THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM SALUDA COUNTY
COURT OF COMMON PLEAS

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2018-001388

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

v.

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

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

INITIAL BRIEF OF APPELLANTS

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

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF ISSUES ON APPEAL

The present action involves a claim for breach of guaranty by a lender against the guarantors of a commercial loan. In a prior foreclosure action against the borrower only, the lender obtained the property through a foreclosure sale and also obtained a personal deficiency judgment against the borrower, which it now seeks to enforce against the guarantors in this action. Under S.C. Code § 15-39-720 (the "**Deficiency Statute**"), a lender may obtain a deficiency judgment only if it submits a single bid on the first day of the foreclosure sale and does not participate in a second "upset sale" held thirty days later, when the property is auctioned to the highest bidder. Here, the guarantors defended on the basis that the lender violated the Deficiency Statute by participating in the initial bidding and then later winning the property at the upset sale. The trial court ruled as a matter of law that the lender's violation of the Deficiency Statute could not serve as a defense to payment on the guaranty.

This appeal contends that this ruling was error and raises the following issues on appeal:

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

2. Does a mortgagee's violation of S.C. Code § 15-39-720 in a prior foreclosure action constitute a defense as a matter of law in a subsequent action for breach of guaranty when the guarantor was not a party to the prior foreclosure action?

STATEMENT OF THE CASE

This action was filed on March 5, 2013, by Respondent Stephen Wilkinson, as Trustee of George B. Buchanan, Jr. Irrevocable Family Trust Dated the 15th day of July, 2001 ("Respondent" or "Trust"). Respondent brought the action seeking to recover on

certain guaranties executed by the Appellants (Redd Green Investments, LLC, A. Bruce, Green, and L. Cliff Redd) ("Appellants" or "Guarantors") and the other Defendants (Anderson North Augusta, LLC, Herbert Anderson, Jr., and Herbert Keith Anderson) ("Defendants"), in conjunction with a commercial loan made to Springs North Augusta, LLC (the "Borrower") and secured by real property located in Aiken County. (Complaint pp. 2-4.) Respondent's claim was based upon a deficiency judgment in the amount of $2,753,192.70, plus interest at the rate of 15% per annum, ("Deficiency Judgment") obtained against the Borrower following the foreclosure sale in a prior foreclosure action ("Foreclosure Action"). (Trial Ex. 10; Court Ex. 1.) The guarantors were not included as defendants in the Foreclosure Action but were pursued separately in the instant action, where the claim had ballooned into one for $4,781,882.55 at the time of trial. (*Id.*)

On May 1, 2013, Appellants filed an Answer, alleging that they were prejudiced by Respondent's improper violation of the bidding statute during the prior Foreclosure Action and that the Respondent therefore should be precluded from enforcing the Deficiency Judgment against the Guarantors in this separate action. (Answer at 2-5.) The Answer included counterclaims for Civil Conspiracy, Constructive Fraud, and Fraud and Deceit, (*id.*), which were withdrawn as counterclaims at trial but retained as providing "the factual basis for the defenses," (Transcript p. 81).

On April 15, 2014, Respondent moved for summary judgment on its claims and against Defendants' counterclaims, (Plaintiff's Motion for Summary Judgment), and filed a supporting affidavit of Stephen Wilkinson seeking to be named as successor Trustee, (Affidavit in Support of Plaintiff's Motion for Summary Judgment and Motion to Amend Caption to Designate Successor Trustee as Real Party in Interest). The affidavit stated

that George B. Buchanan, Jr. established the Trust for his children and their issue and that Mr. Buchanan was "permitted to make additions" to the assets of the Trust. (*Id.* at 2.) Mr. Buchanan's children, George B. Buchanan, III, Robert S. Buchanan, and Sally B. Alexander, signed the attached Appointment of Successor Trustee along with the former trustee, Mr. Sakellaris, and the successor trustee, Mr. Wilkinson. (*Id.* at 4-10.)

Mr. Sakellaris provided a supporting affidavit, testifying that the Trust submitted a bid at the first foreclosure sale in the prior Foreclosure Action on September 4, 2012, in the amount of $6,600,000. (Affidavit of Harry P. Sakellaris in Support of Plaintiff's Motion for Summary Judgment.) Mr. George Buchanan also provided an affidavit, testifying that he was the sole member and manager of 2nd Avenue Holdings, LLC ("Second Avenue Holdings"), which he formed for real estate investment, and that Second Avenue Holdings bid at the second foreclosure sale held on October 4, 2012, in the Foreclosure Action. (Affidavit of Second Avenue Holdings in Support of Plaintiff's Motion for Summary Judgment p. 1.) Second Avenue Holdings was the successful bidder at this second sale, with a bid of $7,160,000. (*Id.*) Mr. Buchanan further averred that Second Avenue Holdings paid a bid deposit of $500,000 on October 4, 2012, and later assigned this bid to the Trust. (*Id.*)

On October 19, 2014, Appellants Bruce Green and Cliff Redd filed affidavits in opposition to summary judgment, averring that Mr. Buchanan formed Second Avenue Holdings on September 10, 2012 (six days after the Trust's bid at the first foreclosure sale) for the apparent purpose of bidding at the second "upset" sale; that all of their prior dealings with the Trust concerning the mortgage or property were with Mr. Buchanan himself, not any Trustee; and that, upon information and belief, Mr. Buchanan

established Second Avenue Holdings to attempt to keep the subject property with the Trust after learning of third parties who intended to present an "upset bid" at the second foreclosure sale where the Trust was forbidden by law from bidding. (Affidavits of Cliff Redd and Bruce Green in Opposition to Plaintiff's Motion for Summary Judgment pp. 1-2.) Mr. Green and Mr. Redd further averred that Second Avenue Holdings was the high bidder at the second sale and assigned its bid to the Trust for no consideration, thereby indicating that it was acting on behalf of the Trust when it bid at the second sale, which was a violation of the foreclosure statutes allowing for a deficiency judgment and which chilled bidding at the second sale. (*Id.* p. 2.)

On March 1, 2016, Stephen Wilkinson was substituted for Harry P. Sakellaris as Trustee, and the caption was amended to reflect this change as well as the removal of William Otha Bodie as a defendant. (Order Amending Caption and Substituting Counsel filed March 1, 2016.)

On March 1, 2016, the Court, without elaboration, denied Plaintiff's motion for summary judgment on Appellants' Counterclaims and stated that the matters could be raised at the directed verdict stage. (Order p. 2.)

On March 1, 2017, Respondent filed a Motion to Dismiss, seeking to dismiss the counterclaims of Appellants for lack of subject matter jurisdiction under Rule 12(b)(1). (Motion to Dismiss p. 1.) Respondent contended that the counterclaims were an improper collateral attack on the order for foreclosure and Deficiency Judgment obtained against the Borrower in the prior Foreclosure Action. (Plaintiff's Memorandum in

Support of Motion to Dismiss Counterclaims pp. 2-3 & Ex. A.)[1] Respondent further contended that "the [B]orrower, not defendant guarantors, is in privity of contract with the [Respondent]" and therefore that the Appellants as guarantors "have no standing to assert such claims and are not permitted to raise them either before the Master [in the Foreclosure Action] or in subsequent proceedings, such as the instant action." (*Id.*)

On June 2, 2017, following a hearing on May 8, 2017, Judge R. Ferrell Cothran, Jr. denied the Motion to Dismiss, ruling that it "is uncontested that Defendants in this case were not parties to the Foreclosure [Action]" and therefore that the deficiency judgment is not the law of the case with respect to the Defendants in the instant action. (Order Denying Plaintiff's Motion to Dismiss p. 2.) He further ruled that Defendants' counterclaims "are not contesting [or seeking to overturn or otherwise attack] the Deficiency Judgment that Plaintiff obtained against [Borrower] in the Foreclosure [Action]" but instead are seeking "to hold the [Respondent] accountable for an alleged violation of the foreclosure upset bid statute found at South Carolina Code Ann. § 15-39-720." (*Id.* at 2-3.)

On September 5-6, 2017, the matter went to a jury trial before Judge R. Knox McMahon. (Transcript p. 1.) After both sides rested their case, the trial judge entered a directed verdict for the Respondent on the basis that, even if there was a violation of the foreclosure bidding statute, S.C. Code Ann. § 15-39-720 (which the trial judge assumed for purposes of a directed verdict), such a violation would not provide a defense to the Defendant's guaranties on the debt. (Transcript pp. 132-33.) On September 7, 2017, the

[1] The Defendants in the instant action were not named defendants in the Foreclosure Action, and the Borrower went into default and did not defend. (*Id.* at Ex. A (Master in Equity's Order and Judgment of Foreclosure and Sale ("Foreclosure Order")) at p. 1-2.)

trial court issued a Form 4 Order directing a verdict in the amount of $4,781,882.65. (Order dated September 7, 2017.)

On Friday September 15, 2017, Appellants served a Motion for New Trial. (Motion for New Trial). On September 18, 2017, Appellants served an Amended Motion for New Trial or in the Alternative to Alter or Amend the Judgment of the Court ("Amended Motion"). (Amended Motion for New Trial or in the Alternative to Alter or Amend the Judgment of the Court).

On June 29, 2018, Appellants received written notice of entry of the Order denying the Amended Motion (entered on June 29, 2018), (Order), and timely served their Notice of Appeal within thirty days of receipt on July 23, 2018, (Notice of Appeal), appealing from (1) the Order of Judge R. Knox McMahon, announced at trial on September 6, 2017, and entered September 7, 2017, granting Respondent's motion for a directed verdict, and (2) the Order of Judge R. Knox McMahon, entered June 29, 2018, denying Appellants' Amended Motion for New Trial or in the Alternative to Alter of Amend the Judgment of the Court. The Orders are appealable pursuant to S.C. Code §14-3-330(1) (providing for appellate review of final judgments in actions commenced in the court of common pleas) and (2) (providing for appellate review of an order that refuses a new trial).

STATEMENT OF THE FACTS

This case involves a loan by the Trust to the Borrower in the amount of $8,728,500, which was secured by 1400 acres of commercial property valued at $30 Million and guaranteed by the Defendants. (Tr. pp. 68, 85 & Pl. Exs. 6-9.) One of the guaranties ("Guaranties") was executed by Appellant Redd Green Investments, LLC and

Defendant Anderson North Augusta, LLC, and the other was executed by Appellants A. Bruce Green and L. Cliff Redd and the other individual Defendants. (Pl. Exs. 8-9) The two Guaranties are substantially similar and provide, in part, that the Guarantors will guaranty the debts "of Borrower . . . in accordance with the terms of any such notes . . . or agreements"; that the Lender may surrender or compromise collateral "with reasonable notice" to the Guarantors; that the Guarantors have a "right of recourse to security for the debts and obligations of the Borrower to Lender" if the Guarantors pay the debts in full; and that "the high bid at the judicial foreclosure sale will be applied to the debt" in the event that the Trust were to foreclose on the collateral. (*Id.*)

Prior to the instant action against the Guarantors, the Trust initiated a foreclosure action against the Borrower, but not against the Guarantors. (Tr. pp. 68, 87.) The Borrower did not defend the action and defaulted. (*Id.* p. 70 & Pl. Ex. 1.) The court entered a default judgment of foreclosure against the Borrower and ordered the property to be sold at a foreclosure auction with the proceeds to be applied to a total debt of $9,450,662.50. (*Id.* p. 70 & Pl. Ex. 1.) Because the Trust claimed a deficiency judgment, (*id.*), it would be allowed under S.C. Code Ann. § 15-39-720 to bid only one time, with the sale then being held open for thirty days to receive upset bids.

At the foreclosure sale, the Trust bid $6.6 Million, which was $2.9 Million less than the debt and well below the $30 million value that the Appellants assigned to the property. (Tr. pp. 52, 85, 88).[2] The sale was then held open for thirty days for upset bids. (*Id.* pp. 52, 88.) At the close of thirty days, Mr. Buchanan himself appeared at the auction, bid against other bidders, and won. (*Id.*) Mr. Buchanan indicated that his bid

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

was made on behalf of one his wholly owned LLCs, and he assigned his bid back to the Trust. (*Id.* pp. 52-53.) As outlined by the Trust in its opening statement at trial:

> [T]he way that the two sales work is that at the first sale the person who is owed the money can put in a bid for the property. . . . There's then a second sale, what might be referred to as the upset bid, okay? **At the second sale, the person who's owed the money is not allowed to bid, nor is that party's representative allowed to bid, and the reason for that is to try to encourage the party who is owed the money to put in the highest bid possible**, okay? . . . .
>
> What happened in this case is at the first sale the trust put in a bid for 6.6 million. . . . .[A]nd then after that **Mr. Buchanan, who was concerned that someone else might come in and take this property and leave the trust in a bad position, losing some money,** decided that it would be **better for one of his companies to own it rather than the -- rather than somebody other than the trust.** So Mr. Buchanan, on behalf of a company he owned called Second Avenue Holdings, LLC, it was a company he had set up to hold some property previously, went to the second sale and there were other bidders there and multiple bids were put in. In the end, Second Avenue Holdings, LLC, won the bid and held the property.
>
> After that point, Mr. Buchanan after consulting with some others and the trustee decided that it would be **better from a tax perspective and from his children's perspective for the trust to hold onto that property** rather than Second Avenue Holdings, LLC. So Second Avenue Holdings, LLC, **assigned the bid that it won back to the trust** so the trust could hold on to the property.

(Tr. pp. 52-53.)[3]

Second Avenue Holdings was solely owned by Mr. Buchanan, (*id.* p. 111), and it was created six days after the Trust's bid at the first sale on September 4, 2012, (*id.* pp. 96-97 & Green Ex. 1.)[4] Its winning bid was for $7,160,000. (*Id.* pp. 69-70 & Pl. Ex. 5).

---

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

[4] Mr. Buchanan contended at trial that he created this company several years earlier, but he was impeached with the Articles of Organization revealing that it came into existence on September 10, 2012. S.C. Code Ann. § 33-44-202(b) ("Unless a delayed effective

That same day it deposited $500,000 toward its bid and, on October 24, 2012, assigned its bid to the Trust for **no consideration**. (Tr. pp. 100-101 & Green Ex. 2.)[5] The property then was deeded from the Master in Equity to the Trust, and the Trust claimed an exemption from the deed recording fee on the basis that it obtained the deed as mortgagee pursuant to foreclosure proceedings. (Tr. pp. 72-73 & Pl. Ex. 3.)

The Court then entered an Order of Deficiency against the Borrower in the amount of $2,484,163.95 on October 26, 2012, which was amended to $2,753,192.70, plus 15% annual interest, on February 13, 2013. (Tr. p. 72 & Pl. Exs. 2-3.) The net result was that the Trust, which *was not allowed to bid at the upset sale*, ended up with the property (valued at $15 to $30 Million) *as a result of a bid at the upset sale*, and it also ended up with a deficiency judgment of $2.8 Million (now $4.8 Million) even though the value of the property exceeded the total debt owed by the Borrower. (Tr. pp. 32, 52-53, 72-73, 85 & Pl. Exs. 2-3, 10.)

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

---

date is specified, the existence of a limited liability company begins when the articles of organization are filed.").

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

the Guaranties because it violated the implied covenant of good faith and fair dealing with the Guarantors. (Tr. p. 123.)

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

The Trustee, Mr. Wilkinson, concurred that the assets held by the Trust have "all been put in there by Mr. Buchanan" in order to eliminate estate taxes and to benefit Mr. Buchanan's children. (*Id.* pp. 65-66, 74.) He explained that his role as Trustee is to make "distributions for the health, education and welfare" of Mr. Buchanan's children. (*Id.* p. 65.) He agreed that Mr. Buchanan gives financial advice to the Trust, brings most of the investments to the table, and makes recommendations about buying or selling property. (*Id.* pp. 76, 78.) Mr. Wilkinson conceded that he has never turned down one of Mr. Buchanan's recommendations. (Id. p. 79.) He even referred to the Trust loaning money to the Borrower as if it were Mr. Buchanan himself loaning the money: "Mr. Buchanan was contacted by someone . . . [who] told him there was an opportunity" and

that "if **he** wanted to loan some money, you know, there was an opportunity to make some money." (*Id.* pp. 66-67 (emphasis added).)

STANDARD OF REVIEW

> When considering a directed verdict motion, the trial court should view the evidence and all reasonable inferences in the light most favorable to the non-moving party. If more than one reasonable inference can be drawn ... the case should be submitted to the jury. The trial court should be concerned only with the existence or nonexistence of evidence, not its credibility or weight.

S.C. Fed. Credit Union v. Higgins, 394 S.C. 189, 193–96, 714 S.E.2d 550, 552–53 (2011) (internal quotations and citations omitted). "The trial court must eliminate from its consideration all evidence contrary to or in conflict with the evidence favorable to the nonmoving party and give to the nonmoving party every favorable inference that the facts reasonably suggest. *Small v. Pioneer Mach., Inc.*, 316 S.C. 479, 482, 450 S.E.2d 609, 611 (Ct. App. 1994). "In essence, [the appellate court] must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor." *Bultman v. Barber*, 277 S.C. 5, 7, 281 S.E.2d 791, 792 (1981).

ARGUMENT

This appeal presents the question of whether a mortgagee is precluded from recovering a deficiency judgment against a guarantor in a subsequent action when the mortgagee fails to name the guarantor in the initial foreclosure action and violates the Deficiency Statute by bidding at the upset sale. The Deficiency Statute exists in order to protect a mortgagor and any guarantors from the foreclosure sale of a property below market value by requiring the mortgagee (or anyone acting on its behalf) to bid only one time—not knowing how high the later bidding ultimately will go—thereby requiring the mortgagee to give its best and highest bid so as not to lose any value in the property to an

upset bidder. If a mortgagee (or someone on its behalf) could bid at the second "upset" sale, then the mortgagee no longer would be required to present its best and highest bid.

Thus, the Appellants respectfully ask this Court to hold that the trial court erred by ruling as a matter of law that a mortgagee's violation of S.C. Code § 15-39-720 in a prior foreclosure action cannot serve as a defense (whether by breach of the implied covenant of good faith and fair dealing, waiver, unlawful act, or unclean hands) to a subsequent action for breach of guaranty when the guarantor was not party to the prior foreclosure action.

In addition, the Appellants seek a ruling that a violation of the Deficiency Statute constitutes a defense *as a matter of law* (whether by breach of the implied covenant of good faith and fair dealing, waiver, unlawful act, or unclean hands) to a subsequent action for breach of guaranty when the guarantor was not party to the prior foreclosure action.

I. THE TRIAL COURT ERRED BY RULING AS A MATTER OF LAW THAT A MORTGAGEE'S VIOLATION OF S.C. CODE § 15-39-720 IN A PRIOR FORECLOSURE ACTION CANNOT SERVE AS A DEFENSE TO A SUBSEQUENT ACTION FOR BREACH OF GUARANTY WHEN THE GUARANTOR WAS NOT PARTY TO THE PRIOR FORECLOSURE ACTION.

A. The trial court directed a verdict against the Appellants even though it assumed a violation of the Deficiency Statute by the Trust.

Appellants opposed the Trust's motion for directed verdict on the basis that it was precluded from recovery under the Guaranties on the basis of a violation of the Deficiency Statute constituting a breach of the implied covenant of good faith and fair dealing, unclean hands, waiver, and/or unlawful act. (Tr. pp. 123, 129; Amended Motion.) The trial court directed a verdict against Appellants on the basis that a violation of the Deficiency Statute was not a defense to the payment obligation on the Guaranty.

After outlining the standard of review for a directed verdict, the court's reasoning and decision are set forth in full as follows:

> Although I think there is more than one inference that can be drawn from parts of the testimony, I do not think they are significant. Even if -- and that -- I say it like that because I'm not interested in the weight of the evidence but the existence of the evidence. If we're looking at the evidence in the light most favorable to the Defendants, there was a violation of Section 15-39-720, upset bid within thirty days on foreclosure or execution sale. That's an inference that can be drawn. To this Court that makes not a whit of difference. Not a whit of difference. I look at Plaintiff's Exhibit Number 8, Plaintiff's Exhibit Number 9, which [are] the guaranty agreements that are the documents upon which this lawsuit has been brought. I do not think a violation of the statute that I just cited is a defense on a guaranty of a debt. Again, tight-roping -- not tight-roping, but following the standard of directed verdict, drawing that inference, it would be in the light most favorable to the Defendant and I do not think there was a violation. I don't think you can turn Rambo into Superman or Superman into Rambo. Second Avenue Holdings is not the irrevocable trust. They're two separate and distinct legal existing entities so for that reason I will direct a verdict for the Plaintiff in the amount of the deficiency judgment and the interest for that $4,781,882.65.

(Tr. pp. 132-33.)

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

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

(*Id.* p. 133.)

Although the trial court clarified that it was assuming a violation of the Deficiency Statute for purposes of its ruling, the trial court also recognized that "the evidence in the light most favorable to the Defendants [showed] there was a violation of Section 15-39-720." (*Id.*) Nonetheless, the court did not set forth the specific basis as to

why or how it ruled that such a violation could not operate as a defense to the Trust's claims on the Guaranties.

B. A guarantor may defend an obligation to pay the debt of the borrower on the basis that the lender breached the implied covenant of good faith and fair dealing by impairing the guarantor's right to receive the benefit of the collateral.

As an initial matter, the rules for interpreting contracts apply to guaranties:

> A guaranty is a contract. The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language.
>
> In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties. If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect.
>
> On the other hand, a contract is ambiguous when its terms are capable of having more than one meaning when viewed by a reasonably intelligent person who has examined the entire agreement. [A] court will construe any doubts and ambiguities in an agreement against the drafter of the agreement.

CoastalStates Bank v. Hanover Homes of S.C., LLC, 408 S.C. 510, 518–19, 759 S.E.2d 152, 157 (Ct. App. 2014) (citations and internal quotations omitted).

In addition, "[u]nder South Carolina law, there exists in *every* contract an implied covenant of good faith and fair dealing." *Shelton v. Oscar Mayer Foods Corp.*, 319 S.C. 81, 91, 459 S.E.2d 851, 857 (Ct. App. 1995), *aff'd,* 325 S.C. 248, 481 S.E.2d 706 (1997) (emphasis in original). The essence of this obligation is "that neither party will do anything to **impair the other's rights to receive benefits** under the contract." *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 500, 473 S.E.2d 52, 53 (1996) (internal quotations omitted) (emphasis added). This implied obligation of good faith on the part of the lender gives a guarantor a defense to payment under a guaranty when the lender

breaches the implied obligation. *See Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 362–70, 147 S.E.2d 481, 481–85 (1966).

The *Nelson* case is instructive because it involved what in essence was a suit on a guaranty, and the defendant guarantor successfully interposed a defense based upon the failure to comply with the implied obligation of good faith and fair dealing. In *Nelson*, an automobile dealer sold automobile loans (made to third party consumers) to a finance company and agreed to pay the balance of any unpaid loan following the repossession and sale of the vehicle by the finance company. *Id.* at 362, 147 S.E.2d at 482. This arrangement in essence was a guaranty of the loans by the dealer. The finance company brought an action against the dealer for breach of the guaranty agreement, and the dealer asserted a defense that the finance company had an implied duty to use reasonable diligence to collect payments before seeking payment from the dealer. *Id.* The finance company moved to strike this defense and counterclaim, and the court denied the motion on the basis of the implied covenant of good faith and fair dealing:

> Although implied covenants are not favored in the law, Nelson's reliance is upon the settled principles that **noncontradictory terms may be implied in a contract in order to effectuate the manifest intention of the parties when the circumstances warrant it, and that there exists in every contract an implied covenant of good faith and fair dealing**.

Id. at 366, 147 S.E.2d at 484 (emphasis added).

The court added: "Although no obligation is expressly imposed, unlimited authority and discretion are conferred on [the finance company] to deal with the obligors, without notice to or consent by [the dealer]. Yet, [the dealer] had the greater pecuniary stake in the successful collection of the accounts. *Id.* at 369, 147 S.E.2d at 485. Thus, the court ruled it was "fairly arguable that [the finance company] was impliedly obligated

to pursue the collection of the accounts with reasonable and customary diligence," and so it denied the finance company's motion to strike the defense. *Id.*

Numerous cases from multiple jurisdictions hold, in the context of a loan guaranty, that the guarantor may defend against an action on the guaranty on the basis that the lender breached the implied obligation of good faith and fair dealing as a result of the lender's impairment of the collateral or other wrongdoing. *See, e.g, Union Bank, N.A. v. Blanchard*, 194 Wash. App. 340, 362–63, 378 P.3d 191, 202–03 (2016) (holding that the implied duty of good faith and fair dealing is a potential defense of a guarantor); *Nat'l Westminster Bank N.J. v. Lomker*, 277 N.J. Super. 491, 500, 649 A.2d 1328, 1333 (App. Div. 1994) (holding that guarantor may "defend against enforcement of lender's rights where the lender has engaged in bad faith, misconduct or the like" in a circumstance where the lender colluded with a third party to back out of contract with borrower and purchase from lender following foreclosure, thereby allowing the lender to take the proceeds of the collateral while not reducing the guaranties by the value of the collateral); *Merrill Lynch Bus. Fin. Servs. Inc. v. Plesco, Inc.*, 859 F. Supp. 818, 828 (E.D. Pa. 1994) ("[Lender's] motion to dismiss the Guarantors' setoffs and counterclaims and/or to strike their affirmative defenses will be denied insofar as it is predicated upon the theory that the Guarantors are precluded from asserting [lender's] alleged bad faith in disposing of [] collateral as either an affirmative defense or as the basis of a counterclaim.")[6]

[6] For additional authorities, *see also, e.g., Fifth Third Bank (Chicago) v. Stocks*, 720 F. Supp. 2d 1008, 1011–13 (N.D. Ill. 2010) (finding a dispute of fact as to whether bank complied with the obligation of good faith and fair dealing required denial of bank's motion for summary judgment); *Daystar Const. Mgmt., Inc. v. Mitchell*, No. CIV.A. 04C-05-175JRS, 2006 WL 2053649 (Del. Super. Ct. July 12, 2006) (holding as a matter of first impression that a guarantor could raise the violation of the covenant of good faith and fair dealing as a defense); *Chem. Bank v. Paul*, 244 Ill. App. 3d 772, 780–83, 614

C. South Carolina law has been amended in order to protect guarantors from the impairment of collateral by lenders, which must be read into the lender's implied obligation of good faith.

Many of these cases where the guarantor relied upon a defense that the lender violated the implied obligation of good faith and fair dealing involved a lender who impaired the value of collateral to the detriment of the guarantor. South Carolina similarly does not allow a lender to impair collateral so as to result in damage to a guarantor. As provided by statute:

> If the obligation of a principal obligor is secured by an interest in collateral, another party to the instrument is a secondary obligor with respect to that obligation, and a **person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of the secondary obligor is discharged to the extent of the impairment**. The value of an interest in collateral is impaired to the extent the value of the interest is reduced to an amount less than the amount of the recourse of the secondary obligor, or the reduction in value of the interest causes an increase in the amount by which the amount of the recourse exceeds the value of the interest. **For purposes of this**

N.E.2d 436, 441–43 (1993) (holding that guarantor could rely on the defense that lender violated the implied covenant of good faith and fair dealing in not reducing the guaranty as agreed); *BA Mortg. & Int'l Realty Corp. v. Am. Nat. Bank & Tr. Co. of Chicago*, 706 F. Supp. 1364, 1376 (N.D. Ill. 1989) (holding that a guarantor could assert as a defense the mortgagee's breach of covenant of good faith implied in every contract, as implied covenant of good faith reflected strong public policy judgment); *Dorsy v. Maryland Nat. Bank*, 334 So. 2d 273, 274 (Fla. Dist. Ct. App. 1976) ("[T]he law imposes on the creditor an obligation not to deal with the debtor or any security for the debt in such a manner as to harm the interest of the guarantor." (citing 38 Am. Jur. 2d Guarantys 126 (1968)); *see also AAR Aircraft & Engine Grp., Inc. v. Edwards*, 272 F.3d 468, 472-73 (7th Cir. 2001) (holding that guarantor of debtor's secured debt could not waive right to commercially reasonable disposition of collateral on debtor's default, where lender foreclosed on collateral and purchased it at a fraction of its value at a commercially unreasonable foreclosure sale, thereby creating an "absurd . . . windfall" to the lender); *Nat'l Westminster Bank N.J. v. Lomker*, 277 N.J. Super. 491, 497, 649 A.2d 1328, 1331 (App. Div. 1994) ("Related to this obligation [of good faith] is the requirement that a lender not 'unjustifiably impair' any collateral. . . .[and] the defense of impairment of collateral is available to a guarantor just as much as to the debtor." (citations omitted)).

> **subsection, impairing the value of an interest in collateral includes . . . failure to comply with applicable law in disposing of or otherwise enforcing the interest in collateral**.

S.C. Code § 36-3-605(d) (emphasis added). Comment 7 to this statute recognizes that "Subsection (d) is based on Restatement of Suretyship and Guaranty Section 42 and deals with the discharge of secondary obligors by impairment of collateral." *Id.* cmt. 7. In turn, Comment f to Section 42 of the Restatement notes:

> **If a secured party disposes of collateral in contravention of the mandated procedures, it is likely that the proceeds will be smaller and, therefore, the deficiency owed by the secondary obligor will likely be greater**. Accordingly, **disposition of the collateral in a manner inconsistent with governing law constitutes impairment of collateral. In some jurisdictions, improper disposition of the collateral prevents recovery of any deficiency from the principal obligor** even in the absence of demonstrated loss. The effect on the secondary obligation of such a bar on seeking a deficiency from the principal obligor is considered in § 44.

Restatement (Third) of Suretyship & Guaranty § 42 cmt. f (1996) (emphasis added).

Further, in the related context of the application of Section 36-3-605(a), which concerns the discharge of a guarantor when the principal obligor is discharged, our Court of Appeals acknowledged the guarantor's argument that the revisions to the UCC in South Carolina "indicate our Legislature intended to provide the Restatement protections to guarantors," which promote "'the prevention of opportunistic behavior by the bank and the borrower without regard to the consequences to the guarantor.'" *CoastalStates Bank v. Hanover Homes of S.C., LLC*, 408 S.C. 510, 520, 759 S.E.2d 152, 158 (Ct. App. 2014). In *CoastalStates*, the Court of Appeals reversed the grant of summary judgment in lender's favor where "the guaranties created an ambiguity" as to the obligations. *Id.* at 524, 759 S.E.2d at 160. The prohibitions in the UCC and Restatement against impairment of collateral must be read into and inform the lender's implied obligation of

good faith and fair dealing in order to prevent self-serving action by the lender that harms a guarantor.

D. <u>The Guaranties at issue contemplated that the Guarantors relied upon the collateral and upon the Trust's compliance with all bidding procedures at a foreclosure sale in order to produce the highest and best bid at such sale, and as a result the Trust's violation of the Deficiency Statute was a breach of the Guaranties and the implied obligation of good faith and fair dealing.</u>

The defense offered by the guarantors at trial, which was rejected by the trial court, is that the Trust breached the implied obligation of good faith and fair dealing when it violated the Deficiency Statute, thereby precluding recovery on the guaranty. It is first necessary to understand the operation of the Deficiency Statute and how it impacts the liability on the Guaranties.

1. <u>The Trust violated the Deficiency Statute to the detriment of the Guarantors.</u>

By operation of S.C. Code Ann. § 15-39-760,[7] S.C. Code § 15-39-720,[8] (the Deficiency Statute) allows a mortgagee to obtain a deficiency judgment against a

---

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

[8] The statute provides in full:

> 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

borrower **if, and only if**, the mortgagee bids **one time** on the first day of the foreclosure auction and the bidding is then held open for thirty days to receive upset bids, with a final auction occurring on the thirtieth day. *Id.* § 15-39-720, -760. **The Deficiency Statute forbids the mortgagee, or "all persons acting in his behalf," from bidding a second time or offering an upset bid at the final auction**. *Id.* § 15-39-720 (emphasis added).

In this way, the Deficiency Statute protects borrowers and guarantors by requiring the mortgagee to make its best and highest bid on the first day of the sale, which in turn minimizes or even eliminates any deficiency. *See* 27 S.C. Jur. Mortgages § 128 ("This effectively forces the mortgagee to enter his highest and best bid at the initial sale."); *see also Holliday v. McFadden*, 188 S.C. 187, 198 S.E. 392, 394 (1938) ("[T]he policy of the Statute is to prevent property being sold at judicial sales for sacrifice prices."). Indeed, the Trust admitted in its opening statement that the purpose of this bidding scheme "is to try to encourage the party who is owed the money to put in the highest bid possible." (Tr.

> 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. If the thirtieth day falls on Sunday the bidding shall be closed on the Monday immediately following.
>
> The bidding shall be reopened by the officer making the sale on the thirtieth day after the sale, exclusive of the day of the sale, at eleven o'clock in the forenoon and the bidding shall be allowed to continue until the property shall be knocked down in the usual custom of auction to the successful highest bidder complying with the terms of sale. The sales officer shall announce the sales about to be closed and shall receive the final bids in such sales in the order determined by him.

p. 52.) By forcing the mortgagee to only bid one time at the initial sale, the mortgagee must offer a bid of fair market value or risk that a third party will outbid it at the second sale and thereby in essence take from the mortgagee what the mortgagee could have received in payment for the debt. Because the provisions allowing for a deficiency judgment do not apply when a mortgagee waives the deficiency and competes with other bidders, the mortgagee should not gain the benefit of a deficiency when it (or someone on its behalf) violates those provisions by bidding at the second sale.

The operation of this statutory scheme is best conveyed by way of an example. Assume a property is worth $1,000,000 and that the lender is owed $800,000. If the lender were to bid any amount less than the debt of $800,000, it risks an upset bid, thereby leaving it with some portion of the debt unpaid. For example, if the lender bid $500,000, then an upset bidder could bid $500,001 and take the property. The lender then would have $500,001 and a deficiency judgment of $299,999. But the scheme seeks to avoid this result by incentivizing the lender to bid the full amount of the debt of $800,000. In doing so, the lender either will have the high bid and take the property valued at $1,000,000, which is well in excess of the debt of $800,000, or a third party will give an upset bid resulting in the full payment of the debt. Either way, the lender is compensated in full for the debt. Thus, the statutory scheme incentives the lender to bid the value of the debt (or the fair market value of the property if less than the debt).

This example also reveals how an unscrupulous lender might manipulate the system to its advantage in order to obtain both the property and a deficiency judgment, if it is allowed to do what Respondent did here. Whereas a scrupulous lender would be incentivized in the above example to bid the full amount of its debt of $800,000 (which

would eliminate any deficiency); an unscrupulous lender who was willing to violate the statute might underbid at the first sale with a bid of $400,000, knowing that it could send a representative to the second sale to preserve the value of the property by bidding against any upset bidders up to the amount of the debt. Thus, if a third party bid up to $500,000 at the second sale, then lender's representative could take the property with a high bid of $500,001 and then assign its bid back to the lender. In this manner, the lender would hold *both* the property (valued at $1,000,000) *and* a deficiency judgment in the amount of $299,999. This would result in a windfall valued at $1,299,999 as compared to a debt of only $800,000, and the borrower (as well as any guarantors) would continue to be obligated to the lender for the deficiency in the amount of $299,999 *even though* the lender unquestionably had been paid in full. This example shows one reason why the statutory scheme does not allow the lender to bid at the second sale and requires the lender to make its highest and best bid at the first sale. It also shows the importance of allowing a guarantor who was not sued in the initial foreclosure action to interpose a defense to payment in a subsequent action on the guaranty.

2. ***The Trust's violation of the Deficiency Statute to the detriment of the Guarantors constituted a breach of the implied covenant of good faith and fair dealing in the Guaranties and therefore precluded recovery.***

As a result of the Trust's violation of the Deficiency Statute, the Appellants argued at trial that the Trust breached the implied obligation of good faith and fair dealing in the Guaranties and therefore should not be able to recover under the Guaranties. The trial judge assumed for the purposes of a directed verdict that the Trust in fact sent a representative to the second "upset" auction in violation of the Deficiency Statute, but nonetheless held that such a violation could not be a defense to the Guaranty.

This ruling was error under applicable South Carolina law. As in *CoastalStates*, the Guaranties at issue here create sufficient ambiguity such that a jury could construe them—and the concomitant obligation of good faith and fair dealing imposed by *Nelson*, related case law, and S.C. Code § 36-3-605(d)—to require the lender not to violate the Deficiency Statute, which impaired the benefit of the collateral to the guarantors because it allowed the Trust to avoid presenting its highest and best bid on the first day of the foreclosure sale. As a result, the violation of the Deficiency Statute breached the implied obligation of good faith and precludes recovery.

The Guaranties contain at least three terms reasonably indicating that the Appellants are entitled to the benefit of the collateral securing the underlying debt and of the protections of the Deficiency Statute. (Pl. Exs. 8-9.) First, the Guaranties provide that Lender may only "compromise" collateral "**with reasonable notice to the undersigned**," (*id.* p. 1 (emphasis added)), which demonstrates a reliance upon the collateral by the Appellants as well as a prohibition against the Trust unilaterally compromising the collateral. Second, the Guaranties also provide that the Appellants have a "**right of recourse to security** for the debts and obligations of the Borrower to Lender" if and when they pay the Borrower's obligations. (*Id.* p. 2 (emphasis added).) This language also demonstrates a reliance upon the collateral by the Appellants and implies that the Trust should not impair the collateral when the Guarantors have right to pay the debt and then seek recourse from the collateral. And, third, perhaps most significantly, the Guaranties include bold language in all capital letter stating that "**THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE**

MORTGAGED PROPERTY." (*Id.* p. 3.) This language expressly focuses on the importance of the high bid at any foreclosure sale, and it follows that the Appellants are relying upon a fair bidding process in accordance with law in order to produce the highest possible high bid. The clear implication is that the lender must not engage in any behavior that would undermine the high bid.

These several provisions within the Guaranties demonstrate that the parties specifically contemplated that the collateral must be preserved for the benefit of all parties, including the Guarantors. Further, the final statement concerning the application of the high bid at the foreclosure sale shows that the parties contemplated that the bidding procedure at any foreclosure sale will impact the amount of the Appellants' obligation under the Guaranties. It follows that the implied obligation of good faith and fair dealing necessarily would prevent the Respondent from doing anything in the bidding process that might prevent the Appellants from gaining the full benefit of the high bid.

It follows that the violation of the Deficiency Statute worked to the severe detriment of the Appellant in depriving it of the Trust's "high bid." The Trust has conceded that the purpose of the bidding statute "is to try to encourage the party who is owed the money to put in the highest bid possible," (Tr. p. 52), yet it virtually admitted that it did **not** make its highest and best bid at the first sale but that it used Mr. George Buchanan—the person who established the Trust, was intimately involved in its operations, and whose children were its sole beneficiaries—to make the high bid at the second sale and then assign this bid back to the Trust.

As admitted in the Trust's opening statement, Mr. Buchanan bid at the upset sale because he "**was concerned that someone else might come in [at the upset sale] and**

take this property and leave the trust in a bad position, losing some money." (*Id.* p. 52.) Of course, the **only reason for Mr. Buchanan to have a concern of the Trust "losing money" would be if the Trust's bid of $6.6 Million were less than the fair market value of the property. Otherwise, it could not lose money**. And the value of the property surely did exceed the $6.6 Million bid, as Appellants valued it at $30 Million prior to the foreclosure, and the Trust valued it at $15 Million immediately following the foreclosure. (*Id.* pp. 32, 85.)

It can never be known what the Trust would have bid if it had offered its highest and best bid on the first day of the sale in accordance with the requirements of the Deficiency Statute. Given that the property' value exceeded the total debt of $9.5 Million, a reasonable bid would have been *at least $9.5 Million*, which would have covered the debt. But instead, as assumed by the trial court for purposes of the directed verdict, the Trust violated the Deficiency Statute and sent Mr. Buchanan to the upset sale to bid a second time for the Trust. Even though the winning bid of $7.2 Million was more than the Trust's first bid of $6.6 Million, **it nonetheless deprived the Guarantors of the benefit of the Trust being forced to make it highest and best single bid in advance of the upset sale without knowledge of how high the bidding would go at the upset sale.** But for this violation, the Guarantors reasonably could have expected the Trust to bid the full amount of the debt and **eliminate any deficiency**, which in turn would eliminate any liability under the Guaranties.

It is for these reasons that the violation of the Deficiency Statute, which was assumed by the trial court to have occurred, at the very least presents a jury question as to whether the Trust breached the implied covenant of good faith and fair dealing under the

principles of *Nelson*, *CoastalStates Bank*, S.C. Code Ann. § 36-3-605(d), and other authorities cited above. Here, the Trust blatantly violated a statute whose very purpose was to protect the Guarantors, and in so doing eviscerated the Guarantors' ability to rely on the collateral. Such nefarious action is the epitome of bad faith and fair dealing and must not be sanctioned by this Court. South Carolina's adoption of S.C. Code § 36-3-605(d) and related Restatement principles, coupled with the longstanding precedent of *Nelson* (and similar decisions in other jurisdictions) that a guarantor may defend on the basis of a plaintiff's breach of the implied covenant of good faith and fair dealing, mandates that the Court of Appeals reverse the directed verdict of the trial court.

E. **Alternatively, the Trust's violation of the Deficiency Statute to the detriment of the Guarantors precludes recovery under the Guaranties by operation of the doctrines of unclean hands, estoppel, waiver, and/or unlawful act.**

In the alternative to being precluded from recovery by the breach of the implied covenant of good faith and fair dealing, the doctrines of waiver, unlawful act, or unclean hands should bar the Trust from enforcing the ill-gotten deficiency judgment by way of a separate action against the guarantors.

Because the provisions allowing for a deficiency judgment do not apply when a mortgagee waives the deficiency and competes with other bidders at a single sale, S.C. Code Ann. §§ 15-39-720, -760, the mortgagee should be deemed to have waived the deficiency when it violated these statutory provisions. *See, e.g., Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 928–29 (Ct. App. 1994) ("Waiver is the voluntary and intentional relinquishment of a known right. It may be implied from circumstances indicating an intent to waive. **Acts that are inconsistent with the continued assertion of a right may also give rise to a waiver**." (emphasis added)).

Also, "[i]t is a well founded policy of law that no person be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act." *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 276, 437 S.E.2d 168, 170 (Ct. App. 1993); *see also Wachovia Bank, NA v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (S.C. Ct. App. 2010), *aff'd as modified*, 404 S.C. 421, 746 S.E.2d 35 (2013). This rule applies at both law and in equity and whether the cause of action is in contract or in tort. *Jackson*, 313 S.C. at 276, 437 S.E.2d at 170. Thus, the unlawful violation of the Deficiency Statute precludes recovery on the Guaranties.

Also, "[t]he doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *Coffey*, 389 S.C. at 75, 698 S.E.2d at 247. The original Foreclosure Action against the Borrower was one in equity. See *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 293, 778 S.E.2d 106, 108 (2015) (noting that a foreclosure action is one in equity and that "[t]he power to render a deficiency judgment is included within the jurisdiction of courts of equity"). If the Guarantors had been named in the original Foreclosure Action, the claims against them also would have been equitable claims. *Id.* As a result of the Trust's unclean hands within the prior equitable Foreclosure Action, by virtue of violating the Deficiency Statute, the Trust should be precluded from recovery in this separate action against the Guarantors.

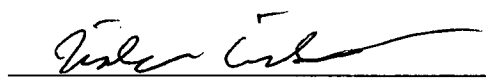
II. A MORTGAGEE'S VIOLATION OF S.C. CODE § 15-39-720 IN A PRIOR FORECLOSURE ACTION CONSTITUTES A DEFENSE AS A MATTER OF LAW IN A SUBSEQUENT ACTION FOR BREACH OF GUARANTY WHEN THE GUARANTOR WAS NOT A PARTY TO THE PRIOR FORECLOSURE ACTION

For all of the reasons above, the Appellants urge this Court to adopt a rule as a matter of law that a mortgagee that violates the Deficiency Statute by bidding twice (whether itself or through someone acting on its behalf) is precluded from recovering a deficiency judgment.

CONCLUSION

The Court of Appeals should reverse the trial court's directed verdict. Appellants further respectfully request that the Court of Appeals instruct the trial court to direct a verdict in favor of Appellants to the extent that the trial court determines that the Trust violated the Deficiency Statute.

Respectfully submitted,



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

Date: September 24, 2018

Attorneys for Appellants

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

Lower Case No. 2015-CP-41-00172

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

v.

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

of Whom

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

PROOF OF SERVICE

The undersigned certifies that the foregoing **INITIAL BRIEF OF APPELLANTS** was served upon all counsel of record, including counsel of record for Respondents, by causing a copy of the same to be deposited in the United States mail, postage prepaid, addressed as follows:

Erik T. Norton, Esq.
John T. Moore, Esq.
1320 Main Street, 17th Floor
P.O. Box 11070
Columbia, South Carolina 29211-1070
Attorneys for Respondent

This 24th day of September, 2018.

William M. Wilson