THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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

Appellate Case No.: Case No. 2018-001238

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

v.

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

BRIEF OF RESPONDENTS REGIME SOLUTIONS, LLC

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QUESTIONS PRESENTED

I. Whether the trial court and Court of Appeals erred in applying the debt method to determine whether a bid price "shocks the conscience" in a junior lien foreclosure.

II. Whether the Court of Appeals erred in finding Petitioners' equity arguments unpreserved and denying the relief sought on equitable principles.

STATEMENT OF THE CASE

On February 24, 2014 Respondent, Winrose Homeowner's Association, Inc. ("Winrose") filed a Complaint for foreclosure of a HOA lien against 25 Caddis Creek Court, Irmo, SC 29063. (App. pp. 100-02). Thereafter the Hales were served with the same and failed to issue a responsive pleading or otherwise appear and defend the action for foreclosure. (App. pp. 102-04). Thereafter, the case was referred to the Master-in-Equity, who issued a decree of foreclosure. (App. p. 90). After properly advertising the impending sale, the property sold at judicial sale on August 4, 2014 subject to any and all valid senior encumbrances on the property, including but not limited to a recorded mortgage on the subject property in the Richland County ROD at Book R 64, Page 617. (App. p. 90). The winning bidder, Regime Solutions, LLC ("Regime"), paid the bid price of $3,036.00 into the court. (App. pp. 176-78). This Court issued a Master's Deed to Regime which was filed on August 22, 2014 in the Richland County ROD in Book 1968, Page 266. (App. pp. 176-78). Regime sought to be put in possession of the property and filed a Rule to Show Cause on September 16, 2014. (App. pp. 105-08). The Hales' Motion to Vacate Sale followed and was considered in advance of ruling on Regime's Rule to Show Cause as the outcome of Defendants' motion was controlling over Regime's motion. (App. pp. 147-75). The

Hales' Motion to Vacate Sale was heard on February 6, 2015 by the Honorable Joseph M. Strickland, Master-in-Equity for Richland County and on April 21, 2015 the trial court filed an Order Denying the Motion to Vacate Sale. (App. pp. 96-9). The trial court held the now-called Debt Method should be employed when considering whether or not a judicial sale bid involving a property with senior encumbrances shocks the conscience. (App. pp. 96-9). The trial court was persuaded by a South Carolina Supreme Court case which used the Debt Method calculation in a similar situation. (App. pp. 96-9). The Debt Method applied to Regime's case would evaluate their bid amount, $3,036, plus the encumbrances against the property, $66,004 as a function of the stipulated fair market value of the property, $128,000. (App. pp. 96-9). The resulting percentage of the effective bid to fair market value ratio is 54%, well above what has shocked the conscience in South Carolina Jurisprudence.

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

filed a petition for rehearing on April 19, 2018. (App. pp. 12-15). The petition was denied on June 1, 2018. (App. p.18). This appeal followed.

STANDARD OF REVIEW

The determination of whether a judicial sale should be set aside is a matter left to the sound discretion of the trial court. *Wells Fargo Bank, NA v. Turner*, 378 S.C. 147, 150, 662 S.E.2d 424, 425 (Ct. App. 2008). "An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions." *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012).

ARGUMENT

The Court of Appeals did not err in applying the Debt Method to the case at issue. The Debt Method is the more appropriate and practical approach to determine whether or nor a bid price shocks the conscience in a junior lien foreclosure. The application was after of the Debt Method was not an abuse of discretion considering the dearth of jurisprudence on the topic and the Master's thoughtful analysis and the confirmation of the same by the Court of Appeals.

Further, the Court of Appeals should not be overturned as to their opinion on the preservation of the Petitioners' equitable arguments. These were not properly raised nor ruled upon. Alternatively, the Petitioners would ask this court to grant them equitable

relief; but for their own actions and negligence they would not be in the situation at hand. As the petitioners point out: "He who seeks equity must do equity."

I. THE COURT SHOULD AFFIRM THE DECISIONS OF BOTH THE TRIAL COURT AND COURT OF APPEALS IN APPLYING THE DEBT METHOD TO JUNIOR LIEN FORECLOSURE "SHOCK THE CONSCIENCE" ANALYSIS.

South Carolina has not established a bright line rule for what percentage the sale price must be with respect to the actual value in order to shock the conscience of the court. *Bloody Point Prop. Owners Ass'n, Inc. v. Ashton*, 410 S.C. 62, 71, 762 S.E.2d 729, 734 (Ct. App., 2014). "However, a search of South Carolina jurisprudence reveals only when judicial sales are for less than ten percent of a property's actual value, have our courts consistently held the discrepancy to shock conscience of the court." *Id.* Although the adequacy of a bid in the exact circumstances of this case has not been addressed by the appellate courts of this State, Respondent contends this Court has already addressed a closely analogous situation and one that is controlling in this case. *Arrow Bonding Co. v. Warren*, 399 S.C. 603, 732 S.E.2d 622 (2012).

In *Arrow* the Appellant, Warren, appealed the denial of his Motion to Set Aside Sale. *Id.* Respondent, Arrow Bonding Company, obtained a $5,120.00 judgment against Warren. Respondent brought an action to foreclose its judgment lien as against a number of properties owned by Warren, which Warren did not answer, and the clerk granted Respondent's motion, ordering entry of the default against Warren, and referring the matter to the Master-in-Equity for a judicial sale. *Id.* The Master issued a deed to Respondent, who was the successful bidder on all of Warren's properties. *Id.* Warren filed

a Motion to Set Aside the Sale, which the Master-in-Equity denied. *Id.* On appeal, this Court concluded that the Master-in-Equity did not err in refusing to set aside the sale. *Id.*

There are two significant distinctions in the *Arrow* case that are particularly applicable to the instant case: (1) the calculation employed by the Master in determining whether the selling price was grossly inadequate; and (2) the distinction the Court drew between adequacy of sales price in senior mortgage foreclosure sales as opposed to other sales where the buyer takes the property subject to mortgage as well as other liens. The Master found that tax assessment records submitted by Warren reflected a combined value of the foreclosed properties of $263,121 and that such records were sufficient to establish the value of the properties sold. *Id.*, 399 S.C. at 606. Although the Master noted the sale price of $2,500 when compared to the $263,121 assessed value of the property would normally shock the conscience, the Master went on to find that there existed mortgage liens totaling more than $88,000 and a federal tax lien in excess of $12,000 which should be considered in determining the effective sales price paid by the buyer. *Id.* Since the properties sold remained encumbered by the mortgages and the tax lien, the Master added $100,000 to the sales price for a total of $102,500 and concluded that the effective sales price of $102,500 represented about 39%, which did not justify setting aside the sale. Although Warren argued on appeal that the Master erred in not judging inadequacy of sale price by comparing the sales price to the properties' value, without considering mortgages or liens, citing *Investors Savings Bank v. Phelps*, 303 S.C. 15, 397 S.E.2d 780 (Ct.App.1990), and *Wells Fargo Bank, N.A. v. Turner*, 378 S.C. 147, 662 S.E.2d 424 (2008), this Court disagreed and concluded that in a sale where the buyer takes property subject

to mortgage and other liens the Master properly considered the amount of mortgages and liens in determining the true value of the property to the buyer at sale. *Id.*, 399 S.C. at 607. In so ruling, the Court specifically distinguished both *Phelps* and *Wells Fargo*:

> In both Phelps and Wells Fargo the judicial sale was to foreclose a mortgage rather than a sale in execution of a judgment. The effect of a mortgage foreclosure sale is to remove the mortgage encumbrance from the property, and therefore the amount of the mortgage is a fair gauge of the property's value in the hands of the buyer. In a judgment execution sale such as this, however, the buyer takes the property subject to the mortgage as well as other liens. [citation omitted] The Master properly considered the amount of the mortgages and tax liens in determining the true value of the properties to the buyer at an execution sale.

Id. Accordingly, the Court concluded Warren did not meet his burden of showing an abuse of discretion in the Master's finding that the sale price was not so grossly inadequate as to shock the conscience.

Similarly, in the present action Petitioners appealed the denial of their Motion to Set Aside Sale based upon the alleged error of the Master to consider the inadequacy of sale price by comparing the sales price to the properties' value, without considering mortgages or liens. As in *Arrow*, the Master in the instant case found that evidence submitted by the parties reflected a property value of $128,000. (App. pp. 97). Likewise, the Master in the instant case went on to find that there exists a mortgage lien totaling $66,004. *Id.* Since the property sold remained encumbered by the mortgage, the Master added $66,004 to the sales price of $3,036 and concluded that the effective sales price of

$69,040 represented about 54% of the property's value, which did not justify setting aside the sale. (App pp. 96-8).

The Petitioners point to another South Carolina case concerning bid price adequacy and ignore the guidance that may be gleaned from opinion. *Bloody Point Prop. Owners Ass'n, Inc. v. Ashton*, 410 S.C. 62, 762 S.E.2d 729 (Ct. App., 2014). In *Bloody Point*, the trial court determined that the buyer had paid an effective sales price of $11,593.20 for the property, a figure derived from the amount of the buyer's bid of $8,800 plus "$2,793 in taxes and fees unpaid by Appellants" and therefore added to the sale price. *Id.*, 762 S.E.2d at 731. This addition of taxes and fees to the sales price was implicitly adopted by the *Bloody Point* Court in its determination that the Respondents purchased the property for $11,593.20 and that the "master applied the correct legal standard in making his determination." *Id.*, 762 S.E.2d at 734. This demonstrates a history in South Carolina law to take outstanding debts into account of effective bid prices.

A point that cannot be overlooked is that the above calculation as presented to the Master occurred after the sale of the property. If the Petitioners had participated in the course of this matter, they would have been able to present evidence to the Master to potentially set a bid price more agreeable to them. At the time of the sale the Master and any would be bidders only had before them what was presented by the Homeowner's Association and in the public record. This is of no fault of the HOA, Respondent, or the Master. The Equity Method is unworkable in a post-sale "shocks the conscience" analysis. An equity inquiry with the involvement of a diligent defendant could, however, offer a viable option for protection, pre-sale, of the defendant's equity. In this way, a diligent

defendant could offer, pre-sale, evidence of equity and the Master could set a bit that would withstand, in the Master's discretion a subsequent "shocks the conscience" challenge. However, such an inquiry has extremely limited application. Seldom will a defendant homeowner have so significant an equity position that the bid price plus outstanding liens would shock the conscience. The practical reason for such limited application is the ability of the defendant homeowner so situated to refinance or sell the home.

The Equity Method has a freezing effect at worst and is unworkable at best. Petitioners, in defending the Equity Method, erroneously attribute certain knowledge to a bidder at a sale. Further, they misunderstand the nature of a bank – 3rd party relationship and how equity is recovered in a property. Petitioners contend "A Bidder Can Easily Calculate the Equity in the Property." (Brief of Petitioners, p. 15). The only party to a junior lien foreclosure action with that knowledge would be the foreclosed homeowner. Mortgage Notes are not recorded as part of real estate transactions in South Carolina. While the Mortgage or pledge of property as collateral is recorded the Note or obligation for repayment is not. The affected homeowner is the only party that has possession, or has the ability to possess, such information. There are a host of statutes prohibiting the disclosure of non-public personal information to anyone other than the borrower or their designee: *Gramm-Leach-Bliley Financial Services Modernization Act* (GLB Act), Title V of the Financial Services Modernization Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (Nov. 12, 1999) (codified at 15 U.S.C. §§ 6801, 6809, 6821, and 6827; 16 C.F.R. part 313 (implementing privacy rules pursuant to GLB Act); *Fair Debt Collections Practices Act*

(FDCPA) Pub. L. 95-109; 91 Stat. 874, September 20, 1977 (and as subsequently amended) (codified as 15 U.S.C. § 1692 –1692p).

Petitioners argue that the terms of the mortgage should give a bidder a rough estimate of equity in a property. This very suggestion ignores the reality of what is knowable by an innocent bidder at a foreclosure sale.

Information concerning the loan that could be acquired by the court, the foreclosing party, or the innocent purchaser for value is at best speculative. While the amount and duration of a mortgage is public record, one can only guess as to the status of the note that the mortgage secures. The interest percentage is not on a mortgage. The amount actually loaned is not on the mortgage- only the purchase price. It is quite possible the underlying loan is an interest only loan with a balloon payment in which the only equity would be presumptive appreciation in the value of the property- in no way a guarantee. The mortgagee could have borrowed in excess of the home sale price for renovation or addition. It is also possible that the loan instrument contemplates future advances or was modified by the lender at some time between the loan's origination and the present action. Loan modifications are also not publicly available.

Petitioners claim "The mortgage states its amount, the interest rate and the minimum monthly payment." (Brief of Petitioners, p. 15). Again, this underscores a misunderstanding on the dichotomy of a note and mortgage. The mortgage at issue, available for viewing at the Richland County Registrar of Deeds, does not show the interest rate and minimum monthly payments, and most, if any, do not. These are present on the

note and notes are not public record. The preceding also illuminates Petitioners' error in drawing parallels to senior lien foreclosures and junior lien foreclosures. Senior lien foreclosures almost always are initiated by the entity that is both the holder of the note and the beneficiary of the mortgage. Therefore, such entity has perfect knowledge of the transactional history of the note. The reality is that a determination of equity without the provision of information by the affected homeowner is speculation and conjecture. In fact, the *Arrow* Court stated that there was no authority which requires or permits the trial court to conduct a title search, discover liens, determine the value of property and then calculate an adequate sale price. 399 S.C. 603, 608, 732 S.E.2d 622, 625 (2012).

Moreover, only the defendant homeowner knows with any certainty the value of the home. A termite infestation is not public record. Nor is a collapsing foundation. Nor can a bidder order an inspection and appraisal. Only the homeowner has such knowledge or access to this information.

Using equity in determining the adequacy of a bid is not supported by any precedent in this State, represents an unworkable calculation, and improperly shifts the burden upon the trial court, the foreclosing party or the innocent purchaser for value to divine such a calculation. Therefore, this Court should reject the notion that equity should be considered in determining the adequacy of a bid at a judicial sale, and uphold the Master and Court of Appeals' implementation of the Debt Method.

The Petitioners repeatedly make the argument that Respondent will have received a windfall in the amount of the equity. Petitioners also make speculative arguments as to Respondent's motivations.

First, any equity in a home is not immediately available to the successful bidder at a junior lien foreclosure. Petitioners make it seem that upon the purchase of the property, Respondent will be awarded cash equivalents of the equity in the property. However, as the Court of Appeals pointed out, "Regime 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. 7). Respondent would have to pay the full amount of the outstanding loan to be able to have clear title to the property. This would also have a beneficial side affect to the Petitioners, as their note would be satisfied and they would no longer be responsible to the mortgagor. Respondent must incur legal fees, delays in possession, taxes, homeowners' association fees and numerous other expense all for the hope of recovering any return on their investment. These factors are priced into a bidder's consideration at the time of the sale.

Secondly, Petitioners' arguments concerning Respondents' motivations and/or actions concerning their other properties has not been preserved, is not relevant to the case at hand, and appears for the first time in the Brief of Appellants to this Court.

II. THE PETITIONERS' EQUITABLE ARGUMENTS WERE NOT PROPERLY RAISED AND ARE THEREFORE UNPRESERVED.

There are four requirements for preserving issues at trial for appellate review: the issue must be: (1) raised to and ruled upon by the lower court, (2) raised by the appellant, (3) raised in a time manner and (4) raised to the lower court with sufficient specificity. *S.C Dep't of Transp. V. First Carolina Corp. of S.C.,* 327 S.C. 295, 641 S.E.2d 903 (2007).

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

Further, the Master did not rule on equitable arguments or maxims. (Appx p.96-9). The Master's analysis was solely base on the Debt Method and found that the bid did not shock the conscience. (Appx p.96-9). At no point in the Order does the Master mention equitable maxims or principles. (Appx p.96-9). The lower court must rule upon an issue for it to be preserved for review. *Wilder Corp. v. Wilke,* 330 S.C. 71, 497 S.E.2d 731 (1998).

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

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

III. IF THE PETITIONERS' EQUITABLE ARGUMENTS WERE PROPERLY RAISED AND RULED UPON, THEY ARE INSUFFICIENT TO HAVE RELIEF GRANTED IN THEIR FAVOR

"It is well known that equity follows the law." *Smith v. Barr*, 375 S.C. 157, 157, 650 S.E.2d 486, 490 (internal citation omitted) (Ct. App. 2007). Petitioners ask this court to grant them relief in the alternative if the law does not shake out in their favor. The exhaustive examination of this appeal, including both the Respondent and Petitioners' multiple stages of research and briefing, the Master's Order and the Court of Appeal's affirmation of the same, focuses on the jurisprudence of shocks the conscience analysis and bid price adequacy as establish in South Carolina case law. There is a prescribed manner for determining what shocks the conscience, as first set forth in *Bonham* and honed over time through its progeny examined thoroughly in this record. See generally *Bonham v. Cave,* 102 S.C. 308, 86 S.E. 681, (1915). These principles were demonstrated in the case of *Nutt Corp. v. Howell Rd., LLC,* 396 S.C. 323, 721 S.E.2d 447 (Ct. App. 2011). The *Nutt* Court found that the Respondent had an adequate remedy at law under contract and therefore seeking equitable relief was unnecessary and improper. *Id.* The *Nutt* Court went on to note that the possibility the statute of limitations potentially barring Respondent from obtaining a legal remedy was no ground in itself for allowing the Respondent to seek equitable relief. *Id.* Similarly, this Court should not need to rely on equitable principles to determine an outcome. The legal framework of examination is present in the laws of South Carolina and has been properly applied and should be affirmed as it applies to this case.

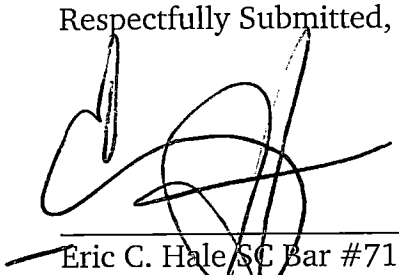
"Equity aides the vigilant and diligent." *Collins v. Sigmon,* 299 S.C. 464, 468, 365 S.E.2d 835, 837 (1989) (internal quotation and citation omitted). This maxim cuts through the confusion that clouds this case. This appeal is not based on a fully fleshed out and defended trial in which an error of judgment or law was unfairly levied on an unsuspecting litigant. The sole reason this matter has reached this point is due to Petitioner's failure to avail themselves of the legal system and defend their rights. It is undisputed that Petitioners were properly served and did not respond to the summons and complaint. (Brief of Petitioners pp. 1). It is undisputed that they were properly given notice of the damages hearing. It is undisputed that Petitioners were given notice of the date of sale. (App. pp. 90). In the face of all of these notices and opportunities to present arguments and defend themselves in law, equity, or both, Petitioners did nothing. They now ask the Court to save them from their inaction and claim that Respondent has acted with inequity.

Petitioners argue that equity will not suffer a wrong without a remedy. (Brief of Petitioners pp. 18). Fortunately for past and future homeowners similarly situated there has been and will continue to be a remedy: participate in the legal process. As argued above Petitioners had remedies readily available to them had they availed themselves of them. It is disingenuous to argue that Petitioners had no remedy when they did not seek a remedy from the inception of this case until after the foreclosure sale.

CONCLUSION

The Debt Method is the best calculation for considering what a bidder will be charged with knowing at sale and calculating whether a bid shocks the conscience. The Equity Method is an unwieldy calculus that requires assumptions and imperfect knowledge. This Court should affirm the decision of the trial court and Court of Appeals and uphold the sale.

Respectfully Submitted,



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PROOF OF SERVICE

The undersigned certifies that a copy of the Brief of Respondent Regime Solutions, LLC has been served upon the following counsel of record by mailing one copy by United States Mail, addressed as shown below on April 24th, 2019.

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