

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2022-000369

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.....

Petitioners.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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Buchanan, Jr. Irrevocable Family Trust Dated the 15th day
of July, 2001*

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S.C. SUPREME COURT

Introduction

This case presents no valid, novel issue of law for this Court to decide. Although the petitioners (the “Guarantors”) attempt to manufacture a novel question, their attempt to evade their obligations under the guaranty agreements is barred by res judicata and waiver, the plain language of the agreements, and by their failure to show that any alleged violation of the bidding statute caused them to suffer any prejudice. The Guarantors contracted to pay any debt Springs North Augusta, LLC owes. They concede the debt—now in the form of a deficiency judgment—is valid and owed by Springs North Augusta. The Guarantors therefore must pay the deficiency judgment. The Court need not and should not consider their attempted maneuver around their contractual obligations. Regardless of whether their purported novel question could be a valid one in the abstract, it is not viable in this case. The trial court properly granted a directed verdict in favor of the Trust, and the Court of Appeals properly affirmed. The Court should therefore deny certiorari.

Counter-Statement of the Questions Presented

- I. Whether the Court of Appeals properly found the Guarantors’ attempted collateral attack on the deficiency judgment is barred by res judicata.
- II. Whether the Court of Appeals properly found the Guarantors are not relieved of their contractual obligations because they did not show any prejudice from the alleged violation of South Carolina Code section 15-39-720.
- III. Whether additional sustaining grounds preclude a reversal of the Court of Appeals and trial court and therefore support a denial of certiorari.

Statement of the Case

This appeal arises out of a foreclosure deficiency judgment involving two guaranty agreements. The Trustee of the George B. Buchanan, Jr. Irrevocable Family Trust, dated the 15th

Day of July, 2001 (the “Trust”),¹ seeks to enforce the guaranty agreements. In the foreclosure action, the Trust foreclosed on a mortgage securing a loan the Trust made to Springs North Augusta, LLC in 2009. (R. 229). At the conclusion of the foreclosure action, the master in equity sold the property in September 2012. (R. 265). Because the property sold for less than the total amount of the debt, the master entered a deficiency judgment against Springs North Augusta. (R. 251).

The Trust filed this action on March 5, 2013, against Redd Green Investments, LLC; Anderson North Augusta, LLC; Herbert Anderson, Jr.; A. Bruce Green; William Otha Bodie;² Herbert Keith Anderson; and L. Cliff Redd. (R. 16). The petitioners in this case are Redd Green Investments, LLC; A. Bruce Green; and L. Cliff Redd (the “Guarantors”). In the complaint, the Trust alleged the Guarantors and other defendants breached two guaranty agreements they entered into with the Trust in which they guaranteed the loan that was the subject of the foreclosure action. *See generally* (R. 16–21). The Guarantors contend they should be relieved of their contractual obligations under the guaranty agreements on the ground that the Trust allegedly violated South Carolina Code section 15-39-720 (the “bidding statute”)³ when 2nd Avenue Holdings, LLC

¹ When the Trust filed the complaint, the Trustee was Harry P. Sakellaris. (R. 16). The caption in the case was amended on March 1, 2016, after the current Trustee, Stephen Wilkinson, replaced Sakellaris. (R. 1).

² William Otha Bodie never answered the complaint and eventually was removed from the caption.

³ Section 15-39-720 provides,

In all judicial sales of real estate for the foreclosure of mortgages and sales in execution the bidding shall not be closed upon the day of sale but shall remain open until the thirtieth day after such sale, exclusive of the day of sale. Within such thirty day period any person other than the highest bidder at the sale or any representative thereof in foreclosure and execution suits may enter a higher bid upon complying with the terms of sale by making any necessary

submitted the winning bid at the foreclosure sale because Buchanan is the owner of 2nd Avenue Holdings. *See* (R. 89–91).

The case proceeded to trial on September 5, 2017. (R. 94). At the close of all the evidence, the Trust moved for directed verdict on the grounds that the Guarantors cannot collaterally attack the foreclosure orders, that the bidding statute was not violated as a matter of law, and that any violation of the bidding statute was not a material breach of the guaranty agreements because the Guarantors received the benefit of the loan. (R. 217–20). The trial court granted the Trust’s motion on the grounds that a violation of the bidding statute is not a defense on a guaranty of a debt and no violation of the bidding statute occurred. (R. 225–26). The Guarantors appealed, and the Court of Appeals affirmed.

I. The Underlying Loan

In November 2009, the Trust and Springs North Augusta, LLC executed a promissory note for a \$7,590,000 loan from the Trust to Springs North Augusta. *See* (R. 266–72). Springs North Augusta was owned by Redd Green Investments, LLC and Anderson North Augusta, LLC. (R. 266; R. 177). Those owners formed Springs North Augusta for the purpose of holding title to 1,420 acres of commercial real estate in Aiken County, South Carolina. (R. 178). The individual

deposit as a guaranty of his good faith, and thereafter within such period any person, other than such highest bidder at the sale or any representative thereof, in foreclosure suits may in like manner raise the last highest bid, and the successful purchaser shall be deemed to be the person who submitted the last highest bid within such period and made the necessary deposit or guaranty. 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.

S.C. Code Ann. § 15-39-720.

appellants in this case, Bruce Green and Cliff Redd, owned Redd Green Investments, LLC, which they formed solely to hold their ownership interest in Springs North Augusta. (R. 177). The loan was secured by a mortgage on the 1,420 acres of commercial real estate, which the Guarantors intended to sell “and pay the note off and hopefully make some money off it.” (R. 178).

As consideration for the Trust to loan the money, the Guarantors executed two guaranty agreements—one signed by Redd Green Investments, LLC and Anderson North Augusta, LLC; and the other signed by appellants Bruce Green, Cliff Redd, and the other individual defendants. *See* (R. 276, 279). The two guaranty agreements contained identical terms. *See (id.)*. All parties executed another agreement (the “Loan Agreement”) memorializing additional aspects of their relationships. (R. 22).

In November 2010, the parties amended the Loan Agreement and promissory note. *See* (R. 273–75; R. 160–61). The amendments extended the maturity date by one year and added the capitalized interest to the principal, making the new principal amount \$8,728,500. (*Id.*). The guaranty agreements remained unchanged.

III. The Foreclosure Action

After Springs North Augusta defaulted on the loan, the Trust filed an action to foreclose on the mortgage. (R. 179–80). The Trust named Springs North Augusta—the only other party to the mortgage—as the sole defendant in the foreclosure action. *See* (R. 229). Springs North Augusta failed to answer, and the master in equity entered a default judgment in favor of the Trust and ordered the property to be sold at auction with the proceeds to be applied to the debt, which then totaled \$9,450,662.50. (R. 232). The Trust bid \$6,600,000 at the initial foreclosure sale. (R. 189). Pursuant to section 15-39-720, the master in equity held the sale open for thirty days to receive additional bids (sometimes referred to as “upset” bids). At the close of the thirty days, 2nd

Avenue Holdings, LLC submitted a winning bid of \$7,160,000. (R. 265). Subsequently, 2nd Avenue Holdings assigned its winning bid to the Trust. (*Id.*). On March 20, 2013, the master issued his report memorializing that 2nd Avenue Holdings assigned its bid to the Trust and that the master conveyed the property to the Trust. (*Id.*). The Guarantors never sought to intervene in the foreclosure action and never objected to the foreclosure sale or the master's conveyance of the property to the Trust pursuant to the assignment of bid from 2nd Avenue Holdings.

Because the property sold for less than the amount of the debt, the master entered a deficiency judgment against Springs North Augusta in the amount of \$2,484,163.95, which it later amended to \$2,753,192.70, plus 15% annual interest. (R. 263–64). At the time of trial on the guaranty agreements and deficiency judgment, the Trust still owned the property and had not received any written offers to purchase the property. (R. 171). Nor had the Guarantors satisfied the deficiency. (*Id.*).

IV. The Guaranty Action

The Trust filed this action to collect the deficiency judgment from the Guarantors. *See generally* (R. 16–21). The Guarantors asserted they are not obligated to pay the deficiency judgment because 2nd Avenue Holdings is a representative of the Trust and was therefore prohibited from bidding at the upset sale pursuant to South Carolina Code section 15-39-720. *See* (R. 90, 327–32). Although the Guarantors initially asserted counterclaims against the Trust, they withdrew those counterclaims at trial “as counterclaims, but not as the factual basis for the defenses.” (R. 174). However, they maintained as a defense that the bidding statute and the implied covenant of good faith and fair dealing required the Trust to submit a bid of at least fair market value for the property at the initial foreclosure sale. *See, e.g.*, (R. 303–04).

At trial, the Trustee testified that he is responsible for managing the Trust, which Buchanan established “for the health, education[,] and welfare” of his children. (R. 158). The trustee testified that Buchanan has contributed all the assets of the Trust but cannot take assets out of the Trust nor receive any disbursements from the Trust. (*Id.*). Finally, the Trustee established the existence of the debt and the guaranty agreements. (R. 159–66).

The Guarantors presented three witnesses: Bruce Green, Cliff Redd, and George Buchanan. (R. 155–215). Bruce Green testified that, pursuant to the loan documents, the Trust advanced approximately \$6,000,000 in cash to Springs North Augusta. (R. 179); *see also* (R. 187). The \$7,590,000 figure represented in the promissory note included the \$6,000,000 cash outlay, plus prepaid interest and additional amounts. (*Id.*). Bruce Green also testified that, although he was a guarantor of the loan, he thought “that never seemed to be a problem” because he believed the property was worth several times more than the loan. (R. 179). Bruce Green further testified as to his knowledge of various events in the foreclosure process, including his assumption that the Trust would not pursue the guaranty agreements because it did not name the Guarantors as defendants in the foreclosure action. (R. 180–81). Finally, Bruce Green acknowledged that he would have been liable for the debt as a guarantor, but he believed he did not have to pay the deficiency judgment because “it was acquired the way it was.” (R. 183). Cliff Redd testified that his answers would be identical to those offered by Bruce Green. (R. 185). Neither Bruce Green nor Cliff Redd testified that any other party attempted to bid at the foreclosure sale, and the Guarantors presented no evidence that 2nd Avenue Holdings’ participation in the sale thwarted any other party’s attempt to participate.

At the close of all the evidence, the trial court granted a directed verdict in favor of the Trust on the grounds that (1) any violation of the bidding statute is not a defense to the Guarantors’

performance pursuant to the guaranty agreements, and (2) no violation of the bidding statute occurred. (R. 225–26). The Court of Appeals affirmed on two grounds. *Stephen Wilkinson v. Redd Green Invs., LLC*, Op. No. 5880 (S.C. Ct. App. filed Dec. 15, 2021) (Howard Adv. Sh. No. 44 at 27). First, the Court of Appeals held the Guarantors’ attempt to challenge the deficiency judgment is barred by res judicata. *Id.* at 33–36. Second, the Court of Appeals held, even assuming a violation of the bidding statute, the Guarantors failed to show any prejudice from the violation “such that they should be relieved from their responsibilities under the guaranty agreement.” *Id.* The Guarantors now seek certiorari. This Court should deny the petition.

Argument

The Court of Appeals properly affirmed the trial court’s directed verdict in favor of the Trust, and the Guarantors present no novel question of law worthy of this Court’s consideration nor any other grounds warranting certiorari. *See* Rule 242(b), SCACR. First, the Guarantors’ attempted collateral attack on the deficiency judgment is barred by res judicata. Second, the Guarantors failed to show they suffered any prejudice from the alleged violation of the bidding statute. Instead, they ask this Court to rewrite section 15-39-720 to provide that a guarantor is automatically relieved of his contractual guaranty obligation if a mortgagee allegedly violates the bidding statute, regardless of whether any evidence exists showing the guarantor was harmed in any way by the bidding and regardless of whether the terms of his guaranty agreement contradict the relief he seeks. Finally, several additional sustaining grounds, not addressed by the Guarantors, support the denial of certiorari: (1) the plain language of the guaranty agreements contradicts the “implied” terms the Guarantors seek to add to the agreements, (2) the Guarantors waived any purported defenses based on the conduct of the foreclosure sale by failing to defend the foreclosure

or challenge the conduct of the sale before entry of the deficiency judgment, and (3) the Trust in fact did not violate the bidding statute.

I. The Court of Appeals properly found the Guarantors’ attempted collateral attack on the deficiency judgment is barred by res judicata.

The Court of Appeals properly held the Guarantors’ attempt to challenge the deficiency judgment in this action is barred by the res judicata doctrine. Res judicata “defines the effect a valid judgment may have on subsequent litigation between the same parties *and their privies*.” *Duckett v. Goforth*, 374 S.C. 446, 464–65, 649 S.E.2d 72, 81–82 (Ct. App. 2007) (emphasis added). It bars subsequent actions by the same parties or their privies “when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties,” *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 108–09 (1999) (citing *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 417 S.E.2d 569 (1992)), and it “ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues,” *Duckett*, 374 S.C. at 464–65, 649 S.E.2d at 81–82. Under the res judicata doctrine, “[a] litigant is barred from raising any issues which were adjudicated in the former suit *and any issues which might have been raised in the former suit*.” *Plum Creek Dev. Co.*, 334 S.C. at 34, 512 S.E.2d at 108–09 (emphasis added) (quoting *Hilton Head Center of S.C., Inc. v. Pub. Serv. Comm’n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). The party seeking to establish res judicata must prove three elements: (1) identity of the parties, (2) identity of the subject matter, and (3) adjudication of the issue in the former suit. *Id.* The Court of Appeals properly found all three elements of res judicata are present in this case, and the Guarantors’ defense is therefore barred.

A. The foreclosure action and this action involve the same subject matter.

The Court of Appeals properly found the subject matter of the foreclosure action and this action—Springs North Augusta’s debt to the Trust and the foreclosure sale—is the same. The

Guarantors' obligation to pay Springs North Augusta's debt, along with their alleged contractual defenses, arose out of the same transaction as the debt itself and the mortgage on which the Trust foreclosed. *See* (R. 276, 279; R. 22). In an effort to avoid the Court's *res judicata* ruling and distinguish the subject matter of the foreclosure action from the subject matter of this action, the Guarantors concede a valid, enforceable deficiency judgment exists against Springs North Augusta and attempt to frame the issue as whether the guaranty agreements remain enforceable in light of the alleged violation of the bidding statute.

The Guarantors' concession is fatal to their arguments, and the arguments are contradicted by the plain language of the guaranty agreements. If the deficiency judgment is valid, the Guarantors must pay it as they agreed when they signed the guaranty agreements. (R. 276, 279) (agreeing to "absolutely and unconditionally guarantee[] to [the Trust] and its successors and assigns the due and punctual payment of any and all notes, drafts, debts, obligations and liabilities . . . of [Springs North Augusta] at any time, now or hereafter, incurred with or held by [the Trust]"). They seek to evade their obligations by arguing the deficiency judgment "violates the Guaranty itself"—not by violating any express provisions of the guaranty agreements, because the express terms contradict their arguments, but by violating the implied covenant of good faith and fair dealing. (Pet. at 18). However, the plain, express terms of the guaranty agreements preclude the Guarantors' arguments as a matter of law.

The guaranty agreements expressly provide that the Guarantors waived any right to challenge the creation of Springs North Augusta's debts:

It is understood that any such notes, drafts, debts, obligations and liabilities may be accepted or created by or with [the Trust] at any time and from time to time without notice to the [Guarantors], and the [Guarantors] hereby express waive[] presentment, demand, protest, and notice of dishonor of any such notes, drafts, debts,

obligations and liabilities or other evidences of any such indebtedness, obligation or liability.

(R. 276, 279). The Guarantors also waived any right to argue the sale price was insufficient:

Waiver of Appraisal Rights. The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. **TO THE FULLEST EXTENT PERMITTED BY LAW AND AS A MATERIAL INDUCEMENT FOR LENDER TO MAKE THE LOAN, GUARANTOR HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.**

(R. 278, 281).

The Trust performed its obligations under the guaranty agreements by issuing a loan to Springs North Augusta, but the Guarantors now want to avoid their own obligations because, as Bruce Green testified, they never thought they would have to actually pay Springs North Augusta's debt. (R. 179). Springs North Augusta performed its obligations and has not impaired the guarantors' rights under the agreements, because they expressly have no rights other than for the loan to be issued. *See Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (explaining there is no breach of the implied covenant "where a party to a contract has done what provisions of the contract expressly gave him the right to do"); *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 500, 473 S.E.2d 52, 53 (1996) (explaining the implied covenant of good faith and fair dealing prohibits a party from doing anything "to impair the other's rights to

receive benefits under the contract”). Consequently, if the deficiency judgment is valid, as the Guarantors concede, they are obligated to perform their end of the bargain and pay the judgment.

Nothing in the guaranty agreements allows the Guarantors to argue an alleged statutory violation during the foreclosure bidding process as a defense to their guaranty obligations. If a valid deficiency judgment exists against Springs North Augusta, then Springs North Augusta owes a debt to the Trust, and the Guarantors are required to pay the debt. The Guarantors cannot concede the validity of the deficiency judgment as to Springs North Augusta—thus conceding the Trust did not breach the implied covenant of good faith and fair dealing in the loan agreement with Springs North Augusta—yet challenge whether it was obtained in good faith when the Trust demands reciprocate its performance by performing their own obligations under the guaranty agreements. Either they are challenging the existence and validity of the deficiency judgment, and their defense is therefore barred by *res judicata*, or they concede the validity of the judgment and are therefore obligated under the guaranty agreements to pay the judgment. The Court of Appeals properly found the subject matter of both actions is the same—Springs North Augusta’s debt to the Trust, which the Guarantors and Springs North Augusta are each independently obligated to pay, and the conduct of the foreclosure sale, which the master in equity approved in the foreclosure action and which the Guarantors failed to challenge. *Op. No. 5880 (Howard Adv. Sh. No. 44 at 34)*.

B. The identity of the parties is the same in the foreclosure action and this action for purposes of *res judicata*.

The Court of Appeals properly found Guarantors are privies with Springs North Augusta, and thus the identity of the parties element of *res judicata* is satisfied. For purposes of *res judicata*, privity depends not on the relationship between the parties but instead on each party’s relationship to the subject matter of the litigation. *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012). The Guarantors and Springs North Augusta had an identical interest in obtaining a

smaller deficiency judgment because the Guarantors were obligated to pay the deficiency judgment if Springs North Augusta could not do so.

Contrary to the Guarantors' arguments, they are privies with Springs North Augusta under the facts of this case for res judicata purposes. The cases that the Guarantors rely upon do not compel a different conclusion. Those cases make clear that whether parties are privies for purposes of res judicata depends on the facts of each case, not on bright-line rules regarding common ownership of corporations or principal-agent relationships. *H.G. Hall Constr. Co. v. J.E.P. Enters.*, 283 S.C. 196, 205, 321 S.E.2d 267, 272 (Ct. App. 1984) (“***On the facts of this case*** common ownership is not enough to establish privity for the purposes of res judicata.” (emphasis added)); *E.A. Prince & Son, Inc. v. Selective Ins. Co. of Se.*, 818 F. Supp. 910, 915 (D.S.C. 1993) (“***Under the facts before the court***, the theory of *res judicata* does not apply and is not a bar to this action.” (emphasis added)). The cases also provide “[t]he term ‘privy’ when applied to a judgment or decree, ***means one so identified in interest with another that he represents the same legal right.***” *H.G. Hall Constr. Co.*, 283 S.C. at 204, 321 S.E.2d at 271 (emphasis added). The Guarantors and Springs North Augusta shared an identical interest and legal right in the foreclosure action. Each is independently obligated to pay Springs North Augusta’s debts to the Trust, including any deficiency judgment. Therefore, the Guarantors and Springs North Augusta had the same interest in obtaining the smallest deficiency judgment possible. Accordingly, under the facts of this case, the Guarantors and Springs North Augusta are “so identified in interest with [one] another that [they] represent[] the same legal right” and are therefore privies for purposes of res judicata. See *H.G. Hall Constr. Co.*, 283 S.C. at 204, 321 S.E.2d at 271.

C. The validity and amount of the deficiency judgment were adjudicated in the foreclosure action.

Finally, the Court of Appeals correctly held the master in equity adjudicated the amount of Springs North Augusta’s remaining debt to the Trust when he entered the deficiency judgment. The master also was aware of 2nd Avenue Holdings’ assignment to the Trust, and he approved of that assignment when he conveyed the property to the Trust. (R. 265, 285–86). It cannot be disputed that the Guarantors are required by contract to pay Springs North Augusta’s debts to the Trust. Rather than perform their contractual obligation, they argue the amount of the debt would be lower or extinguished altogether but for the actions of 2nd Avenue Holdings at the foreclosure sale. The amount of the remaining debt (i.e., the deficiency judgment) was adjudicated by the master in equity. The Guarantors cannot assert that the deficiency judgment should have been smaller in this subsequent action. They could have asserted their rights in the foreclosure action and raised the issue of 2nd Avenue Holdings’ participation in the sale, but they chose not to do so. Accordingly, the Guarantors’ defense is now barred by res judicata.⁴ Thus, the purported novel question the Guarantors attempt to raise now need not be decided in this case—regardless of whether it is a valid question—because the Guarantors’ assertion of the question is barred by res judicata and the plain language of the guaranty agreements.

II. The Guarantors bear the burden of proof on their affirmative defenses and did not show that they suffered prejudice from any alleged violation of the deficiency statute.

The Court of Appeals properly held the Guarantors failed to show the alleged violation of the bidding process caused them to suffer any prejudice because “no evidence shows what the

⁴ The case relied upon by the Guarantors to assert res judicata cannot apply to a deficiency judgment is inapplicable. It addresses collateral estoppel, which requires an analysis of different elements than res judicata. *See In re Est. of Brown*, 430 S.C. 474, 488, 846 S.E.2d 342, 349 (2020). The amount of the deficiency judgment was adjudicated by the master in the foreclosure action.

winning bid would have been had Second Avenue not placed the highest bid.” Op. No. 5880 (Howard Adv. Sh. No. 44 at 35). Even if a violation of the bidding statute could otherwise be a valid defense to a guaranty obligation, the Guarantors cannot be relieved of their obligation to perform under the guaranty agreements unless they can show that the sale price would have been higher but for Buchanan’s actions. They failed to do so. The fact that the winning bid was \$7,160,000 proves no party was willing to bid more than \$7,160,000, and the Guarantors suffered no prejudice from 2nd Avenue Holdings’ purchase as a matter of law because they would be in no better position if 2nd Avenue Holdings had not submitted a bid and instead a third party had purchased the property. *See Peoples Fed. Sav. & Loan Ass’n v. Myrtle Beach Ret. Grp., Inc.*, 302 S.C. 223, 233 & n.1, 394 S.E.2d 849, 855 & n.1 (Ct. App. 1990) (Cureton, J., concurring) (“[T]he developers here are not prejudiced by allowing the lender the discount because they would have been in no better position if a third party had purchased the property at the judicial sale. . . . *Indeed, it is assumed that because a third party did not buy the property at the foreclosure sale no one else was interested in purchasing the property at the price paid by the lender.*” (emphasis added)).

The Guarantors instead ask the courts to extinguish their debt on the hypothetical and illogical ground that a mortgagee would necessarily bid fair market value if it submits only one bid. No provision of South Carolina law supports such a remedy, and no evidence presented at trial supports the Guarantors’ hypothetical. Moreover, the Guarantors benefitted from 2nd Avenue Holdings’ bid at the upset sale. The property would have sold for less than \$7,160,000 if 2nd Avenue Holdings had not bid, and the deficiency judgment would therefore be larger.

Recognizing the lack of evidence that the Trust or any third party was willing to bid more than \$7,160,000, the Guarantors ask this Court to write new law that if the bidding statute is violated, then any guarantors of the debt are relieved of their contractual guaranty obligations,

regardless of the terms of their guaranty contracts—all based on the fiction that their debt would necessarily have been extinguished if the mortgagee submitted its “highest and best bid.” However, the Guarantors’ assumption that the Trust would have bid fair market value but for its alleged violation of the statute is speculation unsupported by any evidence. The Guarantors presented no evidence and cite no evidence that any bidders existed other than the Trust and 2nd Avenue Holdings. Moreover, the Guarantors presented no evidence that Buchanan and the Trust hatched a plan to bid at the upset sale before the Trust submitted its original bid. The record thus contains no evidence that the alleged improper second bid had any impact on the amount of the Trust’s original bid, and the Guarantors therefore cannot, as a matter of law, prove the critical question whether the winning bid would have been higher—and the deficiency judgment smaller—but for the alleged bidding statute violation.

The Guarantors contend the Court should assume the absence of the word “prejudice” in the statute must mean a guarantor is entitled to a presumption of “inherent prejudice” if a mortgagee allegedly violates the statute. Nothing in the statute supports this argument. The statute only explains the required process for the conduct of foreclosure sales. *See* S.C. Code Ann. § 15-39-720. It does not promise or guarantee any bid amount, provide a remedy to borrowers (much less to guarantors) in the event of an improper bid, require or support a presumption of “inherent prejudice,” relieve the Guarantors of any obligation to show prejudice, or shift the burden of proof on the Guarantors’ affirmative defenses to the Trust. It is an inappropriate logical leap to assume the absence of the word “prejudice” from the bidding statute means the statute somehow provides that a guarantor is relieved of his separate, contractual obligation to pay the debt if the mortgagee breaches the requirement that it bid only once at a foreclosure sale. The Guarantors ask this Court to write new law extending well beyond the parameters of the bidding statute. That is the duty of

the General Assembly, not the courts. The Court should therefore decline to address the purported novel question raised by the Guarantors.

The Guarantors also seek to rewrite the guaranty agreements to provide that the Guarantors must pay any deficiency judgment only if the property sells for fair market value and a deficiency remains after the sale. That is not what they agreed. The Guarantors contracted away their appraisal rights and agreed to have the winning bid apply, regardless of whether the bid exceeded fair market value. (R. 278, 281). The guaranty agreements acknowledged that South Carolina law provides statutory appraisal rights,⁵ but provided that each Guarantor “hereby waives and relinquishes the statutory appraisal rights which means the high bid at the judicial foreclosure sale will be applied to the debt regardless of any appraised value of the mortgaged property.” (R. 278, 281). The Guarantors now ask the Court to rewrite the guaranties and require the foreclosure auction to result in a sale for fair market value. However, by the plain language of the guaranty agreements, the Guarantors unconditionally agreed to pay any debt owed by Springs North Augusta. The Court cannot and should not rewrite a contract to require the opposite of the parties’ agreement.

Moreover, notwithstanding the impropriety of the Guarantors’ request to rewrite the statute and guaranty agreements, the Court of Appeals properly found the Guarantors presented no evidence of the fair market value at the time of the foreclosure sale and thus failed to prove the deficiency would have been eliminated or reduced by a bid of fair market value. Op. No. 5880

⁵ *See id.* (recognizing “that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgage property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction.”); *see also* S.C. Code Ann. §§ 29-3-680 through -740 (providing a deficiency judgment may be reduced or extinguished by an appraisal)

(Howard Adv. Sh. No. 44 at 35). Although Mr. Green testified the property was worth \$30,000,000 in 2009, his self-serving testimony that he did not think he would have to perform under his guaranty agreement because he thought the property was still worth some unidentified value greater than the total debt several years later is not evidence a reasonable juror could rely upon to determine the fair market value of the property—much less to determine the winning bid would have been higher than \$7,160,000 but for the alleged bidding statute violation. (*Id.*); (R. 178) (testifying “at one time [the property] was worth over \$30 million . . . when we initially owned it”).⁶ The record lacks any evidence that the fair market value of the property at the time of the sale was greater than the sale price.⁷ Accordingly, the Guarantors cannot even show the sale price was less than the fair market value of the property.

The Guarantors failed to present any evidence of prejudice, and they raise no valid basis to rewrite the bidding statute or the guaranty agreements—actions which are prohibited by law in any event. *See Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) (“When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature’s language.”); *Hardee v. Hardee*, 355 S.C. 382, 387, 585 S.E.2d

⁶ The cases the Guarantors rely upon primarily address the *admissibility* of a property owner’s testimony as to the diminution in value caused by damages to his property. *See Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 594–95, 493 S.E.2d 875, 880 (Ct. App. 1997); *Waites v. S.C. Windstorm & Hail Underwriting Ass’n*, 279 S.C. 362, 366, 307 S.E.2d 223, 225 (1983); *see also Hill v. City of Hanahan*, 281 S.C. 527, 531–32, 316 S.E.2d 681, 684 (Ct. App. 1984) (addressing the admissibility of testimony as to the value of land in a takings case). The admissibility of Bruce Green’s testimony is not at issue.

⁷ The Guarantors’ assertion that “[t]he Trust itself valued the Property at \$15 Million in the days following the sale,” (Pet. at 4 n.2), is not based on *evidence*. Rather, the Guarantors cite to a statement made by their own counsel during argument on an evidentiary issue regarding the admissibility of “testimony related to any negotiations for the subsequent sale of the property that did not result in a written contract or a purchase agreement.” (R. 120–28); *see also* (R. 128) (finding the testimony inadmissible).

501, 503 (2003) (“The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous.”). The Court therefore should not reach the Guarantors’ “novel” question.

III. Additional sustaining grounds preclude a reversal of the Court of Appeals and trial court and therefore support the denial of certiorari.

A. The plain language of the guaranty agreements precludes the Guarantors’ efforts to evade their contractual obligations to pay the deficiency judgment.

By their plain, express terms, the guaranty agreements, read as a whole as all contracts must be read, contradict the Guarantors’ arguments. The Guarantors ask this court to add implied terms that contradict the plain, express terms of the guaranty agreements. This court cannot rewrite the guaranty agreements. The guaranty agreements are contracts subject to standard rules of contract interpretation. *TranSouth Fin. Corp. v. Cochran*, 324 S.C. 290, 294, 478 S.E.2d 63, 65 (Ct. App. 1996) (“A guaranty is a contract and should be construed based on the language used by the parties to express their intention.”). Therefore, the question whether a violation of the bidding statute constitutes a defense to payment on the guaranty agreements is an issue of contract interpretation. When a contract’s language is unambiguous, the court must interpret the contract based on the language alone. *First S. Bank v. Rosenberg*, 418 S.C. 170, 180, 790 S.E.2d 919, 925 (Ct. App. 2016) (citing *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 615, 732 S.E.2d 626, 628 (2012)). The court must read contractual terms in the context of the whole contract and “may not create an ambiguity by pointing out a single sentence or clause.” *Id.* (quoting *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). “This court’s duty is to enforce the contract made by the parties regardless of the parties’ failure to carefully guard their rights.” *Id.*

The guaranty agreements are personal obligations running directly from the Guarantors to the Trust and were immediately enforceable against the Guarantors upon default of the borrower, if the Trust chose to enforce them. *TranSouth Fin. Corp.*, 324 S.C. at 295, 478 S.E.2d at 66. The Guarantors' rights are determined solely by the terms of the guaranty agreements, and the guaranty agreements do not support their position. *See Citizens & S. Nat. Bank of S.C. v. Lanford*, 313 S.C. 540, 544, 443 S.E.2d 549, 551 (1994) ("We adhere to the principle that the guaranty of payment and the promissory note are two separate contracts. We conclude that [the guarantor] is not a party to the note and cannot avail himself of defenses based on impairment of collateral under S.C. Code Ann. § 36-3-606 (1976).").

The guaranty agreements clearly provide that the Trust was making a loan in consideration for an unconditional guarantee of payment by the Guarantors. (R. 276, 279) (providing the Guarantors "absolutely and unconditionally" guarantee payment of the loan "[a]s an inducement to [the Trust] to extend credit to and to otherwise deal with **SPRINGS NORTH AUGUSTA, LLC** . . . and in consideration thereof."). The guaranty agreements are therefore absolute guaranties or guaranties of *payment*; they are not guaranties of *collection*. *See Peoples Fed. Sav. & Loan Ass'n*, 300 S.C. at 281, 387 S.E.2d at 674 ("Under an absolute guaranty of payment, the creditor may maintain an action against the guarantor immediately upon default of the debtor. A guaranty of collection conditions liability of the guarantor upon prosecution of the primary debtor without success." (citations omitted)); *see also* (R. 276, 279) ("providing the guaranty agreements are guarantees "of payment and not of collection"). As guaranties of payment, the Trust is not obligated to take any particular action or accomplish any requirement before demanding that the Guarantors pay the debt, and it is not required to somehow protect the Guarantors by minimizing the amount of the debt they owe. The Guarantors expressly contracted away any such protection.

See Lanford, 313 S.C. at 543, 443 S.E.2d at 551 (finding a guaranty agreement imposed no obligation on the lender to pursue or exhaust the collateral and, instead, “unambiguously places all guarantors, jointly and severally, under liability for 100% of the contract debt”).

The express terms of the guaranty agreements provide (1) the Trust is not required to foreclose on the mortgage prior to pursuing payment from the Guarantors; (2) the loan is not conditional on the Trust taking *any* particular steps related to the mortgage prior to seeking payment of the remaining debt from the Guarantors; and (3) the Guarantors have no right of subrogation unless and until the borrower’s debt is paid in full. (R. 276, 279) (providing the Guarantors’ obligation is “payable immediately upon demand without recourse having been had by [the Trust] against the Borrower or any other guarantor, person, firm, or corporation, and without first resorting to any property held by [the Trust] as collateral security”).

The guaranty agreements further allow the Trust discretion to foreclose on the property first and to pursue the Guarantors if the debt still has not been fully satisfied after the foreclosure. Because the Guarantors cannot escape the plain terms of the guaranty agreements, they ask this court to rewrite the agreements by adding implied terms that contradict the express terms of the agreements. The implied covenant of good faith and fair dealing cannot require the Trust to submit a single bid for fair market value at a foreclosure sale before enforcing a deficiency judgment against the Guarantors when the Trust is not required to pursue foreclosure or a deficiency judgment at all. *See Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (explaining there is no breach of the implied covenant “where a party to a contract has done what provisions of the contract expressly gave him the right to do”). Moreover, the master-in-equity approved the sale and entered a judgment in the foreclosure action. It cannot be an act of bad faith to do something with the permission and approval of a court. The Guarantors also now concede

the deficiency judgment is valid and enforceable against Springs North Augusta. Therefore, the deficiency judgment was necessarily procured in good faith.

The Guarantors have already received the benefit of the guaranty agreements. There is no dispute that the Trust extended credit to Springs North Augusta. Thus, the Trust performed under the agreements in 2009, and the Guarantors received the benefit for which they bargained. The Trust's alleged actions in enforcing its own rights pursuant to the express terms of the guaranty agreements, long after it performed its obligation, cannot be a breach of the implied covenant of good faith and fair dealing. *Adams*, 320 S.C. at 277, 465 S.E.2d at 85; *Tadlock Painting Co.*, 322 S.C. at 500, 473 S.E.2d at 53 (explaining the implied covenant of good faith and fair dealing prohibits a party from doing anything “to impair the other’s rights to receive benefits under the contract”). Similarly, the Guarantors’ miscalculation of the risk does not excuse them from their contractual obligations. *See* (R. 179) (explaining the Guarantors thought they would never have to pay under the guaranty agreements because they believed the property was worth more than the amount of the loan); *see also Rosenberg*, 418 S.C. at 180, 790 S.E.2d at 925.

The Guarantors expressly waived their right to argue the sale price was insufficient, as explained above. (R. 278, 281). The “Waiver of Appraisal Rights” clause expressly provides that, as an inducement for the Trust to make the loan, the winning bid at any foreclosure sale is final and the Guarantors do not have the right to assert that the bid should be higher. (*Id.*). The Guarantors also contracted away any rights to challenge the creation of Springs North Augusta’s debts. (R. 276, 279). Thus, the conduct of the foreclosure sale—and the accusation that it resulted in a sale for less than fair market value—cannot be a defense to the Guarantors’ performance of their contractual obligations. By the plain language of the guaranty agreements, the Guarantors must pay the deficiency judgment—a debt of Springs North Augusta—regardless of how it was

created, and they cannot avoid their obligations on the ground that the deficiency judgment was created by a foreclosure sale allegedly involving more than one bid by the Trust.

The plain language of the guaranty agreements does not include any requirement that the property sell for the full amount of the debt at a foreclosure sale or for fair market value before the Trust may pursue recovery from the Guarantors. The guaranty agreements are *absolute* guaranties, and the Guarantors are liable for whatever the borrower failed to pay. The Guarantors ask this court to create new law and add new, implied terms to the guaranty agreements providing them with greater rights than those for which they contracted. Courts cannot rewrite contracts to change the parties' agreement, and this Court should therefore deny certiorari.

B. The Guarantors waived their purported defense by failing to defend the foreclosure action or challenge the conduct of the foreclosure sale before entry of the deficiency judgment.

The Guarantors' purported defense is barred by laches and waiver. They controlled Springs North Augusta. (R. 177–78). Redd Green Investments LLC, a petitioner here, is one of two owners of Springs North Augusta LLC. (R. 177). Cliff Redd and Bruce Green, also petitioners here, are the only owners of Redd Green. (*Id.*). Thus, the Guarantors had notice of the foreclosure action, and they controlled whether Springs North Augusta defaulted in the foreclosure action and whether Springs North Augusta challenged the conduct of the foreclosure sale.⁸ *See* (R. 180–82) (explaining the Guarantors' knowledge and assumptions at various points in the foreclosure process).

The Guarantors cannot allow Springs North Augusta to go into default, sit on their purported rights as the foreclosure action proceeds to a sale and deficiency judgment while taking no action to protect those purported rights, then assert in this action that they are not bound by the

⁸ Moreover, the sale in this case was publicly noticed. *See* (R. 265).

outcome of the foreclosure action because Springs North Augusta did not contest the action. *See Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994) (“Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay suffers his adversary to incur expenses or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce these rights.”); *Lawrimore v. Am. Health & Life Ins. Co.*, 276 S.C. 112, 114, 276 S.E.2d 296, 297 (1981) (“Waiver is defined as an intentional relinquishment of a known right.”). Such an outcome is inequitable and would reward the Guarantors for failing to defend their own interests. The Guarantors could have also requested to intervene in the foreclosure action to protect their rights, but they did not. *See* Rule 24, SCRPC (providing criteria for intervention). This Court should affirm the judgment in favor of the Trust.

Rather than defend the foreclosure, intervene, or object to the conduct of the sale when the master in equity could have resolved any alleged issues in the sale process, the Guarantors chose not to participate in the foreclosure proceedings and launched a collateral attack when the Trust attempted to collect the deficiency judgment. Although the Guarantors carefully avoid describing their defense as a collateral attack on the deficiency judgment, there is no other description for the defense. If the deficiency judgment is valid as the Guarantors concede, it is enforceable by the Trust against the Guarantors. The Guarantors unreasonably delayed in objecting to the conduct of the foreclosure sale and now seek to use that delay to the prejudice of the Trust by avoiding their obligations under the guaranty agreements. The Guarantors waived their defenses. *See Lawrimore*, 276 S.C. at 114, 276 S.E.2d at 297. This court should deny certiorari. Regardless of whether their novel question is a valid one, they waived their right to pursue it.

C. The Trust did not violate the bidding statute.

As an additional sustaining ground, this Court should affirm the trial court's finding that no violation of the bidding statute occurred. Although the Guarantors contend it is "undisputed" that "the Trust blatantly violated the Deficiency Statute," (Pet. at 1), the Trust in fact did not violate the bidding statute. The trial court stated it assumed for purposes of its directed verdict ruling that a violation of the statute occurred, but it also found that 2nd Avenue Holdings is not a representative of the Trust. (R. 225–26). If 2nd Avenue Holdings is not a representative of the Trust, no violation of the statute occurred, and if no violation of the statute occurred, the Guarantors have no defense to payment of the deficiency judgment, regardless of the answer to their purported novel question.

To prove a violation of section 15-39-720, the Guarantors must prove the winning bid of \$7,160,000 was entered by a representative of the Trust. *See* S.C. Code Ann. § 15-39-720. The winning bid at the upset sale was submitted by 2nd Avenue Holdings, LLC. (R. 162). The Trust does not dispute that Buchanan is the sole owner of 2nd Avenue Holdings. However, there is no legal relationship between 2nd Avenue Holdings and the Trust. Moreover, the Trust is an irrevocable trust set up for the benefit of Buchanan's children, and Buchanan has no legal right to make decisions for the Trust. (R. 158–59, 169–71). The fact that Buchanan set up the Trust—but has no legal control over the Trust's actions—and is the sole owner of 2nd Avenue Holdings does not establish that 2nd Avenue Holdings is a representative of the Trust. Additionally, Buchanan's decision, made after the foreclosure sale, to transfer the property to the Trust does not retroactively transform his bid on behalf of 2nd Avenue Holdings into a bid on behalf of the Trust. Buchanan is free to acquire property and transfer it to the Trust. Doing so does not render any transaction by which he acquired the property an action taken by the Trust, and his occasional role as "advisor"

to the Trust does not render every action he takes an action by the Trust. The statute does not prohibit a mortgagee from ultimately owning the property; it only prohibits the mortgagee from submitting a second bid. The Trust submitted only one bid. Therefore, no violation of the statute occurred, and the Guarantors are obligated to pay the deficiency judgment.

Conclusion

The Court of Appeals properly affirmed the trial court on the grounds that the Guarantors' challenge to the deficiency judgment is barred by res judicata and that the Guarantors cannot show any prejudice resulting from the conduct of the foreclosure sale. Moreover, the plain language of the guaranty agreements precludes the Guarantors' allegations that the Trust breached the implied covenant of good faith and fair dealing, and the Guarantors waived any right to challenge the deficiency judgment. Finally, the Trust did not violate the bidding statute. This case presents no novel question of law for this Court to decide. Accordingly, the Court should deny the petition for writ of certiorari.

(signature page attached)

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