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**Dec 29 2021**

**SC Court of Appeals**

**THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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APPEAL FROM SALUDA COUNTY  
COURT OF COMMON PLEAS

R. Knox McMahon, Circuit Court Judge

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Appellate Case No. 2018-001388

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Stephen Wilkinson, as Trustee of George B. Buchanan, Jr.  
Irrevocable Family Trust Dated the 15th day of July, 2001, .....Respondent,

v.

Redd Green Investments, LLC, Anderson North Augusta, LLC,  
Herbert Anderson, Jr., A. Bruce Green, Herbert Keith Anderson,  
and L. Cliff Redd, ..... Defendants,

Of which Redd Green Investments, LLC, A. Bruce Green,  
and L. Cliff Redd are ..... Appellants.

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**APPELLANTS' PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT**

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Attorneys for Appellants

Pursuant to SCACR 221, Appellants Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd respectfully petition the Court of Appeals for rehearing of the Court’s Opinion in this matter No. 5880, filed December 15, 2021. In affirming the trial court’s decision, this Court overlooked or misapprehended the following particular points.

**I. THE COURT MISTAKENLY APPREHENDED THAT THE GUARANTORS CHALLENGED THE AMOUNT OF THE DEFICIENCY JUDGMENT AND THEREFORE MISAPPLIED THE SECOND AND THIRD ELEMENTS OF RES JUDICATA.**

The Court held that “The Guarantors’ attempt to challenge the amount of the deficiency judgment is barred by res judicata.” (Op. at 7). However, the Guarantors do not challenge the amount of the deficiency judgment that was entered in the prior foreclosure action against Springs North Augusta. As asserted in the Appellants’ Reply Brief:

...[T]he Guarantors do not seek to challenge the amount of the judgment in the foreclosure suit. This judgment was entered against the Borrower, and the Guarantors are not seeking to undo it. Instead, the Guarantors are contending that they have a defense to the Trust’s enforcement of the guaranties because the Trust violated South Carolina law when it obtained the deficiency.

(App. Reply at 21). This distinction is vitally important because it demonstrates that the second and third elements of *res judicata*—namely the identity of the subject matter and adjudication on the merits—do not apply. The Guarantors simply are not attacking the deficiency judgment against the Borrower. This judgment stands and may be pursued by the Trust.

Instead, the Guarantors contend that the Trust’s violation of the bidding statute operates as a defense to the Guarantors’ obligations under their guaranties. The Guarantors’ position is that the deficiency judgment—although enforceable against the Borrower—is not enforceable against the Guarantors in a subsequent action because it violates the Guaranty itself, namely the

implied obligation of good faith and fair dealing.<sup>1</sup> The issues presented in the first action were whether the Borrower defaulted under the loan and whether the property could be sold with the proceeds applied to the debt. The Guarantors' guaranties were not at issue and were not addressed in the first action. The issue in the present action is whether the Trust may recover under the Guaranties or whether the Trust's violation of the bidding statute operates to bar such a recovery. Because this issue was not addressed in the initial foreclosure action—nor could it have been addressed—there is neither an identity of issues in the two actions nor an adjudication on the merits of the Guarantors' liability in the first action.

Stated another way, the amount of the debt and the amount of the deficiency judgment against the Borrower was adjudicated in the first action, but whether such amount could be collected against the Guarantors under the terms of their guaranties was NOT resolved or addressed in the first action. These are entirely separate issues, and it follows that *res judicata* does not bar the defenses raised by the Guarantors in the second action.

## **II. THE COURT MISTAKENLY APPREHENDED THAT THE GUARANTORS AND BORROWER WERE PRIVIES.**

The Court held that the Guarantors were privies with the Borrower because they both “had a shared interest in obtaining the lowest deficiency judgment possible because Guarantors were responsible for any unpaid debt of Springs North Augusta.” (Op. at 8). However, the Court has not cited to any case law or other legal authority that a guarantor and a borrower are privies for purposes of the application of *res judicata*. The Court cites to the relationship between the Guarantors and the Borrower (with the Guarantors being direct or indirect owners of the Borrower) as a basis for notice of the proceeding, (*id.*), but neither the Court nor the

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<sup>1</sup> Alternative theories for the defense include the doctrines of unclean hands, waiver, or not being able to gain from an illegal act.

Respondent has cited to case law supporting its conclusion that such a relationship, or that notice of the proceeding, equates to being privies.

In fact, this Court's precedent is to the contrary. In *H.G. Hall Construction Co. v. J.E.P. Enterprises*, 283 S.C. 196, 321 S.E.2d 267 (Ct. App. 1987), this Court held that common ownership of two corporations, both of which were parties to a contract at issue in prior litigation against one of the companies, did not suffice to make those corporations privies for purposes of applying *res judicata* in a second action against the other company. The Court explained:

Both corporations are owned by the same person, H.G. Hall, Jr. Both were parties to the contract for the Beaufort project. According to J.E.P., H.G. Hall, Jr., as president of Associates, Inc., controlled the conduct of the first lawsuit. Hall is also president of Hall Construction.

While South Carolina courts have not addressed the precise issue presented here, courts in both North Carolina and Georgia have ruled that no privity exists between commonly owned corporations. Similarly, it has been held there is no privity between a corporation and a shareholder merely because the latter controls the former.

...

We find these cases persuasive. Although Hall Construction and Associates, Inc., are both corporations owned by H.G. Hall, Jr., they are different corporations. On the facts of this case common ownership is not enough to establish privity for the purposes of *res judicata*.

*Id.* at 204-05, 321 S.E.2d at 272. Thus, the direct or indirect ownership of the Borrower by Guarantors does not put them in privity for purposes of *res judicata*.

Similarly, the United States District Court for the District of South Carolina, applying South Carolina law, held that a principal-agent relationship and the vicarious liability of the principal for the acts of the agent are not sufficient to create privity for purposes of *res judicata* so as to bind the principal on a judgment against the agent: "A judgment on the merits in favor of the agent is a bar to an action against the principal for the same cause, because the principal's liability is predicated upon that of the agent. But a judgment against the agent is not conclusive

in an action against the principal.” *E.A. Prince & Son, Inc. v. Selective Ins. Co.*, 818 F. Supp. 910, 915 (D.S.C. 1993) (emphasis in original) (quoting *Rookard v. Atlantic & C. Air Line Ry. Co.*, 84 S.C. 190, 65 S.E. 1047 (1909)).

Here, the relationship between the Guarantors and Borrower is analogous to that of principal and agent, with the former’s liability being predicated on the latter’s. Under *H.G. Hall Construction* and *E.A. Prince & Son*, the fact that two parties are under common control or that one controls the other, that one has liability contingent on the other’s, and that their interests are aligned is not sufficient to make them privies for purposes of *res judicata*. Accordingly, it was error for this Court to hold that the Guarantors were privies of the Borrower.

In addition, the Court has overlooked the fact that the Borrower was in default in the foreclosure action and did not defend it. The Court asserts that the “Guarantors could have challenged Second Avenue’s participation in the bidding process in the prior action,” (*id.*), but there is no basis for such a conclusion when the Borrower was in default and not participating in the foreclosure action. As the South Carolina Supreme Court held in *In re Estate of Brown*, “[c]ollateral estoppel does not apply to default judgments because the factual issues were never actually litigated.” 430 S.C. 474, 488, 846 S.E.2d 342, 349 (2020). For the same reason, the doctrine of *res judicata* should not preclude Guarantors from defending the instant action on the basis of a defense that was not litigated in the prior default judgment.

### **III. THE COURT MISAPPREHENDED THAT THE GUARANTORS WERE REQUIRED TO SHOW PREJUDICE.**

The Court alternatively held that, even assuming a violation of the bidding statute, the Guarantors could not raise such a violation as a defense to the guaranty without a showing of prejudice (*i.e.*, that the fair market value of the property was higher than Second Avenue’s bid). (*Id.* at 8-9). Whether or not a showing of prejudice is required in order for a guarantor to assert a

violation of the bidding process as a defense to a guaranty is a novel issue of South Carolina law. There simply is no legal precedent one way or the other. The Court has assumed that a showing of prejudice must be made by Guarantors, but it has not cited to any legal precedent that a showing must be made at all, much less that the Guarantors bear the burden of proof as opposed to the Trust, which is the one who violated the statute.

The statute itself, S.C. Code Ann. § 15-39-720, does not incorporate any requirement of prejudice. It straightforwardly declares: “But the mortgagee or his representative shall enter such bid as he desires at the time the sale is made, and he and all persons acting in his behalf shall be precluded from entering any other bid in any amount at any other time except the single or last bid made by him or in his behalf at the sale.” *Id.* (emphasis added). This language is absolute and makes very clear that the Trust was not allowed to violate the statute by bidding a second time regardless of whether there would be any prejudice. Accordingly, a showing of prejudice is not required.

In addition, even if a showing of prejudice were deemed required, for reasons of public policy such prejudice at the very least should be a rebuttable presumption, with the burden on the at-fault mortgagee to demonstrate that its bid exceeded the fair market value of the property. The law allows for the shifting of the burden of proof for reasons of public policy:

“In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: [1] the knowledge of the parties concerning the particular fact, [2] the availability of the evidence to the parties, [3] the most desirable result in terms of public policy in the absence of proof of the particular fact, and [4] the probability of the existence or nonexistence of the fact.” (7 Cal. Law Revision Com. Rep. [(1965)], p. 89.)

One way for a court to reallocate the burden of proof on a particular issue is to adopt a presumption. The Evidence Code defines a “presumption” as “an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in [an] action.” (Evid. Code, § 600, subd. (a).) Presumptions are either conclusive or rebuttable. (Evid. Code, § 601.)

Rebuttable presumptions are “either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof.” (Ibid.; see Evid. Code, §§ 110 [burden of producing evidence defined], 115 [burden of proof defined].)

A presumption affecting the burden of proof is a rebuttable presumption “established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied.” (Evid. Code, § 605.) Conversely, a presumption affecting the burden of producing evidence is used “to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied.” (Evid. Code, § 603.) “It is the existence of this further basis in policy that distinguishes a presumption affecting the burden of proof from a presumption affecting the burden of producing evidence.” (7 Cal. Law Revision Com. Rep., supra, at p. 99.)

*In re Marriage of Hein*, 52 Cal. App. 5th 519, 537 (Ct. App. 2020) (emphasis added).

Between two parties—where one is at fault for the violation of a statute to the detriment of the other innocent party—it is only logical, just, and fair that the at-fault party should bear the burden of proof as to whether its violation of the statute was prejudicial to the innocent party. This conclusion is particularly true here where the Guarantors were absolutely deprived of the Trust’s high bid due to the Trust’s violation of the statute. As extensively discussed in the Appellants’ briefs, we can never know what the Trust’s high bid would have been, and so the deprivation of this statutory protection taints the entire bidding process.

The statute reflects the public policy of this State, and in order to protect this public policy, prejudice for violation of the bidding statute should be presumed. In short, when a mortgagee violates the bidding statute in order to obtain a deficiency judgment it subsequently seeks to apply against a person who was not party to the proceeding, then it is the at-fault mortgagee who should bear the burden of demonstrating a lack of prejudice—not the innocent third party who should bear the burden of demonstrating prejudice.

#### IV. THE COURT OVERLOOKED EVIDENCE OF PREJUDICE.

Even if the Guarantors are held to have the burden of showing prejudice, the Court overlooked such evidence in the record when it stated that “there is no evidence—other than the amount of the highest bid at the foreclosure sale—of the fair market value of the Property at the time of the foreclosure sale.” (Op. at 9). However, as noted by the Court with respect to the Standard of Review, a motion for directed verdict ““should be denied if the evidence yields more than one reasonable inference or its inference is in doubt.”” (*Id.* at 5 (quoting *Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016))).

Here, there is evidence in the record before the jury<sup>2</sup> that allows for the reasonable inference that the fair market value of the property exceeded Second Act’s bid. A property owner is competent to testify to the value of his own real property. *See, e.g., Waites v. S.C. Windstorm & Hail Underwriting Ass’n*, 279 S.C. 362, 366, 307 S.E.2d 223, 225 (1983); *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 594-95, 493 S.E.2d 875, 880 (Ct. App. 1997); *Hill v. City of Hanahan*, 281 S.C. 527, 531-32, 316 S.E.2d 681, 684 (Ct. App. 1984). The specific testimony as to the value of the subject real property, as noted in the prior briefs, includes:

- Mr. Green testified that the property initially was worth “over \$30 Million” when initially acquired. (Tr. p. 85) (R. p. 178).
- Mr. Green testified that the value of the property was “several times more than the loan” and that as a result his guaranty “never seemed to be a problem.” (Tr. p. 86) (R. p. 179).

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<sup>2</sup> The Court expressed that it was unwilling to consider the evidence offered outside the jury’s presence concerning the value of the Property, including the admission of Trust’s counsel that “[T]he property is worth an awful lot more than what was paid at the foreclosure sale. I think we all know it was. It’s not a big secret.” (Tr. p. 33 (emphasis added)) (R. p. 126). Even without counsel’s candid admission that the property was worth substantially more than the high bid at the foreclosure sale, reasonable inferences may be made from evidence in the record before the jury that the bid was below fair market value.

The jury could reasonably have inferred from this testimony that a property valued over \$30 Million when acquired would be worth over \$7,160,000 at a later point in time (when the foreclosure sale occurred). In addition, the testimony that the value was several times the amount of the loan, when combined with the temporal aspect of the word “never,” allows for the reasonable inference that at all times – including the time of the foreclosure sale – the value of the property exceeded the debt amount and therefore exceeded the winning bid of \$7,160,000 (which was less than the debt amount). Accordingly, the Court overlooked the above testimony when it concluded there was “no evidence” that the fair market value of the property exceeded the debt amount at the time of the foreclosure sale.

### **CONCLUSION**

For the reasons set forth herein, this Court should reconsider its decision and reverse the trial court’s directed verdict.

Respectfully submitted,

s/William M. Wilson III

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Date: December 29, 2021

Attorneys for Appellants

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM SALUDA COUNTY  
Court of Common Pleas  
R. Knox McMahon, Circuit Court Judge

Lower Case No. 2015-CP-41-00172

Stephen Wilkinson, as Trustee of George B. Buchanan, Jr.  
Irrevocable Family Trust Dated the 15th day of July, 2001, .....Respondent,

v.

Redd Green Investments, LLC, Anderson North Augusta, LLC,  
Herbert Anderson, Jr., A. Bruce Green, Herbert Keith Anderson,  
and L. Cliff Redd, ..... Defendants,

of Whom

Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd  
are..... Appellants.

PROOF OF SERVICE

The undersigned certifies that the **APPELLANTS' PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT** were served upon Respondent by causing a copy of the same to be deposited in the United States mail, postage prepaid, and emailed, addressed as follows:

John T. Moore, Esq. (john.moore@nelsonmullins.com), Nicholas Andrew Charles, Esq. (nick.charles@nelsonmullins.com), A. Mattison Bogan, Esq. (matt.bogan@nelsonmullins.com), Nelson Mullins, 1320 Main Street, 17<sup>th</sup> Floor, Columbia, South Carolina 29201, as *Attorneys for Stephen Wilkinson, as Trustee of George B. Buchanan, Jr. Irrevocable Family Trust Dated the 15th day of July, 2001*

This 29<sup>th</sup> day of December, 2021.

s/William M. Wilson III  
William M. Wilson III

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**SC Court of Appeals**

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Attorneys at Law

December 29, 2021

**VIA ELECTRONIC SUBMISSION & US MAIL**

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RE: Stephen Wilkinson, as Trustee of George B. Buchanan, Jr. Irrevocable Family Trust Dated the 15th day of July, 2001 vs. Redd Green Investments, LLC, Anderson North Augusta, LLC, Herbert Anderson, Jr., A. Bruce Green, Herbert Keith Anderson, and L. Cliff Redd,

Of which Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd are Appellants.  
**Appellate Case No. 2018-001388**

Dear Ms. Kitchings:

Enclosed for filing is Appellants Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd's Petition for Rehearing and Proof of Service in the above matter. The required filing fee of \$50.00 is being mailed to the Court. We are serving all counsel of record via email and U.S. mail.

With highest regards,



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