THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Marvin H. Dukes, III, Master in Equity

Case No. 2011-CP-07-0340
Appellate Tracking Number: 2019-000047

TD Bank, N.A.,
Successor by merger to Carolina First Bank, ... Respondent,

v.

Wilbert Roller, Jr., Betty V. Roller, and James Williams..... Defendants,
of whom

Wilbert Roller Jr. and Betty V. Roller are the..... Appellants.

INITIAL BRIEF OF APPELLANT

July 11, 2019

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STATEMENT OF ISSUES ON APPEAL

Did the Master-in-Equity possess subject matter jurisdiction?

Did the foreclosing successor bank produce competent evidence of its right to foreclose?

Is the purchase price of $400,000.00 on property valued over two million dollars so unconscionable as to shock the conscience of an equity court?

Did the Master-in-Equity err in not requiring the foreclosing bank to produce its appraisal of the property and thereby deny the appellants of their right to due process?

STATEMENT OF CASE

This case began as a foreclosure action filed on January 24, 2011 by the respondent's predecessor, Carolina First Bank. (R.O.A. page ___), which the appellants answered on March 4, 2016, demanding a jury trial, and denying the bank was entitled to foreclose and setting up additional defenses of novation, and fraud in the inducement. . (R.O.A. page ____) On October 26, 2011, T.D. Bank (Toronto Dominion) filed an amended complaint, which the appellants answered, adding one additional defense of and tortious interference with prospective business relations. (R.O.A. pages ____ and ____) On May 6, 2011, Carolina First Bank filed a reply to counterclaim. (R.O.A. page ____)

After the bank filed its original foreclosure action, a third party, James Williams, asserted a title claim on the property, and as a result of that competing claim to title, which is not implicated in this appeal, the parties engaged in extensive discovery and litigation over title for a number of years, resulting in a settlement, which quieted the title in the name of the appellants. (The appellant omits the pleadings and Orders related to the quiet title portion of the case because they have no bearing on the foreclosure issues here and would swell the record on appeal to an unnecessary size.)

The quiet title portion of the case took years to resolve, but once it was resolved, the parties agreed the Master-in-Equity could hear the foreclosure case. Following a non-jury trial on April 29, 2014, the Master-in-Equity entered an Order of Foreclosure on July 3, 2014 (R.O.A. page ____). The appellants moved for reconsideration on July 8, 2014, (R.O.A. page ___) alleging that the T.D. Bank lacked standing and that the Master erred in refusing appellants' motion for involuntary nonsuit with prejudice, which the Court denied on November 18, 2014, by form Order. (R.O.A. page ___) The appellant's appealed that decision to this Court on December 18, 2014. (R.O.A. page ___filed at appellate tracking number 2014-002674) While the case was on appeal to this Court, the parties reached an agreement on the procedure of the case, specifically the fact that the appraisals were not completed, which could potentially moot all the issues, and on January 26, 2016, voluntarily dismissed the appeal without prejudice. (R.O.A. page [Court of Appeals Order Jan. 26, 2016])

On July 6, 2016, the Master-in-Equity sold the property at public sale $421,000. (R.O.A. page ___[Aug. 29, 2016, Master's Report of Sale]

Both before and following the sale, the appellants invoked the appraisal statute as authorized by § 29-3-680, and on June 29, 2016, the Court appointed three appraisers in conformity with the statute. (R.O.A. page ___[consent Order for appointment]). The three appraisers presented a joint statement to the Court on July 27, 2018, that the fair market value of the property is $900,000.00, and on October 26, 2018, the Master-in-Equity adjusted the deficiency accordingly. (R.O.A. page ____[Order for deficiency judgment]. The appellants moved for reconsideration on November 2, 2018. (R.O.A. page ___). On December 12, 2018, the Court denied the appellants' motion for reconsideration, and this appeal followed on January 8, 2019. (R.O.A. pages ___ and ____.)

STANDARD OF REVIEW

A mortgage foreclosure is an action in equity. *Continental Mtg. Investors v. Quail Run*, 280 S.C. 400, 312 S.E.2d 272 (1984). In an appeal from a Master-in-Equity the reviewing court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Stevenson v. Stevenson*, 276 S.C. 475, 279 S.E.2d 616 (1981).

STATEMENT OF FACTS

This case presents a dispute in which most of the material facts are not in dispute. On August 7, 2007, Carolina Bank, with whom the appellants enjoyed a long and mutually beneficial relationship, loaned the appellants 2.3 million dollars on a one-year Note secured by the appellants' 21-acre commercial parcel of real estate located on the corner of Bluffton Parkway and Buck Island Road. (The appellant refers to the parcel throughout his testimony as the "22 acres" or the "23 acres.") The terms of the original 2007 Note required the appellants to pay the interest and principal in one year. (R.O.A. page ____[Note]) When the Note became due in 2008, Carolina Bank renewed it on a second, one-year Note for a reduced principal loan of 1.85 million; the third and fourth 2009 and 2010 Notes for the same amount. R.O.A. pages ___, ____, and ____ [Notes]

When the appellants acquired the original 300-acre commercial tract in 1970's, they subdivided out the 21-acre tract that became the last undeveloped large parcel in what would later become the Town of Bluffton. (R.O.A. page ___[tr. page 66, lines 3-21]) In his August 20, 2018, affidavit the appellant, Wilbert Roller, testified he purchased the "22-acre tract" for $421,000.00 in 1980.

Because Carolina Bank's original 2007, promissory note matured in one year, and because the appellants were current on interest payments and had paid down the principal by $450,000.00, the bank renewed the Note for an additional year on September 23, 2008, and each year thereafter. R.O.A. at pages ___, _____, _____. When the second note came due, because the appellants were current on interest payments, Carolina Bank renewed it for an additional year on November 27, 2009, and then again on November 27, 2009. (R.O.A. page ___ and page ____).

Because the appellants had a working relationship with Carolina Bank, the Bank knew that when the appellants acquired the original acreage in 1970's, it was located in Beaufort County and zoned for commercial development and that the appellants were in active negotiation with third parties to develop the tract with BI-LO serving as their anchor tenant. In fact, the June 10, 2008, contract with Bi-L0 called for the sale of 17.5 acres for the price of $325,000.00 per acre, or approximately 5.6 million dollars. (R.O.A. page ___[affidavit of Wilbert Roller, sales contract] The sales price was approximate because of wetland delineation would determine the exact buildable acreage.

However, the Town of Bluffton laid the groundwork for the appellants' troubles when it annexed—and downzoned—the property into its city limits in the 1990's, while appellants were temporarily absent in Texas. R.O.A. page ___[affidavit of Wilber Roller, August 20, 2018]: "During my absence from the State of South Carolina during the years 1994 to 1998, the City of Bluffton annexed the parcel and downzoned it to multi-family residential. I am sure that the City posted the property prior to annexation but the City made no effort to contact me personally in Texas to notify me of its intent to (1) annex my property, and (2) downzone it." Because they were out of state, the appellants were unaware of this annexation until they returned to South Carolina in 2007,

and began to develop it. See testimony of Wilbert Roller at R.O.A. page ____[tr. page 67] and December 3, 2018, affidavit of Wilbert Roller, R.O.A. page ____. Because Bluffton downzoned the tract to residential, the appellants' efforts with BI-LO were stymied until they could petition for a rezoning. Notwithstanding the annexation, the appellants began its efforts to develop the property with BI-LO serving as the anchor tenant. After they secured a written offer to purchase a portion of the tract to serve as the BI-LO for 5.6. million dollars (R.O.A. page _____[affidavit of Wilbert Roller, contract], the appellants petitioned the Town of Bluffton to restore their zoning, which the Town refused to do. The appellants' efforts were further thwarted when in 2007, real estate development melted down as the American economy labored under the results of Wall Street's investment banks' illegal conduct, which triggered a massive taxpayer funded salvage operation. It was during the chaos of the banking recession that the Respondent, T.D. Bank of Canada, purchased Carolina Bank and became the putative holder of appellants' Promissory Note.

Whereas before being acquired, Carolina Bank and the Rollers enjoyed a good relationship as evidenced by the annual renewals of their Note, Toronto Dominion was not interested in working with appellants to provide either long-term financing or to renew their Note to give them time to solve the zoning problem even though the Rollers previously invested tens of thousands of dollars in engineering and design plans and previously secured a contract to allow BI-LO to become the anchor tenant for 5.6 million dollars. The only impediment to appellants completing the development was the Town's political hostility for the project. The appellants contemplated litigation against the Town for its decision, but T. D. Bank would not cooperate and, after allegedly trying to undercut the appellants' contract with Ravenel Investments, insisted on foreclosing, and on January 24, 2011, filed its action, as Carolina One Bank, for foreclosure. Four months after filing the foreclosure, T. D.

Bank filed its amended complaint, officially revealing it was in control. (It also added James Williams as a party defendant.)

After the Master-in-Equity granted respondent's application for foreclosure, he sold the property for $421,000.00 on July 6, 2016. (R.O.A. page ____[Master's Report of Sale]) When T.D. Bank moved for a deficiency, the appellants pointed out to the court that they produced a written appraisal, fixing the fair market value of the property at two million dollars as well as evidence of their contract with BI-LO establishing a purchase price of 5.6 million dollars. In accordance with the appraisal statute, the court appointed an appraisal panel, which reported a value of $900,000.00 on July 27, 2018, which the Master credited against the deficiency. However, when the appellants alleged that T.D. Bank was suppressing evidence, and insisted that T.D. Bank produce for the Court its appraisal for which it required appellants to pay as a condition of the original loan in order to establish the Bank's assessment of value, the Bank refused. As the Notes demonstrate, the Bank required the Rollers pay for the Bank's independent appraisal as a condition of making the original loan. The appellants demanded that the Bank produce this evidence for trial, and the Bank refused. (See. R.O.A. page ____[Promissory Note, page 2, § 5(A): "An appraisal fee of $1,500.00 payable from separate funds on or before today's date.])

The Master-in-Equity decided that the Bank's appraisal was irrelevant, that the appellants had no right to demand the Bank produce a trial witness—really, its appraisal document—and appellants insisted that the Bank cannot simultaneously invoke a claim for a deficiency judgment while suppressing its appraisal, which amounts on a fraud on the Court. The appellants urged the Master that the Bank is required to produce the evidence at the hearing fixing the deficiency amount, and the

Master refused finding the demand to be both irrelevant and untimely. See R.O.A. page ___[October 26, 2018, Order pages 2-3]

Thus, the Bank's lack of standing, the failure of proof, the unconscionable disparity between value and sales price and the Court's refusal to require the Bank produce its evidence of value for trial are the important legal issues raised by this appeal.

ARGUMENTS

Argument 1.
The Master-in-Equity lacked subject matter jurisdiction.

The issue of standing to foreclose following the 2008 banking crises that collapsed the nation's economic system has been addressed by many courts. As this record of annual renewals from 2007 to 2010 makes clear, the Rollers' relationship with the lender was solid. The Bank renewed the appellants' Notes four times, and the Bank was earning substantial interest income. The appellants had every reason to expect the relationship to continue as they navigated their development plans through the Bluffton bureaucracy. However, when the Canadian Bank, T. D. Bank acquired Carolina First, the relationship between lender and borrower evaporated, and T.D. Bank refused to renew the Note and began foreclosure proceedings in 2011 even though the Rollers paid substantial interest and reduced the principal and had invested thousands in development plans.

As the appellants pointed out to the Master-in-Equity in their July 11, 2014, Motion for Reconsideration (R.O.A. page ___), the Master misapplied the law regarding the plaintiff's burden to establish jurisdiction:

In South Carolina, like in every other state, subject matter jurisdiction is fundamental to a court's power to act:

Subject matter jurisdiction of a court depends upon the authority granted to the court by the constitution and laws of the state. Subject matter jurisdiction cannot be waived or conferred by consent. *Anderson v. Anderson*, 299 S.C. 110, 382 S.E.2d 897 (1989); *American Agricultural Chemical Co. v. Thomas*, 206 S.C. 355, 34 S.E.2d 592 (1945)

Paschal v. Causey, 309 S.C. 206, 420 S.E.2d 863 (Ct. App. 1992)

It is undisputed that the Rollers entered into a creditor/debtor relationship with the respondent's predecessor, Carolina First Bank, which, according to the record in this case, no longer exists. The record also demonstrates that T. D. Bank N.A., did not own the security interest in the defendants' property until and unless it demonstrated by competent proof that it is the proper successor of Carolina First Bank, a question of fact put in issue by the appellants' answer. (R.O.A. page ___[Answer ¶2]) Therefore, it is crucial that in order to invoke the Court's power to act for the plaintiff to order a foreclosure, the foreclosing Bank must demonstrate that it is the holder of the Note and its security instrument at the time it commences the foreclosure, in other words, that it has standing. There is not a *scienter* of competent evidence in this case that Toronto Dominion is the proper successor of Carolina First Bank other than the unsupported guess of a "workout officer" Benjamin Roper Jenkins:

Q. You didn't bring any of those [acquisition] documents with you here today?

A. No.

Q. The acquisition documents. Do you know how Toronto Dominion came to acquire Carolina First Bank?

A. Through talks and negotiations

Q. Do you know what year that transaction was completed?

A June 30, 2010.

R.O.A. page ____ [Transcript at page 41, lines 8-17]

The Bank's representative is obviously misinformed about the putative acquisition of Carolina First Bank because when Carolina First Bank commenced this foreclosure in January, 2011, that was a year after the Canadian bank allegedly acquired the local bank. Mr. Jenkins conceded he knew that the Rollers had paid down the principal by $600,000.00, without which Carolina First Bank would not have renewed the notes, and he also testified he was aware that the Rollers had a zoning problem with the Town of Bluffton and had a proposal for the development of a BI-LO grocery store that would generate significant profit. (R.O.A. pages _____[tr. pages 52-54]

In *Fielden v. Fielden*, 274 S.C. 219, 262 S.E.2d 43 (1980), the Supreme Court held that a 1979 amendment to a divorce decree could not operate to fix a 1977 Order incorporating an agreement between the parties because the Family Court in 1977 lacked subject matter jurisdiction: "This Court is aware of the May 16, 1979 Divorce Decree which incorporated the 1977 Separation Agreement. **However, that event, which occurred subsequent to the entry of the Order on appeal, cannot operate to cure the Family Court's lack of subject matter jurisdiction at the time that Order was issued.**" (emphasis added) Here, the record lacks evidence that the plaintiff owns the Note and Mortgage that is the subject of the action other than the unsupported allegation in paragraph 1 of its amended complaint: "Plaintiff T. D. Bank, N.A., Successor by Merger to Carolina First Bank . . . is a bank doing business in Beaufort County, South Carolina." (R.O.A. page ___[amended complaint]) The appellants denied this allegation. (R.O.A. page ____[answer, ¶ 2]) The only evidence in the record is that of the plaintiff's witness, Benjamin Jenkins, from T.D. Bank, who testified he is in charge of "special assets" and that he first became aware of the account with the Rollers, after someone in the Bank transferred the account to him as part of the "work out"

department. Mr. Jenkins testified that TD Bank merged with Carolina First on June 17, 2010, but he relied on nothing more than his memory for this assertion, and it bears repeating that the plaintiff listed in the original complaint is Carolina First Bank.

In *Funderburk v. Funderburk*, 281 S.C. 246, 315 S.E.2d 126 (1984), the Court of Appeals held that the lower court properly refused to consider approving a 1981 contractual agreement because the Court lacked subject matter jurisdiction even though the law changed in 1983, giving the lower court jurisdiction. The point is that the lower court lacked jurisdiction in 1981, and even though the law changed in 1983 giving it jurisdiction, the change could not relate back. In the Order under review (R.O.A. page ____[Order]), the Court erroneously concluded that the plaintiff has met its burden of proof to demonstrate it is the real party in interest and is the owner of the account on which it sues. The trial court overlooked the fact that, aside from Mr. Jenkins' opinion, the record is devoid of any evidence, and thus the plaintiff has not properly invoked the subject matter jurisdiction of the Court. As *Funderburk* demonstrates, the courts of this state are particular about when a court has the power to act.

In the specific area of foreclosure, the appellate courts of Florida and Alabama have found that subsequent cures cannot relate back. See *Rigby v. Wells Fargo Bank*, (Fla. App. 4 District filed April 4, 2012): "A party must have standing to file suit at its inception and may not remedy this defect by subsequently obtaining standing." *Venture Holdings & Acquisitions Grp., LLC v. A.I.M. Funding Grp., LLC*, 75 So 3d 773, 776 (Fla. 4th DCA 2011) Likewise the Court of Appeals in Alabama reached the same result in *Patterson v. GMAC Mortgage, LLC*, (Ala Civ. App. Filed January 20, 2012, Opinion No. 2100490): "In the case now before us, GMAC Mortgage like BAC in *Sturdivant v. BAC Home Loans, LP*, ___So 3d ___ (Ala. Civ. App. 2011), had not been assigned the

mortgage before it initiated foreclosure proceedings. Consequently, under our holding in *Sturdivant*, GMAC Mortgage lacked authority to foreclose the mortgage when it initiated the foreclosure proceedings, and, therefore, the foreclosure and the foreclosure deed upon which GMAC based its ejectment claim are invalid." In 2013, the Supreme Court of Alabama reversed the Court of Appeals at 176 So.3d 845 (2013), but only because the issue in *Patterson* was an ejectment proceeding, not a foreclosure. The Supreme Court held that the Patterson's could not demonstrate prejudice because the buyer took title to the property by a properly executed deed:

> **We do not have before us a case involving defects in the foreclosure process itself that could prejudice the mortgagor**. . . . The more precise view, however, is that it is not the "process", *i.e.*, the preliminary matters of giving and publishing notice and receiving bids on the courthouse steps, by which a foreclosure of the mortgagor's rights is effected. As noted above, such notices and the auction that follows lead to an agreement to buy and sell the property, but it does not constitute the foreclosure. It is the execution and delivery of a deed by which the power of sale ultimately is exercised and, in turn, the foreclosure of the mortgagors rights is accompanied.
>
> *Patterson* at page 851 (emphasis added)

Here, the issue is not whether the third party purchaser has good title (in *Patterson*, the mortgagors were holding over and the title holder brought an ejectment action—not a foreclosure); rather, the legal issue is whether the respondent did or did not have the legal authority to seek a deficiency judgment against the appellants, and the analysis in the Alabama Court of Appeals is still good law in Alabama provided the challenging party can demonstrate "prejudice." There is no doubt that appellants have met this threshold.

Likewise, the Ohio Supreme Court reversed an Order of foreclosure, relying on decisions by the United States Supreme Court, the Third and Ninth Circuit Courts of Appeals, the Supreme Courts of Florida, Oklahoma, Connecticut, and Nebraska, holding that the plaintiff must prove it is the real party in interest at the time of the filing of the complaint:

> The purpose behind the real party in interest rule is "to enable the defendant to avail

himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party at interest on the same matter. *Celanese Corp. of America v. John Clark Industries* (5th Cir. 1954), 214 F.2d 551, 556." *In re Highland Holiday* Subdivision, 27 Ohio App.2d 237, 273 N.E.2d 903 (1971)
Federal Home Loan Mortgage Corp. v. Schwartzwald, 134 OhioSt.3d 13 (2012-Ohio 5017)

The South Carolina, Florida and Alabama cases are all in accord with the general principle of law. Generally, jurisdiction of the court over a cause depends on the state of facts at the time the action is brought. This is especially true where, as here, the appellants had no relationship with T.D. Bank which acquired Carolina First in a time of crises. Without the jurisdictional element of a case or controversy, any court is without power to render a decision. Thus, a court must first find that a party with standing has brought the cause, and that he brings a justiciable issue before the court. If such is not the situation, there is nothing before the court, and the court is totally without jurisdiction to decide any issue in the cause." *C.J.S.*, "Courts" § 16. When faced with this issue, courts all over the country have required a foreclosing bank to prove it has standing. For example, the Supreme Court of Massachusetts held in *U. S. Bank, N.A. v. Ibanez*, 458 Mass. 637 (2011) held that under Massachusetts law, a creditor has to be the mortgagee to foreclose. If the foreclosing entity is not the original mortgagee, it must hold an assignment of the mortgage at the time it first published the notice of sale. If the assignment of the mortgage is obtained after publication of the notice, a subsequently completed foreclosure is unlawful and void.

The Florida Courts have been leaders in this area of law. *The Florida Law Journal*, Volume 85, No. 10 (December 2011) digested the law in this area, including a case that involved, as this one does, a bank claiming to hold title to the Note by merger. Under Florida Statutes §§90.902(1)(a) and 90.803(8) (2009), a bank bringing a foreclosure case under a theory that it acquired title by merger is

required to prove "that the named plaintiff is successor by merger or name change. To support this allegation, if contested, a certified copy of a certificate of corporate existence from federal or state bank regulators, bearing the agency's seal, which are self-authenticating official records, can be obtained for a nominal charge from the agency." *The Florida Bar Journal*, Volume 85, Number 10 (December 2011) page 31.

In the case before the Master-in-Equity, the plaintiff furnished no proof, other than the unsupported opinion of the witness, that TD Bank is the successor of Carolina First by merger and even if it is, whether it properly received either possession or title to the debt that is the subject of this matter. The appellants brought this defect to the trial court's attention, and it refused to act. When the trial court overruled the appellants' objection as to plaintiff's failure to produce the original document, the Court gave a pass to the plaintiff it is not entitled to receive. The appellants have no quarrel with the Court's analysis of *South Carolina Rules of Evidence* Rule 1003. Rule 1003 will ordinarily carry the day except where a party resisting admission of the document challenges the plaintiff's standing. In other words, the trial court correctly analyzed the offer of evidence under Rule 1003 as purely an evidentiary analysis, but the Master-in-Equity did not properly apply the rule because the Court overlooked that the moving defendants' challenge to plaintiff's standing. Because the appellants raised a challenge to standing, it becomes fundamental as to whether the Bank can or cannot produce the original of the Note that it claims it owns as well as sufficient proof that it acquired the assets of Carolina First Bank and possesses standing to maintain this action. At the very least, the Bank must put forth a demonstration sufficient to meet its burden of proof and burden of production to demonstrate by a preponderance of the evidence how it possesses standing to bring this action. Here, the record contains nothing other than Mr. Jenkin's

guesses. Thus, what might be a proper analysis under *South Carolina Rules of Evidence*, Rule 1003 in an ordinary case becomes an improper analysis when the debtors deny that the creditor is the holder of the Note on which it brings suit.

As may be seen by the Order overruling the appellants' objection (R.O.A. pages ____ and _____[Motion for Reconsideration, July 11, 2014 and Order November 18, 2014]), the trial court gave no explanation for its conclusions, despite being offered the opportunity to correct the fundamental question of subject matter jurisdiction raised by the appellants. By deciding the appellants July 11, 2014, motion for reconsideration by Form Order with no explanation, both the appellants and this Court are left to grope in the dark as to how the Court analyzed appellants' standing and involuntary nonsuit questions or why it chose not to do so. Thus, the appellants are entitled to an Order of remand, directing the Master-in-Equity either to dismiss the case for lack of subject matter jurisdiction, or at the least requiring the foreclosing bank to demonstrate by competent evidence that the Master-in-Equity possesses subject matter jurisdiction to act and/or that T. D. Bank is the proper holder of the Note upon which foreclosure is grounded. It is not sufficient for the Master to assume the respondent is a proper party; it is the respondent's burden to demonstrate it is, which it failed to do.

Argument 2.

The Master-in-Equity erred in denying appellants' motion for involuntary nonsuit because the record contains no competent evidence of the debt.

At the close of the plaintiff's case and then again at the close of the case, the appellants moved for an Order of the Court granting an involuntary nonsuit on the ground that the respondent failed to offer competent evidence establishing the debt. As the record of the trial demonstrates, the

respondent's designated witness, Benjamin Roper Jenkins, had no information as to the amount of the debt or the reason why the Bank was pushing foreclosure when there was a third party purchaser waiting to close the transaction contingent only on rezoning. He testified:

Q. Okay. And other than the two exhibits you've produced here today, which were the certified letters marked as Plaintiff's Exhibit 7 dated August 19, 2010, there were no written demands for payment issued by the bank other than those two letters, correct?

A. I cannot answer that because I don't know if there were letters issued prior to my involvement.

Q. Okay. Did you bring your entire file with you today?

A. No.

Q. All right. The only documents you brought are the documents that have been put into evidence?

A. I personally didn't bring anything with me.

Q. Okay. So there is no way to tell the court the payment history and determine the amount of payments made to the bank and when they were made, correct?

A. Not right now today, no.

R.O.A. page ___[tr. page 54, lines 3-23]

Because the Bank failed to meet its burden of proof, on July 8, 2014, the appellants asked the Court to reconsider its Order, pointing out that the Bank's representative knew nothing about the appellants' relationship with the Bank and agreed with appellant's, Wilbert Roller's, testimony that the appellants were making interest payments and paying down principal, including a lump sum payment of $100,000.00 shortly before foreclosure. Mr. Roller testified:

Q. Okay. Well, if you went along with that [letting the Bank sell the property], are you a little surprised to be sitting here today?

A. Well, really—well, I hadn't heard from them in two years or – I called them about paying the 100,000. They hadn't billed me or anything before that. And I said, you all got a lot [the lot at Windmill Harbor]. Why don't we just sell it and give you the money and knock the interest down. And they said, fine. Go ahead and do it.

Q. And they agreed to that?

A. Yes.

Q. And you did that?

A. And I did that.

Q. That was the $100,000?

A. $100,000.

Q. Okay. And is it your testimony here today that that was part of – that was an indication of the agreement that you all had reached?

A. Well, I had signed what I would pay as I could.

R.O.A. page ___-____[tr. page 79, line 24-80, line 18]

The appellant also testified without contradiction that he secured a signed contract for the sale of the property in which the Bank interfered. See R.O.A. at page ____, [tr. page 81], page ____ for the contract. Mr. Jenkins had no knowledge, but the appellant had first-hand knowledge that the Bank interfered in the negotiations by contacting the appellants' purchaser directly. At trial, the appellants conceded they had insufficient evidence to meet their burden of proof to meet each element of their tort counterclaims, but urged the trial court to consider the evidence of the Bank's

actions as defenses to its foreclosure. The trial court's response to these important legal issues was to deny them by way of a form Order on November 18, 2014. (R.O.A. page ____.)

The record in this case shows that the Rollers had paid principal and interest for years, including $100,000.00 shortly before the Bank foreclosed, invested $90,000.00 in plans (R.O.A. page ___[tr. page 70, line 19]), and spent months navigating the Bluffton bureaucracy. While all this was going on, the Bank called his buyer and launched an effort to undercut the appellant. As Mr. Roller testified, once he reported the status of negotiations with Ravenel Development, the Bank then called her and tried to induce her to deal directly with them. (See. R.O.A. page _____[tr. page 70, lines—71, line 1])

The summary of all this evidence is that the foreclosing bank either created or contributed to the financial disaster that led to this foreclosure deficiency judgment, and yet the Master gave all this evidence no weight. When asked to reconsider, the trial court could have cured any deficiency by directing one lawyer or the other to draft a proposed Order, but instead, the Court decided the issue by Form Order, which makes it impossible for the appellants to decide whether to accept their loss or seek judicial review, and more importantly deprives this Court of the opportunity to understand how the trial court reached its decision. See Rule 52, *South Carolina Rules of Civil Procedure*: "In all actions tried upon the facts without a jury . . . , the court shall find the facts specially and sate separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; . . . . The findings of a master, to the extent that the court adopts them, shall be considered as he findings of the court." We have none of that here, but what we do have is a record demonstrating the evidence that if the Bank had simply either followed through on its own to sell the property, or, in the alternative, refrained from interfering in the appellants' efforts, the entire dispute would have been

avoided. Foreclosures are equitable actions but that does not mean a party is relieved from its obligation to meet its burden of production and persuasion, and here, the Bank offered nothing other than the unsupported speculation of a "work out" officer, and thus the trial court erred in not granting the appellants' motion for involuntary nonsuit.

Argument 3.

The disparity between the sales price at foreclosure and the true value of the property is so shocking as to not be enforceable by a court of equity.

A. The disparity between sales price and value is so shocking as to render the deficiency judgment inequitable.

Normally, a disparity between deficiency amount and sales price is not sufficient to set aside a deficiency judgment. However, our Supreme Court held in *American General Financial Services, Inc. v. Brown*, 376 S.C. 580, 658 S.E.2d 99 (2008) that an equity court can set aside a deficiency when the disparity between sales price and the deficiency amount is so great as to "shock the conscience of the court":

> We note that the foreclosure statutes regarding appraisal give the defendant in a foreclosure action—the mortgagor—a right to apply for an order of appraisal which could possibly result in the deficiency judgment being adjusted or extinguished. See S. C. Code Ann. §§ 29-3-680 & 29-3-740 (2007). Furthermore, there are guidelines for an equity court to set aside a foreclosure sale. Although inadequacy of price generally is not enough to allow the court to set aside a sale, if the sale price "is so gross as to shock the conscience," the court may interfere with the sale. *Investors Sav. Bank. V. Phelps*, 303 S.C. 15, 17, 397 S.E.2d 780, 781 (Ct. App. 1990) (quoting *Poole v. Jefferson Standard Life Ins. Co.*, 174 S.C 150, 157, 177 S.E.24, 27 (1934)). In *Investors Sav. Bank v. Phelps*, the Court of Appeals affirmed the Master's decision to set aside the sale where the bid amount was only slightly more than 1% of the original amount of the mortgage. Here, however, appellant's bid was approximately 47% of the original amount of the mortgage.

In this case, the evidence shows that the sale price, $421,000.00 represents 18% of the original mortgage amount of $2,300,000.00 to Carolina Bank and only 7% of the appellant's sales

price to BI-LO. (R.O.A. page ____[sales contract]) Moreover, the Court of Appeals in *Investors Sav. Bank* specifically held that the evidence of the original mortgage amount is "competent evidence" of the true value of the property. This is especially true where, as here, the debtors secured a contract to purchase 17 of the 21 acres for $5.6 million dollars. The only thing standing between the debtors and the consummation of the sale was the debtors' ongoing efforts to restore the property's pre-annexation zoning classification. Thus, the Master-in-Equity erred when it refused to analyze these shocking figures in any fashion. The trial court's legal error is that it concluded, erroneously, that it could give no weight whatsoever to this shocking disparity or to the other evidence in the case that established a higher value, including the owner's opinion of value (R.O.A. page ___[tr. page 78, line 17], the signed June 10, 2008, contract for purchase (R.O.A. page ____), and the Halpern Appraisal for just over two million dollars. (R.O.A. page ____). The Master's error is that he concluded he must accept the Panel's report of $900,000.00, and that report prevents him from considering other evidence. The Master never understood that the appellants' attack on the appraisal was not an "appeal" of the panel's conclusions, which the Mater found time barred, but rather an application to the Court under Rule 60. The appellants' motion filed with the trial court (R.O.A. page ____) explained what rule the appellant was invoking:

2. Rule 60 Motion

Rule 60 of the *South Carolina Rules of Civil Procedure* provides in applicable part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in

time to move for a new trial under rule 59(b);1

(3) fraud, misrepresentation, or other misconduct of an adverse party. . .

The Court's October 26th Order under review misapprehends the defendants' legal position. The Court evaluates the case on a procedural analysis that the defendants are too late to "appeal" the appraiser's report. This misstates the defendants' position. The defendants' legal position, under both Rules 59 and 60, is that the Master-in-Equity is a court of equity and the plaintiff is perpetrating a fraud on the Court by suppressing evidence that it controls and preventing the appraisers from having the applicable data on which to base their decision. The defendants legal position is based on a spoliation of evidence and due process analysis; to wit, that by being deprived to cross-exam the Bank's representative on its claims, the Bank is perpetrating a fraud. In 1986, the South Carolina Supreme Court took up a similar issue in *South Carolina National Bank v. Central Carolina Livestock Market, Inc.*, 289 S.C. 309, 345 S.E.2d 485 (1986). There the South Carolina National Bank appealed the trial court's setting aside a deficiency judgment. In affirming the circuit court's decision to set aside the deficiency judgment, the Supreme Court said: . . .

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). Due process does not mandate any particular form of procedure. *South Carolina Ports Authority v. Kaiser*, 254 S.C. 600, 176 S.E.2d 532 (1970). Instead, due process is a flexible concept, and the requirements of due process in particular cases are dependent upon the importance

1 Because this is a non-jury trial, and because the Court entered its Order establishing the deficiency on October 26, 2018, the defendants, Rollers, are entitled to move for a new trial under Rule 59. Since the grounds for a new trial under Rule 59 are indistinguishable from grounds to set aside a judgment under Rule 60, the appellants treat them together for judicial economy. The only practical difference between Rules 59 and 60 is a pleading requirement that a motion for new trial be made within ten days "after the receipt of written notice of the entry of judgment or of the filing of an order disposing of the action, if no judgment has been entered." Rule 60 allows up to one year. As the Order under review

of the interest involved and the circumstances under which the deprivation may occur. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. ____, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985); *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983)

Instead of addressing the appellants' motion, the trial court simply concluded that (1) it is untimely, and (2) the Bank's appraisal is irrelevant. (R.O.A. page ___[Order at page ___]) Obviously, the appraisal is not "irrelevant" because the whole case is about the true value of the property, which the appraisal panel computed as being $900,000.00. The appellants are not appealing that decision; rather, they are pointing out to the Court that the appraisal panel and the Court are deprived of information pertinent to the calculation because of the Bank's misconduct. The correction of such conduct is through Rule 60, not an appeal. The Bank's misconduct could not be addressed on appeal unless the appellants first gave the trial court an opportunity to address it: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (3) fraud, misrepresentation, or other misconduct of an adverse party." Rule 60 *South Carolina Rules of Civil Procedure*. The standard for a trial court granting such a motion is broad, but here, the Master did not analyze the rule at all, which is an abuse of discretion. Whether the Master should or should not accept the report of the appraisal panel cannot be known until the Bank releases its report, and at the time of the appraisal report, the Master knew the Bank had not produced its appraisal. (See testimony of the Bank's witness quoted above on page ___), and the Master gave no weight to the appellant's testimony, his signed contract, or the Bank's spoliation of evidence. None of this could be addressed by an appeal from the appraisal panel's report because the appraisal panel lacks the authority to

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correctly notes, the Court entered the judgment on July 3, 2014, but the amount of judgment was unsettled until October 26, 2018.

compel production or decide on the admissibility of evidence. For this reason, the case should be remanded with instructions to the Master to consider the Bank's appraisal it refused to produce and weight the appraisal report against the other evidence produced by the appellants.

B. The Bank's suppression of its appraisal, for which appellants paid, denied them fundamental due process and rendered the deficiency judgment unenforceable because the Bank prevented the Court from knowing the true value of the property.

In addition, in holding that disparity in sales price relative to value may be sufficient to set aside a deficiency judgment, the Supreme Court incorporated the *Investors Savings Bank's* "guidelines." The Court of Appeals did not specifically identify the "guidelines" to be employed in the analysis but left the application flexible:

> The rule in South Carolina was no less clearly stated by our Supreme Court in *Poole* and has since been restated by the Court on multiple occasions. *E.g. Hamilton v. Patterson*, 236 S.C. 487, 494, 115 S.E.2d 68, 71 (1960) ("It is well settled in this state 'that inadequacy of price, unless so gross as to shock the conscience of the court *or* accompanied by circumstances from which fraud may be clearly inferred, will not justify the overthrow of a judicial sale.") (emphasis added). Most recently, this Court has reiterated the rule: "Inadequacy of price will not justify setting aside a judicial sale unless the inadequacy is so gross as to chock the conscience *or* the court or is accompanied by other circumstance warranting interference by the court." *Bonney*, 300 S.C.at 365, 387 S.E.2d at 722 (emphasis added). We must assume that when our Supreme Court says "or," it means "or," not "and."

The inequity of the disparity is more shocking here, where the disparity between sales price and value is being used to calculate a deficiency not justified by the facts. Before the Master-in-Equity, the appellants identified two "circumstances from which fraud may be clearly inferred." The first is the foreclosing Bank's refusal to produce to the Court its appraisal of the subject property, which we know is in excess of $2.3 million dollars because that is the amount the Bank lent. The Bank **required** the appellants to pay for this appraisal as a condition of receiving the loan, and yet

the respondent refuses to produce it. The Promissory Note on which this case is premised required the appellant's to pay for an independent appraisal as a condition of Carolina First making the initial loan. See Paragraph ___ of the Note at page ____ of the Record on Appeal. At the hearing before the Master-in-Equity on the entry of deficiency judgment, the Master ruled that such an appraisal is "irrelevant." See Record on Appeal page ____. Since case law establishes the amount of the loan is "competent evidence" to establish value, the Bank's appraisal is germane to the issue before the Court, yet the Bank refused to produce it, and the Master concluded it was irrelevant.

In addition to erroneously concluding the Bank's appraisal is "irrelevant," the Master-in-Equity also determined that the appellants are too late to demand it because they failed to "appeal" the appraisal panel's recommendation to the Court. The legal error here is that the Master equates the appraisal panel report with a decision by the Court. The purpose of the appraisal panel is to make a report to the Court, § 29-3-720, which can then become a judgement. In *South Carolina National Bank v. Central Carolina Livestock Market, Inc.*, 289 S.C. 309, 345 S.E.2d 485 (1986), the circuit court extinguished a deficiency judgment when the appraisal panel found the collateral to be worth more than the amount owed. The Bank appealed, claiming that the trial judge violated its due process rights by not having a trial, but the Supreme Court affirmed, finding that the Bank was afforded full opportunity to challenge the finding of the appraisal panel:

> Under the Act, a judge clearly has the discretion to allow a full trial on the issue of value which would include the presentation of evidence and the cross-examination of witnesses. By analogy to the condemnation cases, **such a hearing would provide a party with a meaningful opportunity to be heard even though the judge is limited to either confirming the appraisal or order a new appraisal.** Therefore we hold that the Act is not unconstitutional on its face since it may be applied in a manner consistent with the due process causes of both the state and federal constitutions.
>
> *South Carolina National Bank* at page 488, emphasis added

Here, the appellant's pleadings filed July 11, 2014, June 1, 2016,and August 29, 2018, R.O.A. pages ____, _____ and _____ [Motion for reconsideration, demand for appraisal, motion for reconsideration] requested that the Master-in-Equity compel the foreclosing Bank to produce the evidence in its sole control. The Master mischaracterized the appellant's efforts as an untimely appeal when the appellant was demonstrating to the Court that the Bank was essentially perpetrating a fraud on the Court by suppressing evidence in its sole control. No equity court should condone such conduct, and the Master's refusal to compel the Bank to produce its appraisal is a fundamental due process legal error that requires reversal.

Second, the appellant identified post judgment conduct by the Bank that demonstrates additional misconduct toward the appellants and its willingness to misuse its superior bargaining position to injure gratuitously the appellants. Following the entry of foreclosure, a purchaser discovered what he contends is a title deficiency, which requires the appellants' signatures to cure. While in negotiations with the third parties, the Bank interfered and transmitted a message to the purchasers that if they paid the appellants any consideration, they would withhold their consent to clearing up the defect. The appellants raised this issue to the Master by way of Rule 60 motion (R.O.A. page ___) as follows:

C. The post judgment misconduct of the Bank

Following the sale of the property, the current owners detected what they believe to be a title defect in their chain of title. The current owners' lawyer, Walter Nester of the McNair Law Firm contacted defendants' counsel about the defect, and as the parties were negotiating for a transfer of interest to the third-party owner, their lawyer sent the following e-mail on September 10, 2018 (R.O.A. page ___[Rule 60 motion dated August 29, 2018]:

From: Nester, Walter <WNester@MCNAIR.NET>
Sent: Monday, September 10, 2018 1:49 PM
To: Simon Fraser <sfraser@fraserallen.com>
Cc: Symons, Janet <JSymons@mcnair.net>
Subject: Roller - Gore Parcel Buck Island and Bluffton Parkway

Simon – I have also spoken with TD Bank about the gore parcel created by the incorrect legal description in the mortgage of Wilbert & Betty Roller to Carolina First Bank (**BK 2612 / P 521**). TD Bank asserts that the Gore was a part of the parcel mortgaged and therefore also part of the property foreclosed. TD Bank is not willing to join in any agreement where your client is to receive any consideration for the gore strip. They will agree to quit claim any rights they may have remaining so long as Roller also signs and no consideration paid.

The other method to clear title is to bring a quiet title action and all that it involves for all the parties.

My client prefers a simple quit claim. Please see if Mr. Roller is willing to sign. Thank you.

This post judgment conduct is shocking in and of itself, but even more glaring when considered against the backdrop that the same bank interfering in the Rollers' negotiations is the same party attempting to perpetrate a fraud on a Court of Equity by securing an inflated or unjustified deficiency judgment. As the Master said in his October 26th Order under review (R.O.A. page ____): "[N]ot every fraud is sufficient to move a court of equity to grant relief from a judgment. Generally speaking, in order to secure equitable relief, it must appear that the fraud was extrinsic or collateral to the question examined and determined in the action in which the judgement was rendered; intrinsic fraud is not sufficient for equitable relief." Order under review at page 3 (R.O.A. page ____), citing *Bryan v Bryan*, 220 S.C. 164, 167-168, 66 S.E.2d 609 (1951).

The Master's reliance on *Bryan* is legal error for two reasons: First, since the 1951 *Bryan* decision on which the Master relied, the dichotomy between extrinsic and intrinsic fraud is on life support. See Judge Hearn's dissent in *Mr. G. v. Mrs. G.*, 320 S.C. 305, 465 S.E.2d 101 (1995):

The ostensible rationale behind the *Throckmorton* dichotomy is that intrinsic fraud is discoverable through the ordinary processes of the trial itself but that extrinsic fraud never enters the judgment. *Lockwood v. Bowles*, 46 F.R.D. 625 (D.D.C.1969). This distinction has been thoroughly criticized by courts and commentators as "difficult to understand and apply." 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2861 (1973).[3]

In refusing to follow this short-sighted logic, one court has said: "We believe truth is more important than the trouble it takes to get it." *Publicker v. Shallcross*, 106 F.2d 949, 952 (C.C.A.3 1939). The same sentiment was even more cogently expressed by Judge (later Justice) Brennan for the New Jersey Supreme Court:

Nevertheless, upon principle, we hold that relief for fraud upon the court may be allowed under our rule whether the fraud charged is denominated intrinsic or extrinsic. *107 The notion that repeated retrials of cases may be expected to follow the setting aside of judgments rendered on false testimony will not withstand critical analysis. . . . We prefer to follow the equity of the matter and to take away an unjust judgment obtained by vital perjury when the injustice and inequity of allowing it to stand are made evident. See *Mr. T. v. Mrs. T.,* 378 S.C. 127, 662 S.E.2d 413 (Ct. App. 2008)

Second, the motion before the Court was based on Rule 60, and as the comments to Rule 60 make clear, the Rule makes **no distinction** between the two: "Fraud, whether intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party are express grounds for relief by motion under amended subdivision (b)." *1948 Advisory Committee Note to Rule 60(b)* Here the Bank's fraud is extrinsic—spoiliaiting evidence is extrinsic; interfering in third party conduct is extrinsic. "An act of perjury or concealment of a document coupled with an intentional scheme to defraud the court justifies the setting aside of a judgment due to extrinsic fraud. *Ray v. Ray*, 374 S.C. 79, 647

S.E.2d 237 (2007) The Bank's conduct has deprived the defendants of a meaningful opportunity to be heard as condemned by our Supreme Court in *South Carolina National Bank v. Central Carolina Livestock Market, Inc.*, 289 S.C. 309, 345 S.E.2d 485 (1986) discussed above. In short, the Bank submits itself to the jurisdiction of the Court only for the purpose of obtaining the relief it seeks, but refuses to submit to the jurisdiction of the Court to be examined under oath about its conduct. In short, it becomes a super plaintiff—in court to get what it wants but not in court to be examined. Before the Master, respondent shifted the inquiry to a timeliness argument, arguing that the defendants waived the right to confront the Bank by failing to "appeal" the appraisal. However, the defendants are not attacking the appraisers; they seek to confront the Bank in open court in order to examine the Bank's conduct both pre and post-sale in order to cast doubt on the validity of the Bank's claim for relief.

Whether the Bank's internal appraisal would have had any effect on the Master-in-Equity is impossible to say because no one can prove a negative. However, this Court can make its own findings of fact and draw its own conclusions of law based on its view of the preponderance of the evidence. *South Carolina National Bank v. Central Carolina Livestock Market, Inc., op cit.* Since the Bank's appraisal is absent, the Bank's subterfuge prevents both the parties and the Court an opportunity to evaluate the document, and the Bank does not possess the power to thwart court process because it is powerful. Likewise, the Master-in-Equity erred in not reopening the case to examine the Bank's post judgment reasons for interfering in the debtors' negotiations with a subsequent purchaser, which potentially reduces the amount of the judgment held by the respondent. Once again, it is impossible to say whether the Bank's interference was substantial or minimal because the purchasers broke off negotiations following the Bank's threat.

As a result, this Court must either remand the case to the Master-in-Equity with instructions to apply the *American General* "guidelines" to determine if the disparity in this case warrants setting aside the deficiency judgment, or, in the alternative, use its inherent authority to make its own findings of fact and conclusions of law and require a reversal of the judgment below because the disparity of 7% or 18% is so great as to shock the conscience of the court, and the Bank's suppression of evidence prevented the Master from having a true understanding of the value of the property and deprived the appellants of fundamental due process.

Argument 4

In asking a Court of Equity to impose a deficiency judgment against appellants, the foreclosing Bank is required to provide the evidence sought by the appellants, and the failure to do so amounts to a denial of fundamental due process.

As set forth in the preceding argument, the appellants' expected the Bank to produce its appraisal as part of the evidence supporting its claim for deficiency judgment.2 The Master-in-Equity calculated the final deficiency judgment against the appellants on October 26, 2018, and the Master's Order under review misapprehends the appellants' legal position. The Master evaluated the appellants' motion to set aside the default on a procedural analysis, holding that the defendants are too late to "appeal" the appraiser's report. This misstates the appellants' position. The appellants' legal position, whether analyzed under Rule 59 or 60, is that the Master-in-Equity is a court of equity and the plaintiff is attempting to perpetrate a fraud on the Court by suppressing evidence that it controls and prevented the court and the appellants from having the applicable data on which the respondent made its loan, including calculating the collateral's value. The appellants' legal position is a substantive one based on spoliation of evidence and due process; to wit, that by being deprived

of the ability to produce and offer the Bank's appraisal, the Bank is perpetrating a fraud because its internal appraisal justified loaning the appellants $2.3 million dollars on the subject property. In 1986, the South Carolina Supreme Court took up a similar issue in *South Carolina National Bank v. Central Carolina Livestock Market, Inc.*, 289 S.C. 309, 345 S.E.2d 485 (1986). There, the South Carolina National Bank appealed the trial court's setting aside a deficiency judgment. In affirming the circuit court's decision to set aside the deficiency judgment, the Supreme Court said:

> The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). Due process does not mandate any particular form of procedure. *South Carolina Ports Authority v. Kaiser*, 254 S.C. 600, 176 S.E.2d 532 (1970). Instead, due process is a flexible concept, and the requirements of due process in particular cases are dependent upon the importance of the interest involved and the circumstances under which the deprivation may occur. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. ____, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985); *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983)
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> • • •
>
> Under the Act, a judge clearly has the discretion to allow a full trial on the issue of value which would include the presentation of evidence and the cross-examination of witnesses. By analogy to the condemnation cases, such a hearing would provide a party with a meaningful opportunity to be heard even though the judge is limited to either confirming the appraisal or ordering a new appraisal. Therefore, we hold that the Act is not unconstitutional on its face since it may be applied in a manner consistent with the due process clauses of both the state and federal constitutions.
>
> There remains the question of whether the Bank was denied due process in the application of the Act. We have previously condemned the use of affidavits to determine disputed issues of fact. See *Simonds v. Simonds*, 232 S.C. 185, 101 S.E.2d 494 (1967); *Lathaam v. Town of York*, 210 S.C. 565, 43 S.E.2d 467 (1947); *Union Savings Bank v. Hubbard*, 138 S.C. 328, 136 S.E. 481 (1927); *Team v. Bryant*, 71 S.C. 331, 333, 51 S.E. 148, 149 (1903). If the judge had remained steadfast in his initial ruling which limited the hearing on appeal to affidavits alone, this ruling, though permitted by the act, would have denied the parties a meaningful opportunity to be heard.
>
> *South Carolina National Bank v. Central Carolina Livestock Market, Inc., supra.*

Here, the circumstances are graver because the foreclosing plaintiff, a successor to the creditor bank with whom the appellants had a relationship, prevented the Court from access to critical information controlled by the Bank about the property being appraised, which is tantamount

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2 The Court entered its Order establishing the deficiency on October 26, 2018. See footnote 1 on page 23.

to a spoliation of evidence. When a party hides, destroys, or fails to produce material evidence solely within its possession, the Court is authorized to impose sanctions up to an including dismissal:

> Whatever sanction is imposed should serve to protect the rights of discovery provided by the rules. *Downey v. Dixon*, 294 S.C. 42, 45 362 S.E.2d 317, 318 (Ct. App. 1987). The burden is upon the appealing party to show that the trial court abused its discretion. *Dunn v. Dunn*, 298 S.C. at 501, 381 S.E.2d at 735. An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of the appellant, thereby amounting to an error of law. *Darden v. Witham*, 263 S.C. 183, 209 S.E.2d at 502, 381 S.E.2d at 735.
>
> *Kershaw County Board of Education v. United States Gypsum Company*, 302 S.C. 390, 396 S.E.2d 369 (1990) (Court approved jury instruction of adverse inference based on defendant's destruction of asbestos ceiling panels.)

The appellants' challenge to the Canadian Bank's intransigence is not directed at the appraisals but at the Court's denial of fundamental due process in allowing it to perpetrate a fraud on the Court by suppressing material evidence and blocking the appellants' opportunity to produce the appraisal evidence for the Court in deciding whether to accept the appraisers' report. It is the Court, not the appraisers who controls the entry of a deficiency judgment; the appraisal report is only evidence, not a substitute for the measured reason of a court. If the Bank is going to assert that the appellants waived the right to enter additional evidence in the record by failing to appeal timely the appraisers' report, the Court has the jurisdiction and the authority under either Rule 59 or 60, or both, to reopen the record to compel the plaintiff to produce the evidence in its sole control, or to impose an appropriate sanction for the Bank's refusal to produce it.

No matter how the Court chooses to evaluate the foreclosing Bank's conduct, whether under a due process analysis, a spoliation of evidence analysis, or an extrinsic fraud analysis, the respondent asked the Master-in-Equity to impose a shocking deficiency judgment against the appellants based on an incomplete record brought about by the Bank's misconduct. As for the

Bank's September, 2018, decision to interfere in the Rollers' negotiations with a third party, the appellants' only opportunity to address it in a meaningful, cost effective manner is to address it in this action. Otherwise, the appellants will find themselves in a collateral estoppel procedural Catch-22 similar to the type of procedural cul-de-sac recently condemned by the U.S. Supreme Court in a property (takings) case, *Knick v. Township of Scott*, ___ U.S. ___, ___ S.Ct. ___ (No. 17-647, June 21, 2019): "The takings plaintiff thus finds himself in a Catch-22. He cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court. The federal claim dies aborning." If the appellants were to challenge the Bank's recent course of conduct in a new action, they will surely find themselves in a procedural cul-de-sac for failure to raise the issue here.

The Master-in-Equity gave all of these concerns short shrift. Yet, the most powerful rule in the *Rules of Civil Procedure* is Rule 60(b) because it is here that the framers guarantee that all courts retain the inherent authority to prevent miscarriages of justice. Rule 60(b)(5) says:

> On motion, and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: . . . (5) it is no longer equitable that the judge should have prospective application.

As discussed in the preceding sections, the Bank has not only refused to appear in Court, but also suppressed evidence, denied the appellants the right to confront the issues and provide the Court with the Bank's appraisal to cast doubt on the validity of its claim for deficiency. The Bank's effort to hide behind a wall of impenetrability deprives the appellants of property without due process of law by saddling them with an unjust large judgment. It is no defense to a Rule 60 or Fifth Amendment violation to say that the appellants could have deposed the Bank's representative, for it

is the Bank's responsibility to accept the burden of production and persuasion, and every litigating constrained by economic factors, relies on a fair hearing to level the playing field against corporations—or even the government itself—against whom a litigant may be unmatched. See Rule 1, *South Carolina Rules of Civil Procedure*. Every party to every suit is entitled to rely on the right to be heard in meaningful manner, and the respondent cannot shift the economic burden of litigation to impoverished litigants to absolve it from its fundamental burden of proof and burden of production as the party seeking judicial relief.

Conclusion

For the reasons set forth above, the appellants respectfully pray for an Order of the Court remanding this case to the Master-in-Equity with instructions to vacate the deficiency judgment and reevaluate it after the respondent produces its appraisal, or in the alternative to compel the Bank to produce its appraisal to this Court and employing the standard of review afforded to appellate courts reviewing non-jury decisions, this Court itself apply the guideline factors identified by the Supreme Court and this Court in evaluating the entry of a deficiency judgment in this case.

Respectfully submitted,

July 11, 2019

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Marvin H. Dukes, III, Master in Equity

Case No. 2011-CP-07-0340

Wilbert Roller Jr. and Betty V. Roller..... Defendants,

vs.

TD Bank, N.A.,
Successor by merger to Carolina First Bank, ... Respondent,

of whom

Wilbert Roller Jr. and Betty V. Roller are the..... Appellants.

PROOF OF SERVICE

I certify that I have served the Initial Brief and Designation of Contents of Record on Appeal on the Respondent, T. D. Bank, N.A., Successor by merger to Carolina First Bank, by depositing a copy of it in the United States Mail, postage prepaid, on July 11, 2019, addressed to the attorneys of record, Matthew E. Tillman, P.O. Box 999, Charleston, S. C. 29402.

July 11, 2019

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July 11, 2019

Hon. Jenny Abbott Kitchings
Clerk of Court,
ATTN.: Amelia
South Carolina Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

Re: TD Bank, N.A., Successor by Merger to Carolina First Bank vs.
Wilbert Roller, Jr., Betty V. Roller, and James Williams,
Case No.: 2011-CP-07-0340
Appellate Case No.: 2019-000047

Dear Ms. Kitchings,

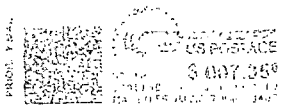
I enclose an original and an extra copy of appellants' initial brief and designation of contents of record on appeal along with a certificate of mailing and a return envelope. Would you be so kind as to file the original and return a filed copy to me? By copy of this letter, I am providing a copy of each to opposing counsel. I thank you in advance for your attention to this request. With kind regards, I am

Very truly yours,
BELK, COBB, INFINGER & GOLDSTEIN, P.A.

Thomas R. Goldstein

TRG/
encl.: Initial Brief, Designation of Contents of Record on Appeal, return envelope

cc: Matthew Tillman, Esq. (with enclosure)



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