THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Master-in-Equity

Joseph M. Strickland, Master-in-Equity

Appellate Case No. 2018-001238

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

v.

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

BRIEF OF PETITIONERS

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I. Whether the Court of Appeals erred in adopting the debt method, rather than the equity method, to determine whether the sale price at a foreclosure sale in which a senior lien is not extinguished shocks the conscience of the Court.

II. Whether the Court of Appeals erred in finding Petitioners' equity argument unpreserved and, if so, whether the sale should alternatively be set aside under equitable principles.

STATEMENT OF THE CASE

This case arises out of a motion to set aside the judicial sale of Petitioners Devery A. Hale and Tina T. Hale's home after the foreclosure of a $500.00 homeowners' association lien. If the Court of Appeals' opinion stands, the Hales and their children will lose their home over $500.00 in homeowners' association dues and remain legally obligated to satisfy the mortgage on a home they can no longer occupy.

In 1998 the Hales purchased and built their home with a note and mortgage for $104,250.00. (App. pp. 113, 132). They still live in the home with their children. (App. p. 132). Their home is subject to dues and assessments from Respondent Winrose Homeowners' Association. Mrs. Hale is approximately 52-years-old and works as a dental assistant. (App. pp. 132, 166). Mr. Hale works in the state prison system. (App. p. 166). The Hales never missed a mortgage payment in over seventeen years and continue to make the payments. (App. pp. 132, 143 lns. 2-4).

On February 11, 2014, Respondent Winrose Homeowners' Association, Inc., filed an action for foreclosure against the Hales. (App. p. 90). The basis of the foreclosure action was a $500.00 dues payment, and the Complaint sought "$566.41 in principal, late fees, interest, and other charges." (App. pp. 92, 100-01). The Hales did not answer or appear. Mrs. Hale stated that when she received service of the lawsuit, she "put the papers in a drawer and forgot about them."

(App. p. 133). She later "received a bill from the HOA asking for $250.00" which she paid "without a problem." *Id.*

On April 3, 2014, the Circuit Court referred the foreclosure to the Honorable Joseph M. Strickland, Master in Equity. (App. p. 86). On July 21, 2014, the Master entered a Judgment of Foreclosure and Sale for a total indebtedness of $2,898.67, which included the $500.00 dues debt, $80.87 in interest, $542.80 in costs, a $2,025.00 attorney's fee, and a $250.00 credit for the payment from the Hales. (App. p. 92). Given the $250.00 credit, by the time the Master entered an order foreclosing on their home and ordering its judicial sale, the Hales principal debt totaled $250.00. The cost to advertise the foreclosure sale—$382.50—exceeded the principal debt. (App. p. 111).

The Order of sale specified that the property "is subject to a senior mortgage held by Nationsbanc Mortgage Corporation recorded in Book R64 at Page 617." (App. p. 94). On August 4, 2014, Respondent Regime Solutions, LLC, purchased the property at a public auction for $3,036.00. (App. p. 176). On September 16, 2014, Regime Solutions filed a rule to show cause to evict the Hales and their children from the home. (App. pp. 105-07, 133).

On November 4, 2014, the Hales filed a Motion to Vacate Sale. (App. pp. 113-16). Along with the Motion, the Hales submitted a $128,000.00 property appraisal. (App. pp. 117-29). The parties agree the property value is $128,000.00. (App. p. 169 lns. 15-18). The Hales argued the Court should set aside the sale because the sale price is so grossly inadequate that it shocks the conscience. (App. p. 114). An issue in this case is what constitutes the sale price—the actual bid price paid or an effective sale price of the bid price plus the outstanding mortgage balance.

At a January 16, 2015 hearing, the Master continued the rule to show cause and the motion to vacate sale "because of an administrative issue in [his] office" that resulted in the case not

appearing on the docket. (App. p. 142). However, counsel and the Master discussed the case on the record. Counsel for Regime Solutions stated it "believe[s] there is significant equity in the property and that they stand to profit from getting the property and paying the mortgage off." (App. p. 144 lns. 12-14). When the Master asked: "They plan to assume the mortgage?", counsel answered, "They are prepared to pay the mortgage off once they have quiet title to the property." (App. p. 144 lns. 15-18). The Hales offered $9,000.00 to settle the matter but Regime Solutions rejected the offer and demanded $35,000.00. (App. pp. 154-55, 158).

On February 6, 2015, the Master heard the motions. (App. p. 147). The Hales presented an affidavit and evidence showing an outstanding mortgage balance of $66,004.00. (App. pp. 132, 135). The Hales argued that the sale price of $3,036.00 shocks the conscience because it is only 4.8% of the equity in the home. (App. pp. 164-65). This method of determining whether the sale price shocks the conscience is referred to as the "equity method".[1] Using the equity method, the court divides the actual sale price by the equity in the home (the outstanding mortgage balance subtracted from the property value). In this case that is a $3,036.00 sale price divided by $61,996.00 equity in the home (the $66,004.00 outstanding mortgage balance subtracted from the $128,000.00 home value), resulting in a sale price that is 4.8% of the equity. (App. p. 31).

Respondents argued the Court should use the "debt method". (App. pp. 156-57). Using the debt method, the Court calculates an "effective" sale price by adding the outstanding mortgage balance to the sale price and then compares that amount to the home's value. In this case there is

[1] The Hales also argued for use of the sale price divided by the property value but that calculation is not at issue in the appeal. (App. pp. 164-65). Using the property value, the court divides the $3,036.00 sale price by the $128,000.00 appraisal value, resulting in a sale price that is 2.37% of the home's value. (App. p. 114).

an effective sale price of $69,040.00 ($3,036.00 plus $66,004.00) divided by $128,000.00 home value, resulting in a sale price that is 54% of the home's value.

In addition to the inadequate sale price, the Hales also argued the Master should vacate the sale for equitable reasons. (App. p. 113-14, 165-66). They argued the "Court has the ability in its gavel to do equity where perhaps equity should be done", Regime Solutions was "unreasonable in negotiations", and the Hales are "hard-working people" who "deserve this home" and are "not behind on their [mortgage] payments" to the bank. (App. pp. 165-66). The Hales also argued that "we need to think about people losing their homes on homeowners association dues." (App. p. 165). The Hales offered to pay $9,000.00 that day to settle the case. (App. p. 166).

The Master denied the Hale's motion to vacate the sale. (App. pp. 96-98). Rather than using the actual sale price, he used the debt method to calculate an "effective sales price" of $69,040.00 (the $3,036.00 bid plus the $66,004.00 outstanding mortgage balance), and divided that by the $128,000.00 property value to find the effective sale price is 54% of the property value and does not shock the conscience. (App. p. 97).

On appeal to the Court of Appeals, the Hales argued the Master should not have added the mortgage balance to the actual sale price to create an effective sale price because the correct calculation for determining if a successful bid shocks the conscience is the equity method—dividing the actual sale price by the equity in the property. The Hales also argued the foreclosing homeowners' association should investigate the equity value in the property and the Master should have vacated the sale under equitable principles. (App. pp. 25-37).

A majority of the Court of Appeals affirmed the Master's denial of the Hales' motion to vacate the sale, and Chief Judge Lockemy dissented. (App. pp. 1-11). The majority found no South Carolina case "expressly weighing the Equity and Debt Methods and declaring the preferred

method when accounting for a senior encumbrance." (App. p. 5). It held that this Court's opinion in *Arrow Bonding Co. v. Warren*, 399 S.C. 603, 732 S.E.2d 622 (2012), "did not conclusively establish whether the Debt or Equity Method is the law in South Carolina" but yet still found that "[t]he take away from *Arrow Bonding* . . . is that we should consider the senior mortgage on this property." (App. pp. 6-7). After discussing a Court of Appeals' opinion that "appeared to utilize the Equity Method", the Court nonetheless held "the Debt Method is the proper method for taking into account a senior encumbrance when deciding whether a successful bid shocks the conscience." (App. pp. 6-7). As explanation for its holding, the Court of Appeals stated "the successful bidder is required to satisfy the senior encumbrance dollar for dollar prior to obtaining clear title", "the Debt Method is consistent with our general policy of upholding properly conducted judicial sales because the Debt Method will result in fewer set asides", and "Regime [Solutions] cannot truly access the equity in the property without satisfying the senior encumbrance because any future sale of the property would be subject to the senior encumbrance." *Id.* The Court of Appeals then agreed with the Master that, applying the debt method, an effective bid of approximately 54% of the property's fair market value did not shock the conscience. (App. p. 7). The Court found the Hales' equity arguments unpreserved and did not address the merits. (App. p. 9).

Chief Judge Lockemy dissented in a separate opinion. He agreed that the mortgage debt should be taken into account but "would utilize the Equity Method as a better vehicle to determine whether a bid shocks the conscience" because it "seeks to encourage judicial sales while also being fair to property owners." (App. p. 10). Chief Judge Lockemy noted "[t]he evidence in this case shows [the Hales] have continued to pay the mortgage for a home for which they have no title because they will suffer the consequences of default if they do not. The buyer has paid nothing."

Id. He explained, "I do not believe it proper to give a judicial sale buyer credit for assuming a debt which it is not legally required to pay." *Id.* Chief Judge Lockemy disagreed with the majority's reliance on supposed fewer sales set aside under the debt method. He "suggest[ed] virtually no sales will be set aside under these circumstances. Buyers need only bid a minimal amount and if a property is encumbered by a mortgage of at least 10% of the home's value, the bid is not subject to attack for being grossly inadequate." (App. p. 11). He believes the debt method would "swallow" the rule "that judicial sales must produce bids that are not grossly inadequate." *Id.*

The Hales filed a timely petition for rehearing resubmitting "the arguments from its briefs" and, specifically, arguing the Court of Appeals erred in adopting the debt method because a successful bidder is not legally responsible for the mortgage debt such that it only *paid* $3.036.00 and *might* later pay the mortgage debt. (App. pp. 12-14). They argued using the equity method will not have a chilling effect on foreclosure sales because a potential bidder can easily calculate equity using publicly available information including the original mortgage amount and the tax value of the home. (App. p. 15). Finally, the Hales argued the Court erred in finding their equitable arguments unpreserved. (App. p. 16). The Court of Appeals denied the petition for rehearing on June 1, 2018, and this Court granted the Petition for a Writ of Certiorari on February 1, 2019.

STANDARD OF REVIEW

"An action to foreclose a real estate mortgage is one in equity. In equity cases, we may find facts in accordance with our own view of the evidence." *Dockside Assoc. v. Detyens*, 294 S.C. 86, 88, 362 S.E.2d 874, 875 (1987) (internal citation omitted). "Whether a judicial sale should be set aside is a matter within the discretion of the trial court." *Investors Sav. Bank v. Phelps*, 303 S.C. 15, 17, 397 S.E.2d 780, 781 (Ct. App. 1990).

ARGUMENT

In the foreclosure sale of a *junior* lien on real property, the sale price used to determine if the bid amount shocks the conscience should be the actual price paid, and it should be compared to the equity in the property. This is the equity method, which differs from the calculation used in the foreclosure of a *senior* lien only in that it uses the home's equity rather than its fair market value in comparison to the actual bid amount. The Court of Appeals erred in adopting the debt method, which is based on a legal fiction that the bidder will pay off the outstanding mortgage balance when he is not legally obligated to do so and may still profit from the purchase in numerous ways without ever paying off the mortgage.

Alternatively, the Court of Appeals erred in finding the Hales' equitable arguments unpreserved. The Hales raised the arguments to the Master at the hearing on the motion to vacate the sale, and the Master ruled on them by denying the motion.

I. THE COURT SHOULD UTILIZE THE EQUITY METHOD TO DETERMINE WHETHER THE SALE PRICE AT A FORECLOSURE SALE OF A JUNIOR LIEN SHOCKS THE CONSCIENCE OF THE COURT TO VACATE THE SALE

Since at least 1915, our Courts have held that a judicial sale "fairly made" may be set aside for "inadequacy of price" when "it is so gross as to shock the conscience." *Bonham v. Cave*, 102 S.C. 308, 311, 86 S.E. 681, 682 (1915). When a Court determines whether the price at a sale to foreclose on a junior lien is so gross as to shock the conscience, it should use the actual price paid compared to the equity in the property for its analysis. "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." *Eastern 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."[2] *Id.* at 359, 644 S.E.2d at 807 (citing *Investors Sav. Bank v. Phelps*, 303 S.C. 15, 19, 397 S.E.2d 780, 782 (Ct. App. 1990) (citing *Polish Nat'l Alliance of Brooklyn, U.S.A. v. White Eagle Hall Co.*, 98 A.2d 400 (N.Y. App. Div. 1983))). While "it is the policy of the Courts to uphold judicial sales when regularly made", "in proper cases the Court will set aside a judicial sale." *Poole v. Jefferson Standard Life Ins. Co.*, 174 S.C. 150, 156, 177 S.E. 24, 26 (1934).

In cases for mortgage foreclosure of the *senior* lien, our appellate courts consistently compare the actual sale price at the judicial sale to the property value to determine if the sale price shocks the conscience of the court such that the sale should be set aside. *See Poole*, 174 S.C. at 158-61, 177 S.E. at 27-28 (comparing actual sale price of $500.00 to property value of $5,000.00 to determine price "wholly inadequate" and shocked the conscience); *Wells Fargo Bank, NA v. Turner*, 378 S.C. 147, 149-50, 152, 662 S.E.2d 424, 425-26 (Ct. App. 2008) (comparing actual sale price of $3,000.00 to property value of $82,050.00 to find sufficient evidence supported special referee's holding that "bid was so grossly inadequate as to shock the conscience"); *Eastern Sav. Bank, FSB v. Sanders*, 373 S.C. 349, 352-53, 644 S.E.2d 802, 804-05 (Ct. App. 2007) (comparing actual sale price of $246,000.00 with property value of $550,000.00 to find sales price not "so inadequate as to shock the conscience of the court"); *Investors Sav. Bank v. Phelps*, 303 S.C. 16, 19, 397 S.E.2d 780, 783 (Ct. App. 1990) (holding actual sale price of $510.00 for property with a note in the amount $48,340.00 "was so grossly inadequate so as to shock the conscience").

When addressing motions to set aside a foreclosure sale for a *junior lien* where a senior lien will remain on the property, such as in this case, our appellate courts have used multiple

[2] Respondents do not challenge the use of 10% to determine whether a sale price shocks the conscience. This Court has not addressed the use of 10% but the parties and the Master accepted it as controlling law.

calculation methods. In *Fed. Nat'l Mortgage Ass'n v. Brooks*, 304 S.C. 506, 405 S.E.2d 604 (Ct. App. 2006), the Court of Appeals affirmed a master's decision to set aside a judicial sale based on irregularities but the Court discussed the adequacy of the sale price because "disparity between the accepted bid and the fair value of the property" is a "proper factor" for the court to consider "where there are other circumstances tending to show the sale should be set aside." *Id.* at 509-10, 405 S.E.2d at 606. The foreclosure involved a second mortgage, and the bid of $875.00 was subject to a first mortgage balance of $24,270.00. *Id.* at 508, 405 S.E.2d at 605. The bidder argued the bid price plus the mortgage balance totaled 49% of the property value ($52,500.00) and, therefore, was adequate. *Id.* at 509, 405 S.E.2d at 605-06. The Court found: "It cannot be gainsaid that the payment by [the bidder] of $875 for equity of over $27,000 was adequate, albeit, it is not so grossly inadequate as to shock the conscience of the court." *Id.* at 510, 405 S.E.2d at 606. The Court compared the actual sale price (not an effective sale price that included the outstanding mortgage as argued by the bidder) to the equity in the property.

In *Arrow Bonding Co. v. Warren*, 399 S.C. 603, 732 S.E.2d 622 (2012), this Court affirmed an order denying a motion to set aside a judgment execution sale. Warren acted as a surety for bonds that someone forfeited. *Id.* at 604-05, 732 S.E.2d at 623. The bond company got a judgment against Warren and then filed for foreclosure of the judgment. *Id.* at 605, 732 S.E.2d at 623. Warren defaulted, and the bond company successfully bid $2,500.00 on Warren's thirteen real properties to satisfy a $7,693.31 debt. *Id.* Warren moved to set aside the sale based on an inadequate sale price because the tax assessment records showed a combined property value of $263,121.00. *Id.* at 606, 732 S.E.2d at 623. Rather than comparing the $2,500.00 sale price to the property value, the master added the outstanding mortgages ($88,000.00) and tax liens ($12,000.00) for a newly calculated sales price of $102,500.00 and compared that to the property

value, finding a 39% figure did not shock the court's conscience. *Id.* at 606, 732 S.E.2d at 624. On appeal, Warren argued "the Master erred in not judging inadequacy by directly comparing the sales price to the properties' value, without considering mortgages or liens." *Id.* at 607, 732 S.E.2d at 624. This Court disagreed "[u]nder the circumstances of [the] case", explaining that "[i]n a judgment execution sale such as this, [] the buyer takes the property subject to the mortgage as well as other liens." *Id.* at 607, 732 S.E.2d at 624. This Court found Warren failed to show gross inadequacy of the sale price because "the record is devoid of evidence of the true value of the properties." *Id.* at 608, 732 S.E.2d at 624.

Significantly, the Court made a point of noting that "[t]he propriety of this method of calculating value is not challenged on appeal", thus leaving open the issue of whether adding liens to the sale price is a proper method to determine whether to set aside the sale. *Id.* at 606 n.5, 732 S.E.2d at 624 n.5. The Court did not hold the calculation method used in *Arrow Bonding* is the only calculation to be used but simply found the master did not abuse his discretion. *Id.* at 607, 732 S.E.2d at 624. Therefore *Arrow Bonding* does not stand for the proposition that this State exclusively uses the debt method, and the Court of Appeals erred in adopting it. In *Arrow Bonding*, the lower court used the debt method and the appellant argued not for the equity method but for a direct comparison of the sale price and the property value without taking into account mortgages and liens. In this case, the Hales argue for the equity method, which does take mortgages and liens into account by comparing the actual sale price to the equity in the property. This Court did not consider the equity method in *Arrow Bonding*.

The most recent appellate decision on a motion to set aside a sale for a grossly inadequate sale price does not address the issue in this case. *Bloody Point Prop. Owners Ass'n v. Ashton*, 410

S.C. 62, 762 S.E.2d 729 (Ct. App. 2014).[3] The master found a successful bid of $8,800.00 plus $2,793.20 in unpaid taxes resulted in an $11,593.20 payment that he compared to the property value to find the sale price did not shock the conscience. *Id.* at 65-66, 762 S.E.2d at 731. The issue on appeal was whether the court should use an appraisal from the bidder or the prior owners to establish the property value. *Id.* at 70, 762 S.E.2d at 734. The Court of Appeals affirmed the decision refusing to set aside the sale, finding "the master's decision is supported by the evidence in the record." *Id.* at 71, 762 S.E.2d at 734. Neither the calculation method nor the addition of taxes to the successful bid were an issue on appeal.

None of these cases address whether to use the equity or debt method, and the Court of Appeals erred in interpreting *Arrow Bonding* to require use of the debt method. The equity method is the more appropriate and more factually and legally accurate method for determining whether a sale price shocks the conscience such that the court should set aside a judicial sale in a foreclosure of a junior lien.

The only difference between the foreclosure of a senior lien and foreclosure of a junior lien is that, in the latter situation, the purchaser takes the property subject to the senior lien. The equity method properly takes that into account by comparing the sale price to the equity in the property rather than the property value, which is used in a mortgage foreclosure. Viewing it from a bidder's perspective, the equity method requires a bidder to pay at least 10% of the equity in the property. This is logical and fair to the bidder because the equity is what the bidder is purchasing when he buys a property with a senior lien. Even assuming the Court of Appeals' and Respondents'

[3] The only other appellate opinion regarding foreclosure of a homeowners' association lien, *Wachesaw Plantation E. Cmty. Servs. Assoc. v. Alexander*, 420 S.C. 251, 802 S.E.2d 635 (Ct. App. 2017), "does not argue that the sale price shocks the conscience" but, rather, that it was inadequate and there was excusable neglect. *Id.* at 256-57, 802 S.E.2d at 638.

position as true that a bidder will always pay off a mortgage, the value to the bidder is still the equity. As Regime Solutions' counsel stated at the hearing before the Master, "my client recognized that that property had equity in it, and they declined [the Hales] offer" to settle, and "[t]here's $70,000 worth of equity in the property." (App. p. 154).

Regime Solutions represented to the lower court that it is "prepared to pay off the mortgage once they have quiet title to the property." (App. p. 144 lns. 17-18). That it is prepared to pay off a mortgage is a far cry from a commitment to actually pay it off. Further, the public record shows that Regime Solutions does not pay off mortgages for the properties it buys. The "Richland County public records reveals Regime has purchased 43 properties between November 4, 2013, and September 8, 2015. Of those 43 properties, 18 have entered foreclosure, and 25 have open mortgages of record. Regime does not appear to have paid off one single encumbering lien . . . ."[4] (App. p. 74 n.1). In their brief to the Court of Appeals, the Hales stated that the bidder in a homeowners' association foreclosure action takes the property subject to a mortgage rather than assuming it and, therefore, is not personally responsible for the balance. (App. p. 29). In response, Regime Solutions stated only that the property is encumbered by the mortgage and was silent as to whether it will pay off the mortgage. (App. pp. 55, 60). Therefore, there is no evidence before the Court that Regime Solutions will pay off the mortgage debt and there is no dispute that it is not legally required to do so.

[4] An updated search of the Richland County public records shows that between November 4, 2013 and October 11, 2016: (1) Regime Solutions purchased 38 properties as to which a bank later foreclosed, meaning Regime Solutions did not pay off the mortgage; (2) Regime Solutions purchased 15 properties that it quitclaimed back to the owners for a profit between $2,911 and $13,984 per property; and (3) Regime Solutions purchased 6 properties of which it is still the owner of record and there is still an open mortgage.

The Court of Appeals' reasons for using the debt method are unsupported by law or evidence. As explanation for its holding, the Court of Appeals stated "[1] the successful bidder is required to satisfy the senior encumbrance dollar for dollar prior to obtaining clear title", "[2] the Debt Method is consistent with our general policy of upholding properly conducted judicial sales because the Debt Method will result in fewer set asides", and "[3] Regime [Solutions] cannot truly access the equity in the property without satisfying the senior encumbrance because any future sale of the property would be subject to the senior encumbrance." (App. pp. 6-7). There is no legal or evidentiary basis for a holding that the successful bidder *must* pay the senior lien *dollar for dollar* to obtain clear title. The purchaser and the bank could enter into any number of agreements for the purchaser to obtain clear title without paying the entire mortgage balance. The evicted mortgagor may continue to pay the mortgage (giving a windfall profit to the bidder) to avoid damaged credit and a deficiency balance after a foreclosure sale or to avoid paying taxes on any amount of forgiven debt as taxable income. Chief Judge Lockemy correctly stated in his dissent that it is improper "to give a judicial sale buyer credit for assuming a debt which it is not legally required to pay." (App. p. 10).

There is no legal or evidentiary basis for a holding that the debt method will result in fewer set asides. As Chief Judge Lockemy noted in his dissent, under the debt method "virtually no set asides will be set aside under these circumstances. Buyers need only bid a minimal amount and if a property is encumbered by a mortgage of at least 10% of the home's value, the bid is not subject to attack for being grossly inadequate." (App. p. 11). Use of the debt method will actually encourage low bids.

Finally, there is no legal or evidentiary basis for a holding that the bidder cannot access equity in the property without first satisfying the senior lien. A successful bidder may not intend

to get clear title or profit by paying off the debt because it could easily list the property for sale for an amount more than the mortgage balance, and have the buyer pay off the mortgage as part of the purchase, thereby profiting without ever personally paying the mortgage. Using this case as an example, Regime Solutions could profitably sell the property for $30,000.00 subject to the mortgage. That purchaser would obtain a $128,000.00 home for only $96,004.00 and Regime Solutions would reap a $26,964.00 profit.

The Respondents made three main arguments in opposition to the equity method. Each one is unconvincing and is addressed below.

A. The Equity Method Does Take the Senior Lien Into Account

The equity method more accurately takes the senior lien into account than the debt method. The debt method is based on a legal fiction that uses a false sales price (the actual sales price plus the outstanding debt) to calculate a value based on a false premise (that the bidder is purchasing the fair market value of the property). *See, e.g.*, *Purvis v. Commercial Casualty Co.*, 160 S.C. 484, 487, 159 S.E. 369, 370 (1931) (stating the "rule that the law knows no fractions of a day is . . . a mere legal fiction, and therefore, like all other legal fictions, is never allowed to operate against right and justice . . ."). The bidder at a foreclosure sale is purchasing the equity in the property. In this case, Regime Solutions paid $3,036 for $61,996.00 in equity. The equity method takes that into account by comparing the price paid for the value purchased.

B. The Equity Method will Not Halt Judicial Sales for Foreclosure of Homeowners' Association Liens

Respondents and the Court of Appeals forecast (without evidence) that using the equity method may halt judicial sales for foreclosure of homeowners' association liens because the liens will likely always be a small percentage of the equity in a home. Aside from the fact that there is

no evidence of this in the record, there is no requirement that a homeowners' association use the foreclosure process to collect a dues or assessment debt.

A homeowners' association is not required to satisfy its judgment by foreclosing on real property. Generally, the property value will greatly exceed the value of the debt. "To sell more than is required to do equity violates the rule [71(b)], . . . and principles of equity." *Arrow Bonding Co. v. Warren*, 399 S.C. 603, 609, 732 S.E.2d 622, 625 (2012), Beatty, C.J., and Hearn, J., dissenting ("Certainly, the sale of thirteen separate parcels valued in excess of $260,000 as a single lot was not required to satisfy a $7,693 judgment."). Instead, an HOA has as its disposal the execution laws just like any other judgment creditor.[5] There is no legal or evidentiary basis for finding that the equity method will impact a homeowners' association's ability to collect its debts.

C. A Bidder Can Easily Calculate the Equity in the Property

Respondents argue that the equity method is not workable because a bidder does not know the equity value in a home. As an initial matter, Regime Solutions' arguments before the Master disprove this argument. At the February 2015 hearing, Regime Solutions handed to the Master "some documents that are part of the public record. It's a copy of the mortgage and the UCC, we well as the print out . . . from the Register of Deeds Office with regards to the taxable value on the property as well." (App. p. 169). That Regime Solutions obtained the mortgage from the public record shows that it is capable of calculating equity in the property. The mortgage states its amount, the interest rate, and the minimum monthly payment. Using that information, it is simple to calculate the approximate equity in the property at the time of the judicial sale. "A purchaser at

[5] The Winrose Declaration of Covenants attached to the foreclosure complaint state in Section 8 that for unpaid assessments, "the Association may bring legal action against the owner personally obligated to pay the same ***or*** may enforce or foreclose the lien against the lot or lots." (emphasis added).

a judicial sale is deemed to have notice of all things disclosed by the record." *Wells Fargo Bank, NA v. Turner*, 378 S.C. 147, 151, 662 S.E.2d 424, 426 (Ct. App. 2008). All of the information necessary to calculate equity is a matter of public record and a bidder is deemed to know it.

Further, the debt method requires use of the same information as the equity method, it just uses the balance rather than the amount already paid. The debt method combines the sale price with the outstanding balance. To calculate the outstanding balance, a bidder would use the same information as that used to calculate equity. This argument is unavailing for Respondents' position.

Finally, in the event the Court uses the debt method and affirms, the Hales request the Court also order that, on remand, the Master determine what amount Regime Solutions owes the Hales for the mortgage payments they have continued to make since the foreclosure sale. While the Hales understand they have lived in the home, they also maintain that the mortgage payments, insurance, taxes, and maintenance they have paid far exceed the fair rental value of the home and Regime Solutions should not receive further windfall by taking the home with a much reduced senior lien than when it bid at the foreclosure sale.

II. THE HALES' EQUITABLE ARGUMENTS ARE PROPERLY PRESERVED

The Court of Appeals erred in finding the Hales did not preserve their equitable arguments. It ruled the "arguments regarding equitable maxims unpreserved because they did not properly raise them to the master and the master did not rule on them." (App. p. 9). Both of these findings are incorrect.

First, the Hales properly raised equitable arguments to the Master. At the hearing, counsel for the Hales argued they offered to pay $9,000.00 to settle, "a 300 percent profit to" Regime Solutions, but it was rejected. (App. pp. 158-59). The Hales further argued the "Court has the

ability in its gavel to do equity where perhaps equity should be done", Regime Solutions was "unreasonable in negotiations", and the Hales "deserve this home" and are "hard-working people" that are "not behind on their [mortgage] payments." (App. pp. 165-66). Counsel for Winrose acknowledged "there's been a lot of talk about equity." (App. p. 166 lns. 16-17). That the Hales did not use specific equitable maxim names does not render the argument unpreserved. "A party need not use the exact name of a legal doctrine in order to preserve the issue for appellate review, but it must be clear the argument was presented on that ground." Toal, Jean Hoefer, et al., Appellate Practice in South Carolina (3d ed.) 186.

Second, the Master ruled on the equitable argument by denying the motion to vacate. This satisfies the requirement that an argument is raised to and ruled upon by the lower court. That the Master did not expressly state his rejection of the equitable argument in the Order does not mean the Hales were required to file a Rule 59(e), SCRCP, motion. *See Spence v. Wingate*, 381 S.C. 487, 489-90, 674 S.E.2d 169, 170 (2009) (finding an issue preserved without the filing of a Rule 59(e), SCRCP, motion where the lower court's order did not restate the appellant's grounds for opposition to the motion but did expressly grant the motion on the grounds argued by the appellant); *Bailey v. Segars*, 346 S.C. 359, 364-65, 550 S.E.2d 910, 913 (Ct. App. 2001) (finding issues preserved even though the lower court "did not explicitly rule on the issues" and the appellant did not file a Rule 59(e) motion because the appellant raised the issues, presented them in the record on appeal, and the motion "was denied in a form order").[6] "Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it." *Wilder Corp. v. Wilke*, 330

[6] *See also Clark v. S.C. Dep't of Pub. Safety*, 353 S.C. 291, 312, 578 S.E.2d 16, 26 (Ct. App. 2002) ("[T]here is no blanket requirement that the trial court set forth a separate explanation on all of its rulings on post-trial motions.").

S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (finding an issue preserved where the parties argued clearly conflicting amortization schedules and "the trial court ruled on Seller's objections by expressly adopting Buyer's amortization schedule in its order").

The Hales raised an equitable argument to the Master, and he ruled on it by denying the motion to vacate. Therefore, the issue is preserved.

III. THE COURT SHOULD VACATE THE SALE ON EQUITABLE GROUNDS

If the Court agrees with the Court of Appeals as to the debt method but finds the equitable arguments preserved, it should set aside the sale because equity favors vacating the sale. "Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible." *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 252, 715 S.E.2d 348, 354 (Ct. App. 2011). The Master erred in not exercising his discretion and inherent power to grant equitable relief to the Hales.

Numerous equitable principles favor vacating the sale. "[E]quity will not suffer a wrong without a remedy. Where, as here, a wrong has been suffered, and no adequate legal remedy exists, it is well within the court's powers to fashion an equitable remedy." *Key Corporate Capital, Inc. v. Cnty. of Beaufort*, 360 S.C. 513, 518-19, 602 S.E.2d 104, 107 (Ct. App. 2004) (internal quotation marks and citations omitted), *rev'd on other grounds* 373 S.C. 55, 644 S.E.2d 675 (2007). Without an equitable remedy, the Hales will suffer the wrongs of the loss of their home and equity while remaining legally bound to pay a mortgage. If the Court grants equitable relief and vacates the sale, the Hales will pay Winrose and Regime Solutions will receive a refund of its money.

"A court of equity abhors forfeitures, and will not lend its aid to enforce them. . . . The court has the power in equity to deny or delay forfeiture when fairness demands." *Regions Bank*, 394 S.C. at 256, 715 S.E.2d at 356 (internal quotation marks and citation omitted). The sale should

be vacated because upholding it would result in a forfeiture to the Hales and an unfair windfall to Regime Solutions. Based on a $250.00 outstanding principal debt, the Hales will forfeit their home and $61,996.00 in equity while remaining personally liable for a $66,004.00 mortgage debt. Regime Solutions will, for the price of $3,036.00, obtain the home without any legal liability to pay the mortgage and may choose a number of options to maximize its profit. This is inequitable and should be prohibited.

"He who seeks equity must do equity." *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107, 531 S.E.2d 287, 291 (2000) (internal quotation marks omitted). Regime Solutions failed to act equitably by bidding $3,036.00 for property it knew had significantly more equity value. It also failed to negotiate in good faith with the Hales, who offered almost three times the sale price to settle the matter, by demanding an excessive settlement amount of approximately $35,000.00 for a matter that arises out of a $250.00 debt.

"Equity looks to substance rather than form." *Regions Bank*, 394 S.C. at 253, 715 S.E.2d at 354 (internal quotation marks omitted). This maxim "evolved out of judicial regard for that which ought to be done. [It] applies by dispensing with pure formalities which would otherwise defeat the equity. *Id.* at 253, 715 S.E.2d at 354-55 (internal citation and quotation marks omitted). "When applying this principle, courts look to the substance and intent of the parties, and give a construction consistent with such intent." *Id.* at 253, 715 S.E.2d at 355. The Court of Appeals and the Master applied a calculation that applied form over substance and ignores the intent of the parties. The calculation of whether a bid shocks the conscience is intended to result in fair bid amounts and should be based on the realities of the parties' legal obligations and conduct. Here, the bid amount of $3,036.00 for over $60,000.00 in equity and a property worth $128,000.00 is not a fair price. Further, a finding to the contrary ignores the fact that Regime Solutions is not

legally obligated to pay the mortgage but the Hales are obligated to do so and stand to suffer severe negative consequences if they do not pay it.

CONCLUSION

The foreclosure of homeowners' association liens is widespread in South Carolina, and the use of the equity method will ensure that judicial sales may proceed but at price that is not grossly inadequate. Any other result ignores the reality that a successful bidder can and does profit from the equity in a home without ever being legally obligated to pay, intending to pay, or actually paying off any senior liens. The Hales request the Court reverse the decision of the Court of Appeals and vacate the sale.

Respectfully submitted,

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March 21, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Master-in-Equity

Joseph M. Strickland, Master-in-Equity

Appellate Case No. 2018-001238

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

v.

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

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing *Brief of Petitioners* has been served upon the following counsel of record by mailing one copy by United States Mail, addressed as shown below on March 21, 2019.

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