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 Brief of Appellants

Michael J Anzelmo
Nelson Mullins Riley & Scarborough LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803 799 2000

Mark A Brunty
Brunty Law Firm, P A
Post Office Box 1980
Myrtle Beach, South Carolina 29578
843 449 1500

Attorneys for Appellants

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Statement of the Case

Appellants Robert W Oskin, Glenn Small, and Freddie Kanos (collectively "Appellants" or individually by last name) instituted this declaratory judgment action against Respondents Stephen Mark Johnson, Michael Brown, Joan Conner Brown, and J Conner LLC (collectively "Respondents" or individually as "Johnson" "Michael Brown" "Joan Conner Brown" and "J Conner") {Complaint dated April 17, 2009, R 34} Appellant Oskin is a judgment creditor of Respondent Johnson, and the holder of an assignment of the O'Connell judgment {Amended Order, R 1} Appellants Glenn Small and Freddie Kanos are creditors of Johnson resulting from an undisputed debt owed to them by Johnson {Trans p 57, Order dated March 26, 2010 p 5, R 22}

Appellants sought to have the court declare (1) that the payment to South Carolina Bank & Trust for a purported assignment of a note and mortgage constituted a discharge of the obligations of Michael Brown and Stephen Mark Johnson under that note and mortgage, (2) that Michael Brown is the alter-ego of J Conner LLC, (3) that the assignment of the mortgage from South Carolina Bank & Trust to J Conner LLC was void as it violated the South Carolina Fraudulent Conveyance Statute, and (4) to determine the appropriate statutory penalty for the violation of the South Carolina Fraudulent Conveyance Statute {R 34} After Respondents answered, this matter was referred to the Master-in-Equity pursuant to Rule 53 of the South Carolina rules of Civil Procedure {Order of Reference dated June 23, 2009, R 5}

Appellants filed a motion for summary judgment, which the master denied {Appellants' Motion and Memorandum in Support of Summary Judgment and Order

Denying Summary Judgment, R 14} Likewise, the master denied Respondents Michael Brown, Joan Conner Brown, and J Conner LLC motion for summary judgment {Order Denying Respondents Motion for Summary Judgment, R 10} The matter proceeded to trial on February 15, 2010 {Transcript of Hearing, R 114} [1] The master entered a written order denying Appellants the relief sought in the complaint {Final Order Ending Action filed March 26, 2010, R 17} The master thereafter denied Appellants' Rule 59, SCRCP, motion {Order Denying Motion for Reconsideration to Alter or Amend or for a New Trial filed May 6, 2010, R 30} Appellants filed a timely notice of appeal with this Court

Statement of Facts

On April 27, 2005, Oskin entered into a contract to broker the sale of Wild Wing Plantation and Golf Course on behalf of Steven Mark Johnson {Order filed December 11, 2008, R 1} The contract obligated Johnson to pay Oskin a finder's fee in the amount of $1 million upon close of the transaction {Id } Johnson failed to pay Oskin this fee as required by the contract, and Oskin brought a breach of contract action against Johnson {Complaint dated April 6, 2009, R 34} Johnson failed to respond to that lawsuit {Trans p 160, line 22—p 161, line 2, R 273-74}

While the breach of contract action was pending, Johnson located an oceanfront lot and house (hereinafter "the property") in Myrtle Beach that he wished to purchase {Trans p 140, R 253} Johnson, however, was unable to obtain financing for the purchase due to his credit rating at the time {Trans p 140, R 253} As a result, Johnson approached his uncle, Michael Brown, about jointly purchasing the property

[1] The cover page of the trial transcript contains the wrong civil action number for this matter The correct civil action number is set forth on the cover page of this brief

{Id } Michael Brown agreed to purchase the property with Johnson {Id } On November 30, 2006, Michael Brown and Johnson purchased the property for $3 5 million {SCB&T Note and Mortgage, R 384, 386} Michael Brown and Johnson hold title to the property as tenants in common {Trans p 135, R 248} To finance the purchase of the property, Michael Brown and Johnson jointly executed a note and mortgage in favor of South Carolina Bank & Trust ("SCB&T") in the amount of $3 5 million {SCB&T Note and Mortgage, R 384, 386} The note and mortgage had a two-year term {Id } 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 } [2]

Michael Brown and Johnson agreed that Johnson bore the responsibility for the monthly payments on the property {Trans p 147, R 260} Johnson initially paid the monthly payments, taxes, and insurance on the mortgages on the property {Trans p 147, R 260} However, in early 2008, Johnson was unable to pay the monthly payments, and Michael Brown assumed the monthly mortgage payments on the property {Trans p 147, p 150, line 23—p 151, line 1, R 260-63} In the fall of 2008, Michael Brown began investigating his options to satisfy his obligations under the SCB&T note and mortgage as the maturity date was approaching {Trans p 151-153, R 263-66} In September 2008, Michael Brown ordered and received appraisal from Wachovia on the property and title search of the property {Trans p 151-153, 166, lines 5-23, R 263-66, 279} In response to a request from Michael Brown, Johnson

[2] The property is also encumbered by another mortgage in favor of Ameris Bank in the amount of $500 000 This mortgage was filed on April 27 2007 and remains outstanding This mortgage is not at issue in this appeal

emailed a copy of his financial statement to his uncle {Trans p 159, R ___} Johnson's email indicated that a summary judgment hearing was scheduled for November 3, 2008, in Oskin's breach of contract action and that Johnson had failed to respond to the lawsuit {Trans p 159, R 272} Michael Brown also knew of the judgment of O'Connell that had been purchased by Oskin [3] {Trans p 171-172, R 284-85} In October of 2008, Michael Brown spoke with Wachovia, seeking advice regarding his obligations under the note and mortgage {Trans p 76-77, 85-86, 153-154, Appellants' Trial Exhibit 7, R 189-90, 198-99, 206-07}

After the hearing on November 3, 2008, the Honorable Diane S Goodstein entered an order granting Oskin summary judgment against Johnson in the breach of contract action {Order filed December 11, 2008, R 1} The court entered judgment in the amount of $1 million {Id } The court later amended its order to reflect an additional $262,499 99 in pre-judgment interest In total, Oskin became a judgment creditor of Johnson in the amount of $1,262,499 99 {Id }

In the November of 2008, Michael Brown initiated discussions with SCB&T inquiring as to whether the bank would accept a lower payoff amount of the loan because the value of the property had depreciated {Trans p 75, 170, R 188, 283} At the time, the property appraised for $2 5 million {Trans p 90, R 203} SCB&T informed Michael Brown that it would only accept a full payoff of the loan {Trans p 168, R 281} Michael Brown also expressed his concerns with how this potential judgment would affect his interest in the property {Trans P 90, R 203} On November 4, 2008, one day after the summary judgment hearing in Oskin's breach of

[3] Michael Brown refers to O Connell as McConnell at the hearing

contract action, Michael Brown informed SCB&T of the possibility of a judgment against Johnson {Transp p 167, R 280} On November 19, 2008, Michael Brown travelled to Columbia to meet with SCB&T about the note and mortgage {Trans p 168, lines 17-23, R 281} SCB&T informed Michael Brown that he could not buy the note and mortgage himself because his status as a co-obligor would result in a pay-off of the note, thus leaving no note or mortgage to assign {Deposition of Jim Boyd p 29 line 25—p 30 line 25, R 372-73}

After the meeting, Michael Brown's attorney organized J Conner LLC in North Carolina on November 19, 2008 {Trans p 177, line 3-12, LLC filing letter, R 290, 410} The filing was expedited and Michael Brown personally paid the expedited filing fee {Trans p 180-181, R 293-94} At the hearing, Michael Brown recounted his deposition testimony as to his purpose for creating J Conner He testified at the hearing

> Q "That SCB&T note has prompted borrower to seek legal advice in dealing with the outstanding liens Borrower s attorney suggested this alternative to protect assets And that was your—that's what you were trying to do, right, protect this asset?" Non-responsive, nods head "Is that a yes?"
>
> A And then I answered "yes "
>
> Q Okay

{Trans p 186, lines 12-20, R 299} In fact, Michael Brown further testified that J Conner would not have been created if he was not liable on the SCB&T note and mortgage

> Q The purpose of money being sent to SCB&T was to take care of your obligation to SCB&T, is that right?

A It was to—so that SCB&T would assign that mortgage to J Conner

Q And the reason that was created was because you owed money to SCB&T, correct?

A Yes

Q If you didn't owe that money and it was solely Mr Johnson, that owed the money on the SCB&T note, and you had not signed any other agreement with SCB&T, would J Conner have been created?

A No

{Trans p 207, lines 9-23, R 320}

Joan Conner Brown, Michael Brown's wife, was listed as J Conner's sole member {J Conner Operating Agreement, R 412} J Conner's sole purpose was "to acquire that certain note and mortgage held by South Carolina Bank & Trust, N A from Michael Brown and Stephen Mark Johnson" {Id } This was done, as stated by Michael Brown, 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}

Michael Brown continued discussions with Wachovia Bank, N A , about lending the $3 5 million[4] needed to facilitate J Conner's acquisition of the note and mortgage from SCB&T {Trans p 191, lines 14-20, R 304} Michael Brown was the only party to negotiate with Wachovia about obtaining these funds {Trans p 92-93, 191, R 205-06, 304} According to Wachovia, Michael Brown was aware the property was

[4] As noted above SCB&T would only accept a full payoff of the loan

"facing some judgment liens if the property is not taken out of its existing structure " {Trans p 98 line 23—p 99 line 2, R 211-12}

After SCB&T refused to take less than the full pay-off amount, Brown informed Wachovia to move forward with the loan to J Conner As a condition of Wachovia agreeing to loan the $3 5 million to J Conner, Wachovia required Michael Brown to secure the loan with six investment accounts [5] Five of the six accounts pledged as security were owned solely by Michael Brown {Trans p 110-111, 113, lines 10-17, R 223-24, 226} The sixth account was in the name of Joan Conner Brown {Trans p 113, R 226} Michael Brown's hedge fund account pledged to secure the loan was to be liquidated[6] to pay down approximately $2 million of the $3 5 million debt to Wachovia {Trans p 110-11, R 223-24} In addition, Wachovia required that Michael Brown execute a personal guaranty agreement {Trans p 192, lines 6-21, R 305} Joan Conner Brown, Michael Brown's wife, also executed a personal guaranty for the loan Michael Brown also signed both the security agreement and control agreement as "borrower " {Security and Control Agreements, R 435, 445}

Thereafter, Wachovia wired $3 5 million to SCB&T to complete the J Conner transaction {Trans p 197, line 21—p 198, line 3, R 310-11} Because the amount actually due to SCB&T under the note and mortgage exceeded the $3 5 million, Wachovia required an additional payment of $44,303 31 before it would complete the J Conner transaction {Trans p 198, line 4—p 199, line 15, 200, R 311-12, 313} As a result, Michael Brown delivered a personal check drawn from his personal

[5] At the time Wachovia managed Michael Brown s wealth and multiple investment accounts

[6] While this was agreed to by Michael Brown the account was never liquidated

account to SCB&T in the amount of $44,303 31 {Id } Moreover, Wachovia required J Conner to set up a demand deposit account from which Wachovia could withdraw funds for monthly interest payments related to the $3 5 million loan {Trans p 202, Exhibit 25, R 315} Michael Brown satisfied this obligation by depositing another personal check in the amount of $50,000 in the demand deposit account {Trans p 202, Exhibit 25, R 315} With the full amount paid, SCB&T executed an allonge assigning the note and mortgage to J Conner {Trans p 200-210, line 19, R 313-23} Since receiving the assignment, J Conner has never required Michael Brown or Stephen Mark Johnson to make payments under the note and mortgage {Trans p 204, lines 20-25, p 221, line 15-20, p 249, line 6-12, R 317, 334, 362}

Thereafter, Appellants instituted this declaratory judgment action against Respondents {Complaint dated April 6, 2009, R 34} Appellant Oskin is a judgment creditor of Respondent Johnson, and the holder, by assignment, of the O'Connell judgment {Id } Appellants Glenn Small and Freddie Kanos are creditors of Johnson resulting from an undisputed debt owed to them by Johnson {Order dated March 26, 2010 p 5, R 17}

Appellants then sought to have the court declare (1) that the payment to South Carolina Bank & Trust for a purported assignment of a note and mortgage constituted a discharge of the obligations of Michael Brown and Stephen Mark Johnson under that note and mortgage, (2) that Michael Brown is the alter-ego of J Conner LLC, (3) that the assignment of the mortgage from South Carolina Bank & Trust to J Conner LLC was void as it violated the South Carolina Fraudulent Conveyance Statute, and (4) to determine the appropriate statutory penalty for the violation of the South Carolina

Fraudulent Conveyance Statute {R 34} The master entered a written order denying Appellants the relief sought in the complaint {Final Order Ending Action filed March 26, 2010, R 17} The master thereafter denied Appellants' Rule 59, SCRCP, motion {Order Denying Motion for Reconsideration to Alter or Amend or for a New Trial filed May 6, 2010, R 30} Appellants filed this appeal

Standard of Review

A suit for a declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue Felts v Richland County, 303 S C 354, 356, 400 S E 2d 781, 782 (1991) An action to set aside a transfer as fraudulent pursuant to the Statute of Elizabeth is an action in equity Albertson v Robinson, 371 S C 311, 315, 638 S E 2d 81, 83 (Ct App 2006) Moreover, an alter-ego cause of action will be review under an equitable standard of review Mid-South Management Co , Inc v Sherwood Develop Corp , 374 S C 588, 649 S E 2d 135 (Ct App 2007), Peoples Fed Savings & Loan Assoc v Myrtle Beach Golf & Yacht Club, 310 S C 132, 425 S E 2d 764 (Ct App 1992) As an action in equity, this Court has the ability to find facts in accordance with its own view of the preponderance of the evidence Pinckney v Warren, 344 S C 382, 387, 544 S E 2d 620, 623 (2001)

Argument

I The master-in-equity erred in failing to find the transfer of the note and mortgage violated the Statute of Elizabeth

The master held that the Statute of Elizabeth did not apply to Appellants' argument because the parties to the transfer of the note and mortgage were not indebted to Appellants Also, the master held that even if the statute were applicable Appellants

failed to establish any intent to defraud by the Respondents Both findings constituted error The Statute of Elizabeth applies to Appellants cause of action against Respondents Moreover, the master's findings are contrary to the preponderance of the evidence that established intent to defraud Appellants This Court should reverse the master and enter judgment in favor of Appellants setting aside the transfer

a The Statute of Elizabeth applies to set aside the transfer of the note and mortgage in this action

The master held that the Statute of Elizabeth did not apply to Appellants' argument because the parties to the transfer of the note and mortgage were not indebted to Appellants {Final Order p 6 ¶ 25—p 7 ¶ 26, R 17} This was error for two reasons First, the Statute of Elizabeth does not require the transferor to be indebted to the complaining creditor in order to set aside the conveyance 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 Second, our Supreme Court has found that such a relationship is not required to set aside a fraudulent conveyance under the Statute of Elizabeth The statute is applicable to any person defrauded in connection with the conveyance of the property 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

First, this Court should reverse the master's finding that the Statute of Elizabeth requires "the grantor to be indebted to the complaining creditor at the time of the transfer " {Final Order p 6 ¶ 25, R 17} Such a holding ignores the clear language of

the statute [7] South Carolina allows a transfer to be set aside as a fraudulent conveyance under Section 27-23-10 of the South Carolina Code This section is known commonly as the Statute of Elizabeth and provides, in pertinent part

> Every gift, grant, alienation, bargain, transfer, and conveyance of lands, tenements, or hereditaments, goods and chattels or any of them, or of any lease, rent, commons, or other profit or charge out of the same, by writing or otherwise, and every bond, suit, judgment, and execution 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, penalties, and forfeitures must be deemed and taken to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding

S C Code Ann § 27-23-10(A) (Supp 2004) (emphasis added) The statute unambiguously applies to both "creditors **and others**" and allows either to set aside a conveyance that is made with the intent to defraud, hinder, or delay The unambiguous language of the Statute of Elizabeth does not require a debtor/creditor relationship as a prerequisite to set aside a fraudulent conveyance No language is used to limit its application to actions by creditors seeking to avoid transfers by his debtor Nor does the statute require the transferor to be indebted to the creditor at the time of the transfer A holding to the contrary would render meaningless the term "others" used in the statute

That is precisely the effect of the master's order The master incorrectly found the Statute of Elizabeth only applies to situations where a debtor/creditor relationship existed between the parties Such a finding rendered the term "others" meaningless

[7] Respondents have not maintained that the statute is ambiguous or otherwise requires interpretation by the court Therefore this Court should apply the clear language of the statute

and without effect 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") In sum, the Statute of Elizabeth unambiguously applies to both "creditors **and others**" and allows either to set aside a conveyance under the statute The Statute of Elizabeth does not test who made the transfer, rather, it looks to the person affected by the transfer or conveyance The master erred in finding the Statute of Elizabeth was limited to situations where the transferor was indebted to the complaining creditor at the time of the transfer

Second, our Supreme Court has recognized the Statute of Elizabeth applies to parties other than creditors In Lebovitz v Mudd, 293 S C 49, 358 S E 2d 698 (1987), the court held that the Statute of Elizabeth does not apply solely to creditors seeking to set aside transfers made by his debtor Id at 52, 358 S E 2d at 700 In that case, no creditor/debtor relationship existed at all between Lebovitz, the party seeking to set aside the conveyance, Mudd [8] Mudd owed no debt to any party in the action, and Lebovitz was not a creditor of any party to the action Mudd arranged for Lebovitz to purchase real estate at a certain price After making such arrangements, Mudd bought the property for a substantially lower sum and then resold the property to Lebovitz

[8] Lebovitz was not the only appellant seeking to set aside the conveyance However for ease of reference all appellants will be referred to collectively as Lebovitz Likewise the parties fraudulently conveying the property will be referred to as Mudd

through a straw party and retained the profits Id at 51, 358 S E 2d at 699 After Lebovitz discovered the scheme to defraud him, he brought an action for fraud and unfair trade practices against Mudd Id Mudd then recorded eighteen deeds, which were backdated to prior the Lebovitz purchase, transferring all of the property from the straw party to Mudd and then from Mudd to a newly created partnership in Illinois Lebovitz brought an action to set aside these transfers of the property under the Statute of Elizabeth, alleging the transfers were made to allow Mudd to defraud Lebovitz by escaping liability for his original fraud and unfair trade practices Id

Mudd moved to dismiss Lebovitz's fraudulent conveyance cause of action, alleging Lebovitz was not a creditor entitled to use the Statute of Elizabeth to set aside the transfers Id The trial court agreed, finding Lebovitz failed to assert he was a creditor of Mudd within the meaning of the Statute of Elizabeth [9] Id On appeal, Lebovitz argued his complaint properly alleged the status of a person entitled to the protections of the Statute of Elizabeth Id at 52, 358 S E 2d at 700 The Supreme Court agreed Id In finding statute of Elizabeth applied to Lebovitz's cause of action, the court looked to the actual language of the statute The court noted the statute referred to "creditors *and others* " Id (emphasis in original) The court reasoned

> As 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)

[9] The trial court dismissed the fraudulent conveyance cause of action on a second ground that is irrelevant to the court s decision to afford Lebovitz the protections of the statute as it relates to this appeal

As is evident from the above language, the Supreme Court held the Statute of Elizabeth does not only apply to creditors The court clearly established that other parties defrauded in connection with a conveyance may maintain an action under the Statute of Elizabeth The court clearly recognized that the "and others" language in the Statute of Elizabeth mandates that the protections afforded therein apply even in the absence of a creditor/debtor relationship

This approach has been recognized in other jurisdictions as well In Corry v Shea, 128 N W 892 (Wisc 1910), the Wisconsin Supreme Court allowed a non-creditor to pursue an action under the fraudulent conveyance statute [10] The court noted that the "appellant in this action is not a creditor of respondent " Id at 894 The court specifically rejected that such a position is fatal to the claim under the fraudulent conveyance statute Id Instead, the court held

> It is a mistake to suppose that the statute of Elizabeth only avoids deeds and conveyances coming within its exact provisions as to creditors The statute is much broader in its operation It enacts that every conveyance made to the end, purpose, and intent to delay, hinder, or defraud creditors *and others* of their just and lawful actions, etc , shall be void It extends not only to creditors, but to *all others* who have cause of action or suit, or any penalty or forfeiture The claimant may not come within a sharply defined meaning of the word creditor, but he may maintain his standing in the equity of creditors

Id (emphasis in original) (internal quotations omitted), see also 37 Am Jur 2d Fraudulent Conveyances § 118 (2010) (stating that "[p]rotection has been extended to creditors and, in addition, others Such expressions have been construed liberally, so as to include within the protection of the statute all persons who have interests of

[10] The Wisconsin State of Elizabeth is identical to our Statute of Elizabeth

which they may be defrauded") (internal quotations omitted), 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") As a result, the master erred in finding the Statute of Elizabeth was limited to situations where the transferor was indebted to the complaining creditor at the time of the transfer

Appellants recognize that the vast majority of litigation under this statute arises when a creditor seeks to set aside a conveyance made by his debtor [11] However, the fact that this is the context in which the courts address the Statute of Elizabeth does **not** establish that is the only way for the statute to be utilized to set aside a fraudulent conveyance The statute unambiguously allows "others" to set aside a conveyance as fraudulent Likewise, our Supreme Court allows "others" to maintain an action under the Statute of Elizabeth in the absence of a creditor/debtor relationship The master erred by limiting the statutes application to actions by a creditor against his debtor Therefore, this Court should reverse the master and hold that the Statute of Elizabeth

[11] Appellants do not contend the test recited by the master to set aside conveyances when the parties have a creditor/debtor relationship is incorrect or needs to be overturned Appellant merely contends this is the general rule for setting aside a conveyance **when** a grantor is indebted to the creditor at the time of the transfer The use of this test in such a situation does **not** mean a grantor **must** be debtor of the creditor at the time of the conveyance in order to set aside the conveyance under the Statute of Elizabeth If it did then the term others would be meaningless in the statute The test is merely inapplicable when the parties do not have creditor/debtor relationship As a result Future Group II v NationsBank 324 S C 89 478 S E 2d 45 (1996) offers no assistance to Respondents and the master erred in relying on it to support the finding that the grantor has to be indebted to the complaining creditor at the time of the transfer in order for the Statute of Elizabeth to apply

applies to set aside the transfer of the note and mortgage as a fraudulent conveyance in this action

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

The master found that there was no intent to defraud by Respondents {Final Order p 7 ¶ 28—p 8 ¶ 29, R 17} The master's ruling is not supported by evidence This Court should reverse

The evidence[12] established that 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 and O'Connell's judgment Michael Brown knew that Oskin was a creditor of Johnson Michael Brown also knew that Johnson had failed to respond to Oskin's lawsuit As a result, Michael Brown told SCB&T of the possibility of judgments against Johnson During these discussions with SCB&T, Michael Brown learned that he could not buy the note and mortgage himself because his status as a co-obligor would result in a pay-off of the note, thus leaving no note or mortgage to assign

The preponderance of the evidence established that, in response to learning this information, Michael Brown had his attorney organize J Conner in order to facilitate acquiring the note and mortgage from SCB&T The filing was expedited, and Michael Brown personally paid the expedited filing fee J Conner was necessary to achieve the goal of the Michael Brown to protect his interest in the property and shield it from

[12] Please note that all facts recited in the argument section have previously been set forth in the statement of facts with corresponding cites to the record Thee cites to the record are eliminated in the argument section for brevity unless it is a new fact not previously set out

Oskin's judgments against Johnson J Conner existed solely to purchase the note and mortgage from SCB&T This was done, as stated by Michael Brown, 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} Michael Brown 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 worked to get the loan to J Conner as follows (1) he undertook substantial negotiations with Wachovia, despite not being a member of J Conner, in order to complete the transaction, (2) he owned five of the six accounts that Wachovia required to be pledged as the security, (3) he agreed that one of those accounts, a hedge fund account solely owned by Michael Brown, should be liquidated to pay down approximately $2 million of the $3 5 million debt to Wachovia, (4) he executed a personal guaranty agreement for the Wachovia loan, (5) he signed both the security agreement and control agreement as "borrower," (6) he 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, and (7) he 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

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 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 and hold (1) Respondents violated the Statute of Elizabeth and (2) the Statute of Elizabeth applies to set aside the transfer of the note and mortgage as a fraudulent conveyance in this action

Additionally, the master's finding that Appellants were not prejudiced because their interests were subordinate to SCB&T and Respondents was error {Final Order p p 8 ¶ 29, R 17} As shown fully in section II, *infra*, the $3 5 million payment to SCB&T operated as a pay-off of the note and mortgage that rendered the obligation satisfied As a result, the value of the property is sufficient to allow Appellants to fully recover once they move to execute against Johnson

II J Conner is the alter-ego of Michael Brown, and, thus, the $3 5 million payment to SCB&T operated as a pay-off of the principal amount due under note and mortgage

The master found (1) that the evidence did not support a determination that J Conner was the alter-ego of Michael Brown[13] and (2) that the $3 5 million payment to SCB&T could not constitute a payment of the note and mortgage {Final Order p 9 ¶ 32—p 10 ¶ 33, p 10 ¶ 36—p 11¶ 36, R 17} The master also held that, even if the

[13] The order reverses the order stating Michael Brown is not the alter ego of J Conner This brief sets forth the correct order

payment resulted in the pay-off of the note, Michael Brown would be equitably subrogated to Johnson, retaining his priority over Appellants {Final Order p 10 ¶ 35, R 17} All three finding constitute reversible error First, the preponderance of the evidence established that J Conner was the alter-ego of Michael Brown Second, the master misapplied the rules of priority for future advances made under a future advance clause in a mortgage to determine the $3 5 million payment to SCB&T could not constitute a payment of the note and mortgage Lastly, the master incorrectly found that equitable subrogation would bar Appellants' action Therefore, this Court should reverse the master, holding that Michael Brown was the alter-ego of J Conner and that the $3 5 million payment to SCB&T constituted a payment in full of the principal of the note and mortgage

a The preponderance of the evidence established that J Conner was the alter-ego of Michael Brown

The master found she was "not convinced by the evidence that Michael Brown is the alter-ego of J Conner, LLC " {Final Order p 9 ¶ 32, R 17} The preponderance of the evidence cannot support this finding In fact, the preponderance of the evidence proved J Conner was the alter-ego of Michael Brown This Court should reverse and hold J Conner was the alter-ego of Michael Brown

An alter-ego theory requires a showing of total domination and control of an entity by another Colleton County Taxpayers Assoc v School Dist of Colleton County, 371 S C 224, 237, 638 S E 2d 685, 692 (2006), Mid-South, 374 S C at 603, 649 S E 2d at 143, Peoples Fed Savings & Loan Assoc v Myrtle Beach Golf & Yacht Club, 310 S C at 148, 425 S E 2d at 774 A showing of inequitable

consequences caused by the total domination must also be shown Id Total domination and control "may be shown where the subservient entity manifests no separate interest of its own and functions solely to achieve the goals of the dominant entity " Colleton County, 371 S C at 237, 638 S E 2d at 692 Therefore, a court should disregard an entity as an alter-ego when (1) the subservient entity functions solely to achieve the goals of the dominant entity, (2) the subservient entity manifests no interest of its own separate from the dominant entity, and (3) inequitable consequences result from the total domination Here, Michael Brown, the dominant party, exercised total domination over J Conner, the subservient entity, resulting in inequitable consequences to Appellants

First, the evidence established that Michael Brown's goal 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 This is evident from his course of dealings with SCB&T In the fall of 2008, Michael Brown began investigating his options to satisfy his obligations under the SCB&T note and mortgage as the maturity date was approaching As part of that process, Michael Brown first learned Oskin was a creditor of Johnson Johnson informed Michael Brown that a summary judgment hearing was scheduled for November 3, 2008, in Oskin's breach of contract action and that Johnson had failed to respond to the lawsuit In response to this news, Michael Brown expressed his concerns to SCB&T as to how this potential Oskin judgment would affect his interest in the property In fact, one day after the summary judgment, Michael Brown informed SCB&T of the possibility of a judgment against Johnson SCB&T informed Michael Brown that he could not buy the note and

mortgage himself because his status as a co-obligor would result in a pay-off of the note, thus leaving no note or mortgage to assign Michael Brown then had his attorney organize J Conner LLC, in order to facilitate acquiring the note and mortgage from SCB&T Michael Brown personally paid the expedited filing fee

Second, the evidence established J Conner functioned solely to achieve the goals of the Michael Brown and had no interest of its own separate from Michael Brown J Conner existed solely to purchase the note and mortgage from SCB&T J Conner's operating agreement provides its **sole purpose** as "to acquire that certain note and mortgage held by South Carolina Bank & Trust, N A from Michael Brown and Stephen Mark Johnson " No other purpose or interest was set forth to the master In fact, it was undisputed that this was the sole purpose of J Conner {Trans p 244, lines 4-7, R 357} This was done, as stated by Michael Brown, to protect his property asset from the Oskin judgment 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

Third, the evidence established additional other indicia of domination by Michael Brown Michael Brown had his attorney organize J Conner The filing was expedited, and Michael Brown personally paid the expedited filing fee There is no evidence in the record that Joan Conner Brown was involved with organizing J Conner Michael Brown was the only party that approached Wachovia about lending the $3 5 million needed to facilitate J Conner's acquisition of the note and mortgage from SCB&T Joan Conner Brown did not engage Wachovia in lending J Conner the $3 5 million Michael Brown, despite not being a member of J Conner, was the only

party to negotiate with Wachovia about obtaining these funds Joan Conner Brown did not participate in the negotiations with Wachovia During the negotiations, Michael Brown informed Wachovia that the property was "facing some judgment liens if the property is not taken out of its existing structure " Further, five of the six accounts pledged as the security required to obtain the Wachovia loan were owned solely by Michael Brown One of those accounts, a hedge fund account solely owned by Michael Brown, was to be liquidated to pay down approximately $2 million of the $3 5 million debt to Wachovia In addition, Michael Brown executed a personal guaranty agreement for the Wachovia loan Also, Michael Brown also signed both the security agreement and control agreement as "borrower " Michael Brown also 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 Joan Conner Brown did not provide any funds to facilitate the transfer of the note and mortgage from SCB&T to J Conner Lastly, 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

The evidence relied on by the master to find lack of control by Michael Brown is misplaced That evidence has nothing to do with the total domination of J Conner by Michael Brown The fact that Joan Conner Brown had personal accounts at Wachovia and owns investment securities does evidence any control of J Conner In fact, that only evidence of Joan Conner Brown's involvement with J Conner was a payment of twenty-thousand dollars {Trans p 245, lines 7-9, R 358} Joan Conner Brown admitted J Conner has no business activities {Trans p 248, line 25—p 249, line 2, R 361-62} Again, there is no evidence that she negotiated on behalf of J

Conner for the Wachovia loan, was otherwise involved in the transaction, or was involved in the creation of J Conner

The preponderance of the evidence cannot support a finding that Joan Conner Brown has control over J Conner despite being named as sole member The preponderance of the evidence established that (1) 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 judgment against Johnson, (2) he created J Conner, (3) he negotiated on behalf of J Conner to obtain the $3 5 million from Wachovia, (4) he wrote nearly $95,000 in personal checks to facilitate J Conner obtaining the Wachovia loan, (5) he guaranteed the Wachovia loan to allow J Conner to obtain the $3 5 million, and (6) he signed both the Wachovia security agreement and control agreement as "borrower " This Court should find the preponderance of the evidence established J Conner was the alter-ego of Michael Brown

Lastly, recognition of J Conner would result in inequitable consequences, promote fraud, wrong, injustice, or contravene public policy Michael Brown misused his power of 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 J Conner has never required Michael Brown or Johnson to make payments under the note Joan Conner Brown testified that J Conner has never required Michael Brown or Stephen Mark Johnson to make payments under the note and mortgage Any legitimate company that acquired a note and mortgage would require payment from the obligors It would also contravene public policy to allow

persons obligated under a note and mortgage to avoid those contractual obligations by setting up a shell entity to purchase the note and mortgage in order to escape the payment terms

As shown above, the preponderance of the evidence established that J Conner is the alter-ego of Michael Brown The evidence also established that recognition of J Conner would result in inequitable consequences, promote fraud, wrong, injustice, or contravene public policy The master erred in finding otherwise This Court should reverse and hold J Conner was the alter-ego of Michael Brown

b The presence of 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

The master found that the existence of the future advance clause in the mortgage precludes a finding that the mortgage had been satisfied {Final Order p 10 and 11 ¶ 36, R 17} The court relied on the well-settled rule that a mortgage containing a future advance clause remains valid even after payment in full of the underlying debt See Central Production Credit Assoc v Page, 268 S C 1, 8, 231 S E 2d 210, 214 (1977) Appellants agree that this is the rule in situations when a mortgage contains a future advance clause However, application of the rule does not impact Appellants recovery in this matter The rule announced in Central Production simply allows a mortgage holder retains priority over other lien holders in order to recover future advances made to the borrower even after the mortgage principal has been paid in full However, application of the rule does not impact Appellants recovery in this matter Id

The mortgage can remain valid and not affect Appellants right to recover at all Here, the mortgage holder was entitled to $3 5 million plus interest from the

borrowers Once that amount is paid in full, then the mortgage holder has been paid in full as the principal of the note and mortgage The mortgage holder 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 However, Central Production does not stand for the premise that the mortgage holder would be entitled to any anything other than repayments of future advances Importantly, no future advances were made under this mortgage Therefore, the mortgage holder in this action is entitled to no additional money

An illustration will elucidate this argument Assume Oskin moved to sell the property after the payment of the $3 5 million to SCB&T, and the property sold for some amount Under Central Production, the mortgage holder had priority over Oskin to those proceeds in order to be repaid for any outstanding future advances it has made to the borrowers Here, no future advancements were made Therefore, the amount the mortgage holder would receive under the priority rules of Central Production would be zero The mortgage holder could not claim entitlement to any of the proceeds to pay down the mortgage principal because it has been paid in full To hold otherwise would permit the mortgage holder to receive a double recovery as the principal amount As a result, Oskin would be entitled to Johnson's half of the proceeds from the sale

The master simply misapplied the Central Production rule to bar Appellants recovery Actually, application of the Central Production rule to this case leads to the inescapable conclusion that even with the mortgage holder retaining priority, Appellants

can still recover the amounts due to them The master erred in holding otherwise and this Court should reverse

c The master incorrectly and unnecessarily found that equitable subrogation would preclude a finding that the note and mortgage had been paid

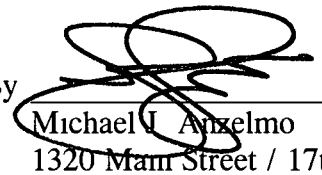
In denying Appellants claim that the note and mortgage were satisfied by the $3 5 million payment to SCB&T, the master held that even if the note and mortgage were satisfied then equitable subrogation would preclude Appellants from recovering {Final Order p 10 ¶ 35, R 17} This finding is immaterial to 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 Appellants only requested a declaration that the $3 5 million payment to SCB&T constituted a payment of the note and mortgage here Appellants did not request a determination of priority by the master Appellants have not tried to enforce its Johnson judgment and the subrogation priority issue would be addressed in that action Therefore, no need existed for master to reach this issue This finding should be vacated by this Court

Moreover, Respondents failed to plead equitable subrogation in their answer {Answer of Respondents, R 110} As such, the issue was not properly before the master See Kuznik v Bees Ferry Associates, 342 S C 579, 609, 538 S E 2d 15, 30 (Ct App 2000) (finding an equitable subrogation claim must be plead in the answer in order to be considered by the court) Therefore, no need existed for master to reach this issue This finding should be vacated by this Court

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

NELSON MULLINS RILEY & SCARBOROUGH LLP

By 

Michael J Anzelmo
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803 799 2000

Mark A Brunty
Brunty Law Firm, P A
Post Office Box 1980
Myrtle Beach, South Carolina 29578
843 449 1500

Attorneys for Appellants

Columbia, South Carolina
July 7, 2011

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

CERTIFICATE OF COUNSEL

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

NELSON MULLINS RILEY & SCARBOROUGH LLP

By _____

Michael J. Anzelmo
1320 Main Street / 17th Floor
Post Office Box 11070
Columbia, South Carolina 29211
803 799 2000

Attorneys for Appellants

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CERTIFICATE OF COMPLIANCE

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

NELSON MULLINS RILEY & SCARBOROUGH LLP

By _____

Michael J. Anzelmo
1320 Main Street / 17th Floor
Post Office Box 11070
Columbia, South Carolina 29211
803 799 2000

Attorneys for Appellants

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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)

Pleadings	Appellants' Final Brief
Counsel Served	Henrietta Golding Dan V Butler McNair Law Firm Post Office Box 366 Myrtle Beach, SC 29578

C Scott Masel
Newby, Sartip, et al
Post Office Box 808
Myrtle Beach, SC 29578

Lisa P. Whitehurst
Lisa Whitehurst
Administrative Assistant

July 8, 2011