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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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AMT CADC VENTURE, LLC, a Delaware limited liability company,  
*Plaintiff/Appellee,*

*v.*

SUN AMERICAN GROUP-GRIFFITHS PARK, L.L.C., an Arizona limited  
liability company; MICHAEL ZIPPRICH and MICHELE SHONKA,  
husband and wife, *Defendants/Appellants.*

No. 1 CA-CV 14-0261  
FILED 3-31-2015

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Appeal from the Superior Court in Maricopa County  
CV2011-021604  
The Honorable Lisa D. Flores, Judge

**AFFIRMED**

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COUNSEL

Gammage & Burnham, P.L.C., Phoenix  
By Kevin J. Blakly and Gregory J. Gnepper  
*Counsel for Plaintiff/Appellee*

Polsinelli PC, Phoenix  
By Andrew B. Turk and Nathan J. Kunz  
*Counsel for Defendants/Appellants*

**MEMORANDUM DECISION**

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge John C. Gemmill and Judge Kenton D. Jones joined.

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**K E S S L E R**, Judge:

¶1 Sun American Group-Griffiths Park, L.L.C. (“Sun American”) and Michael Zipprich and Michele Shonka (“Zipprich/Shonka”) (collectively, “Appellants”) appeal from the trial court’s judgment in favor of AmT CADC Venture, LLC (“AmT”). For the reasons stated below, we affirm.

**FACTUAL AND PROCEDURAL HISTORY**

¶2 AmT lent Sun American \$10,018,250. Payment on the loan was secured by Sun American’s interest in two parcels of real property (“the Property”). As a condition for AmT issuing the loan, Phillip J. Polich and Stacy Polich (“the Poliches”) and Zipprich/Shonka signed a written guaranty pertaining to the loan (“the Guaranty”).<sup>1</sup> The Poliches and Zipprich/Shonka jointly, severally, and unconditionally promised to pay (1) 50% of the outstanding principal balance owed on the loan at maturity, (2) all interest and late charges owed on the loan, (3) all taxes assessed against the loan’s collateral, and (4) all other charges provided for under the loan documents, including attorneys’ fees and other expenses incurred in enforcing the loan.

¶3 Sun American failed to repay the loan by August 31, 2010, the maturity date. As such, a trustee’s sale was held. As of the date of the sale, prior to the application of the trustee’s sale proceeds to the principal, a principal of \$7,000,034.64 and interest of \$1,165,991.85, were due and owing on the loan. At the trustee’s sale, AmT submitted the highest bid at \$2,000,000. That \$2,000,000 was applied to the principal of the loan.

¶4 After the trustee’s sale, AmT filed a complaint against Sun American, the Poliches, and Zipprich/Shonka to recover the remaining balance on the loan. The trial court held a one-day bench trial to determine the fair market value of the Property and enter a judgment on the remaining

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<sup>1</sup> The Poliches are not parties to this appeal.

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balance. At the bench trial, the parties each called their own licensed appraiser.

¶5 Albert Nava (“Nava”), an Arizona-certified appraiser, testified for AmT. According to Nava’s report, the “as is” fair market value of the Property as of the sale date was \$1,850,000. Chadwick Murray (“Murray”), also an Arizona-certified appraiser, testified for Sun American, the Poliches, and Zipprich/Shonka. According to Murray’s report, the “as is” fair market value of the Property as of the sale date was \$5,000,000.

¶6 After the bench trial and reviewing the parties’ written closing arguments, the court issued an under-advisement ruling in which it found the fair market value of the Property as of the sale date was \$2,585,500. Based on this, the court entered judgment for AmT against Sun American for \$5,580,526.49. This amount included the principal deficiency balance after the application of the fair market value of the Property (\$4,414,534.64) and the accrued interest on that principal balance (\$1,165,991.85). The court also awarded AmT judgment against the Poliches and Zipprich/Shonka, as guarantors, jointly and severally, for \$4,738,266.20. This amount included 50% of the principal deficiency balance prior to the application of the fair market value of the Property (\$3,500,017.32), the accrued interest on that principal balance (\$1,165,991.85), and the unpaid property taxes on the Property (\$72,257.03). Additionally, the court awarded AmT its attorneys’ fees and costs.

¶7 Appellants filed a timely appeal. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (“A.R.S.”) section 12-2101(A)(1) (Supp. 2014).

**DISCUSSION**

I. The CoStar Statistics

¶8 Appellants first claim the trial court erred because it did not specifically make a factual finding regarding the CoStar statistics presented by Murray. According to Appellants, the court’s failure to make such a finding indicates the court, in coming to its conclusions on fair market value, failed to consider the CoStar statistics, which Appellants believe to be essential evidence and an objective basis supporting Murray’s higher fair market value appraisal. We review the question of whether, after a bench trial, a court has made sufficient findings of fact and conclusions of law de novo, as a mixed question of fact and law. *Murphy Farrell Dev., LLLP v. Sourant*, 229 Ariz. 124, 128, ¶ 13, 272 P.3d 355, 359 (App. 2012).

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¶9 “In all actions tried upon the facts without a jury . . . the court, if requested before trial, shall find the facts specially and state separately its conclusions of law thereon . . .” Ariz. R. Civ. P. 52(a). “The purpose of requiring the trial court to enter findings of fact and conclusions of law is to enable [the appellate] court to examine the bases for the trial court’s decision.” *In re U.S. Currency in Amount of \$26,980.00*, 199 Ariz. 291, 294, ¶ 7, 18 P.3d 85, 88 (App. 2000). In making such findings, the court need only “make findings on the ultimate facts, not each subsidiary evidentiary fact on which the ultimate facts are based.” *Id.* (citing *Gilliland v. Rodriquez*, 77 Ariz. 163, 167, 268 P.2d 334, 337 (1954) (stating that “[a] court is called upon to make findings of only ultimate facts and is not required to bolster them by subsidiary findings on evidentiary matters upon which such ultimate facts are based . . .”). Moreover, litigants are required “to object to inadequate findings at the trial court level so that the court will have an opportunity to correct them.” *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 540, ¶ 23, 96 P.3d 530, 538 (App. 2004). Failure to object to inadequate findings with the court results in waiver of the issue on appeal. *Id.*

¶10 We disagree with Appellants’ assertion that the court erred in not making a specific factual finding regarding the CoStar statistics for several reasons. First, Appellants have waived this argument on appeal. Appellants concede they did not challenge the court’s findings of fact and conclusions of law after the court issued its ruling. *See id.* Appellants contend that challenging the court’s findings of fact and conclusions of law was unnecessary because they believe their argument that the court erred by failing to make a finding about the CoStar statistics is different from the argument that the court’s findings were inadequate. We see no distinction between an alleged inadequate finding and failure to make a finding. Under either characterization, Appellants’ point is that the findings were insufficient and they should have raised an appropriate objection to permit the trial court to amend or correct any alleged deficiency.

¶11 Second, even if the issue had not been waived, there was no error. The trial court expressly stated that it had considered all the evidence in issuing its findings of fact. The CoStar statistics merely reflect overall average sale prices of vacant land in Casa Grande over a ten year period. Any finding on the CoStar statistics is not an ultimate fact and the court did not have to include any reference to them in the findings of fact. Accordingly, the findings were sufficient and “pertinent to the issues and comprehensive enough to provide a basis for the decision.” *Gilliland*, 77 Ariz. at 167, 268 P.2d at 337.

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¶12 Third, even if the court had to address the CoStar statistics in its findings of fact, there was no reversible error. “[T]he trial court, having seen and heard the witnesses and the evidence, is in a better position to determine credibility and weight than the appellate court.” *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 302, 681 P.2d 390, 454 (App. 1983). As noted above, the CoStar statistics had little relevance on the fair market value finding because they were simply overall average sales prices of vacant land in the area over a ten year period. Further, the court set forth the substantial evidence it relied upon for its findings of a fair market value closer to Nava’s calculations rather than to Murray’s: (1) Murray failed to analyze the parcels separately, while Nava analyzed the parcels separately; (2) Nava’s comps were generally more similar to the subject property and had all sold by the valuation date while Murray’s were less similar and two of his comps had not sold by the valuation date; (3) Murray failed to make several adjustments to the value of his comps which the court believed necessary while Nava made more appropriate adjustments for location, size, shape, zoning, offsite utilities, and flood zone; and (4) the credibility of each appraiser.

II. The 2009 and 2010 Appraisals

¶13 Appellants next argue the trial court erred by admitting into evidence appraisals of the Property from 2009 and 2010, neither of which was conducted by either party’s expert. According to Appellants, these appraisals constituted inadmissible hearsay. We will not disturb a trial court’s admission of evidence absent a clear abuse of discretion and resulting prejudice. *Selby v. Savard*, 134 Ariz. 222, 227, 655 P.2d 342, 347 (1982).

¶14 Arizona Rule of Evidence 703 allows an expert to “base an opinion on facts or data in the case that the expert has been made aware of or personally observed” without those facts or data having to be admissible provided “experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject.” When the facts or data are otherwise inadmissible, however, “the proponent of the opinion may disclose them to the [finder of fact] only if their probative value in helping the [finder of fact] evaluate the opinion substantially outweighs their prejudicial effect.” Ariz. R. Evid. 703. Further, “[f]acts or data underlying the testifying expert’s opinion are admissible for the limited purpose of showing the basis of that opinion, not to prove the truth of the matter asserted.” *State v. Rogovich*, 188 Ariz. 38, 42, 932 P.2d 794, 798 (1997).

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¶15 Nava testified that he reviewed the 2009 and 2010 appraisals in his preparation of his own appraisal of the Property and that they were consistent with the trend in the market at the time. According to Nava, appraisers often rely on the appraisals of others in the field to obtain different sorts of information, such as “information about the property that [they] may not otherwise know” or “information concerning the market that . . . can [be] further check[ed] and independently verif[ied].” Nava stated that such information helps appraisers, like Nava, “understand the property a little bit better.”

¶16 Over the objection of defense counsel, who raised concerns that admission of the appraisals would confuse the issues of fair market value in 2009 and 2010 with the issue of fair market value in 2012, the court admitted the 2009 and 2010 appraisals. In doing so, the court asserted it was completely aware of its “responsibility to determine the fair market value as of May 7<sup>th</sup>, 2012” and that it would not give the appraisals more weight than they deserved as documents Nava reviewed in preparation of his report. Although the court referred to the valuation of the 2009 and 2010 appraisals in its under-advisement ruling, the court only used those figures to demonstrate that Nava’s valuation of the Property was consistent with the 2009 and 2010 “appraisals, the general market trend, and the impact of the recession.” The court did not use the appraisals as independent proof of the matter asserted—that in 2009 and 2010 the Property was, in fact, worth \$3 million and \$1.78 million respectively. Therefore, even assuming the court abused its discretion in admitting the 2009 and 2010 appraisals, given the circumstances under which they were admitted and the way in which the court utilized that evidence in coming to its decision, Appellants suffered no prejudice as a result of the court admitting the 2009 and 2010 appraisals under Arizona Rule of Evidence 703.

### III. Murray’s Use of Comparable Listings

¶17 Appellants next contend the trial court erred by finding that Murray should have reduced the values of two of his comparable listings (Murray2 and Murray3) by half. A “trial judge’s factual findings are reviewed on a clearly erroneous standard.” *Valley Med. Specialists v. Farber*, 194 Ariz. 363, 366, ¶ 9, 982 P.2d 1277, 1280 (1999) (citing Ariz. R. Civ. P. 52(a)). “A finding of fact is not clearly erroneous if substantial evidence supports it, even if substantial conflicting evidence exists.” *Kocher v. Dep’t of Revenue of State of Ariz.*, 206 Ariz. 480, 482, ¶ 9, 80 P.3d 287, 289 (App. 2003).

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¶18 Appellants misconstrue the court's findings regarding Murray's comparable listings. The court found "Murray2 and Murray3 eventually sold at the listing prices, but the sales did not occur until several months after the valuation date, and Murray made no adjustments even though values presumably rose during this period."<sup>2</sup> (Footnote omitted.) The court separately found that "Murray did not adjust any listing prices despite his report showing that, on average, listing prices in Casa Grande, [as of the valuation date,] were almost double actual sale prices." Based on these and other factual findings, the court concluded that "Nava's comps [were] more informative in determining the fair-market value of the subject property" than Murray's comps.

¶19 Substantial evidence supports the findings by the court that Murray's failure to make downward adjustments to Murray2 and Murray3, given their status as listings as of the date of appraisal, resulted in Murray2 and Murray3 being less informative in determining the fair market value of the Property. Murray used the listing prices of both Murray2 and Murray3 as of the date of appraisal. Although Murray2 and Murray3 sold for their listing prices as of the date of appraisal, it is uncontested that both sold months after the date of appraisal. Murray made no downward adjustments to Murray2 and Murray3 in his report, despite having this information. This failure conflicted with Murray's overall approach to valuating the Property. Murray used the sales-comparison approach, which, according to Murray, "is based on comparison between the subject property and similar properties which sold within a reasonable period *prior* to the date of appraisal, and which are capable of providing insight into the valuation of the subject property." (Emphasis added.) Given Murray's own definition of the sales-comparison approach, the court did not err in finding Murray2 and Murray3 less informative in determining the fair market value of the Property when Murray made no adjustments based on the fact that they were sold *after* the date of appraisal.

¶20 Appellants also point out that Nava testified he relies on listings but has reservations with the fact that listings "can be priced at just about anything." Appellants argue that Nava's reservation is moot when the listing is later sold for the listed price, as is the case here. We disagree. Murray2 and Murray3 were both sold months after the date of appraisal. As such, the prices at which they were sold do not reflect their value "within

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<sup>2</sup> According to the trial court's finding, Murray2 actually closed nine months after the appraisal.

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a reasonable period prior to the date of appraisal” as required by the sales-comparison approach.

IV. The Judgment Against the Guarantors

¶21 Finally, Appellants argue the trial court erred in calculating the judgment against Zipprich/Shonka as guarantors of the loan because the protections of A.R.S. § 33-814 (Supp. 2014)<sup>3</sup> cannot be waived. According to Appellants, A.R.S. § 33-814 required the 50% owed by the Guarantors on the outstanding principal as of the date of maturity to be reduced by the fair market value of the Property. AmT maintains Arizona case law and the written terms of the Guaranty support the trial court’s calculation of the judgment against the Guarantors. “Contract and statutory interpretation issues are questions of law subject to our *de novo* review.” *Tenet Healthsystem TGH, Inc. v. Silver*, 203 Ariz. 217, 219, ¶ 5, 52 P.3d 786, 788 (App. 2002). However, “the intent of the parties” entering into a contract “is a question of fact left to the fact finder.” *Chopin v. Chopin*, 224 Ariz. 425, 428, ¶ 7, 232 P.3d 99, 102 (App. 2010). We defer to the court’s explicit and implicit factual findings concerning the parties’ intent, unless those findings are clearly erroneous. See *John C. Lincoln Hosp. & Health Corp.*, 208 Ariz. at 537, ¶ 10, 96 P.3d at 535.

¶22 Section 33-814(A) states:

[T]he deficiency judgment shall be for an amount equal to the sum of the total amount owed the beneficiary as of the date of the sale, as determined by the court less the fair market value of the trust property on the date of the sale as determined by the court or the sale price at the trustee’s sale, whichever is higher.

¶23 A valid statute is automatically deemed to be part of any contract affected by it even if the contract does not reference the statute. *Banner Health v. Med. Sav. Ins. Co.*, 216 Ariz. 146, 150, ¶ 15, 163 P.3d 1096, 1100 (App. 2007). However, we have held § 33-814(A) fails to “address whether the sale price of a property at a trustee’s sale,” or, impliedly, the valuation of the fair market value of the property, “necessarily extinguishes a guarantor’s liability” under a limited guaranty. *Tenet Healthsystem TGH, Inc.*, 203 Ariz. at 220, ¶ 8, 52 P.3d at 789. Even assuming that A.R.S. § 33-814(A) applies to limited guarantees, given the trial court’s findings

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<sup>3</sup> We cite the current version of applicable statutes when no revisions material to this decision have occurred.

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regarding the language of the Guaranty here, the court did not err in refusing to reduce the 50% owed by the Guarantors by the fair market value of the Property. Section 2.1 of the Guaranty provides:

Subject to the limitations hereinafter set forth, Guarantor hereby absolutely and unconditionally guarantees to Bank (a) the full and prompt payment of the principal, interest, premiums, penalties and late charges, if any, and other amounts required to be paid by Borrower pursuant to the Note, Deed of Trust and/or Agreement . . . when and as the same shall become due, whether at the stated maturity thereof, by acceleration or otherwise, and (b) the full and prompt performance of all other obligations, if any, required to be performed by Borrower pursuant to the Agreement and/or the Deed of Trust . . . ; provided, however, that except as hereinafter provided, Guarantor's liability under this Guaranty shall not exceed an amount equal to fifty percent (50%) of the then outstanding principal balance of the Loan . . . , plus the sum of the following amounts:

(a) All interest and late charges payable by Borrower under the Loan;

...

(c) The amount of all applicable real estate taxes and assessments payable with respect to the Property .

...

(Emphasis added.)

¶24 According to the trial court, given the above language, even though the parties intended the Guarantors would be liable for no more than 50% of the principal balance, "it was still the 'full' principal balance being guaranteed." Therefore, the court found the parties intended the Guarantors would be liable for an amount equivalent to 50% of the principal balance owed at the time the principal balance became due, unless the principal balance was reduced below the 50% limit. According to the court, the language of Section 2.3(h) of the Guaranty confirmed the intent of the parties. Section 2.3(h) provides:

The joint and several obligations of Guarantor under this Guaranty shall be absolute and unconditional and shall remain in full force and effect and shall not be discharged,

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affected, modified or impaired upon the happening from time to time of any event, including, without limitation, any of the following, whether or not with notice to or the consent of Guarantor:

...

(h) any partial payment<sup>[4]</sup> of any Note that does not reduce the aggregate indebtedness evidenced by the Note below the maximum amount of this Guaranty . . . .

¶25 A guaranty, as a contract, must be given effect under its written terms, so long as those terms are unambiguous.<sup>5</sup> *Consol. Roofing & Supply Co. v. Grimm*, 140 Ariz. 452, 455, 682 P.2d 457, 460 (App. 1984). Appellants cite to several cases stating that the protections of A.R.S. § 33-814 cannot be waived. *See CSA 13-101 Loop, LLC v. Loop 101, LLC*, 233 Ariz. 355, 362, ¶ 24, 312 P.3d 1121, 1128 (App. 2013) (review granted September 23, 2014); *Parkway Bank & Trust Co. v. Zivkovic*, 232 Ariz. 286, 290-91, ¶ 17, 304 P.3d 1109, 1113-14 (App. 2013); *MidFirst Bank v. Chase*, 230 Ariz. 366, 368, ¶ 7, 284 P.3d 877, 879 (App. 2012) (“The primary purpose of the statute is to ‘prohibit a creditor from seeking a windfall by buying property at a trustee’s sale for less than fair market value.’” (citation omitted)). Here, however, the language of the Guaranty reflects the partial Guarantors agreed to limit their rights under the statute, not to waive it.

¶26 The language above demonstrates the parties’ agreement that the Guarantor *absolutely and unconditionally* guaranteed payment of the 50% of the principal balance of the loan as of the loan’s maturity date. Such language in a partial guaranty limits a partial guarantor’s rights under A.R.S. § 33-418. AmT was entitled to the benefit of the Guaranty, or the Guarantors’ absolute and unconditional promise to pay 50% of the principal balance of the loan as of the loan’s maturity date. On the other hand, under the Guaranty, the Guarantors agreed to receive the benefit of A.R.S. § 33-814 only if the fair market value reduced the principal balance of the loan to less than the 50% the Guarantors had guaranteed.

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<sup>4</sup> We need not address the merits of whether the proceeds of a trustee’s sale or the valuation of fair-market value constitutes a payment under the Guaranty.

<sup>5</sup> Although Appellants argue that when a guaranty is ambiguous, we construe it in favor of the guarantor, they do not argue the Guaranty here is ambiguous.

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¶27 In other words, under the Guaranty, the Guarantors agreed to remain bound by the Guaranty, despite the application of trustee's sale proceeds or the fair market value of the Property, unless the principal balance was reduced below the amount guaranteed by the Guarantors. Specifically, the Guarantors would not receive the benefit of trustee's sale proceeds or the fair market value of the Property unless the principal balance was reduced below \$3,500,017.32. Again, this language stresses that the Guarantors intended to limit their rights under the Guaranty, promising to pay the "back-end" of the loan. Applying the fair market value of the Property (\$2,585,500) to the amount owed on default (\$7,000,034.64) did not reduce the principal balance owed by more than half.

¶28 Further, Appellants' argument effectively rewrites the Guaranty. Appellants point out that if the Guarantors' obligation to pay 50% of the principal balance was reduced by the fair market value of the Property, the Guarantors would still remain liable for \$2,000,000. However, more than 50% of that \$2,000,000 would be what the Guarantors promised to pay in accrued interest and property taxes. If we were to interpret the Guaranty as Appellants suggest, the Guarantors would be liable for less than \$1,000,000 on the principal balance as of the date of maturity. Such an interpretation ignores the intent of the parties which is best reflected by the language of the Guaranty. As such, the trial court did not err in refusing to reduce the 50% owed by the Guarantors on the outstanding principal as of the date of maturity by the fair market value of the Property.

¶29 Alternatively, Appellants argue the outstanding principal as of the date of maturity should have been reduced by the fair market value of the Property before the 50% limit on the Guarantors' liability was calculated. Thus, they contend the court should have reduced the balance owed on the note by the \$2,500,000 fair market value, leaving approximately \$4,500,000 owed, of which the Guarantors would be liable for \$2,250,000.

¶30 We disagree. The trial court found, by the terms of section 2.1 of the Guaranty, that the parties intended "the 50% 'cap' on liability" to be "measured at the time when payment [was] due." Given the record before us, such a finding by the court is not clearly erroneous. Therefore, the trial court did not err in refusing to reduce the outstanding principal as of the date of maturity by the fair market value of the Property before the 50% limit on the Guarantor's liability was calculated.

**CONCLUSION**

¶31 For the foregoing reasons, the judgment in favor of AmT is affirmed. Because AmT is the successful party on appeal, we grant AmT's request for reasonable attorneys' fees pursuant to A.R.S. § 12-341.01(A) (Supp. 2014) and the terms of the note. We will award AmT taxable costs on appeal and reasonable attorneys' fees upon timely compliance with Arizona Rule of Civil Appellate Procedure 21.



Ruth A. Willingham - Clerk of the Court  
FILED : ama