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

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SC Court of Appeals

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 REPLY BRIEF OF APPELLANT

November 7, 2019

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REPLY TO STATEMENT OF CASE

On page 3, the Respondent asserts that following the Order of foreclosure: "The Appellants then began a confusing series of procedural maneuvers." (Respondent's brief at page 3). The Respondent suggests there is confusion where this none. As the Respondent points out, the procedural history of the case prior to the entry of the deficiency judgment is tortured, first because T.D. Bank never had a relationship with the Appellants or the transaction that gives rise to this foreclosure until, allegedly, after Carolina First filed suit, and second because a third party made a title claim to the subject property that had to be resolved. (See first complaint in R.O.A. page ____.) Appellants caused neither of these procedural detours. The only legal issues raised by this appeal involve the question of jurisdiction and the trial court's misapplication of Rule 60 after it entered a deficiency judgment. There is no confusion over whether the Appellants were trying to "appeal" a decision or "amend" the trial court's entry of deficiency because—and Respondent glosses over this undisputed point—the Appellants challenged the entry of a deficiency judgement for the Respondent's lack of standing and suppression of evidence before the entry of a deficiency, not at the entry of foreclosure. Any putative confusion evaporates as soon as the distinction between foreclosure and deficiency is drawn. A short reply is therefore appropriate to dispel this alleged confusion.

Before the trial court entered its deficiency judgment, the Appellants pointed out that the Respondent failed to establish it was the real party in interest because the Appellants' relationship was with Carolina First, not the Respondent. Thus, the resolution of the original appeal has no bearing on the entry of a deficiency because the entry of a deficiency is a stand-alone procedure that occurs after foreclosure. The Appellants invoked the appraisal statute, § 29-3-680, S. C. Code, ann., because they were confident the subject property is worth more than the debt. After the appointed

appraisal panel filed its report on July 27, 2018, (R.O.A. page ____), the Appellants pointed out that the foreclosing Bank, Carolina First, possesses a written appraisal, for which it charged Appellants, and did not provide it to the appraisal panel and refused to produce it to the trial Court for its consideration. In short, the Bank suppressed material evidence in its sole possession in order to support its claim for an inflated deficiency judgment.

Thus the Appellants alleged two bars to the entry of a deficiency judgment. When the Appellants called subject matter jurisdiction into question, the Respondent replied that it is the proper party because it possesses the original Note and Mortgage, but the record reflects it could not produce them. R.O.A. pages ___, ____, ____[tr. pages 26, 27,30] In fact, the Respondent's witness conceded that there is no evidence in the record to validate the Bank's claim to be the successor of Carolina First:

Q. . . . The reason I ask is there is not evidence in this record today that would allow a court to determine or someone looking at this record to determine that in fact TD Bank actually acquired Carolina First other than your testimony. Is that a fair summation of the record?

A. Yes. (R.O.A. page ___, lines 16-22 [tr. page 42])

All of Mr. Jenkins' testimony was based on speculation—he could not even provide a payment history. See R.OA. page ___, lines 3-23 [tr. page 54]: "Q. 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."

The Respondent cannot have it both ways—on one hand establishing its standing based on its possession of the original loan documents it cannot produce, and then on the other hand, simultaneously refusing to produce the **only available** copy of its written appraisal of the subject property when it possesses the only original document. The Appellants asked the trial court to do

nothing more than require the Bank to divulge this document to the Court, which is neither confusing nor surprising and specifically authorized by Rule 60 of the *South Carolina Rules of Civil Procedure*. The Respondent suggests, but offers no legal authority, that the Appellants' decision to utilize Rule 60 instead of an "appeal" of the appraisal panel's report prevents the Appellants from using Rule 60 to call the Bank's misconduct to the Court. Rule 60 is designed to allow litigants to challenge judgments when procured by fraud, mistake, or even excusable neglect and sets a one-year time limit for such challenges. Thus, this matter is before the Court of Appeals arising out of the application of the Appraisal Statute, § 29-3-680, S, C. code, ann., and it involves nothing more than the fundamental evidentiary issue that the Bank should not be permitted to suppress evidence that undercuts its application for a deficiency judgment in a court of equity.

REPLY ARGUMENTS

Reply to Argument 1

The Appellants are not appealing the judgment of foreclosure—they are appealing the entry of a deficiency judgment procured by suppression of evidence—and the Respondent made the loan based on a written appraisal that it refuses to divulge.

The Respondent's first argument is premised upon a misreading of the Appellant's two legal issues raised by this appeal. The first, Appellants' challenge to subject matter jurisdiction, can be raised at any time, even on appeal by the Court itself. The second, discussed more fully in the next section, is that the Appellants are challenging the trial court's refusal to require the Respondent to produce its written appraisal since the Respondent is the only source. As discussed in Appellants' initial brief and throughout this Reply, the trial court refused for three erroneous reasons: 1. That Appellants' application was too late, 2. That Appellants failed to prove a fraud, and 3. That the Court lacked discretion to address the application. R.O.A. page ____[October 26, 2018, Order] While the procedure of this case took a tortured path, that tortured path arose from a third party's challenge to

title and had nothing to do with the just amount of a deficiency judgment, and nothing to do with the Appellants calling the trial court's attention to the existence of the Bank's appraisal and the Bank's suppression of it via a Rule 60 motion as authorized by the Rules.

Reply to Arguments 2A, 2B, & 2C.
The Appellants are not appealing the judgment of foreclosure—they are challenging the entry of a deficiency judgment under Rule 60.

As the record in this case demonstrates, other than the unsupported opinion of a lay witness, T.D. Bank never did explain how it claims the legal authority to seek a deficiency judgment against the Appellants, relying entirely on the fact that the signage changed in 2010: "And on June 17th of 2010, the merger took place with signage, et cetera." (R.O.A. page ___, lines 8-10 [tr. page 17]) When asked a direct question about merger, the Bank's witness could not answer it, or even supply a payment history, other than to give an unsupported opinion. The colloquy from the transcript of record is quoted *verbatim* on page 11 of the Appellants' initial brief and found in the Record on Appeal at pages ___-_____, and as the Court can see for itself, that Mr. Jenkin's testimony is nothing more than an unsupported speculation, a mere guess, and as discussed above and throughout, he could not even produce the original loan documents.

The Respondent is correct that "[its] trial witness testified that the Respondent became the successor in interest by merger to Carolina First Bank on June 17, 2010." (Respondent's Brief at page 9, quoting transcript at page 17, R.OA. page ____), but omits the cross examination of the same witness demonstrates he had no personal knowledge of a merger. All he knows is that the signs changed. As the party with the burden of production and persuasion, the Respondent is obligated to produce more than an opinion of a lay witness, especially where the Appellants challenged the Bank's standing in their original Answer—see ¶ 26 of Defendant's December 6, 2011, Answer.

(R.O.A. page ___) and where the Bank's claim to standing is based on possession of the original loan documents that it could not produce. If there is any "confusion" in this case, it stems from Plaintiff's unsettled status. Carolina First Bank brought the original foreclosure action on January 24, 2011. On October 26, 2011, TD Bank, N.A. filed an Amended Complaint. R.O.A pages ___ and _____.) Appellants' December 6 2011, Answer to the Amended Complaint denied the Plaintiff had the right to sue. See Answer at ¶ 26 of Appellant's December 6, 2011 Answer. (R.O.A. page ____) And, as set forth fully in Appellant's Initial Brief at pages 10-17, the issue of subject matter jurisdiction can never be waived.

Second, the Appellants never raised a defense to non-payment of the loan to Carolina First Bank, asserting instead a series of affirmative defenses, and thereafter choosing to rely upon the appraisal statute for their protection because 1: Appellants had a written appraisal in hand setting the property's undeveloped value as worth more than the amount owed (R.O.A. page ___[Halpern appraisal] as well as an executed contract from BI-LO, offering to purchase a portion of the property for 5.7 million dollars. See R.O. A. page _____, Wilbert Roller's August 20, 2018 [pages 1-2] and December 3, 2108 affidavits [page 4], Defendant's Exhibit 1:

> The parcel is unique in Bluffton as it remains the only undeveloped large tract on Buck Island Road. All the other corners on Buck Island Road are developed and consist of shopping malls with large anchor tenants.
>
> In June of 2008, I received an offer to purchase 17.5 acres for $325,000.00 per acre (roughly 5.7 million dollars). The contract is attached to this affidavit. As a result, I hired Michael Kronimus of K.R.A. Associates, the leading architecture firm in the area to handle the presentation to the Town of Bluffton. The Town of Bluffton refused to restore my zoning due to the objections of a small group of Bluffton residents who demanded that I provide certain things for them as a condition of going forward. They demanded that I build a community civic center and a ballfield for them, and make a financial contribution to their neighborhood association, which I declined to do.
>
> As a result, the tract retains its current zoning classification of "residential general," which does allow dense multi-family development on the property, a fact overlooked by the court-

> appointed appraisers. For example, as the property is currently zoned, it could accommodate a large condominium development, apartment complex, or mobile home park. The court appointed appraisal gives none of these future uses any consideration. In short, they ignore the property's highest and best use.
>
> As it currently exists with its present zoning, the property is worth in excess of two million dollars as supported by the original appraiser prepared by Mark Halpern, attached here.
>
> As it [the subject property] currently exists with its present zoning, the property is worth in excess of two million dollars as supported by the original September 6, 2016, appraisal prepared by Mark Halpern, which I previously filed with the Court.

In fact, the only reason this transaction did not turn out to be a financial win for everyone concerned was because the Appellants could not overcome the vicissitudes of the Bluffton Town Council, which downzoned the property while Appellants were out of state and remained steadfast in thwarting development of the property. The Appellants are not the first and will not be the last to suffer ruin as victims of small-town politics. See *Kelo v. City of New London*, 545 U.S. 469 (2005) (The type of harm visited on the plaintiffs of *New London* is constitutionally blocked in South Carolina. *S. C. Const.*, Art. I, § 13.) The record is not challenged that the Appellants had in hand a written offer to purchase a portion of the property for 5.7 million dollars to serve as the site of a BI-LO grocery store. (R.O.A. page ____[affidavit of Wilbert Roller, Defendants Exhibit 1, tr. pages 69-71]). Likewise, the Appellants had in hand a written appraisal of Mark Halpern, dated September 26, 2016, which estimated the value of the undeveloped property just over 2 million dollars. (R.O.A. page ____) By contrast, the **only** evidence in the case supporting the trial court's finding that the property is worth $900,000.00 is the evidence of the judicial sale—and the reassignment of the bid—which is unconscionable. In arriving at its decisions to impose a deficiency judgment, the lower court ignored, and therefore could not analyze, the Appellants' evidence or their efforts to point out the Respondent's suppression of material evidence, and this is reversible error. When Appellants pointed out to the Court that the Bank was in possession of a written appraisal on which it relied in

making a loan in excess of 2 million dollars, it is obvious that the suppressed appraisal fixes the value far in excess of the $900,000.00 value settled on by the trial court, and the Bank cannot hide behind the appraisal panel to shield its suppression of this evidence. Regardless of the value assigned by the appraisal panel, it is at least just as important for the Court to consider what the entity seeking the deficiency judgment believes the property is worth, and yet, in giving Appellants' Rule 60 motion short shrift, the trial court condoned the Bank's suppression of this important evidence. It is one thing to consider and weigh evidence and make creditability determinations, but it is quite another to accept one bit of evidence and ignore the rest. Through their Rule 60 motion, the Appellants properly brought to the trial court's attention that it overlooked both the competing evidence of value and the Respondent's suppression of evidence. As the Order under review demonstrates, the trial court relied on self-refuting logic, holding that the Appellants failed to prove a fraud while simultaneously denying the Appellants access to the evidence necessary to prove the fraud! When Appellants pointed this out in their Motion for Reconsideration (R.O.A. page ____), the trial court ignored it, making a decision by way of a form Order with no explanation. (See R.O.A. [Order]. The trial court's original decision on October 26, 2108, Order (R.O.A. pages ___-____) turned away the Appellants' challenge on the ground that 1) it was too late, 2) there was no evidence of fraud on the court, and 3) the court lacked the discretion to correct its own order. Obviously, the Appellants' application was timely because, as pointed out at the beginning of this Reply, the Appellants were not attacking the Order of foreclosure; they were attacking the entry of a deficiency judgment, and Rule 60 allows litigants up to one year to request correction of a judgment. There is no time limit if the motion is brought under Rule 60(b)(5). Likewise, Appellant's were not "appealing" the decision of the appraisal panel; they were pointing out to the trial court that the appraisal panel—and the Court—were prevented from having material information and that the trial

court failed to consider other competent evidence. Of course the Appellants' motions were timely because they were directed at the Court amending its Order, which is a process governed by Rules 59 and 60, and Appellants were well within the deadlines imposed by those Rules.

As for the trial court concluding it lacked discretion, to modify its own Order (see R.O.A. page _____, October 26, 2018): "The Supreme Court of South Carolina held that a Master-in-Equity does not have the discretion to deny a deficiency judgment unless the creditor expressly waived the claim for a deficiency," both Rule 59 and 60 specifically allow the Court to correct Orders for any of the reasons listed in the Rule. When the Supreme Court ruled that a Master-in-Equity lacked the discretion to **deny** a deficiency judgment, it said nothing about the **amount** of the deficiency judgment, and the purpose of Rules 59 and 60 is to allow trial courts to address unfairness whether it results from fraud, from mistake, or even from excusable neglect. As discussed more fully below, the trial court erred in concluding it lacked discretion to amend its order: "Whether to grant or deny a motion for relief from judgment lies within the sound discretion of the master." *Belle Hall Plantation Home Owner's Association , Inc. v. Murray*, 419 SC. 605, 799 S.E.2d 310 (Ct. App. 2017) (affirming Master-in-Equity's grant of a 60(b) relief when Master found lack of notice constituted sufficient evidence of fraud or mistake) The Appellants never asserted the Master possesses the authority to deny a deficiency judgment; rather, the Appellants asserted that the amount of the deficiency must be based on the true value of the property, and the Bank's suppression of material evidence constitutes sufficient grounds under Rule 60 to re-open the inquiry to see that a just amount is entered. The whole purpose of the appraisal statute is to prevent what has occurred in this case, and the only reason the amount is so unconscionable is because the Bank successfully suppressed the most important, material evidence in the case. Thus, it was reversible error for the

trial court to allow the Bank to manipulate the result by suppressing material evidence to achieve an unjustifiably inflated deficiency judgment.

The entry of an Order of foreclosure has never been challenged in this case—other than Appellants' challenge to subject matter jurisdiction. After being ruined by the animus of small town politics, the Appellants were glad to be out from under the property, and this record demonstrates the property was worth more than the debt whether the Court considers the owners' opinion, the Halpern appraisal, the BI-LO contract, or just the inference raised by the Bank's suppression of its appraisal. "The trial court . . . instructed the jury that when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party. See *Welch v. Gibbons*, 211 S.C. 516, 46 S.E. (2d) 147 (1948)." *Kershaw County Bd. Of Education v. U.S. Gypsum, Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990) Instead of challenging the right of the Court to sell the property—other than subject matter jurisdiction—the sole issue before the Court is the trial court's decision regarding what amount to enter as a deficiency judgment. The determination of the just amount is a stand-alone procedure created by the General Assembly to protect against injustices such as the present case. And, not to put too fine a point on it, the Bank seeking to maximize its deficiency has successfully suppressed its written appraisal of the property, which is available from no other source, and for which it absolutely refuses to divulge.

Reply to Argument 3

The Appellants' motion for involuntary nonsuit is predicated upon the trial court's lack of subject matter jurisdiction.

The Respondent sets out the correct standard of review for an involuntary non-suit, but, again, conflates two legal issues. Appellants never challenged the nonpayment-arrearage; rather, they raised two issues: (1) subject matter jurisdiction—which can never be waived—and (2) the

Respondent's suppression of material evidence to support its claim for an inflated deficiency amount. As set forth in the initial brief (pages ___-____) and above, the Bank's witness had no information about how the Bank acquired alleged ownership of the Appellants' loan, and as discussed throughout, the trial court determined it could not take up the Appellants' Rule 60 motion for three clearly erroneous reasons. Thus, in evaluating whether the trial court did or did not err, the reviewing court must sift the record to answer two questions:

1) Did the Bank produce sufficient evidence to allow the trial court to find jurisdiction, and
2) Can the Bank suppress material evidence to inflate its claim?

As argued throughout the initial brief and above, the Bank provided nothing on which to ground a finding of jurisdiction other than Mr. Jenkins' unsupported lay opinion, and the trial court simply ignored the Appellants' demands that the Bank produce its appraisal. Since the record fails to contain reliable evidence of jurisdiction and establishes the Bank suppressed its evidence, this Court should either dismiss the action for deficiency judgment in total, or, in the alternative, remand the matter back to the Master-in-Equity with instructions to require the Bank to produce competent evidence that it is the real party in interest and to require the Bank to divulge its conclusion about the value of the property.

Reply to Argument 4

The Appellants never challenged the foreclosure sale; rather, they challenge the entry of a deficiency judgment.

The Respondent again mischaracterizes the Appellants' legal position, transforming Appellants' argument into a straw man. The Appellants never challenged the sale of the property, which would have been an act of futility. It is an indisputable statement of fact that judicial sales do not bring fair market value for distressed property because the property is offered with little

advertisement to a microscopic pool of buyers who can pay cash. Even the Bank's witness conceded this point. (R.O.A. page [tr. 40, lines 15-19]) This fact is, of course, the reason for the appraisal process. Moreover, as the affidavits of the Appellants demonstrate (R.O.A. pps. ____ and _____), their almost 20-year battle with the Town of Bluffton to restore their zoning left them emotionally exhausted and financially ruined, a phenomenon so common it gives rise to the adage that "you can't fight city hall." The Appellants conceded the sale and never asked the trial court to set it aside because: 1) they knew that the property would never bring fair market value at a foreclosure sale, and 2) they knew they had the protection of the appraisal statute, and they had a September 26, 2016, written appraisal in hand that valued the property more than the debt, as well as a fully executed contract showing the potential value of the property. R.O.A. pps. ____ and ____. In light of the vast potential for the tract, the Bank's refusal to assist the borrowers' attempts to address the Town's zoning stance makes as much sense as sailing the Titanic at full speed through frozen waters. By contrast, the Respondent showed an amazing capacity for generosity to a third party who made a spurious title claim. It is beyond the reach of lawyers or Courts either to explain or to remedy such things, but the fact remains that the trial court accepted the appraisal panel's results without considering any other evidence.

The Respondent's Fourth Argument attempts to get around this injustice by suggesting that the Court's conscience can be shocked **only** by a low price paid for the property and nothing else. This is an illegitimate and overly narrow limitation of the Court's powers easily refuted by any philosophical consideration of the judicial system: "Laws are a dead letter without courts to expound and define their true meaning and operation." Alexander Hamilton, *The Federalist Papers*, Number 22 (1787). Rather than digress into a discussion of the philosophy of the judicial system, we can rely on the more succinct statement contained in Rule 1 of the *South Carolina Rules of Civil*

Procedure: The Rules "shall be construed to secure the **just**, speedy, and inexpensive determination of every action." (emphasis added) As the Respondent correctly notes, our Supreme Court has held that foreclosure sales can be set aside for insufficient consideration, and there is nothing in those decisions—or in any other case law—limiting the rule to sales and proscribing the same principle from being applied to deficiencies. As discussed in the Appellants' Initial Brief, the Supreme Court's decision in *South Carolina National Bank v. Central Carolina Livestock Market, Inc.*, 289 S.C. 309, 345 S.E.2d 485 (1986) makes clear the expansive power of the Court to do what is just: "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."

See also *Peoples Federal Savings & Loan Assoc. v. Myrtle Beach Retirement Group, Inc.*, 302 S.C. 223, 394 S.E.2d 849 (A. C. App. 1990): "As noted we hold that on appeal, the circuit judge or master in this case may either (1) confirm the report of the appraisers or (2) 'order a new appraisal upon such terms as he may deem equitable.'" Here, as the record demonstrates, the Master-in-Equity refused to consider the Appellants' evidence or arguments because he erroneously determined that Appellants were barred from filing a Rule 60 motion to correct or amend an Order, which was not time barred. The Master in Equity never apprehended that an attack on an Order for suppression of evidence is not barred by the ten-day time for appeal of the appraisal panel report. Moreover, without forcing the Bank to disgorge its suppressed evidence, rendered any appeal of the panel report to nothing more than an act of futility unless the trial court did its job and forced the Respondent to disgorge the evidence it suppressed.

In order to escape the application of the appraisal protection process to the Appellants, the Respondent's entire case is premised upon two incorrect statements of law; to wit, that the Appellants did not "appeal" the appraisal panel report, and that the trial court has no discretion. As argued in the initial brief and throughout this Brief, the Appellants are not appealing the appraisal panel report because the appraisal panel was denied material evidence. The Appellants are, over and over and over, pointing out that the Bank suppressed evidence and the appraisal panel never had the Bank's evidence related to the value of the property. Likewise, the trial court utterly ignored the Appellant's evidence regarding value and concluded, erroneously, that it lacked discretion to test the appraisal panel report for accuracy, a palpable legal error requiring reversal.

Reply to Argument 5

The foreclosure sale price of $421,000.00 is so low as to shock the conscience of the Court.

The sale of the property at judicial sale fetched about 14% of the debt claimed by the Bank. The $900,000.00 arrived at by the panel represents 31% of the debt, not the 46% cited by the Respondent on page 13. See R.O.A. page ______[May 25, 2016, judgment] $2.9 million divided into $421,000.00 = 14%; into $900,000.00 = 31%. As the record demonstrates, the high bid for the sale was $421,000.00 (R.O.A. page ___[Master's August 29, 2016 Statement of Receipts and Disbursements]) The Respondent mischaracterizes Appellants' argument thus: "The Appellants contend that a June 10, 2008 unconsummated contract to sell the subject property to BI-LO provides the valuation by which the foreclosure sales price should be measured." (Respondent's Brief at page 13.) This is a straw man argument, which allows the Appellant in reply to bring the dispute into sharp focus. It is an undisputed statement of law that the deficiency judgment process is governed by traditional rules of due process. *S. C. National Bank v. Carolina Livestock*, 289 S.C. 309, 345 S.E.2d 485 (1986), *Peoples Federal Savings & Loan Assoc. v. Myrtle Beach Retirement Group, Inc.*,

302 S.C. 223, 394 S.E.2d 849 (A. C. App. 1990) Due process means the application of traditional rules of procedure, those being the *S. C. Rules of Evidence* and the *S. C. Rules of Civil Procedure.* In determining whether the amount of deficiency judgment is just, the finder of fact is entitled to sift the evidence and make findings of fact, and if the amount returned by the appraisal panel is unjust, the Master-in-Equity can set it aside and order a new appraisal. § 29-3-780, S. C. Code, ann. In reviewing the decision of the trial court to deny Appellants' Rule 60 motion, this Court can review the record and make its own findings of fact and conclusions of law. The BI-LO contract is evidence, nothing more, nothing less. The trial court gave it no weight, and likewise the trial court gave the Halpern appraisal no weight, and likewise the trial court gave the Bank's suppression of evidence no weight. When the matter came before the trial court on a Rule 60 motion, the issue was before the trial court was the Bank's suppression of its appraisal evidence. However, the trial court determined it lacked discretion to do anything other than enroll the Appraisal Panel result, and this is the legal error that brings this case to this Court. By successfully suppressing its own evidence, the Respondent prevented the trial court from having either a full or a fair basis to evaluate the inadequacy of consideration. What constitutes consideration so low as to shock the conscience of the Court is a subjective debate, but what is not a subjective debate is that the rules of evidence, the rules of civil procedure, and the fundamental mandate of the judicial system to provide justice require that the decision be based on a full and fair disclosure of material evidence. In other words, Courts should not turn blind eyes to injustice.

Reply to Argument 6
The Appellants' application for relief under Rule 60 was timely.

The Respondent's Argument 6 is a restatement of the previous arguments, broken down as follows:

A. The motion for relief under Rule 60 was untimely under § 29-3-750.

B. The motion for relief under Rule 60 was untimely under Rule 60.

C. The trial court properly denied the motion.

D. The trial court lacks discretion to adjust the deficiency judgment.

As to Arguments A and D, the Appellants' reply is fully set forth above (case involves application of Rule 60, not appeal of Appraisal Panel, and the trial court has discretion to see that justice is done), and further extensive reply on these points would unduly burden the Court with a repetition of arguments set forth above. As to Argument B, Rule 60 provides: "The motion shall be made within a reasonable time and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." The Court can take judicial knowledge of the fact that the Appraisal Panel does its work outside the presence of the parties, and the parties have no idea what the Appraisal Panel is considering or how it goes about its work. Likewise, its report to the Court gives no explanation as to how it arrived at its valuation other than saying that one appraiser thought the property was worth $2,050,000.00, one thought $600,000.00, and "All appraisers ultimately agreed that the proper area of the subject property was 10.8 acres (usable area only) and everyone ultimately agreed on a value for the Roller property of $900,000.00." See R.O.A. page ____ [July 17, 2018 report] However, it is also an indisputable statement of law that the Court enters the judgment, not the Appraisal Panel, and the trial court has full discretion under § 29-3-750, S. C. Code, ann. to do whatever is necessary to ensure that the deficiency judgment entered is just. On August 20, 2018, within 30 days of receiving the Appraisal Panel's report **but before the trial court entered an adjusted amount of the deficiency judgment,** the Appellants filed an Affidavit (R.O.A. page ___) demonstrating the Appraisal Panel's failure to consider relevant evidence along with a Motion to Vacate the Demand for Deficiency Judgment (R.O.A. page ____)

for the Bank's misconduct in suppressing evidence in its sole control. (In their November 2, 2018, Motion for Reconsideration, the Appellants pointed out additional Bank misconduct following entry of the deficiency amount. R.O.A. page ____.) The timeliness of the application under Rule 60 cannot be debated, and the Respondent attempts to get around this indisputable fact by asserting that the Appellants' sole remedy was to appeal the Appraisal Panel's conclusion under § 29-3-750. Reasonable minds can differ over different legal strategies, but such debates do not change the existence or the application of the *Rules of Civil Procedure*, and the fact is that the Appellants made a timely application under Rule 60. And this brings us to the legal errors requiring reversal because the trial court concluded that the application was untimely when it was not and that it lacked discretion which it has—the entire appeal in a single sentence!

After the trial court erroneously concluded it had no discretion to question an Appraisal Panel Report or afford relief to the Appellants under Rule 60, the Appellants tried to call attention to these errors in their November 2, 2019, Motion for Reconsideration (R.O.A. page ___), when they pointed out: "The Court's October 26th Order under review misapprehends the defendants' legal position. . . . The defendants' legal position under both Rules 59 and 60, is that the Mater-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 form having the applicable data on which to base their decision." In this motion for reconsideration, the Appellants identified new post judgment misconduct by the Bank. R. O. A. page ___, November 2, 2018, Motion at page 5. In the Affidavit filed in support of the Motion for Reconsideration (R.O.A. page ___), the Appellants pointed out that the Respondent—or at least, Carolina First—was willing to extend credit of $2.3 million dollars on the undeveloped property which it appraised. It is unconscionable for the Bank to know claim a deficiency judgment of over $2 million dollars while simultaneously suppressing the best evidence of the property's

value. In short, the trial court rewarded the Respondent for its own misconduct, and the Appellants timely sought relief under Rule 60 to address this. In denying the motion for reconsideration, the trial court entered a form Order with no explanation, and thus this Court is left with the reasons identified in the October 26th Order as the basis for denying the Appellants relief. As previously demonstrated, this Order is controlled by two palpable errors of law.

Reply to Argument 7
The failure to use discretion is an abuse of discretion

Respondent's argument 7 is unnecessary. The Master-in-Equity decided that it does not possess the discretion to do anything other than adjust the deficiency judgment in accordance with the conclusions of the Panel. It is pointless to argue about **if** the Master-in-Equity used discretion in denying Appellants' application because, as his October 26th Order makes clear, he concluded he lacks discretion (R.O.A. page ___): "The Plaintiff did not waive its right to the deficiency judgment, so this Court has no discretion to effuse the request for a deficiency or vacate the judgment." Under South Carolina law, the refusal to use discretion is tantamount to an abuse of discretion:

A circuit court's failure to exercise discretion is itself an abuse of discretion. *In re Robert M.*, 294 S.C. 69, 362 S.E.2d 639 (1987); *State v. Smith*, 276 S.C. 494, 280 S.E.2d 200 (1981); Fields v. *Regional Med. Ctr. Orangeburg*, 354 S.C. 445, 581 S.E.2d 489 (Ct. App. 2003); *State v. Mansfield*, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000); *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990). Here, the circuit court failed to exercise discretion. See Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."); *Balloon Plantation*, 303 S.C. at 155, 399 S.E.2d at 441 ("It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly."). The judge was mandatorily required to at least evaluate and consider the affidavit.

Courtney v. Schmidt, 357 S. C. 310, 592 S.E.2d 326 (Ct. App. 2003) (reversed grant of summary judgment in negligence action for trial judge's refusal to consider affidavits)

Here, the trial judge refused to employ any discretion, and this failure is error. Speculating what the trial court might have done if it had employed a discretionary standard does not cure the

defect of refusing to use discretion. Likewise, it is unavailing to assert that the failure to use discretion does not deprive a litigant of due process because all legal errors, unless they relate to matters that do not change the outcome, so-called "harmless errors," always affect due process because a litigant suffers when his or her legal rights are erroneously decided. As Shakespeare might have said if he were a lawyer: abuse of discretion by any other name smells just as rank.

Reply to Argument 8
The Appellants timely raised the spoliation argument through Rule 60.

As demonstrated above, the Appraisal Panel rendered its report on July 27, 2018. Within thirty days thereafter, before the Court entered a revised judgement, the Appellants filed an affidavit and a motion to vacate under Rules 59 and 60. The basis for the motion (R.O.A. page ____) is that the Respondent improperly suppressed evidence that if produced would erode its legal position on the amount of deficiency judgment. The timely filed written motion set forth in detail the basis for the application, and that is all that is required. Thus, the Appellants raised the issue both timely and at the earliest opportunity under Rule 60. As set forth above, the Appraisal Panel does its work outside the presence of the parties, and thus the parties have no idea what the appraisers are considering, but after they announced their decision to base the appraisal on the amount of the judicial sale and the reassignment, the Appellants recognized that the Bank was not forthcoming with evidence in its possession and timely raised the issue as both a spoliation issue and a fraud on the Court. As the party asking for entry of a deficiency amount, the Bank is not free to suppress evidence, and the trial court committed legal error in allowing the Bank to withhold this critical information from the Court and the parties.

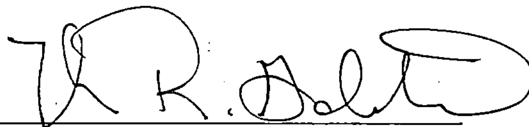
Conclusion

This record demonstrates that the decision imposing a 2.9 million dollar deficiency judgment

is not supported by the record. The Respondent suppressed critical information, and the trial court did nothing to compel them to divulge it. The trial court erroneously concluded that it lacked discretion to take up the Appellants' motion, and this is reversible error. For any and all of these reasons, the deficiency judgment should be reversed or remanded with instructions for the trial court to evaluate the Bank's appraisal, and in light of its disclosure make such judgements to the amount of the deficiency as the facts require. For these reasons, 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,

November 5, 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

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SC Court of Appeals

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

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

vs.

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

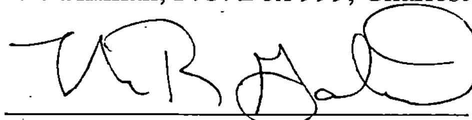
of whom

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

PROOF OF SERVICE

I certify that I have served the Initial Reply Brief and Joint 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 November 8, 2019, addressed to the attorneys of record, Matthew E. Tillman, P.O. Box 999, Charleston, S. C. 29402.

November 8, 2019



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November 8, 2019

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

Re: T. D. Bank v. Roller
Appellate Tracking Number: 2019-000047

Dear Ms. Kitchings,

I enclose the original and an extra copy of the Appellants' Reply Brief and Designation of Contents of Record on Appeal, along with a certificate of service and a self-addressed, stamped return envelope. Would you be so kind as to file the original and return a clocked copy to me in the envelope provided? 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

cc: Matthew Tillman

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