474, 488, 846 S.E.2d 342, 349 (2020), which addresses collateral estoppel, not *res judicata*).

The amount of the deficiency judgment and the conduct of the foreclosure sale were adjudicated by the master in the foreclosure action. Accordingly, the Guarantors’ defenses are

⁵ *See also Countrywide Home Loans, Inc. v. Umbarger*, Op. No. 2011-MO-001, 2011 WL 11748257, at *2 (S.C. Sup. Ct. filed Jan. 7, 2011) (“Countrywide cites [two cases] for the proposition that collateral estoppel does not apply where the issue sought to be precluded was decided in a default judgment. ***Such may be the case for collateral estoppel claims, but default judgments are res judicata in the absence of fraud or collusion.***” (emphasis added) (citing *Morris*)).

now barred by res judicata. Thus, the Court need not and should not reach the Guarantors' purported "novel" issues or their attempts to have this Court write new law regarding guaranty agreements, because their defenses are barred by res judicata.

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

The Court of Appeals properly held the Guarantors failed to show the alleged violation of the statutory bidding process caused them to suffer any prejudice because "no evidence shows what the 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 the alleged violation. They failed to do so. This Court should affirm the Court of Appeals and trial court.

The Guarantors' contention that the Trust breached the implied covenant of good faith and fair dealing is an affirmative defense for which the Guarantors bear the burden of proof. *See Pike v. S.C. Dep't of Transp.*, 343 S.C. 224, 231, 540 S.E.2d 87, 91 (2000) (rejecting a party's burden-shifting argument because it "flies in the face of the well-established rule that the party pleading an affirmative defense 'has the burden of proving it'" (quoting *Hoffman v. Greenville Cty.*, 242 S.C. 34, 39, 129 S.E.2d 757, 760 (1963))). To prove a breach of contract—including a breach of the implied covenant—the party alleging the breach must establish that it suffered damages (i.e., prejudice) caused by the breach. *See Hotel & Motel Holdings, LLC v. BJC Enters., LLC*, 414 S.C. 635, 652, 780 S.E.2d 263, 272 (Ct. App. 2015) ("The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach."). Thus, the Guarantors

bear the burden to prove they were harmed by the alleged breach of the implied covenant of good faith and fair dealing.

The Guarantors failed to present any evidence from which a jury could reasonably infer that the Guarantors suffered any harm caused by the conduct of the foreclosure sale. 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 for less than \$7,160,000. *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)). In fact, the Guarantors presented no evidence that any third party even attempted to bid on the property at the upset sale. To the contrary, the record contains evidence of only two bids—the Trust's initial bid of \$6,600,000 and 2nd Avenue Holdings' bid of \$7,160,000 at the upset sale. Thus, the only evidence in the record is that if 2nd Avenue Holdings had not bid, the winning bid would have been \$6,600,000 and the deficiency judgment would have been even greater than it is now. 2nd Avenue Holdings' bid at the upset sale therefore **reduced** the amount of the deficiency judgment the Guarantors are obligated to pay. The Guarantors were not harmed by 2nd Avenue Holdings' bid; they **benefitted** from it.

Although the Guarantors appear to argue they were deprived of “the full benefit of the collateral,” (Pet. Br. 13), they in fact received the full benefit of the collateral. The Guarantors

rely on *Southern Bank & Trust Co. v. Harley*, 292 S.C. 340, 356 S.E.2d 410 (Ct. App. 1987), *aff'd as modified*, 295 S.C. 423, 368 S.E.2d 908 (1988), but *Harley* supports the Trust's position. The sale proceeds were applied to the total debt, and the Guarantors are responsible only for the deficiency. The Guarantors therefore received the full benefit of the collateral. *See id.* at 342, 356 S.E.2d at 411 ("The Guarantors rely on the principle that a guarantor of a secured debt is entitled to have the proceeds of the collateral applied to the liquidation of the debt if the creditor forecloses the security before proceeding on the guaranty. The purpose of this rule is to avoid a double recovery by the creditor. The rule does not avail the Guarantors in this case, however. As required by the rule, Southern did apply the proceeds of the foreclosure to reduce the indebtedness. Nevertheless, there remains an unpaid balance of \$79,221.77. Requiring the Guarantors to pay this sum will not impose on them a liability greater than they agreed to assume. Neither will it result in a double recovery to Southern.").

The Guarantors incorrectly focus on whether the fair market value of the property exceeded the bids by the Trust and 2nd Avenue Holdings. The fair market value of the property is immaterial because the question is whether the deficiency judgment owed by the Guarantors would have been reduced or eliminated but for the alleged violation of the bidding statute, not whether the fair market value exceeded the sale price. Regardless, the Court of Appeals properly found the record contains no evidence of the fair market value, and the Guarantors fail to cite any such evidence. Op. No. 5880 (Howard Adv. Sh. No. 44 at 35). Although Mr. Green testified the property was worth \$30 million in 2009 and therefore being a guarantor "never seemed to be a problem," (R. 178), his self-serving testimony that he did not think he would have to perform under his guaranty agreement is not evidence a reasonable juror could rely upon to determine the fair market value of the property at the time of the foreclosure sale—much less to determine 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”).⁶ The Guarantors’ assertions that the Trust valued the property at \$15 million are, by their own admission, based on “evidence offered outside the jury’s presence.” (Pet. Br. 16–17). In reviewing the granting of a directed verdict, this Court must analyze whether the Guarantors presented any evidence from which *the jury* could make reasonable inferences in the Guarantors’ favor. *See Guffey*, 364 S.C. at 163, 612 S.E.2d at 697. A jury cannot draw inferences from any purported “evidence” not presented to it.

Moreover, the purported “evidence” that the Trust valued the property at \$15 million is not evidence at all. The Guarantors cite two statements made by counsel outside the jury’s presence: (1) a statement by the Guarantors’ 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” that the Trust valued the property at \$15 million in the days following the sale and obtained an appraisal valuing the property at \$15 million, and (2) a statement by the Trust’s counsel during the same argument that “the property was 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.” (Pet. Br. 16). Statements by counsel made during argument on an evidentiary issue are not evidence,⁷ *Landry v. Landry*, 430 S.C. 153, 163, 843 S.E.2d 491, 496 (2020) (“[I]t is

⁶ The cases the Guarantors rely upon, (Pet. Br. 16), 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 do not argue the trial court erred in admitting or excluding any evidence.

well settled that statements by counsel are not evidence.”), and those statements were not presented to the jury and therefore cannot constitute evidence from which a jury could find in the Guarantors’ favor.⁸

Faced with a lack of evidence that any person was willing to bid more than \$7,160,000 and a lack of evidence of fair market value, the Guarantors rely on a vague and conclusory argument that they were “absolutely deprived of the Trust’s highest and best bid due to the Trust’s violation of the statute.” (Pet. Br. 18). Although they cite no support for this contention, and the record contains no evidence that the Trust would have entered a higher bid at the initial sale but for 2nd Avenue Holdings’ allegedly improper bid at the upset sale, the Guarantors appear to base their contention on the fiction that a mortgagee will necessarily submit a bid equal to or greater than fair market value (or at least equal to or greater than the amount of the debt) if it submits only one bid. (Pet. Br. 18–19). Based on this fiction, they ask the Court to “presume” the Guarantors suffered prejudice and invent a doctrine of “inherent prejudice” applicable in the narrow circumstance where a mortgagee allegedly submits an improper second bid during a foreclosure sale and then seeks to recover a deficiency judgment from guarantors—regardless of the terms of the guaranty contracts. (Pet. Br. 12–15). However, they offer no evidence supporting this fiction and provide no logical basis on which the Court can make such an assumption.

The Guarantors also ask this Court to create a new body of common law that does not exist—and need not exist—in South Carolina. The Guarantors contend the Court should assume

⁸ Moreover, contrary to the Guarantors’ assertion that the jury could infer a property worth \$30 million at the time of the loan would be worth more than \$7,160,000 at the time of the foreclosure sale, Mr. Green testified Springs North Augusta could not pay off the loan issued in 2009 because “the real estate values started tanking about that time or they had been tanking and they didn’t pick up any since.” (R. 180). Thus, a jury cannot reasonably infer from any evidence presented at trial that the fair market value of the property remained above \$7,160,000 at the time of the foreclosure sale.

the absence of the word “prejudice” in the bidding 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. *See id.* 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 reject the Guarantors’ argument.

The Guarantors also urge this Court to invent and apply a drastic burden-shifting rule. Although the breach of the implied covenant is an affirmative defense for which the Guarantors bear the burden of proof, *see Pike*, 343 S.C. at 231, 540 S.E.2d at 91, they ask this Court to shift the burden to the Trust to prove that “its bid exceeded the fair market value of the property.” (Pet. Br. 14, 17–19). The Guarantors cite no case law in support of this drastic departure from the general rule that defendants bear the burden of proof on their affirmative defenses nor any South Carolina authority requiring a mortgagee to bid more than fair market value at a foreclosure sale. Instead, they rely first on the absence of the word “prejudice” from the bidding statute, then assert as a matter of “public policy” that the Court should create a rebuttable presumption that a guarantor has suffered prejudice if a mortgagee violates the bidding statute. (Pet. Br. 17–19).

Contrary to their arguments, the bidding statute does not exist for the purpose of protecting guarantors, and the Guarantors cite no authority for their assertion that “the statute is designed to advance the public policy of protecting guarantors.” (Pet. Br. 19). The statute does not provide a defense to guarantors or even address guarantors. Further, the Guarantors cite no authority supporting or permitting the creation of a rebuttable presumption under these circumstances. The California case relied upon by the Guarantors only defines what a rebuttable presumption is; the case does not support the Guarantors’ contention that a rebuttable presumption should be created in these circumstances. (Pet. Br. 17–18); *In re Marriage of Hein*, 52 Cal. App. 5th 519, 537–38 (2020). The only example of a public policy-based rebuttable presumption cited by the Guarantors under South Carolina law is the “rebuttable presumption that a fit natural parent should have custody as against a third party” based on the State’s public policy “to reunite parents and children.” (Pet. Br. 18) (citing *Hopkins v. S.C. Dep’t of Social Servs.*, 313 S.C. 322, 326–27, 437 S.E.2d 542, 544 (1993)). The State’s public policy and presumption that natural parents should have priority in child custody matters is not analogous to deficiency judgments and guaranty agreements, and it should be given no weight.

Moreover, public policy requires the enforcement of contracts according to their terms. *See Wolf v. Colonial Life & Acc. Ins. Co.*, 309 S.C. 100, 108, 420 S.E.2d 217, 221 (Ct. App. 1992) (“Sound public policy generally requires the enforcement of contracts freely entered into by the parties.”). The Guarantors thus present no basis for this Court to save them from their own agreements by reading protections for guarantors—including burden shifting and rebuttable presumptions of prejudice—into a statute that does not address guarantors, particularly where the Guarantors contracted away their defenses and presented no evidence or logical basis to assume

that they were deprived of the Trust's "highest and best bid" or that the deficiency would have been smaller but for the alleged bidding statute violation.

III. 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 expressly contracted away the defenses they raise in their brief. The Guarantors now 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”). Instead, the

guaranty agreements 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. *See id.*

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*, 320 S.C. at 277, 465 S.E.2d at 85 (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. The first sentence of the agreements provides 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). 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. 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*, 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.

Finally, the guaranty agreements expressly provide that the Guarantors waived any right to challenge the creation of Springs North Augusta's debts. (R. 276, 279). The Guarantors also waived any right to argue the sale price was insufficient. (R. 278, 281) ("Waiver of Appraisal Rights"). The "Waiver of Appraisal Rights" clause expressly provides that, as an inducement for the Trust to make the loan, the Guarantors waived their statutory right to have the property appraised and the appraisal value substituted for the high bid at the foreclosure sale. *Id.* This statutory right may have allowed the Guarantors to assert that fair market value of the property was greater than the amount of the debt and eliminate any deficiency. *See* S.C. Code Ann. §§ 29-3-680 through -740 (providing a deficiency judgment may be reduced or extinguished by an appraisal). Instead, the Guarantors expressly waived their statutory right and agreed that the winning bid at any foreclosure sale is final and "will be applied to the debt ***regardless of any appraised value of the mortgaged property.***" (R. 278, 281) (emphasis added). The Guarantors now ask this Court to (1) add implied terms to the guaranty agreements that contradict the express terms by which the Guarantors waived any right to assert that the sale price was insufficient or less than fair market value, and (2) write new law shifting the burden to the Trust to prove the sale

price exceeded the fair market value—despite the fact that the Guarantors expressly contracted away their right to rely on their desired new law. This Court should reject both requests and affirm the Court of Appeals and trial court.

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

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

The Guarantors’ purported defenses are barred by laches and waiver. They controlled Springs North Augusta and admitted they had notice of the foreclosure action.⁹ *See* (R. 177–78, 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 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

⁹ Moreover, the sale in this case was publicly noticed. *See* (R. 265).

to intervene in the foreclosure action to protect their rights, but they did not. *See* Rule 24, SCRCPP (providing criteria for intervention).

Although the Guarantors carefully avoid describing their defenses as a collateral attack on the deficiency judgment, there is no other description for the defenses. 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 affirm the Court of Appeals and trial court.

B. 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 and assumed for purposes of this appeal that the Trust violated the Deficiency Statute," (Pet. Br. 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 arguments they raise on appeal.

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.

C. This Court cannot dismiss the Trust’s claims.

Finally, the Guarantors ask this Court for relief the Court cannot grant. The only issues raised by the Guarantors in this appeal are whether the trial court erred in granting a directed verdict in favor of the Trust and whether the trial court erred in denying the Guarantors’ motion for a new trial. However, the Guarantors now ask this Court to “direct that the action against the guarantors be dismissed due to the statutory violation.” (Pet. Br. 12). In the Court of Appeals, they asked the court to “instruct the trial court to direct a verdict in favor of [the Guarantors] to the extent that the trial court determines that the Trust violated the Deficiency Statute.” (App. Br. 27). The Guarantors did not move for a directed verdict based on the alleged violation of the bidding statute. *See* (R. 215–22). Accordingly, their request for a directed verdict or dismissal is not

properly before this Court. Even if this Court reverses the trial court and Court of Appeals, it can only order a new trial on the sole issue before the trial court—whether the Guarantors are obligated to pay the deficiency judgment pursuant to the guaranty agreements.

CONCLUSION

This Court should affirm the Court of Appeals and trial court. The Guarantors' attempted collateral attack on the deficiency judgment is precluded by res judicata, and the Guarantors cannot show any prejudice resulting from the conduct of the foreclosure sale. Moreover, this Court should not create new law and add implied terms to a contract based on the Guarantors' hypothetical and illogical assertion that their debt would have been extinguished if 2nd Avenue Holdings did not bid at the upset sale, particularly where the Guarantors contracted away their rights to make these arguments. The terms of the guaranty agreements are plain and unambiguous: the Guarantors are required to pay the deficiency judgment. Accordingly, this Court should affirm the Court of Appeals and trial court.

(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

November 16, 2022