

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM Horry COUNTY  
Master-in-Equity

The Honorable Cynthia Graham Howe  
Horry County Master-in-Equity

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Case No 2009-CP-26-03470

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Robert W Oskin, Glenn Small  
and I reddie 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 RESPONDENTS MICHAEL BROWN,  
JOAN CONNER BROWN AND J CONNER, LLC

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## STATEMENT OF ISSUES ON APPEAL

- I Whether the trial court properly ruled that the assignment of the note and mortgage (the “Assignment”) did not violate the Statute of Elizabeth when (i) SCB&T, the assignor, was not indebted to Appellants at the time of the Assignment, (ii) SCB&T had no fraudulent intent with regards to the Assignment, (iii) the Assignment was executed to secure the Bona fide claims of J Conner, LLC, the assignee, and (iv) Johnson’s interest in the Property remains within the reach of Appellants?
- II Whether the trial court properly ruled that the payments to SCB&T did not result in a pay-off of the note and/or satisfaction of the mortgage when (i) J Conner, LLC maintained an existence separate and independent of M Brown, (ii) the mortgage contained a future advance clause, and (iii) the doctrine of equitable subrogation entitled M Brown to be subrogated to the rights of SCB&T, as holder of a first mortgage lien on the subject property, to the extent of the payments made by M Brown in excess of his one-half share of the SCB&T debt?

## STATEMENT OF THE CASE

This action arose out of an assignment of a promissory note and mortgage from South Carolina Bank and Trust, N A (hereinafter "SCB&T") to Respondent J Conner, LLC that occurred on December 30, 2008 (hereinafter the "Assignment") The Complaint was filed April 6, 2009 seeking a declaratory judgment that (i) the Assignment of the note and mortgage was a fraudulent conveyance in violation of S C Code Ann § 27-23-10, also known as the "Statute of Elizabeth", and (ii) the payment to SCB&T for the Assignment resulted in pay-off of the note, thereby satisfying the mortgage (R pp 36-49) Additionally, Appellants sought the civil penalty under S C Code Ann § 27-23-30 in the amount of \$245,000 00 from each Respondent Respondents denied the allegations that the Assignment violated the Statute of Elizabeth and that the payment to SCB&T resulted in pay-off of the note and satisfaction of the mortgage (R pp 110-113)

On June 23, 2009, the matter was referred to the Horry County Master in Equity pursuant to Rule 53, SCRCP (R pp 5-9)

By Stipulation of Dismissal dated September 2, 2009, SCB&T was dismissed from the lawsuit (R pp 509-510)

Appellants amended their Complaint on November 20, 2009 to incorporate a Confession of Judgment in favor of David O'Connell against Respondent Stephen Mark Johnson, which Confession was assigned to the Appellant Robert O Oskin (R pp 512-525)

Trial was held before the Horry County Master in Equity February 15, 2010 After hearing all witness testimonies and reviewing all evidence, the Master ruled against

Appellants on all claims Specifically, as set forth in the Final Order Ending Action, dated March 25, 2010 (hereinafter the “Final Order”), the Master ruled that (i) the Statute of Elizabeth did not apply to the Assignment of the note and mortgage, (ii) even if applicable, the Assignment of the note and mortgage did not violate the Statute of Elizabeth, (iii) the payments to SCB&T for the Assignment did not result in a pay-off of the note nor the satisfaction of the mortgage, thus, the note and mortgage continue to be valid and enforceable pursuant to its terms, (iv) even if the payments to SCB&T resulted in a pay-off of the note, M Brown was equitably subrogated to Johnson’s interest in the Property to the extent of the monies paid by M Brown in excess of his one-half share of the obligations on the note (R pp 18-29)

By motion filed April 5, 2010, Appellants moved to alter or amend the Final Order and later submitted a memorandum in support of the motion (R pp 511-512) A hearing on the Motion for Reconsideration was held before the Master-in-Equity on April 30, 2010 The motion was denied (R pp 30-31)

Respondents received the Notice of Appeal on June 10, 2010

## STATEMENT OF THE FACTS

In 2006, the Respondent Stephen Mark Johnson (hereinafter “Johnson”) approached his uncle, Respondent Michael D Brown (“M Brown”), and requested that M Brown co-sign on a \$3.5 million promissory note to jointly purchase a lot and home in Myrtle Beach, South Carolina (the “Property”) (R p 253, lines 5-19) Johnson told M Brown that he would refinance the loan in six to eight months, at which time M Brown would be taken off the note (Id) M Brown agreed and co-signed on a \$3.5 million promissory note in favor of SCB&T for the purchase of the Property (R pp 394-395) The term of the note was two (2) years and it provided for interest-only payments for the first 23 months, with a final balloon payment due on November 30, 2008 (Id) The note was secured by a first mortgage lien on the Property (the “SCB&T Mortgage”) (R pp 386-393) Title to the Property was conveyed to M Brown and Johnson as tenants in common (R pp 379-383)

In addition to the SCB&T Mortgage, the Property was also encumbered by a second mortgage lien in favor of Ameris Bank in the amount of \$500,000.00 to secure a promissory note for the same amount (R pp 396-405) The debt to Ameris Bank, which arose in April 2007, remained outstanding at the time of the trial (R p 325, lines 1-24)

Initially, Johnson made the monthly interest-only payments on the SCB&T note until early 2008 when he could no longer afford to make the payments, at which time M Brown paid the remaining monthly payments (R p 260, lines 8-19)

In October 2008, M Brown contacted Wachovia Bank with respect to refinancing the SCB&T loan (R p 189, line 20-p 190, line 16) At that time, M Brown did not want to liquidate any assets to pay off the SCB&T note that was coming due in

November 2008, however, wanted to protect his interest in the Property (R p 327, line 16-p 328, line 2) Due to the low appraisals on the Property,<sup>1</sup> Wachovia Bank could not approve the \$3.5 million loan if the loan was to be secured by a mortgage on the Property (R p 203, line 8-p 204, line 10) However, Wachovia Bank could issue the loan if it was secured by marketable securities valued at \$3.5 million (R p 205, lines 2-15)

In early November 2008, M. Brown approached SCB&T in an attempt to reduce the note balance (R p 280, lines 7-9) M. Brown followed up with a meeting with SCB&T officers on November 19, 2008, at which time he was informed that SCB&T would not reduce the note balance (R p 281, lines 6-14) In order to avoid foreclosure, and without having to liquidate any assets, M. Brown, along with his wife, Joan Conner Brown ("J. Brown"), decided that their best option was to form an LLC to purchase the note and mortgage from SCB&T, with the purchase being financed by a loan obtained by the LLC from Wachovia Bank (R p 290, line 3-p 291, line 16, p 356, line 18-p 357, line 3, p 371, lines 16-25, p 372, lines 13-15)

On November 20, 2008, J. Conner, LLC was formed, with J. Brown being its sole member (R pp 410-424) On December 18, 2009, Wachovia Bank approved the loan to J. Conner, LLC in the amount of \$3.5 million (the "Wachovia Loan") to purchase the SCB&T note and mortgage (R pp 429-434) The Wachovia Loan is personally guaranteed by, and is secured by separate investment accounts owned by, M. Brown and J. Brown (R pp 435-462)

The \$3.5 million proceeds from the Wachovia Loan was wired to SCB&T on December 18, 2008 (R p 230, lines 3-25) An additional amount of \$44,303.31 was

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<sup>1</sup> The Property was worth approximately \$25.26 million in October 2008 (R pp 464-469, pp 484-489)

paid to SCB&T by personal check of M Brown to complete the purchase (R p 310, line 25-p 312, line 15, p 103) After receiving full payment on the purchase of its note, SCB&T assigned the note and mortgage to J Conner, LLC on December 30, 2008 (R pp 406-409)

Jim Boyd, senior vice president with SCB&T, and John Lee Scott, banker with Wachovia Bank, confirmed at the trial that Johnson had no involvement relating to the purchase of the SCB&T note and mortgage by J Conner, LLC, the loan obtained by J Conner, LLC for the purchase nor the actual Assignment of the note and mortgage to J Conner, LLC (R p 239, line 14-p 240, line 23, p 374, lines 10-24)

At the time of the Assignment, Appellant Robert W Oskin ("Oskin") was the holder of a judgment in excess of \$1 million against Johnson relating to a dispute regarding real estate commission (R pp 1-4, p 150, lines 3-7) At the trial, Oskin testified that the actual dollar amount he came out of pocket for relating to the real estate commission dispute was less than \$100,000 00 (R p 151, line 16-p 152, line 5)

In addition to the \$1 million judgment, Oskin also became the holder of a Confession of Judgment in the amount of \$36,000 executed by Johnson in favor of David B O'Connell (R pp 526-527) Oskin purchased the Confession of Judgment from O'Connell for \$500 0 on November 4, 2009, nearly seven (7) months after the Complaint was filed (R pp 528-529, p 152, line 6-p 153, line 17)

At the trial, Oskin testified that neither M Brown, J Brown nor J Conner, LLC had any involvement with the circumstances relating to the \$1 million judgment (R p 150, line 3-p 151, line 15, p 154, lines 3-21) In fact, Oskin admitted that he had never

met, loaned monies to, nor had any contact with M Brown, J Brown or J Conner, LLC prior to this lawsuit (R p 153, line 18-p 155, line 16)

At the time of the Assignment, Appellants Glenn Small (“Small”) and Freddie Kanos were holders of a \$200,000 00 promissory note executed by Johnson on June 3, 2007 (R p 530)<sup>2</sup> Small testified at the trial that M Brown, J Brown and J Conner, LLC had no involvement with this debt and, furthermore, that Small had never met, loaned monies to, nor had any business dealings with M Brown, J Brown or J Conner, LLC <sup>3</sup> (R p 171, lines 5-22, p 173, line 7-p 174, line 16)

At the trial, both Oskin and Small testified that SCB&T was not indebted to any of the Appellants, that the note and mortgage were valid instruments and that SCB&T had the discretion and right to sell and assign the note and mortgage to J Conner, LLC without Appellant’s consent or authorization (R p 155, line 17-p 158, line 17, p 171, line 23-p 172, line 6, p 174, line 17-p 175, line 1, p 176, line 22-p 177, line 10, p 178 lines 1-13) Oskin and Small also testified that they did not make any payments towards the SCB&T note nor pay any of the taxes, insurance or other expenses on the Property (R p 157, line 15-p 158 line 2, p 177, lines 11-25)

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<sup>2</sup> The promissory note was admitted over objection that the document was not the original and that it was missing the second page of the 2 page document (R p 162 line 20 p 170 line 1)

<sup>3</sup> Appellant Freddie Kanos did not testify at the trial

## STANDARD OF REVIEW

The standard of review for a declaratory judgment action is determined by the nature of the underlying claim(s) Auto Owners Ins Co , Inc v Newman, 385 S C 187, 191, 684 S E 2d 541, 543 (2009) An action to set aside a transfer as fraudulent pursuant to the Statute of Elizabeth is an action in equity Future Group, II v Nationsbank, 324 S C 89, 97, 478 S E 2d 45, 49 (1996) Furthermore, an action to pierce the corporate veil lies in equity Mid-South Management Co , Inc v Sherwood Develop Corp., 374 S C 588, 649 S E 2d 135 (Ct App 2007) In an appeal from an action in equity, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence Doe v Clark, 318 S C 274, 457 S E 2d 336 (1995) However, an appellate court is not required to disregard the findings of fact by the trial court nor ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses Pinckney v Warren, 344 S C 382, 387, 544 S E 2d 620, 623 (2001)

## ARGUMENT

I THE TRIAL COURT PROPERLY RULED THAT THE ASSIGNMENT OF THE NOTE AND MORTGAGE DID NOT VIOLATE THE STATUTE OF ELIZABETH

**A SCB&T, the assignor, was not indebted to Appellants at the time of the Assignment and there was no evidence of fraudulent intent on the part of SCB&T**

The Statute of Elizabeth provides in relevant 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 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) Appellants argue that the term “creditors and others” in the statute allow Appellants to set aside the Assignment despite the fact that neither SCB&T, the assignor, nor J Conner, LLC, the assignee, were indebted to Appellants at time of the Assignment Appellants’ protracted interpretation of the term “creditor and others” simply ignores the line of cases that clearly require the transferring party to (1) be indebted to the complaining creditor at the time of the transfer, and (11) have actual intent to defraud the creditor(s) when the conveyance is made for valuable consideration See Albertson v Robinson, 371 S C 311, 316, 638 S E 2d 81, 83 (Ct App 2006)(“ under the Statute of Elizabeth conveyances may be set aside where the transfer is made by the **grantor** with the actual intent of defrauding his [grantor’s] creditors where that intent is imputable to the grantee, even though there is valuable consideration ”)(emphasis added), Future Group II, 324 S C at 96, 478 S E 2d at 49 (“If there is valuable consideration, the transfer will be set aside only where the **grantor** was indebted at the time of the transfer and had an actual intent to defraud creditors imputable to the grantee”)(emphasis added), Royal Z Lanes, Inc v Collins Holding Corp., 337 SS C 592, 594, 524 S E 2d 621, 622 (1999)(to set aside conveyance as fraudulent, “[t]he **grantor** must be indebted at the time of the transfer”), Leasing Enterprises, Inc v Goodwin, 312 S C 122, 125, 439 S E 2d 294, 296 (Ct App 1993)(in analyzing whether conveyance should be set aside, court must “look to the conduct of the **debtor**”)(emphasis added)

At the trial, Appellants Oskin and Small testified that neither SCB&T nor any of the Respondents M Brown, J Brown and J Conner, LLC were indebted to any of the

Appellants and, furthermore, the Appellants had never met, loaned monies to, nor had any contact with them prior to this lawsuit (R p 153, line 18-p 158, line 17, p 171, line 5-p 172, line 6, p 173, line 7-p 175, line 1, p 176, line 22-p 177, line 9, p 178 lines 1-13) Appellants' only debtor is Johnson by virtue of the judgments and promissory note held by Appellants. In addition, Johnson had no involvement with the negotiations relating to the purchase of the note and mortgage, the loan obtained J Conner, LLC to purchase the note and mortgage nor the actual Assignment of the note and mortgage, as confirmed by the testimonies of Jim Boyd, senior vice president of SCB&T, and John Lee Scott, the Wachovia Bank loan officer who handled the \$3.5 million loan to J Conner, LLC for the purchase of the note and mortgage (R p 239, line 14-p 240, line 23, p 374, lines 10-24)

As holder of the note and mortgage, SCB&T clearly was the owner of these properties (R pp 386-395) Pursuant to its rights as holder, SCB&T sold the note and mortgage to J Conner, LLC, at face value, a transaction not any different than any other sale and assignment of negotiable instruments by the bank (R p 374, lines 10-24, p 375, line 10-p 376, line 25, p 377, lines 15-20, p 378, lines 4-7) In fact, at the trial, Appellants Oskin and Small admitted that that note and mortgage were valid instruments and that SCB&T had the discretion and right to assign the note and mortgage to J Conner, LLC without consent of Appellants (R p 155, line 17-p 158, line 17, p 171, line 23-p 172, line 6, p 174, line 17-p 175, line 1, p 176, line 22-p 177, line 10, p 178 lines 1-13) Furthermore, there is no evidence of actual intent by SCB&T to defraud the Appellants, which Appellants expressly acknowledged by dismissing SCB&T from this

lawsuit (R pp 509-510) Under these circumstances, and based on well-settled law, the Statute of Elizabeth does not apply to the Assignment

Appellants rely on the case of Lebowitz v Mudd, 293 S C 49, 358 S E 2d 698 (1987) in support of their argument that the Statute of Elizabeth does apply to the Assignment Lebowitz involved the transfer of eighteen (18) pieces of property owned by a named defendant in a pending lawsuit which rendered the defendant insolvent Id at 51, 358 S E 2d at 700 The trial court dismissed plaintiff's fraudulent conveyance claim on the basis that the plaintiff failed to plead his status as a creditor in his complaint and, further, that the plaintiff had to first reduce his debt to a judgment and have execution issued and returned *nulla bona* before having standing to attack a conveyance as being fraudulent Id at 51, 358 S E 2d at 700 In its ruling, the Supreme Court stated

The statute does not limit its application to judgment creditors  
Rather, it's protection extends to other types of parties defrauded  
in connection with the conveyance of property

Id at 52, 358 S E 2d at 700 In reversing the trial court's dismissal of the fraudulent conveyance claim, the Lebowitz Court compared the factual allegations in its case with those alleged in Dennis v McKnight, 161 S C 209, 159 S E 555 (1931), wherein the court held that the complaint did sufficiently state a cause of action for fraudulent conveyance based upon allegations that the defendant had conveyed all his property to his wife with the intention of placing it out reach of plaintiff should the plaintiff recover in a wrongful death action then-pending against defendant Id at 52, 358 S E 2d at 700 The Lebowitz Court reasoned that, like Dennis, the plaintiffs sufficiently pled that the conveyance by the transferring party, a defendant in the pending lawsuit, which rendered it insolvent, was made with knowledge of the tort claims asserted

against it pending at the time of the conveyance, thereby sufficiently pleading a claim for fraudulent conveyance. In other words, the Complaints in both Lebowitz and Dennis sufficiently pled facts that the transferring party in each case, each of whom were named defendants in the respective lawsuits, had intent to defraud the respective plaintiffs with regards to the subject conveyance by placing the defendant's properties out of reach of the plaintiffs.

The holdings and rationale in Dennis and Lebowitz actually support the trial court's ruling in the underlying action that the statute is not applicable to the Assignment (a) the property being conveyed (note and mortgage) belonged to SCB&T, the holder of the note and mortgage, which is neither a debtor, nor potential debtor, of Appellants,<sup>4</sup> (ii) the Assignment did not affect the solvency of Johnson, the only debtor in this case<sup>5</sup>, and (iii) there is no evidence that SCB&T, the assignor, had intent to defraud the Appellants, which the Appellants expressly acknowledged by dismissing SCB&T from the lawsuit (R pp 509-510). Thus, both the Lebowitz and Dennis cases support the trial court's ruling that the Statute of Elizabeth did not apply to the Assignment of the note and mortgage.

**B The Assignment was executed to secure the Bona fide claims of J Conner, LLC**

The trial court ruled that the Appellants failed to prove that the Assignment was the result of an actual intent to defraud the Appellants (R p 24, ¶ 28). Appellants disagree and argue that the purpose and intent of the Assignment was to "preclude Appellants from executing against the property" and "insulate the property from Appellants' claims against Johnson," thereby perpetuating a fraud on Appellants.

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<sup>4</sup> SCB&T was dismissed by Stipulation of Dismissal on September 2, 2009 (R pp 509-510).

<sup>5</sup> Johnson continues to be a co-owner of the Property with M. Brown (R pp 379-383).

However, the Assignment secured the Bona fide claims of J Conner, LLC as purchaser of the \$3.5 million note and mortgage from SCB&T, a purpose previously held to be proper by the South Carolina Supreme Court. In McDaniel v. Allen, 265 S.C. 237, 217 S.E.2d 773 (1975), the Supreme Court recognized, and upheld, a conveyance of property by a debtor to his wife against a fraudulent conveyance claim by the debtor's creditors because the purpose of the transfer was to secure the "Bona fide claims" of the grantee wife. Id. at 243, 217 S.E.2d at 776.

In McDaniel, the plaintiff, a judgment creditor, sought to set aside a conveyance of real property by the defendant debtor to his wife, which conveyance was made seven (7) days prior to the issuance of the judgment. Id. at 239-240, 217 S.E.2d at 774. The property had been previously purchased by defendant debtor and his wife six (6) years prior to the questioned transfer, with the purchase being financed by a loan secured by a mortgage on the property. Beginning the date of the purchase, the mortgage payments were made primarily by the wife. Thus, in consideration for "settlement of their property rights as between them" and an additional cash payment of \$2,500 paid by the wife to the defendant debtor, the defendant debtor transferred his entire interest in the property to his wife. Id. at 240-41, 217 S.E.2d at 774-75. The trial court ruled the conveyance fair, for valuable consideration and without intent to defraud the plaintiff creditor. Id. at 241, 217 S.E.2d at 775. The Supreme Court, in affirming the trial court's ruling, held that "the evidence fails to show any intent on the part of the wife to defraud her husband's creditors, and merely shows a purpose to secure her own Bona fide claim." Id. at 243-44, 217 S.E.2d at 776.

Jim Boyd, senior vice president of SCB&T, testified that the \$3.5 million note and mortgage was assigned to J. Conner, LLC only after the bank received full payment for the purchase (R. p. 374, lines 10-18). Thus, just like the real property in McDaniel, the note and mortgage was assigned only after valuable consideration (excess of \$3.5 million) was paid for the transfer. And just like in McDaniel, the purpose of the Assignment was not to defraud Appellants', but instead was to "secure the Bona fide claims" of J. Conner, LLC with regards to payment on the note. In other words, the Assignment ensured that J. Conner, LLC would have recourse against the makers and the Property in the event the monies owed under the assigned note were not paid. See Moore v. M.M. Weinberg, 373 S.C. 209, 220, 644 S.E.2d 740, 745-46 (Ct. App. 2007) (assignee stands in the shoes of its assignor and has all the same rights and privileges, including the right to sue, as the assignor), S.C. Code Ann. § 36-3-301 ("holder of the instrument" entitled to enforce the instrument). In addition, both Jim Boyd and John Lee Scott, experienced bankers with SCB&T and Wachovia Bank, respectively, testified that the formation of an entity for the purposes of purchasing, holding and enforcing negotiable instruments, such as the SCB&T note and mortgage, was a "common business practice" and is typically described as a "refinance" and/or "sale" of a note and mortgage (R. p. 206, line 17-p. 208, line 24, p. 218, lines 3-7, p. 237, line 20-p. 238, line 19, p. 375, line 10-p. 376, line 25, p. 377, lines 15-20). Thus, consistent with the ruling and rationale in McDaniel, the trial court properly ruled that there existed no actual intent to defraud the Appellants with regards to the Assignment of the note and mortgage. See also McElwee v. Kennedy, 56 S.C. 154, 34 S.E. 86 (1899) ("Even if we were to assume that there is evidence of Mala fides in the grantor, yet if the sole purpose of the grantee was to secure

her claims, having no intent to hinder, delay or defeat other creditors, her title cannot be affected by the Mala fides of the grantor”)

**C The Assignment did not result in “injustice” or “fraud” on Appellants**

The trial court ruled that the Assignment did not result in any “injustice” or “fraud” on Appellants because Appellants’ interest in the Property, as creditors of Johnson, was not affected by the Assignment (R p 25, ¶ 29) Prior to the Assignment, Appellants’ judgments<sup>6</sup> were subordinate and junior to the \$3 5 million SCB&T first mortgage and \$500,000 00 second mortgage to Ameris Bank (Id) Thus, when combined with the fact that the Property was only valued at approximately \$2 5 – 2 6 million (R pp 464-469, 484-489), the trial court reasoned that Appellants’ interest in the Property would have been extinguished in the event of foreclosure by SCB&T (R p 25, ¶ 29)

Appellants contend this ruling is erroneous based upon the assumption that the payments received by SCB&T “operated as a pay-off of the note and mortgage that rendered the obligation satisfied ” As argued below, this assumption is without basis and not supported by the evidence

So long as the property that is the subject of the questioned conveyance remains within reach of the complaining creditors, the Court of Appeals has ruled that the trial judge should not set aside the conveyance Leasing, 312 S C at 125, 439 S E 2d at 296 In Leasing, the defendant debtor conveyed his interest in his residence to his wife, a co-debtor, for no consideration The plaintiff creditor sued defendant debtor (but not the wife even though she was a co-debtor) and sought to set aside the conveyance pursuant to

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<sup>6</sup> With regards to the promissory note issued by Johnson (R p 530) the holder of the note would have no interests in the Property because the debt had not been taken to judgment

the Statute of Elizabeth. The trial court found the transfer not fraudulent and, furthermore, held that the plaintiff had failed to show any prejudice caused by the conveyance since plaintiff could have sued the wife along with the defendant husband. Id. at 123-24, 439 S E 2d at 295-96. In affirming the trial court's ruling, the Court of Appeals agreed that the plaintiff creditors were not prejudiced by the transfer because "it did not place the property beyond" the creditor's reach. Id. at 125, 439 S E 2d at 296. In other words, the creditor's position to collect on his debt was not affected by the conveyance because the property was still within its reach.

In the underlying case, Johnson's interest in the Property is still within Appellants' reach. Title to the property has not changed and remains in the name of Johnson and M. Brown as tenants in common. (R. pp. 379-383). Thus, consistent with the rationale in Leasing, Appellants have not been prejudiced by the Assignment of the note and mortgage and, therefore, the trial court properly ruled that there was no "injustice" or "fraud" on Appellants. See Haskins v. Certified Escrow & Mortgage Co., 96 Cal App 2d 688, 216 P 2d 90 (1950) (noting as an established point of equity that a creditor does not sustain an injury unless the transfer puts beyond the creditor's reach property that the creditor would otherwise be able to subject to the payment of the debt).

**D Appellants did not preserve for appeal the issue of whether the Statute of Elizabeth applied to conveyances by persons other than debtors or potential debtors**

In its Final Order, the trial court ruled that based on South Carolina law, in order for the Assignment to be subject to the Statute of Elizabeth, the transferring party (SCB&T) must have been indebted to the complaining creditors (Appellants) at the time of the Assignment. (R. p. 23, ¶ 24-p. 24, ¶ 26). Because neither SCB&T, the assignor,

nor J Conner, LLC, the assignee, were indebted to Appellants at the time of the Assignment, the Statute of Elizabeth did not apply (R p 24, ¶ 26)

In their Motion for Reconsideration, Appellants did not contest this specific ruling. Instead, Appellants argued that the statute applied because (i) the Assignment of the mortgage was “a ward to keep creditors at bay and shelter Brown and Johnson”, (ii) the note and mortgage was “transferred, charged, alienated, and encumbered in an effort to hinder or delay the Plaintiffs”, and (iii) M Brown was a creditor of Oskin by virtue of M Brown’s co-ownership of the Property with Johnson (R pp 542-546). Therefore, because Appellants did not contest this specific ruling, the issue of whether the Statute of Elizabeth is applicable to conveyances by persons not indebted to the complaining creditors at the time of the conveyance was not preserved for appeal. See I’On v Town of Mount Pleasant, 338 S C 406, 526 S E 2d 716 (2000)(parties should raise all issues to the trial court to obtain a ruling), Townsend v City of Dillon, 326 S C 244, 486 S E 2d 95 (1997)(issues not ruled upon by the trial judge are not preserved for appeal), Noisette v Ismail, 304 S C 56, 403 S E 2d 122 (1991)(holding that an issue is not preserved for appeal where the trial judge did not rule on the issue and no Rule 59(e) motion was made)

II THE TRIAL COURT PROPERLY RULED THAT THE PAYMENT TO SCB&T DID NOT RESULT IN A PAY-OFF OF THE NOTE AND SATISFACTION OF THE MORTGAGE

**A J Conner, LLC is not the alter ego of Michael Brown**

Appellants assert that J Conner, LLC is the alter ego of M Brown, thus, any payments made by J Conner, LLC to SCB&T were really payments made by M Brown. According to the South Carolina Court of Appeals

Alter ego describes a theory of procedural relief. The alter ego doctrine is merely a means of piercing the corporate veil. Under this theory, when a parent company controls the business decisions and actions of its subsidiary, the subsidiary becomes an instrument or alter ego of the parent. Control required for liability under an alter ego doctrine amounts to **total domination** of the subsidiary to the extent the subsidiary manifested no separate corporate interests and functioned solely to achieve the purpose of the dominant corporation. Moreover, common officers and/or directors and public identification of one corporation as the other's subsidiary do not, without more, support the conclusion the subsidiary is its parent's alter ego or agent for the transaction of its business.

However, merely establishing the level of control or dominance a parent must have over a subsidiary, in order to prove it is the alter ego of the subservient corporation, is not sufficient to maintain an alter ego action. Instead, **one must also show that the retention of separate corporate personalities would promote fraud, wrong or injustice, or would contravene public policy**.

In addition, several factors should be considered before a parent corporation may be held liable for the torts of its subsidiaries. These include stock ownership by parent, common officers and directors, financing of subsidiary by parent, payment of salaries and other expenses of subsidiary by parent, failure of subsidiary to maintain formalities of separate corporate existence, identity of logo, and plaintiff's knowledge of subsidiary's separate corporate existence.

Jones v Enterprise Leasing Company Southeast et al, 383 S C 259, 267-68, 678

S E 2d 819, 823-24 (Ct App 2009)(citations omitted)(emphasis added). The evidence does not support a finding that Michael Brown had “total dominion” over J Conner, LLC (hereinafter the “LLC”) nor that maintaining the separate existence would promote fraud, wrong or injustice, or would contravene public policy.

- The sole member of the LLC is J Brown (R pp 412, 423)
- J Brown is the only person that has executed any documents on behalf of the LLC (R pp 423, 428, 434, 463)

- The LLC maintains its own bank account separate from M Brown from which payment on the Wachovia Loan were paid (R p 222, line 20-p 223, line 4)
- Negotiations relating to the \$3 5 million Wachovia Loan were discussed with M Brown, J Brown and Sherry McGirt, attorney for the LLC (R p 205, line 20-p 206, line 13, p 235, line 23-p 236, line 3)
- John Lee Scott with Wachovia Bank testified that J Brown was an independent woman who maintained a number of accounts, both investment and checking, at Wachovia Bank separate from M Brown and the LLC (R p 226, lines 10-17, p 236, lines 4-21, p 358, line 25-p 359, line 11)
- John Lee Scott dealt predominantly with M Brown regarding the Wachovia Loan due to health issues with J Brown (R p 238, line 20-p 239, line 6)
- The LLC was formed for the purpose of purchasing, holding and enforcing the \$3 5 million SCB&T note and mortgage (R p 206, lines 14-24, p 295, lines 1-13, p 319, lines 15-22, p 329, line 3-p 330, line 23, p 356, line 24-p 357, line 3, p 360, lines 10-23)
- Jim Boyd and John Lee Scott, officers with SCB&T and Wachovia Bank, respectively, testified that the formation of the LLC to purchase the \$3 5 million SCB&T note and mortgage is a common business practice (R p 206, line 17-p 208, line 24, p 218, lines 3-7, p 237, line 20-p 238, line 19, p 375, line 10-p 376, line 25, p 377, lines 15-20)
- The Wachovia Loan is personally guaranteed by, and is secured by separate investment accounts owned by, M Brown and J Brown (R pp 435-462)

Based on the above facts, clearly M Brown does not exercise “total dominion” over J Conner, LLC, which maintains a separate and independent existence. Furthermore, maintaining this separate existence would not promote fraud, wrong or injustice, or contravene public policy, a fact supported by the testimonies of Jim Boyd and John Lee Scott, experienced bank officers with SCB&T and Wachovia Bank, respectively, who both testified that the formation of J Conner, LLC to purchase and hold the note and mortgage was a “common business practice ” (R p 206, line 17-p

208, line 24, p 218, lines 3-7, p 237, line 20-p 238, line 19, p 375, line 10-p 376, line 25, p 377, lines 15-20) Therefore, the trial court correctly ruled that J Conner, LLC was not the alter ego of Michael Brown See In re Derivium Capital, LLC, 396 B R 184, 190 (Bkrtcy D S C 2008)(to establish control, the plaintiff must show that the “subservient corporation in reality had no separate existence of its own”)

**B The presence of the future advance clause precludes a finding that the mortgage was satisfied regardless of the source of payment to SCB&T**

Appellants argue that, despite well settled law, the trial court erred in ruling that the existence of the future advance clause in the mortgage precluded a finding that the mortgage is satisfied, even upon full payment of the note by a co-debtor In Central Production Credit Association v Page, 268 S C 1, 231 S E 2d 210 (1977), the Supreme Court held that if a mortgage contains a future advance clause, the mortgage remains open and valid, even after payment in full of the underlying debt

The [mortgage] statute clearly sanctions the right of parties to give and to accept open-end mortgages to secure future advances There is nothing express or implied, in the statute to infer that it was the intent of the legislature that the mortgage be dead once there is no debt momentarily existing The statute permits the parties to agree that the mortgage live on until the mortgagor requests its cancellation A holding that an open-end mortgage dies when there is currently no debt for it to secure, would severely limit its beneficial use and defeat the legislative intent As long as the mortgage is of record, any subsequent lien holder or purchaser takes with notice of the impact of the Code section

We hold that after the initial debt was fully paid the mortgage did not die, it remained of record, dormant but viable

Id at 8, 231 S E 2d at 214 Appellants admit that while this is the “well-settled rule”, the rule does not affect their recovery based upon the assumption that (i) J Conner, LLC is the alter ego of M Brown, and (ii) the payments received by SCB&T

were payments from M Brown, a co-debtor, thereby resulting in a pay-off of the note. Thus, according to Appellants, the mortgage, while continuing to exist per Central Production, only allowed J Conner, LLC to retain its priority as to future advances only since the original \$3.5 million debt was allegedly paid in full by M Brown, a co-debtor on the SCB&T note (App Brief, pp 26)

Appellants' underlying assumptions are unfounded and not supported by the evidence. As stated above (i) J Conner, LLC is not the alter ego of Michael Brown, and (ii) the payments to SCB&T were consideration for the purchase of the note and mortgage by J Conner, LLC and not payments made by M Brown to pay off the debt. See Sections I(B) and II(A), infra. Therefore, J Conner, LLC, as assignee of the SCB&T note and mortgage, retains a first priority mortgage lien for the full amount (\$3.5 million) in addition to any future advances made by J Conner, LLC on the assigned note.<sup>7</sup> See Moore, 373 S.C. at 220, 644 S.E.2d at 745-46 (assignee stands in the shoes of its assignor and has all the same rights and privileges, including the right to sue, as the assignor)

**C Even if the payments to SCB&T resulted in a pay-off of the note, M Brown is equitably subrogated to the rights of SCB&T, as first mortgage lien holder, to the extent of the payments made in excess of M Brown's one-half share of the debt**

Appellants argue that equitable subrogation has no bearing on the issue of whether the payment to SCB&T constituted as a payment by a debtor which resulted in a pay-off of the note. However, equitable subrogation does impact the outcome of this issue to the extent there is a ruling that the payments to SCB&T resulted in a pay-off of the note.

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<sup>7</sup> J Brown testified that J Conner LLC made a future advance of \$20,000 (R p 358, lines 4-12)

Subrogation is broadly defined as “the substitution of one person in the place of another with reference to a lawful claim or right ” 73 Am Jur 2d Subrogation § 1 (1974)

South Carolina Court’s highly favor the remedy of subrogation

The remedy of subrogation is highly favored by the courts and is to be liberally and expansively applied. The remedy is broad enough to include every instance in which one person, not a mere volunteer, pays a debt for which another is primarily liable, and which in equity and good conscience should be discharged by the latter.

Southern Bank and Trust Co v Harrison Sales Co., Inc., 285 S C 50, 51, 328 S E 2d 66, 67 (1985)(citations omitted) Subrogation can arise by statute, by contract, or through equity. Shumpert v Time Insurance Company, 329 S C 605, 611-612, 496 S E 2d 653, 656 (Ct App ) *rehearing denied* (1998) While conventional subrogation arises by contract and is specifically bargained for by the parties, equitable subrogation (also called “legal subrogation”) is implied subrogation that arises under the common law.

Legal subrogation is not dependent upon contract. The doctrine is an equitable one, founded not upon any fixed law, but upon principles of natural justice, its purpose is to require the ultimate discharge of a debt by the person who in equity and good conscience ought to pay it, and it is to be applied according to the dictates of equity and good conscience in the light of the actions and relationship of the parties.

Shumpert, 329 S C at 611-612, 496 S E 2d at 656 The elements of equitable subrogation are

- 1 The party claiming subrogation has paid the debt
- 2 The party was not a volunteer but had a direct interest in the discharge of the debt or lien
- 3 The party was secondarily liable for the debt or for the discharge of the lien
- 4 No injustice will be done to the other party by the allowance of the equity

United Carolina Bank v Caroprop, LTD, 316 S C 1, 3, 446 S E 2d 415, 416 (1994) Appellants assert that the funds used to pay for the Assignment were really payments made by M Brown, a co-debtor on the note, resulting in a pay-off of the note and satisfaction of the mortgage Thus, SCB&T's first mortgage lien is wiped out and Appellants' judgment lien would have second priority on the Property junior only to the \$500,000 mortgage lien held by Ameris Bank However, with respect to payments made by a co-obligor on a common debt, the Supreme Court specifically held "where one co-tenant pays more than his proportionate share of the debt on property, the excess amount is paid as a surety, thereby entitling him to priority over claims against his co-tenant's estate" United Carolina, 316 S C at 3, 446 S E 2d at 417 Assuming *arguendo* that the payments to SCB&T are deemed to be payments made by M Brown, as co-debtor on the note (as opposed to a payment by J Conner, LLC for the purchase of the note and mortgage), under United Carolina, M Brown is equitably subrogated to SCB&T's first mortgage lien rights to the extent of the monies paid in excess of M Brown's one-half share of the debt (1) M Brown caused the debt to be paid in full, (2) M Brown had a direct interest in the discharge of the debt or lien as co-obligor on the note and mortgage, (3) M Brown was secondarily liable for the debt, *see* United Carolina at 3-4, 446 S E 2d at 416 (in recourse loan, property is primarily liable for debt on note secured by mortgage, with debtor being secondarily liable for debt), and (4) no injustice will be done to the Appellants because it continues to maintain the same priority that existed prior to the payments by M Brown *See* United Carolina at 4, 446 S E 2d at 416 (finding no injustice where junior lienholder "has done nothing to advance its priority")

Under equitable subrogation, M Brown steps into the shoes of the original creditor, in this case, SCB&T *See Dodge City of Spartanburg, Inc v Jones*, 317 S C 491, 454 S E 2d 918 (Ct App 1995)(through doctrine of equitable subrogation, subsequent creditor assumes rights and priority of prior creditor) M Brown then assumes the rights and priority of SCB&T as first mortgage lien holder to the extent of the over-payment by M Brown on the underlying debt Therefore, the trial court correctly ruled that even if the payments received by SCB&T resulted in a pay-off of the note, M Brown would still be equitably subrogated to the rights of SCB&T, as first mortgage lien holder, to the extent of the monies paid in excess of M Brown's one-half share of the debt (R p 27, ¶ 35)

In response to Appellants' contention that equitable subrogation was not properly pled in Respondents' Answer, this issue was neither raised at or prior to the trial nor in Appellants' Motion for Reconsideration, therefore, Appellants' failed to preserve this issue for appeal *See I'On supra* (parties should raise all issues to the trial court to obtain a ruling), *Townsend supra* (issues not ruled upon by the trial judge are not preserved for appeal), *Noisette supra*, (holding that an issue is not preserved for appeal where the trial judge did not rule on the issue and no Rule 59(e) motion was made)

### **CONCLUSION**

For the foregoing reasons, the trial court's rulings set forth in the Final Order Ending Action, dated March 25, 2010, should be AFFIRMED

RESPECTFULLY,



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July 6, 2011  
Myrtle Beach, SC

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM Horry COUNTY  
Master-in-Equity  
The Honorable Cynthia Graham Howe  
Horry County Master-in-Equity

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Case No 2009-CP-26-3470

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Robert W Oskin, Glenn Small  
and Freddie Kanos,

Appellants,

v

Stephen Mark Johnson, Michael Brown,  
Joan Conner Brown and J Conner, LLC

Respondents,

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CERTIFICATE OF COUNSEL

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The undersigned certifies that the Final Brief of Respondents Michael Brown, Joan Conner Brown and J Conner, LLC complies with Rule 211(b), SCACR. The undersigned further certifies that this Final Brief complies with the Supreme Court's Order of August 13, 2007 regarding personal identifiers and sensitive information.



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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM HORRY COUNTY  
Master-in-Equity

The Honorable Cynthia Graham Howe  
Horry County Master-in-Equity

Case No 2009-CP-26-3470

**RECEIVED**  
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**SC Court of Appeals**

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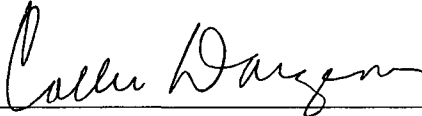
PROOF OF SERVICE

I, Colleen D'Argenio, an employee of McNair Law Firm, P A , attorneys for the Respondents Michael Brown, Joan Conner Brown, and J Conner, LLC in the above-entitled action, certify that I have served the Final Brief of Respondents Michael Brown, Joan Conner Brown, and J Conner, LLC, Certificate of Counsel and Proof of Service on counsel for Appellants and Respondent Stephen Mark Johnson, by United States Mail, postage prepaid, and Email on the 6<sup>th</sup> day of July, 2011, at the following addresses

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