THE STATE OF SOUTH CAROLINA In
the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Joseph F. Strickland, Master in Equity Judge

Case No. 2018-00251

South State Bank, Respondent,

v.

Sand Dollar 31, LLC, and Rhonda Meisner,

of whom Rhonda Meisner is Appellant.

REPLY BRIEF OF THE APPELLANT

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Appellant

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The appellant respectfully replies to the Respondents Initial Brief and offers correction of certain facts which are supported by the record.

First, the respondents claim that this Honorable Court cannot review certain findings of fact in this case such as: "Meisner's personal liability for the deficiency judgments is the law of the case and is not reviewable by the Court"... and instructs this Court the court " must disregard 13 pages of Meisner's appellate brief."

The appellant respectfully disagrees with the respondent that this Court cannot review the Appellant's personal liability and craves a review by this Court of the complete lower court record. At issue are two motions to alter and amend the judgments pursuant to S.C. R. Civ. P. Rule 52, 59, and 60 which will be further analyzed below. The S.C.R. Civ. P. Rule 59 (e) that was filed June 7, 2012 was ruled on by written order of the court November 7, 2012 and was the subject of the first appeal. The other oral motion that was made and granted during the hearing July 18, 2012 was not ruled on until final judgment in 2017.

REVIEW OF FACTS LEADING TO THE JUNE 7, 2012 MOTION THAT WAS RULED ON NOVEMBER 6, 2012.

In 2012, appellant Meisner received a letter directly from the respondent BANK, even though she was represented by counsel at the time, dated May 29, 2012 but received on June 6, 2012 which included an *unsigned* form 4 Order that indicated personal judgments were filed against her as a result of the April 25, 2012 foreclosure hearing.**(R.VOL. I. p. 451:1-22)** Respondent BANK, contrary to the instructions on the Form 4, had entered an order for the entire debt into the public roles against appellant Meisner without the application of the foreclosure sales price, the deficiency sales price, or the appraisal amounts *contrary* to the deficiency statute. **(R. VOL. I. p. 451:1-4)** S. C. Code Ann. §29-3-660.

The entry affected the appellant's rights to other properties owned in her name which were not included in the foreclosure proceeding. Upon receipt of the form 4 orders, the appellant informed her attorney about receiving the unsigned and unstamped form 4 orders and the very next day, the appellant's attorney filed a motion to alter and amend *those* filed judgments because the deficiency had not been determined.**(R. VOL. I. p. 450:4-8)**.

There was significant confusion about what was properly served on the defendants based on sending the form 4 directly to the appellant; However, once the attorney for the defendants was informed that a judgment against the appellant was filed personally, he filed the June 7, 2012 written motion to alter and amend pursuant to S.C.R. Civ. P. Rule 59 (e) motion. **(R. VOL. I. pp 450:16-25; 451:1-17).**

A. The June 7, 2012 Motion to alter and amend

The June 7, 2012 Motion to Alter and Amend which was the subject of the previous appeal occurred:

before the July 5, 2012 deficiency sale, **(R. VOL.II P.592)**
before the defendants July 31, 2012 verified application for Order of appraisals, **(R. VOL.II pp.521-528)**
before the determination of the deficiency amounts, **(R. VOL. I. pp.9-18; VOL II. Pp.905-918)**
before the parties briefed the guaranty agreement pursuant to the Master in Equity's oral order, **(R. VOL. II. pp. 646-65)** and
before the respondents Motion to Vacate the deficiency sale. **(R. VOL. II. Pp. 581-591)**

As the respondent notes, an oral order of the court *can* be changed by the court in the written order; however, here, the Court did not change its verbal order regarding the June 7, 2012 motion. The court specifically denied the June 7, 2012 order orally and instructed the respondent BANK to draft a non-argumentative order to that effect which he ruled on November 6, 2012 **(R. VOL. I. p. 472:11-16) (R. VOL. I. pp.36-7.)**

As the court noted during the July 18, 2012 hearing on the June 7, 2012 motion, the judgment of foreclosure and the amount due is required to be entered for the foreclosure defendant before the foreclosure sale can occur. **(R. VOL I. p.470:15-18)** The BANK confirmed this judgment was filed with the court. **(R. VOL.I. p. 470:9-10)**

At the same hearing the court also *granted* the defendants oral motion to take testimony regarding the guaranty agreement pursuant to S.C.R. Civ. P. Rule 52, 59, 60 over the BANK's objection which the BANK did not appeal. **(R. VOL.I. pp 472:6:25; 473:1-22)**

Rule 52 (b) specifically provides:

> When findings of fact are made in actions tried by the court without a jury, the *question of the sufficiency of the evidence to support the findings* may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings *or has made a motion to amend them* or a motion for judgment. (emphasis by the appellant)

Contrary to the respondent's assertions, the respondent BANK understood the court's oral denial of the June 7, 2012 motion because the BANK referenced this fact in the hearing held on July 18, 2012 to clarify that the court was denying the June 7, 2012 motion and to make a non-argumentative order to that effect. **(R. VOL.I. pp 472:11-15).** The BANK also understood that the court granted the oral motion over the BANK's objections because the BANK referenced the oral order in its August 10, 2012 memorandum regarding the guaranty agreement. **(R. VOL.I. pp 473:10-18).**

B. **The July 18, 2012 S.C.R. Civ. P. Rule 52, 59, 60 Oral Motion**

The attorney for Sand Dollar 31, LLC and the appellant, in the lower court proceedings, made an oral motion (in the presence of a court reporter) pursuant to S. C. R. Civ. P. Rule 52, 59 and 60 motion to brief the guaranty agreement(**R. VOL. I. p. 457:11-21**). The BANK objected to the oral motion **(R. VOL. I. p. 473:10-16).** The Master in Equity overruled the BANK's

objection to the motion and ordered the parties brief the guaranty agreement. (**R. VOL. I. p. 473:17-8**). The respondent BANK *did not* appeal this decision by the Master in Equity and complied with the court's oral order for both parties to brief the guaranty agreement.

The respondent BANK, Sand Dollar 31, LLC the foreclosure defendant, and the appellant, through its respective attorneys complied with the oral order of the Master in Equity to brief the guaranty agreement. **(R. VOL. II. p. 646-653) (R.VOL. I. p. 328:9-25)** The June 7, 2012 Motion to Alter and Amend was interlocutory in nature and was heard by this Honorable Court of Appeals because it affected substantial property rights of other properties owned by the appellant and affected the right of the respondent BANK to have legally foreclosed on the properties pursuant to S.C. Code Ann.§29-3-630. **(R. VOL I. p.470:15-18)**.

This Court, in the initial appeal, ruled some issues brought up by the appellant in the first appeal had not been ruled on by the Master in Equity in the first appeal and were therefore not available for review. These premature arguments of the appellant in the first appeal based on the timing of the orders *does not* preclude this Court from review of the final judgments in this case, now that the Master in Equity has finally ruled on the outstanding issues. The second oral S.C.R. Civ. P. Rule 52, 59, and 60 motion that was granted during the June 18, 2018 hearing was not ruled on until 2017 with the Master in Equity's written order.

The appellant avers all issues regarding the personal judgments against the appellant are available for this Honorable Court to review based on the motions and timing in this case.

JULY 18, 2012 HEARING

The Court and the respondent acknowledged during the July 18, 2012 hearing, that the deficiency amounts had not yet been entered **(R.VOL I. p.455:22-25)**; **(R. VOL. I. p.450:4-8)**.Counsel for Sand Dollar 31, LLC and the appellant argued that some issues were deferred at

the April 25, 2012 foreclosure hearing including the final judgments. **(R. VOL I. p.450:16-25).** At the April 25, 2012 foreclosure hearing the BANK stated:

> there are certain matters that the plaintiff and the defendant agree are not in controversy *at this point* and the *only thing* we'll be taking testimony on is the *amount of the debt and the foreclosure itself*, and I believe those are the only matters that are outstanding. (emphasis added by appellant)

Counsel for the defendant Sand Dollar 31, LLC and the appellant understood that the final judgment against the parties would be determined after the deficiency sale of the property and the application of the appraisals. **(R. VOL I. p.450:16-25)** All parties briefed the guaranty agreement in August of 2012 which was not ruled on until 2017. The appellant respectfully avers that this Court can review whether the respondents proved that appellant Meisner was personally liable for the debts of Sand Dollar 31, LLC in the April 25, 2012 foreclosure hearing as suggested by the respondents and the final judgment and orders are appropriate given the facts of the case.

ENFORCEMENT OF THE GUARANTY AGREEMENT AGAINST APPELLANT PERSONALLY

As an initial matter, the respondent admits and reiterates in its initial brief, it brought an action in equity to enforce another legal entity's guaranty agreement without entering into evidence assignment, transfer, or ownership, of the guaranty agreement in question. [1]**(R. VOL I. P.456:1-16) (R. VOL. I. p.21) (R. VOL. I. pp.9;19) (R. VOL.II p. 905);**

This Court can take its own view of facts in equity cases. Here, as argued via S.C.R. Civ. P Rule 52 (b) evidence is lacking to support the Master in Equity's determination that the BANK

[1] During the pendency of the first appeal, the respondent requested and was granted to change the title of the case to its legal name currently, South State Bank; however, this does not change the fact the respondent has not, prior to the trial or during the trial, offered evidence of ownership or enforcement of the guaranty agreement in question in the name of South Carolina Bank and Trust, N.A. by SCBT, N.A. (the plaintiff in the lower court) during the pendency of this litigation.

proved the capacity by which the appellant signed the guaranty in the trial. **(R. VOL. I pp.9-18)(R. VOL. I. p. 329:6-15).** The respondent BANK, during the foreclosure hearing, entered no evidence or testimony that the guaranty agreement was a personal guaranty, **(R. VOL. I pp.483:10-25;484:1-16) (R. VOL. I. p. 329:6-15).** including the guaranty agreement. **(R. VOL. I pp. 153; 484:4-13)** The 1st Amend. Compl. Requests a *personal judgment* against Sand Dollar 31, LLC **(R. VOL. I pp. 78-9 ¶ 29).** The respondents request payment from defendant Meisner on "less any sums which plaintiff may receive from on the note" **(R. VOL. I pp. 82 ¶ 10)** The characterization of the guaranty agreement as personal was limited to the title of the claim. **(R. VOL. I pp. 79-80 ¶ 34-39).** However, not only was this fourth cause of action against Meisner denied in the answer, the respondent did not prosecute or put forth any evidence during the trial on April 25, 2011 or at any time thereafter of the personal capacity of Meisner as the signer of the guaranty agreement. [2]

Second, the respondents attempt to limit the declaratory judgment action to only reserving the appellant's appraisal rights but the declaratory judgment action specifically sought the court's determination "as to the responsibilities and obligations of the parties under the notes, mortgages, and guaranty agreements." **(R. VOL. I pp.155-165).** Importantly, in the judgment of foreclosure and sale, the Master in Equity awarded to the plaintiff a deficiency *or* a personal judgment, but not both. **(R. VOL.II p.503 ¶ 18)**

As the respondent notes, the Master in Equity held a final foreclosure hearing in both cases. **(Resp. In. Brief. p. 2¶ 4)** However, Sand Dollar 31, LLC was the mortgagor and the BANK at the outset of the hearing indicated the hearing was limited to the amounts owed and the

[2] The appellant acknowledged to the Court that she signed the agreement in her personal capacity in post- trial hearings and as a direct result of a question by the Master in Equity.

foreclosure, which counsel for the appellant confirmed that the appraisal and amounts owed would be determined later. **(R. VOL. I. p.477:6-16)** The BANK *never* prosecuted its fourth cause of action during the April 25, 2012 foreclosure hearing or at any time thereafter.

The appellant respectfully replies to the Respondent's Initial Brief:

I. Appellant's reply to "Meisner's personal liability for the deficiency judgment is the law of the case and not reviewable by this court."

The respondent BANK's claim "Meisner's personal liability for the deficiency judgement is the law of the case and not reviewable by this court" is not supported by the record or the second oral S.C.R. Civ. P. Rule 59 e that was made in the presence of a court reporter. **(R. VOL. I. p.457:18-21).**

The appellant argues the BANK's valuation in its motion to vacate the deficiency sale and the defendant's acceptance of that valuation in the lower court defeats any deficiency owed by the appellant because both parties valued the properties at the amount of the mortgage.**(R. VOL. II p. 531¶2; 895) (R. VOL.II p.638: n. 1)**

Respondents in this case demanded a deficiency from the parties therefore, the foreclosure was governed by the deficiency statute. S.C. Code Ann. § 29-3-630. Contrary to the respondents assertions, the attorney for Sand Dollar 31, LLC and the appellant confirmed that both defense parties chose an appraiser, Angela Buckley, at the July 18, 2012 hearing and that "they" would file the verified petition for appraisal before the deadline of July 31, 2012 **(R. VOL.I. p.471:5-20).** Therefore, even though the application for verified petition for appraisal was signed by the appellant as an individual and the single member of Sand Dollar 31,

LLC, the appellant was not "representing" Sand Dollar 31, LLC in this regard. ((**R. VOL.I. p.471:5-20).** Throughout the proceedings Sand Dollar 31, LLC was represented by attorney Glenn Bowens. Additionally it was Mr. Bowens who accepted the BANK's value on behalf of Sand Dollar 31, LLC and the appellant as the amount of the mortgage. (**R.VOL.I pp.267:22-25;268;1-7;275:6-25)**

The Master in Equity had not ruled on the guaranty agreement, the declaratory judgment action, the issues with the appraisal statute, or the judicial estoppel argument at the time the initial appeal was filed; however the parties valuation of the property as the mortgage amount mooted these issues. So even if the Court determined the BANK proved the capacity of the appellant in the guaranty agreement, the appraisal statute allows for the agreed upon price to be substituted.(**R. VOL. I. p. 293:4-25;297:5-13). (R. VOL.II p.638: n. 1)**

II. Appellant's reply to: "The Master did not err in holding the Respondent was not judicially estopped from taking any position taken in the motion to vacate the foreclosure sale after it was withdrawn."

The Master in Equity erred when he did not accept the valuation of the properties by the respondent BANK which defendant Sand Dollar 31, LLC and the appellant accepted orally by the attorney representing the parties as well as in writing. (**R. VOL. II. p 895-6) (R. VOL.II p.638: n. 1)** In effect, the parties agreed the mortgage amount should be the fair market value of the property.

The attorney for Sand Dollar 31, LLC and the appellant requested the court to adopt the plaintiff BANK's valuation of the properties as the value argued in the

BANK's motion to vacate the sale and substitute this amount pursuant to the appraisal statute for the sale price in October of 2012. (**R. VOL.II p.638: n. 1**)

As the respondent argues, judicial estoppel is an equitable concept that prevents litigants from offering a certain *set of facts* that conflict with facts previously asserted in the same or related litigation. *Cothran v. Brown,* 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). (emphasis added by appellant)

The South Carolina Supreme Court adopted judicial estoppel in *Hayne Federal Credit Union v. Bailey*, ruling "Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). The Hayne court limited judicial estoppel to issues of fact.

Here, the appellant argues the valuation of the properties is such an issue of fact to apply judicial estoppel based on the Hayne court's analysis. The appellant further avers the legislature enacted the appraisal statute, as its stated purpose, to prevent banks from the *very acts* they committed in this case by bidding low at the judicial sale only to subsequently demand a deficiency. S. C. Code Ann. §29-3-660.

Appraisal Statute- Valuation of the properties

The appraisal statute was implemented by the legislature, for the benefit of the mortgagors and guarantors in foreclosure proceedings, when a deficiency judgment is demanded by the BANK and not for the benefit of the BANK. The purpose of the statute is to protect mortgagors and guarantors from BANK's submitting a low bid, while demanding the difference, from the defendants. While the BANK has been granted the right to a deficiency, mortgagors and guarantors have been granted rights under the appraisal statute. Therefore, the deficiency statute and the appraisal statutes are, in effect, balancing statutes. The benefits conferred by the

respective statutes requires each party to apply for the protections from the Court and to comply with the statutes.

The Master in Equity ordered the parties have the appraisal completed at the July 18, 2012 motion hearing. **(R. VOL.I. p.445:5-13)** The attorney for Sand Dollar 31, LLC and the appellant informed the court that the defendant parties had identified their appraiser as Angela Buckley. **(R. VOL.I. p.436:1-5).** S. C. Code Ann. § 29-3-680. The BANK conceded, the receipt of the verified petition for appraisal, by the defendants, without exception.[3] Therefore, pursuant to the statute, the BANK should have filed a return within 10 days. The court's record reflects the BANK did not file a return within 10 days of the filing ; however, the Master in Equity extended the time for the BANK to file and granted an additional week for the BANK to comply with the appraisal statute at the August 13, 2012 hearing. **(R. VOL.I. p.436:1-5).** The BANK said they were waiting on the written order. **(R. VOL.I. p.434:23-25;435:1-5)** A further review of the Court's record indicates the BANK, even after receiving an extension from the Master in Equity, the BANK failed to file the return to the application or file the designation of the appraiser with the Clerk of Court.[4][5]

Instead, the BANK filed a motion to vacate the deficiency sale on August 30, 2012, 10 days beyond the date the Master in Equity gave the BANK to identify its appraiser.**(R. VOL. I. p. 445:6-13)** The BANK, in its motion to vacate the sale argued a fair gauge of the value of the properties, is the amount of the mortgage. The BANK also argued the purchaser S.C.O.R.E.

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[3] Certificate of Service, Verified petition for Appraisal (**R. Vol. II. .p.521;526**; (**R. Vol. I. p.** 434:20-25;435:1-17)

[4] **R. Vol. I. p. 435:20-23**

[5] The BANK sent a letter this year (almost 5 years after the due date of the return) from the BANK's appraiser that purported to establish agreement between him and the defendant's designated appraiser on the valuation of the properties; however, the BANK conceded the other appraiser did not sign or affirm his representations to the Court Additionally, pursuant to the statute the BANK's appraiser is disqualified due to his first degree and direct business relationship with the BANK.

purchased the property with equity. [6] The BANK had the opportunity to bid an amount that would deny subsequent purchasers the equity in the property but failed to do so. While the BANK did not file the return or appraisal with the court, the BANK did inform the parties of the appraiser's name. Appellant Meisner argued the BANK's elected appraiser was disqualified via the statute because he worked for the BANK, on the commercial side of the business, which the statute specifically prohibits**(R. VOL. I. p. 294:14-25).(R. VOL. I. p. 308:3-22)** The respondent BANK misunderstood the statute and argued to the Court the appraiser only has to not be a relative.**(R VOL. I. p. 298:14-17) (R. VOL. I. p.294):**

> The relevant statute for selection of the appraisers is S. C. Code Ann.§ 29-3-700
>
> ... he shall issue and order that the property be appraised at its true value as of the date of sale by three disinterested individuals who must be state-certified general real estate appraisers as defined in Section 40-60-20 (20), state-certified residential real estate appraisers as defined by 40-60-20(21), or state-licensed real estate appraisers as defined by Section 40-60-20(22), *who shall not be parties to the action or connected in business with* or related by blood or marriage within the sixth degree to any such party.

The BANK was aware of the obligation to pick a disinterested party as the BANK reminded the defendants of this requirement during a hearing. **(R. VOL. I. p. 436:6-20)** The Master in Equity also commented that if the appraisers can't agree he would appoint someone. **(R. VOL. I. p. 435:24-5; 436:1-2)** Here, the BANK and the appellant agreed that the properties should be valued at the amount of the mortgage. **(R. VOL.II p.638: n. 1)** Also, the BANK and the appellant is in a good position to value the properties for the following reasons:1) the BANK loaned money to Sand Dollar 31, LLC based on the value of the property 2) the BANK sought foreclosure, from Sand Dollar 31, LLC, on those same amounts in court 3) the BANK

[6] **R. VOL. I. p. 437:3-24**

also made representations to the court via motion, memorandum and in the hearing to vacate the sale, that the upset bidder purchased the property *with equity* and that the amount of the mortgage is an appropriate value for the two properties 4) the appellant and Sand Dollar 31, LLC via motion, memorandum, and argument accepted the BANK's valuation via their application for appraisal.[7] In the appellant's view, the BANK failed to comply with the appraisal statute or the court's order by failing to file a return to the defendant's application, or a return to the application for appraisal opting instead, to seek vacatur of the deficiency sale.

ARGUMENT FOR ACCEPTANCE OF BANK'S VALUATION

This state has long accepted the rule that a property owner is competent to present the value of the property. *Lewis v. South Carolina State Highway Dept.*, 278 S.C. 170, 173, 293 S.E.2d 434, 436 (1982); *Seaboard Coast Line R.R. v. Harrelson*, 262 S.C. 43, 46, 202 S.E.2d 4, 5 (1974); *Rogers v. Rogers*, 280 S.C. 205, 209, 311 S.E.2d 743, 746 (Ct.App.1984). In *Rogers*, the Supreme Court noted that an owner of property "is competent to estimate its value as a matter of law," citing *Seaboard Coast Line R.R.* and *Wigmore* on Evidence. 280 S.C. at 209, 311 S.E.2d at 746. According to Wigmore, "The owner of an article, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth; the weight of his testimony (which often would be trifling) may be left to the jury." 3 John H. Wigmore, Wigmore on Evidence § 716, at 48 (1940). The BANK filed for foreclosure on the subject properties and represented that they were owed more than 3 times what the BANK bid at the judicial sale. **(R. VOL. I. p. 307:7-15)** Additionally, the appellant as a licensed real estate broker, stated the mortgage amount of the property is a fair assessment of the property. (R__)

[7] Defendants Memorandum on judicial estoppel and the appraisal statute filed Nov. 2, 2012.

Not only does State law allow both the BANK and the appellant to purchase the property at the foreclosure sale, the Order of Foreclosure and Sale specifically referenced at ¶ 35 "if the purchaser is *anyone other than the defendant* in possession..." as further proof the BANK and the defendants are authorized by both law and Order of foreclosure to purchase the property at the foreclosure sale.

Therefore, the BANK's argument that the defendants are "double dipping" by not bidding more at the deficiency sale and simultaneously applying for appraisal rights misses the mark and conflates the appraisal statute with the deficiency sales process. The BANK is the one who placed the initial bid and subsequently acknowledged that the properties had equity when purchased for more than the BANK's bid.

Judicial estoppel evolved to protect the truth-seeking function of judicial proceedings by punishing those who seek to misrepresent facts to gain advantage." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997); *see also John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1995) (stating goal of judicial estoppel "is to prevent a party from playing 'fast and loose' with the courts, and to protect the essential integrity of the process."). The South Carolina Supreme Court ruled, "[j]udicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." *Hayne*, 327 S.C. at 251, 489 S.E.2d at 477. "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." *Id.* The *Hayne* court limited the doctrine as it applies to facts, not law.

The application of judicial estoppel "is an equitable concept, depending on the facts and circumstances of each individual case, [and] application of the doctrine is discretionary." *Carrigg v. Cannon*, 347 S.C. 75, 83-84, 552 S.E.2d 767, 772 (Ct. App. 2001)

(quoting *Hawkins v. Bruno Yacht Sales, Inc.,* 342 S.C. 352, 368, 536 S.E.2d 698, 706 (Ct. App. 2000), *cert. granted* Sept. 27, 2001)). For judicial estoppel to apply, courts evaluate the following factors:

First, a party's later position must be inconsistent with its earlier position. Second, . . . whether the party has been successful in persuading a court to accept the earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled, ...' A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *N.H. v. Me.*, 532 U.S. 742, 750-51 (2001) (citations omitted); *see Lowery v. Stovall*, 92 F.3d 219 (4th Cir. 1996).

"Judicial acceptance means only that the first court has adopted the position urged by the party . . . as part of a final disposition." *Lowery*, 92 F.3d at 224-25.

In this case, BANK requested foreclosure $62,180 in the amount of the mortgage in 2011-CP-40-06317 and requested foreclosure in the amount of the mortgage of $ 36,000 for 2011-CP-40-06318. In both cases, this Court granted the foreclosure and judgment for the BANK. The BANK then reduced its valuation, at the foreclosure sale, when it suited its purposes by bidding a modest amount on each property, in the foreclosure sale to capture both the equity and the deficiency. In 06317, the BANK bid $25,000 and in 06318, the BANK bid $10,000. South Carolina Operating Room Equipment, LLC bid one dollar greater in both deficiency sales.

The BANK then returned to this Court and its original opinion of valuation and moved to vacate the deficiency sales based on inadequacy of price and other factors involving the sale. Importantly, the BANK did not allege any impropriety of the part of the Master in Equity in the

handling of the bidding or of the sale. The BANK alleged the upset bidder *should* have bid more, but the appellant has found no such requirement as a basis for such an allegation, particularly when the BANK *established* the initial bid, which by statute should have been its highest and best bid. Most troublesome is the BANK's fluctuations in its valuations of the properties at the different phases of litigation, as well as the fact that it never filed, with the clerk of court, a return to the verified petition for appraisal, or entered a value for the properties, other than the mortgage value, into the record of the Court or into evidence.

The respondent BANK based on the court's order had the properties appraised in 2012 which was completed on September 13, 2012. **(R. VOL. II. p.667-802)**The respondent BANK argued it needed a written order in 2017; however, the BANK's appraiser completed the appraisal in 2012. **(R. VOL. II. p.667-802)**The respondent BANK, in October of 2012 filed a motion to vacate the deficiency sale and valued the property at "a fair gauge of the value of the properties was represented by the amount of the mortgage". **(R. VOL. II. p.581-591)** This representation to the Court is the same representation of value the respondent BANK made in its Foreclosure Complaint against Sand Dollar 31, LLC. **(R. VOL. II. p.502).** It is axiomatic that banks do not give loans on properties that are valued less than the loan amounts. The respondent noted that the loans in question were commercial loans. **(R. VOL. I. p. 50; 75)** The appellant acknowledged to the court that the loans associated with the foreclosure cases were commercial loans limited to 70% of the value of the property for the loan.

The framework of this case fits perfectly with judicial estoppel. The required elements of judicial estoppel are submitted with references to the record and the facts of this case:

(1) **Two inconsistent positions taken by the same party or parties in privity with one another**: Here, the respondent BANK came to a court of equity and argued they

were given mortgages to secure the loans they made in the amounts of $63,734 and $43,225. **(R. VOL. I. p. 50; 75)** The loans given by the bank were limited to 70 percent of the appraised value of the property. **(R. VOL. I. p. 50;75)** The Court ordered foreclosure of the properties based on the BANK's claimed amounts owed, in effect accepting the valuation of the property by the BANK in loaning the money owed. **(R. VOL. II p.500-539).** The respondent BANK then returned to the court of equity at the foreclosure sale and bid significantly less (approx. 1/3 of the value) than the amount of the loans given, at the same time the respondent BANK demanded a deficiency from the mortgagor and from the appellant. **(R. VOL. I. p. 50;75)** Finally, the BANK returned to the very same court of equity and argued in its motion to vacate the deficiency sale that "a fair gauge of the property's value was the amount of the mortgage". **(R. VOL. II. Pp. 581-591)** The BANK also inadvertently and while reading from its file, admitted the original appraisal amounts in open court. **(R. VOL. I. p. 272: 19-21) (R. VOL. I. p. 274:2-12)** Here, the BANK has admitted in front of the court that the value of the property is at a minimum, the amount of the mortgage. **(R. VOL. I. p. 274:2-12)**. The attorney for Sand Dollar 31, LLC and the appellant accepted the respondent's valuation of the properties as the mortgage amount, in writing and orally. **(R. VOL. I. p. 267:3-14) (R. VOL. I. p.270:10-21)**

The BANK's Motion to Vacate the Deficiency Sale

The BANK made the motion to vacate the deficiency sale on September 6, 2012 and accused the appellant of "Meisner has not been honest or forthright" and "the defendant was intentionally deceptive and warrants intervention from the court."

Not only does State law allow both the BANK and the appellant to purchase the property at the foreclosure sale, the Order of Foreclosure and Sale specifically referenced at ¶ 35 "if the purchaser is *anyone other than the defendant* in possession..." as further proof the BANK and the defendants are authorized by both law and Order of foreclosure to purchase the property at the foreclosure sale.

Therefore, the BANK's argument that the defendants are "double dipping" by not bidding more at the deficiency sale and simultaneously applying for appraisal rights misses the mark and conflates the appraisal statute with the deficiency sales process. The BANK is the one who placed the initial bid and subsequently acknowledged that the properties had equity when purchased for more than the BANK's bid.

These accusations are not only untrue, but in fact represents the respondents actions by valuing the property at the amount of the mortgage to loan the money and in the motion to vacate the sale but bidding an amount significantly less the value they set in the Motion to Vacate the Sale.

The BANK, in its memo, re-iterated the fact Sand Dollar 31, LLC purchased the Linden Street property for $34,500 six years before the motion *at a foreclosure sale* on July 6, 2006. **(R. VOL. II. Pp.581¶ 2).** The BANK went on to argue a fair gauge of the value of the property is the amount of the mortgage. **(R. VOL. II. Pp.582¶ 2-3).**

The BANK quoted *Spillers v Clay* and stated, "the court may consider the discrepancy between the accepted bid and the *fair market value* of the property as evidence" to set aside a judicial sale. *Spillers v. Clay*, 233 S.C 99, 104,103 S.E. 2d 759,761(1958). Here, the BANK itself admitted to the court, it committed the very the acts the legislature attempts to prevent in

the appraisal statute, that is knowingly bidding low to increase the deficiency of the defendants. **(R. VOL. II. Pp.581¶ 2).**

The BANK went on to argue, in support of the valuation of the property as the amount of the mortgage, that the *deficiency bid* by South Carolina Operating Room Equipment, LLC was less than (1) Sand Dollar 31 LLC paid to acquire the property at the foreclosure sale, (2) the amount of the loan the respondent BANK loaned that was given to defendant Sand Dollar 31, LLC or (3) the purchase price by South Carolina Operating Room Equipment, LLC at the deficiency sale that gained significant equity. **(R. VOL. II. Pp.581¶ 2).** The BANK admitted there was "equity in the properties." **(R. VOL. II. Pp.584 ¶ 1).** The BANK here admitted it intentionally bid less than the property was valued. **(R. VOL. II. Pp.581¶ 2).** Contrary to its allegations against the appellant, it was the BANK who was in control of the deficiency via its initial bid amount, that the BANK admitted was far less than the property's value.

By the time the initial Judicial Sale was complete on June 4, 2012, Sand Dollar 31, LLC and the appellant lost any legal or equitable rights to the property, but the deficiency was not extinguished as the respondent reports. S.C. Code Ann. § 29-3-660.

Deficiency Statute S.C. Code Ann. § 29-3-660

On June 4, 2012, when the original foreclosure sale was complete, contrary to the respondents claims, the deficiency demanded by the respondent BANK *was not* extinguished as to the mortgagor Sand Dollar 31, LLC. S. C. Code §29-3-670. However, the amount owed by any guarantor, mortgagor, or any other person, was increased due to the BANK's low bid. S.C. Code Ann. §29-3-680 provides:

> and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such a party to the action and the court may adjudge *payment of the residue* of such debt remaining

unsatisfied *after a sale* of the mortgaged premises against such other person and may enforce such judgment as in other cases.

(2) **The inconsistent positions were made by the respondent or its predecessor in interest in this litigation.**

The respondent is the same entity that brought the foreclosure action, demanded a deficiency from the defendants including the appellant, in this litigation.

(3) The party taking the position must have received some benefit from the position.

The respondent was successful and benefited from its valuation of the property when the Master in Equity ordered the foreclosure of the properties based on the mortgages given which were in turn valued by the BANK's initial appraisal of the properties when the loans were originated. **(R. VOL. I. Pp.50;75).** Then once granted the foreclosure with inflated amounts owed had the BANK not executed the foreclosure, the BANK sent a representative to the first foreclosure sale and bid an amount that was approximately 1/3 of the value of the property.

(4) The position taken must be part of effort to mislead the court.

The respondent intentionally bid low at the foreclosure sale on June 4, 2012 with full knowledge that the BANK maintained its demand for a deficiency and that the BANK had previously loaned money based on the BANK's initial appraisal and valuation of the properties. **(R. VOL. II. Pp.581¶ 2).** Many other states require BANK's that seek a deficiency to bid an amount equal to the money they loaned. Additionally, the BANK hired an appraiser that pursuant to the appraisal statutes, was disqualified to offer his or appraisal because he currently worked for the BANK on the commercial side of the business.**(R. VOL. I. p. 295:4-13)** Additionally, as evidence the BANK attempted to mislead the court with the low bid, the BANK filed the motion to vacate and acknowledged an equity.

(5). **The positions must be totally inconsistent.**

Here, whether a fair gauge of the value of the property is the amount of the mortgage as the BANK determined and the defendants accepted as well when:

(1) it loaned the money for the original purchase of the property,
(2) when it filed the foreclosure lawsuit,
(3) when it admitted the original appraisal amount in court, and
(4) when it filed its motion to vacate the sale

or When the BANK bid approximately 1/3 of the above amounts at the foreclosure sale. **(R.VOL. I p. 307:7-20)** The BANK's bid at the foreclosure sale is completely inconsistent as its valuation of the properties when it loaned the money and when they valued the property in the motion to vacate the sale.

III. The Appellant's reply to "Master did not err in his determination of the deficiency amounts against Meisner."

The Master in Equity should have valued the properties as the amount of the mortgage because all parties agreed in writing that the fair market value of the property was the mortgage amount. The Master should have further found as previously argued that the BANK did not prosecute enforcement of the guaranty agreement and as such that the appellant was responsible for Sand Dollar's debts.

As previously argued, the Master in Equity granted Sand Dollar 31, LLC and the appellant's oral motion, in the presence of a court reporter, pursuant to S.C. R. Civ. P. Rule 52, 59, 60 to re-open testimony and brief the guaranty agreement over the BANK's objection.**(R. VOL. I. p.473:10-18)** The BANK did not appeal this ruling. Therefore, this Court can find its own facts and conclusions that the BANK did not prosecute the fourth cause of action and determine that the guaranty agreement made the appellant responsible for Sand Dollar's debts.

The appellant made a verified petition for appraisal of the properties which allows for the appraised price once agreed on by the parties to be substituted for the deficiency sales price. The statute says if the appraisers cannot agree, then the court would appoint a third appraiser; however, here all parties accepted the amount of the mortgage price and effectively extinguished the appellants deficiency found by the Master in Equity.

In the July 18, 2012 hearing, the Master in Equity said if the appraisers could not agree, then he would appoint a third appraiser. **(R. VOL.I p.435:12-13)** Because the appellant has taken the position in its motion to vacate the sale, that the value of the property must be measured by the amount of its mortgage, the respondent's value of the property should be exchanged for the sales price gleaned at the deficiency. The respondent must now be judicially estopped from arguing a lesser value pursuant to the appraisal statutes because all parties agreed on the mortgage value for the properties. Thus, any and all deficiency claimed by SCBT must be removed as a matter of law.

This BANK's valuation that the appellant accepted complies with the goals of both the appraisal statute and the deficiency statute. Additionally, this Court has long accepted the notion that the owner of property can value its own property as previously argued.

IV. The Appellants response to: The Master did not err did not abuse his discretion in denying Meisner's motion to amend pleadings four years after entry of Judgments of Foreclosure and Sale.

The Master in Equity should have allowed the appellant to amend the pleadings in this case for abuse of process and the other causes of action because the BANK had actual knowledge that the hired appraiser Eugene Garvin worked for the bank on the commercial side of the business and was disqualified under the

appraisal statute to participate in the appraisal process.(**R. VOL. I. p.295:8-17**) This disqualified appraiser then submitted an expired appraisal via letter from 2012 which is not allowed under the USPAP guidelines that the respondent BANK stated the appraiser followed. (**R.VOL.I. p. 298:14-25;299:1-20**) However, Mr. Garvin used as comparable foreclosure properties when the appraisal statute specifically denote the fair market value.(**R.VOL.I. p723.**) Additionally, the BANK was aware that even the mortgagor can repurchase the home at the foreclosure sale so there was no legal or equitable basis for filing the motion to vacate the sale, it was simply done to further harass the appellant. Also, the BANK could not show why the amendment would prejudice them particularly since they have requested to have the automatic stay lifted to enter evidence more than 4 years after the foreclosure case.

Second, the respondent BANK requests judgment against the appellant via a guaranty agreement that the BANK admits was given in favor of another party without providing the court with any documentation of transfer into the BANK's name prior to the proceeding against Sand Dollar 31, LLC.

Third, the respondent did not prosecute the guaranty agreement in the Court below in the appellant's personal capacity and offered no evidence that appellant Meisner signed the guaranty agreement in her personal capacity.[8] In fact, the BANK representative Wendy Wolfson, testified that appellant Meisner signed the guaranty agreement on behalf of Sand Dollar 31, LLC.(**R. VOL.I p. 484:1-13**) Appellant Meisner's testimony regarding her relationship to Sand Dollar 31, LLC

[8] The appellant truthfully answered the Master in Equity in a post- trial conference the capacity that she signed the guaranty agreement; however, this does not change the fact the BANK

was just that she was the member. (**R. VOL. I. p.488:18-23**) The guaranty agreement itself was silent as to capacity as an individual or corporate capacity and the BANK did not enter or request the articles of organization for Sand Dollar 31, LLC to be entered into the record.

For the above reasons the appellant respectfully argues the Master in Equity erred by not allowing the appellant to amend the pleadings to add counterclaims against the BANK when in the same year it allowed the BANK to enter appraisals into the record 4 years after completion.

V. The Master in Equity did not abuse his discretion in lifting the automatic stay to permit the filing of Return of Appraisers with the Richland County Clerk of Court.

First, the return of the appraisers was due over 4 years ago. The respondent never entered the appraisals into evidence and opted instead to seek vacature of the deficiency sale so that it could re-bid and gain the equity in the properties which is contrary to the deficiency statute. The BANK failed or elected not to enter into evidence the appraisals in 2012 and should not have been allowed to enter into evidence the appraisal as it prejudiced the appellant. Prior to the appraisal letters submitted by a disqualified appraiser being entered into the record the only agreement between the parties was the valuation at the mortgage amount. Additionally, Angela Buckley did not join in the valuation of the 2012 appraisals which was in contravention to the order of the Master in Equity.

For the above reasons and all references to the record, the appellant respectfully requests the Court to find:

1. The Master in Equity should have found: the BANK did not prosecute its enforcement of the guaranty agreement against appellant Meisner personally;
2. The Master in Equity should have found the property is valued at The BANK's submission of the value of the property as the mortgage amount which was as agreed to by all parties and pursuant to the appraisal statutes the BANK's valuation should be substituted for the deficiency sale in determining the amount of the deficiency.
3. The Master should have found the appellant could amend her counterclaims against the BANK.
4. The Master should have found the BANK was too late to lift the automatic stay and enter the 2012 appraisals because they affected a substantial right and prejudiced the appellant.

Respectfully Submitted,

Dec 18, 2018

Sept 3, 2019

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