PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Opinion No. 5880 (S.C. Ct. App. filed December 15, 2021)

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 .....Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioners are guarantors of a commercial loan made by Respondent Buchanan Trust ("Trust") to an entity ultimately owned by the guarantors and secured by real property. The Trust initially sued its borrower for foreclosure of the real property but did not name the guarantors in that initial action. The Trust bid on the property at the first foreclosure sale, which was held open for thirty days in order for the Trust to claim a deficiency judgment in accordance with the terms of S.C. Code § 15-39-720 (the "**Deficiency Statute**"). Under the Deficiency Statute, a lender may obtain a deficiency judgment only if it submits a single bid on the first day of the foreclosure sale and does not participate in a second "upset sale" held thirty days later, when the property is auctioned to the highest bidder. *Id*. § 15-39-720, -760. **The Deficiency Statute forbids the mortgagee, or "all persons acting in his behalf," from bidding a second time or offering an upset bid at the final auction**. *Id*. § 15-39-720 (emphasis added).

In this manner, a lender that desires a deficiency judgment necessarily must enter its highest and best bid at the first sale because it is not allowed to bid at the second upset sale. However, the Trust blatantly violated the Deficiency Statute by sending a representative to bid at the second upset sale. This representative won the property and assigned its winning bid to the Trust, which also obtained a deficiency judgment against its borrower. It is undisputed and assumed for purposes of this appeal that the Trust violated the Deficiency Statute.

This appeal involves a second lawsuit filed by the Trust against the guarantors (which includes the Petitioners) seeking to recover the unpaid deficiency

judgment entered against the borrower in the prior foreclosure action. The guarantors defended the lawsuit on the basis that the Trust could not enforce the guaranties when it violated the Deficiency Statute. The theories proffered by the guarantors were that such a violation constituted a breach of the guaranty's implied covenant of good faith and fair dealing and/or created a defense by way of estoppel, waiver, illegal act, or unclean hands. The Trust moved for a direct verdict on the basis that a violation of the Deficiency Statute could not serve as a defense to payment on the guaranty, which was granted by the trial court and affirmed on appeal. This Petition for Certiorari follows the denial of Petitioner's Petition for Rehearing.

CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the petition for rehearing was made and finally ruled upon by the Court of Appeals on February 24, 2021.

QUESTIONS PRESENTED FOR REVIEW

1. When a mortgagee/lender obtains a deficiency judgment in a foreclosure action against its borrower (but not against the guarantor), is the mortgagee/lender's breach of the Deficiency Statute in that prior action a valid defense to payment of the deficiency judgment in a subsequent action filed by the mortgagee/lender against the guarantor? This issue presents a novel question of law.

STATEMENT OF THE CASE

This case involves a loan by the Trust to Springs North Augusta, LLC (the "Borrower") in the amount of $8,728,500, which was secured by 1400 acres of

commercial property valued at $30 Million and guaranteed by the Defendants. (Tr. pp. 68, 85 & Pl. Exs. 6-9) (R. pp. 161, 178, 266-81). One of the guaranties ("Guaranties") was executed by Appellant/Petitioner Redd Green Investments, LLC and Defendant Anderson North Augusta, LLC, and the other was executed by Appellants/Petitioners A. Bruce Green and L. Cliff Redd and the other individual Defendants (Defendants, including Petitioners, are referenced as "Guarantors"). (Pl. Exs. 8-9) (R. pp. 276-81). The two Guaranties are identical and provide, in part, that the Guarantors will guaranty the debts "of Borrower . . . in accordance with the terms of any such notes . . . or agreements"; that the Lender may surrender or compromise collateral "with reasonable notice" to the Guarantors; that the Guarantors have a "right of recourse to security for the debts and obligations of the Borrower to Lender" if the Guarantors pay the debts in full; and that "the high bid at the judicial foreclosure sale will be applied to the debt" in the event that the Trust were to foreclose on the collateral. (*Id*.) (R. pp. 276-81).

Prior to the instant action against the Guarantors, the Trust initiated a foreclosure action against the Borrower, but not against the Guarantors. (Tr. pp. 68, 87) (R. pp 161, 180). The Borrower did not defend the action and defaulted. (*Id*. p. 70 & Pl. Ex. 1) (R. pp. 163, 230). The court entered a default judgment of foreclosure against the Borrower and ordered the property to be sold at a foreclosure auction with the proceeds to be applied to a total debt of $9,450,662.50. (*Id*. p. 70 & Pl. Ex. 1) (R. pp. 163, 229-36). Because the Trust claimed a deficiency judgment, (*id*.) (R. pp. 163, 234-35), it would be allowed under S.C. Code Ann. § 15-

39-720 to bid only one time, with the sale then being held open for thirty days to receive upset bids.[1]

At the foreclosure sale, the Trust bid $6.6 Million, which was $2.9 Million less than the debt and well below the $30 million value that the Appellants/Petitioners assigned to the property. (Tr. pp. 52, 85, 88) (R. pp. 145, 178, 181).[2] The sale was then held open for thirty days for upset bids. (*Id*. pp. 52, 88) (R. pp. 145, 181). At the close of thirty days, Mr. Buchanan himself appeared at the auction, bid against other bidders, and won. (*Id*.) (R. pp. 145, 181). Mr. Buchanan indicated that his bid was made on behalf of a wholly owned LLC, Second Avenue Holdings, and he assigned his bid back to the Trust. (*Id*. pp. 52-53) (R. pp. 145-46). As outlined by the Trust in its opening statement at trial:

> [T]he way that the two sales work is that at the first sale the person who is owed the money can put in a bid for the property. . . . There's then a second sale, what might be referred to as the upset bid, okay? **At the second sale, the person who's owed the money is not allowed to bid, nor is that party's representative allowed to bid, and the reason for that is to try to encourage the party who is owed the money to put in the highest bid possible**, okay? . . . .

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[1] Under Section 15-39-760, the provisions of Section 15-39-720 do not apply when the lender "expressly waives" a deficiency judgment against the borrower, in which case the sale is not held open for thirty days, and compliance with the bid must be made immediately. *Id*. § 15-39-760. In this manner, a lender who wants to retain a deficiency judgment against the borrower (*i.e.,* a judgment in the amount that the debt exceeds the high bid at the foreclosure sale) must comply with Section 15-39-720 and hold the bidding open for thirty days.

[2] The Trust itself valued the Property at $15 Million in the days following the sale. (Tr. p. 32) (R. p. 125). Even at this value, the Property was worth well above the debt of $9.5 Million.

> What happened in this case is at the first sale the trust put in a bid for 6.6 million. . . . .[A]nd then after that **Mr. Buchanan, who was concerned that someone else might come in and take this property and leave the trust in a bad position, losing some money,** decided that it would be **better for one of his companies to own it rather than the -- rather than somebody other than the trust.** So Mr. Buchanan, on behalf of a company he owned called Second Avenue Holdings, LLC, it was a company he had set up to hold some property previously, went to the second sale and there were other bidders there and multiple bids were put in. In the end, Second Avenue Holdings, LLC, won the bid and held the property.
>
> After that point, Mr. Buchanan after consulting with some others and the trustee decided that it would be **better from a tax perspective and from his children's perspective for the trust to hold onto that property** rather than Second Avenue Holdings, LLC. So Second Avenue Holdings, LLC, **assigned the bid that it won back to the trust** so the trust could hold on to the property.

(Tr. pp. 52-53) (R. pp. 145-46 (emphasis added)).[3]

Second Avenue Holdings was solely owned by Mr. Buchanan, (*id*. p. 111) (R. p. 204), and it was created six days after the Trust's bid at the first sale on September 4, 2012, (*id*. pp. 96-97 & Green Ex. 1) (R. pp. 189-90, 283-84).[4] Its winning bid was for $7,160,000. (*Id*. p. 69 & Pl. Ex. 5) (R. pp. 162, 265). That same day it deposited $500,000 toward its bid and, on October 24, 2012, assigned its bid to the Trust for **no consideration**. (Tr. pp. 100-101 & Green Ex. 2) (R. pp. 193-94,

[3] A party is bound by the admissions of counsel at opening statement. 88 C.J.S. Trial § 267.

[4] Mr. Buchanan contended at trial that he created this company several years earlier, but he was impeached with the Articles of Organization revealing that it came into existence on September 10, 2012. S.C. Code Ann. § 33-44-202(b) ("Unless a delayed effective date is specified, the existence of a limited liability company begins when the articles of organization are filed.").

285-86).[5] The property then was deeded from the Master in Equity to the Trust, and **the Trust claimed an exemption from the deed recording fee on the basis that it obtained the deed as mortgagee pursuant to foreclosure proceedings**. (Tr. pp. 71-72 & Pl. Ex. 3) (R. pp. 164-65, 252, 261-62).

The Court then entered an Order of Deficiency against the Borrower in the amount of $2,484,163.95 on October 26, 2012, which was amended to $2,753,192.70, plus 15% annual interest, on February 13, 2013. (Tr. pp. 71-72 & Pl. Exs. 2, 4) (R. pp. 164-65, 249-51, 263-64). The net result was that the Trust, which *was not allowed to bid at the upset sale*, ended up with the property (valued at $15 to $30 Million) *as a result of a bid at the upset sale*, and it also ended up with a deficiency judgment of $2.8 Million ($4,781,882.55 at the time of trial[6]) even though the value of the property exceeded the total debt owed by the Borrower. (Tr. pp. 32, 52-53, 71-73, 85 & Pl. Exs. 2-4, 10) (R. pp. 125, 145-46, 164-66, 178, 249-64, 282).

After it obtained a Deficiency Judgment against the Borrower in the Foreclosure Action, the Trust brought the instant action against the Guarantors seeking to recover on the Guaranties. The Guarantors contended at trial that when Mr. Buchanan appeared at the upset sale and presented the winning bid, he violated the Deficiency Statute, S.C. Code Ann. § 15-39-720, because he was acting

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[5] The Assignment of Bid noted that the deposit would be returned to Second Avenue Holdings less the Master's commission and other court costs, and those costs were reimbursed by the Trust. (Tr. p. 101 & Green Ex. 2) (R. pp. 194, 285). Thus, Second Avenue Holdings netted zero dollars, and so there was no consideration.

[6] (Trial Ex. 10; Court Ex. 1) (R. pp. 282, 289-90).

on behalf of the Trust who was forbidden from bidding at the upset sale, and therefore that the Trust is precluded from recovery on the Guaranties because it violated the implied covenant of good faith and fair dealing with the Guarantors (and/or because of unclean hands, waiver, and/or unlawful act). (Tr. pp. 123, 129; Amended Motion) (R. pp. 216, 222, 294-95).

At trial, the Guarantors presented a great deal of evidence supporting their contention that Mr. Buchanan, and in turn his wholly owned entity, Second Avenue Holdings, was acting on behalf of the Trust at the second foreclosure sale. Mr. Buchanan's own testimony established that he regularly and routinely acted on behalf the Trust in its operations. He testified that he set up the Trust and funded it out of his own assets, (*id.* pp. 93-94) (R. pp. 186-87); that he holds the title of "financial advisor" of the Trust, (*id.* p. 111) (R. p. 204); and that he routinely identifies properties to be put into the Trust, (*id.* p. 110) (R. p. 203). He further testified that he was the one who identified the loan opportunity to the Borrower and met with the Guarantors on behalf of the Trust—without the Trustee—in order to initiate the transaction. (*Id.* p. 110) (R. p. 203). The Trustee also obtained his consent before proceeding with the foreclosure action in this matter. (*Id.* p. 95) (R. p. 188).

The Trustee, Mr. Wilkinson, concurred that the assets held by the Trust have "all been put in there by Mr. Buchanan" in order to eliminate estate taxes and to benefit Mr. Buchanan's children. (*Id.* pp. 65-66, 74) (R. pp. 158-59, 167). He explained that his role as Trustee is to make "distributions for the health, education

and welfare" of Mr. Buchanan's children. (Id. p. 65) (R. p. 158). He agreed that Mr. Buchanan gives financial advice to the Trust, brings most of the investments to the table, and makes recommendations about buying or selling property. (*Id*. pp. 76, 78) (R. pp. 169, 171). The Trustee conceded that he has never turned down one of Mr. Buchanan's recommendations. (*Id*. p. 79) (R. p. 172). He even referred to the Trust loaning money to the Borrower as if it were Mr. Buchanan himself loaning the money: "Mr. Buchanan was contacted by someone . . . [who] told him there was an opportunity" and that "if **he** wanted to loan some money, you know, there was an opportunity to make some money." (*Id*. pp. 66-67 (emphasis added)) (R. pp. 159-60).

After both sides rested their case, the Trust moved for a directed verdict. The Defendant Guarantors opposed the Trust's motion for directed verdict on the basis that the Trust was precluded from recovery under the Guaranties because its violation of the Deficiency Statute constituted a breach of the implied covenant of good faith and fair dealing, unclean hands, waiver, and/or unlawful act. (Tr. pp. 123, 129; Amended Motion) (R. pp. 216, 222, 294-95). The trial court directed a verdict against Guarantors based on the court's ruling that a violation of the Deficiency Statute was not a defense to the payment obligation on the Guaranty. After outlining the standard of review for a directed verdict, the court's reasoning and decision are set forth in full as follows:

> Although I think there is more than one inference that can be drawn from parts of the testimony, I do not think they are significant. Even if -- and that -- I say it like that because I'm not interested in the weight of the evidence but the existence of the evidence. If we're looking at the evidence in the light most favorable to the Defendants, there was a violation of Section 15-39-720, upset bid within thirty days

> on foreclosure or execution sale. That's an inference that can be drawn. To this Court that makes not a whit of difference. Not a whit of difference. I look at Plaintiff's Exhibit Number 8, Plaintiff's Exhibit Number 9, which [are] the guaranty agreements that are the documents upon which this lawsuit has been brought. I do not think a violation of the statute that I just cited is a defense on a guaranty of a debt. Again, tight-roping -- not tight-roping, but following the standard of directed verdict, drawing that inference, it would be in the light most favorable to the Defendant and I do not think there was a violation. I don't think you can turn Rambo into Superman or Superman into Rambo. Second Avenue Holdings is not the irrevocable trust. They're two separate and distinct legal existing entities so for that reason I will direct a verdict for the Plaintiff in the amount of the deficiency judgment and the interest for that $4,781,882.65.

(Tr. pp. 132-33) (R. pp. 225-26).

Following a question by Appellants' counsel, the trial judge clarified that he assumed a violation of the Deficiency Statute for purposes of the directed verdict:

> And I understand and I cited the statute. As I say, I don't want to weigh the evidence and say it's -- based on my ruling that there wasn't a violation; I assume there was a violation of the statute for purposes of my ruling.

(*Id*. p. 133) (R. p. 226) (emphasis added).

Thus, the trial judge entered a directed verdict for the Trust on the basis that, assuming a violation of the Deficiency Statute, such a violation would not provide a defense to the Defendant's guaranties on the debt. (Tr. pp. 132-33) (R. pp. 225-26). On September 7, 2017, the trial court issued a Form 4 Order directing a verdict against Defendants in the amount of $4,781,882.65. (Order dated September 7, 2017) (R. pp. 10-11). Nonetheless, the court did not set forth the specific basis as to why or how it ruled that such a violation could not operate as a

defense to the Trust's claims on the Guaranties. Following denial of their motion for a new trial, the Petitioners appealed. (R. pp. 12-13, 291-96,365-69).

On December 15, 2021, the Court of Appeals issued an opinion affirming the circuit court's granting of the Trust's motion for directed verdict. *Wilkinson v. Redd Green Invs., LLC*, 868 S.E.2d 406 (S.C. Ct. App. 2021) ("Opinion"). On February 24, 2022, the Court of Appeals denied rehearing.

ARGUMENTS

This case presents a novel issue of law warranting review. *See* Rule 242(b)(1), SCACR. There is no case law in South Carolina that addresses the issue of whether a guarantor may assert as a defense to enforcement of the guaranty that the lender/mortgagee violated the Deficiency Statute in a prior foreclosure action by improperly bidding at the second upset sale (thereby depriving the guarantor of the lender's highest and best bid at the first sale). In other words, may a lender "get away" with a blatant violation of South Carolina law in a prior proceeding that did not even involve the guarantor? Or may the guarantor assert the violation as a defense in a subsequent action? This issue has yet to be decided, and no case law supporting the decision was cited by the trial court or the Court of Appeals.

It stands to reason that this Court must not allow lenders to violate a South Carolina statute with impunity in order to obtain a deficiency judgment and then enforce the ill-gotten deficiency against a guarantor in a subsequent action, particularly when the guarantor was not a party to the initial action where the violation took place. A ruling overturning the decision of the Court of Appeals supports public policy, fairness, and general notions of justice and fair play. If this

Court were to decline granting certiorari, then the Respondent will get away with a great injustice that would promote the violation of South Carolina law by future lenders and be grossly unfair to Petitioners and future guarantors.

For these reasons, the Supreme Court of South Carolina should exercise its discretion to grant certiorari.

I. This Court should grant certiorari to resolve the novel question of whether violation of the statutory prohibition on the mortgagee bidding at the second sale may operate as a valid defense in a subsequent action against a guarantor.

The Court of Appeals held that the Guarantors could not assert a violation of the statute as a defense to the Trust's action to enforce the guaranties for the reasons that (1) the Guarantors were barred by res judicata, and (2) even assuming a violation of the statute, the Guarantors failed to show that they were prejudiced. Both of these bases to affirm the trial court are erroneous as a matter of law. These two issues are discussed in reverse order.

A. Prejudice

The Court of Appeals 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.,* evidence that the fair market value of the property was higher than Second Avenue Holding's bid). (Opinion at 8-9). As an initial matter, assuming prejudice is required, this holding fails to appreciate the inherent prejudice in denying the Guarantors the benefit of the Trust's highest and best bid. It is vital to understand that the entire purpose of the Deficiency Statute is to protect borrowers and guarantors by requiring the mortgagee to make its

highest and best bid on the first day of the sale, which in turn minimizes or even eliminates any deficiency. *See* 27 S.C. Jur. Mortgages § 128 ("This effectively forces the mortgagee to enter his highest and best bid at the initial sale.); *see also Holliday v. McFadden*, 188 S.C. 187, 198 S.E. 392, 394 (1938) ("[T]he policy of the Statute is to prevent property being sold at judicial sales for sacrifice prices.").

Indeed, the Trust admitted in its opening statement at trial that the purpose of this bidding scheme "is to try to encourage the party who is owed the money to put in the highest bid possible." (Tr. p. 52) (R. p. 145). By forcing the mortgagee to only bid one time at the initial sale, the mortgagee risks being outbid by a third party if the bid is under fair market value, thereby in essence taking from the mortgagee what the mortgagee could have received in payment for the debt. Because the provisions allowing for a deficiency judgment do not apply when a mortgagee waives the deficiency and competes with other bidders, the mortgagee should not gain the benefit of a deficiency when it (or someone on its behalf) violates those provisions by bidding at the second sale and thereby deprives the guarantor of the mortgagee being forced to make its highest and best bid at the beginning of the sale rather than the end of the sale.

That said, whether 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. The Court of Appeals assumed that a showing of prejudice must be made by Guarantors, but it did not cite 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 that 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, this requirement is satisfied by the fact that the Guarantors were inherently prejudiced by the violation because they were deprived of the highest and best bid of the Trust (as discussed above). Such a deprivation could not be cured by the fact that the Bank's representative (Second Avenue Holdings) outbid other bidders at the second upset sale because it fails to establish whether the Trust would have bid even higher at the first sale without having the knowledge of how high competing bidders might bid at a second sale.

Regardless of whether this Court agrees that Guarantors made a showing of inherent prejudice, the Petitioners did produce direct evidence from which it could be inferred that the value of the property exceeded Second Avenue Holding's bid.

Although the Court of Appeals concluded 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," (Opinion at 9), there was at the very least evidence that would support a reasonable jury conclusion that the fair market value of the Property exceeded the Trust's bid. 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[7] that allows for the reasonable inference that the fair market value of the property exceeded the Trust's high 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 includes:

- Mr. Green testified that the property initially was worth "over $30 Million" when initially acquired. (Tr. p. 85) (R. p. 178).

[7] The Court of Appeals 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.

- 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) (emphasis added).

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.

But even if the Guarantors failed to produce sufficient evidence of prejudice (whether direct or implied/inherent), the Court of Appeals erred by placing this burden upon the Guarantors rather than placing a burden of showing a lack of prejudice upon the Trust. For reasons of public policy, 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 discussed above, we can never know what the Trust's high bid would have been—if it had been forced to make a high bid at the first sale without knowing what would be bid at the second upset sale (as

opposed to sending a representative to the second upset sale so as to know how high it must bid)—and so the deprivation of this statutory protection taints the entire bidding process.

In conclusion, the Deficiency 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 and/or the burden shift to the Trust. In short, when a mortgagee violates the bidding statute in order to obtain a deficiency judgment that 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.

B. Res Judicata

The Court of Appeals incorrectly held that "[t]he 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.[8] The Guarantors simply are not attacking the deficiency judgment against the Borrower. This judgment stands and may be pursued by the Trust against the Borrower.

Instead, the Guarantors contend that the Trust's violation of the Deficiency 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. *See, e.g., Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 500, 473 S.E.2d 52, 53 (1996) (holding that the implied covenant of good faith and fair dealing prohibits a party from doing anything taking any action that would "impair the other's rights to receive benefits under the contract." (internal quotations omitted)); *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360,

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[8] As noted by the Court of Appeals, res judicata requires identity of parties and subject matter, as well as prior adjudication of the issue:

> "The doctrine of res judicata provides that final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were or could have been raised in that action." *Venture Eng'g, Inc. v. Tishman Constr. Corp. of S.C.*, 360 S.C. 156, 162, 600 S.E.2d 547, 550 (Ct. App. 2004) (quoting *In re S.N.A. Nut Co.*, 215 B.R. 1004, 1008 (1997)); *see also Pye v. Aycock*, 325 S.C. 426, 432, 480 S.E.2d 455, 458 (Ct. App. 1997) ("To establish res judicata, three elements must be shown: (1) the identities of the parties is the same as a prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction.").

(Opinion at 7.)

362–70, 147 S.E.2d 481, 481–85 (1966) (holding that a breach of the implied covenant of good faith and fair dealing is a valid defense to a guaranty agreement).[9]

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 enforceability of the guaranties was not at issue and was not addressed in the first action. The issue in the present action is whether the Trust may enforce under the Guaranties or whether the Trust's violation of the Deficiency 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 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.

In addition, there is no identity of parties that supports application of the doctrine of *res judicata*. The Court of Appeals 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

[9] Alternative theories for the defense include the doctrines of unclean hands, waiver, or not being able to gain from an illegal act.

unpaid debt of Springs North Augusta." (Op. at 8). However, the Court of Appeals did not cite 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 of Appeals cites to the relationship between the Guarantors and the Borrower (with the individual Guarantors being owners of an entity with an ownership interest in the Borrower) as a basis for notice of the proceeding, (*id.*), but neither the Court of Appeals nor the Respondent has cited to case law supporting the conclusion that such a relationship, or that notice of the proceeding, equates to being privies.

In fact, there is precedent 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), the Court of Appeals 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*. At the very least, the Court of Appeals' decision in this appeal creates patently contradictory court precedent, which requires action by this Court to resolve.

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 of Appeals to hold that the Guarantors were privies of the

Borrower. Again, at the very least, the Court of Appeals' holding on this issue creates a direct conflict in South Carolina legal authority, which requires resolution by this Court.

In addition, the Court of Appeals overlooked the fact that the Borrower was in default in the foreclosure action and did not defend it. The Court asserted 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 this 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* does not preclude Guarantors from defending the instant action on the basis of a defense that was not litigated in the prior default judgment.

CONCLUSION

This case warrants review because the Court of Appeals' decision incorrectly disposes of a novel issue of South Carolina law. Petitioners ask the Court to grant this petition for a writ of certiorari and clarify for South Carolina lenders and guarantors that a mortgagee's violation of section § 15-39-720 may serve as a defense to a claim against a guarantor when that claim is premised upon the violation.

Respectfully submitted,

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Date: March 28, 2022

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Opinion No. 5880 (S.C. Ct. App. filed December 15, 2021)

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 .....Petitioner.

PROOF OF SERVICE

I, William M. Wilson, III, of Wyche, P.A., attorneys for the Petitioners in the within action, do hereby certify that I have this date served upon opposing counsel the foregoing **PETITION FOR A WRIT OF CERTIORARI** by Email and first class U.S. mail, addressed to the following:

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March 28, 2022