

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. Joseph M. Strickland, Master-In-Equity

Appellate Case No.: Case No. 2015-001807
Opinion No. 5549

Winrose Homeowners' Association, Inc. and Regime Solutions, LLC.....Respondents,

v.

Devery A. Hale and Tina T. Hale.....Petitioners.

Respondent Regime Solutions' Return to Petition for Writ of Certiorari

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OVERVIEW OF ISSUES

Petitioners Devery A. Hale and Tina T. Hale (“Hales”) seek a review of the Court of Appeals’ decision on the application of a particular method of determining whether or not a judicial sale bid amount “shocks the conscience”. In the alternative, the Hales seek to have this court reverse the Court of Appeals on equitable arguments they believe they presented to the trial court. Neither of these issues merit review by this court. Under Rule 242(b) SCACR a writ of certiorari is not a right, but will only be granted when there are special and important reasons for the Court to do so. There are no novel questions of law; there is no conflict with any of this Court’s decision with respect to the issues raised by Petitioners; and there are no constitutional issues or federal questions. *See id.* While there was a dissenting opinion, the majority presented a well-reasoned rebuttal to the dissent’s concerns. *Winrose Homeowner’s Assoc., Inc. and Regime Solutions, LLC v. Devery A. Hale and Tina T. Hale*, Op. No. 5549 (S.C. Ct. App. Dated April 4, 2018) (Shearouse Adv. Sh. No. 14 at 24) Additionally, the dissent was silent on the Hales’ equitable arguments, and would have simply chosen the alternative method of “shocks the conscience” analysis. *Id.* at 33-35.

The Court of Appeals affirmed the trial court’s decision to apply the Debt Method in determining whether or not a judicial sale bid price shocks the conscience when a bidder is subject to a senior encumbrance. *Id.* The Debt Method adds together the bid price and the senior encumbrances and uses that number as the effective bid price. The effective bid price is then compared to the fair market value to determine whether or not the bid shocks the conscience. Generally, in South Carolina a bid that is less than 10% of the fair market

value is considered to shock the conscience. *See e.g., Arrow Bonding Co. v. Warren*, 399 S.C. 603, 607-08, 732 S.E.2d 622, 624 (2012). Because a bidder must satisfy the senior encumbrance in order to obtain clear title the Court of Appeals ruled that the Debt Method is the proper method to apply in a senior encumbrance situation, and that in this instance the bid price did not shock the conscience. *Winrose* at 29. Further, the Court of Appeals held the Hales' equitable arguments were unpreserved. *Id* at 32-33.

All of the Hales' issues on appeal were discussed and ruled upon. The Court of Appeals was able to point to specific instances of South Carolina law where the Debt Method has been employed. The Hales, in their petition, merely re-brief their arguments on appeal and do not provide compelling reasons why this Court should take the extraordinary step of granting a writ of certiorari. Therefore, the Hales' Petition for Writ of Certiorari should be denied.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. Did the Court of Appeals err when it applied the Debt Method to affirm the trial court's decision that the bid amount did not shock the conscience?
- II. Did the Court of Appeals err when it determined that the Hales equitable arguments were not preserved?

COUNTER-STATEMENT OF THE CASE

On February 24, 2014 Respondent, Winrose Homeowner's Association, Inc. ("Winrose") filed a Complaint for foreclosure of a HOA lien against 25 Caddis Creek Court, Irmo, SC 29063. (Appx. p. 100-02). Thereafter the Hales were served with the same and failed to issue a responsive pleading or otherwise appear and defend the action for

foreclosure. (Appx. p. 102-04). Accordingly, the case was referred to the Master-in-Equity, who issued a decree of foreclosure. (Appx. p. 90). The subject property sold at judicial sale on August 4, 2014 subject to any and all valid senior encumbrances on the property, including but not limited to a recorded mortgage on the subject property in the Richland County ROD at Book R 64, Page 617 and in the amount of \$99,037.00. (Appx. p. 90). The winning bidder, Regime Solutions, LLC ("Regime"), paid the bid price of \$3,036.00 into the court. (Appx. p.176-178). This Court issued a Master's Deed to Regime which was filed on August 22, 2014 in the Richland County ROD in Book 1968, Page 266. (Appx. p.176-178). Regime sought to be put in possession of the property and filed a Rule to Show Cause on September 16, 2014. (Appx. p.105-08). The Hales' Motion to Vacate Sale followed and was considered in advance of ruling on Regime's Rule to Show Cause as the outcome of Defendants' motion was controlling over Regime's motion. (Appx. p.147-75). The Hales' Motion to Vacate Sale was heard on February 6, 2015 by the Honorable Joseph M. Strickland, Master-in-Equity for Richland County and on April 21, 2015 the trial court filed an Order Denying the Motion to Vacate Sale. (Appx. p.96-9). The trial court held the now-called Debt Method should be employed when considering whether or not a judicial sale bid involving a property with senior encumbrances shocks the conscience. (Appx. p.96-9). The trial court was persuaded by a South Carolina Supreme Court case which used the Debt Method calculation in a similar situation. (Appx. p.96-9, citing *Arrow Bonding Company v. Warren* 399 S.C. 603, 732 S.E.2d 622, 623 (2002)). The Debt Method applied to Regime's case would evaluate their bid amount, \$3,036, plus the encumbrances against the property, \$66,004 as a function of the stipulated fair market value of the

property, \$128,000. (Appx. p.96-9). The resulting percentage of the effective bid to fair market value ratio is 54%, well above what has shocked the conscience in South Carolina Jurisprudence.

The Hales filed a Notice of Appeal on August 21, 2015. (Appx. p.139-40). The Court of Appeals heard oral arguments on May 3, 2017 and filed a ruling on April 4, 2018. (Appx. p.1-11). The Court of Appeals agreed with the trial court's use of the Debt Method. (Appx. p.6) The Court of Appeals reasoned that the Debt Method was the superior method to use because a bidder knows they are subject to senior encumbrances a bid accordingly. (Appx. p.6-9). Further, the bidder does not have full access to any value in the property without satisfying all the senior encumbrances. (Appx. p.6-9). Finally, the Court of Appeals noted that the Debt Method was most compatible with upholding judicial sales, a general policy throughout the South Carolina court system. (Appx. p.7). The Court of Appeals denied the Hales' equitable argument as unpreserved. (Appx. p.9). The Hales filed a petition for rehearing on April 19, 2018. (Appx. p.12-15). The petition was denied on June 1, 2018. (Appx. p.18). This Petition for Writ of Certiorari followed.

ARGUMENT

- I. The Court of Appeals did not err when it affirmed the trial court's application of the Debt Method calculation to determine whether a bid subject to a senior encumbrance shocks the conscience.

This court has previously applied the Debt Method in determining whether or not a bid in a judicial sale subject to a senior encumbrance shocks the conscience. (*See Arrow*

Bonding). A successful bidder at a junior lien judicial sale must satisfy any senior encumbrances in order to obtain clear title and access equity, if any, in a property. Therefore, when performing a review of a judicial sale, the measure and extent of the senior encumbrances must be included. This is what the Debt Method does. To do otherwise would be to ignore the realities attendant to obtaining marketable title to a property purchased at judicial sale.

The Hales assertion ignores the presumption that judicial sales are openly and freely conducted and the policy of the Courts to uphold such sales when regularly made. The Hales assert no unfair means; only that the bid amount shocks the conscience when viewed as a function of the Hales' equity in the property.

Equity is an unworkable inquiry in a shock the conscience analysis because the presence of equity in a home is not knowable with any certainty by a would-be bidder. A record of the presence of equity, that being the market value of the home, less encumbrances, is only available in the instant action because it is was developed by the Hales in their motion to vacate the sale. (Appx. p.113-31). The information presented by the Hales was certainly not publicly available at the usual judicial sale.

A bidder in Regime's position has no idea whether or not a particular property at sale has equity, though they can make certain assumptions. Indeed, only the mortgagor is in a position to know with any certainty the equity in their own property. The purchaser at a junior lien judicial sale is only capable of ascertaining the date, duration and amount of the first mortgage. The terms of repayment - the Note- is not a publicly available document. Even assuming the bidder were able to accurately discover the present holder

of a note and mortgage, a feat that is speculative at best given that notes and mortgages are routinely assigned without timely updating of the same, the servicer of the loan is nearly impossible for a bidder to ascertain. Further, even if the well-meaning bidder were able to divine the servicer, they would find that they could, nevertheless, not obtain a payoff due to federal law prohibiting the dissemination of such information to third parties. See Gramm-Leach-Bliley Financial Modernization Act, Pub.L. No. 106-102, 113 Stat. 1338. Although a bidder could learn the date, duration and amount of the first mortgage and make certain assumptions based on standard mortgage terms, this would be at best an educated guess. The would-be bidder has no way of knowing if the Note has been modified, paid down, or is severely delinquent. Next, there is the matter of the value of the property. The best publicly available information is the tax estimate. However, the tax estimate doesn't account for conditions on the property or any improvements or maintenance, or lack thereof, unless those matters were considered by the assessor. The bidder could find themselves with a shell of a home without any way to know that before bidding. The homeowner, on the other hand, could obtain a payoff, order an appraisal and thereby make an educated estimate of the value of the property less encumbrances. This information is not ascertainable by even the most experienced bidder. Therefore, a prudent bidder at a junior lien judicial sale will adjust their bid accordingly. See *Cypress on Sunland Homeowners Ass'n v. Orlandini*, 257 P.3d 1168, 1181 n.8 (Ariz. Ct. App. 2011).

The Hales, seemingly conceding the aforementioned impediments to a would-be bidder, further argue that the Debt Method is unworkable because it requires a bidder to know the outstanding mortgage amount to accurately calculate the effective sales price.

This argument fails because it attempts to unjustifiably shift the burden in a shock the conscience analysis. In short, it is putting the cart before the horse. As set forth above, the would-be bidder could learn the date, duration and amount of the first mortgage and make certain assumptions based on standard mortgage terms. The would-be bidder might also ascertain the taxable value of the property and use the foregoing knowledge to make an educated guess about equity. While not without any information, the bidder is taking a gamble based on the information available. Thus, their bid is accordingly adjusted to account for these unknowns. This is all that is available to the bidder and the only evidence in a shock the conscience analysis absent proof otherwise by the adversely affected homeowner.

In actuality, however, neither the Debt Method nor Equity Method are calculated before or during a typical judicial sale. They are only tools for an aggrieved party to challenge a completed sale. It is incumbent upon the party seeking to set aside a judicial sale in a scenario such as this to prove their outstanding mortgage balance and present value of the subject property, as the Hales did in the motion hearings before the trial court. The Hales arguments about knowledge are misplaced in the process of a judicial sale. The Debt Method simply isn't raised until a party challenges the sale, at which time they have ample opportunity to prove any figures they wish to advance in support of their position.

II. The Court of Appeals did not err when it held that the Hales equitable arguments were improperly preserved.

There are four requirements for preserving issues at trial for appellate review: the issue must have be (1) raised to and ruled upon by the lower court, (2) raised by the

appellant, (3) raised in a time manner and (4) raised to the lower court with sufficient specificity. *S.C Dep't of Transp. V. First Carolina Corp. of S.C.*, 327 S.C. 295, 641 S.E.2d 903 (2007).

The Hales presented their equitable arguments for the first time in their brief to the Court of Appeals. (Appx p. 69-85). Counsel for the Hales had the opportunity to request that the master-in-equity grant them relief based on equitable maxims in his motion to set aside the judgment, at the motion hearing for same, and by way of a Rule 59 motion to reconsider. However, at no time were these equity requests made. Instead, the first appearance of equitable maxims was in the Hales' brief to the Court of Appeals. (Appx p.77-82). The Hales point to their SCRCP Rule 60(b)(5) motion as proof of a request for equitable relief. Rule 60(b)(5) contemplates, inter alia, that a court may relieve a party from judgment if "it is no longer equitable that the judgment should have prospective application". While their motion states that it is seeking relief under Rule 60(b)(5) SCRCP, the Hales motion asked the trial court to set aside the sale, a standard separate from vacating a judgment. Setting aside a sale is considered under a standard set forth in various SC Appellate decisions. Counsel for the Hales explained that his clients were willing to pay the homeowner's association lien if the sale were set aside. (Appx p.164-66). At no time do the Hales contest the judgment, and this is precisely why the trial court did not rule on that issue. There was no 60(b)(5) analysis by counsel at the motion hearing or by the trial court in its Order.

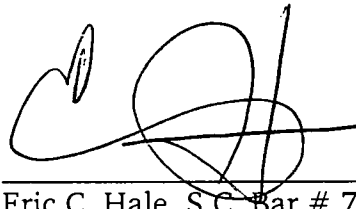
Further, the Master did not rule on equitable arguments or maxims. (Appx p.96-9). The Master's analysis was solely base on the Debt Method and found that the bid did not

shock the conscience. (Appx p.96-9). At no point in the Order does the Master mention equitable maxims or principles. (Appx p.96-9). The lower court must rule upon an issue for it to be preserved for review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998). The proper procedure for the Hales, upon reading the master's order and finding no mention of equity or maxims, would have been to file a Rule 59(e) motion to reconsider, pointing to their arguments allegedly raised at the motion hearing and requesting the master to rule on them. SCRCP Rule 59. That did not occur, ostensibly because the arguments were not fully realized until the Hales' appellate brief. The master's denial of the motion was based on a legal standard, and he was neither presented with, nor ruled upon any equitable principles. The Hales cite *Bailey* for the prospect that they were not required to file a Rule 59(e) motion to have the master consider the equitable arguments they believe they raised. *Bailey v. Segars*, 346 S.C. 359, 364-65, 550 S.E.2d 910, 913 (Ct. App. 2001). In *Bailey* the appellant fully presented his case to the trial court in a post-trial motion and his motion was denied. *Id.* Here, the Hales did not present equitable arguments to the master. The Hales also cite another S.C. Court of Appeals case for the proposition that the courts need not separately explain all its rulings *in post-trial motions* [emphasis added]. *Clark v. S.C. Dep't of Pub. Safety*, 353 S.C. 291, 312, 578 S.E.2d 16, 26 (Ct. App. 2002). The italicized segment is the key to the ruling. In *Clark* the court found it unnecessary for a trial court to explain all its rulings in a post-trial motion because the trial record shows the reasons for denial. *Id.* In this case the trial record was devoid of any mention of equitable maxims and there was no post-trial motion. Thus, the Hales reliance on *Clark* is misplaced.

The Hales did not raise any equitable maxims for consideration. The Master did not rule on any equitable maxims and it is clear from the Order that the ruling of the court was based on the standard attendant to setting aside a sale as opposed to a judgment under Rule 60(b)(5) SCRPC.

CONCLUSION

The Hales have not given sufficient reason for this Court to grant their petition for Writ of Certiorari. The arguments preserved on appeal were fully addressed by the Court of Appeals and therefore this Court should deny the Hales' petition.



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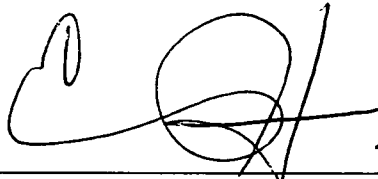
Certificate of Service

I certify that on August 16, 2018 I served the Respondent Regime Solutions' Return to Petitioners' Writ of Certiorari by depositing a copy in the United States Mail, postage prepaid to the following:

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