BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Master-in-Equity

Joseph E. Strickland, Master-in-Equity Court Judge

Case No. 2012-213559

SCBT,N.A.

Respondent,

v.

Sand Dollar 31, LLC; Rhonda Meisner; of whom Rhonda Meisner is Appellant,

Appellant.

INITIAL BRIEF OF APPELLANT

Rhonda L. Meisner
Post Office Box 689
Blythewood, South Carolina 29016
(803) 960-3696
Pro Se Appellant

Table of Contents and Cases

Table of Contents:

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. DID THE MASTER–IN-EQUITY ERR IN DENYING THE MOTION TO ALTER AND AMEND THE JUDGMENT?

2. ARE RESPONDENTS JUDICIALLY ESTOPPED FROM VALUING THE PROPERTIES DIFFERENTLY THAN IN THE BANK'S MOTION TO VACATE THE JUDICIAL SALE?

3. DID THE MASTER-IN-EQUITY ERR IN AWARDING ATTORNEY FEES WITHOUT A FILED AFFIDAVIT OR ITEMIZATION OF ATTORNEY FEES?

Background

This is an appeal of a personal judgment, the valuation of the properties subject to a mortgage foreclosure proceeding and the entry of the judgments into the public index in excess of the amount owed, including an appeal of the associated attorney's fees. The Defendant, Rhonda Meisner ("Meisner") was the guarantor of a mortgage loan that was initiated by Sand Dollar 31, LLC ("Sanddollar") with SCBT, N.A. ("Bank"). Meisner is the single-member of the Sanddollar Limited Liability Company. Sanddollar subsequently defaulted on the loans and the Bank sought foreclosure of the properties securing the loans. The Bank filed a lis pendens on September 27, 2011 and subsequently filed a lawsuit seeking to foreclose on the properties. The Bank also named Meisner as a Defendant as she signed the guaranty agreement associated with the loans. Defendants Sanddollar and Meisner answered the complaint by and through their attorney Glenn Bowens. Meisner and Sanddollar sought a declaratory judgment on whether both entities were entitled to Appraisal rights pursuant to S. C. Code 29-3-680 and a declaratory judgment of the rights and liabilities of each of the parties under the Note, Mortgage and Guarantee agreement and the amount of the deficiency judgment, if any. Defendants specifically preserved their rights to an Appraisal and invoked the valuation protections of the Appraisal Statute in Their answer and Counterclaim. The Bank sought a deficiency against Sanddollar and the enforcement of a Guaranty Agreement associated with the properties that was signed by Meisner. The Foreclosure hearing was held April 25, 2012 and the Court ruled the evidence of the debt was sufficient and the Foreclosure of the properties could proceed but that both Sanddollar and Meisner retained their Appraisal rights according to the Appraisal Statute .The sale was scheduled for June 4, 2012. Because the Bank had demanded a deficiency, the sales bidding process would remain open for 30 days and the deficiency sale was scheduled for July 5, 2012. Prior to sale of the properties and the completion of the Appraisals, on May 16, 2012 the Bank entered judgment in the public roles for both Sanddollar and Meisner indicating each entity was responsible for the entire amount the Bank demanded as payment for the sums owed. The properties were sold at the deficiency sale on July 5th, 2012 to South Carolina Operating Room Equipment, LLC (SCORE). After the sale of

the properties, the Bank filed a Motion to Vacate the Foreclosure Sale, based on the fact that Meisner was the single member of SCORE, LLC and that Meisner in her individual capacity had filed a Certified Petition as outlined in the Appraisal Statute for the valuation of the properties. The Bank named both Meisner and Sanddollar as Defendants in the Motion to Vacate the Judicial Sale but did not name SCORE, LLC as a defendant in the Motion to Vacate the Judicial Sale. The Court scheduled a status conference for November 6, 2012 to hear the Motion to Vacate and to hear arguments on the memorandums regarding the Motion to Vacate the Sale which were previously submitted to the Court regarding the valuation of the properties. At the hearing, Judge Strickland apologized that due to the Presidential election there would not be a court reporter available to make a record. The parties agreed to proceed with the caveat that if necessary another hearing would be held to create a record. After an update on the submitted memorandums, the order to deny the Motion to Alter and Amend the judgment was ruled on by the Court and recorded on November 6, 2012 effectively ruling on the outstanding issues of the Declaratory Judgment, the Guaranty agreement and the Property valuation. A notice of Appeal was served on all parties and a copy provided to the Honorable Judge Joseph M. Strickland on December 6, 2012. This appeal follows.

STATEMENT OF THE CASE

South Carolina Bank and Trust, N.A. (Bank) by and through their attorney Teri Tomsk,(Stomski) an attorney with the firm Rogers, Townsend and Thomas, PC (initiated Foreclosure Proceedings against Sand Dollar 31, LLC (Sanddollar) and sought to enforce a guarantee agreement signed by Rhonda Meisner (Meisner) by filing a lawsuit. The Bank filed the amended lis pendis against the properties on September 27, 2011. Glenn Bowens (Bowens) attorney for the Defendants Sanddollar and Meisner answered the lawsuit on January 19, 2012. In the Answer and Counterclaim, Defendants explicitly stated they would pursue Appraisal Rights under the Appraisal Statute, S. C. Code 29-3-760; requested the Court to reference the Guarantee Agreement attached to the lawsuit for the exact terms of the Guarantee Agreement and requested a Declaratory Judgment for the rights, responsibilities and obligations of each of the parties under the Note, Mortgage and Guarantee Agreement associated with the Properties involved in the Foreclosure. The foreclosure sale was held on April 25, 2012. Meisner testified that she brought one property current and submitted to the Court as Evidence the payment receipt from the Bank in receipt of her payment. After hearing from both the Bank and Meisner, the Honorable Judge Joseph M. Strickland ruled the debt owed on both properties was confirmed and the properties could be sold at the foreclosure sale and instructed Stomski that the Bank should revise the prepared order to include the ruling that Sanddollar and Meisner retained Appraisal Rights. On May 3, 2012 Kathy Clark a paralegal with the Bank's attorney's firm sent an email to Bowens and someone in the Master's office identified as CorneliusS@rc.gov that included attachments which were the proposed orders and record of the hearings in both foreclosure cases. On May 17, 2012 Bank sent an email to Attorney for Defendants Glenn Bowens stating the hearing was held on April 25, 2012 and the scheduled foreclosure sale would proceed on June 4, 2012. On May 29, 2012 the Bank sent a letter directly to Sanddollar and to Meisner indicating

the hearing on April 25, 2012 occurred and a judgment was entered against Meisner and Sanddollar on May 16, 2012. Meisner received the letter dated May 29, 2012 on June 6, 2012; however attorney for Sanddollar and Meisner, Glenn Bowens was not copied on the letter and did not receive a copy of the May 29, 2012 letter indicating the judgments had been filed in the public record. On June 7, 2012, Bowens filed a Motion to Alter and Amend the Order and Judgment filed by the Bank which included attorney fees based on the letter and form 4 judgments sent to Meisner. On July 4, 2012 Bowens sent a letter to the Court requesting to delay the Deficiency Sale for both properties scheduled for the next day July 5th, 2012 so that the Court could consider the Motion to Alter and Amend prior to conducting the sale. Stomski sent a letter to the Court via facsimile dated July 5, 2012 opposing the delay of the Deficiency sale. The letter indicated her clients, the Bank would be prejudiced by delaying the sale for any reason. The Court scheduled a conference call for the morning of July 5th between Stomski, Bowens and Judge Strickland to hear the respective arguments delaying the sale. The Court ruled the deficiency sale scheduled for later in the day on July 5, 2012 would proceed as scheduled. Kevin Knowell, (Knowell) an agent for South Carolina Operating Room Equipment, LLC (SCORE) was the successful bidder on behalf of SCORE, LLC on both properties. SCORE, LLC is a Limited Liability Company in good standing with the Secretary of State's office and Rhonda Meisner (Meisner) is the single member of SCORE, LLC. Later in the day on July 5th, 2012 but prior to the deadline in the Master of Equity's instruction on fulfilling the requirements of the sale, SCORE, LLC deposited the required 5% of the bid price in the second step of complying with the foreclosure sale as outlined in the Master's Order of foreclosure and Sale; the first step being Knowell's bid on behalf of SCORE, LLC. On July 18, 2012 Bowens filed with the Court his Memorandum in Support of the Motion to Alter and amend the judgment. The Court scheduled a hearing on July 18, 2012 to discuss the Motion to Alter and Amend filed by Bowens. Present at the hearing were Bowens, Stomski, Meisner, and Judge Strickland. During the hearing the Court asked the parties to brief their positions on the Guaranty agreement and the application of the Guaranty agreement to the Deficiency amount. The Bank also requested the Court to consider a Motion to Vacate the Judicial Sale and Stomski was directed to consult with her client and then

file a formal Motion if the Bank wanted to file a Motion to Vacate the Judicial Sale. The Bank via Stomski sent a letter to Bowens providing the Affidavit of Attorney's fees. The Bank filed their return to the Motion to Alter and Amend on July 27, 2012. On July 30, 2012 Stomski filed a Motion to Vacate the Judicial Sale on behalf of the Bank naming Meisner and Sanddollar as Defendants but not including SCORE, LLC as a Defendant. On July 31, 2012 Meisner filed a Certified Petition for Appraisal for both properties sold at the deficiency sale on July 5, 2012 which complied with the time constraints associated with the instructions of the Appraisal Statute. On August 8, 2012 the Master's office filed the report on Sale and disbursements and Order of Confirmation of Sale. On August 10, Bowens filed a memorandum on the Guaranty Agreement on behalf of Sanddollar and Meisner. Meisner also filed a Memorandum with the Court on the Guaranty agreement. On August 30, 2012 the Bank filed a Motion to Vacate the Judicial Sale naming Sanddollar and Meisner as Defendants. On September 27, 2012 Rick Gleissner, Attorney for SCORE, LLC made an appearance in the case by filing a notice of appearance and noticing Plaintiff Bank via Stomski and Defendants Sanddollar and Meisner via Bowens. On November 2, 2012 Defendants Sanddollar and Meisner via their attorney Glenn Bowens filed a Memorandum on Judicial Estoppel and the Appraisal Statutes. At the hearing on November 6, 2012 Judge Strickland signed the order Denying Defendants Sanddollar and Meisner's Motion to Alter and Amend the Judgment entered in the public record by the Bank. The Motion to Alter and Amend the Judgment was filed by Bowens on the Defendants behalf earlier in the year on June 7, 2012.On November 8, 2012 Bowens wrote a letter to Judge Strickland outlining the outstanding issues with regard to the foreclosure cases as Judge Strickland had requested at the Status conference on November 6, 2012. On November 7, 2012 Stomski sent a letter to Bowens enclosing the filed stamped copy of the Order Denying the Motion to Alter and Amend which Bowens received on November 10, 2012. The notice of Appeal was filed and served on all parties on December 6, 2012. A copy of the notice of appeal was also sent to the Honorable Judge Joseph M. Strickland on December 6, 2012.

ARGUMENT

1)BECAUSE RESPONDENT FILED A PREMATURE AND INACCURATE FORM 4 JUDGMENT; RESPONDENT HAS CAUSED DUPLICATE JUDGMENTS TO BE FILED IN THE PUBLIC RECORDS IN VIOLATION OF THE SUPREME COURT RULES FOR ENTERING FORM 4 JUDGMENTS AND CONTRARY TO THE ORDER OF FORECLOSURE

Prior to the Foreclosure hearing on April 25, 2012 the Bank and Defendants Sanddollar and Meisner's attorney had agreed the hearing on April 25, 2012 was only to discuss whether or not the foreclosure could proceed and the debt Sanddollar, the only Defendant subject to the foreclosure proceeding owed to the Bank. (R___) The Application of the Appraisal Statutes and application of the Guaranty agreement to the deficiency, if any, would be evaluated after the sale of the properties (R___). Wendy Wolfson Vice President of SCBT (Bank) testified to the debt and to the fact the bank paid attorney's fees to Stomski which is necessary to validate the debt to the Bank prior to initiating the foreclosure proceedings against Sanddollar. However, her testimony was not sufficient to show how Meisner, in her individual capacity owed the identical debts to the Bank (R__). Wolfson's testimony did not identify that Meisner signed the Guaranty agreement in her individual capacity and not as a member of Sanddollar (R__). The Guaranty agreement itself does not designate Meisner's legal status on the form (R__).The Form 4 was filed **prior** to the foreclosure sale, **prior** to the application of the Appraisals and or the valuation of the properties by the Bank and **prior** to the application of the Guaranty Agreement to the debts owed by Sanddollar.(R__) Each of these separate applications of funds or credits would reduce the amount of the judgment to both Sanddollar and Meisner. The Bank erroneously filed judgments against Sanddollar and **contemporaneously** filed the same erroneous amounts of judgments against Meisner. (R____)These amounts were in excess of the amounts identified in the Guaranty agreement and conveyed to third parties that both Sanddollar and Meisner owed **the identical debt** to the Bank **essentially doubling** the judgment amounts owed in the eyes of third parties viewing the public judgment roles (R__). The instructions for filing the Form 4 were not followed (R__) and the Form 4 was not, prior to

filing, signed by the judge (R__). The Form 4 Order indicates the Sanddollar and Meisner each owe $63,734.92 (Civil Action# 11-CP-40-6317) (Appellate Case # 213558) and $43,220.45 (Civil Action# 11-CP-40-6318)(Appellate Case #213559). The Form 4 Order, which was not signed by the Court, is used to index the parties' name and amount of the judgment in the public record. (R__) Based on the instructions for the use of a Form 4 Order, the Plaintiff should not have filed the Form 4 Order. (R__) Instruction # 2 provides: "The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index." (R__)The judge did not sign the Form 4 Order. (R__) Instruction # 10 provides:

When an Order of Foreclosure is filed, neither the parties nor the debt owed should be listed in the Information for the Judgment Index Section, **unless the foreclosure order specifically requires** entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.(R__). Instruction #12 provides: "...subsequent information, including deficiency judgements can be added after the case is over..."

The foreclosure order signed by the court did not specifically require entry of the full judgment amount before the foreclosure sale (R__) The order stated in paragraph 33 that the Order for Deficiency would be entered **after crediting** the proceeds of the sale, not the full judgment before the sale. The Bank ignored the order of the Court and entered the full judgment amounts against Sanddollar and Meisner and entered identical amounts of debts owed to the Bank thereby doubling the amounts owed. (R__) Moreover, counsel for the Bank knew when she filed the Form 4 Order that the sale and appraisal had not taken place and the amount recorded in the public record would be reduced.(R__) Making matters worse, counsel for the Plaintiff sent someone to the foreclosure sale to bid on the properties: $25,000.00 on the Linden Street property and $10,000.00 on the Winnsboro Road property, which meant she **absolutely knew** the amount recorded was **not the correct amount**.(R__) The filing of the Form 4 Order gave the false impression that both Sanddollar and Meisner owed $63,734.92 and $43,220.45 and became

a lien **on all properties** owned by Sanddollar and Meisner **not just the ones subject** to the foreclosure actions (R__). The Guaranty agreement is a separate contract from the mortgage contract. (R__)

The "form 4" should have never been filed as the application of the Appraisals and the guaranty agreements and the foreclosure sales themselves had not yet been completed (R___). Additionally, by the time the Judge signed the order denying the Motion to Alter and Amend the Order on November 6th, 2012 the foreclosure sales **were complete** and the Bank was in possession of the funds received from the Court which were distributed from the sale of the properties which reduced the amounts of the debt at least by $25,001 and $10,501 respectively. Refusing to Amend the amounts entered in the public roles via the Order of Judgment when this information was in front of the Court was clearly erroneous. Sanddollar or Meisner **never** owed the amounts entered in judgment in the public index. This is the very reason the Supreme Court issued the rules against entry of the order on form 4 and why the Court should have required the Bank to remove the erroneous entries based on the Order of Foreclosure and the Supreme Court rules. The judgments are not accurate and therefore they cannot be legal.(R__) Meisner is prejudiced by the entry of the judgments as the judgment affects title to other lands outside of the current action because it creates a lein on other properties owned by Meisner. This is the very reason the Supreme Court issued the Rules for entering judgments in foreclosure cases. Meisner was not the Defendant to the foreclosure action but a guarantor, until the amount determined to be owed by Meisner is decided, the erroneous amounts enrolled in the public roles should not be sanctioned by the Court.

2) BECAUSE RESPONDENTS FILED A MOTION TO VACATE THE JUDICIAL SALE; RESPONDENTS ARE JUDICIALLY ESTOPPED FROM VALUING THE PROPERTY LESS THAN THE VALUE CLAIMED IN THEIR MOTION TO VACATE THE SALE FOR A DEFICIENCY AGAINST APPELLANT.

Also by the time the Court signed the denial of the Motion to Alter and Amend on November 6, 2012, the Bank had admitted the Value of the properties was the amount of their Mortgage on each associated properties in their Motion to Vacate the Sale (R__). By naming Sanddollar and Meisner in

their Motion to Vacate the Sale, the Bank created a Privity of Parties or Privity of Interest in the Valuation of the properties with SCORE, LLC which would not have existed had the Bank not named Sanddollar and Meisner as Defendants in the Banks Motion to Vacate the Judicial Sale (R__). By the time the Motion to Vacate the Sale was filed by the Bank, the Judicial Sale was complete therefore extinguishing any legal or equitable rights that could be claimed by either or Sanddollar or Meisner (R__). Naming both Meisner and Sanddollar in the Motion to Vacate the Sale created a privity of interest between the three entities regarding the valuation opinion submitted by the Bank in the Motion to Vacate the Sale (R__). The Bank's valuation of the properties, the limitations of the Guaranty agreement and the application of the funds received from the Judicial Sale effectively extinguished the liability of Meisner for any outstanding obligations of Sanddollar regarding the foreclosure of the two properties involved.

Privity of Parties/Judicial Estoppel

Privity of Parties deals with the relationship of the parties to the subject matter and not to the relationship between the parties (R__). While the Motion to Vacate the Judicial Sale involves three separate and distinct legal entities, Sanddollar, Meisner and SCORE, by naming Sanddollar and Meisner as Defendants in the Motion to Vacate the Sale in the confines of the foreclosure preceding the Bank created a privity of Parties with regard to the subject of the valuation of the property. Roberts v. Recovery Bureau Inc. 316 S.C. 492, 496, 450 S.E 2d 616,619 (Ct App 1994). In this case, Sanddollar and Meisner lost all equitable and legal interest in the properties subject to the Bank's foreclosure proceedings on June 4th, 2012 (R__). However, Meisner and Sanddollar at the time of the Banks Motion to Vacate Judicial Sale on September 6, 2012 retained an interest in the valuation of the properties under the Appraisal Statutes based on the deficiency demanded by the Bank (R__). The Bank, instead of naming the legal owner of the properties, SCORE, in a **separate and distinct lawsuit**, named both Meisner and Sanddollar as Defendants in their Motion to Vacate the Judicial Sale and tied the Motion to the original foreclosure proceeding. (R__). South Carolina recognizes only two reasons to set aside a Judicial Sale. Specifically, South Carolina will set aside the Judicial Sale when, (1). "The sales price is 'so gross as to shock

conscience [;]' or (2) the sale is accompanied by other circumstances warranting interference from the Court.'" Wells Fargo Bank, N.A. v. Turner, 378 S.C. 147,150,667 S.E. 2d 424, 425 (Ct. App. 2008) (citing Poole v Jefferson Standard Life Ins. *Co.* 174 S.C. 150,157, 177 S.E.24, 27 (1934). In this case, (1) The Court made no error in the sale (2) the price paid **was more than** the Bank was willing to pay, therefore it shouldn't shock the conscience of the Bank (3) there is no "scheme" unless the Bank is suggesting the South Carolina legislature has participated and "authorized" a "scheme" as the purchase by SCORE, LLC conformed to the order of sale by the Master's order and was in compliance with the laws regarding foreclosure sales. The laws of South Carolina do not prevent the Mortgagor from purchasing the properties; therefore to suggest the law prevents SCORE, LLC from purchasing a property in a foreclosure is not consistent with the statutory construct in South Carolina for mortgage foreclosure sales.

Additionally, it is important to note, the Bank does not make any accusations about irregularities in the bidding process or the judicial sale itself, only about the purchaser. Had the property been purchased by the Bank itself, or any other citizen or company, Meisner and Sanddollar would retain their appraisal rights. If it is legal for the Bank to purchase without penalty the same should be true for any other company or individual.(R__).

In their Motion to Vacate the Judicial Sale of the properties, in Foreclosure actions 11-CP-40-6317 and 11-CP-40-6318 the Bank and has claimed that the value of the properties **should be set at the mortgage amount** for the properties (R__). Defendants "Sanddollar" and "Meisner" previously petitioned the court for their Statutory Appraisal Rights and the bank has conceded both entities maintain their statutory rights to an appraisal (R__). South Carolina Operating Room Equipment, LLC (SCORE) outbid the Bank at the deficiency sale and became the legal and equitable owner of both properties upon receipt of the deed from the Richland County Master in Equity (R__). The Bank, by naming Sanddollar and Meisner as defendants in the Motion to Vacate the Judicial Sale has created a "privity of parties" with regard to Bank's valuation of the properties based on the Appraisal Statutes and Common Law Doctrine of Equity. (R__).

3)BECAUSE RESPONDENTS NAMED APPELLANTS AS DEFENDANTS IN THE MOTION TO VACATE THE JUDICIAL SALE; RESPONDENTS CANNOT CHANGE THEIR POSITION ON THE VALUATION OF THE PROPERTY FOR THE DEFICIENCY ACTION.

Appraisal Statute

The Appraisal Statute was specifically instituted to protect Mortgagors from Mortgagees foreclosing on properties; then under-bidding at the Judicial Sale only to later sell the property for a profit and subsequently demand a large deficiency from the Mortgagors and or Guarantors. (R__). Here, the Bank's scheme to bid low at the judicial sale as contemplated by the Legislature in enacting the Appraisal statute is **admitted** by the Bank in both the bidding process **and the valuation of properties** via the Motion to Vacate the Judicial Sale (R__). The Bank knew the properties were worth more than the amount they bid at the judicial sale, but still bid a minimum amount (R__). The Bank was not prejudiced by SCORE, LLC's purchase of the property in excess of the Bank's bid, to the contrary, the bank should have bid an adequate amount initially. South Carolina is one of the few states that does not hold the purchase price against the purchaser even when the purchaser is the Mortgagee. (R__). The Bank then argued in the Motion to Vacate the Judicial Sale that " ... the mortgage value is a fair gauge of the property's value in the hands of a buyer" of the properties is the amount of the Mortgage owed on the properties. (R__). The Bank further argues the Court could set aside a sale when the "... the discrepancy between the winning bid and the fair market value" ... The Bank seems to forget that the Bank is the one who's bid was upset. The Bank should have bid the "fair market value". (R__).

Meisner and Sanddollar accepted the Bank's "mortgage amount" valuation of the properties under the Appraisal Statute (R__). The Appraisal Statute gives a specific process for valuing the properties where a deficiency is demanded to protect the Mortgagors and or Guarantors in the valuation of properties. (R__). As such, the Statute on Deficiency Sales states the Mortgagee must put their highest and best bid at the time of the Judicial Sale. (R__) The Appraisal Statute also gives guidance to who would qualify as an appraiser for the purpose of setting the value of the property. The Court gave direction to both parties to get the properties appraised and submit the value to the court if both appraisers

agreed. (R__) If the appraisers did not agree, the Court would appoint a third appraiser and come up with the value if necessary. (R__) In this case, prior to the return of the appraisers, the Bank itself, via the Motion to Vacate the Judicial Sale, valued the properties at the amount of the mortgage which was accepted by Sanddollar and Meisner.(R__). In order to increase the amount of the of the deficiency judgment against Sand Dollar and Meisner, the Bank intends to suggest a lower value for the properties under the Appraisal Statute. The Bank is asking the Court to determine the amount owed in the deficiency judgment based on these **lower** property values when it previously asked the Court to set aside the foreclosure sale by valuing the properties at the market property values represented by their respective mortgages (i.e. $62,280.00 for # 6317 and $36,000.00 for # 6318).

The Bank is judicially estopped from changing its position on the facts regarding the value of the property between the Motion to Vacate the Foreclosure Sale and the Motion for a Deficiency Judgment. The Bank asserted the value of the properties was the value of the mortgage in order to attempt to set aside the foreclosure sale, it cannot now claim a different property value for same properties in order to increase the amount of the deficiency judgment. The South Carolina Court of Appeals has held:

> "[j]udicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation."
>
> When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him

Cothran v. Brown, 350 S.C. 352, 566 S.E.2d 548 (S.C.App. 2002).

The Bank bid low at the judicial sale in order to get the properties so that it could turn around and sell them at a higher price and make a profit while at the same time pursuing a deficiency judgment against Sanddollar and Meisner. The Bank is seeking to increase the amount of the deficiency judgment by

changing its position on the value of the property and is asking the Court to aid it in its scheme to both make a profit on the property and increase the amount of the deficiency judgment; the Bank's scheme is not equitable.

Ironically, it was the Bank's premature and inaccurate indexing of judgments against Sanddollar and Meisner that prevented either entity from being able to secure financing in order to re-purchase the properties and subsequently resulted in the Bank's "confession" of the true value of the properties (R__). The motive for the Bank's actions is simple and has three separate and distinct parts. First, the Bank filed the Motion to Vacate the Sale against Sanddollar and Meisner to have a second chance to get ownership of the properties and the equity (R__) e.g.: the chance to re-bid; the South Carolina Deficiency Sale Statute specifically requires the Mortgagee to enter their highest and best bid at the foreclosure sale (R__). Second, they filed the Motion to Vacate the Judicial Sale in connection with the foreclosure proceeding in to attempt to continue to have the attorney's fees paid by the Defendants which was not contemplated in the original mortgage agreement. Third, if Sanddollar or Meisner would have been the successful bidder, the Bank would **not** have tried to Vacate the Sale and in their argument for the "Motion" mistakenly admit the Bank's true opinion of the value of the properties to the Court (R__) Had Sanddollar or Meisner re-gained ownership of the properties, the previously filed erroneous form 4 judgments would immediately attach to the properties and the Bank would still have received the equity. Had the Bank purchased the property, they could have sold the properties for a profit and still claimed the erroneous judgments filed against both Meisner and Sanddollar (R__). The only problem with the Bank's "motion to vacate the judicial sale" as it played out in front of the Court was the fact that inadvertently, the Bank admitted the value of the properties should be set at the amount of the mortgage associated with the properties.

Meisner testified that she had lost her job and that the tenants at both properties were unable to pay their rent as the reason for non-payment of the mortgages. (R__) She further testified that she had previously brought one property current and was attempting to catch up the payments on the other

property from her recent job loss when the Bank refused to accept payments on either property and initiated the foreclosure actions. (R__). In 2010 the Supreme Court announced stricter scrutiny of foreclosures and a process to evaluate the actions of Banks when a Mortgagors primary home was involved. (R__). These properties did not qualify for the protective order the Supreme Court issued as they were rental properties. (R__). However, the Supreme Court did make reference to the fact that foreclosure should be the last resort not be the first tool to be taken out of the tool box (R__).

Guaranty Agreement

During a hearing held on July 18, 2012, the Court requested the parties brief the issue of the application of the Guaranty Agreements with regard to the liability of Meisner on any deficiency judgment as Defendants had previously filed a motion for a Declaratory Judgment in their answer and counterclaim to the original foreclosure proceeding. (R__)

The Defendants' Answer & Counter Claim previously had asked for a declaratory judgment to determine the parties' rights and liabilities under the Note, Mortgage and Guaranty Agreement and to determine the rights and obligations of the parties with respect to the amount of the deficiency judgment requested by the Plaintiff.(R__) The Guaranty Agreements placed monetary limitations on Meisner's personal liability.(R__) Meisner sought this declaratory judgment because she wanted to make certain that, should there be a deficiency judgment, her liability did not exceed those limitations.(R__).

During the trial of Civil Action 11-CP-40-6317(Appellate case # 213558) and 11-CP-40-6318(Appellate case # 213559), held on April 25, 2012, the Plaintiff presented two Guaranty Agreements executed by Meisner guaranteeing payment of the two promissory notes between the Plaintiff and Sanddollar.(R__) Meisner claims her maximum liability for a deficiency judgment based on these Guaranty Agreements is $31,140.00 for the loan in 11-CP-40-6317(appellate case # 213558) and $36,000.00 for the loan in 11-CP-40-6318 (Appellate #213559) as provided in the two respective Guaranty Agreements the Bank sued for in the foreclosure proceedings; Meisner requested the Court

issue a declaratory judgment to that effect.(R__) A review of the guaranty agreements in question offers no evidence of whether Meisner was acting in her personal capacity or as a member of Sanddollar (R__) There are no words such as "Personal Guaranty" or "Jointly and Severally" or "individually and "corporately" or "acting as a member on behalf of Sanddollar." In fact, without acknowledgement from Meisner, a reader of the guaranty would not be able to determine Meisner's legal capacity reading the agreement. There are no "articles of instruction" for members or "articles of organization" required as part of the loan for Sanddollar indicating Meisner had been given authority to act as a Member of Sanddollar.(R__) Since none of the LLC documents are attached to the loan, it is not unreasonable to presume that the Guaranty agreement could serve the function of providing a "right to act" agreement on the behalf of the LLC by Meisner as part of the loan processing.(R__) As such, an independent reviewer would not recognize without additional information whether the guarantees were executed in Meisner's personal capacity or in the capacity of "member" Sanddollar 31, LLC. While Meisner acknowledges the guaranty was presented to her as a personal guaranty for a business loan; an outside reader of the documents might not be able to discern the relationship of Meisner to Sanddollar and the intent of the parties, further giving credence to the fact the guaranty is ambiguous and therefore requires extrinsic evidence to interpret the intent of the parties. (R__)

Meisner claims that the purpose of the Guaranty Agreements and the intent of the parties was to guarantee the Plaintiff received $31,140.00 for the loan in 11-CP-40-6317 and $36,000.00 for the loan in 11-CP-40-6318 should Sanddollar default. These amounts represent the money actually loaned by the Plaintiff to Sandollar. Meisner also claims that if the high bid at the foreclosure sale **or the appraised value was equal to or exceeded** those amounts, then her liability under the Guaranty Agreements will be satisfied as the Plaintiff will have received the guaranteed amounts provided in those agreements.(R__)

Meisner bases her claim that the Guaranty Agreements limit her liability to $36,000.00 and $31,140.00 on three basic grounds. First, the Guaranty Agreements specifically states the maximum dollar amount in paragraph A. Second, paragraph 4 provides that the guarantor is liable for "all

indebtedness, without limitation as to amount" if "no amount is stated." However, since an amount is stated, i.e. $31,140.00 and $36,000.00, then the guaranty is limited to those amounts. Third, this was the understanding of the parties at the time the Guaranty Agreements were made, based on representations made by the Bank to the effect that the amount guaranteed was the dollar amount stated in the agreement.

The Bank disagrees with Meisner's interpretation of the Guaranty Agreements and claims she owes $63,734.92 in 11-CP-40-6317[1] (appellate #213558)and $43,220.45 in 11-CP-40-6318 (appellate #213559); these amounts represent the money actually loaned to Sanddollar **plus** other debts allegedly incurred by Sanddollar in the form of attorney fees, interest, corporate charges, late charges, taxes, escrow advances, costs of litigation and other charges. The Bank bases these claims on its interpretation of paragraph 4 of the guaranty; however, paragraph 4 is in conflict with paragraph A. The Bank's interpretation of Paragraph 4 reveals an inherent ambiguity between paragraph 4 and paragraph A.

Guaranty agreements are contracts[2] and their interpretation is governed by the same contract law principles as any other contract. The South Carolina Court of Appeals has held:

> A contract is ambiguous when the terms of the contract are reasonably susceptible to more than one interpretation.
>
> The uncertainty in interpretation can arise from the words of the instrument, or in the application of the words to the object they describe.
>
> Whether a contract is ambiguous must be determined from the entire contract and not from any isolated clause of the agreement. Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 672 S.E.2d 799 (Ct.App.2009) (internal citations omitted)

When a contract is susceptible of more than one interpretation, the non-drafting party is given the benefit of the ambiguity. The South Carolina Supreme Court has held:

---

[1] This amount represents more than double the amount identified in the Guarantee Agreement.
[2] Transouth Financial Corp. v. Cochran, 324 S.C. 290, 478 S.E.2d 63 (Ct. App. 1996)

It is generally held that an ambiguity in a written contract should be construed most strongly against the drafters. We quote, with approval, the following from 17A C.J.S. Contracts § 324:

"(A)mbiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage.

The reason for the rule of strict construction against the party preparing the contract is that one who speaks or writes can, by exactness of expression, more easily prevent mistakes in meaning more than one with whom he is dealing, and that he who has brought the agreement into existence and is thus primarily responsible for its inadequacy should justly suffer for its shortcomings."

Myrtle Beach Lumber Company, Inc. v. Willoughby, 276 S.C. 3, 274 S.E.2d 423 (S.C. 1981).

There is no dispute that the Guaranty Agreements at issue were drafted and prepared by the Bank. Based on the Supreme Court's holding, the ambiguity must be resolved in favor of Meisner. The parties' conflicting interpretations requires the Court to interpret the agreement and issue a declaratory judgment. When a written contract is ambiguous extrinsic evidence may be admitted to determine the parties' intent. Duncan v. Little, 384 S.C. 420, 682, S.E.2d 788 (2009).

The Guaranty Agreements in the two cases are pre-printed forms and are identical with the exception of the dates and dollar amounts. Both Guaranty Agreements contain two options, Paragraph A and B, with a box beside each paragraph, one of which is to be marked with an "X". Paragraph A was marked in both 11-CP-40-6317 and 11-CP-40-6318. Importantly, Paragraph A limited the amount

guaranteed to $31,140.00 (11-CP-40-6317) and $36,000.00 (11-CP-40-6318) respectively. On the other hand, Paragraph B, which was **not checked**, required payment by the guarantor of:

> ...each and every debt, liability and obligation **of every type and description** which Borrower may now or at any time hereafter owe to lender (**whether such debt, liability or obligation now exists or is hereafter created or incurred**, and whether it is or may be direct or indirect, due or to become due, **absolute or contingent**, primary or secondary, liquidated or unliquidated, or joint, several or joint and several; all such debts, liabilities and obligations being hereinafter collective referred to as the "indebtedness"). (emphasis added)

The Bank claims that Meisner is liable for payment of Sand Dollar's debts beyond the $31,140.00 and $36,000.00 stated in the guaranty are exactly the type of debts contemplated by Paragraph B; at the time the Guaranty Agreement was executed these other debts:

(1) did not exist;

(2) they were neither created nor incurred;

(3) were indirect and secondary to the amount borrowed;

(4) were contingent and had not yet become due.

The Bank wants to focus just on paragraph 4 which itself is ambiguous; however, when interpreting a contract the contract must be read as a whole, without focusing on any single provision to determine the contract's meaning. Pee Dee Stores, at 242. Paragraph 4 must be interpreted in light of paragraphs A and B. The Bank's argument that paragraph 4 makes Meisner liable for these additional debts would make more sense if Paragraph B had been checked; however, the parties did not check Paragraph B. Even under the Bank's interpretation that the specific dollar amount stated in the Guaranty

Agreement referred to the amount of "principal" guaranteed, the Plaintiff still claims $48,698.20 is due in principal in 11-CP-40-6317(Appellate Case 213558), when the Guaranty Agreement only provided for $31,140.00, which is over $17,000.00 more in principal than the Bank is allowed under its own interpretation of the agreement.

The question before the Court is whether the Guaranty Agreements place a monetary limitation on Meisner's personal liability (as claimed by Meisner) or whether Meisner's liability is unlimited (as claimed by the Bank). The South Carolina Court of Appeals has held:

> Although not yet decided in South Carolina, in the absence of an express limitation of an amount of a guaranty as a general rule the amount of the liability, or, in other words, the measure of damages, on a default by the principal obligor is that amount of loss which the guarantee has sustained by reason of such default ... PPG Industries, Inc. v. Orangeburg Paint Center, Inc., 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988)

The Guaranty Agreements in these cases do place "an express limitation of an amount" i.e. $36,000.00 and $31,140.00. If the parties intended for her liability to extend beyond the stated dollar amounts then paragraph B would have been marked. Based on the holding in PPG Industries, and Myrtle Beach Lumber Company, the ambiguity created by paragraph 4 and paragraph A must be resolved in Meisner's favor. Furthermore, the Bank has valued the property at the mortgage amount of the property which effectively satisfies the guaranty agreement.

4)BECAUSE RESPONDENTS HAVE NOT FILED AN AFFIDAVIT OF ATTORNEY FEES OR ITEMIZED STATEMENT WITH THE COURT AND RESPONDENTS HAVE NAMED APPELLANTS IN ACTIONS OUTSIDE OF THE MORTGAGE FORECLOSURE ACTIONS; ATTORNEY FEES SHOULD BE DENIED OR ADJUSTED

As of July 31, 2012 the Bank's attorney had still not filed with the Clerk's office the affidavit of attorney's fees to provide proof of the reasonableness of the fees under the Jackson v. Speed criteria. The

Bank claims attorney fees in the following amounts: (1) $3,321.00; (2) $2,679.00; and (3) an undisclosed amount for attorney fees under the category of "Allowable Advances." The Bank claims over $6,000.00 in attorney fees related to the Linden Street property. This same property was previously foreclosed upon and the court awarded $2,900.00 in attorney fees, less than one half the amounts being claimed in the present case (R__) The court should deny this request for attorney fees without documentation supporting a claim for fees that are double the amount of the previous foreclosure on the same property.

Second, in Civil Action # 11-CP-40-6318(appellate case # 213559) the Bank claims attorney fees in the following amounts: (1) $4,924.00; (2) $3,760.00; and (3) an undisclosed amount for attorney fees under the category of "Allowable Advances." The Bank lists as "Allowable Advances": "escrow advances;" "corporate charges," "expenses from the foreclosure action" and an ambiguous charge for "other charges." The Bank did not separately identify the amounts allocated from the $6,263.60 for each of these charges. Without an affidavit and itemized statement of attorney fees and costs it is impossible for the Court to evaluate the propriety and reasonableness of these claimed charges or for the Defendants to decide if these charges are objectionable.

The Court must evaluate the reasonableness of the claimed attorney fee based on the six factors outlined by the Supreme Court in Jackson v Speed, 326 S.C. 289, 486 S.E.2d 750 (1997). The Supreme Court held that the trial judge should consider the following six factors when determining the reasonableness of a claim for attorney fees: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. Id. The Supreme Court also held that "on appeal, an award for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor" Id. The Court cannot accomplish this task without an itemized statement of attorney fees and costs. The Court should also consider that the Defendants offered to settle the case without the necessity of going to court and made a payment to bring the loan current when deciding the issue of attorney fees. The Bank has engaged in conduct that Meisner considers to be improper,

fraudulent, libelous, abusive and in violation of rules governing the filing of form 4 orders: (1) filing an order with a judgment amount the Bank knew was not correct and/or final, especially when the Bank knew it was going to be bidding on the properties at the foreclosure sale and thereby reduce the amount of the judgment by the amount of the bid; (2) filing an order without obtaining the trial court's signature on the order; (3) filing an order in violation of the instructions; (4) failing to notify Meisners' counsel that the proposed order had been transmitted to the court; (5) failing to notify Meisner's counsel that the order had been signed and filed; and (6) sending a letter, in an attempt to collect a debt that was in litigation, directly to Meisner when the Bank knew Meisner was represented by counsel.

The Appellant requests the Court consider the Plaintiff's conduct, which Meisner contends constitutes unclean hands, when deciding the Bank's request for attorney fees. As a result of the Bank's conduct, Meisner has been required to incur additional attorney fees and costs unnecessarily. By the Bank's actions the Bank has tried or will try to collect attorney's fees not contemplated in the original mortgage contract eg: the Motion to Vacate the Sale. The Appellant requests the court award Appellants' attorney fees and costs and/or make an appropriate adjustment to the attorney fees and costs that may be awarded to the Bank to offset the fees and costs incurred by the Defendants with respect to this motion.

Additionally the Attorney's for the Bank has increased the costs associated with this litigation by filing the Form 4 prematurely and inaccurately and therefore causing a required defense response. Many of the actions and hearings associated with this case are the results of the Bank's attorneys trying to garner rights for the Bank not available legally; such as trying to limit the Appraisal rights of Meisner, naming Meisner as a defendant in an action that does not legally include them e.g.: Motion to Vacate the Judicial Sale and by threatening to sue Meisner for comments made in open Court which counsel for the Bank knows these comments have an absolute Privilege.

Conclusion

The entry of the judgment amounts on the Form 4 against Meisner in the public record is clearly erroneous. The Form 4 did not have the Judge's signature prior to entering the full judgment of Sanddollar's debts against Meisner. Additionally, the Order of Foreclosure did not dictate the full judgment amount should be entered for Sanddollar much less Meisner, the Guarantor, prior to the foreclosure sale. The enforcement of a Guaranty agreement necessarily assumes there is something to enforce. On November 6th when the written order was signed, The Court had considered the Guaranty agreement, Appraisal Statute arguments, the Privity of Parties and the Judicial Estoppel argument regarding the valuation of the property's value and still sanctioned the entry of judgment in the public roles by denying the Motion to Alter and Amend the Judgment. The Order ruled against the Defendant with regard to the Guaranty agreement, otherwise the order would have been vacated and replaced. The Order did not set the valuation of the property suggested by the Bank and accepted by the Defendants via the Appraisal Statute by allowing a judgment stand for the full amount against Meisner. Furthermore, the Bank has admitted the "bad deeds" of bidding a minimal amount and then confessing the true value of the property in front of the Court. This information is usually hidden behind the walls of the institution, but here in front of the Court of Equity such inequitable behavior should not be tolerated. The only value for the properties in front of the court is the suggested "mortgage value" put forth by the Bank in their Motion to Vacate the Sale and the "mortgage value" was accepted by the Defendants.

For the reasons noted above, The Court should not sanction a retroactive approval of inappropriate judgments being enrolled in the public indexes. As officers of the Court, Attorney's not following the Supreme Court rules for the entry of judgments should have some economic repercussions considering the economic hardship this causes Defendants. Furthermore, this retroactive approval of inappropriate actions further emboldens the Bank's attorneys to "take action" then beg for forgiveness later. In the instant case, the judgments filed against Meisner have never existed in the amounts enrolled in the public roles.

Appellants request the Court to reverse and remand the ruling of the Master in Equity. The Appellant prays to have the judgment against Meisner removed from the public roles. Appellant further prays, The Court issue a decree that the naming of the Defendants in the Motion to Vacate created a privity of parties and the Bank is Judicially Estopped from entering a different value for the property for determining the deficiency if any. The Appellant further prays that the attorney's fees associated with these foreclosure actions be reviewed and adjusted in light of the Plaintiff's actions.

Respectfully Submitted,

Rhonda L. Meisner, Appellant
P.O. Box 689
Blythewood, SC 29016
(803)960-3696

3/8/2013

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Master-in-Equity

Joseph M. Strickland, Master-in-Equity Court Judge

2012-213559

SCBT,N.A.

Respondent,

v.

Sand Dollar 31, LLC; Rhonda Meisner; of whom Rhonda Meisner is Appellant,

Appellant.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Rhonda L. Meisner
P.O. Box 689
Blythewood, SC
29016
(803)960-3696

PROOF OF SERVICE APPELLANT INITIAL BRIEF AND DESIGNATION OF MATTER

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Master-in-Equity

Joseph M. Strickland, Master-in-Equity Court Judge

Case No. 2012-213559

SCBT, N.A.

Respondent,

v.

Sand Dollar 31, LLC; Rhonda Meisner; of whom Rhonda Meisner is Appellant

Appellant.

PROOF OF SERVICE

I certify that I have served the Initial brief and the designation of matter in the above matter on SCBT, N.A. by depositing a copy of it in the United States Mail, postage prepaid, registered mail on January 30, 2013 addressed to its attorney of record, Teri Stomski, Rogers, Townsend and Thomas, PC 220 Executive Center Drive Columbia, South Carolina 29210.

March 8, 2013

Rhonda L. Meisner, Appellant
Post Office Box 689
Blythewood, South Carolina 29016
(803) 960-3696
Appellant