THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Hon. James O. Spence, Master-In-Equity

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SC Court of Appeals

Appellate Case No. 2016-001882

The Mill Homeowner's Association, Inc.....Plaintiff

v.

Randall W. Cofer and Corey C. Cofer.....Respondents,

Regime Solutions, LLC..... Appellant.

INITIAL BRIEF OF APPELLANT, REGIME SOLUTIONS, LLC

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF REFERENCES ii
STATEMENT OF ISSUES ON APPEAL 1
STATEMENT OF THE CASE 1
STATEMENT OF THE FACTS 2
STANDARD OF REVIEW 3
ARGUMENT 3
A. The trial court's "shock the conscience" calculation was in error. 3
B. Equity comparison is not a workable calculation of bid price adequacy. 7
C. There were no irregularities in the sale to satisfy the second prong of the *Wells Fargo* analysis. 9
D. In the alternative, should this court determine that a shock the conscience analysis of the adequacy of a foreclosure sale price in terms of equity is appropriate, the burden to establish equity should be borne by the Respondent. 11
CONCLUSION 13

TABLE OF REFERENCES

Cases

Arrow Bonding Co. v. Warren, 399 S.C. 603, 732 S.E.2d 622 (2012) 4, 5, 6, 8, 10
Bennett v. Floyd, 237 S.C. 64, 115 S.E.2d 659 14
Bloody Point Prop. Owners Ass'n, Inc. v. Ashton, 410 S.C. 62, 71, 762 S.E.2d 729, 734 (Ct. App., 2014) 4, 8
Brownlee v. Miller, 208 S.C. 252, 37 S.E.2d 658 14
Carson v. CSX Transp., Inc., 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012) 3
Cumbie v. Newberry, 251 S.C. 33, 37, 159 S.E. 2.d 915 (1968) 14
E. Sav. Bank, FSB v. Sanders, 373 S.C. 349, 359, 644 S.E.2d 802, 807 (Ct. App. 2007) 4
Ex parte Cooley, 69 S.C. 143, 154-55, 48 S.E. 92, 95 (1904) 11
Ex parte TLC Laser Eye Ctrs. (Piedmont/Atlanta), LLC, 404 S.C. 385, 392, 745 S.E2d 105, 109 (2013). .3
Federal Nat. Mortg. Ass'n v. Brooks, 405 S.E.2d 604, 304 S.C. 506 (Ct. App. 1991). 7, 10
Howell v. Gibson, 208 S.C. 19, 37 S.E.2d 271 (S.C. 1946). 11
In re Wallace, 179 S.C. 480, 484, 184 S.E. 849, 851 (1936). 11
Investors Savings Bank v. Phelps, 303 S.C. 15, 397 S.E.2d 780 (Ct.App.1990) 6, 8, 11
MI Co., Ltd. v. McLean, 325 S.C. 616, 482 S.E.2d 597 (Ct. App. 1997) 3
Poole v. Jefferson Standard Life Ins. Co., 174 S.C. 150, 177 S.E. 24 (S.C. 1934). 11
Robinson v. Estate of Harris, 378 S.C. 140, 662 S.E.2d 420, 423, (S.C. App., 2008) 14
Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006) 14
Wells Fargo Bank, NA v. Turner, 378 S.C. 147, 150, 662 S.E.2d 424, 425 (Ct. App. 2008..... 4, 6, 8, 10, 11
Wingard v. Hennessee, 206 S.C. 159, 33 S.E.2d 390 14

Statutes

Fair Debt Collections Practices Act (FDCPA) Pub. L. 95-109; 91 Stat. 874, September 20, 1977 (and as subsequently amended) (codified as 15 U.S.C. § 1692 –1692p) 9
Gramm-Leach-Bliley Financial Services Modernization Act (GLB Act), Title V of the Financial Services Modernization Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (Nov. 12, 1999) (codified at 15 U.S.C. §§ 6801, 6809, 6821, and 6827); 16 C.F.R. part 313 9

STATEMENT OF ISSUES ON APPEAL

1. **Did the Court err in its application of the "Shock the Conscience" standard as it applies to this matter under South Carolina law?**
2. **Did the Court err in determining that there were irregularities in the sale ?**

STATEMENT OF THE CASE

This appeal arises from the trial court's grant of Respondent's Motion to Vacate Sale, filed on May 19, 2015 and amended to include a motion under Rule 60(b)(1) on July 17, 2015. On April 2, 2014 Plaintiff, the Mill Homeowner's Association, Inc., filed a complaint for foreclosure of an HOA lien against 113 Millhaven Lane, Lexington, SC 29072. (R.p____; Compl.). Respondents were served with the same and failed to issue a responsive pleading or otherwise appear and defend the action. (R.p____; Judgment, Feb. 2, 2015 p.1). The case was referred to the Master-in-Equity, who issued a decree of foreclosure. (R.p____; Order of Reference; Judgment, Feb 2., 2015). Subsequently the subject property sold at judicial sale, and the winning bidder, Regime Solutions, LLC (hereinafter "Regime"), paid the bid price of $4,857.00 into the Court and was granted a Master's Deed. (R.p____; Master's Deed). The Master's Deed to Regime was filed on March 9, 2015 in the Lexington County R.O.D. at Book 17498, Page 335. (R.p____; Master's Deed). Thereafter Regime sought to be put in possession of the property and filed a Rule to Show Cause on April 1, 2015. (R.p____; RTSC). Respondents' Motion to Vacate Sale and subsequent Motion to Set Aside Judgment followed. (R.p____; Motion, May 19, 2015; Motion, July 17, 2015). Respondents' motions were heard on September 14, 2015 by the Honorable James O. Spence, Master-In-Equity for Lexington County and on

February 17, 2016 Judge Spence filed an Order granting Respondents motions. (R.p____; Tr.; Order Feb. 17, 2016). Appellants filed a Motion to Alter or Amend which was clocked in on March 7, 2016 and was decided by briefs filed with the court. (R.p____; Motion Brief-Regime Solutions; Motion Brief-Cofers). Judge Spence ruled on the Motion to Reconsider in an Order filed on July 8, 2016 and received by Regime on August 25, 2016. (R.p____; Order, July 8, 2016; Notice of Hearing). Appellants filed the instant appeal by Notice of Appeal dated September 9, 2016. (R.p____; Notice of Appeal).

STATEMENT OF THE FACTS

On or about April 2, 2014 Respondents were served with a lis pendens, summons and complaint by the plaintiff for failure to pay their homeowner's association dues. (R.p____; Compl; Aff. of Service; Tr. p1. ¶¶1-6). Respondents did not answer the summons and complaint, nor did they pay off their balance owed to the plaintiff, and were thereafter held in default and their property sold at a foreclosure sale. (R.p____; Judg. Foreclosure). Respondents petitioned the court claiming that they did not receive proper notices prior to their property being sold and that the bid price at the sale was inadequate. (R.p____; Motion May 19, 2016). The Court did not agree with the Respondents' argument concerning service of notices prior to sale. Instead the Court determined that service of notices was proper and that Respondents did not rebut the presumption that they received notices for the foreclosure hearing and the sale date. (R.p____; Order Feb. 17 pp. 10-11). Nevertheless, the Court felt the bid price at the sale "shocked the conscience" and granted Respondents their requested relief on those grounds. (R.p____; Order Feb. 17 pp. 17). Appellants disagree with the Court's decision as South Carolina jurisprudence

does not support the conclusion that the Court reached in its February 17th order.

STANDARD OF REVIEW

"A real estate foreclosure is an action in equity." *MI Co., Ltd. v. McLean*, 325 S.C. 616, 482 S.E.2d 597 (Ct. App. 1997). The South Carolina Court of Appeals "review[s] factual findings and legal conclusions in an equitable action de novo." *Id.* In addition, the interpretation of an order is a question of law subject to de novo review. *See Ex parte TLC Laser Eye Ctrs. (Piedmont/Atlanta), LLC,* 404 S.C. 385, 392, 745 S.E2d 105, 109 (2013). "An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions." *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012).

ARGUMENT

A. The trial court's "shock the conscience" calculation was in error.

The Court erred in its application of South Carolina law in relation to bid amounts and setting aside sales. A judicial sale can be set aside for two reasons: (1) if the inadequacy of the price is so gross as to shock the conscience of the court; or (2) if the price is inadequate and this inadequacy is accompanied by other circumstances that warrant the interference of the court. *Wells Fargo Bank, NA v. Turner*, 378 S.C. 147, 150, 662 S.E.2d 424, 425 (Ct. App. 2008). In the Order filed on February 17, 2016 the Court's fourth section reads: "Regime Solutions' bid price is grossly inadequate, so as to shock the conscience of the Court and require a setting aside of the sale." (R.p.___; Order). The hearing on September 14, 2015 devoted much time to this topic.

(R.p.__; Order "South Carolina has not established a bright line rule for what percentage the sale value must be with respect to the actual value in order to shock the conscience of the court." *Bloody Point Prop. Owners Ass'n, Inc. v. Ashton*, 410 S.C. 62, 71, 762 S.E.2d 729, 734 (Ct. App., 2014); citing *E. Sav. Bank, FSB v. Sanders*, 373 S.C. 349, 359, 644 S.E.2d 802, 807 (Ct. App. 2007). "However, a search of South Carolina jurisprudence reveals only when judicial sales are for less than ten percent of a property's actual value, have our courts consistently held the discrepancy to shock conscience of the court." *Id.* The key issue in this case is how to calculate the bid price as a percentage of the property value. Regime asked the Master-in-Equity to follow the reasoning of *Arrow Bonding Co. v. Warren*, 399 S.C. 603, 732 S.E.2d 622 (2012). In *Arrow* the Appellant, Warren, appealed the denial of his Motion to Set Aside Sale. *Id.* Respondent, Arrow Bonding Company, obtained a $5,120.00 judgment against Warren. *Id.* In August 2007, the clerk issued a Judgment Execution, and on September 19, 2007, the sheriff issued an Execution Account Statement. *Id.*, 399 S.C. at 605. Respondent brought an action to foreclose its judgment lien, which Warren did not answer, and the clerk granted Respondent's motions, ordering entry of the default against Warren, and referring the matter to the Master-in-Equity for a judicial sale. *Id.* The Master issued a deed to Respondent, who was the successful bidder on all of Warren's properties. *Id.* Warren filed a Motion to Set Aside the Sale, which the Master-in-Equity denied. *Id.* On appeal, the Supreme Court concluded that the Master-in-Equity did not err in refusing to set aside the sale. *Id.*

There are two significant points in the *Arrow* case that are particularly applicable to the instant case: (1) the calculation employed by the Master in determining whether the selling price was grossly inadequate; and (2) the distinction the Court drew between adequacy of sales price in first mortgage lien foreclosure sales as opposed to other sales where the buyer takes the

property subject to a senior mortgage and other encumbrances. The *Arrow* Court found that tax assessment records submitted by Warren reflected a combined value of $263,121 and were sufficient to establish the value of the properties sold. *Id.*, 399 S.C. at 606. Although the Master noted the sale price of $2,500 when compared to the $263,121 assessed value of the property would shock the conscience if title was taken absent any encumbrances, the Master went on to find that there existed mortgage liens totaling more than $88,000 and a federal tax lien in excess of $12,000 which should be considered in determining the effective sales price paid by the buyer. *Id.* Since the properties sold remained encumbered by the mortgage and the tax liens, the Master added $100,000 to the foreclosure sale price for a total of $102,500 and concluded that the effective sales price of $102,500 represented about 39%, which did not justify setting aside the sale. *Id.* Warren argued on appeal that the Master erred in not judging inadequacy of sale price by comparing the sales price to the properties' value, without considering mortgages or liens, citing *Investors Savings Bank v. Phelps*, 303 S.C. 15, 397 S.E.2d 780 (Ct.App.1990), and *Wells Fargo.* The Supreme Court disagreed and concluded that in a sale where the buyer takes property subject to mortgage and other liens the Master properly considered the amount of mortgages and liens in determining the true value of the property to the buyer at sale. *Id.*, 399 S.C. at 607. In the present case, Regime Solutions bought the property at the foreclosure sale for $4,857.00. (R.p._____; Master's Order of Sale and Disbursement). The Cofer's introduced an online Lexington County tax assessment showing a tax value of $223,857.00. (R.p. ___; Tax Printout). At the time of sale there was a recorded mortgage lien against the property of $236,388.00 that Regime would be subject to once they became the owners of the property. (R.p.___; Title to Real Estate). Using the calculation that was not overturned in *Arrow* and the figures available to Regime at the time of bidding, the effective bid percentage in this case would actually exceed the

property value.[1] As this was the only information concerning the measure of the mortgage lien on the property, there was a very real chance that Regime would be underwater in the property. However, the Cofer's offered evidence that the balance owed on the first mortgage lien was approximately $124,000. (R.p. ___; Mortgage statement) Even when the bid is added to the actual amount left owing on the mortgage, a matter not within the scope of facts knowable to Regime, the effective bid percentage in this case would be 57.5% of the property value as alleged by Respondents.[2] Such a percentage is not shocking to the conscience.

However, the trial court in reaching its conclusion mistakenly relied on S.C. Appeals Court Case, *Federal Nat. Mortg. Ass'n v. Brooks* in determining the bid shocked the conscience. *Federal Nat. Mortg. Ass'n v. Brooks,* 405 S.E.2d 604, 304 S.C. 506 (Ct. App. 1991). The *FNMA* case is a textbook illustration of the inadequate bid amount plus irregularities analysis of bid price as opposed to the shock the conscience analysis. In *FNMA* a Special Referee set aside a sale price of $875 due to being inadequate and took notice of many irregularities in the sale. *Id.* at 605. The Order herein makes the statement that *FNMA* stands for the proposition that it is appropriate to compare bid price to equity in determining bid percentage for the purposes of shock the conscience analysis. Regime respectfully disagrees. The *FNMA* case acknowledges without challenge that the bid price paid by the appellant together with the mortgage balance represents almost 49% of the total value of the property. *Id.* In fact, while the court in *FNMA* does note that the bid $875 for over $27,000 in equity is inadequate, they specifically go on to say that although inadequate "it is not so grossly inadequate as to shock the conscience of the court". *Id.* at 606. In the *FNMA* case the $875 represents 3.2% of the alleged equity, suggesting

[1] 236,388 + 4,857.00= 241,245. 241,245/223,857 = 1.07 OR 107% of the property value.
[2] 124,000 + 4,857.00= 128,857. 125,857/223,857 = 0.5756 OR approx. 57.5% of the property value.

that the *FNMA* court did not use that comparison to determine a way to calculate the effective bid price for a shock the conscience analysis. If it were otherwise then, applying the same logic to the present case, assuming equity value of $111,588.68[3] and, as *supra*, a bid amount of $4,857, Regime paid 4.4% of the equity. Therefore even this comparison that the Order relied on in granting the Cofer's relief would show that Regime's bid amount did not shock the conscience.

B. Equity comparison is not a workable calculation of bid price adequacy.

There are a host of cases discussing the valuation of property and the determination of an effective sale price paid by a buyer for purposes of a shock the conscience analysis. (see *Investors Savings Bank v. Phelps*, 303 S.C. 15, 397 S.E.2d 780 (Ct.App.1990); *Wells Fargo Bank, N.A. v. Turner*, 378 S.C. 147, 662 S.E.2d 424 (2008); *Arrow Bonding Co. v. Warren*, 399 S.C. 603, 732 S.E.2d 622 (2012); and *Bloody Point Prop. Owners Ass'n, Inc. v. Ashton*, 410 S.C. 62, 762 S.E.2d 729 (Ct. App., 2014). However, there is not one that calculates adequacy of a sales price for a shock the conscience analysis in terms of equity. Perhaps this is because equity is simply a quantity that is unknowable by the court, the foreclosing party, or the innocent purchaser for value. The only party to a foreclosure action with knowledge concerning equity would be the foreclosed homeowner. The fact is that Mortgage Notes are not recorded as part of real estate transactions in South Carolina. While the Mortgage or pledge of property as collateral is recorded the Note or obligation for repayment is not. The affected homeowner is the party uniquely in possession of or capable of gaining possession of this information. There are many statutes prohibiting the disclosure of non-public personal information to anyone other than the

[3] As calculated by the master in his February 2016 order.

borrower or his designee[4]. The Master's Order incorrectly imputes knowledge to Regime that they would not know, nor could know due to these statutes, such as the first lien holder's identity or the amount of the pay-off. (R.p.___; July Order). "Or, Regime could have contacted they first mortgage to determine the pay-off amount and adjusted its bid accordingly". (R.p.___; July Order). This statement is simply not accurate due to the above.

Perhaps the lack of precedent for considering equity in a determination of the adequacy of a sale price in terms of a shock the conscience analysis is because the information that is discernible by the court, the foreclosing party, or the innocent purchaser for value is at best speculative. While the amount and duration of a mortgage is public record, one can only speculate as to the status of the loan that the mortgage secures. It is quite possible the underlying loan is an interest only loan with a balloon payment where the only equity discernible would be appreciation in the value of the property. It is also possible that the loan instrument that is not public record contemplates future advances or was modified by the lender at some time between the loans origination and the present action.

Further, tax value per county records is not an appropriate avenue for determining equity. This value might be inaccurate for any number of reasons: the condition of the property has significantly improved or declined since the last assessment; the property has not been revalued by the tax assessor for a lengthy period; prior assessments were deflated or inflated due to the comparable sales in a neighborhood, etc.

The simple truth is that a determination of equity without the provision of information by

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[4] *Gramm-Leach-Bliley Financial Services Modernization Act* (GLB Act), Title V of the Financial Services Modernization Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (Nov. 12, 1999) (codified at 15 U.S.C. §§ 6801, 6809, 6821, and 6827); 16 C.F.R. part 313 (implementing privacy rules pursuant to GLB Act); *Fair Debt Collections Practices Act* (FDCPA) Pub. L. 95-109; 91 Stat. 874, September 20, 1977 (and as subsequently amended) (codified as 15 U.S.C. § 1692 –1692p)

the affected homeowner is speculation and conjecture. In fact, the *Arrow* Court stated that there was no authority which requires or permits the trial court to conduct a title search, discover liens, determine the value of property and then calculate an adequate sale price. *Arrow* at 608. Using equity in determining the adequacy of a bid for purposes of a shock the conscience analysis is not supported by any precedent in this State, represents an unworkable calculation, and improperly shifts the burden upon the trial court, the foreclosing party or the innocent purchaser for value to divine such a calculation. Therefore, this Court should reject the notion that equity should be considered in determining the adequacy of a bid at a judicial sale for purposes of a shock the conscience analysis.

C. There were no irregularities in the sale to satisfy the second prong of the *Wells Fargo* analysis.

The *FNMA* court was more concerned with addressing the irregularities in the sale, not endorsing a calculation to determine percentages, as the Order would suggest. And therein lies the biggest distinction. There were no irregularities in this sale. The Order's first determination is "Service was proper." (R.p. ___; Order). The Order goes on to say: "The Cofer's argument that they did not receive the foreclosure hearing notices is not sufficient to grant any form of relief; but it establishes the sort of "additional circumstances" or "slight irregularities" contemplated by the South Carolina jurisprudence which, that when coupled with inadequate sales price, warrant vacating the sale. (R.p. ___; Order). Again, Regime respectfully disagrees. First, the jurisprudence revolving around irregularities concerns improper conduct of the officer of the court making the sale or the purchaser. *See Ex parte Cooley*, 69 S.C. 143, 154-55, 48 S.E. 92, 95 (1904) and *In re Wallace*, 179 S.C. 480, 484, 184 S.E. 849, 851 (1936). The cases the Order

cites to only bolsters Regime's position.[5] (R.p. ___; Order). *Investors* and *Wells Fargo* are not irregularities cases, but rather "shocks the conscience" cases. *Poole* deals with irregularities in the sale, *inter alia,* a master not accepting a bid that he should have. *Poole*, 177 S.E. at 27. *Howell* was also a case involving irregularities in the sale, examining allegations that there was an improper bidding relationship between a bidder and the auctioneer. *Howell,* 37 S.E.2d at 273. The *Howell* court even explained when "other circumstances" should sustain a motion to set aside a sale: "To have that effect there must be such irregularity in the proceedings as to show that the sale was not fairly made, or that appellant was defrauded or misled to his injury or loss." *Id.* at 275. There are no allegations in the record that the Master or any bidder did anything to make the sale unfair or defraud the Cofer's. The only claim of irregularity was allegedly not receiving hearing notices. The Master's own order confirms 1) that the plaintiff properly executed proof of service and 2) Defendants could not sufficiently rebut the presumption that the mailings were carried out appropriately. (R.p___; Order p.10-11). There were no irregularities demonstrated in the record that can set aside this sale.

Second, it would be manifestly unfair to impute the types of irregularities, namely the alleged non-receipt of hearing notices, to Regime as the Orders attempts to do. That is why the jurisprudence around irregularities only concerns those of the sale. Regime could be on notice and see irregularities in the sale or bidding, because that is the first time they are involved with the property. Regime argued in the underlying case that they were a bona fide purchaser for value without notice. (R.p. ____; Motion brief- Regime). The Court could only point to the fact that Regime is on notice of the jurisprudence of" shocks the conscience" law in South Carolina

[5] *Investors Savings Bank v. Phelps*, 303 S.C. 15, 397 S.E.2d 780 (Ct.App.1990); *Wells Fargo Bank, N.A. v. Turner*, 378 S.C. 147, 662 S.E.2d 424 (2008); *Poole v. Jefferson Standard Life Ins. Co.,* 174 S.C. 150, 177 S.E. 24 (S.C. 1934). *Howell v. Gibson,* 208 S.C. 19, 37 S.E.2d 271 (S.C. 1946).

in its Order denying Regime's status as BFP. (R.p.___;July Order). It is telling that there is no evidence in the record that the July Order could point to that would evidence Regime's opportunity to identify irregularities in the sale. Regime still contends they are a BFP, and Regime still contends there were no irregularities with the sale, and the record reflects that. Therefore, the bid price does not shock the conscience, nor were there irregularities to couple with an inadequate build. The Master in Equity's ruling should be reversed, and the sale reaffirmed in favor of Regime.

D. In the alternative, should this court determine that a shock the conscience analysis of the adequacy of a foreclosure sale price in terms of equity is appropriate, the burden to establish equity should be borne by the Respondent.

If this Court is inclined to entertain foreclosure sale price as a function of equity as a novel alternative in determining whether a bid shocks the conscience, the Regime suggests that the burden for establishing equity and a minimum bid be shifted to the affected homeowner(s). As set forth *supra*, the affected homeowner(s) is in the best position to provide information on the equity in a property. Although there is no precedent for such a requirement, if this Court were to adopt a calculation including equity it would be consistent with the spirit of existing law to require the affected homeowner(s) to provide evidence of that equity. For instance, Rule 71(a) SCRCP provides that any party who has appeared in the action may present proof that the debt may be satisfied by selling the property in parcels, rather than selling the whole to satisfy the claims. Likewise, in the present circumstances, if the Court were to adopt equity as an alternative calculation to determine whether a bid shocks the conscience, any party who has appeared, including the affected homeowner, could present proof that there is equity in the property such that the court could fashion a minimum bid amount that would not shock the

conscience of the court. Although this would place an unnecessary burden on the trial court in light of existing precedent, if this Court is inclined to adopt an equity calculation model Regime would offer that placing the burden on any affected party prior to sale is the only just and equitable way to do so.

This requirement on the homeowner would also be consistent with the existing law concerning bona fide purchasers at foreclosure sales. To be considered a bona fide purchaser without notice a party must show (1) actual payments of the purchase price of the property, (2) acquisition of legal title to the property, or the best right to it, and (3) a bona fide purchase. *Robinson v. Estate of Harris*, 378 S.C. 140, 662 S.E.2d 420, 423, (S.C. App., 2008). A bona fide purchase is "in good faith and with integrity of dealing, without notice of a lien or defect." *Spence v. Spence*, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006). There have been no allegations by the the Cofers that Regime has not satisfied each of the foregoing requirements.

The South Carolina Supreme Court in *Cumbie v. Newberry* held:

> A sound public policy requires that the validity of judicial sales be upheld, if in reason and justice it can be done. In the furtherance of this principal, our decisions have applied the general rule, applicable here, that a purchaser in good faith at a judicial sale is not affected by irregularities in the proceedings or even error in the judgment, under which the sale is made; but is required at his peril only to make inquiry as to the jurisdiction of the court which ordered the sale, and whether all proper parties were before the court when the order was made.

(*Cumbie v. Newberry*, 251 S.C. 33, 37, 159 S.E. 2.d 915 (1968) (citing *Wingard v. Hennessee,* 206 S.C. 159, 33 S.E.2d 390; *Brownlee v. Miller,* 208 S.C. 252, 37 S.E.2d 658; *Bennett v. Floyd,* 237 S.C. 64, 115 S.E.2d 659).) Similarly, Regime can only be charged with matters that are of the public record. If an affected party established, prior to sale, that there was equity in the property then any potential bidder would be on notice that the bid amount needed to be a certain

amount to be beyond challenge under a shocks the conscience analysis. Even if this methodology is adopted with approval from this Court, the outcome of this particular action is nonetheless unchanged as the Regime, as bona fide purchaser, cannot be charged with knowledge concerning the equity in the property which was not a matter of public record.

CONCLUSION

For the reasons set forth above the decision of the Court below should be reversed, and the sale reaffirmed in favor of Regime.

Respectfully submitted,

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Proof of Service

I certify that I have served the Appellant's Designation of Matter to Be Included in the Record on Appeal and Appellant's Initial Brief on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on October 19, 2016, addressed to their attorney of record, James Randall Davis, P.O. Box 489 Lexington, South Carolina 29071.

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