THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Master in Equity

Cynthia Graham Howe Master in Equity

Case No 09 CP 26 3470

Robert W Oskin Glenn Small and Freddie Kanos	Appellants
v	
Stephen Mark Johnson Michael Brown Joan Conner Brown and J Conner LLC	Respondents
And which State of South Carolina ex rel Allan Wilson Attorney General is	Intervening Party

Final Reply Brief of Appellants

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Argument

I The clear and unambiguous language of the Statute of Elizabeth establishes that it applies to set aside the transfer of the note and mortgage in this action

In their brief, Respondents ask this Court to ignore the clear and unambiguous language of the Statute of Elizabeth in order to affirm the master's ruling {Resp Br p 7-9} Respondents focus exclusively on the test applicable to set aside a fraudulent conveyance when the parties have a creditor/debtor relationship This is error The Statute of Elizabeth is not limited to situations where the transferor is indebted to the complaining creditor in order to set aside the conveyance This Court should reverse the master and hold that the Statute of Elizabeth applies to set aside the transfer of the note and mortgage as a fraudulent conveyance in this action

The Statute of Elizabeth applies, in relevant part, to "[e]very grant transfer, and conveyance of lands by writing or otherwise which may be had or made to or for any intent or purpose to delay, hinder, or defraud **creditors and others** of their just and lawful actions, suits, debts, accounts, damages must be deemed and taken to be clearly and utterly void, frustrate and of no effect " S C Code Ann § 27-23-10(A) (Supp 2004) (emphasis added)

The clear language of the statute allows "creditors **and others**" to set aside a conveyance that is made with the intent to defraud, hinder, or delay Respondents ignore this language and ask this Court to do the same In their brief, Respondents do not refute this fact that the plain and unambiguous language of the Statute of Elizabeth does not require a debtor/creditor relationship as a prerequisite to set aside a fraudulent

conveyance They likely fail do so because the Statute of Elizabeth is unambiguously applicable to any person defrauded in connection with the conveyance of the property S C Code Ann § 27-23-10(A), see also 37 C J S Fraudulent Conveyances § 22 (2010) ("A fraudulent conveyance can occur even if the debtor is not a party to the conveyance"), 43 C J S Fraudulent Conveyances § 43 (2010) ("the term creditor, as employed in such statutes, is not used in a narrow or strictly technical sense, but has been construed liberally, so as to include all persons who may have interests or demands of which they may be defrauded")

Additionally, Appellants do not "simply ignore[]" the line of cases that apply to set aside a fraudulent conveyance when the when the parties have a creditor/debtor relationship as alleged by Respondents {Resp Br p 8} In fact, as set forth in Appellants' brief, Appellants recognized that the vast majority of litigation under this statute arises does arise in that context {App Br p 16} However, Appellants' argument is the State of Elizabeth is not limited to situations when the parties have a creditor/debtor relationship simply because that is the common scenario where this issue arises The Statute of Elizabeth itself clearly indicates it allows "others" to set aside a conveyance that is made with the intent to defraud, hinder, or delay [1]

Lastly, Respondents fail to distinguish Lebovitz v Mudd, 293 S C 49, 358 S E 2d 698 (1987) Respondents claim that the court allowed the action to set aside the transfer to proceed because the each of the defendants had the requisite intent to

[1] To hold otherwise would impermissibly render meaningless a term of the statute See e g Hinton v S C Dept of Probation Pardon & Parole Servs 357 S C 327 342 592 S E 2d 335 343 (Ct App 2004) (holding that the court should seek construction of a statute that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless) Pike v S C Dept of Transp 332 S C 605 618 506 S E 2d 516 523 (Ct App 1998) (A statute should be so construed that no word clause sentence provision or part shall be rendered surplusage or superfluous)

defraud the plaintiff {Resp Br P 11} This misconstrues the express holding of our Supreme Court In that action, Lebovitz brought an action to set aside a fraudulent conveyance of defendant, Mudd Id at 51, 358 S E 2d at 699 Mudd moved to dismiss Lebovitz's fraudulent conveyance action, claiming **only** that Lebovitz was not a creditor entitled to use the Statute of Elizabeth to set aside a transfer Id The trial court agreed, finding Lebovitz failed to assert he was a creditor of Mudd within the meaning of the Statute of Elizabeth Id On appeal, Lebovitz argued the Statute of Elizabeth was not limited to judgment creditors Id at 52, 358 S E 2d at 700 The Supreme Court agreed Id The court noted the statute referred to "creditors *and others* " Id (emphasis in original) Focusing on the term "others" in the statute, the court reasoned that "[a]s the emphasized language clearly shows, the statute does not limit its application to creditors Rather, its protection extends to **other types of parties defrauded in connection with the conveyance of property** " Id (emphasis added) Thus, Respondents misconstrue the impact of Lebovitz Lebovitz specifically authorizes the Statute of Elizabeth to be utilized by "others" defrauded in connection with the conveyance of property The master erred in holding otherwise

II The preponderance of the evidence establishes the transfer of the note and mortgage was done with the intent to defraud Appellants

Respondents first claim that the transfer "was executed to secure the bona fide claims of J Conner, LLC" and lacked any intent to defraud Appellants {Resp Br p 11-13} In support of this position, Respondents focus solely on how the transfer was structured rather than the reasons and intent behind why the transfer existed in the first place and the effect on Appellants The preponderance of the evidence proved that

Michael Brown initiated the process to structure a transaction relating to the SCB&T note and mortgage with the intent to defraud Appellants and preclude them from executing against the property As a result, this Court should reverse the master

Respondents rely heavily on the formalities and procedures undertaken by Respondents to create J Conner and to purchase the note and mortgage {Resp Br p 11-13} In particular, Respondents focuses on the fact that a separate legal entity, J Conner, was created to hold and enforce the note and mortgage Further, Respondents elicited testimony that creation of such an entity was properly performed under South Carolina law and was a "common business practice " Respondents' position is summarized as follows—because Respondents created a valid legal entity recognized by the State and such entities are commonly used to purchase notes and mortgages, then their action was presumptively proper Stated differently, Respondents believe that because they used recognized and legal vehicles to structure the transaction then the transaction could not defraud Appellants In essence, Respondents want this Court to ignore the substance of the transaction because the form of the transaction was proper and common However, such a position does not account for how those actions were used as intended to defraud Appellants The preponderance of the evidence proves that Michael Brown created of J Conner to acquire the note and mortgage and insulate the property from Appellants' claims against Johnson and they structured the transaction with intent to defraud Appellants As set forth fully in Appellants' brief, the preponderance of the evidence established the following

-- Michael Brown's goal upon learning of Oskin's pending judgment against Johnson was to structure a transaction relating to the SCB&T note and mortgage in

order to protect his interest in the property from being affected by Oskin's judgment against Johnson

-- Michael Brown had his attorney organize J Conner in order to facilitate acquiring the note and mortgage from SCB&T

-- The filing was expedited with Michael Brown personally paying the expedited filing fee

-- J Conner existed solely to purchase the note and mortgage from SCB&T

-- Michael Brown stated the transaction was structured to protect his property asset from the Oskin judgment {Trans p 186, lines 12-20, R 299}

-- The only reason J Conner existed was because Michael Brown was obligated under the note and mortgage and wanted to avoid the Oskin judgment against Johnson {Trans p 207, lines 9-23, R 320}

-- It was Michael Brown who approached Wachovia about lending the $3 5 million needed to facilitate J Conner's acquisition of the note and mortgage from SCB&T

-- Michael Brown then exclusively participated in ensuring that Wachovia decided to lend the $3 5 million because he knew this transaction was necessary as he informed Wachovia that the property was "facing some judgment liens if the property is not taken out of its existing structure "

-- Michael Brown undertook substantial negotiations with Wachovia, despite not being a member of J Conner, in order to complete the transaction

-- Michael Brown owned five of the six accounts that Wachovia required to be pledged as the security for the transaction to be complete

-- Michael Brown agreed that one of those accounts, a hedge fund account solely owned by him, should be liquidated to pay down approximately $2 million of the $3 5 million debt to Wachovia

-- Michael Brown executed a personal guaranty agreement for the Wachovia loan

-- Michael Brown signed both the security agreement and control agreement as "borrower "

--Michael Brown wrote a personal check, drawn on his personal account, in the amount of $44,303 31 to cover the shortfall in the payment amount owed to SCB&T to complete the transaction

-- Michael Brown set up the demand deposit account for J Conner and deposited another personal check in the amount of $50,000 in the demand deposit account

Therefore, the preponderance of the evidence proved that Michael Brown initiated the process to structure a transaction relating to the SCB&T note and mortgage in order to protect his interest in the property from being affected by Oskin's judgments against Johnson and to preclude Appellants from executing against the property Michael Brown went to great lengths and personal expense to ensure this was accomplished This Court should find the preponderance of the evidence established Respondents intended to defraud Appellants by creating of J Conner to acquire the note and mortgage and insulate the property from Appellants' claims against Johnson Therefore, this Court should reverse the master

Respondents further cite Leasing Enterprises, Inc v Goodwin, 312 S C 122, 439 S E 2d 294 (Ct App 1993), to support their claim the master correctly refused to set aside the transfer Respondents claim Leasing supports a finding that the transfer need not be set aside because the property is still within the reach of Appellants {Resp Br p 14} However, Leasing is distinguishable and does not support Respondents' position

In that case, Mr Goodwin entered into a lease on behalf of his business with Leasing Enterprises 312 S C at 123, 439 S E 2d at 295-96 Mrs Goodwin also guaranteed the agreement Id at 123, 439 S E 2d at 295 Mr Goodwin became delinquent on the lease payments Id One year after execution of the lease, Mr Goodwin transferred the marital residence, which was in his name only, to Mrs Goodwin Id Leasing Enterprises was aware of the transfer at the time it was made Id at 124, 439 S E 2d at 295 After the transfer, Leasing Enterprises sought a deficiency judgment against only Mr Goodwin under the guaranty Id Leasing Enterprises obtained a judgment against Mr Goodwin Id Thereafter, Leasing Enterprises brought a subsequent action against Mr and Mrs Goodwin to set aside the transfer of the marital residence under the Statute of Elizabeth Id at 124, 439 S E 2d 296 The trial court and court of appeals held that the transfer would not be set aside because Leasing Enterprises could have sued Mrs Goodwin in the deficiency action but failed to do so Id at 125, 439 S E 2d 296 Further, the court denied relief because the transfer "did not place the property beyond Leasing Enterprises' reach **because of the personal guarantee of Mrs Goodwin** " Id (emphasis added) Thus, the court

held the property was still within the reach of Leasing Enterprises because of the unique factual situation created by the guaranty

No such unique situation exists in this action to keep the property within the reach of Appellants In fact the counter is true Respondents have strategically decided to leave the note and mortgage in place solely as a shield to Oskin's enforcement action against the property [2] This shield effectively puts the property beyond the reach of Appellants Had the transfer to J Conner never existed, Respondents would have extinguished that obligation within two years [3] After the satisfaction of that obligation, Appellants could have executed against the property and recovered their judgments fully Because the note and mortgage have been left in place by J Conner, Appellants are prejudiced and the property is effectively beyond their reach Therefore, this Court should reverse the master [4]

III The master erred in failing to find that the payment to SCB&T constituted a pay-off of the note and mortgage

The master erred in finding that J Conner was not the alter-ego of Michael Brown and that the $3 5 million payment to SCB&T was not a full payment of the note and mortgage This Court should reverse

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[2] As Joan Conner testified at trial the note and mortgage remain in effect but J Conner does not enforce them

[3] The note and mortgage had a two-year term {SCB&T Note and Mortgage R 384 386} The note provided for interest only payments for the first twenty three months and a final balloon payment consisting for the remaining amounts outstanding plus interest {Id }

[4] Respondents also claim Appellants failed to preserve for appeal the issue of whether the Statute of Elizabeth applies to persons other than debtors {Resp Br p 15 16} This argument is manifestly without merit Appellants entire position throughout this litigation was that the statute applied to transactions such as the one instituted in this action despite the lack of debtor/creditor relationship The master specifically ruled against Appellants when she held the statute only applied to those in a debtor/creditor relationship Thus the issue was addressed by the Court no Rule 59 SCRCP motion was needed and this issue is properly before this Court

a J Conner was the alter-ego of Michael Brown

Respondents allege that J Conner was did not constitute the alter-ego of Michael Brown {Resp Br p 19} The reasoning for this claim mirrors the logic set forth by Respondents in sections I B and I C of their brief In those sections, as in this argument, Respondents focus solely on how the transfer was structured rather than the reasons behind why the transfer existed in the first place and the effect on Appellants {See Resp Br p 18-19} This ignores the preponderance of the evidence that established Michael Brown created and controlled J Conner

Again, Respondents rely heavily on the formalities and procedures undertaken by Respondents to create J Conner and to purchase the note and mortgage {Resp Br p 18} Respondents also rely on the fact that creation of such an entity was properly performed under South Carolina law and was a "common business practice " {Resp Br p 19} However, such a position again does not account for how Michael Brown used J Conner to further his goal to structure a transaction relating to the SCB&T note and mortgage in order to protect his interest in the property from being affected by Oskin's judgment against Johnson

As set forth fully in section II, *supra*,[5] the preponderance of the evidence established that Michael Brown created, controlled, and designed J Conner to further his own personal goal He initiated the process to structure a transaction relating to the SCB&T note and mortgage in order to protect his interest in the property from being affected by Oskin's judgment against Johnson He alone he created J Conner to accomplish this goal He negotiated on behalf of J Conner to obtain the $3 5 million

[5] For brevity sake Appellants will not rehash the evidence here again It is fully set forth in Section II and in Appellants initial brief

from Wachovia He wrote nearly $95,000 in personal checks to facilitate J Conner obtaining the Wachovia loan He guaranteed the Wachovia loan to allow J Conner to obtain the $3 5 million He signed both the Wachovia security agreement and control agreement as "borrower " In sum, Michael Brown misused J Conner to thwart Appellants' legitimate claims against the property J Conner exists solely to shield the property from the reach of Appellants as intended by Michael Brown Thus, this Court should find the preponderance of the evidence established J Conner was the alter-ego of Michael Brown

b The future advance clause in the mortgage does not preclude a finding that the $3 5 million payment to SCB&T constituted a payment of the principal of the note and mortgage

Respondents again rely on Central Production Credit Assoc v Page, 268 S C 1, 8, 231 S E 2d 210, 214 (1977), to support their belief that "J Conner retains first priority mortgage lien for the full amount ($3 5 million) in addition to any future advances made by J Conner " {Resp Br p 20} This again misconstrues Central Production That case actually supports Appellants Respondents also fail to refute the fact that the mortgage can remain valid and not affect Appellants right to recover at all Central Production simply allows J Conner to retain priority as to future advances only

Here, SCB&T was entitled to $3 5 million plus interest from the Michael Brown and Johnson Once that amount was paid in full, then the SCB&T note and mortgage has been paid in full as to the principal of the note and mortgage The mortgage holder, now J Conner, is not entitled to receive any more money to satisfy the principal amount (as it has been fully paid) The only amounts the mortgage holder

would be entitled to from the date of payment on would be to amounts relating to any future advances made after full payment as set out in Central Production Central Production does not stand for the premise that the mortgage holder would be entitled to any anything other than repayments of future advances Respondents, in brief, fail to refute this rule announced in Central Production Simply put, once Michael Brown paid $3 5 million to SCB&T to satisfy the note and mortgage, Respondents only remaining priority was for any future advances

c Equitable subrogation does not preclude a finding that the note and mortgage had been paid

Respondents assert that Michael Brown would be entitled to equitable subrogation and priority over Appellants in the event that the $3 5 million payment constitutes pay-off of the note and mortgage {Resp Br p 22} [6] This ignores the fact that Michael Brown would not be entitled to this equitable remedy because he had unclean hands in this transaction Accordingly, this Court should reverse the master

Our Supreme Court has established that equitable remedies, such as equitable subrogation, are discretionary and the court can, and does, refuse to provide a remedy when the party claiming the equitable relief has failed to act equitably in the transaction at issue Matrix Financial Servs Corp v Frazer, Cite (2010) (holding the court will not grant a discretionary equitable remedy to a party who acted with unclean hands in a transaction), Ingram v Kasey's Assocs , 340 S C 98, 531 S E 2d 287 (2000) ("He who seeks equity must do equity")

[6] The master relied on this argument to hold that even if the note and mortgage were satisfied then equitable subrogation would preclude Appellants from recovering {Final Order p 10 ¶ 35 R ___} This finding is immaterial to the issue of whether the $3 5 million payment to SCB&T constituted a payment of the note and mortgage Equitable subrogation has no bearing on that issue Equitable subrogation only impacts priority disputes between parties Priority was not at issue in this action

As stated by Respondent, in order to allow Michael Brown to seek equitable subrogation, the Court must first find his payment of $3 5 million constituted a full pay-off of the note and mortgage Further, as set forth above and in Appellants' brief, if the note and mortgage were paid in full, then Michael Brown's actions in creating J Conner would have been for the sole purpose of precluding Appellants from enforcing their judgments against the property Such a course of action establishes that Michael Brown acted with unclean hands—he paid off the note and mortgage then J Conner to thwart Appellants' legitimate claims against the property and improperly shield the property from the reach of Appellants As a result, he is precluded from receiving equitable relief The master erred in holding otherwise and should be reversed

Lastly, Respondents claim Michael Brown is only secondarily liable for the note and mortgage as is required to seek equitable subrogation {Resp Br p 23} Respondents rely exclusively on United Carolina Bank v Caroprop, Ltd , 316 S C 1, 446 S E 2d 415 (1994), to support this position United Carolina does not support this contention In fact, United Carolina stands for the proposition that the property is primarily liable for a debt under a note and mortgage **only** if the property is transferred If no transfer occurs, the makers of the note and mortgage remain primarily liable Therefore, United Carolina establishes that Michael Brown is primarily liable for the note and mortgage and precluded from seeking equitable subrogation

In United Carolina, Auten and Atlantic Properties purchased land with joint and several liability under a mortgage given to Interstate Investment Associates 316 S C at 2, 446 S E 2d at 416 Atlantic subsequently conveyed its one-half interest to Caroprop, Ltd Id Caroprop gave a second mortgage to First South Savings Bank

Id Ultimately, Caroprop stopped paying no the note and mortgage, and Interstate instituted foreclosure proceedings Id Auten, to avoid foreclosure, satisfied the Interstate note and mortgage Id Auten then instituted an equitable subrogation Id at 3, 446 S E 2d at 416 First South counterclaimed, alleging its mortgage had priority over Auten's subrogation interest Id The sole issue before the court was if Auten was primarily or secondarily liable for the debt Id at 3, 446 S E 2d at 417 The Court held that "upon Atlantic's conveyance of its share of the property, Auten, in equity, became secondarily liable for the debt Id at 4, 446 S E 2d at 417

Thus, the court held a party only becomes secondarily liable on a note and mortgage **only** if the property is transferred The maker of the note and mortgage remain primarily liable until the property is transferred Here, no transfer of the property has occurred so Michael Brown remains primarily liable for the note and mortgage Therefore, Michael Brown is primarily liable for the note and mortgage and precluded from seeking equitable subrogation The master erred in holding otherwise and should be reversed

Conclusion

Based on the foregoing, this Court should reverse the master-in-equity and enter judgment in favor of Appellants This Court should remand this action to the master to make a finding as to the amount of penalty to be awarded to Appellants for Respondents violation of the Statute of Elizabeth

{Signature Page Follows}

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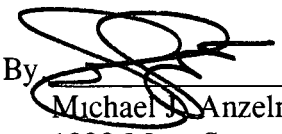

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Reply Brief complies with Supreme Court Order dated August 13, 2007, regarding personal identifiers and sensitive information

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants, do hereby certify that I have served all counsel/parties in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es)

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